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Between Monster And Machine: Rethinking the Judicial Function

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BETWEEN MONSTER AND MACHINE: RETHINKING THE JUDICIAL FUNCTION

LEE ANNE FENNELL*

I. INTRODUCTION	183
II. JURISPRUDENTIAL THREATS	186
A. <i>The Monster</i>	186
B. <i>The Machine</i>	193
III. BETWEEN MONSTER AND MACHINE	201
A. <i>Rules and Discretion</i>	201
B. <i>Two Models of Judging</i>	210
1. <i>Blind Balancing</i>	210
2. <i>Seamless Storytelling</i>	214
IV. TOWARDS A PRAGMATIC VISION OF JURISPRUDENCE	217
A. <i>Unpacking the Toolbox: Slide-Rules and Stories</i>	217
B. <i>Building a Better Metaphor</i>	221
V. CONCLUSION	225

I. INTRODUCTION

At the beginning of *The Nature of the Judicial Process*, Benjamin Cardozo describes the difficulty and unease with which judges confront the question: "What is it that I do when I decide a case?"¹ Nearly eight decades later, judges and legal scholars find themselves no closer to a coherent and believable characterization of the judicial process. Moreover, there is no consensus as to what judges *should* be doing. The emergence of new strains of legal theory in recent decades has added intensity and new vocabularies to jurisprudential debates, but has failed to generate an adequate aspirational model for judging. The result is something of a jurisprudential identity crisis. Should judges be umpires, henchmen, priests, creative writers, oracles, gardeners, logicians, or

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1. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10 (1921).

something else entirely?² Should they aspire to Herculean wisdom, empathetically participate in the problems of the litigants before them, or settle for ironically tailoring the emperor's new clothes?³ These questions are important ones. The way in which the judicial function is conceptualized has overarching implications for law and legal theory, with society-wide repercussions.⁴ Yet such questions cannot be meaningfully tackled without an appreciation of the jurisprudential threats that judges themselves perceive as circumscribing their work. In other words, before deciding what judges ought to become, it is worth considering what they are most afraid of becoming. Only by locating the outer boundaries of legitimate judicial action can the terrain that lies within be meaningfully surveyed.

I begin by analyzing two vivid and recurrent metaphorical images which have been used repeatedly in judicial opinions to express what judging should *not* be. The first metaphor is that of the monster, most expansively presented in Justice Scalia's concurrence in *Lamb's Chapel v. Center Moriches Union Free School District*.⁵ The second metaphor is that of the machine, perhaps nowhere more eloquently raised and rejected than in Justice Frankfurter's majority opinion in *Rochin v. California*.⁶ These two pejorative images—the monster and the machine—together represent precisely what is most disturbing

2. See, e.g., *id.* at 19 (quoting Blackstone's characterization of judges as "living oracle[s] of the law"); *id.* at 98-99 (discussing judge's role in pruning dysfunctional judicial doctrines); RONALD DWORKIN, A MATTER OF PRINCIPLE 158-59 (1985) (analogizing "[d]eciding hard cases at law" to the creation of a "chain novel," where a different author contributes each successive chapter); JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN 190-91 (1986) (comparing judges to priests); Philip Soper, *Metaphors and Models of Law: The Judge as Priest*, 75 MICH. L. REV. 1196, 1199 (1977) (discussing judges as henchmen, logicians, game players, and priests).

3. See RONALD DWORKIN, LAW'S EMPIRE 239 (1986) (introducing Hercules, "an imaginary judge of superhuman intellectual power and patience who accepts law as integrity"); LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 200 (1996) (using the metaphor of the emperor's new clothes to describe "the emptiness of constitutional [law] arguments"); ROBIN WEST, CARING FOR JUSTICE 23 (1997) (suggesting traditional notions of justice should be supplemented with empathy).

4. The power of metaphor to shape thought in law, as well as in other disciplines, has been well recognized. See, e.g., MILNER S. BALL, LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY 22 (1985) (asserting that "metaphor is instrumental in shaping reality"); HAIG BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS 7 (1992) (describing how the "importance of the metaphor in legal discourse . . . began to be recognized and explored by a few legal scholars in the 1980s"); DENNIS R. KLINCK, THE WORD OF THE LAW 335-70 (1992) (discussing "the contemporary upsurge of interest in metaphor" and its relation to law); James E. Murray, *Understanding Law as Metaphor*, 34 J. LEGAL EDUC. 714 (1984) (discussing "the analogical, metaphorical thinking which an increasing number of legal scholars are proposing as foundational to law"); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1114 (1989) (explaining "the use of metaphor in constructing a framework for . . . a more realistic concept of law"); see generally GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980); ROBERT L. SCHWARZ, METAPHORS AND ACTION SCHEMES: SOME THEMES IN INTELLECTUAL HISTORY (1997).

5. See 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring); see also *infra* Part II.A.

6. See 342 U.S. 165, 171 (1952); see also *infra* Part II.B.

and problematic about the work of judging. They correspond to the twin dangers of runaway discretion and the complete preclusion of discretion, and find echoes in contemporary debates over the degree to which individual litigants' narratives should be taken into account in judicial decisions.

Taking these jurisprudential threats as starting points, I consider the inherent tension between discretionary and rules-based models of judging. Using examples drawn from current law, including two recent Supreme Court opinions and the federal sentencing guidelines, I explore the nature of the debate over these two modes of decisionmaking.⁷ I contend that a successful model of judging requires a workable synthesis between rules and discretion.

I next examine two alternative formulations of the work of judging that have gained currency with judges and scholars and which seem to promise an effective assimilation of rules and discretion.⁸ The first of these, judging as balancing, has become the dominant approach in judicial opinions and offers the semblance of rationality, fairness, and exactitude. Yet the metaphor does not accurately describe what judges do in deciding a case, and the heuristic of the scales offers no determinacy given the fact that the weights and their weighings lie in the sole discretion of the judge. Nor does balancing provide a principled way of handling pre-existing rules—they can simply be placed on the scales like anything else and outweighed whenever the judge wishes them to be.

The second vision of judging I consider is Ronald Dworkin's image of the judge as a participant in the writing of a "chain novel."⁹ While on the surface such an approach might seem to mediate well between the demands of rules and the particularistic requirements of the case at hand, in reality it could not do so. Either the judge would be bound to maintain the internal consistency of the piece at all costs (and without regard to the real-world implications for the litigants before her), or the judge would creatively overwrite the past narrative to make room for her own idiosyncratic preferences. In neither case would the tension between rules and discretion be appropriately mediated.

I conclude by sketching out how the judicial function might be meaningfully reconceptualized.¹⁰ I suggest that any appropriate view of judging must be closely tied to notions of pragmatism and must blend discretionary and rules-based elements. The metaphoric formulation that fits best with such a pragmatic approach, I argue, is that of the judge as a builder, arriving at a partially constructed job site with a well-stocked toolbox and a rather fuzzy and incomplete set of blueprints. She cannot ignore the existing structures any more than she can ignore the ambiguous dictates of the blueprints, yet she can interpret the plans intelligently and tear down, rebuild, patch up, or chip away as necessary.

7. See *infra* Part III.A.

8. See *infra* Part III.B.1-2.

9. DWORKIN, *supra* note 2, at 158-59; see also *infra* Part III.B.2.

10. See *infra* Part IV.

II. JURISPRUDENTIAL THREATS

A. *The Monster*

In his *Lamb's Chapel* concurrence, Justice Scalia likens the selectively-applied "*Lemon* test"¹¹ of Establishment Clause jurisprudence to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."¹² Although reliably spooky, the monster is also quite obedient and pliant:

It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.¹³

Scalia's depiction of the ghoul is, of course, highly comical; he marvels at its continued survival despite the fact that "no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart."¹⁴ Yet behind the comedy lurks a serious point about the dangers of judicially created doctrines and the discretionary manner in which they are applied.

The criticism leveled at the *Lemon* test could be applied with equal force to scores of other haphazardly formed and inconsistently applied judicial creations, suggesting that Scalia's monster is but a single specimen of a rather robust species. Such judicially created monsters and their incorporeal brethren—ghosts—have repeatedly haunted jurisprudence, with a number of sightings reported by Supreme Court justices. For example, in *Hensley v. Eckerhart*, Justice Brennan lamented the fact that 42 U.S.C. § 1988¹⁵ had metamorphosed into "a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion (not

11. The Court enunciated a three-prong test in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) to determine whether an establishment of religion in violation of the First Amendment had occurred.

12. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

13. *Id.* at 399 (citations omitted).

14. *Id.* at 398.

15. 42 U.S.C. § 1988 (1994).

to mention circuit splits) in its wake.”¹⁶ Accusing the majority of creating a monster (or conjuring up a ghost) is a time-honored rhetorical device. Indeed, the use of the monster image seems to be a potent manifestation of the legitimating and power-checking function of the dissent.¹⁷

The monster and ghost metaphors correspond to a particular set of jurisprudential dangers that are worth unpacking. First, monsters and ghosts are not “real” in the sense that they govern their own destinies or have meaningful lives or goals of their own.¹⁸ They are by-products of someone else’s creative energies, parasites and predators rather than bona fide members of a hereditary line. A monster is a creature cobbled together from incongruent bits and pieces—something fundamentally illegitimate. A ghost carries the slightly different connotation of that which has lost all vitality, resonance, and relevance, but which refuses to obey the natural order of things by departing from the realm of the living. Both images contrast sharply with that of a vital, thriving legal doctrine that carries with it a pedigree or “title deed” attesting to

16. *Hensley v. Eckerhart*, 461 U.S. 424, 455 (1983) (Brennan, J., concurring in part and dissenting in part); see also *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 248 (1987) (Blackmun, J., concurring in part and dissenting in part) (“[L]ike a ghost reluctant to accept its eternal rest, the ‘colorable argument’ surfaced again.”); *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 198 (1980) (“[T]he ghost of the expansive contributory infringement era continued to haunt the courts.”); *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91-92 (1958) (“Invocation of the Due Process Clause to protect the rights asserted here would make the ghost of *Lochner v. New York* . . . walk again.”); *Williams v. North Carolina*, 325 U.S. 226, 244 (1945) (Rutledge, J., dissenting) (“Once again the ghost of ‘unitary domicile’ returns on its perpetual round, in the guise of ‘jurisdictional fact,’ to upset judgments, marriages, divorces, undermine the relations founded upon them, and make this Court the unwilling and uncertain arbiter between the concededly valid laws and decrees of sister states.”); *Fann v. McGuffey*, 534 S.W.2d 770, 786 (Ky. 1975) (Sternberg, J., dissenting) (“[T]he encroachment of implied consent into our judicial philosophy is a monster, so great that its disastrous effect is unpredictable.”); *Plumley v. Klein*, 199 N.W. 2d 169, 173 (Mich. 1972) (Black, J., dissenting) (“I cannot hold still before this latest judicial monster.”); *Commonwealth v. Watlington*, 420 A.2d 431, 435 (Pa. 1980) (Flaherty, J., dissenting) (“It is time for the Court to realize that we have inadvertently created a monster of inefficiency and judicial wastefulness in our past interpretations of the [Post Conviction Hearing Act].”); *McCormick v. Stowe Lumber Co.*, 356 S.W.2d 450, 462 (Tex. Civ. App. 1962, writ ref’d n.r.e.) (Hughes, J., dissenting) (“[The majority] creates a judicial monster from whose clutches there is no escape.”); RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 9 (1993) (stating that judicial application of “the doctrine of unconstitutional conditions . . . roams about constitutional law like Banquo’s ghost, invoked in some cases, but not in others.”); cf. *In re The Western Maid*, 257 U.S. 419, 433 (1922) (Holmes, J.) (“Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.”).

17. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 26 (1960) (“[T]he dissent and its possibility press toward reckonability of result.”).

18. In this respect, they bear some superficial resemblance to the jurisprudential metaphor of the judge as “henchman,” an image criticized by H. L. A. Hart. See Soper, *supra* note 2, at 1199 (citing H. L. A. HART, *THE CONCEPT OF LAW* 19 (1961)). Yet unlike a judicial henchman applying coercive force to carry out the will of a sovereign, these monsters and ghosts are created by, and take their orders from, the judges themselves.

its genealogy and heritage.¹⁹ Moreover, both monsters and ghosts are terrifyingly powerful beings that can threaten despite their marginal status. Scalia's monster may be "docile and useful"²⁰ for the justices' purposes, but litigants will likely find it to be neither. Worse, monsters and ghosts operate outside of the laws of nature; they are not animals that can be observed or understood. The implication is clear: It is pointless for lawyers to attempt a behavioral study of such incorporeal beings or to attribute rationality to their lurching movements.

That the monster metaphor should be used to indict judicial doctrines fashioned entirely with words is not surprising. The notion of the monster is deeply rooted in language, as David Williams explains: "Several ancient teratological legends trace the appearance of the monster in the world to the moment of the collapse of the Tower of Babel and suggest a causal relation between the two events."²¹ Thus, the monster represents the failure of words, the misshapen product of an arrogant attempt to achieve unity through language.²² Conversely, ghosts represent the haunting afterimage of that which was once meaningful, but has lost all meaning and vitality. Significantly, it is only in the context of organic life—here, the living, evolving life of the law—that monsters and ghosts emerge as aberrations, misbegotten creatures threatening the natural order.

