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Legal Realism, Common Courtesy, and Hypocrisy

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In the USA, courts are publicly defined by their distance from politics. Politics is said to be a matter of interest, competition, and compromise. Law, by contrast, is said to be a matter of principle and impartial reason. This distinction between courts and politics, though common, is also commonly doubted – and this raises difficult questions. How can the courts at once be in politics yet not be of politics? If the judiciary is mired in politics, how can one be sure that all the talk of law is not just mummery designed to disguise the pursuit of partisan interests? In one sense, an ambivalent public understanding of the courts and suspicions of judicial hypocrisy pose a threat to judicial and democratic legitimacy. Yet, in another sense, public ambivalence and suspected hypocrisy may actually open up space for the exercise of legal power. I illustrate and critique the enabling capacities of ambivalence and hypocrisy by drawing an analogy to common courtesy. *Law, Culture and the Humanities* 2005; 1: 75–102

I. Introduction

For scholars of law, the study of culture carries the promise of discovery. Those who have taken the cultural turn find a new world of legal relations open before them, stretching beyond the realm of judges, lawyers, and litigants. Soap operas, sitcoms, film, literature, religion, and science all become fresh sites for legal analysis. In turn, the new knowledge gathered in the broad fields of culture may be used to re-interpret practices in more conventional legal domains.¹

In this article, I will illustrate how cultural study may be used to develop new insights about the judicial process by examining the great American contribution to legal thought, legal realism. My specific aims are (i) to identify the public meaning given to legal realism in contemporary American discourse; (ii) to interpret legal realism's public meaning by

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1. For an early study in this vein, see Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective," in Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), pp. 167–234.

analogizing it to the American practice of common courtesy; and (iii) to elaborate and to critique the conception of legal power suggested by the courtesy analogy.

The story of legal realism's genesis and development in the USA is well documented.² As originally formulated during the early part of the twentieth century, legal realism exposed the role played by politics in judicial decision-making and, in doing so, called into question conventional efforts to anchor judicial power on a fixed, impartial foundation. The powerful realist rejection of objective judicial reasoning was subsequently taken up by a number of commentators. Yet the realist vision ultimately appeared incomplete. It left judges and jurists to confront the responsibilities of choice without the comforts of certainty. Legal realism painted a portrait of political judging and then failed to provide a persuasive explanation of how political courts could be fair arbiters of the law.

The notion that legal realists were unable to reckon with the consequences of their own critique has provoked academic debate over realism's account of judicial behavior.³ Should legal realism be accepted and the uncertain, contingent nature of a politicized judicial process embraced?⁴ Should legal realism be rejected and the unwavering legal basis of judicial action asserted?⁵ Or is judicial decision-making a blend of political ideology and legal commitments, too complex to be captured by either the abandonment or the acceptance of the realist creed?⁶

Although questions about the validity of legal realism as a theory of judicial behavior are at the center of academic debate, it is the public meaning ascribed to legal realism by legal actors and citizens that is the focus of my concern.⁷ In Sections II and III, I outline the basic conditions under which American courts currently operate and then examine the popular beliefs that

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2. Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington, Kentucky: University Press of Kentucky, 1973); Laura Kalman, *Legal Realism at Yale, 1927–1960* (Chapel Hill: University of North Carolina Press, 1986); Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992); John Henry Schegele, *American Legal Realism and Empirical Social Science* (Chapel Hill: University of North Carolina Press, 1995); and Neil Duxbury, *Patterns of American Jurisprudence* (New York: Oxford University Press, 1995).
 3. For a detailed overview of this debate's history, see Stephen M. Feldman, *American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage* (New York: Oxford University Press, 2000).
 4. See, e.g., Jeffrey A. Segal and Howard J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002).
 5. For the classic formulation of this position, see Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (1959), pp. 1–35.
 6. There is a growing political science literature organized around this view. The central claims and texts of this literature are usefully reviewed in Howard Gillman, "What's Law Got to Do With It? Judicial Behavioralists Test the 'Legal Model' of Judicial Decision Making," *Law and Social Inquiry* 26 (2001), pp. 465–504.
 7. This is not to say that public discourse and academic debate are or ever have been entirely separate. There are many links between the two – links that may often work to the disadvantage of academic debate. See Dorothy Ross, *The Origins of American Social Science* (New York: Cambridge University Press, 1991). My claim is that the public understanding of a claim may have its own social and political significance, even if some academics happen to think that the public understanding is wrong.

citizens have about judicial decision-making as well as the public claims that judges make about their own actions. At the level of public discourse, I find that the assertions of legal realism have neither been fully accepted nor completely rejected. On one hand, judges and citizens acknowledge that the judicial process is infused with politics; on the other hand, judges and citizens believe that judicial decisions are determined on nonpolitical, purely legal grounds. The American judiciary is said to be squarely situated *in* politics, yet it is not, somehow, thought to be entirely *of* politics.

