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What Do Judges and Justices Maximize? (The Same Things Everyone Else Does)

Richard A. Posner
Richard.Posner@chicagounbound.edu

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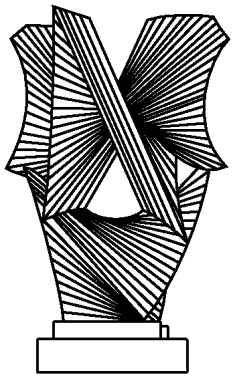

What Do Judges Maximize?
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Richard A. Posner

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

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I. Introduction

This paper offers a new positive economic theory of judicial behavior, focusing on the "ordinary" appellate judge with secure tenure (for example, a federal court of appeals judge or U.S. Supreme Court Justice), as distinct from the judicial "titans" on which most of the previous literature explicitly or implicitly focuses. Analogizing judges to nonprofit enterprises, to voters in political elections, and to spectators at theatrical performances, I propose a simple model in which judicial utility is a function mainly of income, leisure, and judicial voting. I use this model to explain various judicial behaviors (ranging from stare decisis to what I call "go-along voting"), to make falsifiable predictions concerning judicial effort, and to provide a framework for evaluating changes in judicial compensation and rules of conduct and for comparing judicial with legislative behavior. Although my principal interest is in the economic theory of judicial behavior (with some borrowings from "law and literature" in Part VI), the approach that I sketch may also have value for the solution of practical problems of judicial administration, as well as some relevance to the economic analysis of other occupations in which nonpecuniary income is a large part of total compensation.

The motivation for the paper should be plain. At the heart of economic analysis of law is a mystery that is also an embarrassment: how to explain judicial behavior in economic terms, when almost the whole thrust of the rules governing the compensation and other terms and conditions of judicial employment is to divorce judicial action from incentives—to take away the carrots and sticks, the different benefits and costs associated with different behaviors, that determine human action in an economic model. Since the judges are the central actors in the drama of the common law and play lead parts in statutory and constitu-

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[*] Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. This is the revised text of a paper delivered at a conference on economic analysis of law held at George Mason University School of Law on January 28, 1993. I thank the conference participants, plus Douglas Baird, Frank Easterbrook, David Friedman, Lawrence Lessig, Martha Nussbaum, Mark Ramseyer, and Michael Trebilcock for many helpful comments.

tional law as well, the inability thus far to explain their actions in economic terms mocks the claim of economic analysis to explain the salient features, institutional as well as doctrinal, of the law in general and the common law and other judge-made law in particular. The economic analyst has a model of how criminals and contract parties, injurers and accident victims, parents and spouses—even legislators, and executive officials such as prosecutors—act, but falters when asked to produce a model of how judges act. If economics is the science of rational choice, why shouldn't it be fully applicable to judges? Judges may not be as bright as the naive and credulous believe or as their boosters in the legal profession aver, but they are rational.

I approach the puzzle of the judicial utility function from a slightly unusual angle. Instead of trying to explain why judges adopt one judicial philosophy or another, or decide a particular case one way or another, or follow or don't follow precedent, I ask simply, Are judges rational? Or do the elaborate efforts that society makes to strip them of incentives place their behavior beyond the reach of the economic model of rational man? I argue that judges are rational and specifically that they can fruitfully be viewed as composites of three types of rational maximizer: the nonprofit enterprise, the voter, and the theatrical spectator. Although none of these types is easy to model in rational-maximizer terms, enough progress has been or can be made in fitting them to the economic model to provide a framework for understanding judicial behavior as rational too. This framework makes it possible to consider in a new light not only the basic question of judicial rationality, but also more particular issues such as judicial moonlighting, the difference between dictum and holding, the principle of stare decisis (that is, decision according to precedent), trends in judicial conflict of interest rules, the effect of higher judicial salaries, the tension between judges and law professors, and whether judges are hard-working.

A novelty inherent in my approach is that it downplays the "power trip" aspect of judging, which has been the focus of most of the few previous efforts to model the judicial utility function. In fact, I assume that trying to change the world plays no role in the judicial utility function. Which is not to say that judges are indifferent to power; they enjoy, I shall argue, the power that goes with deciding cases. But only a small minority, whom I shall ignore, have a visionary or crusading bent.[1]

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[1] Hence the common criticism of the Supreme Court in the Burger years as lacking any "vision" or sense of mission. I believe that this is true of most courts most of the time, but is not necessarily a good criticism.

We should recall the commonplace that the framers of the Constitution designed a government that could be adequately manned by moral and intellectual mediocrities, a characterization of officialdom from which not even federal judges are wholly exempt. The existence of such institutions as life tenure for federal judges suggests that the framers believed that judges could not be counted on to behave with consistent courage, although some of course have.[2] In addition, politics, personal friendships, ideology, and pure serendipity play too large a role in the appointment of federal judges to warrant treating the judiciary as a meritocracy. By treating judges as "ordinary people," my approach domesticates them for economic analysis. Economists have no theories of genius.[3] Fortunately for economic analysis, most law is made not by the tiny handful of great judges but by the great mass of ordinary ones.

II. Whose Behavior? Federal Appellate Judges

Judging is a diverse occupation, even if one ignores the profound differences between the Anglo-American and Continental judiciaries. I shall not try to model the behavior of all judges, but shall focus on federal appellate judges: not only because I am one and know this group of judges best,[4] but also because efforts to strip away incentives have progressed furthest with this group, thus making federal appellate judges most illustrative of the peculiar (economically speaking) character of the Anglo-American judiciary.

Article III of the Constitution erects such a high hurdle to removing a federal judge from office that pretty much the only thing that will get him removed is criminal activity. A federal judge can be lazy, lack judicial temperament, mistreat his staff, berate without reason the lawyers who appear before him, be reprimanded for ethical lapses, verge on or even slide into senility, be reversed all the time for elementary legal mistakes, hold under advisement for years cases that could be decided perfectly well in days or weeks, leak confidential information to the press, pursue a

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[2] Notably the federal judges who supervised public school desegregation in the South after *Brown v. Board of Education*.

[3] But *see* Daniel L. Rubenson and Mark A. Runco, "The Psychoeconomic Approach to Creativity," 10 *New Ideas in Psychology* 131 (1992), for a stab at one.

[4] In so saying I do not mean to suggest that judges have privileged access to the judicial utility function. A utility function is not a psychological or phenomenological concept but a device for generating hypotheses. I doubt that *any* judge subjectively experiences his work in the way modeled in this paper. I know I do not.

nakedly political agenda, and similarly misbehave in a variety of other ways that might get even a tenured civil servant or university professor fired; he will retain his office. His pay cannot be lowered, either—and neither can the pay of a good judge be raised. All judges of the same rank are paid exactly the same, and so the carrot is withdrawn along with the stick. Another reason there is no carrot is that a judge is, of course, forbidden to accept bribes from litigants, to pocket filing fees or other fees levied on litigants, or to collect royalties from people who cite his opinions. He gets a fixed salary, period.

