

Of Judges, Law, and the River: Tacit Knowledge and the Judicial Role

Chad M. Oldfather³¹⁰
Professor,
Marquette University Law School

"I preach the neglected beauty of the obvious."
Karl Llewellyn

Introduction

This essay arises out of a conference panel charged with answering the question "What does it mean to be a judge?" That's a tall order, and one is tempted to begin - and perhaps to end - by formulating taxonomy of characteristics that judges ought to have. Indeed, that is a tactic that others have used. The resulting lists differ in their particulars, but are broadly similar. The enumerated traits include attributes like intelligence, legal knowledge, judgment, decisiveness, and so on.³¹¹

I do not dispute the value of the traits that tend to end up on such lists, and it is hard to quarrel with them as qualities that judges ought to possess. But the exercise is of limited utility, because the characteristics are typically offered at such a high level of generality as to provide no meaningful guidance. We all

favor intelligent judges,³¹² just as we all favor, say, freedom. But when we drill down more deeply we discover that this agreement masks differing conceptions of what intelligence, or freedom, or some similarly general concept means. Of course, one solution would be to attempt to define more precisely what any of these concepts mean, or ought to mean. But it may be that greater precision would not be desirable even if it is potentially possible to achieve, and that what is desirable instead is having a bench that reflects a plurality of approaches.



³¹⁰ Associate Dean for Research, Professor of Law, Marquette University Law School. E-mail: chad.oldfather@marquette.edu.

³¹¹ See Andrew J. Wistrich, *Defining Good Judging*, in THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 249 (David Klein & Gregory Mitchell, eds. 2010); Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*,

11 CORNELL J.L. & PUB. POL'Y 273, 285 (2002).

³¹² With the occasional exception, most often embodied by Senator Roman Hruska's defense of the nomination of G. Harrold Carswell to the Supreme Court: "Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance?" Cong. Rec., 91st Cong., 2d Sess., at 7498 (1970).

Change is constant in both the law and the river. Just as the river pilots in Twain's day would accompany other pilots to keep their knowledge current, lawyers and judges must engage in a constant process of learning and relearning that can come only through continuing engagement with the material.

I am going to take the analysis in a somewhat different direction. This analysis is best set up with a story related by Karl Llewellyn in his masterwork *The Common Law Tradition: Deciding Appeals*.³¹³ As Llewellyn tells it, President Roosevelt appointed a large number of legal academics to the circuit courts, including a number of Llewellyn's close friends.³¹⁴ And so Llewellyn asked them to make notes of how they decided their cases: "Do it this first year; by the second year it will just be happening without your noticing, the way it does with all the others. The notes may not mean anything to you, but they will to me; I am outside. You may not have time to study them, but I will. And if they come from enough of you folks, we are going to find enough patterns to make sense."³¹⁵ Seven agreed to his request. Yet he received not even a single note.³¹⁶

Judge Henry Friendly was not surprised.³¹⁷ Friendly directs the reader

to another part of Llewellyn's book, where Llewellyn quotes William James for the proposition that "the completed decision wipes off memory's slate most of the process of its attainment."³¹⁸ The judges may have reached the end of their decisional processes and found that they had little to say.³¹⁹ But Friendly offers more. "A further reason is that the new judge soon learns that each judge judges differently from every other judge and that any one judge judges differently in each case."³²⁰ Even if there is something to say, then, it may not be possible to generalize from one case to the next. Judge Andrew Wistrich develops this point, cautioning against a focus limited to the characteristics of a good judge on the grounds that such an approach overlooks the influence of the context and environment in which decisions are made.³²¹ Focusing on the characteristics of judges, and on the internal processes by which they make their decisions, may be to overlook important situational and institutional factors.

There is another lesson to draw from Llewellyn's story, which is more-or-less the one that Llewellyn himself draws. It is that much of what goes into the process of decision-making is inarticulable. The problem is not so much that the process itself is self-erasing, or that it varies too much from one case to the next, but that it has, at its core, elements that are indescribable. Newcomers to the craft are

³¹³ Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960).

