



WHAT IS OBVIOUSLY WRONG WITH THE FEDERAL JUDICIARY, YET EMINENTLY CURABLE

PART I

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I REALIZE I'VE GOTTEN a not entirely welcome – though not entirely undeserved – reputation as a maverick, naysayer, scoffer, gadfly, faultfinder – in short a committed candid critic of the American legal system,¹ and in particular of the federal judiciary, the branch of the system that I know best, having been a federal court of appeals judge for the past 34 years, and that I hammer most frequently. My just-published book *Divergent Paths: The Academy and the Judiciary* (2016) will cement that reputation.

What is odd is that most of the criticism I receive is of my writings or speeches about the judicial process, as exemplified by this article. Criticisms of my judicial opinions are rare, even though I have written more than 3100 published opinions in my 34 years as a federal appellate judge. And such criticisms as the opinions do receive differ in tone and content from the

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¹ See, e.g., Lincoln Caplan, "Rhetoric and Law: How the productive, contentious, prodigious Richard A. Posner became one of America's most influential judges," *Harvard Magazine*, Feb. 2016, p. 49, www.harvardmagazine.com.

criticisms of my extrajudicial comments on the judicial process. Criticisms of my opinions tend to focus on my citing Internet websites in them.

In the present article, however, and its sequel (Part II, to be published in the next issue of this journal), I try to retreat some distance from controversy by confining my discussion to those features of the federal judicial process that are at once demonstrably unsound *and* readily corrigible without need for federal legislation or radical changes in legal doctrines or practices. That is not to say that anything I criticize *will* be changed, however convincing my critique. For law is wedded to the past as no other profession is. You don't hear doctors bragging about thirteenth-century medicine, but you hear lawyers bragging about the thirteenth-century Magna Carta (without even understanding it – they think it guaranteed the ancient liberties of the English, whereas in fact it guaranteed just the rights of barons, and in any event was soon annulled, later restored, and eventually demoted to the purely symbolic).

Another way to characterize the legal profession in all three of its major branches – the academy, the judiciary, and the bar – is that it is complacent, self-satisfied. Chief Justice Roberts in his annual reports likes to describe the American legal system as the envy of the world. Nonsense. The system has proved itself ineffectual in dealing with a host of problems, ranging from providing useful (as distinct from abstract theoretical) legal training at bearable cost to curbing crime and meting out rational punishment, providing representation for and protection of the vast number of Americans who are impecunious or commercially unsophisticated (so prey to sharpies), incorporating the insights of the social and natural sciences (with the notable exception of economics, however), curbing incompetent regulatory agencies such as the immigration and social security disability agencies, and limiting the role of partisan politics in the appointment of judges. The system is also immensely costly (more than \$400 billion a year), with its million lawyers, many overpaid, many deficient in training and experience, some of questionable ethics.

I focus on the three principal phases of the federal judicial process: trials, intermediate appeals, and decisions by the Supreme Court. But much that I'll be saying is applicable to state judiciaries as well, all of which (so far as I know) have a tripartite structure (trial court, intermediate appellate court, supreme court) similar to that of their federal counterpart.

TRIALS

The most obvious and most readily corrigible defect of the federal trial process is the use of “pattern jury instructions,” which are drafted by committees consisting of both judges and lawyers. Judges are not required to use them in instructing a jury, but they like to do so, both to spare themselves the agonies of composition and to minimize the likelihood of a reversal because of an instruction error. The problem is that, being drafted in legal language, many pattern instructions are largely unintelligible to jurors. The drafters appear to have a deficient sense of the capabilities of the intended audience. I conduct trials as a volunteer in the district courts of my circuit (the Seventh Circuit), and when I have a jury trial I draft the instructions myself, writing on a level that a person with no legal training can understand.

