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REFOCUSING AWAY FROM RULES REFORM AND DEVOTING MORE ATTENTION TO THE DECIDERS

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INTRODUCTION

The premise of this issue of the *Denver University Law Review* is to permit the contributors to address the question of which procedural rule he or she would change if so empowered. Notwithstanding the attractiveness of the assignment, I find myself straining the boundaries of the assigned topic to address an important related issue—the quality of the judges and the adjudication system applying the rules. During the past quarter-century, the legal system has devoted an inordinate amount of time and energy revising litigation rules relative to the time spent on the more pressing problems of adjudication weakness related to the quality, temperament, neutrality, and support of the system's judges and the resources devoted to the system.

The issue of judicial competence and integrity is particularly troubling in the wake of *Caperton v. A.T. Massey Coal Co.*,[1] where the U.S. Supreme Court vacated a state supreme court decision in which a justice—who had received at least $3 million in campaign support from a litigant—cast the deciding vote to relieve the litigant of a liability award of $50 million ($82 million with interest).[2] The Court reached this result,

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1. 129 S. Ct. 2252 (2009).

2. *See infra* note 8 and accompanying text (reviewing the facts of *Caperton*). Technically, the campaign contributor was not a formal party to the litigation. *See Caperton*, 129 S. Ct. at 2257. He was, however, the CEO of litigant A.T. Massey Coal Company as well as the personification of the company. *See id.* Many observers put the amount of campaign support received by the challenged justice at $3.5 million. Editorial, *Clouded State Supreme Court*, CHARLESTON GAZETTE, Apr. 7, 2008, at 4A, *available at* http://www.wvgazette.com/Opinion/Editorials/200804060029 ("Massey Energy's CEO spent an astounding $3.5 million to defeat Benjamin's Democratic opponent."). With interest, the amount at stake exceeded $75 million. *See id.* In the aftermath of the U.S. Supreme Court's decision in June 2009, the West Virginia Supreme Court (without the tainted justice) reheard the case, holding in a 4–1 vote that the underlying decision was a nullity due to a forum selection clause requiring that all disputes related to a coal delivery contract between a Caperton-related company and a Massey-related company be tried in Buchanan County, Virginia. *See* Caperton v. A.T. Massey Coal Co., No. 33350, 2009 WL 3806071 (W. Va. Nov. 12, 2009). Discussion of the decision on remand is beyond the scope of this article but represents a very broad and in my view problematic construction of the forum selection clause. Nonetheless, it has the decided advantage of being rendered without the participation of a justice so financially linked to the winning litigant.

one I view as compelled by common sense,[3] through a 5–4 vote.[4] The dissenters, led by Chief Justice Roberts and Justice Scalia, minimized the danger of biased judging presented by the situation[5] and questioned the practical feasibility of the Court's approach, as well as the wisdom of expanding review of state court judicial disqualification pursuant to the Due Process Clause.[6] If nothing else, the state justice's clearly erroneous failure to recuse (the constitutional question may have been fairly debatable but the basic disqualification question was not) wasted vast amounts of money and time by expanding the litigation and necessitating multiple

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3. *See* Jeffrey W. Stempel, *Completing* Caperton *and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal*, 29 REV. LITIG. 1 (forthcoming 2010) (manuscript at 29), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=jeffrey_stempel.

4. *Caperton*, 129 S. Ct. at 2256–57, 2267 (forming the majority, Kennedy, J., joined by Stevens, Souter, Ginsburg & Breyer, JJ., voted to vacate the West Virginia Supreme Court decision where a state court justice casting the deciding vote had received $3 million in campaign aid from the CEO of defendant Massey; and Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., voting to let the decision stand in spite of key participation by the challenged state court justice); *see also id.* at 2274–75 (Scalia, J., dissenting) (criticizing the majority for extending due process review to cases of judicial recusal based on campaign activity).

5. *See id.* at 2273 (Roberts, C.J., dissenting) ("And why is the Court so convinced that this is an extreme case? It is true that Don Blankenship spent a large amount of money in connection with this election. But this point cannot be emphasized strongly enough: Other than a $1,000 direct contribution from Blankenship, [disqualified West Virginia Supreme Court of Appeals] *Justice* [Brent] *Benjamin and his campaign had no control over how this money was spent.*"); *see also id.* ("Moreover, Blankenship's [$3 million in] independent expenditures do not appear 'grossly disproportionate' compared to other such expenditures in this very election."); *id.* at 2275 (Scalia, J., dissenting) ("The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution. Alas, the quest cannot succeed—which is why some wrongs and imperfections have been called nonjusticiable.").

6. *See id.* at 2267–72 (Roberts, C.J., dissenting) (contending that the "end result [of the majority's decision favoring disqualification] will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case" and raising a list of specific questions regarding application of the majority's standards for judicial impartiality satisfying constitutional due process); *see also id.* at 2275 (Scalia, J., dissenting) ("In the best of all possible worlds, should judges sometimes recuse even where the clear commands of our prior due process law do not require it? Undoubtedly. The relevant question, however, is whether we do more good than harm by seeking to correct this imperfection through expansion of our constitutional mandate in a manner ungoverned by any discernable rule. The answer is obvious.").

More precisely, the Roberts dissent posed 40 questions in defense of its view that the majority's invocation of the Due Process Clause to require judicial disqualification due to receipt of enormous campaign contributions was not a sustainably practical approach to policing the judicial integrity of state courts. *See id.* at 2267, 2269–72 (Roberts, C.J., dissenting). Forty enumerated questions, that is, with many containing subparts or follow-up questions. *Id.* at 2269–72. If one calculates the total number of questions in the Roberts dissent as one would in reviewing litigation interrogatories, the total number of questions actually totals 80 queries. *See id.* Although to some the Roberts dissent makes useful points about line-drawing and application of the constitutional norm in the context of recusal, most of the questions are easily answered or serve more as nitpicking efforts to undermine the majority opinion and largely serve to underscore the dissenters' disagreement with the majority view that a judge should not sit on cases involving $3 million benefactors. *See* Jeffrey W. Stempel, *Playing Forty Questions: Responding to Justice Roberts' Concerns in* Caperton *and Some Tentative Answers About Operationalizing Judicial Recusal and Due Process*, 38 SW. L. REV. (forthcoming 2010) (manuscript at 6, 51–52, on file with author).

motions, a trip to the Supreme Court, and yet another oral argument on the merits of the case.[7]

To be sure, *Caperton* represents a high-water mark judicial error requiring Supreme Court intervention, and a low point of judicial performance.[8] One commentator described the Court's relatively limited exten-

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7. *See* Jeffrey W. Stempel, *Impeach Brent Benjamin Now!?: Giving Adequate Attention to Failings of Judicial Impartiality*, 47 SAN DIEGO L. REV. (forthcoming 2010) (manuscript at 6, 10–11), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=jeffrey_stempel (reviewing the history of the *Caperton* case and assessing the error of the justice's failure to recuse pursuant to Canon 3(E) of the West Virginia Judicial Code as well as the Due Process Clause).

8. The *Caperton v. Massey* drama began when Hugh Caperton purchased the Harman Mine in southwestern Virginia in 1993. *See* John Gibeaut, *Caperton's Coal: The Battle over an Appalachian Mine Exposes a Nasty Vein in Bench Politics*, A.B.A. J., Feb. 2009, at 52, 52, *available at* http://www.abajournal.com/magazine/capertons_coal. The mine contained "high-grade metallurgical coal, a hot-burning and especially pure variety that steel mills crave to fuel the blast furnaces used to make coke needed in their production process." *Id.* A.T. Massey Coal Company, led by CEO Don L. Blankenship, wanted to acquire the Harman Mine and its high-grade coal, but Caperton was unwilling to sell. *Id.* Through a series of commercial and legal initiatives, which Caperton viewed as fraudulent and predatory, but Massey characterized as merely aggressive business, Massey eventually drove the Harman Mining Corporation and other Caperton corporate entities into bankruptcy. *See* Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 232–33 (W. Va. 2008) (providing extensive background of the case in an opinion written by three state court justices who ruled for Massey). "Through a series of complex, almost Byzantine transactions, including the acquisition of Harman's prime customer and the land surrounding the competing mine, Massey both landlocked Harman with no road or rail access and left Caperton without a market for his coal even if he could ship it." Gibeaut, *supra*, at 52; *see also Caperton*, 679 S.E.2d at 230–33. In 1998, Caperton agreed to sell the Harman Mine to Massey but the deal collapsed down the home stretch as Massey insisted on changes that Caperton contended reflected bad faith and an attempt to ruin the Caperton interests. *See* Gibeaut, *supra*, at 52.

Caperton's companies (Harman Mining Corporation, Harman Development Corporation and Sovereign Coal Sales, Inc.), filed for Chapter 11 bankruptcy in 1998 facing $25 million in claims. *See Caperton*, 679 S.E.2d at 230, 233; Gibeaut, *supra*, at 52. Caperton, who had personally guaranteed $1.9 million of his companies' debt, sued Massey in West Virginia, alleging fraud and tortuous interference with contract. He obtained a $50 million jury verdict in 2002 that survived vigorous post-trial attack by Massey. *See Caperton*, 679 S.E.2d at 233. The trial court rejected Massey's new trial and remittitur motions in June 2004, and in March 2005 denied Massey's motion for judgment as a matter of law. *Id.*

Elections for the West Virginia Supreme Court were slated for November 2004, with Justice Warren McGraw seeking re-election. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2254 (2009). Massey CEO Blankenship threw his support to challenger Brent Benjamin. *See* Elliot G. Hicks, Editorial, *Merit Selection, Not Elections, Must Be How We Choose Justices*, CHARLESTON GAZETTE, Dec. 14, 2004, at 5A, *available at* 2004 WLNR 14039840; *Millions Spent to Defeat Warren McGraw*, CHARLESTON GAZETTE, Dec. 4, 2004, at 3A, *available at* 2004 WLNR 13311082; Cecil E. Roberts, Editorial, *Blankenship's Hollow Rhetoric, His Money Defeated McGraw, Now He Must Help Miners*, CHARLESTON GAZETTE, Dec. 13, 2004, at 5A, *available at* 2004 WLNR 14039766. Blankenship contributed the statutory maximum of $1,000 to the Benjamin campaign committee and also donated nearly $2.5 million to a political organization named "And for the Sake of the Kids," which opposed Justice McGraw and advocated Justice Benjamin's election. Paul J. Nyden, *Reports Show Benjamin, Blakenship Connections*, CHARLESTON GAZETTE, Feb. 15, 2009, at 1A, *available at* http://www.wvgazette.com/News/200902140483 (noting that "And for the Sake of the Kids" group specialized in running negative advertisements targeting Justice McGraw); *see also* Marcia Coyle, *Amici Urge Recusals in Cases of Substantial Election Contributions*, TEX. LAW., Jan. 12, 2009, at 5, 5, *available at* http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202427319015slreturn=1&hbxlogin=1 (noting that "And for the Sake of the Kids" group worked to defeat Justice McGraw). In addition, Blankenship spent more than $500,000 independently on television and newspaper advertisements favoring Justice Benjamin, as well as for fundraising on behalf of Justice Benjamin. *See, e.g.*, DEBORAH GOLDBERG ET AL., JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004,

sion of due process-based review of state judge disqualification decisions as a "cold day in hell" standard of intervention[9]—and he is probably correct. The Supreme Court has neither the time nor the stomach for regularly policing lower court breaches of disqualification standards. Unfortunately, neither do most appellate courts and state high courts. Indeed, where recusal[10] is concerned, the federal and state high courts are arguably as much a part of the problem as part of the solution. Although U.S. Supreme Court corrections of judicial recusal error are rare, judicial recusal failures are surprisingly frequent.[11]

Worse yet, judicial failure to recuse is but a part of a larger problem: a lot of judging is simply not very good, and the judiciary views itself with the inaccurate presumption that judges are highly resistant to the cognitive and emotional limits and distortions that afflict all human beings.[12] In addition, both the electoral and appointive methods of select-

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at 4–5 (Jesse Rutledge ed., 2004), http://www.gavelgrab.org/wp-content/resources/NewPoliticsReport2004.pdf (showing an advertisement opposing McGraw accused him of letting a child rapist out of prison and allowing him to work as a high school janitor). Justice Benjamin won with slightly more than 53 percent of the more than 700,000 votes cast and subsequently cast the deciding vote on the merits of Massey's appeal to the West Virginia Supreme Court. *Caperton*, 129 S. Ct. at 2257 ("Benjamin won. He received 382,036 votes (53.3%) and McGraw received 334,301 votes (46.7%).").

In June 2009, the Court by a 5–4 majority sided with Caperton and vacated the decision reversing his $50 million judgment. *Id.* at 2267. The Court observed:

> [T]here is serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.
>
> Applying this principle, we conclude that Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case.

Id. at 2263–64.

9. Caperton *Ruling May Spur States to Enhance Their Process for Judge's Recusal*, 25 LAW. MANUAL ON PROF. CONDUCT 335, 337 (2009) (internal quotation marks omitted) (quoting law professor Charles G. Geyh, reporter for the ABA Joint Commission to Evaluate the Model Rules of Judicial Conduct).

10. This article treats the words "disqualification" and "recusal" as synonyms. Some courts and commentators have historically distinguished the terms, suggesting that disqualification is a judge's mandatory obligation to avoid participation in a case while recusal is a more voluntary, discretionary act informed by a judge's own preferences as well as prevailing law. *See* JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 4.04 (4th ed. 2007) (tending to use disqualification as a preferred term, but using recusal as an acceptable synonym); RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 20.8 (2d ed. 2007) (noting the traditional distinction, but using the terms interchangeably throughout the treatise); Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1223 (2002) (using the terms interchangeably); Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 460 (2004) (outlining the traditional distinction between the terms).

11. *See infra* sources cited note 13 and accompanying text (discussing other instances of bad judicial disqualification practice); *see also* FLAMM, *supra* note 10 (citing cases where trial judges refused to disqualify and were reversed); Miller, *supra* note 10, at 460.

12. *See generally* Cass R. Sunstein, *Introduction*, *in* BEHAVIORAL LAW AND ECONOMICS 1, 1–10 (Cass R. Sunstein ed., 2000). The Introduction, in particular, offers a brief but very good overview of the type of cognitive biases affecting human judgment as well as addressing the problem of constructed preferences that may not be fully rational. *Id.* at 1–5. Among the biases summarized are

ing judges are proving problematic, injecting big money and electioneering in judicial selection along with an arguably politicized, less-skilled judiciary. Whatever the strengths or shortcomings of individual judges, they work in a system that provides inadequate support regarding pay, staffing, caseload, and working conditions.

Part I briefly states my case for this perhaps overly provocative thesis (and one sure to continue to keep me off judicial continuing legal education programs) that much judicial performance is mediocre to poor and that increased, systemic efforts toward improving judicial performance should be given higher priority than rules reform. Part II addresses the "anachronistic" cult of undue deference to and insufficient realism about judges, in particular the system's insufficient grappling with problems of cognitive error and excessive judicial self-confidence. Part III offers some suggestions for improving judging and the environment in which judges work, which should in turn improve adjudication as much or more than any package of rule reforms.

I. RULES ARE ONLY AS GOOD AS THOSE APPLYING THEM (AND THE INFRASTRUCTURE OF ADJUDICATION)

As much as I would like to sound the clarion call of crisis rhetoric, the system is not in danger of imminent collapse because of judicial error. But there are nonetheless far too many errors for a system that prides itself on accuracy, predictability, dependability, consistency, and rationality. To continue further with the example of recusal, there are far too many instances where judges preside over cases in spite of being disqualified under the applicable rules of the game.[13] Theoretically, courts

self-serving bias, extremeness aversion, hindsight bias, optimistic bias, and status quo bias. *Id.* at 3–4, 8. Heuristics that streamline decision-making but may mislead include the availability of heuristic and anchoring as well as case-based decisions. *Id.* at 5. In addition, cognitive factors affecting valuation include loss aversion, mental accounting, and the difficulty of translating normative judgments into monetary amounts, particularly where there is not an established market for the loss or damage in question. *Id.* at 5–7; *see also* Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 377–80, 382–85 (2004) (discussing status quo bias, omission bias, the recognition heuristic, one-reason heuristics, and imitation); Guthrie & George, *supra*, at 381 (citing Daniel G. Goldstein & Gerd Gigerenzer, *The Recognition Heuristic: How Ignorance Makes Us Smart*, *in* SIMPLE HEURISTICS THAT MAKE US SMART 37 (Gerd Gigerenzer et al eds., 1999); Bernhard Borges et al., *Can Ignorance Beat the Stock Market?*, *in* SIMPLE HEURISTICS THAT MAKE US SMART, *supra*, at 59) (discussing "ignorance-based" heuristics, which according to some are not all bad); Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 598–99 (2003) (addressing status quo bias under rubric of normality bias). *See generally* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1124 (1974).

