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The Perceived Authority of Law in Judging Constitutional Cases

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THE PERCEIVED AUTHORITY OF LAW IN JUDGING CONSTITUTIONAL CASES

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I. INTRODUCTION

The purpose of this conference is a dialogue between scholars and judges about judging. Because judges have many opportunities to read what scholars think, and scholars don't very often have this kind of chance to hear judges reflect on their own experiences and perspectives, I expect the main benefit to go to us scholars. However, for many questions of jurisprudential interest, figuring out what relevance different judicial experiences might have is complicated, and extensive discussion may be necessary to learn what really matters.

I shall focus on a question that has lain at the center of jurisprudential discussion in the last few decades: the extent to which judicial decision is controlled by perceptions of the law as it exists rather than perceptions of the law as it should be. This inquiry is related, but only tangentially, to Frederick Schauer's helpful suggestions about how understandings about rules might affect the manner in which a judge performs his or her role in constitutional cases. I do not address the main aspects of Professor Schauer's paper more directly because I have little useful to add. However, one of my ambitions is to show that the relation between my inquiry and Professor Schauer's is more complex than might appear at first glance.

II. JUDGING AND LEGISLATING

Let me begin with a crude and simple distinction between judging and legislating. Judging typically involves the application to a particular case of standards that are authoritative for the judge. Legislating involves making standards. If conscientious legislators are voting on a proposed revision of the Internal Revenue Code, they need to decide whether the revision will improve the law. A revision may be desirable even if it fits less comfortably with the existing corpus of tax law, and other law, than the provision it replaces. The existing law is not authoritatively binding for the legislator. Judges, by contrast, are not

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free to make up provisions superior to the ones they are called upon to apply; for them the existing corpus of law is binding.

As any two-day law student will recognize, this dichotomy is too neat, and I want to mention some of the wrinkles. Legislators acting in an ordinary legislative capacity are bound to follow constitutions that govern them (although, as Robert Nagel has remarked, it is doubtful how far they are, and should be expected to be, attentive to constitutional limits). Roughly speaking, the relevant legislatures for federal constitutional change are made up of the different combinations of federal and state bodies that can amend the Constitution. When persons act in the capacity, say in deciding whether to adopt an amendment to permit legislation restricting flag burning or abortion, their ultimate judgment need not depend on whether a proposed amendment is more compatible with the rest of the Constitution than is the present legal disposition of the subject. Nevertheless, for both the amendment process and ordinary legislation, the existing corpus of law has a weak authority even when it may freely be altered. A representative considering a flag burning amendment may care whether Supreme Court decisions that grant a free speech right to burn flags are sound interpretations of the first amendment. An argument that an amendment will correct an imbalance mistakenly introduced by the Supreme Court will have some force in favor of adoption; an argument that the amendment will truly introduce a change in the basic ground rules of political dissent will have contrary force. Similarly, the claim that a proposed revision of the Internal Revenue Code will not fit well with what exists is a good argument against the revision. Still, a conscientious legislator can say: "I recognize that the proposed revision alters what exists and does not fit as well with the corpus of law as what is now in its place; I am voting for the revision because it will improve things." This is all I shall say directly about the force of existing law for legislators because our conference is about judging, not legislating.

The complexities about judging are largely familiar. Many constitutional issues that reach appellate courts have no clear answer and the constitutional standards that count in appellate decisions are notoriously vague. A point made by Professor Schauer is worth reemphasizing. Not all constitutional standards are uncertain as they apply to particular circumstances and not every constitutional question in every case is hard to decide. But in cases that reach appellate courts that are important because of some constitutional issue, at least that constitutional question will not be easy to decide. Can the model of

law to be *discovered* apply if reasonable arguments can be made either way about what the answer is?

