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Judging Judging

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Commentary

JUDGING JUDGING

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I am especially pleased to have been asked to comment on Judge Linde's 1993 Monsanto Lecture. At a time when members of the academy and bench sometimes wonder whether they are like ships passing in the night,[1] Professor né Judge né Professor Linde's life belies the supposed gap between theory and practice. At a time when, regrettably, public interest in judging focused almost exclusively on federal judges and questions of public law, Judge Linde gained prominence as *the* preeminent common law judge of his generation. He did so with wit, style, and grace, and, more to the point of his remarks here, he did so with a restrained (though not ineffectual) view about the role of judges. When Judge Linde speaks about judging, people listen.

I come openly to praise Judge Linde's remarks. Though his style is easy, the question he poses and the answer he gives are at the heart of a theory of judging and, consequently, of law. He makes three basic points: (1) judging is different from other normative activities, particularly legislating, (2) this difference is (or should be) maintained by the kinds of reasons judges give for their decisions, and (3) specifically, judges who rest their decisions on considerations of public policy should rely on *public* expressions of policy, not on their own lights. Each point is important, each point is unfashionable, and, in my opinion, each point is correct.

One of the legacies of legal realism, and one of the tenets of some current critical theory, is that whatever judges *say* they are doing, they are really doing something else. When they *say* they are deferring to an external standard they are *really* just imposing their own values. When they *say* they are deferring to a statute or precedent, they are *really* just deciding how our social world ought to be structured. When they *say* they are being subordinate to the legislature,

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1. *See, e.g.*, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Sanford Levinson, *Judge Edwards' Indictment of "Impractical" Scholars: The Need for a Bill of Particulars*, 91 MICH. L. REV. 2010 (1993); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191 (1993).

they are *really* just legislating.[2] This conclusion is often supported by a claim that law is indeterminate, and therefore does not really constrain a judge, so the judge must really be doing something else. Why this "something else" must be legislating, as opposed to acting on a whim or following the command of God, is often unclear, but legislating is the usual suspect.[3]

The objection that judging is not really different from legislating runs counter to our shared legal experience. For example, in *Melody Home Manufacturing Co. v. Barnes*,[4] the Texas Supreme Court held that a contract to repair tangible goods has an implied warranty of good and workmanlike service that is enforceable under Texas's Deceptive Trade Practices Act.[5] Two years earlier, in *Dennis v. Allen*,[6] the Court had decided that *professional* services do not have an implied warranty of good and workmanlike service and therefore are not covered by the Act. In a concurring opinion, Justice Gonzalez wondered what had happened in the interim.[7] Justice Mauzy responded:

> Both the Senate sponsor and the House sponsor of House Bill 417 wanted to include breach of implied warranties in the bill when it was being considered by the legislature in 1973. However, the Attorney General of Texas had entered into a political agreement not to include implied warranties in an effort to have a "consensus" bill. I was the Senate sponsor of H.B. 417 and I am well aware of the compromises and political horse trading engaged in by the Attorney General of Texas at the time the bill was passed. I fail to see how those political compromises that were so necessary to achieve a worthwhile result in the legislative process 14 years ago can in any way be construed as "an improper excursion into the legislative arena" [as Justice Gonzalez had argued].

The concurring opinion asks how this case is any different from

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2. Even H.L.A. Hart, who thought judges are sometimes constrained, believed that when they are not constrained (i.e., when they decide cases in the "penumbra" rather than the "core") they act as legislators. *See* H.L.A. HART, THE CONCEPT OF LAW (1961); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) [hereinafter Hart, *Positivism*].

3. Opponents of the idea that judging is different from other normative disciplines, that is, that it is at least partially an "autonomous" normative activity, propose competing theories of what this "something else" really is, from economics to politics to social science. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987) (economics); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987) (politics). It is difficult to understand how judging can be all of these things at once, unless these other activities are also really one and the same.

4. 741 S.W.2d 349 (Tex. 1987).