What is compelling and apt about Scalia's image of the monster is that it portrays an utterly manipulable, yet fully dangerous creature. The fact that the beast can be killed or commanded by the Court provides little solace to litigants forced to endure its unpredictable rampages. Nor are the repeated burials really very comical when one considers the resources that are wasted as litigants try to make sense of the resulting "geometry of crooked lines and wavering shapes."²³ Such a judicial creature is nothing more than judicial discretion in a formidable shape; unseen hands determine its course. Therein lies its true monstrosity. It is one thing, Scalia seems to suggest, for judges to simply admit that they are reaching whatever result they think best in a given case.²⁴ It is quite another to pretend that the result is the work of a judge-made creature that can be beckoned or ignored at will.

19. CARDOZO, *supra* note 1, at 102-03.

20. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring).

21. DAVID WILLIAMS, *DEFORMED DISCOURSE: THE FUNCTION OF THE MONSTER IN MEDIAEVAL THOUGHT AND LITERATURE* 61 (1996).

22. *See id.* at 61-63.

23. *Lamb's Chapel*, 508 U.S. at 399 (Scalia, J., concurring). Indeed, there is something almost distasteful about the humorous portrayal of the Court's whimsical rulings, given their real consequences and incontrovertible coercive power. *See generally* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (emphasizing the violent and coercive force of law); cf. Richard Delgado & Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061, 1062 (1994) (criticizing the Supreme Court's use of "scornful humor").

24. *Lamb's Chapel*, 508 U.S. at 398-400 (Scalia, J., concurring).

It is worthwhile to consider the factors that might impel judges to conjure up such ghouls. One cannot suppose that any judge intentionally sets out to create a monster or harbor a ghost; rather, these creatures must be unfortunate by-products of more defensible judicial tendencies. The explanation lies, I believe, with the confluence of the desire to constrain the range of judicial choices and the simultaneous desire to react in a particularistic manner to individual situations as they arise. It is the combination of these two tendencies that creates monsters. If judges were to single-mindedly and openly pursue their own policy preferences in each case, they would create no monsters (though they might provoke criticism of a different sort). Conversely, the rulings of judges who view themselves as being constrained from exercising any choice at all are more likely to invite criticism for being overly mechanical rather than monstrous. The monster metaphor speaks uniquely to the situation in which a judge formulates constraints while retaining (for herself or for other judges that may follow) the discretion to ignore those constraints when they produce a result that diverges too far from the decisionmaker's own preferences.

The desire to constrain the judicial choice-set and streamline decisionmaking is, I believe, genuine. At first this might seem counterintuitive; we would expect judges, as rational actors, to desire a broader rather than narrower field in which to give free rein to personal preferences and to shrink from anything that would bind their future discretion. Yet this is not always the case. One reason is economy. Because decisionmaking is very costly (*i.e.*, time-consuming, mentally taxing, sometimes even emotionally draining), shorthand formulations and tools that make use of past investments in information-gathering and reasoning are efficient.²⁵ It makes sense that judges would develop tools for use in routine situations rather than start from scratch in each case.

There are other reasons why judges would find it in their interest to cabin their own discretion, particularly in areas of constitutional law where textual guidance is quite limited. The legitimacy of the institution demands an appearance of rationality and consistency, rather than an open resort to idiosyncratic judicial preferences. Moreover, inconsistency in judicial decisionmaking generates uncertainty that causes potential litigants to make two kinds of mistakes, both of which increase litigation. Unsure of what the law permits or forbids, people may violate the law unintentionally; likewise, unsure whether a particular practice is legal or illegal, people may erroneously bring suit against lawful practices. Perhaps nowhere is this phenomenon more evident than in the area of religion in the public schools, the very domain of Scalia's "*Lemon* test" monster.²⁶ Caught in the whipsaw of the Free Exercise

25. See George J. Stigler and Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76, 81-83 (1977) (suggesting that stability in behavior often attributed to "custom" or "tradition" can actually be explained in terms of "economizing on information").

26. See *supra* notes 12-14 and accompanying text.

Clause's demands and the Establishment Clause's prohibitions, school boards and school administrators proceed with much trepidation, correctly predicting that virtually any action (or inaction) they choose may spawn a lawsuit. Thus, clarity and predictability in judicial opinions may further institutional interests by reducing litigation. They may also enhance institutional legitimacy by quelling public criticism.

Another factor is judges' deeply internalized commitment to the concept of "the law" as an entity separate from their own preferences. There are compelling psychological reasons why judges would wish to remove their decisionmaking one step away from their own preferences, quite apart from the public appearance of legitimacy. In this manner, "the law" can be blamed for compelling an unsettling result, while the judge divests herself of personal responsibility for any resulting unfairness.²⁷ In emphasizing her compunction over following "the law," the judge may even hint that were the decision truly up to her (which it is not), things might have gone differently. This tactic is used by the magistrate in J. M. Coetzee's novel, *Waiting for the Barbarians*, when he sentences a peasant who deserted the army to visit his family after being conscripted into service for stealing chickens:

"We cannot just do as we wish," I lectured him. "We are all subject to the law, which is greater than any of us. The magistrate who sent you here, I myself, you—we are all subject to the law." He looked at me with dull eyes, waiting to hear the punishment, his two stolid escorts behind him, his hands manacled behind his back. . . . "[W]e live in a world of laws," I said to my poor prisoner, "a world of the second-best. There is nothing we can do about that. We are fallen creatures. All we can do is to uphold the laws, all of us, without allowing the memory of justice to fade."²⁸

Chief Justice Truepenny takes a similar tack in Lon Fuller's *The Case of the Speluncean Explorers*.²⁹ Truepenny asserts that he has no choice but to uphold the conviction of the men who killed and ate one of their party to avoid starvation, after being trapped for many days in a cave with no prospect of imminent rescue: "This [murder] statute permits of no exception applicable to this case, however our sympathies may incline us to make allowance for the tragic situation in which these men found themselves."³⁰

27. Robert Cover terms this impulse the "judicial can't." ROBERT M. COVER, JUSTICE ACCUSED 122-23 (1975), cited and discussed in Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1590-91 (1987).

28. J. M. COETZEE, *WAITING FOR THE BARBARIANS* 138-39 (Penguin Books 1982) (1980).

29. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

30. *Id.* at 619.

In such instances, the outcome may appear to be a foregone conclusion, and the decisionmaking process a purely mechanical one. Yet a judge's asserted inability to decide a case in any manner other than the manner in which she is in fact deciding it demands further scrutiny. The decision that one "has no choice" in a given situation is nonetheless a decision. A pattern of inconsistency in making this antecedent decision (*i.e.*, whether or not one "has a choice" to depart from the applicable rule) or in the results that are "compelled" by a given rule, would evidence a greater role for discretion than the rhetoric would suggest. Of such stuff monsters are made.

Particularly troublesome are situations, common in constitutional law, in which the applicable text provides little or no guidance. In such instances, judges must concoct rules which constrain their own future choices without removing discretion they might legitimately wish to exercise in the future. This dilemma finds analogues in the literature on precommitment and self control, where, in Ulysses-like fashion, rational actors take advance precautions to constrain the choices available to their own future selves.³¹ Through judge-made doctrines, courts tie themselves (and future judges) to the mast, but do so with knots loose enough to be easily undone in an appropriate case. Thus the courts may create doctrines that "bind" them to reach a particular result in a certain type of case, while finding themselves at liberty to ignore or break those constraints given sufficiently compelling facts.

The simultaneous wish to constrain choices while allowing oneself discretion in a sufficiently weighty future instance is not in itself monstrous. In fact, Jon Elster has argued that this approach is employed only by those at the apex of ethical life:

The lowest form of ethical life is presumably total and myopic impulsiveness. At a higher level is the life according to self-imposed rules or strategies of precommitment; and at the very highest level the deliberate breach of these rules when, all things considered, this seems justified.³²

This might suggest that the monster metaphor is unfair and misleading. Are the judges accused of creating monsters merely operating at a higher and more enlightened level? Quite possibly, this is the case some of the time. But the intuition that there is such a thing as a judicial monster remains. What, if anything, distinguishes appropriate judicial discretion, appropriately applied to

31. See, e.g., JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 36 (rev. ed. 1984). In *The Odyssey*, Ulysses orders his men (whose ears he has stopped up with wax) to tie him to the mast of the ship as they approach the domain of the Sirens. To foreclose any possibility that he will be allowed to exercise his expected future preference, he specifically instructs the men to "tighten and add to my bonds" if he should beg them to release him. HOMER, *THE ODYSSEY* Book XII (E. V. Rieu trans., Penguin Books 1946) (n.d.), quoted in ELSTER, *supra* at 36.

32. ELSTER, *supra* note 31, at 107.

self-imposed judicial rules, from more insidious forms of monster-making?

An example of the way precommitment is used by individuals may be helpful. Imagine a person is going on a long journey by automobile and, upon departure, is given a large packet of double-chocolate brownies by an indulgent relative. The traveler has a meta-preference for not consuming fattening food items such as brownies, but knows that as her journey progresses she will develop a short-term preference for consuming the brownies. A crude precommitment strategy might involve hiding the offending brownies within easy reach (say, in the glove compartment) and promising oneself that the brownies will only be "found" in the event one "really wants" to eat them. This is tying oneself to the mast with thin twine indeed. A more meaningful precommitment strategy would involve discarding the brownies altogether; this would allow no instances in which the "no brownie" rule could be broken. Between these two extremes, one might adopt intermediate strategies such as putting the brownies in the trunk (so that a full stop would be necessary to retrieve them) or having a friend hide them somewhere within the many parcels and bags in the car. Such intermediate strategies might be devised to permit one to exercise a preference for consuming the brownies only when factors are present which legitimately override the "no brownie" rule. For example, the car might break down in a remote area necessitating a long walk or a long wait, or our traveler might become fatigued and legitimately need nourishment during the course of her journey.³³

The difficulty inheres in the fact that the person who must decide whether a sufficient reason for breaking the rule exists is the same person who resorted to the precommitment strategy in the first place, precisely because she recognized her own inability to make good decisions about when to break the rule.³⁴ The secret to a good precommitment strategy, then, is to erect barriers to violating a rule which are sufficiently high that overcoming them to break the rule will only be "worth it" when a truly compelling reason exists. In other words, the person sets the "price" of breaking the rule (the lost time in searching for the brownies, for example) higher than the benefit that one would derive out of eating the brownies under ordinary circumstances. This price will, however, be incurred in extraordinary circumstances in which the benefit from eating the brownies is greater than the self-imposed costs of finding them.

33. The inspiration for this example was a passage in the novel *Good Benito*, in which the protagonist's mother orders a household employee to hide desserts and then berates the employee when the cakes and pies are hidden "too well" or "not well enough." ALAN LIGHTMAN, *GOOD BENITO* 34-35 (1994).

34. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 98 (1991) (observing that, "if the designer of a decision-making environment is guided by a concern that certain decision-makers not make certain kinds of decisions, it appears psychologically counterintuitive (although not logically inconceivable) to authorize decision-makers to determine in each case whether this is the kind of decision with respect to which they should not be trusted.").

In the judicial context, what is needed is some means of distinguishing between discretion that represents a legitimate departure from the rules for compelling reasons, and that which represents an illegitimate departure for less-than-compelling reasons. The monster metaphor suggests the ascendancy of an illegitimate exercise of discretion that is fundamentally incompatible with the purposes for which the putatively constraining doctrine was created. Moreover, the image suggests that the doctrine is itself so misshapen that it invites exercises of illegitimate discretion. When a judge-made doctrine, however well-intentioned its conception, becomes so unpredictable that it does nothing more than conceal the exercise of judicial preferences, a monster has been created. Thus, the monster represents the exercise of unrestrained preferences from behind the mask of a doctrine that places only imaginary constraints on the judicial function.

It is easy to see that such unbridled yet disguised discretion is problematic, and that avoidance of this monster is a valid concern for judges, lawyers, and litigants. But the monster of unbridled discretion is not the only nightmare image that judges must avoid. John Noonan argues that there are actually two types of monsters, one stemming from “[a]bandonment of rules” and the other from “neglect of persons.”³⁵ This second jurisprudential danger can be conceptualized by reference to a horrifically *consistent* monster—the machine.

B. *The Machine*

*Rochin v. California*³⁶ is memorable primarily for the gut-wrenching facts that triggered the unprecedented application of the Fourteenth Amendment’s Due Process Clause to a search and seizure situation.³⁷ The evidence at issue in the case was retrieved by forcing a tube into the suspect’s stomach against his will and infusing an emetic solution which induced vomiting. In a strongly worded majority opinion, Justice Frankfurter condemns the actions of the arresting officers:

This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.³⁸

35. JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* 18-19 (1976).

36. 342 U.S. 165 (1952).

37. At the time *Rochin* was decided, the Fourth Amendment had not yet been held to constrain searches and seizures by state officials. See *Wolf v. Colorado*, 338 U.S. 25 (1949), *overruled by Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961).

38. *Rochin*, 342 U.S. at 172.

Frankfurter goes on to reject a mechanical view of “due process.” While denying that the Due Process Clause permits “judicial caprice” or the indulgence of “fastidious squeamishness or private sentimentalism,”³⁹ he even more vehemently disavows a stilted and mechanical view of the clause that would allow judges to shrink from the exercise of judgment in appropriate cases:

To believe that this judicial exercise of judgment could be avoided by freezing “due process of law” at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges, for whom the independence safeguarded by Article III of the Constitution was designed and who are presumably guided by established standards of judicial behavior. Even cybernetics has not yet made that haughty claim.⁴⁰

Machines, presumably, do not have consciences that are vulnerable to shocks of any kind. Perhaps for this reason, they have historically been the object of anxiety and fear.⁴¹

By evoking the nightmarish image of constitutional adjudication by inanimate machine, Frankfurter effectively underscores the uniquely human role of the judge. The human factor is particularly important, Frankfurter suggests, when “dealing not with the machinery of government but with human rights” in an area unencumbered by “formal exactitude.”⁴² It is not merely coincidental that the “machine” image in *Rochin* was juxtaposed against images of the most visceral of bodily functions. The facts of the case remind us that human beings are flesh and blood creatures, not mere abstractions or equations, and as such demand an appropriately human judicial response.⁴³

39. *Id.*

40. *Rochin*, 342 U.S. at 171. *But see* HANS VAN DE BRAAK, *THE PROMETHEUS COMPLEX: MAN'S OBSESSION WITH SUPERIOR TECHNOLOGY* 89-92 (1995) (discussing the claim that a complete human consciousness could be “downloaded”).

