IS THERE A PSYCHOLOGY OF JUDGING?

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In the United States, as in most countries, judges share three prominent characteristics. First, and tautologically, they are judges. Second, and with the exception of the lay magistrates who hear small cases in many states, they are lawyers. And third, the opinions of some attorneys and litigants notwithstanding, they are human beings. My goal in this paper is to examine in a preliminary way the relative contributions of each of these three characteristics in explaining judicial cognition and judicial behavior.

The potential value of such an inquiry lies in its contrast with the (rather small) existing literature explicitly focused on the psychology of judging. That literature, with few exceptions, 

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supports the conclusion that it is the third and not the first or second of the items on the above list -- the judge as human being and not the judge as judge or the judge as lawyer -- which has the greatest explanatory power in accounting for judicial behavior, and which holds the greatest promise for setting a research agenda for law and psychology in general and for the psychology of judging in particular. More often implicitly than explicitly, the existing research, sometimes by initial assumption and sometimes in its findings, is compatible with the view that a judge’s attributes as a human being reveal more about the psychology of judging than does anything a judge might have learned in law school, acquired in the practice of law, or internalized by virtue of serving in the judicial role.

The conclusion that judges behave and make decisions in a manner largely tracking the behavioral and decision-making patterns of non-judge human beings is occasionally supported by empirical findings.\(^3\) Far more often, however, this conclusion lurks in the background as an undocumented and unargued premise in the research on the psychological dimensions of judicial behavior. Researchers tend to assume that what we know about human decision and cognition will apply to judges, and thus are rarely bashful about applying their non-judge experimental results to judicial behavior. One study on analogy, for example, takes its findings about how non-judge experimental subjects deal with analogies as strongly suggesting that judges will use precedent in much the same way,\(^4\) just as a more comprehensive survey of the psychological research on the same topic of analogy asserts that this research is largely applicable to the decision-making processes of judges.\(^5\) And in the law review literature, it is routine to assume

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\(^3\)See authorities cited in note 2, supra.


\(^5\)Keith J. Holyoak, Analogy, in The Cambridge Handbook of Thinking and Reasoning 117 (Keith
that what contemporary cognitive and social psychology teaches us about the decisions of human beings is virtually wholly applicable to the decisions of lawyers and judges.⁶

The actual research on judges has to date been quite limited, which perhaps explains why the dominant characteristic of most of the literature on the psychology of judging is simply to assume that research on lay people is applicable to judges.⁷ But even when there has been serious research on the psychological dimensions of actual judicial decision-making, that research is of less pervasive value than we might initially suppose, and that is because such research has tended to focus almost exclusively on the fact-finding⁸ and verdict-rendering dimensions of the judicial role. Judges are indeed often required to evaluate factual information presented at trial in order to determine simply what happened, and then, in place of a jury, are frequently in the position of delivering a final verdict. Thus, judges are commonly compelled by the requirements of their role to decide which of multiple opposing factual accounts is most


⁷There are, of course, numerous logistical and often ethical impediments to doing research on real judges, and thus the assumption that typical research subjects are representative of judges is facilitated by the ease of locating the former and the difficulty of doing serious experimental work on the latter. And see note 11, infra.

⁸Fact-finding is not to be confused with fact-locating or fact-discovering. Fact-finding is the legal term of art for determining on the basis of the evidence that is presented in court what actually happened, but the fact-finding judge bases her decision entirely on what is presented and argued by the parties before her.
likely to be true.\textsuperscript{9} And in engaging in this and associated tasks, judges perform functions virtually identical to those performed by a jury.\textsuperscript{10} So insofar as people might previously have believed that judges would be superior to jurors in performing various fact-finding tasks, or might have believed that judges would be largely immune from the cognitive biases of mere mortals, some of the current research on the psychology of judging has performed a valuable function in disabusing us of the view that judges by virtue of their intelligence or legal training or judicial position could significantly outperform juries with respect to the very same fact-focused inquiries.

By focusing so dominantly on the fact-finding and verdict-rendering tasks that judges share with jurors, however, the existing research may have slighted many of those aspects of judging – most obviously selecting the relevant law, interpreting the law, reaching conclusions about the law, and sometimes simply making law – that are more or less the exclusive province of the judge. Because judges thus perform tasks that jurors and everyday decision-makers do not, and also because judges possess characteristics that experimental subjects do not,\textsuperscript{11} perhaps

\textsuperscript{9}Indeed, the prevalent focus on the jury in much of the psychological research is itself curious in light of the fact that the institution of the jury does not exist in civil law countries, is not used outside of criminal cases (with the occasional exception of libel trials) in any common law country other than the United States, and is a rapidly declining institution even for criminal cases in the United States and elsewhere. See Guthrie, Rachlinski, and Wistrich, supra note 2, at 781; Frederick Schauer, On the Supposed Jury-Dependence of Evidence Law, 155 U. Pa. L. Rev. 165 (2006).

\textsuperscript{10}On the distinction between the tasks typically performed by trial judges and those typically performed by appellate judges, and on the implications of this distinction for social science research, see C.K. Rowland & Robert A. Carp, Politics and Judgment in Federal District Courts (1996).