³¹⁴ *Id.* at 264.

³¹⁵ *Id.* at 265.

³¹⁶ *Id.*

³¹⁷ Henry J. Friendly, *Reactions of a Lawyer-Newly Become Judge*, 71 *YALE L.J.* 218 (1961).

³¹⁸ *Id.* at 229.

³¹⁹ For a general treatment of the phenomenon, see Dan Simon & Nicholas Scurich, *Judicial Overstating*, 88 *CHI.-KENT. L. REV.* 411 (2013).

³²⁰ *Id.* Judge Michael Boudin extols Friendly's virtues as a judge, but then notes: "Other judges, including very fine ones, have done the job differently: Brandeis as a justice was an impassioned advocate; Black, a unique mixture of populist sentiment and (at least in his own mind) literal construction. Wisdom and Tuttle, heroic judges immersed in civil rights litigation, were sometimes part of the struggle and not above it." Michael Boudin, *Judge Henry Friendly and the Craft of Judging*, 159 *U. PA. L. REV.* 1, 14 (2010).

³²¹ See Wistrich, *supra* note 1.

likely to find description particularly difficult,³²² but the problem remains even for the veteran. This is not to suggest that judges cannot provide a reasoned justification for their decisions - that is a different matter - but simply that the ability to provide an after-the-fact justification that situates a decision within the relevant legal materials and justifies it by reference to those materials does not mean that judges can accurately or adequately identify, in any sort of precise way, the steps they undertook in making the decision.

This essay builds on the preceding observations, namely that judging is a context-driven activity, and one that draws to a great degree on processes not fully articulable. Those observations in turn highlight a central challenge facing those responsible for the design and maintenance of judicial institutions (including the education of judges). Appreciating that challenge requires the acceptance of three largely uncontroversial propositions. The first is that the law affords a great deal of discretion to judges. Sometimes this is by design, and sometimes it is a product of the inherent underdeterminacy³²³ of much law. The second is that in exercising this discretion judges are susceptible to an array of unconscious influences often regarded as illegitimate, and that if unchecked threaten to undermine the rule of law. The third is that the inarticulable nature of judicial decision-making means that good judging necessarily entails drawing on another sort of unconscious influence - in this case, one that we want to celebrate and cultivate. The challenge thus stems from the need to give play to some unconscious influences but not others,

and it is complicated by the fact that the line between legitimate and illegitimate influences is both blurry and contestable.

I. Judicial Discretion and the Factors that Influence It

As Professor Maurice Rosenberg noted in opening one of the earliest and best academic discussions of discretion:

To speak of discretion in relation to law is to open a thousand doorways to discussion. The concept is pervasive and protean, with intimations of both power and responsibility. Even when confined to judicial settings, it manifests itself in numberless ways. Whatever the court, wherever it sits, the judge soon finds himself talking, wondering and, at times, thinking about discretion and its implications.³²⁴

A. The Sources of Judicial Discretion

The discretion afforded judges emerges from two primary sources. The first involves express grants.³²⁵ This sort of discretion is perhaps most obvious in the case of trial courts, in which judges exercise a vast amount of discretion ranging from how they manage their courtrooms, to whether a piece of evidence is admissible, to sentencing, and so on. For most of these tasks, we recognize that it would be either impossible or undesirable to attempt to mandate particulars. There are too many ways in which cases differ from one another, and one size very clearly does not fit all. Express grants of discretion are less apparent in appellate courts, but present nonetheless. Courts of last resort often possess discretionary jurisdiction, pursuant to which they exercise almost unfettered control over the content of their

³²² Llewellyn, *supra* note 3, at 265-66.

³²³ See *infra* Part I.A.

³²⁴ Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYR. L.

REV. 635, 635 (1971).

³²⁵ Rosenberg further subdivides this kind of discretion into its primary and secondary versions. See *id.* at 637.

dockets. But even more mundane aspects of appellate review contemplate the exercise of discretion in their implementation. Consider, for example, harmless-error review. The process of assessing the impact of a trial judge's error is every bit as context-dependent as a trial judge's determination whether a given piece of evidence's probative value is substantially outweighed by risk of unfair prejudice.

