

THE SUPREME COURT, PUBLIC OPINION, AND THE ROLE OF THE ACADEMIC COMMENTATOR

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For decades, a debate has raged over the appropriate role of the Supreme Court in American society and how the Court should interpret the Constitution. Many prominent Justices and commentators have premised their theories on the notion that the Supreme Court's effectiveness depends on its public legitimacy and that this legitimacy is inherently fragile. Thus, influential individuals such as Justice Felix Frankfurter, Professor Alexander Bickel, and Professor Jesse Choper, have argued for judicial restraint so that the Court can preserve its political capital and preserve its institutional legitimacy.¹

In this paper, I question their premise that the Court's legitimacy is fragile and that a central function of a theory of judicial review should be to limit the Court's activities so as to preserve its credibility. In Part I, I suggest that the Court has enormous public credibility; more than any other institution of American government. I then consider what accounts for this degree of public confidence and conclude that it is a result of its deliberative processes and substantively its producing a largely acceptable body of decisions over a long period of time. My conclusion is that theorists such as Frankfurter, Bickel, and Choper are wrong in their premise that the Court should decide cases so as to safeguard fragile public legitimacy.

Part II then explores the role of the academic commentator in the development of public opinion concerning the Court. Initially, I consider the importance and functions of commentators in light of the conclusions in Part I. Commentators are crucial in explaining the Court's processes and decisions to the public, most of whom never will

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1. See, e.g., *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting); ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 201-68 (1962); JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 55-59 (1980).

read a Supreme Court opinion. Because the Court's legitimacy depends, in large part, on its processes, commentators should constantly seek to educate the public about them. Moreover, because the Court's legitimacy is not fragile, commentators should never feel the need to perpetuate a false image of constitutional law as being value neutral or to refrain from criticizing, even sharply criticizing, the Court.

Finally, Part III examines the ethics of being a commentator on the Supreme Court in light of the role definition described in Part II. Professor Laurie Levenson and I have written a series of articles on the ethics of being a legal commentator. Part III explores how the principles in those articles apply in the context of commenting on the Court and its decisions.

LEGITIMACY AND THE SUPREME COURT

We live in a time of great cynicism about the institutions of American government. The causes of this distrust of government and its officials are complex. In part, there is a sense that government has failed us in some of its most basic duties. Public education is often woefully inadequate, crime is perceived as insufficiently controlled, and poverty is unabated. People question whether government can succeed at all in dealing with such difficult and intransigent problems. Constant scandals, from Watergate to Iran-Contra to Clinton, and more at the state and local level, have engendered skepticism about our public officials. There is today a crisis of confidence in American government.

Interestingly, though, the Supreme Court has been immune from that cynicism. At a time when other government institutions are often held in disrepute, the Court's credibility is high. Professors John M. Scheb and William Lyons set out to measure and determine this.² They conducted a survey to answer the question: "How do the American people regard the U.S. Supreme Court?"³ Their conclusion is important:

According to the survey data, Americans render a relatively positive assessment of the U.S. Supreme Court. Not surprisingly, the Court fares considerably better in public opinion than does Congress. The respondents are almost twice as likely to rate the Court's performance as 'good' or 'excellent'

2. See John M. Scheb II & William Lyons, *Public Holds U.S. Supreme Court in High Regard*, 77 JUDICATURE 273, 273 (1994).

3. *Id.*

as they are to give these ratings to Congress. By the same token, they are more than twice as likely to rate Congress' performance as 'poor.'⁴

This survey was done in 1994,⁵ before the recent events that likely further damaged Congress' public image.