5. *Id.* at 351; *see also* TEX. BUS. & COM. CODE ANN. § 17.41 *et seq.* (Vernon Supp. 1993).

6. 698 S.W.2d 94 (Tex. 1985).

7. *Melody Home*, 741 S.W.2d at 358 (Gonzalez, J., concurring).

> *Dennis v. Allison* . . . . The answer to that question is that the makeup of this court has changed. . . . The people, speaking through the elective process, have constituted a new majority of this court . . . .[8]

It seems clear to me, at least, that Justice Mauzy confused his earlier role as a legislator with his new role as a judge. *Melody Home* was a celebrated case in Texas, and I have not spoken with *anyone*—regardless of their views about the desirability of imposing warranties in service transactions, regardless of their views about the appropriate reading of the Deceptive Trade Practices Act, and regardless of their views about the legitimacy of judges "making policy"—who thinks Justice Mauzy decided the case in a way that is appropriate for a judge. It seems, after all, that judges and legislators do have different roles, as Judge Linde insists. We are sometimes confused about this distinction when we study hard cases. In hard cases we argue about the fine points of a judge's role and are impressed with the difficulty of drawing precise lines to define it. In easy cases,[9] however, such as Justice Mauzy's opinion in *Melody Home*, it is difficult to deny the difference between the role of a judge and the role of a legislator.

A conclusion that Justice Mauzy confused his role as a judge with his earlier role as a legislator does not depend on a conclusion that he was wrong about the merits of his argument or that his motivations were bad. His *motivations*, as distinguished from his *reasons*, are beside the point.[10] In any event, Justice Mauzy is a decent, compassionate, "well-motivated" person. It is not that he based his decision on an intrinsically pernicious or fallacious argument. If he had in fact been a legislator, a change in the composition of the legislature would have been a perfectly appropriate argument. His argument was not wrong, it was just inappropriate for a judge.[11]

Judge Linde's second point is that we should evaluate the legitimacy of a judge's decision by the *reasons* he gives, not by the *result* he reaches. This claim, too, swims against the current. An implicit feature of much current legal scholarship is that we should organize legal rules, doctrines, and holdings (that is, *results* of legal reasoning) according to some preferred normative theory, such as economics,[12] Aristotelian justice,[13] civic republicanism,[14] liberal-

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8. *Id.* at 361-62.

9. *See, e.g.*, Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

10. *See infra* text accompanying notes 17-19.

11. Similarly, a legislature might provide relief to the victims of an earthquake or a flood on the grounds of charity and human solidarity, but these would not be appropriate reasons for a court to order such relief. The issue is not the intrinsic merits of the arguments, it is the propriety of the arguments as bases of *judicial* decisions. Again, it is these easy cases that support Judge Linde's claim that the role of a judge is different from the role of a legislator.

12. *See, e.g.*, LANDES & POSNER, *supra* note 3.

ism,[15] and so on. We can always *evaluate* the content of law from the perspective of another normative system, but this style of scholarship does more (or less) than that. It offers these other systems as *foundations* for law. On this view, these other disciplines are, in an important sense, part of law.[16] They purport to support the "surface" phenomena of doctrines, rules, and holdings from a "deeper" foundation that is internal to the legal system.

Important, and to my mind pernicious, features of this approach are (1) that it fails to maintain an appropriate distinction between law and other disciplines, and (2) that it encourages a fetish for evaluating the *results* rather than the *methods* of legal analysis. The first problem is that addressed by legal positivism, and while Judge Linde's claim is consistent with (indeed even supportive of) legal positivism, the separation of law from other disciplines is not the central goal of his remarks. The second problem, however, is at the heart of Judge Linde's remarks.