\textsuperscript{11}The statement in the text is not intended to express even the slightest sympathy with the hoary but misguided cavil (e.g., Who Needs Real Managers When You’ve Got Fraternity Boys: Accurate Subjects for Psychiatric Research, Psychology Today, January/February 1998) that experiments on university undergraduates are of limited value in learning about the behavior of people who are not undergraduates. In the absence of identifiable and germane differences between undergraduates and people in general, there is no good reason to doubt the
the conclusion (or, even more problematically, the empirically non-grounded premise) that judicial decision-making is substantially similar to that of those who are not judges is open to question. Just as it would be a mistake to draw too many conclusions about the methods of mathematical reasoning employed by the faculty of the Harvard Mathematics department from studies about the methods that ordinary people use to do mathematical calculations at the supermarket or when balancing their checkbooks, so too might it be a mistake to draw conclusions about how judges reasons with rules and precedents and authorities from the way in which the man on the Clapham omnibus\(^{12}\) deals with similar inputs into and constraints on his decision-making processes. And it certainly would be a mistake to draw conclusions about how judges perform a range of judge-specific tasks from what we have found about how lay people perform quite different tasks.

Thus, the question is whether the experience of studying to be a lawyer and then of practicing law causes decision-making, especially about legal (as opposed to factual) matters, to diverge in deep and cognitively substantial ways from the decision-making of the human beings who do not possess such training and experience.\(^{13}\) Added to this is the possibility that serving as

\(^{12}\)The man on the Clapham omnibus is the considerably quaintier and more charming British equivalent of the American “reasonable man.” See Hall v. Brooklands Auto Racing Club, [1933] 1 K.B. 205, 224.

\(^{13}\)It is also possible that those who become lawyers self-select, or are selected, on the basis of their possession of attributes that are relatively rare in the general population but that are not only germane to success as a lawyer, but are also germane to success as a judge even among the class of lawyers.
a judge might produce further gaps between what we might expect of judges and what might be expected even of similarly trained and experienced people holding different roles. So it is possible that in engaging in law-focused tasks there is a divide between lawyers and people in general, and an even wider divide between judges and people in general.

Even more likely is the possibility that multiple phenomena are at work, with self-selection into law, subsequent legal training, subsequent legal experience, self-selection into judging, and then finally serving in the judicial role all interacting with each other to produce an even wider gap between how judges and lay people reason and decide. To the extent that this possibility actually obtains, the putative differences arguably produced by an interaction of legal training, legal acculturation, legal experience, and the judicial role may even generate process and not just content-based differences between the cognitive mechanisms of judges and the aggregate cognitive mechanisms of non-judge humanity. That is, there may be differences, at least with respect to some highly important judicial tasks, between how judges and lay people think and not merely differences in what they think about.

The battery of possibilities offered in the previous paragraphs is not intended to be anything more than an array of potentially testable hypotheses. If even some of these hypotheses are in fact true, however, then the possibility exists of there actually being a genuine psychology of judging. But if, on the other hand, these hypothesized differences between judges and pay people do not in fact exist, and if instead the assumptions and premises of judge as human being lying behind most of the existing research are sound, then the psychology of judging will turn out to be an interesting application of larger psychological issues, but will not in any

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14 Or it may be that the causal mechanism operates in a different direction, with lawyers being selected for the judiciary, or self-selecting into the judiciary, because they possess skills or proclivities to forms of reasoning and decision-making that are different from those of mine run practicing lawyers.
fundamental way constitute a discrete area of inquiry. Viewed from this perspective, if the most important or only determinant of judicial decision-making characteristics is the fact that the judge is human, then a psychology of judging would be little different from a psychology of dentistry or a psychology of plumbing. It would be interesting to know what psychology could teach us about how dentists and plumbers think, but the application of research findings about human beings to the human beings who fill these socially important roles is a long way from saying that there is a psychology of dentistry or plumbing. Perhaps the psychological dimensions of judging are different from those of dentistry or plumbing, but we will not know that unless we depart from the assumption that what we know about people is necessarily applicable to judges. And because I suspect that there might be more to the psychology of judging than there is to the psychology of dentistry or plumbing, and because I suspect as well that there are reasons to believe that legal and judicial attributes may cause judicial decision-making to depart in relevant ways from the decision-making of lay people, my aim in this paper is to examine in a preliminary and non-empirical way – hypothesis offering but not hypothesis-testing – what a genuine psychology of judging might look like, and why, most of the existing literature on the psychology of judging notwithstanding, we ought to take this possibility seriously.

I. The Promises and Premises of Legal Reasoning

Almost four centuries ago, Lord Coke spoke of the “artificial” reason of the law, and he did so hundreds of years before even the advent of university-based formal training in law. Now

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15 The statement in the text is not intended to say anything about the respective abilities or intelligence of lawyers, judges, dentists, and plumbers. One need not be smarter (or dumber) than the average of humanity in order to engage in a cognitively specialized task.

that such training is ubiquitous, Lord Coke’s premise is more important yet, because the view that there is a special reason of and for law has become the guiding principle for vast numbers of American law schools and their equivalents\textsuperscript{17} in other countries. These schools purport to teach their students the mysterious art of “legal reasoning,” and they hold out the hope that at the end of legal training a student at one of these institutions will have learned how to “think like a lawyer.”\textsuperscript{18}

The belief that thinking like a lawyer is fundamentally different from simply thinking has declined a bit in the past several generations, but not much. Law schools these days do indeed pay more attention than they did in the past to the methods of philosophy, literature, economics, and the empirical social sciences, among others, but they have scarcely abandoned their commitment to there being such a thing as legal reasoning, to legal reasoning being a somewhat autonomous skill, and to the responsibility of law schools to inculcate this skill in those would be lawyers and judges. Moreover, law schools appear to subscribe to the view that legal reasoning is not easily picked up on one’s own, and that formal training and subsequent experience in thinking like a lawyer can and characteristically does produce a genuinely transformed method of thinking, reasoning, arguing, and decision-making.

