STUDII JURIDICE

How Judges are Free to Decide Cases

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Abstract:
Philosophers of law have been primarily interested in theories of free will only in regard to the freedom of the citizen, subject to a body of criminal law, and its consequences for the justification of punishment upon breach of that law. This essay considers the free will of judges – first, in connection with two prominent views in legal philosophy, legal formalism and American legal realism, and, second, from the perspective of the libertarian theory of free will recently developed by judge and philosopher David Hodgson. I argue that while the commitments of formalists and realists as to whether judges are free to decide cases are often implicit and ambiguous, the extension of Hodgson's libertarianism to judicial reasoning is a novel contribution to the theory of adjudication.

Rezumat: *Filozofii dreptului sunt, în principal, interesați, de problema teorei liberului arbitru numai în ceea ce privește libertatea cetățeanului, subiect al dreptului penal, și consecințele acestuia asupra justificării pedepsei urmare a încălcării normelor penale. Acest eseu tratează liberul arbitru al judecătorilor – în primul rând, prin raportare la două teorii proeminente în filozofia dreptului, formalismul juridic și realismul juridic american și, în al doilea rând, din perspectiva teoriei libertariene a liberului arbitru dezvoltată recent de judecătorul și filozoful David Hodgson. În acest eseu susțin că, în timp ce ideile formaliștilor și ale realiștilor cu privire la libertatea judecătorii de a soluționa litigii sunt adesea implicite și ambigue, aplicarea libertarianismului lui Hodson la raționamentul juridic reprezintă o contribuție nouă la teoria deciziei judiciare.*

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Introduction

Most philosophers of law since Plato have speculated in some way about the nature of free will and its consequences for the administration of law, indeed for the very possibility of legal governance (Bourke 1964). But they have commonly approached these issues through a rather narrow lens: from the point of view of an individual citizen, and as they bear on the law's regulation of their conduct, and for whom, it is supposed, the law establishes an array of rights, permissions, and obligations. The focus is often narrower still. Philosophers have for the most part been preoccupied with questions about the freedom of persons who must live under a body of *penal* law, that is, law which is meant to guide conduct by the establishment of a range of offenses, and which includes standards for the imposition of punishment, such that those who commit those offenses will be subject to sanction according to those standards. One familiar line of thought related to free will is this. If persons rarely make free choices or, worse, if free will itself is an illusion and all actions are but the inevitable consequences of antecedent events, then the practice of judging persons morally responsible for their actions, which presumes the freedom to do otherwise, would lack adequate foundation. Consequently, attributions of legal guilt or innocence, which are at least partly based on such practices and judgments, would also no longer make sense under a body of criminal law, and any system of punishment which coerces citizens on the grounds of such attributions would be unjust, or at the very least pointless. This recurring preoccupation with questions of free will for the purpose of developing theories of criminal responsibility and punishment is not merely a matter of history; it remains the dominant approach in discussions among writers working at the intersection of free will and legal philosophy.[278]

While there may be sound historical and pragmatic reasons for the persistent focus on only the free will of citizens subject to a regime of criminal law, a moment's reflection suggests that the choice of focus is theoretically arbitrary. Whether and how humans are capable of free choice bears equally on how to understand and evaluate both the governance of law that is not punitive, as well as the freedom and responsibility of other participants in a legal system, besides would-be offenders, such as various officials whose conduct and decisions are essential to the functioning of primary legal institutions. And so, for example, little attention has been paid to the question of whether *judges* are free, and therefore responsible, both in imposing punishments on offenders and in acting across the standard range of other rule-governed, adjudicative contexts. Nor have the consequences of the possible answers to those questions been considered for general theories (both conceptual and normative) of law and adjudication.

The neglect is unfortunate, since questions about the freedom and responsibility of judges are at least as significant as ones about that of criminal defendants. After all, if in fact judges are not free, and so fully determined, to reason and decide as they do – from ordering injunctions, to imposing sentences on criminal defendants, to deciding 'hard cases' – then the issue of whether a person facing punishment for committing an offense was free or not to commit it would be, at best, of secondary significance. In that case, too, it would make little sense to attempt to hold judges to account for their decisions, since they would be unable to decide otherwise than they do. By contrast, if judicial decision was not determined at all by antecedent

[278] Examples of this trend can be found in these recent collections of essays: Pardo and Patterson (2013), Vincent (2013), and Nadlehoffer (2013). An illuminating history of this trend in Anglophone legal philosophy over the last century can be found in Green (2014).

events, such that the decisions of judges occur at random, we would be faced with a different problem. If one purpose of law is, as is often said, the administration of justice, and insofar as justice involves a sort of regularity, perhaps in the form of judges "treating like cases alike" (Rawls 1971: 206-213; Hart 2012:155-167), then in an indeterministic universe, judging in the pursuit of justice would be impossible or, at least, a matter of chance. Holding judges responsible for their decision would similarly be pointless, though for different reasons.