13. *See* Miller, *supra* note 10, at 436–62 (listing an array of judicial misconduct resulting in sanctions over the course of more than 200 footnotes; sanctions for disqualification error consumed only three footnotes); Stempel, *supra* note 7, at 5–6 (arguing that errs in failing to recuse are not treated with sufficient seriousness). The U.S. Supreme Court has performed particularly poorly concerning disqualification of the Justices, each of whom makes a final, unreviewable determination regarding his or her participation in a case. *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 227–33 (2d ed. 2002) (discussing Justice Rehnquist's improper

should almost never err in this regard because the presumption is one of disqualification if the case is uncertain or close.[14] Substitute judges of equivalent talent and integrity are nearly always available to replace a judge about whom impartiality concerns exist.

Similarly, judges regularly err in deciding Rule 12 dismissal motions,[15] summary judgment motions,[16] motions for judgment as a matter

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failure to recuse in *Laird v. Tatum*, 408 U.S. 1 (1972), and concluding that Rehnquist also committed perjury when addressing the situation in confirmation hearings); Monroe H. Freedman, *Judicial Impartiality in the Supreme Court—The Troubling Case of Justice Stephen Breyer*, 30 OKLA. CITY U. L. REV. 513 *passim* (2005) (addressing disqualification lapses by Justice Breyer); Monroe H. Freedman, *Duck-Blind Justice: Justice Scalia's Memorandum in the Cheney Case*, 18 GEO. J. LEG. ETHICS 229 (2004) (addressing Justice Scalia's failure to recuse in the case involving his friend, Vice President Dick Cheney, and their duck-hunting trip during the pendency of the case, focusing on the Justice's arguably tendentious memorandum defending his decision not to recuse); Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 112–14 (2004) (noting that Justices make unilateral, unreviewable decisions as to their eligibility to participate in cases, criticizing, and proposing change); Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 851–63, 899–918 (2009) [hereinafter Stempel, *Chief William's Ghost*] (criticizing, similarly, *Laird v. Tatum* episode and discussing other improper recusal behavior by justices as well as lower courts continuing to laud the concept of "duty to sit" after it was abolished while citing the Rehnquist nonrecusal with apparent ignorance of controversy that surrounded it); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 590 (1987) (noting that Justices make unilateral, unreviewable decisions as to their eligibility to participate in cases, criticizing practice, and proposing change).

Disturbingly, Justice Rehnquist's papers on file with the Hoover Institution reflect his brethren (and it was all brethren at the time) supporting his decision and minimizing the concerns of his critics. *See* Stempel, *Chief William's Ghost*, *supra*, at 858 n.126. Chief Justice Burger and Justices Stewart, White, and Powell all praised his analysis and at least implicitly endorsed the Rehnquist decision, even though the closer examination of academic commentators reveals great error by Justice Rehnquist in sitting on the case. *See id.* at 854–61; *see also id.* at 813–14 (showing a letter from Justice Potter Stewart approving of Rehnquist's draft memorandum and assessment); *id.* at 858 n.126 (noting Justice Powell's lack of praise for Justice Rehnquist's "splendid memorandum"). With informal gate-keeping like this by the Justices themselves, there is little de facto check on the self-interested recusal decisions of the justices.

Twenty years earlier, the Court, in similar fashion, barely (by a 5–4 vote) disapproved of a federal district judge who was a trustee of Loyola University (New Orleans) presiding over a bench trial and rendering favorable findings to a litigant looking to pay Loyola $7 million for land that he would need if he prevailed in the litigation. *See* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 850 (1988); STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 592–602 (8th ed. 2009) (reproducing edited version of opinion and noting that Judge Collins, the subject of the recusal motion, whose conduct was not deemed recusal-worthy by four justices, was subsequently "convicted of bribery, conspiracy, and obstruction of justice in connection with his judicial duties. He was sentenced to nearly seven years in prison, but for a while he remained a federal judge, and continued to draw his salary *while in prison*. In 1993, to avoid impeachment, he resigned his judgeship. He was disbarred in November 1994").

14. Stempel, *Chief William's Ghost*, *supra* note 13, at 895.

15. *See* FED. R. CIV. P. 12. Under Rule 12 and its state analogs, a defendant may seek dismissal based on lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, deficient process, deficient service of process, failure to join an essential party, or failure to state a claim under which relief may be granted even if the facts as stated in the complaint, counter, or cross-claim are true. *Id.*

Defendants routinely make Rule 12 motions. Consequently, appellate reversal of trial court outcomes favorable to plaintiffs, if based on the lack of a right to relief under the substantive law, indicates likely error by the trial court in previously having denied a defendant's Rule 12(b)(6) motion arguing failure to state a claim. Similarly, an appellate reversal based on lack of subject matter jurisdiction (Rule 12(b)(1)), personal jurisdiction (Rule 12(b)(2)), or improper venue (Rule 12(b)(3)) suggests trial court error since these motions are routinely made if the defendant has a

nonfrivolous basis for the motion. *See* THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, 2001 SUPPLEMENTAL SURVEY OF CIVIL APPEALS: APPEALS FROM GENERAL CIVIL TRIALS IN 46 LARGE COUNTIES, 2001–2005, at 5 tbl.7 (2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/agctlc05.pdf (finding fifty percent of trial outcomes reversed on appeal; forty-five percent where plaintiff prevailed at trial, and 65 percent where defendant prevailed at trial); Stanton Wheeler et al., *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870–1970*, 21 LAW & SOC'Y REV. 403, 406–07 (1987) (finding reversal rates ranging from roughly thirty-five percent to almost sixty-five percent in sample of 6,000 cases spanning 1870–1970 time period); Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191, 1194–97 (1978) (noting reversal rate of nearly forty percent overall in 1870–1970 sample); *see also* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1133–34 (2003) (criticizing perceived excessive use of pretrial disposition devices).

16. *See* FED. R. CIV. P. 56 (permitting the court to enter judgment as a matter of law without further proceedings where there exists no genuine dispute of material fact, and movant is entitled to legal relief). Regarding judicial error in application of Rule 56, see Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 102–119 (1999) (listing examples of judges granting summary judgment to Title VII defendants in spite of substantial, sometimes shocking evidence in record of race or gender discrimination); Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 140–41 (1991) (discussing how courts often wrongly accept defendant's claim of non-discrimination as conclusive without testing defendant assertions); Ann C. McGinley & Jeffrey W. Stempel, *Condescending Contradictions: Richard Posner's Pragmatism and Pregnancy Discrimination*, 46 FLA. L. REV. 193, 211–18 (1994) (examining Title VII case, and concluding that well-regarded Seventh Circuit Judge Richard A. Posner and a colleague (panel decision was 2-1) erred in affirming grant of summary judgment); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 228–42 (1993) (same); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 180–81, 218 (2000) (reviewing cases and finding summary judgment often granted erroneously, particularly in civil rights and discrimination cases).

See also Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 107–09 (1988) (questioning the correctness of much of the U.S. Supreme Court's important summary judgment trilogy of Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); and Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). *But see* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153–54 (2000) (reversing the summary judgment in age discrimination case where appellate court had ruled evidence of derogatory remarks about plaintiff insufficient to create triable issue of fact); Weisgram v. Marley Co., 528 U.S. 440, 456 (2000) (reversing appellate court error in granting summary judgment in product liability claim); Hunt v. Cromartie, 526 U.S. 541, 553 (1999) (reversing summary judgment in voting rights case); Mollica, *supra*, at 205–209 (discussing *Reeves*, *Hunt*, and *Weisgram*). While cases like *Reeves*, *Hunt*, and *Weisgram* reflect the Supreme Court properly applying Rule 56, they of course also show that federal appeals courts erred quite dramatically. For example, *Reeves*, *Hunt*, and *Weisgram* were all unanimously decided cases.

In nearly ten percent of appeals, it appears that a grant or denial of summary judgment is alleged to be erroneous. COHEN, *supra* note 15, at 11 app. A. Further, the number of summary judgment motions made and granted appears to be increasing. *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL. LEGAL. STUD. 591, 591 (2004) (finding case termination by summary judgment was approximately two percent in 1960 and moved to nearly eight percent by 2000); Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 896 (2007) (finding summary judgment motions made in approximately twelve percent of cases in 1975 and moved to twenty-one percent of cases by 2000); *see also* Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919 (2009); Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 J. LEGAL STUD. 121 (2009).

of law,[17] and discovery disputes.[18] With all too much frequency, they give credence to incredibly weak legal arguments and factual assertions.[19]

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17. *See* FED R. CIV. P. 50. Prior to 1991, Rule 50 motions were "directed verdict" motions if made prior to jury deliberation and motions for "judgment notwithstanding the verdict" if made after the jury had spoken. In each case, as with the current judgment-as-a-matter-of-law nomenclature, the motion is made after the claimant's evidence has been presented and argues that, as a matter of law, there is insufficient evidence to satisfy the claimant's burden of proof to establish a legal right of recovery. *See* DAVID F. HERR, ROGER S. HAYDOCK & JEFFREY W. STEMPEL, MOTION PRACTICE §§ 21.02, 22.03 (5th ed. 2009); FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE § 7.21 (5th ed. 2001). The change in nomenclature was made in part as a response to U.S. Supreme Court's 1986 summary judgment trilogy, *see* cases cited *supra* note 16, which more expressly equated the standards for Rule 50 and Rule 56 motions. Prior to the trilogy, the prevailing view was that the grant of summary judgment required no genuine factual disputes, while a Rule 50 motion could be granted even if there was conflicting but unpersuasive evidence supporting the nonmovant. *See* Stempel, *supra* note 16, at 129–158.

Like summary judgment, judgment as a matter of law is a frequent basis for appeal and reversal. COHEN, *supra* note 15, at 11 app. A; Note, *supra* note 15, at 1199–1202.

18. *See generally* ROGER S. HAYDOCK & DAVID F. HERR, DISCOVERY PRACTICE §§ 31.04, 32.02 (5th ed. 2009) (courts err with some frequency in deciding discovery motions and have wide discretion on many discovery issues). Of course, in a manner akin to the old adage about doctors being able to "bury their mistakes," erroneous trial judge discovery rulings seldom become the subject of appeal because a discovery ruling is normally not a final, appealable order and normally does not become the object of successful interlocutory review. *See* JAMES ET AL., *supra* note 17, §§ 5.14, 12.4 (discussing that review of discovery ruling is ordinarily not appealable until after final judgment). Similarly, the trial court's evidence rulings are often effectively insulated from appellate review because the vast bulk of civil litigation settles, leaving no final judgment subject to appeal. *See* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339–40 (1994) (noting that although various measures may differ slightly, it is universally acknowledged that 90 percent or more of civil cases settle).

19. *See* McGinley, *supra* note 16, at 206, 255–56 (finding that both trial and appellate courts frequently err in granting or affirming summary judgment in discrimination cases); sources cited *supra* note 16; *see also* Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limited Misapplication of Rule 11 by Harmonizing It with Pre-verdict Dismissal Devices*, 60 FORDHAM L. REV. 257, 276–79 (1991) (discussing that, in reversal of sorts from problem of excessive grants of summary judgment, some courts have erroneously ruled that a legal claim for which summary judgment was denied prior to trial can later be characterized as legally unsupported and subject to Rule 11 sanction).

See, e.g., Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153–54, *cited in supra* note 15; Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (reversing the Fifth Circuit and trial court for applying heightened pleading standard to civil rights claim arising out of policy abuse even though Federal Civil Rules 8 and 9 provide no basis for such a heightened pleading requirement); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496–97 (1985) (reversing the Second Circuit for imposing heightened pleading requirements for RICO claim despite lack of any basis for requirement in statute or civil rules). *But see* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009) (holding, in an opinion inconsistent with *Leatherman*, that the plaintiffs' 270-paragraph complaint was insufficient to establish potential claim); *see also* Vandenberg v. Superior Court, 982 P.2d 229, 246 (Cal. 1999) (reversing lower courts for holding that commercial general liability insurance applies only to tort claims and not to contract claims resulting in property damage despite evidence of any such textual limitation in insurance policy); Jeffrey W. Stempel, *Reason and Pollution: Correctly Construing the "Absolute" Exclusion in Context and in Accord With Its Purpose and Party Expectations*, 34 TORT & INS. L.J. 1, 4–5 (1998) (collecting cases taking irreconcilable views as to meaning and application of standard form commercial liability insurance language, and concluding that courts construing pollution exclusion so broadly as to negate coverage for common torts err and improperly strip policyholders of coverage). I realize that not everyone will agree with me about the proper construction of the pollution exclusion. But at a minimum, the stark split amongst the courts interpreting the very same language suggests that roughly half the courts have erred in some sense, even controlling for factual distinctions in the cases.

At least as measured by their track record on appellate review, the performance of trial judges is merely okay and hardly great. Although trial courts are affirmed roughly sixty percent of the time,[20] this is hardly a statistic that should encourage complacency. While that's a great winning percentage (batting average, if you will) for sports, it seems far too low for a legal system that prides itself on accuracy, predictability, dependability, consistency, and rationality. Put another way, trial judges are deemed wrong on appeal almost half the time. If commercial airlines had a similar track record, airports would be empty. Yet as a society we continue to participate in a legal system that has a relatively high error rate, even if one regards the problem as sufficiently solved through the quality control of appeal. But further consideration bursts even this small bubble.

Appellate courts are, to paraphrase Justice Jackson's memorable phrase, final but hardly infallible.[21] As demonstrated regularly in legal periodicals,[22] rehearing motions, and conflicting caselaw,[23] many appel-

20. COHEN, *supra* note 15, at 1; Wheeler et al., *supra* note 15, at 406; Note, *supra* note 15, at 1199–00. *But see* Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 971 (2002) (noting relatively high affirmance rates for less politicized commercial claims as contrasted to more controversial civil rights or job discrimination claims); Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 150 (2002) (suggesting strong "affirmance effect" in practice); Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights Into the "Affirmance Effect" on the United States Courts of* Appeals, 32 FLA. ST. U. L. REV. 357, 358 (2005) (suggesting that at least for federal appeals court review of trial decisions, affirmance rate is much higher, perhaps ninety percent). Because the bulk of litigation in America is state court litigation, I tend to regard the state court data, such as that in the Wheeler and Cohen sources, as more important and indicative of the degree to which error pervades the system. In addition, I question whether the Guthrie–George reading of the data, which is based on the Annual Reports of the Administrative Office of the United States Courts, overstates affirmance, although that is a topic for another day.

21. *See* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

22. *See supra* notes 13–17 and accompanying text; *see also* Charles Nesson, *Agent Orange Meets the Blue Bus: Factfinding at the Frontier of Knowledge*, 66 B.U. L. REV. 521 (1986) (criticizing, persuasively, grant of summary judgment by highly regarded judge (Jack B. Weinstein (E.D.N.Y)) against opt-out plaintiff in Agent Orange litigation). This theme of judicial error runs through many articles in legal periodicals, including many of mine. *See, e.g.*, Jeffrey W. Stempel, *Class Actions and Limited Vision: Opportunities for Improvement Through a More Functional Approach to Class Treatment of Disputes*, 83 WASH. U. L.Q. 1127 (2005) (criticizing judicial decisions denying partial class action treatment despite sufficient commonality of legal and factual claims); Jeffrey W. Stempel, *An Inconsistently Sensitive Mind: Richard Posner's Cerebration of Insurance Law and Continuing Blind Spots of Econominalism*, 7 CONN. INS. L.J. 7 (2000) (praising prominent judge's insurance-related opinions but finding some wrongly decided); Jeffrey W. Stempel, Domtar *Baby: Misplaced Notions of Equitable Apportionment Create a Thicket of Potential Unfairness for Insurance Policyholders*, 25 WM. MITCHELL L. REV. 769 (1999) (criticizing Minnesota Supreme Court decision permitting insurers to avoid full payment of policy limits for triggered claims that extend over several years by prorating responsibility into years when policyholder's insurance was exhausted or unavailable); Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381 (1996) (criticizing broad construction of arbitration clauses and naïve judicial attitude that arbitration is invariably faster and cheaper than litigation with no potential loss of adjudicator expertise or neutrality (a view supported in G. Richard Shell, *Fair Play, Consent and Securities Arbitration: A Comment on Speidel*, 62 BROOK. L. REV. 1365 (1996); Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335 (1996))); Jeffrey W. Stempel, *Reassessing the "Sophisticated" Policyholder Defense in Insurance Coverage Litigation*, 42 DRAKE L. REV. 807 (1993) (criticizing decisions, including one by revered Fifth Circuit Judge John Minor Wisdom,

late decisions are arguably wrong—perhaps even obviously wrong—to everyone but the two or three jurists on the panel who supported the result.[24] Although this ironically suggests that in many instances of reversal it was the trial judge who was correct, the net effect is to underscore that adjudication results hardly represent cosmic truth.