Strikingly, Scheb and Lyons found that the "Court is fairly well-regarded across the lines that usually divide Americans."⁶ For example, there are no significant differences between how Democrats and Republicans rate the Court's performance. In short, the Court is a relatively highly regarded institution, more so certainly than Congress or the presidency.⁷

This is not a new phenomena. Throughout this century, the Court has handed down controversial rulings. Yet the Court has retained its legitimacy and its rulings have not been disregarded. Judge John Gibbons remarked that the "historical record suggests that far from being the fragile popular institution that scholars like Professor Choper . . . and Alexander Bickel have perceived it to be, judicial review is in fact quite robust."⁸

In fact, even at the times of the most intense criticism of the Supreme Court, the institution has retained its credibility. For example, opposition to the Court was probably at its height in the mid-1930s. In the midst of a depression, the Court was striking down statutes thought to be necessary for economic recovery. In an attempt to change the Court's ideology, President Franklin D. Roosevelt—fresh from a landslide reelection—proposed changing the size of the Court. This "Court packing" plan received little public support. The Senate Judiciary Committee, controlled by Democrats, rejected the proposal and strongly reaffirmed the need for an independent judiciary:

Let us now set a salutary precedent that will never be violated. Let us, of the Seventy-fifth Congress, . . . declare that we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of the liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power, or

4. *Id.*

5. *See id.* at 273 n.1.

6. *Id.* at 273–74.

7. *See* Everette Dennis, *Another Look at Press Coverage of the Supreme Court*, 20 VILL. L. REV. 765, 781 (1974) (reviewing public confidence in the Supreme Court during the 1950s and 1960s).

8. John Gibbons, *Keynote Address*, 56 N.Y.U. L. REV. 260, 271 (1981).

factional passion, approves any measure we may enact.⁹

This is a telling quotation and a powerful example because if anything should have undermined the Court's legitimacy, it was an unpopular Court striking down popular laws enacted by a popular administration in a time of crisis. Public opinion surveys reflect that this Committee report reflected general support for the Supreme Court, despite the unpopularity of its rulings. In 1935 and 1936, most respondents, 53% and 59% respectively, did not favor limiting the power of the Supreme Court in declaring laws unconstitutional.¹⁰

Indeed, the Court's high regard, described by Professors Scheb and Lyons, has been remarkably constant over time.¹¹ Professor Roger Handberg studied public attitudes about the Supreme Court over several decades and concluded that public support for the institution has not changed significantly and that the "Court has a basic core of support which seems to endure despite severe shocks."¹² Professor John Hart Ely noted this and observed:

[T]he possibility of judicial emasculation by way of popular reaction against constitutional review by the courts has not in fact materialized in more than a century and a half of American experience. The warnings probably reached their peak during the Warren years; they were not notably heeded; yet nothing resembling destruction materialized. In fact, the Court's power continued to grow and probably never has been greater than it has been over the past two decades.¹³

Why has the Court maintained its legitimacy even when issuing highly controversial rulings? Social science theories of legitimacy offer some explanation. The renowned sociologist Max Weber wrote that there are three major bases for an institution's legitimacy: tradition, rationality and affective ties.¹⁴ That which historically has existed tends to be accepted as legitimate. Therefore, 200 years of

9. S. REP. NO. 75-711, at 14 (1937).

10. See Roger Handberg, *Public Opinion and the United States Supreme Court: 1935-1981*, 59 INT'L SOC. SCI. REV. 3, 8, tbl. 2 (1984).

11. See Scheb & Lyons, *supra* note 2, at 273; see also Robert B. McKay, *Judicial Review in a Liberal Democracy*, in NOMOS XXV 121, 125-26 (J. Poland Pennock & John W. Chapman eds., 1983); Handberg, *supra* note 10, at 12. See generally Joseph Tanenhaus & Walter E. Murphy, *Patterns of Public Support for the Supreme Court: A Panel Study*, 43 J. OF POL. 24 (1981) (finding continued support for the Supreme Court).

12. Handberg, *supra* note 10, at 12.

13. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 47-48 (1980).

14. See Joseph Bensman, *Max Weber's Concept of Legitimacy*, in CONFLICT AND CONTROL 42-47 (Arthur J. Vidich & Ronald M. Glassman eds., 1979); see also Peter M. Blau, *Critical Remarks on Weber's Theory of Authority*, 57 AM. POL. SCI. REV. 305, 308-14 (1963).

judicial review grants the Court enormous credibility. Additionally, that which is rational is likely to be regarded as legitimate. The judiciary's method of giving detailed reasons for its conclusions thus helps to provide it credibility. Finally, that which is charismatic, things to which people have strong affective ties, are accorded legitimacy. It has long been demonstrated that people feel great loyalty to the Constitution. The Court's relationship to the document and its role in interpreting it likely also enhances its legitimacy.

