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CHAPTER TWO

THE LIMITS OF LAW

Judges are sworn to uphold the law. Yet, as we have already seen, sometimes the judges are accused of violating that oath to pursue their own agendas, or of allowing ideological or other biases to decide cases. In the following chapters we explore that claim, which is leveled frequently both in the public square and by prominent political scientists. Before doing so, however, we must pause and look at the law itself. The idea that law decides cases is fundamental, and taken as a given by much of society. Understanding how law does so—and the extent to which it limits or authorizes judicial discretion—is essential to any sophisticated examination of judicial decisionmaking. This Chapter takes up those questions.

I. Posing the Question: The Chief Justice’s Analogy

In the summer of 2005, President George W. Bush nominated John Roberts to be Chief Justice of the United States Supreme Court. When Roberts testified before the Senate Judiciary Committee regarding his confirmation, he drew an analogy to the game of baseball to describe his role as a Justice of the Supreme Court. “Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules, they apply them.”¹

Absent its context, one might have expected Roberts’ use of such an analogy to be uncontroversial. Judges are supposed to be neutral umpires, aren’t they? But because of the context in which they were uttered, and who uttered them, Chief Justice Roberts’ words have been picked apart, critiqued, criticized and even mocked.²

¹ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of Judge John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

² See, e.g., Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1069 (2006) (“Although both make decisions, it is hard to think of a less apt analogy. An umpire applies rules created by others; the Supreme Court, through its decisions, creates rules that others play by. An umpire's views should not make a difference in how plays are called; a Supreme Court Justice's views make an enormous difference. Justices John Paul Stevens and Antonin Scalia frequently disagree in important constitutional cases; everyone knows that it is because their views and ideologies are drastically different.”); Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings for*

Roberts was nominated at a time when the federal judiciary was the subject of great political controversy. Over the prior ten years, charges of “judicial activism” were leveled regularly at the Justices. As an historical matter, accusations of activism had been applied most commonly to the Supreme Court during the tenure of Chief Justice Earl Warren. The Warren Court rendered many controversial decisions on issues such as school desegregation, school prayer, and the rights of criminal defendants.³ These decisions generally were seen to be in a “liberal” direction. (We are going to focus on the terms “liberal” and “conservative” more closely in the next Chapter, but for now take them in their common parlance.) Critics believed the Warren Court’s social change agenda, which frequently involved striking down state and federal laws, was more properly pursued in legislative bodies; hence the “activist” appellation. Beginning in the mid-1990s, however, during William Rehnquist’s tenure as Chief Justice, the Supreme Court demonstrated that conservative Justices could use their power to strike down laws as aggressively as could a liberal Court. The Rehnquist Court invalidated many laws enacted largely by a Democratic Congress.⁴ As a result, liberals began flinging the accusation of “activism” back at conservatives. Claims of activism were so rampant that the term began to lose any clear meaning.⁵

In the midst of these debates over judicial activism, New York’s Democratic Senator Chuck Schumer, a prominent member of the Senate Judiciary Committee, suggested the Senate should start overtly considering a nominee’s ideology with regard to his or her fitness for office. “For one reason or another,” Schumer wrote in a widely noted opinion piece in *The New York Times*, “examining the ideologies of judicial nominees has become something of a Senate taboo. In part out of a fear of being labeled partisan, senators have driven legitimate consideration and discussion of ideology underground.” In light of present politics, however, Schumer argued it

Judge Sonia Sotomayor, 40 U. BAL. L.F. 1, 14 (2009) (“The argument that ‘discretion-free’ judging, devoid of the influence of one’s identity or experiences, is implausible in a profession populated by human beings, and not machines, is compelling”); Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709, 1716 (2007) (“Viewing judges merely as objective umpires chills the very introspection required to achieve a more objective jurisprudence.”); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 702 (2007) (“The umpire analogy would have judges ‘just’ decide constitutional cases according to ‘the rules.’ Judges, however, cannot ‘just’ decide constitutional cases according to ‘the rules’ because they cannot agree on what the rules are in the vast majority of the most important cases. Judges cannot agree on what the rules are in such cases because a critical purpose of constitutional rules is to express a social vision, and many social visions in contemporary American society are deeply contested.”); Lauren Collins, *Number Nine: Sonia Sotomayor’s High-Profile Début*, NEW YORKER, Jan. 11, 2010, at 42, 53 (“The robotic dispensation of justice is a fiction”); Robert Schwarz, *Like They See ‘Em*, N.Y. TIMES, Oct. 6, 2005, at __ (“The myth of the neutral umpire is no more tenable than that of the neutral justice.”).

³ See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the Sixth Amendment requires the government to provide counsel to indigent criminal defendants); *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that mandatory school prayer in public schools violated the Establishment Clause of the First Amendment); *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding that racially segregated public schools violated the Fourteenth Amendment).

⁴ See Thomas M. Keck, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 2 (2004); Lori Ringhand, *The Rehnquist Court: A “By The Numbers” Retrospective*, 9 U. PA. J. CONST. L. 1033, 1034 (2007). [Cite Ringhand book.]

⁵ See Stefanie A. Lindquist & Frank B. Cross, *Measuring Judicial Activism* 29-46 (2009); Randy E. Barnett, *Constitutional Clichés*, 36 CAP. U. L. REV. 493, 493 (2008); Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709, 1716 (2007); Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555, 556 (2010). See generally Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195 (2009) (collecting sources that use or analyze the language of judicial activism).

was time for that to change. “No one needs to be reminded that the president was elected by the narrowest of margins, while the Senate is closely split. In such a time, the president and the Senate must collaborate in judicial appointments, and certainly, Senate opposition to judicial nominees outside the mainstream is justified. Tilting the court further to the right would push our court sharply away from the core values held by most of our country’s citizens.” And then, Schumer made a veiled threat: “If the president uses ideology in deciding whom to nominate to the bench, the Senate, as part of its responsibility to advise and consent, should do the same in deciding whom to confirm. Pretending that ideology doesn’t matter—or, even worse, doesn’t exist—is exactly the opposite of what the Senate should do.”⁶

Just months before Roberts’ nomination, the battle over judicial ideology came to boil in the great filibuster fight of 2005. At the time, nominations to the federal courts were being made by the Republican President, George Bush, and Democrats were in the minority in the Senate, which was charged with confirming those judges. Under the then-existing Senate rules, a minority could stop any legislative action by holding the matter on the Senate floor – filibustering it – until the majority could muster 60 votes to stop the filibuster.⁷ Angry at what they saw as overly conservative and ideological appointments to the federal bench, Democrats were filibustering certain Bush nominees. Frustrated, Republicans threatened to change the rules to end the Democrats’ use of the filibuster. This was called the “nuclear option” because of the gravity of using a procedural tactic to end this long-time protection held by the minority. In response, Democrats said they would bring all business in the Senate to a halt if the nuclear option were employed. Tensions ran high as a key vote on the filibuster approached. Then, suddenly, a compromise was reached. On May 23rd, 2005, a “Gang of 14” Senators – seven from each party, and enough Democrats to end the filibusters of Bush nominees – signed on to set of principles regarding when the filibuster could appropriately be used for judicial nominations. Under the deal, the Democrats agreed to an up or down vote on certain Bush nominees – i.e., no filibuster – so long as Republicans took the nuclear option off the table. Going forward, Senators in the Gang of 14 agreed only to filibuster under certain “extraordinary circumstances,” the definition of which was left to the conscience of individual Senators.⁸

John Roberts’ nomination to the Supreme Court triggered all of these pre-existing tensions. President Bush initially nominated Roberts as a Justice on July 19, 2005, just weeks after the filibuster deal was reached. Some Democrats in the Gang of 14 had taken the position that the deal did not apply to the Supreme Court. Moreover, it looked very much like Roberts’ nomination was going to affect the ideological balance on the Supreme Court. Roberts was nominated to fill the position on the Supreme Court opened by the retirement of Sandra Day O’Connor. In many, many cases the Rehnquist Court had been split 5-4 between the liberals and the conservatives. Although Justice O’Connor largely had voted in a conservative way, she had parted ways with her conservative colleagues to cast important moderating votes on such issues as affirmative action and abortion.⁹ Thus, it was expected that Roberts’ ideology would be very

⁶ Charles E. Schumer, *Judging by Ideology*, N.Y. TIMES, June 26, 2001, at A19.

⁷ Frustrated by Republican blocking of President Obama’s judicial appointments, on [date] Senate Democrats exercised the nuclear option as to judicial appointments. It is still too early to tell what the long-term effects will be, but doing so allowed the Senate to confirm several previously blocked nominees.

⁸ Carl Hulse, *Bipartisam Agreement on Judges Averts Showdown in Senate*, N.Y. TIMES, May 24, 2005, at ____.

⁹ See, e.g. *McCreary County. v. Am. Civil Lib. Union of Ky.*, 545 U.S. 844 (2005) (O’Connor, J., concurring) (holding that display of Ten Commandments in Kentucky courthouses violated the Establishment Clause); *Hamdi v.*

much in play. Then, suddenly, Chief Justice Rehnquist died of cancer and President Bush tapped Roberts instead for the Chief Justice position. (Current Justice Samuel Alito ultimately was nominated and confirmed to O'Connor's seat.) Although a transition from Rehnquist to Roberts would have less ideological significance, the stakes were sufficiently high—and the battle lines sufficiently well-marked—that the Roberts nomination remained the subject of heated controversy.

Perhaps it was no accident, then, that when John Roberts testified before the Senate Judiciary Committee he used the umpire analogy to portray the role of the judge in a distinctly non-ideological way. He wanted to reassure the Democrats in the Senate charged with confirming him of his moderation. “I have no agenda,” Roberts promised the Senators and the nation, “but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench, and I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and *I will remember that it's my job to call balls and strikes, and not to pitch or bat.*”¹⁰

Five years later, the ideological shoe was on the other foot as President Barack Obama nominated Solicitor General and former Harvard Law School Dean Elena Kagan to fill the seat Justice John Paul Stevens was leaving. She was asked by Senator Amy Klobuchar (D-Minn) “Do you think the balls-and-strikes analogy is a useful one, and does it have its limits?” Here is part of her response:

I suppose the way in which I think that the metaphor does have its limits. . . was that the metaphor might suggest to some people that law is a kind of robotic enterprise, that there's a kind of automatic quality to it, that it's easy, that we just sort of stand there and, you know, we go ball and strike, and everything is clear-cut, and that there is -- that there is no judgment in the process.

And I do think that that's not right. And it's especially not right at the Supreme Court level where the hardest cases go and the cases that have been

Rumsfeld, 542 U.S. 507 (2004) (O'Connor, J., for the majority) (holding that failure to give United States citizen being held as enemy combatant a meaningful opportunity to contest factual basis for his detention violated the Due Process Clause); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (O'Connor, J., for the majority) (upholding affirmative action in university admissions); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (O'Connor, J., concurring) (striking down Nebraska statute banning so-called “partial birth” abortion); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (O'Connor, J., for the majority) (holding that student may sue a public school district under Title IX for sexual harassment by another student); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (O'Connor, J., for the majority) (holding that exclusion of male applicant from state-support, women-only nursing school violated the Equal Protection Clause). *See also* Linda Greenhouse, *Court in Transition: News Analysis; Consistently, a Pivotal Role*, N.Y. TIMES, July 2, 2005, at A10 (“Over the last 11 Supreme Court terms, Justice Sandra Day O'Connor has sided with the majority in more 5-4 decisions than any other justice. . . . Justice Sandra Day O'Connor was near the center of the court and a swing vote on a host of other social issues.”).

¹⁰ Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55, 56 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States) (emphasis supplied).

the subject of most dispute go. And as to that, I think that there is -- judges do, in many of these cases, have to exercise judgment. They're not easy calls.

That doesn't mean that they're doing anything other than applying law. I said yesterday on a couple of different occasions, it's law all the way down. You know, you're looking at text. You're looking at structure. You're looking at history. You're looking at precedent. You're looking at law, and only at law, not your political preferences, not your personal preferences.

But we do know that not every case is decided 9-0, and that's not because anybody's acting in bad faith. It's because those legal judgments are ones in which reasonable people can reasonably disagree sometimes.¹¹

These snippets from the Roberts and Kagan confirmation hearings capture the problem that lies at the heart of this Chapter—and, in an important sense, this entire book. Chief Justice Roberts describes the judge as neutral arbiter of legal disputes. On that view, judges' personal characteristics should not affect their decisions; it is the law, not the judge, that decides the case. Just as we would expect two umpires to call the same balls and strikes, different judges should reach the same conclusions on the same legal questions. As Justice Kagan notes, however, not all Supreme Court decisions are 9-0. There is disagreement. So, what is deciding those cases in which judges disagree? She insists that “political” and “personal preferences” do not decide cases, that it is “law all the way down.” But how can judging be neutral if different judges reach different decisions?