My primary concern here will therefore be with the question of judicial freedom, and to examine several prominent views which address, implicitly or explicitly, whether (and how) judges are free to decide cases.[279]

A selective survey of some of the major movements in the theory of adjudication over the last century in Anglophone legal philosophy shows an equivocal, undisciplined, and perhaps at times unwitting, engagement with the issue. For example, scholarly discussions of the legal formalism of the late nineteenth and early twentieth century standardly integrate the language of compulsion and necessity to express its core idea: that legal rules fully 'determine' judicial decision, and function in the minds of judges as so many 'chains' or 'fetters', that judges must apply such rules 'mechanically', and so on. Such claims seem to suggest that judges can*not* decide otherwise than they do in particular cases; the legal sources somehow render judges unfree. And yet, writers in the formalist tradition rarely go further to consider the sense these remarks should have in the context of the free will debates. To take another example, the American legal realists famously responded that law does not compel judges, at least not to the extent the formalists claimed, and that the actual causes of judicial decisions lie mostly outside the law. Most of the realists, nonetheless, maintain that a full and complete causal explanation of the decisions of judges in particular cases is in principle attainable, and, further, that knowledge of the factors referenced in that explanation would help interested observers of judges better predict those decisions.

The core of the realists' positive research program, which many of them thought should proceed according to the empirical methodologies of the social sciences and behaviourist psychology, was to develop explanations of judicial decisions by identifying the sets of sufficient causal factors which determine those decisions, what Jerome Frank called the 'hunch-producers'.

While these claims may appear to reflect substantial assumptions about the free will of judges, I will conclude, in the next two sections, that most realists, as well as the many writers on formalism, have largely left unaddressed the questions of whether and how judges are free. While these writers have been inattentive to even the most rudimentary distinctions made by philosophers of free will, I consider the compatibility of their jurisprudential views with a range of positions in the free will debates. This brief survey will, however, serve as a useful propaedeutic for examining the theory of free will recently developed by David Hodgson (2012 and 1991: 379-464).

[279] I will follow many writers in legal philosophy by focusing on rendering final judgments in cases as paradigmatic judicial acts, though the discussion easily extends to other examples, e.g., granting or denying a motion during a court proceeding, or in courts with discretionary review, deciding whether to accept a case on appeal.

Hodgson's theory is especially interesting in the context of formalism and realism, and of judicial freedom more generally, for several reasons. First, from a historical perspective, the context in which his views developed is novel. Like several of the American legal realists, Hodgson was a lifelong legal practitioner. And like two notable realists, Jerome Frank and William O. Douglas, Hodgson was also an appellate judge, having served as a judge on the Supreme Court of New South Wales, Australia, for nearly thirty years. Unlike his realist judicial counterparts, however, he was a trained philosopher as well, having completed a D.Phil. at Oxford supervised by H.L.A. Hart alongside other students, such as John Finnis and Joseph Raz, who would themselves become influential philosophers of law.[280] Second, like Frank (Leiter 2005: 51), Hodgson never held an academic appointment, yet over the course of his career on the bench produced a substantial corpus of theoretical writings.[281] Finally, Hodgson's relevant published writings (approaching a thousand pages) also constitute a very rare case in the history of philosophy, in which a sitting judge has developed systematic, philosophically sophisticated views about the nature of free will. In fact, Hodgson's theory is the first such discussion of free will from the bench since Henry Home, Lord Kames, a judge on the Court of Session (Scotland's supreme civil court) and important figure in the Scottish Enlightenment, who published his *Essays on the Principles of Morality and Natural Religion* in 1751 (Haakonssen 2005).[282] And just as with Kames (Harris 2005: 103-106), Hodgson's philosophical views are also informed by his experiences of deliberating in the course of resolving disputes brought before him in his capacity as judge.

In addition to this novel context, Hodgson's substantive views are also distinctive. Hodgson argues for a variant of libertarianism about free will, according to which choices about both what to do and what to believe are controlled by the chooser yet not completely determined by the operation of the laws of nature.[283] These undetermined choices he contextualizes within a theory of what he calls 'plausible reasoning.' He did not, however, fully draw out the consequences of his views for an account of how judges decide cases, though some of his remarks, as well as his occasional use of judicial examples, are suggestive. The view of judicial freedom that emerges from Hodgson's libertarianism, which I sketch out in the fourth section, suggests interesting contrasts and comparisons with certain realist and formalist themes. After drawing out those points of comparison, I conclude that, because he clearly develops his general theory of free will with many core features of judicial reasoning in mind, that theory can be usefully adapted and understood as a novel view in the history of legal philosophy, of not only judicial freedom, but also as part of a broader theory of judicial reasoning and adjudication. The libertarian view of judicial freedom prompts us to ask new questions of old

[280] See the Introduction to this volume for discussion of Hodgson's legal and philosophical careers.

[281] Douglas, before being appointed to the United States Supreme Court in 1939, was for a brief period a professor at Yale Law School (Kalman 1986).

[282] While Kames took up his judicial appointment a year after publishing the *Essays*, he made substantial revisions in its subsequent editions while serving on the Court (Haakonssen 2005: xiv-xvii).

[283] See Robert Kane, "Making Sense of Libertarian Free Will: Consciousness, Science and Laws of Nature", Chapter 2 of this volume, for further discussion.

theories, namely, how an account of the free will of judges may shape, and perhaps constrain, the range of plausible views in the theory of adjudication. It is to those old theories which I now turn.

Legal Forms and Judicial Freedom

I begin with legal formalism, an allegedly popular view among lawyers and legal academics throughout the common law world in the nineteenth and early twentieth century, and which was influential for even longer in Continental Europe (Tamanaha 2010; Schauer 1988). Formalism is often said to be a set of mutually supportive claims about the nature of both law and adjudication. Law, on this view, is an autonomous, rationally ordered system of principles, structured as an axiomatic system with a small number of foundational abstract concepts and principles, such that the principles and rules applying to concrete cases are derivable deductively from the more general and abstract ones. The contents of a legal system are constructed by logical inference out of these strictly legal materials and so without reference to, say, moral considerations, or the social or political contexts in which the legal materials were made or given legal effect. The law is accordingly comprehensive and complete, and thus sufficient to yield unique and determinate results in each and every case brought before a court. This determinacy and uniqueness is partly explained and reinforced by how judges decide cases according to law thus understood. It is judges who derive the unique and determinate answers to cases before them by way of formal and deductive methods of reasoning from abstract principle to particularized legal decisions.