The second source of discretion is the underdeterminacy of law. The saying has it that "we are all Realists now." Simply put, no law maker acting at Time 1 - whether it be legislature, court, or administrative agency - can fully specify the content of the law, whether due to limits of language, limits of foresight, or both. This means that a court acting at Time 2 will necessarily have room in which to exercise judgment either in determining what the law is or how it applies to the facts of a given case. Judge Posner has dubbed this the "open area," and noted that judges enjoy an involuntary freedom resulting from the inability of formal legal standards to determine outcomes in all cases: "That inability, and that difficulty or impossibility, create an open area in which judges have decisional discretion - a blank slate on which to inscribe their decisions - rather than being compelled to a particular decision by 'the law.'"³²⁶

B. Corrupting Influences

Wherever there is discretion, there is potential for it to be exercised in ways that are inconsistent with the purposes that led to its granting. Sometimes this happens in ways that involve clear failures of

process, such as where a judge simply neglects to account for some required component of the analysis. But it can also result from unconscious influences, and recent decades have witnessed the development of considerable evidence that judicial decision-making is not immune from these effects.

The existence of these influences is well established. Political scientists took the lead in demonstrating that judicial decision-making is correlated with ideology.³²⁷ In similar fashion, psychologists have demonstrated that human decisionmaking in general is afflicted by various biases that lead to systematic and predictable departures from rationality.³²⁸ A growing body of research demonstrates that judges, too, are susceptible to these influences.³²⁹ Much work remains to be done to refine these basic insights, and to identify the nature of the causal mechanisms at work. The important point for the purposes of this article is simply that judicial behavior, like human behavior more generally, departs from both pure rationality and from the sort of ideology-free objectivity that we might posit as the ideal.

As this characterization suggests, the implicit assumption in many discussions of unconscious influences on judicial behavior is that such influences are undesirable. The cynical take would be that this research simply confirms that law is merely politics and we ought not pretend otherwise. But for most people the results seem to be regrettable and the sort of thing we should strive to overcome through judicial education, procedural and institutional design, and otherwise.

³²⁶ Richard A. Posner, *How Judges Think* 9 (2008).

³²⁷ *E.g.*, Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* 433 (2002).

³²⁸ *See generally* Daniel Kahneman, *Thinking, Fast and Slow* (2011).

³²⁹ *E.g.*, Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 *CORNELL L. REV.* 777 (2001).

C. Contributing Influences

A focus on the sorts of influences just discussed creates a danger of reflexively regarding unconscious influences on judicial behavior as pernicious. If we do so, however, we risk overlooking the basic point that judging necessarily - and *desirably* - draws on influences that are unconscious in the sense that they are inarticulable.³³⁰ Indeed, we might say more generally that doing the work of law often entails resorting to such influences.³³¹ The phrase I will use to capture the idea comes from philosopher Michael Polanyi, who wrote of what he called "tacit knowledge." Polanyi most famously encapsulated the idea in the phrase "we know more than we can tell."³³² Stated somewhat generally, the idea is that there are certain sorts of tasks the doing of which cannot be described in words. Polanyi's most famous example is of riding a bicycle - something that most people know how to do, but which almost no one can explain.³³³

Polanyi wrote:

An art which cannot be specified in detail cannot be transmitted by prescription, since no prescription for it exists. It can be passed on only by example from master to apprentice...

To learn by example is to submit to authority. You follow your master because you trust his manner of doing things even when you cannot analyse and account in detail for its effectiveness. By watching the master and emulating his efforts in the presence of his example, the apprentice unconsciously picks up the rules of the art, including those which are not explicitly

known to the master himself...

