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Foreword

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FOREWORD

JAY TIDMARSH*

The topic of this symposium, “The Judiciary,” is timely and vital. In recent years, as candidates have waged ever more expensive and partisan election campaigns for judicial office, the tension between judicial independence and judicial accountability has commanded significant attention within the bench, the bar, and the academy.¹ Although the tension plays out most practically in the debate over appointed versus elected judges, it is more fundamentally a debate about the judiciary’s role in a democratic society, about the nature of judging, and about the nature of law. With the rich array of points of view and methodologies that they bring to bear on these questions, the articles and notes in this symposium sum up to an important and fresh contribution to the literature.

The articles by Professors Geyh² and Dimino³ frame the debate over independence and accountability. As both authors relate—even as they try to find ways to mediate between the standard positions—the basic fault line in the debate is a jurisprudential one. On the one side—the side of judicial independence—lies a formalist view that law is knowable, and that legal reasoning is an objective enterprise that ought to be protected from political influences. On the other side—the side of judicial accountability—lies the realist-critical-attitudinal view that law is politics, and that legal reasoning is a mask for choosing naked political preferences that ought to be subjected to democratic control. Their articles, as well as the student note by Rachel Luberdá,⁴ reject this simplistic dichotomy, and seek a bal-

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1. See, e.g., Symposium, *Fair and Independent Courts: A Conference on the State of the Judiciary*, 95 GEO. L.J. 895 (2007).

2. Charles Gardner Geyh, *Straddling the Fence Between Truth and Pretense: The Role of Law and Preference in Judicial Decision Making and the Future of Judicial Independence*, 22 J. L. ETHICS & PUB. POL’Y 435 (2008).

3. Michael R. Dimino, Sr., *Accountability Before the Fact*, 22 J. L. ETHICS & PUB. POL’Y 451 (2008).

4. Rachel Luberdá, *The Fourth Branch of the Government: Evaluating the Media’s Role in Overseeing the Independent Judiciary*, 22 J. L. ETHICS & PUB. POL’Y 507 (2008).

ance that reflects a view of the law as indeterminate but not necessarily radically political as it is applied on the ground.

The articles by Professors Lubet,⁵ Hellman,⁶ and Engler⁷ then examine, from various perspectives, the intersection between judicial independence, judicial accountability, and the ethical rules that pertain to judicial behavior. Professor Lubet argues that loosening the ethical restrictions on judicial speech in campaigns and elsewhere might have the unintended consequence of subjecting judges to more politicized attacks in the "marketplace of ideas." Professor Hellman critiques the new rules on judicial misconduct, arguing that even more openness in the process of investigating complaints would enhance the credibility, and thus the independence, of judges. Professor Engler advocates a more active, and less umpireal,⁸ stance for judges when one party is unrepresented.

Professor Wendel⁹ and Justice Keyes¹⁰ use the foundational jurisprudential question of the nature of law as their jumping-off points for reflecting on the obligations of the judiciary. Both start with the Hart/Dworkin debate over whether it is possible to distinguish legal from political sources of reasoning. After also blending in comparative insights of civilian and common-law systems, Professor Wendel concludes that labeling judicial decisions as "legal" or "political" is unfruitful, and that a requirement that judges provide reasons for their decisions acts as a sufficient response to concerns about political speech by judges as well as a sufficient check on "failures of judicial impartiality." Justice Keyes argues that the law is systematically moral; thus, contrary to Dworkin's position, a judge's strict adherence to the law best advances the moral and social-justice aims of the law. Beginning instead from the vantage point of Catholic moral theology, a stu-

5. Steven Lubet, *Judicial Campaign Speech and the Third Law of Motion*, 22 J. L. ETHICS & PUB. POL'Y 425 (2008).

6. Arthur D. Hellman, *When Judges Are Accused: An Initial Look at the New Federal Judicial Misconduct Rules*, 22 J. L. ETHICS & PUB. POL'Y 325 (2008).

7. Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 J. L. ETHICS & PUB. POL'Y 367 (2008).

8. Cf. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) (critiquing the adversarial system's capacity for finding the truth).

9. W. Bradley Wendel, *Impartiality in Judicial Ethics: A Jurisprudential Analysis*, 22 J. L. ETHICS & PUB. POL'Y 305 (2008).

10. Evelyn Keyes, *Two Conceptions of Judicial Integrity: Traditional and Perfectionist Approaches to Issues of Morality and Social Justice*, 22 J. L. ETHICS & PUB. POL'Y 233 (2008).

dent note by Eric Parker Babbs¹¹ argues that pro-life Christian judges cannot, consistent with their religious obligations, authorize parental-bypass orders for minors seeking abortions because doing so materially cooperates in evil.