I argue that the ambivalent public meaning of legal realism provides fertile ground for public suspicion. Since the political nature attributed to the judicial process often appears to be at odds with claims of judicial impartiality, it is natural to wonder whether judicial appeals to law are anything more than ad hoc rationalizations deployed to obscure private agendas. Of course, suspicions that a judge may be merely affecting a reliance on legal principle do not prove that judicial decision-making as a whole is hypocritical – nor, for that matter, do the suspicions prove that judicial decision-making is sincere. But suspicions of judicial hypocrisy are nonetheless worth taking seriously.

In one sense, public suspicions are important because they may threaten the legitimacy of the courts and the government more generally. Litigants may not respect court orders when they suspect that a judge is advancing a political agenda; more broadly, citizens may doubt the authority of government when they suspect a powerful institution is misrepresenting its manner of operation.

In a second, less obvious sense, public suspicions of judicial hypocrisy are important because they may be constitutive of, rather than detrimental to, the prevailing legal order. It is this second sense that is of primary interest to me in this article. In Sections IV–VI, I consider how ambivalent realism and its concomitant suspicions of hypocrisy may actually open up space for the exercise of legal power. I develop my position by making a comparison with the American practice of common courtesy. I argue that courtesy, as interpreted and advanced by the leading etiquette maven Miss Manners, not only is attended by suspicions of hypocrisy, but also purports to serve important social purposes *because of* the opportunities it presents for hypocrisy. I use Miss Manners' rendering of courtesy to draw an analogy with the public understanding of legal realism and to explore the idea that popular suspicions of judicial hypocrisy may actually be part of a distinct form of dispute management.

Just as the ambivalent public meaning of legal realism does not give us direct information about actual judicial motivation, the courtesy analogy does not prove that legal actors are devoted followers of Miss Manners nor does it prove that the judicial process is driven by willfully hypocritical participants. The strength of the courtesy analogy (to the extent it has any) is to be found in its analytical coherence and its capacity to generate new hypotheses about legal behavior. I argue that the courtesy analogy does indeed suggest several propositions: that legal actors will prize a kind of politeness in the judicial process; that litigants will be satisfied by courteous

treatment whether or not they win their case; that habit and pleasure will play central roles in the judicial process; that judicial decisions are unlikely to be conceptually deep and logically rigorous; and that a flexible practice of legal politesse will often be used to soften and manage conflict, thereby shielding larger inequalities and hierarchies from serious challenge. I elaborate each of these propositions and discuss the empirical evidence that lends them support.

II. Legal Realism in the State Courts

My examination of legal realism's public meaning begins in the winter of 2003. It was then that the *New York Times* announced the triumph of legal realism, "the jurisprudential philosophy that calls for a frank acknowledgement of the role politics and other real-world factors play in judicial decision-making."⁸

The announcement was occasioned by Justice Thomas Spargo's energetic participation in the political process. When campaigning for a New York town judgeship in 1999, Spargo handed out free cider and doughnuts, distributed coupons for free gas at a local convenience store, sent free pizzas to school teachers and government workers, and bought a round of drinks for everyone at a local watering hole.⁹ Once elected town justice, Spargo kept up his partisan activities by speaking at political fundraisers and, more famously, by participating in obstreperous protests at the Miami-Dade County Board of Elections, with "the aim of disrupting the recount process" after the 2000 presidential election.¹⁰ Spargo's political enthusiasm earned him a judicial promotion. In 2001, he was elected to the State Supreme Court in Albany County.

Spargo's politicking was less popular in other quarters. The New York State Commission on Judicial Conduct charged Spargo with violating the state rules governing judicial behavior. In response, Spargo filed suit claiming that the state code of judicial conduct was unconstitutional. The federal district court agreed. Applying the United States Supreme Court decision *Republican Party of Minnesota v. White*, the judge ruled that Spargo was free to be as politically active as he had been.¹¹ Thus, the *New York Times* was prompted to declare a conquest for legal realism, a victory for the notion that the office of judge is essentially political.

