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JUDGES AS ALTRUISTIC HIERARCHS

2001 George C. Wythe Lecture

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Judges are hierarchs. By this, I mean that judges in our society enjoy positions of unusual authority associated with four important characteristics. First, judges possess remarkable power to decide the fates and fortunes of others. Second, they possess this power not because they have purchased it in the market or acquired it by force, but because they have been selected to receive it, sometimes by the very persons whose fates and fortunes they will decide.¹ Third, judges are expected to use their power not to pursue their own interests—which would be viewed as an abuse of power—but to serve the social goal of the fair and impartial application of law.²

* Professor of Law, University of California at Los Angeles Law School. Much of the work on this Article was completed while I was Professor of Law and Director of the Sloan Project on Business Institutions at the Georgetown University Law Center, and I would like to thank both the Sloan Foundation and the Law Center for their support. I am also indebted to Judy Areen, Jayne Barnard, Margaret Blair, Lan Cao, Julie Cohen, Michael Diamond, Robert Drinan, the Honorable Harry T. Edwards, Mitu Gulati, Vicki Jackson, Neal Katyal, Daniel Klerman, David Luban, Alan Meese, Wendy Perdue, the Honorable Richard A. Posner, Kevin Quinn, Eric Rasmusen, Frederick Schauer, Mike Seidman, the Honorable Leo Strine, Mark Tushnet, and Robin West for their useful comments and insights; my apologies to anyone whose name I may have inadvertently omitted.

1. Consider the recent case of *Bush v. Gore*, 531 U.S. 98 (2000), in which a Supreme Court whose members had been selected by past presidents determined which of two competing candidates would become the next president. Similarly, state court judges are often elected and re-elected to office by the citizenry to decide disputes between, inter alia, state citizens. Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 128 (1983) (describing election of judges in California).

2. There is room for substantial disagreement about what it means to say that judges ought to “apply the law.” Perhaps judges should focus solely on the text of the law, or on the original intent of those who drafted it, or on some broader notion of the public good. The point is that, whatever one’s view about where one finds the law, it is generally understood that the judge’s role is to figure out what the law is and to apply it fairly, impartially, and carefully to the case at hand. Ruth Gavison, *The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability*, 61 S. CAL. L. REV. 1617, 1640-41 (1988) (“All theoretical attempts at answering the question how judges should decide cases agree that

(One can of course argue over where judges should look to find the law—indeed, this is a central problem in jurisprudence—but whatever “the law” is, it is commonly understood that it is normatively desirable that judges follow it). Fourth, judges are expected to serve this social goal faithfully, even though they have remarkably little financial incentive to do so.

The federal judiciary offers a striking example of this pattern. At both the trial and the appellate levels, federal judges enjoy enormous discretion to determine the outcomes of the cases before them.³ They enjoy this authority because they have been appointed by the President with the advice and consent of the Senate.⁴ They are expected to use their judicial powers to decide disputes fairly and according to law, even though they receive no significant external rewards when they do so, and suffer no significant external punishments when they do not.

It is this last aspect of judges' hierarchical status that I find especially intriguing and troubling, and it is the focus of this discussion. Consider the monetary incentives faced by the typical member of the federal judiciary. A federal judge has a job for life, and she cannot be removed from it unless she indulges in the most egregious forms of conduct.⁵ As a matter of law, her salary is fixed by Act of Congress; it can neither be increased to reward superlative effort, nor cut to punish inferior performance.⁶ As a result, federal judges operate in a world where monetary carrots and sticks are notably lacking. Indeed, if one looks only at financial incentives, it is difficult to explain why most federal judges do not simply decide their cases by flipping a coin, and then take the rest of the day off and go fishing.⁷

it is a prime duty for a judge to obey the law, and to develop it within the constraints imposed by the legal system and its tradition.”).

3. Because bringing an appeal is both expensive and uncertain, a federal district court's ruling often determines the outcome of a case. At the circuit court level, an opinion can only be overturned by the Supreme Court.

4. See U.S. CONST. art. II, § 2, cl. 2.

5. U.S. CONST. art. III, § 1 (“Judges . . . shall hold their offices during good behavior . . .”).

6. *Id.* (“Judges . . . shall . . . receive for their services, a compensation, which shall not be diminished during the continuance in office.”).

7. The judicial role is not the only hierarchal role we observe in contemporary society.

Contemporary scholars, faced with this lacuna, have had to employ a great deal of imagination to explain why judges might in fact perceive it as in their self-interest to do a good job of judging.⁸ For example, in one early and pioneering article on the subject, Robert Cooter argued that judges are motivated by the desire to enhance their prestige among lawyers and litigants.⁹ Other commentators have hypothesized that judges might expend effort because they hope to be appointed to a higher court, fear being reversed by a higher court, are concerned about their reputations among their fellow judges, or have a general desire to exercise influence¹⁰ and “have an impact for the sake of having an

Trustees, guardians, and directors of nonprofit corporations are also selected to receive power that they are then expected to exercise for the benefit of others, in circumstances where there are few external incentives for them to do a good job. To some extent this is also true of the directors of many for-profit corporations. As a legal matter, directors of public corporations control corporate assets worth trillions of dollars. Although they are expected to exercise this control for the benefit of the firm and its shareholders, there are remarkably few external incentives to motivate them to do a good job. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 315-19 (1999) (discussing directors as altruistic hierarchs); Lynn A. Stout, *In Praise of Procedure: An Economic and Behavioral Defense of Van Gorkum and the Business Judgment Rule*, 96 NW. U. L. REV. (forthcoming 2002) (same). I suspect that many tenured law professors may also view themselves as altruistic hierarchs.

8. See Cooter, *supra* note 1, at 107 (“[E]conomists have not had much success in creating a theory to explain the objectives of public judges.”); David A. Skeel, Jr., *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 VAND. L. REV. 647, 653 n.19 (1997) (book review) (“[P]ublic choice theorists have had far more difficulty modeling . . . judges’ behavior, as compared to legislators and private economic actors, due to the absence of a compelling theory as to what . . . judges maximize.”).