In effect, to the extent to which our intelligence falls short of the ideal of precise formalization, we act and see by the light of unspecifiable knowledge and must acknowledge that we accept the verdict of our personal appraisal, be it at first hand by relying on our own judgment, or at second hand by submitting to the authority of a personal example as carrier of a tradition.³³⁴

This sort of analysis, Polanyi further contended, extends to instances of "connoisseurship," which includes not only tasks, such as wine tasting, that we would ordinarily think of as the traditional domain of connoisseurs, but also to tasks like medical diagnosis.³³⁵ Polanyi himself drew the connection to common-law judging: "In deciding a case today the Courts will follow the example of other courts which have decided similar cases in the past, for in these actions they see embodied the rules of law. This procedure recognizes the principle of all traditionalism that practical wisdom is more truly embodied in action than expressed in rules of action."³³⁶

Polanyi's phrase has not appeared widely in the legal literature. Related ideas, however, have surfaced in a number of places. In *The Bramble Bush*, Karl Llewellyn put it as follows:

We have discovered in our teaching of the law that general propositions are empty. We have discovered that students who come eager to learn the rules and who do learn them, *and who learn nothing more*, will take away the shell and not the substance. We have discovered that rules

³³⁰ See generally Paul Gewirtz, On "I Know It When I See It," 105 YALE L.J. 1023 (1996).

³³¹ Gewirtz describes his main point as follows: "Law is not all reasoning and analysis—it is also emotion and judgment and intuition and rhetoric. It includes knowledge that cannot always be explained, but that is no less valid for that." *Id.* at 1044.

³³² Michael Polanyi, The Tacit Dimension 4 (2009).

³³³ Michael Polanyi, Personal Knowledge 49-50, 88 (1962).

³³⁴ *Id.* 53.

³³⁵ *Id.* at 54.

³³⁶ *Id.*

alone, mere forms of words, are worthless. We have learned that the concrete instance, the heaping up of concrete instances, is necessary in order to make any general proposition, be it rule of law or any other, mean anything at all. Without the concrete instances the general proposition is baggage, impedimenta, stuff about the feet. It not only does not help. It hinders.³³⁷

Three decades later, in *The Common Law Tradition: Deciding Appeals*,³³⁸ Llewellyn spoke of the need for judges to resort to “horse sense” and “situation sense.” Llewellyn described “horse sense” to mean “neither the sense of a horse nor ordinary common sense, but that extraordinary and uncommon kind of experience, sense, and intuition which was characteristic of an old-fashioned skilled horse trader in his dealings either with horses or with other horse traders.”³³⁹ By “situation sense” Llewellyn meant the ability to recognize that what at first appears to be a novel situation actually fits within a familiar type.³⁴⁰ The idea can be found as well in the following nugget from Justice Holmes: “I have long said there is no such thing as a hard case. I am frightened weekly but always when you walk up to the lion and lay hold the hide comes off and the same old donkey of a question of law is underneath.”³⁴¹

Llewellyn and Holmes are not alone. Thirty years before Llewellyn wrote *The Common Law Tradition*, Judge Joseph Hutcheson extolled the virtue of the “hunch” in judicial decision making: “that intuitive flash of understanding which makes the jump-spark connection

between question and decision.”³⁴² More recently, Anthony Kronman wrote in *The Lost Lawyer* of the craft values involved in lawyering and judging, and of the role of practical wisdom and what he called “deliberative imagination” in judicial decision-making.³⁴³

Each of these commentators recognizes that there is more to law than can be reduced to words, and that the verbal formulation of a legal rule often provides only a starting point, in which case an appropriate analysis must draw on the less tangible “senses” to which Llewellyn refers. Cultivating those senses, and the ability to apply them to specific situations, requires long experience, in the law generally, and in the task of judicial decision making. It requires the absorption of cultural norms and the acquisition of working knowhow, which of course can be only partially passed along via rules or principles. Even then, as Llewellyn cautions, “the rules not only fail to tell the full tale, taken literally they tell much of it wrong,” and they can be put to proper use only via “ways and attitudes which are much more and better felt and done than they are said.”³⁴⁴ Sensitivity to these ways and attitudes can be developed only through sustained exposure to examples. It is the acquisition of a craft.

