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WHAT CAN WE DEMAND OF JUDGES IN RETURN FOR INDEPENDENCE?

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The focus of this Essay is the intersection of two propositions widely accepted among legal practitioners and scholars in the United States. The first, empirical, proposition is that indeterminacy in the law allows judges' policy views to affect their decisions in significant ways. Few observers today would seriously dispute the claim that judges "sometimes are influenced by their political and moral views and their personal biases."[1] The second, normative, proposition is that society is best served by having judges who are highly independent in the sense that they need not fear losing their jobs as a result of decisions that displease certain audiences. Although there are prominent advocates of constraints on independence such as judicial elections,[2] it is my sense that sentiment in the legal community leans much more strongly toward freeing judges of these constraints.

Common though these beliefs may be, they do not coexist harmoniously in a political system where democratic self-rule is taken seriously—the more widely the first proposition holds, the more it undermines the second. A central principle of our political system is that individuals are not entitled to impose their policy views on other people unless they are authorized to do so by, and answerable to, those same people. This principle is not absolute, but exceptions to it must be carefully justified. As I understand the most popular and powerful justifications of judicial independence, they do not rest on claims that judges are wiser than other people or otherwise more likely to make good policy choices. Rather, they rest on claims that legal texts and principles are more likely to guide judges when the resulting decisions are unpalatable and likely to be unpopular. Accordingly, arguments for independence are weaker the less that judges are able to divorce their readings of the law from their personal preferences.

One way to resolve the tension between the two propositions is to weaken the second—given that judges are sometimes influenced by their policy preferences, they should enjoy only some freedom from accountability. This is in fact the option chosen by most U.S. states; unlike Article III federal judges,

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1. BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 6 (2010). Tamanaha presents overwhelming evidence that this understanding of judges' behavior has been much more widespread across American legal history than is commonly thought. *See id.* at 132–155.

2. *See* CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 18 (2009) ("[D]emocratic politics in the form of state supreme court elections is flourishing and should be fostered rather than impaired.").

the vast majority of state judges have renewable terms of set length, and most must face voters to stay in office.[3]

This Essay takes a different approach to resolving the tension. In my view, arguments for independence are very strong, especially those arguments emphasizing the protection of unpopular litigants. Even if I were inclined to dispute them, there is not enough space in this Essay to do so adequately. Hence, I will simply assume that the system in place for federal judges is defensible. Further, I readily concede that human judges cannot reasonably be expected to purge the influence of personal views from all of their decisions. But it does not follow from either or both of these concessions that we must simply accept whatever judges give us. Quite the contrary, I think it perfectly appropriate to place heavy demands on judges in return for freedom from accountability.

For readers who balk at this statement, an analogy to another group of professionals with extraordinary job security might be useful. Instructors of undergraduate constitutional law classes often require students to write mock briefs or opinions in response to a real or hypothetical case. Imagine that a series of careful studies found consistent evidence that liberal professors tended to give somewhat higher grades to papers expressing liberal viewpoints, while conservative professors tended to give somewhat higher grades to conservative papers. Presumably, this would not precipitate a large-scale movement to abolish tenure, but the finding surely would be met with more than a shrugged, "Oh well, professors are human." We would expect professors to acknowledge the existence of a problem and take steps to address it. Judges, whose decisions are much more consequential, should be held to at least as high a standard.

What should we demand of largely unaccountable judges? I offer two suggestions. First, we should demand that they engage in intensive, sustained efforts to ensure that personal views do not exert undue influence[4] on their decisions.[5] Second, we should demand from judges more candid information about their policy preferences and moral views. If nothing else, nominees for federal judgeships should be required to answer questions about their policy preferences at their confirmation hearings.

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3. *See Methods of Judicial Selection*, AM. JUDICATURE SOC., http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm (last visited Feb. 17, 2011).