Well, there is a small carrot. Supreme Court Justices are often appointed from the ranks of federal court of appeals judges, and although the probability of such an appointment is very low for any particular judge even if he is one of the relatively few who is talked about for such a promotion, it figures in the thinking of some judges. However, the impact of a particular decision on the prospects for promotion is normally very slight. Some decisions have no impact at all on those prospects and in the case of almost all the remaining decisions the impact is unpredictable—the decision may offend as many influential people as it delights.

Promotion to jobs outside the judiciary is discouraged by the structure of judicial compensation. It is heavily backloaded.[5] The pension is extraordinarily generous, but there is no vesting till age 65, so anyone who quits sooner gives up a large expected benefit. The attractive pension arrangements are important for inducing judges of advanced age to retire; Article III presumably outlaws mandatory retirement for Article III judges, and makes it very difficult to force judges to retire even for cause. So here a carrot must do all the work.

The compensation and tenure structure for federal district judges is the same as that for appellate judges (except that the salary is slightly lower), but they have greater prospects for judicial promotion,[6] although

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[5] The incentive effects of different methods of compensating employees and other agents is the subject of an extensive economic literature, pertinently illustrated by Edward Lazear and Sherwin Rosen, "The Economics of Compensation of Government Officials," in *The Rewards of Public Service: Compensating Top Federal Officials* 101 (Robert W. Hartman and Arnold R. Weber eds. 1980), and by Ronald N. Johnson and Gary D. Libecap, "Agency Growth, Salaries and the Protected Bureaucrat," 27 *Economic Inquiry* 431 (1989). On the effect of the backloading of compensation on the turnover of federal civil servants, *see* Richard A. Ippolito, "Why Federal Workers Don't Quit," 22 *Journal of Human Resources* 281 (1987). In this paper I take for granted the compensation and tenure regime of federal judges.

[6] Mark A. Cohen, "The Motives of Judges: Empirical Evidence from Antitrust Sentencing," 12 *International Review of Law and Economics* 13 (1992), pre-

for the most part only to the court of appeals. More important in keeping them in line is the fact that a district judge presides more or less continuously at trials and other proceedings in open court in which he is required to make rulings and talk to lawyers and jurors. If he isn't on the ball, this soon becomes known and he gets a bad reputation in the legal community. Appellate judges, in contrast, are largely shielded from direct evaluations of their work. They never have to make rulings in open court, or indeed open their mouth in court. Provided only that they can hire competent law clerks, they will be able to churn out, regardless of their own efforts or ability, professionally competent opinions—and opinions are virtually their only public product and hence virtually the only basis upon which the legal profession, or the rest of the world, can evaluate them. It is the unique insulation of federal appellate judges from any sort of accountability that makes their behavior such a challenge to the economic analysis of law, and more broadly to the universalist claims of the economic theory of human behavior.

III. The Nonprofit Analogy

The usual starting point for discussing the behavior of federal judges is the behavior of other government officials—an area however in which not a great deal of progress has been made, and in any event not I think the most fertile analogy to judicial behavior. Three other analogies are more promising. One is to nonprofit enterprise, the second is to voting in political elections, the third to watching a play or movie.

The theory of nonprofit enterprise that we owe to Henry Hansmann[7] posits that the nonprofit form is likely to be the preferred means of providing a service when the buyers cannot observe the output. If you want to help the starving people of Somalia, and to this end you make a contract with a food distributor to provide X amount of soybeans to those people, it will be very difficult for you to determine whether the distributor has done this. He is more likely to do it if he is forbidden to

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sents some empirical evidence that desire for promotion affects the behavior of district judges.

[7] Henry B. Hansmann, "The Role of Nonprofit Enterprise," 89 *Yale Law Journal* 835 (1980). The growing economic literature on nonprofit enterprise is further illustrated by Burton A. Weisbrod, *The Nonprofit Economy* (1988); Edwin G. West, "Nonprofit Organizations: Revised Theory and New Evidence," 63 *Public Choice* 165 (1989), and David Easley and Maureen O'Hara, "The Economic Role of the Nonprofit Firm," 14 *Bell Journal of Economics* 531 (1983).

pocket the residual income (after paying all expenses),[8] in other words the profit, from the distribution activity. For then the benefit to him of cheating on the contract is reduced.

The problem of the shirking agent is only reduced, however, not eliminated. The nonprofit distributor has less incentive to be efficient than a profit maximizer would have, because cost savings do not accrue to him as profit. We therefore expect more slack in a nonprofit enterprise, and also more transforming of profits into perquisites, a normal consequence of constraining monetary profits.[9] Why do not *all* the profits get transformed into perks? First, beyond a point perhaps soon reached, the utility conferred by a perk may be only a small fraction of its cost. Second, people will not donate to a nonprofit organization whose employees are known to overindulge in perks—as the United Way recently discovered to its sorrow. (These two points are connected. The more costly the perks are relative to their benefits, the less the risk of exposure is worth running.) Third, a form of enterprise that constrains profit-making may attract as employees people less preoccupied with money-making than the comparable employees of profit-making enterprises. They may be more risk averse and hence more willing to trade money income for job security, or their utility functions may be dominated by nonpecuniary sources of utility. In either event, given their preferences (or "character") they are not as likely to try to squeeze the last penny of pecuniary advantage from their situation. I do not put much weight on this point, however, in view of the empirical evidence *contra*.[10]

The relation of the economic model of the nonprofit enterprise to federal appellate judges, as distinct from public officials of more uncertain tenure, should be apparent. The public would find it difficult, should it attempt to hire judicial services from a private organization, to determine the extent to which its contractor was producing "justice." This suggestion is not inconsistent with the fact there is a good deal of private judging, particularly but, especially with the recent emergence of "rent-a-judge" and mediation services offered by law firms, not only in

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[8] A big loophole, of course: those expenses include his salary!

[9] A staple observation in the literature on the regulation of public utilities. *See*, for example, Armen A. Alchian and Reuben A. Kessel, "Competition, Monopoly, and the Pursuit of Money," in *Aspects of Labor Economics* 157 (National Bureau of Economic Research 1962); Richard A. Posner, *Economic Analysis of Law* 350, 653 (4th ed. 1992). "Slack" is perhaps better viewed as leisure, a perquisite, than as something separate from perquisites.