II. Tracing the Proper Bounds of Unconscious Influence

We have seen that the nature of law is such that judges must exercise discretion, sometimes by design, and sometimes because it can be no other

³³⁷ K.N. Llewellyn, *The Bramble Bush: Some Lectures on Law and its Study* 2 (1930).

³³⁸ See LLEWELLYN, *supra* note 3.

³³⁹ *Id.* at 201.

³⁴⁰ *Id.* at 60.

³⁴¹ Oliver Wendell Holmes, Jr., & Frederick Pollock, *Holmes-Pollack Letters: The Correspondence Of Mr. Justice Holmes And Sir*

Frederick Pollock, 1874-1932 155-56 (2d Ed. 1961).

³⁴² Joseph C. Hutcheson, Jr., *Judgment Intuitive: The Function of the Hunch in Judicial Decision*, 14 CORNELL L. REV. 274, 893 (1929).

³⁴³ Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 326-27 (1993).

³⁴⁴ Llewellyn, *supra* note 27, at 214.

way. This exercise of discretion is subject to unconscious influences, and as the discussion in the preceding section suggests, those influences can be the product of improper factors, and thus the sort regarded as bad, or can be the product of the sort of tacit knowledge essential to the appropriate implementation of the bare framework provided by formal legal standards.

This dichotomy suggests the existence of a line between the two types of influence; a separation between the bad and the good. It also suggests an at least partial answer to the question: "what does it mean to be a judge?" Being a judge means following the articulable parts of law as far as one is able. This will often be quite far, and will cover the resolution of most cases. But being a judge also means recognizing that sometimes the articulable parts do not take one the entire way, in which case it becomes necessary to resort to intuition or situation sense or whatever one wants to call the inarticulable aspects of the role. When that happens the judge must attempt to give weight to the *appropriate* types of unconscious influence, while simultaneously minimizing, and ideally eliminating, the effects of undesirable sorts of influence.

So described, this is a tall order for at least two reasons. First, by definition a judge cannot be aware of unconscious influences on her decision-making. Even if resorting to tacit knowledge is a conscious process, it is the sort that seems especially susceptible to being swayed by unconscious influences. Second, there is the difficulty in

determining when unconscious influences are good, versus when they are bad. A judge who leans on the unconscious or ineffable in reaching a decision may achieve greater justice as a result, but he may also err in the other direction. And he will himself be unable to know.

A. The Example of Judging in Aesthetic Sport

It is useful in appreciating the point to consider judging in a different context. Certain sports such as gymnastics and figure skating - the kind philosophers of sport call "aesthetic sports"³⁴⁵ - are scored via an official's assessment of the quality of an athlete's performance. To an even greater degree than in law, the judges in these sports must apply underdeterminate standards in fulfilling their role. For example, among the standards figure skating judges must apply are those calling for the assessment of a given performance's "flow and effortless glide" and "phrasing and form."³⁴⁶

To the outsider, those words are nearly meaningless. To tell the non-skater, or even the novice skater, that she must gauge the extent to which a performance exhibits those characteristics is to give that person very little guidance. The phrases gain meaning only when considered in conjunction with a base of tacit knowledge, which here takes the form of an internalized sense of what the ideal skating performance would look like.³⁴⁷ That base of knowledge, like tacit knowledge more generally, can be acquired only through the gradual accumulation of experience in and absorption of the relevant culture.³⁴⁸ Thus

³⁴⁵ See Graham McFee, *Sport, Rules, and Values: Philosophical Investigations into the Nature of Sport* 90-91 (2004).

³⁴⁶ For an overview, with links to more detailed information, see *International Judging System (IJS)*, US FIGURE SKATING, <http://www.usfsa.org/>

[New_Judging.asp?id=289](http://www.usfsa.org/New_Judging.asp?id=289) (last visited May 25, 2015).

³⁴⁷ Bernard Suits, *Tricky Triad: Games, Play, and Sport*, 15 J. PHIL. SPORT 1, 6 (1988).