4. What constitutes "undue influence" is concededly an important, difficult question. I do not attempt to answer it here. For the purposes of this Essay, it is enough to posit widespread agreement that personal views should have a quite limited influence on judges' decisions and that it is at least plausible that this influence could be more limited than it now is.

5. This is far from an original idea. In fact, one could understand the prescriptive literature on methods of legal (especially constitutional) interpretation over the last several decades as a vast effort to resolve the tension by guiding judges' behavior. I take no position on whether that effort may eventually bear fruit, but at this point there is too little consensus about appropriate methods to offer the necessary guidance. Instead, my aim here is to suggest methods that should be equally acceptable to those with different ideologies or philosophies of judging.

Before developing these suggestions, let me clarify the assumptions underlying my argument. There are two empirical assumptions that I believe are uncontroversial and ask the reader to accept without much discussion of supporting evidence. First, a nontrivial fraction of all court cases present questions allowing for more than one plausible answer under accepted legal methods.[6] Typically, such cases make up a larger chunk of the docket in higher courts than in lower ones. Second, in these types of cases, there is a strong tendency for judges' decisions to match the positions they prefer on extralegal grounds.[7]

Note that the second assumption does not imply that judges intentionally choose positions on the basis of personal preference, or even that they are aware of a relationship between their preferences and their decisions; nor does it imply that they decide carelessly. It is fully consistent with an assumption—probably correct, in my view—that judges typically make serious efforts to find the most legally compelling answer, regardless of their own preferences. It just holds that, if this is what judges are trying to do, they do not always succeed.

Note, too, that I employ terms such as "personal views" and "preferences" loosely here. Personal views may be based on beliefs about morality, efficacious public policy, or other related issues. For the purposes of this Essay, it is enough to define these views as idiosyncratic and independent of the substance of legal materials such as statutes and precedents.

Nor do I take a position on the difficult question of the extent to which legal interpretation can proceed without reference to moral or policy principles. Bearing in mind that my concern here is not judging generally, but rather the decisionmaking of judges who do not have to answer for their decisions, the argument rests on just two normative assumptions. First, unaccountable judges should put their personal views aside where traditional legal methods of analysis point largely in the direction of a single answer to a legal question. Second, even where more than one answer is plausible, judges are not entitled to choose a position on the ground that it is intuitively appealing; rather, their obligation is to determine what position is best. "Best" may be defined in different ways, and of course the most intuitively appealing option will usually strike judges as best. But reasonable judges will also recognize that they may be wrong—that their

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6. *See* TAMANAHA, *supra* note 1, at 111–31. More than a hundred years ago, Wilbur Larremore wrote in the *Yale Law Journal*: "In this condition of affairs judges indulge in the delusion that they are observing *stare decisis* merely because they cite precedents. The truth is that . . . judicial precedents may be found for any proposition that a counsel, or a court, wishes established, or to establish." Wilbur Larremore, *Judicial Legislation in New York*, 14 YALE L.J. 312, 317–18 (1909).

7. The literature supporting this claim is far too vast to do it justice here. For a highly influential work focusing on the ideology of the U.S. Supreme Court, see JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002). For a thorough overview of the relationship between judges' political party affiliations and votes on many different courts, see Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 JUST. SYS. J. 219 (1999).

predispositions may lead them astray—and so must test the logic of a preferred position against its main competitors in the fullest, fairest way.

I. SEEKING OUT DISAGREEMENT

The trouble, as both personal experience and psychological studies tell us, is that this can be very hard to do. Humans show a marked tendency to engage in cognitive processes that—while helpful for taking us through ordinary daily activities with minimal effort—let us down when we confront difficult reasoning tasks.[8] Psychologists have identified a great many such processes, often referred to as "biases."[9] A number of these biases relate to the topic of this Essay, but one, "confirmation bias," is particularly relevant.