More specifically, I suggest that the Court's robust public image is a result of its processes and its producing largely acceptable decisions over a long period of time. The Court is rightly perceived as free from direct political pressure and lobbying, bound by the convention of reaching rational decisions that are justified in opinions, and capable of protecting people from arbitrary government. Social scientists have shown that an institution receives legitimacy from following established procedures. The Court's legitimacy, in part, is based on the perception and reality that it does not decide cases based on the personal interests of the Justices or based on external lobbying and pressures. In a recent book highly critical of the Court, Edward Lazarus lambastes the current Justices, yet he never even suggests a single instance of improper influence or conflict of interest.¹⁵

The Court's credibility is a product of the correct perception that it decides cases based on a formalized procedure: it reads briefs, hears arguments, deliberates, and writes opinions. Indeed, the very process of opinion writing, regardless of their content, is crucial because it makes the Court's decisions seem a product of reason, not simply acts of will.

Although the Court's high credibility is a result of this process, I believe that this is necessary for its institutional legitimacy, but not sufficient. The Court also has produced a large body of decisions, that over a long period of time, have generally been accepted by the public. If the Court were to produce a large number of intensely unpopular rulings over a long period of time, its credibility would suffer. In the short-term, its processes ensure its continued legitimacy; in the long-term, overall acceptability of its decisions is sufficient to preserve this credibility.

Recognition of the Court's robust legitimacy is important in the on-going debate over judicial review. Many, including those as

15. See generally EDWARD LAZARUS, *CLOSED CHAMBERS* (1998). I develop this point in more detail in Erwin Chemerinsky, *Opening Closed Chambers*, 16 *YALE L.J.* 1087 (1999).

prominent as Felix Frankfurter, Alexander Bickel, and Jesse Choper, have proclaimed a need for judicial restraint so as to preserve the Court's fragile institutional legitimacy.¹⁶ They argue that the Court must depend on voluntary compliance with its rulings from the other branches of government and that this will not occur unless the Court preserves its fragile legitimacy. Justice Frankfurter dissented in *Baker v. Carr*, the Supreme Court's landmark decision holding that challenges to malapportionment were justiciable, arguing that the Court was putting its fragile legitimacy at risk.¹⁷ Frankfurter urged restraint, stating: "The Court's authority—possessed of neither the purse nor the sword—ultimately rests on public confidence in its moral sanction."¹⁸

Choper, for example, concludes from this premise that the Court should not rule on federalism or separation of powers issues so as to not squander its political capital in these areas that he sees as less important than individual rights cases. Bickel argued that the Court should practice the "passive virtues" and use justiciability doctrines to avoid highly controversial matters so as to preserve its political capital.¹⁹ Other scholars reason from the same assumption. Daniel Conkle, for example, speaks of the "fragile legitimacy that attaches to Supreme Court pronouncements of constitutional law."²⁰

I am convinced that these scholars are wrong and that the public image of the Court is not easily tarnished, and preserving it need not be a preoccupation of the Court or constitutional theorists. There is no evidence to support their assertion of fragile public legitimacy and almost 200 years of judicial review refute it.

THE ROLE OF THE MEDIA AND THE ACADEMIC COMMENTATOR

To say the obvious, the vast majority of the American public learns of the Supreme Court's activities and decisions through the media. Few in the public ever read a Supreme Court decision or even would know how to find one. From a rhetorical perspective, the Court writes for a very limited audience: the parties whose case is being decided; lower courts who must follow its precedents; future

16. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 201-07 (1962); JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 55-59 (1980).

17. 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

18. *Id.*

19. See BICKEL, *supra* note 16, at 201-68.

20. Daniel O. Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, 69 MINN. L. REV. 587, 588 (1985).

litigants in all courts who must treat its pronouncements as law and deal with them; legislative staffs who sometimes can respond with legislative action; academics who will analyze them; and the media who will communicate them to the public.