Notice that on this view, because their decisions are logically derivable from strictly legal materials, judges do not, and in fact cannot, exercise *discretion* in any meaningful sense. Legal reasoning appears akin to mathematical reasoning, in that its steps are explicit and each is strictly governed by an *a priori* principle of inference. As a result, the decisions of judges, insofar as those judges are generally competent, rational, and conscientious, are perfectly predictable; that is, if one could know all the contents of the legal materials relevant to a case, as well as what deductively followed from those materials given the facts of the case, then how a judge is to decide the case could be reliably, indeed infallibly, predicted. Formalism is referred to, often disparagingly, as 'mechanical jurisprudence' (Pound 1908), because, if true, it would leave no room for any recognizable form of *judging* at all. Deciding a case would be a matter of identifying logical relations between the more or less abstract legal rules and principles, and the relations between those materials as applied to facts, all of which invariably yields a unique, and uniquely correct, disposition of the case.

This picture of adjudication invites the question of whether it requires any assumptions about the metaphysical freedom of judges: for example, the assumption that they lack it, or have it only in some limited sense. The issue becomes more urgent given that, in addition to the familiar label of 'mechanical jurisprudence', the language which scholars have often used to express the basic tenets of formalism seems to suggest a strong form of psychological determinism in regard to the free will of judges in deciding cases. That is, discussions of formalism appear to imply that, invariably, the judges cannot, in a metaphysically significant sense, do otherwise than they do in deciding cases; their decisions are fully determined by antecedent, and specifically legal, causes. And so formalism casts judges as "calculating

machine[s]" (Posner 1993: 21), as "will-less" (Sebok 1998: 53), as "tied down on every side by rules of law" (Pound 1913: 710), and as "simple automata" (Gilmore 1977: 77). A central premise of formalism is the "ascription of responsibility [for decisions] elsewhere" than to the judge (Sebok 1998: 50); formalism, it is said, "reduce[s] adjudication to a mechanical task, thereby…fully eliminating freedom in judicial decision" (Lind 1993: 166). Now, one could easily imagine a *philosopher* using just such phrases to express a view, sometimes called 'hard determinism', according to which free will simply does not exist: that it is an illusion or a myth (Smilansky 2000). But is formalism necessarily committed to such a view of the freedom of judges, i.e., that they lack, in a strong, metaphysical sense, free will to decide as they do?

Properly understood, and despite appearances, it is doubtful that formalists so claim. More philosophically sensitive discussions of formalism present it as committed to either the *descriptive* claim that judges respond primarily to the rational demands of applicable legal rules, or the *normative* claim that judges *ought* to decide cases only in accordance with strictly legal sources, that is, that judges ought to appeal only to legal reasons to justify their decisions.

Sometimes both claims are included in traditional versions of formalism (Schauer 1988; Leiter 2007: 23-25). Even so, most views about the nature of free will are compatible with each of them. The descriptive claim could be true whether or not judges have free will. And in regard to the normative claim, despite the hyperbole of judges being 'automata' when constrained by law, formalists seem to make just the opposite assumption. That is, they seem committed to the view that judges *are* genuinely free to choose how to decide cases; however, *if* they wish to decide a case properly, then they will choose to engage in, and thereby be constrained by, formal, deductive forms of reasoning using the reasons only the law provides. The normative view is thus more plausibly construed as the claim that judges *ought* to decide cases formalistically, and, since 'ought' (generally) implies 'can', then formalists assume that judges *can* do otherwise than they do in deciding cases. And all but deeply sceptical theories of free will can make sense of the idea that judges are free to do otherwise than they do in this sense. The language of compulsion and necessary often used to express formalism references at most *logical*, and so not metaphysical, necessity; that is, that judges are bound to adhere to the valid principles of logical inference in deciding cases, insofar as they are rational. Legal formalism, therefore, does not require any particular view of the nature of judicial freedom, at least in the sense that interests philosophers of free will.

Legal Realism[284]

I turn now to consider the multifaceted twentieth-century movement of American legal realism. Much has been written in recent years attempting to identify and evaluating its central claims and themes.[285] Luckily, we can sidestep these lively interpretive debates by focussing on a limited set of realist ideas. In its critical aspects, the central task of legal realism is usually taken as the refutation of

[284] I thank David Frydrych, Brian Leiter, and Kevin Walton for helpful discussion of the issues in this section.

[285] F Helpful recent studies of American legal realism can be found in Dagan 2018, Schauer 2013, Postema 2011: 79-140, Leiter 2007, and Duxbury 1995.

formalism, as a true descriptive account of how judges decide cases. Because realism has sometimes been defined in terms of its denial of formalism, and given the conclusion of the previous section, one might suppose from the outset that, just as the core claims of formalism do not require any particular assumptions about the free will of judges, realism is likewise agnostic about whether judges are free (and, if so, in what sense and to what extent.) It may be thought, that is, that formalism and realism are equally compatible with virtually any position one might take in the free will debates.

