Judgment

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What Law Judges Can Learn from Sports Officiating and Art Criticism

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To my wife
Prema
with thanks

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Preface

This essay comes at the end of a long and frustrating search. For years I have asked how we can know whether a judicial decision was substantively correct, but no answer ever satisfied. The task of judging seemed riddled with discretion and uncertainty. I knew, following Hamilton, that will and judgment were not the same and that judges had only judgment. The Federalist No. 78, at 399 (Alexander Hamilton) (Max Beloff ed., Basil Blackwell 2nd ed. 1987). And, if I had forgotten that lesson, Hamilton's view was front and center in dissents written by Chief Justice Roberts and Justice Scalia in two cases handed down in June 2015. But these dissents simply confirmed that we do not really know what judgment is. Scalia's dissent insisted that the Roberts majority opinion for the Court crossed the line from judgment to will (*King v. Burwell*, 135 S.Ct. 2480, 2506 (2015)); and Roberts' dissent (coming one day later) objected to Justice Kennedy's willfulness in his opinion for the Court (*Obergefell v. Hodges*, 135 S.Ct. 2584, 2611 (2015)).

I decided to seek help in understanding legal judgment from someone in another discipline — a friend in the fine arts department. How did he judge whether a painting was good? He said "coherence."[1] That set me thinking. Perhaps there is no way to certify the substantive correctness of a legal judgment. But what could take the place of confidence in the substantive outcome? Maybe it was the way the judge reasoned in the judicial opinion, analogous to making an aesthetic judgment about the coherence of a painting.

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1. The aesthetic concept of coherence and the application of that idea to legal judgment are concerned with judging a particular work of art or a specific adjudicated case. It does not refer to coherence with a more general body of work (whether aesthetic or legal) with which the specific work or case may be compared. For a discussion of coherence in this latter sense, *see* John David Ohlendorf, *Against Coherence in Statutory Interpretation*, 90 Notre Dame L. Rev. 735 (2014).

And that set me searching more broadly for how judgment is reached in activities other than the law — how consumers, God, sports officials, and art critics judge. It turns out that some of these activities have little to tell us about legal judgment. Consumers' choices involve preferences, not judgment. God's judgment is ineffable, without reasons that we can comprehend. Sports is more promising. Officials make judgments based on rules, just like judges. But, unlike judges, they rarely choose the rules and rarely explain their reasoning process. They are too concerned with the institutional imperative of preserving the flow of the game, unlike judges, who put up with delay because of the importance of persuading people that they "got it right."

Finally, I came to art critics, whose choice of decision-making criteria and efforts to persuade the public of their point of view seem closest to what law judges do. It turns out that arguments about how to identify objective criteria to make aesthetic judgments have striking parallels to arguments about how judges might justify their decisions by substantively objective standards. In the end, I concluded that the exercise of discretion and the resulting uncertainty that art critics encounter have lessons for law judges, who encounter the same difficulties. The primary difference is that much more is at stake in the law.

My "solution" to the problem of legal judgment relies on Kant's notion of "subjective universals," which he developed to explain aesthetic judgment. This "solution" (I argue) leads to considering the virtues of rhetoric as the method by which judges can self-justify their decisions. Judges insist on, without being able to prove, the objective validity of their opinions, just like art critics. They cannot appeal to natural law, agreed-upon custom, their own education, the clarity of the text or legislative purpose, established canons of interpretation, or any other foundational principle that has passed across the legal stage. They are on their own, with nothing but the persuasive power of the judicial opinion to justify how they exercise discretion and impose order on an uncertain legal landscape.

Following this chain of thought, I wondered how judges could best write opinions in a way that took account of their discretion and the resulting legal uncertainty and how the legal profession could communicate that reality to the general public without sacrificing faith in the law. I will suggest that the legal profession could benefit from looking at how the scientific community informs the public about how science really works; and that people would be receptive to an explanation of legal judging that analogized the judge's struggle to find an answer to sports officiating (yes, even to calling balls and strikes).

I realize that this essay runs counter to the modern trend of searching for legal certainty, characterized by the ascendance of textualist interpretation

of legal documents, but there is no gainsaying the reality of judging. As Posner says, "judges realize in their heart of hearts that the superficial clarity to which they are referring when they call the meaning of a statute 'plain' is treacherous footing for interpretation." *Friedrich v. City of Chicago*, 888 F.2d 511, 514 (7th Cir. 1991). It is better not to follow Scalia and Garner in their Grand-Inquisitor-like concern that the "foolish" cannot be trusted with accurate information about judicial law-making.[2] We should instead look for ways that we can all be educated about what judges do.

2. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 5 (Thomson/West 2012).

Introduction

Hamilton famously assured us in Federalist #78 that judges did not have will, but "merely" judgment.[1] But what is "judgment"? I put aside the fact that Hamilton was being tendentious, trying to put at ease those New Yorkers whose fear of a robust judiciary might lead them to oppose ratification of the Constitution. Hamilton's caution about judging is taken seriously today whatever its historical origins — for example, in Justice Scalia's dissent to Chief Justice Roberts' opinion for the Court in the case upholding tax credits for health insurance on federal exchanges under the Affordable Care Act (Obamacare);[2] in Chief Justice Roberts' dissent (the next day!) objecting to Justice Kennedy's opinion for the Court finding a right to same-sex marriage in the Constitution;[3] and in Justice Kennedy's insistence that an interpretation of a law that departed from the clear meaning of the statutory text risked having judges cross the line from judgment to will.[4] These dissents seem to assume that we know what judgment means. Similarly, Scalia's sarcastic references to Kennedy's majority opinion in the same-sex marriage case as purporting to engage in "reasoned judgment" (the scare quotes are by Scalia)[5] implies that judgment is a faculty of mind that we can define. But from Hamilton to the present day, a definition eludes us.

In the following pages I will respond to Hamilton's implicit challenge to explain how judicial judgment can avoid being willful.[6] I will insist that the

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1. *See* The Federalist No. 78, at 399 (Alexander Hamilton) (Max Beloff ed., Basil Blackwell 2nd ed. 1987) [hereafter "The Federalist"].

2. King v. Burwell, 135 S.Ct. 2480, 2506 (2015) (Scalia, J., dissenting).

3. Obergefell v. Hodges, 135 S.Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting).

4. Public Citizen v. United States Dept. of Justice, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring).

5. 135 S.Ct. at 2621 (Scalia, J., dissenting).

6. My response also addresses the argument that the judicial role should be analyzed through the lens of separation of powers (s*ee* John F. Manning, *Textualism and*

interpretation of legal texts involves the exercise of lawmaking discretion in a far greater range of cases than we might think,[7] but that there is still a sense in which legal judgment can stake a claim to objective validity, despite the existence of judicial discretion and legal uncertainty.

My inquiry will take a circuitous route. Judgment is characteristic of many activities and our understanding of what law judges do will benefit from a comparison with other types of judging — specifically: judgments made by consumers of food and art, God's judgment, sports officiating, and judgments made by food and art critics (not consumers). Four features of law judging highlight what we are looking for by making these comparisons. Law judges (1) base conclusions on reasons (2) in the exercise of lawmaking discretion; (3) these reasons are presented publicly; and (4) there is a great deal at stake in their judgments. Other types of judgment will display less than all of these characteristics and it is this disparity that explains why the search for objectivity in law judging is so important.

We should approach these questions with some humility. James Madison cautioned us that "the faculties of the mind itself have never yet been distinguished and defined, with satisfactory precision, by all the efforts of the most

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the Equity of the Statute, 101 Colum. L. Rev. 1 (2001)), which is another way of asserting that will and judgment belong in separate compartments. There are those who would not accept this compartmentalization of judging, illustrated by Max Radin's insistence that "our legislature is no more or less sovereign than . . . judges" (Max Radin, *A Short Way with Statutes*, 56 Harv. L. Rev. 388, 406 (1942)) and by Alexander Hamilton's view that judges should interpret statutes to prevent injustice (The Federalist No. 78, at 399 (Alexander Hamilton)). But even assuming that separation of powers is the best way to understand judging, we still need to know what the separate judicial power entails and that requires understanding what is meant by legal judgment.