I employ other simple methods of making trials more intelligible to jurors, such as allowing them to ask questions, limiting the number and length of the exhibits (documents and sometimes photos or videos) admitted into evidence, ruling on the admissibility of exhibits before trial in order to expedite the trial, requiring lawyers to limit their objections to one word (so as not to distract the jury with legal mumbo-jumbo), conducting the voir dire (the questioning of prospective jurors to determine their suitability to participate as jurors in the case) myself and limiting the number of voir dire questions. I also make sure to give the jurors *reasons* for what I tell them not to do, such as not to do their own Internet research. Some judges just tell them: you must not do your own research. But to be told this without a reason must puzzle jurors, and may induce some of them to disobey the order. There *is* a good reason to forbid jurors to conduct their own research, and it’s easily (though rarely) explained: they may discover things online that the lawyers and witnesses at the trial don’t mention and don’t even realize are pertinent to the case, with the result that the jurors who do such research may acquire information that the lawyers or witnesses could explain was false or misleading or even irrelevant yet that they would never have a chance to explain because the jurors would not have disclosed the information to them. Trials would become downright chaotic if to solve the problem just indicated jurors were told that if they come across some juicy bit of information from their Google searches they should ask the lawyers about it during the trial.

A big problem with jury trials is that often they involve technological or commercial issues that few jurors understand (not that many judges understand them either) and that the lawyers and witnesses are unable or unwilling to dumb down to a level that the jurors would understand. There is a solution to this problem, however, though one that few judges employ: appointment by the judge of an expert witness (thus a “neutral” expert, by virtue of not having been selected by the lawyer for one party to the litigation). The authority to make such an appointment is explicitly conferred on federal judges by Rule 706 of the Federal Rules of Evidence, but is alien to the Anglo-American judicial culture, in which the witnesses in a case are designated by the lawyers rather than by the judge.

The fault is the culture. Our legal culture, in contrast to that of most countries in the world (notably Japan and the nations of Continental Europe), is “adversary,” in the sense that the judge is the arbiter of a contest – a drama, really – put on by the lawyers for the contending parties. (In the inquisitorial system, as the system in force in most other countries is called, the lawyers can nominate witnesses but the judge decides whether to call them and he questions them, at least initially.) The lawyers in a case in our system often differ *greatly* in quality, and this distorts the adversary process. Often one of the parties, moreover – invariably the plaintiff if it’s a civil case and the defendant if it’s a criminal one – has no lawyer, which shifts the odds enormously in favor of the represented party regardless of the merits of his case.

Differences in the quality of lawyers wouldn’t matter a great deal if, for example, they were compensated as judges are: with a uniform government salary unrelated to outcomes or the relative wealth of the respective parties in a case. (The analogy is to a “single payer” system of medical care.) There would then be no contingent fees and no \$1100 an hour billing rates. My pay isn’t docked if I’m reversed by the Supreme Court, and neither do I get a bonus if the Court affirms a decision of mine, or for that matter denies certiorari in every single case in which the loser in a case in which I wrote the majority opinion asks the Court to take the case and reverse me. That’s not how lawyers in our system are compensated. “The rule of law is a huge public good, but no commercial lawyers are working to achieve ‘justice’: they work to win a case in a zero-sum tournament. The last hour of legal effort purchased by a party to a legal dispute yields its return not

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by generating more justice, but by increasing the chances of winning the tournament. There are simply too many people spending their time on these zero-marginal-social-product activities. Worse, many of them are highly talented.”²

Another serious problem with trials in our system is the overemphasis on live testimony and thus on the efficacy of cross-examination as a method of determining the truth. Jurors are told to assess the truthfulness of a witness’s testimony by considering not only the plausibility of what the witness says but also the witness’s “demeanor” – the manner in which he expresses himself, his apparent confidence or nervousness, and other visual and auditory clues (tone of voice, rapidity of speech, etc.). Actually these are misleading clues – there are nervous liars and confident liars, nervous truth-tellers and confident truth-tellers, articulate and inarticulate liars and truth-tellers, and so on. Yet no legal catchphrase is more often repeated than that determinations by a trial judge (or jury) whether to believe or disbelieve a witness can be overturned on appeal only in extraordinary circumstances. The reason is said to be the inestimable value, in assessing credibility, of seeing and hearing the witness rather than reading a transcript of his testimony (which the appellate judges ordinarily are limited to doing), since the transcript eliminates clues to veracity that are supplied by tone of voice, hesitation, body language, and other nonverbal expression. But this is one of those commonsense propositions that appears to be false. A considerable academic literature finds that nonverbal clues to veracity are unreliable and distract a trier of fact from the cognitive content of the witness’s testimony.³ In short, “demeanor cues do not lead to accurate lie detection.”⁴

² Paul Collier, “Wrong for the Poor: A Clearer Alternative to Thomas Piketty: and the Problem When Capitalists Make Nothing But Money,” *Times Literary Supplement*, Sept. 25, 2015, p. 3. I would not limit his criticisms to commercial lawyers.