³⁴⁸ Polanyi, *supra* note 23, at 53.

aspiring judges in aesthetic sports have typically spent time as a participant in the sport, with the process of becoming a judge continuing through a period of apprenticeship from which candidates can graduate only if their assessments are sufficiently similar to those of longer-serving judges.³⁴⁹ Put differently, the aspiring judge must demonstrate that her internalized conception of the ideal performance is sufficiently well-calibrated to that of existing judges in order to become a judge at all. It is a classic process of acquiring tacit knowledge.

The result of this process, when implemented throughout a sport, is that there exists, in a rough sense, a “right answer” to questions of judging, at least if we are willing to posit some best conception of the nature of the ideal performance. Any given performance will stand a certain distance from the best conception, which makes it possible to judge that performance relative to both the ideal and to other performances. But even if we conclude that such a best conception exists, there is no reason to think any given judge or panel of judges will have access to it. The very nature of such a best conception is that it is likely to be a distillation of, or interpolation among, the notions of the idealized conception held by some collection of judges or participants in the sport, and thus not something that is held by any single person. It is unlikely to match up precisely

with any one person’s conception of the ideal, but each person will necessarily regard her conception of the ideal as the appropriate version, for if she did not then she would be doing something other than applying the idealized version.

A problem emerges in that the precise content of the performative ideal is inaccessible (in varying degrees) to judges. There is another difficulty. Even were we to conclude that any given judge could draw upon the best conception of the ideal, we immediately face a similar problem in terms of assessing the individual performances to be measured against the ideal. It is almost certainly beyond the limits of human cognition to be able to perceive, take into account, and hold in memory the various factors necessary to fully assess any given performance and then score it relative to the ideal.³⁵⁰ Because it is cognitively impossible for a judge to mentally wield each of the criteria applicable to judging a performance, it becomes necessary for her to fall back on heuristics and intuition.

Not surprisingly, research has revealed that all sorts of unconscious influences creep into the process. It will come as no surprise to those who have even a passing familiarity with Olympic figure skating that judges manifest nationalistic and other forms of affiliation biases, pursuant to which judges favor skaters from their own country or, in more regional competitions, their own skating club.³⁵¹ The same is true of reputation

³⁴⁹ See Chad M. Oldfather, *Of Umpires, Judges, and Metaphors: Adjudication in Aesthetic Sports and its Implications for Law*, 25 MARQ. SPORTS L. REV. 271 (2014).

³⁵⁰ Clare MacMahon & Bill Mildenhall, *A Practical Perspective on Decision Making Influences in Sports Officiating*, 7 INT’L J. SPORTS SCIENCE & COACHING 153, 154 (2012) (“Researchers have pointed out that the perceptual-cognitive tasks in officiating create demands that surpass human information processing limits.”).

³⁵¹ See Cheryl Litman & Thomas Stratmann, *Judging on Thin Ice: Affiliation Bias in Figure*

Skating, Working Paper, September 2013, available at <https://www.cesifogroup.de/ifoHome/events/Archive/conferences/2014/02/2014-02-28-event-ConfCESifo/Programme.html>; John W. Emerson, Miki Seltzer, & David Lin, *Assessing Judging Bias: An Example from the 2000 Olympic Games*, 63 AM. STATISTICIAN 124 (2009); Eric Zitzewitz, *Nationalism in Winter Sports Judging and Its Lessons for Organizational Decision Making*, 15 J. ECON. & MGMT. STRATEGY 67 (2006); Robert Whissell et al., *National Bias in Judgments of Olympic-Level Skating*, 77 PERCEPTUAL & MOTOR SKILLS 355 (1993).

biases, which lead to skaters with strong reputations receiving, on average, higher scores than those without.³⁵² Order biases lead to generally higher scores for skaters later in a sequence even if competition order is independent of scores in a prior round or some other measure of skill.³⁵³ It is clear, then, that unconscious pressures shape the behavior of judges in these sports. Judges necessarily draw on tacit knowledge in assessing performances, and it should hardly surprise us that this process of accessing inarticulable knowledge is influenced in these ways.