The response offered by some legal realists and critical legal scholars is that no correct answer exists; despite smokescreens of objective justification, the judge is really in the position of a legislator, deciding what to do without much useful direction from authoritative sources. A more moderate claim of judicial "legislative" power is that the law can often determine correct answers even when those answers are not initially clear, but that in some significant percentage of cases, the hardest cases, the judge is like a legislator, left free by the law to decide one way or the other. This position is represented by Benjamin Cardozo's talk in *The Nature of the Judicial Process* of judges legislating "between gaps";[1] it is also represented by H.L.A. Hart's idea, in his *The Concept of Law*, of judges creating law in the "open texture."[2]

Another approach holds out the possibility of a correct answer even when determining that answer is difficult. It might be thought for constitutional issues that the ultimate guide is constitutional language, or the adopters' intent, or the force of precedent, or coherence with the law and legal institutions as a whole, or some combination of these. If someone believes: (1) that the judge's job is to interpret the legal materials; (2) that the best strategy of interpretation is somehow to be discovered rather than created; and (3) that under the best strategy the reasons for a decision one way will almost always be at least slightly stronger than the reasons for decision the other way, that person can believe that judges, in even the hardest cases, are, or should be, really applying law rather than making it. On this account, one can perceive judicial inquiry as a voyage of discovery, while respecting the complexity of law and the obvious reality of reasonable disagreement about correct or desirable results.

A third general approach is skeptical of any ultimate distinction between judicial law application and judicial law making. Every decision under authoritative materials requires interpretation; every interpretation involves the subjective character of the interpreter as well as the attributes of what is being interpreted. No act of interpretation is simply discovery or simply creation. There may be no correct answer that stands above the disagreements of conscientious interpreters, but that does not mean any interpreter is making law from scratch. On this skeptical view, the metaphors of "judicial legislation" and "judicial discovery" are both substantially misleading and the dichotomy being suggested does not exist. Genuine disagreements exist over what

1. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1949).
2. *See* H.L.A. HART, THE CONCEPT OF LAW 121-50 (1961).

judges take into account and how much weight they give what they take into account, but the general jurisprudential issue should be consigned to the dustbin of confused and unproductive inquiries.

III. The Relevance of Judicial Experience and the Elusiveness of Relevant Experience

The apparently central question about the judicial role that I have posed has descriptive, normative, and conceptual dimensions. What are judges doing? What should judges be doing? How can we best, or usefully, conceptualize what judges are or should be doing? Most writers, including myself, have supposed that judges' reflections on their experience of judging can provide very important information about the descriptive dimension. I shall concentrate on that. (What some or most judges are doing does not, of course, determine what judges should be doing; but it has *some* bearing on the normative dimension. What people do may be an indication of what they are capable of doing. Ordinarily a normative theory should not call for behavior that is impossible or extremely difficult. Further, if our "legal system" is partly composed of conventional understandings, including implicit understandings about how roles are to be performed, a descriptive account of how officials understand their roles can have some normative force for how officials should perform their roles.) I want to say something about the difficulty of distilling judicial perceptions and about the further difficulty of moving from judicial perceptions to what is *really happening*.

A. Reporting Experience

The first problem is figuring out what the judge believes he or she is doing. Why not just ask the judge, in a setting that will elicit a candid response, if she feels she is sometimes legislating? Unfortunately, the initial answer to this question can hardly be the end of the inquiry. Cardozo did much more than give an initial answer. After years on the bench, he wrote eloquently, thoughtfully, and at length about the subject. He spoke about judges "legislating." Surely we can take his perception of what *he* did at face value. Not necessarily, the "law as discovery" proponent may say. Cardozo understood that sometimes the existing law did not provide an answer in any easy sense; and he understood that a judge's whole personality and philosophy affected decisions. The notion of "legislation between gaps" was a rough way to express those truths. But, so the argument goes, what Cardozo did in difficult cases, as evidenced by his opinions, was to draw from the law and its growth in a subtle manner quite different

from the straightforward lawmaking effort of a legislator. Regrettably, Cardozo failed to develop an adequate conceptual apparatus to explain more accurately what he was doing, but his judicial life was actually consistent with the idea that conscientious judges seek to discover the law even in the hardest cases.

On this topic, consider the remarks of Chief Judge Wald during the first session of our conference. She said that judges fall back on *"can't helps"* and that personal experience affects decisions.[3] This sounds pretty "realist," as if she thinks on occasion judges cannot avoid going beyond the law. But the proponent of "law as discovery" may say that her remarks establish nothing of the sort; they only show that Chief Judge Wald is self-reflective enough to recognize that when she interprets the legal materials to determine the correct answer, her personal experience and fundamental values inevitably influence her.