The ideal of judicial neutrality is reflected in the familiar expression that ours is a “government of laws, not of men.” The expression is gendered because it is old. John Adams famously invoked it in summarizing the views of thinkers who had written throughout the ages about the notion of a republic.¹² It gained even wider currency when he wrote it into the Declaration of Rights in the 1780 Constitution of the Commonwealth of Massachusetts, and it has been repeated endlessly ever since.

In reality, the concept underlying the phrase is more ancient yet. Sir William Blackstone often is quoted on the issue. Blackstone was the great chronicler of the British common law. His “Commentaries on the Laws of England,” first published in four volumes from 1765 to 1769, were enormously influential on both sides of the Atlantic Ocean. In them, Blackstone wrote that “it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion;” the precedents are “a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments; he being sworn to

¹¹ Confirmation Hearing on the Nomination of Elena Kagan to an Associate Justice of the U.S. Supreme Court: Hearing Before the S. Comm. on the Judiciary,, 111th Congress 8-9 (2010) (statement of Elena Kagan, Nominee to be an Associate Justice of the United States Supreme Court).

¹² See John Adams, *Novanglus; or, A History of the Dispute with America, From its Origin, in 1754, to the Present Time*, No. 7 (1775).

determine, not according to his own private judgment, but according to the known laws and customs of the land[.]”¹³

The judge’s “uniform” – the judicial robe – is an important bit of symbolism that captures this core notion of the ideal of the neutral judge, that a judge should decide not “according to . . . private sentiments” or to “private judgment, but according to the known laws and customs of the land.” Indeed, British judges wore bright-colored robes, and early American judges often followed this tradition. But by 1800 Chief Justice John Marshall – the author of *Marbury v. Madison*, and the person most responsible for the putting the Supreme Court on the path to what it is today – had prevailed upon his colleagues in the Supreme Court to adopt simple black robes like those commonly worn by judges in his home state of Virginia. As Professor Paul Kahn has explained, “[t]he black robes are a symbol of the division the rule of law strives to maintain between the person of the judge and the judicial function. Not just the personal voice but personal knowledge must be suppressed by the rule of law. The judge appears to have neither private will nor private knowledge.”¹⁴ Or, as Chief Justice Roberts put it during his confirmation hearings, “judges wear black robes, because it doesn’t matter who they are as individuals. That’s not going to shape their decision. It’s their understanding of the law that will shape their decision.”¹⁵

Chief Justice Roberts’ critics faulted him for obscuring the point that Justice Kagan brought to the fore: that faithful application of the law, especially at the level of the Supreme Court, leaves room for judges to exercise discretion. Judges sometimes have no choice but “to exercise judgment,” in Kagan’s words, because the law is not “clear-cut.” Kagan is referring to the problem of “legal indeterminacy,” which is to say there is a certain amount of play in the joints of the law.¹⁶ Where the law is indeterminate – where reasonable minds could disagree on the correct answer – different judges may indeed reach different conclusions on the same legal questions. Chief Justice Roberts’ umpire analogy assumes that the contours of the strike zone are clear, and do not vary from umpire to umpire. With the help of slow-motion instant replay, we could decide with certainty whether any given call was right or wrong. Reasonable minds (and sharp eyes) should not disagree. Kagan’s point is that law is not like baseball in this respect.

Judge Richard Posner—surely the most famous judge today not on the Supreme Court—raised a similar objection about the Roberts analogy:

Until recently, different umpires defined the strike zone different, so that pitchers had to adjust their tactics to the particular umpire. That analogy is to the way in which different judges interpret the Constitution differently. The interpretive freedom of umpires was deemed intolerable, and beginning with

¹³ 1 WILLIAM BLACKSTONE, Commentaries *69.

¹⁴ PAUL KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA 116 (1997).

¹⁵ Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 178 (2005).

¹⁶ For more on legal indeterminacy, see, e.g., Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 578 (1993); Kenneth J. Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989); Brian Leiter, *Legal Indeterminacy*, 1 LEGAL THEORY 481 (1995); Lawrence Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987); Mark Tushnet, *Critical Legal Theory (without Modifiers) in the United States*, 13 J. POLIT. PHILOSOPHY 99 (2005).

the 2002 season Major League Baseball installed cameras ... to photograph all pitches so that it could be determined objectively whether umpires were calling balls and strikes according to a uniform standard. When the system detects a significant error rate on the part an umpire, he is disciplined. If the judiciary had a similar system for evaluating judicial decisions, Roberts's analogy would be spot-on. But of course it does not.¹⁷

The reality of legal indeterminacy puts pressure on the ideal of judges as neutral arbiters, personalities duly hidden underneath the black robes. If judges sometimes must rely on their own “judgment” to decide cases, doesn't it follow that a judge's life experience, or personal characteristics, or hopes for promotion, or ideology, will influence her decisions? If the answer is yes – and we hope to show you that it is, at least some of the time – what should we make of that fact? How do we, in theory and in practice, square Chief Justice Roberts' ideal with reality?

FOR DISCUSSION

Is it possible to reconcile Chief Justice Roberts' and Justice Kagan's views? What of those who accuse judges of deciding on the basis of “political” or “personal preferences?” As to the latter, how might you tell the difference between a judge who is deciding on the basis of law in good faith, and one who is letting personal preferences hold sway?

II. Two Views of Judging

The tension identified in the previous Section – between the ideal of judicial neutrality and the reality that the law sometimes leaves room for (indeed, it demands) judicial discretion – is reflected in two competing views of judging. Each is, to a large extent, a caricature. But the caricatures can be helpful in structuring our thinking about the boundaries between a “government of laws” and “one of men.”

A. The Judge as Neutral Arbiter

Chief Justice Roberts promised to “remember that it's my job to call balls and strikes, and not to pitch or bat.” The analogy of judge to umpire captures a particular way of thinking about the role of judging, and about the law. On that view, judges do not make law; they simply apply it. And, in theory at least, the “correct” application should be evident to anyone with legal training. Judges (like umpires) are not infallible—they may make mistakes. But the very concept of a mistake assumes that there are right and wrong answers to legal questions.

¹⁷ Richard Posner, HOW JUDGES THINK 79 (2008).

Consider the following case, which raises a question about the scope of a federal criminal statute. Pay attention to the court's reasoning. The opinion suggests that the answer to the legal question is straightforward, even obvious. Do you agree?

UNITED STATES V. PHELPS

877 F. 2d 28 (9th Cir. 1989)

WRIGHT, J.

. . . Title 18 § 924(c)(1) (1982 & Supp. V. 1987) reads:

Whoever, *during and in relation to any crime of violence or drug trafficking crime . . .*, uses or carries a firearm, shall . . . be sentenced to imprisonment for five years, and if the firearm is a machinegun [sic], . . ., to imprisonment for ten years. (emphasis added).

Query: does the Act intend to punish for using a firearm as an item of barter in negotiating the purchase of a controlled substance?

I.

Appellant Mark Phelps and his coconspirator Turnipseed needed a supply of ephedrine in the summer of 1987. They had an operative methamphetamine laboratory but needed one component, ephedrine, which was in short supply. Acting on an informant's tip, federal agent Fabiano negotiated with the conspirators and represented that he could supply the chemical if the price was right. At a later meeting, Fabiano was accompanied by Agent Paur, who agreed to pose as an associate and attempt to buy an automatic weapon.

Phelps told the agents that he was an expert in guns and had experience in converting semi-automatic MAC 10 firearms to fully automatic mode. Agent Paur showed interest and asked to buy such a weapon. Phelps declined to make an outright sale but offered to give it to Paur on delivery of the first ten pound shipment of ephedrine. The automatic pistol was displayed and was unloaded and unregistered.

The agents inspected the laboratory and weapon, obtained a search warrant, seized records and chemicals, and arrested Phelps and his coconspirator. Phelps was convicted by a jury on five counts, Count 5 being the charge of using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1).

II.

Phelps contends that the government presented insufficient evidence to convict him under § 924(c)(1) because his use of the firearm for barter was not "in relation to" his drug trafficking offense. Although the government concedes that Phelps carried the gun solely to exchange it for ephedrine, it asserts that a firearm's mere presence increases the danger in an illegal transaction.

It contends that the statute applies whenever a gun is in any manner connected to a drug trafficking offense. We reject the government’s contention.

The phrase “in relation to” is broad. Because either party’s interpretation of the statute is plausible, we look to its history and purpose to ascertain the correct reading. The legislative history . . . indicate[s] that § 924(c)(1) should not apply to the unusual situation presented here.

...

The legislative history indicates that Congress did not intend the statute to apply to all situations in which a firearm was present or added danger during a crime. The statute’s original language made it a crime to “carr[y] a firearm unlawfully during the commission of any felony.” 18 U.S.C. § 924(c)(2) (1982). In 1984, Congress modified the language by combining subsections 924(c)(1) and 924(c)(2). The new language requires that the firearm be used “during *and* in relation to” the crime.

Congress’ clarification demonstrates that it intended to exclude some uses in which a gun was present, “such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight.” S. Rep. No. 225, 98th Cong., 2d Sess. 314 n. 10. Yet “evidence that the defendant had a gun in his pocket but did not display it, or refer to it,” could support a conviction where “from the circumstances or otherwise it could be found that the defendant intended to use the gun.” *Id.*

We conclude that the mere presence of a firearm does not trigger the statute. Congress directed the statute at “persons who chose to carry a firearm as an offensive weapon for a specific criminal act.” *Id.* . . . Here, the firearm did not have a role in the crime as an offensive weapon. The firearm was not used “in relation to” the crime as a weapon would normally be used. Because Phelps used the gun only for barter, his conduct is excluded by the statute.

We REVERSE Phelps’ conviction under § 924(c)(1) and AFFIRM his other convictions.

* * *

Phelps seems straightforward enough, right? Indeed, the court’s logic can be reduced to a syllogism:

1. Congress intended for it to be illegal to commit drug-related or violent crimes using guns in a certain way: “as an offensive weapon.”
3. Here the gun was not used as an offensive weapon.
3. Ergo, Phelps’ conviction must be reversed.

There is a school of thought that imagines law working in just this sort of firm, determinate way in most if not all cases. A judge takes the facts of a case, applies a pre-existing

legal rule, and – voilà, presto! – out comes a decision. Let’s call this “Mechanical Legal Formalism.”

Here is how Professor Matthew Stephenson has described this sense of how law works:

Mechanical legal formalism holds that the “law” consists of a collection of rules contained in a well-defined set of source materials—principally statutes, regulations, contracts, and prior judicial decisions—along with a relatively small number of fundamental legal concepts. At least according to the pure version of Formalism, every legal question has a right answer that a properly trained lawyer or judge can deduce by correctly applying the canonical legal materials to the facts of the case. This view implies that a disagreement over the correct legal conclusion can arise only when at least one of the parties has committed an error of legal reasoning, acted in bad faith, or been misinformed as to the relevant facts or law.¹⁸

Note that Professor Stephenson’s account begins with the word “mechanical,” which sounds almost derisive. It is not his word; it is the word that critics of legal formalism applied to that approach to legal decisionmaking.¹⁹ Debates over formalism and its alternatives are not purely intellectual ones. Rather, they were shaped in the crucible of politics.

Around the turn of the twentieth century, there was considerable turmoil surrounding the industrialization of the market. Many workers moved from agriculture and other pursuits into production, coming from domestic farms and faraway places. They often faced difficult working conditions. Political mobilization on their behalf led to the adoption of statutes to protect the workers, such as laws governing minimum wages and maximum hours, working conditions, etc. Then, judges invalidated a number of these laws, on the ground that they were unconstitutional.²⁰

As a result of court decisions striking Progressive Era legislation, an extended debate erupted in the public sphere over the proper role of courts in society. In that debate, one of the critiques leveled at judges was that they were deciding cases “mechanically,” i.e., without attention to the social facts as they existed in the broader world. For example, judges might say that to limit a worker’s hours was to deprive her of her constitutional right to “liberty of contract,” as though “liberty of contract” were a bounded and coherent concept, and the law limiting worker hours a clear violation of it, while taking no account whatsoever of the enormous disparity in bargaining power between workers and employers that made such a “liberty” illusory on the employee’s part.²¹ These critics of judges – and their intellectual descendants – came to deem the judging in that era “formalistic.”

¹⁸ Matthew C. Stephenson, *Legal Realism for Economists*, 23 J. ECON. PERSP. 191, 193-94 (2009).

¹⁹ See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 606 (1908).

²⁰ See generally William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts 1890-1937*. See also, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

²¹ See, e.g., William J. Gaynor, *Do Our Courts Stand in the Way of Social and Economic Progress?*, 28 BENCH & BAR 102 (1912); Roscoe Pound, *Courts and Legislation*, 7 AM. POL. SCI. REV. 361, 364 (1913) (“For the application of law is not and out not to be a purely mechanical process.”); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM.