"Confirmation bias" refers to "the inappropriate bolstering of hypotheses or beliefs whose truth is in question . . . [through] unwitting selectivity in the acquisition and use of evidence."[10] If we begin a reasoning process leaning toward a certain position, we display confirmation bias when we inappropriately pay more attention to and give more weight to evidence favoring that position than evidence casting doubt on it.[11] In close cases, judges subject to confirmation bias will tend to see the policy positions they prefer as better supported by precedent, historical evidence, text, and so on.

Some instances of confirmation bias can be understood as manifestations of a more general phenomenon known as motivated reasoning. In a seminal article, Professor Ziva Kunda explained that both accuracy goals—to reach correct answers regardless of what they are—and directional goals—to reach particular answers regardless of whether they are correct—can motivate reasoning.[12] When a directional goal exerts more force than an accuracy goal, reasoners—while not feeling free to reach any conclusion just because it is appealing (the accuracy goal still exerts some force)—will "search memory for those beliefs and rules that could support their desired conclusion."[13] When motivated reasoning is at work, people may feel that they are reasoning objectively, but this objectivity "is illusory because people do not realize that the process is biased by their goals, that they are accessing only a subset of their relevant knowledge, [and] that they would probably access different beliefs and rules in the presence of different directional goals."[14]

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8. *See* Hal R. Arkes, *Costs and Benefits of Judgment Errors: Implications for Debiasing*, 110 PSYCHOL. BULL. 486, 486 (1991).

9. For a categorization and partial catalogue of cognitive processes, see *id.* at 487–92.

10. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998).

11. *See id.*

12. Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 480 (1990).

13. *Id.* at 483.

14. *Id.*

I am not aware of any direct evidence showing the operation of confirmation bias or motivated reasoning in judicial decisionmaking, but there is abundant reason to think they are present there. Professor Eileen Braman has employed creative experiments to show that law students engage in motivated reasoning—for instance, policy preferences influence their assessments of similarities between precedential and hypothetical cases and of litigants' standing to bring suit.[15] Across a series of experimental studies, Dean Chris Guthrie, Professor Jeffrey J. Rachlinski, and Judge Andrew J. Wistrich have convincingly demonstrated that judges tend to exhibit the same biases as other people in completing reasoning tasks.[16] None of these experimental studies involve decisionmaking in actual cases. However, the scope of the findings makes it difficult to believe that judges can shed all biases upon ascending to the bench.

Furthermore, in a discussion of what he calls "coherence based reasoning,"[17] Professor Dan Simon points to a phenomenon that anyone who reads judicial opinions regularly encounters:

> The facts[,] . . . precedents, [and other considerations] all come together in a coherent whole to make for the inevitable and undeniably correct result. The sense of correctness is bolstered by the dearth or absence of arguments to the contrary. By the culmination of the opinion, one might wonder how the decision could be considered to have been anything but obvious in the first place. This sense of obviousness, however, quickly dissolves upon turning to the opinion of the dissenting judges. Dissenting opinions too tend to be strongly coherent and persuasive . . . . Thus, while the opinions are exceedingly coherent internally, they are radically inconsistent with a slew of seemingly plausible arguments contained in the opposing opinion.[18]

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15. EILEEN BRAMAN, LAW, POLITICS, AND PERCEPTION 83–140 (2009).

16. *See, e.g.*, Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 43 (2007) ("[J]udges, like everyone else, have two cognitive systems for making judgments—the intuitive and the deliberative—and the intuitive system appears to have a powerful effect on judges' decision making."); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1330–31 (2005) ("The presumption that people can ignore what they know, or use it for some purposes but not for other purposes, may sometimes be true, but often is little more than a convenient fiction. This may mean that judicial decision making is not as accurate as we hope it is." (citation omitted)). *See generally* Birte Englich, *Blind or Biased? Justitia's Susceptibility to Anchoring Effects in the Courtroom Based on Given Numerical Representations*, 28 LAW & POL'Y 497, 511 (2006) ("[B]asic insights about the psychological mechanisms of human judgment may help to decide what is fair in a court of law.").

17. Dan Simon, *In Praise of Pedantic Eclecticism: Pitfalls and Opportunities in the Psychology of Judging*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 131, 134 (David Klein & Gregory Mitchell eds., 2010).