[10] Summarized in West, note 7 above, at 168-169.

the form of arbitration. The arbitrator or other private judge is hired by the parties to a dispute to resolve that dispute, not to produce the full range of judicial services. The full range includes rulemaking through the issuance of opinions that interpret common law principles, statutes, rules and regulations, and constitutional provisions, and, of equal or even greater importance, the provision of a "stand-by" dispute-resolution service for people who can't agree on a neutral arbiter. The arbitrator's or other private judge's output is therefore more readily observable than that of a "full service" public judicial system.[11] The incentive effect of conditioning the private judge's compensation on satisfying a market demand may therefore enable the slack associated with the nonprofit counterpart service to be avoided at reasonable cost. Hence in some areas of dispute resolution private judging may be able to compete effectively with public judging even though the latter is subsidized.[12] The coexistence of profit and nonprofit firms is common in other industries as well, despite the tax advantages that the latter enjoy.[13]

Since the output of a full-service judiciary cannot readily be evaluated, a rational public is reluctant to buy that output from a profit-making enterprise, which would be tempted to grab for big profits by skimping on the costs of the service. The public's (and for that matter the legislature's, or the executive branch's) lack of capacity for evaluating the output of a full-service judiciary forestalls trying to solve the problem by hiring competitive judicial firms, quite apart from the separate problem of maintaining legal consistency and coherence that would be created by a competitive judiciary. Competition doesn't work well when none of the customers for an industry's product or service can make even a rough determination of the quality of the output offered by the competing firms and if warranties or equivalent guarantees are infeasible. Unable to rely on the free market or on incentive compensation, the public forbids the judges to take monetary profits from judging, not only by receiving bribes or being paid out of court fees, fines, or other rev-

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[11] Well, not entirely, since the absence of an opinion (commercial arbitrators generally do not issue opinions, as the theory predicts, though labor arbitrators generally do) makes it more difficult to evaluate the quality of a judge's work. A related point is that arbitrators are understood to exercise broad discretion, and, as I shall note shortly, discretionary judgments are more difficult to evaluate than "ruled" ones.

[12] On the economics of arbitration, and of private judging generally, *see* William M. Landes and Richard A. Posner, "Adjudication as a Private Good," 8 *Journal of Legal Studies* 235 (1979); Robert D. Cooter, "The Objectives of Private and Public Judges," 41 *Public Choice* 107 (1983).

[13] *See*, for example, Weisbrod, note 7 above, ch. 8.

enues generated by the judicial process but also through such indirect means as sitting on a case in which a relative, or a company in which the judge owns stock, is a party. Thus, as the discretionary power of the judiciary increases, the rules on conflict of interest become more stringent, because the more discretion judges exercise the more difficult it is to determine the quality of judicial output.

Because the judiciary has been placed on a nonprofit basis, we should expect that judges on average do not work as hard as lawyers of comparable age and ability. I believe that this is true, at least of appellate judges.[14] The enormous caseload increases of recent decades have been accommodated mainly by expansions in staff, though judges do I think work harder today than they did thirty or forty years ago. It is not surprising that judicial "moonlighting" is strictly limited, presumably so that judges cannot easily transform judicial leisure into cash income—which by increasing the value of that leisure would induce rational judges to do even less judicial work.

The fact that through incentives and selection the structure of judicial compensation makes judges less likely to work hard than their peers in private practice should not be regarded as *necessarily* a deplorable consequence of the judiciary's nonprofit form of organization. Since leisure is a form of income, an increase in leisure should reduce the amount of pecuniary income demanded by judges of a given quality. Hence by not forcing judges to work too hard—probably a futile undertaking anyway—the judiciary's nonprofit structure enables competent people to be attracted to judging at lower wages than would otherwise be necessary. The offset is highly imperfect, because the greater leisure of the low-paid judge means that more judges must be hired, in order to get the work done. Nevertheless the leisure, or slack, that results from the nonprofit organization of the judiciary is not a pure cost to the system.

That slack can be controlled, moreover, ex ante, by careful screening of judicial candidates. Especially if behavior has a habitual component, a person known to be a hard worker in his present job may be a good bet to continue working hard even after the incentives that may initially

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[14] Compare the finding that members of Congress who have announced that they are retiring vote less in their last term of office—the penalty for shirking is less. John R. Lott, "Political Cheating," 52 *Public Choice* 169, 179-182 (1987). As an aspect of my taking the structure of judicial compensation and tenure for granted, I shall not inquire why Congress as it were "permits" judges not to work too hard, by increasing the number of judges and their staffs in order to meet increases in workload. But it is apparent that Article III limits the power of Congress to force judges to work harder than they want to do.

have induced him to work hard are removed. In fact the screening of candidates for federal judicial appointment is quite elaborate (just as—and for a similar reason—premarital search is more protracted the more difficult it is to get a divorce); and most judges are appointed at an age at which their work habits have had many years to become firmly fixed. Perhaps that is one reason why persons under 40 are rarely appointed to federal judgeships. It is true that academic tenure is usually awarded at a younger age, but since academic salaries are not fixed or outside earnings effectively constrained, and there is more than one academic employer, academics retain monetary incentives to work hard.

Nonprofit organizations are not constrained to pay all employees of the same rank the same compensation. Nor for that matter is the federal judiciary. Secretaries and other support personnel can receive quality raises and bonuses, and there is even a cash prize (the Devitt Award) for federal judges, though only one is awarded every year. Nevertheless, if we set the prize to one side, federal judges of the same rank (and apart from the Supreme Court Justices all Article III judges are in one of just two ranks—district judge or circuit judge) are all paid the same regardless of their productivity, stature, etc.—even regardless of their years of service.[15] The difference in treatment between judicial and support personnel reflects the fact that the former have a great deal more discretionary power, which ultimately is what makes judicial output so difficult to value. To recognize differences in the quality or value of that output would replicate the problem that gave rise to the nonprofit organization of the judiciary in the first place. The judge who spent less time per case so that he could grind out more cases faster for higher pay would be like a profit-making judiciary that minimized its costs in order to pocket a larger profit. Suppose a judge who increased his output by 1 percent received an extra $5,000 a year. His monetary incentive would be to reduce the time he spent on each case by 1 percent, so that he could decide 1 percent more cases in the same amount of time. For then, assuming that he was not working more intensively (and why should he be?), the $5,000 bonus would represent a pure profit, made possible by the difficulty encountered by the "buyers" of his decisions in evaluating their quality.

[15] Except that the older a judge is, the greater the expected value of his pension. This is a big exception to the uniformity of judicial salaries, but it is not something over which the individual judge has any control.

IV. Some Elements of the Judicial Utility Function

I said that I do not think federal appellate judges work as hard as comparable lawyers in private practice. Most of them, however, work quite hard—often at an age when their counterparts in private practice have retired and are living in Scottsdale or La Jolla. They must be deriving utility from the work of being a judge, and not just from the status of being a judge, which they could retain while doing very little and sometimes—when they have reached retirement age—nothing. Their utility function must in short contain something besides money income (from their judicial salary) and leisure. Let us consider some possibilities, with particular reference to components of utility that (unlike judicial income) can be affected by judicial effort.

