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## **“The Good Judge”**

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## **THE GOOD JUDGE**

### **INTRODUCTION**

Three habits of the good judge are drawn from observation over many years. There are enough of these observations to qualify as statistically significant. Many writings on judging and law have been consulted and are cited. There are some references to pertinent works of philosophy. Finally, I have read and referred to a number of judicial biographies. Perhaps the dominant influences were supplied by three thinkers: Justice Benjamin Cardozo; John Dewey, the American pragmatist; and Judge Richard Allen Posner of the Seventh Circuit. Cardozo's three volumes written in the 1920s explore as well as any American the real processes employed by judges.<sup>1</sup> John Dewey was an instrumentalist and a pragmatist who wrote several pieces on law and always asked whether something worked.<sup>2</sup> Judge Posner is the most prodigious legal thinker of our time. His progression from a strict economics and law thinker to contributions that have continually matured and expanded, leaving a trail of books, prove him to be a developmental thinker. Judge Posner claims to be a pragmatist, and in my mind his later writings have some relationship to both Cardozo and Dewey, but he admitted he does not have a psychology. There is a case to be made that jurisprudence is of two types: first, analysis of what actually happens in courts; second, what ought to happen in courts. The three habits here relate to both types of jurisprudence. Set out here is a nonacademic, overarching theory of how good

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<sup>1</sup> THE NATURE OF THE JUDICIAL PROCESS, Yale University Press (1921); THE PARADOXES OF LEGAL SCIENCE (1928); THE GROWTH OF THE LAW (1924).

<sup>2</sup> See Dewey's articles cited in the text and a chapter Corporate personality in his book *Philosophy and Civilization* where he traces the history of legal definitions of Corporate personality, pointing out their artificiality and giving his view that the question should be: Do these definitions work? Compare the recent U.S. Supreme Court case on corporate rights in religion and political contributions.

judges think. In my view, American judges have always been pragmatists, so the term neopragmatism does not reflect American jurisprudential history.

### THE THREE HABITS

How does the good judge think? Justice Cardozo starts *The Nature of the Judicial Process*<sup>3</sup> by saying that a judge attempting to explain to a layperson how he or she decides cases will end up retreating. There are many jurisprudential ideologies, ethics rules, and precedents governing how a judge should decide a pending matter. But questions about how a judge should *think* about such problems – as the interpretation of a statute or the Constitution, or whether the judge should make law – have a long, distinguished history of irresolution.

I would like to discuss how good judges think about the matters they must decide. There are three parts to the question, *How does the good judge think?* First there is the word *good*, a value-laden term. I would like to explore whose good is involved when the good judge acts. In this article, the term *good* will not be limited to the observations of the writer, but drawn from many writings and observations by others.

The second term, *judge*, is limited here to any American judge,<sup>4</sup> whether sitting singly or with other judges. It might be objected that the differences in approach between lower court judges and high appellate judges are so much different that no basic jurisprudential values can be identified that apply to all. But it is a basic assumption of this piece that those common values can be identified.

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> Alexis de Tocqueville thought democratic individualism is a depreciation of the past, page 45 pragmatism statesmanship and the Supreme Court Jacob John Cornell Page 45. I view English jurisprudence as an important separate subject not found in the thinking of American judges. I know others have attempted to articulate similarities between our two legal cultures, law, and legal theory in the United Kingdom and the United States. Richard Posner, (1996) Oxford Press.

The third term, *think*, is used to ask whether there are certain qualities of thought used by any good judge. As this is written, research into human thought proceeds at an intense rate. I will give a few examples later.

The three judicial habits are: First, the good judge would say: The use of judicial doubt about the just and proper legal result of any case or ruling, when it is first considered. Second, the good judge would say: The habit of comfort working with the principles of both induction and deduction. Third, the good judge would say: The habit of a willingness and ability to consider the effect of a judicial decision on all persons affected by it.

Is it true that no judge can be considered “good” without some measure of these three habits? The difficulty here is the diverse American judicial system. Can we characterize what so many different judges do every day, much less what they “ought” to do? Do American judges think like other people? Should their thought processes be analyzed by reference to those jurisprudential, philosophical, and psychological works of lawyers, philosophers, and psychologists? Do philosophical works, and there are many, that purport to analyze how humans receive and process information from the outside world yield anything of value in formulating a definition of the good judge?

Are these three the right habits? Are they among the right habits of the good judge?

Why is so little of the philosophy of law written by trial judges or courtroom lawyers, who very often see final law and justice administered? Perhaps most trial judges and lawyers have little time to put down their reflections. It’s not that they don’t reflect. Trial judges and lawyers examine daily the space between law and justice. In the United States, most final decisions are accomplished without formal or lengthy written opinions. Much jurisprudential

writing concentrates on the appellate opinions of higher courts. This is understandable because of the precedential value of such decisions but also because of easy access. Appellate opinions are written statements easily obtained by law professors and jurisprudential thinkers. The written opinions selected as examples of judicial thinking are often cutting-edge cases. Although this article will discuss some cases representing a major change, might it be true that the philosophy of law should address everyday law in all of the courts and not be exclusively concerned with the thinking of groundbreaking appellate judges?

These three habits reflect basic psychology.<sup>5</sup> But somehow studies of how mice figure out how to obtain a food pellet seem unhelpful and inappropriate in helping us understand how a judge decides whether there is or isn't jurisdiction. But judges' thought processes are at the heart of understanding the law they create.<sup>6</sup> The more practical purpose of this article is to explore whether these three habits are used by any good judge.<sup>7</sup>

Preliminarily, keep in mind that these habits should all be modified by the phrase, "in the time available to the judge." This is necessary in any discussion of what makes a good judge because of the heavy burdens placed on those who administer justice. We are looking here for habits that define the good judge at any judicial level – those judges on a busy criminal calendar

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<sup>5</sup> Henry Glietman, *Basic Psychology* (3d ed. 1992). The Honorable Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1, 34 (2009); Adam Benforado & Jon Hanson, *The Costs of Dispositionism: The Premature Demise of Situationist Law and Economics*, 64 MD. L. REV. 24, 29 (2005); Stephen J. Choi, G. Mitu Gulati, *Ranking Judges According to Citation Bias (as a Means to Reduce Bias)*, 82 NOTRE DAME L. REV. 1279, 1293 (2007); Michael J. Gerhardt, *How a Judge Thinks How Judges Think*, by Richard A. Posner, *Harvard University Press*, 2008, 93 MINN. L. REV. 2185, 2186-87 (2009).

<sup>6</sup> A modest example of psychological principles is the heuristics used by humans to solve problems. A decision-maker takes an object or person to be part of a given class based upon characteristics that are often associated with members of a class. Do – should – judges use heuristics? Daniel Robison, *Philosophy of Psychology* (1985).

<sup>7</sup> It is possible define the good judge using Rawls's approach of asking what we all would want if we were going before a judge and wanted a fair result. Although the Rawls approach would support some conclusions here, it does not quite work because it has a hypothetical flavor and suffers from a flawed psychology. Most real litigants seek the best possible result for themselves. They are usually less interested in a fair result the way Rawls might have understood that concept. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

who consider 50 or more matters a day, and those on the U.S. Supreme court, which publishes 70 or 80 full opinions a year.<sup>8</sup>

The distinction between how the good judge does think and how a judge ought to think is expressly cited by many writers.<sup>9</sup> Many writings are concerned with how a judge should rule, not how a judge should think. Some writings dispute whether the “is” of law and the “ought” of law should be or can be separated. Some extreme positivists believe the law “is,” and there is no “ought.” Some realists meld the “is” with the “ought.” Professor Fuller’s<sup>10</sup> most general thesis was this: “In the field of purposive human activity, which includes both steam engines and the law, value and being are not two different things, but two aspects of an integral reality.” Thus, the question “Is this assemblage a steam engine?” overlaps mightily with the question “Is this a good steam engine?” Contrary to what common sense and some positivists suggest, such questions *are* to a considerable extent inseparable. The “is” and the “ought” are two aspects of an “integral reality.” It is the good judge who makes it so. For a discussion of Professor Fuller, see Summers.<sup>11</sup> If the practicing lawyer has a perspective on these issues, it could be that when a client walks out of a courthouse with a final decision, there is only the “is” of law. It matters not to that client that the law is different in another circuit or another courtroom in the same building, or that he or she won or lost by a five-to-four decision.

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<sup>8</sup> Nothing in this article should be taken as suggesting the Supreme Court has an easy work load.

<sup>9</sup> Aristotle, *THE NICOMACHEAN ETHICS*, BOOK V (3<sup>rd</sup> ed. 2002); IMMANUEL KANT, *THE METAPHYSICS OF ETHICS* (J.W. Semple ed., 3<sup>rd</sup> ed. 1886) (1796); BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, Lecture III at 111 (1921) (“[L]ogic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired.”).

<sup>10</sup> *Supra* note 11.

<sup>11</sup> A professor of law for 46 years, Lon Luvois Fuller taught jurisprudence at the Harvard Law School from 1939 to 1972. When he retired, his biographer Robert S. Summers called him one of the four most important American legal theorists of the last hundred years. Fuller believed that law should be value-laden. Robert Summers, *LON L. FULLER JURISTS: PROFILES IN LEGAL THEORY* (1984).

