Aesthetic Judging

Chad M. Oldfather[*]

This Article offers a conceptualization of judges in the legal system as analogous to their namesakes in sports such as gymnastics and figure skating. It is, to a degree, a counter-intuitive suggestion. Figure-skating judges, after all, do not enjoy a reputation for being unbiased and scandal-free. Indeed, figure skating and aesthetic sports like it are often pejoratively referred to as "subjectively" judged. It is a seemingly curious model for a legal system that strives to avoid all these things.

There is no question that the more common analogy, which invokes the metaphor of the judge as an umpire, provides the judiciary with a more comforting public face. The value of thinking of judges in law as analogous to judges in aesthetic sport lies not in its public relations value, but rather in its ability to focus attention on aspects of the judiciary that the umpire metaphor obscures. Judges in both contexts draw on ineffable criteria that cannot be fully captured in words. These are the sorts of things that form the basis of characteristics, such as wisdom, which have taken a back seat in our metrics-obsessed era. To be sure, both types of judges thus stand open to suggestions that improper criteria — bias, politics, and the like — are the true drivers of their decisions. Both systems must therefore rely on institutional and procedural mechanisms, including a long process of acculturation in shared norms, together with a cluster of procedural and institutional features, to minimize the influence of improper considerations and to provide litigants, participants, and the public with an assurance that decisions are the products of appropriate

 Professor of Law and Associate Dean for Academic Affairs, Marquette University Law School. Many thanks to participants in a roundtable at the University of San Diego School of Law for discussions that sparked this project, to participants at a faculty workshop at Marquette University Law School for their helpful comments on an early draft, to Elisabeth Lambert for her comments, and to Sam Magnuson and Nate Oesch for their outstanding research assistance. Special thanks to my daughters Ada, Audrey, and Laura, whose participation in aesthetic sports was a direct cause of its existence and allowed me to have the many experiences and conversations with coaches, judges, and athletes that helped shape its analysis.

considerations. Increased mindfulness of this dynamic takes on greater significance in a world, such as ours, marked not only by a fetish for the quantifiable, but also by broad and deep disagreement over core aspects of our culture.

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INTRODUCTION

One seeking to divide judicial philosophies into opposing categories has many options. To name just a few, there are formalists and functionalists,[1] originalists and non-originalists,[2] those who view the judge's role as passive and those who espouse a more interventionist approach.[3] None of these distinctions purports to capture the only difference among judges that matters; each captures a facet of judging, and a single judge can rightfully bear any number of labels.

My focus here is on an aspect of judging that overlaps with, but is distinct from, the categories listed above. We might speak of it in terms of a distinction between judges who believe that law can be, and must be, captured, expressed, and worked with solely via verbal formulations, on the one hand, and those who believe that law cannot be, and should not be, regarded as so limited. Judges in this latter camp maintain that the ideas embodied in law cannot always be linguistically captured, that inarticulable concepts can nonetheless be properly regarded as law, and that sometimes judicial decision-making appropriately and necessarily draws upon these sorts of concepts through resort to "hunch" or "intuition." The view was most famously expressed by Justice Stewart in his "I know it when I see it" formulation,[4] but it appears in other prominent opinions. Justice Holmes's dissent in *Lochner v. New York* provides one example: "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."[5] So, too, Justice Jackson's admission in his opinion in *Youngstown Sheet & Tube v. Sawyer* that his experiences in the executive branch "probably are a more realistic influence on my views

[1] *See* William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21-22 (1998). The distinction developed in this article no doubt bears some similarity to the formalist-functionalist distinction, but the basic cleavage is different. Linda Jellum has distinguished between the formalist, functionalist, and "ocular" tests. *See* Linda D. Jellum, *"Which Is to Be Master," The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 860-72, 871 n.228 (2009). The analysis here develops something akin to that distinction.

[2] *See* Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1187 (2008) (surveying originalist theories and their alternatives).

[3] Compare Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366-67 (1978) (passive role), with Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1307-09 (1976) (active role), for classic views of the contrasting positions.

[4] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[5] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction."[6] The idea can be found elsewhere,[7] such as in the Court's "shocks the conscience" test,[8] its determinations as to who counts as an inferior officer under Article II, and in those strands of substantive due process analysis that invoke "the traditions and (collective) conscience of our people. "[9] The phenomenon is on display as well in trial judges' balancing of probative value versus unfair prejudice under Rule 403,[10] and their assessment of the "fit" of a proposed expert witness's testimony.[11]

These sorts of differences in judicial philosophy are often expressed via the use of shorthand. Discussions often involve the use of phrases such as "strict constructionism" and "judicial restraint" which serve as rough indicators of an underlying stance. As elsewhere, metaphor can be influential in setting the terms of a debate. In this context, one particular metaphor has proven to be especially durable and influential — that of the judge as an umpire.

This is, in many respects, unsurprising. Metaphors make the murky or abstract more concrete. They can shape the way we think about their subject,[12] and often provide us with "a new understanding of our

[6] Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

[7] The examples that follow in the text are hardly an exhaustive list. My colleague, Bruce Boyden, has identified such an approach in the copyright opinions of Learned Hand. *See* Bruce E. Boyden, *Learned Hand: You're Reading Him Wrong*, MARQ. U. L. SCH. FAC. BLOG (Apr. 13, 2018), https://law.marquette.edu/facultyblog/2018/04/13/learned-hand-youre-reading-him-wrong/. For a more general shift toward more formula-based judging in the post-Hand Second Circuit, see Bruce E. Boyden, *The Legal Process Sea-Change*, MARQ. U. L. SCH. FAC. BLOG (Apr. 17, 2018), https://law.marquette.edu/facultyblog/2018/04/17/the-legal-process-sea-change/.

[8] The test originated in Rochin v. California, 342 U.S. 165, 172 (1952). For a critical overview, see generally Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307 (2010) (contending that the test should be rejected based on arguments from history, precedent, and practicality).

[9] The most famous invocation of the phrase occurs in Justice Goldberg's concurring opinion in Griswold v. Connecticut, 381 U.S. 479, 493 (1965).

[10] FED. R. EVID. 403.

[11] *See, e.g.*, Robert H. Davis, *Using Lawyer-Experts in Financial Litigation (Part I)*, 14 PRAC. LITIG. 51, 55 (2003) (considering the application of "fit" in a specific litigation context).

[12] Consider the 2016 presidential election, which was a contest between a candidate who promised to "drain the swamp" and build a wall to stop the flow of undocumented immigrants and another who made an ill-fated reference to a "basket of deplorables" and spoke of offering a "path to citizenship." *See* Carmine Gallo, *The Metaphors that Played a Role in Trump's Victory*, FORBES (Nov. 9, 2016, 5:10 PM), http://www.forbes.com/sites/carminegallo/2016/11/09/the-metaphors-that-played-a-

experience."[13] That new understanding can enlighten, by highlighting previously overlooked features of the subject,[14] but it can also obscure.[15] And sports provide a natural source of metaphors for legal discourse. Sport leagues bear deep similarities to legal systems, and present many similar questions concerning the nature, interpretation, and implementation of rules.[16] Both law and sport are rule-governed practices, both frequently involve contests pitting adversaries directly against one another, and both share a fundamental logic that requires the presence of a neutral third party to apply the rules in an evenhanded way. It is no coincidence that those who have thought most deeply about the role of officials in sport have drawn on the work of those who have thought most deeply about the role of judges.[17]

Nor is it a surprise that the judicial role has often been described in terms of sports metaphors. Chief among these, again, is the metaphor

role-in-trumps-victory/#7d649e8f5902=; Rose Hendricks, *Metaphors of the 2016 Presidential Election*, ROSE HENDRICKS (May 13, 2016), https://rosehendricks.com/2016/05/13/metaphors-of-the-2016-presidential-election/. For a website devoted to the observation and analysis of the use of metaphors in politics, see generally POLITICAL METAPHORS, http://www.politicalmetaphors.com/ (last visited Aug. 28, 2018).

[13] GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 139 (1980).

[14] *See* JAMES GEARY, I IS AN OTHER: THE SECRET LIFE OF METAPHOR AND HOW IT SHAPES THE WAY WE SEE THE WORLD 9 (2011)

> ("But when we lend a thing a name that belongs to something else, we lend it a complex pattern of relations and associations, too. We mix and match what we know about the metaphor's source . . . with what we know about its target . . . . A metaphor juxtaposes two different things and then skews our point of view so unexpected similarities emerge. Metaphorical thinking half discovers and half invents the likenesses it describes.").

[15] Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 CONN. L. REV. 17, 24-30 (1994) [hereinafter *The Hidden Ball*] (outlining the ways in which metaphor can obscure meaning).

[16] *See* Mitchell N. Berman, "*Let 'em Play" A Study in the Jurisprudence of Sport*, 99 GEO. L.J. 1325, 1329 (2011) [hereinafter *Let 'em Play*].

> But the law-ness of sports systems is not merely superficial, for they exhibit such essential institutional features as legislatures, adjudicators, and the union of primary and secondary rules. We might reasonably have expected a discipline of "sports and law" to have arisen as a region of study belonging either to comparative law or to special jurisprudence.

Id.

[17] John Russell has both observed that it is the case that those writing on the philosophy of sport have often drawn on legal theory in their analyses and argued that no legal theory adequately accounts for the parallel issues that arise in sport. J.S. Russell, *Limitations of the Sport-Law Comparison*, 38 J. PHIL. SPORT 254, 254-55 (2011).

of the judge as umpire. In his opening statement during his confirmation hearings Chief Justice Roberts famously invoked the comparison.[18] The analogy comes naturally, and it dates back at least as far as 1886.[19] Those who use it generally mean to invoke a limited conception of the judicial role, in which judges assume a passive posture and simply apply rules that are generated elsewhere.[20] From such a perspective the litigants and the (typically) legislatively generated law are the primary determinants of the outcome of litigation rather than the judge. In the Chief Justice Robert's words, "Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them."[21] It is a powerful metaphor, and one with understandable appeal.

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[18] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005), https://www.judiciary.senate.gov/imo/media/doc/GPO-CHRG-ROBERTS.pdf [hereinafter *Confirmation Hearing*] (statement of John G. Roberts, Jr., Nominee, Sup. Ct. of the U.S.).

[19] Aaron J. Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 199 YALE L.J. ONLINE 113, 114-17 (2010), http://yalelawjournal.org/forum/the-justice-as-commissioner-benching-the-judge-umpire-analogy. Indeed, a small literature has grown up around the practice. For an early, if not the earliest, work on the topic see generally *The Hidden Ball*, *supra* note 15 (analyzing the use of "umpire" metaphors in judicial opinions), which generated a response, see generally Michael J. Yelnosky, *If You Write It, (S)He Will Come: Judicial Opinions, Metaphors, Baseball, and "the Sex Stuff,"* 28 CONN. L. REV. 813 (1996) (responding to Oldfather's analysis of umpire metaphors in judicial opinions). For two more recent pieces (which both cite the latter but not the former of the preceding two articles, not that anyone would notice), see generally Douglas E. Abrams, *Sports in the Courts: The Role of Sports References in Judicial Opinions*, 17 VILL. SPORTS & ENT. L.J. 1 (2010) (analyzing the use of sports metaphors in judicial opinions); Megan E. Boyd, *Riding the Bench — A Look at Sports Metaphors in Judicial Opinions*, 5 HARV. J. SPORTS & ENT. L. 245 (2014) (analyzing the use of sports metaphors in judicial opinions).

[20] *See* Michael P. Allen, *A Limited Defense of (at Least Some of) the Umpire Analogy*, 32 SEATTLE U. L. REV. 525, 529-30 (2009). This is not the only point that an invoker of the analogy could be attempting. For example, Nate Oman offers an interpretation of the metaphor as invoking a conception of judicial virtue:

> I think that the analogy is offered as a statement about judicial virtue. A virtuous judge is one who fairly applies the law. We can and will have strong and, I assume, good faith disagreements about what the law means and how it should be applied. The umpire analogy is not meant to resolve such disputes. It is not a gesture toward one approach rather than another. Rather, it is a gesture toward what a virtuous judge is like.

Nate Oman, *In Defense of Umpires*, CONCURRING OPINIONS (Apr. 15, 2010), https://concurringopinions.com/archives/2010/04/in-defense-of-umpires.html.

[21] *Confirmation Hearing*, *supra* note 18, at 55.

Yet critics have identified a number of ways in which the judge-as-umpire metaphor is inapt.[22] Umpires must exercise judgment in the application of the rules, and judges do have a role in making the rules. This Article probes a more fundamental distinction, and its focus stems from the umpire analogy's conception of legal rules, and of judges' relation to them.[23] Legal rules — to a considerably greater degree than the rules of baseball — are often not clear in their scope or self-executing in their application, and their full content must often be discerned through the exercise of professional judgment. When that happens, a judge deciding a case brings into being a conclusion that did not and could not exist without the exercise of that judgment. The judge acts less like the umpire of the prevailing metaphor and more like the (aptly named) judges in sports such as figure skating and gymnastics. It is this latter category of officials, I contend, that serves as a more appropriate source of metaphor.

Notwithstanding the prevalence of the umpire metaphor, lawyers and legal scholars have generally not drawn on insights generated by sport as avenues of approach to difficult problems in law. Yet there is reason to think that these sorts of analyses can prove useful.[24] Sports can generate multiple examples and variations of approach that can, in turn, inform our consideration of related problems in law. Sports can thereby serve the same function as other legal systems in more traditional comparative law scholarship. As this Article will demonstrate, sports take widely varying approaches to structuring and regulating the role of officials. Consideration of those variations, and their justifications, can help to flush out ways in which we might reconsider aspects of the judicial role that we tend to take for granted. Relatedly, we might find that using examples from sports to think

[22] *See, e.g.*, Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709, 1709-11 (2007) (identifying aspects of the judicial role obscured by the metaphor); *The Hidden Ball*, *supra* note 15, at 35-39 (same); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 705-09 (2007) (same); Vaughn R. Walker, *Moving the Strike Zone: How Judges Sometimes Make Law*, 2012 U. ILL. L. REV. 1207, 1210-23 (2012) (same); Kim McLane Wardlaw, *Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1633-36 (2010) (same); Zelinsky, *supra* note 19, at 118-24 (same).

[23] This piece builds on and extends observations from two prior works. *See generally* Chad M. Oldfather, *Of Judges, Law, and the River: Tacit Knowledge and the Judicial Role*, 2015 J. DISP. RESOL. 155 (2015) (analyzing the role of judges and the "not fully articulable" nature of their processes and activities); Chad M. Oldfather, *Of Umpires, Judges, and Metaphors: Adjudication in Aesthetic Sports and Its Implications for Law*, 25 MARQ. SPORTS L. REV. 271 (2014) (suggesting that there are more suitable analogies than "judge as umpire").

[24] *See Let 'em Play*, *supra* note 16, at 1330-31.

through problems that arise in both law and sports allows us to break free from biases and preconceptions that affect our analyses in the legal context.

Let us take a step back. Consideration of a broader range of sports reveals that not all bear the same relationship to rules that baseball does, and, relatedly, that officials' roles differ in meaningful ways in different kinds of sports. One basic cleavage seems pertinent. Philosophers of sport have drawn a distinction between *purposive* and *aesthetic* sports. In the former, the goal of the sport (scoring runs in baseball, goals in soccer and hockey, touchdowns in football) is independent of its means of achievement, so long as the rules of the game are otherwise complied with. In aesthetic sports such as gymnastics and figure skating, in contrast, the determination of winners and losers depends entirely on the manner in which the designated tasks are performed. To put the distinction simply, it is possible to "win ugly" in a purposive sport, while it is by definition impossible to do so in an aesthetic sport. And notice something else: the umpires in baseball do not, except in the rare situation, decide who wins a game. It is the players who do the work. In aesthetic sports, in contrast — *and in law* — there can be no winner without the authoritative ruling of the judicial system. It is easy to imagine there being a winner of a baseball or basketball or soccer game that is played without anyone assuming the role of official. The same does not hold for gymnastics or a figure skating competition — or for a trial or appeal.[25]

There is another significant point of consequence to our analysis. The criteria by which judges in aesthetic sports assess the performances they must score are typically vague, general, and incomplete. Judges do not generate their scores through the mechanistic application of objective criteria, but must instead make and apply aesthetic judgments guided by rules that state the desirable characteristics of a performance in a general way through the invocation of concepts such as "flow," "form," and "artistry." The rules are this way because it is the only way they can be — words cannot capture the necessary level of detail. The judges must accordingly fill the gaps left by the rules' incompleteness by reference to their own internalization of a standard that the rules of the sport can only partially specify. That internalization is the product of a slow

[25] To be sure, there are other instances — such as those involving a missed filing deadline or a statute of limitations that has run or the application of some other bright-line rule — where the litigants themselves can, at least in theory, determine the outcome. But such cases do not involve judging in the sense contemplated here.

process of acculturation into the sport and its prevailing conception of an ideal performance. The judge learns what is good by watching hundreds or thousands of performances and seeing what more experienced evaluators consider to be good.

A focus on the distinction reveals the ways in which discussions of judging in the legal system tend to highlight or obscure some of its features. These discussions routinely assume a rhetoric that places priority on rules, and that expressly privileges a view of judging that assumes that legal rules — in some relatively fixed, formalistic way — are all that judges work with. By implication, then, any judging that draws upon something else must be illegitimate. This is an alluring portrayal of the judicial role. By invoking the image of the judge as umpire, we provide an additional layer of support. It is not merely a suggestion that it is possible as a task to simply consult the rules, but also a suggestion that there is no other way in which the task could be legitimately performed. The umpire is not free to disregard or modify the rules of baseball for the simple reason that *those are the rules of baseball*, and as a result an umpire who did so would be acting in a manner contrary to his role within the game of baseball. To accept the analogy as appropriate to the judicial role in law is to smuggle in similar conclusions about the nature of that role. It is to invite one's audience not only to accept the proposition that judges have no appropriate authority to modify the legal rules, but also that rules of law can exist nowhere other than in their linguistic formulations, such that there is nothing standing behind the words to which judges can resort in the task of applying them.[26] The metaphor thus obscures even the existence of a debate by inviting its audience to accept as uncontroversial the notions that *of course* there are rules of the game and *of course* it is the role of the official to apply those rules, and nothing more or less.

By contrast, recasting the judicial role as analogous to *judges* in aesthetic sport makes it easier to recognize that there are situations where we as a legal culture accept just the things that the judge as umpire invites us to reject. Aesthetic sports face many of the same challenges in the conception and implementation of the judicial role

[26] This is not to suggest that officials in other sports do not have to contend with ambiguous rules or draw upon their trained judgment in doing so. The notion of "interference," for example, which officials in many purposive sports must often apply, involves assessments that must be made taking account of the context of both the specific situation as well as the larger ethic of the sport. My claim is not that any categorical difference in the nature of officials' roles in the two types of sports arises out of the fact that only one set of officials must draw on this sort of judgment.

that the legal system faces. Their judges must apply standards that do not and cannot fully articulate all the criteria by which the judges are to assess the performances they are called upon to score. Much like judges in the legal system, judges in aesthetic sports are subject in the application of their judgment to influences of which they may not be fully aware or able to control. And as with judges in the legal system, the operation of these influences is a mixed bag. There is room for reasonable dispute over the extent to which the existence of differing schools of thought about what the best skating looks like ought to provide permissible grounds for differences in scoring, over the extent to which external considerations such as prior knowledge about a competitor's abilities or reputation ought to affect a judge's assessment of a performance, and so on. At the same time, there seems to be a rough consensus concerning some of the influences, both conscious and unconscious, that should not come into play. At least at the highest levels, most aesthetic sports rely on panels of judges, and many prohibit those judges on those panels from communicating with one another (as well as with athletes and coaches), and indeed from bringing with them to their positions any sort of electronic devices that might allow for communication from elsewhere. There are, of course, dissimilarities. Competitions in aesthetic sports do not involve adversarial proceedings in the same way that legal proceedings do, nor do they involve the triad structure that lies at the heart of the judicial role.[27] The metaphor, like any metaphor, is not a perfect fit. My claim is only that it is in significant respects a better fit than the judge-as-umpire.

Perhaps the most significant feature highlighted by a comparative approach to judging in law and judging in aesthetic sport is that any mechanism of judging that relies on judgments rooted in inarticulable norms requires some mechanism for ensuring that those norms will be shared among the judges. Imprecise concepts such as "reasonableness" and "due process" can function as law only to the extent that those charged with applying them have a common understanding of what

[27] Martin Shapiro contends that a triadic structure lies at the heart of a root concept of "courtness":

> Cutting quite across cultural lines, it appears that whenever two persons come into a conflict that they cannot themselves solve, one solution appealing to common sense is to call upon a third for assistance in achieving a resolution. So universal across both time and space is this simple social invention of triads that we can discover almost no society that fails to employ it.

MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1-2 (1986).

they mean. So, too, with judgments regarding the relative quality of figure skating routines. Common understandings provide a source of discipline and regularity.

Selection mechanisms *can* play a role in this process, and acculturation *will* play a role. A basic feature of the institutional architecture of aesthetic sports involves fostering uniformity among those who become judges, through both educational programming and through processes by which prospective judges demonstrate that their judgments conform to those of existing judges. A judge cannot be selected unless that judge has demonstrated a sufficiently thorough internalization of the standards applied by existing judges. Likewise, the legal system relies on selection and acculturation to serve as a source of discipline. As we will see, however, there is reason to believe that both sets of mechanisms operate less strongly than in aesthetic sports. Judicial selection typically is tied to the political process in a more-or-less direct way, meaning that variations in the political identity of selectors can impact the extent to which understandings are shared. As our society becomes increasingly pluralist it becomes correspondingly more difficult to count on politically informed processes to provide the same sort of discipline. At the same time, legal education may serve as a less reliable source of acculturation. This might be so for reasons related to the divisiveness that characterizes our society more generally. It could also be a product of legal academia's recognition and propagation of the belief that law in a formal sense does not fully constrain judges, who may in turn be enabled to reach decisions by reference to their ideology. If that is correct, then one implication of the analysis here is that the legal system ought to increase its reliance on alternative mechanisms of channeling judicial behavior so as to counter the lessened constraint provided by selection and acculturation, or to seek other ways to respond to the erosion of an important source of discipline.

The remainder of this Article proceeds as follows. Part I unpacks the judicial role in the legal system. Part II similarly explores the nature of judging in aesthetic sports. Part III then undertakes a comparative analysis of the ways in which the roles are structured and extracts further insights about the nature of the two roles and their implications for one another. A significant aim of Part III is to develop a taxonomy of mechanisms used in sport and law to facilitate the necessary further channeling of judicial behavior. A brief conclusion follows.

I. JUDGING IN THE LEGAL SYSTEM

To set up the analysis that follows, Part I engages in a relatively lengthy unpacking of the judicial role in the legal system, a necessary predicate to demonstrating that the role and its manifestations and implementation are meaningfully akin to their sport counterparts. The discussion will demonstrate that, despite its efforts to depict legal reasoning as a syllogistic process, the law remains a domain in which intuitive judgments based on inarticulable factors play a significant role.