None of this is news to anyone alive since the time of the legal realist movement.[25] In an adversary system, particularly one mixing lay input (the jury, witnesses, public opinion, economic power, election of judges) with imperfect legal actors (bad judges, harried judges, emotional judges, politicized judges, self-interested judges—and staff suffering similar

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erroneously concluding that normal rules of contract construction do not apply when policyholder is a "sophisticated" business entity (a position supported in Hazel Glenn Beh, *Reassessing the Sophisticated Insured Exception*, 39 TORT TRIAL & INS. PRAC. L.J. 85 (2004))).

Indeed, one could flip through the pages of almost any law review and find several examples of professors, practitioners, and student authors doing a pretty good job of demonstrating that at least some judicial decisions are quite wrongly decided, poorly reasoned, insufficiently considered, and the like. Although at one level this demonstrates that other lawyers and near-lawyers can be nearly as cocksure as judges, there is more than mere legal realist difference of opinion at work. Judges may read these works and reasonably conclude that their critics (including or especially me) are wrong. Fair enough, but it is doubtful that the critics are wrong one hundred percent of the time. And, if the critics are even half right, this suggests enough judicial error to merit concern.

23. Conflicts among the federal circuit courts of appeals are a leading ground for U.S. Supreme Court review. *See* Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 432–33 (1997) (finding that one reason to grant review is when a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals); *see also* Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788, 793 (2009) (certiorari granted because of circuit split); Schiavone v. Fortune, 477 U.S. 21, 22 (1986) (same).

Different state courts frequently reach inconsistent or even diametrically opposed decisions. For example, different state supreme courts may be construing exactly the same insurance policy language and according the terms different meanings—perhaps one court claims the language is unambiguous while another finds it fraught with ambiguity. *Compare* Hazen Paper Co. v. U.S. Fid. & Guar. Co., 555 N.E.2d 576, 580–82 (Mass. 1990) (holding that government agency's "potentially responsible party" letter regarding Superfund liability is "suit" under liability insurance policy triggering insurer's duty to defend policyholder in agency enforcement action), *with* Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co., 959 P.2d 265, 280 (Cal. 1998) (holding that agency enforcement letter and action are not "suits"). Obviously, both of these decisions cannot be correct, but they are both nonetheless controlling law in their respective jurisdictions. Thus, even decisions that will never formally be deemed incorrect caution judges to appreciate that other reasonable jurists may view an issue or dispute from the opposite perspective. *See* EMERIC FISCHER, PETER NASH SWISHER & JEFFREY W. STEMPEL, PRINCIPLES OF INSURANCE LAW § 11.06 (rev. 3d ed. 2006) (juxtaposing inconsistent cases interpreting the same insurance policy language).

24. Most federal appellate decisions are the product of a three-judge panel, as are state intermediate appellate court decisions, with many state supreme courts also sitting in panels to decide cases deemed insufficiently important for en banc review. As a practical matter, appellate decisions are thus not an industry-wide declaration of the legal community but the product of the preferences of two or more jurists. *See* Note, *supra* note 15, at 1212 (finding that roughly half of state supreme court cases reversing trial courts have one or more dissenting justices).

In addition, U.S. Supreme Court decisions and those of en banc lower courts often feature several dissenting votes. Although this is to a large extent an inevitable aspect of the indeterminacy of law, it suggests that the system is quite a long way from rendering results that enjoy universal or unquestioned support.

25. *See* Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C L. REV. 685, 695 (2009) ("'[T]o say that no political prejudices have swayed the court,' noted Coles with consummate realism, 'is to maintain that its members have been exempt from the known weaknesses of human nature, and above those influences which operate most powerfully in determining the opinions of other men.'" (alteration in original) (quoting Walter D. Coles, *Politics and the Supreme Court of the United States*, 27 AM. L. REV. 182, 182 (1893))).

shortcomings), adjudicatory outcomes will often fall short of perfection. But many items of judicial business do not involve thorny legal issues or implicate the value choices that divide humans in a post-modern world. Many judicial decisions involve relatively straightforward applications of rather simple legal precepts, such as that a judge should recuse where impartiality might be reasonably questioned or that summary judgment should not be granted if there are disputed material facts that would divide reasonable persons as to their meaning (in which case a jury is required for most such claims). But even for these types of claims, error is relatively frequent, and may occur at both the trial and appellate levels.[26]

For too many years, the legal system has accepted a lower order of performance by figuratively shrugging and contending that the system's goal is not to be correct so much as to provide resolution.[27] Even those seeing courts as norm articulators have not been sufficiently concerned about systemic reform even though they are quick to decry decisions that displease them.[28] We have accepted too much mediocrity in both the application of law and in legal outcomes. In particular, we have been willing to suffer too many jurists who fail to recognize situations in which their impartiality is suspect or who misapply the law to the cases before them. At the same time, we have saddled the good ones with too much weight from elections, fundraising, insufficient staff and logistical support, and insufficient moral support, such as failing to defend judges from attacks against their independence and fidelity to legal safeguards that are unpopular in the current political climate (for example, due process rights for terrorism suspects). In addition, the clubbish culture of civility in the fraternity of the bench makes it difficult for better judges to candidly call out the judges of blameworthy behavior.[29] This situation is

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26. *See* sources cited *supra* note 13 (regarding erroneous disqualification rulings); *see also, e.g.*, Merrick v. Farmers Ins. Group, 892 F.2d 1434 (9th Cir. 1990) (affirming summary judgment granted in age discrimination case in spite of clear material factual dispute with trial court improperly making credibility assessments of conflicting witnesses); Healy v. N.Y. Life Ins. Co., 860 F. 2d 1209 (3d Cir. 1988) (affirming case with similar improper crediting of defense witnesses and disbelief of plaintiff's testimony in violation of summary judgment ground rules, but with a dissenting opinion). Both cases are criticized in McGinley, *supra* note 16, at 237–241.

27. *See* JAMES ET AL., *supra* note 17, § 1.1 (stressing that a primary role of courts is to act as a mechanism for resolving disputes with finality, but noting other occasionally conflicting goals of due process and furthering of social and political values) ("[P]rocedure should yield final and lasting adjudications so that people may enjoy repose and security in their legal relationships." (citing RESTATEMENT (SECOND) OF JUDGMENTS ch. 1 (1980))).

28. *See* ROBERT M. COVER, OWEN M. FISS & JUDITH RESNIK, PROCEDURE 225–26 (1988) (tending to emphasize role of courts as generators of social norms and policy more than as mere resolvers of atomized disputes); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1612–13 (1986) (same); John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 579–80, 637 (1984) (noting due process considerations in litigation); *see also* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 135–39 (1974) (noting role of courts in ordering society but suggesting limited ability to effect significant social change through litigation rather than legislation and electoral politics).

29. *See, e.g.*, Stempel, *supra* note 7 (criticizing the U.S. Supreme Court, the West Virginia state bar, and the judicial disciplinary authorities for failing to appreciate the magnitude of a state

one of long standing, but seems particularly irksome coming at the end of an era when there has been so much attention to revising the procedural rules applied by the judges we simultaneously over-revere and under-assess. The Federal Rules of Civil Procedure, for example, have been subject to significant substantive amendment on a rolling basis during the past forty years, with a complete restyling taking effect in 2007.[30] Further changes are currently pending.[31] Although most observers appear to approve of the restyling,[32] many of the substantive changes have divided the profession and are not obvious improvements.[33] Yet serial revision of

supreme court justice's failure to recuse and multiple opinions reflecting ignorance, improper application of law, or improper desire to remain on case where he ultimately was disqualified).

30. Promulgated in 1938, the Federal Rules of Civil Procedure were only modestly amended in 1946, 1948, and 1963, followed by major amendments in 1966. Thereafter came significant amendments in 1970, 1980, 1983, 1987, 1993, and 2000, plus a wholesale restyling that became effective in 2007. In other words, the Rules have received major revision more than once a decade. By contrast, the U.S. Supreme Court and many state courts continue to allow each individual justice sole authority over their participation in cases, and few states have ceased electing judges. By comparison, however, Rules revision seems nearly perpetual as compared to the less frequent and episodic attention given to judicial selection and supervision (e.g., judicial conduct commissions, which arrived in force during the 1970s, remain comparatively unchanged during the past 20 years). *See* ALFINI ET AL., *supra* note 10, chs. 13–16 (surveying judicial discipline commissions and other avenues for sanctioning or removing judges); *see also id.* § 13.01 ("In the latter third of the twentieth century, judicial conduct commissions emerged across the country and quickly became the primary means by which judicial conduct is regulated and discipline imposed."); JUDITH ROSENBAUM WITH JEFFREY M. SHAMAN & KATHERINE LEVIN, PRACTICES AND PROCEDURES OF STATE JUDICIAL CONDUCT ORGANIZATIONS (1990); 1 AM. JUDICATURE SOC'Y, JUDICIAL CONDUCT ORGANIZATIONS GOVERNING PROVISIONS (Kathleen Sampson & Joseph B. Cahill eds., 1982 & Supp. 1984).

31. U.S. Courts, Federal Rulemaking, http://www.uscourts.gov/rules/index2.html (last visited Mar. 15, 2010) (noting the September 15, 2009 Judicial Conference of the United States' approval of proposed amendments to appellate rules, criminal rules, civil rules, evidence rules, and bankruptcy rules). In particular, Civil Rules 8, 26 and 56 are recommended for amendments that, if not derailed by the U.S. Supreme Court or Congress, should take effect on December 1, 2010. *Id.*

32. Certainly, this has been the sentiment expressed by civil procedure professors on the AALS listserv based on the reaction of their students who, unlike the faculty, are unburdened by having grown up practicing under the pre-2007 Rules language. Notwithstanding that the restyling may have been done well, one can continue to reasonably ask whether it was an apt expenditure of resources. The pre-December 2007 language of the Rules may have been imperfect, but it was not indecipherable.

33. Discovery Rules changes in 1993 and 2000 alone spurred a stream of concern and criticism. *See, e.g.*, Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 39–41 (1992); Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 53 (1997) ("Much of the hoopla about litigation costs may be traceable to those whose real complaint is that they or their clients are exposed to liabilities that they would prefer to avoid."); Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 683–84, 688–89 (1998) (questioning wisdom of the 1983 and 1993 Amendments designed to combat supposedly excessive and abusive discovery); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1396, 1443–44 (1994); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 *passim* (1991) (questioning the efficacy of the proposed disclosure system that was eventually enacted in the 1993 Amendments to the federal civil rules); Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform,"* LAW & CONTEMP. PROBS., Spring/Summer 2001, at 197, 197–200, 211 (criticizing many post-1970 changes to the federal discovery rules); Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1160, 1163 (1993) (finding many post-1970 changes to Rules to err too greatly in the direction of restricting claims and reducing adjudication in favor of encouraging settlement); Carl Tobias, *Discovery Reform Redux*, 31 CONN. L. REV. 1433, 1433–34 (1999) (noting the seeming excessive focus on discovery rather than other aspects of the civil rules and litigation).

the text of the Rules ("tinkering" to those less supportive) continues,[34] without much evidence to suggest it has improved the federal adjudication process.[35] And, of course, with each new iteration of federal rule revisions comes a subsequent round of deliberation in the states, most of which pattern their rules on the federal rules—or at least will reconsider idiosyncratic state rules in light of federal developments.[36] This results in a system focusing more on the text of the rules while focusing considerably less attention on the legal officers applying the rules. Some recalibration is in order.

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34. *See* Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 761 (1993) (relating a conversation with noted plaintiffs' security class action attorney Edward Labaton, Esq., who stated that he viewed the establishment of a Standing Committee on Civil Rules as a mistake due to its tendency to encourage excessive Rules revision).

For example, in the current package of proposed Civil Rules amendments, Rule 8 is to be changed so that "discharge in bankruptcy" is no longer an enumerated defense, a change that does no harm but also does not really change the law because the discharge provisions of the federal bankruptcy statutes have always taken precedence over Rule 8. *See* STANDING RULES COMM., JUDICIAL CONFERENCE OF THE U.S., REPORT TO JUDICIAL CONFERENCE: SEPTEMBER 2009 app. C-13 (2009), http://www.uscourts.gov/rules/jc09-2009/2009-09-Appendix-C.pdf (explaining rationale for changes). In addition, Rule 56 is to be amended so that language that summary judgment "should be granted" if the motion is meritorious will be changed to "shall be granted," restoring language that was in the Rule from 1938 until 2007 but was altered as part of the restyling project. *Id.* at C-6. Although the restyling may have accomplished some good things, the shall-to-should change, which injected some uncertainty as to whether substantive summary judgment law had changed, was not one of them. *See id.* In addition, pending changes to Rule 26 will make expert witness report drafts and communications with counsel subject to work product protection, in effect undoing some of the changes the Rules Committee made in the 1993 Amendments that expanded the scope of expert witness discovery. *Id.* at C-2 to C-3. The Committee's assessment is quite persuasive, particularly concerning the likely advantages of revising the expert discovery rules, which have led to considerable waste and gamesmanship. But, the change is nonetheless in large part a correction of prior Committee mistakes and also supports an argument that the federal bench failed to sufficiently alleviate expert discovery problems through its rulings and case management.

35. *See* Gregory P. Joseph, *Federal Litigation—Where Did It Go off Track?*, LITIG., Summer 2008, at 5, 62 (arguing that the rule changes "have made federal civil litigation procedurally more complex"); Miller, *supra* note 10, at 439–40; Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 *passim* (1992) (noting and criticizing rules changes designed to restrict discovery and make pretrial disposition easier); Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115, 115–16 (1991) (criticizing crisis rhetoric and undue efforts of politicians to be perceived as active in rules and court reform); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1413–27 (1992) (criticizing inconsistent court practices encouraged by 1990 congressional legislation and proliferation of local rules and practices); *see also* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Symposium, *Reinventing Civil Litigation: Evaluating Proposals for Change*, 59 BROOK. L. REV. 655 (1993).

36. The degree of state embrace of federal rules is something less than wholesale adoption but most state civil litigation systems largely are in accord with the federal rules regarding the conduct of litigation. *See generally* Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A survey of Intra-state Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311 (2001); John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2003); John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989).

Although some rules changes have been helpful,[37] many have been inconsequential[38] or arguably counter-productive.[39] Rather than expending more energy on rule revision, the next decade or so would be better spent attempting to improve judicial selection, performance, and discipline. Structural changes and increased financial support should be part of this effort. A significant part of the project should be improved selection of judges, consciousness-raising of the bench regarding common cognitive error, and a push for increased humility on the bench, particularly in cases to which judges have a connection. If nothing else, the system should eliminate once and for all situations like *Caperton* in which a badly mistaken (or perhaps even unscrupulous) judge makes a close to

37. For example, the revision of Rule 15 in response to *Schiavone v. Fortune*, 477 U.S. 21 (1986), which construed former Rule 15 in a manner that made it more difficult to add a party and have a claim relate back to the date of the original pleading for statute of limitations purposes, is generally regarded as a helpful response to a problematic Court decision. *See* Joseph P. Bauer, Schiavone*: An Un-*Fortune*-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720, 720, 722–23 (1988); Harold S. Lewis, Jr., *The Excessive History of Federal Rule 15(c) and Its Lesson for Civil Rules Revision*, 85 MICH. L. REV. 1507, 1514–25, 1558–59 (1987) (noting problem of relation back with amendments under former Rule 15).