Although I will discuss presently my view of what legal reasoning is, I want to be careful

\textsuperscript{17}Outside of North America, the study of law takes place largely at the undergraduate level, although some additional and post-graduate law study is common. Although not my focus here, it would be a potentially valuable research project to examine whether studying law from the age of eighteen or nineteen, and in place of some other undergraduate major, produces a significant difference in reasoning and decision-making from that which exists in those who do not commence the serious study of law until at least the age of twenty-two, and who already have received some training as undergraduates in another field of inquiry.

not to overstate the claim about the alleged distinctiveness of legal reasoning. Law schools and
the legal culture do not typically maintain that legal reasoning is totally or even almost totally
unconnected with ordinary reasoning,\(^{19}\) in the way that Estonian is unconnected with English, for
example, or that literary interpretation is unconnected with multivariate calculus. Nor could
they. Rather, the most plausible version of the claim to distinctiveness in legal reasoning would
be the comparative statistical claim that some of the methods of reasoning that are located
outside of legal reasoning – arguments from precedent,\(^{20}\) reasoning from rules, and reliance on
authority, most prominently – are much more highly and differentially concentrated in legal
argument and legal decision-making than in ordinary reasoning and decision-making, the degree
of difference being sufficiently great as to support the conclusion that legal reasoning is, in the
aggregate, appreciably different from the kind of reasoning that takes place in other decision-
making domains. So although lawyers and judges necessarily employ non-legal forms of
reasoning as they argue cases and make decisions, and although non-lawyers occasionally make
use of the characteristic modalities of legal argument, the differential degree of concentration of
these modalities in legal argument is so great, the law schools’ view of the world appears to
maintain, as to justify the claim that something very different is going on when lawyers and
judges tackle a problem or face a decision.

So what then is legal reasoning, or at least what is it alleged to be? What is it to think
like a lawyer, as opposed to just think? These are neither easy nor uncontroversial questions, and

\(^{19}\)And if they do, they shouldn’t.

\(^{20}\) To forestall a too-early objection, I will signal here that I do not take the use of analogy and the
constraints of precedent as being especially similar. See note 55, infra. Lawyers use analogy
frequently, but so do most other professionals and most lay people. Feeling obligated to follow a
previous decision that one believes to be erroneous, however, the strict sense of precedent or
stare decisis, is arguably far less prevalent outside of law than in, and may thus comprise part of
the array of reasoning and decision-making modalities that collectively can be thought of as legal
reasoning.
so we find in the literature on legal reasoning and legal argument the claims that legal thinking is about the ability to seek and do justice in the individual case,\textsuperscript{21} or about the capacity for self-critically seeing and appreciating viewpoints opposed to one’s own,\textsuperscript{22} or about a tendency towards clarity and analytic precision,\textsuperscript{23} or about a talent for understanding and dealing with facts,\textsuperscript{24} or about a facility in argument and debate,\textsuperscript{25} or about the capability of engaging in analogical reasoning.\textsuperscript{26} Yet although there can be little doubt that all of these skills and many more are necessary for successful lawyering (and judging), and equally little doubt that good lawyers tend to have them in greater abundance than poor ones, these are not skills that seem especially of greater importance for lawyers than they are for police officers, physicians, social


\textsuperscript{22}See Suzanna Sherry, Democracy and the Death of Knowledge, 75 U. Cinc. L. Rev. ___ (forthcoming 2007).

\textsuperscript{23}Sherry, supra note 22. See also Kenneth J. Vandevelde, Thinking Like a Lawyer: An Introduction to Legal Reasoning (1996).


\textsuperscript{25}See Bandstra, supra note 24.

workers, politicians, and countless others. Most of these skills, even including the skill of analogical reasoning,27 are domain-general reasoning abilities, and while lawyers may on average be better at them than other people, it is highly probable that any identifiable differential ability between lawyers and others with respect to these and similar tasks is explained almost entirely by the fact that lawyers are also on average somewhat better educated, smarter, and possibly even more motivated than the population at large.

But although many of the posited components of legal reasoning are neither unique to nor even much concentrated in lawyers and legal argument, there is one form of reasoning -- or one cluster of associated forms of reasoning -- that can more plausibly be understood to set lawyers apart from others, and it is one that might usefully be described as second-order reasoning.28 When engaged in ordinary (first-order) reasoning and decision-making, people tend, not surprisingly, to try to make the best decision for the problem or task at hand. Their aim is typically to reach the right result for this case - the present case. That this is so for ordinary people, however, is not to say that it is so for lawyers and judges, for one of the things that law schools attempt to teach their students is precisely to avoid thinking that the right result for this present case is necessarily the right result all things considered. So consider, for example, the typical allegedly Socratic29 dialogue that takes place between student and teacher in the first year of


29There is scant connection between the question-centered methods of teaching employed by Socrates in the Platonic dialogues and the type of questioning that has traditionally taken place in
of law school. After eventually being coaxed into reciting the facts of some reported case correctly and accurately, the student is then asked what the correct result should be for the present case, and she commonly responds by announcing what she believes to be the most fair or just outcome as between the opposing positions of the particular parties. At this point the student is then asked to give the rule or principle that would support this outcome, and here the characteristic pattern of Socratic inquiry begins. By a series of patterned and well-planned hypotheticals, the professor challenges the student’s initially proffered rule, with the aim of demonstrating that the rule that would generate a just or fair or efficient outcome in the present case would generate less just, less fair, or otherwise less satisfactory results in other cases. And in taking one student through this series of uncomfortable applications of the student’s initially chosen rule, the professor attempts to get all of the students in the class to understand that the best legal rule may be one which produces an unjust result in the present case, but which will produce better results in a larger number of cases, the result in the present case notwithstanding.