These possible interpretations of what Justice Cardozo and Chief Judge Wald have said indicate the danger of drawing too much from a judge's initial account of what he or she does, even when the account is the reflective and honest statement of a capable and very intelligent judge. We all have difficulty translating our experience into conceptual abstractions, and a judge, like the rest of us, is likely to grasp for the abstractions at hand. Perhaps most often a judge's account will reflect the jurisprudential conceptions the judge found persuasive before becoming a judge. A judge who has believed that judges "legislate between gaps" will be inclined to understand his or her experience in that way. What Cardozo said did not fit with dominant earlier theories, although Holmes had spoken in that way two decades before; but when people reject earlier characterizations, a different danger emerges. They may tend to flee to stark opposites. We can have little confidence that what Cardozo wanted to *deny* is what the modern "law as discovery" theorist wants to assert.

If initial generalizations by judges about their experiences are somewhat treacherous, perhaps we can better learn from what they say about more concrete doctrinal matters, that is, fairly immediate standards of decision. Suppose a judge says that in hard cases under the contracts clause of the Constitution she applies economic analysis of the wealth maximization sort, deciding the case in a way that will encourage free markets or replicate their outcomes. But why is she doing this? If she just thinks any society should move toward a substantive law that promotes wealth maximization, but does not suppose the contracts clause or our Constitution embodies that approach, then she understands herself to be legislating between the gaps (or perhaps

3. Wald, *Constitutional Conundrums*, 61 U. COLO. L. REV. 727, 728 (1990).

even legislating to replace existing principles). On the other hand, if she believes that wealth maximization best carries out ideas of social contract and free economic life that undergird the Constitution in general, and the contracts clause in particular, her position is that she is genuinely applying the law, not making it.

All this leads me to conclude that a great deal of self-examination and dialogue is usually needed to yield productive insights about judicial experience and psychology as it bears on the broad jurisprudential question I have posed. When that is engaged in, a risk is run that the judge will become so tangled in abstractions she will lose sight of how she actually decides. This risk, however, must be taken because any simple initial responses are too unreliable.

Might one draw an even more discouraging conclusion? Is it possible that *whatever judges say* about their experience, their perceptions could fit any of the basic jurisprudential positions? Were this to be true, it would suggest that the differences among the basic positions must be matters of conceptualization, not involving disagreement about what is taking place in the minds of judges.

I want to resist this skeptical conclusion. I think there can be differences in judicial perceptions that bear on whether judges regard themselves as legislators. A judge may or may not sometimes say to herself, "I am now left free to develop the law in the way I believe is best." A judge may also see herself as facing situations when a decision one way would be more faithful to the law as it exists (taking everything relevant about the law into account), whereas a contrary decision would develop the law in a desirable direction or would reach a morally better outcome to the immediate situation. How would a Justice have candidly defended the Supreme Court's decision during the Great Depression that sustained legislation severely restricting the rights of mortgagees.[4] He might have believed that the contracts clause and Constitution as a whole, according to their most reasonable construction, permitted such regulation; or he might have said that the conditions of the Depression were so severe the justices were right to depart from the most reasonable constitutional construction because that would benefit society.

My own conclusion is that there can be differences in judges' understanding of their experiences that could sensibly be put as differences over whether they sometimes see themselves as legislating. But I am convinced that it takes much dialogue and judicial self-scrutiny to get at those understandings, as well as an environment in which judges

4. Home Bldg. & Loan Ass'n v. Blaisdell, 209 U.S. 398 (1934).

will feel comfortable delving into the complex currents of mind that lead to decision.

B. The Relevance of Experience to What Is Happening

The second concern about judicial perceptions is their relationship to what is *really* going on. Suppose most judges believe they are discovering the law. They may be deluding themselves. There may often be nothing there to discover. If a critic who rejects claims that discovery is possible, believes that interpretation of authoritative materials is significantly different from straight legislation, he might acknowledge that a judge's perception of discovering law is at least strong evidence that interpretation of authoritative materials is occurring. A different critic might claim that all normative decisions are interpretive in a broad sense, and that at least in many cases what really influences judges is no different from what influences legislators. That critic may suppose that judges act like legislators despite their contrary perceptions.