A. The Civics Book Version of Judging as an Entirely Rational Activity

On its surface, the legal culture is one that privileges visible rationality. Students enter law school "with minds full of mush," in the classic phrasing of the fictional Professor Kingsfield, "and leave thinking like a lawyer," that is, thinking clearly, precisely, and articulately. In Karl Llewellyn's phrasing, the first year of law school

> [A]ims, in the old phrase, to get you to "think[] like a lawyer." The hardest job of the first year is to lop off your commonsense [and] to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice — to knock these out of you along with woozy thinking, along with ideas all fuzzed along their edges. You are to acquire the ability to think precisely, to analyze coldly, to work within a body of materials that is given, to see, and see only, and manipulate, the machinery of the law.[28]

At the center of the law's aura of rationality, and of legal training, stands the judicial opinion. Opinions ideally serve as models of the type of thinking that law students are to embrace. Their ubiquity in law school creates and reinforces an understanding that courts cannot simply reach decisions but must instead provide reasons justifying them. That understanding, in turn, permeates the legal system. The judiciary, as Alexander Hamilton noted in Federalist 78, "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid

[28] KARL N. LLEWELLYN, THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY 102 (1930) [hereinafter BRAMBLE BUSH].

of the executive arm even for the efficacy of its judgments."[29] The Court's legitimacy, as the joint opinion of Justices Kennedy, O'Connor, and Souter in *Planned Parenthood v. Casey* outlined, depends on the quality of the justifications it provides for its decisions.

> As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.
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> The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.[30]

The vision of judging advanced by the joint opinion is one in which courts draw upon previously articulated legal standards, and one in which there is a clear distinction between *principled* justifications and those based in social, political, or personal concerns.[31] Judge Patricia Wald broke the idea into two components. First:

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[29] THE FEDERALIST NO. 78, at 1 (Alexander Hamilton) (McLean's ed., 1788).

[30] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 865-66 (1992).

[31] *See* Paul Gewirtz, *On "I Know It When I See It*," 105 YALE L.J. 1023, 1025 (1996)

> One of the few ways we have to justify our power to decide matters important to our fellow citizens is to explain why we decide as we do. The second reason we write opinions is to demonstrate our recognition that under a government of laws, ordinary people have a right to expect that the law will apply to all citizens alike.[32]

This view of the proper form of judicial decision-making has a distinguished academic pedigree as well. The legal process theorists championed the notion of "reasoned elaboration,"[33] which requires not merely rationality, but also demonstration of how the application of a legal standard in the case before the court is consistent with its

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("Judicial power involves coercion over other people, and that coercion must be justified and have a legitimate basis. The central justification for that coercion is that it is compelled, or at least constrained, by preexisting legal texts and legal rules, and by legal reasoning set forth in a written opinion. From this perspective, the exercise of judicial power is not legitimate if it is based on a judge's personal preferences rather than law that precedes the case, on subjective will rather than objective analysis, on emotion rather than reasoned reflection.").

As Judge Ruggero Aldisert put it:

> A judicial opinion may be defined as a reasoned elaboration, publicly stated, that justifies the court's conclusion or decision. Its purpose is to set forth an explanation for a decision that adjudicates a live case or controversy that has been presented before a court. This explanatory function is paramount. In the common law tradition, the court's ability to develop case law finds legitimacy and acceptance only because the decision is accompanied by a publicly recorded statement of reasons.

RUGGERO J. ALDISERT, OPINION WRITING 12 (2d ed. 1990).

It has not always been thus:

> Disclosure of reasons has come in modern times to seem an essential feature of judicial action, an assurance of rationality and a safeguard against misuse of power. . . . It was not always so. In ancient times the messages of the oracle were cryptic by design, so that the motives of the god would be somewhat disguised and the attending priests would have useful work as interpreters. After the function was secularized, the legal oracles of the past were seldom called on to give judicial opinions.

JOHN P. DAWSON, THE ORACLES OF THE LAW xi-xii (1968).

[32] Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writing*, 62 U. CHI. L. REV. 1371, 1372 (1995).

[33] *See generally* G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973) (chronicling the historical development of reasoned elaboration).

application in past cases.[34] For example, Herbert Wechsler famously argued that legitimate adjudication entails the application of "neutral principles."[35] He contended "that the main constituent of the judicial process is precisely that it must be genuinely principled."[36] A principled decision, in turn, "is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."[37] Among the decisions that run afoul of this requirement are "summary dispositions that fail to offer any reasoned justification for their results," as well as those supported by reasons that cannot be neutrally applied in the sense that the court would not be willing to adhere to them in all situations to which they apply.[38] Lon Fuller's vision of adjudication was one in which legitimacy flows from its "distinguishing characteristic," namely "that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor."[39] A judicial decision must accordingly "meet the test of reason"[40] and "be *strongly responsive* to the parties' proofs and arguments in the sense that it should proceed from and be congruent with those proofs and arguments."[41]

More recently, Frederick Schauer has explained that "reasons are what we typically give to support what we conclude precisely when the mere fact that we have concluded is not enough."[42] Mathilde Cohen has explored the relationship between the idea of reason giving and liberal democratic theory.[43] She identifies the duty to give reasons

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[34] *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 147-48 (William N. Eskridge, Jr. & Philip P. Frickey, Jr., eds., 1994) [hereinafter THE LEGAL PROCESS].

[35] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15-16 (1959) ("I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.").

[36] *Id.* at 15.

[37] *Id.* at 19.

[38] Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 985 (1978).

[39] Fuller, *supra* note 3, at 364.

[40] *Id.* at 366-67.

[41] Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 412 (1978) [hereinafter *Participation*].

[42] Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 637 (1995).

[43] *See generally* Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A*

"as an attempt to reconcile the fact of pluralism with our ideal of toleration."[44] Thus, "[p]roponents of very different versions of liberal democracy usually disagree on certain features that define a democratic regime . . . [but] they insist that *judicial* reason-giving is fundamental to the political and moral legitimacy of a democracy."[45] Rawls, for example, characterizes the role of the Supreme Court as "exemplar of public reason . . . . This means, first, that public reason is the sole reason the court exercises. It is the only branch of government that is visibly on its face the creature of that reason and of that reason alone."[46] The providing of reasons by courts thus rewards and reinforces the parties' role in the adjudicative process,[47] facilitates accountability by enabling public monitoring of judicial decision-making, and provides a mechanism for keeping judicial decisions within the bounds of what can be appropriately justified.[48]

Consistent with all of this, our standard depiction of the judicial role leaves little room for suggestions that legitimate judging has aspects that include something other than straightforward rationality. A judge who cannot provide reasons for a decision is a judge who we might suspect to be substituting the rule of men for the rule of law, or, in Hamilton's phrasing, exercising "will" instead of "judgment."[49] Even those theorists who contend that judicial decisions are driven by something other than, or in addition to, doctrine understand that judges must provide justifications for their decisions that depict them

Comparative Law Approach, 72 WASH. & LEE L. REV. 483 (2015) (assessing the role of reason-giving in judicial process).

[44] *Id.* at 496.

> At the heart of contemporary theories of liberalism stand two main ideas — pluralism, the idea that there are many competing conceptions of the good life, and toleration, the idea that reasonable persons may disagree about those conceptions and that we must therefore learn to live with those who do not share our values.

Id.

[45] *Id.* at 496-97.

[46] JOHN RAWLS, POLITICAL LIBERALISM 235-36 (1993).

[47] Lon Fuller regarded party participation as "the distinguishing characteristic of adjudication," and contended that "[w]hatever heightens the significance of this participation lifts adjudication toward its optimum expression." Fuller, *supra* note 3, at 364; *see also Participation*, *supra* note 41; Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 125 (2005).

[48] Cohen, *supra* note 43, at 506-07; *see also* FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 57-58 (1980) (considering the ways in which writing disciplines decision-making).

[49] THE FEDERALIST NO. 78, *supra* note 29, at 4.

as having been determined by appropriately legal materials.[50] Judge Joseph Hutcheson put the point colorfully:

> [I]n my youthful, scornful way, I recognized four kinds of judgments: first the cogitative, of and by reflection and logomancy; second, aleatory, of and by the dice; third, intuitive, of and by feeling or "hunching;" and fourth, asinine, of and by an ass; and in that same youthful, scornful way I regarded the last three as only variants of each other, the results of processes all alien to good judges.[51]

One of the signature examples of this cultural reticence arises out of a famous line in Justice Stewart's concurring opinion in *Jacobellis v. Ohio*.[52] The case involved a theater owner who was charged with and convicted of obscenity for showing a French film that involved a lovemaking scene. Justice Stewart concluded that the film was protected by the First Amendment because it was not hard-core pornography — a concept that he acknowledged "may be indefinable," and that he would in any event not attempt to define it in that opinion, "[b]ut I know it when I see it, and the motion picture involved in this case is not that."[53] This is, Paul Gewirtz notes,

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[50] Frederick Schauer explains:

> . . . According to the Realists, judges typically make decisions on the basis of something other than, or in addition to, existing legal doctrine. This nonlegal reason for a decision could be a nonlegal hunch, a judgment based on personal characteristics of the litigants or judge, an all-things-considered judgment about who as a matter of fairness ought to win the case, or a policy judgment about which ruling would have the best consequences . . . .
>
> The Realists understood, however, that judges could not, professionally or culturally, explain their prelegal or extralegal judgments in terms of hunches, personal characteristics, abstract appeals to justice, or even straightforward policy analyses. Even if the Realists would have preferred it to be otherwise, they knew that the norms of the legal system required judges to justify their rulings in traditional legal terms, whatever the actual motivation for those rulings might have been. A professionally acceptable legal judgment would thus have to be couched in the language of cases, statutes, regulations, legal rules, legal principles, and accepted legal secondary authorities — in other words, in the language of the traditional sources of law.

FREDERICK SCHAUER, THINKING LIKE A LAWYER 134-35 (2009).

[51] Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L. REV. 274, 275-76 (1929).

[52] 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[53] *Id.*

strikingly out of step with the typical rhetoric of judicial opinions. It comes across as more assertion than justification, and one that points to "a nonrational, intuitive gut reaction, instead of reasoned analysis; it seems to be utterly subjective and personal."[54]

B. The Influence of the Inarticulable

There is, then, the civics-book version of the judicial role, in which the judge's task is nothing more-or-less than to use logic to derive answers from pre-existing authorities. But a moment's reflection reveals that this depiction of the judicial role obscures much. Judges do not — cannot — simply apply the law in the sense of using deductive logic to reach conclusions compelled by governing principles provided from outside the judicial system. Language is simply too imprecise for most legal commands to be fully determinate.[55] Even Hamilton's Federalist 78 recognizes this in discussing the necessary need for the exercise of judicial judgment in

[54] Gewirtz, *supra* note 31, at 1025.

> There is not much about the phrase "I know it when I see it" that is startling in itself. If we heard it at a dinner party, few heads would turn . . . . Yet it did startle, even shock, when it appeared, and it continues to do so today. The shock derives totally from its location within a Supreme Court opinion, since both its rhetoric and its content are so unusual in that context.

Id. at 1024.

[55] At its core, the suggestion that the law is indeterminate amounts to the suggestion that formal legal materials do not, and cannot, extend so far as to cover all the questions that actually arise, with the result being that there is, as Judge Richard Posner has characterized it, a category of "cases in which the conventional tools of judicial decision making could not resolve the appeal — cases in what I call the 'open area.'" RICHARD A. POSNER, REFLECTIONS ON JUDGING 106-07 (2013). Precisely how far this point goes — that is, whether legal materials can be manipulated to reach any result in any case, or whether instead they preclude only some subset of all possible answers — is a matter of at least theoretical debate. *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 470 (1987); *see also* KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 78 (Paul Gewirtz ed., Michael Ansaldi trans., 1989) [hereinafter CASE LAW SYSTEM] ("[T]he freest judge's space for movement continues to grow smaller, and must remain so. The constraints and the socialization resulting from his membership in society and from his legal training guarantee the continuity of decisions, the continuity of legal norms, and the predictability of the 'freest' decision making."). Llewellyn regards himself as making a sociological point here. These constraints and the regularity they produce are visible across the run of cases, even as the lawyer or judge immersed in the details of an individual case may perceive great freedom and lack of constraint: "[W]hat looks to the sociologist like constraint can look to the lawyer like completely free discretion. The sociologist sees the forest, the lawyer sees the trees." *Id.* at 11.

situations where two laws conflict with one another.[56] Hamilton provides an example in the form of a situation in which two statutes conflict, and notes that the courts have addressed such situations via a presumption that the later statute should win out.

> But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an EQUAL authority, that which was the last indication of its will should have the preference.[57]

The principle that Hamilton refers to can, once derived, take the form of a rule, and can be applied in a logical fashion. But notice that two things will have happened. The first is that the judiciary will have made law. The second is that it will have done so by reference not to some articulated legal standard but rather to intuitions about which rule best advances "truth and propriety."[58]

Even an arch-formalist like Justice Scalia recognized that judges make law: "I am not so naïve (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it *as judges make it*, which is to say *as though* they were 'finding' it — discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be."[59] The interesting questions

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[56] *See* THE FEDERALIST NO. 78, *supra* note 29, at 3.

[57] *Id.*

[58] *Id.*; *see* Chad M. Oldfather, *Methodological Pluralism and Constitutional Interpretation*, 80 BROOK. L. REV. 1, 31 (2014) ("Legal reasoning thus takes place within a framework established by the acceptance of certain conventions. Judges can reason *from* those conventions, but they cannot reliably reason *to* them.").

[59] James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176-77 (1989) ("In a judicial system such as ours, in which judges are bound, not only by the text of code or Constitution, but also by the prior decisions of superior courts, and even by the prior decisions of their own court, courts have the capacity to 'make' law."). In *Republican Party of Minnesota v. White*, Justice Scalia responded to Justice Ginsburg's distinction between judicial and legislative elections as follows:

> This complete separation of the judiciary from the enterprise of 'representative government' might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to 'make' common law, but they have immense power to shape the States' constitutions as well.

thus concern not *whether* judges make law, but *how* and *to what extent* it is appropriate for them to do so. It might be, as Justice Holmes phrased it, that judges are "confined from molar to molecular motions."[60] Or judicial law-making might be, perhaps legitimately and inescapably, something that takes place on a larger scale than that.

We can set questions about the appropriate scale of judicial law-making aside for now and notice something common to the process whatever its nature. Every time a court makes law, whether it is doing so on a large or a small scale, it is engaging in the same sort of process that Hamilton alludes to. The judge faced with a question that existing authorities do not provide a clear answer to must, by definition, conjure up something that did not exist before. This is not to deny the role that preexisting, established, and articulated principles play in guiding the judge's decision.[61] But judges will not agree on which principles are applicable, and in what order of priority they ought to apply, and often the principles will seem to point in opposite directions.[62] In approaching this task, judges must resort to professional norms, coupled with their sense or intuition about which tools are most appropriate to the job.

> [I]n new and difficult cases this merges in, and in all cases is influenced by, current moral, political and social ideas, especially fixed pictures of the end of law and of an ideal legal and social order, by reference to which, consciously or subconsciously, the tribunal determines how far possible interpretations will yield a just result in the individual cause and judges of the intrinsic merit of the different developments of the legal materials potentially applicable which are urged by the contending parties.[63]

536 U.S. 765, 784 (2002).

[60] S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.").

[61] *See supra* notes 31–37, and accompanying text.

[62] The classic illustration of this is Karl Llewellyn's identification of twenty-four sets of dueling canons of statutory construction. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950). As Llewellyn argues, the canons cannot therefore be self-executing. Rather, "to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon . . . ." *Id.* at 401. The precise content of these other means, and their implications, are the ultimate source of the disagreement.

[63] Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 949

In Justice Holmes' classic phrasing:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[64]

The task of making sense of existing legal materials and triangulating among them to generate new legal material is one that can be only partially governed by law in the traditional sense.[65] Holmes again: "And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves . . . new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted."[66] Several decades later, dissenting in *Lochner v. New York*, Holmes put the point as follows: "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."[67]

(1923). Judge Leon Yankwich put the point as follows:

> As justice *by right* takes the place of justice *by grace*, the function of the judge is to administer and interpret the law according to definite norms. To do so effectively, the judge must understand life about him and the societal conflicts form which litigation stems. As law grows out of the needs of the community, its content must change and adapt itself as the community's transformation. Adaptability thus becomes one of the main merits of the common-law system. Like a sturdy tree its roots are in the past, its trunk in the present and its topmost branches reach skyward. And the judge who, in the process of applying and interpreting the law, bears this constantly in mind is most likely to achieve such perfection as may come to his craft.

Leon R. Yankwich, *The Art of Being a Judge*, 105 U. PENN. L. REV. 374, 386 (1957).

64 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

65 Frederick Schauer describes the process by which specific considerations come to be regarded (or not regarded) as appropriately *legal* authorities "as a *practice* in the Wittgensteinian sense: a practice in which lawyers, judges, commentators, and other legal actors gradually and in diffuse fashion determine what will count as a legitimate source — and thus what will count as law." Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1957 (2008).

66 HOLMES, *supra* note 64, at 36.

67 Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

As Holmes suggests in these quotes, the influence of intuition extends beyond the law-making task and into the process of applying law to facts. It is an idea with a pedigree that extends well beyond Holmes.[68] Judge Joseph Hutcheson described the process of decision in difficult cases as requiring him to digest the pertinent legal material, following which he would "give my imagination play, and brooding over the cause, wait for the feeling, the hunch — that intuitive flash of understanding which makes the jump-spark connection between question and decision . . . ."[69] Paul Gewirtz, ruminating on "I know it when I see it," concludes, "Law is not all reasoning and analysis — it is also emotion and judgment and intuition and rhetoric. It includes knowledge that cannot always be explained, but that is no less valid for that."[70]

So far, we have covered well-traveled territory. Law, at least as commonly conceived, does not provide judges with everything necessary to make all of the decisions they must make. What fills the gaps left by formal legal materials in these situations? What drives the intuition? There are three categories of answers. The first is that it is ideology, that judicial decisions reflect the political preferences of judges who decide cases in much the same way a legislator decides how to vote. A second is that judicial decision-making is merely a type of typical human decision-making, and thus is impacted by the same sorts of systematic cognitive errors that afflict human reasoning more generally. The third, as suggested above, is that judges draw upon an inarticulable, or at least not wholly articulable, sense of professionally conditioned judgment. These answers are not mutually exclusive. Judges may be driven by one force in some situations but not in others, or by all of them at the same time. The remainder of this part will consider them in turn.

1. Ideological Influences

Political scientists in particular work on understanding how judicial decision-making, especially at the Supreme Court level, is driven by

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[68] *See* Pound, *supra* note 63, at 951 ("Frequently application of the legal precept, as found and interpreted, is intuitive."); *see, e.g.*, R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381, 1398 (2006) ("[I]ntuition plays a pervasive role in all standard forms of judicial reasoning. Again, this is not to suggest that intuition by itself suffices to link a collection of facts to a unique legal conclusion. The main point instead is to continue building our appreciation of the universal dependence of adjudication on intuition.").

[69] Hutcheson, *supra* note 51, at 278.

[70] Gewirtz, *supra* note 31, at 1044.

judges' ideological preferences. The strongest form of this approach is the attitudinal model, which envisions judges as approaching each case by asking what result they prefer as a matter of policy, and then voting accordingly.[71] The model has been refined over time to incorporate other influences,[72] and these days strategic models, which regard judges as considering the broader consequences of their decisions, provide the dominant account among political scientists.[73]

[71] In one of the classic statements:

> The attitudinal model represents a melding together of key concepts from legal realism, political science, psychology, and economics. This model holds that the Supreme Court decides disputes in light of the facts of the case via-a-vis the ideological attitudes of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.

JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86 (2002). The model does not purport to reach all aspects of judicial behavior. "Because few areas in political life can be well represented by unconstrained choice, judicial scholars have carefully limited the attitudinal model in its pure form to the one area where it most plausibly applies: the decision on the merits." *Id.* at 96. Nonetheless, research has revealed a relationship between ideology and decision-making in the federal courts of appeals as well. *See* Frank B. Cross, *Collegial Ideology in the Courts*, 103 NW. U. L. REV. 1399, 1401 (2009).

[72] *See, e.g.*, Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 193 (2012) ("More recently, however, a cadre of interdisciplinary scholars has bridged this divide with a flurry of empirical projects demonstrating that judicial decision making is subject to a complex array of influences, including law, ideology, and others."). The various factors that influence a judge's ability to decide by reference to ideology will vary by court and circumstance: "[J]udges will have less discretion when judges can be overruled by higher courts, political culture disfavors judicial independence, legally determinate cases fill the docket, or when judges seek higher office, can be replaced by the electorate, or even assassinated by political enemies." Jeffrey A. Segal, *Judicial Behavior*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 19, 25-26 (Keith E. Whittington et al. eds., 2008).

[73] *See* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 6-7 (2006).

> Strategic judges consider the effects of their choices on collective outcomes, both in their own court and in the broader judicial and policy arenas . . . . To achieve this result, judges might vote and write opinions that differ from their own conceptions of the right thing. Thus we cannot assume that a judge's vote in a freedom of speech case fully reflects the judge's conception of good policy. If the goal of an appellate judge is to advance freedom of speech as much as possible, she might take a more moderate position in a particular case in order to win majority support for a pro-free speech ruling by her court. The judge might also try to avoid a decision that provokes Congress to enact legislation limiting free speech.

Id. at 6.

Even so, these accounts assume that formal legal and institutional constraints provide only a partial source of discipline, and that the remaining gaps are filled by ideology.

Most accounts of the role of ideology in judicial decision-making at least implicitly view the effect as pernicious. This is consistent with the account of law and judging as, when properly done, rooted in reason and principle. A judge who draws upon his ideology in making a decision seems to be a judge who is exercising will, who is making the decision a product of his own preferences rather than serving as the conduit for the law. If that is all that is taking place, or if too many decisions are made in this fashion, then the rule of law will be threatened by the prospect of decisions that are contingent upon the identity of the decision-maker rather than consistent across all decision-makers.

But a view of law that regards all ideological influences as bad is, as many commentators have pointed out, too simplistic. Judge Harry Edwards, for example, has argued that "[t]he hypothesis that judicial decisionmaking is influenced by the ideology of judges is remarkable only if and to the extent that ideology is extrinsic to law."[74] He is not alone.[75] Law facilitates and indeed often encourages the resort to normative reasoning — which is to say, reasoning that draws upon, or is at least strongly correlated with, ideological considerations.[76] More

[74] Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1945 (2009).

> It is well understood that legal reasoning partakes of moral judgment in cases in which judges routinely exercise delegated or common law-making authority. This need not, and generally does not, take the form of personal whim or preference. Rather, in cases where the law requires it, judicial decisionmaking can include a situated and disciplined elaboration of the conventional norms of the American political community . . . . On this account, some play for inherently contestable political judgments is simply built into law and strikes us as a normal constituent of good judging.

Id. at 1945-46.

[75] *See, e.g.*, Dan M. Kahan et al., *"Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 361 (2016) ("But those who understand how the law works — and the contribution that judges, using normative theories, play in imparting content to it — would not characterize this debate as reflecting extralegal 'ideological' considerations as opposed to the perfectly ordinary, acceptable exercise of jurisprudential judgments.").