9. Cooter, *supra* note 1, at 129.

10. E.g., Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 85-86 (1991) (noting that within the paradigm of public choice theory, “consistency requires ascribing some sort of self-centered motivation to judges,” such as the desire to exercise power, to increase their salaries by pleasing the legislature, or to garner the approval of lawyers and legal academics); Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 110-11 (1989) (suggesting that judges are motivated by the desire for leisure, the fear of reversal, and the wish to enhance the power of the judiciary); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 13-15, 31 (1994) (suggesting that judges are self-interested and act to maximize their leisure, influence, prestige, reputation, and enjoyment); J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994) (suggesting that desires for favorable postings might influence Japanese judges’ decisions); Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787, 1823-24 (1992) (arguing that judges might use their power to pursue their private interests but might nevertheless choose rules that maximize average

impact."¹¹ Judge (formerly Professor) Richard Posner has argued that, in addition to these concerns, judges may also get utility from playing the judicial "game" according to its rules. Posner posits that judges may decline to decide cases on personal whim for the "same reason that many people do not cheat at games even when they are sure they can get away with cheating. The pleasure of judging is bound up with compliance with certain self-limiting rules that define the 'game' of judging."¹²

In this discussion, I suggest an alternative approach. In offering this alternative, I do not intend to suggest that the quest for prestige, the fear of reversal, the hope of higher appointment, or concern for one's reputation are *unimportant* judicial incentives. Rather, I suggest that they are *incomplete*. I believe that if we wish to truly understand hierarchy in general and the judiciary in particular, we must formally acknowledge a fundamental truth about judges that is implicit in many popular discussions of the judiciary,¹³ but notably absent from much contemporary scholarly

social welfare, assuming that the rules will also enhance their welfare); Stephen M. Bainbridge & Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Bowdledly) Rules of Thumb in Security Fraud Opinions* (2001) (unpublished manuscript, on file with author) (arguing that self-interested judges seeking to reduce their dockets and to avoid cases they find personally uninteresting adopt doctrinal "shortcuts" that allow them to refuse to hear many securities fraud class actions); Eric Rasmussen, *A Theory of Trustees, and Other Thoughts, with a postscript* 7-8 (2000) (arguing that judges are a form of trustee and that they are motivated by pride and by the desire to keep their positions, exercise power, and impose their favored policies), available at <http://pacioli.bus.indiana.edu/erasmuse/published/98.BOOK.trustees.NEW.pdf>.

11. Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 627-34 (2000) (Robert S. Marx Lecture).

12. Posner, *supra* note 10, at 28. This argument raises the interesting question of why a judge might value "following the rules" more than following her personal preferences for a particular outcome. Although Posner posits that following the rules gives judges pleasure, this is not inconsistent with the claim that following the rules remains a form of other-regarding behavior. See *infra* text accompanying notes 15-16 (discussing revealed preference approach to altruism).

13. Posner, *supra* note 10, at 25-26 (noting "the piety in which the public discussion of judges is usually clothed"); Schauer, *supra* note 11, at 624 (noting that "[j]udges occupy . . . a romantic position in much of American consciousness," and that there is "an image of the judge as someone largely lacking in self-interest"). This view also is prevalent among many law students and professors. The image of the judge as a benevolent and dedicated lawgiver, however, tends to be something that is both "in the air" at law schools, and remarkably absent from formal scholarly discussions of judicial motivation. See *infra* note 14 (discussing literature on judicial motivation).

discourse on judicial motivation and behavior.¹⁴ This fundamental truth is that *the modern judiciary rests on the expectation that judges will behave in an altruistic fashion.*

ALTRUISM AND RATIONAL CHOICE

To some, the word “altruistic” may conjure up images of Mother Theresa and similar ascetics who devote their lives to helping others. I do not intend to suggest that we expect judges to endure similar levels of self-sacrifice. Nor do I suggest that judicial altruism need be directed toward any particular person or persons. I am saying something far more modest. I am saying that *we expect judges to try to do the right thing*—to try to apply the rules of law in a fair, impartial, and consistent manner—even though they are neither rewarded when they do, nor punished when they do not.¹⁵

14. Much of contemporary legal literature rejects, implicitly or explicitly, the notion that as a positive matter judges might try “to do the right thing” even when they would prefer to not do so. See sources cited *supra* notes 9-11; see also sources cited *infra* note 18 (discussing related views of critical legal theorists who argue that judges self-interestedly use their power to impose their personal policy preferences on the broader society).

An exception to this rule can be found in a series of articles authored by the Honorable Harry T. Edwards, himself a judge, which argue that judicial decisions ought to be, and often are, the product of the neutral application of law rather than a judge’s desire to advance his own political views or otherwise indulge in self-interest. Harry T. Edwards, *Collegiality and Decisionmaking on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998); Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WISC. L. REV. 837; Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385 (1984); see also Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 995 (1995) (arguing that judges have incentive to “adhere to professional norms,” for both internal and external reasons); *supra* note 12 (discussing Richard Posner’s theory that judges enjoy following the rules of the “game” of judging).

Interestingly, while most modern legal scholars reject the positive claim that judges are driven by something other than self-interest, jurisprudential discussions generally begin with this as the normative ideal. *E.g.*, H. L. A. HART, *THE CONCEPT OF LAW* 115 (2d ed. 1994) (arguing that in applying the law a judge must think that “what he does is the right thing”); Gavison, *supra* note 2, at 1640 (“All . . . agree that it is a prime duty for a judge to obey the law . . .”).

15. Although there is ample room for disagreement about where judges ought to look to find “the law,” see *supra* note 2, there is a general consensus that the requisites for good judging include competence at identifying law, commitment to obeying it, and impartiality in applying it. Gavison, *supra* note 2, at 1623-24, 1628 (legal competence, impartiality, and obedience to law lie at “the relatively unproblematic core of the judicial role”).