³ See, e.g., Amina Memon et al., *Psychology and Law: Truthfulness, Accuracy and Credibility* (2d ed. 2003); Scott Rempell, “Gauging Credibility in Immigration Proceedings: Immaterial Inconsistencies, Demeanor, and the Rule of Reason,” 25 *Georgetown Immigration Law Journal* 377 (2011); Guri C. Bollingmo et al., “The Effect of Biased and Non-Biased Information on Judgments of Witness Credibility,” 15 *Psychology, Crime & Law* 61 (2009); Jeremy A. Blumenthal, “A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility,” 72 *Nebraska Law Review* 1157 (1993).

⁴ Max Minzer, “Detecting Lies Using Demeanor, Bias, and Context,” 29 *Cardozo Law Review* 2557, 2566 (2007).

The implication is that a witness's truthfulness can be determined more reliably by reading a transcript of his or her testimony than by listening to it. The law, however, "has its own set of psychological principles and concepts that permeate all its activities. By keeping these independent of 'basic legal psychology' its statements are protected from any criticism from scientific psychology. Therefore, the law can regard its basic psychological statements as valid even if scientific verification qualifies them as invalid."⁵ It's time that law caught up with science.

I have mentioned the potentially important inroad that Rule 706 makes into the adversary system, and another and more traditional one, though little noted as constituting such an inroad, consists of the many exceptions to the hearsay rule.⁶ Most hearsay statements, including much of the hearsay admissible at trial under one or more of the exceptions (notably hearsay relied on by expert witnesses), are statements made by persons who are not available to be cross-examined and so are not subjected to the imagined rigors of the adversary process.

We're not about to change from a system of mainly oral testimony to one in which all testimony is written, but at least we should give jurors transcripts of the testimony they hear. Nowadays oral testimony at a trial or other hearing is not only recorded by the court reporter but also simultaneously transcribed electronically so that it can be read by the judge on a video screen on the bench as the witness testifies. Each juror should be similarly equipped so that he or she can be reading a transcript of each witness's testimony simultaneously with hearing and seeing the witness testify.

Sentencing criminals is another major task of trial judges, and one they could do better than they do by thinking more clearly about the goals and consequences of sentencing and the extensive academic literature that deals with this and related issues of criminal law.⁷ A particular shambles is

⁵ Viktoras Justickis, "Does the Law Use Even a Small Proportion of What Legal Psychology Has to Offer?" in *Psychology and Law: Bridging the Gap* 223 (Canter and Žukauskiene eds. 2008).

⁶ See, e.g., Fed. R. Evid. 801-807, and my article "On Hearsay," forthcoming in *Fordham Law Review* (2016).

⁷ See, e.g., my book *Divergent Paths* 197-221, 347-350 (2016); John Bronsteen et al., "Happiness and Punishment," 76 *U. Chi. L. Rev.* 1037, 1060 n. 115 (2009); Yair Listokin, "Crime and (with a Lag) Punishment: The Implications of Discounting for Equitable Sentencing," 44 *Am. Crim. L. Rev.* 115, 124 (2007); Stephanos Bibas, "Plea Bargaining Outside the Shadow of Trial," 117 *Harv. L. Rev.* 2463, 2504-2506 (2004); Paul H. Robinson &

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“supervised release,” which has almost entirely displaced parole in the federal system. Parole was sensibly based on observations of the convicted criminal’s behavior in prison; if he behaved himself he could expect a shortened sentence plus a degree of supervision during the parole period. Under the regime of supervised release, the judge at sentencing decides what restrictions to impose when the inmate is released, yet without having a clear idea of what he’ll be like when released, which may not be for many years. There is a huge menu of restrictions, many vague, for the judge to select from, and if he likes he can make up his own. We’ve had cases in which conditions of supervised release were imposed on defendants sentenced to life in prison. I call these Lazarus cases because the conditions will go into effect only if, after dying in prison, the defendant is resurrected.