[76] *Id.* at 360-61

> ("It is a well-known feature of the Anglo-American system of law that it frequently demands that judges resort to normative reasoning. There is no

broadly, as Douglas Edlin observes, judging in a common-law system necessarily and desirably leaves room for the operation of judges' individual perspectives. There is an unavoidable element of subjectivity, which is countered by the requirement that judgments "must contain statements of justificatory reasons for legal conclusions, and that these conclusions depend on their evaluation and validation by the community as legal judgments."[77] Purely ideological decision-making remains undesirable. But because the traditional tools of legal analysis cannot always point the way to an answer, other things, including political ideology as we normally conceive of it, can fill in at least some of the gaps.[78]

This qualification, of course, is only partly satisfactory. To acknowledge that ideology is sometimes intrinsic to law simply raises

> way for highly general concepts such as 'fraud,' 'unreasonable seizure,' 'unlawful restraint of trade,' 'fair use,' 'materiality,' 'freedom of speech,' and the like to be made operative in particular cases without specifying what states of affairs those legal provisions should be trying to promote. . . . In this environment, it is perfectly commonplace for judges who have competing 'jurisprudential' orientations to *disagree* on what normative theory should animate a particular legal provision. It is not a surprise, either, that in those instances the competing orientations that guide judges will be correlated with *alternative political philosophies* or orientations on the part of the judges in question.").

[77] DOUGLAS E. EDLIN, COMMON LAW JUDGING: SUBJECTIVITY, IMPARTIALITY, AND THE MAKING OF LAW 6 (2016). William Popkin likewise draws on Kant to outline a similar conception of judging:

> Law judges are . . . objective in the same sense that art critics are objective, whether or not there are objectively provable criteria. The judge's arguments are not "true" or "valid" in the familiar sense of those terms. When the judge makes judgmental choices about which there is uncertainty, there is no natural law or community standard on which people can agree. . . . The judge's legal arguments are objective only because they claim to provide objectively justifiable reasons to an audience that is free to agree or disagree.

WILLIAM D. POPKIN, JUDGMENT: WHAT LAW JUDGES CAN LEARN FROM SPORTS OFFICIATING AND ART CRITICISM 102-03 (2017).

[78] Judge Posner puts the point this way:

> Because the materials of legalist decision making fail to generate acceptable answers to all the legal questions that American judges are required to decide, judges perforce have occasional — indeed rather frequent — recourse to other sources of judgment, including their own political opinions or policy judgments, even their idiosyncrasies. As a result, law is shot through with politics and with much else besides that does not fit a legalist model of decision making.

RICHARD A. POSNER, HOW JUDGES THINK 9 (2008).

the question of when ideologically inflected decision-making is appropriate and when it is not. The answer is undoubtedly contestable and is beyond the scope of this Article. But its existence draws attention to the need to be mindful of the components of the institutional and procedural architecture that shape judges' abilities and incentives to resort to such reasoning.

2. Cognitive Illusions and Other Psychological Forces

A second category of answers to our "what fills the gaps left by formal legal materials?" question proceeds from the understanding that legal reasoning, and therefore judicial decision-making, is not qualitatively distinct from normal human reasoning. A judge deciding a case is, on this view, engaged in a process that is fundamentally the same as the one she uses to decide what to have for dinner, which house to buy, or how to plan for retirement.[79]

The most interesting questions here concern the ways in which that process can be led astray. The relevant scholarship draws upon recent work investigating systematic failings in human judgment and decision-making, and other related phenomena that can influence judges. Like the work exploring the effects of ideology in judicial decision-making, the literature here is large and I will only briefly summarize it. Consider, for example, the work of Chris Guthrie, Jeffrey Rachlinski, and Andrew Wistrich, who draw on a line of cognitive psychology pioneered by Daniel Kahneman and Aaron Tversky.[80] That work arises out of the observation that human thought is dominated by two modes or systems. "System 1" thinking involves the making of quick, intuitive judgments that require little or no conscious effort. The sorts of tasks that System 1 performs well

[79] As Frederick Schauer has observed, an assumption about the extent to which judicial reasoning is the same as ordinary human reasoning "lurks in the background as an undocumented and unargued premise of the research on the psychological dimensions of judicial behavior." Frederick Schauer, *Is There a Psychology of Judging?*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 103, 103-04 (David Klein & Gregory Mitchell eds., 2010). This assumption is, he further notes, questionable. One alternative, which is consistent with one of the major themes of this Article, is that "the experience of studying to be a lawyer and then of practicing law causes decision making in law, especially about legal (as opposed to factual) matters, to diverge in deep and cognitively substantial ways from the decision making of human beings who do not possess such training and experience." *Id.* at 105. Schauer also raises the possibility that self-selection into a judicial role, and experience as a judge, further separate judges from lawyers. *Id.*

[80] For an overview, *see generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

includes detecting which of two objects is closer or where a sound originated, detecting anger or hostility in a person's face, reading signs, and the like. "System 2," in contrast, entails conscious mental effort. System 1 is always engaged, and always passing information along to System 2 for its consideration.[81] System 2, for its part, is fully engaged only when System 1 is surprised or encounters a situation for which it does not have a ready answer. This is, generally speaking, a fortunate arrangement, because it allows us to go about our lives with minimum cognitive effort.

But it is not perfect. "System 1 has biases, . . . systematic errors that it is prone to make in specified circumstances . . . . [I]t sometimes answers easier questions than the one it was asked, and it has little understanding of logic and statistics."[82] Guthrie, Rachlinski, and Wistrich have, over a series of projects, explored the various ways in which judges, like most humans, are susceptible to the errors that System 1 makes.[83] Although their results suggest some respects in which judges may be less susceptible to cognitive illusions than the general population, on the whole, their study concludes that judges are as cognitively limited as the rest of us.

Another example of work applying the insights of psychology to judicial decision-making is Lawrence Baum's application of social psychology to consider how judges' self-presentation — that is, their efforts to make favorable impressions on others — might affect their behavior as judges.[84] Baum starts from the assumption that, like others, judges care about how they are perceived by their "salient audiences" — those who are important to them.[85] He further contends that judges' social groups and professional peers are likely to have the greatest influence on their behavior. These groups' influences will sometimes push judges towards a decision according to traditional conceptions of law (because that is the judicial ideal held by those

[81] *See id.* at 20-25 (describing the systems and their general relationship with one another).

[82] *Id.* at 25.

[83] *See generally* Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007) (analyzing the ways in which judges make automatic and snap judgments); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (analyzing the quality of judicial decision); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005) (discussing the ability of judges to make decisions in light of inadmissible information).

[84] *See generally* BAUM, *supra* note 73 (discussing various factors that affect a judge's decision-making process).

[85] *Id.* at 4.

groups), but other times have a different sort of influence, such as where a result suggested by legal materials would be contrary to the social or political preferences of judges' peers. These influences may often operate unconsciously.[86]

In contrast to ideology, it is less clear that there is a proper role for cognitive illusions to play in judicial decision-making, since one of their key characteristics is to skew judgment away from rationality. In the context of ordinary human reasoning this will, arguably, not always be problematic. One school of thought holds that resort to these sorts of cognitive shortcuts is a beneficial, efficient way to make decisions in an environment of limited time and cognitive resources.[87] As demonstrated above,[88] however, law strives for rationality. As the discussion that follows suggests, that striving will, to some extent, necessarily be in vain. But that of course does not mean that the law should simply accept and incorporate the various ways in which human decision-making departs from complete rationality.

Efforts at self-presentation to salient audiences, in contrast, can sometimes cut in the other direction, at least insofar as the audiences consist of professional peers who value judicial behavior that comports with the characteristics valued by the system as a whole. Here, too, the lines between proper and improper may be murky, but attentiveness to the dynamic is appropriate.

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[86] *See id.* at 12-13.

[87] This school of thought is most prominently associated with psychologist Gerd Gigerenzer, who characterizes these "cognitive algorithms" as "fast and frugal." *See generally* Gerd Gigerenzer & Daniel G. Goldstein, *Reasoning the Fast and Frugal Way: Models of Bounded Rationality*, 103 PSYCH. REV. 650 (1996) (reporting the results of a study suggesting that such algorithms often perform as effectively as fully rational decision-making processes). Drawing on the work of Herbert Simon, Gigerenzer calls into question the desirability of classical rationality as the benchmark for all decision-making. "Satisficing" — "a blend of sufficing and satisfying" which can be informally characterized as making decisions that are "good enough" — will instead often be sufficient. *Id.* at 651.

> These satisficing algorithms operate with simple psychological principles that satisfy the constraints of limited time, knowledge, and computational might, rather than those of classical rationality. At the same time, they are designed to be fast and frugal without a significant loss of inferential accuracy, because the algorithms can exploit the structure of environments.

Id.

[88] *See supra* Part I.A.

3. Professional Judgment, or "Situation Sense"

A third answer is that professional norms — which we might even include under an expansive definition of "law" — do much of the work, and that the intuitions that a judge brings to bear on the task are more disciplined than meets the eye.[89] The idea dates back to Aristotle,[90] but Karl Llewellyn offered the first developed account of this sort of reasoning in law, which he referred to as "situation sense." As one of the preeminent Legal Realists, Llewellyn recognized that the stuff of formal legal materials — cases, statutes, and other sources of doctrine — provides little constraint in difficult cases.[91] He contended that the decisions of courts nonetheless exhibit "reasonable regularity" — judicial decisions in difficult cases are not "foredoomed in logic," but neither are they "the product of uncontrolled will which is as good as wayward."[92] The judge instead exercises "situation sense," a combination of "ways and attitudes which are much more and better felt and done than they are said."[93] The judge:

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[89] These professional norms of course might themselves be regarded as the products of ideology, in which case the boundaries between what I am treating as "ideology" and as "norms" could be re-characterized as being between less-and more-crystallized forms of ideology, with boundaries that will shift over time. I would not reject that characterization, but nonetheless think it appropriate to treat the two categories as distinct and as worthy of distinct treatment.

[90] Aristotle thought of the person of practical wisdom, or the *phronimos*, as capable not only of abstract logic, but of applying accumulated experience and reflection while controlling for biasing factors. The *phronimos* will not be able to uncontroversially demonstrate the correctness of a given practical judgment, so in this sense, some sort of public trust or confidence in the *phronimos* is required.

Wright, *supra* note 68, at 1422.

[91] We have discovered in our teaching of the law that general propositions are empty. We have discovered that students who come eager to learn the rules and who do learn them, and who learn nothing more, will take away the shell and not the substance. We have discovered that rules alone, mere forms of words, are worthless. We have learned that the concrete instance, the heaping up of concrete instances, the present, vita memory of a multitude of concrete instances, is necessary in order to make any general proposition, be it rule of law or any other, mean anything at all. Without the concrete instances the general proposition is baggage, impedimenta, stuff about the feet. It not only does not help. It hinders.

LLEWELLYN, BRAMBLE BUSH, *supra* note 28, at 12.

[92] KARL N. LLEWELLYN, COMMON LAW TRADITION: DECIDING APPEALS 4 (1960) [hereinafter COMMON LAW TRADITION].

[93] *Id.* at 214.

> *[C]an* throw the decision this way or that. *But not freely*. For to him the logical ladder, or the several logical ladders, are ways of keeping himself in touch with the decisions of the past. This, as a judge, he wishes to do. This, as a judge, he would have to do even if he did not wish . . . . For while it is possible to build a number of divergent logical ladders up out of the same cases and down again to the same dispute, *there are not so many that can be built defensibly*. And of these few there are some, or there is one, toward which the prior cases pretty definitely press. Already you see the walls closing in around the judge. Finally, when all is done, he does remain free to choose — in a sense. But not free in another — for he is a judge. As a human being, his "attitude" — the resultant of his life—conditions him. As a judge — and a potent factor in his attitude — his conscience conditions him. It is his job to decide which ladder leads to the just conclusion, or to the wise conclusion — when he sees two clear possibilities.[94]

Lawyers and judges bring a shared set of techniques, and shared experiences and understandings that lead them to treat legal rules and materials differently from the untrained.[95] Thus, Llewellyn concluded: "[T]he freest judge's space for movement continues to grow smaller, and must remain so. The constraints and the socialization resulting from his membership in society and from his legal training guarantee the continuity of decisions, the continuity of legal norms, and the predictability of the 'freest' decision making."[96]

Here again we encounter recognition of the proposition that the linguistic content of law is not the sole driver of decision-making — otherwise laypersons would be just as capable of the process as trained professionals — coupled with an understanding that other forces are at work. Whether we wish to consider it the use of "law" or not, this resort to norms and intuition does not, at least when properly done, mean that judges are engaged in "subjective" decision-making.[97] The

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[94] LLEWELLYN, BRAMBLE BUSH, *supra* note 28, at 73.

[95] LLEWELLYN, CASE LAW SYSTEM, *supra* note 55, at 77.

[96] *Id.* at 78. Llewellyn regards himself as making a sociological point here. These constraints and the regularity they produce are visible across the run of cases, even as the lawyer or judge immersed in the details of an individual case may perceive great freedom and lack of constraint: "[W]hat looks to the sociologist like constraint can look to the lawyer like completely free discretion. The sociologist sees the forest, the lawyer sees the trees." *Id.* at 11.

[97] It is, nonetheless, often misapprehended in just that way:

> In fact, more negatively, courts often link intuition to subjectivity, where

notion suffuses Llewellyn's work, and is well captured by philosopher Michael Polanyi's concept of "tacit knowledge," which is in turn best embodied in his phrase, "We know more than we can tell."[98] To some degree with respect to all that we know, and to an extraordinary degree with respect to some of it, we are unable to articulate the content of our knowledge.[99] Such knowledge cannot be passed along through instruction in rules or maxims — and therefore cannot be embodied in legal doctrine in its traditional forms. Learning comes instead through repetition and exposure to examples. "By watching the master and emulating his efforts in the presence of his example, the apprentice unconsciously picks up the rules of the art, including those which are not explicitly known to the master himself."[100] The judge and the lawyer will be unable to say precisely *why* their shared techniques are appropriate to the task or *how* those techniques work, and often may not even recognize that they are drawing on them. That the knowledge is ineffable does not mean that it is not real.

> subjectivity is being contrasted unfavorably with objectivity in decisionmaking. By itself, intuition in such contexts is thought to be an inadequate basis for the legal judgment in question. What some judges think that intuition crucially lacks may vary. Beyond lack of objectivity, reasoning itself in a broader sense may be thought to be missing or insufficient in cases of intuition. Intuition by itself may be thought to be insufficiently analytic. Or intuition may be thought by some judges to lack scientific support, to be without sufficient empirical support, or simply to be unscientific.

See Wright, *supra* note 68, at 1388-89.

98 MICHAEL POLANYI, THE TACIT DIMENSION 4 (1966).

99 Polanyi asserts that "strictly speaking nothing that we know can be said precisely," MICHAEL POLANYI, PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY 87-88 (1958) [hereinafter PERSONAL KNOWLEDGE] and in doing so adverts to the following observation by Alfred North Whitehead: "There is not a sentence which adequately states its own meaning. There is always a background of presupposition which defies analysis by reason of its infinitude." ALFRED NORTH WHITEHEAD, ESSAYS IN SCIENCE AND PHILOSOPHY 73 (1948). Umberto Eco highlights a slightly different aspect of the phenomenon:

> When the writer (or the artist in general) says he has worked without giving any thought to the rules of the process, he simply means he was working without realizing he knew the rules. A child speaks his mother tongue properly, though he could never write out its grammar. But the grammarian is not the only one who knows the rules of the language; they are well known, albeit unconsciously, also to the child.

UMBERTO ECO, THE NAME OF THE ROSE 545 (Richard Dixon trans., Houghton Mifflin Harcourt 2014) (1980).

100 POLANYI, PERSONAL KNOWLEDGE, *supra* note 99, at 53.

As Paul Gewirtz has observed,[101] Llewellyn's work also bears a resemblance to the later theories of Stanley Fish, who speaks in terms of "what transpires between fully situated members of a community."[102] As one illustration of the concept, Fish relates a newspaper account of a pre-game conversation between then-Baltimore Orioles manager Earl Weaver and pitcher Dennis Martinez. The reporter asked Martinez about Weaver's "words of wisdom."[103] In Martinez's telling, Weaver said, "Throw strikes and keep 'em off the bases," and Martinez said, "O.K."[104] Fish contends that such an apparently contentless discussion was the only kind that they could possibly have had. Martinez had either internalized the necessary information or he had not, and because his learning had not — indeed, could not have[105] — occurred through formalized statements of knowledge, there was no way for Weaver to have conveyed anything useful to Martinez by using words.[106] There was

> [N]ot a formula or a method or a principle — in fact no guidance at all — simply a reminder of something that Martinez must surely already know, that it is his job to throw a

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[101] *See* Paul Gewirtz, *Editor's Introduction*, *in* LLEWELLYN, CASE LAW SYSTEM, *supra* note 55, at xvii-xx.

[102] Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1773 (1987).

[103] *Id.*

[104] *Id.*

[105] Fish seeks to make two points with the Martinez example (and another). "First, what they together suggest is that performing an activity — engaging in a practice — is one thing and discoursing on that practice another. Second, the practice of discoursing on practice does not stand in a relationship of superiority or governance to the practice that is its object." *Id.* at 1777-78. In fact, he claims that there is, "in a strict sense," no relationship at all between engaging in a practice and discussing that practice. *Id.* at 1775. Theory (discourse on a practice) does not itself generate knowledge, he contends, but instead:

> [O]perates as a verbal place-marker for a knowledge that develops in the context of a trial-and-error attempt to match an example . . . . In other words, the articulation of the theory refers to knowledge acquired independently of it, and it serves as a mnemonic and exhortative device. Listening to theory talk may be a part of the experience of becoming a practitioner but not because theory talk would in any strong sense be generating the practice.

Id. at 1775 n.3.

[106] *See id.* at 1774.

> baseball in such a way as to prevent opposing players from hitting it with a stick.[107]

The moment of brilliance for Fish, the one in which Martinez demonstrated that even "if his baseball skills are suspect, his philosophical skills would seem to be beyond dispute,"[108] came when Martinez followed up the anecdote by observing, "What else could he say? What else could I say?"

Fish contends that judges are likewise driven not by something external, some theory or formalization, but rather by their internalization of practice:

> [W]hen judges do what they do, they do not do it in accordance with or at the behest of some systematic and coherent account of law and its relation to morality and society. Judging, in short, cannot be understood as an activity in the course of which practitioners regularly repair for guidance to an underlying set of rules and principles.[109]

In this sense Fish pushes the point beyond Llewellyn, rejecting the related idea offered by Ronald Dworkin that judges come to rely on "a fairly individualized working conception of law"[110] that they have developed over the course of their training and experience.[111] On Fish's view, then, verbal formulations of rules are merely admonitions to bring internalized knowledge to bear on the resolution of a case. The judge who gives herself a jurisprudential prompt at the outset of her decisional process is not invoking some concept that will, itself, provide additional discipline to her decisional process, but rather

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107 *Id.* at 1773.

108 *Id.*

109 *Id.* at 1785.

110 RONALD M. DWORKIN, LAW'S EMPIRE 256 (1986).

111 *See* Fish, *supra* note 102, at 1788. Fish finds Dworkin's prescription that judges work to arrive at the "best" judgment to be puzzling:

> One wants to say, with Dennis Martinez, "what else could we be or do except what, according to our lights, was the best?" That is, someone whose sense of appropriateness includes a firm conviction of what is and is not obligatory and what is and is not responsible judicial behavior will not have to look elsewhere for his convictions or for an understanding of what would be the "best" thing to do. "Be the best you can be" finally means nothing more than "act in the way your understanding of your role in the institution tells you to act."

Id. at 1793.

reminding herself by shorthand of what she already knows.[112] She is telling herself to throw strikes and keep 'em off the bases.

A final example. Consider again Gewirtz's assessment of Justice Stewart's "I know it when I see it." Gewirtz contends that neither Justice Stewart contemplating obscenity nor Justice Frankfurter applying the "shocks the conscience" standard under the Due Process Clause is engaged in some freewheeling, unrooted assessment of what he happens to think about the situation before him. Justice Stewart, Gewirtz suggests, did not imagine himself to be applying "a personal, idiosyncratic notion of 'hard-core pornography.'" He was instead drawing upon a conception that, though perhaps incapable of being captured in a tidy verbal formulation, was nonetheless the sort of thing "that virtually *all* people would view as beyond the pale, that virtually all would think suppressible."[113] In similar fashion, Frankfurter's "shock" was not that of the uninformed observer, but rather that of someone who had long been exposed to, and given deep consideration to, "the constitutional balance between liberty and order in law enforcement, and who had written many judicial decisions in cases involving these issues. His beliefs and reasons . . . had been sufficiently internalized that his immediate reactions reflected patterned thought."[114] Such standards might appear on their surface to invoke subjectivity, but instead direct the judge to consult a host of norms and shared understandings that can provide as much discipline as any verbal formulation.[115]

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[112] *Id.* In Fish's view, the fact that judges provide an explanation for their decisions that depicts them as drawing on principles from statutes, cases, and other forms of authority merely demonstrates that they are engaged in a separate process:

> They are engaging in the practice of self-presentation, that is, the practice of offering a persuasive account of why they have done what they have done — decide the case this way rather than that — which is not the same thing (why on earth should it be?) as offering an account of how they actually did it.

Id. at 1790.

[113] Gewirtz, *supra* note 31, at 1037.

[114] *Id.* at 1032.

[115] It is worth noting that even if such phrases as these are taken as an invitation for a judge to engage in something that would clearly qualify as "subjective" reasoning, that might not be such great cause for concern. Consider for example Michael Perry's argument that a judge, in determining what the vague and indeterminate "fundamental aspirations signified by the Constitution" require, "should rely on *her own beliefs* as to what the relevant aspiration requires." MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY 149-51 (1988) (emphasis added). For starters, no one whose subjective views are outside the mainstream is likely to have become a judge, so the likelihood of radicalism is minimized at the

Professional norms or situation sense can thus exert a constraining effect on judicial decision-making. But there is another, seemingly contradictory, sense in which reliance on these sorts of norms provides a benefit. By relying on professional acculturation as a source of discipline the system also facilitates change. A world in which judges may only apply rigid standards in a mechanistic way is a world in which legal change must come from whoever has the authority to change the rigid standards. Judicial formalism is in this sense inherently conservative because it hinders or eliminates one avenue for the evolution of law. But if the content of the law rests on accepted social propositions — a claim most easily advanced with respect to the common law[116] and constitutional law[117] — then a system that relies on acculturation as a source of discipline will retain the ability to evolve as a result (a point discussed more fully below). Put differently, a system in which judges are entitled to exercise professional judgment in their interpretation and application of legal standards is a world that allows for law to change as the nature and content of that professional judgment shifts in response to changes in the culture more generally.[118]

outset. The internalized concepts that generate a subjective response in any given judge will thus tend to be widely shared in the legal community. What is more, the structure of the judiciary — with its mechanisms for appeal, and multi-member appellate courts — makes it difficult for a truly idiosyncratic view to be determinative. "A thoughtful judge will rely on her own beliefs as to what the aspiration requires only after *forming* those beliefs, or at least *testing* them, in the crucible of dialogic encounter with the wisdom of the past, of the tradition, including original beliefs, precedent, and anything else relevant and helpful." *Id.* at 150.