41. *See* EDWARD TENNER, *WHY THINGS BITE BACK: TECHNOLOGY AND THE REVENGE OF UNINTENDED CONSEQUENCES* 10 (1996) (noting that “[f]rom the earliest days of the industrial age, the greatest artists and writers of the West have had their eyes on the recalcitrant and even malevolent machine”).

42. *Rochin*, 342 U.S. at 169.

43. Similarly, in *Green v. United States*, Justice Frankfurter again uses an organic image—“that which has been deemed part of the bone and sinew of the law”—to justify following precedent while simultaneously asserting that “[d]ecision-making is not a mechanical process.” 356 U.S. 165, 193 (1958) (Frankfurter, J., concurring), *overruled in part on other grounds by* *Bloom v. Illinois*, 391 U.S. 194 (1968). The organic and the mechanical are recurrent, and often opposing, images in law. *See* Lawrence H. Tribe, *The Idea of the Constitution: A Metaphor-morphosis*, 37 J. LEGAL EDUC. 170, 171 (1987); cf. Note, *Organic and Mechanical Metaphors in Late Eighteenth-Century American Political Thought*, 110 HARV. L.

The *Rochin* opinion recognizes “that hypothetical situations can be conjured up” that might call for a different result, but the majority finds such speculative risks overwhelmed by the compelling facts of the case.⁴⁴ Here again, the idea that judges are human beings rather than machines is relevant. When a judge rules on a given case, she does not merely replace one cog or gear with another of a more suitable gauge and then walk away. When a new case arises presenting different factors, a human being will be there, awake at the switch, ready to make the appropriate adjustments to reach the appropriate result.

The idea that judges are more than mere machines and that judicial doctrines are not purely mechanical has been repeated numerous times in judicial opinions.⁴⁵ As *Rochin* demonstrates, mechanical justice is resisted even—and perhaps especially—when the rule in question flows from a judge-made doctrine. Frankfurter’s frequently cited admonition regarding the operation of precedent asserts that “*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.”⁴⁶

These repeated protestations against the mechanization of justice respond

REV. 1832, 1839-49 (1997) (suggesting that “organic and mechanical metaphors coexisted and intertwined with each other in the founding generation’s political thought”).

44. *Rochin*, 342 U.S. at 174.

45. See, e.g., *Bowen v. City of New York*, 476 U.S. 467, 484 (1986) (“The ultimate decision . . . should not be made solely by mechanical application of [precedential] factors, but should also be guided by the [underlying] policies . . .”); *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 633 (1983) (“Our decision today announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded.”); *Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375, 390-93 (1983) (rejecting the “mechanical test set out in *Attleboro*” in favor of a “balance-of-interests” test) (referring to *Public Util. Comm’n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927)); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983) (“[T]he decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors . . .”); *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 608 (1981) (Stevens, J., dissenting) (“[T]he Court’s decision today is founded on nothing more than the mechanical application to this case of principles developed in other contexts to serve other purposes.”); *Illinois v. Somerville*, 410 U.S. 458, 462 (1973) (“This formulation, consistently adhered to by this Court in subsequent decisions, abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial . . .”); *Baker v. Carr*, 369 U.S. 186, 281 n.11 (1962) (Frankfurter, J., dissenting) (“[J]udgment concerning the ‘political’ nature of even a controversy affecting the Nation’s foreign affairs is not a simple mechanical matter . . .”); *Panhandle E. Pipe Line Co. v. Public Serv. Comm’n*, 332 U.S. 507, 512 (1947) (“Those merely mechanical considerations are no longer effective, if ever they were exclusively, to determine for regulatory purposes the interstate or intrastate character of the continuous movement and resulting sales we have here.”); *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.) (“The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike.”).

46. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

to a legitimate threat. In the West, the machine has been a central metaphor for the world, and for the creatures and institutions within it, since at least the eighteenth century.⁴⁷ Attempts to apply the machine model to the law were perhaps inevitable. Jerome Frank references "the insistent effort to achieve predictability by the attempt to mechanize law, to reduce it to formulas in which human beings are treated like identical mathematical entities."⁴⁸ Roscoe Pound speaks of "the futility of nineteenth-century attempts to make courts into judicial slot machines."⁴⁹ Nor are attempts to mechanize law a thing of the past, as the recent work of the Federal Sentencing Commission demonstrates.⁵⁰ Moreover, the influence of the metaphor of the machine lingers on in the guise of what Michael Foley terms "the American cult of balance," which "can and does provide a common frame of reference by which everything derives meaning and value from the way it is physically related to everything else."⁵¹

If a machine can do the work of a judge (or if a judge's job is merely to tend a set of machines in the manner of the drone-like workers in the movie *Metropolis*⁵²), then it matters little whether judges are intelligent or ignorant, wise or foolish, fair or capricious. Any unique capacity for moral judgment that a good judge brings to the job is worse than irrelevant. In fact, it could become an occupational hazard if the dissonance between the judge's sense of justice and the results of the "justice machine" are often radically at odds.⁵³ In any event, the role of the judge would be trivialized under any pure "machine" model of justice. If the monster image represents the fear of judicial discretion gone awry, the machine represents the complete lack of judicial discretion. The

47. See, e.g., MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 17 (1986) ("[T]he notion of a constitution as some sort of machine or engine, had its origins in Newtonian science. Enlightened philosophers, such as David Hume, liked to contemplate the world with all of its components as a great machine."); ROSCOE POUND, *LAW AND MORALS* 46 (2d ed. 1926) ("It was an eighteenth-century idea that a body of enacted law might be made so complete and so perfect that the judge would have only to select the exact precept made in advance for the case in hand, and then mechanically apply it."); ROBERT L. SCHWARTZ, *METAPHORS AND ACTION SCHEMES: SOME THEMES IN INTELLECTUAL HISTORY* 146 (1997) ("It can be said immediately that the Mechanism metaphor became the dominant one of the age, lasting until the present century.").

48. JEROME FRANK, *LAW AND THE MODERN MIND* 118 (1930).

49. POUND, *supra* note 47, at 55. Despite his aversion to "slot machine" justice, Pound did believe that certain fields of law, such as property, offered no room for discretion. See *id.* at 59 n.27, 71; FRANK, *supra* note 48, at 208-09 (arguing that Pound would endorse "judicial slot-machines" in certain types of cases, with "the facts being inserted in one end of the machine and the decision, through the use of mechanical logic, coming out at the other end.").

50. See discussion *infra* Part III.A at 207-210.

51. MICHAEL FOLEY, *LAWS, MEN AND MACHINES: MODERN AMERICAN GOVERNMENT AND THE APPEAL OF NEWTONIAN MECHANICS* 233 (1990); see also *infra* Part III.B.1 (discussing metaphor of scales).

52. *METROPOLIS* (Universum Film Aktiengesellschaft 1927).

53. Cf. LEWELLYN, *supra* note 17, at 121 (maintaining that if a judicial opinion "were typically a chance result on the order of roulette or even tossing pennies, the lawyers handling an appellate practice with success would little resemble those who do today, nor could many appellate judges of personal integrity stay out of the asylum.").

human element is suppressed entirely; the judge is reduced to the ministerial role of feeding the facts of the case into the machine and helplessly awaiting the result that is extruded from the other end.

The temptations in favor of creating something resembling a justice “machine” are obvious. Machines have the advantage of producing consistent results, and should therefore be capable of producing a highly predictable legal regime. This predictability has ramifications for society at large. If properly calibrated, a mechanistic approach should be capable of providing optimal incentives (or deterrents), thereby influencing the behavior of the countless people who may never become litigants.⁵⁴

Moreover, one might think that machines would be highly efficient at dispensing justice. This, of course, assumes that machines could be designed in a manner capable of dispensing something that could properly be viewed as “justice.” The term “efficiency” implies more than raw speed; it assumes suitability of the means to the specified ends. For example, it would be nonsensical to say that flipping rapidly through a book is an efficient way to read it; however, this might be an efficient way to achieve some other goal, such as locating dog-eared pages or marginalia. Similarly, one might simply say that machines can generate outcomes rapidly. Of course, drawing lots, flipping coins, or awarding judgments to the taller of the two litigants would also be expedient ways of generating outcomes.⁵⁵ It is perhaps significant that two of the specific machines named to metaphorically reference a mechanical style of jurisprudence are the slot machine and the “catch penny contrivance”—machines designed to operate solely upon luck and trickery.⁵⁶

Because machines operate impartially, they can theoretically avoid any unfairness stemming from consideration of impermissible factors. Samuel Butler, a nineteenth century satirical writer, pointed out precisely this advantage of machines: “No evil passions, no jealousy, no avarice, no impure desires will disturb the serene might of those glorious creatures.”⁵⁷ The

54. See CARDOZO, *supra* note 1, at 130 (noting the vast number of people whose daily actions are influenced by the law, but who never have occasion to “appeal to judges to mark the boundaries between right and wrong.”).

55. See SCHAUER, *supra* note 34, at 148 (noting that “efficiency could . . . also be served by a procedure that made decisions ‘by the toss of a coin or the cast of a die.’”) (quoting RICHARD WASSERSTROM, *THE JUDICIAL DECISION* 73).

56. Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940) (asserting that “[s]ummary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth.”), *quoted in* McCormick v. Stowe Lumber Co., 356 S.W.2d 450, 461-62 (Tex. Civ. App. 1962, writ ref’d n.r.e.) (Hughes, J., dissenting) (maintaining that “[t]he majority here creates more than a ‘catch penny contrivance.’ It creates a judicial monster from whose clutches there is no escape.”); *see also* POUND, *supra* note 47, at 55 (rejecting slot machine image of law).

57. LEWIS MUMFORD, *2 THE MYTH OF THE MACHINE: THE PENTAGON OF POWER* 194 (1970) (quoting a letter from Samuel Butler to “The Press” in Christchurch, New Zealand (1863)).

philosophical difficulties with such a mechanical solution to judicial bias should be obvious. Machines may be free of impermissible bias, but they also lack wisdom, compassion, judgment, and a sense of justice. Once a particular machine has been calibrated and fired up, it is merciless and indiscriminate in its operations. Its gears and teeth perform the prescribed motions precisely and completely, no matter what is inserted into it.

It is not difficult to design a system that will preclude consideration of impermissible factors. The difficulty is in also avoiding the unintentional exclusion of factors that are not only relevant, but vitally important. Imagine a robotic paper shredder designed to seek out and shred any paper it finds within a given space. The shredder works in an entirely nondiscriminatory manner, ferreting out and shredding paper without regard to color, texture, typeface, or size. However, it also cannot distinguish between scrap paper and such items as currency, irreplaceable family photographs, or the only existing copy of a work of great literature. Using such a machine to tidy up the clutter in one's home or office would be unthinkable.

The problem is not a purely technical one. Installing ultra-sensitive sensors into the shredder that could detect and refuse a specified list of items might be some improvement, but it would not save a child's cherished drawing lying forgotten in the bottom of a drawer, or the urgent, unexpected letter that was just slipped through the mail slot. As H.L.A. Hart explains, the inability to anticipate every factual contingency is a serious problem:

If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for a further choice. Everything could be known, and for everything, since it could be known, something could be done and specified in advance by rule. This would be a world fit for "mechanical" jurisprudence.

Plainly this world is not our world . . .⁵⁸

Hart seems to leave open the question of whether such "mechanical jurisprudence" would be desirable, were it possible. This question has become an increasingly relevant one. The number of legal rules—statutes, regulations, and precisely worded judicial doctrines—has been expanding rapidly in recent decades,⁵⁹ edging us ever closer to a world in which every factual possibility is anticipated in advance by some legal rule. Corresponding advances in

58. HART, *supra* note 18, at 125.

59. See, e.g., Robert C. Clark, *Judicial Decisionmaking and the Growth of the Law*, 17 HARV. J. L. & PUB. POL'Y 1 (1994) (commenting on the increased volume of judicial decisionmaking).

technology have made it feasible to catalogue and recall vast quantities of legal rules; the same technology could presumably be used to match factual patterns to existing rules and generate a result. Indeed, artificial intelligence systems have already been developed to predict judicial outcomes for a given fact pattern based on weighted factual similarities to previously decided cases.⁶⁰

Cardozo suggests an answer to the normative question when he criticizes judges who rely on the mechanical application of precedent: "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."⁶¹ Such an approach drains all vitality and life from the work of judging. Cardozo's indictment of this conception of judging evokes the organic and the biological: "[N]o system of living law can be evolved by such a process."⁶² A machine achieves consistency precisely because it does not change or grow.

There is plainly more to judging than this. Joel Levin suggests as much when he argues that no single computer program could replicate the judicial process.⁶³ Yet he adds a curious qualification: "[I]n stating that a computer could not duplicate a judicial system, one should not imply that it necessarily would always operate more poorly or achieve less satisfactory results."⁶⁴ It is unclear whether Levin is making the mundane observation that even a stopped clock is right twice a day, or whether he is suggesting that a computer could be a serious contender in dispensing justice. This is not an idle question. The powerful computerized databases available today may already be helping to shape judicial opinions, and it is not difficult to imagine a computer algorithm capable of replicating Justice Cardozo's color-matching exercise.