To be clear, the label of formalism can be, and perhaps should be, separated from these historical events. There's reasonable debate whether judging then was notably different from judging now, and whether the era of formalism existed as anything other than an academic exercise.²² Today, formalism is a respected school of thought among some lawyers and legal thinkers, who applaud close attention by judges to the legal sources of decision.²³ All lawyers need to know how to do this sort of legal interpretation.

The question, though, is whether any judge can be a pure legal formalist, let alone a “mechanical” one. Put differently, can mechanical legal formalism, standing alone, resolve hard cases? Or can it only generate the appearance of doing so?

B. Legal Realism

Is *Phelps* right? Did Congress intend the phrase “uses . . . a firearm” to refer only to the use of a gun as an offensive weapon? Recall Justice Kagan’s objection that not all cases are “easy calls” where “everything is clear-cut, and . . . there is no judgment in the process.” Is *Phelps* a hard or easy case? Consider what another court had to say on the same subject.

UNITED STATES V. SMITH

957 F.2d 835 (11th Cir. 1992)

EDMONDSON, J.

Defendant John Angus Smith tried to trade a MAC-10 machine gun and silencer for cocaine. The question presented is whether the use of a firearm in trade for drugs supports a conviction under 18 U.S.C. § 924(c)(1) for using a firearm during and in relation to a drug trafficking felony.

To establish a violation of 18 U.S.C. § 924(c)(1) in this circuit, the government must show the defendant (1) either actually or constructively possessed the firearms, and (2) used or carried the firearms during and in relation to the drug trafficking offense. *United States v. Poole*, 878 F.2d 1389 (11th Cir. 1989). Smith admits to possession of the gun, but claims that his attempted barter is not the kind of use in relation to drug trafficking prohibited by section 924(c)(1).

Smith relies on *United States v. Phelps*, 877 F.2d 28 (9th Cir. 1989), *reh’g denied en banc*, 895 F.2d 1281 (9th Cir. 1990).

We believe the *Phelps* opinion’s stress on a defendant’s alleged intentions to use the weapon offensively is incorrect. The plain language of the statute supplies no such requirement,

L. REV. 605, 606 (1908) (“[Law] must not become so completely artificial that the public is led to regard it as wholly arbitrary.”); Editorial, *The ‘Inalienable Right’ to Starve*, CHRISTIAN SCI. MONITOR, Apr. 11, 1923, at 20.

²² Compare, e.g., TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE, *supra*, with Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473 (2003).

²³ See, e.g., John Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1716-19 (2002).

see 18 U.S.C. § 924(c)(1) (applying to “whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm . . .”); see also *Phelps*, 895 F.2d at 1282-83 (Kozinski, J., dissenting); and in this circuit, the plain meaning of the statute controls “unless the language is ambiguous or leads to absurd results, in which case a court may consult the legislative history and discern the true intent of Congress.” . . . We see no ambiguity in section 924(c)(1) and disagree with the conclusion that use in relation to a drug trafficking crime somehow excludes use in trade for drugs.‡

Smith’s argument (and that of *Phelps*) seems particularly puzzling in the light of our position that violations of section 924(c)(1) do not require that firearms be “fired, brandished, or even displayed during the drug trafficking offense.” *Poole*, 878 F.2d at 1393. Many courts have found firearm use even where the firearms could not be used offensively because they were out of reach of the defendant, inoperable, or unloaded.

More like this case are instances in which section 924(c)(1) convictions were upheld despite defendant's claim of non-belligerent reasons for having the weapon. . . .

The lesson of these opinions is that use may be established by evidence of possession—and Smith concedes possession of the MAC-10—“if possession is an integral part of and facilitates the commission of the drug trafficking offense.” *Poole*, 878 F.2d at 1393. Although facilitation of the offense has often been interpreted to mean firearm use for protection of drugs, or for the protection and emboldening of the defendant, we believe all that is needed is “an intent to use the weapon to facilitate in any manner the commission of the offense.” *Phelps*, 895 F.2d at 1286 (Kozinski, J., dissenting).

When drug purchasers trade guns for drugs, the trade not only facilitates, but also becomes, an illegal drug transaction. We therefore conclude that trading guns for drugs constitutes use of a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1).

The conviction is AFFIRMED.

* * *

Smith holds just the opposite of *Phelps*, based on the argument that the “plain meaning” of the statute compels that conclusion. Can you say for sure which of these decisions is correct?

‡ We would reach the same conclusion if forced to confront the legislative history of section 924(c)(1). See S. Rep. No. 225, 98th Cong., 2d Sess. 314 n. 10, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3492 n. 10 (requirement that use be “in relation to” crime precludes statute application where firearm’s “presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight”); see also *Phelps*, 895 F.2d at 1283-84 (Kozinski, J., dissenting) (“Congress used the broad term ‘in relation to’ precisely to avoid interpretive hair-splitting about peculiar and unexpected factual scenarios that might escape a more narrowly drawn definition”); *United States v. Rosado*, 866 F.2d 967, 970 (7th Cir.) (Congress did not intend that statute be given a “cramped reading”), cert. denied, 493 U.S. 837, 110 S. Ct. 117, 107 L. Ed. 2d 79 (1989).

And can you do it, in particular, without resorting to some broader policy considerations outside the legal sources themselves?

If you can't say whether *Smith* or *Phelps* is right, you are observing the problem of legal indeterminacy that Justice Kagan emphasized in her confirmation hearings. There are going to be some cases – how many is a question we will be discussing presently – in which there is no apparent single right answer. Both the *Phelps* and the *Smith* courts might have arrived at perfectly good legal answers. But neither of them is inexorably the right one.

This indeterminacy is precisely what drove the critics of formalistic judging nuts in the early twentieth century. In their view, judges were reaching contestable decisions that affected people's lives greatly, and yet the results were presented as inexorable, with insufficient attention to the contrary view.²⁴

Some critics of Mechanical Legal Formalism had their own view of what was going on in the law, a view Professor Stephenson has labeled label Radical Legal Skepticism:

[R]adical legal skepticism—[or simply] “Skepticism”—accepts the definitional claim that the “law” consists of a set of canonical legal source materials, but denies that these sources supply a determinate answer to any significant legal question. Rather, Skeptics claim law is so malleable that plausible legal arguments, derived from canonical legal sources, are almost always available to justify any conceivable resolution of a contested case—and that if a plausible legal argument were not available, a judge could always change or ignore the law. . . . According to Skeptics, legal “reasoning” of the sort that appears in judicial opinions is merely an after-the-fact rationalization that obscures or mystifies the true basis for judicial decisions. What is this true basis? Generally, say the Skeptics, judicial decisions depend on the preferences of the judges over substantive outcomes—who wins and who loses. While these preferences may reflect idiosyncratic biases or concerns about career and reputation, Skeptics usually argue that the best predictor of case outcomes is the judge's political ideology. Of course, not all cases implicate highly charged political controversies like abortion or capital

²⁴ To complicate things, though it is not a necessary part of our discussion here, the critics of the judges also had an argument about democratic governance: that the laws the judges were striking down were enacted by democratically-elected legislative bodies, yet the judges – at least the life-tenured federal judges – were unaccountable to the popular will. Particularly when the law wasn't clear, critics argued, the judges should defer to the popular will. *See, e.g.,* *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Harlan, J., dissenting) (“[T]he public interests imperatively demand . . . that legislative enactments should be recognized and enforced by the courts as embodying the will of the people unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution.”); Archibald Cox, *Judge Learned Hand and the Interpretation*, 60 HARV. L. REV. 370, 370-71 (1947); Oliver Wendell Holmes, *Book Notices*, 6 AM. L. REV. 132, 141 (1871) (“[I]f the will of the majority is unmistakable, and the majority is strong enough to have a clear power to enforce its will, the courts must yield”); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536-37 (1947); Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388 (1942).. *See also* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 88 (2005) (arguing that judges should interpret statutes in light of what a reasonable member of Congress would do); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed. 1998) (arguing against judicial policymaking as undemocratic).

punishment, but most Skeptics suggest that judges have ideological preferences even with respect to more mundane controversies: judges tend to favor plaintiffs or defendants, individuals or corporations, government or private citizens, and so on. Even in non-ideological cases, judges will favor whichever party appears more sympathetic in the particular dispute.²⁵

History gives this group of critics a name – Legal Realists – and part of the core Realist insight is that law can frequently be indeterminate in just this way.²⁶ Born in the struggles over judging during the Progressive Era, by the 1930s Realism was a full-blown (and controversial) movement. Yet, even in its youth, the Realist critics included individuals destined to become some of the country’s most renowned lawyers and judges. And today it is deemed a cliché to say “we are all realists now.”²⁷

It is difficult to describe Legal Realism with precision, in part because it means different things to different people.²⁸ Still, there are some basics to the Realist critique. First, Realism began as an attack on Legal Formalism. Oliver Wendell Holmes, while Chief Justice of the Massachusetts Supreme Court, called the “certainty” that one sought by making “legal reasoning seem like mathematics” “only an illusion.”²⁹ Second, many Realists believed the law was indeterminate, especially as applied in a “mechanical” way.³⁰ Third, and most controversially, some Realists claimed that in the face of indeterminacy, judges were left free to – and did – decide cases on the basis of their own biases or predilections, conscious or not. Learned Hand, then a practicing lawyer and later one of America’s most revered judges, wrote in 1908, “A vote of the court necessarily depends not upon any fixed rules of law, but upon the individual opinions upon political or economic question of the persons who compose it.”³¹ Finally, some Realists believed that the antidote was for judges and the law to take better account of law on the

²⁵ Stephenson, *Legal Realism for Economists*, *supra*, at 194-95 (citations omitted; emphasis added).

²⁶ A modern face of Legal Realism is found in the (now largely defunct) Critical Legal Studies (“CLS”) movement. See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1983); Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779 (1992); Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986). The primary difference between Realism and CLS was that CLS adherents believed indeterminacy was inherent in law, and that given its pervasiveness the entire direction of law was determined by political ideology – in large part one to the right of their own.

²⁷ On cliché, Cite Greene article; perhaps Legal Realism as a Theory of Law, 46 Wm and Mary L Rev xx. Legal Realism became a movement with the publication of Karl Llewellyn’s manifesto, “A Realistic Jurisprudence – the Next Step.” 30 Colum. L. Rev. 431 (1930). Yet, NEH Hull is surely right that its foundations rested in the work of many “Progressive-Pragmatists,” chief among them Dean Roscoe Pound of Harvard. See Hull, 1989 Duke L. J.; Friedman, *The Will of the People* Ch. 6.

²⁸ Some of the “extensive” literature on Realism is set out in full in NEH Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange Over Legal Realism*, 1989 Duke L. J. 1302; see also [sources cited on p. 479, n. 249 in TWOTP (Horwitz, sebok, leiter)

²⁹ Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 Harv. L. Rev. 7 (1894).

³⁰ For extensive discussion see Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. Rev. 1383, 1404-13 (2001).

³¹ Learned Hand, *The Due Process of Law and the Eight-Hour Day*, 21 Harv. L. Rev. 495, 501 (1908)

ground, or law in action – the realities of the situation in which law operated. Thus the name “Realism.”³²

FOR DISCUSSION

1. Return to the question of why the judges in *Smith* and *Phelps* came to different conclusions. A Skeptic might seek to explain the disagreement by reference to the judges’ political ideology. The *Phelps* panel consisted of two judges appointed by Democratic presidents, plus one judge appointed by Richard Nixon (a Republican); while the *Smith* panel consisted of two Republican appointees, plus one judge appointed by Lyndon Johnson (a Democrat). Do you think those additional facts help make sense of split between the two opinions?
2. Can you think of an alternative explanation for why these two cases were decided differently? What might you say about the law at issue in these cases?

III. CABINING INDETERMINACY

As we have seen, one of the core difficulties with Justice Roberts’ “balls and strikes” analogy is that, unlike the strike zone in baseball, the correct legal answer cannot always be identified with objective certainty. The law is sometimes indeterminate. Even if all judges had full information and boundless time, expertise, and energy—the equivalent of slow-motion replay on every pitch—reasonable minds might still disagree on the proper resolution of a case. Where that is true, judges have discretion, and their personal views may well influence their decisions. This is the point Justice Kagan (hardly a legal Skeptic) made at her confirmation hearings.

It would be a mistake, however, to jump too quickly from the fact that law will contain some indeterminacy, to the conclusion that it is indeterminacy and judicial discretion all the way down. That is certainly not how most judges see it. One of the earliest, and most famous, discussions of judicial decisionmaking can be found in then-Judge Cardozo’s Storrs Lectures, which he delivered at Yale Law School in 1921. Cardozo was appointed to the Supreme Court in 1932, by which point he was already a legend in the law, renowned for his path-breaking common law decisions, his elegant legal prose, and his keen mind. At the time of the Storrs Lectures, Cardozo was a judge on the New York Court of Appeals. His topic for the Yale lectures was *The Nature of the Legal Process*. Judge Richard Posner has written of the lecture:

The *Nature of the Judicial Process* is the first systematic effort by a judge to explain how judges reason. It is also the first serious effort by a judge to articulate a judicial philosophy—by “serious” I mean an effort going beyond the standard phony judicial disclaimer . . . of ever exercising discretion.³³

³² Perhaps the first to so identify the problem was then Harvard professor and later Supreme Court justice Felix Frankfurter, who in 1916 wrote “Hours of Labor and Realism in Constitutional Law.”29 Harv. L. Rev. 372 (1916).