116 *See* MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 1-3 (1988) [hereinafter NATURE OF THE COMMON LAW]. Eisenberg argues that common-law adjudication requires judges to draw on what he labels "social propositions" — "all propositions concerning the world other than doctrinal propositions, such as propositions of morality, policy, and experience" — in every instance. *Id.* at 1-2.

117 Schauer argues:

> [C]onstitutions rest on logically antecedent presuppositions that give them their constitutional status. As a result, constitutions can and do change not only when they are amended according to their own provisions or their own history, however broadly those provisions or that history may be understood, but whenever there is a change in these underlying presuppositions — political and social, but decidedly not constitutional or legal.

Frederick Schauer, *Amending the Presuppositions of a Constitution*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 145, 147-48 (Sanford Levinson ed., 1995).

118 The vision of judging I describe here is broadly similar to that outlined in Edlin, *supra* note 77, at 7:

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The three categories of influence that I have outlined do not all have the same character. Commentators typically regard ideological and psychological influences as pernicious, with their effects to be minimized if possible. And it is these pernicious influences that have taken center stage in recent scholarly discussions. Meanwhile, those discussions have paid relatively little attention to the notion that professional norms might serve as a source of counterbalance, and if anything exhibit an implicit hostility to the idea.[119] Part of the goal of this Article, and a significant benefit of juxtaposing judging in law with judging in aesthetic sport, is to highlight the role of professional norms and to demonstrate both their familiarity and their capacity to act as a source of discipline.

II. JUDGING IN AESTHETIC SPORT

As noted above, the umpire has traditionally served as the most natural sporting analogy for judges.[120] Many have pointed out the various ways in which the analogy falls short,[121] and I will not further pursue those critiques here. My goal here instead is to demonstrate that a different sort of sports official provides an equally, if not more apt source of analogy, namely the judges who score what philosophers of sport refer to as "aesthetic sports." These include familiar Olympic sports such as figure skating and gymnastics, which require judges to apply highly indefinite standards, which in turn necessitates resort to a developed expertise based on which to assess the performances they must rank. The parallels here are of course also not complete, but they nonetheless provide a useful and appropriate basis for comparative analysis.

Two features of the role of the aesthetic judge are critical to this suggestion. The first is the fact that the judge in an aesthetic sport in a very real sense creates the outcome of an event. Umpires, for the most

> The process of common law judging combines the individual perspectives of judges with a recognized form of legal argumentation that is expressed to a larger community. A judge's perspective on the law is an essential part of that judge's contribution to the law. The expression of the individual response within the forms of legal judgment ensures that the judgment will be recognized as a source of law and enhances the judge's contribution to the common law system and process.

119 *E.g.*, Brett G. Scharffs, *Law as Craft*, 54 VAND. L. REV. 2245, 2287 (2001).

120 *See supra* notes 18–21, and accompanying text.

121 *See supra* note 22, and accompanying text.

part, merely enforce rules, and it is the players who determine which team wins. Indeed, it is not difficult to imagine a baseball game played to conclusion without any umpires. Judges in aesthetic sports also enforce rules, but their primary role is to generate judgments, and there can be no winner without the exercise of that judgment. The second, which is related to the first, is that judges in aesthetic sport are typically guided by indeterminate standards — the sporting equivalents of "reasonableness," "equal protection," and so on — that require the judge to draw upon what we might call expertise or professional judgment to fill in the particulars.

A. The Distinction Between Purposive and Aesthetic Sport

Before taking up the question of how judging in aesthetic sport works, it makes sense to situate our understanding of precisely what aesthetic sports are. Stated somewhat crudely, and before assigning labels, we can draw a basic distinction between sports in which scoring occurs largely independently of the judgment of the officials, and those in which scoring is a product of the judgment of the officials. Put differently, the distinction is between sports that have a referee (or umpire) and those that have judges. Baseball provides an example of the former kind of sport. For the most part, spectators are able to determine for themselves when runs have scored because umpires' decisions are not integral to scoring. Figure skating is an example of the latter sort of sport, in which spectators might have a general sense of how strong a skater's performance was, but in which the scoring of the performance is entirely a product of the exercise of the officials' judgment.

Philosopher David Best gives these two types of sport the labels "purposive" and "aesthetic,"[122] and others have identified a similar break between types of sports.[123] In the case of purposive sports,

[122] DAVID BEST, PHILOSOPHY AND HUMAN MOVEMENT 104-05 (Ivor Morrish ed., 1978).

[123] Philosopher Bernard Suits captured the distinction as follows:

> The Olympics (as well as the Commonwealth Games, and so on) contain two distinct types of competitive event, what I have elsewhere called judged as opposed to refereed events. One is a performance and so requires judges. The other is not a performance but a rule-governed interplay of participants, and so requires not judges but law-enforcement officers, that is, referees. Performances require rehearsal, games require practice.

Bernard Suits, *Tricky Triad: Games, Play, and Sport*, 15 J. PHIL. SPORT 1, 2 (1988) [hereinafter *Tricky Triad*].

"[t]he purpose [of the sport] can be specified independently of the manner of achieving it as long as it conforms to the limits set by the rules or norms . . . ."[124] Thus in soccer, say, the purpose (or goal) of the sport — to get the ball across the goal line and into the net — can be specified without reference to the means by which it is done. This is not to say that the rules do not place restrictions on those means — the fact that the hands may not be involved in the process is probably the most prominent of those restrictions. But so long as a competitor does not run afoul of those restrictions, achievement of the goal counts regardless of the specific means by which it is achieved.[125] The competitors' aim is to score goals, without regard to whether they do so in an especially pleasing way.

Aesthetic sports will likewise feature something that can be identified as the goal that the competitors must seek to achieve — performing certain gymnastic moves or skating jumps — but place little emphasis on simply achieving the goal as opposed to doing so in an aesthetically pleasing manner.[126] Gravity does the work of getting

Another version distinguishes between open- and closed-skill sports:

> [S]ubjectively judged sports can typically be classified as closed-skill sports in that the performance environment does not change nor do the expected execution of the movements. In contrast, referees are typically involved in open-skilled sports, where athletes respond in a dynamic environment with the play's development based on the immediate conditions available. Open-skilled sports also facilitate greater variability in terms of how the performers execute the movements. As such, differences emerge between the demands of the two roles. Gymnastics judges, for example, remain static in a particular spot for observation of the performances. They never change from one performance to the next. Referees, on the other hand, need to move around a playing field, constantly adjusting their position to get the best visual perspective possible.

Diane Ste-Marie, *Expertise in Sport Judges and Referees: Circumventing Information-Processing Limitations*, *in* EXPERT PERFORMANCE IN SPORTS: ADVANCES IN RESEARCH ON SPORT EXPERTISE 169, 176 (Janet L. Starkes & K. Anders Ericsson eds., 2003). For an insightful reflection on whether Suits was wrong to regard judged sports as not being games, see generally Thomas Hurka, *On Judged Sports*, 42 J. PHIL. SPORT 317 (2015).

[124] BEST, *supra* note 122, at 104.

[125] As Graham McFee observes,

> [S]pectators may take an interest in the *manner* of performance, may prefer their favoured team to win with grace and flair; but, as far as the sport goes (and especially competitions in that sport), such admiration of the team's performance is beside the point. Indeed, it is easy to imagine a team playing elegantly and gracefully, but losing.

Graham McFee, *Officiating in Aesthetic Sports*, 40 J. PHIL. SPORT 1, 3 (2013).

[126] The question of whether aesthetic sports involve an identifiable "goal" is more

the diver from the platform into the pool. It is what the diver does between departing the platform and hitting the water that matters and, more than that, *how* she does it. This requires "judges who 'look and see' *that* such-and-such a move was executed, and *how*; and who knows what that is worth in terms of the scoring in the sport."[127] To be sure, officials in purposive sports are also called upon to exercise similar judgment. For example, football referees must often determine whether a player was in possession of the ball at a particular moment in time, which is the sort of judgment that draws upon something beyond the mere ability to place people or objects relative to one another in space.[128] But those judgments do not, except in the rare case, determine who wins and loses.[129] In aesthetic sports, in contrast, there is no basis for the ranking of competitors other than the judge's scoring.

Another way of getting at the distinction is that in purposive sports the rules identify a goal and then largely specify the ways in which that goal may *not* be achieved. So long as competitors do not engage in

difficult than meets the eye. Bernard Suits contended that certain sorts of sports are not games because they do not have identifiable goals. *See* Bernard Suits, *The Trick of the Disappearing Goal*, 16 J. PHIL. SPORT 1, 8-9 (1989). Klaus Meier disagreed. *See* Klaus V. Meier, *Performance Prestidigitation*, 16 J. PHIL. SPORT 13, 22-25 (1989).

127 McFee, *supra* note 125, at 3 ("Indeed, all aesthetic sports must use some variation of this method of awarding a score — for *someone* must determine the manner in which this competitor or team performed, since for *aesthetic sports* the manner of performance is fundamental to the result; that is, to what is assessed.").

128 *See id.* at 5 ("Thus, for example, in American (grid iron) football, the receiver catching the ball must land with both feet in bounds (which we can imagine might be determined, say, with technology: for instance, monitored electronically). But he/she must also be *in control* of the ball. To determine whether he/she has the requisite control will require that some umpire or judge 'look and see.'"). *See generally* J.S. Russell, *Are Rules All an Umpire Has to Work With?*, 26 J. PHIL. SPORT 27 (1999) [hereinafter *Are Rules All an Umpire Has*] (arguing that because rules in sport contain the same sorts of indeterminacies as rules in law, officials are necessarily left to exercise discretion).

129 Suits acknowledges that officials in purposive sports must make judgment calls that bear superficial similarity to those of judges in aesthetic sports, but argues that the situations are not the same. *See* Suits, *Tricky Triad*, *supra* note 123, at 5.

> . . . [The judgments of officials in purposive sports] not only are *not* the crux of such games in which they are found but, much more important, they are thought of as something very close to being necessary or unavoidable evils. Referees make judgment calls not as to overall performance, and indeed not with respect to performance skills at all, but with respect to *events* . . . . The judgment calls of referees are not judgments about degree of approximation to an ideal but only about what happened under what circumstances.

Id. at 6.

any of the prohibited means the rules remain indifferent to the manner in which the goal is achieved. A goal is a goal in soccer no matter where the ball was kicked from or how many passes preceded it, but not if it was thrown into the goal. A touchdown occurs whenever the ball breaks the plane of the goal line while in possession of a player, but not if it was preceded by a prohibited forward pass or a play run from an illegal formation. A scoring play may be the product of perfect execution, a lucky bounce, or a completely broken play, and it counts the same so long as no rules were broken. This creates a need for officials, but their task is to ensure that participants follow the rules.

In aesthetic sports, in contrast, while it may be possible to identify goals that competitors must seek to achieve, the achievement of those goals, standing alone, bears only a slight relationship to scoring. The failure to achieve a goal — to complete a required type of jump in a figure skating routine, for example — will often have consequences in the form either of a score of zero with respect to some component of the overall score, or in the competitor receiving no score at all. And sports such as figure skating involve the assessment of technical as well as artistic merit.[130] But achievement of some underlying goal is an only incidental feature of the competition. It is, instead, the manner in which that goal is achieved that is important, and the judges' score — which is, in purely aesthetic sports, the only score the competitor will receive[131] — is a product of their assessment of how well the competitor performs. To put the comparison somewhat differently, it is easy to imagine participants in purposive sports winning despite mistaken calls by the officials. That is not the case in aesthetic sports,

[130] Marks for technical merit, in contrast to those for artistic merit, are more akin to the factual reports that baseball umpires make when they call a batter out on strikes or safe at home plate. It is, in other words, a matter of checkable, empirical fact whether skaters perform the required jumps and do so without falling or stumbling.

Nicholas Dixon, Canadian Figure Skaters, French Judges, and Realism in Sport, 30 J. PHIL. SPORT 103, 105 (2003).

[131] There are certainly sports that appear to be hybrids, such as ski jumping, which incorporates both a distance measure and an aesthetic measure. *See, e.g.*, Robert Siegel, *Add a Judge and Things Get Tricky: The Quandary of Subjective Sports*, NPR (Feb. 21, 2014, 4:00 PM), http://www.npr.org/2014/02/21/280759146/add-a-judge-and-things-get-tricky-the-quandary-of-subjective-sports ("If anything, the style points have actually taken the style out of ski jumping. If you look at old ski jumping videos, there are a lot of different forms, a lot of different unique styles that kind of gave each jumper a bit of flavor. But now, they're kind of bound to this very strict criteria. And the other thing is that they're really highly correlated. You know, a good style point generally results in a longer jump so a lot of people have kind of question the points.").

where the officials have the final, and typically exclusive, word.[132] Their job includes more than simply policing for rule violations.

The question of whether there is some clean analytical distinction between purposive and aesthetic sports remains open. Its answer is not critical to this Article's analysis. The important point for present purposes is simply that there is a category of sport in which the judgment of the officials is determinative of the outcome. We turn next to the consideration of the nature of the exercise and application of that judgment.

B. The Nature of Judging in Aesthetic Sport

Perhaps the most basic role of sports officials is to perform a settlement function. Somebody must make authoritative determinations on questions of rule compliance in order for a game or event to proceed. But simply providing those authoritative determinations is not enough, as evidenced by the fact that not just anyone is allowed to be an official. Instead, competitors and spectators alike desire officials who will provide appropriate applications of the rules, and consequently sports officials must typically meet some minimum qualification level. These qualifications are manifestations of an understanding that each sport has certain excellences that it is desirable for officials to have.

Philosopher Harry Collins has formulated a conceptual framework for analyzing judging in sport that, as we will see, probes the nature of these skills and is also useful in fleshing out a comparative perspective on officiating in sport and judging in law. One component of the role involves what Collins labels "ontological authority."[133] That is, officials often have, simply by virtue of their position, the ability to

[132] Calls by umpires and referees can often have a significant impact on a contest's outcome, but in figure skating the judges' marks are its sole determinant. In most sports, athletes have some opportunity to compensate on the playing field for bad decisions by referees and umpires, but in skating this is impossible because the judges make their decision only when the performance is over. Furthermore, although judges in all sports have to make judgment calls, these are typically reports of observed events: whether the tennis ball landed out, whether the goal scorer was offside when the ball was passed, and so on. In contrast, even marks for the technical merit of a skating performance are an *evaluation* rather than a report, and marks for artistic merit are aesthetic judgments that are even further removed from mere reports of physical events.

Dixon, *supra* note 130, at 107-08; *see also id.* at 104.

[133] Harry Collins, *The Philosophy of Umpiring and the Introduction of Decision-Aid Technology*, 37 J. PHIL. SPORT 135, 135-36 (2010).

create a reality within a game: "[W]hat they decide *defines* what happened in any particular instance in so far as it affects the subsequent unfolding of the game, the outcome of the game and the way the game is recorded in the statistical archive."[134] The second component involves "epistemological privilege."[135] As a result of enjoying both a superior vantage point from which to view the action (a "positional advantage") coupled with an expertise in watching and assessing game play (an "expertise advantage"), officials are the observers best able to accurately see and evaluate what has taken place. The ontological authority that officials possess is, to a large degree, a product of the epistemological privilege they enjoy.[136] Participants cede the authority to make authoritative determinations to officials based on the understanding that the officials are the ones most qualified to do so.

Collins does not examine how the relationship between ontological authority and epistemological privilege differs between purposive and aesthetic sports, but it seems clear that there are significant differences of degree if not of kind. In purposive sports the officials' authority is largely rooted in the rules of the sport, and so it is the positional advantage that officials enjoy that provides the greater basis of their authority. Baseball fans might appreciate that umpires have a more-developed skill at calling balls and strikes, or football fans appreciate that referees have a similar skill at spotting or holding amongst the chaos of line play. But for the most part these officials' authority stems from the understanding that they are simply the ones in the best position to see and assess what happened. As John Russell has explained in examining the role of baseball umpires, the official making a call in a purposive sport is doing so on the basis of some antecedent state of affairs that either exists or does not, and if it does, does so independent of the call itself.[137] Put differently, there is a difference between saying "the runner was out" and "the ump called the runner out." The former can be assessed as true or false independently of the latter.[138] The rules of purposive sports are in

[134] *Id.* at 136.

[135] *Id.*

[136] *See id.* ("To a large extent it is thought proper to grant ontological authority to match officials because it is assumed that they have the 'epistemological privilege' in respect of everyone else. Thus, if an umpire says 'I call it as I see it' it is assumed that the umpire is the most likely person to 'see it as it is.'").

[137] *See* J. S. Russell, *The Concept of a Call in Baseball*, 24 J. PHIL. SPORT 21, 22 (1997).

[138] *Id.* at 23 ("The umpire's call may indeed make you out or safe (or whatever) in

most instances clear in their formulation and application. As a result, we can imagine the authority of an official rising or falling with the extent to which his calls comport with the requirements of the rules. Indeed, the rise of instant replay review is consistent with this interpretation. The existence of an authoritative way to determine whether the officials got it right has led to a willingness to undercut the authority of individual officials with respect to those calls as to which the rules provide a sufficiently definite standard.

A judge in an aesthetic sport likewise takes account of an antecedent state of affairs — whatever it is that a given athlete did in the context of his performance. But that state of affairs does not have significance — or at least precise significance — without the contribution of the judge's expertise to its interpretation. A skating performance, say, is not entitled to some specific score simply by virtue of having happened in the same way that a pitch is a strike, a runner out, or a batted ball a home run. The judge's determination cannot easily be said to be true or false in the same way that one can speak of a call regarding whether a base runner was safe.[139] Nicholas Dixon surely understates the matter when he characterizes the challenge of assessing aesthetic judgments as "notoriously difficult." "Even if we can agree on common criteria for aesthetic judgments, two different works of art — or athletic performances — can qualify as aesthetically pleasing by virtue of different subsets of these criteria, making it difficult to make comparative judgments."[140]

What this suggests is that the authority of the judge in aesthetic sport is grounded to a much greater extent in the expertise advantage that the judge enjoys. Indeed, her physical position — typically outside the performance arena — is not better than that of many spectators, such that she enjoys little in the way of positional advantage. She instead has an enhanced ability to perceive what took place — to know where and how to look to best determine what the

one sense, but whether you were in fact out or safe is a further question that can be asked, and it would be settled by how well the call reflected the events as they actually occurred, not just by examining what the umpire said."); *see also* Dixon, *supra* note 130, at 104 ("Because baseball calls are descriptions of physical events, we can easily accept that some calls are plain wrong.").

[139] One can imagine here a debate that parallels that over the "one right answer" thesis in law. It is possible to imagine some theoretically ascertainable performative ideal for a sport, as well as a proper calculation of the relationship between that ideal and a given performance, and thus a correct score. However realistic that theoretical possibility, its achievement in reality is as impossible in sport as it is in law.

[140] Dixon, *supra* note 130, at 104-05.

performer has done — and to properly assess it relative to preceding and subsequent performances.

This in turn requires some sort of criteria by which the judge is to assess the manner of performance and as to which she can be characterized as an expert. Given the preceding discussion, one might imagine that the rules of a given sport would provide detailed specifications. Although some aesthetic sports have attempted to move in that direction,[141] for the most part the rules' articulation of the criteria by which performances are to be judged are spare and amorphous.

The idea that the formal rules of sport do not provide all the information necessary to evaluate the practices of a sport is hardly a new one and applies even within purposive sports.[142] One version of this view draws on Ronald Dworkin's philosophy of law and holds "that abstract principles are part of the law governing a sport and that those principles can be determined by reflection on the values and purposes that best cohere with the institutional history of the sport and show it in its best light."[143] Those abstract principles[144] in turn provide the basis for assessing a sport's rules and processes and whether they facilitate recognition of the specific excellences that the sport is designed to reward.[145] Principles also bear on the question of whether officials ought to be formalistic in their interpretation and

[141] As Graham McFee notes, "changing the rules for scoring — that is, changing what is valued (or even looked for) by officials — may be changing the character of the sport." McFee, *supra* note 125, at 8-9. As McFee discusses, this has happened in men's figure skating, in which the former set of rules had led to a world that valued pure athleticism in the form of jumping ability over grace, and in which the rules were modified to make clear that the other elements of the sport are to be given their due. *See id.* at 11-12; *cf.* Mary Pilon & Jeré Longman, *Despite Revamp, Figure Skating Gets Mixed Marks*, N.Y. TIMES (Feb. 5, 2014), https://www.nytimes.com/2014/02/06/sports/olympics/despite-revamped-system-for-judging-figure-skating-gets-mixed-marks.html ("After a vote-trading scandal by judges discredited the pairs and ice-dancing competition at the 2002 Winter Olympics in Salt Lake City, skating officials overhauled the scoring and judging systems, trying to make the sport more objective and less susceptible to corruption.").

[142] *See* Mitchell N. Berman, *On Interpretivism and Formalism in Sports Officiating: From General to Particular Jurisprudence,* 38 J. PHIL. SPORT 177, 177-78 (2011) [hereinafter *Interpretivism and Formalism*].

[143] *Id.* at 177.

[144] Berman, for example, articulates what he calls "the athletic principle," which "provides that a competitive athletic contest is better, ceteris paribus, when its outcome reflects the competitors' relative excellence in overcoming the obstacles the sport presents by executing the particular physical skills and virtues that the sport is designed and maintained to foster and promote." *Id.*

[145] *See id.* at 177-78.

application of the rules of the sport, or whether they may instead depart from the plain linguistic meaning of rules when to do so would better promote an underlying principle.[146]

Consider, for example, the "Pine Tar Incident" from a 1983 game between the Kansas City Royals and the New York Yankees. After Royals player George Brett hit a two-run home run to give the Royals the lead in the top of the ninth inning, Yankee manager Billy Martin pointed out to the umpires that the pine tar on Brett's bat extended more than eighteen inches up its handle end, in violation of the rules.[147] Under a formalistic interpretation of the rules, Martin was correct, and Brett should have been called out, and that was indeed how the umpires ruled. But such an interpretation seemed clearly contrary to the principles underlying the game. The presence of the pine tar gave Brett no advantage, and if anything, made it more difficult for him to hit a home run. The Royals protested the umpires' decision, and the league president agreed, overturning the umpires' call and ordering that the game be recommenced from the moment after Brett's now-legitimate home run.[148] Mitch Berman has identified a number of similar situations in which unanticipated circumstances have arisen that present an apparent conflict between the literal dictates of the rules of a sport and the principles that underlie those rules.[149]

The situation faced by the judge in an aesthetic sport presents this dynamic on a more pervasive scale. Such a judge is, as the bulk of her job, required to apply not rules but standards, often formulated in very general terms. These require her to draw upon a conception of the excellences that the sport is designed to foster and reward. Here is where the act of judging in an aesthetic sport most resembles judging in law. Because the rules of the sport do not and cannot fully specify the criteria to be applied, the judge in an aesthetic sport must draw upon professional judgment or the equivalent of situation sense. She must bring to her job a conception of the ideal performance, a mental picture of what perfection looks like.[150] She must then score each

[146] *See id.* at 178. Berman's take is that principles such as the athletic principle do indeed push towards antiformalism, but that some sports may embrace other principles that push in the opposite direction. *Id.* Golf, for example, seems to be a sport that embraces strict adherence to the rules. *See id.* at 189.

