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Brad Wendel
Cornell Law School, bradley-wendel@postoffice.law.cornell.edu

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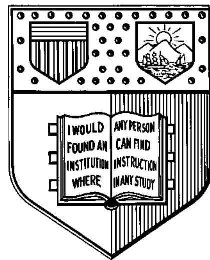

Jurisprudence and Judicial Ethics

W. Bradley Wendel

Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853-4901

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Jurisprudence and Judicial Ethics

Brad Wendel[1]

1. Introduction.

The fundamental value in judicial ethics is impartiality. This means that a judge is duty-bound to decide cases on their merits, be open to persuasion, and not influenced by improper considerations.[2] The paradigm case of unethical behavior by a judge is taking a bribe to decide a case in favor of one of the parties. This kind of corruption, which is fortunately rare in many developed countries, is also relatively uninteresting from an intellectual point of view. A more difficult case of failure of impartiality, conceptually speaking, involves a judge who relies on extra-legal factors as the basis for a judicial decision. Making sense of judicial ethics therefore requires a distinction between factors a judge may take into account when rendering a decision, and those which are excluded from consideration. In American legal discourse, this distinction is often stated in terms of law vs. politics, where "politics" is used to mean any normative view that is not incorporated into the law.[3] (However, American lawyers and judges do not regard it as improper to rely on "policy" arguments, which are, in effect, middle-level principles of political morality that play a role in justifying legal decisions. Linguistically, it is unfortunate that two

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[1] Professor of Law, Cornell Law School.

[2] The American Bar Association Model Code of Judicial Conduct defines impartiality as "absence of bias or prejudice in favor of, or against particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge."

[3] See, e.g., Duncan Kennedy, *A Critique of Adjudication {fin de siècle}* 24-25 (1997) (arguing that a central project for jurisprudence is drawing a line between ideology and law, with only the latter being admitted as a legitimate ground for judicial decisionmaking).

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cognate words, "policy" and "politics," are used to describe considerations that are appropriate and forbidden, respectively, in judicial decision-making.) This criticism — that judges act unethically when they make decisions the basis of politics, not law — is familiar from high-profile cases such as the *Bush v. Gore* vote-recount litigation in 2000,[4] and ruling by a federal appeals court (subsequently reversed by the Supreme Court) that the inclusion of "under God" in the Pledge of Allegiance recited in public schools is unconstitutional.[5] In contrast with legal decisions made by actors within the executive branch of government, in which policy and ideological factors may play a role,[6] judicial decisions are supposed to be justified solely on the basis of legal reasons.

The general theme of this paper is that the role of the judge, and the subject of judicial ethics, cannot be discussed in the abstract; the analysis must have a foundation in some view about the nature of law. Talking about "legal reasons" and criticizing judges for relying on non-legal reasons presupposes a tenable distinction between the legal and non-legal domains. This, of course, is one of the principal points of contention between legal positivists and their critics. If there is one position that unites the varieties of legal positivism, it is the distinction between what is law and what is not law is a social fact.[7] If this is the case, then it is an empirical matter to discover the content of the law — one simply looks at the relevant sources to determine what

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[4] 531 U.S. 98 (2000).

[5] Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004).

[6] Trevor W. Morrison, "Constitutional Avoidance in the Executive Branch," 103 *Columbia Law Review* 1189, 1194 (2006).

[7] Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press 1973), p. 37.

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judges have relied upon as reasons for their decisions. Metaphorically, one can draw a boundary line separating reasons that are "inside" the law from those that are "outside" the law. Armed with this information, one can then criticize, as failing to respect the obligation of impartiality, judges who rely on reasons outside the law. These excluded reasons could be political and ideological beliefs, personal relationships with the parties, the payment of bribes, legally irrelevant facts or evaluations (such as the wealth, status, or physical attractiveness of one of the parties), and so on. On the other hand, if some kind of moral or political argument is required to differentiate between law and non-law, it is not simply an empirical matter to draw a boundary separating inside from outside. The distinction between law and non-law would be evaluative and contestable, and would make reference to the very sorts of political, ideological, and policy reasons that may or may not be part of the law. The claim that the possibility of a value-free distinction between law and non-law is untenable is at the heart of Ronald Dworkin's theory of law. Thus, the Hart-Dworkin debate will serve as the framework for this paper.

More specifically, the paper will discuss two aspects of the law-politics distinction. First, principles of judicial impartiality must take a position on the existence of judicial discretion and the problem of legal interpretation.[8] In Hart's jurisprudence, there are some questions to which a uniquely correct legal answer cannot be given. As Hart noted, linguistic rules are to some extent indeterminate in their application, due to the open texture of language, the necessity of exercising judgment to determine what fact situations fall under the specification of a rule, and the plurality

[8] Kent Greenawalt, "Discretion and the Judicial Decision: The Elusive Quest for the Fetters That Bind Judges," 75 *Columbia Law Review* 359 (1975).