Judge Linde insists that the legitimacy of a judge's decision should be determined by the *reasons* the judge uses, not the *results* the judge reaches.[17] Thus, we can say that Justice Mauzy wrote an illegitimate opinion, irrespective of the rule, doctrine, or holding that it established. Imposing an implied warranty of good and workmanlike service in transactions to repair tangible goods is not what makes his opinion illegitimate (or what could make his opinion legitimate). The reasons he gave to reach that result are what make his opinion illegitimate.[18] From this perspective, the majority opinion in *Melody Home*, which also reached the result of adopting an implied warranty of good and workmanlike service to repair tangible goods, might be legitimate, even if Justice Mauzy's opinion is not. The difference would be in the kinds of reasons each opinion used to explain its conclusions.

We might think that this view of legitimacy is problematic on either or both of two grounds. First, using an account of legitimacy that refers to the types of reasons a judge gives, rather than the result the judge reaches, raises the specter

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13. *See, e.g.*, Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992).

14. *See, e.g.*, James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211 (1993).

15. *See, e.g.*, Cass R. Sunstein, *Liberal Constitutionalism and Liberal Justice*, 72 TEX. L. REV. 305 (1993).

16. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

17. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) (describing six modes of constitutional analysis that legitimate judicial review); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991) (same) [hereinafter BOBBITT, CONSTITUTIONAL INTERPRETATION].

18. If we insist on evaluating the *results* in these terms, we should just ask whether a judge reached a result by using legitimate reasons.

of indeterminacy. Indeterminacy also has other sources—such as conflicting lines of precedent, ambiguous language in statutes, and so on—but a criterion that does not even *try* to evaluate results openly admits that identifying determinate results is not even a goal.

A criterion that focuses on reasons *might* require determinate results as a by-product if it is sufficiently narrow to require only one set of reasons for each case and these reasons dictate a unique result. Any *plausible* criterion of legitimate reasons, however, is likely to approve a variety of reasons, indeed a variety of *types* of reasons. For example, would we not approve reasons that refer to a statute's language *and* reasons that refer to a statute's purpose as both being permissible *types* of reasons for a judge to give? And is it not possible that these different types of reasons might lead a judge to different results? If so, evaluating the legitimacy of judicial opinions by the types of reasons they employ rather than by the results they reach recognizes yet a new source of indeterminacy.

There is no answer to this objection other than to say, "So what?" For those who strive for determinacy, an evaluation of a judicial opinion's legitimacy in terms of the reasons it employs surely is not attractive. But why should we insist that our legal system is determinate in the strong sense that the objection requires? Is our legal experience not just the opposite, that our system does *not* dictate determinate results in all cases? And are we not likely to be in a better position to police or evaluate the kinds of reasons judges use than to police or evaluate results according to a controversial normative criterion? If so, why shy away from applying criteria about good judging to the reasons judges use and openly recognize (even embrace) the fact that judges must make *choices* among reasons, that is, that judges must *decide* cases?[19] There is not the time or space here to argue for these conclusions in any detail. I can, however, at least suggest that the objection from indeterminacy is not self-evidently correct.

Second, a criterion of judging that focuses on the types of reasons a judge employs, rather than the results a judge reaches, runs counter to the fashion of scientism in legal theory. Unlike normative systems, science thrives on giving

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19. *See* BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 17.

Indeterminacy does not mean that we are always adrift when trying to predict what a judge will do. Constraining the kinds of reasons a judge can use, coupled with knowledge about judicial practice, permits a great deal of predictability, notwithstanding that judges sometimes consciously choose between different types of legitimate reasons that point to opposite results. Judges do have irreducible choice in many cases, but we can still predict what judges will do in most cases. It is no answer to say that we cannot do so in hard cases or that easy cases are not "interesting." The social value of predictability comes from legal practice in run-of-the-mill, easy cases. Moreover, predictability is only one of the values a legal system serves. Another value is having a widely accepted method for resolving disputes.

a unique account of events, and it judges success by being able to predict the future. Causation is the central feature of the scientific approach. If a theory cannot provide an account of what caused an event, it has not done its job. A "scientific" approach to the social sciences applies the same criteria to social events. Applied to law, scientism seeks to explain *why*, not just *how*, judges reach results in specific cases. It seeks to offer an algorithm to predict results. It seeks to provide an account of what caused results in the past. Thus, it abhors an open recognition of choice, indeterminacy, and decision. A criterion of judging that focuses on a judge's reasons, rather than on the judge's results, accomplishes none of these goals.