Finally I’d like to see the trial judge play a more active role in the trial. He needn’t be just an umpire. I said that jurors shouldn’t be permitted to do Internet research, but the judge should be. With at least 4 billion web-sites accessible via Google, the Internet is an enormous repository of information pertinent to an enormous variety of legal and factual (notably technological and financial) issues that arise in or relate to trials. It’s important however, as I suggested earlier, that the lawyers be given a chance to rebut any contestable Internet-sourced evidence (as distinct from evidence that the judge can take judicial notice of because it’s incontestable, or evidence that merely supplies background or context that helps make the decision comprehensible) that the judge injects into the case. But to avoid complicating trials and confusing jurors, or for that matter lawyers and their clients and witnesses, judge-sponsored Internet-sourced evidence should remain, for the time being, exceptional rather than routine.

APPEALS TO THE COURTS OF APPEALS

There are changes at once desirable and feasible to be made at the federal court of appeals level too, some of form and some of substance. At the level of form, the first thing to do is burn all copies of the *Bluebook*,

John M. Darley, “The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best,” 91 *Geo. L.J.* 949, 954-955 (2003); Linda S. Beres & Thomas D. Griffith, “Habitual Offender Statutes and Criminal Deterrence,” 34 *Conn. L. Rev.* 55, 62-65 (2001); A. Mitchell Polinsky & Steven Shavell, “On the Disutility and Discounting of Imprisonment and the Theory of Deterrence,” 28 *J. Legal Studies* 1, 4-6 (1999).

in its latest edition 560 pages of rubbish,⁸ a terrible time waster for law clerks employed by judges who insist as many do that the citations in their opinions conform to the *Bluebook*; also for students at the Yale Law School who aspire to be selected for the staff of the *Yale Law Journal* – they must pass a five-hour exam on the *Bluebook*. Yet no serious reader pays attention to citation format; all the reader cares about is that the citation enable him or her to find the cited material. Just by reading judicial opinions law students learn how to cite cases, statutes, books, and articles; they don't need a citation treatise. In the office manual that I give my law clerks only two pages are devoted to citation format.

There is a zombie quality to the *Bluebook*. If you look up “*Bluebook*” in *Wikipedia*, you find under “reception” a summary of my criticisms; but you find no defenses.⁹ That however is typical of legal academia. The academy rarely bothers to defend any of its antiquated and pointless practices, numerous as they are; and the cone of silence embraces the judges and the practicing lawyers as well. Critics of established practices typically are ignored.

One might think that even if the *Bluebook* has to remain untouchable – that is to the legal profession what the Rules of Golf are to golfers¹⁰ – judges and their clerks would endeavor to eliminate from their judicial opinions superfluous verbiage, which is experiencing a weed-like growth and tenacity. Many an opinion ends for example with the statement that “for the foregoing reasons the decision of the district court is” affirmed or reversed. Were “for the foregoing reasons” deleted, would the reader think that the judge was concealing the reasons for the decision? That there *were* no reasons? That the reasons would be announced at some indefinite time in the future? Sometimes this silly flourish is found at the beginning of the opinion, as when we read that “for the reasons set forth below, we affirm [or reverse] the judgment of the district court.” Is the

⁸ To illustrate, I have included scans of Section R6.1 from the 20th edition of *The Bluebook*. See pages 195 & 196 below. R6.1 is one-and-a-half pages of mandates dealing with abbreviations, including directions to another 29 pages of “lists of specific abbreviations” in a dozen categories.

⁹ “Bluebook,” *Wikipedia*, <https://en.wikipedia.org/wiki/Bluebook#Reception>.

¹⁰ R&A Rules Limited and The United States Golf Association, *Rules of Golf* (33rd ed., Jan. 2016); www.usga.org/rules-hub.html.

ABBREVIATIONS, NUMERALS, AND SYMBOLS

6

Abbreviations

6.1

Tables at the end of this book contain lists of specific abbreviations for arbitral reporters (T5), case names (T6), court names (T7), explanatory phrases (T8), legislative documents (T9), geographical terms (T10), judges and officials (T11), months (T12), periodicals (T13), publishing terms (T14), services (T15), and subdivisions (T16).

Abbreviations not listed in this book should be avoided unless substantial space will be saved and the resulting abbreviation is unambiguous.

Note that in legal writing the same word may be abbreviated differently for different uses:

- ▶ F. and Fed.
- ▶ app. and App'x

(a) **Spacing.** In general, close up all adjacent single capitals:

- ▶ N.W.
- ▶ S.D.N.Y.