Similarly, the 1993 Amendments to Rule 11, which were designed to rectify problems created by the 1983 Amendments to Rule 11, were well received and appear to have been largely effective in reducing satellite Rule 11 litigation regarded by many as wasteful and excessively strategic. *See* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 21–36 (2d ed. 1994); GEORGENE M. VAIRO, RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES AND PREVENTIVE MEASURES § 1.01 (Richard G. Johnson ed., 3d ed. 2004); *see also* Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105, 106–16 (1991) (noting that after perceived excessive use of Rule 11 against civil rights claims, courts appear to have adopted more a restrained approach); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 308 (1989) (noting that public law attorneys "believe that Rule 11 constitutes an ongoing threat to their efforts"); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 196–97 (1988) (criticizing aspects of the 1983 Amendment to Rule 11 and consequent upsurge in Rule 11 practice).

38. *See* Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 14, 33 (2001) (finding the 2000 Amendments to the scope portion of Rule 26 not to have made much difference, at least initially); Jeffrey W. Stempel & David F. Herr, *Applying Amended Rule 26 (B)(1) in Litigation: The New Scope of Discovery*, 199 F.R.D. 396, 396–97, 423 (2001) (noting change but suggesting that it may not have a dramatic impact); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 636–37 (2001) (criticizing interest group influence in connection with scope amendments and expressing concern that narrowed scope of discovery will disadvantage plaintiffs but conceding that impact would likely not be dramatic if the claimant's counsel are sufficiently skilled). Similarly, the creation of the disclosure requirements of Rule 26 in the 1993 Amendments caused substantial concern, but appears to have had relatively little impact in practice because the material subject to disclosure was historically always requested in the parties' respective first waves of discovery requests. *See* Rowe, *supra*, at 25–27.

39. Rule changes that do not effect much change could be considered counterproductive in that they impose transaction costs without accomplishing much positive change. *See* Stempel, *supra* note 38, at 531. Even after the recent restyling of the rules, which professors and students see as producing clear Rules, the text on the whole can be criticized for introducing transaction costs and occasionally creating potential litigation issues as to whether a wording change merely restates the earlier rule or creates a slightly different rule. *See* STANDING RULES COMM., *supra* note 34, at C-6 (describing proposed changes in Rule 56 to reverse linguistic change made by 2007 restyling).

unreviewable self-serving determination regarding his own qualifications to participate in a dispute.[40]

II. PERILS OF RULE FIXATION AND THE INCREASINGLY ANACHRONISTIC CULT OF THE JUDGE: UNDERADDRESSED PROBLEMS OF SELECTION, SUPPORT, COGNITIVE ERROR, AND OVERCONFIDENCE

American law has been largely a cult of the judge since at least the time of the Christopher Columbus Langdell deanship at Harvard Law School. Dean Langdell's case method, which focused on learning law through assimilating the writings of judges, made the judge the center of the legal universe.[41] Although the legal realist movement changed the terrain of the legal education and the profession, even making judges targets of critical commentary, the judicial cult was more modified than dethroned.[42] Even in the modern era, the study of appellate cases remains the primary vehicle for studying law, particularly in the formative first-year curriculum.[43]

If anything, judges were, and remain, at least as venerated in the post-realist era[44] as during the height of nineteenth century formalism. For every Chancellor Kent then,[45] there was a Learned Hand,[46] Louis Brandeis,[47] or Benjamin Cardozo[48] during the middle third of the twen-

40. Stempel, *supra* note 7, at 6 (observing that the quality of a state justice's analysis and reasoning regarding his recusal so misapplied clearly applicable law (of which he was repeatedly apprised) as to call into question his motives).

41. *See* ROBERT STEPHENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 52 (1983) (describing the evolution of American legal education as formal law schools replaced apprenticeships and self-taught "reading law," culminating in Harvard Law Dean Christopher Columbus Langdell's establishment of the case method as the dominant form of legal education during the late nineteenth century); Jeffrey W. Stempel, *All Stressed Up but Not Sure Where to Go: Pondering the Teaching of Adversarialism in Law School*, 55 BROOK. L. REV. 165, 166–76 (1989) (reviewing STEPHEN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION (1988)) (same).

42. *See* STEPHENS, *supra* note 41, at 155–56; sources cited *infra* note 44.

43. *See* WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, SUMMARY: EDUCATING LAWYERS 5–6 (2007), http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf.

44. *See* BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 183–85 (1994) (finding that basic tenants of legal realist movement have been absorbed into mainstream of modern American law); Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 2, 49–50 (2007) (same); Marin Roger Scordato, *Post-realist Blues: Formalism, Instrumentalism, and the Hybrid Nature of Common Law Jurisprudence*, 7 NEV. L.J. 263, 271–78 (2007); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 469 (1990) ("Legal realism has dominated American legal education for over half a century."); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE: 1927–1960 (1986)) ("All major current schools of thought are, in significant ways, products of legal realism. To some extent, we are all realists now.").

45. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 332 (2d ed. 1985) (noting the influence of New York jurist Samuel Kent).

46. Learned Hand was a prominent Second Circuit judge who was widely celebrated as one of the nation's best jurists. *See generally* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994).

47. Louis Brandeis, also widely celebrated, was the first Jewish U.S. Supreme Court Justice and a prominent Boston attorney prior to being appointed to the Court. The University of Louisville

tieth century and with the last third came adulation of Earl Warren,[49] William Brennan,[50] Henry Friendly[51] and Richard Posner.[52] Several Justices even appear on postage stamps.[53] Today's law students are likely

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Law School in his original hometown bears this name as does a prominent university in Boston. *See generally* EDWARD A. PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000); *see also* BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES (1982) (examining Brandeis's behind-the-scenes influence on American law, with some criticism of his hidden influence including covert collaborations with Felix Frankfurter (who now is honored on a U.S. Postal Service stamp, *see infra* note 53)).

48. Benjamin Nathan Cardozo sat on the New York Court of Appeals and the U.S. Supreme Court and is often held out as an example of outstanding, far-sighted judging. *See generally* RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

49. Former California Governor Earl Warren was Chief Justice from 1953 to 1969 and was widely revered by liberals and moderates, even if disliked by many conservatives. *See, e.g.*, JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 10–11 (2006); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (dedicating the book to Warren, for whom Ely clerked, with memorable phrase: "You don't need many heroes if you choose carefully"); Jeffrey Rosen, Op-Ed., *The Trial of John Roberts*, N.Y. TIMES, Sept. 13, 2009, at WK18, *available at* http://www.nytimes.com/2009/09/13/opinion/13rosen.html ("[I]f Chief Justice Roberts presides over a broad, ideologically divided ruling in a campaign finance case the court heard last week, he risks being remembered instead as a conservative Earl Warren."). Liberals with long memories also note that Warren, as California Attorney General, supported the shameful internment of Japanese-Americans that was the subject of *Korematsu v. United States*, 319 U.S. 432 (1943), *coram nobis granted*, 584 F. Supp. 1406 (N.D. Cal. 1984). Even if a judge is not uniformly venerated, the judge's prominence provides ample evidence of the judicial cult in American law. For example, although Justices Warren and Roberts are both household words, comparatively few, even in the legal profession, know of Floyd Abrams, one of the advocates in the Supreme Court case noted by Professor Rosen.

50. William Brennan served on the U.S. Supreme Court from 1956 to 1990 and was considered a pivotal member. Like Justice Warren, Justice Brennan was often criticized by conservatives but lionized by liberals and enjoyed cult-like fame. *See generally* The Oyez Project, William J. Brennan, Jr., http://www.oyez.org/justices/william_j_brennan_jr (last visited Mar. 15, 2010); WILLIAM J. BRENNAN JR.: AN AFFAIR WITH FREEDOM: A COLLECTION OF HIS OPINIONS AND SPEECHES (Stephen J. Friedman ed., 1967); *Jawboning Justice*, N.Y. TIMES, Apr. 2, 1987, at A30, *available at* http://www.nytimes.com/1987/04/02/opinion/topics-of-the-times-jawboning-justice.html (quoting William Bradford Reynolds criticizing Brennan as a "radical egalitarian").

51. Henry Friendly was founding partner of the firm now known as Cleary Gottlieb Steen & Hamilton LLP and served on the Second Circuit from 1959–1974. He was famous in academic circles as reputedly having the highest grades at Harvard Law School since Brandeis's student days and regarded by many as the nation's best appellate judge, and one of the best judges never to be appointed to the U.S. Supreme Court. *See* Michael Norman, *Henry J. Friendly, Federal Judge in Court of Appeals, is Dead at 82*, N.Y. TIMES, Mar. 12, 1986, at B6, *available at* 1986 WLNR 846371; *see also* HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973) (well regarded and widely scholarly book by Judge Friendly).

52. Richard A. Posner, a well-known law professor and prolific scholar, was appointed to the Seventh Circuit in 1981. *See* Fed. Judicial Ctr., Biographical Directory of Federal Judges, http://www.fjc.gov/public/home.nsf/hisj (last visited Mar. 15, 2010); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (7th ed. 2007); Elena Kagan, *Richard Posner, The Judge*, 120 HARV. L. REV. 1121, 1121–22 (2007). Although his fame stems in substantial part from his scholarly writings, it seems clear that his platform as a judge has enhanced his exposure and stature. A search of "Richard Posner" in Journals and Law Reviews in Westlaw showed only 34 references to Posner before he was appointed to the judiciary; after 1981, 9,649 references.

53. *See* U.S. Courts, Four Supreme Court Justices Honored in New Postage Stamps, http://www.uscourts.gov/newsroom/2009/postageStamps.cfm (last visited Mar. 15, 2010) (noting that on September 22, 2009 commemorative stamps of Justices Joseph Story (on Court from 1811–1845), Louis Brandeis (1916–1939), Felix Frankfurter (1939–1962) and William Brennan (1956–1990) were released).

familiar with prominent judges but not with similarly influential practitioners, like Reginald Heber Smith—the inventor of the billable hour[54]—Edward Bennett Williams,[55] E. Barrett Prettyman,[56] or H. Bartow Farr.[57] Even less likely is familiarity with lawyer-legislators, such as Robert Kastenmeier[58] or Birch Bayh.[59] To the extent American law is a movie, the judge always has the starring role, whether playing hero or villain.[60]

Not surprisingly, with the pedestal of center stage comes some sense of entitlement and even arrogance. Lawyers are indoctrinated to view a judgeship as the pinnacle of professional achievement and appear

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54. Reginald Heber Smith was a partner in the prestigious Boston law firm of Hale & Dorr who is both credited and blamed for setting the modern means of attorney payment through hourly rates. Ruth Bader Ginsburg, *In Pursuit of the Public Good: Lawyers Who Care*, 52 ME. L. REV. 301, 302 (2000). Prior to the spread of this custom, attorneys tended to charge flat rate amounts based on their estimates of the work or their views as to the value of the services rendered. As late as the 1980s, some prominent New York firms continued to send bills with statements such as "For Services Rendered—$750,000" and no further breakdown of time spent, a practice that would lead to hoots and howls today.

55. Edward Bennett Williams was a noted Washington, D.C. trial lawyer and named partner of the prestigious Williams and Connolly law firm. He defended several prominent public figures, including organized crime boss Frank Costello, Teamsters Union President Jimmy Hoffa, and Senator Joseph McCarthy. *See Edward Bennett Williams, Trial Lawyer, Dead at 68*, N.Y. TIMES, Aug. 15, 1988, at D11, *available at* http://www.nytimes.com/1988/08/15/obituaries/edward-bennett-williams-trial-lawyer-dead-at-68.html.

56. E. Barrett Prettyman was a partner in the Hogan & Hartson law firm specializing in advocacy before the U.S. Supreme Court. *See* Myron H. Bright, *Jurists-in-Residence Programs*, FED. LAW. Jan. 2007, at 38, 41.

57. H. Bartow Farr, a name partner in Farr & Taranto, specializes in Supreme Court advocacy. Like Prettyman, he has a reputation for excellence and an enviable track record of prevailing in most of his cases before the Court. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 124–25 (1984) (striking down injunctive relief ordered by federal court in connection with deprivations of developmentally disabled residents at institution (Farr's client) notwithstanding that federal court's inquiry and decision followed roadmap set forth by Court in prior decision in case); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 5 (1981) (reversing lower courts on the ground that the Patients' Bill of Rights in Developmental Disabilities Act of 1975 did not create independent rights at law, but was only funding a statute).

58. Kastenmeier, a long-time Wisconsin congressman, was chair of the Judiciary Subcommittee on Federal Rules and was responsible for many litigation reform efforts. He was eventually unseated by a television anchor. *See* Biographical Directory of the U.S. Cong., Kastenmeier, http://bioguide.congress.gov/scripts/biodisplay.pl?index=k000020 (last visited Mar. 15, 2010).

59. Birch Bayh (D.-Ind.) was a U.S. Senator credited with major revisions of the federal statutes governing disqualification of judges. *See generally* John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43 (1970). He is the father of current Indiana U.S. Senator Evan Bayh, who has announced he will not seek re-election.

60. Perhaps the best known lawyers in America are those appearing regularly as guest commentators on television or occasionally thrust into the spotlight because of a high profile televised trial. Although many of the former are good lawyers, most can correctly be characterized as not being in the upper echelon of the profession, at least as viewed by the profession itself. As to the latter, for every David Boies or Barry Richard (who argued *Bush v. Gore* in various stages and forums), there are lawyers like the O.J. Simpson prosecution team, who performed horribly. *See* Chris Tucker, *Lawyer Says O.J. Case Was Lost Early*, DALLAS MORNING NEWS, Feb. 15, 1998, at 10J, *available at* 1998 WLNR 7416011. But, as bad as some of the lawyering in *People v. Simpson* may have been, the performance of trial judge Lance Ito is widely regarded as worse and he appeared to occupy center stage even more than the prominent defense lawyers retained by Simpson. *See, e.g.*, John Caher, *Counsel, Media Spar over TV's Effect in Court*, N.Y. L.J., Jan. 30, 2004, at 1 col. 3 (noting media criticism's effect on Ito's demeanor in court); *No Media Circus*, NEWSDAY, June 4, 1997, at A42, *available at* 1997 WLNR 560130.

to retain that view notwithstanding modern concerns over salary,[61] caseloads, working conditions, and life restrictions attendant in becoming a judge. Like any other human being put in a position of authority (complete with lawyers and their clients fawning to curry favor), judges may acquire a false sense of infallibility.

But with this power frequently comes frustration. Judges commonly complain about restrictions on their activities, unfavorable press scrutiny, low pay (at least relative to what they received as attorneys), impoverished working conditions, and bureaucratic burdens.[62] For appellate judges, travel obligations add to the stress no matter how much junket value they may appear to have to outsiders. For every chance to hear cases in San Francisco, there are judges slogging to Omaha in the dead of winter. For elected judges, there are the added burdens of fundraising, campaigning, and the constant fear of voter rejection. Although few judges leave the bench voluntarily, they may develop the sense that they are underappreciated and misunderstood—and that critics (political, social, and academic) simply do not understand the intricate realities of judging.

As discussed above,[63] one area in which some degree of judicial trench mentality appears with some frequency is on matters of disqualification. In many of the reported cases on disqualification, judges not only err in failing to recuse, but err badly. *Caperton v. Massey* serves as a prime example of a judicial officer repeatedly making terribly bad recusal decisions. *Liljeberg v. Health Services Acquisition Corp.*[64] likewise reflects bad judicial behavior by an apparently bad judge[65] that was rectified by a 5–4 U.S. Supreme Court vote.[66] *Aetna Life Insurance Co. v. Lavoie*[67] reflects similarly suspect judicial behavior of an Alabama justice that required U.S. Supreme Court correction. And cases such as these reaching the Court are likely just the tip of the iceberg.

The problem becomes particularly acute where the jurist's recusal decision is not reviewable, as in the case of U.S. Supreme Court Justices

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61. *See generally* Stephen J. Choi et al., *Are Judges Overpaid? A Skeptical Response to the Judicial Salary Debate*, 1 J. LEGAL ANALYSIS 47 (2009). Despite complaints about relatively low pay in comparison to private practice, few judges leave the bench and judicial vacancies appear to draw many applicants.

