

Responses

SOME REALISM ABOUT JUDGES: A REPLY TO EDWARDS AND LIVERMORE

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For some years I have been arguing for a realistic approach to understanding judicial behavior.¹ That approach is challenged in a recent article by Judge Harry Edwards of the U.S. Court of Appeals for the D.C. Circuit and Mr. Michael Livermore, the executive director of the Institute for Policy Integrity at New York University School of Law.²

What I am calling the “realistic approach” is, most simply, the view that judges play a legislative role in many cases, and those usually the most important ones—the ones that shape the law or have an immediate effect on society. And they play that role not only in common law cases and other areas of explicitly judge-made law but also in the interpretation of statutes and—of course—of the U.S. Constitution. The opposing approach, which I call the “legalistic approach,” pictures judges as oracles, engaged in applying law stated in orthodox legal sources, such as statutory or constitutional text or judicial decisions having the status of precedents, and doctrines built from those decisions, to the facts of new cases. Judges in this picture are transmitters of law, not creators, just as the oracle at Delphi was

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1. See, for example, my article, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1994). The fullest explanation of my approach is in my recent book *HOW JUDGES THINK* (2008).

2. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009).

the passive transmitter of Apollo's prophecies. The analogy of judge to oracle was Blackstone's, who went so far as to argue that even common law judges were oracles, engaged in translating immemorial custom into legal doctrines rather than in legislating doctrines.³

The realistic view goes back to Plato's dialogue *Gorgias*—before there even was a legal profession or professional judges; we find it in Bentham, famously in Holmes (and less bluntly in Cardozo), in legal realism, later in political science, and then in economics and in critical legal studies. Though Holmes is venerated by lawyers and judges, the legalistic view continues to dominate professional discourse about judging. The reason is that lawyers and judges—particularly judges—like to think that judicial decisionmaking is an “objective” activity, that decisions are produced by analysis. No one today thinks the process wholly oracular. But the idea of the judge as an analyst shares with the idea of the judge as an oracle the assumption that legal questions always have right answers: answers that can be produced by transmission from an authoritative source, though in the modern view the transmission is not direct but is mediated by analysis. And the judge remains an oracle in the sense that his personality does not count. The personality of the oracle at Delphi was no more important than the personality of a coaxial cable. To the legalist, a judge is a calculating machine. To the realist, he or she is a typical human being, whose judicial votes, because they are not generated by a process that resembles the operation of the scientific method or the rules of logic, are influenced by life experiences, professional training and experiences, political ideology, temperament, personal-identity characteristics such as race and sex, energy, ambition, sentiment, taste for leisure or for hard work, cognitive quirks, training and intelligence, and the other influences on human behavior. Out of these elements some judges (and more law professors) have built elaborate theories—law as the quest for original meanings, law as active liberty, law as libertarianism, law as integrity, and so forth—but these the realist regards more as rationalizations of dispositions than as theories that actually guide decisions and can be verified or refuted, rather than simply accepted or rejected.

The realistic approach to judicial behavior is challenged in the article by Judge Edwards and Mr. Livermore, to which I now turn. I will not try to go through the article page by page, registering my

3. See 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

disagreement with the points made by the authors; with many of their points I have no disagreement. I will confine this reply to the seven points with which I disagree.

1. *Legalistically Indeterminate Cases Shape the Law*. The authors say that the realists exaggerate the degree to which judges are unable to achieve agreement through deliberation that, overriding ideological and other differences, generates an objectively correct decision. Their evidence for the charge of exaggeration is that even in the Supreme Court many decisions are unanimous though the Justices are ideologically diverse; and “many” becomes “most” in the federal courts of appeals⁴ (I do not know the situation in the state court system).

But no realist has ever denied that *most* judicial decisions are legalistic. Legalism is a *category* of realistic judicial decisionmaking. Legalistic doctrines such as plain meaning and stare decisis enable judges to economize on their time and effort; to minimize controversy with other branches of government by appearing to play a modest, technical, “professional” role (in the sense in which members of professions seek deference from the laity on the basis of their real or pretended specialized knowledge); and to provide a product—reasonably predictable law—that is socially valued and therefore justifies the judges’ privileges. I do not doubt moreover that some judges think that every case, however novel and difficult, can be resolved by reference to an authoritative text, statutory (or constitutional) or judicial. But realism, or at least the form of realism that I defend, is not a theory of judicial self-consciousness. Whatever judges think they are doing, they cannot resolve a novel case legalistically because a novel case is one to which the orthodox legal materials of text and precedent do not speak beyond furnishing ideas of policy that might be used to “legislate” the outcome of the novel case.

