PART I: OF LAW AND JUDICIAL CHARACTERISTICS

Judges wear black robes, in part to obscure their individuality. It is the law that decides cases, not the judge. Or so it is in theory—reflected in the famous statement that "ours is a government of laws, not of men." Still, judges are human beings, and as such are likely to have the same biases and predilections as the rest of us. To what extent does it matter who is under the robes? And if it matters, how should we think about that? Those are the questions posed in this first Part.

A. Are All Judges Alike?

FRANCOLINO V. KUHLMAN

224 F. Supp. 2d 615 (S.D.N.Y. 2002)

Schwartz, A.

[Following an eight-month trial, Joseph Francolino was found guilty by a jury of illegal conduct of a waste-hauling business. The state judge at Francolino's trial, Justice Leslie Crocker Snyder, then sentenced Francolino to ten-to-thirty years in prison, and ordered him to pay a $900,000 fine. His conviction was affirmed on appeal. Prisoners convicted by state courts can apply subsequently to the federal courts for a writ of habeas corpus, arguing that the state trial violated their constitutional rights and must be invalidated. This Francolino did.

The heart of Francolino's constitutional claim in federal court was that, by utilizing a procedural trick, the prosecution was able to choose the judge who tried him. Ordinarily, judges are assigned at random to hear cases. However, the prosecutors in his case manipulated the process by bringing pretrial motions to the judge of choice, and then getting the Administrative Judge to assign the pretrial judge on the basis of experience with the case—in effect, thus allowing the prosecutors to "select" the trial judge. Apparently, this was somewhat of a common practice in New York. Why would the prosecutors do so, particularly in this case? The federal judge explained:]

Francolino argues that prosecutors steered his case towards Justice Snyder because of her allegedly pro-prosecution bias. . . . Francolino turns to several articles that have been written about Justice Snyder.* New York Magazine profiled Justice Snyder in a piece entitled, "The Enforcer," in which she stated she "happen[s] to be an admirer of law enforcement"; the article also notes that "[d]efense attorneys complain that [Justice] Snyder is unabashedly pro-prosecution" and that she is considered "the darling of prosecutors." Nina Burleigh, The Enforcer, N.Y. Mag., Mar. 30, 1998, at 35, 38. National Association of Criminal Defense Lawyers president Gerald B. Lefcourt has stated that Justice Snyder is a "lifelong prosecutor" and that "defense lawyers do not believe they get treated fairly in her courtroom." Burleigh, at 39. A New York Times article about Justice Snyder states that according to some defense lawyers, friends, and colleagues, "as a former prosecutor, she acts like one on the bench, undermining the defense in ways large and small." Katherine E. Finkelstein, Hard-Liner in Pearls and Basic Black Robe, N.Y. Times, Dec. 20, 2000, at B2. She was featured in the CBS program, 60 Minutes on March 11, 2001. Mike Wallace noted that Justice Snyder is "famous for her candor from the bench, plus the knockout maximum sentences she imposes." 60 Minutes (CBS television broadcast, Mar. 11, 2001). He added that "[s]ome people say prosecutors love to have [Justice Snyder] on a case because [she] help[s] the prosecutor make the case." Id. During the course of the broadcast, Wallace also noted that Justice Snyder has been mentioned as a successor to the current D.A., Robert Morgenthau. Justice Snyder stated, "It's something that I think would be exciting." Id. Burleigh also notes that Justice Snyder "admits" to having "her eye on the [D.A.'s] job." Burleigh, at 35. The government does not contradict Francolino's contention that Justice Snyder has a reputation for being pro-prosecution. In light of this fact, the Court will assume, arguendo, that Justice Snyder has such a reputation.

[The federal court found – as had a predecessor decision, New York Criminal Bar Assoc. v. Newton, 33 F. Supp. 2d 289, 290 (S.D.N.Y.1999) – that prosecutors were in fact manipulating the system to get favorable judges. And the judge in Francolino's federal case condemned the manipulation in the strongest of terms:]

Any criminal justice system in which the prosecutor alone is able to select the judge of his choice, even in limited types of cases, raises serious concerns about the appearance of partiality, irrespective of the motives of the prosecutor in selecting a given judge. The Supreme Court "'repeatedly has recognized [that] due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.'" United States v. Pearson, 203 F.3d 1243, 1257 (10th Cir. 2000) (quoting Schweiker v. McClure, 456 U.S. 188 (1982)).