[147] *Id.* at 180; *see also Are Rules All an Umpire Has*, *supra* note 128, at 30.

[148] Berman, *Interpretivism and Formalism*, *supra* note 142, at 181.

[149] *Id.* at 183-85.

[150] *See* Suits, *Tricky Triad*, *supra* note 123, at 6 (suggesting that games (i.e., purposive sports) generate skills "by erecting barriers to be overcome, but

performance based on her assessment of its distance from the ideal.[151] Because the content of that ideal is largely ineffable and cannot be reduced to a verbal formulation, the focus of the rules tends to be more on what the competitor must do (i.e., execute certain specified maneuvers, such as jumps and spins in figure skating), and scoring is based on how well the competitor does the required act. As Bernard Suits points out, to the extent that rules in this context have a prohibitive bite, it is generally focused at conduct outside of the competitive arena (such as prohibitions on doping), and that "once a performance is under way, there are no rules, or scarcely any, that need enforcing."[152] Thus "the rules to which the judges of

performances do so by postulating ideals to be approximated.").

> In games, *rules*, to repeat the point, are the crux of the matter. Just these rules generate just these skills. In performances, ideals are the crux of the matter. Just these ideals generate just these skills. That is why it is possible to speak of a perfect performance, at least in principle, without fear of contradiction . . . .

Id.

[151] This task can vary in its complexity. Occasionally the performances consist of the same moves. In the equestrian world, for example, horses and riders competing in hunter classes must jump the same jumps in the same order, and it is easy to imagine a judge positing the perfect horse and rider combination having a perfect round. Sports in which participants have the ability to choreograph or otherwise structure the order in which they complete required elements, as well as to add optional elements, complicate the task. Regardless of whether it is meaningful to speak of an ideal choreography or sequencing of moves, the simple fact that different competitors are performing different moves at different times would seem to necessarily make it more difficult to make the relative assessments.

[152] Suits, *Tricky Triad*, *supra* note 123, at 5. Suits expands on the point:

> Now it may be objected that, contrary to what I have said, there clearly *are* rules that must be followed while actually engaging in performative sports. For example, the gymnast must not falter or stumble after dismounting from the parallel bars. It is perfectly permissible to call such a requirement a rule, but it is quite clear, I should think, that such "rules" are entirely different from, say, the offside rules in football and hockey. The offside rule is what has come to be called, by me and many others, a constitutive rule, while the standard of a clean dismount from the parallel bars is a rule of skill, or a tactical rule, or a rule of practice.

Id. at 5-6. Klaus Meier disputes Suits's contention that offside rules are constitutive rules, in the context of contesting Suits's assertion that performances are not games. *See* Klaus V. Meier, *Triad Trickery: Playing with Sport and Games*, 15 J. PHIL. SPORT 11, 19-20 (1988). Meier's critique does not relate to the point I am advancing here. *But see* R. Scott Kretchmar, *On Beautiful Games*, 16 J. PHIL. SPORT 34, 38-39 (1989) (siding with Meier on the question of whether performances are games, and identifying "two species of games, those in which players freely accept unnecessary problems *in*

performances address themselves are . . . rules of skill rather than constitutive rules."[153] All of this, of course, resembles the law judge's application of Llewellyn's "situation sense."[154] Both sets of judges possess a kind of knowledge that cannot be fully captured in a verbal formulation.

Another way to appreciate the distinction is to assume the perspective of a fan. In a purposive sport, the fan can access all the information necessary to assess the accuracy of most officials' calls. Even the relatively casual baseball fan watching a replay can decide for himself whether the pitch was a ball or a strike, or whether a runner was safe. The accuracy of that decision, and thus the official's decision, can be readily assessed by reference to the rules of the sport. The players and the fans thus have all the information necessary to determine whether the officials are doing an appropriate job.

That same fan might have an opinion about the relative merits of a series of performances in an aesthetic sport, but except in extreme cases the fan cannot be shown to be right or wrong by reference to a specific provision in the rules. Using only the rules, the best the fan would be able to do is point to a provision — the figure skating rule referencing "flow and effortless glide," for example — and argue that, in his view, the judge's scoring inappropriately ordered the performances relative to one another. The response to the fan's critique would be based primarily on the judge's expertise. It would be rooted in the rules only in the sense that it would challenge the fan's interpretation of "flow and effortless glide" as being based in an unfamiliarity with the proper norms of the sport.[155] The judges' authority is therefore anchored in their status as the officially designated sources of expertise rather than in having a necessarily

reaching some state of affairs and those in which players freely accept unnecessary problems *while* reaching some state of affairs.").

[153] Suits, *Tricky Triad*, *supra* note 123, at 6. Suits later restated the point as follows: Following the rules in diving means treating each rule as a directive to do a particular thing. Following the rules in foot racing and, of course, in games generally, does not mean treating each rule as a directive to do a particular thing; it means treating the rules collectively as parameters within which the participant *chooses* what to do. It is thus characteristic of players of games that they have room for strategies or tactics in the course of the event, whereas in diving according to the present account and in performances generally, there is virtually no such room. *Id.* at 5.

[154] *See supra* Part I.B.3.

[155] We might also imagine a response suggesting, for example, that the fan lacked a sufficiently well-trained eye to discern which skater best complied with the norms. That response could not of course be based in the rules, but would instead amount to a critique of the fan's perceptive expertise.

superior view of the action or an ability to refer to rules that unequivocally demonstrate the rightness of their rulings.

None of the above is to deny that the official in a purposive sport and the judge in an aesthetic sport will bring an overlapping set of skills to their job. Both will have a detailed understanding of the rules that govern their sport. Both will, at least occasionally, be confronted with situations in which the rules are incomplete or indeterminate.[156] Both will have developed tools, or shortcuts, that they draw upon in applying the rules to the situations they confront, and the use of those tools will often require resort to tacit knowledge. The football referee, for example, will rely on experience to make inferences about what must have happened based on the relative position of the players.[157] The judge in the aesthetic sport will, additionally, bring with her an idealized conception of how a performance ought to go. The composition of this conception will be almost entirely based in tacit knowledge. The differences between the rules and the mix of skill they draw upon are almost certainly differences of degree rather than of kind.

Because judges in aesthetic sport must lean so heavily on their professional judgment, their stance opens them to a set of critiques that parallels those directed at judges in law and surveyed in the preceding Part.[158] Because the rules of the sport cannot fully specify the criteria by which performances are to be assessed, and indeed can often do so only in the most general of ways, there is room for other, potentially external and improper, factors to influence judgment. The most common charge lobbed against aesthetic sports is that judging in those sports is "subjective."[159] Underlying this critique is the fear that

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156 "It is not difficult to demonstrate that rules in sport face the same indeterminacies that rules do in other contexts." *Are Rules All an Umpire Has*, *supra* note 128, at 27 (footnote omitted).

157 *See*, *e.g.*, Clare MacMahon & Bill Mildenhall, *A Practical Perspective on Decision Making Influences in Sports Officiating*, 7 INT'L J. SPORTS SCI. & COACHING 153, 160 (2012) ("For example, if asked to judge whether a player is offside, not having viewed the player's entire movements, a football referee may use the availability heuristic, to search her memory for any experience of a player at that level of play moving with such speed from an onside position.").

158 *See supra* Part I.B.

159 *See, e.g.*, Siegel, *supra* note 131 (discussing both the explosion in the number of judged sports included in the Winter Olympics and the increased controversy that it has entailed); John Branch, *Who Needs Stopwatches? From the Shadows, Judges Take Starring Roles*, N.Y. TIMES (Feb. 5, 2014), https://www.nytimes.com/2014/02/06/sports/olympics/who-needs-stopwatches-from-shadows-judges-are-co-stars.html?_r=0 ("But Olympic evolution has taken sports increasingly into subjective territory, where winners are not determined by clocks and measuring tapes. Even in the wake of judging scandals in figure skating, most of the events that have been added to the

each judge will have her own preferences, and that competitors are therefore at the whim of whatever happens to be the preferred style of that day's judge. If a judge at one competition prefers a certain style of performance while a judge at a subsequent competition prefers a different style, then placings can start to seem arbitrary. It begins to look as if something akin to ideological preferences at work. But of course, here, as with judges in law, it may be that some of these differences are internal to the sport, such that their application is to be expected and perhaps event applauded.[160]

There are other factors that can potentially skew scoring. Studies have uncovered order effects, pursuant to which competitors who appear later in a sequence of performances tend to receive higher scores than those who appear earlier.[161] Others suggest that panels of judges who are able to see one another's scores tend to converge toward a shared standard over the course of a competition.[162] Simple exhaustion from having expended the mental energy necessary to judge a large number of performances can result in a judge applying

Olympics over the past 20 years, and most of those that will debut in Sochi, Russia, require a panel of judges to determine the winners — an exercise that might seem ripe for exploitation and controversy.").

160 *See supra* notes 73–75, and accompanying text. Just as there are jurisprudential differences among judges, even differences that are highly correlated with ideology, that should not trouble us because they simply reflect a lack of consensus with respect to the underpinnings or proper application of a particular doctrine, so, too, might we imagine differing schools of thought within an aesthetic sport. Judges from one school will differ in their assessments from those in another, and those differences would simply reflect some evolving or otherwise unsettled aspect of the performative ideal, rather than some form of pernicious bias.

161 *See, e.g.*, Iain Greenlees et al., *Order Effects in Sport: Examining the Impact of Order of Information on Attributions of Ability*, 8 PSYCHOL. SPORT & EXERCISE 477, 477 (2007) (study showing "the order in which performance information is received influences the overall attribution of ability").

162 Social-psychological research has identified two basic reasons for conformity: informational and normative influence. Informational influence implies that people conform to the group norm because they want to make a correct judgment and because they are more certain about the judgment of others than about their own judgment. Normative influence implies that people conform to the group norm because they want to make a good impression on others or because they fear to be rejected by others when their judgment stands out negatively.

See Filip Boen et al., *The Impact of Open Feedback on Conformity Among Judges in Rope Skipping*, 7 PSYCHOL. OF SPORT & EXERCISE 577, 580 (2006) (citations omitted); *id.* at 578 (describing research supporting the existence of six distinct biases, including a "conformity effect").

an effectively different standard at two different stages of a competition.[163]

Of further concern is the possibility that the judge will be influenced by factors from outside the arena of competition. The judge might be familiar with some of the competitors based on having observed their past performances or having become familiar with their reputations and score their present performances more or less favorably as a result.[164] The judge might be aware of the affiliation of some of the competitors — what team they compete for or who their coach is — and be similarly influenced. Scores based on these or other improper factors (assuming they are indeed improper) necessarily reduce the extent to which the competitors' performances on a specific occasion are what generates their scores and lead to results that are different from those that would be generated by a properly trained judge who was not influenced by the extraneous factors.

In sum, then, the situation of the judge in an aesthetic sport is in many respects the same as that of the law judge. She must apply a set of rules that do not provide obvious answers to all questions, and that necessarily provide little guidance on the more difficult questions. In those circumstances the judge must draw upon a well of tacit knowledge, the not-fully-articulable expertise she has accumulated over the course of a career. That presents dangers, because it involves resort to knowledge that is inaccessible to lay observers, who, because they cannot assign significance to all of what they see in the same way that a judge can, may be inclined to imagine the judge's assessments to be a product of something other than a legitimate measuring of quality. And indeed, there is evidence suggesting that illegitimate considerations do sometimes influence judges' assessments. This in turn raises the need for ways in which to channel judges' decision-making. The next Part turns to consideration of these mechanisms.

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[163] For an example taken from purposive sport, a study of calls made by plate umpires in Major League Baseball found that umpires were 4.7% more likely to mistakenly call a pitch a strike in the ninth inning of a game as compared to the first inning. Jerry W. Kim & Brayden G. King, *Seeing Stars: Matthew Effects and Status Bias in Major League Baseball Umpires*, 60 MGMT. SCI. 2619, 2627 (2014).

[164] *See, e.g.*, Leanne C. Findlay & Diane M. Ste-Marie, *A Reputation Bias in Figure Skating Judging*, 26 J. SPORT & EXERCISE PSYCHOL. 154, 163 (2004) ("The general finding of this research was that a reputation bias does exist in figure skating judging. Skaters' ordinal rankings, which are used to determine their final placement in competition, were better when skaters were evaluated by judges who knew of their positive reputation versus when they were evaluated by judges who did not recognize their name.").

III. JUDGING IN SPORTS AND LAW: A COMPARATIVE ANALYSIS

We turn now to an exploration of the mechanisms used in the two domains to channel the behavior of judges toward proper application of the governing standards and away from improper influence. Before doing so, it is worth pausing to take one more look at officiating in purposive sports. Judge Posner has observed that the very existence of most of the ethical rules that apply to judges in law stands as evidence of an understanding that legal questions often do not have clearly correct answers.[165] If they did we would not have to worry as much about conflicts of interest, or for that matter having multi-member courts, or any of the other mechanisms of constraint beyond the simple existence of positive law itself. A well-positioned observer would be able to determine when a court got it wrong, and we would have a regime that looks more like those typical of the rules of purposive sports.

Consider, for example, the provisions of the rules of Major League Baseball relating to umpires. The relevant rules are overwhelmingly about establishing the scope of the umpire's authority.[166] Rule 9.04 prescribes the umpires' positions, directing the umpire-in-chief to

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[165] Posner notes:

> American judges today are subject to exquisitely refined and elaborated rules on disqualification for conflict of interest. The tiniest potential conflict is disqualifying. This would make no sense if legal reasoning (including the resolution of factual disputes) were as transparent and reproducible as scientific reasoning and experimentation, for then an erroneous decision would be perceived and corrected and the judge ridiculed or removed for having yielded to temptation. The legal system must lack confidence in its ability to detect judicial errors. Consistent with this point, the rules on conflict of interest have been growing stricter in lockstep with the decline of consensus in law and the concomitant growth in judicial discretion. The weaker the consensus, the more difficult it is for judges to fix the premises of decision and, by so doing, to make legal reasoning approximate logical deduction. Because legal reasoning is more (only?) cogent when there is a consensus concerning the relevant political and social values, conflict of interest rules are less needed in that setting to prevent bias from operating.

See RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 127-28 (1990) [hereinafter PROBLEMS OF JURISPRUDENCE].

[166] *See* MAJOR LEAGUE BASEBALL, OFFICIAL BASEBALL RULES 80 (2013), http://mlb.mlb.com/mlb/downloads/y2013/official_baseball_rules.pdf (§ 9.01 provides umpires with general authority to enforce the rules, to rule on points not specifically covered by the rules, and to eject players, managers, and others); *id.* at 80-81 (§ 9.02 concerns the finality and appealability of umpires' decisions); *id.* at 82 (§ 9.03 designates the umpire-in-chief and field umpires); *id.* at 82-83 (§ 9.04 assigns duties to umpire-in-chief and field umpires).

"stand behind the catcher"[167] and providing that "[a] field umpire may take any position on the playing field he thinks best suited to make impending decisions on the bases."[168] The rules relating to umpires are followed by a set of "General Instructions to Umpires," which come as close as the rules do to regulating potential conflicts of interest. The instructions tell umpires not to talk to players or coaches, and while noting that umpires should be courteous to team officials, admonishes them to "avoid visiting in club offices and thoughtless familiarity with officers or employees of contesting clubs."[169] Still, the instructions emphasize that, "Most important rule for umpires is always 'BE IN POSITION TO SEE EVERY PLAY.' Even though your decision may be 100% right, players still question it if they feel you were not in a spot to see the play clearly and definitely."[170]

The National Hockey League's rules contain a set of provisions relating to officials that is considerably lengthier than baseball's, but that has a similar flavor. The rules establish the scope of authority of the referees,[171] linesmen,[172] and other officials,[173] and prescribe the positioning of some of the off-ice officials.[174] The rules relating to improper influences on officials take the form of provisions proscribing challenging[175] or physically abusing officials.[176] USA

[167] *Id.* at 82 (§ 9.04(a)).

[168] *Id.* (§ 9.04(b)).

[169] *Id.* at 83 (§ 9.00 "GENERAL INSTRUCTIONS TO UMPIRES").

[170] *Id.* at 84 (§ 9.05).

[171] NATIONAL HOCKEY LEAGUE, OFFICIAL RULES 2014-15, at 49-51 (2014) (Rule 31.2: "The Referees shall have general supervision of the game and shall have full control of all game officials and players during the game . . . ."; Rule 31.4: "It shall be the duty of the Referees to impose such penalties as are prescribed by the rules for infractions thereof and they shall give the final decision in matters of disputed goals.").

[172] *Id.* at 51-53 (Rule 32.3 states "The Linesmen are generally responsible for calling violations of off-side (Rule 83) and icing (Rule 81). They may stop play for a variety of other situations as noted in sections 32.4 and 33.5 below.").

[173] *Id.* at 53-55 (Rule 33.1 outlines the duties of the Official Scorer); *id.* at 55-56 (Rule 34, Game Timekeeper); *id.* at 56-58 (Rule 35, Penalty Timekeeper); *id.* at 58 (Rule 36, Goal Judge); *id.* at 59-61 (Rule 38, Video Goal Judge).

[174] *Id.* at 53-55 (Rule 33.4 states "The Official Scorer should view the game from an elevated position, well away from the players' benches, with house telephone communication to the public address announcer."); *id.* at 58 (Rule 36.2 states "There shall be one Goal Judge situated behind each goal (or in an area designated and approved by NHL Hockey Operations), in properly protected areas, if possible, so that there can be no interference with their activities."); *id.* at 59-61 (Rule 38.5 states "The Video Goal Judge must be located in a secluded area in the upper level of the building with an unobstructed view of both goals.").

[175] *Id.* at 61-64 (Rule 39, "Abuse of Officials").

[176] *Id.* at 64-65 (Rule 40, "Physical Abuse of Officials").

Hockey's Code of Conduct for On-Ice Officials similarly exhorts officials to "[b]e fair and impartial at all times" and "[u]se honesty and integrity when answering questions."[177] As that second standard suggests, officials are obligated to "[a]nswer all reasonable obligations and requests."[178] There are no elaborate provisions relating to officiating in contests involving participants with which one has had a prior relationship.

In purposive sports, then, the emphasis is on knowing the rules, applying them with confidence, and maintaining an appropriate demeanor while doing so. Consultation with other officials is encouraged. The entire approach reflects an understanding of the process of rule enforcement as one that can generate objectively correct answers.

The contrast between aesthetic sports and purposive sports when it comes to codes of conduct for officials is striking. Much like the judicial system, the rules of aesthetic sports tend to include relatively elaborate codes of ethics governing their judges. These codes cover matters ranging from potential sources of bias and partiality to more mechanical aspects of the judge's role such as positioning and communication with other judges. As we undertake our exploration of law and aesthetic sports, we will see that both sets of systems rely on a mix of mechanisms to engender a balance between independence and accountability. The desired independence is from factors that might improperly influence decisions, and the accountability is to the governing standards, whether they be provided by law or by the rules of sport, as well as to the contestants and to the public. The discussion that follows is largely descriptive and is primarily an effort to develop a taxonomy of the most common approaches that sports and law use to guide judicial behavior. The taxonomy is in turn useful both as support for the proposition that judging in aesthetic sport provides an appropriate metaphorical parallel to judging in law, and as a menu of tools available to those assessing and designing institutions and procedures in both the legal and sporting contexts.

A. Acculturation, Selection, and Removal

The appropriateness of the parallel I have outlined between judging in law and judging in aesthetic sport depends to a large degree on the proposition that both sorts of judges rely on an ineffable sort of domain-specific knowledge in determining the full content of and

[177] USA HOCKEY, 2013-17 OFFICIAL RULES AND CASEBOOK OF ICE HOCKEY xvii (2013).
[178] *Id.*

applying the standards they are charged with administering.[179] Not all of the questions faced by judges in the two contexts require resort to this knowledge, nor does it always play the sole or determinative role in answering the questions to which it does apply. There are, after all, easy questions answerable by reference to formal sources of law.[180] But there are also more difficult questions, and questions requiring the exercise of discretion. These require judges to draw on a base of knowledge that is by definition not susceptible to being fully captured via linguistic formulation. It is instead the sort of thing imparted by long exposure to the field — a process of acculturation.[181]

Acculturation serves multiple functions in both settings. It is, first and primarily, a source of discipline. The process of becoming a judge serves to condition judges of both sorts to regard certain lines of reasoning or types of performance as consistent with prevailing norms or not. A judge fully acculturated into a stable system will instinctively recognize what is good or desirable in a way that a newcomer or less experienced participant will not. Thus, acculturation produces a significant amount of regularity. But at the same time it can serve as a source of change. Because acculturation tends to take place via decentralized processes, the content of the norms that judges internalize can evolve, and ways of thinking or performing can move in and out of fashion.[182] To take an easy example, there was a time in our legal culture's history when trial by ordeal was an acceptable mode of proceeding.[183] That time has passed, and a modern judge knows that instinctively, not because she was taught it, but because the system into which she was acculturated is not one that has room for it. A more recent example concerns courts' now generally uniform

[179] *See supra* notes 97–100, and accompanying text.

[180] There is general agreement that there are easy cases presenting easy questions. But estimates vary widely concerning just how prevalent such cases are. *See, e.g.*, Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 286-87 (1997) (finding estimates of easy cases ranging from five to fifteen percent, all the way up to ninety percent).

[181] *See* LLEWELLYN, *supra* note 92, at 4; POLANYI, *supra* note 98, at 4, and accompanying text.

[182] *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921) ("My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will thereby be promoted or impaired.").

[183] *See* Rollin M. Perkins, *Absurdities in Criminal Procedure*, 11 IOWA L. REV. 297, 297 (1926).

tendency to give great weight to statutory text, a trend that reflects a change in emphasis in the legal culture that can in turn be largely attributed to Justice Scalia's influence.[184]

Let us start with aesthetic sports. There the acculturation process works by design to channel judges toward a shared conception of their role and the content of the standards they must apply. Judges almost always began as competitors in the sport they judge. In contrast to judges in law, then, their initial exposure to their sport is less likely to be standardized. The process of learning a sport from a coach or series of coaches bears more resemblance to the new lawyer's learning from mentors and other senior lawyers at the outset of a practice career than it does to attendance at law school. To be sure, some sports, such as figure skating,[185] impose an extensive structure on participants' advancement through the sport, which likely has a similar effect. But even then one imagines that the diffuse, non-standardized methods of and priorities in instruction serve as a relatively looser mechanism of acculturation than in law. There are likely to be different schools of thought, and styles that are preferred in some places rather than others. Even so, if the body of judges in a sport holds a relatively uniform view of what is desirable, then that view is generally reflected in the sport because the only path to success as a coach or competitor is to reflect their preferences back to the judges.

There is reason to believe such uniformity exists. The selection processes for judges in aesthetic sport, at least in general, are expressly designed to foster uniformity. Those seeking to become judges must undergo an apprenticeship, and cannot become judges until they demonstrate that they can make judgments that are consistent with

184 *See* Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 CATH. U. L. REV. 683, 686 (2016) ("Justice Antonin Scalia has had a profound influence on statutory interpretation. One of the things he has helped to do is to narrow the areas of disagreement about how to interpret statutes. Every judge now seems to start with the text of the statute. If you came to our court and sat in our courtroom for a week — and I do not advise that for anyone who wants to stay sane — you would hear every judge asking, 'What does the text of the statute say? How does the text of the statute support your position?' That has been a big change in statutory interpretation, and it has helped establish better and clearer rules of the road."); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1296 (1990) ("Before Justice Scalia's appointment . . . the Court's approach to statutory interpretation could be described as eclectic, devoid of any unifying theory.").