However, when asserting positive claims about law and judicial reasoning, there is a persistent, and more than superficial, concern among realist writers with aspects of judicial decisions – for example, their causes, predictability, and efficacy – which more directly prompts questions about what view (or views) of judicial freedom, if any, they require in making claims about them. The various claims of the realists who suggested that the (deterministic) methodology of the then-nascent social sciences should be extended to jurisprudence, the so-called 'sociological wing' of legal realism (Leiter 2007: 28-29), are of particular interest, given the traditional concern among theorists of free will about the significance of adopting the modern scientific worldview for the very possibility of free choice (Kane 2005). Despite the recent explosion of scholarly interest in American legal realism, the relations between its core claims and substantive positions about the free will of judges have not been explored, and are potentially more illuminating and suggestive for the future development of realist ideas than in the case of formalism.

The relevant concerns are evident from the very beginning of the realist tradition. Oliver Wendell Holmes, an inspiration for the realists in both their critical and positive modes, famously advised law students (1897) that the key to a successful career in the law is to always view the law from the perspective of their client. By this, he did not mean the point of view of their actual future clients, nor did he mean the ideal client as good citizen, but rather the *bad person*, "who cares only for the material consequences of his actions and who wishes 'to avoid an encounter with the public force'" (Holmes 1897: 457). From this (he thought) theoretically privileged point of view, Holmes claims that the law is nothing more than a matter of "predictions of the incidence of the public force through the instrumentality of the courts" (1897: Holmes then remarks, almost in passing, that "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" (1897: 461). We can set aside the many ambiguities in, and obvious objections, to these claims, and ask instead whether Holmes is committed to any view about whether judges are free to do what they do when deciding causes. In particular, the questions arise whether, on his view, ascertaining reliable predictions of judicial behaviour entails that judges are fully determined to decide as they do and, if so, whether that further implies they are free (on a compatibilist account) or not (on an incompatibilist one). Holmes's predictive view is even compatible with what has been called a 'restrictivist' variant of libertarianism, according to which the types of action that exhibits libertarian freedom are highly restricted, such that other types of action would admit of Holmesian-style prediction (Clarke 2003: 119-120).

In other contexts, Holmes seems to accept the commonsense view that people (presumably including judges) do indeed have free will. For example, he speaks freely of the policy "to give a man a fair chance to avoid" liability in tort

(1881: 144) and considers the question of whether one acts as "a free person and himself responsible" (1921: 51). He even writes of the central importance in the law of "freedom of the will" in the sense used by Kant and Hegel (1881: 206-207). Such remarks may imply a kind of compatibilism about free will, one which would become the default position in legal theory in the twentieth century. Holmes, however, was generally disinterested in substantive philosophical theories and how they may apply in the context of the law or legal philosophy (Postema 2011: 47), and was otherwise circumspect about how any view on free will related to the "prophecies of what the courts will do in fact."[286]

Following Holmes, many of the writers most closely associated with realism became more focused in regard to both their objections to formalism and their proposals to enhance jurisprudential inquiries about judicial behaviour, in some cases by using methods from the social sciences. Many of these theorists thought that when one takes a hard look at what judges actually do when they decide cases, it was quite clear that they were not deductively and demonstratively applying a complete and comprehensive set of legal rules and principles – even if on occasion judges claimed and took themselves to be doing just that. Instead, realists were united in the idea that, as the realist Hermann Oliphant succinctly puts it, "courts respond to the stimulus of the facts in the concrete cases before them rather than to the stimulus of over-general and outworn abstractions in opinions and treatises" (1928: 75). A complementary view among the realists was that the ostensible justifications given for decisions in particular cases – for example, the lines of reasoning we find in the judicial opinions that make up the common law – are not only invariably *ad hoc*, but also *post hoc*, essentially rationalizations constructed in support of the initial "response to the stimulus of the facts." A judge has a response to the facts and then sets about to find acceptable legal or political arguments to acceptably justify it. Judicial reasoning was argument *from* the conclusion, not *to* it (Radin 1925: 359). The purported *ratio* of a case was, the realists said, nothing more than "judicial window dressing" (Postema 2011:118). The whole foundation of the workings of the courts is, as realists put it, judicial "hunches" (Hutcheson 1929; Cohen 1935) or a "situation sense," developed and conditioned by legal training, of the proper resolution of cases (Llewellyn 1951). Argument from precedent might be the vehicle, but these hunches are the engine, of what the courts do in fact.

Many realists thought that these 'hunches' that judges have about how to resolve a dispute conformed to certain patterns, and that these patterns were discoverable and in fact useful to ordinary citizens, and particularly to the lawyers arguing in their courts. The core of the realists' positive research program, which many of them thought should proceed according to the empirical methodologies of the social sciences and behaviourist psychology, was to develop explanations of judicial decisions by identifying the sets of sufficient causal factors which determine those decisions, what Jerome Frank called the 'hunch-producers' (1963: 112-113). For present purposes, we can distinguish two sorts of accounts that realists gave of such factors. First, those who gave an 'externalist' account identified the causally efficacious factors that lie *outside* the mind of the judge,

[286] See, however, Green (2014: 39n14), who argues that Holmes was a skeptic about free will.