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of aims that may be embodied in a rule.[9] When a judge encounters some gap in the law, where it is clear that there is no correct answer to the legal question, the judge must exercise discretion, and will in effect create new law.[10] Dworkin, by contrast, denies that a judge has discretion in cases where the application of a legal rule seems indeterminate. If the judge's decision truly imposes duties on the parties, and is justified with reference to the parties' *rights*, then there must be some authoritative source of rights — legal rules, standards, or principles — that exists before the judge makes her decision, and controls the judge's her decision-making.[11] Hart and Dworkin agree that judges are duty-bound to follow the law and not make decisions on the basis of ideology or personal preferences where there is applicable law controlling the decision. The difference is that Dworkin thinks there is always applicable law controlling the decision, while Hart believes there are cases in which judges permissibly "legislate," or make decisions on the basis of extra-legal considerations. For Dworkin to sustain this claim, however, he must first provide good reasons to believe that what look like extra-legal normative political reasons are actually part of the law.

The second area of discussion is the justification for certain restrictions imposed on judges by positive law (rules of judicial conduct, statutes, and court rules) often misleadingly referred to as rules of "judicial ethics." (Civilians may refer to these as the *deontologie* of judges.) At least in the United States, many of these restrictions purport to regulate bias and the

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[9] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 2d ed., 1994), pp. 126-29.

[10] *Id.*, pp. 135-36, 145-47.

[11] Ronald Dworkin, "The Model of Rules I," in *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press 1977), pp. 32-34; "Hard Cases," in *id.*, pp. 101-05.

risk that judges will not be impartial. For example, a federal statute permits a party to file a motion to disqualify a judge "in any proceeding where [the judge's] impartiality might reasonably be questioned."[12] Courts applying the rules governing judicial conduct often regulate prophylactically, by disqualifying judges from presiding over certain types of cases, based on conduct that is taken to be evidence of bias. This conduct can include speaking or writing publicly on controversial political and legal subjects, being a member or serving on the board of directors of an organization with a particular ideological viewpoint, or teaching at or attending continuing legal education seminars in which particular political views are expressed. One of the recurring areas of controversy in the application of these rules are cases in which the judge's alleged failure of impartiality is related to having controversial political or religious beliefs.

There are some interesting empirical issues which must be passed over here, including (1) the validity in general of the inference from conduct to stable dispositions or character traits that can be used to reliably predict future behavior — many cognitive psychologists argue that affirming the validity of that inference is a mistake, i.e. the "fundamental attribution error"[13]; (2) the relevance of the law vs. judges' political attitudes as a basis for predicting judicial decisions — political scientists have proposed and tested an "attitudinal model" for predicting decisions, which asserts that political beliefs are a better predictor of judicial decisions than legal rules[14];

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[12] 28 U.S.C. § 455(a).

[13] See, e.g., John M. Doris, *Lack of Character: Personality and Moral Behavior* (Cambridge: Cambridge University Press 2002), pp. 93-97.

[14] Jeffrey A. Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge: Cambridge University Press 1993).

and (3) the capacity of judges (or anyone, for that matter) to set aside irrelevant considerations and decide cases on their merits.[15] The normative question to focus on here, however, is whether there is anything wrong with a judge basing a legal decision, in whole or in part, on the sorts of considerations that anti-bias rules focus on.

2. Civilian and Common-Law Judges.

Before discussing these two issues, it is necessary to say something briefly on the difference between the judicial role in common-law and civil-law systems. It would not be appropriate (or at least it would not be very interesting) to present a paper at an international conference that focuses only on decision-making by common-law judges. However, it may seem to civilian lawyers that this entire question is misplaced, because the official view of judges in civil-law systems is that they do not engage in interpretation at all, but simply apply the code to the facts in a syllogistic way. The judicial role is to find the right provision of the code, and reason from that provision (the major premise), the facts (the minor premise), to the conclusion which follows as a matter of deductive logic.[16] If there is any ambiguity in the code, the judge should refer the question back to the legislature for resolution; to do otherwise would be a violation of the separation of powers between the judicial and legislative branches of

[15] See Andrew J. Wistrich, Chris Guthrie and Jeffrey J. Rachlinksi, "Can Judges Ignore Inadmissible Evidence? The Difficulty of Deliberately Disregarding," 153 *University of Pennsylvania Law Review* 1251 (2005).

[16] John Henry Merryman, *The Civil Law Tradition* (Stanford, Cal.: Stanford University Press, 2d ed., 1985), p. 36.

government. The judge is a "faithful agent of the statutory law,"[17] who does not have a personality of her own, does not engage in creative interpretation, and whose decisions do not themselves qualify as a source of law.