My answer to this second objection is similar to my answer to the first objection. The problem is not with a criterion that focuses on reasons, it is with scientism itself. Insisting on a *causative* account (in the scientific sense) of normative decisions is itself a mistake. It is as though we evaluated a mathematical argument by insisting on a causative account of what made the mathematician choose a particular mathematical tool. Why a mathematician (or judge) chose a particular tool might itself be an interesting question of psychology, but this does not mean that mathematics (or jurisprudence) itself must give such an account. History, sociology, and psychology ask interesting questions about law, but they do not provide the appropriate internal account of judging. A jurisprudential theory of appropriate judging simply should not strive for a scientific account.

Again, these remarks do not fully answer the objection from scientism. Proponents of scientism in legal theory would undoubtedly have much to say in response. The point here is again that scientism is not self-evidently unobjectionable as an approach to jurisprudence. At least a *plausible* (and to my mind correct) response to the objection from scientism is simply to reject the premises of scientism in jurisprudence at the outset of the debate. That is, the goal of a jurisprudential theory is decidedly not to give a scientific account of judicial decisions. Thus, it is no embarrassment to a jurisprudential position that, because it focuses on reasons rather than results, it does not give an account of what *caused* a uniquely determined result.[20]

Judge Linde's third point is more specific than his first two. Here he argues not only that judicial opinions should be judged by the reasons a judge employs, but also that certain types of reasons are (or should be) impermissible.

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20. It might also be argued that this view obscures the important question of whether the result is morally justifiable (or correct on some other, external normative standard). This is just the general issue of legal positivism. I cannot answer the issue here, other than to say that the view does no such thing. Indeed, it highlights the issue of moral (or other) justifiability, which is an important and *distinct* issue. *See* Hart, *Positivism*, *supra* note 2.

In addition, he argues that while some types of reasons are permissible tools for judges to employ, others are not. Specifically, he argues that, when judges refer to "policy" reasons, they should consult "public" embodiments of the policy, not their own lights. It would not be permissible, under Judge Linde's view, for a judge to abandon punitive damages in medical malpractice cases simply because the judge thinks that we face a crisis of defensive medicine. It would be permissible, however, for a judge to rely on this policy argument if, for example, the legislature had shortened the statute of limitations in medical malpractice cases in response to such a crisis. The statute itself would not resolve the issue of punitive damages, but it would be "public" evidence of a policy to reduce defensive medicine that a judge could use to explain a decision to abandon punitive damages. Judge Linde observes that our current legal practice does not limit judges in their reference to "public" instantiations of a policy, but he argues that judges should limit their practice in this way.

Judge Linde's third point raises two issues: what counts as a public reason, and why should we limit judges to public reasons? First, what counts as a public reason? Judge Linde would include any legislative statement of policy, even if it comes in the form of a statute that does not specifically address the problem the judge faces in a particular case. We probably would want to include *implicit* evidence of a legislative policy by allowing judges to infer policies from statutory structures and schemes. We might also include embodiments of policy reflected in the statements and actions of other political actors, such as executive branch officers and administrative officials. We would also surely include policies reflected in judicial precedents.

But what about evidence of "social" policies that are reflected in the statements and actions of private individuals and institutions? Should the fact that churches and other private institutions widely support aid to the homeless count as evidence of a *public* policy? Should a long line of academic commentary in favor of a policy count as public evidence of that policy? What of a single law review article? And how specific must the public policy be? Does our general commitment to privacy count as a reason to protect medical records against disclosure, or must a judge find public evidence of a policy in favor of privacy *with regard to medical records*?