Some philosophical writings about what the law ought to be, or how judges should think, could technically be referred to as “reform.” In this age of academic specialization, there are many wellsprings of thought that enrich the flow of the law. Examples of twentieth century philosophical reformist writings include: the writings of Judge Frank<sup>12</sup> suggesting greater use of psychological concepts; the early writings of Judge Richard Posner urging greater use of economics, or in his later writings, reasoning; the writings of Drucella Cornell relating to feminist efforts aimed at overcoming legal injustice against women; the writings of Herbert Wechsler and other proceduralists; and the writings of moralists such as Ronald Dworkin.<sup>13</sup> Some of these writers and thinkers have had great influence in legal circles. Some have enriched the law while others have only gained a foothold. American judges, on any given day, make rulings that reflect these and many other jurisprudential writings whether or not the judge has ever heard of them. Justice Grodin, formerly of the California Supreme Court, thinks “[t]he broad philosophical issues – that legal philosophers like to talk about and academicians like to talk about – judges very seldom talk about.” Judge Posner has also acknowledged that judges are not conscious of theory when they are deciding cases. If Justice Grodin and Judge Posner are both correct, that judges are not thinking in theoretical jurisprudential terms when they decide cases, then what are they thinking about? In many courts, Austin’s view that law is the command of a sovereign can be found comfortably next to Dworkin’s moralistic right-based ideas.<sup>14 15</sup>

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<sup>12</sup> Jerome New Frank, Judge of the United States Court of Appeals for the Second Circuit, in office March 27, 1941-January 13, 1957. (May 22, 1826 – July 6, 1906)

<sup>13</sup> See generally Richard Posner, *THE ECONOMICS OF JUSTICE* (1981); Drucilla Cornell, *BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW* (1999); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 1-15 (1959); Ronald Dworkin, *LAW’S EMPIRE* (1986).

<sup>14</sup> It is not difficult to find two or more of these legal theories operating in the same court, in the same day, and even in the same matter. An example would be a motion to suppress under the Fourth Amendment for illegal search and

Has the historical literature dealt sufficiently with how good judges think? Is there the judicial equivalent of John Locke's *Concerning Human Understanding* or Hume's work on the relationship between reasoning and emotions? Perhaps we will be treated in the days ahead to a school of jurisprudential thought that will emulate these deep-thinking masters. The mental life of judges is studied in our culture.<sup>16</sup> There is an artificial quality in some of this research because of the independence and diversity of the judiciary. For now we must be satisfied with these three questions and some possible answers. The questions we address are not just jurisprudential. They are psychological. How does the good judge think?

The United States judicial system is vast. The federal courts, divided into thirteen circuits, have approximately 2,686 judges, including magistrates and active senior judges.<sup>17</sup> In 2014, 376,536 cases were filed in the district courts.<sup>18</sup> The fifty state systems are even larger. For example, California has to handle more than 2,211 filings per judge per year, while Texas has 1,960 filings per judge per year.<sup>19</sup> All judges at all levels must apply law to cases that each have their own unique facts. They often must examine many facts and determine which ones are

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seizure where Dworkin's idealism can dwell together with Wexler's process theories. This court reality undermines the occasional jurisprudential claim of discovering the new Rosetta Stone.

<sup>15</sup> For one of the best discussions of current comparative jurisprudence, see James R. Hackney, Jr., *LEGAL INTELLECTUALS IN CONVERSATION*, NY University Press (2012).

<sup>16</sup> Jennifer K Robbennolt, JD, PhD and Matthew Taskin, JD, *Can judges determine their own impartiality?*, University of Illinois College of Law, 2010, Vol 41, No. 2; *The neurobiology of opinions: can judges and juries be impartial?* <http://www-bcf.usc.edu/~juandc/PDFpapers/wp-neurola.pdf>; *The Court's Brain: Neuroscience and Judicial Decision Making in Criminal Sentencing*, American Judge's Association, Court Review, Volume 49 pp. 48-62; Maya Sen, *How Judicial Qualification Ratings May Disadvantage Minority and Female Candidates*, *JOURNAL OF LAW AND COURTS*, Vol. 2, No. 1 (Spring 2014), pp. 33-65; Nicola Gennaioli and Andrei Shleifer, *Judicial Fact Discretion*, *JOURNAL OF LEGAL STUDIES*, Vol. 37 (January 2008); Kimberly Papillon, *The Court's Brain: Neuroscience And Judicial Decision Making In Criminal Sentencing*, 49 *Court Review* 48 (2013); Richard A. Posner, *Judges' Writing Styles (and Do They Matter?)*, 62 *U. CHI. L. REV.* 1421 (1995).

<sup>17</sup> United States Courts (2008) <http://www.uscourts.gov/statistics/table/11/judicial-facts-and-figures/2013/09/30>.

<sup>18</sup> ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, *available at* <http://www.uscourts.gov/statistics-reports/judicial-business-2014>.

<sup>19</sup> R. LaFountain, R. Schauffler, S. Strickland, S. Gibson, & A. Mason, *Examining the Work of State Courts: An Analysis of 2009 State Court Caseloads*, 13 (National Center for State Courts 2011), <http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf>.



admissible, which ones should shape the law to the case, and, at the appellate level, which ones deserve prominence in their written decision-making. Defining universally good judicial decision-making is no small task and might be thought of as impossible. How uniform to one another are the thought processes of individual judges? I am reliably informed that when judges have been given personality tests at their official and confidential gatherings, the judges' results are all over the lot. This is no surprise to any lawyer who regularly goes to court.

Another distraction from our assigned task is the multivoiced public concepts of the good judge encountered on a daily basis. These public conceptions can partially define the judicial system. Terms include “law and order judge,” “activist judge,” “strict construction judge,” and “laissez-faire judge,” as well as our old friends “liberal” or “conservative” judge. Other publicly voiced concepts of the good judge change from generation to generation, but while in vogue they shape the social surroundings in which the judge works. Do judges escape the public assumptions of their age? It is doubtful, and should be undesirable for them to do so. These current societal values stick to the judicial mind.<sup>20</sup> The goal here is to define a philosophical, psychological basis for judging that is sustainable across generational political and societal shifts. These three questions are asked with the modesty that comes from the realization that any jurisprudential writing can only meet one of two fates. It can be critiqued or ignored. In some ways the discussion of judicial thinking below is not new. Each of the three questions has philosophical antecedents.

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<sup>20</sup> I am indebted to Thomas C. Grey for his jurisprudential historical writings, which include: *Do We Have an Unwritten Constitution*, in *A CONSTITUTIONAL LAW ANTHOLOGY* (Michael J. Glennon, Donald E. Lively, Phoebe A. Haddon, Dorothy E. Roberts, and Russell L. Weaver, eds., 2nd ed., 1997); and *Holmes and Legal Pragmatism*, 41 *STANFORD L.R.* 787-870 (1989).

**I. DOES A GOOD JUDGE HAVE THE HABIT OF STARTING EACH MATTER WITH DOUBT ABOUT THE PROPER RESULT?**

Every case is different. The facts are different. The parties are different. The social context of each case is at least somewhat different. The motivations, the intent, the biases, the context, the memories of the witnesses, the ability to accurately recreate the relevant past events varies from matter to matter. The meaning of words sometimes in the same case, or even in the same statute, are all different. And if we want to look at the problem full in the face, we must admit that each judge is different. To add to this complexity, our population has people from many different cultures and traditions. The number of different languages and dialects that must be translated in our courts reaches into the hundreds. In the court translating process, it becomes clear that different cultures have at least slightly different meanings for such central legal concepts as contract, willfulness, family, and parental prerogatives. With this partial and inadequate list of realities that flood our courts, does it seem odd for the writers of jurisprudence to declare they have found the one and only rational explanation of law? As explained more fully below, William James, the American pragmatist, would have thought one overarching theory of law impermissible, because what works varies from case to case. Well then, can justice through law be attempted in such a factual and legal bedlam?<sup>21</sup> Yes, if the judge enters the case with an open mind, starting with doubt about what happened in this case and what the result should be. Judicial doubt resists the temptation to start a case with strong inclinations suggesting the

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<sup>21</sup> My concept of the oscillating relationship between law and justice is to see law as moving toward justice. Law is a dynamic, evolving set of rules and procedures. Justice is a proportionate appropriate result by application of legal rules to specific facts and people. Suppose through the accidents of court calendaring a misdemeanor calendar showed a hundred petty theft cases. The good judge knows at the beginning of the calendar that each of those hundred cases is at least a little bit different. There at the lectern is the eighteen year-old first offender followed by the sixty-one year-old, ill, repeat offender. Perhaps it helps in understanding the need for doubt at the beginning of a matter to suggest that in each case the law is the same, but the justice of each case may be at least slightly different.

probable outcome. Each case is at least potentially new in the mind of the good judge. Each factual inquiry, each legal analysis, each argument, all of it, is treated as at least potentially new. Ideology – a fixed, inflexible set of personal rules that must be superimposed on an evolving, complex world – has no place here. Personal universals are not helpful. Presuppositions, tendencies of thought, biases exist but are controlled by the good judge. This judicial doubt as to the proper outcome at the beginning of a matter requires a clean slate, an open mind, and a habit of fairness that sees each matter as freestanding and deserving of unique attention. I will discuss later in greater detail the difficulties for the good judge in starting with such a state of mind.