My colleague Mitch Lasser argues that this official portrait seriously misrepresents reality, that judges in civil-law systems are aware of and rely on policy reasons as a basis for judicial decisions, that there is uncertainty in the application of code provisions to the facts of litigated disputes, and that the short, deductively reasoned judicial opinions published by civilian courts do not represent the real reasons lying behind the decision.[18] Lasser goes so far as to say that it is taken for granted that the code contains gaps, conflicts, and ambiguities; that the model of adjudication as deductive reasoning is untenable; and that the judiciary plays an essential role in the creation and development of the law.[19] He quotes the author of a leading French treatise on civil law as saying that "the judge is a man and not a syllogism machine: he judges by his intuition and his sensitivity as much as he does by his knowledge of rules and by his logic."[20] The French judge therefore is concerned that legal decisions be equitable and just, in the same way that common-law judges are attentive to policy considerations.

For example, in a tort case that reached the highest French court, the *Cour de cassation*,

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[17] Mitchel de S.-O.-L'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press 2004), p. 37.

[18] *Id.*, pp. 42-44.

[19] *Id.*, p. 45.

[20] *Id.*, p. 46.

the legal issue was whether the plaintiff could recover general damages (what American lawyers would call non-pecuniary damages) even if she was in a permanent vegetative state. Although the court's written opinion was, as is typical, only three paragraphs long and extremely cryptic, published academic commentary reveals that the judges were sensitive to policy considerations. There are also internal (and highly confidential) reports by judicial officers, the Advocate General and the Reporting Judge, which play an important role in the court's decision-making process.[21] Significantly, the reports of these judicial officers make frequent reference to the academic commentary which cites broader policy considerations, beyond the statutory text, supporting judicial decisions. Examining these documents reveals that the court in the tort case was concerned with its institutional relationships with other courts, such as the Criminal Chamber, the lack of clarity in the law that had arisen around the issue of general damages, the value of human dignity that would be promoted by permitting the plaintiff in this case to recover, and pragmatic considerations such as the difficulty of evaluating general damages awards.[22] American lawyers would recognize these considerations as exactly the sorts of policy reasons — i.e. middle-level principles of justice — that figure prominently in the discourse of common-law courts in tort cases. If this description of the French system in action is accurate, it serves as a caution not to rely too heavily on the simplistic picture of civil-law judges as mechanical decision-makers. The difference between the French and the American systems, as typical representatives of civil-law and common-law styles of adjudication, turns out to be in the candor with which judges disclose the basis for their decisions in public opinions. However, the two

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[21] *Id.*, pp. 47-49.

[22] *Id.*, pp. 40-44, 56-60.

systems are more similar than they may appear at first in terms of the extent to which judicial decision-making is not mechanical or algorithmic, and judges must exercise discretion when deciding cases. As a matter of legal theory, the same problem thus arises in both systems — namely, what considerations are relevant to justifying a judicial decision. This is the philosophical problem with which this paper will be primarily concerned.

3. Legal Positivism and Judicial Discretion.

On the assumption that judicial decision-making is not mechanical, and that judges rely on considerations other than the plain meaning of statutory texts and (in common-law systems) a narrow reading of the holdings of precedent cases, how can we formulate a test for impartiality that differentiates between permissible and impermissible grounds for judicial decisions? For the purposes of this discussion, assume a case similar to the one described by Lasser — a tort issue concerning the recoverability of damages that might come before any appellate court.[23] The plaintiff seeks damages for emotional distress, as a result of having witnessed her husband, who was standing nearby, be struck by a car driven by the defendant. She testified that she feared for her own safety, even though she was not struck by the car. However, she was so frightened that she became physically ill. The trial court dismissed the plaintiff's claim for damages, on the authority of a precedent case which held that a plaintiff cannot recover for emotional distress

[23] This discussion is based very loosely on a case from the Supreme Court of New Jersey, *Falzone v. Busch*, 214 A.2d 12 (N.J. 1965). It bears some similarity to the example of Mrs. McLoughlin, used by Dworkin throughout *Law's Empire* to illustrate different conceptions of law and adjudication. Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press 1986), p. 24 and *passim*.

absent a physical impact upon the plaintiff. The reasons the court gave in the earlier case were as follows:

- A person is legally responsible only for the natural and proximate results of a negligent act. Physical illness is not the natural and proximate result of fright in a person of ordinary physical and mental vigor.
- Awarding damages for emotional injury is unfair because the defendant's liability will be out of proportion to the defendant's culpability.
- The magnitude of emotional injuries tends to be unforeseeable. It is unfair to impose liability for unforeseeable harms, because there is no way the defendant could have anticipated and prevented them.
- Permitting the plaintiff to recover for emotional distress in this case would "naturally result in a flood of litigation" because it is easy to feign emotional distress.
- It is impossible to calculate the amount of recoverable damages without speculation and conjecture. (In the United States this argument has an institutional-competence aspect, because non-expert juries assign damages to the plaintiff, subject to some modification by the trial judge.)