As with most problems, there will be close cases and difficult lines to draw. But what should be our motivating concerns? This depends on the second issue raised by Judge Linde's third point: why should we even insist on public evidence of policies in judicial opinions? It is helpful here to invoke a similar proposal by John Rawls in the realm of political discourse.

In his new book, *Political Liberalism*, Rawls argues that political debate

should be limited to reasons that are, in his sense of the word, public.[21] By this he means that, in a pluralistic society—where citizens have different views about morals, religion, and social goals—political debate should be limited to reasons that reflect our overlapping consensus in favor of social and political cooperation. A commitment to tolerance is part of this overlapping consensus, so reliance on the value of tolerance is permissible in public political debate. A commitment to Christianity or feminism is not part of this consensus, so reference to these values is not permissible in public, political debate.

Rawls's view of public reasons in *political* debate is problematic for several reasons,[22] but these reasons need not concern us here. The point here is Rawls's *argument* for insisting on public reasons in political debate. Political debate, he argues, should be structured to support our underlying commitment to social and political cooperation among pluralistic groups that otherwise differ about basic religious and moral values. It is not reasonable to expect any group to cede to another group the criteria to resolve moral and religious issues, and if each group argues from its own particular commitments, public discourse will break down. Only by limiting public debate to reasons that are part of the overlapping consensus for social and political cooperation can we support and strengthen the overlapping consensus that permits social cooperation in the first place. Permitting individuals to argue from within their own moral and religious convictions would undermine faith in and support of our commitment to social and political cooperation among pluralistic groups.

Rawls may not be convincing in his specific claim about political discourse,[23] but his general point is instructive. The reasons used in a particular type of discourse should support the goals and needs of the discourse itself. For Rawls, this means that public political discourse should use reasons that can reinforce the stability of public political discourse in a pluralistic society. What, then, is Judge Linde's reason for limiting use of policy reasons to public embodiments of policy?

One reason might be democracy. Policy disputes, so this argument goes, should be resolved by the political branches of government, at least whenever possible. If this is the reason for insisting on public evidence of policies, we should look for the statements and acts of public officials who are elected to make policy or are appointed by elected officials to make these decisions. Under this view, law review articles and statements or activities of private institutions and actors, such as churches, unions, and civic organizations, should

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21. JOHN RAWLS, POLITICAL LIBERALISM 212-54 (1991).

22. I have addressed these problems elsewhere. *See* William Powers, Jr., *Constructing Liberal Political Theory*, 72 TEX. L. REV. 443 (1993).

23. *Id.*

not count.

There might be another reason, however, why public evidence of policies is important for judicial discourse. Maybe we want judges to refer to public evidence of policies because we think participants in the debate about judicial decisions, including the parties arguing before a particular court, should have equal access to the rhetorical modes of explanation and argument that are available to the judge. Unlike public embodiments of policy, a litigant would have no access to the judge's own lights. Under this view, public policies would not necessarily be limited to the statements and actions of officials and institutions, but could also include a reasonably well-defined list of non-governmental sources. The point here, which is analogous to the point Rawls makes in *Political Liberalism*, is that the reasons judges use should reinforce and support, or at least not undermine, public commitment to the process of judging.

This is not the place to resolve the details of these matters. Indeed, there is surely room for debate, as a normative matter, about the types of reasons judges should use.[24] Suffice it to say that Judge Linde has made an important contribution to this debate, at least for one subset of reasons judges should use to explain their decisions. But, to return to an earlier theme, the importance of Judge Linde's comments lies not just in the particulars of his proposal, it lies also in the methodological commitment to judging judges not just (even at all) by the *results* of their decisions, but also (or only) by the *reasons* they give. This is not to say that other normative disciplines cannot make useful critical judgments about the results of judicial opinions, but law can do no more than ask judges for the right kinds of reasons.

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24. This does not mean that the legitimacy of judicial opinions in our actual legal system is determined by these criteria. That task is accomplished by the actual practices of our legal discourse. The debate here is one of *normative* jurisprudence.

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