A word needs to be said about judicial doubt and our current philosophical surroundings. Postmodernism, deconstruction, and critical legal studies<sup>22</sup> are three branches of current philosophical doubt.<sup>23</sup> Some modern art reflects such doubt.<sup>24</sup> Current doubt can justifiably trace its approach back to some early thinkers. Sextus Empiricus, a Roman, lived in the middle of the second century after Christ. A celebrated skeptic, he described the philosophy of the skeptics as an effort to keep seeking.<sup>25</sup> Skeptics of that Roman period sought not to isolate the truth but to show that certainty on any issue made bad sense.<sup>26</sup> Russell Shorto has written a wonderfully researched popular history of the thought of Descartes, who is portrayed, in the book *Descartes' Bones*, as the great initiator of doubt in Western thought.<sup>27</sup> As the author points out and as I am arguing, doubt is the necessary starting point in a search for truth.

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<sup>22</sup> “The notion that courts have a unique reasoning capacity to discover and protect moral or political rights is just as suspect as the claim that they are uniquely able to enforce and elaborate a preset legal rights framework.” MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 202 (1987).

<sup>23</sup> Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* 11 *CARDOZO L. REV.* 920 (1990).

<sup>24</sup> THOMAS MCEVILLEY, *SCULPTURE IN THE AGE OF DOUBT (Aesthetics Today)* (1999).

<sup>25</sup> GEORG HEGEL, *LECTURES ON THE HISTORY OF PHILOSOPHY*, 338 (2d ed. 1996).

<sup>26</sup> JENNIFER MICHAEL HECHT, *DOUBT: A HISTORY: THE GREAT DOUBTERS AND THEIR LEGACY OF INNOVATION FROM SOCRATES AND JESUS TO THOMAS JEFFERSON AND EMILY DICKINSON* 163 (2003).

<sup>27</sup> *Descartes' Bones: A Skeletal History of the Conflict Between Faith and Reason.* Russell Shorto, Vintage 2008.

Cynicism and intellectual despair do not sit comfortably in the mind of the good judge. No one can build a judicial system for the real world on that kind of doubt. Philosophical doubt can be useful to begin part of an analysis. It can clear away old assumptions that are no longer useful. The healthy curiosity of the good judge will ask what the right result should be as he or she begins to work on a new matter. In the good judge, this way of starting becomes a habit accompanied by curiosity and interest.

One difficulty in starting each case with doubt about the just outcome is the judicial practice of examining precedent, and how that habit grooves the judicial mind. The right answer is in the law if the judge can just find it. Rules are enacted by the legislature or an appellate court. Law commands in categories. But judges at all levels encounter cases that don't fit into neat, clear precedents.

A good example is *Rapanos v United States*, 547 US 715. Congress passed the Clean Water Act. The Act contained protection for "navigable waters." Step one was a statute with a concept. The reality was that some rivers in the West dry up totally in the summer. Are navigable waters ones that flow all year? Where were Western members of Congress when this statute was passed, you might ask? Did Congress decide to leave the San Joaquin high and dry? That seems doubtful. We leap over all the rules of legislative interpretation and hard-fought controversies to make a simple point. The good judge starts that case with doubt. John Dewey, ever the pragmatist, would start with the question: What works?

If all cases are at least somewhat different from one another, then it falls on the good judge to measure the law to the case. But justice certainly includes treating similar cases in a similar way. Most writers on justice discuss the need for an appropriate "proportionate" judicial

response. This tension between uniformity and individuality is at the heart of judging. Langdell<sup>28</sup> is credited with inventing the case method and teaching the distillation of the legal principles that apply to parties. But justice seeks the right result in each case, not just a convenient grouping necessary to conform to universals in the judge's head. The legislatures passing a statute and attempting to anticipate each possible situation to be covered by the statute creates a problem that goes deep into legal analysis. As a law student, I heard professor Lon Fuller ask us how we would design paths in the park across the street so that each person who wished to cross would be accommodated.<sup>29</sup> Aristotle had a slightly different formulation of this basic problem that confronts judges on a regular basis. Any statute passed by the legislature is an attempt to anticipate paths of human activity. The result is legislation by categories. "When legislators pass legislation for all individuals they cannot anticipate every circumstance that will arise so a judge must apply equity/equality by asking what the legislature would have said if they understood this case."<sup>30</sup> A modern adaptation of Aristotle's dilemma was stated by Cardozo in his *Nature of the Judicial Process*.<sup>31</sup>

This difficult judicial decision-making is filtered through personal values. Each judge has his or her own life experiences; religious, moral, or spiritual values; upbringing; education; and professional experience, to mention just a few life-shaping factors influencing in the judiciary. All these may influence judicial decision-making. Some positivists deny that personal values do

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<sup>28</sup> BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826-1906* (2009). Christopher Columbus Langdell (May 22, 1826 – July 6, 1906) was Dean of Harvard Law School from 1870 to 1895.

<sup>29</sup> See SUMMERS, *supra* note 11.

<sup>30</sup> See ARISTOTLE, *supra* note 9.

<sup>31</sup> BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, Lecture III at 112-113 (1921) (Justice Cardozo suggests that symmetrical development may be bought at too high a price. Uniformity ceases to be good when it becomes uniformity of oppression). Throughout *THE NATURE OF THE JUDICIAL PROCESS* Justice Cardozo describes the judge filling in the gaps left by earlier decisions or the legislature. He referred to those instances when judges make a new synthesis as "legal formulation." See *id* at 162-163. Positivists have difficulty allowing for this necessary creative judicial process.

or should play any part in judging. This hoped-for purity in judicial decision-making is illusory. Humans, including judges, use personal values. But the good judge is capable of doubting the application of his or her own values to a particular case. The good judge is capable of realizing that in some cases, the law or the facts require that his or her values be put to one side or ignored entirely. This doubting of one's own personal values is the kind of introspection and self-realization possessed by the good judge.<sup>32</sup>

Another inhibitor of beginning doubt is the quantity of cases and workload that flow through some busy courts. The temptation to think, "I know how to handle a case like this" is resisted by the good judge. Doubting the correct outcome, although more difficult in a court with many repetitious matters, is the beginning state of mind of the good judge. Matching the justice and the law to each case in limited time is a major challenge, but it is what the good judge is always attempting. Attempting is the right word because judging is a human activity with limitations.

Our postmodern culture is not always ready to embrace or trust the concept of the good judge. Postmodernism denies the existence of a reliable center and, as a result, leaders of all kinds have been taken down a notch. To support the Cardozo view of judging, the society in which the courts exist must accept and even admire judicial leadership. Deconstruction on occasion goes beyond constructive criticism that leaves the person, entity, or concept criticized still standing. Some deconstructive writing on legal matters has enjoyed scorching the philosophical earth, leading too often to a sort of jurisprudential despair. Do these writers have a good grasp of what actual judges do when deciding real cases? Any judge is called upon to

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<sup>32</sup> FRANK J. COLUCCI, *JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY* (2009).

decide each case whether the prior decisions or legislation are or are not clear. Therefore, all judges at all levels must be fillers of gaps. An open mind and sensitivity to the individuality of cases, parties, and merits are fundamental qualities in the good judge. Since Aristotle spotted the problem of gaps in the law (see footnote 9) we can safely assume the problem is not new and is probably permanent.<sup>33</sup> The closer we look at the legislative process that formulates a statute, the more judicial questions arise. First, a group of elected officials observe some need in the real world. Then through a process of compromise they approve language containing words, concepts, categories, and descriptions. If we pull apart a piece of legislation the way a judge must do, we find words expressing legislative mental states expressing the combined views of the world hammered out in compromise. Words like *willfully*, *malice*, *knowing*, *intent to defraud*, *perjury*, *intentional violation of a protective order*, *deadly weapon*, *malicious mischief*, and *sanity*. Legislative words have edges, penumbras, and radiating nuances. If the judge is dealing with one of these concepts, what comes into his or her mind? What concept is imagined? The contemplation of a legal term, any legal term, is an act of imagination. Compound the analyses by asking: What concepts did the legislators have in mind? In *National Federation of Independent Business v. Sebelius*, Justice Roberts recast the meaning of “individual mandate” to buy health insurance as a tax and constitutional exercise of Congress’s taxing power, when the majority agreed the individual mandate did not fall within Congress’s powers under the

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<sup>33</sup> As early as the fourteenth century, some thinkers questioned the usefulness of using any universals. Among these thinkers were: Epicurus, William Ockham, George Berkeley, David Hume, and John Stuart Mill. These thinkers can also be considered nominalists. MEYRICK H. CARRÉ, *REALISTS AND NOMINALISTS* (1964). William Ockham believed humans used universals for the sake of ease. D. M. ARMSTRONG, *NOMINALISM AND REALISM: UNIVERSALS AND SCIENTIFIC REALISM, VOLUME I* (1978); FREDERICK COPLESTON, *HISTORY OF PHILOSOPHY, VOLUME III* (1993); R. A. EBERLE, *NOMINALISTIC SYSTEMS* (1970); REINHOLD SEEBERG, *TEXTBOOK OF THE HISTORY OF DOCTRINES* (2010).