usually norms or practices that are not, or not a part of, strictly legal rules or principles.[287] Felix Cohen, for example, claimed that a judicial decision is "a product of social determinants and an index of social consequences. A judicial decision is a social event" and that "only by probing behind the decision to the forces which it reflects, or projecting beyond the decision the lines of its force upon the future, do we come to an understanding of the meaning of the decision itself" (1935: 843). Discovering such forces would involve investigating "human psychology, economics and politics" (1935:844). So, for example, prevailing political norms of deregulation or protection of traditional marital rights might be ssential parts of an explanation of a decision. Realists such as Llewelyn (1960) and Oliphant (1928) adduced examples of judicial decisions which, they claimed, showed that the efficacious causal factors which explain those decisions were really certain "background facts, those of mercantile practice" (Llewelyn 1960: 126). That is, norms practiced and accepted by a sufficient number of commercial actors in the industry in which a particular dispute arose often could be shown to have had a determinative effect on a judge's 'hunches' and subsequent reasoning in a given case. Similarly, norms of conventional or individual morality may have a similar effect on the judge's reasoning, and the hunch on which it based (Radin 1925).[288]

The second, 'internalist' sort of proposed account of the causes of judicial decision makes essential reference to causal factors *within* the mind of the judge. Edward Levi (1949), for example, recommends that decisions are best explained by reference to a judge's adoption of a set of professional norms governing the structure, relevance, and disciplined construction of legal arguments. Oliphant suggests (1928: 160-161) that the intuitions of judges which are shaped by their experience of "social reality," rather than (aspects of) that reality itself, should serve as the primary explanans: "Individual temperament and our self-interest cause us, in the most subjective fashion, to select from the totality of our experience that which satisfies our temperament, and fortifies our interests" (1928: 161).

One version of this second kind of account will be of particular relevance in comparison to Hodgson's views discussion below. Jerome Frank, an American federal appellate judge, diverged from his realist colleagues by focusing primarily on the idiosyncrasies of judges' personalities to explain their decisions. It was the "peculiar traits, dispositions, biases, and habits of the particular judge" (1930: 119) that were more often the underlying causes of decision, independently of legal rules, political affiliations, commercial norms, or moral conventions. Frank's view has often been expressed by the crude idea that how a judge decides a case is a function of what the judge had for breakfast that morning (Dworkin 1986: 36). However, the view is more sophisticated than that. Frank started writing in the late 1920s when Freud's theory of the mind was all the rage, which famously emphasizes the role of unconscious drives in both thought and action. Frank, inspired by this theory,

[287] Some realists, like Frank (1963: 290), concede that legal rules are in many cases explanatorily relevant to understanding particular judicial decisions, though incomplete in and of themselves.

[288] See Frank (1963: 113 n5) for an even longer list of realist speculations about the causal antecedents of judicial hunches.

thought that what best explained judicial decisions were the hidden, unconscious drives within a judge's mind, as shaped by that judge's childhood experiences and developmental history. To know the hunch-producers of any particular judge we would therefore need to know intimate details of his or her personality and psychological profile as borne out by extensive psychoanalytic investigation.

But on Frank's view, even knowing a judge's complex psychology is not enough to make reliable predictions as to how that judge will decide a case. One must also know the facts of the case, sets of facts that are always unique. Ex ante claims about a judicial outcome is then really about how a judge with such a psychology will engage with such facts to produce the all-important "hunch." But if the daunting complexity of the personalities of individual judges are then multiplied by the radical uniqueness of sets of facts which they are asked to assess, we are lead, Frank argued, to the conclusion that judicial behaviour is after all *not* predictable. The complexities and idiosyncrasies of a particular judge's psychology, combined with the infinitely variable sets of facts that make up a particular case, make it impossible to know precisely how a judge will decide a case, much less how the judge will justify the decision. What a judge will do when presented with a unique set of facts governed by a particular legal regime is thus necessarily shrouded in mystery, except perhaps to a virtuoso and omniscient psychoanalyst. In this way Frank ran counter to the realist tradition: he agreed that the law mostly does not determine cases, but nor do social, political, moral, or other extra-legal factors amenable to study by the social sciences. Reliable predictions of judicial decision *would* be based on the idiosyncrasies of the judge's personality combined with the facts of the case, but the inherent complexity of it all makes these predictions ultimately out of our cognitive reach (Frank 1963: 113-125).[289]

What, if anything, do these views imply about the nature and extent of the free will of judges? Unlike discussions of formalism, realists do not routinely invoke hyperbolic metaphors of judicial freedom or constraint, at least when pursuing their positive research program. Their views, however, are not as easily dismissed as ones entirely unrelated to positions within the free will debates. These otherwise diverse views are unified in a general purpose, indeed the very purpose inherited from Holmes, at once theoretical and practical: to develop a framework sufficient to ground accurate, or at least highly reliable, predictions about how judges will decide cases. These views therefore assume that judicial behaviour is predictable, and we may wonder about the compatibility of that assumption with various positions on free will. It may be thought, for example, that because reliable prediction of judicial behaviour is possible, realists must regard such behaviour deterministically: that it is fully explainable by reference to antecedent causal events. This may suggest a general incompatibilism about judicial freedom. That is, predictability requires the assumption that the causal factors which explain judicial decisions, whether

[289] For example, Frank notes that the relevant aspects of a judge's personality are "innumerable" (1963: 119) and that "no one can know in advance what a judge will believe to be the 'facts' of a case" (1963: 125). In addition to these claims, Frank advocated for judicial discipline to *bring about* uniformity in how judges decide cases, so that they would be more predictable (1963: 35-41). This would seem to suggest that a judge has *control* over her responses to the facts, and so control over the ultimate disposition of the case. Judges would then seem to have free will in some non-trivial sense. Frank, however, never explained how this view is consistent with those described above.

external or internal to the judge's mind, completely determine particular decisions in a way that prevents the judge to exercise control over the decision.