[The lawyers for the state, arguing that Francolino's sentence should be upheld, responded essentially that all judges are the same in one important way: that a prosecutor's choice of judges is necessarily limited to a group of judicial officers "who have undergone the process of selection and appointment, [and] who have sworn to uphold the law and defend the Constitution […]." But the federal court was not buying it: "The fact that all judges on a given court have been vetted by a selection and appointment process and that each has taken an oath may mean that each is entitled to equal respect, but does not mean that all judges are identical."

* The Court reviews these media reports not to determine the truth of the matter they assert, but to provide context for Francolino's arguments that Justice Snyder has a *reputation* for bias.

In defense of its conclusion, the Francolino court quoted from the Supreme Court decision in Laird v. Tatum, 409 U.S. 824 (1972):]

Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like. Lawyers recognize this when they talk about "shopping" for a judge; Senators recognize this when they are asked to give their "advice and consent" to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community.

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Who seems to have the better of the arguments here? The prosecutors, arguing that Justice Snyder was like any other judge? Or Francolino and the federal judge, arguing that it was impermissible for the prosecutors to seek out a prosecution-oriented judge for what (given the length of the trial) must have been an intricate case? In short, did it matter who was wearing Justice Snyder's robes?

FOR DISCUSSION

1. Did Francolino get a fair shake in the New York state courts? Why or why not? What precisely would be the difficulty with Judge Snyder trying Francolino? How would you know whether her pro-prosecution biases (assuming they exist) affected the decision?

2. Note the *Francolino* court's discussion of the "appearance" of bias. This is a concern that will appear repeatedly throughout this book. It is not just the impact on a particular litigant that might matter: some practices are so troubling that even if we still think a particular litigant should lose, allowing a decision to stand in light of those practices is said to undermine faith in the system more generally. Do you accept this argument? Which way do you think it cuts in Francolino's case?

B. Justice Marshall's Lament

In *Francolino*, the federal judge relied on the Supreme Court's decision in *United States v. Pearson*. Consider the quotation from *Pearson* as you read the following case study, from the Supreme Court itself.

In three cases decided between 1987 and 1991, the Supreme Court considered the question of whether – in a death penalty case – the sentencing jury may be presented with what commonly is referred to as "victim impact" evidence. That evidence might contain information about the deceased, as well as the impact of the murder on the victim's family and friends.

In the first case, *Booth v. Maryland*, 482 U.S. 496 (1986), John Booth and an accomplice murdered an elderly couple, Irvin and Rose Bronstein, after robbing their home. Booth was sentenced to death by the jury, and challenged the sentence as violating his rights under the

Eighth Amendment to the Constitution. Maryland law required preparation of a "victim impact statement" or VIS in certain crimes. Here are excerpts from the VIS that the jury heard:

> "[T]he victims' son reports that his parents had been married for fifty-three years and enjoyed a very close relationship, spending each day together. He states that his father had worked hard all his life and had been retired for eight years. He describes his mother as a woman who was young at heart and never seemed like an old lady. She taught herself to play bridge when she was in her seventies. The victims' son relates that his parents were amazing people who attended the senior citizens' center and made many devout friends."
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> "As described by their family members, the Bronsteins were loving parents and grandparents whose family was most important to them. Their funeral was the largest in the history of the Levinson Funeral Home and the family received over one thousand sympathy cards, some from total strangers."
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> "It became increasingly apparent to the writer as she talked to the family members that the murder of Mr. and Mrs. Bronstein is still such a shocking, painful, and devastating memory to them that it permeates every aspect of their daily lives. It is doubtful that they will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them."

In an opinion by Justice Powell, the Supreme Court held that admission of the VIS violated Booth's rights. In light of the Eighth Amendment, which prohibits the infliction of "cruel and unusual punishments," the Court consistently had held that a sentencing jury must make an "individualized determination" of whether death is the appropriate sentence, based on the "character of the individual and the circumstances of the crime." The question was whether the information in the VIS had "some bearing on the defendant's 'personal responsibility and moral guilt." The Court concluded not, reasoning that "[t]he focus of a VIS . . . is not on the defendant, but on the character and reputation of the victim and the effect on the family. These factors may be wholly unrelated to the blameworthiness of a particular defendant . . . ." In addition, often it will prove very difficult for the defendant to "rebut such evidence without shifting the focus of the sentencing hearing away from the defendant."