To put the point (somewhat awkwardly) in economic terms, I am arguing that we expect judges to display what I shall call "other-regarding revealed preferences." I employ the economic concept of a revealed preference here to emphasize that I am discussing how judges *behave* rather than how they *feel*. Judges' apparently altruistic behavior may be driven by guilt, ego, mindless adherence to role, or the fear that a goddess in a toga will strike the erring judge with lightning. Whatever the motivational source of other-regarding behavior, the bottom line is that judges often *act as if* they care not just about costs and benefits to themselves but also about costs and benefits to others, including perhaps such abstract "others" as the rule of law, or ideals of proper judicial conduct.¹⁶

This is a far more diluted version of altruism than the sort associated with Mother Theresa. Indeed, it might be alternatively described as moral principle, commitment to public service, legal craftsmanship, or even noblesse oblige. Yet even so diluted, the notion that altruism plays a role in shaping judicial behavior is controversial. This is because the idea of altruism flies in the face of rational choice analysis, which generally presumes that the best way to model and predict human behavior is to assume that people are rational actors concerned only with improving their own welfare.¹⁷

Rational choice theory has become a staple of modern legal scholarship, and this is no less true for scholars who study the judiciary than for those who study contract law or products liability. As a result, the *homo economicus* model of behavior provides the foundation on which much of the contemporary scholarly literature on judicial behavior is built.¹⁸ This influence is especially apparent

16. In effect, I am adopting a behavioral approach that treats the judge as a black box. Rather than trying to observe what goes on inside the box, I simply compare the social and economic variables that go into the box and the behavior that comes out.

17. It is something of a standard move for rational choice theorists to suggest that if people behave altruistically this must mean that they get pleasure (utility) from helping others, so altruism remains consistent with self-interest. This move has a tautological flavor: it presumes that people are selfish and so anything they do, they must do to make themselves better off. Moreover, as a practical matter most rational choice analysis of the judiciary rests implicitly on the assumption that judges and other people look out only for their own interests, narrowly defined. See, e.g., sources cited *supra* notes 9-11.

18. See, e.g., Cooter, *supra* note 1, Elhauge, *supra* note 10, Macey, *supra* note 10, Posner, *supra* note 10, Schauer, *supra* note 11, Stout, *supra* note 10. But see Chris Guthrie et al.,

in the writings of those who work in the area known as “public choice,” a field which applies the tools of economics to the behavior of political actors, and presumes that legislators, judges, and other public servants are motivated primarily by self-interest.¹⁹

I believe that rational choice theory has much to offer in our quest to explain the actions of government institutions. I also believe, however, that rational choice can be fundamentally misleading when used to analyze a hierarchical role like that of the modern judge. Standard rational choice analysis leaves out something important, something that lies at the core of our notions of proper judging. The missing ingredient is altruism. I suspect that if we really expected judges to behave purely selfishly, they would not play nearly so great a role in our economic and political system, nor would we grant individual judges so much power. A corollary is that if we want to develop a solid understanding of judicial motivation, we must formally recognize the phenomenon of other-regarding behavior and incorporate it into the analysis of judicial behavior.

To do this we need to look outside economics and rational choice to the broader social sciences literature. I have reviewed some of that literature, and I have good news to report: social scientists outside the field of economics have developed a rather impressive

Inside the Judicial Mind, 86 CORNELL L. REV. 777 (reporting results of empirical study designed to test not whether judges were self-interested, but whether they were rational). Although the idea that judges are selfish and rational actors is associated with the “law and economics” perspective, a related assumption of judicial self-interest may underlie the work of critical legal theorists who argue that judges do not apply principles of law in a neutral fashion, but instead use their considerable discretion to interpret those rules to impose their own political ideologies on the broader society. *E.g.*, DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIECLE 57 (1997) (discussing American judiciary’s “bad faith”); LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW 7 (2001) (arguing that judges decide cases according to their political preferences); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 821-22 (1983) (arguing that legal rules are manipulable and that judges interpret them to justify the outcomes they want). Of course, if a particular judge believes that her ideological principles are in fact in society’s best interest, and if she applies those principles even in cases where she finds the result personally distasteful, one might argue that such behavior is in fact other-regarding.

19. Skeel, *supra* note 8, at 651. See generally MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (1997); Symposium, *Positive Political Theory and Public Law*, 80 GEO. L.J. 457 (1992); Symposium, *The Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

formal understanding of when, why, and to what extent people are likely to behave in an other-regarding fashion.²⁰ Altruism, it turns out, is neither a rare nor a quirky behavior. Indeed, it is both common and predictable.

As an introduction to this literature, I would like to focus on a representative subset of the evidence on altruistic behavior that I believe is both especially compelling and especially useful. This is the empirical evidence from studies of human behavior in a type of experimental game known as a "social dilemma."

EXPERIMENTAL EVIDENCE OF ALTRUISM IN SOCIAL DILEMMAS

Casual empiricism suggests that everyday life is full of incidents of altruism. People keep promises, leave tips, and decline to take advantage of others' obvious mistakes even in nakedly commercial transactions. Yet to the dedicated skeptic, such anecdotal evidence may be unconvincing. This may be because contemporary societies tend to be structured so that altruistic behavior also is at least consistent with—if not necessarily fully explained by—observable external incentives.²¹ As an example of this pattern, consider the observation that most people do not mug other people. Altruism offers one possible explanation for this phenomenon: perhaps most people prefer not to hurt and frighten others. It is also possible, however, that most people do not mug others solely out of fear that they will be arrested and punished, or fear that their victims might resist and injure *them*.²²

In social dilemma experiments, social scientists can exclude the possibility of such external motivations for altruistic behavior by creating situations that clearly pit self-interest against the interests

20. *E.g.*, HOWARD MARGOLIS, SELFISHNESS, ALTRUISM, AND RATIONALITY (1982); BEYOND SELF-INTEREST (Jane J. Mansbridge ed., 1990); COOPERATION AND PROSOCIAL BEHAVIOUR (Robert A. Hinde & Jo Groebel eds., 1991). These are only a few examples of a vast literature.