Popularity. Professor Cooter suggests that public judges "seek prestige" among "the lawyers and litigants who bring cases before the judges."[16] They do this, he believes, "by ignoring effects upon parties other than disputants." What he calls prestige sounds more like popularity. I think it is true that many federal appellate judges, although they are in no way dependent upon the goodwill of the bar (unlike their counterparts in elected state judiciaries), are sensitive to their popularity with members of the bar, especially if, as is common, many of their friends are drawn from the bar. People like to be liked. Few judges, however, care whether they are popular among the litigants themselves. How could they? Virtually every decision produces a happy winner and an unhappy loser. Judges' desire to be popular with lawyers may express itself in judicial reluctance to impose sanctions upon or even to criticize lawyers who perform below reasonable professional standards, but I believe not otherwise.

Prestige. In a sense distinct from popularity on the one hand and deference (outward shows of respect, discussed later) on the other, prestige is unquestionably an element of the judicial utility function. The thirst for prestige is manifested primarily in opposition to any large increase in the number of judges, at least high-level judges, and to extending the title "judge" to lower-level judicial personnel, such as magistrates and bankruptcy referees (now called "magistrate judges" and "bankruptcy judges," to the dismay of many Article III judges). Judges normally reluctant to ascribe base motives to their group have been vocal in insisting that a substantial increase in the number of judges would, by diluting judicial prestige, increase the difficulties of recruitment. Apart from opposing an increase in the number of judges or a dilution of the

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[16] Cooter, note 12 above, at 129.

title "judge," there is little an individual judge can do to enhance his prestige as a judge. That prestige inheres in the whole judiciary. Free-rider problems make it unlikely that any one judge will exert himself strenuously to raise the prestige of all. But it would be a mistake to regard prestige as entirely a group asset. A judge who engages in scandalous or disreputable behavior will lose prestige even if he retains his judgeship.

Public interest. I exclude from the judicial utility function the desire to promote or maximize the public interest. Its inclusion would be inconsistent with an approach that treats judges as "ordinary" human beings. Although views concerning the public interest undoubtedly affect judicial preferences, just as they affect voter preferences (more on this shortly), they do so, I assume, only insofar as decisions expressing those views enhance the judge's utility.

Avoiding reversal. Judges don't like to be reversed, but I do not think that aversion to reversal figures largely in the judicial utility function. It is nonexistent in the case of Supreme Court Justices, and fairly unimportant in the case of court of appeals judges because reversals of appellate decisions by the Court have become rare and most reflect differences in judicial philosophy or legal policy rather than mistake or incompetence by the appellate judges.[17] Hence they are not perceived as criticism. Higgins and Rubin found that reversal rates do not affect district judges' chances of promotion.[18]

Reputation. As my reference to criticism implies, a potentially significant element of the judicial utility function is reputation, both with other judges, especially ones on the same court—one's colleagues—and with the legal profession at large. Reputation is a function of effort, but only of a minimal level of effort. Beyond that, effort, especially when it shows up in greater output, may actually make a judge unpopular among his colleagues by making him seem a rate breaker, show off, or know it all. Employers like a Stakhanovite; fellow employees do not. Concern with reputation does not explain why judges don't always retire at the earliest opportunity, which would be financially the wisest course. Some do, but many do not.

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[17] The fact that Judge Bork had never been reversed by the Supreme Court was actually used as an argument *against* his confirmation, as indicating that he was in too close sympathy with a Court viewed as excessively conservative by many Senators.

[18] Richard S. Higgins and Paul H. Rubin, "Judicial Discretion," 9 *Journal of Legal Studies* 129 (1980).

V. Voting as a Source of Judicial Utility

Voting and Related Maximands. The elements of the judicial utility function that I canvassed in the preceding part of this paper are I think less important for the average federal appellate judge than the one I want to highlight in this part, which is best understood by analogy to voting in political elections.[19] Although voting is not compulsory in this country, vast numbers of people vote—and are more likely to vote the larger the election (for example, in a presidential election than in a mayoral election) even though the likelihood that their vote will affect the result of the election is smaller when more people vote. This suggests that voting is a valued consumption activity of many people. Well, judges are constantly voting. A federal appellate judge votes several hundred times a year. His votes, moreover, although frequently—even in the Supreme Court, most of the time—"wasted" (because the case would have been decided the same way without him—he was not the swing vote), have more impact than the votes of ordinary electors. A judge's vote sometimes decides the outcome of a case, and the outcome of a case is usually important to at least a few people, and in the case of some court of appeals cases and many Supreme Court cases to many—even millions of—people. So if voting in elections is a source of utility, we should not be surprised that voting in cases is a source of utility.

An alternative explanation for voting is that people do it out of a sense of duty, and activity so motivated is different from ordinary consumption.[20] No doubt many do. But the pure consumption element is

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[19] The analogy is used for a different purpose—to explain with the aid of Arrow's impossibility theorem the difficulty of a court's achieving consistency across decisions—in Frank H. Easterbrook, "Ways of Criticizing the Court," 95 *Harvard Law Review* 802 (1982).

[20] Amartya Sen, "Rational Fools: A Critique of the Behavioural Foundations of Economic Theory," in Sen, *Choice, Welfare and Measurement* 84, 97 (1982). Elsewhere, however, Sen has described voting, much in the spirit of the present analysis, as being guided by a desire to record's one true preference. Sen, *Collective Choice and Social Welfare* 195-196 (1970). The duty and consumption explanations for voting are merged in William H. Riker and Peter C. Ordeschook, "A Theory of the Calculus of Voting," 62 *American Political Science Review* 25, 28 (1968)—an article representative of the large economic literature on the rationality of voting. For other examples of that literature, *see* R. D. Tollison and T. D. Willett, "Some Simple Economics of Voting and Not Voting," 16 *Public Choice* 59 (1973); Thomas Schwartz, "Your Vote Counts on Account of the Way It Is Counted: An Institutional Solution to the Paradox of Not Voting," 54 *Public Choice* 101 (1987); Garey C. Durden and Patricia Gaynor, "The Rational Behavior Theory of Voting Participation: Evidence from the 1970 and 1982 Elections," 53 *Public Choice* 231 (1987), and—of particular relevance to this paper—Geoffrey Brennan and Loren

important, perhaps especially for judges. A federal judgeship remains a highly coveted job, and most judges enjoy their work. They are not reluctant conscripts of conscience.

Another source of judicial utility is the deference that judges receive from lawyers and from the public generally.[21] This deference, like that accorded wealthy people, is of the shallowest kind: as soon as the judge loses office, as soon as the wealthy person loses money, the deference ceases. Sensitive people realize this, but it does not eliminate the pleasure that everyone derives from being treated in a respectful manner. The republican simplicity of manners—the "I'm no better than the next guy" deportment—that most American judges affect is intended more to be admired than to be believed.

The deference is not separate from the voting, however, and therefore need not be assigned a separate place in the judicial utility function. Judges receive deference because they have power. They don't in fact have much power, and they're not in fact much deferred to. But such deference as they do receive comes from their being, like wealthy people, more powerful than most people, not from being—like athletes, popular entertainers, and a few heroes, saints, and scientists—admired.