Computerized legal databases are unbounded by the traditional doctrinal categories around which hornbooks and other manual research tools are organized, presenting the interesting and counterintuitive possibility that a computerized judiciary might be more "activist" or "open-minded" than a traditional bench. But as those familiar with computerized legal databases well know, the ability to instantly access cases with factual or theoretical similarities

60. Two such "case-based expert systems" are Alan Tyree's FINDER and James Popple's SHYSTER. Sue Fawcett, *Case-Based Legal Reasoning* (last modified Nov. 30, 1997) <<http://www.gslis.utexas.edu/~suefaw/Casebased.html>>; see also JAMES POPPLE, A PRAGMATIC LEGAL EXPERT SYSTEM 40-41 (1996) (briefly describing the FINDER and SHYSTER systems). The FINDER system contains an interesting safety mechanism that warns users to obtain advice from a "human lawyer" when its two different predictive mechanisms generate different results. Alan L. Tyree, *FINDER: An Expert System* (last modified Dec. 20, 1997) <<http://www.law.usyd.edu.au/~alant/aulsa85.html>>.

61. CARDOZO, *supra* note 1, at 20-21.

62. *Id.* at 20; see also *id.* at 20-21 ("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.").

63. JOEL LEVIN, *HOW JUDGES REASON: THE LOGIC OF ADJUDICATION* 157 & n.51 (1992).

64. *Id.* at 157 n.51.

to one's own presents both the promise of fresh analogies across subject areas and the risk of unhelpful, faulty, or even laughable analogies. No matter how uninhibited a judicial machine might be in shattering the traditional compartmentalization of law, its lack of the uniquely human capacity for creativity and judgment would make its brand of activism utterly untenable.

While one could indeed design "a random generator which linked all possible signs in all possible ways" in an effort to replicate human creativity, the sheer volume of unhelpful results would make such an invention useless.⁶⁵ One might think of Borges's lonely librarian in *The Library of Babel*, trapped in a vast library containing volumes with every possible combination of letters.⁶⁶ While the collection necessarily includes every work of great literature, history, theory, and science, the occupants of this library can search for a lifetime without ever encountering a single coherent sentence.⁶⁷ Making successful conceptual leaps across contexts requires a selective and cultivated sensitivity to latent similarities between otherwise unconnected factual scenarios, an ability to detect submerged judicial concerns in one case that echo those found in another. Martha Nussbaum terms this capacity "to see one thing in another, to see one thing as another" as "the metaphorical imagination."⁶⁸ It has more in common with a literary sensibility than a mechanistic one.

Moreover, a computer would always generate suboptimal results if only for the rather tautological reason that those results would be computer generated. The damage done by automated justice transcends any substantive optimality in outcomes; it inheres in the depersonalized treatment of individuals that is implied by such a system. As a theoretical matter, it makes no difference whether these depersonalized results are generated by a manual tool, such as a chart or slide rule, rather than through the use of modern technology or artificial intelligence—although the latter possibilities may seem to present a more insidious threat. Of course, one might counter that if the substantive

65. S. Ryan Johansson, *The Brain's Software: The Natural Languages and Poetic Information Processing*, in *THE MACHINE AS METAPHOR AND TOOL* 9, 40 n.49 (Hermann Haken et al. eds., 1993); see also MUMFORD, *supra* note 57, at 191 ("Within its strict limits, a computer can perform logical operations intelligently, and even, given a program that includes random factors, can simulate 'creation,' but under no circumstances can it dream of a different mode of organization than its own.")

66. JORGE LUIS BORGES, *The Library of Babel*, in *COLLECTED FICTIONS: JORGE LUIS BORGES* 112 (Andrew Hurley trans., Viking 1998).

67. *Id.*

68. MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 36 (1995) (discussing Dickens's novel *Hard Times*, in which the character Louisa "sees shapes in the fire, endows perceived patterns with a significance that is not present in the bare sense perception itself."). The ability to see past narrow doctrinal boundaries has long been a valued skill in law. See Oliver Wendell Holmes, *The Path of Law* (1897), in *PRAGMATISM: A READER* 145, 164-65 (Louis Menand ed., 1997) (relating the story of a justice of the peace who summarily disposed of a suit for breaking a churn on the ground that he could find nothing in the statute books about churns); see also Jay M. Feinman, *The Jurisprudence of Classification*, 41 *STAN. L. REV.* 661, 662-63 (1989) (examining the "classification of legal doctrine" and exploring the negative aspects of "thinking in categories").

outcomes from a “justice machine” were really demonstrably better than those generated by human judges, any accompanying depersonalization would become irrelevant. One could argue that it is better to have depersonalized justice than personalized injustice. Alternatively, one might argue that if the only objection to a “justice machine” is the fact that its results are computer-generated, the problem could be solved by simply concealing the truth about the judicial process. For example, distinguished-looking actors could be hired to sit on the bench, nod thoughtfully, take notes, and sporadically issue curmudgeonly admonitions as data presented by the litigants is captured by a hidden computer that will actually determine the case’s outcome. The judicial process would become nothing but a form of ritualized theater.⁶⁹

The problem with mechanized justice runs deeper than this, however. Under a mechanical worldview all problems are seen as solvable, all rules as perfectible, and all situations as classifiable. The judicial process, by design, stands in fundamental opposition to such a worldview. Its very function is to deal with the slippage, the messiness of life, the individual situations that defy categorization, the rules that do not cut cleanly—with all the flesh-and-blood problems that come before the court, one at a time, in all their humanity.⁷⁰ As Cardozo explains, “the serious business of the judge” takes place here, “when the colors do not match, when the references in the index fail, when there is no decisive precedent.”⁷¹

III. BETWEEN MONSTER AND MACHINE

A. Rules and Discretion

Neither the monster nor the machine provides a particularly attractive view of jurisprudence, yet each provides clues as to the appropriate way in which the judicial function might be conceived. Judges desire to constrain their choices—but not so much that they are prohibited from later changing their minds in an appropriate case. They seek to separate their own preferences from what “the law” requires, but do not view their own moral sensibilities as completely irrelevant to deciding cases. They wish to operate pursuant to rules,

69. Some argue that the judicial process already resembles theater in some respects. See, e.g., Milner S. Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81, 82 (1975) (exploring the “notion that judicial proceedings are themselves a type of theater”).

70. See, e.g., Daniel J. Solove, *Postures of Judging: An Exploration of Judicial Decisionmaking*, 9 CARDOZO STUD. L. & LITERATURE 173, 207 (1997) (describing law as “a layered collage, pasted together in an often disorganized and *ad hoc* manner, unfolding before us in ways we do not entirely understand and cannot completely foresee”); Roger J. Traynor, *The Limits of Judicial Creativity*, 29 HASTINGS L.J. 1025, 1026 (1978) (observing that in deciding cases, judges are confronted not with “a well-programmed, orderly parade,” but with “fragments from a circus on the loose, collared by anxious barkers for a motley procession across the line of vision”).

71. CARDOZO, *supra* note 1, at 21.

but with room for judicial discretion.

The interplay between rules and discretion lies at the heart of the twin dangers identified by the monster and machine metaphors. Yet it is difficult to discern the contours of the space that lies between these two negative models of jurisprudence. One might question whether there is any space between them at all. Inserting a measure of discretion into an otherwise mechanical model can turn it into a kind of monster. Removing judicial discretion over whether and when to apply a certain doctrine means that the doctrine will be applied "mechanically." The tension is a familiar one. As H. L. A. Hart explains, all legal systems have to navigate

between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case.⁷²

Frederick Schauer has similarly distinguished between particularistic and rule-based decisionmaking, with the former requiring open resort to the unique contextual mix involved in a given situation and the latter consciously precluding the consideration of such situation-specific factors.⁷³ Echoes of the conflict between these two approaches can be heard in the contemporary debate between adherents of an "economic" approach to law, wherein general rules are formulated based on stock assumptions about human rationality, and those urging a more empathetic style of judging that accounts for individually contextualized "narratives."⁷⁴

72. HART, *supra* note 18, at 127.

73. SCHAUER, *supra* note 34, at 77-78; *see also* Edward E. Sampson, *Social Change and the Contexts of Justice Motivation*, in *THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR: ADAPTING TO TIMES OF SCARCITY AND CHANGE* 97, 113 (Melvin J. Lerner & Sally C. Lerner eds., 1981) (contrasting particularism, which "emphasizes the embedded and contextual qualities of human life," with universalism, which attempts "to establish transsituational principles that are blind to special contextual features"); Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B. U.L. REV. 941, 942 (1995) (distinguishing between accounts of judging that focus on "systemic constraints" and those that emphasize the individual judge's preferences); Solove, *supra* note 70, at 185 (discussing the tension between abstraction and individuation in judging).

74. *See, e.g.*, Paul J. Heald, *Economics as One of the Humanities: An Ecumenical Response to Weisberg, West, and White*, 4 S. CAL. INTERDISC. L. J. 293, 295-97 (1995) (discussing some criticisms of the economic legal theory in law and literature scholarship); Robin West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L. REV. 867, 867 (1988) (contrasting the "economic man" from economic legal theory with the "literary person" from literary legal analysis); *cf.* Thomas C. Grey, *What Good is Legal Pragmatism?*, in *PRAGMATISM IN LAW AND SOCIETY* 9, 16-17 (Michael Brint & William Weaver eds., 1991) (describing the schism between contextualism and instrumentalism in contemporary legal

Rules are attractive in the legal context because they promise consistency and predictability.⁷⁵ This proposition fits with the notion of “rule of law,” which assumes a set of knowable and enforceable legal standards, which will be consistently applied.⁷⁶ As Schauer explains, “Rules are necessarily *sticky*, resisting current efforts to mould them to the needs of the instant.”⁷⁷ In this manner, they buffer society from rapid change and make life more liveable by freeing individuals and societies from the burden of life experienced “as a series of constant and unbounded choices.”⁷⁸

Rules are, of course, relatively unhelpful when new or unanticipated situations arise. Because they reflect the limited perspectives and imperfect predictive capabilities of their makers, efforts to devise a comprehensive system of rules to cover every conceivable situation have proved futile.⁷⁹ Thus, discretion of some sort seems unavoidable. Yet each exception or modification chipped into a rule erodes its ability to perform its society-wide function of influencing behavior. Because the primary impact of rules is invisible, whereas the impact of applying or ignoring a rule in a given case is immediate and evident, judges might be expected to systematically underestimate the risks associated with eroding a rule. This result is but one manifestation of the common psychological phenomenon whereby one’s concern with the impact on known and identifiable persons outstrips any concern about impacts on persons that cannot be readily identified (even when the second group is far larger).⁸⁰ Ever more stringent rules might be devised to counteract this tendency, yet a completely unbendable rule could be disastrous if a situation occurred in which discretion was truly warranted.

Judges must also apply a set of meta-rules that specify a hierarchy of rules and indicate when certain rules are to be set aside.⁸¹ For example, one such meta-rule might read: “A legislative rule must be followed except when it comes into conflict with a constitutional rule.” Another might be: “Follow judge-made doctrines in constitutional matters unless doing so leaves unredressed a situation which shocks one’s conscience.” Some of these meta-rules are tremendously open-textured and malleable. For example, in the area of precedent, the meta-rule seems to be, approximately: “Follow precedent

thought).

75. GIDON GOTTLIEB, *THE LOGIC OF CHOICE: AN INVESTIGATION OF THE CONCEPTS OF RULE AND RATIONALITY* 172 (1968).

76. See THOMAS C. GREY, *THE WALLACE STEVENS CASE 89-90* (1991) (maintaining that “any theory that denies the essential place of rules, of order, and of reason in law neither can nor should have any hope of significant success”).

77. SCHAUER, *supra* note 34, at 82.

78. *Id.* at 231.

79. FRANK, *supra* note 48, at 186-87 (discussing the efforts of Frederick the Great and Napoleon to devise comprehensive legal codes).

80. See GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES AND THE LAW* 6 (1985).

81. Cf. JAMES M. BUCHANAN, *THE ECONOMICS AND THE ETHICS OF CONSTITUTIONAL ORDER* 4-5 (1991) (describing “constitutional economics,” which involves choosing the constraints within which other choices will be made).

unless you really want to depart from it."⁸²

As the machine metaphor suggests, a jurisprudential model based solely on strictly applied rules would be narrow and uninspiring. Including a meta-rule that permits the interjection of discretion based on contextual factors seems promising. But it is not self-evident exactly what such contextualization would mean. One possibility would be the more empathetic style of judging urged by scholars such as Lynne Henderson and Robin West.⁸³ Richard Posner has criticized such calls for empathetic judging, citing, *inter alia*, "the inherent unpredictability of a jurisprudence of empathy" and the possibility of "negative as well as positive empathy—the revulsion of contemplating a style of living alien to the judges' own experiences."⁸⁴ Schauer similarly suggests that the preference of some feminist legal scholars for particularistic and contextualized (rather than rule-based) decisionmaking could backfire.⁸⁵

There is indeed something initially puzzling about a plea for greater judicial empathy from groups that have historically borne the brunt of societal bias. Should not these groups applaud the removal of discretion (which, after all, has mainly worked to their disadvantage) and seek refuge in the blind, impartial application of rules? Despite the surface plausibility of such a position, I believe the question must be answered in the negative. Rules are merely devices for shifting choice either temporally or institutionally (or both) from one group of fallible human beings to another.⁸⁶ Choice and the concomitant opportunity for bias are not eliminated in a world in which rules are strictly followed; instead, they are merely retroactively transferred to the rulemaker.