The mistake in equating unanimity (absence of published dissent) with agreement is that judges do not always dissent publicly from a decision with which they disagree. I have discussed what I call “dissent aversion”⁵ elsewhere and will not repeat the discussion here.

4. See Edwards & Livermore, *supra* note 2, at 1941–44.

5. POSNER, *supra* note 1, at 32–34; see also Lee Epstein, William M. Landes & Richard A. Posner, Why (and When) Judges Dissent: A Theoretical and Empirical Analysis (Nov. 13, 2009) (unpublished manuscript, on file with the *Duke Law Journal*).

A more important point (since dissent aversion is much less pronounced in the Supreme Court than in the courts of appeals) is that the cases that can be decided by the methods of legalism are not the cases that shape the law, the novel cases. Today's law, insofar as it is the product of judicial decisions, is the product of decisions that were stabs in the dark rather than applications of settled law. Some of those cases were unanimous, such as *Brown v. Board of Education*,⁶ but that decision was not arrived at by legalistic analysis and could not have been. It was the product of political agreement—a shared repugnance to racial segregation viewed as antithetical to evolving American values.

Even Judge Edwards says that 5 to 15 percent of cases decided by his court are indeterminate from a legalist standpoint.⁷ If one cumulates those figures over many years and many courts, it is apparent that an immense number of decisions are legalistically indeterminate; and among them, as I have said, are the decisions that have made the law what it is today. (Just compare the text of the Constitution with the body of modern constitutional doctrine, or for that matter the text of the Sherman Act with the body of modern antitrust law.)

2. *Proxy Problems.* The authors point out that the standard realist variable in empirical studies of judicial behavior—the party of the president who appointed the judge who cast the vote in question—explains only a fraction of judges' votes.⁸ And that is true. It is true because the variable is a crude proxy for ideological leanings (in part because the political parties are not ideologically uniform), and no proxy at all for the other nonlegalistic factors that I mentioned, such as background and temperament, that influence judicial votes. Yet despite its crudeness, the proxy has been found in numerous studies to have significant explanatory effect, even after correcting for other variables that might influence a judge's votes.⁹

6. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

7. Edwards & Livermore, *supra* note 2, at 1898.

8. *Id.* at 1942.

9. See, e.g., CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? 151 (2006); Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. (forthcoming 2010) (manuscript at 20 n.3), available at <http://epstein.law.northwestern.edu/research/genderjudging.html>; William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 786 (2009); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 243 (1999).

3. *Judicial Self-Reporting.* Judge Edwards in his part of the joint paper gives heavy weight to what judges—in fact, to what Judge Edwards—reports about how they decide to vote in a case as they do.¹⁰ The assumption is that judicial self-reporting—judicial introspection—is a valid source of knowledge. I am skeptical, especially when it conforms closely to the “party line” on judicial decisionmaking. For largely political reasons—mainly to avoid seeming to compete with the other branches of government in making policy—most judges most of the time downpedal the creative or legislative role in judging. Sometimes the parade of modesty becomes ludicrous, as when John Roberts at his confirmation hearing said that the role of a Supreme Court Justice, which he would faithfully inhabit, was similar to that of a baseball umpire who calls balls and strikes but does not make or alter the rules of baseball.¹¹ That was so ridiculous, and Chief Justice Roberts is so sophisticated, that it cannot be what he actually thought. I am not suggesting that he is hypocritical. Judicial confirmation hearings have become a farce in which a display of candor would be suicide. It would also be a mistake. It would be to commit what philosophers call a “category mistake.” It would be equivalent to a Shakespearean actor interrupting his recital of Hamlet’s “To be, or not to be” soliloquy by saying that he did not actually think that death was “a consummation devoutly to be wished”; he was just saying it because it was in the script he had been given.