However, it has long been recognized that the mere fact of reliable predictability of the behaviour of a person does not entail that that person does not act freely. For example, we may know intimately the motivations and dispositions of a close friend, such that we may be able to accurately predict things such as what meal she will have or who she will marry, and yet it be the case that the friend chooses freely (Flew 1969). So the mere possibility of prediction does not necessarily lead us to scepticism about freedom. However, if the possibility of *infallible*, rather than only generally reliable, prediction was a part of the realist view, then that may make, e.g., a libertarian theory of free will implausible, as it requires at least the possibility of undetermined choice in regard to certain sorts of actions (Clarke 2003).

One further substantive, albeit negative, connection between realism and commitments about judicial freedom is, perhaps, this. If the 'externalist' causal explanations of judicial decisions – citing factors independent of the judge's mind such as social, political, and commercial norms – are put forth as in themselves complete and sufficient, then that would count against giving certain other kinds of valid explanation of the freedom of the judge. For example, certain incompatibilist accounts of free will, which require that the efficacious factors producing the action to be within the agent, seem incompatible with such purely 'external' explanations of the judicial decisions. More precisely, agent-causal libertarian explanations (O'Connor 2011; Palmer 2014), appear to be strictly incompatible with a realist account of that sort. But as is often the case, the realists' stated positions are not sufficiently precise to pass such categorical judgments on the issue.

There is a related lack of clarity in 'internalist' accounts such as those of Frank and Levi. While each can be interpreted as consistent with indeterminist, agent-causal theories of freedom, Frank often oscillates between implying determinist and indeterminist views. At times, he maintains that study of the psychological profiles of particular judges will yield more reliable predictions about what those judges will do, because the relevant psychological factors fully determines their actions (e.g., Frank 1930: 281-282). At others, he seems to suggest that such factors exhibit a complexity and elusiveness that render their efficacy mysterious, and perhaps for that reason not fully determinative of action.[290] We will return to Frank's views in a moment, after consideration of David Hodgson's theory of free will and how it may explain the freedom of judges, as these two views admit of instructive comparisons.

Hodgson on Libertarian Free Will

In the discussions of formalism and the many variants of realism, we have seen a recurrent contrast between, on the one hand, writers employing the language of freedom and constraint to express their positions about how judges decide cases, and yet, on the other hand, being unclear or ambivalent about the relations between their views on adjudication and substantive philosophical theories of free

[290] "That those jungles of the mind which we are just beginning to discover will soon be reduced to a high state of civilized order is not likely, but that they must ever remain in their present chaotic state is equally far from certain" (Frank 1930: 122). Cf. Robert Kane's application of chaos theory to explain indeterministic neural processes (1999: 128-130).

will as they may apply to the circumstances of the judge. We now turn the views of David Hodgson, who, by contrast, more carefully articulated a theory of free will, while being more circumspect about its significance for a general theory of adjudication.

While Hodgson was, like Frank, an appeals court judge for many years, his philosophical interests were, unlike Frank and the realists, not primarily in the nature of adjudication or the reliable prediction of judicial decisions, but rather in traditional questions of free will. Indeed, in interpreting Hodgson's views, we confront the opposite challenge which we encountered in understanding the realists. That is, we must speculate about how Hodgson's developed libertarian theory of free will may imply or suggest a view about the free will of judges and judicial reasoning that can fruitfully be compared with the formalist and realist views already discussed.

Hodgson was well aware of recent advances in neuroscience over the last couple of decades (2012: 133-142), but was sceptical that those advances show, or could show, that human choice was wholly determined by "highly complex brain activity" (2012: 133). He thought that those advances, though important and illuminating, left room for an incompatibilist, libertarian kind of free will. As a practicing judge, it is perhaps surprising that he never extends his theory of free will to an account of how judges are free to decide cases, though his occasional use of the example of judicial reasoning to explain and illustrate the theory (e.g., 2012: 34-35, 38, 71) are suggestive of the contours of such an account. After briefly explaining his general libertarian theory, I will apply it in the context of judicial decision-making, and then make some observations about how the theory can be understood as a novel contribution to the theory of adjudication.

There are two interrelated claims that form the foundation of Hodgson's libertarian theory of free will. One is that we have conscious experiences, which he takes, in a Cartesian spirit, as virtually undeniable (2012: 10-14). The other is that minds with the capacity for conscious experiences characteristically engage in what he calls 'plausible reasoning' to make decisions about what to believe and do (2012: 37-40). Every type of formalized and deductive reasoning depends on such reasoning, though it is itself is not completely formalizable (2012:45-47). His account of plausible reasoning is intended as an explanation of the role of consciousness in the occurrence of such reasoning, and at the same time an account of how both conscious reasoning and its outputs – choices or decisions – are not completely determined by antecedent events, and for that reason are done or made freely.

The relevant features of conscious, plausible reasoning for our purposes are that such reasoning is *rational*, *non-random*, and yet *indeterministic* (2012: 69-75). Plausible reasoning is *rational* in that it involves the recognition and response to reasons, in the sense familiar to moral philosophers over the last half century (Skorupski 2010: 35-56). There are features of the world (including ourselves, our character, dispositions, and so on) which we can and do recognize as normatively significant, as considerations counting in favour or counting against doing and believing things, such that we can appreciate that significance in our reasoning and reflect that appreciation in our actions and attitudes. Plausible reasoning is *non-random* in the sense that the alternative courses of action which are open to us, constituted and structured by those reasons, in a given circumstance of practical choice are themselves

determined by a set of natural laws operating to cause the physical and psychological circumstances in which we reason and act. Thus, which career options that are open to a person at a given moment of her life, or whether to buy a banana or pear at the market, or whether to go to New York by car or train, and so on, are all menus of practical options which themselves can be explained naturalistically by reference to physical (and psycho-physical) laws. Nonetheless, Hodgson argues that *how* we respond to such options so constituted, that is, how we reach the particular outcomes of plausible reasoning (beliefs, decisions and the actions that execute them), is *not* determined by such laws.

