

JUDICIAL BEHAVIOR AND PERFORMANCE:
AN ECONOMIC APPROACH

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I. INTRODUCTION

In this Essay, I propose that judicial behavior is best understood as a function of the incentives and constraints that particular legal systems place on their judges. The approach is thus an economic one, but it is also commonsensical, has broad empirical support, and, of particular relevance to this Symposium, has strong implications for assessing judicial performance and performance-based criteria for judicial promotion. This Essay contains no original empirical research, but seeks to provide a framework for interpreting and guiding empirical studies of judicial behavior.

An immediate and important implication of the approach is that judicial behavior is likely to differ across national legal systems and indeed within a nation's legal systems to the extent that components of the system (such as the different jurisdictions in the United States) differ in the incentives and constraints that they impose on judges. And still another implication is that the orthodox notion that judges merely interpret and apply law is unlikely to hold in all or even most legal systems. Another is that the criteria of judicial performance are relative to the incentives and constraints that determine judicial behavior. In some judicial systems, a judge's reversal rate might be a critical performance criterion, while in others more weight would be placed on how often a judge's opinions were cited by other courts or even on the political acumen exhibited by the judge in his opinions. It is a mistake to suppose that one performance criterion or set of such criteria should be applicable to all judges. I will pause from time to time in my analysis of judicial behavior to spell

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out in further detail the implications of my approach for performance evaluation.

My starting point in analyzing judicial behavior is the assumption that judges, like other people, are maximizers of their utility.¹ That is, every judge has a utility function and tries to maximize the weighted utility of the arguments (representing preferences or desires) in the function. The utility function of the average person who is not a judge is likely to be dominated by income, leisure, family relationships, work satisfaction, and a concern for personal integrity, reputation, and felt achievement. The judge's utility function is likely to be quite similar, but with somewhat different weights. Most people who seek or accept a judgeship probably derive more utility from leisure and public recognition relative to income than the average practicing lawyer does; the judge is also likely to be more risk-averse, since judicial incomes are lower but also more stable than those of practicing lawyers. Since no one is forced to be a judge, and the job is not to everyone's liking by any means, there is self-selection—itsself reflecting the play of incentives and constraints on human behavior—into the judiciary. And once selection has occurred, the incentives and constraints imposed by the structure and rules of the judicial career influence the judge's behavior—for example, by inducing a greater pursuit of leisure or intellectual satisfaction relative to income—which in turn influences who is interested in becoming a judge.

The possible variations in incentives and constraints that could be brought to bear on judges are well-nigh infinite; to simplify the analysis, I shall analyze the behavior of judges in just a handful of possible configurations (incentive-constraint “packages”): private judges (that is, arbitrators); judges in career judiciaries such as one finds in most countries other than those whose legal systems derive ultimately from England; elected judges, such as one finds in most state courts in the United States; and U.S. federal trial judges, federal intermediate appellate judges (that is, federal circuit judges), and Supreme Court Justices. I will offer predictions based on the rational model of judicial behavior concerning the likely behavior of judges in these different systems and compare my predictions with actual, observed judicial behavior.

II. PRIVATE JUDGES (ARBITRATORS)

Arbitrators are selected by, or with the consent of, the litigants. An arbitrator who gets a reputation for favoring one side or the other

1. See RICHARD A. POSNER, *OVERCOMING LAW* 109-44 (1995) (discussing what judges maximize); Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129 (1980).

in a class of cases, such as cases of employment termination or disputes between investors and brokers or between management and unions, will be unacceptable to one of the parties in any such dispute, and so the demand for his services will wither. We can expect, therefore, a tendency for arbitrators to “split the difference” in their awards, that is, to try to give each side a partial victory (and therefore partial defeat).² For this will make it difficult for the parties on either side of the class of suits in question to infer a pattern of favoritism. What is more, the pattern will be attractive to risk-averse disputants (because it will truncate both the upside and the downside risk of the dispute resolution process) and will therefore help to differentiate arbitration from adjudication. This is important because arbitrators, unlike courts, are not subsidized by the government; their fees and expenses must be defrayed by the disputants. The public subsidy of adjudication places them at a cost disadvantage vis-à-vis the courts. One way to overcome this disadvantage is to offer a distinctive service, and splitting-the-difference decisionmaking is such a service.

Arbitration offers something else attractive to risk-averse disputants: a lower error rate than juries, because arbitrators, when they are not lawyers, are business people who have experience relevant to the case at hand. This advantage is at least partially offset, however, by the fact that arbitration awards cannot be appealed (presumably to reduce the cost of arbitration and thus reduce the cost advantage of the courts), though they can be challenged in court on narrow grounds. Because of that offset, I am inclined to stress the splitting-the-difference character of arbitration in explaining the attractiveness of this substitute for adjudication as well as in elucidating the

2. “[C]ourts and juries are viewed as more likely to adhere to the law and less likely than arbitrators to ‘split the difference’ between the two sides, thereby lowering damages awards for plaintiffs.” *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 693 (Cal. 2000); see also Bruce L. Benson, *Arbitration*, in 5 *ENCYCLOPEDIA OF LAW AND ECONOMICS: ECONOMICS OF CRIME AND LITIGATION* 159 (Boudewijn Bouckaert & Gerrit De Geest, eds., 2000); Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 *LAW & CONTEMP. PROBS.* 105, 114-18 (2004); Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers’ Paradox in Responding to Hostile Environment Sexual Harassment—A Proposed Way Out*, 67 *FORDHAM L. REV.* 1517, 1565 (1999) (finding that arbitrators alter “almost half” of the prior punishments in sexual harassment cases that come before them); Alan Scott Rau, *Integrity in Private Judging*, 38 *S. TEX. L. REV.* 485, 523 (1997); Donald Wittman, *Lay Juries, Professional Arbitrators, and the Arbitrator Selection Hypothesis*, 5 *AM. L. & ECON. REV.* 61, 81 (2003) (“[A]rbitrators tend to split the difference and consequently are much more likely [than civil juries] to find a verdict in favor of the plaintiff.”); Jane Spencer, *Waiving Your Right to a Jury Trial*, *WALL ST. J.*, Aug. 17, 2004, at D1. But there is some support for the belief in findings that there is less variance in arbitrators’ awards than in jury awards. See Drahozal, *supra*, at 118. Since the lower end of the range of possible awards is truncated at zero, a reduction in variance is likely to reduce the average award. That would supply a motive for the contract party who was more likely to be sued than to sue for breach of contract to want an arbitration clause in the contract.