The pure utility of voting, when one's vote is highly unlikely to have any effect, is different from the "power trip" aspect of voting. Most previous economic analyses of judicial behavior have been concerned with judges' power[22]—not as a source of deference, the only use I make of it in this paper, but as a source of satisfaction akin to that enjoyed by creative people. Artists, in the Nietzschean view that equates power and creativity, make works of art that sometimes change sensibility; judges make decisions that sometimes change social or business practices. Artists impose their aesthetic vision on society; judges impose their political vision on society. They do this mainly through the precedential force of their decisions. Hence the economic analysis of precedent emphasizes the tradeoff between the loss of power that results from judges' following their predecessors' decisions rather than innovating, on the one

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Lomasky, "The Impartial Spectator Goes to Washington: Toward a Smithian Theory of Electoral Behavior," 1 *Economics and Philosophy* 189 (1985).

[21] Lawyers, like other sellers of services, are, in contrast to judges, deference givers rather than deference receivers.

[22] For a notable example, *see* Rafael Gely and Pablo T. Spiller, "A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the *State Farm* and *Grove City* Cases," 6 *Journal of Law, Economics, & Organization* 263 (1990). Exceptions include the Cooter and Higgins and Rubin papers, notes 12 and 18 above.

hand, and, on the other, the loss of power that results if, by refusing to follow their predecessors' decision and thus weakening the practice of decision according to precedent, the new judges reduce the likelihood that *their* successors will follow their decisions.[23] My theory abstracts from these issues (though I shall suggest an alternative theory of stare decisis, one that abstracts from influence maximizing). It thus is applicable to judges, I believe the majority, even on the Supreme Court, who have no great interest in changing (or resisting change in) law or society.

For the handful of judges who today still write their own opinions, and for some who do not, there is additional utility, akin to that which a literary or scholarly author obtains, from being a published author. There is also the intrinsic pleasure of writing, for those who like to write, and of exercising and displaying analytical prowess or other intellectual gifts, for those who have them and want to use them. But I ignore these and other additional sources of satisfaction in the work of a judge as adding little of analytical significance to voting. Also, they are not important to most judges, who are happy to cede opinion-writing to eager law clerks, believing that the core judicial function is deciding, that is, voting, rather than articulating the grounds of decision.

Implications. The relatively modest, completely invariant salary, coupled with (indeed, in part a function of, as we have seen) the utility conferred by voting and by the deference which the judicial voting power brings in its train, explains how judges are motivated to vote and also why they do not sell their votes in some crude sense. Although it does not explain why they vote in a nonrandom manner, the analogy to political voting helps to explain this. People who vote in elections the outcomes of which they cannot influence nevertheless do not vote randomly. The utility is not in the act of voting but in voting for someone or something. It is related to the utility that people derive from speaking their mind about some subject, even though nothing will be changed thereby.

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[23] *See*, for example, Lewis A. Kornhauser, "Modeling Collegial Courts I: Path Dependence," 12 *International Review of Law and Economics* 169 (1992); Kornhauser, "Modeling Collegial Courts. II. Legal Doctrine," 8 *Journal of Law, Economics, & Organization* 441 (1992); Posner, note 12 above, at 534-536, 541-542. There is a serious free-rider problem, since one judge's flouting precedent will be unlikely to damage the practice seriously. But the problem can be held in check, at least to some extent, by the highest court in the jurisdiction. The members of that court are few enough to be concerned about the impact of their behavior with respect to precedent on the survival of the practice of decision according to precedent in their jurisdiction. Id. at 542.

Since judges derive power, as well as the pure consumption value of voting, from judicial activity, and power is no less when it is exercised randomly, we might expect judges to vote less responsibly than the ordinary voter! Of course if most judges voted randomly, the whole caboodle of judges would be got rid of eventually. But random voting by a single judge would not endanger that judge's tenure, so standard free-rider analysis would predict a lot of random judicial voting. Yet this is rare. There are two reasons. One is that, as I have been emphasizing, for judges as for ordinary citizens voting has a pure consumption value unrelated to its instrumental, power-exercising value (which as I have said is negligible for the ordinary citizen—yet he votes); and that pure consumption value depends on whom you vote for. The second reason is that for judges voting in panels, as all appellate judges do almost all the time, the cost of nonrandom voting is very low. Even in a three-judge panel, provided that at least one judge has a strong opinion on the proper outcome of the case, or even that a law clerk of one judge has a strong opinion on the matter, the other judges, if not terribly interested in the case, can simply cast their vote with the "opinionated" judge. This will not be random behavior and will incidentally be leisure-serving. If both indifferent judges vote against the opinionated one, he may write a fierce dissent that will either make them look bad or require them to invest time in revising the majority opinion to blunt the points made by him. Notice that if one indifferent judge decides to go along with the opinionated one, the other indifferent one is likely to go along as well—otherwise he will be forcing himself to write a dissenting opinion.

"Going-along" voting is only one example of the influence of leisure-seeking on judicial behavior. Another—once leisure is defined for these purposes, as it should be, as an aversion to any sort of "hassle," as well as to sheer hard work—is the insistence by judges that their decisions are coerced by "the law" and hence that the judge shouldn't be blamed by the losing party or anyone else distressed by the outcome. (Call this the theory of power without responsibility.) A third example of the working of the leisure in the judicial utility function is the strong norm of equality in appellate-court assignments. Judges of the same court hear the same number of cases and generally are assigned the same number of decisions to write.[24] Any effort by one judge to hear more than his proportional share of cases or snag more than his proportional share of writing assignments is not only rebuffed but resented. For one thing, it

[24] In the latter regard, however, the Supreme Court is more flexible than the courts of appeals.

might result in Congress's deciding that a smaller number of judges could handle the federal judicial workload.

A fourth example is the distinction between "holding" and "dictum"—the latter being anything in a judicial opinion which is not essential to the outcome. Dicta, unlike holdings, are not considered to be binding on judges of the same or a subordinate court in subsequent decisions. This principle can be rationalized in various ways, but leisure-seeking is an important and neglected factor in a complete explanation. Because dictum is nonbinding, a judge can, without thereby mortgaging his future votes, join an opinion by one of his colleagues that contains much with which he disagrees. In exchange, other judges will join his opinions even though they disagree with much in them. This "live and let live" attitude made possible by the difference in authority between holding and dictum reduces the amount of effort that judges need invest either in their own opinions (to meet objections by other judges to dicta) or in the opinions of their colleages (to purge those opinions of objectionable dicta).