But do not close up single capitals with longer abbreviations:

- ▶ D. Mass.
- ▶ S. Ct.

In abbreviations of periodical names (see **table T13**), close up all adjacent single capitals except when one or more of the capitals refers to the name of an institutional entity, in which case set the capital or capitals referring to the entity off from other adjacent single capitals with a space. Thus:

- ▶ GEO. L.J.
- ▶ B.C. L. REV.
- ▶ N.Y.U. L. REV.
- ▶ S. ILL. U. L.J.

Individual numbers, including both numerals and ordinals, are treated as single capitals:

- ▶ F.3d
- ▶ S.E.2d
- ▶ A.L.R.4th

But, insert a space adjacent to any abbreviation containing two or more letters:

- ▶ So. 2d
- ▶ Cal. App. 3d
- ▶ F. Supp. 2d

R6

Abbreviations, Numerals, and Symbols

Close up initials in personal names:

- ▶ W.C. Fields

(b) Periods. Generally, every abbreviation should be followed by a period, except those in which the last letter of the original word is set off from the rest of the abbreviation by an apostrophe. Thus:

- ▶ Ave.
- ▶ Bldg.
- But:
- ▶ Ass'n
- ▶ Dep't

Some entities with widely recognized initials, e.g., AARP, CBS, CIA, FCC, FDA, FEC, NAACP, NLRB, are commonly referred to in spoken language by their initials rather than by their full names; such abbreviations may be used without periods in text, in case names, and as institutional authors. Do not, however, omit the periods when the abbreviations are used as reporter names, in names of codes, or as names of courts of decision. Thus:

- ▶ NLRB v. Baptist Hosp., Inc., 442 U.S. 773 (1979).
- But: E. Belden Corp., 239 N.L.R.B. 776 (1978).

United States may be abbreviated to "U.S." only when used as an adjective (do not omit the periods):

- ▶ U.S. history
- But: history of the United States

In addition to the abbreviation "U.S.," always retain periods in abbreviations not commonly referred to in speech as initials (e.g., N.Y., S.D.).

6.2 Numerals and Symbols

(a) Numerals. In general, spell out the numbers zero to ninety-nine in text and in footnotes; for larger numbers, use numerals. This general rule is subject, however, to the following exceptions:

- (i) Any number that *begins a sentence* must be spelled out.
- (ii) "Hundred," "thousand," and similar *round numbers* may be spelled out, if done so consistently.
- (iii) When a series includes numbers both less than 100 and greater than or equal to 100, numerals should be used for the entire series:
 - ▶ The plaintiffs gained, respectively, 117, 6, and 28 pounds.
- (iv) Numerals should be used if the number includes a decimal point.
- (v) Where material repeatedly refers to percentages or dollar amounts, numerals should be used for those percentages or amounts.
- (vi) Numerals should be used for section or other subdivision numbers.

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judge worried that, without the flourish, the reader would think that the opinion would not give reasons for the decision? Another silly expression is “after careful consideration, we [affirm, reverse, or whatever],” implying (unintentionally) that usually the judges are careless but this time they’ve given the case “careful consideration.”

Redundancy is a common form of superfluity in judicial opinions, as when the opinion states that “a question of fact [is] to be determined from the totality of all the circumstances.” A totality is all. Even grammatical mistakes are not uncommon, such as “his presentence report . . . recommended that he was subject to an enhanced sentence.” Terms appear commonly that have no meaning at all, such as “moral turpitude.”

Apart from being crowded with superfluous flourishes, of which I’ve given just a few examples, appellate opinions tend to be overlong, crammed with irrelevant facts and repulsive legal jargon (“subjective prong” is one of my favorite examples of judicial illiteracy – for further examples see footnote 15 below) and also crammed with headings and subheadings like the chapter headings in books, yet in opinions they introduce paragraphs that need no headings, with headings such as “Introduction,” “Facts,” “Analysis,” “Conclusion” (often a conclusion of one sentence or less). Often the opinion conceals the judges’ actual thinking, which may be at the level of hunch, common sense, emotion, or ideology (four headings you’ll never see), that motivated the decision. Would that judges would heed Polonius’s aphorism in *Hamlet* that “brevity is the soul of wit and tediousness its outward limbs and flourishes.”