behavioral effects of privatizing judging, rather than to emphasize the more conventional differences between adjudication and arbitration.

Evaluating the performance of arbitrators is difficult, especially when, as is the common practice in commercial as distinct from labor arbitration, they do not write opinions. Although arbitration awards cannot be appealed, they can be challenged in court, on narrow grounds as I said; but presumably arbitrators whose awards are repeatedly vacated by the courts lose business, as judicial invalidation of the award creates added delay and expense for the parties, who, remember, bear the entire cost of arbitration. Also, lawyers observe the demeanor of the arbitrator in the hearings before him, and of course the outcome of the arbitration, and they form judgments, which they pass on to their clients, concerning the competence and biases (if any) of particular arbitrators.

III. CAREER JUDICIARIES: HEREIN OF THE ECONOMICS OF BUREAUCRACY

The career judiciaries found in countries whose legal systems do not have an English origin are, as the term “career judiciary” implies, systems manned by lawyers who make an entire career of being a judge.³ In contrast, most U.S. (and other Anglo-American) judges become judges only after a career in some other branch of the legal profession, such as private practice, prosecution, or teaching. In the U.S. federal judiciary, the average age of appointment to the district court has, since Harry Truman’s Presidency, varied from forty-nine to fifty-three, while that of circuit judges has varied from fifty to fifty-six.⁴ Obviously a lawyer first appointed to a judgeship in his forties or fifties is embarking on a second career.

A career judiciary is a part of the civil service. Appointment and promotion are by merit. Promotion is a critical feature of career judiciaries because a fresh law school graduate will naturally occupy the

3. See, e.g., Nicholas L. Georgakopoulos, *Discretion in the Career and Recognition Judiciary*, 7 U. CHI. L. SCH. ROUNDTABLE 205 (2000) (comparing “career” and “recognition” judiciaries); J. Mark Ramseyer & Eric B. Rasmusen, *Judicial Independence in a Civil Law Regime: The Evidence from Japan*, 13 J.L. ECON. & ORG. 259 (1997) (offering an empirical study on the incentives facing members of the Japanese judiciary—a career judiciary system).

4. Albert Yoon, *Love’s Labor’s Lost? Judicial Tenure Among Federal Court Judges: 1945–2000*, 91 CAL. L. REV. 1029, 1048 n.70 (2003). These are, I stress, averages. There is considerable variance on both sides. I was only forty-two when appointed (with no prior judicial experience) to the U.S. Court of Appeals for the Seventh Circuit; my colleague Frank Easterbrook was only thirty-seven when he was appointed; and some circuit judges have been appointed, again with no prior judicial experience, in their sixties, though this is rare. Although some newly appointed or promoted federal judges have prior state or federal judicial experience (in particular, a substantial minority of federal court of appeals judges are promoted from the district court), most do not.

lowest rung of the judicial ladder when first appointed and will expect to rise to more responsible positions as he gains experience. I cannot see any important difference between a career judiciary and any other professional civil service, such as the diplomatic service or the armed forces. So the analysis of judicial behavior in a career judiciary should be essentially the same as the analysis of bureaucratic behavior in general, while bureaucratic behavior, in turn, should be similar though not identical to the behavior of employees in a large business firm; and let me start with that similarity.

The economic difference between an employee and an entrepreneur, in the sense of an independent business person, is that the employee does not sell his output; rather, he rents his labor to the employer. The employer tries to value each employee's output but recognizes that because the output of a firm is a team effort, only rough estimates are possible. And because of that roughness, the problem of agency costs arises: that is, the incentive of the employee or other agent to shirk if the cost to the employer of detecting some amount of shirking is greater than the benefit of preventing that shirking. The difficulty of valuing the employee's output leads employers to adopt proxies for that value, such as the employee's credentials and other input information, including the number of hours he works and the number of mistakes he makes. In general, the more costly it is to evaluate an employee's output, the more inclined the employer will be to substitute evaluation of inputs, such as credentials, hours, and care. These are costly as well as imperfect substitutes, and on both accounts one expects some shirking to remain uncorrected; stated differently, agency costs are unlikely to be eliminated entirely.