While rules may appear to offer impartiality, they may contain embedded assumptions that work to the disadvantage of individual litigants. Rules can also be devised to perform an end-run around situations that would otherwise demand the exercise of compassion. Guido Calabresi recounts Justice Black's proposed solution to the problem of prior restraints on freedom of the press, given that such restraints might prevent loss of American lives:

Justice Black drew a rather grisly conclusion. He believed there ought to be an absolute rule forbidding any and all prior

82. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 455-56 (1990) (noting that "Judges follow the previous decisions of their court when they agree with them or when they deem legal stability more important in the circumstances than getting the law right.").

83. See, e.g., Henderson, *supra* note 27; WEST, *supra* note 3. But see Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 365 (1996) (concluding that emotions such as empathy are not "always helpful or appropriate in the legal arena"); Cynthia V. Ward, *A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature*, 61 U. CHI. L. REV. 929, 931 (1994) (criticizing empathy as an untenable theoretical approach).

84. POSNER, *supra* note 82, at 412.

85. SCHAUER, *supra* note 34, at 162 n.25.

86. *Id.* at 158-62.

restraints on publications, and that such a rule should be promulgated in a case where *no* lives were at stake. If that were done and a situation involving lives ever came up, the lives would be lost before the case got to court. The court would never be in the situation of either openly and coldly decreeing that a hundred people must die or limiting what Black deemed the greater value—freedom of the press.⁸⁷

Where rules systematically disadvantage a particular group or dodge responsibility for making choices about individual human lives, rule-following may provide nothing more than an efficient means of enforcing a particular moral error.

The rules applied by a court might be formulated by a legislature, an administrative body, a higher court, a prior court, or even by a temporally antecedent version of the same judge or panel of judges. In any event, there is always some distance between the rulemaker and the judge deciding whether to apply, bend, break, or ignore the rule. Theorists calling for greater empathy in judging are apparently predicting that the interests of the historically underrepresented will be better served by choices made by present-day judges than by those made by any of the other possible rulemakers.

This may be a rational bet, on the whole. The judicial branch is particularly well-suited to the hearing of individual stories, unlike a legislature, which must deal in broad generalities.⁸⁸ Moreover, one might hope that currently sitting judges would be more enlightened and empathetic to a variety of special concerns than judges of the past, if for no other reason than the fact that the composition of the judiciary is slowly beginning to move a bit closer to that of the population at large. A related argument is that judges have always employed certain forms of empathy and antipathy in deciding cases, reacting favorably to those features in a case with which they can easily identify and which resonate with their own experiences, reacting unfavorably to those that are alien.

Two recent fourth amendment cases, *Minnesota v. Carter*⁸⁹ and *Knowles v. Iowa*,⁹⁰ illustrate this point. These cases were decided by the Supreme Court just one week apart, and Chief Justice Rehnquist authored both majority opinions. *Carter* involved a fourth amendment claim asserted by two individuals who were briefly present as guests in a third party's home for the

87. GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 16 (1985).

88. In practice, such a distinction may be illusory. Legislatures are often moved to act by anecdotal evidence, and public choice theorists have suggested that legislative enactments may be excessively responsive to the special interests of cohesive and motivated groups. See DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 12-37 (1991).

89. 119 S. Ct. 469 (1998).

90. 119 S. Ct. 484 (1998).

sole purpose of bagging cocaine for resale.⁹¹ Refusing to extend the Fourth Amendment protection previously accorded overnight guests in the homes of others, the Court, in a 6 to 3 decision, held that the individuals bagging the cocaine “had no legitimate expectation of privacy in the apartment” since they were only there very briefly, were present for purely commercial reasons, and had no other ties with the homeowner or the premises.⁹²

The second of the cases, *Knowles*, asked whether the police, after properly stopping a motorist for speeding and issuing him a citation may, on that basis alone, conduct a full search of his car.⁹³ The Court unanimously held that such a “search incident to citation” is forbidden by the Fourth Amendment, relying on such unsupported and empirically questionable assertions as “[t]he threat to officer safety from issuing a traffic citation . . . is a good deal less than in the case of a custodial arrest,” and “the possibility that an officer would stumble onto evidence wholly unrelated to the speeding offense seems remote.”⁹⁴

How is one to reconcile these two cases, issued by the Court in almost the same breath? One explanation is simply that the two cases are unrelated doctrinally—that one involves the interpretation of the “search incident to arrest” exception to the warrant requirement, while the other involves an assessment about the legitimate expectations of privacy. In a narrow, technical sense, this is certainly true. Yet it seems quite possible that these disparate results were not, in fact, pieced together through a painstaking process of applying detailed analysis within these narrow doctrinal categories, but rather were intuited whole from the life experiences of the Justices themselves.

Supreme Court Justices, automobile drivers themselves, can readily identify with the privacy interests of automobile drivers generally. Neither they, nor anyone they know, wishes to be searched based upon a simple traffic infraction. Hence, such a search cannot be reasonable. In contrast, Supreme Court Justices do not engage in any sort of business that involves entering and spending time in other people’s homes. It is likely that nobody in their social circle engages in such a business.⁹⁵ Many tradesmen and service people—plumbers, contractors, carpenters, consultants, real estate agents, cleaning persons, and the like—regularly conduct business in other people’s homes, but the impact on these groups of people was not seriously considered.

91. *Carter*, 119 S. Ct. at 471.

92. *Id.* at 474. In contrast, “five members of the Court would place under the Fourth Amendment’s shield, at least, ‘almost all social guests.’” *Id.* at 483 n.2 (Ginsburg, J., dissenting) (quoting the concurring opinion of Justice Kennedy).

93. *Knowles*, 119 S. Ct. at 486.

94. *Id.* at 487-88.

95. The facts of the case were, of course, unsympathetic (the business in which the defendant was engaging was that of packaging cocaine), but the Court’s reasoning was broad enough to cover any person present in another person’s home solely for business purposes during daylight hours. The fact that the activity was illegal was irrelevant to the analysis. See *Carter*, 119 S. Ct. at 483 (Ginsburg, J., dissenting) (citing the Solicitor General’s position at oral argument).

One can only guess whether the result would have been different if doctors and lawyers routinely made house calls.

My point is not to attack the specific results reached in these cases, but only to suggest that neither of these cases was decided in an empathetic vacuum. The ability or inability of a judge to identify with a litigant's situation may well be outcome-determinative. Calling attention to the already entrenched role of judicial empathy might cause judges to strive for a more inclusive style of empathy that encompasses lives unlike their own. In other words, because empathy is already here to stay, one has nothing to lose by trying to broaden its embrace.

Yet empathy has some serious limitations. With whom is one supposed to empathize, for example, in a grisly murder case? The victim? The victim's family? The murderer (who perhaps had an atrocious childhood)? The murderer's family? Many corporate disputes lack any obvious human protagonists with whose "story" one might engage, leaving one to empathize, if at all, with anthropomorphized versions of the entities themselves. Matters are complicated by the fact that a judge receives carefully edited and imaginatively packaged versions of litigants' stories, which have been consciously constructed to trigger certain empathetic reactions. It is easy to imagine judicial empathy becoming monstrous under these conditions, especially as institutionalized empathy meets with ever-slicker presentations and higher and higher production values. At the limit, one might imagine lawyers submitting feature-length films chronicling their clients' "stories" that the judges would view while hooked up to an "empathometer" measuring the direction and intensity of their feelings.⁹⁶ This image is repugnant, at least in part because the judicial office is supposed to elevate judges above emotional manipulation. The rule of law requires judges to focus on the alignment, or misalignment, between rules and behavior and not to base judgments on the strength of their emotions. Nevertheless, the intuition that a wise and compassionate judge is better than a bloodless rule technician suggests that some role for discretion should remain and that context can and should matter.

The Federal Sentencing Guidelines offer an interesting case study. They originated from a fear of judicial monsters: "Congress, in viewing the end product of the former sentencing process, apparently concluded that a hydra-headed monster had evolved—bred from judicial discretion, or indiscretion, and parole convolutions."⁹⁷ Yet in fending off judicial monsters, Congress turned judges into machines, as some commentators argue: "[I]n the typical case [under the Sentencing Guidelines], the judge is supposed to perform an

96. Films based on sensational cases, sometimes released while the cases are still pending, may already be eroding the line between fact and fiction in the courtroom. See BARRY R. SCHALLER, *A VISION OF AMERICAN LAW: JUDGING LAW, LITERATURE, AND THE STORIES WE TELL* 148 (1997).

97. *United States v. Franco*, 691 F. Supp. 1036, 1042 (E.D. Ky. 1988) (citing S. REP. NO. 98-225, at 46-49 (1983), *reprinted in* 1984 U.S.C.A.N. 3182, 3229-32).

automaton's function by mechanically applying stark formulae set by a distant administrator."⁹⁸

Sentencing under the Guidelines is drained of any individualized moral force, and primarily involves the calculation of offense level and criminal history scores using a set of detailed and technical instructions. The box corresponding to the intersection of those two scores on a 258-box grid holds the offender's fate.⁹⁹ In fact, a software package developed by the Sentencing Commission can calculate the appropriate sentencing range based upon specified input factors.¹⁰⁰ Upward and downward departures are permitted in certain limited circumstances, but many factors, such as a defendant's personal history and socio-economic background, must usually be excluded from the calculus.¹⁰¹ Thus, the Federal Sentencing Guidelines offer perhaps the closest approximation to date of a "justice machine." Although some tinkering with the machinery still occurs, judges are largely foreclosed from exercising discretion in response to individual situations.

These constraints become comprehensible if one views the Sentencing Guidelines as "devices for the allocation of power" that are consciously designed to achieve a certain level of "decision-maker disability."¹⁰² The volume and pitch of the judicial backlash against these Guidelines suggests that this disabling of the judicial function was both recognized and unwelcome.¹⁰³

98. KATE STITH AND JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 169 (1998); *see also* United States v. Dibiase, 687 F. Supp. 38, 41 (D. Conn. 1988) (Cabrane, J.) (stating that "forty-three district judges in the Second Circuit issued a public statement (supported by the circuit judges of the Circuit) noting, *inter alia*, that the use of mathematical values had reduced the discretion of the sentencing judge 'almost to the point where the sentencing process could be performed by a computer or an accountant.'").

99. *See* STITH & CABRANES, *supra* note 98, at 81-82 (discussing the moral and symbolic importance of the human encounter between the sentencing judge and the defendant, which is eliminated by the guidelines); *id.* at 3 (describing the sentencing grid).

100. The software system, known as ASSYST (Applied Sentencing System), is "a rule-based expert system." Alan J. Rothman, *Desktop Lawyering: Judicial Computing's Winning Appeal*, 207 N.Y. L.J. No. 91, 4, (May 12, 1992). According to the United States Sentencing Commission's website, the Commission has ceased updating and maintaining the software because of informal surveys suggesting that the program is not frequently used. ASSYST (visited Oct. 19, 1999) <<http://www.ussc.gov/assyst.htm>>.

101. STITH & CABRANES, *supra* note 97, at 4 (asserting that "the judge's authority to depart from the Guidelines is notable not because it offers opportunities to individualize a criminal sentence, but because those opportunities are so limited").

102. SCHAUER, *supra* note 34, at 98.

103. *See, e.g.*, United States v. Harrington, 947 F.2d 956, 964 (D.C. Cir. 1991) (Edwards, J., concurring) (observing that "like the emperor's new clothes, the Sentencing Guidelines are a bit of a farce" and that "the Guidelines are rigid in formulation and, thus, often produce harsh results that are patently unfair"); United States v. Dibiase, 687 F. Supp. 38, 41 (D. Conn. 1988) (citing a public statement issued by forty-three district judges criticizing the Guidelines); Harriet Chiang, *New Drug Law is Backfiring, Judges Say*, S.F. CHRON., Sept. 25, 1989, at A1 (describing how one judge wept in open court when faced with the necessity of imposing a guidelines-mandated sentence).

Nor can human choice, finally, be avoided. The disabling of one decisionmaker implies the enabling of another. Discretion, displaced from the realm of judging, is forced backwards onto those responsible for putting cases into the system in the first place and for specifying the parameters under which they are to be assessed.¹⁰⁴ And judges, of course, are not the only persons capable of creating monsters.¹⁰⁵

The Federal Sentencing Guidelines offer one way—and perhaps a not particularly satisfactory way—of coming to grips with the inherent tension between rules and discretion or the universal and the particular. The particular is essentially discarded in favor of the universal; discretion is displaced and dampened by rules requiring mechanical application. Federal judges are turned into sentencing machines, while prosecutors are granted a degree of discretion that is arguably quite monstrous. Although the Sentencing Guidelines are apparently here to stay, they usefully illuminate some of the key issues involved in mediating between rules and discretion in judging.

As the monster and machine metaphors suggest, discretionary and rules-based approaches to judging can each be dangerous in isolation. Yet both approaches are indispensable to judging, and are not mutually exclusive. Instead of quibbling over the relative merits of the worldviews and philosophical positions that each approach suggests, legal theorists should focus their efforts on arriving at a workable synthesis.¹⁰⁶ In this spirit, Catharine Wells has sought to unite “structured” and “contextual” models of

104. See *United States v. Bethancurt*, 692 F. Supp. 1427, 1435 (D.C. Cir. 1988) (stating that “[w]hile the judge would still pronounce the sentence, he would merely parrot a decision already made by the prosecutor”); *United States v. Brodie*, 686 F. Supp. 941, 946 (D.C. Cir. 1988) (noting that “whether or not one agrees with the choices made by the Commission, the fact is that the Commission did make choices, literally hundreds, nay, thousands of policy choices in sentencing”); STITH & CABRANES, *supra* note 98, at 125 (arguing that, “the factors that Congress and the Sentencing Commission have insisted be significant determinants of sentences are themselves the product of *choices*—exercises of discretion, if you will—that may be as arbitrary as any choice made by a judge unconstrained by statutory or regulatory sentencing rules”).