62. *See* Lee May, *Federal Judges Complain Pay Is Too Low, Seek Raises*, L.A. TIMES, July 28, 1985, at MN8, *available at* http://articles.latimes.com/1985-07-28/news/mn-5438_1_federal-judge.

63. *See supra* Introduction.

64. 486 U.S. 847 (1988) (discussing judge who was trustee of university with multi-million dollar interest in case outcome failed to recuse).

65. *See* GILLERS, *supra* note 13, at 592, 602 (observing that trial judge who failed to recuse in *Liljeberg* was eventually convicted of bribery, conspiracy, and obstruction of justice).

66. *See Liljeberg*, 486 U.S. at 870 (Rehnquist, C.J., with White & Scalia, JJ., dissenting); *id.* at 874 (O'Conner, J., dissenting).

67. 475 U.S. 813 (1986) (holding that Alabama Supreme Court Justice should have recused in case presenting same legal issue involved in his similar claim against another insurance company; failure to recuse violated insurer's due process rights).

Rehnquist, Scalia, and Breyer, who have made shockingly bad—and uncorrected—determinations not to recuse.[68] West Virginia Supreme Court Justice Benjamin's refusal to disqualify, although perhaps debatable as a matter of due process, clearly failed the standard set forth in Canon 3(E) (now Rule 2.11) of the Code of Judicial Conduct.[69] He memorialized this bad decision in writing on four occasions, revealing that he apparently did not understand the applicable legal standard and instead erroneously measured his ability to participate according to whether he subjectively thought he could be fair.[70] Disappointingly but unsurprisingly, he concluded he could be perfectly fair in spite of having received $3 million in campaign help from the CEO of a litigant with $82 million riding on his vote.[71]

Justice Benjamin's recusal failings, although more severe than most, are perhaps a sign of the times as judicial elections become hotly politicized and candidacies are heavily financed by interest groups hoping to place sympathetic judges on the bench. Today, substantial monetary support has joined the historical list of circumstances—family, friends, law firm connections, and direct financial interest—that create recusal questions. Although favoritism has always been a danger to impartial justice, the influx of campaign money and its cousins, such as jobs for judicial relatives and lucrative court appointments, have increased the problem of actual and perceived bias.[72]

Even when their assessments are not clouded by finance, family, or friendship, judges have proven surprisingly fallible, both in controlled experiments and in actual practice. In a variety of studies, judges have been shown to be susceptible to cognition errors and bias, just like laypersons.[73] For example, self-serving bias—the tendency for people to

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68. *See* source cited *supra* note 13 and accompanying text.

69. *See* Stephen M. Hoersting & Bradley A. Smith, *The* Caperton *Caper and the Kennedy Conundrum*, 2009 CATO SUP. CT. REV. 319, 325 & n.25 (2009).

70. *See* Stempel, *supra* note 7, at 22, 29, 52.

71. *See id.* at 10–11.

72. *See* Jeffrey W. Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary*, 4 NEV. L.J. 35, 45–49 (2003) (discussing large increase in campaign spending during past decade); Michael J. Goodman & William C. Rempel, *Juice vs. Justice: A* Times *Investigation* (pt. 1), L.A. TIMES, June 8, 2006, at MN1, *available at* http://articles.latimes.com/2006/jun/08/nation/na-vegas8 (discussing perceived abuses and judicial favoritism in Las Vegas); Elliot G. Hicks, Op-Ed., *Merit Selection, Not Elections, Must Be How We Choose Justices*, CHARLESTON GAZETTE, Dec. 14, 2004, at 5A, *available at* 2004 WLNR 14039840.

73. *See, e.g.*, Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420, 420 (2007) (reviewing literature and finding substantial evidence that judges are impacted by cognitive biases and reasoning errors; arguing that judges "possess three sets of 'blinders': informational blinders, cognitive blinders, and attitudinal blinders" which make "accurate application of governing law to the facts of the case . . . difficult"); Mitu Gulati, Jeffrey J. Rachlinski & Donald C. Langevoort, *Fraud by Hindsight*, 98 NW. U. L. REV. 773 (2004) (finding judges and juries vulnerable to hindsight bias in concluding fraud took place when incorrect estimates or statements resulted only from mistake and lacked scienter); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (findings also suggest judges are influenced by framing, hindsight bias, representativeness, and egocentric bias as well as anchoring); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998) (observing that hindsight bias affects

overestimate themselves, their abilities, and their success or prospects for success—"can also influence judges, leading them to believe that they are better decision makers than is in fact the case."[74] Summarizing this research, one author observed that it has "shown us that judges are subject to hindsight bias, can be manipulated by anchoring, will sometimes fall prey to the lure of inappropriate evidence[,] and suffer a number of other 'blinders.'"[75] Other scholars have suggested that much judicial error results not only from cognitive failings, but also from "strong biases and prejudices" that pose "a major obstacle to the fair administration of justice."[76]

In addition, judges are perhaps more inconsistent about basic legal axioms than is commonly thought. In one experiment, for example, judges were asked to convert their concept of the variant burdens of proof—preponderance, clear and convincing evidence, beyond a reasonable doubt—to percentages. The percentage definitions given by the judges varied in ways that should make observers uncomfortable about the consistency of the bench. For example, some judges thought that proof at the eighty percent level was beyond a reasonable doubt while others identified the standard as ninety-nine percent.[77] The percentage

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judges and juries); W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. L. & ECON. REV. 26, 29 (1999) (finding "judges exhibit a variety of biases"); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005) (observing that judges have difficulty disregarding inadmissible evidence while making determinations when they are faced with variants of various hypothetical questions); *see also* Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 LAW & HUM. BEHAV. 353, 354, 357 (1999) (finding that mock jurors's knowledge of caps on damages had effect of depressing what would otherwise have been awarded as damages; no reason to think that judges are not similarly affected).

74. Guthrie, *supra* note 73, at 436; *accord* Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979, 983–84 (1994) (finding that bankruptcy judges appear to overestimate their efficiency as compared to attorney evaluations); *see also* Guthrie et al., *supra* note 73, at 813–14 (finding over half of judges surveyed estimated that they were in the top quarter of the bench as measured by reversal rates).

75. Stephan Landsman, *Nobody's Perfect*, 7 NEV. L.J. 468, 468 (2007) (noting that work of Guthrie and others "is part of a historical trend that has increasingly focused on judicial fallibility," including prominent Kalven & Zeisel jury research of 1950s and 1960s). *But see id.* at 475–76 (suggesting that use of lay juries, who are often insulated from information known to judges, in combination with judges for adjudication, may significantly reduce adverse impact of blinders); Philip M. Pro, *Mis(understanding) Judging*, 7 NEV. L.J. 480, 483 (2007); Elaine W. Shoben, *Evidentiary Wisdom and Blinders in Perspective: Thoughts on Misjudging*, 7 NEV. L.J. 500, 509–10 (2007); *see also* Stephen N. Subrin, *Thoughts on Misjudging Misjudging*, 7 NEV. L.J. 513, 513–20 (2007) (taking issue with some of Guthrie's conclusions and finding them misleading in four different dimensions, including failing to see limits of empirical research, taking overly narrow view of civil litigation process, overestimating neutrality of arbitrators and mediators as compared to judges, and underweighting corrective impact of jury system).

76. *See* Rodney J. Uphoff, *On Misjudging and Its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System*, 7 NEV. L.J. 521, 522–23 (citing instances of bad judicial behavior, including bias and favoritism); *see also id.* at 525–30 (providing examples of judicial conduct so bad that it appears to result from bias or prejudice rather than mere susceptibility to cognitive miscalculation).

77. *See* Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE. L.J. 1299, 1311 (1997).

ranges used to define clear and convincing evidence were similarly wide-ranging.[78] In another experiment, judges were given a hypothetical civil rights claim with a hypothetical summary judgment motion. They varied substantially in whether they would grant or deny the motion[79]—a motion based on supposedly very clear law.[80]

These experimental results are not particularly encouraging for fans of the imperial judiciary. At a minimum they reveal a good deal of inconsistency between judges. Consider the consequences for a criminal defendant: Before Judge A, the defendant will be convicted if the judge is eighty percent confident; before Judge B, the judge must be absolutely convinced. In the summary judgment context, Judge X is ready to find against a plaintiff as a matter of law while Judge Y believes the matter requires jury attention—and both Judges X and Y are viewing the same set of hypothetical cases facts. This hardly evokes the type of consistency and predictability to which law aspires.

In real life, judges make similar decisions that appear erroneous to many. For example, one judge concluded *as a matter of law* that there was no actionable sexual harassment even though a supervisor repeatedly rubbed an employee's thigh and attempted to kiss her despite her protests, holding that the plaintiff failed to raise an issue of fact that the reasonable person would find that the supervisor's actions created a hostile work environment.[81] Another found—*again as a matter of law*—that being called a "black bitch" was sufficient proof of race discrimination to merit jury consideration of the issue.[82] In an age discrimination case, the trial and appellate courts found an employer's claim of firing for poor performance convincing—*as a matter of law*—despite five glowing performance reviews and only one stating that the manager and the employee were not "on the same 'wavelength.'"[83] Another federal judge threw a civil rights litigant out of court for failing to raise his claim in state court—even though the state court had refused to hear the claim.[84]

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78. *See id.*

79. *See* Myron H. Bright, *Do Philosophy and Oral Argument Influence Decisions?—Getting There*, A.B.A. J., Mar. 1991, at 68, 69–71.

80. *See* FED. R. CIV. P. 56(c) ("The [motion for summary] judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.").

81. Saxton v. AT&T Co., 10 F.3d 526, 528, 537 (7th Cir. 1993); *see also* Beiner, *supra* note 16, at 106–08 (providing similar examples).

82. *See* EEOC v. Champion Int'l Corp., No. 93 C 20279, 1995 WL 488333, at *1–2 (N.D. Ill. Aug. 1, 1995).

83. *See* McCoy v. WGN Cont'l Broad. Co., 957 F.2d 368, 370 (7th Cir. 1992).

84. *See* Delew v. Wagner, No. 97-CV-90 (D. Nev. Apr. 4, 1997), *rev'd* 143 F.3d 1219, 1221–23 (9th Cir. 1998) ("The state court denied the motion [for leave to amend brought by plaintiffs] and directed the Delews to file a separate section 1983 complaint. While we question the soundness of that decision, we have no power to correct it and must accept the unique posture the Delews' claims appear before us. . . . The Nevada state court effectively split the Delews' causes of action by denying their motion to join the two actions in one proceeding. The rule concerning the claim splitting is not applicable here.").

When the case was reversed and remanded, a second federal judge granted summary judgment on the ground that there were no facts creating a jury issue, even though the plaintiff had introduced substantial evidence of a police cover-up designed to prevent the family of a decedent bicyclist from gathering evidence against an officer's wife who had run into the cyclist.[85]

Civil rights and job discrimination cases provide some particularly shocking examples of judges willing to accept hokey legal arguments. Consider the "same actor" defense to job discrimination claims through which some defendant employers have successfully argued that—*as a matter of law*—an adverse employment action cannot have been the product of invidious discrimination if the same person both hired and fired the employee.[86] Even if this argument made some sense, where the person hiring the plaintiff is also the alleged discriminator, this is at best only evidence tending to suggest non-discrimination. It cannot logically be conclusive or support even a rebuttable presumption of non-discrimination. Nonetheless, some well-educated jurists have been willing to embrace this defense to a discrimination claim and unfairly impose upon employees the burden of overcoming a presumption of non-discrimination, where the same superior both hires and fires an alleged victim of discrimination.

One might be tempted to explain the disparate *Delew* results according to the judicial politics of whether a judge is receptive to or hostile toward civil rights claims against a police department. However, the Ninth Circuit panel was one composed of judges generally regarded as conservative, suggesting that the trial court error was clear under the law. The judge who wrote the Ninth Circuit opinion, Joseph Sneed, was appointed to the bench by Richard Nixon, and is the father of former Hewlett–Packard CEO, Carly Fiorina, a prominent John McCain supporter in 2008, and is generally regarded as a judicial conservative. Panel member Diarmuid O'Scannlain was appointed by Ronald Reagan and is regarded by many lawyers as the most ideologically conservative member of the Ninth Circuit. Panel member Harlington Wood, Jr., a Seventh Circuit judge sitting by designation, was appointed by Richard Nixon and is considered conservative. For biographies on the aforementioned judges, see Fed. Judicial Ctr., *supra* note 52.

85. *See* Delew v. Las Vegas Metro. Police, No. CV-S-00-0460 RLH (LRL) (D. Nev. Dec. 17, 2002), *rev'd sub nom.* Delew v. Wagner, 143 F.3d 1219 (9th Cir. 1998). The plaintiff's evidence of record included certain officers spiriting the officer's spouse away from the scene for at least two hours so that she could not be observed and viewed as inebriated, mishandling a simple blood test so that its results (which tended to show significant alcohol in her bloodstream) would be inadmissible in court, and failure to preserve evidence.

Although it was possible that the officers in question could present an innocent explanation for their conduct sufficient to satisfy a jury, it is hard to imagine a reasonable observer that did not see these facts as at least presenting a jury question. Yet there was at least one federal trial judge who thought that no reasonable jury could fail to render a defense verdict on these facts.

After the Ninth Circuit reversal and remand, the police department conducted a mock jury exercise that brought in a multi-million dollar mock verdict, leading the department to settle the case for more than a $1 million. When the views of laypersons and defense counsel differ this much from a judge's decision, a little concern is in order, as well as a little humility for the judges.

86. *See, e.g.*, Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1314–16 (1998) (arguing that the same-actor defense is "simply not how discrimination works"); Julie S. Northup, Note, *The "Same Actor Inference" in Employment Discrimination: Cheap Justice?*, 73 WASH. L. REV. 193, 221 (1998) (concluding that the defense allows valid claims to be dismissed).

A perhaps more egregious example was presented when employers asserted the "after-acquired evidence" defense to discrimination claims. Under this defense, an employer who had allegedly fired an employee for discriminatory reasons would—after the suit was filed—seek and obtain some negative information about the plaintiff that arguably justified dismissal and then argue that the employee was dischargeable on these nondiscriminatory grounds, even though the employer as a matter of uncontested fact had not made the adverse job decision on this basis.[87] The Supreme Court, in *McKennon v. Nashville Banner Publishing Co.*,[88] correctly concluded that such information could not constitute an absolute bar to a discrimination claim since the after-acquired evidence defense by definition asks a court to hold an employer's conduct nondiscriminatory based on reasons for discharge that were concededly not actually used by the employer in making the discharge decision.[89]

Although impaired logical reasoning skills cannot be discounted as a reason for such opinions, they probably reflect some judges' hostility toward such claims. Neither explanation, however, is very comforting. Judges have also made significant errors regarding the fortuity element of insurance, erroneously reasoning that policyholders are not covered for injuries they commit through acting unreasonably, when the entire point of insurance is to protect policyholders when their negligence leads to legal liability (people who were never negligent would theoretically never face tort liability) and also failing to note that even the most careful actor can be sued by a mistaken, bitter, or strategically acting plaintiff.[90]

The limited scope and space of this Article precludes any attempt at a lengthy or detailed list of examples of judicial error, but any experienced reader of cases or observer of courtroom activity undoubtedly has experienced a few jaw-dropping moments when faced with a deeply incorrect judicial decision.[91] As noted above, the aggregate statistics suggest that reviewing courts find trial judges wrong roughly forty percent of the time.[92] I do not mean to suggest that adjudication is a paint-by-numbers enterprise. Some amount of disagreement is inevitable in many

87. *See, e.g.*, Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988); *see also* JEFFREY W. STEMPEL, LITIGATION ROAD: THE STORY OF *CAMPBELL V. STATE FARM* 162–67 (2008) (discussing fired insurance agent's age and religious discrimination claims, and court barring claims as a matter of law where after discharge employer found evidence of improper behavior). *See generally* Ann C. McGinley, *Reinventing Reality: The Impermissible Intrusion of After-Acquired Evidence in Title VII Litigation*, 26 CONN. L. REV. 145 (1993) (setting forth background of after-acquired evidence defense and noting cases where it worked for employers in spite of its logical incoherence and factual inaccuracy).

88. 513 U.S. 352 (1995).

89. *See id.* at 362–63.

90. *See* 1 JEFFREY W. STEMPEL, STEMPEL ON INSURANCE CONTRACTS § 1.06 (3d ed. 2006 & Supp. 2009).