³³ Richard A. Posner, *CARDOZO: A STUDY IN REPUTATION* 32 (1990).

Cardozo's analysis of the subject was breathtaking to his audience and to those who read the subsequent volume he published. Here is an account of the event itself, which – even discounting for hyperbole and the high esteem in which Judge Cardozo was held – is pretty remarkable:

He was scheduled to deliver [the lectures] on four successive days at 5 P.M. The first lecture was given in a lecture hall accommodating some 250 listeners. . . . [E]very student and every faculty man was in the room. Standing on the platform at the lectern, his mobile countenance, his dark eyes, his white hair, and his brilliant smile, all well lighted before us, he read the lecture, winding it up at 6 o'clock. He bowed and sat down. The entire audience rose to their feet, with a burst of applause that would not cease. Cardozo rose and bowed, with a smile at once pleased and deprecatory, and again sat down. Not a man moved from his tracks; and the applause increased. In a sort of confusion Cardozo saw that he must be the first to move. He came down the steps and left, with the faculty, through a side door, with the applause still in his ears.

The next day, each student must have brought a friend. The hall was jammed, with many more pushing to get in; and we transferred the lecture to the nearby Lampson Lyceum, with some 500 seats. For the remaining lectures that hall was filled to capacity; and each day at 6 P.M. the ritual of the first day was exactly repeated—the rising of the audience, the continuous applause, the smile of pleasure, the appreciative bow, and the leaving with the faculty while all others stood and cheered. Both what he had said and his manner of saying it had held us spell-bound on four successive days.³⁴

Not to take anything away from Cardozo – *The Nature of the Legal Process* is a remarkable book – but part of the reason for the reaction was historical. Recall that Cardozo was speaking during a period of history in which the role and conduct of judges was hotly contested. Yet, Cardozo was remarkably candid for his time in describing the personal element that influenced judging, and he was critical of others for not discussing it. Cardozo sounded a lot like a Legal Realist, albeit one who had thought deeply about the matter. It is worth reading this excerpt carefully:

I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge. I wish I might have found the time and

³⁴ Arthur L. Corbin, *The Judicial Process Revisited: Introduction*, 71 YALE L. J. 195, 197-98 (1961).

opportunity to pursue this subject farther. I shall be able, as it is, to do little more than remind you of its existence. There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations. I do not doubt the grandeur of the conception which lifts them into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. None the less, if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by. We like to figure to ourselves the processes of justice as coldly objective and impersonal. The law, conceived of as a real existence, dwelling apart and alone, speaks, through the voices of priests and ministers, the words which they have no choice except to utter. That is an ideal of objective truth toward which very system of jurisprudence tends. It is an ideal of which great publicists and judges have spoken as of something possible to attain. ‘The judges of the nation,’ says Montesquieu, ‘are only the mouths that pronounce the words of the law, inanimate beings, who can moderate neither its force nor its rigor.’ So Marshall, in *Osborne v. Bank of the United States*, 9 Wheat. 738, 866: The judicial department ‘has no will in any case. . . . Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law.’ It has a lofty sound; it is well and finely said; but it can never be more than partly true. Marshall’s own career is a conspicuous illustration of the fact that the ideal is beyond the reach of human faculties to attain. He gave to the constitution of the United States the impress of his own mind; and the form of our constitutional law is what it is, because he moulded it while it was still plastic and malleable in the fire of his own intense convictions.³⁵

In his lectures Cardozo tried to address the question at the heart of this Chapter: can the reality of judging be squared with the ideal? Note that Cardozo concludes that the “ideal of objective truth . . . can never be more than partly true.”

What made Cardozo’s talk breathtaking was, in part, his willingness to accept that judges had “an underlying philosophy of life” that they brought to their job. “There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals.” Cardozo was fully aware that there was room for the judges’ own views to play a role when the law provided space for judicial discretion. Judge Posner underscores the point nicely:

The decision-making freedom that judges have is an *involuntary* freedom. It is the consequence of legalism’s inability in many cases to decide the outcome . . . and the related difficulty, often impossibility, of verifying the correctness

³⁵ BENJAMIN C. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167-70 (1921).

of the outcome, whether by its consequences or its logic. That inability, and that difficulty or impossibility, create an open area in which judges have decisional discretion – a blank slate on which to inscribe their decisions – rather than being compelled to a particular decision by “the law.”³⁶

Still, Cardozo was rigorous in examining when precisely that discretion might arise – and when it did not. He conceded the sometime indeterminacy of law, but also put it in its place. He drew three separate categories (one of them divided into two of its own). Follow his argument, and draw your own conclusion as to how persuasive he is.

A. Where Law Has Bite 1: Non-Litigated Disputes and Settled Cases

According to Cardozo:

Most of us live our lives in conscious submission to rules of law, yet without necessity of resort to the courts to ascertain our rights and duties. Lawsuits are rare and catastrophic experiences for the vast majority of men, and even when the catastrophe ensues, the controversy relates most often not to the law, but to the facts. In countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful. Life may be lived, conduct may be ordered, it is lived and ordered, for unnumbered human beings without bringing them within the field where the law can be misread, unless indeed the misreading be accompanied by conscious abuse of power. Their conduct never touches the borderland, the penumbra, where controversy begins. They go from birth to death, their actions restrained at every turn by the power of the state, and not once do they appeal to judges to mark the boundaries between right and wrong. I am unable to withhold the name of law from rules which exercise this compulsion over the fortunes of mankind.³⁷

Cardozo’s point is that looking at the universe of cases that judges decide can’t show us the full effect of the law, because the law shapes our behavior in ways that drastically reduce the number of legal disputes that arise in the first place. If you and your neighbor respect the laws of private property and refrain from building sheds on each other’s property, you will avoid what could otherwise become a legal dispute—but you will do so *because of* the law. In other words, the law is at work all around us, all the time.

Suppose, though, that your neighbor is a scofflaw and brazenly builds a garden shed on your property. We now have a legal dispute—but we still may not have a case that will be

³⁶ POSNER, HOW JUDGES THINK, *supra*, at 9.

³⁷ CARDOZO, *supra*, at 128-30.

decided by a judge. First, only a small fraction of legal disputes are actually taken to court. Research shows that, “apart from automobile-related injuries, Americans are extremely reluctant to sue. A large . . . study found that claims were made in 44% of motor vehicle injuries, 7% of work-related injuries, and 3% of other injuries—all in all, in about one accidental injury in ten.”³⁸

Second, only a small fraction of cases filed in court are actually decided by a judge, because the overwhelming majority of cases settle: Rather than taking their chances with the judge or a jury, the parties reach an agreement as to the appropriate resolution of their dispute. The universe of cases that do *not* settle—that is, the cases that are presented for judicial decision at the trial level—is by no means a random sample of disputes. In fact, they tend to be relatively hard cases, where there is significant room for disagreement about the facts or the relevant law. The seminal work on this issue was by George Priest and Benjamin Klein.³⁹ The authors make the point that if the relevant legal and factual issues were clear, parties would gain nothing, and would lose a lot of time and money, by relying on a judge to resolve the dispute. It is when the parties cannot agree on the proper resolution of the dispute on their own (and with the help of their lawyers) that they need a judge to act as referee. We explore the question of what cases come to court in Chapter Five. For present purposes, it suffices to note that we would expect the most straightforward disputes – the cases where the law is pretty clear – to settle, because the parties will agree on the likely resolution at trial and will prefer to minimize their litigation costs. If we only look at the cases that judges decide, we risk seriously underestimating law’s determinacy.

FOR DISCUSSION

1. Cardozo’s point is remarkably absent from swaths of the empirical political science literature, a fact that is more than a little ironic given that there is a statistical concept that captures it precisely. This is the problem of *selection bias*. We discuss this concept in more detail in Chapter Three, but the basic idea is straightforward: If you want to test data for an effect, you have to make sure you have all the right data; that you have not “selected” data that is bound to have what you are looking for, and if you chose more comprehensive data the effect would disappear. As Professor Orley Ashenfelter and his colleagues explain:

A major problem haunting studies of judicial decisions in published opinions is selection bias: because published opinions are not a representative sample of all cases, the fact that plaintiffs win, say, half of the published opinions of a certain type of case tells us nothing about the legal system's effect on all cases filed in the system (much less on all disputes out there). To be concrete, suppose we are interested in whether the legal system treats contract plaintiffs more favorably than tort plaintiffs (or medical malpractice plaintiffs more favorably than other tort plaintiffs, or sex discrimination victims more favorably than race discrimination victims). We observe that contract plaintiffs win half the court judgments, while tort plaintiffs win only 30 percent, a statistically significant difference. The problem is that one cannot

³⁸ David Luban, *A Flawed Case Against Punitive Damages*, 87 Geo. L.J. 359, 377 (1998).

³⁹ George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

tell from this whether the court is treating these cases differently. The litigants themselves can decide to settle a case or present it to the court for judgment. In making this decision, the cases for court judgment are unlikely to be a random sample of cases.⁴⁰

2. What would be the analogy to Cardozo's point in the context of our gun cases? Arguably, after these decisions, you could expect to see one of several things happen: Criminals could not be using guns because they know of the law. Cases could plead out because the law is clear. Prosecutors could use the law to get quick pleas, or good deals. None of these results would produce judicial decisions, yet the law would still be doing important work.

B. Where Law Has Bite 2: Easy Cases

The situations we were just discussing say something about the determinacy, or "bite," of law, but nothing about judicial discretion. They are disputes that never arise, or that never come to judges. Cardozo went beyond this point to the cases that do lead to litigation, and even here he found the room for the judges' values to be smaller than supposed:

Of the cases that come before the court in which I sit [the highest court in New York State], a majority, I think, could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain. Such cases are predestined, so to speak, to affirmance without opinion. In another and considerable percentage, the rule of law is certain, and the application alone doubtful. A complicated record must be dissected, the narratives of witnesses, more or less incoherent and unintelligible, must be analyzed, to determine whether a given situation comes within one district or another upon the chart of rights and wrongs. The traveler who knows that a railroad crosses his path must look for approaching trains. That is at least the general rule. In numberless litigations the description of the landscape must be studied to see whether vision has been obstructed, whether something has been done or omitted to put the traveler off his guard. Often these cases and others like them provoke difference of opinion among judges. Jurisprudence remains untouched, however, regardless of the outcome.⁴¹

FOR DISCUSSION

1. Of cases that are presented to judges, Cardozo discusses two categories of cases where the legal rule is clear. What is the difference between the two categories?

⁴⁰ Orley Ashenfelter, et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*. 24 J. LEGAL STUD. 259 (1995).

⁴¹ CARDOZO, *supra*, at 163-66.

2. Cardozo says that the first category of cases “could not, with semblance of reason, be decided in any way but one.” It follows that we should expect unanimous decisions in such cases. (As Cardozo suggests, we should not necessarily expect the decisions to be *published*—a point we explore in Chapter Three.) In fact, we see extraordinarily high rates of unanimity in the courts of appeals, where almost ninety-eight percent of decisions are unanimous.⁴² As might be expected, the unanimity rate is lower in the Supreme Court, averaging about fifty-seven percent from 1990-2007. Is it fair to assume that every case that generates a unanimous decision was easy, in Cardozo’s terms? (Recall that the decision in *Brown v. Board of Education*, discussed in Chapter One, was unanimous.)

3. Cardozo acknowledges that there is a class of cases in which the applicable legal rule is settled, but its application to the facts of the case is debatable. His point is that the judge is not acting as a “lawgiver” in such cases because the law is unaffected by the decision. Does it follow that the cases are easy, or that the law is fully determinate?

4. Again, what might be the analog in our guns situation? Recall that Congress passed a law providing for a mandatory five year sentence for the “use” of a gun “in relation to” a drug crime. 18 U.S.C. § 924(c)(1) (2006). We looked at cases where guns were employed as an item of barter, in exchange for drugs—something of an odd circumstance. If you wanted to know about law having bite, what would you go looking for? What cases do you think Congress had in mind?