Hodgson argues that the (indeterministic) freedom exhibited in our responses to rational options in plausible reasoning is explained by the (again, indeterministic) role of a specific type of experience, what he calls "feature-rich gestalts of conscious experiences" (2012: 97). These reunique, often counter-to-fact (because characteristically entertained prior to practical choice) combinations of factual circumstances and the reasons arising out of them, which support one alternative over another. As gestalts, they are grasped as complex unities of such facts and reasons, held in the imagination in deliberation as objects of choice. For example, in regard to whether to travel to New York by car or train, various iterations of the price and time of the journey, the differing aesthetic qualities of travel, the efficiency and direction of the route, and so on, all may combine to form a variety of gestalts in deliberation which are candidate objects of choice. Hodgson suggests that the *uniqueness* of these gestalts makes makes our experience of them in consciousness undetermined by the otherwise applicable laws of nature; their singular composition, he thinks, renders our experience of them resistant to nomological explanation (2012: 104-105). Because we can synthesize the complex set of facts and reasons before us in a particular choice situation in robustly unique ways, and respond to those combinations 'appositely' (i.e., according to their rational significance), what we end up doing or believing is, while constrained in terms of the spectra of alternatives we start with, ultimately not determined by the physical laws which determine those spectra, but is chosen freely yet indeterministically.

He illustrates the point with examples of practical reasoning involving artistic creativity. So vhen we assess a painting by Picasso, we grasp the unique combinations of qualities of the painting ("the look of particular faces…the painting's overall appearance"), the experience of which, Hodgson claims, "generally does not engage with computational rules" (2012: 105). While these qualities are subject to explanation in terms of such rules, our engagement with them is reflected in and is productive of our (freely made) appraisal of the painting, an essential part of which is the grasping of just these feature-rich gestalts of our experience of the painting.

Another example is Wagner's composition of *Tristan und Isolde* (2012: 106-7). When Wagner considered what the opening bars of its Prelude should be, he considered unique and unprecedented possible concatenations of notes, rests, and tempos. These combinations admit of causally deterministic explanations, referencing the history of the development of music, the nature of composition, and so on. But just as with Picasso, Wagner's responses to these, Hodgson claims, could not be sufficiently explained by computational rules. The uniqueness of the combination of features prevents such rules from governing Wagner's apposite responses to the gestalt to which he

actually did respond and which appears in the finished work. Hodgson thinks such aesthetic examples exhibit the same libertarian, free choice as in more mundane ones.

Hodgson holds that these features of plausible reasoning are not displayed in every decision to act or adopt a belief. Some actions, for example, we do unconsciously, out of habit, on the basis of "snap" judgments, and so on,[291] but many practical contexts, he thinks, require employing it. The law is just such a context that calls for discursive reasoning: "The superiority of careful conscious reflection over intuitive snap decisions in the type of reasoning with which I am most familiar, namely judicial decision-making, is I believe well established" (2012: 71).

How Judges are Free to Decide Cases

A *judge* therefore is a paradigm case of a plausible reasoner. In deciding a case, a judge has to carefully and deliberately examine the often complex facts of a case, to study the relevant statutory provisions and case law as to their meaning and application, perhaps consider extensive expert and non-expert testimony from witnesses, and patiently and attentively consider arguments from lawyers about what, in their view, the proper outcome of the case should be and why. If serving on an appellate panel, the judge must confer with her colleagues about their views about many of these matters. And more generally, the judge must assess the rational significance of all these things, including the reliability of the factual record, the credibility of the assertions of witnesses and experts, the merits of legal arguments from both the lawyers on each side and the court below, the coherence of those arguments with other legal rules and principles, and so on. According to Hodgson, the most general possible practical alternatives that the judge is presented with (e.g., finding a defendant innocent or guilty, given that certain facts are established or have failed to have been established, or granting or denying a motion to dismiss the case) are determined and circumscribed by natural and physical law-governed processes. The facts which determine these alternatives for the judge include not just the judge's particular psychology but also the state of the legal system, the factual history of the case, the credibility of witness testimony, and much more. But beyond these alternatives so presented, in order to reach a decision, judges as plausible reasoners make use of what we might call conscious *gestalts of justice*. That is, the judge imagines complex scenarios comprised of various combinations of all the factors just mentioned to constitute a menu of practical options. Just as Wagner, when he composed the opening bars of the Prelude to *Tristan and Isolde* (2012: 106), considered various "unique" and "unprecedented" aesthetic wholes of that passage of music, and responded appositely to the one which now forms part of that composition, so too judges consider unique and unprecedented wholes composed of complex combinations of facts, legal materials, and ways in which those materials might apply to those facts, as well as estimations of the credibility of witnesses, of the probabilities of unknown facts being the case (or not), and so on, in order to decide the case in a way that is inexplicable by psycho-physical laws. The ultimate judicial decision is, then, not completely

[291] Cf. Joseph Raz's notion (1999: 71 and 232) of acting for and conforming to a reason 'automatically' and without conscious thought. Both Hart (2012: 139-140) and Warnock (1973: 35) make a similar point in regard to acting on a rule.

determined by the (direct and indirect) operation of physical laws shaping the judge's deliberations, and is genuinely free, as the result of the judge's involvement in producing an undetermined, rational, and efficacious response to the gestalts of justice so constituted by those (natural) laws, specifically the gestalt that represents the decision so taken.