Commerce Clause or the Necessary and Proper Clause, saving the heart of the Patient Protection and Affordable Care Act.<sup>34</sup>

When a judge is preparing to rule on a motion to dismiss, instruct the jury, or rule on an appeal, doubt is a good way to start. Philosophers have grappled with these problems for a long time. Peter Abelard (1079—1142) attacked the related problem of universals. Born into a royal family, he enjoyed humiliating his teachers with his brilliant quandaries. Do universals exist outside the mind? What is the relationship between names in the mind and things in the world? Or are names just convenient mental states? If one has a mental image of something in the world is that image more than what Abelard called a “likeness”? Mental images, he wrote, are not things. There is a relationship between Abelard’s focus on mental images and things in the world, and a judge’s effort to interpret the mental images Congress had in a statute with the reality of the facts in the case at hand that come from the outside world. Abelard posed three questions relating to names in the mind and things in the world.

First: Are names inside in the mind also outside the mind? If the congressional statute represents the collective mind of a majority of members, do the terms in the statute exist outside Congress? The legal system understandably depends on a yes answer. The judicial application of the statute attempts to carry out the legislative will either expressed in the statute or, if missing, a synthetically produced congressional will by an objective analysis. Often there is nothing easy about this judicial task. Often only the modesty of healthy judicial doubt can drive the court to a proper conclusion.

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<sup>34</sup> Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012).



Second, Abelard asked: If names are outside the mind, are they material or immaterial? The law would answer that they are material. It is the material world that Congress hopes to affect.

The legislative mind sees the world as having categories. How can legislators hope to express legislation covering thousands of disparate happenings in such a way that no judicial interpretation is necessary? Legislation says, “All citizens must-or all citizens must not.” The words on the legislative page are filtered through lawyers and finally judges. What do these words mean? The good judge must often decide, then the ruling becomes the law in that court.

Abelard’s third question was: If names are extra-mental and material, are they separate from things or involved in them?<sup>35</sup> As shown above, terms often used in legislation raise questions about the scope of the definition intended. As a small example, criminal lawyers spend their lifetimes grappling with the term “willful,” The Eighth amendment prohibits cruel and unusual punishment. Only doubt can be the good judge’s beginning point in cases involving the execution of the mentally handicapped, or juveniles. In 2005, Justice Kennedy wrote for the 5-4 majority in *Roper v. Simmons* that found it is unconstitutional to impose capital punishment for crimes committed while under the age of eighteen, overturning Supreme Court precedent and

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<sup>35</sup> No doubt Abelard was indebted to Boethius, born in 480 CE. He wrote, “For the senses cannot be exercised at all outside matter; the imagination does not behold universals; the reason cannot grasp the simple Form. But the understanding looks down, so to say, from above. It visualizes the Form, and distinguishes all that lies beneath it, but in such a way that it apprehends the Form itself, which could not be known to any of the other faculties; for it recognizes the universal as the reason does, and the shape which the imagination sees, and the matter which the senses grasp, but without deploying the reason or imagination or senses. Rather, by that single appraisal of the mind it regards all these things, so to say, as Form. Likewise the reason, when it observes some universal, does not deploy the imagination or the senses, but grasps what is apparent to the imagination and the senses; for the reason defines the universal which it has conceived like this: ‘Man is a two-footed rational animal.’ Though this is a universal concept, everyone knows that the object is open to the imagination or the senses, but by visualizing it rationally. The imagination too, though it takes its starting-point of sighting and fashioning shapes from the senses, even in the absence of the senses surveys all that is accessible to them by the criterion not of sensation but by that of the imagination.” THE CONSOLATION OF PHILOSOPHY, 106-107, BOETHIUS, TRANSLATED BY P.G. WALSH, OXFORD UNIVERSITY PRESS, 1999.

statutes in twenty-five states that had the penalty set lower.<sup>36</sup> The opinion was notable for citations to modern research in psychiatry and the emerging “national consensus” against the execution of juvenile offenders.<sup>37</sup> Numerous psychiatric and medical associations submitted amici briefs arguing that recent developments in neuropsychological research demonstrate that the adolescent brain has not reached adult maturity.<sup>38</sup>

Abelard’s questions about universals began to be seen as radical by Abelard, and questioning legislation in the same way no doubt seems radical to the reader. Abelard adjusted his thinking by acknowledging how humans use universals. He began to see universals as likenesses and then as predictors. A mental image is a “predictable of many.”<sup>39</sup> Here we see Abelard’s mention of *red bricks*, *tables*, and *trees* as useful terms like their legal cousins *deadly weapon*, *malicious mischief*, and *sanity*. It is not hard to find more current philosophers dealing with the complexity of the world as Abelard did. David Lewis was for many years a renowned philosopher at Princeton before his early passing. He thought, “All there is in the world is a vast mosaic of local matters of particular fact.” All this puts in perspective the difficult task of the

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<sup>36</sup> 543 U.S. 551 (2005). See also *Graham v. Florida*, 560 U.S. 48 (2010) (holding that juvenile offenders cannot be sentenced to life imprisonment without parole for nonhomicide offenses).

<sup>37</sup> *Roper v. Simmons*, 543 U.S. 551, 559, 573, 125 S. Ct. 1183, 1189, 1197 (2005) (“It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. . . . As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others.”) (internal citations omitted).

<sup>38</sup> *Roper v. Simmons*, 543 U.S. 551 (2005), *Brief of the American Medical Association, American Psychiatric Association, American Society for Adolescent Psychiatry, American Academy of Child & Adolescent Psychiatry, American Academy of Psychiatry and the Law, National Association of Social Workers, Missouri Chapter of the National Association of Social Workers, and National Mental Health Association as Amici Curiae in Support of Respondent; Brief for the American Psychological Association, and the Missouri Psychological Association as Amici Curiae Supporting Respondent*.

<sup>39</sup> Peter Abelard [1079—1142 CE] established himself as a master, a scholar, and a controversial thinker because he raised the issue of universals. He was in the nominalist camp holding that universals are utterances or mental terms, not things in the real world. The universality of a universal derives from the fact that it is predictable of many things, the *Oxford Companion to Philosophy* reports. This is one of the central questions in the analysis of law. Congress passes a statute that purports to cover all such situations in all states on all days at all times with all parties. Can it possibly reconcile law and justice each time it is applied? PETER ABELARD BY JOHN MARENBO, CAMBRIDGE 1997.

good judge: matching the facts of the case with the law AKA Abelard's universals, or Lewis's perception of a factual mosaic.

But John Dewey asked a more practical pragmatic question. Does law work? Of course it does, but often only after the good judge brings constructive doubt to start the interpretive process. In a brilliant thirty-page exegesis, Dewey traced civilization's legal definitions of organizations, including corporations. With each example he gently showed the arbitrary societal definitions and their defects. He thought the law of corporate personality had been a legal conception, signifying what law makes it signify. Dewey makes the arbitrariness of this corporate history apparent. He then offers his solution: *Law must work*.

Dewey thought that "the principle of natural law and justice in the sense that technical and official legal rules need to be adapted to secure desirable results in practice may well be accepted."<sup>40</sup> In *Citizens United*, 558 U.S. 2010, a fractured Court held that corporate and other political expenditures were permissible because they were expressions of free speech. But what if the case produced unworkable legal principles that reduced others' ability to participate in democratic discussions? And where in the corporation do these free speech rights reside? With the managers, the owners, or the shareholders? All nine of the good judges of the highest Court should and probably did start consideration of the matter with doubt. Here we attempt to free ourselves temporarily from applying the term *good* to the votes of the judges. Jurisprudence, the philosophy of law, is a lot more than counting up the results. It must include the judicial process used.

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<sup>40</sup> JOHN DEWEY ET AL., PHILOSOPHY AND CIVILIZATION 141-172 (1931).

The echoes of Abelard's thinking about universals and specifics tell us the legislature's mental conception that the category known as murder should be criminal was correct. But the good judge is faced with the question: Is it murder in this case? Should there be a lesser included instruction in this case?

But we can leave to others the interesting question of whether categories exist outside the mind. For our purposes it is enough to understand that there is a difference between categories such as general rules of law, and a judge's need to categorize actual diverse and varied human experience by matching the law to the facts of the pending case.

How often do judges grapple with gaps, obscurity, or ambiguities in existing rules of law? My answer is, much more than the existing writings allow. My answer is: often. It is true that the good judge must fill the gaps, clarify the obscurity, or adopt one of two or more meanings. With few exceptions, each case must be decided with the best answer that can be divined. As an example, at this writing three states have enacted hybrid corporate structures. Part for-profit part nonprofit, these new corporate statutes raise a number of important questions because of their revolutionary nature. Questions such as: Does the new form change the business judgment rule?<sup>41 42 43</sup>

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<sup>41</sup> Furthermore, does it change securities litigation? What rights do the shareholders have? Judges deciding these new questions will start with doubt.