This form of Socratic inquiry is not restricted to the law school classroom, and it is noteworthy that it is the common form of judicial questioning in appellate argument. Because the law school classroom. Even apart from the enormous advantage that Plato had over the rest of us in being able to write the answers as well as the questions, Socrates’ goal was to extract from his interlocutors some latent but non-specialized insight, rather than to inculcate in them a specialized skill that they hitherto did not possess. Now it may be that the ability to engage in just this kind of second-order reasoning is latent in everyone, but if it is sufficiently latent that it takes law professors and three years of law school to extract it for most people, then there is no difference of consequence between an inculcation and an extraction model of legal education, for in either case that student develops the ability actually to do something that she could not do before.

A seemingly common mistake is to assume that the essence of legal argument is an attempt to persuade, and thus that in engaging in the task of persuasion lawyers are doing something quite similar to that done by politicians, newspaper editorialists, teachers, members of the clergy delivering sermons, and countless other persuaders of all stripes. But legal argument, at least according to the traditional account, is persuasion of a special kind precisely because it is persuasion parasitic on how the judge will make her decision. So if the traditional account of legal reasoning is sound – and it may well not be – the lawyer is not attempting to persuade the
appellate courts see themselves either as setting forth rules that will control other and future factual situations, or as writing opinions that will serve as precedent for future cases, the appellate judge is often focused as much on the effect of this ruling on future cases as with reaching the best result in the present case. As a consequence, therefore, appellate advocates often find themselves being asked how the rule or result they are advocating will play out in various hypothetical cases. And, as in the law school classroom, these various hypothetical situations are offered against the background of the view that the right result in the case actually before the court will only be the actual result if it can be justified in a way that will not produce the wrong results in too many of the array of expected future cases.\textsuperscript{31}

In seeking to demonstrate to the hapless student or struggling advocate how the best legal outcome is often something other than the best outcome in the immediate case, the prototypical Socratic interrogation aligns itself with an even more important dimension of legal reasoning and argument, the way in which the backward-looking, constraining, and limiting dimensions of law\textsuperscript{32} often mandate a result other than the one that would seem optimally fair or maximally judge that such-and-such is a good outcome simpliciter, but is instead attempting to persuade the judge that what would be a good outcome is not precluded by existing precedents to the contrary, or is attempting to persuade the judge that existing precedents command a result regardless of whether the result is otherwise s good one or not.


wise, all things considered, in the particular case.\textsuperscript{33} It may appear unfair on the balance of all reasons to deprive a person of property\textsuperscript{34} or a place on a ballot\textsuperscript{35} just because he has missed a statutory deadline for understandable, innocent, and ultimately inconsequential reasons, but the law characteristically even if not universally enforces the literal meaning of authoritative language even when such an action produces a bad result in the particular case.\textsuperscript{36} And it may seem equally unfair to take the existence of a clear precedent as commanding a suboptimal result, especially from the vantage point of a decision-maker who thinks the precedent mistaken, but following that seemingly erroneous precedent is what, under the most traditional understanding, the law expects its decision-makers to do.\textsuperscript{37}

It is important to note that the second-order reasoning that I describe here is not about what 

what is, but is instead about what to do. The law obviously must on countless occasions engage in factual inquiry to determine who fired the gun, or how much toxic waste was discharged into the river, or whether someone was in possession of inside information when they purchased a

\textsuperscript{33}See Emily Sherwin, A Defense of Analogical Reasoning in Law, 66 U. Chi. L. Rev. 1179 (1999) (defending precedent-constrained reasoning even though the results of such reasoning “will sometimes be wrong”). See also Emily Sherwin, Legal Rules and Social Reform, 36 San Diego L. Rev. 455 (1999).

\textsuperscript{34}United States v. Locke, 471 U.S. 84 (1985).

\textsuperscript{35}See the unreported Vermont decision in Hunter v. Norman, described in Frederick Schauer, Formalism, 97 Yale L.J. 509 (1988).


\textsuperscript{37}See Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“in most matters it is more important that the applicable rule of law be settled than that it be settled right”); Larry Alexander & Emily Sherwin, The Rule of Rules: Morality, Rules, and the Dilemmas of Law (20001); Larry Alexander, Constrained By Precedent, 63 S. Cal. L. Rev. 3 (1989); Frederick Schauer, Precedent, 39 Stan. L. Rev. 571 (1987).
substantial quantity of securities, or whether the driver of some car had consumed alcohol prior to being involved in an accident. But these factual determinations, in the law, are typically precursors to a determination of what the law requires to be done on the basis of these facts, and what the law requires to be done is often, on this account, something other than that which a non-legal decision-maker would determine, all things considered, should be done. So although the legal system often has need of factual inquiry, it is precisely in moving from this factual inquiry to an action-producing consequence that legal reasoning potentially differs in fundamental ways from the reasoning of other action-producing agents. These other agents, we often think, are focused on producing the right decision for this decision-making event, but if the characteristic decision-making modality of law is different from the decision-making modalities of other domains, then legal reasoning and decision-making may be different as well. Legal reasoning, on this widespread account, is “artificial” not only because of the way in which it is deliberately not focused on reaching the fair or just or right decision for this case, but also because it both appears and is so different from the non-artificial practical reasoning in which non-lawyers ordinarily engage.