The judge must now decide what to do in the present case. The jurisprudential question this raises is, what is the law governing the judge's decision? The question for judicial ethics is what the value of impartiality requires. My suggestion is that the answers to these questions are intimately related, that an impartial judge is one who follows the law, but ascertaining the content of the law is quite a bit less clear than scholars of judicial ethics tend to assume.

Dworkin hints at this connection when he says that "judicial decisions in civil cases . . . characteristically are *and should be* generated by principle not policy."[24] For Dworkin, the

[24] Ronald Dworkin, "Hard Cases," in *Taking Rights Seriously*, *supra*, p. 84.

distinction between reasons of principle and reasons of policy is that principles can be shown to be consistent with past political decisions made by other officials (judges and legislators) within a general political theory that justifies those decisions.[25] Policy reasons, in contrast with principles, may refer to moral norms but these are not norms that belong to *this particular society's* political morality.[26] Reasons of principle are therefore "inside" a particular society's law and reasons of policy are "outside" the law of that community, but note that for Dworkin, "the law" must be understood in an idiosyncratic way. Hart claims that for any legal system, there is a master rule for distinguishing law from non-law; this is the rule of recognition.[27] He further insists that the existence and content of the law can be determined without reference to moral criteria.[28] Dworkin challenges both the existence of a rule of recognition and the content-independence of law. He denies that a rule of recognition can ever be formulated because moral argumentation is necessary to establish the existence of legal principles.[29] Reasons of principle are controversial in the sense that they cannot simply be "read off" the law in a straightforward way, without arguing that they are justified on the basis of the normative political theory.[30] There

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[25] *Id.*, pp. 87-88.

[26] *Id.*, pp. 90-92; Dworkin, "The Model of Rules I," *supra*, p. 22.

[27] Hart, *supra*, pp. 100-110.

[28] Hart, "Postscript," *supra*, p. 269. Hart stressed the content-independence of law in papers written after the first edition of *The Concept of Law*. See H.L.A. Hart, "Commands and Authoritative Legal Reasons," in *Essays on Bentham* (Oxford: Clarendon Press 1982), p. 243.

[29] Dworkin, "The Model of Rules I," *supra*, pp. 40-41, 43; Dworkin, "Hard Cases," *supra*, p. 90.

[30] Ronald Dworkin, "The Model of Rules II," in *Taking Rights Seriously*, *supra*, p. 65-68.

can be no source-based criteria for identifying legal principles.[31] Further, according to Dworkin, we must believe in the existence of legal principles in order to account for what a judge is doing when he or she decides a case in which existing law does not unambiguously determine the result. In Dworkin's view, a judge should never step outside existing law and make new law, for to do so would be to retroactively confer new rights on the parties.[32]

In the tort case example, "the law" consists most obviously of a rule — "no liability for emotional distress without physical impact." In addition to that rule, however, the law *arguably* consists of the reasons given by judges in support of that rule, as well as reasons given in other cases that tend to support the a very different rule. Other cases might have permitted recovery, albeit in circumstances that are factually distinguishable from the exact case before the court, citing reasons such as the importance of deterring wrongdoing; the injustice of permitting an injury to an innocent victim to go uncompensated; the anomaly that recovery for emotional distress is permitted in cases where there is some physical impact, however slight; and the ability of trial courts, using rules of evidence and their power to reduce excessive damage awards, to provide adequate guidance to juries in the assessment of damages. In our hypothetical, it is unclear how a judge should decide the case. Some judges might read the precedent case narrowly, and deny recovery to the plaintiff; other judges might read the precedent case more broadly and permit the plaintiff to recover damages. We recognize the possibility of a reasoned

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[31] Compare Joseph Raz, "Authority, Law and Morality," in Ethics in the Public Domain (Oxford: Clarendon Press 1994).

[32] Dworkin, "The Model of Rules I," *supra*, p. 30; Dworkin, "Hard Cases," *supra*, p. 81.

discourse contesting the outcomes of these cases. The interesting jurisprudential question, which will shed light on the judicial-ethics question, is *what accounts for* the disagreement between these judges. There are at least four possibilities, although I think only the first two are plausible descriptions of how adjudication works in practice.

(1) Dworkin would say there is some uncertainty over the *grounds* of law, by virtue of which a proposition of law (e.g. "the plaintiff is entitled to recover damages for emotional distress without a physical impact") may be deemed true or false.[33] Dworkin's position is a challenge to Hart's view that the authority of law is a function of a convention among judges of making reference to certain considerations when deciding cases.[34] It amounts to a denial of the view that "social facts are what make rule-of-recognition statements true, and therefore social facts are what make it the case that the law is one way rather than another."[35] According to Dworkin, there seems to be no stable convention of relying on, or excluding reliance on, certain considerations as the grounds of law. Some of the reasons cited by judges in support of their decisions are part of the grounds of law, but others are just rhetorical flourishes or irrelevant references to extra-legal policy considerations. The only way to know the difference is to ask what the point is of having law, and make political arguments about the function of law in our

[33] Dworkin, *Law's Empire*, *supra*, p. 4.