An obvious difference between a corporate and a government bureaucracy is that it is much more difficult to value the latter's output and therefore the value contributed by the individual bureaucrats. This increases agency costs, which in turn implies that the agents (the government bureaucrats) will have greater scope for pursuing their private ends than the employees of business firms. One private end is leisure; so one form that agency costs take in a bureaucracy as in a business firm is shirking. But in addition—and here we come upon a subtler difference between behavior in the two types of bureaucracy—the ideological character of the missions of many government agencies, in contrast to the strictly financial character of the profit-maximization goal of business firms, implies that agency costs in a government bureaucracy will take the form not only of shirking but also of "sabotage." That is, employees will have a tendency to re-

define the agency's mission to coincide with their personal ideological goals.⁵

This is certainly a tendency of a judicial bureaucracy, given the political and ideological significance of adjudication. But there are proxies for minimizing these agency costs that resemble those employed by business firms. Credentials are one: grades in law school are a proxy, though like most proxies a rough one, for ability to perform well as a judge, which is one factor in the likelihood of actually performing well. Although the ultimate output of a judiciary—something that might be termed “legal justice”—is extremely difficult to value, the performance of a judge can be proxied by such things as backlog, reversal rate (consideration of which acts as a check on a judge's minimizing his backlog by overly hasty decisionmaking—more on this later⁶), judicial demeanor, complaints by litigants and lawyers, and, in a career judiciary, the quality of the judge's rulings as evaluated by his superiors in the judicial bureaucracy.

One of the most important devices by which bureaucracies minimize agency costs is by laying down detailed rules for the bureaucrats to follow, since conformity to a rule is easier to determine than whether the bureaucrat is creative, innovative, imaginative, and so forth. Hence we expect and find that career judiciaries are found in legal systems that rely heavily on detailed codes rather than on the looser standards that are characteristic of common law systems. When a code sets forth a legal rule with great specificity, it is relatively easy to determine whether the judge is applying the code correctly; judicial agency costs are therefore minimized.

A career judiciary can be expected to be methodologically conservative and therefore unadventurous. Promotion in a career judiciary as in any other branch of the civil service depends ultimately on one's ability to perform to the satisfaction of one's superiors, and it is difficult to see how the supervisors in a career judiciary will benefit in their own careers from having bold, experimentally minded subordinates. It is not like a business firm, in which a division head's hard-driving, innovative subordinates may produce increases in revenues and profits that will redound to his credit for having selected and encouraged those subordinates. Thus, we can expect the output of a career judiciary to display low variance, to be of uniformly professional

5. See, e.g., JOHN BREHM & SCOTT GATES, *WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC* (1997); Lael R. Keiser, *The Determination of Street-Level Bureaucratic Behavior: Gate-Keeping in the Social Security Disability Program* (unpublished manuscript, presented at the National Public Management Research Conference, Georgetown University, Oct. 9-11, 2003), available at <http://www.pmrnet.org/conferences/georgetownpapers/keiser.pdf> (last visited Mar. 31, 2005).

6. See *infra* text accompanying notes 16-18.

quality, but to be uncreative.⁷ It is no surprise that legal academics in nations that have career judiciaries are treated not merely as commentators on the law, as in Anglo-American legal systems, but as sources of law; the judges are unwilling to play such a role. With the structure of the judicial career and the heavy reliance placed on legal codes and treatise writers as sources of law, performance criteria that emphasized intellectual creativity and independence, political acumen, or even pragmatic insights into “law in action” would be misplaced. A judge who excelled in such dimensions would be stepping out of his designated role.

IV. PROMOTION PROSPECTS: CAREER VERSUS LATERAL-ENTRY JUDICIARIES

I have emphasized the role of promotion in constraining the behavior of judges in career judiciaries. In contrast, promotion is of limited significance in an Anglo-American-style lateral-entry judiciary. Most judges are not promoted at all, partly because judges tend to be appointed at a relatively advanced age, partly because there are very few rungs in the judicial ladder in most Anglo-American judiciaries, and partly because previous judicial experience is not required for appointment to even the highest rung. For example, although in the U.S. federal court system a significant fraction of intermediate appellate judges are appointed from the trial bench, most are not; and because there are many fewer appellate than trial judges, the great majority of district judges are not promoted.⁸ What is more, the salary and prestige differences between district and circuit judges are small, though the workload is lighter in the appellate court. And while at present almost all the Supreme Court Justices were federal circuit judges previously, there are so few Justices, and they serve for such a long time, that the percentage of federal court of appeals judges who

7. John Henry Merryman has noted that the civil law judge is a kind of expert clerk. He is presented with a fact situation to which a ready legislative response will be readily found in all except the extraordinary case. His function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union. The whole process of judicial decision is made to fit into the formal syllogism of scholastic logic. The major premise is in the statute, the facts of the case furnish the minor premise, and the conclusion inevitably follows.

JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 36 (2d ed. 1985); see also Georgakopoulos, *supra* note 3, at 212 (noting that incentives faced by members of a career judiciary tend to discourage innovation); John Henry Merryman, *The French Deviation*, 44 *AM. J. COMP. L.* 109, 116 (1996) (discussing these effects as found in the French judiciary).

8. See Daniel Klerman, *Nonpromotion and Judicial Independence*, 72 *S. CAL. L. REV.* 455, 461 (1999) (“[T]he probability that a district court judge serving during the 1990s would be promoted to the court of appeals was only six percent.”).

becomes Supreme Court Justices is minuscule. Furthermore, while merit is not completely irrelevant to promotion in the federal court system (even promotion to the Supreme Court,⁹ where political criteria dominate), it is not the dominant factor. In particular, the higher judges do not decide who among the lower judges shall be promoted. The result of all these factors is that promotion prospects cannot be expected to play a significant constraining effect on the behavior of American judges, in sharp contrast to the situation in a career judiciary. We must look elsewhere for the constraints.

V. ELECTED STATE JUDGES

The elected judiciaries of the U.S. states—and most of the states use some form of election to choose all or most of their judges—provide a striking contrast to the foreign career judiciaries. An elected judge is subject to constraints that have only attenuated counterparts in other types of judiciary. The first and most obvious is that, provided he is elected for only a limited term and therefore must stand for reelection, he is subject, as a tenured federal judge is not, to a form of performance review.