185 U.S. Figure Skating requires all competitive skaters to progress through a testing structure in order to advance. *See All About U.S. Figure Skating Tests*, U.S. FIGURE SKATING, http://www.usfsa.org/content/AllAboutTests.pdf (last visited Oct. 20, 2018).

those of existing judges.[186] The aspirant typically begins by spending a period as a shadow judge, and if she does sufficiently well in that role she is allowed to serve as a judge at the lowest levels of the sport. Following that she can work her way up the ranks, being required at each stage to demonstrate that she has internalized and can consistently apply the standards of those already at that level.[187] At the Olympic level, sports take a variety of approaches to ensuring that judges have an appropriate level of training and acculturation. Most require judges to have a minimum amount of experience judging at the national level,[188] and to have recently attended specified sorts of educational sessions.[189] Some place rigid age restrictions — both minimum and maximum — on their judges.[190] Selection processes can matter at a more micro level as well. For example, one commentator suggests that Olympic judges selected by international governing bodies exhibited less nationalistic bias than those selected by national governing bodies.[191] Because of the incentives this creates for judges — who want to maximize their chance at an Olympic judging appointment — the effect radiates downward and leads to less-biased judging in lower-level competitions as well.[192]

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[186] *See, e.g.*, *School of Judging*, USA GYMNASTICS, https://usagym.org/pages/education/pages/judging/ (last visited Oct. 20, 2018); *So You Want to Be a Figure Skating Judge?*, U.S. FIGURE SKATING, http://usfigureskating.org/story?id=89433 (last visited Oct. 20, 2018); *L Education Program*, U.S. DRESSAGE FED'N, http://www.usdf.org/education/judge-training/lprogram/index.asp (last visited Sept. 9, 2018).

[187] General information about becoming a judge, and advancing through the ranks, is available via the "Judges" page on the U.S. Figure Skating website, see generally *So You Want to Be a Figure Skating Judge?*, *supra* note 186.

[188] INT'L SKI FED'N, THE INTERNATIONAL SKI COMPETITION RULES (ICR): BOOK III: SKI JUMPING 39 (2016) (Rule 404.1.2 requires a minimum of three years of experience as a national-level judge); INT'L SKATING UNION, SPECIAL REGULATIONS & TECHNICAL RULES – SINGLE & PAIR SKATING AND ICE DANCE 201844 (2018) (Rule 413 requires service as a judge at three national competitions during the preceding 36-month period).

[189] INT'L SKI FED'N, *supra* note 188, at 40 (Rule 404.1.5 discusses mandated education sessions for Ski Jumping Judges); INT'L SKATING UNION, *supra* note 188, at 44 (Rule 431.1.c discusses mandatory completion of a seminar for international figure skating judges).

[190] *See* INT'L SKI FED'N, *supra* note 188, at 39 (Rule 404.1.2 discusses age requirements for Ski Jumping Judges); INT'L SKATING UNION, *supra* note 188, at 44-45 (Rule 413.1.a discusses age requirements to qualify as a figure skating judge).

[191] *See* Eric Zitzewitz, *How Ski Jumping Gets Olympic Judging Right (and Figure Skating Gets It Wrong)*, WASH. POST (Feb. 12, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/12/how-ski-jumping-gets-olympic-judging-right-and-figure-skating-gets-it-wrong/?utm_term=.48594f4d0f96.

[192] *Id.*

In all, the processes of becoming a judge in an aesthetic sport, and of advancing through the ranks, bears considerable resemblance to the process of becoming a judge in a civil law system.[193] It is a distinct career path, and one that requires targeted training as a condition to entry. Advancement is tied to measures — primarily correspondence with the decisions of more senior judges — that are internal to the sport.

But the connections between acculturation and performance are likewise evident in common-law systems. At the broadest level, they are intertwined with dominant public opinion and culture more generally, and are perhaps most readily apparent in the context of constitutional law. As humans we are products of a certain era, which shapes our understanding of the world in fundamental ways. Those of us alive in 2018 cannot fathom a world in which slavery is a commonplace phenomenon, just as those alive in 1818 would have difficulty comprehending a world in which the wrongness of slavery is a bedrock moral principle. To the extent that the law reflects, in Holmes's phrasing, "the felt necessities of the time,"[194] it should come as no surprise that lawyers and judges in any given era should have a shared understanding of what law is meant to accomplish (and, as importantly, not accomplish) and, at a broad level, how it ought to apply even in situations in which the letter of the law provides no clear direction.[195] This is the idea behind the familiar suggestion that the Supreme Court does not lead, but rather follows. To be sure, that

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[193] *Cf.* Charles H. Koch, Jr., *The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems*, 11 IND. J. GLOBAL LEGAL STUD. 139, 143 (2004).

> Civil law judges are educated as judges and usually serve that role throughout their professional lives. Budding judges enter an apprenticeship as judges, not as advocates. They move from the apprenticeship supervised by senior judges, to junior positions on less important courts, to ever more important positions on more important courts. They serve within a community of judges who are available to assist them in becoming better judges. Their promotions are based on performance and are controlled by judges themselves in some form of council.

Id.

[194] HOLMES, *supra* note 64, at 1.

[195] *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 5-7 (2004) (arguing that, as a descriptive matter, "constitutional interpretation almost inevitably reflects the broader social and political context of the times"); *id.* at 5 (explaining that judges therefore "are unlikely to be either heroes or villains"); *id.* at 6 (noting their socially conditioned preferences will not lead them to interpret or apply law in ways that are substantially out of step with public opinion).

phenomenon is partly a product of the institutional limitations that the Court faces. It lacks the independent ability to compel compliance with its decisions, and so must rely on the force of its reasoning.[196] And that reasoning, of course, will garner acceptance only insofar as it resonates with those who must enforce and accept the Court's decisions. This is simply another way of saying that the Court, like all courts, is bound by constraints that the justices themselves hardly recognize as constraints because they are simply part of a shared understanding.[197] The Court could not have decided *Obergefell v. Hodges* in 1985, both because society would not have accepted the underlying propositions and because the justices themselves, as products of that society, were likely not quite so ready to do so themselves.[198]

The effect operates at a narrower level as well, in cases where judges must decide between legal alternatives that do not implicate fundamental understandings. Such a case might involve questions about the content of a new or ambiguous statute, the applicability of an established rule to a new situation, or a blending of the two. A judge interpreting the statute will draw upon certain techniques in doing so. These techniques will not be established in the sense that every judge and lawyer will agree on them.[199] Some judges are textualists, while others are purposivists, to make the distinction at a very broad level, and those orientations will often lead to different results. But while there may not be agreement on a single, proper mode of interpretation, there certainly is agreement that some techniques are out of bounds. It would be wrong not only to decide cases based on a coin flip, say, but also based on politics, a relationship to one of the litigants, sympathy for a party, or any other form of result orientation. And while these examples might not seem to rule out that much, it is worth bearing in mind that we are not

196 *See supra* notes 29–31, and accompanying text.

197 *See* KLARMAN, *supra* note 195, at 5 ("This book argues that because constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times."); *id.* at 449 ("Constitutional law generally has sufficient flexibility to accommodate dominant public opinion, which the justices have little inclination, and limited power, to resist.").

198 *See id.* at 450.

199 For discussion of methodological pluralism, see generally William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2404-07 (2015) (contending that methodological pluralism is not required in constitutional interpretation); Oldfather, *Methodological Pluralism*, *supra* note 58 (describing and justifying methodological pluralism in constitutional interpretation).

terribly far removed from a society that practiced trial by ordeal.[200] Beyond that Llewellyn's "situation sense," those "ways and attitudes which are more and better felt and done than they are said,"[201] provides real constraint.

Dan Kahan and his colleagues have provided some initial empirical support for the suggestion that situation sense, or professional judgment, acts to discipline judicial decision-making. They provided groups of judges, lawyers, law students, and members of the general public with statutory interpretation problems "designed to trigger unconscious political bias in members of the general public."[202] The members of the general public resolved these problems in ways that reflected their underlying political predispositions. Judges and lawyers, in contrast, exhibited consensus on the results despite their underlying ideological disagreements. Law students were moderately less polarized than the general public but fell well short of the consensus shown by the more seasoned professionals.[203]

This is so because judges bring professional judgment to their decision-making. "Professional judgment consists of habits of mind — conscious and effortful to some degree, but just as much tacit and perceptive — that are distinctively fitted to reasoning tasks that fall outside ordinary experience."[204] Law students "enjoy an immature form of the professional judgment that fully trained and experienced lawyers possess,"[205] and therefore remain more susceptible to ideological influences.

Legal education is a significant part of this acculturation process, and it is reasonable to think that the manner in which that education is carried out has effects on both the content of the intuitions judges bring to their role and the manner in which they execute it. It is in law school, after all, that most lawyers first begin to learn what counts as a good legal argument, and we might expect changes in what is emphasized in law school to have effects on how law operates. The category of "good arguments" shifts over time,[206] and law school

200 *See* Perkins, *supra* note 183, at 297.

201 COMMON LAW TRADITION, *supra* note 92, at 214.

202 Kahan et al., *supra* note 75, at 354.

203 *Id.* at 354.

204 *Id.* at 370.

205 *Id.* at 413.

206 Frederick Schauer explores this dynamic in *Authority and Authorities*, 94 VA. L. REV. 1931, 1956-60 (2008). As he notes, "the status of a source as an authority is the product of an informal, evolving, and scalar process by which some sources become progressively more and more authoritative as they are increasingly used and

represents the initial, and thus understandably influential, exposure that lawyers get to its boundaries.

For example, Ryan Scoville has suggested that there is a connection between the extent to which international law is taught in a country's law schools and the nature and extent of that country's compliance with international law.[207] The underlying suggestion is simply that education shapes viewpoints, which in turn shape national attitudes toward international law,[208] such that lawyers who have been conditioned by their education to regard international law as significant will not only be more attuned to international law issues that they may confront, but also more respectful of it as a body of legitimate law should they find themselves in a situation where it matters.

Anthony D'Amato has expressly suggested such a connection between legal education and judicial behavior, contending that the rise of legal realism and its pervasive influence on the law school curriculum produces judges who regard formal legal materials as having little constraining effect.[209] Regardless of whether his specific

accepted." *Id.* at 1956-57. Schauer's inquiry is into the relationship between citation practice and what counts as authoritative, but his point dovetails with the observation here. *Id.* at 1956-60. What we collectively regard as authoritative shifts over time, and law school instructors are on the front lines of conditioning lawyers as to what is an appropriate source to cite, and thus what counts as a good legal argument.

[207] Ryan M. Scoville, *International Law in National Schools*, 92 IND. L.J. 1449, 1500 (2017).

[208] From the concluding paragraph of Scoville's article:

> Attitudes about international law do not simply exist; they must come from somewhere, and it is reasonable to think that at least one of their principal sources is the classroom, which provides the only significant training on international law that most lawyers ever receive. If this is right, then national aggregations of small choices about curricular design and classroom instruction carry significant policy consequences over the long run . . . .

Id. at 1507.

[209] Anthony D'Amato, *Legal Realism Explains Nothing*, 1 WASH. U. JUR. REV. 1, 9 (2009).

> But far more important than the impact of legal realism upon attorneys and law professors was its psychological impact upon judges. Every judge in the United States was once a law student. A future judge, sitting in a classroom in the 1920s or 1930s, might have experienced a rush of empowerment upon realizing that all his classmates were studying the law in the hopes that someday they might influence *him*. Better yet, once he became a judge, he would not have to pay much attention to what the lawyers said about the law (any more than he did in the classroom). For the "law" would be whatever he proclaimed it to be.

point is correct, it seems uncontroversial to imagine that the conceptions of law one encounters as a law student will exert influence over the course of one's career, including time spent as a judge.

The process of acculturation becomes much less systematic once formal education concludes. But there is still much to learn. The three years of law school can serve only as the beginning to a process of professional formation that necessarily extends into a career. And here is where experiences begin to diverge. There are large-scale divisions — private practice versus in-house versus government, litigation versus transactional, civil versus criminal — and smaller ones within them. Lawyers within each of these settings are likely to develop different conceptions of the role of law and the way law works.

The selection process further complicates matters. The people who we think of when we think of "judges" — which is to say, Article III judges and judges on state courts of general jurisdiction — do not achieve that status without the intervention of actors outside of the judicial system. Federal judges must be nominated by presidents and confirmed by senators, and this only sometimes happens via processes including components designed specifically to assess their legal acumen.[210] Some state court judges are appointed, while others are elected, in a wide variety of schemes.[211] There again, legal acumen only sometimes plays a dominant role. Politics, in both its ideological and more generic senses, appears instead to be the driving force, because political actors — who need not be legally trained, and who in any case are not acting as lawyers in this context — make judicial selection decisions for what one assumes are likely to be political

Id. at 9. In a related vein, Scott Altman has argued that judges who understand themselves to be constrained by legal authorities are more likely to behave as if they are, whereas judges who believe judicial decisions to be product of other factors are more likely to view the process "as a tactical game, the point of which is to pursue [their] own goals" regardless of what they might understand a formal legal standard to require. Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 307-19 (1990).

[210] For an assessment of one effort to introduce merit selection into the federal nominating process, see generally Annie L. Owens, "*All Politics is Local*": *The Politics of Merit-Based Federal Judicial Selection in Wisconsin*, 88 MARQ. L. REV. 1031 (2005) (analyzing the history and effectiveness of the Wisconsin Federal Nominating Commission).

[211] There is an extraordinarily large literature on state judicial selection. For strong examples, see generally Rachel Caufield, *Judicial Elections: Today's Trends and Tomorrow's Forecast*, 46 JUDGES' J. 6 (2007); Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259 (2008).

reasons.[212] There inheres in this dynamic an invitation to shape one's views to conform with what the selecting authority is perceived to desire, and selecting authorities will tend to pick those candidates whose views are most similar to their own.

The role played by parties external to the judicial system itself provides a significant point of difference between law and aesthetic sport. A legal system that worked as aesthetic sport does, in which judges picked their own successors, or in which selectors required a predetermined degree of similarity between aspiring and existing judges, would be a system that ensured greater uniformity of perspective. That perspective would not necessarily remain fixed over time, because the tastes of insiders can evolve, and no selection process could ensure complete correspondence of views between existing judges and their successors. A system in which political actors determine who becomes a judge is one in which any process of internal evolution will be unlikely to develop to be out of step with mainstream political views, for the simple reason that those holding the selection authority will not select judges holding such positions.[213] It is also a system in which a stable internal perspective can be upset by changes in the political climate, which can lead to the selection of judges whose views are radically different from those already in place.[214] In total, if one set of views remains consistently dominant in a

[212] The politics, though, is typically mediated by judicial philosophy. *See* Michael Stokes Paulsen, *Straightening Out* The Confirmation Mess, 105 YALE L.J. 549, 556 (1995) (reviewing STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS (1994)) ("Judicial philosophy and the outcomes to which it predictably (though not invariably) leads are what animate special interest groups — not nanny taxes, marijuana smoking, or even sexual harassment. Judicial philosophy is the reason why Presidents pick certain candidates.").

[213] Jack Balkin and Sandy Levinson have argued that such a mechanism serves as a significant source of constitutional change:

> When enough members of a particular party are appointed to the federal judiciary, they start to change the understandings of the Constitution that appear in positive law. If more people are appointed in a relatively short period of time, the changes will occur more quickly. Constitutional revolutions are the cumulative result of successful partisan entrenchment when the entrenchment party has a relatively coherent political ideology or can pick up sufficient ideological allies form the appointees of other parties.

Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066 (2001).

[214] The most famous example here, of course, being the "switch in time" on the Supreme Court in the face of the New Deal and President Roosevelt's Court-packing plan. Prior to 1937 the Supreme Court consistently struck down economic regulations, relying on both a narrow understanding of the commerce power and a

jurisdiction's political sphere, the result should be relative uniformity amongst its judges. Greater political polarization, at least to the extent that it results in changes in the identity of the selecting authority, can lead to a lack of uniformity.

Judges come to the bench, then, with a variety of professional experiences and perspectives. Judicial training is minimal,[215] and not likely in itself to add much to the acculturation mix. And while time spent in the role, perhaps especially on a collegial court, undoubtedly engenders a certain amount of conformity, judges will manifest very different preferences in terms of the nature and content and appropriate ways of interpreting and applying law.[216] This is not to deny the existence of shared assumptions — such as that law has independent meaning and governing force, with the result that judging is not merely the application of subjective will — but simply to note that the nature of the acculturation process in the American system is such as to generate less convergence than could be achieved via other mechanisms.

A final point. There is a third component — removal — to the package of influences of which acculturation and selection are a part. A judge who can be easily removed, one imagines, will approach the job differently than one who is secure in the position. Security fosters independence, which in turn allows a judge to follow her own best conception of the governing standards. A lack of security, in contrast, creates incentives to act in a manner that pleases the authority responsible for retaining or reappointing a judge.

Judges in the legal system are comparatively difficult to remove. Federal judges may be removed only through impeachment, meaning

conception of substantive due process that protected liberty of contract. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.3.3-3.3.4, at 247-68 (4th ed. 2006) (outlining the Court-packing plan). In 1937, possibly in response to the Court-packing plan, Justice Owen Roberts changed his position on these issues. "Deaths and retirements allowed Roosevelt to name seven Justices in the next five years. Ten years after his death, a majority of the Justices remained Roosevelt appointees." Robert A. Schapiro, *Must Joe Robinson Die?: Reflections on the Success of 'Court Packing,'* 16 CONST. COMMENT. 561, 563-64 (1999).

[215] For an overview, see generally AM. BAR ASS'N STANDING COMM. ON JUDICIAL INDEP., REPORT OF THE STUDY GROUP ON PRE-JUDICIAL EDUCATION (2005).

[216] I am assuming here that judicial philosophy matters — that is, that a judge who purports to be an adherent of a particular judicial philosophy will feel sufficiently constrained by that philosophy to follow it even where it calls for a result that the judge would otherwise prefer not to reach. Whether that is or even can be so would be, at least, difficult to test empirically, and in any case is a debated question. *See, e.g.*, Jamal Greene, *How Constitutional Theory Matters*, 72 OHIO ST. L.J. 1183 (2011) (considering the role of constitutional theory in judicial decision-making).

that they enjoy effectively life tenure. State court judges are also difficult to remove from office, though most serve fixed terms that require them to stand for some sort of reelection should they wish to retain their position.[217] The result in both cases is that judges enjoy a relatively secure position, which in turn provides them with a reasonable degree of decisional independence.

Sports officials enjoy less security. Those in professional sports leagues have the most secure positions. Although such officials are employees of a private organization, and thus subject to removal by the league, they are typically retained on the understanding that they will hold the position throughout an entire season, at least. Moreover, those in the major sports leagues are members of unions and thus enjoy additional contractual protections.[218] Aesthetic sports, in contrast, tend not to be organized into leagues or to have the same sort of "season" as purposive sports. Officials are retained on a competition-by-competition basis. Competitions take place on a schedule that may be coordinated by a governing body, but that nonetheless has something of an ad hoc flavor when viewed from the perspective of competitors, who generally have latitude to choose which competitions they will take part in. The hiring of judges may likewise be coordinated by a governing body, but in some sports is left to event organizers.

It is difficult to make general conclusions about the effect that any specific one of these arrangements will have. Mechanisms of acculturation, selection, and removal differ in meaningful ways from one legal jurisdiction to the next, and from one sport to the next. All are embedded within a broader institutional and procedural context that can amplify or mitigate the effects. Some arrangements, as a product of their acculturation and selection processes, will foster a deep, broadly shared understanding of the ideals judges should recognize. Certainly, an arrangement in which judges bear some responsibility for selecting judges, as is generally the case in aesthetic sports, will lead to greater homogeneity of perspectives, though it would also have a tendency to diverge from the preferences of the

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[217] For an overview, see NAT'L CTR. FOR STATE COURTS, *Methods of Judicial Selection*, JUDICIAL SELECTION, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm (last visited Sept. 9, 2018).

[218] *See World Umpires Association*, BASEBALL REFERENCE, http://www.baseball-reference.com/bullpen/World_Umpires_Association (last updated Jan. 22, 2015, 8:43 AM); NAT'L BASKETBALL REFEREES ASS'N, http://www.nbra.net (last visited Sept. 9, 2018); NAT'L HOCKEY LEAGUE OFFICIALS ASS'N, http://www.nhlofficials.com (last visited Sept. 9, 2018). The NFL Referees Association does not appear to have an Internet presence.

political branches. Such effects could be countered by a more aggressive removal regime, as well as by increased reliance on other mechanisms for channeling discretion. In other arrangements the effects of acculturation will be less robust, and the system will require different sorts of compensating adjustments elsewhere. The system as a whole is undoubtedly too complex to enable precise matching. My point is not to offer definite answers, but simply to uncover the key components for consideration.

B. Development and Maintenance of Epistemological Privilege

Recall that philosopher Harry Collins breaks the sports official's role into components involving "ontological authority" and "epistemological privilege."[219] Officials' epistemological privilege — a product of their expertise and a superior vantage point — provides much of the basis for their ontological authority — the power officials possess to create a reality during the course of game play by virtue of the calls they make. Consideration of the nature of epistemological privilege in the legal context provides yet another perspective on how the judge-as-umpire conception fails to accurately capture the judicial role. As noted above,[220] a considerable amount of the officials' epistemological authority in a purposive sport — such as baseball — is a product of a positional advantage. It is not so much that participants or spectators are incapable of determining whether a pitch was a ball or a strike, or whether a runner was out, but rather that they are not generally well-positioned to make those calls with great accuracy.[221] In aesthetic sports, in contrast, judges do not enjoy a unique positional advantage.[222] They are no closer to the action than many other

[219] *See supra* notes 133–36, and accompanying text.

[220] *See supra* Part II.B.

[221] This underscores the sense, given by the rules as a whole, that the rules of the game provide a sufficiently determinate set of standards that the key question is whether the umpires were in position to see what happened. If they were, then the understanding is that they will be sufficiently motivated to get the call right that they will not be swayed by factors external to the game. At the same time, the players and fans will almost always have both an understanding of the requirements of the applicable rule and the ability to monitor the umpires' behavior sufficiently enough to detect egregious errors. There is a recognition that umpires bring an expertise to the task, but it is an accessible expertise — the ability to be in position to make the call, and to perceive and make sense of events quickly enough to do so with respectable credibility. And discussions surrounding perceived errors take the form of "he missed the call" — meaning, for example, he misperceived the fact of whether the ball or the runner arrived first — rather than "he has different, and I believe wrong, preferences."

[222] *See supra* Part II.B.

spectators, and while they are assured of a good vantage point from which to view the action, that vantage point is not qualitatively superior to the vantage points available to many spectators. (This Article will take up the related but distinct question of the relationship between the positioning of officials and the nature of the contest below.[223]) Their epistemological authority thus stems primarily from their expertise advantage, which consists not only of a deep familiarity with the sport, but also a set of evaluative skills that have been demonstrated to be consistent with more senior judges in the sport.