<sup>42</sup> It follows that in the appointment of judges, the skills of the applicant must be equal to the task. The appointing authority might be well-served to consider the judicial thinking described here. The implications of these good-judge concepts for appointing authorities are not covered here, but they do exist.

<sup>43</sup> I am indebted to my colleague Suz MacCormack who is one of the pioneers of the hybrid corporation in California, for her efforts to explain these new forms to me.

There are other solid practical reasons for the good judge to start a case with doubt about the outcome. One reason is the meaning of words.<sup>44</sup> This Wittgensteinian problem supplies plenty of reason for modest doubt by the good judge at the beginning of the case. What does the term *commander-in-chief* mean in Article II of the U.S. Constitution? What is the meaning of *just compensation* in the Fifth Amendment? Most reasoning humans think by starting with instincts, assumptions, and their own life experiences. Because the law must be based on authority, however, written decisions often are drafted as though the result were inevitable given the state of the law. But the reality of judicial thinking is usually more uncertain.

Constitutional interpretation requires the reading of a well-written set of basic principles. In the Ninth Amendment we find, “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” This amendment was argued in *Roe v. Wade*, but not cited in the majority opinion. How should a judge discern the meaning of those words? Of course, there is the question of original intent. But the good judge knows or at least doubts his or her ability to always determine what was in the collective minds of the founders.<sup>45</sup> There are too many possibilities adhering to *Roe v. Wade* to write a complete list. Should the judge look at history, religion, medicine, or the common-sense meaning of the Constitutional language? If we say precedent is our answer, there may be no case directly on point. This can be true even in settled areas of law. The world moves on, and the law must adapt to it. If we bring the wrong deconstructionist scholar to the task, there may be a blinding flash of brilliant verbiage, which results in the suggestion that the words do not appear on the page. But the good judge will start with doubt about the correct answer. A judge can have understanding in

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<sup>44</sup> For a discussion of the ambiguity and subjectivity of words and language, *see generally* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1953).

<sup>45</sup> *See* FRANK J. COLUCCI, *supra* note 32.

his or her experience. But the good judge approaches every case and matter understanding that it may be different from prior cases and matters, prior assumptions, and earlier experiences.

A generic example of the good judge's doubt. The defendant in a criminal case is arraigned and charged with a number of fraud counts. Common beliefs dictate that most defendants are guilty, but the defense is spirited and the statute in question is specific and does not cover the defendant's alleged activity. The judge is unsure and works on the problem with an open mind, demonstrating judicial doubt about the proper outcome. It does not matter to the good judge that he or she used to be a prosecutor or a defense lawyer.

## II. DOES A GOOD JUDGE HAVE THE HABIT OF USING BOTH INDUCTION AND DEDUCTION?

The above brief examination of judicial doubt leads us to the issue of judicial thinking to resolve that doubt. How do judges think? Does the law school preoccupation with deduction – arriving at a conclusion by beginning with legal premises found in cases and legislation – dominate the thinking of the good judge? How often must the judge use inductive reasoning, i.e., the mastery of facts to reach a conclusion? My answer is that the good judge uses inductive reasoning frequently to assess probabilities. George Boole (1815–1864) in his book *The Laws of Thought*, attempted to discover a method of probabilities. The goal was an algorithm. He worked with the hope that humans could proceed to the given probabilities derived from any system of events. Isn't that what a sentencing judge does? What commends Boole's work to many is his view of unlimited possibilities out there in the world and all those connections that have an affect on human activity. His research led to the computer much later. But a casual examination of

treatises on logic<sup>46</sup> can only offer an occasional snippet helping the good judge. With rare exceptions,<sup>47</sup> judges do not and cannot think exclusively in formulaic standardized ways.

*The Stanford Encyclopedia of Philosophy* defines inductive logic as a process whereby, as evidence accumulates, it becomes clear that a proposition is probably false or probably true. In this article I am using the term *induction* simply to mean a faculty of mind comfortable enough with the intake of facts to enrich any judicial decision. A beginning, partial, and inadequate list of judicial inductive occasions includes: 1) infusing rules of law with practical human experience;<sup>48</sup> 2) examining facts to determine what rule of law should apply;<sup>49</sup> 3) examining admissible evidence to determine whether it is proper to admit other evidence;<sup>50</sup> 4) formulating opinions about witnesses' characters (there are occasions where the trial court must pass upon the adequacy of evidence and the all-important sentencing obligations); 5) understanding the evidence before them; 6) passing upon posttrial motions; 7) sentencing criminal defendants if there is a conviction;<sup>51</sup> 8) understanding scientific-terminology, and expert testimony, in order to rule on admissibility;<sup>52</sup> and 9) comprehending the facts in the record and marshaling them to fit the law of the case. Judge Mansfield, respected as a great commercial judge in the late 1700s, went to the docks in London and interviewed ship captains about the rules of trade they

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<sup>46</sup>MORRIS R. COHEN & ERNEST NAGEL, AN INTRODUCTION TO LOGIC 157 (HARVARD BOOKS ALDISERT 1934); and RUGGERO J. ALDISERT, LOGIC FOR LAWYERS (NITA 1988).

<sup>47</sup> See footnote 77, *infra*.

<sup>48</sup> James Brosnahan & William J. Dowling, *A Constitutional Attack on the Antitrust Per Se Rule*, 16 SANTA CLARA LAW REV. 55–76 (1976).

<sup>49</sup> Ronald Dworkin's theory that judges should make determinations in close cases by first examining what legal rules would "fit" with the legal landscape, and then decide which of those rules normatively "justify" the existing legal landscape in that case, is one influential, if controversial, approach to a type of judicial inductive thinking. See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057–1086 (1977).

<sup>50</sup> Fed. R. Evid. § 404(b).

<sup>51</sup> Subject to the sentencing guidelines of that jurisdiction. See 18 U.S.C. § 3553a (2006); *United States v. Booker*, 543 U.S. 220 (2005).

<sup>52</sup> *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

encountered in their travels in order to enrich his rulings in commercial law.<sup>53</sup> This exotic, antique example is replicated in a more formal way by modern judges who hold tutorials before a complex matter to educate themselves about the anticipated issues. Judge Jack Weinstein<sup>54</sup> was among the early modern judges who fashioned the use of tutorials for judges in scientifically complex cases. In a tutorial, the parties present experts, evidence, and explanations of complex evidence. Judge Becker<sup>55</sup> was one of many judges who developed the modern *in limine* motion heard by a judge before a trial to determine admissibility of evidence.<sup>56</sup>

Since each judge is different, we can safely assume each judge reasons somewhat differently. Some judges prefer, and are best, at deduction. These judges are comfortable with the top-down distillation of legal rules from the legislature or higher appellate courts. They are most comfortable when finding and announcing the law. Other judges prefer, and are best at, induction, the gathering of disparate facts for the purpose of coming to a conclusion. Contrast, for example, the Supreme Court jurisprudence of Chief Justice John Marshall and Justice Joseph Story.<sup>57</sup> Story was fond of citations of law. He wrote when the nation was young and needed legal authority. But Marshall wrote some of the most important cases with his logic as the central theme. Both were great judges with very different styles. The uses and proximity of facts used in both deductive and inductive reasoning change as a matter ascends the court structure. The appellate courts use inductive reasoning from facts supplied by advocates that are contained in

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<sup>53</sup> EDMUND HEWARD, LORD MANSFIELD (1979).

<sup>54</sup> Martha Minow, *Judge for the Situation: Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLORADO L. REV. 2010, 2019–21 (1997).

<sup>55</sup> Hon. Edward R. Becker, United States Court of Appeals for the Third Circuit, 1971—2006.

<sup>56</sup> *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3rd Cir. 1994).

<sup>57</sup> *Cf. McCullough v. Maryland*, 17 U.S. 316 (1819) (Chief Justice Marshall—deductive reasoning) *with* *The Amistad*, 40 U.S. 518 (1841) (Justice Story—inductive reasoning).



the briefs. Trial courts see and hear the witnesses. Appellant judges must also ask: What happened here?

No judge uses only one and not the other. The good judge uses both induction and deduction. What are the operative facts, when fairly marshaled, that are relevant to the rulings? Common law judges, especially commercial judges, make the point that common law grows by induction as commercial experience comes into the courts from the outside world. A commercial development can nurture beneficial legal growth. The California Supreme Court adopted the sophisticated-user doctrine and defense to partially negate a manufacturer's duty to warn.<sup>58</sup>

All humans base their reason on experience. It is useless to suggest to people inside or outside the law that judges do not or should not find an appropriate place in their thought processes for their own experience. It is much harder to determine what we mean when we say judges use their own experience. What makes their experience reliable? What ensures that memory, the close cousin of experience, is accurate? What shows that the judge's experience is relevant to this case? If a judge is divorced, is that experience useful in family court? Judiciary committees at all levels delve into the candidate's experience. Has he or she practiced law? What was that practice? What was his or her judicial experience? How did he or she relate to others? Does he or she have good instincts? Is he or she scholarly, intellectually curious, and smart—in short, what has been this applicant's experience in life? Why is it important, as many believe, for there to be diverse judges with different life experiences? I have always thought, but have never brought the matter to scientific proof, that the inclusion of women in large numbers in the legal

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<sup>58</sup> Johnson v. American Standard, 179 P.3d 905 (Cal. 2008).

profession coincided with the dramatic increase in civil and criminal processing of child and spousal abuse.