Finally, Judge Anderson uses the story of a routine day processing his criminal docket, and the defendant who throws an unexpected monkey wrench into the slowly grinding mill of the criminal-justice system, as the basis for reflection on the modern judicial system, the nature of redemption, and the importance of moral vision.¹²

Putting into juxtaposition the legal, ethical, political, philosophical, moral, and theological dimensions of legal issues is the goal of the *Journal of Law, Ethics & Public Policy*, and in this issue the editors have so admirably succeeded in their task that I have been left wondering what additional scraps of wisdom I might impart to the reader. Let me sketch two brief ideas from my own perspective as a proceduralist. The first is a comparative point; the second an historical one.

First, I take it that modern adjudication has four principal tasks: declaring the law, finding the facts, applying the law to the facts, and (when appropriate) shaping a remedy.¹³ Different legal systems allocate roles, rules, and responsibilities in different ways in order to accomplish these tasks. Observers who have described the procedural systems of the Soviet Union and Maoist China have noted the pervasive influence of the Communist Party in the legal system. Institutionalized in the office of Party officials known as procurators, the purpose was to ensure that judicial decisions conformed to the goals of the Communist Party.¹⁴ Procurators enjoyed significant powers—including the powers to institute lawsuits and to intervene in private lawsuits that affected the Party's interests—that made them, at least in cases of some political significance, the most influential figure in the legal system. At the same time, procurators were often criticized for failing to take action in many serious disputes, such as

11. Eric Parker Babbs, *Pro-Life Judges and Judicial Bypass Cases*, 22 J. L. ETHICS & PUB. POL'Y 473 (2008).

12. Leland P. Anderson, *A "More Excellent Way": Moral Imagination & the Art of Judging*, 22 J. L. ETHICS & PUB. POL'Y — (2008).

13. See SUZANNA SHERRY & JAY TIDMARSH, *CIVIL PROCEDURE: ESSENTIALS* 11–13 (2007).

14. For descriptions of the work of procurators, see MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* (1985); SHAO-CHUAN LENG *JUSTICE IN COMMUNIST CHINA* (1967). Cf. Stephen C. Thaman, *Reform of the Procuracy and Bar in Russia* 3 PARKER SCH. J. E. EUR. L. 1 (1996) (discussing changes in the procuracy after the breakup of the Soviet Union).

environmental or other litigation that we might call "public law" in nature, that might call the actions of the government into question.

Whether fair or not, Americans probably do not regard the judicial systems of Soviet Russia and Maoist China as the pinnacles of judicial integrity. To the contrary, the phrases "show trials" and "kangaroo courts" frequently come to mind. The particular reason why we carry this image is, I suspect, because we are skeptical that judges can dispassionately carry out the four tasks of adjudication that I have described—particularly, the tasks of finding the facts and applying the law to those facts—when they are subjected to the constant oversight of the Procuracy, which keeps a vigilant eye on the consistency between judicial outcomes and the government's political preferences. And we are particularly skeptical that judges in such an environment can act neutrally when challenges to the actions or policies of the government are put into the dock.

I do not mean to criticize too harshly the office of the procurator. As Mirjan Damaska points out, procedural rules can be expected to look very different when a government takes an activist, policy-implementing stance toward its people and when its judicial system is hierarchically ordered.¹⁵ But that system is not our system. As Damaska also points out, Americans adopt a far more laissez-faire attitude toward government, and a more decentralized and diffused approach to governmental and judicial power. Our very different experiences and expectations of government and judicial power make us suspicious of such efforts to guide individual lawsuits toward the preferred social outcome.

If we substitute the phrase "the People" for the phrase "the Procuracy," we make the argument for greater judicial accountability. We hold judges accountable to the will of the people; we make them conduits for the policies that a majority of citizens prefer. Rather than institutionalizing the role of articulating and achieving preferred social policy in the procurator, we use elections to instantiate that role in the judge. In the Soviet Union and China, there existed at least the formal distinction between the judge and the official designated to assure that judicial outcomes accorded with social preferences; those who wish to hold judges accountable for their ability to smoothly transmit majoritarian preferences into judicial decisions eliminate even that formal distinction.

15. MIRJAN DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986).

I do not, of course, wish to be understood as suggesting that those who favor greater judicial accountability are closet Communists or totalitarians. But I do wish to point out the contradiction between strong notions of judicial accountability (at least as understood to mean that judges who fail to render decisions conforming to majoritarian preferences should be voted out of office) and the nature of the American legal and political order. Americans tend to regard courts as a place to resolve disputes that arise in the course of their private ordering of affairs, rather than as a place to transmit previously determined social policies into reality. We tend to diffuse judicial power through layers of court systems and even to lay citizens on juries, rather than to force a lock-step mentality that insists on close judicial conformity with the stated (or intuited) preferences of the polity.