A fifth example, though another for which there admittedly are alternative explanations, is the multitude of devices, most judge-invented, for ducking issues presented by the parties to appeals: the issue is moot or unripe, or calls for an "advisory opinion," or presents a nonjusticiable political question, or the party pressing it lacks standing, or the appeal was filed a day late, or the appellant had failed to exhaust some administrative or judicial remedy. These devices enable the judges to reduce their work, as well as to avoid the hassle involved in wrestling with difficult, politically sensitive issues. The latter consequence is the more important. More expeditious dispatch of judicial business may, by reducing court queues (a cost of using the courts), increase the demand for judicial services, just as building a new highway may, by reducing highway congestion, induce an increase in the amount of traffic. It is true that only the ablest judges are apt to notice a jurisdictional defect unnoticed by the parties and the district judge, but ordinarily one of the parties will have an incentive to bring the defect to the court's attention.

My approach may even help explain why judges adhere to stare decisis but not rigidly. If they adhered rigidly, they would not be voting. Voting implies some discretion; if there is no felt choice, there is no pleasure in choosing. Yet if judges considered every case afresh they would have to work much harder in each case, and they would also lose the protection from criticism, from "hassle," that comes from being able to blame an unpopular decision on someone else (that is, on earlier

judges). There might also be more litigated cases because of greater legal uncertainty.

"Going-along" voting and "live and let live" opinion-joining are practices related to but distinct from vote trading ("logrolling"). They are distinct because they are leisure-serving rather than power-maximizing. It is therefore understandable why vote trading by judges is condemned, and is in fact rare, while the other practices, which are common, are condoned or ignored. Legislators have a different utility function from judges, in part because they face reelection. Power and influence are more important to them than to judges, and therefore they engage in logrolling.[25] Here then is an economic reason to suppose, contrary to the extreme claims of some legal realists and critical legal scholars, that judges are not just legislators in robes. This analysis also predicts, however, that vote trading may occur among elected judges.

VI. The Spectatorship Analogy

A difficult question remains—that of the judge's motivation, when all monetary punishment and reward has been stripped away, and a choice between work and leisure is not in the offing, to vote for one side rather than another, or to vote for one interpretation of a statute or legal doctrine rather than another, or to adopt one judicial philosophy (such as "conservative," "liberal," "activist," or "restrained") rather than another. The traditional objection to the secret ballot—that it promotes, or at least protects, irresponsible voting—has carried the day in respect to voting by judges. Every judicial vote is public[26] (though sometimes a judge will tell his friends that he joined an opinion with which he disagreed because he didn't think the issue significant enough to warrant a dissenting opinion). This facilitates criticism, which can be expected to have a greater effect on behavior when ordinarily more powerful incentives, such as money, are not in play. Yet most judges in fact are relatively insensitive to criticism other than by other judges, believing conveniently that most of it is motivated by political disagreement, envy, ignorance (willful or otherwise) of the conditions under which judges work, and

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[25] Barry R. Weingast, "The Political Institutions of Representative Government: Legislatures," 145 *Journal of Institutional and Theoretical Economics 693* (1989).

[26] Not a universal feature of judging, by any means. Mark Ramseyer tells me that in Japan, when lower-court judges sitting in three-judge panels decide cases, the votes are not made public and dissents are never written.

self-promotion. Moreover, public comment on judicial decisions other than by the Supreme Court is rare. Only a tiny fraction of the tens of thousands of other appellate opinions published each year receive any sort of critical attention that might get back to the judge and alter his future behavior.

Choices of the kind that face a judge who must vote in a case—choices that cannot be made on the basis of wanting to increase one's pecuniary income, leisure, fame, or other forms of utility—are common in other areas of living. They are for example the choices we make when watching dramatic or cinematic performances. Athletic contests are different, mainly because of the built-in "bias" in favor, normally, of the "home" team, a bias that makes the judicial analogy strained. However, the bias is highly relevant to state court adjudication, and can help explain not only the federal diversity jurisdiction but also the exclusive federal jurisdiction over many types of case that pit a state resident against federal taxpayers.

The audience for a play or movie is detached, having no tangible stake in the outcome of whatever struggle is being depicted on stage or screen. Yet ordinarily it is induced to "choose" one side or the other. Usually the choice is manipulated by the author—he "tells" us as it were to side with the hero against the villain. But in dramatic works of deep ambiguity, which often are highly popular among intellectuals on that account, such as *Hamlet*, or *Measure for Measure*, or *Pygmalion*, the choice offered to the spectator is a real one, because the author either has not resolved in his own mind the central tension in the situation dramatized or has not been able (or desired) to communicate the resolution clearly. This explains the popularity of revisionist interpretations of literature, such as arguing that the real hero of *Paradise Lost* is Satan. The result is to make the work more dramatic, hence more engrossing. So the spectator, or, in the last example, the reader (but a "live" performance provides a closer analogy to the judicial process, though today many cases are submitted for decision without any oral argument or other hearing—much as when a play is read rather than performed), has to weigh the evidence and come to a decision. The position of the judge is similar.[27] If spectators get consumption value out of such choices, it is not surprising that judges do.

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[27] The analogy between the judge and the literary reader or spectator is developed, though for a different purpose, in Martha C. Nussbaum, "Equity and Mercy" (forthcoming in *Philosophy and Public Affairs*). On the dramaturgical character of trials, *see* Milner S. Ball, "The Play's the Thing: An Unscientific Reflection on Courts under the Rubric of Theater," 28 *Stanford Law Review* 81 (1975), and on

Spectators make choices about the meaning of a play or movie by bringing to bear their personal experiences and any specialized cultural competence that they may have by virtue of study of or immersion in the type of drama that they are watching, and often by discussing their reactions with friends who may have a similar competence. The judge brings to bear on his spectatorial function not only a range of personal and political preferences, but also a specialized cultural competence—his knowledge of and experience in "the law." And if he is an appellate judge he will discuss with his professional colleagues the proper outcome of the contest before making up his mind.

Of course not every case has the rich ambiguities of *Hamlet*. Many cases involve puzzles soluble with the technical tools of legal analysis—here the judge is like the reader of a detective story. The jury as factfinder performs a similar function. It is a different kind of spectatorship from the one I am stressing here, that of the appellate judge asked to decide not where truth lies but which party has the better case.

The voting and spectatorship analogies to judicial decision-making are similar. This is most easily seen by comparing applause to voting—for in a large audience the clapping of a single spectator contributes little more to the overall noise level than a single vote in an election. The voter is the spectator[28] in a contest between candidates, much as the reader or viewer of *Antigone* is the spectator of a contest between Antigone and Creon. It is no surprise that voter turnout is higher, the more publicized and the closer an election is,[29] just as the audience for a heavily advertised, highly dramatic play is likely to be larger than the audience for a meagerly advertised, undramatic play. The difference is that political campaigners ordinarily (though not invariably[30]) appeal primarily to the voter's self-interest, thus asking him to express an intensely personal preference. The judge, like the theatrical spectator, is asked to cast a disinterested vote.

Why has the spectatorship analogy to judging been overlooked? One reason is the piety in which the public discussion of judges is usually

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the forensic character of drama, *see* Kathy Eden, *Poetic and Legal Fiction in the Aristotelian Tradition* 176-183 (1986).

[28] Brennan and Lomasky, note 20 above.