105. Administrative action has the potential to become monstrous as well. See *New York v. United States*, 342 U.S. 882, 884 (1951) (per curiam) (Douglas, J., dissenting) (asserting that “unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion”), quoted in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962).

106. See GREY, *supra* note 76, at 89 (criticizing the “stereotyped oppositions” of “Equity versus Strict Law: colored particularity versus colorless abstraction . . . life versus mechanism . . . and, perhaps the two master oppositions, warm versus cold and heart versus head”). While Grey concedes that these oppositions offer legal humanists opportunities for “some satisfying name-calling,” he argues that their acceptance of such “stock dualisms” is misguided. *Id.* “Strategically, to accept the separation of heart and head and align with the heart in the ensuing party struggle is to relegate oneself to marginal, weekend, after-hours status—and to losing.” *Id.*

jurisprudence,¹⁰⁷ and Anthony Kronman has urged a “bifocal” approach in which the detachment associated with legal rules and the individualized sympathy associated with discretion simultaneously provide close and distant foci.¹⁰⁸ A workable integration of discretionary and rules-based approaches to judging is critical to avoiding the twin dangers of monster and machine.

B. Two Models of Judging

Before I consider how a workable integration of rules and discretion might be achieved and conceptualized, two models of judging that have gained currency in recent decades merit discussion. While these two models do not begin to represent all of the ways in which judging has been conceived, I focus on them because each appears to promise a successful mediation between the need for rules and the need for discretion. The first model is that of judging as balancing, which, as Anthony Kronman notes, has become the dominant mode of deciding cases.¹⁰⁹ The second is Ronald Dworkin’s image of the judge as an author in an ongoing “chain novel.”¹¹⁰ As I will show, neither of these images of judging actually succeeds in synthesizing rules-based and discretionary decisionmaking.

1. Blind Balancing

No image of justice has been more longstanding and influential in our society than that of the blindfolded goddess Themis, holding a set of scales.¹¹¹ It is an old-fashioned set of scales, with two pans, each presumably representing a side of the dispute. The idealized judicial exercise implicit in this

107. Catharine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1728, 1745 (1990).

108. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 72-73 (1993). Efforts to mediate between rules and discretion date back to Aristotle. See Solove, *supra* note 70, at 185 and sources cited therein, including MARTHA C. NUSSBAUM, *LOVE’S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* 66-75, 99 (1990); see also NUSSBAUM, *POETIC JUSTICE*, *supra* note 68, at 47 (maintaining that “it is not as if we have to make a choice between the utilitarian vision and a collapse into mere sentimentality”); ROBIN WEST, *NARRATIVE, AUTHORITY AND LAW* 426 (1993) (noting that both “rights talk” and stories are essential to moral decisionmaking); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?* 87 MICH. L. REV. 2099, 2126 (1989) (asserting that “unguided emotion” is as much to be feared as “[f]oolish formalism”).

109. See KRONMAN, *supra* note 107, at 348.

110. See DWORKIN, *supra* note 2, at 228.

111. See BOSMAJIAN, *supra* note 4, at 170; WEST, *supra* note 3, at 29. The image has not gone uncriticized. See, e.g., Judith Resnik, *Feminism and the Language of Judging*, 22 ARIZ. ST. L.J. 31, 37 (1990) (arguing that this “image captures a fair amount of the power but not too much of the anguish” of judging and contrasting it with the Nigerian “Lord of Jurisprudence,” who is depicted with multiple knives embedded in his chest); *infra* note 116 (discussing criticism of blindfold). In some images, Themis also holds a sword at her side, but the scales tend to upstage this token of power.

image goes something like this: As the judge hears the case, she places little lead weights in the respective pans. All the while, she keeps her eyes covered to avoid seeing the identity of the litigants or even the direction in which the balance is tilted at any given moment. Only when the case has been fully presented does she observe which pan holds the weightier load and declare that the interests corresponding to that pan have outweighed those on the other side.

In explaining her decision in the opinion she must write, the judge must describe this balancing process and its outcome by pointing to the factors that were considered. In other words, she must tell the world which specific aspects of the case caused her to place weights into one pan or the other. Only rarely will she hint at the specific amount of weight associated with the various factors or discuss how the balance might have been struck differently under different facts. This sort of opinion—"the long and excessively footnoted decision that moves, in a stiffly mechanical way, through a recitation of the different factors bearing on the case at hand to the generally uninformative conclusion that a balancing of them yields a certain result"—has become standard today.¹¹² Yet do such opinions describe what judges actually do, or even what they ought to do, when they decide a case?

At first blush, such a balancing approach appears to be a purely mechanical model for judging.¹¹³ The scales are a type of mechanical device designed to convert physical inputs into an objectively observable outcome that the judge is constrained to adopt as the holding of the case. Posner has questioned the balancing metaphor on just such grounds:

It is unclear what exactly it means to "weigh" arguments and, therefore, whether the process of decision in the face of conflicting arguments can be conceived in mechanically computational terms. Even if it can be, it is the wrong approach for a judge to follow. A person should not surrender deeply held beliefs on the basis of a weak argument just because he cannot at the moment find a stronger one in defense of those beliefs.¹¹⁴

Upon closer inspection, however, it becomes clear that the process is far from mechanical. The judge must decide whether, and to what extent, various factors should be "given weight."¹¹⁵ This means that she not only has to decide when a particular factual circumstance or argument justifies adding a weight, but she

112. KRONMAN, *supra* note 108, at 347.

113. See KLINCK, *supra* note 4, at 354-55 (noting that balancing imagery falsely implies "that adjudication is a process of measuring, and that, like measurement, it can be reasonably 'precise'").

114. POSNER, *supra* note 82, at 124.

115. See VINING, *supra* note 2, at 161 (discussing the legal metaphor of "taking factors into account and giving them weights").

also must decide how heavy a weight to select and in which pan to place it. Yet even this choice-enhanced calculus fails to describe how judges really decide cases; nobody really believes that any judge remains blindfolded while loading the pans and only removes the blindfold at the end of the exercise to observe the result.¹¹⁶

The use of balancing rhetoric typically aligns more closely with the following exercise: A judge looks at the litigants, the situation, and the legal arguments, sans blindfold. After making a point of ignoring certain factors that she does not feel should enter into the decisionmaking process, she impressionistically reaches a provisional result. She writes down all of the reasons that support that decision, and then writes down all of the reasons that would support the opposite result. She then considers—based on a variety of factors, including personal life experiences and precedent—whether the reasons supporting the provisional result seem, in general and taken as a whole, sufficient to outweigh those on the other side of the dispute. If the answer is negative, she either rethinks the provisional result, or makes an effort to discover additional factors that would add weight to the provisional result.

This account of the judicial decisionmaking process is similar to the theory of judging as *ad hoc* justification that was propounded by legal realists such as Jerome Frank and Karl Llewellyn.¹¹⁷ As Frank explains, it is unrealistic to expect a judge—or any other human being—to reason forward from premises to conclusions: “[I]t is fair to assume that the judge, merely by putting on the judicial ermine, will not acquire so artificial a method of reasoning. Judicial judgments, like other judgments, doubtless, in most cases, are worked out backward from conclusions tentatively formulated.”¹¹⁸ For Llewellyn, the psychology of decisionmaking casts doubt upon the judicial opinion as an accurate record of the decision process: “[T]he opinion, however well reasoned, must either express the doubt, the choice, and the creation, or else fail to show the actual process of deciding.”¹¹⁹

Because everything is made commensurable under a balancing approach and because virtually anything—social policy preferences, efficiency concerns, personal observations about how the world works—can weigh in the balance, almost any result is defensible, at least in the close cases that are of greatest interest. Moreover, because the balancing takes place in a black box, there is no way to disprove the result reached. Anthony Kronman has suggested that the ability to hide behind a set of scales is attractive to the young judicial clerks

116. Perhaps this would not even be desirable. Stith and Cabranes, in their critique of the Sentencing Guidelines, suggest that the blindfold should at least be raised at the sentencing stage. STITH & CABRANES, *supra* note 98, at 79. Robin West has gone further, suggesting that an alternative image of caring—that of a wide-eyed and watchful protector—should replace that of blindfolded justice. WEST, *supra* note 3, at 31-32.

117. See SCHAUER, *supra* note 34, at 191-92.

118. FRANK, *supra* note 48, at 101 (citing John Dewey, *Logical Method and the Law*, 10 CORNELL L. Q. 17, 20 (1924)).

119. LLEWELLYN, *supra* note 17, at 12.

charged with penning opinions:

As a rhetorical device, therefore, the image of the balance—a dominant image in the opinions of the Supreme Court and, increasingly, of other appellate courts as well—is likely to be particularly attractive to those who by virtue of their inexperience feel unable to articulate the bases of their judgments, or who simply lack confidence in them and are therefore afraid to expose their own deliberations too nakedly.

Like the use of complex multipart tests and similar analytic schemes, to which it is in fact a perfect complement, the rhetoric of balancing is thus a strategy of insecurity.¹²⁰

If the choice to add weights to one side or another ultimately depends on an impressionistic view of the case, then the question of whether a particular factual scenario invites identification or revulsion can be outcome-determinative. The pans of the scale are broad enough to accommodate personally held beliefs about psychology or social policy and are susceptible even to the crude expedient of a judicial thumb.¹²¹

Rules, whether in the form of precedent or legislation, occupy an ambiguous and precarious position within the balance model. At times a judge might rely on a particular rule in deciding whether, and how heavily, to weigh various factors. At other times, the judge might decide that the rule itself should be thrown into the balance. Because the balance model contains no meta-rules for determining when and how legal rules will be used, it is fatally indeterminate. Unlike an experiment that any scientist could replicate employing standard laboratory techniques, a judicial outcome generated by “balancing” uses no standardized weights or measures, follows no set procedure, and offers no opportunity for verifying that the considerations on the prevailing party’s side were indeed weightier.

Moreover, the balancing model does not contemplate the existence of external benchmarks against which to assess outcomes, nor does it attempt to take seriously the individual stories of the litigants before the court. Only the relative positions of the two sides of the scale have significance, and these relative positions lie wholly within the control of the judge operating the scales. Far from providing a principled way of bringing rules and discretion together, the balance model seems to capture the worst of both worlds. Behind the facade of scientific rationality and carefully calibrated judgment lies a brand of discretion which is not only unchecked but uncheckable. One might even call

120. KRONMAN, *supra* note 108, at 349.

121. *See* United States v. Sharpe, 470 U.S. 675, 720 (1985) (Brennan, J., dissenting) (asserting that the Court’s Fourth Amendment balancing has been performed with “the judicial thumb . . . planted firmly on the law enforcement side of the scales”).

it monstrous.

2. *Seamless Storytelling*

Ronald Dworkin has suggested that judges deciding difficult cases can be likened to participants engaged in an exercise of progressive narration in which each person musters her interpretational and authorial skills to add a chapter to an ongoing novel, subject to the criterion of narrative coherence.¹²² In support of this argument, Dworkin points out that in deciding a case, a judge must look back over similar past cases and “determine, according to his own judgment, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is.”¹²³

The analogy has some surface appeal. Judicial opinions, like legends passed down by oral tradition, are marked by a great deal of repetition. Each case recites fragments and formulations from past cases, as if in a refrain or incantation, and then works rhetorically from what is known and solid to what is yet unknown. The enterprise involves a special kind of reading and a special kind of writing. It is undisputed that interpretive and rhetorical techniques are indispensable in doing the job well. But can a judge really be conceptualized as a serial contributor to a novel? Can the corpus of decided case law be likened to literary work with a coherent plot line and rational character development?

Upon closer examination, it is apparent that Dworkin’s “chain novelist” formulation offers a dangerous metaphor for the work of judging. Underneath such literary pretensions, his vision of judging really is nothing more than the application (and possibly the extrapolation) of precedent, which the judge-authors assume to be mechanically binding whenever and wherever it applies. The key insight of the metaphor is that judges are not free to change the story *in medias res*, though perhaps they must find creative ways to make the story continue in an aesthetically appealing manner. Dworkin emphasizes that the judge “*must* interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own.”¹²⁴ Ruling out “new directions” means that as the body of decided case law grows larger and interstices are filled, the creative discretion of the judge shrinks accordingly. Eventually, her role begins to resemble that of Cardozo’s judge, with a large card file of color swatches against which to match the case at bar.¹²⁵

122. DWORKIN, *supra* note 2, at 158-59; RONALD DWORKIN, *LAW’S EMPIRE* 228-38 (1986). Criticisms of this model include Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982); Solove, *supra* note 70, at 178-83, 207.