[34] See Scott Shapiro, "The Hart/Dworkin Debate: A Short Guide for the Perplexed," in Arthur Ripstein, ed., *Ronald Dworkin* (Cambridge: Cambridge University Press 2007).

[35] Benjamin C. Zipursky, "The Model of Social Facts," in Jules Coleman, ed., *Hart's Postscript: Essays on the Postscript to* The Concept of Law (Oxford: Oxford University Press 2001), p. 223.

society.[36] The boundary between "inside" the law and "outside" the law is therefore contestable and requires normative political arguments to establish. A judge's decision must fit with existing precedents, and "the actual political history of his community will sometimes check his other political convictions," but once a possible interpretation passes a threshold of fit, the judge must apply "[h]is own moral and political convictions" to say what the law of the community is.[37]

(2) A positivist could avoid the force of Dworkin's objection by arguing that the law is one thing, and its application is another.[38] The inside/outside boundary is relatively determinate, and may be ascertained empirically. Rule-of-recognition statements can still be evaluated on social facts. In addition to criteria for determining the content of the law, there are also "standards that determine acceptable methods of interpreting and applying" legal norms.[39] It is important not to confuse questions pertaining to the content of law with questions about its application. Any normative arguments concerning the nature of judging pertain to these latter standards, not to the content of the law (i.e. are not contests over the specification of the rule of recognition, but its application).[40] One might even observe that Dworkin's own theory does not exclude this second possibility. He argues that ascertaining the law on any issue requires the judge to ask which interpretation (of the statute or the precedents) will show the existing law of

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[36] Dworkin, *Law's Empire*, *supra*, pp. 65-68.

[37] *Id.*, pp. 255-56.

[38] See E. Philip Soper, "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute," in Marshall Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* (London: Duckworth 1983).

[39] *Id.*, p. 8.

[40] See Jules Coleman, "Negative and Positive Positivism," in Cohen, *supra*.

this community in its best light.[41] A judge asking this question may, in effect, be asking whether normative political theory requires including a given reason as part of the grounds of the law, but she could also be asking, in effect, whether normative political theory entails standards for applying the law that gives that consideration greater weight in judicial deliberations.

(3) The "official" theory of judging embraced by the civil law — that the judge is merely "the mouth that pronounces the words of the law"[42] — would admit no uncertainty with respect to either the grounds of law or the methods of its application. Comparative law scholars have shown, however, that judges may write as if legal judgments were exercises in deductive logical reasoning, but in fact there is a great deal of ambiguity and uncertainty in the law, and therefore room for discretionary decision-making by judges. Because of the open texture of language, general rules can never determine their own application; thus, adhering to the "official" theory of mechanical judging has only the effect of disguising the need for the exercise of discretion.[43]

(4) The radical indeterminacy thesis, associated with some strands of the American legal realist and critical legal studies movements, is that law does not constrain the decisions of judges. The domains of law and politics are extensionally identical, so to the extent judges seem to be appealing to specifically legal norms, they are doing so merely to camouflage the true, political, basis of their decision. There are numerous well known problems with this position. For one

[41] Dworkin, *Law's Empire*, *supra*, p. 52, 90, 225, 256.

[42] Lasser, *supra*, p. 37 (quoting Montesquieu, *The Spirit of the Laws*).

[43] Hart, *supra*, p. 129.

thing, as Hart pointed out, a judge who believes that her decisions are unconstrained by law would be unable to think of herself as *a judge*, as opposed to a private citizen.[44] In order for a legal system to exist, judges must take the internal point of view toward the rule of recognition, and regard it as stating a genuine obligation.[45] The radical indeterminacy thesis cannot account for the normativity of law — that is, its capacity to create obligations on the part of judges to justify their decisions on the grounds of law. A related problem, which will be important to the discussion of judging in good faith, in the following section, is that the claim of radical indeterminacy confuses *causal* explanations with *justifications* of judicial decisions.[46] A reason that may be given as an explanation of a judicial decision (e.g. that a judge has a particular partisan or ideological commitment) may be insufficient as a justification.

To see how this jurisprudential issue makes a practical difference in judicial ethics, imagine two different judges considering the hypothetical tort case. One is ideologically committed to the free market, distrusts government regulation, thinks industries do a fairly good job of voluntary compliance with reasonable norms of public safety, believes in principles of individual liberty and personal responsibility, and resists any attempt to redistribute wealth on a more egalitarian basis. The second judge take a dim view of the willingness of businesses to comply with their social responsibilities and cannot be trusted with self-regulation, believes that

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[44] *Id.*, p. 136.