Interestingly enough, Spargo himself was among the first to call legal realism's triumph into question. Although he thought that the ruling was "absolutely good" because it freed judges to be more involved in the political life of their communities, he otherwise believed that the decision pushed a political understanding of the courts too far. "When people think

8. Adam Liptak, "Judges Mix with Politics," *New York Times*, February 22, 2003, pp. B1, B8.

9. *Spargo v. New York State Commission on Judicial Conduct*, 2003 U.S. Dist. LEXIS 2364, 16–22 (2003).

10. *Spargo* at 19.

11. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

of Tom Spargo,” Spargo said, “many would consider my reputation as a kind of partisan hack lawyer or Republican law expert. But when you get on the bench, then all that is behind you... [F]rankly, I have not had a political thought in any of the work that I’ve done as a judge.” It was one thing to acknowledge that politics played a part in judicial life, but it was altogether something else to argue that judicial decision-making was all politics. When it came to legal realism, Spargo seemed to suggest, it was best to accept a little bit, but not too much.¹²

Spargo’s ambivalent reaction to his own exoneration seemed hard to believe. How could he consistently lay claim to both the roles of politician and judge? He had assiduously courted voters through frankly political electioneering. On the basis of his behavior, one could easily infer that Spargo was a judge who could be counted on to represent the interests of his political supporters. Yet, if this were true, then Spargo had misled litigants and the general public by claiming to be unbiased. By trying to have it both ways, simultaneously playing partisan politics and claiming judicial impartiality, Spargo risked looking like a hypocrite: his courtroom behavior appeared to be an act, an effort to affect a degree of neutrality and open-mindedness which he did not possess. He claimed to give litigants a serious hearing, but his behavior suggested that he was just giving them the pretense of being heard.¹³

In principle, Spargo easily could have avoided landing in such a bind. He could have stuck to a single role and thus eliminated the appearance of hypocrisy. For example, he could have responded to his courtroom victory by insisting that judicial decision-making is a thoroughly political enterprise. The goal, Spargo might have claimed, is not to pretend that judges operate on the basis of neutral legal principles, but to recognize that judges are political actors with power over controversial policy questions. As a result, Spargo could have argued that open judicial politicking is a welcome sight. Vigorous judicial elections contested by aggressively political candidates allow voters to select and control the officials responsible for making legal policy. Reasoning along such lines, Spargo might have sincerely defended his actions as a critical contribution to democratic politics.¹⁴

Alternatively, Spargo could have denounced the claims of legal realism from the outset. He could have argued that although elected politicians are necessarily obligated to represent the voters who placed them in office, judges are only required to “represent the Law”.¹⁵ The job of the judge,

12. Al Baker, “Partisan Pit Bull, but Not on the Bench,” *New York Times*, 22 Feb, 2003, p. B8.

13. In other words, Spargo appeared to lack what H.L.A. Hart called an “internal” view of the law. See H.L.A. Hart, *The Concept of Law*, 2nd ed. (New York: Oxford University Press, 1994), pp. 56–57, 89–91.

14. Compare the similar argument made by Justice Scalia (*White* at 784). See also Judicial Elections White Paper Task Force (Michael Debow, Diane Brey, Eric Kaardal, John Soroko, Frank Strickland, Michael Wallace), “Judicial Selection White Papers: The Case for Partisan Judicial Elections,” *Toledo Law Review* 22 (2002), pp. 393–409.

15. *White* at 803, Justice Ginsburg dissenting, internal citations and quotation marks omitted. See also Terri Jennings Peretti, *In Defense of a Political Court* (Princeton: Princeton University Press, 1999), pp. 11–35. Richard A. Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* (Stanford: Stanford University Press, 1961), pp. 14–22.

Spargo might have claimed, is to reason strictly on the basis of legal principle, to assimilate each dispute before the court into a coherent legal order and to articulate a framework of rules capable of resolving the issue at hand and of regulating subsequent judicial decisions. Insisting that judges are bound by the law and rightly indifferent to popularity, Spargo could have run a low-key, nonpartisan campaign and muted his political participation once on the bench. Rather than being seen as a “partisan hack lawyer”, Spargo could have sincerely cultivated a reputation for independence and impartiality. He would have had no reason to contest charges leveled by the Commission on Judicial Conduct, since he would have never engaged in any judicially untoward actions in the first place.