91. *See, e.g.*, Uphoff, *supra* note 76, at 525–27 (relating episode of very troubling trial judge animosity toward criminal defendant drawn from professor's practice experience).

92. *See supra* text accompanying note 20.

cases. Just as there has been a tendency to accept less-than-unanimous jury verdicts, there may be a post-modern Zeitgeist counseling a less judgmental attitude toward reversal rates and decisions with which we disagree. It may be the appellate panel, or simply two-thirds of the appellate panel, that is incorrect. My point is simply that judicial decision-making appears to fall far short of the near-universal rates of affirmance, approval, consensus, or acceptance one would expect—at least for routine matters not implicating political divisions—if judges were as infallible as they present themselves or as our legal and education system assumes them to be.

During the nearly 25 years of the *Zenith–Celotex–Liberty Lobby* summary judgment trilogy,[93] it has become judicially popular to sing the praises of summary judgment and for judges to believe they can omnisciently apply Rule 56[94] without error. Appellate statistics and scholarly commentary make it quite clear that the bench is not nearly so omniscient as it supposes.[95] To some extent, one must be a bit arrogant to be a judge facing a summary judgment motion, in that the enterprise requires supreme judicial self-confidence—an assurance that the judge absolutely knows the permissible range of reasonable views of the evidence. But, many judges seem to regularly go beyond this baseline minimum and find themselves frequently declaring a singular view of the world that is not shared by other judges, let alone legal scholars. If the facts in summary judgment motions were really not subject to genuine dispute, and the law is reasonably clear, the affirmation rate for summary judgment motions would be 100 percent. Even discounting the legal realism that many statutes and case precedents are not clearly determinative of the correct legal outcome in a given dispute, one would expect much higher affirmation rates, and much less scholarly commentary arguing that courts erred in applying the straightforward "no genuine dispute of material fact" standard.

Nonetheless, judges as a class seem astonishingly confident in their own infallibility. I witnessed a telling example during hearings regarding the draft amendments to the discovery rules that were eventually promulgated in 1993. During an April 1993 public hearing in Atlanta, a lawyer witness stated that the majority of his colleagues opposed the proposed system of disclosure, to which an irritated Judge Sam Pointer (Northern District of Alabama and then-Chair of the Civil Rules Committee) replied that the Committee was not conducting a "plebiscite."

93. *See* Stempel, *supra* note 16, at 107–09 (discussing the U.S. Supreme Court's 1986 summary judgment trilogy of Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); and Celotex Corp. v. Catrett, 477 U.S. 317 (1986)).

94. FED. R. CIV. P. 56.

95. *See* sources cited *supra* note 16.

Perhaps, but if the Committee (or at least its Chair) was so singularly uninterested in practitioner opinion, why was it holding hearings?[96]

Judge Pointer's relatively insular view is matched by an institutional trend as well. The most recently constituted Federal Civil Rules Committees have been composed almost exclusively of judges.[97] The original Committee that drafted the 1938 Rules included a higher portion of law professors and attorneys from government and private practice.[98] Today, the Rules Committees (Criminal, Appellate, and Bankruptcy, as well as Civil Rules) are ninety percent judges.[99] When the process is already highly judge-centric, one would think that the judiciary, which determines committee membership, would consider seeking more diversity of input and participation.

In similar fashion, it appears that the bulk of judicial education classes are taught by judges or former judges, with comparatively few led by practitioners and even less by legal academics.[100] And, as was

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96. The short answer to my rhetorical question is that the Committee was required to hold the hearing pursuant to the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. If it had been up to Judge Pointer and the other Committee members, perhaps there would have been no public hearings. Certainly, there appear to have been no significant revisions in the Committee's proposal as a result of public comment.

More troubling to me is the degree to which Judge Pointer's remarks reflect a certain us-versus-them trench mentality in which lawyers are the enemy, advocating for a status quo that permits them to engage in income-enhancing strategic behavior rather than concerned participants in the justice system. To be sure, some lawyers are self-serving and venal. But most of those bothering to show up at a Rules hearing, even if well aware of client preferences (or even if funded by clients) appear to me to take seriously their roles as officers of the court. Fortunately, in many issues of Civil Rules revision—for example, the 1993 changes to Rule 11, and the pending changes to Rule 26 regarding expert witness discovery—the judiciary does appear to be listening to lawyers and not discounting their concerns as mere self-interest.

As an afterward, notwithstanding my concern that Judge Pointer was unduly hostile to lawyers who did not like the proposed 1993 discovery reforms, they have not been the mild disaster I predicted. *See* Jeffrey W. Stempel, *Cultural Literacy and the Adversary System: The Enduring Problems of Distrust, Misunderstanding, and Narrow Perspective*, 27 VAL. U. L. REV. 313, 314–16 (1992). And Judge Pointer was a primary force (and reputedly a prime drafter) of the 1993 Amendment to Rule 11 that corrected many problems engendered by the 1983 Rule 11 Amendment.

97. *See* COMM. ON RULES OF PRACTICE & PROCEDURE, CHAIRS AND REPORTERS (2009), http://www.uscourts.gov/rules/Members_List_07_2009.pdf [hereinafter CHAIRS AND REPORTERS].

98. *See* Resnik, *supra* note 35, at 499 n.24 (noting that original Rules Committee included "leading lawyers (active in the bar and in politics) and . . . law professors").

99. *See* CHAIRS AND REPORTERS, *supra* note 97.

100. *See* Nat'l Judicial Coll., 2009 Alphabetical Listing of Courses, http://www.judges.org/coursesalpha_2010.html (last visited Mar. 15, 2010).

For example, approximately a dozen educational programs were presented at the September 2009 Conference of the American Judges Association ("50th Anniversary Celebration"), nearly all presented by sitting judges. The exceptions were a deputy district attorney speaking about "The Link Between Animal Cruelty and Violence to Persons," a Harvard Medical School professor, and Erwin Chemerinsky, Dean at the UC–Irvine Law School. One session involved "Judicial Ethics" but the speaker had not been determined by the time the program was posted. *See* Am. Judges Ass'n, 50th Anniversary Celebration (2009), http://aja.ncsc.dni.us/htdocs/2009Annual/SpeakerMaterials/Briefprogram.pdf.

To be sure, Chemerinsky is the gold standard among legal academics and always worth hearing. His topic "Supreme Court of the United States Review of Recent Decisions of Significance to State Court Judges" appears timely and useful and includes a discussion of *Caperton v. Massey*, although it is only one of fifteen cases noted in his outline (coming after cases on the Fourth

noted more than a quarter-century ago, judges appear much more focused on case management than on substantive adjudication[101] and on preserving maximum judicial discretion even as attorney discretion is increasingly limited.[102]

III. INITIAL STEPS TOWARD IMPROVEMENT

Widespread or systemic problems ordinarily require a systemic and far-reaching solution. Full articulation of promising avenues for reform with even partial explanation would consume an entire law review issue. In a nod to attempted brevity, this Part briefly lists what I regard as the most promising initiatives, some of which are in the nature of structural change and the composition of the bench, others in the form of rule changes, and others that largely depend on changes in judicial attitude and self-perception.

A. Recusal and Disqualification Reform

First, some basic recusal reform: A jurist's decision not to recuse should always be subject to at least one level of review. Obviously, this problem is most pronounced in the U.S. Supreme Court and in the many state supreme courts that operate under the same each-judge-is-the-law-unto-himself system. Recusal decisions made by an individual jurist should be subject to review before another judge, a designated review panel, or the full court, perhaps (in state courts) with a right of further discretionary review vested with a state judicial discipline commission. For trial judges, unlike for some supreme court justices, including U.S. Supreme Court justices, the current system has reasonable checks upon judicial recusal errors. But even here, there remains room for improvement in states that do not permit at least one peremptory challenge to a judge and do not provide for chief judge review of an individual judge's refusal to recuse.[103]

Amendment, the Confrontation Clause, the Sixth Amendment right to counsel, and DNA testing for criminal defendants). *See* Erwin Chemerinsky, Supreme Court Review (2009), http://aja.ncsc.dni.us/htdocs/2009Annual/SpeakerMaterials/SupremeCourtReview.pdf (program materials). There is little hint in the program of education about the types of heuristics and biases that may often lead to poor recusal practice and incorrect decision-making on matters of procedural and substantive law, although some discussion is reflected in the power point slides of Harvard psychology professor Ronald Schouten. *See* Ronald Schouten, Assessing Dangerousness: Myths and Research (2009), http://aja.ncsc.dni.us/htdocs/2009Annual/SpeakerMaterials/AssessingDangerousness.ppt (program materials). As appears usual, much of the emphasis was on case management.

101. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–78 (1982).

102. *See* Edward Brunet, *The Triumph of Efficiency and Discretion over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 276–77 (1991).

103. *See* FLAMM, *supra* note 10, chs. 17, 26–28 (noting degree to which such devices are used in the states); *see also* Deborah Goldberg et al., *The Best Defense: Why Elected Judges Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 526–27 (2007) (advocating greater use of peremptory challenges and additional review to reduce disqualification errors).

Each federal trial judge makes the initial decision about disqualification, subject to appellate review. Unfortunately, however, the recusal decision is not ordinarily subject to immediate review,[104] creating both the problem of wasted resources if a case is vacated and remanded for recusal error, and the potential problem of appellate courts flinching from reversing a nonrecusal decision that will necessitate repetition of a lengthy, expensive, or inconvenient trial. Correspondingly, one potentially useful reform is making available immediate review of a judge's refusal to disqualify, either at the district court level or through expedited interlocutory review. The latter need not be such a baroque proceeding as to undermine the final order rule but can be a "quick look" to ensure that the trial judge has not obviously erred. After final adjudication, an aggrieved party could continue to press the issue although, as a practical matter, it is less likely to prevail than if there had been no previous review of the trial judge's decision to stay on the case.

Compared to federal judges, the level of review for state court judges is often more rigorous and includes at least some immediate review. In many states, although the challenged judge makes his own initial recusal decision, the affected party may as a matter of right receive review by the chief justice of the trial court. Thereafter, there is appellate review and possible state supreme court review. Where failure to recuse goes beyond mere question as to impartiality, but rises to the level of a probability of bias, the nonrecusal may be reversed on constitutional grounds under the authority of *Caperton v. Massey*.[105]

State trial court recusal practice seems superior to the federal model in another regard. In the federal system, a litigant can have a judge removed as a matter of right if he moves for recusal and files an affidavit of bias or prejudice pursuant to 28 U.S.C. § 144.[106] However, an attorney considering this option must have some evidentiary ground for asserting (under oath and in the affidavit) that the challenged judge is prejudiced or biased.[107] By contrast, in many states, the parties may exercise one peremptory challenge to remove a judge as a matter of right, provided this is done at the outset of the case.[108] This system allows lawyers and litigants the necessary freedom to seek recusal without needing to develop a convincing case of bias, and permits removal of the judge where the attorney has doubts about the judge's ability to be impartial.[109]

Of course, a recusal motion is useful only if made—and making the motion requires that a litigant or counsel have at least some information

104. *See* JAMES ET AL., *supra* note 17, § 12.4 (regarding final order rule and limits on interlocutory review).
105. 129 S. Ct. 2252, 2265 (2009).
106. *See* FLAMM, *supra* note 10, § 23.2.
107. *See id.* § 23.6.
108. *See* Goldberg et al., *supra* note 103, at 522.
109. *See id.* at 526.

to bring the judge's impartiality into question. Logically, then, a stringent disclosure requirement is also necessary for effective recusal practice. Although judges are already required to disclose any potential basis for challenging their participation in a case on impartiality grounds, some consciousness-raising might be necessary to spur judges to disclose information sooner and more often.

Improved disclosure would be particularly helpful where the concern is lack of impartiality due to campaign support. In many states, campaign funding disclosure laws are inadequate in that they do not sufficiently mandate immediate posting of campaign contributions and amounts. Ideally, campaign contributions should be disclosed on a website immediately upon receipt, with sufficient identifying information about the donor, particularly for organizations with patriotic-sounding names that may merely be the front organizations for individuals or companies.

But as the *Caperton* saga shows, direct campaign contributions may be only the tip of the iceberg. All but $1,000 of the $3 million spent on West Virginia Justice Benjamin's electoral behalf came from so-called independent expenditures, rather than through direct contributions to the Benjamin campaign (the state has a $1,000 limit on direct contributions).[110] If campaign spending disclosure is to be effective, it must apply to advocacy organizations as well. When a group with an innocuous name like "Citizens for Better Courts" raises money, its detailed donor list should be publically available on the web in real time.

Although I urge less attention to rulemaking and more attention to judging, many of my prescriptions for improved judging involve proposed new rules or systems. But, simple attitude adjustment or consciousness-raising may go a long way toward improved judicial performance. Regarding recusal, an important mental adjustment for judges would be the simple realization that judges are relatively fungible, a fact already recognized in jurisdictions that permit peremptory challenges to judges. If Judge X cannot hear a case, this hardly imperils justice. Judge Y can hear the case. If the system is working reasonably well, there should not be a great quality gap between Judge X and Judge Y.

Unfortunately, the history of judicial recusal has been an implicit preference for holding on to a case out of misplaced pride, and concern that recusal will impose burdens on other judges or permit strategic judge shopping by litigants.[111] Most notoriously, the traditional "duty to sit" doctrine reflected this attitude which, during its 1950–1970 heyday, counseled judges to disqualify only in clear cases and to lean against

110. *See supra* note 8 (describing *Caperton* matter).

111. *See* Stempel, *Chief William's Ghost*, *supra* note 13, at 814–19 (describing background and rationale of duty to sit and its unfortunate evolution into presumption of resistance to recusal in close cases).

recusal in close cases.[112] Although what I call this "pernicious" version of the duty to sit was removed from the ABA Model Code in 1972 and from federal law in 1974,[113] it persists in case dicta and remains in force in some states.[114]

B. Improved Education for Judges

Another simple means of improving judicial performance without amending rules or establishing new structures is improved education for judges regarding cognitive biases and reasoning errors commonly made by humans. For example, the experiments discussed above[115] might not have had such drastic impact in judicial perceptions of the hypothetical cases if the judges had been given even a little training in this concept so that they could realize the degree to which mental anchors impact human judgment.

Currently, it appears that, despite substantial judicial education in court management, new laws, and emerging types of cases, there is little judicial education directed toward informing the judges of the insights of cognitive psychology and behavioral economics.[116] Even a day-long course regarding anchoring, hindsight bias, status quo bias, optimism bias, self-serving bias, the availability heuristic, and similar traits affect-

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112. *See id.* at 835–36, 849–50.

113. *Id.* at 863–68.

114. *See id.* at 882–84.

115. *See supra* notes 73–80 and accompanying text (discussing findings in Guthrie et al., *supra* note 73).

116. *See supra* note 100 and accompanying text (regarding nature and frequency of judicial education courses).

This is not to suggest that judicial education courses are completely devoid of inquiry on these topics or that judicial education courses draw their faculty completely from the bench. However, a review of the websites, programs, and available course materials of the National Judicial College or the American Judicature Society, or the American Judges Association, The National Center for the Study of State Courts, Federal Judicial Center and other organizations engaging in judicial education, confirms that primary focus appears to be on case management and substantive law, with little or no discussion of behavioral psychology literature. When judicial education materials speak of "bias," in almost all instances they refer to race, gender, ethnic, or religious bias rather than cognitive bias. Although the increasingly raised judicial consciousness as to these topics is encouraging, it to me suggests substantial room for improvement. Forty years after the civil rights movement of the 1950s and 1960s, it is at least good to know the bench is getting courses on race bias. A similar time lag may accompany the bench's eventual institutionalization of courses taking a more sophisticated approach to cognitive decision-making and impartiality.