It is clear that a "descriptive" assertion that judges are really "discovering" law in hard cases must rest on more than judicial experience. Some argument must be advanced that the discovery metaphor is appropriate to the subject. A judicial perception of discovery is more dispositive of whether judges are doing something significantly different from legislators. Many judges have been legislators. As I have said, legislators do not perceive themselves as making refined judgments about what present law provides. (Legislators may be interpreting their culture or political realities or something else, but they are not mainly interpreting law.) If judges do honestly perceive themselves to be making such refined judgments about law, it is unlikely that the perceived difference is *nothing* more than rationalization and delusion.

Suppose that judges do not think they are discovering the law in hard cases. They candidly say they think they are making law. Extensive questioning indicates that they really do not perceive themselves as drawing from the legal materials in some very hard cases (except in the initial sense of finding competing arguments to be evenly balanced). They really think the law "runs out" and they face the case like a legislator, asking what new rule or outcome will be best for the future. Even if the answers they reach *could* be reached by a judge trying to discover the law, these judges are not really doing that. A judge who is self-consciously making the law, and whose account fits well her mental processes, *is* making the law. Thus, a judge's assertion, after extensive questioning, that she is making the law is more

dispositive of what is actually going on than a judge's claim that she is discovering the law. To vindicate the latter claim, as I have noted, one must also argue for the actual possibility of discovery in difficult cases.

IV. PREDICTION AND ADJUDICATION

Before I turn to some connections between what I have suggested and what Professor Schauer says about rules, I want to mention a particular possible ingredient of judicial decision in constitutional cases that gets shunted aside early in his essay. He rightly ridicules the idea that judges are predicting what *they* will do. But, because his own focus lies elsewhere, he does not address the position of the vast majority of judges, who have courts that can review their decisions. At this conference our judicial participants are on the most important courts that review federal constitutional issues other than the United States Supreme Court. It is a very important question how far they see their responsibility as predicting what the Supreme Court will do. (Conceivably on a large court, a panel might be influenced by prediction of what other panels or the court as a whole will do, but I shall pass over that possibility.) I want to be careful here. No one doubts that binding Supreme Court precedent influences other judges, but predicting outcomes is not quite the same as following precedent. The most evident difference arises when a Supreme Court precedent clearly points in one direction, but the judges on a federal court of appeals or state supreme court doubt that the Supreme Court will follow it.

A much more common instance concerns the direction in which existing precedents will be developed. Consider this illustration. In *Escobedo v. Illinois*[5] the Supreme Court made a departure from the prevailing due process approach under which the admissibility of confessions was judged on the basis of their voluntariness in full context. The Court said that a confession would be inadmissible if given after a suspect in custody had asked to speak to counsel that he had already obtained. By itself, *Escobedo* was narrow, but many doubted that the Supreme Court would treat differently someone who did not already have counsel or would treat differently someone who failed to request counsel. *Miranda v. Arizona*,[6] and its fourfold warnings, were the sequel. Suppose, prior to *Miranda*, a judge on a state supreme court thought *Escobedo* was misconceived and should not be extended. He believed respect for precedent did not require going further; that is, he thought the special situation of *Escobedo* could be distinguished on plausible legal grounds. However, his educated guess was that five

5. 378 U.S. 478 (1964).
6. 384 U.S. 436 (1966).

justices on the Supreme Court would make the extension that was in fact made in *Miranda*. It is an important and interesting question how far judges see their role as predicting what Supreme Court justices will do in constitutional cases. Does it matter whether the case is one in which actual review is likely? Does it matter how certain the prediction is?

V. THE AUTHORITY OF LAW AND RULES

I now want to relate my focus to that of Professor Schauer. It would be convenient to think of the judge who applies rules as deferring to authority and the judge who makes rules or who aims for the best outcome on the facts as not deferring to the authority of law, but rather making law. These correlations, however, would be much too easy. Professor Schauer says he is especially interested "in those cases in which a judge sees a rule as inclining in one direction, but also sees either the purpose behind the rule, or some moral or political factor . . . as inclining in the opposite direction."[7] What specially intrigued me was the differentiation between the way the rule inclines and the way the purpose of the rule inclines. Should we not say that the purpose is an aspect of the rule and that one would need to know something about the purpose to figure out which way the rule inclines in some cases? Still, I agree with Schauer that the import of the *language* of the rule and the import of the purpose behind it might diverge in some cases.