21. For a partial explanation of this pattern, see *infra* note 38 (discussing how legal sanctions can support altruistic behavior by reducing its relative cost, and thus encourage altruistic adherence to law even in situations where the threat of legal sanction alone would not suffice to deter a purely selfish actor from violations).

22. Similarly, one person may keep her promise to another because she feels an altruistic commitment to do so. She may also keep her promise, however, because she fears that if she does not, the promisee will "tattle" on her to their mutual friends, and her reputation will suffer.

of others.²³ This is done by asking two or more experimental subjects to play a game in which they must each choose between two strategies: either “cooperate,” or “defect.” Payoffs in the game are structured so that each subject always maximizes her personal return by defecting. Yet if everyone defects, the group as a whole gets less than if all cooperated.²⁴

As this description suggests, subjects in social dilemmas face incentives similar to those presented by the famous “prisoner’s dilemma” of game theory. Rationally selfish subjects should always choose to defect.²⁵ Yet *homo sapiens* placed in social dilemmas turn out to behave quite differently from *homo economicus*. Over the past four decades, scholars have published the results of hundreds of experimental studies in which subjects were asked to play social dilemmas.²⁶ As a rule of thumb, experimenters have found that cooperation rates in social dilemmas average about fifty percent.²⁷

23. See generally Robyn M. Dawes et al., *Cooperation for the Benefit of Us—Not Me, or My Conscience*, in BEYOND SELF-INTEREST, *supra* note 20, at 97-110 (summarizing social dilemma studies); Robyn M. Dawes & Richard H. Thaler, *Cooperation*, 2 J. ECON. PERSP. 187 (1988) (summarizing studies); David Sally, *Conversation and Cooperation in Social Dilemmas: A Meta-Analysis of Experiments from 1958 to 1992*, 7 RATIONALITY & SOC’Y 58 (1995) (summarizing over 100 studies done between 1958 and 1992); Toshio Yamagishi, *The Structural Goal/Expectation Theory of Cooperation in Social Dilemmas*, in 3 ADVANCES IN GROUP PROCESSES 51 (Edward J. Lawler ed., 1986) (summarizing studies).

24. A classic example of a social dilemma is the “Give Something” game. In that game, a group of n subjects is given an initial monetary stake—say, \$10 each. The subjects are then asked to choose between either keeping all their money for themselves or contributing all or part to a common “investment pool.” The players are told that any money contributed to the pool will be multiplied by some factor of $n-1$ or less, and then redistributed to all the subjects pro rata. Because each player is allowed to share in the pool regardless of whether she contributes, the best individual strategy for the selfish player is to contribute nothing. The group’s total (and average) payoff, however, is only maximized if each player contributes her entire stake.

25. In order to exclude the possibility of external incentives for cooperation, social scientists have run social dilemma experiments involving large groups of subjects who were told they would play the game only once and who were assured that their choice of strategy could not be observed by either the experimenter or their fellow players. Sally, *supra* note 23, at 65, 67. In such situations there is no possibility that a player would suffer either retaliation or reputational loss by choosing to defect. A purely selfish player accordingly would always defect.

26. See *supra* note 23.

27. *E.g.*, Dawes & Thaler, *supra* note 23, at 189 (subjects on average contribute 60 to 40 percent in social dilemma contribution games); Sally, *supra* note 23, at 62 (finding mean cooperation rate of about fifty percent for sample of over 130 social dilemma studies).

People cooperate—and they cooperate frequently. What does this tell us?

First, that altruism exists and indeed is common. In the right circumstances—in a moment I shall elaborate on what I mean by “the right circumstances”—people regularly and reliably reveal other-regarding preferences. In other words, people often act as if they care about costs and benefits to others, and not just as if they care about costs and benefits to themselves.

Not always, however. Social dilemma studies teach us that most people have a remarkable capacity for altruism, but they also teach us something else: the decision to behave altruistically appears largely determined by what I shall call “social” variables. Such social variables include beliefs about what others need, what others expect, how others are likely to behave, and what others’ relationships are to oneself. Purely selfish actors would be indifferent to such concerns unless they somehow changed their own economic payoffs. Real people, it turns out, are exquisitely responsive to them.

This responsiveness is obvious from the social dilemma evidence. Although cooperation rates in social dilemma experiments average fifty percent, experimenters have been able to produce a wide range of cooperation rates by changing the social context in which the game is played. Indeed, by altering social variables, experimenters have produced cooperation rates in social dilemmas as high as ninety-five percent (almost universal altruism) and as low as five percent (an almost complete absence of altruism).²⁸ It is important to bear in mind in considering these findings that social dilemmas are structured so that purely selfish players *always* defect.

Social dilemma experiments accordingly provide compelling evidence that most people have a capacity to behave in an altruistic fashion. But—and this is a key “but”—they are only likely to behave altruistically when the social conditions are favorable.

cooperation rate of about fifty percent for sample of over 130 social dilemma studies).

28. Sally, *supra* note 23, at 62, 71.

SOME SOCIAL DETERMINANTS OF ALTRUISM IN SOCIAL DILEMMAS

Let us examine some of the factors that have been found to be most significant, in a statistical sense, in determining cooperation rates in social dilemmas. One of these is the requests the experimenter makes of the subjects. As a general rule, subjects in social dilemmas cooperate substantially more when the experimenter asks them to cooperate and defect substantially more when the experimenter tells them to defect.²⁹ This effect is so pronounced that cooperation rates change dramatically if the experimenter even *hints* at what she wants the subjects to do.³⁰ For example, when experimenters in one study presented subjects with a social dilemma labeled the "Community Game," they observed cooperation rates averaging sixty percent. Changing the name of the dilemma to the "Wall Street Game" caused cooperation rates to drop dramatically, to an average of thirty percent.³¹

The finding that people tend to do what an authority figure suggests they should do is unlikely to surprise any serious observer of human nature.³² Nevertheless, from a rational choice perspective it presents something of a puzzle. Purely selfish subjects in a social dilemma should be indifferent to an experimenter's requests and desires; after all, these do not affect their own monetary payoffs.