18. *Id.* at 138.

Assuming that these one-sided opinions are not always the result of rhetorical strategy, they provide more evidence that even judges committed to accurate decisionmaking can stack the deck.

This discussion of concepts is less rigorous than it ideally would be; despite my conflation of them, confirmation bias, motivated reasoning, and coherence based reasoning are not synonymous. However, for purposes of this Essay, it is enough to highlight an insight common to all—despite judges' best intentions, intellectual precommitments such as moral views and policy preferences will often exert a powerful influence on the direction their reasoning takes.

As already noted, these insights are not available to us only through the research of psychologists; they also come from daily observation of ourselves and others. Given their legal training and experience evaluating the positions of others, judges might be expected to be particularly aware of the dangers. And so, a critical reader could argue that there is little reason to be concerned about the effects on judges' decisionmaking. This argument would run up against other work in psychology, however. For instance, little evidence exists to show that mere awareness of the possibility of bias is sufficient to eliminate it.[19] More fundamentally, recognizing human beings' general susceptibility to bias does not necessarily entail recognizing one's own susceptibility. In a series of studies, Professor Emily Pronin and her colleagues have demonstrated a strong tendency of people to believe that biases affect others' reasoning more than their own.[20] They see this "bias blind spot"[21] as arising from a tendency to "over-value thoughts, feelings, and other mental contents, relative to behavior, when assessing their own actions, motives, and preferences, but not when assessing others."[22] We know that we wish to be unbiased, so we credit those wishes in the face of contrary evidence; we do not have the same access to or trust in others' introspections, so in their cases we give more weight to objective indications of bias.

I can think of no good reason to imagine that judges are less prone to this blind spot than anyone else. In fact, one might suppose that the trappings of office and deference from others that come with judgeships exacerbate the problem—though that is admittedly just speculation. Certainly, when we consider the plethora of cases where the majority and dissenting writers accuse each other of reading personal preferences into the law instead of following their

19. *See* Scott O. Lilienfeld et al., *Giving Debiasing Away: Can Psychological Research on Correcting Cognitive Errors Promote Human Welfare?*, 4 PERSP. ON PSYCHOL. SCI. 390, 394–95 (2009).

20. *See* Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565 (2007); Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369 (2002).

21. Pronin & Kugler, *supra* note 20, at 566.

22. *Id.* at 566.

example and applying the law faithfully,[23] it would seem rash to assume that judges have any special immunity.

The upshot of this discussion is that it is unreasonable to ask those governed by the decisions of unaccountable judges to accept "trust us" as a response to the threat of unduly influential personal views. Rather, we should demand that judges take active measures to counteract the threat, at least where doing so would not cause excessive delay or otherwise negatively affect their decisionmaking.

What exactly should judges do? Unfortunately, here psychology is less helpful, as researchers so far have had only limited success in identifying practices that reduce bias.[24] Nevertheless, both common wisdom and some research evidence[25] point to the importance of forcing oneself to take seriously the possibility that one's own ideas are incorrect—what Baron has influentially termed "actively open-minded thinking."[26] Of course, judges are routinely exposed to competing arguments from the parties to a case, but this is not enough. It is too easy for us to discount one set of arguments while telling ourselves that we are being evenhanded. The effort needs to be more active and less self-trusting. Judges should actively seek out disagreement and opinions from people committed to very different views.

Before proceeding, let me be clear that this recommendation applies only to situations where judges have time for deliberation. Especially in a trial court, some decisions—such as rulings on objections or certain motions—must come very quickly. We do not want trial judges to slow proceedings to a crawl or tie themselves in knots. It is worth noting, though, that a habit of seeking out disagreement—cultivated at appropriate times—could prove helpful to one's reasoning even in those instances where the decision must come right away.