So given this broad outline of a libertarian explanation of judicial freedom, as a direct extension of Hodgson's theory, how might it relate to the theories of adjudication already canvassed? While, as we have seen, the various versions of realism and formalism do not themselves necessarily imply any particular view about free will, we may ask whether, if Hodgson's view of free will is true, whether that would cast doubt on the plausibility of any of these theories of adjudication. Would he be sympathetic to Holmes's recommendation to attend to what the courts actually do as a guide to advising clients? Does he share the realists' optimism that we can discern the causes of judicial decisions, whether it be in the extra-legal social forces influencing judges, or in the particular psychological profiles of judges, or even perhaps as the formalist maintained, in the legal sources themselves?

There are no definitive answers to these questions, but I think that considering the view I have developed on Hodgson's behalf alongside formalism and realism allows us to see that his can be seen as a novel competitor with these views, and so a novel contribution to the theory of adjudication. For the account of judicial reasoning as libertarian, plausible reasoning finds truth in each of these other theories, though departs from them in interesting ways.

Recall the view of (descriptive) formalism, that legal sources completely determine the outcome of cases by mechanically and deductively applying them to a given set of facts. As have construed his theory, Hodgson would deny this, for the simple reason that on his vieew judicial decisions are not completely determined by *anything*, including the applicable legal sources. That is not to say, however, that the law is inert and plays no role in those decisions, as the realists sometimes claim. What the applicable law is in a given case will obviously constrain the spectra of alternative courses of action open to a judge when disposing of a case, but it does so in non-obvious and dynamic ways not recognized by the formalist. For example, the applicable law will contribute to shaping the ongoing strategies of the litigants, its history will constrain the possible interpretations of its meaning, and will constrain generally how the lawyers argue the case, particularly in an appellate context. This will in turn constrain the gestalts of justice the judge will have available in reasoning out what seems to her the proper outcome. So while the law does not completely determine decisions, it will nonetheless be one salient factor in determining the range of possibilities of decision.

What about the (what I have called "external") realists' insistence that social, political, and commercial norms are the causes of the outcomes of cases? The theory of plausible reasoning can concede some truth in this suggestion as well. For these extra-legal causal determinants, just as much as the legal ones, play a role in constraining the alternative courses of official action available to a judge in a particular case. Hodgson clearly recognizes that the reasons that bear on a particular decision often may be multifarious and in fact incommensurable (2012: 38-39). However, Hodgson would disagree with Frank when he claims that the "peculiar traits, dispositions, biases and habits of

the particular judge will, then, often determine what he decides to be the law" (Frank 1930: 119). Hodgson's libertarianism would lead him to respond that even these factors do not fully or completely determine the outcome. However, he would concede that the idiosyncrasies of a judge do often "often determine what he decides" in the limited sense of (partially) determining the possible gestalts of justice, as I have called, which a judge may consciously experience, and from which an undetermined and free choice will result.

As to whether judicial behaviour can reliably be predicted, as was the realists' aspiration, Hodgson again presents a more complex view. Realists assumed that there were factors that could be identified which, taken together at least, could offer an adequate explanation and basis for predicting judicial decisions. Hodgson agrees that given the set of laws of nature, combined with the facts of a judge's psychology, that probabilities could be reasonably assigned to each alternative a judge is faced with in a given case. But his libertarian theory of free will commits him to the view that those probabilities will never approach one. The indeterministic role of conscious gestalts of justice in the reasoning of the judge ensures that, from the point of view of an observer, how a judge decides a case will not be predictable on the basis of any set of conceivable factors, whether internal or external to the judge's mind.

Recall that Frank was the only realists who considered the possibility that judicial decisions were ultimately unpredictable. He thought that if judicial decisions were unpredictable, it was due to the judges' own complex set of psychological idiosyncrasies in responding to the facts of a case, as well as to the innumerable interpretations which a judge may give of the facts themselves. Hodgson, I think, would agree with Frank's claim that judicial decision-making is at bottom an unpredictable matter. But Hodgson and Frank give different explanations for the unpredictability. Frank attributes it to the unknowable depths of the Freudian mind and the infinite variations in fact patterns, whereas Hodgson attributes it to the role of indeterminate gestalts in promoting and facilitating rationality, a role, it seems, which is not explainable by the psychological and cognitive sciences.

Conclusion

Hodgson's libertarian theory of free will, developed in part on the basis of experiences of the kind of discursive, practical deliberation required of judges, suggests a novel account of how judges are free to decide cases. It also raises previously unexplored questions regarding the commitments of earlier views of adjudication in the twentieth century, in particular legal formalism and American legal realism. These views are ultimately unclear about such commitments, but as I have tried to show, they provide useful comparisons to illuminate key features of Hodgson's views. Given the dominance of compatibilism about free will in legal theory over the last several decades, the incompatibilist theory of judicial reasoning which I have only outlined here, based on Hodgson's libertarianism, is a long overdue addition to discussions of free will and the law. While the theory leaves many questions unaddressed, the suggestion of this paper is that it may be developed to occupy a distinctive place in debates across a range of topics in legal philosophy, including within the theory of punishment and adjudication.

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