A second social factor that has proven important in determining cooperation rates in social dilemmas is whether the players share a sense of social identity (that is, a sense of membership in a common group). For example, studies have found that allowing the players in the game to communicate with each other significantly increases the incidence of cooperative behavior, even when the

29. *Id.* at 78 (finding that experimenters' explicit instructions to cooperate raised average cooperation rates in large samples of social dilemma studies by as much as forty percentage points, whereas formal instructions to defect lowered cooperation rate by as much as thirty-three percentage points).

30. Lee Ross & Andrew Ward, *Naive Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, in VALUES AND KNOWLEDGE 103, 106-07 (Edward S. Reed et al. eds., 1996).

31. *Id.*

32. One of the most notorious and disturbing illustrations of this phenomenon is Stanley Milgram's famous experiment in which subjects complied with his instructions to administer a series of simulated "electric shocks" of supposedly increasing severity to a person on the other side of a partition as a means of "training." Stanley Milgram, *A Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL 371 (1973). Of course, such results are only disturbing if one has other-regarding preferences.

players are not allowed to discuss the game itself.³³ More blatant manipulations of group identity—for example, dividing players into subgroups based on the color chip they pick out of a hat, or their taste for abstract versus impressionist painting—also influence the incidence of cooperative behavior.³⁴ Subjects asked to play with members of another subgroup (an “out-group”) cooperate significantly less than they would in a game with members of their own subgroup (their “in-group”) or even with strangers.³⁵

Yet a third social variable that has proven important in determining cooperation in social dilemmas is what the subjects expect their fellow subjects to do. If a player believes her fellows are likely to cooperate, she is more likely to cooperate herself.³⁶ This result offers an especially strong challenge to the *homo economicus* model, because the expectation that one’s fellows will cooperate in a social dilemma actually *increases* the expected return from defecting. Nevertheless, if one thinks other players are going to behave “nicely,” as a statistical matter one is far more likely to behave “nicely” oneself.

SOME ECONOMIC DETERMINANTS OF ALTRUISM IN SOCIAL DILEMMAS

In emphasizing the importance of social context in determining the incidence of cooperation in social dilemmas, I do not wish to leave the impression that economic factors are irrelevant or insignificant. They are significant. It turns out, however, that they

33. Sally, *supra* note 23, at 78. See generally Robyn M. Dawes, *Social Dilemmas*, 31 ANN. REV. PSYCHOL. 169, 185 (1980) (commenting that “[t]he salutary effects of communication on cooperation are ubiquitous” and citing studies).

34. Sally, *supra* note 23, at 79.

35. *Id.* at 78-79 (indicating “subgroup identity decreased the probability of cooperation by 12%-15%”).

36. Scott T. Allison & Norbert L. Kerr, *Group Correspondence Biases and the Provision of Public Goods*, 66 J. PERSONALITY & SOC. PSYCHOL. 688 (1994) (reporting that “[n]umerous studies have reported that individuals are more likely to cooperate when they expect other group members to cooperate than when they expect others to defect” and citing authorities); Dawes, *supra* note 33, at 187 (discussing same findings); Yamagishi, *supra* note 23, at 64-65 (discussing experimental findings that “expectations about other members’ behavior is one of the most important individual factors affecting members’ decisions in social dilemmas”).

are significant in different ways than rational choice theory would predict.

As already noted, any degree of cooperation in a social dilemma game is inconsistent with the *homo economicus* model. Social dilemma experiments thus offer compelling evidence that most people behave in a far more other-regarding fashion than rational choice theory predicts. But it appears that, even when people choose to behave altruistically, they remain concerned about their own welfare. Other things being equal, the incidence of cooperation in social dilemmas drops significantly as the personal returns from adopting a defecting strategy increase.³⁷ The implication is that most people are indeed capable of honor, fairness, and generosity—as long as it does not cost them too much.

This possibility may help explain why the phenomenon of altruistic behavior in everyday life has received so little attention from rational choice theorists. It may be easy to overlook many altruistic acts because they involve only small sacrifices on the part of the altruists who indulge in them.³⁸ At the same time, it is important to recognize that the likelihood that altruistic behavior occurs most often when it is least personally costly does not imply

37. For example, David Sally's survey of nearly one hundred studies reported that doubling the reward from defecting appeared to decrease average cooperation rates by as much as sixteen percent. Sally, *supra* note 23, at 75.

38. It may also explain why most people seem to try to stay within the constraints of tort law and criminal law, even when a cold calculation of costs and benefits suggests they could profit from negligent or criminal behavior. In theory, legal sanctions alone can deter criminal and tortious conduct—if the sanction is severe enough and the law is enforced often enough. In practice, there are many situations in modern life where a purely selfish person might calculate—after discounting the likely sanction by the probability that her misbehavior might never be detected or punished—that she could profit from a crime or tort. Rational choice theory predicts that *homo economicus* would run amok in the face of such underenforcement. The social dilemma evidence suggests, however, that “optimal deterrence”—reducing the expected benefit from a crime or tort to zero—is unnecessary to motivate a properly-socialized *homo sapiens* to avoid harming others. All that is needed is to frame the social context so that torts and crimes are viewed as unacceptable behaviors, and then to impose sufficient expected sanctions to reduce the opportunity cost associated with obeying the law to the point where most people are willing to make the sacrifice associated with such other-regarding behavior.