My complaint is not that modern appellate opinions lack eloquence. They certainly do lack it. But eloquence is no longer a property of legal writing. No judge or Justice today writes eloquently, as Holmes and Brandeis and Cardozo and Jackson and a few others once did. The literary culture is moribund in today’s United States. Clarity, not eloquence, is the only attainable, though not attained, literary goal of modern judicial writing, cultural changes having largely killed off the humanities. (Among the current Supreme Court Justices, only Justice Breyer appears to have genuine cultural breadth.) The attainable goal in contemporary judicial opinions comes down to plain talk. I am therefore minded to take my motto from a century-old poem of the great Irish poet William Butler Yeats:

And I grew weary of the sun
Until my thoughts cleared up again,
Remembering that the best I have done
*Was done to make it plain.*¹¹

Judicial complexity afflicts the substance as well as form of appellate decision making. At the substantive level the obvious, and readily implementable, reform is to simplify – indeed largely to discard – the standards of appellate review. There are multiple standards for deciding how much weight to give the decision or findings of a district judge or an administrative agency – the main ones are substantial evidence, abuse of discretion, clearly erroneous, arbitrary and capricious, reasonableness, and *de novo*. But all but the last are as a practical matter synonyms. The last means that the appellate court gives no weight to a district court’s or an agency’s ruling on a pure issue of law, as otherwise there would be insufficient uniformity of law – rules of law would vary across district judges. The other standards of review mean little more than that in reviewing factual or procedural rulings the appellate court will affirm unless convinced that the ruling was incorrect; and so if the court has doubts about the soundness of the ruling but thinks it quite possible that the ruling is correct after all, it will affirm – ties go to the district court or agency. If my analysis is correct, there is no reason for an appellate opinion to mention a standard of review. All it need say, unless the challenged ruling is a pure legal ruling rather than a fact-finding or the application of a rule to facts, is that it is or is not persuaded by the district court’s or agency’s finding.

A number of common practices of federal appellate courts can easily be abandoned, and should be. One is announcing in advance (often months in advance) who the members of the panel will be that will hear a particular case. Such a pre-announcement is likely to cause the lawyers to focus on the particular leanings of the panel members, which may result in decisions that reflect the idiosyncrasies of particular judges rather than the law of the circuit and by doing so may provoke gratuitous rehearings *en banc*. Another unsound practice is for one judge on a panel to be assigned by the presiding judge to prepare a bench memo (which means, as a practical

¹¹ “Words,” from William Butler Yeats, *The Green Helmet and Other Poems* (1910) (emphasis added).

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matter, have a law clerk of the assigned judge prepare a bench memo) for circulation to the other members of the panel in advance of argument. The likely result is to give that judge disproportionate influence in the panel's deliberations. And finally, though federal judges' staffs, consisting mainly of law clerks, are very small from a managerial standpoint, judicial management is frequently inefficient, even eccentric, yet, given the smallness of the judges' staffs, readily improvable (one would think).¹²

The most serious problem with appellate litigation, both at the circuit level and in the Supreme Court (as I'll argue at greater length in Part II of my article), is the stodginess and stuffiness of the American legal culture, characteristics that I noted earlier with reference to the continued veneration of Magna Carta. Judges are forever looking backwards, and not only in constitutional cases, where the backward looks carry them back mainly to the late eighteenth century (the years of the original Constitution and the Bill of Rights) and to 1868 (the year the Fourteenth Amendment was ratified), but also in statutory and common law cases, where judicial precedents are venerated, as are many constitutional decisions. The judges march forward while looking back – that is the stodginess. Not for them T.S. Eliot's admonition: "Not fare well, but fare forward, voyagers."¹³ Nor Nietzsche's great critique of historicism.¹⁴ Rather "the many authors in the nineteenth century who thought they were recovering the historical Jesus" but in fact "were looking down the well of history and catching their own reflections. Jesus-scholars . . . are often writing autobiography and

¹² See Mitu Gulati and Richard A. Posner, "Judicial Staff Management," __ *Vanderbilt Law Review* __ (2016) (forthcoming); Richard A. Posner, *Divergent Paths: The Academy and the Judiciary* 222-230, 372-373 (2016).

¹³ "The Dry Salvages."