What is less clear is whether all of these biases are as “bad” as we might first imagine. Some might turn out to be shortcomings, but of the sort we would regard as less pernicious than they might first appear. What seems to be the manifestation of a nationalistic bias, for example, might simply be a reflection of differing stylistic preferences. It may be, in other words, that a judge whose scoring seems to reflect nationalistic biases is accurately assessing individual performances, but comparing them to an ideal differing in material respects from other judges’. Others may simply reflect judges’ efforts to make up for the cognitive deficits that render them unable to accurately assess a given performance. In other words, the influence of biases may be the product of an effort to fill in the informational gaps resulting from judges’ inability to take in all the pertinent information. Because they cannot see everything, they complete their knowledge by drawing upon the next-best available substitute. Thus a judge who is influenced by a skater’s reputation could be characterized as acting illegitimately,

but could also be viewed as drawing on the same sense of the skating community (the one that gave rise to the reputation) that is the source of the concept of the ideal performance that is to be the benchmark. While the resulting assessment may differ from the one that a perfectly informed judge would make, it would arguably be better than one for which the judge had to resort to some other form of proxy.

B. Judges, Law, and the River

A similar dynamic holds in the context of judging in law. The socialization process is considerably more complex, and the standards that judges must apply are less consistently opaque, but there are plenty of situations in which judges must implement either expressly granted discretion or imprecise legal standards. In doing so they draw upon tacit knowledge.³⁵⁴ It is at least theoretically possible that there is a single correct answer to any of these legal questions. But as is true with respect to judges in aesthetic sport, there are reasons to question whether any individual judge can reliably access that right answer.

As noted above, judges’ exercise of discretion is subject to similar sorts of unconscious influences. Just as we might not want to reflexively conclude that the operation of these sorts of influences in aesthetic sport is a bad thing, so, too, there might be ways in which what we initially perceive as biases in the law are actually reflections of legitimate differences in the way judges conceive of their jobs, or are instances of reliance on second-best information that, if ignored, might lead to even less-optimal decisions.

³⁵² Leanne C. Findlay & Diane M. Ste-Marie, *A Reputation Bias in Figure Skating Judging*, 26 J. SPORT & EXERCISE PSYCH. 154 (2004).

³⁵³ Iain Greenlees, et al., *Order Effects in Sport:*

Examining the Impact of Order of Information on Attributions of Ability, 8 PSYCH. SPORT & EXPERTISE 477 (2007).

³⁵⁴ See *supra* Part I.C

Take the example of ideology. Because law ultimately rests on politics, we might conclude that some political responsiveness by judges is not a bad thing. For example, one answer to Alexander Bickel's complaint about the countermajoritarian nature of judicial review is to show that judicial review is not fully countermajoritarian.³⁵⁵ This might be so because the political preferences of those who appoint judges continue to manifest themselves in those judges' decision making.³⁵⁶ The point is probably even stronger in state systems in which judges are elected. There we might imagine justifying an even larger role for the influence of politics.

This is a large topic, and one that I mean simply to identify and not resolve. Part of the point is simply that reasonable minds will differ about the extent to which it is desirable to have politics influence judicial decision making, about the contexts and ways in which it might be appropriate for that influence to operate, and so on. They will also differ over whether and when it is appropriate for judges to rely on decisional heuristics departing from the narrow prescriptions of rationality.³⁵⁷ Just as in aesthetic sport, the boundary between proper and improper influence is fluid and contestable, and it is consequently difficult to say when a judge has crossed it.

One answer to our question "what does it mean to be a judge," then, is that it means being someone who must walk something of a tightrope - who must draw on the good parts of her tacit knowledge while avoiding the pitfalls associated with

undesirable unconscious influences. Because we are concerned here with processes that operate beneath the surface, there are limits to what a judge can do to balance these forces while deciding any given case. Much of the necessary channeling of discretion must take place via mechanisms that operate more broadly.

This brings us back to Judge Wistrich's suggestion that we ought to pay more attention to context and circumstance. Our focus must not be solely on the individual judge deciding the individual case, but also on the cultural, institutional, and procedural contexts in which she works. And we must keep an eye on changes in those contexts.