In this respect, too, judges in law are more similar to judges in aesthetic sport. They enjoy a positional advantage vis-à-vis the litigants only in the sense that they occupy a neutral perspective. But any other non-party present in a courtroom, whether it be trial or appellate, either is or could easily make themselves as well-positioned as the judge. Observers and parties alike can see testimony and evidence coming in, can hear the legal arguments of the parties, and can access the written submissions that the parties have made in support of those arguments. Whenever it is the case that the law clearly compels a certain result, the parties can typically see this as well as the judge. Those, then, are the lawsuits that do not get filed, or that settle before or even during trial.

It is in situations where those who have seen what has transpired in the courtroom cannot agree on a conclusion about the significance of what they have seen that a judge is required. At this point the judge's authority does not stem from a positional advantage, a point the judge-as-umpire metaphor obscures. A judge making a ruling in that situation draws not on a superior vantage point, but rather on her sense of what the right answer is, or is likely to be. She refers to her deep familiarity with the law, and a set of privileged evaluative skills. The law judge's expertise is privileged not because she has demonstrated sufficient conformity with her peers, but rather because she has demonstrated it to the applicable selection authority. Even so, she draws on a reservoir of situation sense, of tacit knowledge of what the verbal formulations of the governing legal standards cannot capture.

In an ideal world the two affirmative mechanisms explored in the preceding subsection — acculturation and selection processes — should result in judges who have unquestioned epistemological privilege in both the legal and sporting contexts. They will have absorbed the pertinent disciplinary norms and will have been selected

[223] *See infra* Part III.G.

via a process that ensures that their absorption was sufficiently complete. So situated, competitors and interested observers could confidently conclude that the judges will make the best assessments of performances, and their ontological authority would be well-established. But a moment's consideration reveals that we do not regard selection and acculturation as sufficient in either context. We do not simply give judges free rein to make decisions, but have instead created elaborate structures, rules, and processes to provide further assurances that judges are deciding what we want them to decide according to the criteria we want them to apply. Subsequent subsections will explore some of the more common mechanisms for further channeling judges' behavior.

But even subject to that qualification, one of the points that the juxtaposition of judges in law and sport drives home is the importance of legitimacy to the role of the judge, and the legitimizing role that recognition and facilitation of the application of expertise has. Figure skating provides an example. The various high-profile scandals that have surrounded Olympic figure skating judging led directly to changes in the judging processes.[224] Those changes were designed to provide greater assurance to competitors and the public that the judging process was not based on criteria that were perceived as illegitimate. Any such change undoubtedly creates space for an argument that the shift went too far, that the new standards place too great an emphasis on "objective" criteria to the exclusion of the ineffable. But the point remains that there is a strong connection between the extent to which judges are regarded as drawing upon their *expertise* in assessing figure skating, as opposed to *preferences* that are viewed as distinct from that expertise and therefore illegitimate, and the overall esteem in which a sport is held.

There is a lesson here for the legal system. If judges are perceived as able to bring illegitimate criteria to bear on their decision-making, or even more as being unable to do anything but decide according to such criteria, then the legitimacy of the system overall will be threatened. That, truly, would be a world in which the rule of law had given way to the rule of men. But if the system can develop judges with a true expertise advantage, and convince litigants and the public

[224] *See* Stacy E. Lom, *Changing Rules, Changing Practices: The Direct and Indirect Effects of Tight Coupling in Figure Skating*, 27 ORG. SCI. 36, 39-40 (2016) (providing an overview of the changes to figure skating judging resulting from Olympic scandals); Shira Springer, *A Skating Judge Walks You Through the Scoring System*, BOS. GLOBE (Mar. 28, 2016), https://www.bostonglobe.com/sports/2016/03/28/skating-judge-walks-you-through-scoring-system/S28bQijxqjREN3w9XYWwVM/story.html.

that the advantage is real and not a product of illegitimate, external factors, its legitimacy will be secure.

C. Restrictions on External Sources of Information

Courts exist in the first instance to resolve specific disputes.[225] One party claims that he has been wronged by another, and asks a court for a conclusion in its favor based on its invocation of what it will contend is settled law applied to a set of settled facts.[226] The focus is both retrospective and narrow, and is manifested in a variety of doctrines. As a general proposition, for example, the law rejects the appropriateness of evidence of a person's character. Rule 404(a)(1) of the Federal Rules of Evidence embodies two key propositions, the first of which is that the question at a trial concerns how someone acted "on a particular occasion," and the second of which is that someone's character is not an appropriate consideration in determining how they acted on that occasion.[227] To be guilty of a crime one must not only have satisfied all the elements of a criminal statute, but to have done so concurrently.[228]

To be sure, there are senses in which this focus changes at the appellate stage. Appellate courts take on a prospective law-making role in addition to their responsibility for resolving specific disputes.[229] In doing so they must attempt to project how the rules of law they formulate will apply to situations beyond the facts of the case at hand, which in turn requires consideration not only of the specific dispute before the court, but also of the larger class of cases of which it is a part.[230] This dynamic gets formal recognition in the distinction between adjudicative and legislative facts.[231] With respect to the

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[225] *See* SHAPIRO, *supra* note 27, at 1.

[226] Fuller, *supra* note 3, at 368-69.

[227] *See* FED. R. EVID. 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.").

[228] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 15.01 (8th ed. 2018).

[229] *See* Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1297 (2008) [hereinafter *Writing, Cognition*].

[230] *See generally* Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 344-50 (2009) [hereinafter *Universal De Novo*].

[231] The distinction was first given precise identification by Kenneth Culp Davis:

> When a court or an agency finds facts concerning the immediate parties — who did what, where, when, how, and with what motive or intent — the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts . . . .

specific dispute before it, an appellate court is limited to consideration of the adjudicative facts in the record. In its prospective role as a determiner of the law, in contrast, an appellate court may consider a considerably broader, almost limitless set of materials.

So, too, in sports the idea is to determine who prevailed in a specific contest. "That's why they play the games," as the saying goes. A team's reputation, and its overall record, play, or should play, no role in determining whether it wins on a given day. Of course, there are disputes about whether particular players might get the benefit of more favorable calls, and whether some coaches are more successful than others in working the referees. But in purposive sports these effects are minimal.[232] Fans might regard a specific result as a fluke that would happen only one time out of ten, but almost never do they contend that the team or contestant that was better on that day was illegitimately deprived of a victory.

Consider, in contrast, an aesthetic sport. Because the applicable standards are opaque, and because competitors do not face each other head-to-head, it is less clear to fans when one contestant has had a better day. This creates a greater possibility of the perception, and perhaps the reality, that judges were influenced by something beyond the quality of the specific set of performances turned in at a given competition. The nature of that "something" might be a specific competitor's reputation, the reputation of the competitor's coach, or something else entirely. Whatever its nature, it can be considered illegitimate if it draws on factors beyond the specific performance being judged.[233]

> Legislative facts are the facts which help the tribunal determine the content of law and of policy and help the tribunal to exercise its judgment or discretion in determining what course of action to take. Legislative facts are ordinarily general and do not concern the immediate parties.

KENNETH CULP DAVIS, ADMINISTRATIVE LAW § 15.03, at 296 (3d ed. 1972).

232 This is not to suggest that the effects do not exist. *See* Kim & King, *supra* note 163, at 2632-33.

233 One could imagine this point being qualified in the following way. If the competition is one that determines who qualifies for some subsequent team or competition — a spot in the Olympics, or on a national or international team, say — then one could argue that the goal of the competition is to select the competitors who are most likely to perform at a high level in that subsequent event, in which case there is an argument that reputation, or at least a consistent pattern of strong past performances, ought to be a legitimate consideration. Of course, purposive sports rarely if ever work that way. There are cases of athletes who have missed a qualifying competition because of injury being given a spot that would otherwise have gone to a different competitor. *See* Colin Ward-Henninger, *NBA Playoffs: Steph Curry's Swagger Provides Missing Ingredient for Warriors' Championship Recipe*, CBS SPORTS (May 2, 2018),

Judges in sport, of course, do not have an express law-making (or rulemaking) function. Theirs is the entirely retrospective task of assessing the specific performances that have just occurred before them, and of ranking them relative to one another. As the sports' rules embody to varying degrees, this is a task as to which the judge is to set aside any information that she may have about the competitors or the teams they represent.[234] It is a feat that judges appear to be only somewhat successful in accomplishing. Evidence suggests that judges are susceptible to reputation biases, and other forms of bias.[235]

These types of influences — which in the legal context are discussed in Part I.B above — have proven to be difficult to eradicate. Any system that features decision-makers who rely on a base of expertise that is not fully articulable, and the contours of which are therefore likely to be somewhat opaque even to the person who possesses the expertise, runs the risk that the decision-makers will be influenced by improper factors.

As suggested above, the legal system handles this largely through the exclusion of evidence, such as that relating to a person's character.[236] More fundamentally, the elements of most causes of action are structured so as to render evidence bearing on matters other than what happened at a specific place and time immaterial, and thus irrelevant and subject to exclusion.[237] But of course these rulings must be made by judges, and not surprisingly there is reason to believe that judges may not be able to ignore information that they have ruled to be inadmissible.[238] While the effect can likely not be completely eradicated, further procedural reforms might help. These include

https://www.cbssports.com/nba/news/nba-playoffs-steph-currys-swagger-provides-missing-ingredient-for-warriors-championship-recipe/. But not in the situation of an athlete or team who has competed at a qualifying event and lost, even if that loss was a fluke.

[234] *E.g.*, INT'L SKATING UNION, *supra* note 188, at 57 (Rule 430.f states: "Officials must . . . not show bias for or against any competitor on any grounds; be completely impartial and neutral at all times; base their marks and decisions only on the performance and not be influenced by reputation or past performance; disregard public approval or disapproval . . . .").

[235] *See supra* notes 161–64, and accompanying text.

[236] *See* FED. R. EVID. 404(a)(1), *supra* note 227227, and accompanying text.

[237] Evidence is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." FED. R. EVID. 401(a)-(b). Because lawsuits almost always concern what happened a specific place and time, evidence that does not help the factfinder determine what happened at the place and time will not be of consequence to the determination of the action.

[238] *See* Wistrich et al., *supra* note 83, at 1251.

dividing responsibility among different judges, so that the judge who presides at trial is not the same judge who made the pretrial evidentiary rulings, and who will therefore be unaware of the inadmissible and potentially corrupting information.[239]

In sports, the predominant solution to the problems presented by the influence of knowledge obtained outside the specific competition being judged is simply to exhort judges to ignore it.[240] Beyond that they have made little progress. In most cases it is impossible to conceal an athlete's identity, and at least some will develop enough of a reputation to be recognizable to judges. The possibility of a team-based source of bias arises in situations in which individual competitors have not developed sufficiently robust reputations.[241] In contrast to musical auditions, for example, where at least some orchestras have adopted a system of screening musicians off from selectors to remove the potential influence of appearance-based biases,[242] sports do not have an effective way to introduce anonymity into the process in those situations where a lack of anonymity is most likely to matter. Indeed, sports have generally not found a good way to address this directly beyond rules exhorting judges to base their scores only on what they observe in the performance they are judging. In most cases it is not possible to anonymize the performer, and at the higher levels of a sport it is more likely to be the case that judges will know the identity of specific competitors (while at the lower levels it may be that a team bias would be more likely to manifest itself). Individual judges, or at least some of them, will thus be improperly influenced, and because the remedy cannot involve limiting the information available to judges it must lie elsewhere, in panel decision-making and other mechanisms.

D. Conflict of Interest Standards

Impartiality is a cornerstone of the American legal system. "There is perhaps no more basic precept pertaining to the judiciary than the one

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[239] *Id.* at 1325-26.

[240] *E.g.*, INT'L SKATING UNION, *supra* note 188, at 57 (Rule 430.f exhorts judges to "base their marks and decisions only on the performance and not be influenced by reputation or past performance . . . .").

[241] *See* CHERYL LITMAN & THOMAS STRATMANN, JUDGING ON THIN ICE: AFFILIATION BIAS IN FIGURE SKATING (2013), http://www.kevinfraker.com/school/stats/articles/ch9/skating-gm.pdf (finding effects arising out of team affiliation).

[242] *See, e.g.*, Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000) (discussing the phenomenon and its history).

holding that judges should be sufficiently detached and free from predisposition in their decision-making."[243] This is, of course, a statement of the ideal explored in Part II, the idea that judges should decide cases and questions by reference to proper sources and be free from improper influences.

Of course, a standard stated in such general terms begs the question of what it means to be detached or free from predisposition. The current formulation of the answers can be found in codes of judicial ethics. As the leading treatise on the subject notes, the causes of an insufficiently detached judicial mind "break down into three general categories: bias or prejudice, relationships, and interests."[244] The core concept appears in the Model Code of Judicial Conduct's Rule 2.11, which calls for a judge to "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned,"[245] and then proceeds to refine the prohibition via provisions that track the three categories just listed. Disqualification for bias or prejudice is required only "when they are personal"[246] — directed at or in favor of one of the parties to a suit rather than involving a judge's "moral convictions or attitudes about the law or societal issues."[247] What is more, the source of the bias or prejudice must generally be "extrajudicial." In other words, opinions or impressions of a party that the judge develops during the course of presiding over a case will not, as a general matter, trigger the need for disqualification.[248] Prior knowledge about the facts of a case, gleaned from outside the proceedings, will also provide grounds for disqualification.[249]

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[243] JAMES J. ALFINI ET AL., JUDICIAL CONFLICT AND ETHICS § 4.01, at 4-2 (4th ed. 2007).

[244] *Id.* § 4.01, at 4-3.

[245] MODEL CODE OF JUDICIAL CONDUCT r. § 2.11(A) (AM. BAR ASS'N 2007).

[246] ALFINI ET AL., *supra* note 243, § 4.05, at 4-15.

[247] *Id.* "That a judge has a general opinion about a legal or social matter that relates to the case before him or her does not disqualify the judge from presiding over the case. Despite earlier fictions to the contrary, it is now understood that judges are not without opinions when they hear and decide cases." *Id.*

[248] *Id.* § 4.05A, at 4-17.

[249] *Id.* § 4.05F, at 4-30 ("In the American legal system, facts are to be determined on the basis of evidence presented in court within the adversary process so that each side can present its version of the facts . . . . Even where a judge is not sitting as a fact-finder, he or she should not possess prior knowledge of the facts of a case, because that knowledge could unfairly influence the judge's rulings and other actions in the case.").

Relationships become a problem most clearly when a spouse or family member is a party, lawyer, witness, or person who has more than a de minimis stake in the outcome of a case.[250] Beyond that, things become less clear. Social relationships are not and cannot be automatically problematic. Even in large cities judges come to know and have relationships with members of the bar who practice before them. The question thus becomes the core Rule 2.11 question of whether, in a given situation, the judge's impartiality can reasonably be questioned. Courts have held that judges should have disqualified themselves in cases where a close friend was a party,[251] or where a party had a role in the judge's appointment to the bench.[252] Business relationships with parties or the lawyers will likewise provide grounds for disqualification.[253] Membership and even activity in the same political party as one of the parties, or the holding of political or religious views contrary to one of the parties, in contrast, will not alone constitute sufficient grounds for disqualification.[254] The final category of regularly recurring situations in which disqualification issues arise involves situations in which a judge or any of the judge's family members has an economic interest in the outcome of a case.[255]

As Judge Richard Posner has suggested, the very existence of these standards compels the conclusion that legal reasoning is not "as transparent and reproducible as scientific reasoning and experimentation."[256] He further connects the increasing strictness of conflict of interest rules with a decline of consensus within the legal system.

> The weaker the consensus, the more difficult it is for judges to fix the premises of decision and, by so doing, to make legal reasoning approximate logical deduction. Because legal reasoning is more (only?) cogent when there is a consensus concerning the relevant political and social values, conflict of interest rules are less needed in that setting to prevent this bias from operating.[257]

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250 *See* MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A)(2) (AM. BAR ASS'N 2007).

251 *See, e.g.*, ALFINI ET AL., *supra* note 243, § 4.09, at 4-43, 4-44 n.286.

252 *Id.* § 4.09, at 4-43, 4-44.

253 *Id.* § 4.11, at 4-57, 4-58.

254 *See id.* § 4.09, at 4-44.

255 MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A)(3) (AM. BAR ASS'N 2007).

256 PROBLEMS OF JURISPRUDENCE, *supra* note 165, at 127-28.

257 *Id.*

The point of course resonates nicely with the notion that judges draw on and are constrained by tacit knowledge instilled through their acculturation into the profession.[258] As the content of that acculturation becomes less consistent, it provides less constraint, and allows more room for the play of undesirable influences, creating in turn a greater need to resort to other mechanisms for channeling judicial behavior, or at least providing further assurance of its legitimacy. Enhanced conflict of interest provisions performs that function.

As noted above,[259] the rules of purposive sport tend to deal with conflicts of interest only in the most general way. There seems to be little concern that officials will exercise their discretion to favor competitors with whom they have some relationship or affinity. This is, one imagines, largely a product of the rules-driven nature of such officials' tasks. There is no room for such bias to sneak in unnoticed when the decision in question concerns whether a player remained in bounds.

In aesthetic sports, in contrast, as in law, it is more difficult to confirm the correctness of judges' rulings. Thus, it is not surprising that, although there is considerable variation from one sport to the next, conflict of interest regimes in aesthetic sports tend, at a broad level, to track those in law. At the core one typically finds a general provision exhorting judges to avoid the appearance of bias or other impropriety.[260] Other standard prohibitions include those against: (1) judging in competitions in which a family member is a competitor;[261]

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[258] *See supra* Part I.B.

[259] *See supra* notes 166–76, and accompanying text.

[260] *See, e.g.*, FÉDÉRATION INTERNATIONALE DE GYMNASTIQUE, GENERAL JUDGES' RULES § 1 (2017) (outlining a general obligation to avoid bias, behave ethically, and exhibit competence); FÉDÉRATION EQUESTRE INTERNATIONALE, DRESSAGE RULES — CODEX FOR FEI DRESSAGE JUDGES § 2 (2018) ("A Judge must avoid any actual or perceived conflict of interest. A judge must have a neutral, independent and fair position towards riders, owners, trainers, OC's and other Officials and integrate well into a team. Financial and/or personal interest must never influence or be perceived to influence his way of judging."); INT'L SKATING UNION, CODE OF ETHICS § 4(f) (2017) ("I recognize that even the appearance of misconduct, impropriety, insincere attitude or purpose can be damaging.").

[261] *E.g.*, FÉDÉRATION INTERNATIONALE DE GYMNASTIQUE, GENERAL JUDGES' RULES § 1 (2017) (applying to close relatives); FÉDÉRATION INTERNATIONALE DE NATATION, CODE OF ETHICS art. V(F)(13)(a) (2017) (including among the list of potential conflicts of interest to be avoided situations where an official could have or appear to have the ability to gain advantage for "themselves, their family, relatives, friends, and acquaintances"); INT'L SKATING UNION, CONSTITUTION AND GENERAL REGULATIONS r. 121(3)(k)(ii)(5) (2018) (defining "family" to include "all persons who, due to their

(2) judging in competitions in which one serves in some other role, such as coach or team doctor;[262] (3) accepting gifts or entertainment;[263] and (4) communicating with competitors during the course of a competition.[264]

There are, of course, qualifications and deviations stemming from the particular circumstances of individual sports. For example, figure skating, in recognition of the vote-trading and other scandals that have plagued its highest levels, has an express provision relating to influences that might arise out of close relationships with officials from other countries.[265] Some of the recently added Winter Olympics sports, such as freestyle skiing, have seen such rapid evolution that judges often want to hear from competitors during the competition so that they will be able to understand the moves the competitors perform,[266] which is perhaps simply a more aggressive version of a

relationships, may reasonably appear to be in a conflict of interest position regarding a competing Skater"); U.S. EQUESTRIAN FED'N, GENERAL RULES r. 1038 (2018) (placing a broad range of restrictions on existing and prior relationships between judges, competitors, trainers, and horses).

262 *E.g.*, FÉDÉRATION EQUESTRE INTERNATIONALE, DRESSAGE RULES — CODEX FOR FEI DRESSAGE JUDGES § 2 (2018) (placing specific time-based restrictions on the extent to which a judge may have served as a trainer of a competing horse and rider); INT'L SKATING UNION, CONSTITUTION AND GENERAL REGULATIONS r. 121(3)(k)(ii)(2) (2018); U.S. GYMNASTICS, RHYTHMIC GYMNASTICS RULES § 4(IV)(D) (providing that judges must, "[f]or all qualifying competitions, act only in the capacity of an official during warm-ups and competition and not serve in a dual capacity (i.e., coach/judge, parent/judge, meet director/judge, etc. during the same session)").

263 *E.g.*, INT'L SKATING UNION, CODE OF ETHICS §§ 4(j)-(l) (2017) (prohibiting the acceptance of "cash, travel, hotel accommodations, entertainment or other benefits and favors except normal entertainment in accordance with prevailing local custom and souvenirs of nominal value" but creating a limited exception for certain "sports and social events of more than nominal value").

264 *See, e.g.*, INT'L SKATING UNION, SPECIAL REGULATIONS & TECHNICAL RULES — SINGLE & PAIR SKATING AND ICE DANCE r. 351(1) (2018) (prohibiting officials from giving any sort of encouragement or advice to competitors).

265 INT'L SKATING UNION, CODE OF ETHICS § 4(f) (2017) ("I acknowledge that within the ISU skating family, strong friendships are established between Officials from different countries . . . I recognize that these factors, coupled with opportunities as an ISU Official to reward friends, trade favors or receive things of value by engaging in unethical conduct, may present temptations which are inconsistent with my personal integrity and my commitments to the ISU.").

266 As an article written in the lead up to the Sochi Winter Olympics puts it, "an easygoing vibe permeates these sports."

> The judges invite athletes and coaches to talk to them — even in the middle of a competition, maybe between qualifying rounds and the finals. Some sports are inclined to sequester judges, to protect them from the lobbying efforts of persuasive participants. Not snowboarding and free-skiing.

practice followed in sports such as figure skating, where judges will often watch skaters practice so that they can gain an understanding of what a skater's program will look like.[267] Variations such as these serve to underscore the point that judicial ethics cannot be a one-size-fits all endeavor, and that certain types of concerns are more appropriate for greater or lesser regulation depending on circumstances.

E. The Mechanics of Decision-making

In law, as discussed above,[268] the basic understanding is that decisions are only as good as the reasons provided for them. Generally speaking, this means that judges provide reasons for their decisions, and the more significant of these decisions are typically justified in a written opinion.[269] The process of writing serves as a source of

> "You can say, 'Hey, I want to speak to the head judge,'" Jankowski said. "He'll come out and you say: 'What happened in the qualifiers? The score was this, but they did this. Why are you judging him like that? This is previously how you judged.' They think about it. They're not going to change the score, necessarily, but they'll take it into account, talk to the other judges.
>
> "We're not trying to influence them one way or another. We're just trying to hold them accountable to their standards."
>
> Before competitions, judges spend hours researching the competitors. They will study videos of the athletes to familiarize themselves with the latest tricks. They will meet to discuss what to expect. They will watch warm-ups to see who is doing what.