[45] *Id.*, p. 116 (if the rule of recognition "is to exist at all, [it] must be regarded from the internal point of view as a public, common standard of correct judicial decision, and not as something which each judge merely obeys for his part only").

[46] Steven J. Burton, *Judging in Good Faith* (Cambridge: Cambridge University Press 1992), pp. 43-47.

market failure and consumer irrationality justify more extensive government regulation, and abhors gross inequalities of wealth and favors progressive taxation and income redistribution. (In the United States these positions correspond roughly with the Republican and Democratic parties, respectively, so for convenience we can refer to these judges as the Republican and Democratic judges.) The ethical question would be uninteresting, however, if it were the case either that the law were perfectly determinate or it were completely indeterminate. If position (4) were correct and these two judges could decide the case on basis of their ideological convictions and not be deemed to have reached a legally incorrect result, then presumably they would simply follow their political preferences and provide a *post hoc* legal justification. On the other hand, if position (3) were correct and the application of the law to the facts of this case was a matter of syllogistic deduction, the political viewpoints of the judges would be irrelevant, as any competent reasoner would reach the same conclusion.

There are interesting questions of judicial ethics only if, as I believe is the case, legal decision-making is neither a species of deductive logic nor subject to the unconstrained whims or purely political beliefs of judges. In that case, judges can disagree in good faith about the right decision in hard cases. The Hart/Dworkin debate boils down to the question of what judges are doing when they disagree about the right decision in hard cases. Position (1), above, represents Dworkin's argument that the disagreement is over whether some consideration is part of the law or not. Position (2) takes the content of the law as given by social sources, and maintains that the disagreement is over how legal reasons should be prioritized or balanced. Normative political (i.e. non-legal) arguments within these positions pertain to whether something ought to be

considered part of the law (position (1)) or how legal reasons should be ranked and weighted (position (2)). Applying these positions to our example, the Republican and Democratic judges would view the tort case as follows.

Position (1) (Dworkin): Reasons given by the judge in the precedent case (that it is unfair to impose liability for harms that are unforeseeable, etc.) and in other analogous cases must be understood as arguments *of* political theory about what the law *should* be.[47] The practice of making and justifying legal judgments is normative all the way down. In order to decide the tort case, a judge "must find, if he can, some coherent theory about legal rights" which accounts for and justifies all relevant prior legislation and judicial decisions in the area.[48] Because one can tell a "Republican" and a "Democratic" story to explain and justify the existing law of emotional distress damages, it is the task of each judge to engage "[h]is own moral and political convictions"[49] to determine the content of the law. When the judge has done this, the judge is not creating new law, but discovering what the law *is*, even though political argument was required to ascertain the content of the law.[50] This position raises the possibility that a Republican judge could decide the case one way (probably denying recovery of emotional distress damages) and the Democratic judge could reach the opposite result (permitting recovery), and *both* could claim that they are giving an account of the law as it actually existed, prior to their decision. This is a

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[47] Dworkin, *Law's Empire*, *supra*, p. 248 ("he must decide which interpretation shows the legal record to be the best it can be *from the standpoint of substantive political morality*").

[48] *Id.*, p. 240.

[49] *Id.*, p. 256.

[50] *Id.*, pp. 260-61.

consequence of the "protestantism" of Dworkin's theory of law.[51] Dworkin believes that even though people who participate in the same social practice share various background understandings about their common form of life, there is often not consensus on the best constructive interpretation of law that will show the community's political morality in its best light.[52] Interpretation is therefore "insufficiently intersubjective"[53] to ensure that judges are not simply enacting their own political preferences under the guise of interpreting the law.

Position (2) (Hart): To the extent judges make a conventional practice of relying on certain considerations, the reasons given in past cases can be identified as law without resort to normative political theory. If there is an area of indeterminacy in the law, judges must exercise discretion, weigh and balance the relevant considerations, and reach the best judgment they can, understanding that they are, in effect, creating new law.[54] There may be standards, such as principles of judicial craft, that constrain this decision. Alternatively, a judge may look to the community's moral standards to fill gaps and resolve ambiguities in the law.[55] In the tort case, Republican and Democratic judges may differ in the way the weigh and balance the competing considerations as a normative political matter, but if they are honest about following community moral standards, their decisions may converge. Similarly, if there are genuine principles of

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[51] See Gerald J. Postema, "'Protestant' Interpretation and Social Practices," 6 *Law and Philosophy* 283 (1987).

[52] *Id.*, pp. 297-98.

[53] *Id.*, p. 301.

[54] Hart, *supra*, pp. 132-36.