There are, of course, some notable exceptions to the general rule; courses that appear to be quite sophisticated and interesting regarding judicial ethics, including disqualification, as well as regarding race and gender bias. However, the courses typically cost roughly $1,000, perhaps more, which may suppress attendance. *But see* Nat'l Judicial Coll., Ethics in the Everyday Court, http://www.judges.org/news/news010509.html (last visited Mar. 15, 2010) (describing National Judicial College course presented by sitting judge running 76 minutes and costing $50 and planning to cover ABA Model Judicial Code and "include a discussion about recusal as it should have been applied in the Illinois Supreme Court case *Avery v. State Farm Mutual Insurance Company* as well as examples from Wisconsin and West Virginia"); Cynthia Gray, Top 10 Recent Judicial Ethics Cases, http://aja.ncsc.dni.us/htdocs/2009Annual/SpeakerMaterials/Top10Ethics.pdf (2009) (program materials) (giving first discussion of *Caperton v. Massey* and addressing other notable recusal cases). Perhaps an effort at not only expanding course offerings but encouraging, subsidizing, or even mandating attendance is in order.

ing human cognition could go a long way toward inoculating judges against these misleading influences, or at least reducing the influence of these factors on judges.[117] Organizations like the National Judicial College, the American Judicature Society, or the American Judges Association could make a special effort to add these to the curriculum and encourage attendance. State judicial administrators, as well as the Federal Judicial Center in its efforts to educate federal judges, could promote this.

C. Judicial Selection Reform

But, education and consciousness-raising alone will not be enough. A useful structural change would be to move away from elections and toward appointment of judges. Currently, nearly eighty percent of the states elect judges to some degree.[118] Where the elections are full-blown, knock-down, drag-out affairs similar to executive or legislative races, there are obvious dangers that results will not bring forth the apogee of the legal profession. Many talented lawyers simply will not want the economic and social inconvenience of running for judge. Many will dislike the fundraising and flesh-pressing process (although they dare not be caught on camera expressing the latter sentiment).[119]

In addition, the very notion of judges as candidates listening to constituent groups is distasteful, at least when the groups promote their particular agendas rather than overall court reform. Judges are supposed to be deciding cases based on the record before them and the law. Consideration of individual voter or interest group preferences as discerned on the campaign trail (e.g., "it's time to get tough on criminals," or "legal liability is choking business in this state," or "you should see my workers compensation payments") have little legitimate role in the process. Although consideration of public policy and public values is legitimate, these should be discerned from objective sources such as legislation, history, chronicled relevant data, or even (subject to some trepidation) personal experience, rather than from ad hoc consideration of informal contacts with voters and supporters. It is even more disturbing to think

117. *See* Guthrie, *supra* note 73, at 428–29 (discussing cognitive error heuristics and biases).

118. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2274–75 (2009) (Scalia, J., dissenting) (noting widespread state practice of electing judges in some form); Stempel, *supra* note 72, at 60 n.61 (citing Am. Bar Ass'n, Fact Sheet on Judicial Selection Methods in the States, http://www.abanet.org/leadership/fact_sheet.pdf (last visited Mar. 10, 2010)) (stating that nearly forty states have either partisan elections (seven), nonpartisan elections (fourteen) or retention elections (seventeen)); *see also* Am. Judicature Soc'y, Judicial Selection Methods in the States, http://www.ajs.org/selection/sel_state-select-map.asp (last visited Mar. 15, 2010).

119. *See* CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 17–19 (1997) (reviewing considerations that encourage or discourage seeking of judicial office); James J. Alfini & Jarrett Gable, *The Role of the Organized Bar in State Judicial Selection Reform: The Year 2000 Standards*, 106 DICK. L. REV. 683, 705, 708 (2002) (reviewing similar considerations).

that a judge's notion of public policy may derive from the views of a key supporter such as a large contributor or a media baron.

Appointment is not without its own politicking, as potential judges jockey for favor in the eyes of those making the selections. Warren Burger, then a judge of the D.C. Circuit, openly "ran" for the U.S Supreme Court by making speeches mirroring President-Elect Richard Nixon's campaign rhetoric on judicial philosophy.[120] Justice Sonya Sotomayor, notwithstanding her blue chip credentials, would probably not be on the Court if her last name were Johnson and she had grown up in Scarsdale.[121]

However, these sorts of political considerations are quite different from those that threaten judicial independence and competence in an elective system. Burger's efforts to stand out as the sort of "strict constructionist" likely to be favored by Nixon were perhaps a bit like watching a junior associate trying to chat up the managing partner in hopes of making a good impression, but were nonetheless based on his substantive legal views and quite relevant to the task of judging. Ethnic, racial, social, and religious diversity are all legitimate grounds for consideration in judicial election, making Sotomayor's Puerto Rican heritage and her professional accomplishments surmounting the poverty of her youth germane, particularly in a country where a Hispanic has never been on the Court and the rich generally have more access to power than the poor.

By contrast, in an elective system, candidates can succeed through the coalition building of tacitly pre-committing on issues to interest groups without any need for a coherent or correct judicial philosophy. The cunning candidate can, in the course of a day (albeit with a wink and a nod to satisfy the Code of Judicial Conduct), tell doctors she will find restrictions on malpractice claims constitutional, tell businesses that she will err on the side of finding less injury and denying some treatments in order to lower workers compensation costs, tell other businesses that she is concerned about reported abuses of union organizing drives, inform a church congregation of her distaste for abortion, affirm her disinclination to strike a ballot initiative on technical grounds, and let it be known to

120. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 18–25 (1979).

121. *See* Damien Cave, *For Hispanics, Court Pick Sets off Pride, and Some Concerns*, N.Y. TIMES, May 27, 2009, at A16, *available at* http://www.nytimes.com/2009/05/27/us/politics/27latino.html (noting that Obama may have nominated Sotomayor to thank the Hispanic community for their support of his 2008 campaign); Editorial, *The New Justice*, N.Y. TIMES, May 27, 2009, at A26, *available at* http://www.nytimes.com/2009/05/27/opinion/27wed1.html (discussing Sotomayor's background and nomination to the Supreme Court).

the police union that criminal defendants are likely to lose evidence suppression motions and receive harsh sentences if convicted.[122]

Although some may defend this as faithful to democratic values, lawyers should be appalled at this conflating of the judicial and the legislative functions. Where judicial candidates are forced to act like representatives, an important checking function of the judiciary is irretrievably lost before the first judicial decision is rendered. And limited empirical study of electoral judicial politics appears to confirm the common sense notion that judges vote in a manner consistent with their electoral support, particularly campaign contributions.[123]

The appointment process should also be de-politicized. Particularly at the federal level, judicial selection has become less about merit and more about installing jurists predictably supportive of the appointing party's agenda, preferably at a sufficiently young age that the new judge can render favorable opinions for decades. The Burger episode noted above, while hardly scandalous, is an illustration. Although well regarded, Warren Burger would never have made anyone's list in a vote for the country's most able jurists or finest legal minds. At the time, the federal bench contained many able Republican judges while law firms and law faculties were similarly full of people with credentials equaling or exceeding those of Judge Burger. But, in addition to talking the right talk for a Nixon appointment, Judge Burger had a consistently conservative voting record and had distinguished himself in conservative circles by being in frequent opposition to his colleague, D.C. Circuit Judge David Bazelon, a noted liberal.[124] The Burger choice thus made political sense and was not an obvious error, but it was hardly an attempt to put the nation's best legal mind on the High Court. For the past twenty years, White House efforts to fill federal trial and appellate posts have been marked by an effort to place noncontroversial but politically reliable judges on the bench. Professors Farber and Sherry have criticized this development, while taking pains to note that they do not subscribe to the fairy tale of judges completely removed from real world considerations:

> Oliver Wendell Holmes had it almost right: The life of the law is logic *and* experience. If the institutional structures sharpen the logic, a

122. This would be all in the nature of a campaign day's work for a politically conservative judicial candidate, while politically liberal judicial candidates could of course be doing just the opposite (e.g., hinting to trial lawyers that damages caps are unconstitutional or to criminal defense lawyers that she will be tough on the police in suppression hearings) at just as frenetic a pace.

123. *See* Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 646, 661 (1999) (noting that changes in Alabama Supreme Court decisions regarding enforceability of arbitration clauses reflect changes in Court composition, with judges supported by business groups more favorable to arbitration); Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at 11, *available at* http://www.nytimes.com/2006/10/01/us/01judges.html.

124. *See* WOODWARD & ARMSTRONG, *supra* note 120, at 21–24 (discussing Burger appointment).

> life lived in the law provides the necessary experience. In that life, the legal culture and professional norms discourage radical, politicized, or idiosyncratic decision making. The judicial selection process ideally should reinforce these professional norms, but today it sadly fails to do so.
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> . . . .
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> The judicial appointment process is now dominated by the assumption that a nominee's political views matter more than his or her legal acuity or judicial temperament. It was not always this way. Until the late 1980s or so, lawyers were nominated to the federal bench—including the Supreme Court—because they were prominent and respected, as well as usually being stalwart members of the president's party. But party affiliation is not the same as political ideology; in the past, moderate members of the president's party were more likely to be respected by the bench and bar—and therefore more likely to be nominated and confirmed—than were those on the left or right fringes of the party.[125]

Farber and Sherry point to the appointment of Justice Harry Blackmun to the Court as an example of an almost bygone era of reduced partisan loyalty and ideological purity in selecting nominees. Justice Blackmun made a name for himself by quietly practicing law for sixteen years before President Eisenhower nominated him to the Eighth Circuit. He was a moderate Republican who had supported Democrat Hubert Humphrey's Senate campaign. In his eleven years on the Court of Appeals, Blackmun earned a reputation as a careful, hardworking, and moderate judge. His Court of Appeals opinions are not particularly ideological, and his nomination to the Supreme Court was probably prompted as much by his long-standing friendship with Chief Justice Warren Burger as by his obvious competence.[126]

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125. *See* DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 113, 116 (2009).

126. *Id.* at 116. Continuing with another illustration, Farber and Sherry provide:

> Another example of how the nomination process used to work is a current federal district judge, whose open and repeated downward departures from the federal sentencing guidelines in some types of drug cases led to a congressional investigation, Republican lambasting of soft-on-crime judges, and eventually a statute limiting judges' authority to depart downward (which was recently overturned by the Supreme Court in *United States v. Booker* [543 U.S. 220 (2005)]). How did this apparently partisan judge get to the bench? Well, he was a respected local lawyer who managed the election campaign of a successful congressional candidate, which led to his appointment as U.S. Attorney, which in turn led to his nomination to the federal bench. And before you jump to any conclusions: The congressional candidate was a Republican, and the supposedly soft-on-crime judge in question was appointed to both the U.S. Attorney position and the federal judgeship by President Ronald Reagan.

Id. at 116–17 (citing 18 U.S.C. § 3553(b)(1) (2000 & Supp. 2004).

The judge unnamed by Farber and Sherry is James Rosenbaum (D.-Minn.), with whom I worked on the successful 1978 U.S. Senate campaign of Rudy Boschwitz (R.-Minn) (serving in the Senate until defeated by the late Paul Wellstone in the 1990 election). Having seen Judge Rosenbaum close-up in the campaign, and as a judge when I practiced in Minnesota, and as a law professor

To the extent that states mix appointment with retention election, these sorts of problems are mitigated but hardly eliminated. The incumbent appointed judge facing a retention election in Missouri Plan-like systems has a decided advantage over the judicial challenger, but nonetheless remains vulnerable to public rejection for reasons that may have little to do with judicial performance. In addition, the incumbent has a record that can be distorted, while a challenger, if pulled from the ranks of the practicing bar, may have essentially no record. Even if the challenger has represented unsavory clients, there is always the excuse that even the despicable are entitled to an attorney. Advocacy groups can be particularly adept at turning a legally correct vacation of an erroneously imposed sentence, or reversal based on clear evidentiary error, into a television advertisement asserting that the incumbent judge cares more about criminals than victims.

In addition to appointment, states may want to consider life tenure or long terms of office (presumably subject to reappointment rather than retention election), although there are obvious costs and benefits to such an approach. On the plus side, life tenure or long terms increase judicial independence, not only in substantive legal decision-making but also in judicial administration.[127] On the negative side, this may encourage the type of excessive self-confidence and even arrogance that also creates problems. Again, *Caperton v. Massey* provides an example. As noted above, Justice Benjamin badly erred in failing to recuse and conducted himself in a manner that some observers might regard as a pretext for favoritism or even corruption. But however excised any portion of the West Virginia electorate may be, they must wait until 2016 to register their displeasure at the ballot box. In states with the more common six-year terms, Justice Benjamin would face the voters in November 2010,

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occasionally reading his judicial opinions, I concur with Farber and Sherry that he is exactly the type of high caliber professional jurist to which the system aspires. Judge Rosenbaum appears to be a true political moderate, a trait that caused some problems during the Boschwitz Senate campaign, in that he was not always warmly received by more conservative elements of the state Republican party who wished he were more conservative and partisan. His overly candid comments about the harshness of the sentencing guidelines earned him more than a little grief from legislators, the public, and other judges (who reportedly resented having the spotlight shown on what was a relatively common practice because of the harsh and inflexible sentencing guidelines). But it hardly negates his credentials and track record as the type of non-ideological judicial centrist desired under a system committed to the rule of law tempered with justice and equity. That Judge Rosenbaum was vilified for telling the truth about problems with the sentencing guidelines during an era of highly ideological appointments, such as those of Justices John Roberts and Samuel Alito, makes a tellingly negative comment on the current state of the appointment process.

127. For anecdotal proof, just visit federal and state court trials. Federal judges generally brook no shenanigans from counsel, clients or witnesses, and run the metaphorical "tight ship" in court. By contrast, many state court judges, sensitive to lawyer survey results published in the local press and unwilling to alienate potential campaign contributors, tend to grant attorneys far more leeway, resulting in stage whispers, speaking objections, and mini-editorials and closing arguments in the midst of trial, as well as unfair innuendo in questioning witnesses. Although clever (but ethically challenged) lawyers can do this in federal court, counsel often need not even be clever to get away with such conduct in state court.

while his *Caperton* failings were still relatively fresh in the public mind.[128]

To the extent states are unwilling for political reasons to go toward a purely appointive system, election systems can be reformed to increase and improve the information provided to the voter and to reduce the potentially corrupting influence of money in judicial electoral conflict. In addition to merit selection and Missouri Plan-style retention elections,[129] public financing of campaigns appears to be capable of limiting the influence of monied interests,[130] although a judge confident of the support of really wealthy persons or entities can evade the system by refusing public funding and remaining free of spending limits.[131]

D. Political Party Designation for Judges

Another promising reform is the use of political party designation for judges,[132] although it undoubtedly cuts against the grain of the traditional view that judges should be "non-partisan." But the idea of a purely non-partisan judge is fiction. Any person interested in law must be interested enough in public policy issues to have formed basic political views. Judges know whether they are Democrats or Republicans (or at least the direction they lean if independents). Similarly, most of the bar and interest group community (unless the jurisdiction is very large) also know the judge's political leanings. When judicial candidates cannot list party affiliation, only the less sophisticated parts of the electorate (which is, unfortunately, most of the electorate) are kept in the dark.

After *Republican Party of Minnesota v. White*,[133] there is a serious constitutional question as to whether a prohibition on party identification can be enforced because of the First Amendment rights of the candidate

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128. *See* Stempel, *supra* note 3, at 48.

129. *See* Alfini & Gable, *supra* note 119, at 691 (describing Missouri Plan and similar merit selection appointment with retention elections). *See generally* Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509 (1978) (describing the Missouri Plan).

130. *See* Michael W. Bowers, *Public Financing of Judicial Campaigns: Practices and Prospects*, 4 Nev. L.J. 107, 116–17 (2003).

131. This seems inarguable given the First Amendment doctrine related to political speech and campaign spending set forth in Buckley v. Valeo, 424 U.S. 1, 143 (1976) (setting forth constitutional limits on legislation restricting campaign contributions). Similarly, candidates for U.S. President are offered public financing that, if accepted, requires them to observe certain spending limits. However, if the candidate does not accept federal money, the candidate need not adhere to spending restrictions. *See* Peter Nicholas & Janet Hook, *Campaign '08: Race for the White House: Obama Sets His Own Terms for the Race*, L.A. TIMES, June 20, 2008, at A1, *available at* 2008 WLNR 11647946 (observing that candidate Barack Obama rejected federal funding in order not to be bound by federal spending limits).

132. *See* David W. Adamany, *The Party Variable in Judges' Voting: Conceptual Notes and a Case Study*, 63 AM. POL. SCI. REV. 57, 72 (1969) (arguing that voters would choose candidates that share their party preference because it "is a good forecaster of judicial conduct.").