II. The Realist Challenge

Although a widely believed traditional conception of legal reasoning is consistent with the foregoing account, the descriptive accuracy of the traditional conception has hardly gone unchallenged. More particularly, an array of perspectives commonly collected under the heading of Legal Realism can best be understood as presenting not only a challenge to this particular

38For earlier works articulating this traditional account even more boldly than the various articles and other sources cited in the previous section, see, for example, Henry C. Black, Handbook on the Law of Judicial Precedents (1912); Rupert Cross and J.W. Harris, Precedent in English Law (4th ed., 1990); Eugene Wambaugh, The Study of Cases (2d ed., 1894); Glanville Ll. Williams, The Study of Law (11th ed., 1982); John R. Zane, German Legal Theory, 16 Mich. L. Rev. 287 (1918).

39Or, sometimes, American Legal Realism, not only in acknowledgment of its provenance, but also to distinguish it from the Logical Positivism-influenced and thus largely unrelated
conception of legal and judicial reasoning and decision-making, but also, and more germane here, a challenge to the view that judicial reasoning is substantially different from the reasoning of ordinary people. For the Realists, judges were less different from people in general, and from other public and private decision-makers, than the traditional “artificial reason” view maintained. Seen in this way, therefore, much of the existing research on the psychology of judging can be understood as incorporating an unexpressed -- and typically unresearched -- Legal Realist outlook on what judges do and how they do it.

The connection between Legal Realism and the psychology of judging can be traced to the earliest days of Realism. In *Law and the Modern Mind*, Jerome Frank, then in the aftermath of his own recent psychoanalysis, argued that it was essentially impossible for judges to engage in the kind of second-order decision-making then and now associated with the standard or classical account of legal reasoning. Frank argued that judges, like other human beings, invariably trained their attention on the facts and details of this particular case, and, moreover, unavoidably strove to make the best decision for this case and this dispute. Having done that,

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Scandinavian Realism of, for example, Axel Hägerström, Inquiries into the Nature of Law and Morals (1953); Anders Vilhelm Lundstedt, Legal Thinking Revised (1956); Karl Olivecrona, Law as Fact (2d ed. 1971); Alf Ross, On Law and Justice (1958).

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40 On Legal Realism generally, see Laura Kalman, Legal Realism at Yale, 1927-60 (1986); Wilfred E. Rumble, American Legal Realism: Skepticism, Reform, and the Judicial Process (1968). Many of the important articles in the Realist canon are collected in American Legal Realism (William W. Fisher III, Morton Horwitz, & Thomas A. Reed eds., 1983). There are different and competing conceptions of what ideas lay at the core of Realism, but I have no desire here to act as arbiter among the various claims of what Legal Realism was “really” all about. See Brian Leiter, American Legal Realism, in The Blackwell Guide to the Philosophy of Law and Legal Theory 50 (Martin P. Golding and William A. Edmundson eds., 2004). So although various Realists and their fellow travelers advanced a cluster of different claims all in the name of Legal Realism, it should be relatively uncontroversial that the particular part of Realism I stress in the text is at least among the positions advocated by some of the more prominent Realists.

41 Jerome Frank, Law and the Modern Mind (1930).
Frank insisted, the judges would then seek to find conventional legal materials – cases, statutes, regulations, constitutional provisions, maxims, canons, etc. – that would provide an ex post justification or rationalization for a decision reached uninfluenced by those materials. For Frank and others, the key challenges to the accuracy of the classical account lay first in the way in which they saw the actual focus of the judge not only initially but also ultimately as being on reaching the best result for the particular case, and, second, in the fact that the more general law was used by the judge not to produce a decision, but instead to justify after the fact a decision made on decidedly non-legal grounds.

Not all of what ordinarily rides under the banner of Legal Realism fits this mold. When Karl Llewellyn, for example, suggested that judges often made decisions based on rules that diverged from the rules that one would find in the law books, he was denying neither the possibility nor even the desirability of rule-based second-order decision-making. What he did deny, however, was the view that formal official written law provided the source for the actual rules that judges and other decision-makers employed in making their decisions. There were rules, or at the very least principles that exerted normative force and assured a degree of consistency in legal decision-making over time, Llewellyn agreed, but those rules and principles were derived from the judges own policy views and to some extent from the political and social and professional culture within which the judge operated, rather than from the law books or the

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43For a modern and somewhat more sophisticated version of this form of Realism, see Duncan Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. Legal Educ. 518 (1986).

decided cases.\textsuperscript{45}

Even for Llewellyn at times, as when he referred to the “power of the particular,” however, and for many of the other Realists far more pervasively, the challenge offered to the traditional or classical model of legal reasoning was a challenge to the possibility that judges could avoid what they saw as the best result for the case at hand in the service of other and larger law-based, rule-based, precedent-based, or process-based goals. In this regard, therefore, the Realists saw judges first and foremost as human beings,\textsuperscript{46} and saw the (natural) human desire to reach the best outcome for this case as the primary determinant of judicial behavior and judicial decision-making. What judges learned in law school or in practicing law might make some difference at the margins, and so too would the norms that judges internalized when they took on the role and duties of a judge, but these minor differences, most of the Realists insisted, were overshadowed by the particularistic proclivities that judges shared with their fellow human beings. And it is precisely in this respect that the bulk of the existing research on the psychology of judging, research that also sees the pervasively human characteristics of judges as the primary determinant of judicial behavior and judicial decisions, can best be understood as being comfortably at home with a Legal Realist outlook on adjudication in particular and on law more generally.