But much of the judicial self-reporting is, I think, sincere, though not, by virtue of that, reliable; we have all heard of “cognitive dissonance” and how people will fool themselves in order to erase it. There is a well-defined “official” judicial role and most judges would be uncomfortable if they realized that in reality they were playing a different role. So they suppress the realization. My earlier example was of a judge who can think in legalist categories, and so when he votes in a novel case, a case that does not fit those categories, he is legislating unconsciously.

I do not deny that judicial introspection can play a valid role in studies of judicial behavior. But it could do so only as a source of hypotheses to be tested. Many of my own views about judicial

10. See Edwards & Livermore, *supra* note 2, at 1950–58.

11. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr.).

behavior were arrived at by introspection, but I do not expect anyone to be convinced by them unless I present evidence; my say-so is not evidence and neither is Judge Edwards's.

4. *Rhetoric Is Weak Evidence.* A related point made in defense of the legalist approach as a description of actual judicial behavior is that most judicial opinions are legalistic in style. They cite prior decisions as if those decisions really were binding, reason by analogy, give great weight to statutory and even constitutional language, delve into history for clues to original meaning, and so forth. But that is what one would expect if most judges think of themselves as legalists; or if most judicial opinions are largely written by law clerks (as they are), who are inveterate legalists because they lack the experience or confidence or "voice" to write a legislative opinion of the kind that Holmes, Cardozo, Hand, Jackson, Traynor, or Friendly wrote; or if judges think the legalist pose politically useful, as conveying a becoming modesty and avoiding conflict with rival branches of government. Judges have political reasons to represent creativity as continuity, and innovation as constraint; and as there is no recognized duty of candor in judicial opinion writing, they cannot be accused of hypocrisy in writing that way even if they are aware that it does not track their actual decisional process.

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

But this rhetoric reflects and perpetuates a misunderstanding of the nature of American law. That law is suffused with politics (in the ideological rather than the partisan sense—few federal judges have, or at least exhibit in their decisions, a strong sense of party loyalty). Constitutional law, which is law made by the Supreme Court by loose interpretation of the antiquated constitutional text, is political in the sense of being the product not of orthodox legal materials (authoritative text plus precedents) but of the values, political in a broad (but sometimes in a rather narrow) sense, of the Justices. That does not make their decisions "lawless." The primary duty of a judge is to decide cases, and this duty is not waived merely because the judge confronts a case, as he often will, that cannot be decided simply

by reference to orthodox judicial materials—that can be decided only by making a value or policy choice, a choice that inevitably will be influenced by political ideology, career and personal background, and a variety of psychological factors. The critics of the realist approach either do not acknowledge these obvious facts about the American judicial system or are unable to come up with a competing theory of judicial motivations.

Judge Edwards and Mr. Livermore, however, do not make this mistake. Judge Edwards acknowledges that the American conception of law “encompasses, at least in some circumstances, forms of moral or political reasoning.”¹² But why does he call it “reasoning”? What exactly *is* moral and political reasoning? Edwards does not explain. Had he said moral and political *beliefs*, we would be in agreement. Such beliefs are less likely to be the product of a reasoning process than of temperament, upbringing, religious affiliation, personal and professional experiences, and characteristics of personal identity such as race and sex.¹³

6. *Exaggerated Significance of Deliberation.* Recognizing though he does that there is a considerable area of indeterminacy in law viewed from a legalistic perspective, Judge Edwards falls back on the idea of deliberation as a way of overcoming indeterminacy.¹⁴ I think he exaggerates the significance of judicial deliberation. I note that until quite recently, English judges did not engage in deliberation—they were forbidden to do so by the rule of “orality”: everything a judge did was to be done in public so that the public could monitor judicial behavior.¹⁵ Yet the product of these nondeliberating judges was highly regarded; nor am I aware that the decline of orality in the English legal system—a product of increased workload—has improved the system. (In fairness, though, the extreme length of English appellate proceedings by U.S. standards may have provided a substitute for deliberation—each judge on the appellate panel had

12. Edwards & Livermore, *supra* note 2, at 1900; *see also id.* at 1898–901, 1946 (“[S]ome play for inherently contestable political judgments is simply built into law and strikes us as a normal constituent of good judging.”).