The merits vote in *Booth* was 5-4. Joining Justice Powell in the majority were Justices Brennan, Marshall, Blackmun, and Stevens. Justice White dissented in an opinion joined by Chief Justice Rehnquist, Justice O'Connor and Justice Scalia. The dissent disagreed that the defendant's blameworthiness was not at issue: "There is nothing aberrant in a juror's inclination to hold a murderer accountable not only for his internal disposition in committing the crime but also for the full extent of the harm he caused." In addition, Justice White argued that because a capital defendant has a right to put on any evidence in mitigation, the VIS is particularly appropriate to "counteract[]" that evidence. (Justice Scalia also wrote a dissent.)

The Supreme Court revisited the issue in *Booth* just two years later in *South Carolina v. Gathers*, 490 U.S. 805 (1989). Gathers had been convicted of murder and criminal sexual assault of Richard Haynes, and was sentenced to death. Haynes was an unemployed, thirty-one year old

man with some mental difficulties, who considered himself a preacher, and referred to himself as "Reverend Minister." At the time of his death he had on him a bible tract, titled "The Game Guy's Prayer," talking about being a good sport in life. At the sentencing phase, the prosecution talked at length about who Haynes was, and how he did not deserve his fate.

Gathers challenged the prosecutor's argument as a violation of *Booth*, and the Supreme Court agreed. The vote was again 5-4, but the line-up of Justices was slightly different. Justice Kennedy had replaced Justice Powell on the Court, and he dissented, together with Chief Justice Rehnquist and Justices O'Connor and Scalia. Justice White, who had dissented in *Booth*, now joined the majority. Justice White wrote a brief concurrence, saying only "[u]nless *Booth v. Maryland,* is to be overruled, the judgment below must be affirmed. Hence, I join Justice BRENNAN's opinion for the Court."

Case three was *Payne v. Tennessee*, 501 U.S. 808 (1991). As you can see, it came only five years after *Booth* and two years after *Gathers*. Once again the defendant has been sentenced to death, and challenged what happened at the sentencing hearing as a violation of *Booth*. This time the Supreme Court, by a vote of 6-3 overruled *Booth*, holding that VIS were admissible at the sentencing phase of a death penalty trial. In the majority were the *Gathers* dissenters—Rehnquist, O'Connor, Scalia, and Kennedy—together with Justice White and the new Justice Souter, who had replaced Justice Brennan in 1990. Justice Marshall dissented, in a most poignant way:

> Power, not reason, is the new currency of this Court's decisionmaking…Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did
> . . .
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> There is nothing new in the majority's discussion of the supposed deficiencies in *Booth* and *Gathers*. Every one of the arguments made by the majority can be found in the dissenting opinions filed in those two cases, and, as I show in the margin, each argument was convincingly answered by Justice Powell and Justice Brennan.
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> But contrary to the impression that one might receive from reading the majority's lengthy rehearsing of the issues addressed in *Booth* and *Gathers*, the outcome of this case does not turn simply on who — the *Booth* and *Gathers* majorities or the *Booth* and *Gathers* dissenters — had the better of the argument.
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> The overruling of one of this Court's precedents ought to be a matter of great moment and consequence. Although the doctrine of *stare decisis* is not an "inexorable command," this Court has repeatedly stressed that fidelity to precedent is fundamental to "a society governed by the rule of law."
> . . .

> The majority cannot seriously claim that *any* of the[] traditional bases for overruling a precedent applies to *Booth* or *Gathers*. The majority does not suggest that the legal rationale of these decisions has been undercut by changes or developments in doctrine during the last two years. Nor does the majority claim that experience over that period of time has discredited the principle that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion," the larger postulate of political morality on which *Booth* and *Gathers* rest .
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> It takes little real detective work to discern just what *has* changed since this Court decided *Booth* and *Gathers*: this Court's own personnel. Indeed, the majority candidly explains why this particular contingency, which until now has been almost universally understood not to be sufficient to warrant overruling a precedent, is sufficient to justify overruling *Booth* and *Gathers* . . . [T]he majority points out, "*Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents" and thereafter were "questioned by members of the Court." Taken together, these considerations make it legitimate, in the majority's view, to elevate the position of the *Booth* and *Gathers* dissenters into the law of the land.
> . . .
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> Taking into account the majority's additional criterion for overruling — that a case either was decided or reaffirmed by a 5-4 margin "over spirited dissen[t]" — the continued vitality of literally scores of decisions must be understood to depend on nothing more than the proclivities of the individuals who now comprise a majority of this Court.