III. The Issue Joined

The contrast between Realist and traditional views of legal reasoning – between Frank and Coke, if you will – is an important window through which to view questions about the psychology of judging. And although I have stressed the contrast between Realist and traditional


\textsuperscript{46} See Herman Oliphant, \textit{A Return to Stare Decisis}, 14 A.B.A.J. 159 (1928) (“Judges are men and men respond to human situations.”).
views in terms of particularism and generality, or in terms of the distinction between first-order and second-order reasoning, my larger point is in fact dependent on neither of these distinctions. Rather, the central claim is that the Realists, or at least many of them, were concerned with challenging the larger view that there is something distinctive, or special, about legal reasoning. The traditional view, captured well by Coke’s appeal to artificiality, is that lawyers and judges are engaged in demonstrably different cognitive processes from other reasoners and decision-makers. And the Realist view, exemplified by Frank, is that the alleged cognitive differences between judges (or lawyers) and the rest of humanity are either non-existent or exaggerated, with judges engaged in forms of cognition not appreciably different from those of the human species in general, a species of which judges are of course a part.

If the Realists are right about the minimal differences between judges and the rest of us, then the psychology of judging is, simply, psychology, and what we can learn about the psychology of human cognition, human reasoning, human perception, and human decision-making will serve us well, with few changes necessary, in describing, predicting, and understanding the psychology of judging. But if the Realists are wrong, then, to oversimplify things, what the existing research tells us about how ordinary people use analogy will tell us little about how judges decide according to precedent, what the existing research tells us about how people make decisions will tell us little about how judges make decisions according to rules, and what the exiting research tells us about the sources of human decision-making will tell us little about how judges make decisions by following the dictates of even those authoritative sources with which they disagree.

At the very least, therefore, this contrast between the traditional account of legal reasoning and the Realist account suggests that there could, and arguably should, be a research program directed at answering the precise question of the extent to which, if at all, judges actually do engage in second-order reasoning and actually do refrain from reaching what they
believe to be the correct outcome in this case because of the perceived (or actual) constraints of precedent, rule, or authoritative source. Moreover, such a research program would train its attention not only on the hypothesis that judges engage in second-order reasoning, but also on the hypothesis that judicial second-order reasoning is either substantially more frequent or substantially more effective or substantially different from the second-order reasoning of non-judge decision-makers, even assuming that non-judge-decision-makers engage in second-order reasoning at all.

Even the foregoing sketch of a research program is far too crude, however. In addition to attempting to control for intelligence, education, motivation, and various other attributes that judges likely possess to a greater degree than the population at large, such a program would attempt to disaggregate the components of traditional second-order legal reasoning in order to determine whether a significant divide between judges and lay decision-makers existed for each of those components. When instructed to make a decision consistent with a previous decision with which they disagree – the central case of decision according to precedent\(^{47}\) – will judges follow the precedent and reach what they think is the wrong result now more often or differently from ordinary people assigned the same task? If told that the only sources on which they may rely are part of an artificially constricted array of sources and authorities that in this instance might support an erroneous result,\(^ {48}\) will judges limit their attention to this unfortunate array while the non-judges will not, or at least will judges do this to a greater extent than will the non-judges? If commanded to follow a bad rule or to follow a good rule that in this instance produces an unfortunate outcome, will judges much more than others simply follow the rule and swallow the unfortunate outcome? And if expected not to do the right thing because doing the

\(^{47}\text{See note 37, supra.}\)

right thing is in someone else’s jurisdiction or is someone else’s responsibility,\textsuperscript{49} will judges more than or differently from others remain passive in the face of the opportunity to do the right thing, or will they, like most others, treat jurisdictional and related limitations as inconsequential?\textsuperscript{50}

Even if such research were to indicate that judges really were different from lay people for some or all of these tasks, additional research would still be necessary in order to determine whether it was simply legal training that produced the difference, or whether it was something about the role of judge as judge. So we can imagine a research design that might, for example, assign similar tasks to judges, practicing lawyers, and law students, in order to determine whether an identified difference between judges and lay people was explained by some difference between judges and lawyers, or was explained instead by a difference between judges and lawyers and (advanced) law students, on the one hand, and those without legal training, on the other. And even more fine-grained research could explore attempt to locate differences even among classes of judges, as for example in the differences between elected and appointed judges, or between trial and appellate judges, or among judges with various different varieties of pre-judge backgrounds.

Numerous other hypotheses and research possibilities abound, but like the ones just sketched they would all identify a task other than fact-finding or verdict-rendering, and would

\textsuperscript{49}See Blanchflower v. Blanchflower, 834 A.2d 1010 (N.H. 2003) (concluding that same-sex adultery ought to constitute grounds for at-fault divorce, but that such a change was for the legislature and not the courts).

\textsuperscript{50}Consider in this regard the question of federalism. Although lawyers and judges spend much time wrestling with the respective jurisdictional competences of the federal government and the states, there is little indication that either the public or the political world that caters to that public takes the principles of federalism as constituting an independent second-order constraint on either the states or the federal government adopting what the public believes to be a desirable first-order policy.
then seek to determine whether for this task judges were genuinely different, either in outcome or in method, from some relevant non-judge class. An affirmative answer to this question would not, of course, exclude the likelihood of relevant similarities existing alongside the genuine differences. And that is why the existing research showing that judges are susceptible to many well-discussed cognitive failings and biases – anchoring and availability, for example – is arguably incomplete when we are investigating the psychology of judging. Even if judges when acting as finders of fact or when reaching verdicts are prone to all or most of these familiar reasoning failures, the question remains entirely open whether there are also areas in which judges think quite differently, even supposing that with respect to those areas judges would be similarly afflicted with the same or analogous cognitive deficiencies. The existing research tells us little about whether there are such areas of differential thinking, and, if so, what they look like, but until we can answer this question we cannot know whether the conclusions of Legal Realism are correct, and whether the hidden Legal Realist premises of the existing psychological research on judging are in fact sound.