The best opportunities for extensive feedback will usually come from a judge's clerks, those legal professionals who spend the greatest amount of time

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23. *See, e.g.*, 14 Penn Plaza LLC v. Pyett, 129 S.Ct. 1456, 1470 n.9 (2009) (Justice Stevens's "personal view of the purposes underlying the [statute] . . . is not embodied within the statute's text. Accordingly, it is not the statutory text that [he] has sought to vindicate—it is instead his own 'preference' for mandatory judicial review, which he disguises as a search for congressional purpose."); Roper v. Simmons, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting) ("Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.").

24. *See* Lilienfield et al., *supra* note 19, at 391.

25. *See, e.g.*, Charles G. Lord et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1239 (1984) (finding that subjects asked to evaluate an empirical study were better able to overcome bias when prompted to imagine that the study had come to the opposite conclusion); Keith E. Stanovich & Richard F. West, *Reasoning Independently of Prior Belief and Individual Differences in Actively Open-Minded Thinking*, 89 J. EDUC. PSYCHOL. 342, 351–52 (1997) (concluding that subjects with more open-minded thinking dispositions were better at judging the strength of an argument by its quality rather than its consistency with their views).

26. JONATHAN BARON, THINKING AND DECIDING 199–266 (4th ed. 2008).

in close proximity to them.[27] Especially if judges make it clear that their clerks are expected to speak their minds, critical feedback from clerks can offer judges excellent tests of the soundness of their reasoning and their success in avoiding bias.[28]

For this reason, it is distressing to find a pronounced and growing tendency for United States Supreme Court Justices with particular ideological leanings to choose their clerks from circuit judges with similar leanings.[29] Few practices could be better designed to reinforce the Justices' biases and promote one-sided reasoning. Viewed from the perspective laid out in this Essay, it is a poor practice. In fact, not only should judges avoid seeking out clerks who share their predispositions, they should actively seek clerks inclined to disagree with them. Judges can get critical feedback even from ideologically sympathetic clerks, but criticisms from people who genuinely disagree are likely to be more powerful and better tests of the soundness of a judge's arguments.

In making this suggestion, I do not mean to downplay judges' need for clerks they can work with easily and can trust to draft opinions that accurately reflect their views. Certainly it is reasonable on these grounds for judges to shy away from closed-minded clerks from the opposite camp, but I have trouble thinking of a good reason to resist hiring thoughtful and undogmatic clerks whose views differ from theirs. Insofar as judges resist hiring such clerks, I would guess that it is usually because they—like everyone else—are more comfortable being around people who think like them. But that is not a reason that the rest of us should be expected to respect. Judges who are unwilling to encounter disagreement in their chambers that could make them intellectually uncomfortable should resign their posts in favor of ones that do not involve governing the lives of others.

Aside from clerks, court colleagues are the legal professionals most likely to provide judges with extensive feedback. As this feedback is a type of peer review, it might be helpful to consider academic peer review as an analogy. Peer review of submissions to scholarly journals and book publishers, required in most fields, grows from scholars' acknowledgment of their own biases and tendency to make mistakes. Of course peer review does not work perfectly in

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27. *See generally* Rick A. Swanson & Stephen L. Wasby, *Good Stewards: Law Clerk Influence in State High Courts*, 29. JUST. SYS. J. 24, 25 (2008) ("The law clerk–appellate court judge relationship is an intimate working one, in which the primary intended function of the clerk is to research the facts and the law involved in a case, make recommendations to the judge regarding the proper outcome of the case, and then often draft the court's opinion in the case.").

28. *See generally* Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 305 (2008) ("Keeping an open dialogue with the clerk ensures that the clerk is free to express views about the opinion, even when the clerk disagrees with the judge. If the clerk happens to be correct, then an open relationship will foster a better opinion." (citation omitted) (citing Douglas K. Norman, *Legal Staff and the Dynamics of Appellate Decision Making*, 84 JUDICATURE 175, 177 (2001))).