C. Where Law is Indeterminate: Hard Cases

It was only after all this was accounted for that Cardozo found room for the sort of judicial discretion he had been talking about:

Finally there remains a percentage, not large indeed, and yet not so small as to be negligible, where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. These are the cases where the creative element in the judicial process finds its opportunity and power. It is with these cases that I have chiefly concerned myself in all that I have said to you. In a sense it is true of many of them that they might be decided either way. By that I mean that reasons plausible and fairly persuasive might be found for one conclusion as for another. Here come into play that balancing of judgment, that testing and sorting of considerations of analogy and logic and utility and fairness, which I have been trying to describe. Here it is that the judge assumes the function of a lawgiver.⁴³

Note that although Judge Cardozo was perfectly willing to acknowledge that judges’ philosophies influenced their decisions in these hard cases, still his description of what judges do

⁴² Epstein, Landes, Posner 265 Tbl. 6.3.

⁴³ CARDOZO, *supra*, at 163-66.

sounds very different from political policymaking. He says (and we repeat, for it is worth repeating): “Here come into play that balancing of judgment, that testing and sorting of considerations of analogy and logic and utility and fairness, which I have been trying to describe.”

IV. THE LAW IN HARD CASES

We can now see that the truth seems to lie somewhere between the extremes marked out by mechanical legal formalism on the one hand, and radical legal skepticism on the other. Legal questions are not always “clear-cut,” to borrow Justice Kagan’s term. But, at the same time, the law is not always indeterminate. In some cases, the applicable legal rule is clear, and the judge’s role is simply to apply the rule to the facts of the case – to call balls and strikes, as Chief Justice Roberts put it.

Important questions remain, however. How frequent are the “hard” cases where judges have no choice but to exercise their own judgment? Why do they arise? How much discretion do judges have, and how do they exercise it? In other words, just how wide is the chasm between the rule-of-law ideal and the reality that – in hard cases, at least – different judges may reach different conclusions, in part because of who they are as people under their black robes? In hard cases where the law does not provide a determinate answer, is the law playing any role at all?

This section takes up these questions. Recall the guns-and-drugs cases from the lower courts that we discussed earlier in this Chapter—*Smith* and *Phelps*. Those cases illustrate some of the difficult legal questions that can arise out of a seemingly simple statutory prohibition on “us[ing] a firearm . . . during and in relation to” a drug trafficking crime. In this section, we return to the guns-and-drugs issue, asking you to work through some of these questions about judging yourself.

A. Guns and Drugs Continued: Two Supreme Court Decisions

Consider the aftermath of the *Smith* decision. After losing his case in the Eleventh Circuit, the defendant in *Smith* appealed his case to the Supreme Court. Once again, he lost, though three Justices thought he should have won. Justice O’Connor announced the decision of the divided Court.

Smith v. United States
508 U.S. 223 (1993)

O’CONNOR, J.

We decide today whether the exchange of a gun for narcotics constitutes “use” of a firearm “during and in relation to . . . [a] drug trafficking crime” within the meaning of 18 U.S.C. § 924(c)(1). We hold that it does.

...

When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning. Surely petitioner's treatment of his MAC-10 can be described as "use" within the everyday meaning of that term. Petitioner "used" his MAC-10 in an attempt to obtain drugs by offering to trade it for cocaine. Webster's defines "to use" as "to convert to one's service" or "to employ." Webster's New International Dictionary 2806 (2d ed. 1950). Black's Law Dictionary contains a similar definition: "to make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of." Black's Law Dictionary 1541 (6th ed. 1990). . . . Petitioner's handling of the MAC-10 in this case falls squarely within those definitions. By attempting to trade his MAC-10 for the drugs, he "used" or "employed" it as an item of barter to obtain cocaine; he "derived service" from it because it was going to bring him the very drugs he sought.

In petitioner's view, § 924(c)(1) should require proof not only that the defendant used the firearm, but also that he used it *as a weapon*. But the words "as a weapon" appear nowhere in the statute. Rather, § 924(c)(1)'s language sweeps broadly, punishing any "use" of a firearm, so long as the use is "during and in relation to" a drug trafficking offense.

...

Petitioner [also disputes] whether his use of the firearm was "in relation to" the drug trafficking offense. The phrase "in relation to" is expansive, as the Courts of Appeals construing § 924(c)(1) have recognized. Nonetheless, the phrase does illuminate § 924(c)(1)'s boundaries. According to Webster's, "in relation to" means "with reference to" or "as regards." Webster's New International Dictionary, at 2102. The phrase "in relation to" thus, at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. As one court has observed, the "in relation to" language "allay[s] explicitly the concern that a person could be" punished under § 924(c)(1) for committing a drug trafficking offense "while in possession of a firearm" even though the firearm's presence is coincidental or entirely "unrelated" to the crime. *United States v. Stewart*, 779 F.2d 538, 539 (9th Cir. 1985) (Kennedy, J.). Instead, the gun at least must "facilitate, or have the potential of facilitating," the drug trafficking offense. *Id.*, at 540.

We need not determine the precise contours of the "in relation to" requirement here, however, as petitioner's use of his MAC-10 meets any reasonable construction of it. The MAC-10's presence in this case was not the product of happenstance. On the contrary, "far more than [in] the ordinary case" under § 924(c)(1), in which the gun merely facilitates the offense by providing a means of protection or intimidation, here "the gun . . . was an integral part of the transaction." *United States v. Phelps*, 895 F.2d 1281, 1283 (9th Cir. 1990) (Kozinski, J., dissenting from denial of rehearing en banc). Without it, the deal would not have been possible. The undercover officer posing as a pawnshop dealer expressly told petitioner that he was not in the narcotics business and that he did not get involved with drugs. For a MAC-10, however, he was willing to see if he could track down some cocaine.

* * *

As we've seen – and as you are perfectly well aware from living on this planet – the outcomes of Supreme Court cases are often explained by the ideology of the judges. In this regard, let's consider the makeup of the majority and dissent in *Smith*. The Court in *Smith* was split, 6-3. Here's the lineup:

Majority: Justice O'Connor, joined by Chief Justice Rehnquist, Justice White, Justice Blackmun, Justice Kennedy, and Justice Thomas.

Dissent: Justice Scalia, joined by Justices Souter and Stevens.

For anyone remotely familiar with the Supreme Court, the breakdown of majority and dissenting Justices in *Smith* defies any simple ideological categorization. One of the most conservative justices (Scalia) joins two liberals in dissent. The majority is written by a centrist-conservative, and garners the votes of two conservatives (Rehnquist and Thomas), two moderate conservatives (White and Kennedy), and the most liberal member of the court (Blackmun).

Two years after *Smith*, the Justices decided a related question in *Bailey v. United States*, 516 U.S. 137 (1995). *Bailey* involved the prosecution of a man whose car contained a lot of drugs, but also a gun in the trunk. The question in *Bailey* was whether having a gun in the trunk constituted "use" of a firearm while drug trafficking. The defendant argued that "use" required "active employment," while the Government said that merely having the gun nearby and available was enough.

Justice O'Connor wrote this opinion for the majority as well. You've read *Smith*: can you predict how the Justices ruled?

Here is an excerpt of the holding:

We . . . hold that § 924(c)(1) requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense.

. . . As the debate in *Smith* illustrated, the word "use" poses some interpretational difficulties because of the different meanings attributable to it. Consider the paradoxical statement: "I *use* a gun to protect my house, but I've never had to *use* it." "Use" draws meaning from its context, and we will look not only to the word itself, but also to the statute and the sentencing scheme, to determine the meaning Congress intended.

We agree with the majority below that "use" must connote more than mere possession of a firearm by a person who commits a drug offense. Had Congress intended possession alone to trigger liability under § 924(c)(1), it easily could have so provided. This obvious conclusion is supported by the frequent use of the term "possess" in the gun-crime statutes to describe prohibited gun-related conduct. See, *e.g.*, § 922(g), 922(j), 922(k), 922(o)(1), 930(a), 930(b).

...

This conclusion – that a conviction for “use” of a firearm under § 924(c)(1) requires more than a showing of mere possession – requires us to answer a more difficult question. What must the Government show, beyond mere possession, to establish “use” for the purposes of the statute? We conclude that the language, context, and history of § 924(c)(1) indicate that the Government must show active employment of the firearm.

The vote in *Bailey* was 9-0: the Court was unanimous. Was *Bailey* an easy case?

B. What’s Under the Veil of Law? (Could It Be Law?)

If you think reasonable minds could disagree on the meaning of “use” in § 924(c), what do you think is driving the judges’ and Justices’ decisions? Here we consider what might be happening in *Bailey* and *Smith*, if it is not judges determined to evade law to impose their policy preferences. Sometimes one learns best by doing. We are going to walk through a real legal problem that followed on the heels of *Smith* and *Bailey*, and examine what work law might be doing.

1. The Case

We’ll start, as all lawyers do, with the facts of the case. The defendant we are interested in is Maurice Stewart:

In the Spring of 1991, Maurice Stewart, Richard Shorter, and Damon Edwards sold crack cocaine to undercover police officers on a number of occasions. During one of those sales, Stewart and Shorter asked the officers about their plans for the weekend. When the officers told the suspects that they were “running guns,” Stewart asked if he “could also get him an AK-47.” One of the officers said that he would have to check with his cousin, who actually ran the guns.

Several weeks later, during another drug sale, Stewart and Shorter “again brought up the possible purchase of the guns,” asking the officers if they could buy two nine-millimeter guns for \$500. Over the next week, the defendants finalized a deal with the officers. On May 10, Stewart and Shorter accompanied the officers to a house in Northwest Washington, D.C., where the officers gave Gary Stewart, another of Maurice Stewart’s co-conspirators, \$7,000 in exchange for 250 grams of crack. At the time, the officers also agreed to give Maurice Stewart and the others a bag of guns as part of the transaction. Maurice Stewart and Shorter then accompanied the officers to

another location, where the officers gave the guns to Stewart. Immediately, Stewart and Shorter were arrested.⁴⁴

2. *The Issue*

Next, we define the legal question that these facts present. It was only a matter of time before cases presenting the flip side of *Smith* and *Phelps* came to the courts. As you can no doubt already see, the issue here is *whether a person who trades drugs to get a gun (instead of trading a gun to get drugs) has violated Section 924(c)(1)*. Or, as one court put it, “whether one who barter drugs for firearms has ‘used’ the firearms within the meaning of 18 U.S.C. § 924(c)(1)(A), which provides for a mandatory five-year sentence for using a firearm ‘during and in relation to any . . . drug trafficking crime.’”⁴⁵

3. *Examining the Precedents*

Our next step is to see whether an answer to our legal question can be found in existing case law. Justice Cardozo explains:

The first thing [the judge] does is to compare the case before him with the precedents, whether stored in his mind or hidden in the books. I do not mean that precedents are ultimate sources of the law, supplying the sole equipment that is needed for the legal armory, the sole tools, to borrow Maitland's phrase, "in the legal smithy." Back of precedents are the basic juridical conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by a process of interaction, they have modified in turn. None the less, in a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins.

Almost invariably, his first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. *Stare decisis* is at least the everyday working rule of our law. I shall have something to say later about the propriety of relaxing the rule in exceptional conditions. But unless those conditions are present, the work of deciding cases in accordance with precedents that plainly fit them is a process similar in its nature to that of deciding cases in accordance with a statute. It is a process of search, comparison, and little more. Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule.⁴⁶

⁴⁴ *United States v. (Maurice) Stewart*, 246 F.3d 728, 729 (D.C. Cir. 2001).

⁴⁵ *United States v. Cotto*, 456 F.3d 25, 26 (1st Cir. 2006).

⁴⁶ CARDOZO, *supra*, at 18-20.

So, do as Cardozo says. Evaluate Maurice Stewart’s facts in light of *Smith* and *Bailey*. What is the correct answer? Under *Smith* and *Bailey*, does Stewart go to jail for an additional five years, or not?

	<i>Smith</i>	<i>Bailey</i>	<i>Stewart</i>
<i>Defendant’s Actions</i>	Smith exchanges a MAC-10 machine gun and silencer for cocaine.	Bailey had a gun in his trunk while he engaged in a drug transaction.	Stewart exchanges crack cocaine for \$7,000 and a bag of guns.
<i>Result</i>	Defendant “used” the firearms within the meaning of 18 U.S.C. § 924(c)(1)(A)	Defendant did not “use” the firearm within the meaning of § 924(c)(1)(A)	

The reasoning of *Smith* and *Bailey* might be instructive, too. In *Smith*, the Court emphasized the “everyday meaning” of the word “use,” noting that dictionaries define “to use” as “to convert to one’s service,” “to employ,” or “to make use of; to convert to one’s service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of.” In *Bailey*, the Court again considered ordinary meaning as well as statutory context, “to determine the meaning Congress intended.” And it took pains to distinguish “use” from “possession,” concluding that “use” implies “active employment of the firearm.”

Does Stewart’s conduct fit the everyday meaning of “use”? Does it satisfy the “active employment” test from *Bailey*?

It’s not so easy, right? That was the point Cardozo was about to make. Because even when you can identify the right precedents, answers don’t pop out like mechanical legal formalism might imply:

But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him.