The media, and the commentators it uses, are the way in which the vast majority of people learn of the Court's activities.²¹ Commentators, generally academics, are increasingly used in this and all areas of law. Scarcely an article is written reporting a Court decision without quotations from commentators explaining it and evaluating it. Likewise, the electronic media, though often brief in its coverage, often includes analysis by commentators. There is an increasing trend to using legal commentators in all areas of the law, and the Supreme Court is no exception. From anecdotal evidence, I have noticed a great increase in the number of media calls each June, including in the last few years providing regular commentary on Supreme Court decisions for a local newsradio station.

Commentators play a particularly important role in media coverage of the Supreme Court because of the limited sources of information available to reporters. Unlike reporters for executive and legislative branches of government, Supreme Court reporters "receive no assistance in the form of briefings, press conferences, or mimeographed releases."²² Supreme Court reporters must produce stories about complex cases on strict deadlines. Commentators can play a key role in helping the reporters to understand and analyze the decisions.

The analysis in Part I is important in defining the role of the media and commentators. If the Court had fragile institutional legitimacy, an interesting issue would arise as to the role of the media and commentators in preserving its credibility. Would there be any duty to make it seem that the emperor had clothes even when recognizing that there were none? How should the media and commentators balance their duty for honest reporting and opinions with a personal and professional duty to preserve the Court's legitimacy?

But the Court's on-going robust legitimacy makes that issue irrelevant. I would suggest that the media and commentators play three essential roles in shaping public understanding of the Supreme

21. See Everette E. Dennis, *Another Look at Press Coverage of the Supreme Court*, 20 VILL. L. REV. 765, 765 (1974) (noting that public understanding of the Supreme Court's operations and decisions depends almost exclusively on the media).

22. *Id.* at 769.

Court and the Constitution: an educational role about the nature of the institution and the Constitution; an informational role as to particular cases and their implications; and an evaluative role in assessing rulings. I would suggest that the media and commentators do best at the middle task, informing the public about specific decisions, but much less well at the other duties.

The educational role of the media and commentators is important because the public generally has relatively little knowledge about the Court, its processes, or even the Constitution. The public is remarkably ignorant about the Supreme Court. A 1990 survey by the National Law Journal found that only 23% of respondents could state the correct number of Justices on the Supreme Court and 59% of the respondents could not name even one Supreme Court Justice.²³

As argued earlier, the Court's legitimacy in large part is based on its processes. Therefore, public education about these processes is important. I am not suggesting that the media or commentators have a duty to preserve or enhance the Court's credibility. I am suggesting, though, that educating the public about the Court and its processes is important and completely consistent with the ethical and professional duties of the media and commentators.

To be more specific, key aspects of the Supreme Court's processes include its limited docket and its control over it; its deciding cases after briefs and oral arguments; its deliberative process; the internal constraints it operates under, including such limits as stare decisis and justiciability doctrines; and its need to justify its rulings in written opinions. Yet, remarkably little of this is communicated to the public by the media or commentators.

To take a single example, the media and commentators rarely explain to the public the current Court's enormous discretion in choosing which cases to hear. Indeed, I am particularly critical of the media's failure to distinguish between decisions on the merits and denials of review. Over and over again, major newspapers and broadcast outlets present the Court's denial of review as if it were a decision on the merits.²⁴

In terms of the need for public education, how many people know that almost without exception the Court decides which cases to

23. See Marcia Coyle, *How Americans View the High Court*, NAT'L L.J. 1, Feb. 26, 1990 at 1, 36.

24. Others have noted this as well. See Elliot E. Slotnick, *Media Coverage of Supreme Court Decision-Making: Problems and Prospects*, 75 JUDICATURE 128, 136 (1991). Reporters often inaccurately assert that the Court has affirmed or upheld a lower court decision, when in fact the Court has only denied certiorari.

hear and takes cases when there are four votes for hearing them? How many people have any awareness of the process for briefing and arguing cases? How many know the way in which the Court internally makes its decisions and determines who will write opinions? All of this can be better communicated by the media and commentators as part of their educational role. At least for academic commentators, who after all are first and foremost educators, there should be a conscious attempt to perform this function.