This analysis predicts that when the law is underenforced, we should expect the population of people who commit torts and crimes to include a disproportionate number of those who are not inclined toward altruism, and those whose cultural backgrounds have led them to perceive torts and crimes as socially acceptable behaviors.

that altruism is an unimportant phenomenon. Small acts of altruism, when added up over many individuals and many interactions, can produce great aggregate social gains. Moreover, as the parable of the Good Samaritan illustrates, an altruistic act that costs the benefactor relatively little may result in a much greater good for the beneficiary.³⁹

Interestingly, there is reason to believe that it is in just such circumstances that people are most likely to behave altruistically. In addition to personal cost, a second economic variable that appears to influence the incidence of altruism in social dilemmas is the magnitude of the benefits of one's cooperation to one's fellow players.⁴⁰ Other things being equal, subjects in a social dilemma cooperate more as the payoff to their fellows from their cooperation rises.⁴¹

Cooperation rates in social dilemmas accordingly appear to be negatively correlated with the cost of cooperation to the cooperating player, and positively correlated with the benefits of cooperation to others. Taken together, these two empirical findings suggest that when social context favors other-regarding behavior, people behave like intuitive utilitarians. In considering what course of action to choose, they weigh aggregate benefits and costs, including not only benefits and harms to others but also benefits and harms to themselves. Altruism is most likely when the cost to oneself of behaving altruistically is relatively small and the benefit to others relatively large.

39. In the parable of the Good Samaritan, a traveler attacked by robbers and left for dead was found in the road by the Samaritan, who bandaged him, carried him to an inn, and paid the innkeeper two silver pieces to look after him. *Luke* 10:29-36 (New English). Although two pieces of silver may have been a substantial cost to the Samaritan, it was surely smaller than the benefit to the traveler.

40. In a sense, this is a "social" economic variable, as a purely selfish actor would be indifferent to the magnitude of the benefits she brings to others.

41. Sally, *supra* note 23, at 79 (stating that "the size of the loss to the group if strictly self-interested choices are made instead of altruistic ones . . . is important and positive" in predicting cooperation). This suggests that players are willing to incur a rather large personal sacrifice if this produces greater good for the others in the game.

*HOMO SAPIENS DOES NOT (ALWAYS) BEHAVE LIKE HOMO
ECONOMICUS*

Legal scholars willing to venture beyond rational choice theory into the broader social sciences will find an extensive literature on human altruism. In reviewing some of the evidence that has been compiled on human behavior in social dilemmas, I have touched upon only a fragment of that literature. Yet even this brief tour suggests a model of human nature that differs radically from the *homo economicus* model of rational choice.

Social dilemma studies indicate that most people have at least two personalities, or as an economist might put it, two revealed preference functions. In some social situations—for example, buying a car—people predictably behave as if they care only about their own payoffs. In other social situations—for example, at a wedding reception—they predictably behave as if they care at least to some extent about costs and benefits to others. Put differently, preferences are not fixed and exogenous as rational choice presumes, but shift in response to changes in social context. When a respected authority says “you may be selfish,” when we don’t share a common social identity, when others in similar circumstances appear to be acting selfishly—we behave selfishly. When authority says “look out for others,” when we share a sense of common social identity, when we believe others are behaving altruistically—we behave altruistically.

This doubled-sided portrait of human nature offers to shed much-needed light on the question of how we can best motivate judges to serve as faithful hierarchs. If the judiciary is indeed an institution built on the expectation and experience of judicial altruism, even in its diluted form of commitment to public service, understanding the determinants of altruistic behavior may well be the key to encouraging good judging. Of course, any model of judicial behavior that incorporates the phenomenon of socially contingent altruism will be more complicated than the elegant *homo economicus* model of rational choice. There seems no reason to assume, however, that a more-nuanced framework would be so complicated as to exceed our capacity to understand and apply it. Moreover, the potential rewards justify the extra effort. Whatever else they teach us, social dilemma studies unambiguously demonstrate that the *homo*

economicus model is seriously incomplete. To understand and predict human behavior, it is often essential to take account of the empirical reality of socially contingent altruism.

Thus I would like to offer some speculations on what the social dilemma evidence implies for hierarch behavior in general, and for judicial behavior in particular. I emphasize that my remarks should not be interpreted as a call for any particular policy reform. One of the foremost lessons of the social dilemma evidence is that it is dangerous to base policy on a priori analysis. Altruistic behavior is contingent on social context, and social context is a complex phenomenon. How one speaks, how one dresses, the customs and rituals one follows, the size of one's office or salary—each of these things sends a variety of sometimes conflicting signals to be picked up by the social antennae of those around us. As a result, attempts to change social context can easily lead to unintended and undesired consequences, and any particular proposal for reforming the judiciary should be “field tested” for success before being implemented more broadly.

Let me also confess immediately that my arguments are based on extrapolation, and subject to all the associated dangers. There is reason to suspect extrapolation may be appropriate; for example, although many of the published social dilemma studies have relied on undergraduate and graduate students as subjects, similar results have been observed in experiments run among nonstudents in other cultures, including cultures that differ dramatically from our own.⁴² Similarly, there is much other evidence in the broader social sciences literature on altruism that is consistent with the social dilemma findings.⁴³ It is important to bear in mind, however, that social dilemma experiments by their very nature take place in a simplified and artificial environment that cannot begin to mimic the complexities of the real world. As a result, we cannot be sure

42. See, e.g., Joseph Henrich et al., *Cooperation, Reciprocity, and Punishments in Fifteen Small-Scale Societies*, 91 AM. ECON. REV. (2001) (finding that subjects drawn from seven hunter-gatherer, nomadic, and other small-scale societies all displayed significantly positive cooperation rates in playing single-shot social dilemma games with strangers, ranging from an average twenty-two percent cooperation rate among the Machiguenga to a fifty-eight percent cooperation rate among the Orma, and concluding that “the canonical model [of self-interested behavior] is not supported in any society studied”).