I am thinking of a situation in which the language of the rule could sensibly be read either way, but the judge thinks that the language, taken by itself, points in one direction, say in the plaintiff's favor. The purpose of the rule might suggest the opposite result. Suppose that the relevant authorities, the legislators and whoever else counts, want rules in such cases interpreted in light of their purposes. Notice that a judge who interprets according to purpose need not interpret in accord with what she thinks the best outcome would be. An antislavery judge interpreting a fugitive slave law according to the lawmakers' purpose, and a wealth maximization judge interpreting according to a regulatory purpose that is anti-competitive, may decide in ways they find most distasteful. Interpretation according to purpose *may* be more respectful of relevant authority than interpretation according to strict language. One may test this conclusion by imagining directions that parents give to babysitters which the sitters must carry out in some way before the parents return.

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7. Schauer, *Judicial Self-Understanding and the Internalization of Constitutional Rules*, 61 U. COLO. L. REV. 749, 761 (1990).

Sometimes a person may both follow a rule and make subsidiary rules. The head of a dance academy tells instructors how much time students should spend on exercises and how much time they should spend on dancing. An instructor then sets a schedule of exercises for his students. A judge may be following one rule while establishing more particular rules. In the latter capacity, the judge is in one sense creating new law; to that extent he or she is like a legislator. But the judge may or may not perceive herself as introducing any new choices about competing values; if she sees herself as merely providing greater particularity to choices made by others, she does not experience the kind of freedom that typically accompanies legislative activity.

Professor Schauer's paper is largely about whether judges follow rules or decide on the basis of the best outcome (somehow determined), when the two conflict. Although he does not press the position strongly, he expresses his view that our society, or our legal culture, now underestimates the value of establishing and following relatively clear legal rules. Let us suppose that he is right about this. A judge faces a case in which the language of a rule inclines in one direction but other factors make the contrary outcome seem best. How is the judge to resolve the case? Might the judge say, "Fred Schauer is possibly right about what the best legal system would be like, but I am an official in a legal system that gives less emphasis to rules. As an official in that system, I should adhere to common practice." Or will the judge say, "I have a chance to make our system more rule-like and I should do so." We can see that the highly general question of how far the language of rules should determine results itself raises the problem of whether the judge is discovering and applying or creating. How judges perceive their roles in addressing such general aspects of judging is interesting and important.

VI. A Thought About Scholarly Activity and Its Aims

I close with an unrelated comment about legal scholarship which bears on the papers of both Professor Schauer and Professor Nagel. I think Schauer's beginning with reflection on the activity in which he mainly engages is helpful. I am skeptical, however, that most doctrinal, "prescriptive," scholarship is aimed at directly influencing judges. A lot of classroom teaching is prescriptive. We ask students what is the right outcome for a case and we engage them in dialogue about that. Now, when I am doing that, it doesn't occur to me that classroom discussion is going to influence any judges. If I thought about it, I might imagine that conceivably students who were in my class and might become judges or law clerks could be influenced, but I do not

think in those terms. In any event, a lot of scholarship is an outgrowth of the prescriptive dialogue teachers carry on in class. One finds some puzzle or complexity and then tries to develop one's understanding of that. One may always feel it would be nice if judges read one's work and mentioned it in some opinions, but that is not the primary focus. Much prescriptive legal scholarship is the scholar's attempt to get right in his or her view what the outcome of a problem should be, an effort that is often detached from what is actually going on in the courts.

Robert Nagel suggests that if people think their actions are highly likely to exert a kind of influence, they intend that influence. As teachers and scholars we aim to persuade others by the force of our reasoning. Whatever Nagel's categorization may be, I would not call that aim and effect *pressure*, political or otherwise. If someone is persuaded by reasoning, he is not yielding to pressure. A realistic professor must realize that some students, though by no means all, will have a tendency to adopt a position because it is the professor's. (I am having the disquieting feeling recently that students are sometimes rejecting positions because they are mine.) A few judges may occasionally be influenced by the fact that some highly respected professor has taken a position. But it does not follow that the professor intends these effects. He may view them as regrettable, inevitable side effects of his trying to persuade by reasons. It would be highly misleading to say that he is *trying* to influence by his position. The conclusions I draw from this illustration are (1) that a sensible approach to pressure generally must consider the perspectives of both the actor and the person who may be influenced and (2) that the key to an intention to exert pressure must be richer than an awareness of likely consequences.