One objection to this argument is to point to the American jury, which already seems to translate social preferences into legal outcomes; expecting judges to do the same seems no great breach of faith in American justice, especially when judicial elections advance the goal of American democracy. To a large extent, however, this observation misses the mark. The mythic nature of American juries derives from their countermajoritarian stance—from their ability to provide justice to individuals when properly enacted laws do not.¹⁶ Moreover, the combination of the requirement of unanimity (or near-unanimity) in jury verdicts and the requirement of cross-sectional representation on venire panels makes juries imperfect mechanisms for translating the will of the majority into verdicts. In this sense, juries in the American system occupy the same (and not perfectly worked out) relationship to majoritarian decision-making as judges who engage in judicial review of a statute's constitutionality.¹⁷ American courts are not designed to be—as the courts of some communist, socialist, and civilian systems are—an organ for the frictionless transmission of sovereign policy into judicial outcomes.

My second, and historical, point starts with the jury. When the United States was founded, juries enjoyed a power they no

16. When the law that the jury encounters is a rule of common law, when the judges promulgating that rule are not elected, and when the jury's decision-making process "nullifies" that rule, the jury sometimes—but not always—is achieving the outcome that the majority would prefer. When the law that the jury "nullifies" has been enacted by the representative branches of government, however, juries act in a clearly countermajoritarian way.

17. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

longer do: a power to determine both the facts *and* the law,¹⁸ free of all but a limited judicial influence. In the past two centuries, the history of the American jury has been schizophrenic. On the one hand, the growth of legal claims,¹⁹ the demolition of legal barriers such as no-duty rules,²⁰ and the abolition of the straight-jacket of the writ system²¹ allow American juries the opportunity to weigh in on a range of disputes that lay beyond the imagination of the founding generation. On the other hand, the past two centuries have witnessed a constant erosion of jury autonomy in decision making, as the power to determine the law has been taken from juries and devices such as judgments as a matter of law, summary judgment, and formalized rules of evidence have effectively cabined jury factfinding.²²

In more recent years, judges have also been invested, at least on the civil side, with great discretion during the pretrial process, and have assumed the mantle of case managers who often seek to achieve settlements rather than litigated resolutions of lawsuits.²³ Often the choice of which case-management techniques to use—and which not to use—has a direct bearing on the outcome of a case.²⁴ Moreover, trial rates have plummeted in recent years; criminal cases plead out, and civil cases settle. Today fewer than 1.5% of all federal civil cases reach trial. About two-thirds of that small set are jury trials.²⁵

In this litigation environment, the judge has become a towering figure.²⁶ Due to its limited use, the natural counterweight

18. See Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1025–37 (2007).

19. See Geoffrey C. Hazard, Jr., *Authority in the Dock*, 69 B.U. L. REV. 469 (1989).

20. See Robert Rabin, *Tort Law in Transition: Tracing the Patterns of Sociolegal Change*, 23 VAL. L. REV. 1 (1988).

21. See SHERRY & TIDMARSH, *supra* note 13, at 16–30.

22. See Lawrence M. Friedman, *Some Notes on the Civil Jury in Historical Perspective*, 48 DEPAUL L. REV. 201 (1998).

23. See Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 553–62 (2006); see also Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 74 (1982).

24. For an examination of some case-management techniques and their capacity to influence outcomes, see JAY TIDMARSH & ROGER H. TRANGSRUD, *COMPLEX LITIGATION AND THE ADVERSARY SYSTEM* 878–1384 (1998).

25. See SHERRY & TIDMARSH, *supra* note 13, at 96; cf. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (reporting 1.8% trial rate with 1.2% jury trials in the early 2000s).

26. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (describing the ways in which the judge's authority in public-law cases exceeds traditionally exercised powers).

to judicial authority in many cases—the jury—is functionally irrelevant as an antidote.²⁷ The rules of procedure enhance, rather than constrain, judicial power; and when procedural rules do not provide sufficient power, judges often invent new procedural authority under the rubric of “inherent power.”²⁸ I can think of no time in American history when judges were as procedurally powerful as they are today. Given this reality, and given the American distrust of concentrations of power, strong arguments for judicial independence (at least as understood to imply a lack of accountability for the use or abuse of judicial power) are as unappealing as strong arguments for judicial accountability.

What seems to be needed is some “virtue theory of judging”: an acknowledgment that judges are not simple conduits for the preferences of the majority, but also a recognition that they are to exercise their countermajoritarian powers wisely and modestly. As the related difficulty of specifying the limits on the power of judicial review has shown, however, it is impossible to specify a single such theory of judging. Indeed, as many of the contributors to this issue acknowledge, consideration of the judicial role begins with consideration of the nature of law—an equally if not more contentious subject than theories of judicial review or theories of judging.

The questions, and their consequences for the American judiciary, are profound. For this reason, I am grateful to the authors in this symposium for helping all of us to think through them more deeply.

27. This statement does not mean that the institution of the jury is irrelevant. Obviously, many settlements occur in the shadow of the jury, as parties negotiate based on their assumptions about what the jury will do. Likewise, the default mechanism for resolving most cases remains jury trial, so the jury exercises a significant influence over the shape of the American litigation system. See SHERRY & TIDMARSH, *supra* note 13, at 74–97.

28. See Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. (forthcoming 2008) (copy on file with author); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001).