Second, and closely related, the elected judge has to be more sensitive to public opinion than a judge whose tenure does not depend on the whim of the electorate. Only a handful of cases, primarily those involving notorious crimes, will interest a significant portion of the electorate, but in those cases we can expect a systematic bias to creep in. For example, because only the most egregious murders are eligible for capital punishment, judges in a state that has capital punishment may tilt against capital defendants.¹⁰ In addition, we can expect elected judges to tilt more than appointed ones in favor of a litigant who is a resident of the judge's state when the opposing party is a nonresident.¹¹

What this means is that the evaluation of judicial performance in a system of elected judges is likely to be far different from that in a career judiciary. The electorate and one's judicial superiors are very different types of performance evaluators with respect both to knowledge and to the criteria employed in the evaluation. Nevertheless,

9. See Lee Epstein et al., *The Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court*, 32 FLA. ST. U. L. REV. 1145 (2005).

10. Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 792-96 (1995). Consistent with this conjecture, the shorter the average term of judges in a state, the more likely they are to impose the death penalty. Paul R. Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 J. POL. 1206, 1219-21, 1223 (1997).

11. For evidence, see Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157 (1999).

and notwithstanding all the criticisms that are made of judicial election, having to stand for reelection must have some effect in keeping judges on their toes, and there is no corresponding stick in the case of U.S. federal judges.

Third, the judge has to be able to raise money to conduct his electoral campaign, and the primary donors to judicial election campaigns are the lawyers who litigate in the judge's court. If the lawyers on both sides in the principal practice areas—such as lawyers for medical malpractice patients and lawyers for medical malpractice defendants—gave equal amounts of money to judicial candidates, the situation would be much like that regarding arbitrators: the judge would have an incentive to steer a middle course in his rulings in such cases. But in fact the stakes in particular practice areas are often systematically asymmetrical, and in that event an elected judiciary is likely to display a systematic bias.

Putting these points together, we can see that elected judges are less independent politically than appointed ones, especially appointed judges with lifetime tenure.¹² Yet this is not necessarily a bad thing, not only because of the spur to effort that not having tenure can impart, but also because the decisions of elected judges tend to be more predictable than those of appointed judges.¹³ This is consistent with, maybe even entailed by, the fact that elected judges are less independent; the independent judge is likely to have a more complex decision calculus, since he cannot just put his finger to the political wind. And as long as the populist element in adjudication does not swell to the point where unpopular though innocent people are convicted of crimes or other gross departures from the rule of law occur, conforming judicial policies to democratic preference can be regarded as a good thing in a society that prides itself on being the world's leading democracy.

This point underscores the intimate relation between judicial behavior and judicial performance. If (and maybe it is a big if) one takes the existence of an elective judiciary to signify a legitimate democratic preference for aligning judicial and popular attitudes more closely than in a nonelective system, then a judge who defies public opinion is not only a judge unlikely to be reelected; he is, it can be argued, however paradoxically, a bad, even a usurpative, judge. The other side of this coin, however, is that the more uniform is public opinion, the more important judicial independence is in safeguarding

12. For additional evidence, see Brace & Hall, *supra* note 10. See also F. Andrew Hanssen, *Is There a Politically Optimal Level of Judicial Independence?*, 94 AM. ECON. REV. 712, 717 (2004) (providing references).

13. See F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205, 231-32 (1999) (suggesting that greater uncertainty is a cost of judicial independence).

minority rights. Thus Andrew Hanssen finds that judicial independence is most likely to be valued where political competition is intense, because “[b]y establishing an independent court, politicians currently in office make it more difficult for successors to alter the policies passed today.”¹⁴

Oddly, although an elective judiciary is more democratic than an appointive one in the Anglo-American setting, it is not more democratic than a career judiciary in legal systems that do not have an Anglo-American origin. When legislative codes are detailed and judges are formalists in the sense of enforcing the codes as written rather than using them as merely the starting point for the development of legal standards, the democratic legislature is calling the legal tune and the judges really are just executing decisions made by democratic process.

A further, and I think clearly adverse, effect of an elective judiciary is that it limits the field of selection. Most people are temperamentally unsuited for electoral politics and in any event are not good at it, though they may have just the suite of abilities required in an excellent judge. The number of people who have both political and judicial talent (and taste—a judicial career is likely to attract risk averters, and a political career risk takers) is probably very small, and there may even be a degree of incompatibility between the two kinds of talent. The list of failed politicians who went on to become fine judges is, I believe, longer than the list of successful politicians who became fine judges, though I have not been able to document this point.¹⁵ But assuming it is correct, we can expect that other things being equal, an elective judiciary will be less able than an appointive one¹⁶—unless, to repeat a previous point, conformity to popular opinion is deemed a plus rather than a minus in a judge. Of course, other things may not be equal; in particular, lifetime tenure may, as I suggested earlier, have a debilitating effect on effort. The other side of this coin, however, is that lifetime tenure is a highly valuable asset, which increases the real income of federal judges relative to state judges and so contributes to making a federal judgeship more coveted, broadening the field of selection.

14. Hanssen, *supra* note 12, at 726; see also J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994).

15. All that is clear—and surprising—is that in a large sample of federal judges, forty percent had held some kind of political office before becoming a judge, and twenty-seven percent of those (so roughly ten percent of the total) had held elected office. *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, 69 B.U. L. REV. 731, 755-56 tbl.9.1 (1989).