7. I should admit at the outset that my emphasis on judicial discretion and the resulting legal uncertainty may be the result of my own legal specialty, which is tax law. There is a longstanding distinction between tax lawyers and accountants based on the ability and skill of tax specialists to deal with the uncertainties in interpreting and applying the tax law and the contrasting greater skill of the accounting profession in dealing with the clear but jigsaw-like complexity of the Internal Revenue Code. Perhaps I overstate the pervasiveness of legal uncertainty and, therefore, exaggerate the importance of educating the public about the difficulties judges encounter in reaching a decision. After all, as Bentham said, "The power of the lawyer is in the uncertainty of the law." *Letter from Jeremy Bentham to Sir Jas. MacKintosh* (1808), *reprinted in* 10 The Works of Jeremy Bentham (J. Bowring ed. 1962).

acute and metaphysical philosophers."[8] Among these faculties he lists "judgment" and "volition," which are "found to be separated, by such delicate shades and minute gradations, that their boundaries have eluded the most subtle investigations, and remain a pregnant source of ingenious disquisition and controversy."[9] But modern judges who must interpret laws cannot avoid confronting this issue, which is at the heart of the contemporary debate about judging.

At the outset, we must distinguish two meanings of the word "judgment." It can refer to a result, as when a court says that a lower court's judgment is affirmed. But it can also refer to the thought process leading to the result, explained in the judicial opinion. In everyday speech, we are likely to refer to judgment in this latter "thought process" sense. That is the way the Federalist Papers often use the term, with its numerous references to good and bad judgment.[10] The *Oxford English Dictionary (OED)* captures this ambiguity. It describes judgment as involving "discrimination," a "critical faculty," "esp. following careful consideration or deliberation" — as well as the "conclusion thus formed."[11] I am concerned only with the "thought process" meaning of judgment that involves the deliberative process in reaching a decision.

Another preliminary matter concerns the scope of my inquiry about judgment. My concern is with the interpretation of texts, primarily statutory texts, not the common law. Anglo-American judges, including textualists, have always accepted a judicial role in shaping the common law through a creative act of judgment.[12] But Justice Scalia argues that the critical mistake many judges make in statutory interpretation is the intrusion of a common-law mentality into determining the meaning of a statutory text.[13] One response to Scalia is to note that judges in the civil law tradition, who (technically) lack a common-law power, probably exercise judgment to interpret legal texts in much the same way as judges in common law countries, even though you

8. The Federalist No. 37, at 178 (James Madison).

9. *Id.*

10. *See generally* The Federalist (Alexander Hamilton, John Jay, James Madison).

11. VIII Oxford English Dictionary 294, 295 (2nd ed. 1989).

12. Scalia's criticism would presumably not apply when the judge deals with a statute that has a broad open-ended text. Indeed, Judge Easterbrook (a prominent textualist) acknowledges a common-law-like power when applying statutes with open-ended language. Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 544 (1983).

13. Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 13 (1997).

would never know it from the way civil law judges write judicial opinions.[14] But the broader response, which is the theme of this essay, is that we cannot know whether Scalia is correct in criticizing a judge's reliance on a common-law mentality when interpreting statutes without knowing what it means for a judge to exercise "judgment" to interpret legal texts.

My discussion of judgment proceeds as follows. Part I compares law judging and other kinds of judgments. First, I consider judgments made by consumers of food and art. Second, how does God make judgments? Third, what can we learn about judgment from looking at sports officiating? Fourth, and most importantly, I consider judgments made by food and art critics. The comparison of the critic's judgment with judgments made by law judges is the most important because, like a law judge, the critic relies on reasons in the exercise of judgmental discretion and publicly explains those reasons.

Part II then considers how these comparisons shed light on the search for objectivity in legal judgment. More specifically, it addresses the question — how can a judge (and, more broadly, the legal profession) deal with the reality of legal uncertainty and the risk that the general public will lose faith in the law when that uncertainty is seen to be pervasive? First, I argue that the search for objectivity in law can benefit greatly (though controversially) from an understanding of how critics can be objective, despite the uncertainty that is endemic to their role in making judgments. My conclusion relies on the Kantian notion of "subjective universals," which will strike many as an oxymoron. In the context of law, this will mean that the judicial opinion must itself be the source of its own objective validity. Second, I consider how to convey the truth about discretionary legal judgment to the relevant audience. This leads to a consideration of how to write a judicial opinion and how the legal profession can communicate the truth about discretionary judging and legal uncertainty to the general public.

14. *See* Gerard Carney, *Comparative Approaches to Statutory Interpretation in Civil Law and Common Law Jurisdictions*, 36 Stat. L. Rev. 46, 50-51, 58 (2014).