43. See, e.g., ELINOR OSTROM, *GOVERNING THE COMMONS* (1990) (detailing how individuals in developing societies deal with “public goods” problems).

that behavior inside the experimental laboratory necessarily predicts behavior outside it.

Yet if we are willing to assume that people in daily life behave in a way that bears any significant resemblance to how they behave in experimental games, social dilemma experiments offer to open new paths of discovery for those who seek a better understanding of the judiciary and of judicial behavior. To illustrate, I offer some conjectures on how taking account of altruism might allow us to increase the chances that judges will choose to decide cases carefully, impartially, and well. These are only preliminary thoughts, meant to suggest directions for future research more than to provide ultimate conclusions. Nevertheless, they hint at some of the rewards to be reaped from recognizing that judges, like the rest of us, are capable not only of selfishness and avarice, but also altruism and integrity.

RECOGNIZING THE REALITY OF SOCIALLY CONTINGENT ALTRUISM: SOME POSSIBLE LESSONS FOR JUDGES AND JUDGING

I would like to begin by considering some of the more obvious lessons we might draw from the social dilemma evidence on altruism. These lessons are the ones drawn from the empirical finding that altruistic behavior tends to decline as the personal cost of altruism increases.

First, if we want judges to decide cases impartially—that is, in a fashion determined by the law (wherever one finds it) rather than by the identities of the litigating parties—it may be essential to ensure that judges do not have personal stakes in the outcomes of the cases they decide. For example, judges should not be allowed to decide disputes in which they have a direct interest, nor should they be allowed to accept bribes or other payments from the parties. Similarly, if we want judges to decide cases carefully, we must reduce the cost of exercising care. One way to accomplish this is to adopt rules against judicial “moonlighting,” thus reducing the opportunity cost of a judge’s deciding to put her time and effort into judging rather than some more lucrative enterprise.⁴⁴ It also

44. See Posner, *supra* note 10, at 33-34 (discussing moonlighting).

probably is a good idea to select as judges individuals who are already familiar with the law, for example, seasoned practitioners and legal scholars. If you were to hand a layperson a black robe and put him behind the bench, his personal cost of learning the appropriate rules of law would likely be quite high, and the likelihood of his altruistically expending enough effort to do a good job correspondingly low.

Many readers may find such suggestions annoyingly obvious. Indeed, on first inspection they appear to be the same sorts of suggestions one might take from the familiar *homo economicus* model.⁴⁵ It is important to recognize, however, that under the *homo economicus* model, rules that stop judges from moonlighting, accepting bribes, or deciding cases in which they have a personal stake are *necessary but not sufficient* to create incentives for good judging. Put differently, they reduce incentives for judges to decide cases badly (that is, carelessly, erroneously, or in a biased fashion). They do not, however, create incentives for judges to decide cases *well*.

Social dilemma experiments suggest that, under the right circumstances, altruism can provide such an incentive. Imposing constraints on the pursuit of self-interest not only discourages judges from doing what we do not want them to do; it also frees them to do what we want them to do—decide cases in a fair and careful manner. This will only occur, however, when the social and economic circumstances favor altruism. Thus, it is important to take account of some of the other implications of the evidence on behavior in social dilemmas.

Let us start with the empirical finding that people in social dilemmas cooperate more as the perceived benefits of their cooperation to others increase. This finding suggests that if we want judges to do a good job, we need to encourage them to believe that the decisions they reach are, in fact, important to other people. There are of course a variety of different ways to signal to judges that their jobs are important to others. One of the most obvious

45. They are also the same sorts of suggestions one might take from experience. Most of us are skilled if not always conscious observers of human behavior, and so are familiar, at least at an intuitive level, with many of its determinants. Many of the results from social dilemma studies accordingly confirm what we already know from "common sense."

signals—some might even say crude—is the salary we pay them. In contemporary American culture, a high salary is often viewed as evidence of merit and value. Thus it is perhaps a matter for concern when federal judges receive lower salaries than their law clerks expect to earn after leaving their clerkships and beginning work as associates in law firms. From a public policy perspective, this may be penny-wise and pound-foolish, if it signals to judges that their altruistic efforts at careful lawmaking are unimportant and undervalued.⁴⁶

Similarly, what can we learn from the observation that people in social dilemmas cooperate more when they believe other people are also cooperating? One possible implication is that, if we want judges to do a good job and to decide cases carefully, fairly, and impartially, it is essential that they believe that *other* judges in *other* courts also are deciding cases carefully, fairly, and impartially. This observation hints at the tremendous damage that can be done by highly publicized opinions like *Bush v. Gore*.⁴⁷ In reaching their decisions in that case, the justices of the U.S. Supreme Court were widely perceived to have behaved in a biased and partisan fashion.⁴⁸ Such perceptions clearly undermine public faith in the Supreme Court's ability to act as a neutral arbiter. But they also damage the functioning of the judiciary as a whole, if they suggest to other judges in other courts that they need not behave impartially because Supreme Court justices do not.⁴⁹

What about the variable of a common social identity? The social dilemma evidence suggests that judges are likely to do a better job

46. It should be noted that a contrary argument can be made that low judicial salaries may actually encourage greater altruism if people differ in their inclinations towards altruism, and if a low salary serves a "filtering" function by discouraging individuals who are relatively inclined toward selfishness from seeking or accepting judicial appointments.

47. 531 U.S. 98 (2000).

48. See SEIDMAN, *supra* note 18 (noting that polls indicate that a large portion of the public think that the Supreme Court's decision was politically partisan); see also VINCENT BUGLIOSI, *THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINED THE CONSTITUTION AND CHOSE OUR PRESIDENT* (2001) (critiquing opinion); ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED THE ELECTION* (2001) (same).