16. For evidence, see Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 1984 AM. B. FOUND. RES. J. 345 (1984).

VI. FEDERAL DISTRICT JUDGES

Thus far in my analysis the question of judicial behavior has not presented many mysteries. The incentives and constraints facing judges in the systems that I have been discussing are generally rather similar to those playing on more conventional economic actors. The picture changes when we turn to the appointed, life-tenured trial judges of the U.S. federal judiciary. For the typical district judge, as I pointed out earlier, the appointment is terminal: the judge is unlikely to be promoted and therefore unlikely to be constrained in his rulings by desire for promotion. He is also unlikely to resign and go into the practice of law or into some other line of work, even after reaching retirement age; most federal judges prefer to take senior status then, which allows them to judge part-time yet receive their full salary. And only criminal or other egregious misconduct or incapacity will get the judge removed involuntarily. Moreover, not only is the judicial salary the same for all district judges—there are no bonuses for outstanding performance—but a judge's ability to cash in on his judicial reputation by moonlighting as a teacher or lecturer is very limited, as there are strict, low caps on outside earned income, other than book royalties. It seems, then, that the federal judicial career has been carefully designed to insulate the judges from the normal incentives and constraints that determine the behavior of rational actors, except for the relative handful of judges who are ambitious for promotion to the court of appeals; and I shall ignore them. So it is as if the federal judicial career had been configured to perplex economists!

The mystery is at the practical rather than the theoretical level. Most decisions that a person makes have no greater impact on his utility than the decision of a judge has on the judge's utility. A person faced with a choice between two nearly identical items on a menu, such as a choice between two flavors of ice cream, cannot base the choice on the effect on his income or job security, yet his choice will be rational: it will be the choice that generates a larger net increment in his utility. But it may be very difficult to figure out *why* that particular choice is the one that has that consequence. And so it is with judges. The decision of a federal district judge will not affect his income or job security, but it will affect his utility in some other way—the question is in what way. The difference between this and the ice cream case is that the effect of the judicial decision on the judge's utility cannot be reduced to a single dimension, such as taste. Deciding a particular case in a particular way might increase the judge's utility just by the satisfaction that doing a good job produces, which is what we would like. But it might also do so by advancing a political or ideological goal, economizing on the judge's time and effort, invit-

ing commendation from people whom the judge admires, benefiting the local community, getting the judge's name in the newspaper, pleasing a spouse or other family member or a friend, galling a lawyer whom the judge dislikes, expressing affection for or hostility toward one of the parties—and the list goes on and on.

Not only is there no effective mechanism for punishing a judge who yields to such temptations; that he has yielded can in most cases not even be detected. A judge's broad discretion in managing the timing and scope of the litigation before him, in ruling on objections to evidence, and in resolving factual disputes enables him often to so influence the factual premises of the decision that it will appear to proceed ineluctably from the facts. The process by which some facts are highlighted and others ignored or given little weight need not reflect a conscious endeavor to make the judge look good and reduce the likelihood of reversal. It may simply be the consequence of uncertainty opening the way to bias. If an arresting officer says one thing and the person he arrested says something else, the judge's decision as to which one to believe is likely to be influenced, sometimes decisively, by the judge's background (was he a prosecutor before he became a judge? a defense lawyer?). Similarly, if one thinks back to the extraordinary variance in federal sentences that prevailed before the promulgation of the federal sentencing guidelines, one will find it difficult to resist the inference that the most important considerations in fixing a defendant's sentence within the limits permitted by law had nothing to do with legal analysis but everything to do with the judge's attitudes toward personal responsibility and toward the deterrent effect of criminal punishment.

An employer who cannot evaluate an employee's output directly will, as I noted earlier, tend to base hiring, salary, promotion, and firing decisions on observable inputs instead, that is, on *ex ante* signals of quality. So one expects—and finds—that the more secure the tenure of the judges in a particular legal system, and hence the more difficult it is to control their behavior, the more careful will be the screening for the job by the appointing authorities; there will also be more competition for it, which will widen the field of selection and generate greater information for those authorities. Assuming that people have generally stable preferences and that behavior has a strong habitual element, the older a person is when he is appointed to a job, the more predictable his performance in it will be. A lawyer who has performed successfully for many years in practice, demonstrating qualities of sobriety, good judgment, integrity, and other attributes that are important in a judge, will probably continue to display those qualities when the carrots and sticks of a legal practice are withdrawn. It is like firing a gun: the position and rifling of the gun's barrel impart direction to the bullet, but momentum takes over in

guiding the bullet once it leaves the barrel, though wind or other environmental disturbances may deflect it from its initial path. In much the same way, psychological momentum may cause a judge to behave consistently with his previous behavior as a practicing lawyer or prosecutor or professor even though he is freer in his judicial position from financial incentives and constraints than in his prior positions.

Moreover, the fact I have been stressing—that when gross incentives and constraints are removed, a space is created for ones normally of only minor significance to determine the individual's behavior—has an upside as well as a downside so far as conforming judicial behavior to social norms is concerned. People care about their reputation apart from purely instrumental effects; that is why rank orderings and prizes have psychological effects distinct from any career effects of being singled out from one's fellows. For example, federal district judges are sensitive to the quarterly statistics compiled by the Administrative Office of the U.S. Courts showing how many cases the judge has had under advisement for more than a specified length of time—so sensitive that judges will sometimes dismiss cases at the end of a reporting period, with leave to reinstate the case at the beginning of the next reporting period, in order to improve their statistics. Judges also do not like to be reversed,¹⁷ even though a reversal has no tangible effect on a judge's career if he is unlikely to be promoted to the court of appeals in any event.¹⁸ Because judges are sensitive both to backlog and to reversal—neither allowing their backlog to grow to inordinate length merely to reduce the probability of reversal nor allowing their reversal rate to soar merely to eliminate their backlog by making precipitate rulings—they are constrained to exercise a kind of care that is analogous to that of judges in a career judiciary.