Moreover, this educational role includes informing people about the nature of constitutional law. There is no need to preserve the myth that formalism exists or that value-neutral judging is possible. Professors Scheb and Lyons documented that only a small minority believe that ideology has little impact in Supreme Court decision-making.²⁵ The public realizes, even without sophisticated understanding, the key constitutional questions are unresolved by any external source, such as the text or the framers' intent, and that the Court is making value choices about how to interpret a very broadly worded document.

The media also plays an informational role. There is a need to explain to the public what the Court decided and what the implications are from the ruling. This is a task that is performed well, especially by the print media. Superb reporters covering the Court, such as Laurie Asseo, Richard Carelli, Lyle Denniston, Linda Greenhouse, Tony Mauro, and David Savage do an excellent job of summarizing cases and explaining what they mean. The broadcast media, with notable exceptions such as Nina Totenberg, does far less well. It often is very difficult to explain a complex ruling, and especially to give any sense of the reasons behind it or its implications, in the time allotted for most stories on television and radio news.

Commentators are particularly important in explaining to the public the significance of decisions. A crucial role for the academic commentator is conveying why a decision matters in shaping the law and in the lives of people. This, too, should be a conscious role that commentators seek to serve.

Finally, there is an important evaluative role to be served. Is a particular ruling a desirable or undesirable way to interpret the Constitution? Because everything the Court does involves value choices, it is important that these choices be scrutinized and defended and criticized. Although such evaluations fill countless pages of law reviews each year, they are surprisingly absent from most media

25. See Scheb & Lyons, *supra* note 2, at 274.

stories.

THE ETHICS OF BEING A SUPREME COURT COMMENTATOR

Professor Laurie Levenson and I have written a series of articles on the ethics of being a legal commentator.²⁶ No current ethical codes apply to lawyers serving as commentators. Although attorneys always are obligated to comport with their state's code of professional responsibility, those rules concern conduct in representing clients and are silent about behavior as a commentator. Journalists' ethical codes are probably unknown to lawyers serving as commentators and besides are likely of little use to those serving as pundits rather than as reporters.

A voluntary code of ethics for commentators could serve many purposes. Ideally, it would offer guidance to those serving as commentators in the future. We have constantly been confronted with difficult ethical issues in our role as commentators. The shared wisdom of those who have been in this role might offer assistance to those who will serve as commentators in the future in helping them to recognize and resolve ethical issues. As is true for codes of ethics in all fields, such a code can help to raise the professional quality of behavior by helping individuals to identify ethical issues and by setting minimum standards.

A code of ethics might also give guidance to the news media in using commentators and certainly can help the commentator in explaining to the media what is the appropriate, and inappropriate role, for the pundit. Such a code also can lead to more consistency among commentators as they can be guided by a common set of standards.

Perhaps above all, a code of ethics for commentators can demonstrate that commentators take their ethical obligations seriously. The public's general cynicism towards the legal profession certainly has carried over to commentators. Many of the attorneys in the Simpson criminal case have directed their greatest ire towards the pundits. Simpson's defense attorney Barry Scheck, for example, declared: "[i]f this case has fostered disrespect for the system, it's

26. See generally Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator*, 69 S. CAL. L. REV. 1303 (1996) (discussing the ethics of being a commentator); Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator II*, 37 SANTA CLARA L. REV. 913 (1997) (continuing the discussion of being a commentator); Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator III*, 50 MERCER L. REV. 737 (1999).

[because of] the TV coverage...This whole new industry of commentators promotes cynicism, and I speak as one of the original commentators on Court TV. There's no presumption of innocence, there's snap judgments."²⁷ A code of ethics is a way of addressing these criticisms and demonstrating that commentators are cognizant of their important role as public educators.

Most importantly, our effort is guided by the view that what commentators do matters. A commentators' words and opinions are often heard or read by millions of people. They thus shape how people understand and view the legal system. At its best, legal commentary educates the public, engenders respect for the legal profession and the judicial system, and helps to facilitate needed reforms. At its worst, legal commentary misinforms the public and increases cynicism towards lawyers and courts. Because the potential effects are so great, it is imperative that there be a voluntary code of ethics to guide commentators and the media.