49. Well before *Bush v. Gore*, Judge Harry Edwards expressed a similar fear that a public perception of judges as politically motivated decision makers could "become a self-fulfilling prophecy." Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, *supra* note 14, at 838.

of judging when they share a common sense of social identity with the litigants who appear before them. I am not, of course, suggesting that we want to encourage judges to feel a sense of common social identity with, say, mass murderers. Rather, my point is that judges should not feel too socially distant from the general citizenry whose interests they are supposed to represent. Considering this, I am troubled by the custom of dressing judges in formal black robes, seating them behind an imposing bench, and (in many courtrooms) raising the bench above floor level so that they peer down over it at the people whose cases are they are being asked to decide. On the one hand, such customs may serve a valuable function if they act as an ongoing reminder to the judge of the gravity and importance of her role. (At the very least, a black robe is a cheaper way of signaling someone's importance than paying them a larger salary.) On the other hand, such customs increase the social distance between judges and the litigants whose fortunes they decide. The result may be a decline in judges' motivation to behave altruistically by expending the effort and attention required to decide cases well and carefully.

Finally, I would like to consider some of the implications of the finding that people are more likely to behave altruistically when a respected authority figure (in social dilemma experiments, the experimenter) suggests that they should.⁵⁰ This finding suggests that if we want good judging, it would be extremely valuable if we could find someone in a position of authority to tell judges that they ought to do a good job of judging. The obvious problem is: who or what is in a position of authority relative to judges? A federal district judge's authority is technically subordinate to that of the relevant Circuit Court, and the Circuit Court subordinate to the U.S. Supreme Court. Yet the federal judiciary as a whole is an independent branch of government, free from the command or control of either the legislative or executive branch.

Whom or what, then, do judges view as authority? Let me offer one potential answer. You may laugh or you may weep, but it is possible that one authority whose views judges may care about is the legal academy—that is, the law professors who express opinions

50. See *supra* note 29 and accompanying text.

about the quality of judges' judging in scholarly works and in comments reported by the media.

If judges pay attention to what academics say, the following disturbing possibility arises. As I have already noted, over the past twenty years it has become commonplace for the scholarly literature to view the judiciary through the lens of rational choice theory, and so to presume that judicial behavior is driven primarily (indeed, solely) by such selfish motives as the desire to enhance one's reputation, the desire to be promoted to a higher court, or the desire to maximize one's power.⁵¹ When scholars and commentators talk about judges as if they are solely self-interested, that sends a signal to judges that self-interested behavior is both common and expected on the bench. That signal, in turn, increases the likelihood that judges in fact will choose to decide cases in a self-interested fashion. A self-fulfilling prophecy results.

This may explain why, as Frederick Schauer has observed, "to raise the topic of judicial self-interest in the company of judges is something like raising the topic of steak tartare at a convention of vegetarians."⁵² Judges understand, at an intuitive level, that the judicial role is premised on society's expectation that judges, when they are judging, will adopt an other-regarding preference function rather than a self-interested preference function; that they will seek not to improve their own welfare but to "do the right thing." Judges also understand at an intuitive level that to talk about judges as if they allow self-interest to influence their decisions (even if on occasion it does) increases the likelihood that they will in fact behave selfishly.

Public choice theory, with its emphasis on the *homo economicus* model, may provide yet another variation on Heisenberg's Uncertainty Principle. In making observations about judicial behavior, legal scholars may change it. I admit I do not lose much sleep over this possibility. My own suspicion is that academic theorizing has remarkably little effect on what nonacademics, including judges, do.⁵³ Yet there is a second risk scholars run if they

51. See *supra* notes 8-11 and accompanying text.

52. Schauer, *supra* note 11, at 623.

53. This is not to say that nonacademics do not occasionally cite scholarly work in support of positions they have already decided to take.

insist on always analyzing judicial behavior through the lens of rational choice. That risk, quite simply, is that we will fail to understand the nature of the judicial role, and fail as well to understand judicial behavior.

CONCLUSION

It has become commonplace in recent years for legal scholars to apply the tools of rational choice to the institution of the judiciary, and to analyze judicial behavior primarily in terms of the *homo economicus* model of rational self-interest. I have come to believe that this approach is misleading. As an empirical matter, *homo sapiens* clearly is capable of—indeed, inclined toward—altruistic consideration of others' costs and benefits under a variety of circumstances. In other words, people are not always selfish. This phenomenon is important to our understanding of human behavior in a wide variety of contexts, and it may be of special importance in addressing questions of judicial motivation.

The modern judiciary is an institution that is premised in large part upon the expectation and the historical experience of judicial altruism, in the form of judges' willingness to devote significant time and effort to deciding legal disputes carefully, impartially, and in accordance with the law. In other words, the judiciary exists because we believe that judges can behave, to at least some extent, in an other-regarding fashion. An important corollary is that the smaller the role altruism seems to play in determining judicial behavior, the less acceptance and social legitimacy the judiciary is likely to enjoy.

That possibility highlights the importance of taking account of the empirical reality of other-regarding behavior and the various social and economic variables that can promote it. In making this observation, I do not mean to suggest that self-interest is unimportant to understanding judicial behavior. To the contrary, the empirical evidence indicates that in deciding whether to act altruistically, most people keep close track of their own personal costs and benefits.⁵⁴ Thus one of the first steps we must take to

54. See *supra* note 37.

encourage judges to decide cases in an other-regarding fashion is to reduce, to the greatest extent possible, any chance that they might personally gain or lose as a result of how they decide their cases.

Addressing the problem of judicial self-interest is only the first step, however. If we want to accomplish more than simply deterring judges from deciding cases self-interestedly—if we want to motivate them to decide cases well—we must do more. In particular, we must pay attention to the phenomenon of judicial altruism, and to the economic and social variables that promote and discourage it.

In other words, in the quest to understand what judges “maximize,” it is a mistake to assume that self-interest is the *only* variable worth focusing on. If we persist on treating judges and other hierarchs as if they are purely selfish beings, we will miss half the story, and arguably the most important half.