Cases do not unfold their principles for the asking. They yield up their kernel slowly and painfully. The instance cannot lead to a generalization till we know it as it is. That in itself is no easy task. For the thing adjudged comes to

us oftentimes swathed in obscuring dicta, which must be stripped off and cast aside.”⁴⁷

And it is worse still, because: “dicta are not always ticketed as such, and one does not recognize them always at a glance. There is the constant need, as every law student knows, to separate the accidental and the non-essential from the essential and inherent.”⁴⁸

4. *The Holding(s)*

Here’s what the Court of Appeals for the D.C. Circuit concluded in the *Stewart* case:

[I]n *Smith v. United States*, 508 U.S. 223 (1993), the Supreme Court upheld the conviction of a defendant who had traded a gun for drugs. The *Smith* Court held that “one who transports, exports, sells, or trades a firearm ‘uses’ it” in violation of § 924(c)(1). In arriving at this holding, the Court described a number of different “everyday meanings” for “use,” including: “to employ,” “to avail oneself of,” and “to derive service from.” In light of these definitions, the Court explained that the *Smith* defendant had used a gun as “an item of barter . . . to bring him the very drugs he sought.” Echoing our decision in *Harris*, the Court noted that “the gun at least must ‘facilitate, or have the potential of facilitating,’ the drug trafficking offense.”

Two years later, the Supreme Court issued its *Bailey* decision, which “clarified the meaning of ‘use’ under § 924(c)(1).” In *Bailey*, the Court held that “§ 924(c)(1) requires evidence sufficient to show an active *employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense.” In its discussion, the Court again emphasized that “use” should be “given its ‘ordinary and natural’ meaning.” Distinguishing between the terms “use” and “carry” in § 924(c)(1), the Court explained that “a firearm can be used without being carried, *e.g.*, when an offender . . . barter[s] with a firearm without handling it.” The Court underscored that its decision “is not inconsistent with *Smith*,” explicitly recognizing that the “active-employment understanding of ‘use’ certainly includes . . . bartering.”

...

Consistent with the “ordinary meaning” approach employed by the Supreme Court in *Smith* and *Bailey*, we cannot see how a defendant “uses” a gun when he receives it during a drug transaction. The recipient has not employed the gun, availed himself of the gun, or derived any service from the gun by simply trading his drugs for it. Indeed, nothing in a person’s acceptance of a gun embodies the active employment demanded by the Court in *Bailey*. We therefore agree with the Sixth and Seventh Circuits that a person who receives a gun in a trade for drugs has not used the gun in violation of § 924(c).

⁴⁷ *Id.* at 28-29.

⁴⁸ *Id.* at 30.

As the Seventh Circuit succinctly stated in *United States v. Westmoreland*, “there is no grammatically correct way to express that a person receiving a payment is thereby ‘using’ the payment.” 122 F.3d at 435. Quite simply, a “seller does not ‘use’ a buyer’s consideration.” *Id.* at 436. For example, when a person pays a cashier a dollar for a cup of coffee in the courthouse cafeteria, the customer has not used the coffee. He has only used the dollar bill. We see no difference when a person pays for a gun with drugs.⁴⁹

* * *

What did the *Stewart* judges take away from *Smith* and *Bailey*? In Justice Cardozo’s words, what was “essential and inherent” in the two cases? It seems apparent that what the *Stewart* court did was follow the *methodology* of *Smith* and *Bailey*, which is to say that in interpreting the statute a court is to adhere to the “plain meaning” of the words. Under this approach, convicting someone for trading drugs to get guns doesn’t make any sense, right?

But if this were all so simple, why would the government prosecute *Stewart* in the first place? Can you think of any argument on the government’s behalf?

Here’s the opinion of the First Circuit, in the case of *United States v. Cotto*, 456 F.3d 25 (1st Cir. 2006). *Cotto* was a heroin dealer who engaged in more than twenty drugs-for-gun exchanges. As you’ll see, the *Cotto* judges reached the opposite conclusion from the judges in *Stewart*, precisely because they read *Smith* and *Bailey* differently:

The primary issue in this appeal is whether one who barter drugs for firearms has “used” the firearms within the meaning of 18 U.S.C. § 924(c)(1)(A), which provides for a mandatory five-year sentence for using a firearm “during and in relation to any . . . drug trafficking crime.”

...

Cotto’s primary argument is that bartering drugs for firearms cannot constitute “use” of the firearms under § 924(c). He acknowledges that the Supreme Court has held that bartering in the other direction – that is, exchanging guns in order to obtain drugs – does constitute “use” of the firearms. The Court so held in *Smith v. United States*, 508 U.S. 223 (1993). There, the Court reasoned that “[b]y attempting to trade his [gun] for the drugs, [the defendant] ‘used’ or ‘employed’ it as an item of barter to obtain cocaine; he ‘derived service’ from it because it was going to bring him the very drugs he sought.” *Cotto* notes, though, that the Supreme Court soon returned to the issue of what constitutes “use,” holding that “§ 924(c)(1) requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense.” *Bailey v. United States*, 516 U.S. 137, 143 (1995).

...

⁴⁹ *Stewart*, 246 F.3d at 730-731.

We hold that bartering drugs in order to obtain firearms is “use” of the firearms. In doing so, we recognize that Cotto’s position is not without merit. His interpretation of the word “use” has some force given the common understanding of that term: while it is easy to see how he “used” the heroin to get the guns, it is somewhat less natural to say that he “used” the guns as well. See *Stewart*, 246 F.3d at 731; *Westmoreland*, 122 F.3d at 435-36. Were we writing on a blank slate, we might well be inclined to say, based on the most natural reading of the statute, that Cotto did not “use” the guns by bartering for them.

But we do not write on a blank slate. First, *Smith* controls here. In *Smith*, the Court stated that “[b]oth a firearm’s use as a weapon and its use as an item of barter fall within the plain language of § 924(c)(1), so long as the use occurs during and in relation to a drug trafficking offense.” The Court employed a very broad understanding of what it means for a firearm to be “used . . . as an item of barter or commerce.” The Court’s examples included not only variations on delivery, but also multiple instances of receipt. See *id.* at 234 & n.* (listing several offenses involving receipt as examples of “offense[s] involv[ing] use as an item in commerce”); see also *id.* at 235 (referring generally to offenses in which firearms “function as items of commerce”). We are not free to disregard *Smith*, which we view as controlling.

Nor does *Bailey* compel us to distinguish *Smith*. To the contrary, *Bailey* was careful to reaffirm *Smith*, stating that “[t]he active-employment understanding of ‘use’ certainly includes . . . bartering . . . a firearm.” Cotto “used” firearms within the active-employment meaning of *Bailey*. That he received guns does not mean he was passive with respect to them. He “required that he be furnished firearms in exchange for his drugs,” *Ulloa*, 94 F.3d at 956, and he accepted the guns as a way of “clos[ing] the drug transaction,” *Cox*, 324 F.3d at 84, thereby making the guns an operative factor in the drug trafficking offense.

As the Court observed in *Smith*, “[w]hen Congress enacted the current version of § 924(c)(1), it was no doubt aware that drugs and guns are a dangerous combination.” “The fact that a gun is treated momentarily as an item of commerce does not render it inert or deprive it of destructive capacity. Rather, as experience demonstrates, it can be converted instantaneously from currency to cannon.” That is so whether the defendant transfers or receives the gun. Just as the Supreme Court did not think Congress “intended courts and juries applying § 924(c)(1) to draw a fine metaphysical distinction between a gun’s role in a drug offense as a weapon and its role as an item of barter,” we do not think it intended to draw a distinction between bartering with a firearm and bartering for a firearm.

* * *

In fairness to the *Stewart* judges, they had not missed the “bartering” point. Rather, here is how they explained it:

As the Government correctly notes, the *Bailey* Court did list “bartering” as an example of an activity that “falls within ‘active employment.’” But that language by the Supreme Court must be taken in context. The Supreme Court included “bartering” in a list of examples of active employments that might fall within the § 924(c)(1) definitions of “use.” The Supreme Court did not purport to be encompassing every possible situation involving barter as a violation of that statute. Significantly, that discussion followed the Court’s analysis of *Smith*, in which the defendant’s use of a firearm had been the trading of it for drugs. In context, therefore, the Supreme Court’s understanding of Congress’s intent to afford the term “use” its “active connotation” includes situations in which a defendant barter a firearm in return for drugs. The Supreme Court’s inclusion of the word “bartering” in the list of active uses implies no more than that. It does not compel a conclusion that a person who barter drugs to acquire a firearm has used the firearm, as opposed to using the drugs. As we explained above, a person who receives a gun has not actively employed the gun—that is, he has not “used” it within any ordinary understanding of the word “use.”⁵⁰

* * *

When the issue finally came to the Supreme Court, the view of the *Stewart* Court prevailed, this time in an opinion written by Justice Souter (Justice O’Connor had left the Court.):

The Government may say that a person “uses” a firearm simply by receiving it in a barter transaction, but no one else would. A boy who trades an apple to get a granola bar is sensibly said to use the apple, but one would never guess which way this commerce actually flowed from hearing that the boy used the granola. So, when Watson handed over the drugs for the pistol, the informant or the agent “used” the pistol to get the drugs, just as *Smith* held, but regular speech would not say that Watson himself used the pistol in the trade. “A seller does not ‘use’ a buyer’s consideration[.]”⁵¹

Again, the vote was 9-0.

FOR DISCUSSION

1. Although the Supreme Court’s decision was unanimous, it is hard to claim that the applicable law—the statute, 18 U.S.C. § 924(c), and the relevant judicial precedents—was determinate, in the mechanical formalist sense or otherwise. It seems pretty clear that the contrary is true. In other words, this was a hard case, and the Justices (like the lower-court judges) had a fair amount

⁵⁰ *Stewart*, 246 F.3d at 732.

⁵¹ *Watson v. United States*, 552 U.S. 74, 79 (2007) (citations omitted).

of discretion. But does it appear that judicial preferences were driving the decisions in the courts of appeals and the Supreme Court? Do the courts' opinions seem like smokescreens that the judges threw up to cover their preferential paths? Or does it seem to you that the judges actually understood themselves to be engaging in legal reasoning—to be struggling with *legal* questions that did not have easy answers?

2. Like Justice Cardozo, Judge Harry T. Edwards has argued that it is important to distinguish between hard and easy cases. Judge Edwards sits on the United States Court of Appeals for the District of Columbia Circuit, one of the nation's most influential courts. He has written a great deal about judging, and the empirical study of judicial behavior. We will be reading more of what he has had to say shortly. For present purposes, though, Judge Edwards further distinguishes between what he calls "hard" and "very hard" cases. He defines "very hard" cases as those in which "after reviewing the record and all the pertinent legal materials, [he concludes] that the competing arguments drawn from those sources are equally strong. . . . [O]nly in those few cases do[es he] feel that fair application of the law to the facts leaves [him] in equipoise, and that to dispose of the appeal [he] must rely on some significant measure of discretion."⁵² In hard cases, by contrast, "each party is able to make at least one argument that [Judge Edwards] find[s] colorable, but, after research, reflection, and discussion, the argument(s) advanced by one party seem to [him] demonstrably stronger than the argument(s) advanced by the other. Under such circumstances, [he] feel[s] constrained to render judgment in favor of the party who can make the more compelling claims."⁵³ Judge Edwards' point is an important one: even in hard cases where the law does not supply one clear answer, it may be possible to say that the legal arguments on one side are *better or worse* than the arguments on the other side. To be sure, different judges may still disagree over which side has the better case. But, as Judge Edwards insists, there is a difference between saying that reasonable minds may disagree on the correct legal answer and saying that judges have unfettered discretion to pursue their policy preferences. At the very least, judges may experience the two sets of decisions differently. As Judge Edwards explains, when he is assessing the arguments in what he calls "hard" cases, he "do[es] not *feel* as though [he is] drawing upon any personal values or that [he is] exercising any real measure of discretion or free choice."⁵⁴

3. Recall the core claims of the Legal Realists: (1) the law is indeterminate in many cases; and (2) in indeterminate cases, a judge's biases and predilections are deciding cases. Is it possible to believe that the first claim is correct (at least in some class of cases), while rejecting the second? And even if you do not think so, can you still accept that judges sincerely believe that the legal reasoning that fills their opinions represents the best way of answering the relevant legal questions. Can you defend a model of legal reasoning in which judges are not simply deluding themselves?

V. WHAT MAKES HARD CASES HARD?

⁵² 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, 390 (1983).

⁵³ *Id.* at 390-91.

⁵⁴ *Id.* at 391.

We have seen that the law is sometimes indeterminate, creating a discretionary space in which different judges may—and often do—reach different conclusions. Indeed, the law sometimes demands that judges make the sorts of contestable political and moral judgments over which reasonable minds are bound to disagree. This reality puts pressure on the image of a government of laws, not men. It seems that the identities of the men (and women) beneath the black robes matter, perhaps a great deal.