123. DWORKIN, *supra* note 2, at 159.

124. *Id.*

125. CARDOZO, *supra* note 1, at 20.

Significantly, Dworkin's chain author judge has no duty—indeed no license—to check the ongoing story against the realities of the outside world or demand that the doctrines actually work out properly in consequentialist terms. As in fiction, only the internal consistency of the piece itself matters. There is no chance for moral outrage at a story gone awry, and no way to abandon a story that no longer rings true. Errors are not only tolerated, they are expanded, replicated, and applied in new and different settings. Dworkin does suggest that the judge-novelist's mode of interpretation must include “a doctrine of mistake” that can be used to overturn precedents or work around incongruities in the law.¹²⁶ But this doctrine is subject only to the rule that each interpretation must “fit” with prior law, which is itself defined by reference to the canon.¹²⁷ Dworkin's conception of chain-novel judging does nothing to avoid the results of judicial errors that are deep, pervasive, and clearly articulated in prior law. The implications are not trivial ones. Consider the life work of a Dworkian “chain novelist” judge committed to faithfully interpreting and carrying forward the “point or theme” of *Dred Scott*¹²⁸ or *Plessy*.¹²⁹

Judges certainly do add their writings to those of other judges, but the results, thankfully, do not approach the coherent novel Dworkin envisioned. In fact, the chain novel could only be considered a viable description of jurisprudence for someone who has never personally experienced the results of such collaborative efforts. When I taught fiction writing classes (to undergraduates and, separately, to middle-schoolers), I always included a progressive narrative in the lesson plans. The students would have great fun with the exercise, but the results were predictably incoherent. Indeed, one of the purposes of such an exercise was to show the necessity of making global decisions about a story—decisions as to point of view, main characters, tone, style, major themes, plot line, and so on. When the various authors shared the work by writing serially, the later authors often ignored or failed to recognize the decisions earlier authors made regarding such matters. For example, one talented young writer always wrote about penguins, regardless of the apparent subject matter of the fragment she was given. This may have been the result of selective perception rather than intentional usurpation of prior authorial decisions. Within the interstices of plot and character left by the previous writer, this author consistently saw opportunities for penguins.

Dworkin perhaps envisions that the judge-authors will, in practice, work in a manner not materially distinguishable from my penguin-lover's technique. He certainly suggests as much:

126. DWORKIN, *supra* note 2, at 161.

127. *Id.*

128. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *cf.* Solove, *supra* note 70, at 178-83 (arguing that a judge's interpretation of facts, as well as law, influence his decisionmaking).

129. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

If a judge believes that the dominant purpose of a legal system, the main goal it ought to serve, is economic, then he will see in past accident decisions some strategy for reducing the economic costs of accidents overall. Other judges, who find any such picture of the law's function distasteful, will discover no such strategy in history but only, perhaps, an attempt to reinforce conventional morality of fault and responsibility.¹³⁰

It is hard to see how such an open-ended view of interpretation—seeing only what one wishes to see and then acting as if it were there—provides any rein on judicial choice at all.¹³¹ Dworkin responds to this criticism by suggesting that a judge's sense of "integrity" or "coherence" will restrain choice.¹³² But integrity is in the eye of the beholder, and each worldview will appear to its adherents to impose its own irrefutable coherence on the world.¹³³

The chain novel model for judging offers no workable method for mediating between rules and discretion, context and principles, precedent and empathy. If a judge takes the metaphor seriously, her decisions often will be foregone conclusions. She cannot simply go back and change what has been written, but must forge ahead for the sake of the story. On the other hand, if she adopts a thoroughly creative approach to reconstructing past cases, she relegates them to the status of horoscopes or fortune cookies, projecting into them her own deeply held beliefs and aspirations. The chain novel would then become a slippery document indeed, a paper chameleon taking on the colors of the current judge-author.¹³⁴ In either case, the judge would be required to keep her nose in the book at all times, whether as obedient scribe or renegade revisionist. Absorbed in reading and writing, she would never lift her head to observe how the system of law to which she is contributing actually works in

130. DWORKIN, *supra* note 2, at 162.

131. Cf. Fish, *supra* note 122 (explaining that "[a]lthough the parameters of novel practice mark the limits of what anyone who is thinking within them can think to do, within those limits they do not direct anyone to do this rather than that.").

132. *Id.* at 161.

133. Cf. STEVEN PINKER, *HOW THE MIND WORKS* 525 (1997) (stating that "[a]ccording to a saying, if you give a boy a hammer, the whole world becomes a nail. If you give a species an elementary grasp of mechanics, biology, and psychology, the whole world becomes a machine, a jungle, and a society.").

134. Such a judicial canon might come to resemble the "chaotic manuscripts" described in Borges's short story, *The Garden of Forking Paths*—"a contradictory jumble of irresolute drafts." JORGE LUIS BORGES, *The Garden of Forking Paths*, in *COLLECTED FICTIONS*: JORGE LUIS BORGES 119, 124 (Andrew Hurley trans., Viking 1998). Some postmodern novels make literary use of similar types of chaos. See, e.g., ITALO CALVINO, *IF ON A WINTER'S NIGHT A TRAVELER* (William Weaver trans., Harcourt Brace Jovanovich 2d ed. 1981) (1979) (beginning each chapter with a new narrative, as the protagonist is repeatedly thwarted in his efforts to read a full manuscript); STEPHEN DIXON, *INTERSTATE* (1995) (presenting multiple, incompatible versions of a random highway shooting, including one in which the shooting never took place). However, the implications of such an approach in the legal context would be unsettling indeed.

the real world.

IV. TOWARDS A PRAGMATIC VISION OF JURISPRUDENCE

If, as Robert Cover asserts, "legal interpretation is a form of practical wisdom," then the judge's role is a fundamentally pragmatic one.¹³⁵ While pragmatism has long been important to legal thought, it has recently been the subject of renewed interest among legal theorists.¹³⁶ Pragmatism affirmatively eschews overarching theories of all stripes, as Thomas Grey explains: "To the request for an evaluative theory that can stand independently of practice and rule over it, pragmatism answers with one of its core propositions: such theories are not to be had."¹³⁷ Precisely for this reason, however, pragmatism can mediate between competing legal theories—and the worldviews that they represent—without taking sides.¹³⁸ Thus, pragmatism is the ideal vehicle for synthesizing discretionary and rules-based models of jurisprudence. In this final section of the essay, I begin to explore what a pragmatic approach to the judicial function might look like, using the metaphors of the toolbox and builder.

A. Unpacking the Toolbox: Slide-Rules and Stories

At least part of what pragmatism means in the judicial context is an expansion of the range of tools on hand for decisionmaking. Karl Llewellyn emphasizes the importance to American jurisprudence of a well-stocked toolbox: "[T]he court needs to have as tools at hand not a single one or even three, but well-nigh the whole Croesus-wealth of our American authority techniques to choose from. Neat cabinetmaking is both easier, more likely and more reckonable when the workbench is well stocked."¹³⁹ As this toolbox metaphor suggests, a judge need not, and should not, choose between a rules-based approach to judging and a contextualized narrative approach. Nor should she confine herself to using any particular theoretic template, such as law and economics, law and literature, or critical legal studies. Instead, she should fill her toolbox with all manner of conceptual tools and employ them in whatever

135. Cover, *supra* note 23, at 1610.

136. Pragmatism as formulated by thinkers such as John Dewey, William James, and Charles Sanders Peirce clearly influenced legal realism, showing up in the work of Oliver Wendell Holmes, Benjamin Cardozo, Jerome Frank, and Karl Llewellyn, among others. See Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1654 (1990). For a sampling of contemporary views on pragmatism in the law, see generally PRAGMATISM IN LAW AND SOCIETY (Michael Brint & William Weaver eds., 1991); Symposium, *The Revival of Pragmatism*, 18 CARDOZO L. REV. 1 (1996).

137. GREY, *supra* note 76, at 106.

138. Grey, *supra* note 74, at 17 (observing that "today the legal pragmatist proposes to the contending instrumentalist and contextualist schools: 'Good health to both your houses.'").

139. LLEWELLYN, *supra* note 17, at 216-17.

combinations are necessary to achieve a workable result given the contingent circumstances at hand.

Perhaps the most important item in the toolbox is analogy, a meta-tool of tremendous value in legal analysis and judging.¹⁴⁰ Like a power drill that can be fitted with any number of bits and other attachments, analogy is the driving force that activates innumerable other tools. Through analogical reasoning, courts can not only creatively transplant ideas across doctrinal boundaries, but they can also make use of the panoply of heuristics used in other disciplines, such as economics, literature, psychology, sociology, and philosophy. Not every attempt to transfer the methods and approaches of one discipline to another will be successful, however. Moreover, the impulse to explain an entire discipline by simply superimposing the template of another upon it is a powerful but ultimately self-defeating one.¹⁴¹ The best antidote is familiarity with a broader range of disciplines, which will allow the most promising crossovers to crowd out the more strained and unhelpful ones.

Here, I consider two tools that make use of this analogic facility by borrowing insights from other disciplines, and examine how they might be used together to achieve pragmatic results. The first of these tools is what I will term the slide-rule. Despite the limitations inherent in rules, they can be structured in a manner that renders them responsive to differences in situations, resulting in something like a "slide-rule" or "sliding scale." Much important work in law and economics has involved the development of finely calibrated rules formulated as equations. These equations are designed to minimize the overall social cost by solving for a certain value based upon other inputted values. Such slide-rules can powerfully capture intuitions and may avoid at least some of the poor "fit" often associated with rules generally.

Yet like all rules, slide-rules may contain assumptions that are simply wrong, and they pose the danger of providing a chillingly efficient way of replicating the error. They may also fail to take into account certain important—possibly less tangible—variables, and may not recognize applicable constitutional and moral constraints.¹⁴² Another difficulty is the tendency of such rules to rely on a rather flat, two-dimensional view of rationality that does not take seriously the complex motivations of individuals.¹⁴³ And, because the

140. See generally Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993) (examining uses and limitations of analogy in legal reasoning).

141. Cf. NORTHROP FRYE, *ANATOMY OF CRITICISM: FOUR ESSAYS* 354 (1957) (explaining that "[w]henver we construct a system of thought to unite earth with heaven, the story of the Tower of Babel recurs: we discover that after all we can't quite make it, and that what we have in the meantime is a plurality of languages.").

142. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 28-33 (1974) (discussing the importance of moral "side constraints").

143. See, e.g., Amartya Sen, *Rational Fools: A Critique of the Behavioural Foundations of Economic Theory*, Herbert Spencer Lecture delivered at Oxford University (October 1976), in *Philosophy and Public Affairs* 6, Summer 1977, at 317-44, *reprinted and revised in*, CHOICE, WELFARE AND MEASUREMENT 84 (Harvard Univ. Press 1997).

method itself makes all values commensurable, it may seem to neglect personhood.¹⁴⁴ Slide-rules, in short, embody both the promise and the risk of the machine.

The second tool is that of the story or narrative, enthusiastically embraced by law and literature scholars for its purported community-building and empathy-enhancing powers.¹⁴⁵ Stories do indeed have tremendous potential to add a dimension of richness to judicial reasoning. They can challenge, refine, test, and discredit rules. Yet the very thing that makes stories so compelling can also make them dangerous. For one thing, they may not be true. In the novel *Caleb Williams* the protagonist, a fugitive who has been falsely accused, receives the following piece of advice: "Make the best story you can for yourself; true, if truth, as I hope, will serve your purpose; but, if not, the most plausible and ingenious you can invent."¹⁴⁶ The story may not be an accurate factual account, or it may be untrue in a larger and more generalized sense. The concerns that the story raises may not be genuine ones for these litigants or for any other real litigants.

Another risk is simply that particular stories may be neither good nor edifying. While law and literature scholars use great works of world literature as models for the plight of the downtrodden, the lives of most litigants are considerably more prosaic. Their stories may bear a closer relationship to a pulp novel or a television miniseries than to the works of Kafka, Melville, or Shakespeare, and a deeply empathetic look at their lives may yield only boredom or disgust. A more insidious risk is that stories will foster or deepen preconceived ways of thinking, or will intentionally play off biases or prejudices.¹⁴⁷ Thus, while stories offer relief from an overly-formalistic application of rules, they may pose dangers of their own.

Of course, both stories and rules are unavoidable parts of jurisprudence. The case method is, by its very nature, bound up in individualized stories. Moreover, both the operation of precedent and the general impact of judicial decisions on the behavior of citizens mean that in the course of answering the call of a particular story, a rule is also being made that will continue to have vitality in the future. To test the contours of possible rules, the judge is asked

144. See MARGARET JANE RADIN, *CONTESTED COMMODITIES* 201-02 (1996) (discussing the risks associated with a tort rule that "would make the harm of various injuries into a linear, algorithmic scale").

145. See WEST, *supra* note 107, at 424-25 and sources cited therein.

146. WILLIAM GODWIN, *CALEB WILLIAMS* 162-63 (David McKracken ed., Oxford Univ. Press 1970) (1794).

147. See L.H. LaRue, *Stories Versus Theories at the Cardozo Evidence Conference: It's Just Another Metaphor to Me*, 14 CARDOZO L. REV. 121, 136 (1992) (noting that many stories are told "to inculcate prejudice"). For example, the story concocted by Susan Smith to cover up her murder of her two sons—that she had been carjacked by an African-American man—was particularly offensive because it was designed to capitalize on community prejudices. See Richard Grant, *Mother of All Crimes*, THE INDEPENDENT (London), Feb. 25, 1995, at 16; see also LaRue, *supra*, at 135 (responding to glowing accounts of the merits of stories by noting the preponderance of various forms of meritless pulp fiction).

to engage in an exercise of imaginary participation in the world as it might exist after a particular decision is rendered.¹⁴⁸ If the imagined world is not the kind of place that the judge (or anyone else, for that matter) would want to live, then the proposed decision must be rethought. It is in this imaginative exercise that rules and stories work together synergistically.