This is a neglected point, so let me elaborate on it a bit. District court judges have heavy dockets; a judge might well have 500 cases pending before him. Most of these will settle or be abandoned without judicial intervention; but enough will remain that require court action to induce the judge to attend to them, lest his backlog become completely unmanageable. And yet he cannot be completely summary in disposing of these cases because then his reversal rate will rise to an embarrassing level. So backlog pressure keeps him working hard, and reversal threat keeps him working carefully.

17. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 77-78 (1994) (explaining why judges do not like to be reversed on appeal); Higgins & Rubin, *supra* note 1, at 130; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 541 (2001).

18. In addition, Higgins and Rubin found that reversal rate has no effect on a judge's chances of promotion. Higgins & Rubin, *supra* note 1, at 135-36.

But the result is a band, not a point; within the band the judge has discretion—greater discretion than that enjoyed by judges in career judiciaries. Therefore, one expects that personal factors—such as political or ideological concerns personal to the judge rather than embodied in the law, the kind of intellectual laziness that consists of acting on intuition rather than on analysis and evidence, and the delights of tormenting the lawyers that appear before them¹⁹—will play a larger role in federal district judges' decisions than they play in the decisions of their counterparts in career judiciaries. Tormenting the lawyers perhaps especially plays a larger role because it neither affects the judge's reversal rate nor increases his backlog; on the contrary, it will reduce his backlog by inducing more settlements. In short, judicial agency costs—the costs of controlling judicial behavior—are higher in a system in which judges have secure tenure and identical salaries than in one in which their careers depend on their ability to satisfy their superiors' expectations. When agency costs are higher, the agent has more discretion to pursue his own goals whether or not they coincide with his principal's goals.

It is important to distinguish, however, between judicial agency costs and political judging. The many studies which confirm—what everybody knows but orthodox legal thinkers are loath to acknowledge—that the political party of the appointing President is a good predictor of a judge's votes in a wide variety of cases²⁰ shows nothing more than that there is a large open area in American law, that is, an area in which conventional legal materials do not dictate the outcome and the judge is forced to make a policy judgment, inevitably influenced by political or ideological preferences. The judge may still be a faithful agent of the President who appointed him or, to the extent that political preferences (not partisan preferences but preferences concerning public policy) are legitimate tools of adjudication, of “the law.” The problem of agency costs arises only when the looseness of the principal's control over the judge enables the latter to make decisions driven by a preference that is too personal, partisan, or idiosyncratic, to be legitimate.

19. See, e.g., Steven Lubet, *Bullying from the Bench*, 5 GREEN BAG 2D. 11 (2001).

20. See, e.g., ROBERT A. CARP & RONALD STIDHAM, *JUDICIAL PROCESS IN AMERICA* 294 tbl.10.1 (5th ed. 2001); C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 24-57 (1996). This of course is true of American judges in general, not just of federal district judges. See, e.g., Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004). However, in a large sample of civil rights cases at the district court level, Orley Ashenfelter and his colleagues found some effect of race and gender but none of the political party of the appointing President. Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995). For a useful review of the literature, see Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219 (1999).

Similarly, the fact that judicial decisions are sometimes influenced by the race, religion, gender, or other personal characteristics of the judge²¹ need not be an effect of agency costs, but may merely reflect the fact that people from different backgrounds are likely to bring different priors to their resolution of factual issues and to have different policy preferences because of differences in life experiences.

VII. FEDERAL CIRCUIT JUDGES

The analysis of federal circuit judges is broadly similar to that of district judges but with four main differences. First, the dual constraints imposed by backlog pressure and reversal threat are attenuated. The caseloads of circuit judges are lighter than those of district judges, so the threat of an unmanageable caseload looms less ominously; moreover, once a case has been argued to the appeals panel, there will be no further activity in the case until it is decided, which means that the size of the backlog does not affect the workload of the appellate judge, as it does of the district judge. And so few court of appeals decisions are reviewed by the Supreme Court that the threat of reversal cannot operate as a significant constraint on circuit judges' decisions—and for the additional reason that many reversals by the Supreme Court reflect ideological differences rather than error correction (and therefore explicit or implicit criticism); this is less true of reversals of district judges.

Second, because appellate judges sit in panels rather than by themselves, there is a premium placed on cooperative behavior; the downside is the risk of factions and (though I believe this is quite rare in the federal judiciary) of log rolling (that is, vote trading).

Third, appellate judges have a greater opportunity to influence the direction of the law, on the model most famously of Learned Hand, than trial judges do. One reason for this greater opportunity—apart from the obvious one that appellate adjudication focuses far more than at the trial level on general issues of law rather than on factual or procedural issues specific to the particular case—is that, as I have just noted, the Supreme Court reviews only a minute percentage (currently less than one percent) of court of appeals decisions. Entire fields of law are left mainly to the courts of appeals to shape. Many court of appeals judges are not ambitious enough to influence the direction in which the law will evolve or to acquire the kind of reputation that court of appeals judges like Learned Hand and Henry Friendly acquired; and because the risk of reversal is so much lower,

21. See, e.g., Gerard S. Gryski et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143 (1986); Darrell Steffensmeier & Chester L. Britt, *Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?*, 82 SOC. SCI. Q. 749 (2001).

and the reward for creative legal thinking greater, at the court of appeals than at the district court, we can expect these judges to weight leisure more heavily, and to vote their personal preferences more often than district judges do. Like trial judges, and indeed more easily, appellate judges can conceal the role of personal preferences in their decisions by stating the facts selectively so that the outcome seems to follow inevitably or by taking liberties with precedents.