The remainder of this book explores the various individual and institutional forces that shape the exercise of judicial discretion. First, though, it is worth asking whether our current state of affairs is a given, or something we might try to change. Is it possible to limit the range of, or opportunities for, judicial discretion? Could we make more cases easy, and fewer cases hard? Should we want to?

Writing in 1921, Justice Cardozo estimated that “a majority” of the cases he heard as a judge on New York’s highest court (the state equivalent of the U.S. Supreme Court) had only one right answer. More than sixty years later, Judge Edwards offered a similar assessment of his work on the D.C. Circuit, reporting that “approximately one half” of the cases he hears each year “are ‘easy’; the pertinent legal rules seem . . . unambiguous and their application to the facts appears clear.”⁵⁵ The remaining cases, Judge Edwards explained, were either “hard” (with colorable arguments on both sides) or “very hard” (with equally strong arguments). He estimated that only five to fifteen percent of the cases each year were so hard “that to dispose of the appeal [he had to] rely on some significant measure of discretion.”⁵⁶

If we want to think about minimizing judicial discretion, we need a theory for what causes it. What makes some cases hard and others easy?

A. The Limits of Language and Legal Commands

One factor that surely contributes to the difficulty of a case is the nature of the relevant legal command. In short, lawgivers must communicate in their native tongue, yet language has its limits. Can you think of any instance in which you’ve tried very hard to be precise, and yet your (supposedly) clear message got lost?

Think about the cases we have been discussing, interpreting 18 U.S.C. § 924(c)? Was the statute just drafted badly? Could you rewrite § 924(c) in a way that would make *Smith*, *Bailey*, and *Stewart* easy cases instead of hard ones?

Consider here a favorite hypothetical of legal theorists.⁵⁷ A city ordinance declares, “NO VEHICLES IN THE PARK” and imposes fines on violators. Imagine that you are a judge tasked with applying the city ordinance, and that you are presented with the following cases and asked to impose fines. How would you decide each case? Which seem easiest, and which seem hardest?

⁵⁵ Edwards Clev. St. 389-90.

⁵⁶ *Id.* at 390.

⁵⁷ Attributions.

1. There are ten trashcans in the park. The sanitation department drives its trucks into the park to collect the trash and replace the trash bags.
2. A six-year-old child rides her tricycle through the park.
3. A father pushes a baby stroller through the park.
4. A masked gunman has just robbed a convenience store, fatally shooting the store owner. The gunman escaped in his car, and police are giving chase. One officer cuts through the park in his cruiser in an effort to trap the suspect at the next intersection.
5. Two twelve-year-old boys operate a remote-controlled toy car in the park.
6. A World War II military truck is set on a pedestal in the park as a memorial to war veterans.⁵⁸
7. An elderly woman rides her motorized wheel chair through the park
8. A local resident drives through the park in his Honda Civic in order to reduce his commute to work.

Now imagine that you are a member of the city council. After living with the “no vehicles” ordinance for some time and getting a taste of some of the possible cases, the council decides to amend the statute to clarify its reach. You are tasked with producing a first draft. Would it be possible to rewrite the statute in a way that transformed all of the above scenarios into easy cases?

Even with the benefit of hindsight, it’s not so simple, is it?

But, critically, a great deal of law-specification happens *before* the hard cases reveal themselves. In order to do away with judicial discretion, lawmakers would have to get the details right the first time around. They would have to anticipate the many and varied factual scenarios to which their laws will be applied, and provide clear rules to govern each of those scenarios. That is no easy task, to say the least. Lawmakers—ranging from city council members, to legislators, to constitutional drafters, and so on—may have limited knowledge of the relevant issues. They may not understand, or be able to predict, exactly how their rules will work in the world. And even if lawmakers are fully informed and expert, the underlying facts can change in ways that disrupt their handiwork. A rule that makes sense today may prove to be unworkable tomorrow. That is one of the reasons why laws often are written in general terms that are capable of accommodating new circumstances. Such laws can evolve without the need for constant legislative updating. The consequence, however, is a great deal of judicial discretion.

Political reasons also help explain why laws are often—perhaps inevitably—written in a way that leaves discretion to judges and other interpreters. It may be much easier for lawmakers to agree on a general policy direction than on specific details. To return to the example of vehicles in the park, the city councilors might agree that the short-cutting citizen in Case #8 should be fined, while disagreeing on what to do about the police officer in Case #4. Thus, there

⁵⁸ Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 663 (1958).

may be a majority in favor of a relatively opaque prohibition on “vehicles in the park,” but no majority for a more detailed rule that sought to distinguish between police officers and impatient citizens. In such circumstances, legislators often opt to draft laws in ways that address the problem generally but leave the most contentious details unresolved. That way, lawmakers can take credit for doing something while avoiding the ire of disappointed constituents. If the courts decide that the police officer should (or should not) be fined—and if that decision proves to be politically unpopular—lawmakers can argue plausibly that the courts made a mistake.

B. Rules v. Standards

Beyond that, there is a very real debate about the best way to write legal rules, and one of these methods allows for far more discretion than the other. The law may be expressed in *rules* or, alternatively, in *standards*. Consider two constitutional provisions: Article II states that no person shall be eligible for the office of President “who shall not have attained the age of thirty five years”; and the Fourth Amendment states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”

The first provision lays down a bright-line rule; the second, a “reasonable[ness]” standard. Which provision do you think has provoked more litigation? The question answers itself, doesn’t it?

One of the arguments typically offered in favor of rules—and against standards—is that rules make decisionmaking easier and more predictable. Thus, if we wanted to minimize judicial discretion, one approach would be to try to move the law, as much as possible, toward rules and away from standards.

But do we really want to write all of law in bright line rules? Consider yet another constitutional provision, the Fourteenth Amendment’s Equal Protection Clause, which governed the resolution of *Brown v. Board of Education*, which we considered in Chapter 1: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” The Equal Protection Clause lays down a seeming rule, but in truth it leaves countless questions to be answered. What does it mean to deny someone the equal protection of the laws? Should we apply the rule at the time it was adopted (which seemed to allow for segregated schools, and discrimination against women), or should we allow the spaciousness of this language to allow for growth?

The broadly stated rule of the Equal Protection Clause approximates more nearly a standard, allowing us to see why standards might be preferred in some instances. It allows us to see that we might prefer standards over rules at times, for a variety of reasons. Bright-line rules may be too specific. By their nature they tend to be over- and under-inclusive. Why, after all, should the President have to be thirty-five? What about a particularly mature (or particularly popular!) candidate, who is only thirty-four? What about a forty-year-old who seems to have learned few lessons in life? A bright-line rule can get us certainty of outcomes, but it does not necessarily achieve our objectives.

Nonetheless, standards – or any language that can seem less than clear under the circumstances – are going to allow judges discretion. Judges are going to have to decide what is within the law and outside it. Thus, to eliminate judicial discretion we may have to adopt bright-line rules. But that might be cutting off our noses to spite our faces.

C. Challenging Facts

All of this suggests that it would be exceptionally difficult, and probably impossible, to avoid hard cases through the specification of legal rules. Even if we have a particular set of circumstances in mind (like vehicles in the park), it can be a challenge to craft a rule that unambiguously answers all questions. Making matters worse, times change, and cases do too. Questions that once seemed easy may become hard in the face of new facts or social circumstances. Indeed, even the clearest rule might be hard to apply to new facts. Can you imagine a circumstance that would create a hard case for application of the thirty-five-year-old rule for presidents? The question conjures up the stuff of science-fiction—cryogenic freezing, perhaps?—but is it so unthinkable? Do you think the generation that wrote the First Amendment could have imagined the Internet? Did the drafters of the Fourth Amendment’s prohibition of unreasonable searches anticipate thermal imaging⁵⁹ or GPS tracking devices?⁶⁰

The difficulty is not just that the world can change, complicating rules that once were clear. Even when the legal rule is clear and clearly applies to the facts at hand, the result may be so unpalatable that reasonable minds will respond, “it just can’t be!” What should judges do in such circumstances? Consider the following case:

UNITED STATES V. LOCKE
471 U.S. 84 (1985)

Marshall, J.

[The Federal Land Policy and Management Act (FLPMA), enacted in 1976, provided that holders of certain mining claims on federal land must file certain documents with the federal Bureau of Land Management each year. For claims that predated the Act, the FLPMA imposed two specific filing requirements: first, claimants had to file an official “notice of location” with the BLM by 1979; and second, claimants were required to file a notice of intention to hold the claim with the BLM “prior to December 31” of every subsequent year. Any failure to satisfy the annual filing requirement would result in a loss of the claims.

The Locke family had been exercising rights to mine gravel on federal land since the 1960s; the claims were valued at several million dollars. The Lockes had routinely complied with annual filing requirements at the state level, and—as the newly enacted FLPMA required—they filed a notice of location with the BLM in 1979.] At the end of 1980, however, appellees failed to meet on time their first annual obligation to file with the Federal Government. After allegedly receiving misleading information from a BLM employee, appellees waited until

⁵⁹ Cite case

⁶⁰ Cite case

December 31 to submit to BLM the annual notice of intent to hold [the claim] Thus, appellees' filing was one day too late.

This fact was brought painfully home to appellees when they received a letter from the BLM Nevada State Office informing them that their claims had been declared abandoned and void due to their tardy filing. . . . Appellees' mineral deposits thus escheated to the Government.

...

Before the District Court, appellees asserted that the [statutory] requirement of a filing "prior to December 31 of each year" should be construed to require a filing "on or before December 31." Thus, appellees argued, their December 31 filing had in fact complied with the statute, and the BLM had acted *ultra vires* in voiding their claims.

. . . It is clear to us that the plain language of the statute simply cannot sustain the gloss appellees would put on it. . . . While we will not allow a literal reading of a statute to produce a result "demonstrably at odds with the intentions of its drafters," with respect to filing deadlines a literal reading of Congress' words is generally the only proper reading of those words. To attempt to decide whether some date other than the one set out in the statute is the date actually "intended" by Congress is to set sail on an aimless journey, for the purpose of a filing deadline would be just as well served by nearly any date a court might choose as by the date Congress has in fact set out in the statute. "Actual purpose is sometimes unknown," and such is the case with filing deadlines; as might be expected, nothing in the legislative history suggests why Congress chose December 30 over December 31, or over September 1 (the end of the assessment year for mining claims), as the last day on which the required filings could be made. But "[d]eadlines are inherently arbitrary," while fixed dates "are often essential to accomplish necessary results."

...

We are not insensitive to the problems posed by congressional reliance on the words "prior to December 31." But the fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." Nor is the Judiciary licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result. On the contrary, deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that "the legislative purpose is expressed by the ordinary meaning of the words used." . . . The phrase "prior to" may be clumsy, but its meaning is clear. Under these circumstances, we are obligated to apply the "prior to December 31" language by its terms.

...

Stevens, J., joined by Brennan, J., dissenting.

The Court’s opinion today is contrary to the intent of Congress, . . . and unjustly creates a trap for unwary property owners. First, the choice of the language “prior to December 31” when read in context in [the statute] is, at least, ambiguous, and, at best, “the consequence of a legislative *accident*, perhaps caused by nothing more than the unfortunate fact that Congress is too busy to do all of its work as carefully as it should.” In my view, Congress actually intended to authorize an annual filing at any time prior to the close of business on December 31st, that is, prior to the end of the calendar year to which the filing pertains. Second, even if Congress irrationally intended that the applicable deadline for a calendar year should end *one day before* the end of the calendar year that has been recognized since the amendment of the Julian Calendar in 8 B.C., it is clear that appellees have substantially complied with the requirements of the statute

The statutory scheme requires periodic filings on a calendar-year basis. The end of the calendar year is, of course, correctly described either as “prior to the close of business on December 31,” or “on or before December 31,” but it is surely understandable that the author of [the relevant provision] might inadvertently use the words “prior to December 31” when he meant to refer to the end of the calendar year. As the facts of this case demonstrate, the scrivener’s error is one that can be made in good faith. The risk of such an error is, of course, the greatest when the reference is to the end of the calendar year. That it was in fact an error seems rather clear to me because no one has suggested any rational basis for omitting just one day from the period in which an annual filing may be made, and I would not presume that Congress deliberately created a trap for the unwary by such an omission.

It would be fully consistent with the intent of Congress to treat any filing received during the 1980 calendar year as a timely filing for that year. Such an interpretation certainly does not interfere with Congress’ intent to establish a federal recording system designed to cope with the problem of stale mining claims on federal lands. The system is established, and apparently, functioning. Moreover, the claims here were *active*; the Bureau was well aware that the appellees intended to hold and to operate their claims.

. . . I have no doubt that Congress would have chosen to adopt a construction of the statute that filing take place by the end of the calendar year if its attention had been focused on this precise issue.