The experience of each human is at least somewhat different from all others. Judges are human, and writers focusing on judging and jurisprudence can now benefit from other disciplines to understand judicial thinking processes. These diverse intellectual waters are deep and developing currently.<sup>59</sup>

The good judge uses induction because facts are endemic to legal analysis. Each case has its own facts. No murder case is exactly like any other murder case. This fact does not open the door to hopeless relativism. The law describes categories of human activity. Fraud is one of those categories. Facts will determine whether the defendant fits in the prohibited category. At this point we are standing on the dividing line between rationalism<sup>60</sup> and empiricism.<sup>61</sup> Look at any area of law at any level, and you will see cases that turn on the facts arrived at by induction. Public debate on judging tends to center on legal rules. Is a judge for or against abortion, the death penalty, strict construction? But a judicial judgment must rest on the facts. Analysis of the trimester in abortion cases, malice in libel cases, obviousness in patent cases, premeditation in murder cases, willfulness in many criminal cases, all turn on facts arrived at by induction. The good judge's job is lightened by the jury's function, but facts remain a vital part of the good judge's thinking. The good judge knows the appropriate line between the fact finding by the jury and the essential induction necessary on the part of the judge. The good judge avoids sterile legal

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<sup>59</sup> As a very small example, the reader could consult: HENRY GLEITMAN, DANIEL REISBERG & JAMES GROSS, *PSYCHOLOGY* (8th ed. 2010); DANIEL N. ROBINSON, *AN INTELLECTUAL HISTORY OF PSYCHOLOGY* (3d ed. 1995); ROBERT IRVING WATSON & RAND B. EVANS, *THE GREAT PSYCHOLOGISTS: A HISTORY OF PSYCHOLOGICAL THOUGHT* (5th ed. 1997) (*see, e.g.*, chapters 7—9 regarding the difference between empiricism, rationalism, and materialism); KARL R. POPPER, *CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE* (2d ed. 2003).

<sup>60</sup> *See generally* H.L.A. HART, *THE CONCEPT OF LAW* (1st ed. 1961).

<sup>61</sup> *See generally* WILLIAM JAMES, *ESSAYS IN RADICAL EMPIRICISM* (1912).

analysis without proper inductive reasoning encompassing the operative facts. The legal decisions that pour out of appellate courts are filled with factual distinctions. The good judge melds the law and the facts. The good judge does not hide in rational ideology but understands the difficulty of dealing with questions about what really happened here. No application of law based on proportionate justice can be made until the case at hand is understood factually.

In discussing induction here, and in considering the effect on persons affected by legal rulings in the next section, we encounter a central quandary in the law. There is a tension between justice in the individual case and the consideration of societal good in general rules of law. The good judge strives for justice but has a more powerful incentive. The judge's greater incentive is judicial obligation to follow the law to the best of his or her ability. The obligation and benefit of following the law was expressed by David Hume:

[S]ingle acts of justice may be contrary, either to public or to private interest, 'tis certain, that the whole plan or scheme is highly conducive or indeed absolutely requisite both to the support of society, and the well-being of every individual.<sup>62</sup>

The general commands of law covering all persons in a stated category must, at least in part, be measured against what happened in a pending case. What did these parties do here? Is this precise conduct, as shown by the facts, exactly as the law giver announced or is this conduct on the border of the command? Or are these facts just outside the command? What is the scope of the command? So common and challenging are these issues in criminal cases that there is a

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<sup>62</sup> DAVID HUME, *A TREATISE OF HUMAN NATURE*, 353 (3d ed. 2003) (1739—1740).

rule of lenity limiting the scope of criminal statutes.<sup>63</sup> That rule, which no doubt helps justice, reads like an admission that sorting out legal penumbras is not a science but at best a good faith effort. These points have a relativist quality that makes some positivists nervous. Society must have laws that are solid, well defined, and clear, they suppose and insist. But pragmatic application of the law after efforts at induction has a proud American tradition. William James was an early founder and exponent of American pragmatism. The good judge described here is also an American pragmatist, interested in facts and careful about abstractions. The good judge is wary of conceptions, ideas, and fixed beliefs and especially careful when confronted by the judge's own ideology or that of others. James referred to ultra-abstractionists with nuanced disdain. He accused them of always choosing the skinny outline rather than the rich thicket of reality.<sup>64</sup> James thought the common law was truth grafting itself on previous truth, modifying it in the process.<sup>65</sup> "Human motives sharpen all our questions, human satisfactions lurk in all our answers, all our formulas have a human twist."<sup>66</sup> It is useful for our purposes to borrow from James's ruminations on a philosopher's methods of thought. After discussing the thinker's passion for simplification of the world based on many cases, he notes that some have a passion for distinguishing. This is caused by the desire to be familiar with the parts of something. The more details this thinker can carry, the happier he or she is. "Clearness and simplicity thus set up rival claims and make a real dilemma for the thinker. A man's philosophic attitude is determined by the balance in him of these two cravings. No system of philosophy can hope to be universally

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<sup>63</sup> U.S. v. Granderson, 511 U.S. 39, 54 (1994).

<sup>64</sup> WILLIAM JAMES, PRAGMATISM, 68 (1921). James's thought was greatly influenced by evolution and Darwin. Truth to him was always progressing. The number of new advance sheet cases arriving on the desk of an American judge each day is the law's own visible evidence of legal evolution.

<sup>65</sup> See *id.* at 240-241.

<sup>66</sup> JAMES, *supra* note 61, at 242.

accepted among men which grossly violates either need or entirely subordinates the one to the other.”

The pragmatic judge believes in the dynamism of life, which must be reflected in law.

John Dewey wrote:

[W]hen it is systematically acknowledged in practice that social facts are going concerns and that all legal matters have their place within these ongoing concerns, there will be a much stronger likelihood than at present that new knowledge will be acquired of a kind which can be brought to bear upon the never-ending process of improving standards of judgment.<sup>67</sup>

Anti-idealist, solution-oriented, and nonideological, the American pragmatist’s approaches are found in the work of American judges today. The good judge finds a solution to the problem in the matter by fitting the law with the facts. He or she welcomes and is interested in the actual happenings of human existence. Deduction and induction in equal measure are the good judge’s tools.

A generic example of the good judge’s use of induction. The prosecutor, the defense attorney, and the defendant arrive at a plea bargain. The question for the court is whether to accept the plea bargain. The court carefully examines the file and all of its contents, weighing the factual recitations and putting together those facts that help the court decide whether to accept the plea bargain. Which facts should be given more weight? What role does the judge’s experience in weighing facts like those in the file play in the decision-making process? What

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<sup>67</sup> JOHN DEWEY, *MY PHILOSOPHY OF LAW* (1941), *reprinted in* 14 JO ANN BOYDSTON, *THE LATER WORKS OF JOHN DEWEY*, 115 (Jo Ann Boydston ed., 2008).

questions remain to be asked by the court at the hearing? This process, common in courts all over the United States, is one example of the proper uses of induction.

### III.    SHOULD A JUDGE CONSIDER THE EFFECT OF A RULING ON PERSONS AFFECTED BY IT?

In Justice Roberts’s dissent in *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ 2015, the gay marriage case, he writes, “Whether same-sex marriage is a good idea should be of no concern to us.” The effect of that dissent, had it been adopted by a majority, would have denied to thousands of gay people in America that which Justice Roberts himself acknowledges as having undeniable appeal. He cites the argument that same-sex couples should be allowed to affirm their love and commitment through marriage just like opposite-sex couples. There are certainly times when judges are required to enforce the law despite the effects on various parties. But in the gay marriage case, it is a function of the courts to enforce equality in a democracy that is ever searching, as our history shows, for groups previously discriminated against. The unfettered repercussions of denying gay people marriage has rippled through society, and found a home of bias in medical provisions, housing, and jobs. In many ways, as described in this article, Chief Roberts is one of the good judges. But in the gay marriage dissent, he is not considering the effect on those affected.