29. *See* Lawrence Baum & Corey Ditslear, *Supreme Court Clerkships and "Feeder" Judges*, 31 JUST. SYS. J. 26, 42–43 (2010).

practice, but its goal—to ensure that research is not published unless other scholars certify that it is professionally competent and trustworthy—is equally appropriate for judges.[30]

Judges on collegial courts already face a form of peer review—other judges have to agree with them for their opinion to have the force of law. Still, this type of feedback is subtly weaker than academic peer review. For one thing, in academic peer review, scholars who are not directly engaged in the same research project do the vetting, and so generally (though certainly not always) they can evaluate the research more dispassionately. Unfortunately, to achieve this level of peer review, judges would have to circulate draft opinions to judges not sitting on the case. Although this practice is not an unprecedented idea,[31] it would seem unreasonable to demand that judges make off-panel circulation and comment a matter of routine.[32]

Another aspect of academic peer review points to the possibility of a more reasonable demand. Unless judges on one side equal or exceed the number of judges on the other side, they cannot block the other judges' views from becoming the official statement of the court and attaining the force of law. The power of the dissenter in academic peer review is greater. Not every piece that gets published is approved unanimously; certainly a poorly reasoned objection may be disregarded. But seldom will an editor choose to publish work in the face of a careful report claiming serious deficiencies in methods or logic. Judges could move closer to this type of review by agreeing to give extra weight to dissenting views in special circumstances where the dissenter makes a credible claim that the majority's reasoning is not simply unpalatable but fundamentally flawed—that is, that the majority's reasoning would be unpersuasive to anyone not already committed to the majority's position for extralegal reasons. We could ask judges to agree to an informal norm that majority writers pause and reexamine their thinking in such circumstances, or even, on courts that do not sit en banc, to adopt a practice of circulating opinions to other members of the court. Naturally, success would depend in part on the discernment and good faith of dissenting judges. But because dissenters—not having an actual veto—would have to rely on the majority's cooperation to have any impact, it would not be in their interests to abuse this power.

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30. It may enter the reader's mind at this point that this Essay has not been subjected to peer review. Fortunately, I have thought carefully about the substance of the Essay and am less susceptible to bias than other people are. The reader may rest assured that all the reasoning in the Essay is sound.

31. *See generally* Daniel A. Farber & Suzanna Sherry, *Building a Better Judiciary*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING, *supra* note 17, at 285, 294 ("A particularly noncontroversial form of [peer] review would be to require the circulation of opinions to retired justices for comment.").

32. *Cf.* Guthrie et al., *supra* note 16, at 39 (advocating a different type of peer review where judges from other jurisdictions evaluate a selection of previously decided cases). The practice recommended by Guthrie, Rachlinski, and Wistrich could be very beneficial for judges' decisionmaking in general, though it does less to ensure that particular decisions are sound.

More generally, we can ask that judges cultivate a habit of exposure in their professional lives to forceful, intelligent statements of views that clash with their own. For example, liberal judges could attend meetings of conservative groups such as the Federalist Society or the Washington Legal Foundation; conservative judges could attend meetings of liberal groups such as the American Constitution Society or the American Civil Liberties Union. Doubtless some judges already do this, and doubtless many judges try quite hard to reach unbiased decisions. The point of this Essay is not to criticize judges, but to recognize that what we legitimately seek of them—that they treat their moral and policy views with real caution and skepticism in the course of making decisions—is very difficult to achieve. Actively seeking out disagreement may help judges to do this more successfully.