133. 536 U.S. 765 (2002) (striking down on First Amendment grounds restriction on judicial candidates announcing position on legal issues even if issues may be raised in matter coming before the court).

and the voter. Rather than fighting a rear-guard action against expanding information available to the voter, states that elect judges should strongly consider movement toward permitting party designation on the ballot. Although this will be decried in some quarters as partisanship, the net effect will be to provide voters with substantially more information cues than are currently received.

Knowing whether a judge is willing to identify as Republican or Democrat tells the voters quite a bit about a candidate, much more than the average lay voter will be able to discern from the candidate's stump speeches or a few televised debates.[134] In addition, party designation could inject the leavening expertise of the party endorsement process into judicial races. A candidate with the party endorsement could be so designated on the ballot, presumably an advantage even if other candidates indicate their political preferences. The party's official endorsement provides an additional layer of scrutiny, and a vetting party designation does not mean that judges elected as Republicans always rule for Republican litigants or vice versa.[135] Fair application of the rules of disqualification should prevent this.[136]

Party designation would improve and expand voter cues by giving the voters at least some information about the judge's likely views about tort liability, executive power, criminal defendant rights and sentencing, as well as civil rights and job discrimination claims.[137] But this is a rela-

134. "Members of the general public simply do not have enough legal expertise to have an informed opinion, any more than they know enough about medicine or economics to respond to [hypothetical polls on medicine and economics]." FARBER & SHERRY, *supra* note 125, at 117–18 (also noting that when Chief Justice Rehnquist's death created a vacancy in that post, public opinion polls showed Justice O'Connor as the preferred replacement, followed by former New York Mayor Rudolph Giuliani). Although Giuliani is a prominent lawyer and politician, it is unlikely members of the general public outside New York City (where he was U.S. Attorney for the Southern District of New York during the 1980s) know anything about his legal acuity and judicial temperament. In the New York legal community, Giuliani's performance as U.S. Attorney gets mixed reviews, with substantial criticism of his purported grandstanding in making arrests. *See* DANIEL FISCHEL, PAYBACK: THE CONSPIRACY TO DESTROY MICHAEL MILKEN AND HIS FINANCIAL REVOLUTION 112–114 (1995) (noting criticism of Giuliani for televised arrests of non-dangerous white collar criminals hauled off in handcuffs). Adding to other problems with lay selection of professional offices is the public's fickleness. *See* Michael Cooper & Megan Thee, *Resurgent McCain is Florida Victor; Giuliani Far Back*, N.Y. TIMES, Jan. 30, 2008, at A1, *available at* http://www.nytimes.com/2008/01/30/us/politics/30florida.html (reporting Giuliani's dramatically unsuccessful race for the 2008 Republican presidential nomination).

135. *See Republican Party of Minn.*, 536 U.S. at 775–76 (defining impartiality as ruling without regard to identity of litigants rather than absence of views on legal issues).

136. For example, if a litigant is the County Chair of the judge's political party, there would appear to be reasonable question as to the judge's ability to be impartial and the case should be assigned to another judge. A closer question is whether a judge from an opposing political party (as contrasted with a judge identified as an "independent") is disqualified due to a fear of ruling against a political opponent. The correct answer to the recusal question in cases like these is correspondingly fact-dependent.

137. To state what I regard as an obvious but not empirically well-documented truth: Republican judges are more likely to be resistant to tort liability, supportive of executive power, harsher toward criminal defendants, and more skeptical of job discrimination or civil rights claims, while Democratic judges will likely tend in the opposite direction. To the extent that law, precedent, and the evidentiary record in the case are constraining, the judge's overall political orientation should in

tively crude cue. In general, a rational voter would associate Republicans with greater skepticism regarding tort, civil rights, and discrimination claims and a tougher attitude toward crime and criminal defendants, while associating Democratic candidates with largely opposite inclinations. But these broad-brush characterizations can easily become misleading caricatures. For elections to work most effectively, the public must be comparatively well informed about candidate jurisprudential views. Local media play a key role in determining the information that reaches the voter—and largely has fallen down on the job.

Typical media coverage of a judicial election includes a brief profile of the candidate and publication of the candidate's preferred 200-word statement or a skeletal question-and-answer interview that usually does not include probing or sophisticated analysis. Seldom have reporters had legal training. Often, whatever print media coverage exists of judicial races comes in the form of a "voter's guide" contained in a paper appearing shortly before the election, often containing information about other offices on the ballot as well. Under these circumstances, the average voter is unlikely to even focus on the judicial race information let alone retain any of it. Furthermore, because most judicial races lack official Republican and Democratic candidates, there may be three or more candidates for a given seat, which reduces the voter's ability to focus and choose rationally.[138]

In addition, similar candidates may split the vote that would ordinarily accrue to that type of candidate, resulting in the election of a candidate who enjoys the support of only a distinct minority of the electorate. In a hypothetical race with three assistant prosecutors and a public defender, the prosecutors may largely split the "law-and-order" vote, with the public defender winning with the support of only a shade more than one quarter of the electorate. Although defendant rights advocates might applaud this result, it clearly undermines the ideal of elections reflecting majority voter sentiment.

One need not look too far for real world examples. In 2006, five candidates vied for a single state trial judgeship in Nevada. Elizabeth Halverson, a former judicial clerk, ran against four men—all seemingly more qualified according to the common norm of years of experience in practice—and won a surprising victory generally attributed to her status

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theory not affect outcomes but almost certainly does in close cases. But this undoubtedly happens even when the judge's party preference is not on the ballot. At least under a party designation system, the voter has more information about the judge that can be used in casting a ballot based on the voter's own preferences regarding tort liability, executive power, defendants' rights, discrimination, and the like.

138. *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1217 (2003) (observing that people typically can concentrate on only a limited number of options in making choices).

as the only woman in the race.[139] After taking the bench, problems developed in her relations with other judges and complaints emerged regarding her judicial performance, resulting in her suspension in 2007 and eventual removal in 2008.[140] When the story broke, reporters dug deeper into Judge Halverson's background and found that she was subject to an unpaid judgment in California, that her husband was an ex-convict, and that her lifestyle was bizarre.[141] Would even the most feminist of voters have supported Judge Halverson had she known this about the candidate? At the very least, this was information voters should have known, but did not.

The local press, of course, can be forgiven for not having vetted candidate Halverson very well. There were more than twenty judicial offices on the ballot as well as other electoral matters to occupy the time of the reporters. Which leads to another proposed non-rulemaking reform: stagger judicial elections in a manner that minimizes the judicial contests each year so that the press has more opportunity to investigate and question candidates, and voters have more time to glean and examine information about the candidates. Although this is hardly likely to be a panacea, it will make for better voter choices at the margin and probably allow avoidance of embarrassing judicial election outcomes à la Halverson. Even without formal changes of this type, the news media could on its own motion improve the timing, duration, and depth of its coverage of judicial races.

E. Increased Support and Review of Judges

Another change that does not involve the civil or criminal rules is simply providing better logistical and intellectual support to the judges. Although the usual wish list is so well established to be tattered at the edges, there is almost no doubt that better facilities, improved technology, more staff, and more funds for staff training and enrichment would all improve judicial performance at the margin. Once again, however, judges can help themselves through more prudent behavior. With sometimes disturbing frequency, for example, judges often hire their law clerks based on connections rooted in family or their former lives as practitioners or political activists. Many times this is prescription for hiring inferior clerks who in turn produce inferior, inadequately re-

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139. *See* Jon Ralston, Op-Ed., *Jon Ralston Says Voters Can't Be Trusted to Select Judges*, LAS VEGAS SUN, Nov. 19, 2008, at 5, *available at* 2008 WLNR 22090726 (stating that Halverson won because voters often pick women in judicial races).

140. *See In re* Halverson, 169 P.3d 1161, 1170–71 (Nev. 2007).

141. *See* Brian Haynes, *Judge's Husband Has Long Rap Sheet*, LAS VEGAS REV.-J., May 26, 2007, at 1B, *available at* http://www.lvrj.com/news/7700407.html (noting husband's criminal record and that the county cited the couple because their front yard was filled with garbage); Jane Ann Morrison, *Judicial Commission Might Have a Say on Halverson Controversy*, LAS VEGAS REV.-J, May 31, 2007, at 1B, *available at* http://www.lvrj.com/news/7761837.html (commenting on Halverson's $42,000 unpaid judgment from California).

searched, poorly drafted opinions, perhaps without adequate vetting of the precedents cited by the litigants.

Even where the judge properly determines to hire law clerks on merit rather than connection, it appears that judges seldom go beyond the papers submitted by the applicant. In 25 years of teaching, I have had only three judges who ever called regarding a judicial clerkship applicant (I have written scores of letters, which I hope are paid at least some heed by the judges or their current clerks during the screening of applicants). Although I do not claim omniscience about which law graduates will be better law clerks, I have a pretty good idea. A conversation provides the opportunity for a more nuanced view of a candidate recommended by a professor, to compare candidates from the same law school, and to provide a second or third opinion about a candidate by talking to a faculty member who did not write a recommendation letter. Frankly, I am surprised not to get more calls (however much I might complain if inundated with calls). Hiring law clerks is one of the most important activities of the judge. One would expect more digging prior to a hire.[142]

Beyond the selection process, an obvious avenue for improvement is more stringent review of judicial performance. The primary mode of checking judicial error, of course, is appeal. While appellate quality control does not appear to be performing badly, room for improvement abounds. The average time for disposition of a garden-variety federal appeal is roughly eighteen months. While not horrendous, neither is it fast enough to satisfy those who might invoke the traditional "justice delayed is justice denied" mantra. In state systems, average appellate disposition times can be three years or more, a disturbingly long time. In nearly a fifth of the states, the absence of an intermediate appellate court places this burden on state supreme courts, extending delay, resulting in more decisions without opinion or in per curiam opinions (which probably means more staff decision-making than is healthy).

In addition, many state supreme courts, like federal appellate courts, sit in panels of three. In the federal system, this is unproblematic for most cases. However, where a case is close, important, or presents particularly complex issues, en banc consideration would seem apt. But caseload and court size inhibits en banc review, perhaps too much. These issues seem more problematic at the state court level, where many state

142. A related problem is that some judges give substantial consideration to non-merit factors in hiring clerks, such as personal, family, business, church, social, or law firm connections. This, of course, is the judge's prerogative. But when judges exercise that prerogative, they risk producing lower quality work because they are getting lower quality assistance from their clerks. At the very least, one would expect such judges never to complain about the quality of a law school's clerks unless they are hiring based on evaluations suggested by the law school (e.g., grades, co-curricular activities, research papers). A clerk in the bottom quartile of the class who is the son of a family friend will always suffer in comparison to a clerk selected from a more distant law school on the basis of merit.

supreme courts—even those with elected judges—sit primarily in panels of three. Where justices are elected, disposition by panel seems a betrayal of democracy. In an elected judicial system the voters are at least in theory making well-informed choices and are aware of the candidates' jurisprudential and ideological preferences. If this is so, many voters may choose Candidate A over Candidate B out of a desire to bring some ideological or jurisprudential change or balance to the Court. A centrist voter may, for example, rationally support Candidate A, even though the candidate is a judicial-social-political-ideological conservative, out of a feeling that the Court as a whole is too judicially, socially, politically or ideologically liberal.

But when the Court decides most cases in panels of three, the system undermines the voter's attempt to act rationally, at least along this dimension. For example, Candidate-cum-Judge A may be routinely paired with Judge X, another conservative, and Judge Y, a moderate, producing opinions that are considerably more conservative than the voter anticipated would result from his effort to cast a vote in favor of balance on the full court. In the meantime, another panel composed of Judges C, D, and E may be rendering opinions far more liberal than preferred by the voter. Voter preferences and expectations are thwarted when cases are decided by less than the full state supreme court.

If courts are to be selected via election in the manner of a legislature, the entire court should function as one deliberative body in the manner of a legislature for all cases. Panel disposition is at odds with this principle. Defenders of panel disposition may counter that because of law's general constraining and non-political nature, panel disposition makes no difference. If this is so, however, the case for elections is seriously undermined. If adjudication is not significantly political, judges should be chosen on the basis of technical expertise via appointment rather than through the inevitably political process of the ballot box.[143]

In addition, judicial performance should be subject to disciplinary review. In this regard, states arguably are ahead of the federal system. If a federal judge errs, there is little the system can do outside of appeal or occasional removal from a case through disqualification. Federal judges are subject to removal via impeachment, which is a rare event. By contrast, state judges are subject to judicial discipline via the respective state's judicial discipline commission (sometimes called a judicial investigation commission). These commissions have power to investigate complaints or initiate investigations of their own, and possess an array of sanctions. The commissions may punish not only corruption, but also

143. Defenders of panel decision-making on state supreme courts may also argue that courts can grant en banc review where the case is deemed sufficiently uncertain that its outcome could vary depending on panel composition. Although this is a fine argument in theory, it likely founders in practice because of the inertia in favor of using panels as a case management tool.

incompetence, unseemly behavior, and abuse of office. In most all states, commission decisions may be challenged before the state supreme court, making it unlikely that commission actions will unduly undermine judicial independence.[144]

At perhaps a level of tinkering with the system, one might consider changes in judicial compensation, linking pay to performance (as measured by reversal rates or some other metric), productivity (as measured by opinions produced), or influence (as measured by citation). Although there are obvious logistical impediments and substantive concerns, some consideration might be given to moving at least somewhat away from the traditional lockstep compensation of the judiciary.

Consideration should also be given to revising the traditional 9-to-5, Monday-through-Friday orientation of the court system. For example, one means of speeding court disposition is extending the operating hours of the court to include evenings and weekends. Although this is perhaps impracticable for jury trials because of the lifestyle preferences of lay jurors, it should not preclude judges from holding oral arguments or evidentiary hearings at off hours in order to move cases along while continuing to preside over jury trials.

With speed- and efficiency-oriented reforms, of course, there lies the danger of elevating logistical aspects of case management above legal erudition and careful adjudication. Certainly, one serious criticism of judging during the past three decades is the shift from a culture of adjudication to one of pretrial disposition and choreographed, mildly coerced settlement.[145]

Although the line to walk is a fine one, I continue to think that efficiency-oriented reforms are compatible with high-quality adjudication. But the focus should not be so much on getting rid of cases as on adjudicating them more thoroughly, accurately, and rapidly. The trick is in expanding judicial resources directed toward adjudication (such as motion hearings on Saturday, more law clerks, or working late on a written opinion) rather than expending these resources for case tracking or endless settlement conferences. For the most part, settlement should be managed by counsel and the parties or aided through third party neutrals other than the judge (although this creates another source of expenditures). While this transpires, judges should be holding trials and deciding motions to create the shadow of law within which lawyers and litigants will bargain.[146]

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144. *See* ALFINI ET AL., *supra* note 10, ch. 13.

145. *See generally* Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 BROOK. L. REV. 931 (1993).

146. *See* Robert H. Mnookint & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979) (popularizing the "shadow of the law" metaphor).

As with much of what I'm suggesting, changes in rules, statutes, regulations, or administrative protocols can only go so far. Much of what is required is some attitude adjustment in the judiciary and a willingness to weigh costs and benefits more broadly. Under the current regime, spurred by the odes to pretrial disposition such as those set forth in the 1986 summary judgment trilogy, courts appear to operate under the premise that a grant of a Rule 12 motion or a summary judgment motion or judgment as a matter of law is always more efficient than adjudication by trial. But to date no one has actually counted the relative costs and benefits. Considering the immense attorney and judicial investment in assessing, deciding, and defending these motions, including appellate consideration, it would not be surprising if undue emphasis on pretrial disposition proved more costly overall in ordinary matters, simple cases, or disputes where trial will not consume many days. Although there are some judicial legitimacy concerns, a new regime inclined to adjudicate via trial except when the case for pretrial disposition is clear might be more efficient overall with no discernible decrease in justice.

CONCLUSION

Obviously, my if-I-could-change-civil-litigation wish list is longer and less developed than more targeted proposals to change rule language or substantive legal provisions. I also acknowledge swimming substantially against the tide. But, the past twenty-five years of rule revision, despite some accomplishment, appears not to have substantially improved case disposition, and instead has tended to decrease access to the courts. Now seems the hour to shift from rule revision as the primary vehicle of adjudicatory reform to a focus on the judges applying those rules, including their selection, education, and training, and the structural and logistical system in which they operate.