The effect on parties has a long history.<sup>68</sup> Modern judges, including Justice Kennedy, have continued the focus on affected parties. “While it is unlikely that we will devise a

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<sup>68</sup> “*Roman rule was for the common good. Whoever is mindful of the good of the commonwealth is ipso facto mindful of the purpose of right. The truth of this proposition is proved as follows: The definition of right given in the Digests of Law, namely, ‘Right is a real and personal bond between man and man whose preservation preserves society and whose corruption corrupts society,’ is not a definition of the essence of right, but a description of its utility. If this definition is nevertheless a good account of what right is in practice and what it comprises, and if the*

conclusive formula for reasoning in constitutional cases, we have the obligation to confront the consequences of our interpretation, or the lack of it.”<sup>69</sup> Where should the good judge put the main focus? That is the key philosophical question in jurisprudential systemic analysis. The same questions may be asked if societal good is purported to be the end product of the legal system. Should the main focus be on the judge, the lawyers, the law as written, the progress or path of the law, court congestion? My answer and, I suspect, much of the public’s answer is: The good judge puts the main focus on those affected by the rulings. Idealistic reasons for this approach include Immanuel Kant’s suggestion in his *Philosophy of Law* that:

[j]uridical punishment can never be administered merely as a means of promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subject of real right.<sup>70</sup>

What does Kant mean by this statement? Would he support the punishment of defendants as deterrence to others? This reference by Kant to juridical punishment should sound familiar.

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purpose of any society is the common good of its members, the purpose of right must be to promote the common good, and anything that fails to promote it cannot possibly be right. Cicero says this very well at the beginning of his *Rhetoric*: ‘Laws should always be so interpreted as to promote the good of the commonwealth.’ For if laws are not useful to those who are governed by them, they are laws only in name not in fact. Laws should bind men together for their mutual benefit, as Seneca said very truly in his book *On the Four Virtues*: ‘Law is the bond of human society.’ Hence, it is clear that to be mindful of the good of the commonwealth is to be mindful of the purpose of right.” DANTE ALIGHIERI, *ON WORLD GOVERNMENT*, 32 (2d ed. 1949) (957).

“Injustice in this sense too means unfairness or inequality, and the endeavor of the judge is to equalize it. For when one person deals a blow and the other receives it, or one person kills and the other is killed, the suffering and the action are divided into unequal parts, and it is the effort of the judge to restore equality by the penalty he inflicts, since the penalty is so much subtracted from the aggressor’s profit.” ARISTOTLE, *ONE MAN IN THE UNIVERSE* 162 (1943).

<sup>69</sup> COLUCCI, Justice Kennedy, *supra* note 32 at 170.

<sup>70</sup> IMMANUEL KANT, *THE PHILOSOPHY OF LAW* (W. Hastie, B.D. trans., 5th ed. 2002) (1887).

Treating other humans as ends, not as means, is found in much idealistic and religious writing in Western civilization.<sup>71</sup> The relevance of Kant to our thinking about good judicial behavior is strengthened by the occasional conjecture that Kant studied society's development of legal rules when developing his philosophy. The good judge has the ability to consider and understand the effect of rulings on those affected by them. Can the law be crafted and applied so it supplies a service to those affected? The good judge labors to do so. Below I attempt to list some of the issues in defining the persons affected by the good judge.

The reader might say, well, of course good judges have their main focus on the parties. At the same time, it would be impossible but enlightening to have minute-by-minute mental histories of judges considering death penalty cases. Where is their main focus? Is it on deterrence of others? On the justice of retribution based on the perceived heinous nature of the crime? The death penalty example may help our understanding of the focus issue, because the effect on the life of the defendant in a death penalty sentence is total. Justice Kennedy has a theory of personality development, and it played at least a part in his decision in *Roper v. Simmons*<sup>72</sup> that the death penalty for juveniles was cruel and unusual punishment under the Eighth Amendment. His reported theory is that juveniles have not completed their development so it is inappropriate to take away their lives. Similarly, the studied development of safeguards in death penalty law shows a regulation by judges of the effect of such sentences on a group of potential defendants. Refined and specific jury instructions, reversals for inadequate counsel under the Sixth Amendment, and rules of law creating the diminished-capacity defense all reflect caution and a

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<sup>71</sup> IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS: ON A SUPPOSED RIGHT TO LIE BECAUSE OF PHILANTHROPIC CONCERNS* 35 (James W. Ellington trans., 3d ed. 1993) (1785). "Now I say that man, and in general every rational being, exists as an end in himself and not merely as a means to be arbitrarily used by this or that will. He must in all actions, whether directed to himself or to other rational beings, always be regarded at the same time as an end."

<sup>72</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).



focus on the deadly effect of such sentences on the defendant. The effect on the victims of crime is also considered by the good judge.

The good judge must be aware of and overcome many distractions from his or her focus on the affected parties. A few examples may make my point. Among the distracting arguments is the “floodgates” argument that says if the judge rules a certain way, there will be too many cases flooding the courts. Sanctions, under Federal Rule of Civil Procedure 11, say look at this tangential issue and away from the effect of a decision on the merits. *Stare decisis*, which does supply needed continuity to the law, can, when inflexibly adhered to, prevent a focus on the needs of the parties and, on occasion, the needs of a wider community. One of the most reasoned opinions I have read declaring it was time to change the law was Justice Traynor’s opinion limiting sovereign immunity, which had protected California’s state hospitals.<sup>73</sup> As explained below, jurisprudence and the law – at times in the twentieth century, often for different reasons – reduced the focus on the parties affected and put it on process. Professor Barkow has raised the issue of the demise of mercy as a result of the administrative state.<sup>74</sup> Is the lessening of focus on the affected persons as it presently exists a form of judicial detachment from the very society the courts seek to serve? The good judge knows that a court’s public support is diminished if effects are not fully considered.

But the nature of courts is to entertain unresolved controversies where the desired effects are contested. To make it more difficult for judges, each case must be decided whether the merits

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<sup>73</sup> *Muskopf v. Coming Hosp. Dist.*, 359 P.2d 457 (Cal. 1961).

<sup>74</sup> See Rachel E. Barkow, *The Ascent of the Administrative State and the Decline of Mercy*, 121 HARV. L. REV. 1332 (2008).

are simple or not. A decision on the merits must be rendered in almost every case.<sup>75</sup> The parties to litigation will have to endure the results. In *The Common Law*, Holmes wrote, “The very considerations which judges most rarely mention and always with an apology are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned.”<sup>76</sup>

The very hard question here is the scope of the community to be considered by the good judge. Should family members be taken into consideration in criminal cases? Of course, good judges do that every day. Families are affected by many rulings. Judges consider family safety, and the defendant’s relation to the family. But there is a strange, cold provision in the Federal Sentencing Guidelines. They provide that, “[i]n sentencing a defendant . . . family ties and responsibilities are not ordinarily relevant in determining whether a departure [from the guidelines sentencing range] may be warranted.”<sup>77</sup> So the humanist instinct is rejected by the members of a committee that has been given authority over the fate of thousands of defendants – defendants they will never know in cases they will never hear.

In sentencing, this judicial detachment from effects on those affected is not an isolated event but rather one of the major jurisprudential developments coming out of the 1950s, as America moved towards national systems seeking economic stability, among other national imperatives. Did the process thinkers cause a withering of individualized-effects analysis and substitute a systemic analysis from above? Were these thinkers swept along by the organizational instincts of the time? Has this jurisprudential-process focus caused a reduction in focus on the

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<sup>75</sup> With limited exceptions for jurisdictional or jurisprudential reasons, like standing or mootness. *See generally*, HENRY FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973).

<sup>76</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW*, 35 – 111 (2d ed. 1991) (1881).

<sup>77</sup> U.S. SENTENCING GUIDELINES MANUAL, § 5H1.6 (2009).

persons affected? Has process jurisprudence now run its course? Process over result has become one of the animating forces in American legal solutions. Feldman has examined the process legal thinkers of the 1950s. In describing the process scholar's critique of *Brown v. Board of Education*,<sup>78</sup> he wrote:

Wechsler's denunciation of *Brown* sparked an immediate flurry of scholarship. On the one hand, Wechsler's attack seemed almost inevitable. After [Harvard Professor Albert] Sacks' initial praise of *Brown*, legal process scholars had become increasingly hostile toward the inadequate opinions, which repeatedly failed to satisfy the requirements of reasoned elaboration. From the legal process standpoint, the Warren Court often seemed to be little more than a wayward realist, refusing to recognize the importance of the rule of law as expressed in well-reasoned judicial opinions.<sup>79</sup>

The process scholars of the 1950s were much more interested in the stated rationales of the law than in the effect on the parties. Was this more than demanding craft in legal writing? It was much more. It was a philosophical rationalism that was particularly well suited to the classroom. It was a goal that said that the process counted most of all. The contributions of this school of jurisprudence cannot be denied. But there were questionable positions stated that were influential in some academic circles. In the case of *Brown*, the decision opened up schoolhouse doors for many Americans. For our purposes, we note the intense judicial consideration of the effects on the children discussed in the *Brown* decision. But some academics, led by Wechsler,

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<sup>78</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>79</sup> STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE* 127 (2000).

created a grand confrontation: Herbert Wechsler, the ultimate rationalist, taking on Earl Warren, the ultimate equitable empiricist.<sup>80</sup>

Another negative example of elevating process over the effect on litigants affected was the burgeoning of civil discovery, with the focus on allowing lawyers to search for facts so extensively that fewer and fewer clients could afford to be involved in civil litigation. The legal establishment's desire for process has very often gobbled up the justice of the matter. It matters very little to the litigant that much discovery was engaged in to prepare for trial if the cost is such that he or she cannot afford to go to trial. Perhaps every school of jurisprudence passes its point of usefulness. Has the neutral-principles, process school gone too far and passed its point of utility?<sup>81</sup>

A difficult problem with judicial focus on the parties affected is defining who will be considered. The persons to be considered are more than just the parties in the case. There is usually a range of persons that differs depending on the nature of the case. Consider the difference in scope of the persons affected in contract, antitrust, and criminal cases. The scope of consideration of effects also expands as the binding effect of the ruling expands. The effects can reach their maximum at the United States Supreme Court. The good judge does consider different effects in contract, antitrust, and criminal cases. The effects are to be analyzed in ever-widening circles depending on the type of case. Some contract actions represent a commercial dispute whose effects are often only impactful on the parties. Some antitrust cases are imbued

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<sup>80</sup> See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 – 34 (1959).