* * *

Note that *Locke* split two of the Supreme Court’s tightest liberal allies, Justices Brennan and Marshall. Can you see how there is more to judging than ideology?

The statute at issue in *Locke* establishes a bright-line rule, and the relevant facts are not in dispute. Yet the case seemed hard to at least two Justices—and we suspect it will seem hard to many of you—because the outcome seems unjust. Do you agree with Justice Stevens that Congress could not possibly have intended to set the filing deadline at the day before the last day of the calendar year? Can you think of a rational reason for requiring filing before the 31st?

Locke is an attention-getting case, but is hardly alone. Not only is the law often written in vague or general terms that lend themselves to a variety of different interpretations, but even the

simplest and clearest rules can prove to be challenging to apply to unexpected or extreme facts. When you get right down to it, virtually *any* case has the potential to be (or to become) a hard case, depending on the circumstances. Isn't that the lesson of our cases about Section 924(c)?

C. What's so Great About Determinacy?

Even if it were possible to remove all discretion from legal interpretation, it is by no means clear that we should want to. As usual, Cardozo had profound things to say about the inevitability – and necessity – of judicial discretion, creativity, and innovation. Here, a poignant (and oft-quoted) confession:

[W]ithin the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom.

. . .

I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. I found “with the voyagers in Browning's 'Paracelsus' that the real heaven was always beyond.” As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.⁶¹

That sounds poetic, but whatever is he talking about?

Locke seemed a hard case because the result is so harsh. But what about the converse—where a clear rule seems to give a party an unfair *benefit*? Consider this “chestnut” of legal cases:

RIGGS v. PALMER

115 N.Y. 506 (N.Y. Ct. App. 1889).

⁶¹ BENJAMIN C. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 115, 166-67 (1921).

EARL, J.

On the 13th day of August, 1880, Francis B. Palmer made his last will and testament, in which he gave small legacies to his two daughters, Mrs. Riggs and Mrs. Preston, the plaintiffs in this action, and the remainder of his estate to his grandson, the defendant Elmer E. Palmer . . . The testator, at the date of his will, owned a farm, and considerable personal property. . . . At the date of the will, and subsequently to the death of the testator, Elmer lived with him as a member of his family, and at his death was 16 years old. He knew of the provisions made in his favor in the will, and, that he might prevent his grandfather from revoking such provisions, which he had manifested some intention to do, and to obtain the speedy enjoyment and immediate possession of his property, he willfully murdered him by poisoning him. He now claims the property, and the sole question for our determination is, can he have it?

The defendants say that the testator is dead; that his will was made in due form, and has been admitted to probate; and that therefore it must have effect according to the letter of the law. It is quite true that statutes regulating the making, proof, and effect of wills and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer. The purpose of those statutes was to enable testators to dispose of their estates to the objects of their bounty at death, and to carry into effect their final wishes legally expressed; and in considering and giving effect to them this purpose must be kept in view. It was the intention of the law-makers that the donees in a will should have the property given to them. But it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it. If such a case had been present to their minds, and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it. It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers. The writers of laws do not always express their intention perfectly, but either exceed it or fall short of it, so that judges are to collect it from probable or rational conjectures only, and this is called "rational interpretation;" . . . [I]t is said in Bacon: "By an equitable construction a case not within the letter of a statute is sometimes holden to be within the meaning, because it is within the mischief for which a remedy is provided. The reason for such construction is that the law-makers could not set down every case in express terms. In order to form a right judgment whether a case by within the equity of a statute, it is a good way to suppose the law-maker present, and that you have asked him this question: Did you intend to comprehend this case? Then you must give yourself such answer as you imagine he, being an upright and reasonable man, would have given." . . . In 1 Bl[ackstone] Comm. 91, the learned author, speaking of the construction of statutes, says: "If there arise out of them collaterally any absurd consequences manifestly contradictory to common reason, they are with regard to those collateral consequences void." . . . There was a statute in Bologna that whoever drew blood in the streets should be severely punished, and yet it was held not to apply to the case of a barber who opened a vein in the street. It is commanded in the decalogue that no work shall be done upon the Sabbath, and yet giving the command a rational interpretation founded upon its design the Infallible Judge held that it did not prohibit works of necessity, charity, or benevolence on that day.

What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable, and just devolution of property that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate? Such an intention is inconceivable. We need not, therefore, be much troubled by the general language contained in the laws. Besides, all laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes. . . .

Here there was no certainty that this murderer would survive the testator, or that the testator would not change his will, and there was no certainty that he would get this property if nature was allowed to take its course. He therefore murdered the testator expressly to vest himself with an estate. Under such circumstances, what law, human or divine, will allow him to take the estate and enjoy the fruits of his crime? . . .

The judgment of the general term and that entered upon the report of the referee should therefore be reversed, and judgment should be entered as follows: That Elmer E. Palmer and the administrator be enjoined from using any of the personalty or real estate left by the testator for Elmer's benefit; that the devise and bequest in the will to Elmer be declared ineffective to pass the title to him; that by reason of the crime of murder committed upon the grandfather he is deprived of any interest in the estate left by him; that the plaintiffs are the true owners of the real and personal estate left by the testator

GRAY, J., (*dissenting.*)

This appeal presents an extraordinary state of facts, and the case, in respect of them, I believe, is without precedent in this state. The respondent, a lad of 16 years of age, being aware of the provisions in his grandfather's will, which constituted him the residuary legatee of the testator's estate, caused his death by poison, in 1882. For this crime he was tried, and was convicted of murder in the second degree, and at the time of the commencement of this action he was serving out his sentence in the state reformatory. This action was brought by two of the children of the testator They say that to permit the respondent to take the property willed to him would be to permit him to take advantage of his own wrong. To sustain their position the appellants' counsel has submitted an able and elaborate brief, and, if I believed that the decision of the question could be effected by considerations of an equitable nature, I should not hesitate to assent to views which commend themselves to the conscience. But the matter does not lie within the domain of conscience. We are bound by the rigid rules of law, which have been established by the legislature, and within the limits of which the determination of this question is confined. The question we are dealing with is whether a testamentary disposition can be altered, or a will revoked, after the testator's death, through an appeal to the courts, when the legislature has by its enactments prescribed exactly when and how wills may be made, altered, and revoked, and apparently, as it seems to me, when they have been fully complied with, has left no room for the exercise of an equitable jurisdiction by courts over such matters. Modern jurisprudence, in recognizing the right of the individual, under more or less restrictions, to dispose of his property after his death, subjects it to legislative control, both as to extent and as to mode of exercise. . . .

The capacity and the power of the individual to dispose of his property after death, and the mode by which that power can be exercised, are matters of which the legislature was assumed the entire control, and has undertaken to regulate with comprehensive particularity.

The appellants' argument is not helped by reference to those rules of the civil law, or to those laws of other governments, by which the heir, or legatee, is excluded from benefit under the testament if he has been convicted of killing, or attempting to kill, the testator. In the absence of such legislation here, the courts are not empowered to institute such a system of remedial justice.

...

The statutes of this state have prescribed various ways in which a will may be altered or revoked; but the very provision defining the modes of alteration and revocation implies a prohibition of alteration or revocation in any other way. . . .

I cannot find any support for the argument that the respondent's succession to the property should be avoided because of his criminal act, when the laws are silent. Public policy does not demand it; for the demands of public policy are satisfied by the proper execution of the laws and the punishment of the crime. . . .

To allow their argument to preva[i], would involve the diversion by the court of the testator's estate into the hands of persons whom, possibly enough, for all we know, the testator might not have chosen or desired as its recipients. Practically the court is asked to make another will for the testator. The laws do not warrant this judicial action, and mere presumption would not be strong enough to sustain it. But, more than this, to concede the appellants' views would involve the imposition of an additional punishment or penalty upon the respondent. What power or warrant have the courts to add to the respondent's penalties by depriving him of property? The law has punished him for his crime, and we may not say that it was an insufficient punishment. In the trial and punishment of the respondent the law has vindicated itself for the outrage which he committed, and further judicial utterance upon the subject of punishment or deprivation of rights is barred. We may not, in the language of the court in *People v. Thornton*, 25 Hun, 456, 'enhance the pains, penalties, and forfeitures provided by law for the punishment of crime.' The judgment should be affirmed, with costs.

Rutherford, in his *Institutes*, (page 420,) says: "Where we make use of rational interpretation, sometimes we restrain the meaning of the writer so as to take in less, and sometimes we extend or enlarge his meaning so as to take in more, than his words express."

* * *

The majority says it is using "rational interpretation." It elaborates: "Rutherford, in his *Institutes*, (page 420,) says: 'Where we make use of rational interpretation, sometimes we restrain the meaning of the writer so as to take in less, and sometimes we extend or enlarge his

meaning so as to take in more, than his words express.” That’s quite an invitation to judicial law-making, no? This is precisely the sort of thing so many condemn.⁶²

But is it really tenable that Elmer should take his inheritance? And more to the point, is it tenable that this would remain the law? Can you imagine what sort of conduct this would invite? Do the crime, serve the time, emerge wealthy. (This is what commonly is referred to as a moral hazard: an incentive for people to do terrible things.)

Cardozo notes that “principles that have served their day expire, and new principles are born.” In other words, when times change, the law ought to change with it. The difficult question, of course, is who should do the changing. It would be possible to imagine a system marked by detailed, strict, and unyielding laws that judges applied largely by rote. (We say “largely” because, as we saw above, it surely is impossible to remove all discretion from law.) Sooner or later, cases like *Locke* or *Riggs* would arise that exposed serious problems with the existing rules. Nevertheless, in this hypothetical system, judges would continue to apply the laws as written, as the dissent in *Riggs* urges and the *Locke* majority does. It would be up to the legislature—or, perhaps, the responsible administrative agency, or maybe even constitutional drafters—to fix any flaws in the law. What might be wrong with such a system? Are there reasons to prefer a system in which the law is written in a way that invites, or at least allows, judges to shape it in light of current norms and mores—subject to correction by legislatures, agencies, and constitutional drafters?

Our answers to these normative questions might depend on *how* we expect judges to use their discretion. On the one hand, if we believe that judges will tend to be wise and fair, we might choose to leave more play in the joints of the law. On the other hand, if we have good reason to fear that judicial decisionmaking will be skewed in various undesirable ways, we might prefer strict and unyielding laws that leave little room for judicial discretion.

As it happens, the questions that plague us so in the public sphere – are judges adhering to their oaths? Are judges’ personal preferences or ideologies deciding cases? – don’t seem to phase judges much. Judge Richard Posner says, “*The Nature of the Judicial Process* is considered in sophisticated legal circles old hat . . . [I]ts central message is no longer news (today do we not all know that judges are not *simple* automata?).”⁶³ And most judges are ready to admit this – off the bench at least. Patricia Wald was a judge on the D.C. Circuit from 1979 to 1999; she was generally tagged as a liberal. Here is what she had to say about the issue:

. . . I register something of a ho-hum reaction to the notion that judges’ personal philosophies enter into their decisionmaking when statute or precedent does not point their discretion in one direction or constrain it in another. Judges would be rudderless ships if we did not steer through uncharted and murky waters by some sense of conscience or some core of personal beliefs. As human beings, we are all ultimately self-referential;

⁶² ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 134 (1970) (“[T]oo many federal judges have been induced to view themselves as holding roving commissions as problem solvers.”); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 1 (1990) (arguing that courts have become attracted to “the belief that nothing matters beyond politically desirable results, however achieved”).

⁶³ RICHARD POSNER, *CARDOZO: A STUDY IN REPUTATION* 21 (1993).

Justice Holmes characterized a certain number of positions in every judge's repertoire as "can't helps."[†] In such cases personal philosophy may well play a significant role in judging.⁶⁴

Are these judges just too blasé about a real problem? Or are they simply acknowledging that judges are human, and that we've not yet figured out a way for computers to resolve legal cases (if, indeed, that is what we would want).

Do judges let their own ideologies or what have you decide cases? And is there anything that can be done about it? Now that we have some understanding of how law itself works, we've framed up these questions properly, and we explore them in the next two chapters. In Chapter Three, we examine the available empirical evidence on the effects of ideology and other personal characteristics on judicial decisionmaking. In Chapter Four we then think about ways the system can deal with judicial discretion. But it pays, when considering this question, to remember the lesson of *Riggs v. Palmer*.

[†] See Letter from Oliver Wendell Holmes to Harold Laski (Jan. 11, 1929), in *The Essential Holmes* 107 (Richard A. Posner ed., 1992):

[W]hen I say that a thing is true I only mean that I can't help believing it—but I have no grounds for assuming that my can't helps are cosmic can't helps and some reasons for thinking otherwise. I therefore define the truth as the system of my intellectual limitations—there being a tacit reference to what I bet is or will be the prevailing can't help of the majority of that part of the world that I count. The ultimate, even humanly speaking, is a mystery.

⁶⁴ Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 236 (1999).