In our articles, we propose a voluntary code of ethics for commentators to deal with many of the same issues that are addressed in codes of professional responsibility. For example, we discuss in detail issues such as competence, conflicts of interest, and confidentiality. These same issues arise for the Supreme Court commentator.

Above all, the Supreme Court commentator must be competent. What does this mean? At the very least, the commentator should have read the Supreme Court decision before discussing it. Today, Supreme Court opinions are almost instantaneously available via services such as Westlaw and Lexis. There is no excuse for analyzing a case before reading it.

Also, competence, as we all know, is field specific. I am comfortable discussing the Court's opinions in the constitutional law and civil rights area, but not those dealing with business, bankruptcy or tax law. In these areas, I simply refer reporters to others who are experts in the field.

There are differences between Supreme Court commentators and commentators on trial proceedings. The latter is likely to be asked for on-going analysis of what is occurring; the former is much more likely to be asked to analyze the opinion. For commentators on trial proceedings, the difficult issue is how much must be observed to be competent. This is not present for Supreme Court commentators.

27. Marc Fisher, *A Case that Courts Criticism: Simpson Trial Brings Calls for Legal Reform*, WASH. POST, May 22, 1995, at A10.

Moreover, another aspect of competence for trial commentators that we write about is the need to avoid offering predictions as to jury verdicts. The concern is the inability to predict jury behavior and the fear that jurors might hear and be influenced by such predictions. There is no need for commentators to avoid predicting Supreme Court decisions, other than the need to acknowledge the uncertainty of any prediction. Unlike a jury which is unknown, the Justices have a track record and precedents to follow.

Another topic that we discuss in detail is conflicts of interest. In our articles, we discuss several conflicts of interest that might arise while serving in the role of commentator. For example, we considered conflicts created by a commentator's personal relationship with lawyers in a case. At a minimum, we concluded that an individual should not serve as a commentator if he or she has done any work on the case and that any personal relationship with the participants be fully disclosed.

These apply to the Supreme Court commentator as well. We propose certain minimum steps can be taken, however, to enhance neutrality and the public perception of neutrality.

1. Commentators should disclose to the media and to the reporter any current or prior legal, business, financial, professional or personal relationship with a party or witness in the case.

2. The media should disclose such a relationship when using the commentator. For instance, those who previously were attorneys in a case should be identified as such.

3. The commentator should identify whether he or she is being used by the media as an advocate or as a neutral expert. If the commentator is being used as a neutral expert, the commentator should strive to be fair and balanced. If the commentator is unable to do this, then he or she should not be used in the role of neutral expert.

A difficult issue for the Supreme Court commentator concerns impartiality. Every commentator undoubtedly has opinions about the Court's rulings. As Professor Levenson and I discuss at length, the key is for the commentator to be consciously aware of the role being served: is the commentator seeking to provide, to the best of his or her ability, a neutral description of the case, its holding, and its impact; or is the commentator evaluating the decision? As I discussed in Part II, both of these are appropriate roles, but the commentator must be clear as to which is being served. Simply put, it is crucial that the commentator not present his or her opinion as if it is fact, but instead clearly distinguish the presentation of the case from the evaluation of it.

CONCLUSION

The Supreme Court's rulings have enormous impact on people in the most important, and sometimes the most intimate, aspect of their lives. Yet, the Court is largely invisible to most people and few learn more than the brief accounts of decisions on the news or in the papers. I believe that the media and commentators can do a much better job of informing and educating the public about the Court, its processes, and its decisions.

Perhaps the Court's high public esteem, that I discussed earlier, is a product of this ignorance and more knowledge would harm the Court and its credibility. I reject this possibility. As I have argued, the Court's credibility comes from its processes and long-term acceptance of its decisions. In this way, more knowledge may only enhance the Court's image as people see a group of hard-working Justices, free from lobbying and external pressures, struggling to do the best they can.