<sup>81</sup> The need for legal process cannot be denied, but here again emerges the question, “What is the effect on the parties?” The good judge certainly has some impact on process, but the main attack on errant process that is oblivious to its effect on parties would have to be directed at rules committees of civil and criminal procedure. All that important discussion is for another day.

with a public interest, occasionally national in scope, where there are effects on numerous consumers' retailers and wholesalers. Some criminal cases present the need for justice, which if absent, will affect a victim or a defendant with a hurt that will never go away. So how does the good judge consider the parties affected?

First, the judge sees the affected parties accurately, understands the implications of the ruling, and is able to consider the place of this case or matter in the law generally.

Second, the good judge determines what effects and which affected parties should be considered and overcomes (where possible) the legal imperative for uniformity. Shouldn't judges on the same court level be considering the same effects and the same affected parties? If cases were really identical the answer could be yes. But there are certainly similar cases where the effects, for extraneous reasons, fall more heavily on one party than another. Shouldn't the good judge at least consider the actual effects on the actual parties? This tension between the need for uniformity on the one hand and fitting the law to the individual case on the other is daily fare for resolution in the courts. The good judge considers both the need for uniformity and the application of law to the affected parties.

Third, it could be argued by the reader that there are very basic legal principles of long-standing recognition and societal jurisprudential benefit. It could be argued that a judge governed by doctrines such as *stare decisis*, statutory interpretation, and jurisdictional limitations is not to consider the effects on parties.<sup>82</sup> Could it really be correct that the good judge does not consider

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<sup>82</sup> See, e.g., *Flood v. Kuhn*, 407 U.S. 258 (1972) (upholding professional baseball's antitrust exemption from the challenge to reserve clause, which then wedded players to their clubs even after contract expiration, on *stare decisis* grounds) – (even though the antitrust exemption was “an aberration confined to baseball,” “there is a merit to consistency even though some might claim that beneath the consistency is a layer of inconsistency.”); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (interpreting Equal Pay Act statutory period to commence at

the effects on parties when applying such legal principles? First, all three doctrines have been established by judges or legislators who considered the effects on parties,<sup>83</sup> including seventeen state legislatures that have expressly rejected strict construction of statutes.<sup>84</sup> Secondly, if we look more closely at all three doctrines, we see that, when they are applied, good judges do consider effects on parties.

Are there presently opposing schools of thought that offer resistance to considering the effects of rulings on the parties affected? There are many. Because there are negative effects in not considering affected persons, let's examine some theories that divert attention from the consideration of the parties affected.

First, originalism and historical jurisprudence in their most literal forms pay less attention to persons currently affected by legal rulings, and focus more on earlier analysis by earlier decision-makers. Originalists attempt in their constitutional analysis to divine the intention of the founders. In doing so, they substitute a 200-year-old analysis for current thinking.

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decision to hire women at inferior salaries, rather than at subsequent paycheck issuing that implements the adverse effects of the original pay discrimination) ("Ultimately, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."); *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004) (dismissing Establishment Clause challenge to the Pledge of Allegiance on basis of plaintiff's lack of standing due to termination of parental right over child enrolled in California schools) ("[Newdow's] standing derives entirely from his relationship with his daughter, but he lacks the right to litigate as her next friend.").

<sup>83</sup> See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (relying, in part, on *stare decisis* to uphold *Miranda v. Arizona*, 384 U.S. 436 (1966)) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture"); Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 *GEORGETOWN L. J.* 34, 355 – 389 (2010), quoting HAW. REV. STAT. §1-15 (1993) ("Where the words of a law are ambiguous . . . Every construction which leads to an absurdity shall be rejected") and S.D. CODIFIED LAWS § 2-14-12 (2004) ("[T]he law[s] of this state . . . are to be liberally construed with a view to effect its objects and to promote justice") and FLA. STAT. ANN. § 775.021 (West 2004) ("provisions of this code and offenses defined by other statutes shall be strictly construed" such that "when the language is susceptible of differing constructions, it shall be construed most favorably to the accused"); *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding, *inter alia*, that Massachusetts had standing to challenge Environmental Protection Agency's refusal to enact regulations dealing with carbon dioxide) ("Given . . . Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.")

<sup>84</sup> Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 *GEORGETOWN, L. J.* 34, 357 (2010).

There are more fundamental defects in such an approach. To begin with, because of the difficulties of such an analysis, too often the announced result appears to come not from the founders but from the modern judge. Additionally, the Constitution nowhere provides that “our” meaning is the only one ever to be used, despite new conditions. The founders were children of the Enlightenment. Of all American generations, they knew as well as any that they and new generations would know more in the future than they knew on the day of enactment. This original analysis is truer when applied to the Constitution’s more specific stipulations, as in the minimum age of the president or initiating tax bills in the House, and less true where grand, broad terms such as *cruel and unusual punishment* and *due process* are used.

Second, rules that are formulated to reduce judicial workloads can take the focus off the affected parties and put it on judicial burdens. Systemic doctrines limiting court cases not only take the focus off affected parties but deny, in some cases, any access or at least any meaningful access. Take, for example,<sup>85</sup> the denial of counsel in civil cases.<sup>86</sup> Such reasoning is an example of a lack of focus on the parties affected by their rulings. Good judges at least consider the effect of systemic jurisdictional limitations that deny access to the courts.

Third, it has been suggested, most prominently by Chief Justice Roberts during his confirmation hearing, that a judge is like an umpire. A baseball umpire calls the pitch or the play and tolerates very little discussion. Those who follow baseball closely are aware that each umpire has a slightly different strike zone, sometimes in the same game. A baseball umpire is an authoritarian. If the aggrieved player or manager argues too strenuously, he is cast to the showers. There is no reasoning process to speak of, and the decision is almost always final. My

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<sup>85</sup> *Supra* note 75, Judge Friendly’s book on jurisdiction.

<sup>86</sup> *Lassiter v. Dep’t of Social Services*, 452 U.S. 18 (1981).

point here is that the umpire does not and should not consider the effect on the players or teams. But the good judge thinks very seriously about the effects on the parties and others who will be affected by the ruling.

Fourth, a judge has come through education and professional experience, and now “thinks like a lawyer” or at least thinks like a law professor. When the law and its rules are more important than the effect the law has on the parties and the public, justice can be undermined. An extreme example was the 150 years of cases upholding slavery, followed by a hundred years of cases upholding separation of the races. Advances in science allow the good judge to have a greater sense of the effect of rulings on people.<sup>87</sup> Feldman suggests that a whole generation of postmodern legal thinkers developed an approach that “transcended the immediate result of a particular case.”<sup>88</sup> There is much to be questioned about an approach that divorces the parties from the result in a case.

Fifth, there are those who attempt to mount a broadside attack on the judiciary by suggesting that judicial rule making is inferior to legislation, precisely because the judge is somehow distracted by the presence of real parties.<sup>89</sup> This detached, aseptic suggestion would deprive the law of its life force by eliminating considerations of the parties affected.

Sixth, what can be said about a judge’s focus on the path of the law? The reevaluation of established decisional law has much to commend it and has been the subject of some of the best legal thought.<sup>90</sup> What of the law is to be saved for the new generation? The times they are a-

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<sup>87</sup> FELDMAN, *supra* note 79, at 127.

<sup>88</sup> *Id.*

<sup>89</sup> Frederick Schauer, *Do Cases Make Bad Law?* 73 U. CHICAGO. L. REV. 883 (2006).

<sup>90</sup> *See generally*, JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* (1909); BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).



changing. How does the transition affect those concerned? The good judge thoughtfully considers and states such considerations.

A generic example of the good judge considering the effect of a ruling on persons affected by it. Called upon to determine whether to allow an alleged spousal abuser to be released on bail, the court considers what is sometimes called the defendant's "lethality." The good judge asks a series of questions covering the circumstances of the alleged events, the prior history of violence and abuse, and the history of threats. What were they? When were they made? Was there strangulation? Are there prior convictions? The good judge goes through this process to determine what danger there might be to the spouse or other family members.

## CONCLUSION

American judges are and have always been pragmatic. How they actually think about and apply their pragmatism is one of the proper subjects of jurisprudence. The three questions and answers set out here can be, and I hope will be, disputed. I close by acknowledging all of the good judges I have known and admired.

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