[55] See Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press 1949), p. 142.

judicial craft that constrain the way they weigh and prioritize the reasons identified (via social facts) as part of the law, they may reach the same decision. However, neither of these sources of constraint on judicial discretion seem adequate. Unless the community speaks with one voice on matters of justice, there is unlikely to be a consensus for a conscientious judge to discover. The judge would therefore be forced to select some aspect of the community's pluralistic, perhaps even contradictory, discourse about justice as the community's "real" political morality. At this point the neutral discovery of social facts has ended and the judge is engaging in political argumentation. Appeals to a non-political craft of judging as the exercise of Aristotelian practical wisdom run into the same problem of pluralism. Judgment for Aristotle is always exercised with reference to some end of the practice in question, but in most political communities there are multiple competing ends served by the law.

4. *Justifying Rules of Judicial Ethics.*

The positive law of judicial ethics is aimed at minimizing the effect of the judge's political views on the outcomes of cases. For example, the American Bar Association's Model Code of Judicial Conduct prohibits judges from belonging to organizations where membership in that organization would "cast reasonable doubt on the judge's capacity to act impartially as a judge."[56] Continuing on the theme of the hypothetical tort case, in the United States there are

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[56] ABA Model Code, Canon 4A(1). Membership in organizations "devoted to the improvement of the law, the legal system or the administration of justice" is presumptively permitted. *Id.*, Canon 4C(3). However, this permission is qualified by the requirement that membership not cast reasonable doubt on the judge's capacity to act impartially. *Id.*, Canon 4C(3), cmt. [2].

numerous interest and lobbying groups on both sides of the tort reform debate — the Chamber of Commerce and American Tort Reform Association on the side of manufacturers and other businesses, and the American Trial Lawyers Association and consumer-protection associations like Public Citizen on the other side. A judge's membership in one of these organizations might lead an observer to believe that the judge had already made up her mind about the political issues in dispute in the case, and would therefore be unable to decide the case impartially. Other provisions of the rules of judicial ethics restrict public comments by judges about pending cases,[57] prohibit judges from making "pledges, promises, or commitments that are inconsistent" with impartial judging of cases,[58] and require judges to disqualify themselves from presiding over any case in which their impartiality can reasonably be questioned.[59] Judges can potentially run afoul of these rules by, for example, writing op-ed pieces in the newspaper criticizing another court's decision, advocating for a change in the law, or campaigning for judicial office on a political platform that explicitly or implicitly suggests the outcome in certain cases. In each instance, the rationale behind the rule is that the judge's speech or conduct indicates an inability to decide cases impartially.

In the United States, where judges are either elected or appointed in highly public, contentious processes, judges and candidates for judicial office typically declare that they are able to set aside their political beliefs and decided cases "on the law." (Supreme Court

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[57] *Id.*, Canon 3B(9).

[58] *Id.*, Canon 3B(10).

[59] *Id.*, Canon 3E(1).

confirmation hearings are replete with incantatory statements by the nominee and his supporters that if confirmed, he will "follow the law as enacted by the legislature and not make new law based on his personal opinions.") However, the discussion of the Hart/Dworkin debate was intended to show that the political viewpoints of judges may *necessarily* influence the outcomes of cases. In Dworkin's view, judging is inherently a political practice, because ascertaining the content of law is impossible without resort to normative political argument. In Hart's view, by contrast, it is possible to ascertain the content of law empirically, but there may be a further normative question about the best way to prioritize or balance competing legal considerations. The problem is, therefore, whether there is any point to having legal rules that seek to prevent the influence of politics on judging.

One way to answer this question in the affirmative would be to claim there is a difference between reasons of political morality that are relevant to deciding cases (Dworkin's reasons of "principle") and political viewpoints that are irrelevant to the law (Dworkin's reasons of "policy"). Judges who relied on excluded policy reasons could be sanctioned for failure of impartiality, while preserving the ability of judges to rely on included reasons of principle in deciding cases. But Dworkin's own argument shows that this is an untenable strategy. The principles/policy distinction would have to be drawn either by something like Hart's rule of recognition, which differentiates law from non-law as a matter of social fact, or by substantive political argument. As noted above, Dworkin favors the latter strategy, but if moral arguments are required to ascertain the content of law, then it seems unfair for any theorist to exclude a category of reasons *ab initio*. To do so would be to beg the question the argument is aimed at

establishing. Thus, a Dworkinian style of judicial ethics would have to forego limitations on judicial activities and speech aimed at securing a separation between politics and the judicial role. Even if it is possible to differentiate between included and excluded reasons on the basis of social facts, non-legal political reasons would still enter into the process of deciding cases, via the standards judges employ for determining acceptable methods of interpreting and applying the law. The only way to deny this claim is to adhere to an implausible mechanical or formal conception of judging, which holds that judges really are just the mouthpiece of the impersonal, objective law. (This is position (3), above.) At least in common-law systems, however, it is commonly believed that judges can and do vary in their approaches to legal interpretation, and that these variations can correlate with political viewpoints. For example, the Republican judge in the hypothetical might favor an interpretive methodology which sees courts as having a limited role in expanding the rights of consumers, preferring to leave the expansion of existing rights or the creation of new rights to the legislature. A Democratic judge, by contrast, might believe it appropriate for judges to read precedents broadly and to emphasize the expansion of existing rights and the creation of new ones.