[29] This assumes that the election is not likely to be so close that a single vote would decide it—if so, a vote would have significant instrumental value.

[30] Brennan and Lomasky, note 20 above, emphasize the element of disinterest in political voting. They follow Adam Smith's *Theory of Moral Sentiments* in arguing that disinterested actions are likely where their cost is low.

clothed. The analogy seems to give judging a frivolous air. But serious engagement with the arts as reader or viewer is not a frivolous activity; nor is "play" (contrasted with work) incompatible with adherence to rules. A chess player would reduce rather than enhance the pleasure he received from playing the game if he violated its rules, and so would the theatergoer who refused to enter into the lives of the characters on the stage, on the ground that they were not real people. Likewise the judge who violates the rules of the judicial game, Sports fans, theater fans, movie fans, and opera fans often develop a degree of connoiseurship which enhances their pleasure. In other words, they learn the rules (broadly understood) of the game they are watching, and respond in accordance with those rules. It is the same with judges, but with the important difference that the rules of the judicial game are uncertain and contested.

A second reason the spectatorship analogy to judging has been overlooked is the domination of analyses of judicial behavior by legal academics. The academic is a spectator too, but he is a spectator not of the little drama that the judge witnesses—the contest that the judge resolves—but of the judge's opinion. He usually does not attend oral argument or even read the briefs in the cases that he discusses. Naturally, therefore, he tends to ascribe more importance to the opinion, to its reasoning, its rhetoric, etc. than to the decision itself. Yet these are secondary factors for most judges. For the judge, as for Hamlet, "the play's the thing."[31] That is another reason why many judges consider academic criticism of their opinions carping.

The spectatorship analogy can help us see how judicial outcomes reflect both the judges' preferences going in *and* the quality of the briefing and argument in particular cases. It can also help us understand the function of judicial confirmation hearings in enabling the legislators to ascertain the judicial candidates' preferences, since those preferences can be expected to guide judges' decisions.

VII. A Formal Model of the Judicial Utility Function

The implications of the analysis for concrete problems in judicial administration—such as the selection of judges and the structure of judicial compensation—can be further explored with the help of a simple

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[31] Cf. Joseph Bensman and Robert Lilienfeld, *Craft and Consciousness: Occupational Technique and the Development of World Images* 19-22 (1973).

formal model.[32] Consider the following judicial utility function, in which effort is proxied by time:[33]

$$U = U(t_j, t_l, I, R, O)$$

t_j is the number of hours per day that the judge devotes to judging, t_l is the time he devotes to leisure[34] (here defined as all activities other than judging, so that $t_j + t_l = 24$), I is pecuniary income, initially limited to judicial salary, R is reputation, and O are the other sources of utility for a judge discussed in this paper—popularity, prestige, and avoiding reversal. R, O, and (especially) I can be assumed to be invariant to t_j above a low threshold,[35] and let us assume that the average judge is well above it. On these assumptions, the judge will allocate his time between leisure and judging so that the last hour devoted to judging yields him the same utility as the last hour devoted to leisure, since otherwise he could increase his total utility by reallocating time from the less to the more valuable activity.

In this very simple model, income[36] is assumed to have no effect on the utility of judging and of leisure. But it might have an effect. Economists ordinarily assume that an increase in income will result in an increase in the utility of leisure relative to work because of the diminishing marginal utility of money, but this is because work is assumed to generate no utility apart from that derived from the income which it produces. If work (here, judging) produces nonpecuniary utility, just like leisure, it is not obvious that an increase in income will cause a reallocation of time from work to leisure. Indeed, "fun" work like judging might

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[32] I am heavily indebted to David Friedman for criticisms of an earlier version of this part of the paper.

[33] A richer model would consider energy or effort as an additional choice variable, along with time, as in Gary S. Becker, *A Treatise on the Family* 64-79 (enlarged ed. 1991). I recur to this point later.

[34] Leisure need not be consumed off the premises, as it were. Loafing on the job is a form of leisure in my model.

[35] Presumably a judge who refused to do any work at all would be impeached and removed, making I=0.

[36] I am speaking of course of pecuniary income.

be considered a form of leisure.[37] Hence a more discriminating analysis of the effect of income on leisure is necessary.

A higher income will affect leisure in two potentially offsetting ways. The first is by reducing the time devoted to household production,[38] thus freeing up time for other activities, not only pleasurable leisure activities but also judging, itself a source of utility in my model. In effect, the *value* of leisure is reduced when a higher income enables a person to avoid the chores that he needed "leisure" (that is, time free from his market employment) to perform, so there is substitution for these leisure activities. The second effect of a higher income is to increase the utility generated by pleasurable leisure activities, such as travel, by enabling a higher quality of those activities to be bought. A trip to the South Seas is more fun than sitting in a rocking chair on the back porch. Of course, increased *quality* of leisure need not translate into increased *time* devoted to leisure; an alternative would be the substitution of an expensive for an inexpensive vacation of the same length of time. But I assume that people who have more money to spend on leisure activities will increase the time devoted to, as well as the quality of, those activities.

I would expect the effect of a higher income in increasing the demand for leisure time to predominate in the case of an increase in the income of a person whose present income is high enough to have enabled him to eliminate most of his household chores. I therefore predict that a higher judicial salary is likely to reduce the amount of work done by existing judges. But the qualification "existing judges" is important. By increasing the field of selection and specifically by attracting judges who set a higher value on income, and hence on work, relative to leisure, an increase in judicial salary may enable a harder-working class of judges to be recruited. Also, by reducing turnover, especially of the judges with the best private-sector opportunities (who are probably on average the best judges), the higher salary may conduce to a more experienced, higher-quality judiciary. But the possible cost in reduced effort should not be ignored—though here it is necessary to remind the reader that time and effort are not synonyms.[39] If effort or energy are limited, and leisure

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[37] Another example of "productive consumption" would be the business lunch. Gary S. Becker, "A Theory of the Allocation of Time," 75 *Economic Journal* 493, 504 (1965).

[38] Remember that in the model leisure includes all nonjudging activities. An increase in income will enable the purchase of additional labor-saving appliances and the hiring of additional domestic help.

[39] *See* note 31 above.

requires less effort than judging, a reallocation of time from judging to leisure activities may actually increase the effort that the judge devotes to judging and hence the quality of his judicial output.