John Branch, *Who Needs Stopwatches? From the Shadows, Judges Take Starring Roles*, N.Y. TIMES (Feb. 5, 2014), https://www.nytimes.com/2014/02/06/sports/olympics/who-needs-stopwatches-from-shadows-judges-are-co-stars.html?_r=0.

267 A profile of one leading figure skating judge describes the practice as follows:

> Judges have the image of being stern observers on the sideline, having little interaction with the skaters or coaches themselves. In reality, however, the judges mingle quite a bit with the skaters, coaches and parents of skaters, too. The judges sit and take notes during practices at events and even monitor some skaters at their own rinks. The idea behind this is so the judges have an idea of what to expect during a competition. When judges have to make split-second decisions, it pays off to have their homework done. Some consider the practice "pre-judging," but the judges swear by it.

Amy Rosewater, *Inman Awaits Judgment Day*, WASH. POST (Jan. 2, 2002), https://www.washingtonpost.com/archive/sports/2002/01/02/inman-awaits-judgment-day/2345f82f-9c24-4e45-9db2-354b8c484bf9/?utm_term=.a4a178aeb6d7.

268 *See supra* Part I.A.

269 *See generally Writing, Cognition*, *supra* note 229, at 1288-97 (analyzing the effect of and relationship between writing and judicial decision-making).

discipline on the judge, ensuring that his decision comports with the law. That, in turn, helps to sustain the courts' authority and legitimacy, by linking their decisions to standards external to themselves.

In some instances, for example a trial judge ruling on a summary judgment motion, the decision is largely retrospective. The questions in these situations concern what happened, what evidence exists, and whether the appropriate legal test is satisfied. Any opinion issued will be designed to justify the judge's ruling on the specific set of facts presented and will have no prospective effect. But retrospectively oriented justification is not the only function of judicial opinions. As we move up the judicial hierarchy, opinions take on an additional feature.[270] Because they will serve as precedent for future cases — because, in other words, the court that issues them will have made law — the justification takes on a different cast. Now the court must be concerned not only with the specific facts of the case before it, but also with the facts typical of the larger set of cases of which it is a part, and with the values, interests, and other considerations that factor into determining the appropriate content of the law.[271]

It is thus no coincidence that appellate courts, who render these latter sorts of decisions, are multi-member bodies. If indeed some substantial portion of law consists of the not-fully articulable, both in terms of the precise contours of the values to be accounted for as well as the ways in which legal argumentation and reasoning work, then one can reasonably expect that a multi-member court has advantages over a single judge. The single judge has only one perspective on these values and habits of mind, and it is unlikely to be fully coextensive with that of the collective.[272] The mean or median position on a multi-member court will likely be closer to the views of the broader legal society even apart from any value that discussion among the judges might have for facilitating the process.

With some exceptions,[273] judges in aesthetic sport do not provide a justification for their scoring. Most instead simply generate a score, and typically do so almost immediately upon completion of each

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[270] *Id.* at 1297.

[271] *See generally Universal De Novo*, *supra* note 230, at 346-47 (unpacking the components of judicial law-making).

[272] *See, e.g.*, NATURE OF THE COMMON LAW, *supra* note 116 (common-law adjudication requires judges to draw on what he labels "social propositions").

[273] *E.g.*, U.S. EQUESTRIAN FED'N, DRESSAGE RULES r. 122(7)(a) (2018) (stating that judges must score individual movements, and that "[t]he judge should state the reason for his judgment, at least when giving marks of 6.5 and below").

individual performance. The assessments involved must be made almost instantaneously, with no time for reflection or reconsideration. Whatever the advantages of decision-making aided by the requirement of producing a justification, it would be a largely impractical luxury in the context of aesthetic sport.

The primary mechanism by which most aesthetic sports compensate for the biases that any one individual judge may bring to the role is that of panel decision-making.[274] If one assumes the existence of some collective conception of the ideal performance — which could theoretically be discerned by interpolating among the views of some appropriate subset of all the participants in a given sport — then it seems reasonable to suppose that the average score given to a specific performance by members of a group of judges is more likely to reflect the performance's distance from that ideal than would the score of a single judge. Most sports work to preserve this averaging effect by prohibiting the judges on a panel from communicating with one another, and some ensure that judges are not able to see one another's scores during a competition.[275] To a degree, these arrangements are almost certainly the product of the need for efficiency. Judges must ready themselves for the next competitor, making full discussion impracticable. They also serve to ensure that the average score represents a true average by minimizing the potential for one judge to exercise undue influence. On a panel in which judges are allowed to communicate, a judge with a strong personality could exert disproportionate influence. Even without communication, research

[274] *E.g.*, FÉDÉRATION INTERNATIONALE DE GYMNASTIQUE, TECHNICAL REGULATIONS Art. 7.8.2 (2018) (providing for composition of judging panels); FÉDÉRATION INTERNATIONALE DE NATATION, ARTISTIC SWIMMING RULES § 9.1 (2017) ("When qualified judges are available in sufficient numbers one (1), two (2) or four (4) panels of six (6) or seven (7) judges may officiate."); INT'L SKATING UNION, SPECIAL REGULATIONS & TECHNICAL RULES — SINGLE & PAIR SKATING AND ICE DANCE r. 402(1) (2016) (requiring panels of nine judges for Olympic competitions and creating an elaborate framework for their selection from a group of thirteen).

[275] *E.g.*, FÉDÉRATION INTERNATIONALE DE SKI, THE INTERNATIONAL FREESTYLE SKIING COMPETITION RULES (ICR) – JOINT REGULATIONS FOR FREESTYLE SKIING § 3033.6.2 (2017) ("Judges shall be separated on the judges' stand by a minimum of one meter and a partition. There shall be no discussion between the judges concerning the competitors' scores (except by the Head Judge)."); INT'L SKATING UNION, SPECIAL REGULATIONS & TECHNICAL RULES — SINGLE & PAIR SKATING AND ICE DANCE r. 430(f) (2016) ("Officials must . . . not discuss their marks or decisions and marks or decisions of other Officials during the competition with any person other than the Referee . . . ."); U.S. EQUESTRIAN FED'N, DRESSAGE RULES r. 123(4) (2018) ("Electronic scoreboards are permitted, however, when multiple judges officiate in a class, scores from other judges must not be visible to the judges of the same class.").

suggests that members of a panel who can see one another's scores tend to converge in their scoring over the course of a competition.[276]

In sum, the nature of the performative ideal in aesthetic sport and the way in which it is implemented by panels of judges in those sports suggests something significant about the nature of panel decision-making in both the sporting and legal contexts. Because there is no canonical formulation of the performative ideal that exists outside the collective conception of the judges who must apply it, it is not correct to suggest that panels are more likely to reach the "right" result in the sense of being more likely to get close to some objectively correct answer. That said, the answer produced by a panel does seem to be more likely to be correct in the sense that it will be more likely to reflect the consensus underlying the performative ideal.

A similar dynamic seems likely to hold true in the law. The answers produced by a panel of judges are more likely to reflect the consensus underlying the law than the decisions of a single judge. But the specific mechanisms are different because the goals are different. In law, panels of judges exist almost exclusively on courts that have at least some law-making function. A written opinion is a practical necessity in this context,[277] and courts have available time in which to produce it. There remains a danger that one judge will have disproportionate influence, whether because of personality or simply because that judge has primary authority for writing the opinion. But because of the prospective nature of the task, the benefits are likely to outweigh the costs.

F. Compensation

Compensation mechanisms can affect judicial behavior. Consider, as an obvious example, the facts of *Tumey v. Ohio*.[278] The case involved an arrangement in which a village mayor had a supplemental role for which he received compensation only when he assessed fines, and not in cases of acquittal. The Supreme Court concluded that this arrangement ran afoul of due process for the simple reason that it created a financial incentive for the mayor-as-judge to convict.[279]

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[276] *See* Boen et al., *supra* note 162, at 578-79 (discussing the "conformity effect" among judges).

[277] *See Participation*, *supra* note 41, at 412 ("Rules ordinarily cannot emerge from an outcome unless the reasons for that outcome are given.").

[278] *See* Tumey v. Ohio, 273 U.S. 510, 515-523 (1927).

[279] *Id.* at 535.

We might conclude from this that the important thing is to structure compensation so as to provide appropriate incentives. As an initial matter, judicial salaries must be large enough to attract appropriate people to the role.[280] Judges whose compensation varies based on performance might be incentivized in some general sense to do a better job, in the sense of being more attentive to their responsibilities. But this presents difficulties in implementation. An equitable regime of rewarding judges for good performance of their duties requires a set of criteria for assessing judicial quality, and that may be difficult to formulate.[281] Judges will be incentivized to satisfy the criteria used to determine their compensation and will tend to deemphasize the aspects of their job that are not accounted for in those criteria. If, as I have consistently emphasized in this Article, a significant component of judging involves the application of a professional judgment that cannot be adequately captured in words, then it is by definition impossible for that judgment to be assessed via criteria that can be adequately captured in words. The danger of such a regime, then, is that it will incentivize an incomplete, if not inappropriate, set of behaviors.

The legal system implicitly recognizes this dynamic. The American practice, at least, is for all judges at the same level in the judicial hierarchy to receive the same salary, regardless of years of service or quality of performance of the role.[282] Of course, judges find other ways in which to attempt to distinguish themselves, such as by striving to gain a positive reputation through their opinions and public appearances[283] or through hiring the "best" law clerks.[284] But

[280] This is a longstanding point of debate. For a general treatment and empirical study, see generally James M. Anderson & Eric Helland, *How Much Should Judges Be Paid? An Empirical Study on the Effect of Judicial Pay on the State Bench*, 64 STAN. L. REV. 1277 (2012).

[281] Hon. William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PENN. ST. L. REV. 55, 78-79 (2013) (noting the difficulty of formulating criteria by which to determine whether a judicial decision was accurate).

[282] For a nationwide compilation of state judge salaries, see NAT'L CTR. FOR STATE COURTS, SURVEY OF JUDICIAL SALARIES 3 (2017), http://www.ncsc.org/~/media/Microsites/Files/Judicial%20Salaries/JST-2017-layout.pdf.

[283] *See generally* Richard A. Posner, *What Do Judges Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 15 (1993) (considering the various incentives behind judicial behavior).

[284] Aaron L. Nielson, *The Future of Federal Law Clerk Hiring*, 98 MARQ. L. REV. 181, 186 (2014).

> Clerkships are valuable. This means that clerkship hiring is competitive for

compensation does not factor into this mix. The arrangement is consistent with an understanding that judges' acculturation in professional norms will steer them toward appropriate fulfillment of their role.

It is likewise easy to imagine how compensation regimes can factor into judges' behavior in the sporting context. Consider an event hosted by one of the teams competing at the event. A judge, particularly one who was well-compensated, might be inclined to shade his judgments in favor of competitors from the host organization, especially if there were a prospect of return invitations. There are, of course, countervailing pressures, since a judge perceived as favoring one set of competitors would be less likely to be asked to judge elsewhere. But the prospect of skewed incentives arising out of the amount of and conditions of compensation, and of the perception of skewed incentives, seems real.

Aesthetic sports vary in their approach to this potential dynamic. "Most Olympic judges aren't paid. Their expenses are covered, and they have a per diem, typically less than $100. In fact, many lose money because they have to take a vacation from their day jobs."[285] One imagines at least two impulses underlying this approach. The first, and perhaps strongest, is simply cost containment. The costs of judges, especially at lower-level competitions, is passed along to competitors. The second seems related to what we see in the legal system. Judges who receive no compensation will face no financial incentives that might affect their behavior and will thus be more likely to resort to their internalized conception of what an ideal performance looks like. Indeed, such an arrangement will tend to produce judges whose involvement in judging is motivated by love of the sport, and who consequently may be less susceptible to other improper sources of influence as well.

> applicants who want to be hired by the best, most prestigious judges; for judges, who want to hire the best, most able clerks; and for law schools that compete against each other in the rankings. Because there are not enough clerkships for every student who wants one, and because there are not enough perceived top students for every judge, competition inevitably results.

Id.

[285] Rick Maese, *At Winter Olympics, Judges Determine Many of the Medals*, WASH. POST (Feb. 16, 2014), https://www.washingtonpost.com/sports/olympics/at-winter-olympics-judges-determine-many-of-the-medals/2014/02/16/67844f9c-9648-11e3-ae45-458927ccedb6_story.html.

Of course, these arrangements entail tradeoffs. If judges are not compensated for their time, then only a certain subset of people will be able to pursue positions as judges. These people's preferences may not be representative of the entire population of participants in the sport. We would be deeply suspicious of a legal system that relied on all-volunteer judges for similar reasons. It would tend to consist of those who could afford such an arrangement, which would be a group whose interests and incentives could easily be out of step with the populace as a general matter.

G. Positioning of Officials

A frequent point of contrast between purposive and aesthetic sports concerns the positioning of the officials. The primary responsibility of officials in purposive sports is the enforcement of rules,[286] which suggests that the paramount concern should be enabling officials to be in the best position to monitor for rule violations. This requires fluidity. These officials move about the field of play along with the action, occasionally interacting with the players and generally attempting to place themselves in the best vantage point for determining whether the players are complying with the rules. Consider, for example, the rules of Major League Baseball. Rule 8.03 prescribes the umpires positions. The umpire-in-chief must "stand behind the catcher," while a field umpire "may take any position on the playing field he thinks best suited to make impending decisions on the bases."[287] A set of "General Instructions to Umpires" that appears in the same section but after the numbered rules further provides that the "[m]ost important rule for umpires is always 'BE IN POSITION TO SEE EVERY PLAY.' Even though your decision may be 100% right, players still question it if they feel you were not in a spot to see the play clearly and definitely."[288] The focus is on maximizing the umpires' positional advantage, from which a considerable portion of their authority flows.[289]

The judge in an aesthetic sport, in contrast, has much less responsibility for policing rule violations, and is instead concerned primarily with assessing each performance in a consistent manner. This counsels in favor of a fixed position in order to best ensure that scores are comparable across all competitors. Various aspects of a

[286] *See supra* Part II.B.

[287] MAJOR LEAGUE BASEBALL, OFFICIAL BASEBALL RULES § 8.03(b) (2016).

[288] *Id.* at General Instructions to Umpires.

[289] *See supra* Part II.B.

performance will be easier or more difficult to observe depending upon one's vantage point, and many aesthetic sports involve the use of equipment that could partially obstruct a judge's view. To use figure skating as an example, a change in a judge's position might make it relatively more difficult for a judge to see and assess a skater's footwork. Other components of a performance might be designed to maximize their salience to the judges, which would be more difficult to do if competitors were not able to rely on the judges being in a fixed position. As a result, a judge who moved around might end up applying a consistent standard in an inconsistent manner simply because she would be positioned to notice different aspects of different competitors' performances. And while that might end up being a wash, simply because the new position could result in an enhancement of the judge's ability to notice other problems, it hardly seems unreasonable to assume that some positions are objectively better than others in terms of maximizing the ability to see all kinds of errors.

Judges in aesthetic sport thus judge from a fixed location, typically outside the field of play. The applicable rules tend to focus on requiring that judges be stationed at an appropriate vantage point. Gymnastics judges are to "be seated at a location and distance from the apparatus which permits an unobstructed view of the total performance and which permits them to fulfill all of their evaluation duties."[290] Diving judges must be placed together with their backs to the sun on a single side of the platform, at a distance roughly equivalent to the height of the platform, in seating elevated between three and five meters above the water level.[291] They may not change position absent "exceptional circumstances."[292] The rules for dressage prescribe the location of judges in great detail.[293]

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[290] FÉDÉRATION INTERNATIONALE DE GYMNASTIQUE, 2017-2020 CODE OF POINTS — WOMEN'S ARTISTIC GYMNASTICS art. 5.6 (2017). The article further provides a diagram prescribing a seating arrangement for the various officials for each event. *Id.*

[291] FÉDÉRATION INTERNATIONALE DE NATATION, FACILITIES RULES r. 14.4.1-14.4.3 (2017).

[292] FÉDÉRATION INTERNATIONALE DE NATATION, HIGH DIVING RULES r. 4.2.4 (2017).

[293] FÉDÉRATION EQUESTRE INTERNATIONALE, DRESSAGE RULES art. 429(5) (2016).

> Placing of Judges. Three (3) Judges must be placed along the short side, on the outside of and a maximum of five meters (5 m), minimum of three meters (3 m) from the arena at outdoor Competitions and preferably a minimum of two meters (2 m) at indoor Competitions; the Judge at C on the prolongation of the centre line, the two (2) others (M and H) two meters fifty (2.50 m) from and on the inside of the prolongation of the long sides. The two (2) Side - Judges (B and E) must be placed on the outside of and a maximum of five meters (5 m), minimum three meters (3 m) from the arena

This discussion suggests a clear relationship between the nature of a sport and the positioning of officials.[294] And at first glance, the arrangement in law appears to track that found in aesthetic sports.[295] Judges and juries, like judges in aesthetic sport, sit in a fixed position that, by design, serves to give them the best view of what they must judge. As is true of the contestants in aesthetic sport, litigants rely on these fixed positions in structuring their presentations. Of course, there are differences. Judges undoubtedly perform a rule-enforcement role. But it is by and large not a role in which they exercise a free-ranging authority to independently identify violations.[296] Moreover, both types of decision-makers rely upon situation sense in making their assigned determinations. Jurors draw upon their accumulated

> at B and E respectively; at indoor Competitions preferably a minimum of two meters (2 m). When three (3) Judges are used one (1) should sit on the long side. See Article 437 of the Dressage Rules. When seven (7) Judges are used, the two (2) additional Judges will sit at the opposite short side of the Judge at C, five meters (5 m) from and on the inside of the prolongation of the long sides. Exceptions from this may only be approved by the FEI.

Id.

294 One can develop the point further. There are rule-enforcement tasks to be performed by judges in aesthetic sports as well, and some sports assign those responsibilities to distinct sets of officials. In gymnastics, for example, line judges have responsibility for observing the floor exercise and vault, and for calling faults when competitors step outside the allowable surface. FÉDÉRATION INTERNATIONALE DE GYMNASTIQUE, 2017–2020 CODE OF POINTS — WOMEN'S ARTISTIC GYMNASTICS art. 5.5.1 (2017). High diving defines distinct roles for judges and referees as well. FÉDÉRATION INTERNATIONALE DE NATATION, HIGH DIVING RULES r. 5, 7 (2017). Referees are responsible for ensuring that the dive performed is the same as the dive announced and adjusting maximum allowable scores accordingly if they do not correspond, monitoring whether divers receive any assistance after the starting signal, and removing divers or coaches that "disturb[] a contest." *Id.* r. 5.13, 5.21, 5.27. High diving judges on the other hand are supposed to limit the content that they evaluate to the "technique and execution of the dive," awarding "from 0 to 10 points for a dive according to [the judges] overall impression." *Id.* r. 7.1.1-7.1.2.

295 *See supra* Part III.B (discussing the positioning of judges).

296 The extent to which judges ought to be proactive versus reactive is a matter of considerable debate. *See, e.g.*, Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 516-17 (2009) (promoting a more proactive approach). Curiously, the "umpireal" view of judging is associated with the reactive position. *See* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1043-44 (1975) (contrasting the umpireal judge with a judge who takes a more interventionist approach). Viewed from the perspective of positioning, though, that view is backwards. The umpire must seek out the best position from which to determine whether, for example, a base runner was tagged out. The reactive judge, in contrast, waits for one of the parties to raise an issue, and does not involve herself in creating the best perspective for its resolution, whether that be through the development of legal or factual background.

experience to assess witness credibility and otherwise make sense of the facts of a case. Judges draw upon their sense of the law and their sense of the case in making evidentiary and other rulings at the trial level, and in deciding legal questions on appeal. The logic of the system, like the logic of aesthetic sports, compels an arrangement in which the presentations and performances are directed to the decision-maker, rather than one in which the officials take a secondary role as the contestants themselves do the work of deciding who wins.

CONCLUSION

We live in an era that values the quantifiable,[297] and assessments of judicial performance are no exception.[298] But as Chief Justice Marshall observed in *McCulloch v. Maryland*, "Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea . . . ."[299] The judicial role often requires the making of judgments that are rooted in the ineffable and inarticulable, and thus draws on attributes that defy quantification.

A conception of the judge as umpire invites us into a world in which the rules are all that matters, and in which judges mechanistically apply them. It is a comforting world. And as an outward-facing image, a form of public relations directed at a public whose confidence it must foster, the image has considerable value.

But most sophisticated observers of the judiciary recognize that the role of the judge is considerably more complex than the umpire metaphor suggests. The umpire metaphor fails not because sports do not provide an appropriate point of comparison for law. They do. It is simply that a more fitting source of analogy lies elsewhere, in the judges who officiate in aesthetic sports.

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297 *See* JERRY Z. MULLER, THE TYRANNY OF METRICS 3-4 (2018).

> We live in an age of measured accountability, of reward for measured performance, and belief in the virtues of publicizing those metrics through "transparency." But the identification of accountability with metrics and transparency is deceptive. Accountability ought to mean being held responsible for one's actions. But by a sort of linguistic sleight of hand, accountability has come to mean demonstrating success through standardized measurement, as if only that which can be counted really counts.

Id.

298 *See generally* Jordan M. Singer, *Foreword: Productivity in Public Adjudication*, 48 NEW. ENG. L. REV. 445 (2014) (collection of work discussing judging techniques and productivity).

299 McCulloch v. Maryland, 17 U.S. 316, 414 (1819).

That analogy undoubtedly has limited public relations value. Figure skating judges, for example, do not enjoy a reputation for being principled and scandal-free. Yet it is for that very reason that the analogy is so powerful. Judging in law and judging in aesthetic sport both involve the application of criteria that often cannot be reduced to pat verbal formulations, and that accordingly require judges to draw on a deeply conditioned intuition based in a body of acquired knowledge that is largely inarticulable but no less real. Recognition of that point alone is significant. As a legal and academic culture — and perhaps more broadly than that[300] — we have grown insufficiently attentive to the expertise and craft values that the legal system relies on to provide a substantial source of discipline. Of course, the roles' inherent dependence on this sort of tacit knowledge thus opens them up to what the judge-as-umpire elides: the charge that judges have strayed beyond the proper bounds of tacit knowledge and into the application of political or otherwise inappropriate considerations.

A conception of the judge in law as analogous to the judge in sport thus surfaces both the reliance on tacit knowledge and the need to rely on institutional and procedural design to attempt to channel judges' behavior. Proper design thus requires an identification not only of the substantive ideals that are to guide the standards applied, but also who and what judges should be accountable to and independent from. This Article provides a basic taxonomy of the sorts of mechanisms that institutional designers can employ. Striking the appropriate balance within a given system — within different sports, the various jurisdictions in law, and levels of the hierarchies in each — requires a further, context-driven analysis.

All of this takes on even greater significance given the deeply divided culture in which we currently live. A system that depends on acculturation as a source of discipline, as our legal system does, is one that faces a significant source of challenge from a world lacking in a shared conception of core sensibilities. Thinking of the judge as an umpire allows us to evade that challenge. Conceiving of the judge as judge requires us to confront it.

300 *See generally* TOM NICHOLS, THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS (2017) (discussing how the population generally has become content with mediocracy).