II. FRANK DISCLOSURE OF PERSONAL VIEWS

Obviously, not everyone will agree with the preceding proposals. Even if judges accepted them, they would be difficult to implement, and even if implemented they could not produce entirely objective judicial decisionmaking. It is inevitable that personal views will play some role in the decisions of even the most conscientious judges. Now, it may be that for the average federal judge this seldom happens—perhaps in just a few cases per year. It may even be true that in most cases where personal views play a major role it is appropriate for them to do so. But from the perspective of the citizenry, none of this matters. The simple fact is that hundreds, if not thousands, of decisions in federal courts each year involve nontrivial doctrinal developments that reflect the preferences of the deciding judge or judges. In light of this fact, there is a strong argument to be made that nominees should disclose those preferences to the public at their confirmation hearings. Neither senators' questions nor nominees' answers should be restricted to vague references to nominees' "judicial philosophies." Knowing something about nominees' moral and policy views would allow the public to express more informed opinions to senators weighing the nominations. Down the road, this would provide people with more data to evaluate the operation of the federal judicial system, and would allow them to debate more intelligently whether and how the system might be reformed.

That the public would benefit in these ways strikes me as too obvious to require more argument or more of the reader's time. So, let us turn immediately to the likely objection that the costs of adopting the practice would outweigh the benefits. One possible cost is that nominees would compromise their capacity to hear a case impartially by precommitting to a position (or at least appearing to). In my view, Dean Robert Post and Professor Reva Siegel have already thoroughly refuted any argument along these lines. Discussing the propriety of asking a nominee how she would have voted in a particular case, they wrote:

> From the perspective of a litigant seeking vindication of a right to an abortion, and who is concerned about the prejudgment of her case,

> there is no pertinent difference between being judged by Justice O'Connor, who has expressed in an authoritative opinion her view of the merits of [*Planned Parenthood of Southeastern Pennsylvania v. Casey*], and by a new Justice who has in a confirmation hearing recounted how he would have voted in *Casey* had he been on the Court at the time. Nominees who explain the grounds on which they would have voted in an already decided case do not prejudge future cases any more than do judges who write or join opinions in actual cases.[33]

The objection would have even less force as applied to questions about moral and policy views, precisely because such views would not be expected to carry much weight in a judge's decisionmaking. A judge who said he believed *Casey* to be wrong in reaffirming a right to an abortion[34] would be seen as committing himself far more firmly than a judge who said only that he believed abortion to be morally wrong.

A critic might respond, "You've just missed the key point. At present it is true that moral and policy views are not expected to play a large role in judges' decisions. But that would change if we gave these views such prominence in confirmation hearings." I take this response to be the most powerful objection to the proposal, and I concede that it has real force. It is conceivable that open discussion of nominees' extralegal views would breed cynicism about judging among the public and undermine society's respect for judges who attempt to distinguish between what the law requires and what they would prefer to see done.

That it is conceivable, however, does not make it probable. The objection seems to envision confirmation hearings in which senators and nominees extol reliance on personal views in judging, but this would almost certainly not happen. Rather, nominees would undoubtedly accompany their answers with repeated vows not to allow their views to influence their decisions, and there would be admonitions from senators to the same effect.

More importantly, there is good reason to think that having judicial nominees speak more openly about their views—far from weakening norms of good judging—could actually reinforce them. Having revealed where they stand on policies, judges would find it harder than they now do to account for patterns of voting consistent with their policy stances. Assuming that they care about their reputations among the bench and bar (or maybe more generally), they might work harder to make sure that their decisions have an objectively strong basis in the law. Even for judges who care only about whether their decisionmaking is legally sound, their awareness of having publicly stated their

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33. Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38, 46–47 (2006), http://www.thepocketpart.org/images/pdfs/27.pdf (footnote omitted).

34. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (plurality opinion).

views may serve to effectively remind them of what they wish to avoid in their reasoning.

III. CONCLUDING THOUGHT

The proposals outlined here, while not facetious, are offered in a spirit of provocation, and I recognize that many readers will not be persuaded by them. Still, I hope that we can all agree on at least the following—the reason we provide some judges with nearly perfect job security is that we think this is the best way to protect the interests of society, not because any individuals are entitled to such a position. Quite the contrary, being allowed to exercise a position of power without having to fear the loss of one's job or other serious adverse consequences is a tremendous—and extremely rare—privilege. The rest of us are justified in demanding a great deal of those who enjoy such a privilege, and we should not be shy about doing so.