Three decades ago Paul Carrington wrote a short but influential essay called *Of Law and the River*.³⁵⁸ Carrington wrote in response to a then-recent controversy in legal education, but his discussion is pertinent here. Carrington drew on Mark Twain's *Life on the Mississippi* to draw a parallel between law and a river. Twain wrote about his training as a steamboat pilot, and discussed the range of knowledge and depth of experience necessary to capably navigate a river. He also noted that change was constant, and brought about the need for ongoing study of the river. Pilots whose own boats were under repair would often travel on other boats simply to keep their knowledge current.³⁵⁹

Carrington stands with Hutcheson, Llewellyn, and Kronman in regarding judgment and intuition - tacit knowledge - as a key component of being a lawyer or judge.³⁶⁰ Twain, he writes, "like law

³⁵⁵ Or Bassok, *The Two Countermajoritarian Difficulties*, 31 ST. LOUIS U. PUB. L. REV. 333, 351 (2012).

³⁵⁶ See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

³⁵⁷ E.g., Gewirtz, *supra* note 20.

³⁵⁸ Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).

³⁵⁹ *Id.* at 225.

³⁶⁰ "But our work, like that of pilots, requires effective use of intuition going beyond technical knowledge; those who use intuition need to know its limits. Thus lawyers like pilots must always be distrustful of themselves, on guard against the risk of mistaking their own political or social preferences for those of the law." *Id.* at 226.

students... came only gradually to the full realization that his subject was elusive as well as complex, that no amount of sheer memorization of information would ever be enough to make him a good pilot."³⁶¹ "Twain knew that the technical knowledge and skill drilled into him... was not the durable substance he received. Twain tells us that what he really learned... was not marks and channels, but judgment and courage - judgment in the evaluation of his own technical knowledge and skill, courage to apply them despite the ubiquitous risk of professional error."³⁶² This knowledge - tacit knowledge - is the ineffable byproduct of an accumulation of experience, which brings with it not only concrete, technical knowledge, but a feel for how the river, or the law, works.

Change is constant in both the law and the river.³⁶³ Just as the river pilots in Twain's day would accompany other pilots to keep their knowledge current, lawyers and judges must engage in a constant process of learning and relearning that can come only through continuing engagement with the material.

Here is where we encounter cause for concern, because there is reason to believe the context and circumstances in which judges perform their jobs have changed in ways that have negatively affected judges' ability to engage in this sort of learning. Once, or so it seems, judges had the luxury of time. This provided the opportunity for digging into the caselaw and the record, for studying, for observing and perhaps even reflecting on changes in the river of law. That time has passed, and the judicial role has become more managerial in nature. Judges are perhaps now more often like the pilots riding along than like those

actually navigating the river, in the sense that it is others who are engaging more directly with the record and the caselaw. Law clerks now do much of the hands on work - the research, the review of the record, the drafting of opinions.

Whether that change has led to erosion in the base of the tacit knowledge that judges must draw upon is an open question. But one can reasonably hypothesize that contemporary judges' more distant engagement with their work leads the judiciary collectively to be less tied to shared notions of what the law should be and how it should work. Put in the language of aesthetic sport, we might imagine a less robust buy-in to the content of the performative ideal.

Conclusion

While the particulars of my analysis are in many respects both tentative and speculative, it is reasonable to conclude that judicial education has become more important than ever as a means for keeping judges up to date on the course of the river of law. The participants in the conference for which this paper was prepared shared a wide range of wonderful, innovative approaches that can serve this end. I am pleased to have been able to take part in the conversation, and I look forward to the development and implementation of these proposals.

Nota redacției: Articolul a fost publicat inițial în 2015 *Journal of Dispute Resolution, Marquette University Law School Legal Studies Research Paper Series Research Paper no. 15-15*, Revista Forumul Judecătorilor privind permisiunea autorului și a revistei americane în vederea republicării exclusive a studiului în România.

³⁶¹ *Id.* at 224.

³⁶² *Id.* at 225.

³⁶³ *Id.* at 224.