I believe the right approach to judicial ethics is to focus on the application side of the distinction between the content of law (which may or may not be susceptible of determination on the basis of social facts) and standards for its application. Where there are multiple plausible interpretations of existing cases, statutes, and other applicable legal norms, all we can reasonably expect is that a judge deliberate in good faith and reach the conclusion she believes represents the

best reading of the governing law.[60] The subject of judicial ethics is essentially an attempt to flesh out the idea of judging in good faith. That, I suggest, is fundamentally about being prepared to give reasons in justification of a judicial decision. Labeling these reasons as "legal" or "political" is less helpful than simply requiring judges to articulate them, to a real or hypothetical audience of competent observers. As long as a judge's ideological beliefs are germane to legal interpretation, I see no reason to regard judging on this basis as a failure of impartiality, as long as the judge in question is prepared to justify her decision as a constructive interpretation of authoritative texts (cases, statutes, regulations, and the like) in light of the political principles that would best explain and justify them.[61] If the argument given by the judge refers to the sorts of reasons that other judges, lawyers, and legal scholars tend to find persuasive *as justifications*, then the judge is acting ethically. If the only basis for a judge's decision was that she thought the result was more socially desirable, or accorded with her ideological commitments, the judge's decision would be unjustifiable to others. It is important to see that a judge is not required to persuade observers that her decision is the only right one; it is enough for the judge to give reasons to believe that her interpretation is a plausible one, which could be reached on the basis of the reasons given.

Legal systems may be expected to vary in the institutional mechanisms they employ to ensure that a judge's decision is defensible on the basis of legal reasons. In common law systems, judges in appellate courts are ordinarily expected to publish written opinions giving

[60] Greenawalt, *supra*, p. 377.

[61] Dworkin, *Law's Empire*, *supra*, pp. 185, 217-20, 225-28.

reasons for their decision. Appellate judges may dispense with this requirement only in routine, uncontroversial cases. Trial court judges are not required to provide written explanations for their decisions, but as a practice they frequently do, particularly when ruling on motions that can affect the outcome of the litigation. In the French civil law system, academics perform the reason-giving function assigned to judges in common-law systems. "In the case *notes* published alongside the courts' latest decisions, French academics explain the courts' latest decisions, place them in the context of the past and present *jurisprudence*, and thereby play an important role in the explanation and dissemination . . . of judicial norms and eventually legal rules."[62] In both common and civil law systems, therefore, reason-giving is regarded as a fundamental aspect of adjudication. Judicial reasoning may be more or less transparent in these systems, but it serves the same constraining function. A decision based purely on partisan affiliation or ideological preferences, with no foundation in the law, would not be justifiable to the relevant audience of well-informed judges, lawyers, and academics.

If failures of judicial impartiality are kept in check by institutional mechanisms that require reason-giving by judges, there seems to be little point in having rules of judicial ethics that regulate the political speech and affiliation of judges. In the United States at least, there is a tendency for these rules to obscure the real issues in judicial ethics. For example, Justice Scalia was criticized for stating in a speech to a conservative audience that he believed it was not a violation of the constitutional separation of church and state to require public school children to state their allegiance to one nation "under God." He subsequently voluntarily recused himself

[62] Lasser, *supra*, p. 191.

from deciding a case questioning the constitutionality of requiring children to recite the pledge, concluding that his impartiality could reasonably be questioned.[63] Many commentators approved of this outcome, arguing that Scalia was not impartial, and that his conservative beliefs would have in effect foreordained his vote in the case.[64] But notice what happened in the litigation: The Supreme Court reversed a federal appeals court's decision that the pledge's "under God" language was unconstitutional, and legal scholars for the most part agreed that its decision was correct as a matter of constitutional law. In other words, Scalia's position was correct — or at the very least defensible in good faith — as an interpretation of the governing law. His vote might have been causally determined by his political commitments or his religious beliefs, but it was justifiable on the basis of law. The Supreme Court decision reversing the lower court was unanimous, including four judges generally regarded as left-leaning, two centrists, and two conservatives. Thus, a rule requiring Justice Scalia's disqualification in this case seems overinclusive. Rules that sweep this broadly may be justified in legal systems which do not have effective institutional mechanisms for ensuring that a decision is justifiable on legal grounds. In the systems with which I am familiar, however, the requirement that judges give reasons for their decisions is a sufficient guarantee of impartiality.

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[63] As required by 28 U.S.C. § 455(a).

[64] See, e.g., Dahlia Lithwick, "Scaliapalooza: The Supreme Court's Pocket Jeremiah," *Slate* (Oct. 30, 2003).