And yet Spargo did not adopt either one of these alternative strategies. Instead of choosing between the roles of active politician and impartial judge, he clung to both and defended his behavior by arguing that judges are political actors – except when they are not.

The fact that Spargo staked his claim to conflicting political and judicial roles in a highly public fashion is unusual. But the circumstances that gave rise to Spargo’s behavior are hardly unique. The overwhelming majority of state appellate judges in the USA (an estimated 87% of appellate judges in 39 states) must, like Spargo, stand for election. In recent years, judicial elections in an number of states have come to resemble ordinary political elections more closely. Judicial campaigns have grown more expensive and have become more likely to attract the active participation of single-issue interest groups and political parties. As a result, candidates seeking judicial positions around the country must increasingly think about how to woo campaign donors, court constituencies, and craft a winning message. The Supreme Court’s decision in *White*, the ruling that struck down limits on judicial campaigning and served as the basis of Spargo’s legal victory, only promises to accelerate the prevailing trend.¹⁶

At the same time, judicial candidates who have successfully managed their political campaigns are widely expected to act in an unbiased, distinctly nonpartisan way once they are in office. Polls show that substantial majorities of Americans believe state courts should be shielded from politics and allowed to make decisions based on an independent reading of the law.¹⁷ Consistent with popular belief, an overwhelming majority of state judges report that the “making of impartial decisions” is one of the most important responsibilities they have.¹⁸ The expectation of non-partisan judicial behavior is so

16. G. Alan Tarr, “Rethinking the Selection of State Supreme Court Justices,” 39 *Willamette Law Review* 39 (2003), pp. 1445–70. Roy A. Schotland, “Should Judges be More Like Politicians?,” *Court Review* 39 (2002), pp. 8–11.

17. Greenberg, Quinlan, Rosner Research Inc., “Justice at Stake National Survey of American Voters, October 30 – November 7, 2001.” Visited 26 March 2004. <<http://faircourts.org/files/JASNationalSurveyResults.pdf>> See also Deborah L. Hensler, “Do We Need an Empirical Research Agenda on Judicial Independence?,” *Southern California Law Review* 72 (1999), pp. 710–14.

18. Greenberg, Quinlan, Rosner Research Inc., “Justice at Stake National Survey of State Judges, 5 Nov 2001 – 2 Jan 2002.” Visited 26 March 2004. <<http://faircourts.org/files/JASJudgesSurveyResults.pdf>>

broadly shared that the American Bar Association considers it to be an “enduring principle”. “Judges occupy the role of umpires in an adversarial system of justice; their credibility turns on their neutrality. To preserve their neutrality, they must neither prejudge matters that come before them, nor harbor bias for or against parties in those matters. They must, in short, be impartial, if we are to be governed by the rule of law rather than by judicial whim.”¹⁹

On the whole, then, state judges appear to be suspended between conventional expectations of impartial judicial conduct and the growing electoral necessity of shrewd political calculation and frankly partisan behavior. Whether or not they publicly agree with Justice Spargo, many state judges find themselves compelled to play the roles of savvy politician and neutral jurist, forced to act as if they believe in a bit of legal realism, but not too much. And, like Spargo, state judges attempting to straddle the divide between politics and law strain credulity. The political behavior of state judges calls into question their legal commitments, suggesting that the discussion of law in judicial decisions is merely a pose designed to disguise the pursuit of partisan interests. Such skepticism about the impartiality of state judges is hardly hypothetical. The same polling data that highlights broad public expectations of impartial, nonpartisan judicial decision-making also reveals significant public doubts about the degree to which judges actually stick to the law: 76% of voters surveyed report that the term “political” describes state judges either “well” or “very well.”²⁰

III. Legal Realism in the Federal Courts

Federal judges in the USA might be thought to escape the bind squeezing their state counterparts because federal judges need not stand for election. Once nominated by the President and confirmed by the Senate, federal judges, including Supreme Court Justices, hold office during good behavior – a requirement that effectively ensures life tenure on the bench.²¹ The Framers of the Constitution believed that such lengthy judicial terms would work to guarantee impartiality. Alexander Hamilton claimed, for example, that lifetime judicial tenure not only would erect “an excellent barrier to the encroachments and oppressions” of the legislature but also would shield the courts from those “ill humors” of the people that had the tendency “to occasion dangerous innovations in government, and serious oppressions of the minor party in the community.” The grant of lifetime tenure to federal judges was, Hamilton

19. American Bar Association Commission on the 21st Century Judiciary, “Justice in Jeopardy, July 2003, 11.” Visited 26 March 2004. <<http://www.manningproductions.com/ABA263/finalreport.pdf>>

20. Greenberg, et al., “Survey of American Voters.” See also Hensler, “Do We Need an Empirical Agenda on Judicial Independence?”