Let me further complicate the analysis by allowing the judge to obtain some income from moonlighting. The opportunities for such income have been greatly curtailed recently—judges no longer can accept payment for speeches or articles, and their income from teaching has been capped at a modest percentage of their judicial salaries. (Book royalties are not limited, however—so one predicts that judges will give fewer speeches and write more books.) The effect of curtailing nonjudicial income can be modeled by partitioning judges' income into a fixed and a variable component, the second representing moonlighting income. With this refinement, and ignoring the arguments in the judicial function (other than judicial income) that are not particularly responsive to changes in the amount of time invested in judging, the judicial utility function can be rewritten as

$$U = U(I_f, I_v(t_v), t_j, t_l)$$

where I has been divided into a fixed and variable component, the former being the judge's judicial salary and the latter depending on the time he allots to moonlighting (t_v). So $I = I_f + I_v(t_v)$, where $t_j + t_l + t_v = 24$. Now in considering how much time to allocate to judging, the rational judge will consider not only the negative impact on his leisure but also the negative impact on his nonjudicial income. That impact will be less, the fewer lawful opportunities the judge has to obtain such income. Hence we can expect that the curtailment of judicial moonlighting has increased both the judicial effort of the existing judges (save for the book writers!) and their leisure, since the opportunity to moonlight makes leisure more costly.

As before, the effects on judicial selection and retention must be considered in a total evaluation, as must any reduction in government tax revenues from curtailing judges' opportunities to earn outside income. Of course, if in order to limit the effects on selection and retention the curtailment of moonlighting is coupled with an increase in judicial salaries, there may be no net reduction in tax revenues. But there will be a net increase in government spending, to fund the salary increase. And the effect of the higher salary in increasing the judicial demand for leisure may offset the effect of curtailing moonlighting in increasing judicial effort.

I want to say a little more about selection of judges because the formal model is again helpful. A person will accept a judgeship if its net expected utility is positive, which is to say if its utility exceeds that of his present employment (in the practice of law, let us assume) plus the cost (other than the forgone income from practice) of becoming a judge, for example the inconvenience, even humiliation, of filling out elaborate forms and undergoing a searching investigation by the FBI and possibly a severe grilling by the Senate Judiciary Committee. Formally, then, the condition for accepting a judgeship is that

$$U_J(t_j, t_l, I_J, R, P_J) - U_L(t_L, I_L) - C > 0$$

where U_J is the utility from being a judge, I_J is the judicial salary, P_J is the prestige of being a judge, U_L is the utility of practicing law, t_L is the nonpecuniary utility of doing lawyer's work, C is the cost of becoming a judge, and the other terms are either as before or self-explanatory. Lawyers are assumed to have no leisure—more realistically, l_j should be viewed as the contribution to the judge's utility of the additional leisure that a judge has compared to a practicing lawyer. The other arguments in the judicial utility function (that is, the components of O other than prestige) have been dropped as not particularly helpful to the analysis of judicial selection. The utility terms should be translated into present values to be comparable to C, but I omit this detail.

Certain points are obvious enough. The more costly it is to become a judge and the lower the judicial income is relative to income in practice, the less likely a lawyer is to accept a judgeship. Hence the fact that federal judges are paid the same no matter where they live, even though the cost of living and the salaries of lawyers vary widely across the country, enlarges the field of selection in low-cost versus high-cost areas. And the more a lawyer values leisure, prestige, and judging versus lawyering, the more likely he will be to accept a judgeship. A slightly subtler point is that if, in order to widen the field of selection, steps are taken to increase judicial prestige by limiting the growth in the number of judges, this will reduce the amount of leisure that a judge can enjoy without imperiling his reputation. As a result, the field of selection may not, on balance, be widened. However, although the number of candidates may be the same, there will be a shift in the composition of the group away from leisure-loving judges, with the result that limiting the growth of the number of judges may not reduce judicial output.

VIII. Conclusion

My analysis will be criticized as failing to illuminate the central concern of students of judicial behavior. For it no more explains why a particular judge votes a particular way in a particular case or is a devoté of one judicial philosophy rather than another than it explains why a particular theatergoer analyzes a particular play in a particular way. But that was not the purpose of the analysis. It was to show that judicial behavior presents no insoluble puzzles from the standpoint of rational action. Rational judges pursue instrumental and consumption goals of the same general kind and in the same general way that private persons do. There is no mystery as to what they maximize. They maximize a utility function whose principal components are readily observable in the behavior of such familiar participants in the social enterprise as nonprofit firms, voters, and theatergoers. Judges can be viewed as a composite of these other social actors, and when they are so viewed it becomes possible to analyze a number of features of their behavior with the aid of the standard tools of economic analysis.

Although the analysis does not show why judges vote as they do, it does not, as it might appear to do, undermine the thesis that the common law and other areas of judge-made law are on the whole efficiency-enhancing.[40] On the contrary, by showing that the conditions of judicial employment enable and induce judges to vote their values and preferences, the analysis supports or at least does not refute the proposition that judge-made law is efficiency-enhancing because efficiency is an important social value and hence internalized in most judges and is, moreover, the only social value that judges, given their limited remedial powers, can promote in an effective and hassle-free fashion.

Another objection is that my analysis does not explain the "ruled" quality of judicial decision-making. Although there is much error, willfulness, and even zaniness in the decisions of judicial officers (including judges), anyone who has sat with juries and participated in judicial deliberations know that most judicial business, at least in the federal courts (I have no first-hand experience with state courts), is dispatched in a dutiful, responsible, conscientious, and impartial although not always distinguished manner. This important characteristic of judicial behavior is explicable within the framework of my model by reference to screening, of jurors as well as judges, and also by the spectatorship analogy, which teaches that the spectator maximizes his utility by submitting to

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[40] *See*, for example, Posner, note 12 above, pt. 2.

rather than defying the rules and conventions of the genre of the text or the performance that he is reading or watching.

I do think that there is value in treating the judge as an ordinary person rather than as either a Promethean, intent on changing the world, or a saint, devoid of human weaknesses, biases, and foibles. The vast majority of judges are of course neither.[41] They are not, for the most part, either power seekers, like some politicians, or truth seekers, like many scientists. The methods of selection and reward, and other institutional constraints that make truth-seeking a plausible if not entirely realistic goal to ascribe to scientists, do not characterize the judicial environment.[42] There is a risk, acknowledged in the preceding paragraph, of going overboard here. But although judicial candidates are pretty carefully screened for honesty and basic professional competence, judges are generally not selected or promoted primarily on a merit basis. They certainly are not paid on that basis—and they are not supervised at all. The approach taken in this paper, which can and I hope will be extended to elected judges, to Continental judges, to jurors, and to legislators, demystifies judges at the same time that it domesticates them for economic analysis.

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[41] We are beginning, at last, to get a glimpse, from judges, of some of the unvarnished realities of a judicial career. For notable examples, *see* Frank H. Easterbrook, "What's So Special about Judges?" 61 *University of Colorado Law Review* 773 (1990), and Patricia M. Wald, "Some Real-Life Observations about Judging," 26 *Indiana Law Review* 173 (1992).

[42] "[M]ost judges, even Supreme Court Justices, have been plucked from well deserved intellectual obscurity." Charles W. Collier, "The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship," 41 *Duke Law Journal* 191, 221 (1991). From political obscurity as well, one might add.

Readers with comments should address them to:

Richard A. Posner
The Law School
The University of Chicago
1111 E. 60th Street
Chicago, IL 60637

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