As for the minority of ambitious appellate judges (their ambition manifested for example in their often fierce competition to obtain the ablest law clerks²²), the principal constraint is stare decisis, that is, the practice of adhering to precedent. In a rational-actor analysis, the constraining effect of precedent comes not from the fact that stare decisis is a sound policy but from the fact that a judge's influence is dependent to a significant degree on his decisions being treated as precedent by other judges. If he is cavalier about adhering to precedent in his own decisions, he undermines the practice of stare decisis in general and the likelihood that his own decisions will be followed by other judges in particular.

Another, though overlapping, minority of court of appeals judges should be mentioned: those who by reason of prominence, political connections, race or ethnicity, or other factors have a real shot at being appointed to the Supreme Court. With very rare exceptions, the probability that a given court of appeals judge, however well placed he seems in the competition to be appointed to the Supreme Court, will actually be appointed is low; but if the judge attaches enormous value to being a Supreme Court Justice, the expected utility of such an appointment (most simply, the utility of the appointment multiplied by its probability) may influence behavior. Thus, a study found that after Robert Bork's nomination to the Supreme Court failed, in part because of his extrajudicial writings (the largest component of the "paper trail" that did him in), the publication rate of court of appeals judges, after adjustment for other factors, declined precipitately.²³

A fourth factor that differentiates circuit from district judges builds on the earlier suggestion (fundamental to this Essay) that when gross incentives and constraints on behavior are removed, smaller ones can be expected to have a decisive effect. It is that professional criticism of judicial decisions can be expected to place some limitations on the exercise of judicial discretion and more so at the appellate than at the trial level. The principal product of appellate

22. See Christopher Avery et al., *The Market for Federal Judicial Law Clerks*, 68 U. CHI. L. REV. 793 (2001).

23. S. Scott Gaille, *Publishing by United States Court of Appeals Judges: Before and After the Bork Hearings*, 26 J. LEGAL STUD. 371, 375-76 (1997).

judges is the judicial opinion, and judicial opinions are self-contained (or at least self-contained-appearing) texts readily accessible to professional critique. However, present-day professional criticism of judicial opinions is so heavily discounted by most judges as to have little influence on their behavior, and thus it fails as an effective constraint on judicial discretion.

The reasons for this discounting are threefold. There is first a sense among judges that academics and practicing lawyers alike simply do not understand the conditions under which judges work and that much of their criticism of judicial performance is therefore captious, obtuse, and unconstructive. Second, rather than being disinterested, a great deal of the current professional criticism of judicial opinions reflects either client interests (in the case of criticism by practicing lawyers, even when expressed in books or articles) or, in the case of academic criticism, the politics of the professor. Third, and related to the second point, critique of judicial opinions emphasizes opinions of the Supreme Court to the virtual exclusion, or so it seems, of opinions of the lower courts, even though those opinions vastly outnumber Supreme Court opinions. Of course, treatises and law review articles dealing with areas of the law in which the Court is not active are perforce concerned with the work of the lower federal courts. But there is a great difference, so far as professional criticism as an influence on judicial behavior is concerned, between citing a judicial opinion for some proposition and analyzing the opinion in depth.

The relation of the third point to the second lies in the fact that to a great extent the Supreme Court—especially in its constitutional decisions—which are the particular focus of critique—is a political court, so that the critique of its work is also to a great extent unavoidably political, creating the impression that the nation's law faculties have become increasingly politicized.

The fact that conventional professional criticism of judicial opinions is faltering badly as a constraint on the behavior of federal circuit judges makes the development of quantitative criteria of judicial performance, which have received emphasis in this Symposium, a welcome one. Such criteria are less likely than the conventional verbal standards applied to judicial performance to be dismissed as political and are also more economical because statistics can compact a vast amount of information, as discursive critique cannot. But five caveats are in order.

First, judicial performance criteria should not be uniform across courts and judges; such criteria as backlog and reversal rate should, for reasons indicated earlier, play a larger role in the evaluation of district judges than of circuit judges.

Second, as explained below, even first-rate performance criteria may not be useful for determining whether a judge should be promoted.

Third, as with any numerical ranking system there is a danger that the competitors will be able to “game” it.

Fourth, as illustrated by the performance criteria for circuit judges that have received the most attention, such as out-of-circuit citations²⁴ or the more inclusive quantitative ranking scheme developed and applied by Choi and Gulati,²⁵ the choice of criteria depends on assumptions about the incentives and constraints that operate on circuit judges. The criteria just mentioned measure influence and prominence (for example, one of Choi and Gulati’s performance criteria is the number of times a judge is mentioned by name,²⁶ and in another study Gulati and Sanchez rank judges by the number of their opinions published in casebooks²⁷), implicitly treating judicial creativity as a desirable characteristic of circuit judges. Not everyone will agree; and it would be a particularly dubious assumption to apply to career judges and, to a lesser extent, to any trial judges and any elected judges, as well.

And fifth, as critics of the *U.S. News and World Report’s* ranking of colleges and law schools are well aware, numerical rankings are questionable when the rankings are multidimensional, so that the weighting of the different dimensions becomes critical to the rankings. Those weightings tend to be arbitrary. The problem is particularly serious with respect to the ranking of judges, because there is no agreement on what are the most important aspects of judicial performance. If you happen to think that lucidity is an extraordinarily important virtue of a judicial opinion, this will affect your weighting relative to someone who thinks that explaining carefully to the losing party why he lost, or discussing even minor issues, or stating the facts in comprehensive detail, is a more important virtue in a judicial opinion.

I should note that Choi and Gulati do not use reversal rate as a performance criterion for circuit judges. That may seem a surprising

24. For the most complete study, see William M. Landes et al., *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271 (1998).

25. Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23 (2004) [hereinafter Choi & Gulati, *Choosing the Next Supreme Court Justice*]; see also Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299 (2004) [hereinafter Choi & Gulati, *Tournament of Judges*].

26. Choi & Gulati, *Choosing the Next Supreme Court Justice*, *supra* note 25, at 59; see also David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 J. LEGAL STUD. 371 (1999).

27. Mitu Gulati & Veronica Sanchez, *Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks*, 87 IOWA L. REV. 1141 (2002).

omission. However, reversal rate and creativity are likely to be positively correlated, since a judge who is creating precedents rather than just following them can be expected to be reversed more often than the unadventurous judge.²⁸ (The analogy is to the fact that home-run hitters tend to strike out more often than singles hitters.) Moreover, the effect of reversals is captured automatically in one of the performance criteria that Choi and Gulati emphasize—frequency of citation to a judge—because a decision that is reversed is highly unlikely to be cited.

VIII. THE SUPREME COURT

When we turn to the U.S. Supreme Court, the picture changes once again. Reversal risk falls to zero, but there is still a constraining effect from *stare decisis* and the possibility of political retribution in the form of legislation (in the case of statutory decisions) or constitutional amendments (in the case of constitutional decisions) nullifying an unpopular decision;²⁹ political retribution can also take the form of low-level harassment by congressional budget committees,³⁰ and can come from the prospect of the appointment of new Justices, when vacancies arise, who will be unsympathetic to the existing ones. Indeed, because of the high visibility of the Court's decisions, the political constraints operating on the Justices are probably greater than those that operate at lower levels of the federal judiciary. But the combination of those constraints with the lack of guidance that conventional legal materials provide in truly novel cases, which bulk disproportionately large in the Court's docket, makes the Supreme Court importantly a political body³¹—much more so than the lower federal courts—so that analysis of the behavior of the Justices should parallel that of the behavior of conventional political actors, as is frequently argued.³² Yet they cannot be evaluated entirely by that stan-

28. See Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEHAV. & ORG. 31 (1994).

29. See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (discussing and providing empirical evidence on Congress's role in overriding Supreme Court statutory decisions and the extent to which these practices affect Supreme Court decisionmaking). For a more skeptical view of the importance and existence of these effects, see Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1451-59 (2001).

30. Eugenia F. Toma, *A Contractual Model of the Voting Behavior of the Supreme Court: The Role of the Chief Justice*, 16 INT'L REV. L. & ECON. 433 (1996).

31. For excellent discussions, see MARTIN SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE* (1964); and Richard Hodder-Williams, *Six Notions of 'Political' and the United States Supreme Court*, 22 BRIT. J. POL. SCI. 1 (1992).

32. See, e.g., Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

dard, because a rational Justice will give weight to precedent.³³ The political character of the Court demonstrates that the criticism of a Supreme Court Justice for having political smarts³⁴ is not valid; and indeed it is a legitimate criticism of the current Court that the aggregate political experience of its members is slight by historical standards.

This analysis supports Steven Goldberg's criticism of Choi and Gulati's proposal³⁵ that Supreme Court Justices be chosen by a "tournament" of federal court of appeals judges.³⁶ Just as the best appellate judge in a Continental judiciary might very well not be the best choice for a U.S. court of appeals, so a court of appeals judge might very well not be the best choice for the U.S. Supreme Court.³⁷ One must always beware the "Peter Principle": the tendency to promote a person beyond the level of his competence as a reward for competent performance at the next lower level.

The best way to study the tournament proposal, begun by James Brudney in his essay for this Symposium,³⁸ is to apply Choi and Gulati's criteria to the federal court of appeals judges who have become Supreme Court Justices and see whether the criteria are predictive of the judges' performance as Justices. (Their criteria can easily be extended to judges of other courts, to bring Holmes, Cardozo, O'Connor, and others who came to the Court from state judgeships into the picture.³⁹) Of course this would require developing good performance measures for Supreme Court Justices.

IX. CONCLUSION

Difficult as the question of judicial behavior may appear to be from the standpoint of rational-actor analysis, a careful consideration of the incentives and constraints that operate on judges in different types of judicial systems and a careful exploration of analogies between judges and other economic actors, such as conventional bureaucrats and elected officials, may supply satisfactory answers, or at

33. For evidence, see Youngsik Lim, *An Empirical Analysis of Supreme Court Justices' Decision Making*, 29 J. LEGAL STUD. 721 (2000).

34. Justice O'Connor is widely regarded as the most politically astute of the current Justices.

35. See Choi & Gulati, *Tournament of Judges*, *supra* note 25.

36. Steven Goldberg, *Federal Judges and the Heisman Trophy*, 32 FLA. ST. U. L. REV. 1237 (2005).

37. For other reservations concerning the adequacy of Choi and Gulati's methodology for selecting Supreme Court Justices, see Daniel A. Farber, *Supreme Court Selection and Measures of Past Judicial Performance*, 32 FLA. ST. U. L. REV. 1175 (2005).

38. James J. Brudney, *Foreseeing Greatness? Measurable Performance Criteria and the Selection of Supreme Court Justices*, 32 FLA. ST. U. L. REV. 1015 (2005).

39. For example, in my book, RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990), I used out-of-state citations, as well as other numerical criteria, in an effort to determine Cardozo's standing among state judges. *Id.* at 74-91 & 85 tbl.5.

least establish a framework for further research. The analysis can, moreover, be extended to other judicial personnel, including law clerks and magistrate and bankruptcy judges, who operate under different incentives and constraints from those operating on the types of judges discussed in this Essay. And the better the behavior of judicial personnel is understood, the greater the feasibility of developing sound criteria of judicial performance.