21. *Constitution of the United States*, Art. III, sec. 1.

insisted, “the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws”.²² There would appear to be neither the need nor the opportunity for Spargo-style politicking here.

But the Framers’ view of lifetime judicial tenure was seriously questioned in its own day. Opponents of the Constitution feared the political power which could be wielded by permanently ensconced members of the Supreme Court: “independent of the people, of the legislature, and of every power under heaven,” the justices were ultimately bound to “feel themselves independent of heaven itself”.²³ Anti-federalists worried that lifetime tenure, rather than guaranteeing impartiality, would create vast opportunities for judicial elites to pursue their own interests under the guise of unbiased adjudication.

The Anti-federalists’ basic concern – that the law, on its own, would be insufficient to constrain the political reach of judges – is essentially the same concern that sustains contemporary doubts about the politicking of state appellate judges.²⁴ After all, if there were a stable, widely-shared consensus on how judges should interpret the law, then the mere fact of judicial election would not in itself pose a problem; it would be easy to tell whether or not a judge was behaving impartially once on the bench. Yet there appears to be little such consensus on legal interpretation today, at least with regard to the politically-charged constitutional disputes that make up an important component of the state and federal docket. Rather than a clear notion of what the law requires in such hard cases, we have a proliferation of diverse legal arguments covering the entire spectrum of policy alternatives. As Sanford Levinson has observed, “American constitutional lawyers, whether practitioners, academics, or judges, seem to feel relatively few genuine constraints in the kinds of arguments they are willing to make or endorse. It is, I am convinced, harder to recognize a ‘frivolous argument’ in constitutional law than in any other area of legal analysis.”²⁵ Spargo’s protestations of impartiality seem so difficult to believe precisely because we lack broad agreement about what constitutes faithful legal interpretation in contentious cases. If the law is open to divergent renderings that favor different political camps, how can one

22. Alexander Hamilton, “Federalist Paper No. 78,” in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, Clinton Rossiter, ed. (New York: Mentor, 1961), pp. 465, 469. On the Federalists generally, see Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (New York: Norton, 1972).

23. “Essays of Brutus” in *The Anti-Federalist*, Herbert Storing, ed., (Chicago: University of Chicago Press, 1985), p. 183. On the Anti-federalists generally, see Cecelia Kenyon, “Introduction,” in Cecelia Kenyon, ed., *The Anti-federalists* (Indianapolis, IN: Bobbs-Merrill, 1966); and Herbert J. Storing (with the editorial assistance of Murray Dry), *What the Anti-federalists Were For: The Political Thought of the Opponents of the Constitution* (Chicago: University of Chicago Press, 1981).

24. Tarr, “State Supreme Court Justices,” pp. 1459–60.

25. Sanford Levinson, “*Bush v. Gore* and the French Revolution: A Tentative List of Some Early Lessons,” *Law and Contemporary Problems* 65 (2002), p. 11.

really be sure that any judge has not “had a political thought” since joining the bench?²⁶

As this question suggests, federal judges, though spared the political demands of election, may nonetheless be plagued by the suspicion that they harbor political motives. Indeed, the notion that federal judges are political actors is not only a suspicion permitted by the openness of the law but also an inference positively encouraged by the process of judicial appointment. The selection of Supreme Court Justices today is a highly politicized affair, with elected officials intentionally picking nominees in order to advance issues of importance to political parties and prominent interest groups.²⁷ The selection of judges for lower federal courts typically generates less drama and receives less press coverage than Supreme Court appointments. Even so, lower federal court appointments are shot through with political considerations. Judicial nominations are routinely delayed and occasionally derailed as partisans compete for control over the selection process and attempt to fill the lower federal courts with ideologically congenial appointees.²⁸