Llewellyn explains that sometimes “hard cases make bad law” because of a failure of imaginative projection: “[T]here has been application of a rule without visualization of what that application will look like when made general, when phrased as a subrule.”¹⁴⁹ A rule may not “work” if the application of the rule would lead to consequences that would clash with the rule’s purposes or “with the purposes of other rules which belong to the system of rules which it is the job of a court to apply.”¹⁵⁰ These conflicting consequences are rarely present in full force in the case at bar; rather, something in the situation of the litigant before the court hints at the scope of the conflict that might erupt were the rule to be applied in the manner that is being suggested. This exercise is not one of empathy or sympathy for the individual litigant, but rather an ability to see in the litigant’s situation a factor of broad significance. Not incidentally, the reading and interpretation of literature involve this same ability to find universal significance in a specific depiction.¹⁵¹

Llewellyn argues that the psychological process of decisionmaking in difficult situations is “one either of sudden intuition—a leap to some result that eased the tension; or else it was one of successive mental experiments as imagination developed and passed in review various possibilities until one or more turned up which had appeal.”¹⁵² These “mental experiments” are used to test the acceptability and the bounds of particular decisions. Robert Cover describes the centrality of narrative-based counterfactuals to law:

Law may be viewed as a system of tension or a bridge linking a concept of reality to an imagined alternative—that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative. Thus, one constitutive element of a *nomos* is the phenomenon George Steiner has labeled “alterity”: “the ‘other than the case’, the

148. The pragmatic method requires one “to trace out in the imagination the conceivable practical consequences” of a particular concept. Charles Sanders Peirce, *A Definition of Pragmatism*, in PRAGMATISM: A READER 56, 56 (Louis Menand ed., 1997); see William James, *What Pragmatism Means*, in PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 45 (1907) (explaining that a pragmatic method for settling metaphysical disputes “is to try to interpret each notion by tracing its respective practical consequences”).

149. LLEWELLYN, *supra* note 17, at 274.

150. GOTTLIEB, *supra* note 75, at 112.

151. Cf. NELSON GOODMAN, *WAYS OF WORLDMAKING* 103 (1978) (noting that “‘Don Quixote’, taken literally, applies to no one, but taken figuratively, applies to many of us”).

152. LLEWELLYN, *supra* note 17, at 11.

counterfactual propositions, images, shapes of will and evasion with which we charge our mental being and by means of which we build the changing, largely fictive milieu for our somatic and our social existence."¹⁵³

Literature offers a similar opportunity for the vicarious testing of various scenarios.¹⁵⁴ In a different fashion, economics attempts the same thing.

The use of counterfactuals and hypotheticals in law illustrates the synergistic power of stories and rules. The development of rules requires the making of assumptions about human choice and rationality, which in turn requires the spinning of stories. Thus, a potential rule is tested by the stories it generates. As new cases arise, rules must be rethought, not only in light of the case that triggered the rethinking, but also in terms of their implications for the stories of all the other people that would be impacted by the change.

To make use of slide-rules and stories in tandem requires a judge equipped with creativity, discretion, and judgment. It is worth considering in some detail how her work might be metaphorically conceived.

B. Building a Better Metaphor

Posner predicts that the changes in law brought about by pragmatism will be "related not only to politics and economics and not only to the correction of error, but also to new slogans, metaphors, imagery, and other means of bringing about changes in perspective."¹⁵⁵ Not only do "[n]ew realities require new metaphors," but old metaphors can become so entrenched as to resist reexamination.¹⁵⁶ The impasse between rules-based and discretionary approaches to jurisprudence, coupled with the inadequacy of present models of judging, calls for precisely such a rethinking of the judicial function.

A metaphor emphasizes certain aspects of a phenomenon, bringing those aspects into bold relief.¹⁵⁷ The selection of an appropriate metaphor for the

153. Robert M. Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983) (footnote omitted) (quoting GEORGE STEINER, *AFTER BABEL* 222 (1975)).

154. PINKER, *supra* note 133, at 541 (discussing the work of Jerry Hobbs).

155. Posner, *supra* note 136, at 1669.

156. BOSMAJIAN, *supra* note 4, at 72; see 2 FRIEDRICH NIETZSCHE, *On Truth and Falsity in Their Ultramoral Sense*, in *THE COMPLETE WORKS OF FRIEDRICH NIETZSCHE: EARLY GREEK PHILOSOPHY* 173, 180 (Oscar Levy ed., Maximilian A. Mügge trans., 1911), *quoted in* Mark Johnson, *Introduction: Metaphor in the Philosophical Tradition*, in *PHILOSOPHICAL PERSPECTIVES ON METAPHOR* 3, 16 (Mark Johnson ed., 1981) (stating that "metaphors . . . after long usage seem to a nation fixed, canonic and binding").

157. See, e.g., ANNE SHEPPARD, *AESTHETICS: AN INTRODUCTION TO THE PHILOSOPHY OF ART* 122 (1987) (observing that "in thinking of life as a walking shadow, we concentrate on certain aspects of life, walkers, and shadows to the exclusion of others"); Max Black, *Metaphor*, in *PHILOSOPHICAL PERSPECTIVES ON METAPHOR* 63, 75 (Mark Johnson ed., 1981) (describing metaphor as viewing "the night sky through a piece of heavily smoked glass on which certain lines have been left clear").

work done by judges in deciding cases is no trivial matter, because the aspects that are emphasized by the metaphor will tend, in turn, to become emphasized in life. Thus, attention must be paid to an issue that is often sidestepped in analyzing metaphors—"the relative powers of different metaphors to work good or ill in the world."¹⁵⁸ Viewed in this light, choosing the right metaphor for the judicial function is not merely an academic or aesthetic exercise—rather it is a moral imperative.

What is needed is a metaphor for judging that will capture the day-to-day work of a judge struggling to mediate between the call of stories and the strictures of rules, the particular and the universal. An appropriate image of judging should also facilitate

the building of a faith that the work can be done as it should be done, that almost any right craftsman can indeed come close to adequacy . . . [and] that the ideal-picture is in fact approached most of the time by many or most of his brethren, even if not by himself.¹⁵⁹

The metaphor that I believe comes closest to embodying this pragmatic, craft-oriented approach is that of a builder. Unlike the balancing or chain novel metaphors, which lack an external benchmark against which one can assess the impacts of decisions, a building metaphor references a real-world framework of interfacing structural elements. More importantly, it emphasizes the need for the structure to function, to stand, to endure. It acknowledges the role of precedent as a pre-existing structure upon which one might build,¹⁶⁰ but also contemplates the potential need to remodel, expand, modify, and occasionally even demolish sections of that structure. For a pragmatic judge, no foundational structure, no single brick or wall is exempt from reexamination and possible modification, but these structural elements cannot all be demolished simultaneously.¹⁶¹ As with a physical building, work must be done in a manner that does not cause the whole structure to collapse. The reason is a practical one: the law cannot simply shut down for repairs. Even as judges are in the act of removing imperfections from the law, people are still looking to it for

158. WAYNE C. BOOTH, *THE COMPANY WE KEEP: AN ETHICS OF FICTION* 300 (1988).

159. LLEWELLYN, *supra* note 17, at 192.

160. See CARDOZO, *supra* note 1, at 149 (asserting that "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him").

161. See Richard J. Bernstein, *Pragmatism, Pluralism, and the Healing of Wounds*, in *PRAGMATISM: A READER* 382, 387 (Louis Menand ed., 1997) (stating although pragmatists "can never call everything into question at once, nevertheless, there is no belief or thesis—no matter how fundamental—that is not open to further interpretation and criticism"); cf. James, *supra* note 148, at 101 (maintaining that "[t]he most violent revolutions in an individual's beliefs leave most of his old order standing").

guidance and protection.

The metaphor of judge as builder fits with the conception of law as a practical craft, rather than as an art form guided solely by aesthetic standards.¹⁶² This does not mean that aesthetics are utterly unimportant, only that they are overshadowed by matters of function. Elegance in a legal doctrine (marked by such characteristics as simplicity, clarity, and symmetry) is valuable; such a doctrine is likely to have more staying power than a doctrine that is a hideous cobbled-together hodgepodge, all other things being equal. But if the hodgepodge, for all its ugliness, nevertheless has a valid claim to “fit,” there may be an appropriate degree of resistance to leveling it in favor of a more elegant but less well-fitted model.¹⁶³

Builders, like judges, must work from a rather curious set of texts. Nelson Goodman has commented on the special role filled by architectural plans, which are designed by reference to their real-world potentiality: “The end-product of architecture, unlike that of music, is not ephemeral; and the notational language was developed in response rather to the need for participation of many hands in construction.”¹⁶⁴ Likewise, legal texts are designed to function coercively in the real world. They are not designed merely to convey information or to edify their audience; they are designed to make things happen. Like blueprints, however, legal texts can embody varying degrees of clarity. And, like a builder faced with an ambiguous or unclear blueprint, a judge must interpret the text in a manner that will prove workable in the real world. If a staircase is drawn backwards or a gap is left between floor and wall, the builder would be irresponsible to blithely build the thing as drawn.

The building metaphor also encompasses the idea of imaginative projection—the use of hypotheticals and counterfactuals. The judge as builder may sketch possibilities to see how each would look, or tack on a board and then trim it down. She works her way around an issue until she has crafted something that, more or less, fits the shape of the problem before her. Constrained by caseloads and the uneven talents of the lawyers before her, she may find it necessary in a later case to go back and reshape a corner, trim an edge, or sand out an imperfection. This, too, is part of her job. Acknowledging the need for such provisional measures is no disgrace. As Llewellyn explains:

[M]ere knowledge that gears do slip, that theories do need constant help from the skilled hands, that baling wire and

162. POSNER, *supra* note 82, at 117 & n.23.

163. William James acknowledged the inelegance of the pragmatic method generally, describing his “pluralistic empiricism” as “a turbid, muddled, gothic sort of an affair, without a sweeping outline and with little pictorial nobility.” WILLIAM JAMES, *A PLURALISTIC UNIVERSE* 26 (1977), *quoted in* Bernstein, *supra* note 161, at 389.

164. NELSON GOODMAN, *LANGUAGES OF ART: AN APPROACH TO A THEORY OF SYMBOLS* 220 (1968); *see id.* at 218-20.

chewing gum are often the only means to save “the book” or to save the game itself—this has never meant death, it has instead meant life for any institution whose craftsmen still had sap and feeling for their office.¹⁶⁵

In fact, “a case law court which has lost contact with its tradition of ceaseless minor retooling of the stock of rules” is in danger of creating bad law from hard cases.¹⁶⁶

The toolbox metaphor suggests the plurality of approaches that may be useful and emphasizes the utility of adding to the stock rather than selecting a single tool such as a sledgehammer and using it in any and all situations. Relatedly, a judge would need to develop meta-rules to govern the circumstances and order in which various tools would be employed. When different results can be reached through the use of different tools, the tool that achieves the more workable result should be employed. I am using the term “workable” here as a stand-in for the notion of efficient achievement of ends within applicable constitutional and statutory constraints. The concept is akin to utilitarianism, in that it involves an effort to reduce total social cost, but it also incorporates a sensitivity to such factors as the practical effects of departing from precedent and the societal impact of particular judicial formulations and approaches. When choosing between two equally workable approaches, the judge should select the one leading to more elegant results. Simplicity, clarity, and clean lines are important in the law, though these values should not be achieved at the expense of functionality.

Like a building, the law is a repository of history, a keeper of public memory. In places you can see the old workmanship, which is sometimes lovely and sometimes shameful. But the law is not a museum, and it is not a church. It is a living structure in relentless, active use, constantly in need of repair, and constantly under construction. Every day the boundaries are tested; the walls get scuffed, and windows are sometimes broken. Every so often a bit of flooring sags, or a section of roofing begins to leak, or daylight shows through a gap where a corner does not quite meet. The structure is patched, or plastered, or knocked out and redone, and later patched again if need be. Surfaces are sanded or papered over, gaps are filled with caulk, uneven foundations are shimmed. The place smells of paint and sawdust; the job is never finished.

The judge makes the best job of it she can. Walking away is not an option, and neither is starting over again from scratch. It would be a discouraging sort of lifework, were it not for one thing: By and large, the structure works. People live and work within it, depend upon its protection, and walk with relative confidence upon its (mostly) solid floorboards. When difficulties arise, the

165. LLEWELLYN, *supra* note 17, at 192.

166. *Id.* at 274.

judge is there with a good set of tools and plenty of common sense. She does not propel a homemade monster toward the trouble spot, nor does she pluck the answer whole from a machine. Instead, she gets to the heart of the matter herself, guided by what already exists, as well as by imaginative projections of what might be.¹⁶⁷

V. CONCLUSION

The two nightmare images for judging—the monster and the machine—provide rough caricatures of what is to be feared most in jurisprudence. These images correspond to the problems presented by too much or too little discretion, and mirror the conflicts among legal theorists as to whether decisionmaking should rest on universal principles or contextualized narratives. What is needed is a conception of judging that can blend rules-based and particularistic approaches, using the tension between them synergistically. Yet neither of the two images of judging that appear to offer the most promise for mediating between rules and discretion provides a meaningful synthesis. Pragmatism offers an attractive alternative paradigm that can be represented metaphorically by the judge as a builder, making use of any and all available tools to achieve a workable result. Perhaps the time has come for Themis to trade in her rusting scales and threadbare blindfold for a hardhat and toolbox.

167. See John Dewey, *The Need for a Recovery of Philosophy* (1917), in *PRAGMATISM: A READER* 219, 232 (Louis Menand ed., 1997) (“Faith in the power of intelligence to imagine a future which is the projection of the desirable in the present, and to invent the instrumentalities of its realization, is our salvation.”).