Justice Marshall argues that it is inappropriate for the law to change simply because the membership of the Court changes. Do you agree? In his Gathers dissent, Justice Scalia had this to say on the question:

> It has been argued that we should not overrule so recent a decision, lest our action "appear to be ... occasioned by nothing more than a change in the Court's personnel," and the rules we announce no more than "'the opinions of a small group of men who temporarily occupy high office.'" I doubt that overruling *Booth* will so shake the citizenry's faith in the Court. Overrulings of precedent rarely occur without a change in the Court's personnel. The only distinctive feature here is that the overruling would follow not long after the original decision. But that is hardly unprecedented. Indeed, I had thought that the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity. . . .
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> In any case, I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order

that the Court might save face. With some reservation concerning decisions that have become so embedded in our system of government that return is no longer possible (a description that surely does not apply to *Booth*), I agree with Justice Douglas: "A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." Douglas, Stare Decisis, 49 Colum.L.Rev. 735, 736 (1949). Or as the Court itself has said: "[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions." *Smith v. Allwright,* 321 U.S. 649, 665 (1944).

FOR DISCUSSION

Who has the better of the argument? Justice Scalia is correct, is he not, that he took an oath to interpret the Constitution as he best understood it. Besides, as he points out, typically the only way around a constitutional decision by the Supreme Court is to amend the Constitution (almost impossible) or get the Court to change its mind. So, what is wrong with overruling *Booth* and *Gathers*? On the other hand, Justice Marshall has a point, does he not, that something is unseemly about the law changing just because of who happens to be on the Court at any given moment? Isn't that the essence of what seems wrong in *Francolino*?

C. What Decides Cases?

This sort of story, that judges are deciding cases based on their own personal predelictions gets aired all the time in the public sphere. Virtually every account of judicial decisions in the popular press—particularly Supreme Court decisions—identifies the Justices as "conservative" or "liberal," or "Democrat" or "Republican." *New York Times* columnist Adam Liptak explained the conventions in a 2012 article tellingly entitled, '*Politicians in Robes?' Not Exactly, But . . .*:

> A couple of weeks ago, a federal appeals court ruled that voters in Michigan could not ban racial preferences in admissions to the state's public universities. The ruling struck some people as curious ("a state does not deny equal treatment by mandating it," a dissenting judge wrote), but that is not today's topic.
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> This column is about whether it was worth noting the partisan affiliations of the judges on the two sides of that 8-to-7 decision.
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> In his report on the decision for Scotusblog, Lyle Denniston, who has covered the Supreme Court for more than half a century, added a "note to readers" that made the case for omitting such information.

"Readers will find, in some news accounts about this decision, references to the political party affiliation of the presidents who named the judges to the bench, referring to them as Republican or Democratic appointees," Mr. Denniston wrote.

"The author of this blog," he said, referring to himself, "will provide that information only when it is clearly demonstrated that the political source of a judge's selection had a direct bearing upon how that judge voted — admittedly, a very difficult thing to prove. Otherwise, the use of such references invites the reader to draw such a conclusion about partisan influence, without proof."

For purposes of discussion only, let me describe how the vote broke down. Every one of the eight judges in the majority was nominated by a Democratic president. Every one of the seven judges in dissent was nominated by a Republican president.

. . .

Many judges hate it when news reports note this sort of thing, saying it undermines public trust in the courts by painting them as political actors rather than how they like to see themselves — as disinterested guardians of neutral legal principles.

But there is a lot of evidence that the party of the president who appointed a judge is a significant guide to how that judge will vote on politically charged issues like affirmative action.

. . .

The case from Michigan, which is in conflict with another federal appeals court decision, is probably headed to the Supreme Court. It would join a case argued in October, which challenged an affirmative action program at the University of Texas.

The justices' votes in the Texas case are as yet unknown. But here is a good bet: every vote to strike down the program will come from a justice appointed by a Republican president, and every vote to uphold it will come from a justice appointed by a Democratic one.