13. See my book, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999), for a skeptical account of moral reasoning.

14. See Edwards & Livermore, *supra* note 2, at 1949.

15. See ROBERT J. MARTINEAU, *APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS* 101–03 (1990).

much more time than his American counterpart to think about a case.)

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

Further evidence for my reservations concerning the productiveness of judicial deliberation is the curiously stilted character of deliberation. The judges speak their piece, usually culminating in a statement of the vote they are casting, either in order of seniority or reverse order of seniority, depending on the court, and it is a serious breach of etiquette to interrupt a judge when he has the floor. This structured discussion reflects the potential awkwardness of a freewheeling discussion among persons who are not entirely comfortable arguing with each other because they were not picked to form an effective committee, and, as an aspect of the diversity that results from the considerations that shape judicial appointments, may have sensitivities that inhibit discussion of relevant issues involving race, sex, religion, criminal rights, immigrants' rights, and other areas that arouse strong emotions. Judicial deliberation can be highly productive when the issues discussed are technical in character, rather than entangled with moral or political questions frank discussion of which is likely to produce animosity—but cases that raise issues that all the judges agree are technical tend not to be the cases that shape the law, that make it what it is.

7. Why Should Judges Be Legalists? The legalists, while strongly committed to the view that most judges *are* legalists, do not offer a theory of why it is plausible to expect judges in our system to be legalists. Anyone who has studied professional behavior, including the behavior of academics, knows that self-interest, along with personality and, yes, in many fields (including law!), politics plays a role in their behavior. Why would we not expect that to be true with respect to judges? Are they saints by birth or continuous prayer? Are they made saints by being appointed to the bench? Does a politicized

selection process select for saints? Does putting on the robe change the man or woman under it? The realistic view of judges is that they care about the same things that other people care about, including salary, benefits, how hard they work, and how well they are treated by their colleagues. They thus have “leisure preference” and “effort aversion,” but also a desire to be respected and influential. They thus respond to incentives and constraints, like other people; from the assumption that they are like other people, the hypotheses of the realistic approach derive. The effects of lifetime tenure must surely be factored in when modeling judicial behavior. The critics have not explained how it is that federal judges are made over into baseball umpires.

There are expectations concerning the judicial role; there is a degree of self-selection and, in any event, persons uncomfortable in the role are unlikely to seek a judgeship or remain a judge; there is an appreciation for legal values that is inculcated by legal training and reinforced by experience as a lawyer. Judges are not just like other people, or, in what I have described as their “legislative” role, just like members of Congress. But a properly nuanced model of self-interested human behavior can, I believe, explain much of what they do in their judicial role.

To conclude this brief response: Much but by no means all of the apparent disagreement dissolves if proper weight is given to concessions on both sides. I concede and indeed would emphasize that most judicial decisions are indeed “legalistic,” but would add merely that legalistic decisionmaking is consistent with realism. I further concede, appealing to the concept of cognitive dissonance, that most judges do not think of themselves in “realist” terms; but I regard judicial introspection as a source of hypotheses about judicial behavior rather than as evidence for the best explanation of that behavior. And I insist that one must distinguish between the rhetoric and the reality of judicial decisionmaking. But I certainly agree that the political party of the appointing president is an exceedingly crude proxy for the values that drive judicial decisionmaking in legalistically indeterminate cases—yet, crude as it is, it has, as I mentioned earlier, considerable explanatory value—which is inconsistent with the legalistic view of judicial decisionmaking. And it is also improvable.¹⁶

16. See, e.g., Micheal W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 628 (2001).

The authors in their turn concede that a significant fraction of all appellate cases cannot be resolved by an approximation to deduction from the orthodox legal materials of text and precedent, but only by appeal to moral and political considerations.¹⁷ (I consider their 5 to 15 percent estimate of such cases high!)

The residual difference between us appears to be twofold. Judge Edwards and Mr. Livermore overstate (I believe) the role of deliberation in judicial decisionmaking, and, a closely related point, the possibility of *objective* moral and political reasoning. Moral and political reasoning as generally practiced, certainly at the judicial level, is not an analytic process, but an expression of values shaped by temperament, personal experiences, and religious and political beliefs. Deliberation will not bridge the interpersonal gaps created by value disagreements in a morally heterogeneous society.

17. See Edwards & Livermore, *supra* note 2, at 1898.