IV. The Question of Expertise

Although a substantial psychological literature explores the nature of expertise and the way in which expert reasoning is different is different from that of novices, surprisingly little of

51 I bracket here the important debates about whether patterns of reasoning falling short of optimal or perfect rationality are better understood as desirable adaptive strategies (see Bounded Rationality: The Adaptive Toolbox (Gerd Gigerenzer & Reinhard Selten eds., 2001); Gerd Gigerenzer, Adaptive Thinking: Rationality in the Real World (2000); Gerd Gigerenzer et al., Simple Heuristics That Make Us Smart (1999)) or instead as potentially and correctable errors whose correction would, in general, be desirable (Judgment Under Uncertainty: Heuristics and Biases (Daniel Kahnemann, Paul Slovic & Amos Tversky eds., 1982); Daniel Kahnemann & Amos Tversky, Choices, Values, and Frames, 39 Am. Psychologist 341 (1984); Daniel Kahnemann & Amos Tversky, The Framing of Decisions and the Psychology of Choice, 211 Science 453 (1981).)

that literature appears very relevant to the question whether, if at all, judges reason in a significantly different way from ordinary folk. And this is because the overwhelming bulk of the psychological literature on expertise is focused on the question of comparative expertise within a single area of knowledge, rather than on the question, more germane to us here, of the hypothesized cognitive differences across different areas of knowledge. That is, the existing psychological research on expertise focuses on what experts at x do that novices at x do not, with almost none of it being focused on whether people who know how to x, whether expert or novices or somewhere in between, tackle problems and make decisions differently from people who do not know how to x at all, or from people who know only how to y, again regardless of whether they are expert or not.

Little research addresses the question of expertise in this way, and thus little research addresses what we might call specialization rather than expertise. Nevertheless, the specialization question is the one that is central when we are examining the psychology of judging. We could, of course, ask what experienced and expert fact-finders do that novice fact-finders do not, just as we could ask what experienced and expert judges do that novice judges do not. But if we are interested in testing the hypothesis that there is a psychology of judging that differs from the psychology of decision-making simpliciter, then what we want to compare, ideally, is whether there are some tasks that judges perform differently from other human beings just because they are judges. We know from the small amount of existing research on judging per se that there are some tasks - many aspects of fact-finding, principally – in which judges differ less from non-judges and non-lawyers than some of the conventional wisdom has appeared to suppose. But to take these findings, important as they are, as answering the central question about the psychology of judging is like imagining that because auto mechanics approach the finances of their own small business in the same way that psychiatrists approach the finances of

eds., 1988).
their own small businesses that auto mechanics are importantly similar to psychiatrists. That the two are similar with respect to accounting says nothing about whether they are similar with respect to fixing cars and fixing heads, and in much the same way the discovery that judges and jurors, or judges and people generally, are similar with respect to fact-finding avoids an important question if there is something else that judges do that their training and expertise, like that of the auto mechanic, might actually produce important differences with respect to a central part of their job.

If I am right, therefore, that an important component of the task of judging is something other than fact-finding – and that seems arguably true for trial judges and self-evident for appellate judges – then we can understand the importance of focusing on law-finding, law-applying, law-interpreting, and, yes, law-making, for these tasks are a big part of what judges do. But when judges perform these tasks, do they perform them in the same way that those without legal or judicial training or experience would approach these tasks, which is what many of the Legal Realists argued, or do they employ a significantly different skill set, to use an infelicitous and fashionable but not inappropriate term from contemporary management-speak? When it comes to tasks other than fact-finding, do judges think like human beings, or like lawyers, or like judges? Addressing this question should be one of the central items on a research agenda for the psychology of judging, but it is, perhaps surprisingly, an item that has been up to now almost completely absent.

V. Conclusion: The Is and the Ought

Jerome Frank understood the traditional claim about legal reasoning, but he argued that judges were not actually able to perform in the way that the traditional theory demanded.53 And

53It is interesting that when Jerome Frank became a federal judge, a role he occupied for a substantial period in the 1950s and 1960s, he wrote opinions that did not differ substantially in style from those of other more traditional judges. If one were looking for examples of Legal Realist judging, the opinions of Justice William O. Douglas would be much more likely
this suggests the importance of distinguishing three questions about second-order reasoning. The first, implicit in Frank’s perspective, is that people are naturally particularistic. When thinking about their plans and their goals, and most importantly when thinking about their tasks, they are inclined just because of the makeup of the human mind to think in terms of this task, and to be dispositionally prone to making the wrong decision on this occasion in the service of larger or more distant goals.

In this, Frank may well have been wrong. After all, delayed gratification is not something that is beyond the capacities of people, and there is more than a remote possibility that Frank’s speculations – and they were hardly more than that – about the raw material of human psychology were guided far less by psychological fact than by Frank’s own normative or prescriptive views about what lawyers and judges ought to be doing.

Even assuming that Frank was right about what we as humans start with, he may have nevertheless been unduly pessimistic about – and this is the second question -- the possibility that these antecedent particularistic instincts could be changed. So even if we as human animals are temperamentally – physiologically?; genetically? – averse to second-order reasoning, there is no reason to believe that this aversion is so hard-wired as to be incapable of change. Perhaps one form of education, including one form of moral education, is aimed, at least in part, at fostering various forms of second-order reasoning, and to the extent that such education is at times successful Frank and many of his compatriots may have given up too quickly on the possibility that anyone – and not only judges – can both grasp and perform the basic skills of reasoning from rules that one believes to be mistaken or to produce a poor result,\(^\text{54}\) of making decisions candidates.