Liptak's prediction about the Texas case—*Fisher v. University of Texas at Austin,* discussed in Chapter One—echoes a claim made by some political scientists. Proponents of the so-called "Attitudinal Model" argue that Supreme Court Justices decide cases based on their personal policy preferences, not law. The most prominent proponent of the attitudinal model is Harold Spaeth. Together with his former student and co-author Jeffrey A. Segal, Spaeth has

written perhaps the best-known and most cited tract on judicial behavior, The Supreme Court and the Attitudinal Model (or SCAM, as the authors affectionately refer to it), and its younger sibling, The Supreme Court and the Attitudinal Model Revisited (or SCAMR).[1]

Boiled to its essence, there are three claims to the attitudinal model. According to Spaeth and Segal, these three claims apply primarily if not exclusively to the Supreme Court because the Justices' work is not reviewed by a higher court, and the Justices typically do not seek to curry favor in order to gain promotion.[2]

1. Legal reasoning does not constrain judges

Spaeth argues that the legal arguments – what he calls the "legal model" – by which judges justify their decisions do not constrain judges in the way they claim. The reason for this is that law is indeterminate. For example, when he talks about precedents, Spaeth explains that "[b]ecause precedents lie on both sides of appellate court controversies, stare decisis provides no sure ground for decision."[3] In other words, with precedents on both sides, judges following precedent still can dispose of the case either way. Similarly, the laws judges interpret cannot constrain judges because, even though they often profess to follow the "plain meaning" of those legal sources, judges have no way of resolving the ambiguity of language, or of specifying "the point at which plain meaning terminates and one of the other variants begins."[4]

2. Judges decide cases on the basis of their personal preferences

Because the judges are not constrained by law, Spaeth and Segal argue that judges' policy preferences are the real determinants of judicial decisions. "In contrast to the legal model, the attitudinal model states that the Court's decisions are based on the facts of a case in light of the ideological attitudes and values of the participating justices; in other words, on the basis of the individual justice's personal policy preferences."[5] As Spaeth and Segal say, in an oft-quoted sentence, "[s]imply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal."[6]

3. Law is a figment used to cover provide a veneer of legitimacy

According to Spaeth and Segal, "opinions containing [legal] rules merely rationalize decisions; they are not the causes of them."[7] On that account, the legal analysis in Supreme Court

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[1] *See* Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002) [hereinafter SCAMR]; Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model (1993) [hereinafter SCAM].
[2] *See* SCAMR, supra, at 92-96.
[3] SCAM, *supra,* at 302.
[4] SCAM, *supra,* at 298.
[5] SCAM, *supra,* at 296.
[6] SCAMR, *supra,* at 86.
[7] SCAM, *supra,* at 66.

opinions serves "as a cloak to conceal the real bases of the justices' decisions and to provide them with means to rationalize their votes."[8]

Although its prominence seems to be dying out, the Attitudinal Model has had an enormous influence on the study of judging. *Social science has been used to analyze many other aspects of judging and judicial decisionmaking, and in ways that shed far more light than the attitudinal model.* We want to be very clear on this last point, because in the legal world in particular, often all that is known about the social science of judging is the attitudinal model, and that is just not true. Much of the rest of the book is devoted to this social science. Still, as we will see in Chapter Three, study after study has sought to prove the attitudinalists' core claim that judges' personal beliefs—or "ideological attitudes"—are driving their decisions. Although the Spaeth and Segal's attitudinal model is limited to the Supreme Court, empirical scholars have applied its insights to the lower courts as well. Chapter Three offers a detailed, and critical, look at the available data. Then, Chapter Four will discuss how to interpret this data, and how to think about the personal characteristics of judges and judging.

Before we dig into the empirical evidence, however, we first need to examine some of the underlying premises. To say that judges *do* decide cases according to their "partisan affiliations" (as Liptak put it) is to imply that they *can* do so—that they are not constrained by law to decide cases in a particular way. Chapter Two explores the nature and bounds of legal constraint. Is it true that the Supreme Court justices are largely free to vote their preferences? If so, why? Is the same true of lower court judges?

FOR DISCUSSION

Can you think of instances in which you've heard it claimed that judges' ideology, or partisan affiliations, or other personal characteristics explain the outcome of cases? Were you satisfied with those explanations? Can you think of other factors that might be explanatory?

[8] Cite