¹⁴ Friedrich Nietzsche, "On the Uses and Disadvantages of History for Life," in Nietzsche, *Untimely Meditations* 57 (R.J. Hollingdale trans. 1983). The essay was first published in 1874. I discussed the application of his critique to law at some length in my article "Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship," 67 *University of Chicago Law Review* 573 (2000). Since I am citing an article that is almost 150 years old, I have to qualify my aversion to the backward judicial glance. (And I cite an almost 100-year-old article by Max Weber in Part II of this article (footnote 9).) I am also mindful that two thousand years ago Aristotle formulated the modern concept of the rule of law: indifference of judges to the social status or individual attractiveness or repulsiveness of a litigant – in other words, seeing litigants as representative parties and thus judging, as the federal judicial oath states, "without respect to persons." 28 U.S.C. § 453.

calling it biography.”¹⁵ Modern judges and constitutional scholars project their policy preferences on the hapless framers of the Constitution and call this mirror-gazing history. The profession’s stuffiness, as distinct from stodginess, is its stubborn adherence to stale legal terminology, sometimes still in Latin.¹⁶

The problem is that the past does not contain usable solutions to contemporary problems. The eighteenth-century United States, the nineteenth-century United States, and much of the twentieth-century United States might as well be foreign countries so far as providing guidance to solving today’s legal problems is concerned. The judges and Justices know this, though they are unwilling to admit it (often even to themselves), because they feel or sense that their authority is bound up with ancientness, that if they admitted they are constantly remaking the law they would be thought legislators, competing with what judges self-servingly like to call “the political branches,” namely Congress and its state legislative counterparts and the executive branch (both federal and state), with its countless agencies and officials. Though not elected, federal judges legislate whenever their

¹⁵ A.N. Wilson, “Two Horses” (review of John Dominic Crossan, *Jesus and the Violence of Scripture*), *Times Literary Supplement*, Dec. 11, 2015, pp. 26, 27.

¹⁶ I offered the following litany of judicial offenses against the English language in my book *Reflections on Judging* 250 (2013): Latinisms (such as “ambit,” “*de minimis*,” “*eiusdem generis*,” “*sub silentio*”); legal clichés (such as “plain meaning,” “strict scrutiny,” “instant case,” “totality of circumstances,” “abuse of discretion,” “facial adequacy,” “facial challenge,” “chilling effect,” “canons of construction,” “gravamen,” and “implicates” in such expressions as “the statute implicates First Amendment concerns”); legal terms that have an ambulatory rather than a fixed meaning (such as “rational basis” and “proximate cause”); incurably vague “feel good” terms such as “justice” and “fairness”; pomposities such as “it is axiomatic that”; insincere verbal curtsies (“with all due respect,” or “I respectfully dissent”); and gruesome juxtapositions (such as “*Roe* and its progeny,” meaning *Roe v. Wade* and the subsequent abortion-rights cases). To this add: timid obeisance to clumsy norms of politically correct speech; unintelligible abbreviations gleaned from the *Bluebook*; archaic grammatical rules (for example, don’t begin a sentence with “But,” “And,” “However,” or “Moreover” — these words are “postpositives,” and never say “on the other hand” without having first said “on the one hand”); archaic rules of punctuation, especially placement of commas; and offenses against good English (“choate” for “not inchoate,” “pled” for “pleaded” when referring to a complaint or other pleading, “proven” as a verb instead of “proved,” “absent” and “due to” as adverbs, “habeas claim” for “habeas corpus claim,” “he breached his contract” for “he broke his contract”) or against good Latin: “*de minimus*” for “*de minimis*” and *ejusdem generis* for *eiusdem generis*).

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decisions create rules, because those rules have the force of law. The rules sometimes are inspired by orthodox legislative activity, including constitutional provisions, but the principal use to which judges put such provisions is as grants of judicial authority. The free-speech clause of the First Amendment can't mean what it says because a society can't function without a degree of censorship, so instead is treated by judges as an invitation to regulate legislative and executive regulations of speech — permitting some curtailments, such as defamation law and copyright and trademark law and laws punishing unauthorized disclosures of sensitive information, and forbidding others. But to say as judges like to say that in deciding what speech to privilege (adult pornography for example) and what speech to allow to be suppressed they are implementing decisions by the drafters or ratifiers of the Constitution is a joke.

To be continued in the next issue of the *Green Bag*.

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