\(^\text{54}\) On the divergence between a rule-generated result and the best all-things-considered decision, see Alexander & Sherwin, \textit{supra} note 37; Schauer, \textit{supra} note 28; Scott J. Shapiro, \textit{The Difference That Rules Make}, in \textit{Analyzing Law: New Essays in Legal Theory} 33 (Brian Bix ed.,
constrained by precedent thought by the present decision-maker to have been badly decided in
the first place, and of taking the believed-erroneous commands of an authority as nevertheless
providing reasons for action. And to the extent that humans in general can be taught to engage

55 This may be as good a place as any to point out the important difference, off-hand remarks in
the psychological analogy literature notwithstanding, between analogical reasoning and the legal
constraint of precedent. When people, including lawyers, see Levi, supra note 26; Weinreb,
supra note 26, seek to persuade others, or seek guidance in making a decision, they often rely on
analogies. They, like many others, believe that it can be desirable to follow some course of
action now because the present proposed course of action is similar to some course of action in
the past that has worked out successfully. Or they believe that it can be wise to avoid some
decision now because the circumstances of this decision resemble some of the circumstances
of the past in which a particular decision has produced unfortunate consequences. But in all such
instances the decision-maker is using the analogy (see Barbara A. Spellman & Keith J. Holyoak,
Pragmatics in Analogical Mapping, 31 Cognitive Psych. 307 (1996)) to assist in reaching the
correct decision now. The analogy is a tool, and in theory a friend.

The constraint of precedent in law, however, which is far from coextensive with lawyers’
use of analogical reasoning, is far more foe than friend. Having concluded that the right thing to
do now is to N, the lawyer or judge will sometimes find that N is precluded by some previous
decision, often a decision that the present judge thinks mistaken. But insofar as the constraint of
precedent actually constrains (which it likely does outside of hard Supreme Court cases far more
than it does in the Supreme Court, see Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court
and the Attitudinal Model Revisited (2002); Jeffrey A. Segal & Harold J. Spaeth, The Influence
of Stare Decisis on the Votes of United States Supreme Court Justices, 40 Am. J. Pol. Sci. 971
(1996)), then the judge is not looking for the analogy that helps, but instead seeking, often
unsuccessfully, to avoid the analogy that hurts. When Justice Lewis Powell in City of Akron v.
Akron Center for Reproductive Health, 462 U.S. 416 (1983) agreed to invalidate an abortion
restriction on the basis of a decision (Roe v. Wade, 410 U.S. 113 (1973)) with which he
disagreed, or when Justice Antonin Scalia similarly agrees to strike down some state laws on the
authority of a dormant commerce cause doctrinal structure with to which he profoundly objects
dissenting), they are feeling, and therefore being, constrained by precedent, rather than
employing past decisions or events to help inform and optimize their current decisions, and
rather than using past events to persuade others of a desirable course of action now. Whether
such constraint by precedent is desirable is itself debatable, as is the empirical question whether
it is frequent, and, if so, just how frequent. But the importance of these questions should not lead
us to think that being bound by a similar but erroneous decision from the past is very much
similar to choosing to be guided or persuaded by an analogous set of circumstances from an
earlier time.

56 See Heidi M. Hurd, Challenging Authority, 100 Yale L.J. 1611 (1991)(Hurd believes that it is
possible for judges and others to do this, but argues that morally commands them not to).
in such sub-optimizing (in the short term) second-order reasoning, then there would be no reason to believe that lawyers and judges could not be trained to do the same thing, and to do it more often, and to do it better. Implicit in the traditional picture of the artificial reason of the law, therefore, is a story about the possibility that this artificial reason, artificial precisely in its divergence from the ordinary reasoning of ordinary people, can be inculcated in and internalized by even those humans for which it would initially seem artificial.

Because Frank believed that human particularism was so hard-wired as to be unchangeable, he was never forced to reach the normative question. And because he believed that other human decision-making characteristics were equally hard-wired, he again was never compelled to consider whether it might be possible for judges to do, or to be trained to do, what he in fact believed they were not at the time doing. But if, unlike Frank, we assume that the basic tools of second-order reasoning are learnable, we must then face the question whether it would be a good thing for lawyers and judges to learn them. Weber sneered at his (erroneous, as a matter of Islamic law) image of the q'adi, making the best all-things considered for each case. But as some corners of contemporary philosophy, feminist theory, and legal theory, among others, have insisted, making decisions that optimize for the particular case – deciding things one case at a time – is supported by influential arguments, and has much to recommend it, even for those of us who in the final analysis see fewer virtues in particularism than do others. But the


59See Sunstein, supra note 21.

60See Schauer, supra note 18.
point here is not to rehearse these familiar debates. It is instead to point out that an inquiry into the possibility of judicial second-order reasoning -- an inquiry into one important but under-studied dimension of the psychology of judging -- is not only important as description and explanation of how judges behave and decide, but is also the precursor to a normative inquiry into how judges should behave and decide. Such inquiries dominate legal scholarship, often to the unfortunate exclusion of almost everything else, but they are hardly without import. But before we can intelligently decide what judges should do, we need to see both what they are doing and what they can do. This inquiry can be usefully informed by serious empirical inquiry into the psychology of judging, but little progress will be made even on this dimension until the empirical research agenda begins to take seriously the possibility that there might actually be a psychology of judging, a possibility that is surprisingly absent from virtually the entirety of the existing literature.