The identification of federal judges with politics does not stop with confirmation. The media regularly identifies federal judges by the president who nominated them and consistently tags judges as either “liberal” or “conservative”, implicitly suggesting that judicial actions are best understood as a form of partisan policymaking.²⁹ The political insinuations purveyed by the media are reinforced by the practice of judicial decision-making, particularly at the level of the Supreme Court. The number of politically controversial cases on the Supreme Court’s docket has increased over time and the level of discord among the justices has skyrocketed along with it. Over 80% of the full opinions announced by the Supreme Court in the 1920s were unanimous; by the final years of the twentieth century, less than 30% of the full opinions were joined by all the justices. The high degree of disagreement does not project an image of the Court as an impartial arbiter settling individual disputes by enunciating fixed and certain principles of law. On the contrary, the high incidence of dissent makes the Court look more like a fractious political body squabbling over

26. To put this differently, the lack of agreement over legal interpretation makes it difficult for judges to credibly transfer responsibility for their decisions to the impersonal requirements of legal principle. Interpretive dissensus thus makes the judiciary look more political. On the link between popular perceptions of judicial legitimacy and the courts’ capacity to pin decisions on “the law”, see James L. Gibson, Gregory A. Caldeira, and Vanessa Baird, “On the Legitimacy of National High Courts”, *American Political Science Review* 92 (1998), pp. 343–58.

27. Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Confirmations* (New York: W.W. Norton, 1994).

28. Sarah Binder and Forrest Maltzman, “Senatorial Delay in Confirming Federal Judges,” *American Journal of Political Science* 46 (2002), pp. 190–99. Tajuana D. Massie, Thomas G. Hansford, and Donald Songer, “The Timing of Presidential Nominations to the Lower Federal Courts,” *Political Research Quarterly* 57 (2004), pp. 145–54.

29. Rorie L. Spill and Zoe M. Oxley, “Philosopher Kings or Political Actors? How the Media Portray the Supreme Court,” *Judicature* 87 (July–August 2003), pp. 23–29. For a critique of media practice, see Ruth Bader Ginsburg, “Speaking in a Judicial Voice,” *67 New York University Law Review* 67 (1992), pp. 1191–92.

governance of the legal system.³⁰ When the Court regularly decides hotly contested cases by closely divided votes, often featuring stinging dissents, it is little wonder that the media casts Court decisions in partisan terms.

The public nonetheless demands that federal judges, like state judges, be neutral arbiters of the law. Federal judges are conventionally expected to apply the law independently and impartially; the judge who uses her office to advance narrow ideological interests is generally considered to be unworthy of the public's confidence.³¹ Federal courts are legitimate because they are understood to secure due process and equal protection for all. The Supreme Court in particular enjoys large reservoirs of public goodwill because it is thought to be a general guarantor of basic democratic values.³²

All of this leaves federal judges boxed into a version of the same predicament that bedevils so many state judges. On the one hand, federal judges are subject to highly political processes of selection, have partisan affiliations routinely underscored by the media, work with legal materials open to conflicting political interpretations, and, at the level of the Supreme Court, commonly bicker with one another when deciding politically controversial cases. On the other hand, federal judges, including Supreme Court Justices, are conventionally expected to reach their decisions through the impartial application of pre-existing legal principles without depending on political ideology or preference. Thus, federal judges, like state judges, seem to play both political and legal roles, appearing to confirm and to refute the claims of legal realism as they go about their business.

The evidence suggests that members of the federal bench alternate between political and legal roles no more credibly than state judges. A substantial portion of the public believes that the Supreme Court operates with too little regard for either legal principles or impartiality. National surveys find over 40% of respondents agreeing that the Court "favors some groups" and is "too mixed up in politics".³³ For many members of the public, the legal ritual and rhetoric of the Court looks like a sideshow; it is politics, pure and simple, that seems to hold center stage.

30. Robert Post, "The Supreme Court Opinion as an Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court," *Minnesota Law Review* 85 (2001), pp. 1267–1390.

31. John M. Scheb II and William Lyons, "Judicial Behavior and Public Opinion: Popular Expectations Regarding Factors that Influence Supreme Court Decisions," *Political Behavior* 23 (2001), pp. 181–94; American Bar Association, "Justice in Jeopardy".

32. Gregory A. Caldeira and James L. Gibson, "The Etiology of Public Support for the Supreme Court," *American Political Science Review* 36 (1992), pp. 635–64; James L. Gibson, Gregory A. Caldeira, and Lester Kenyatta Spence, "Measuring Attitudes Toward the United States Supreme Court," *American Journal of Political Science* 47 (2003), pp. 354–76.

33. Gibson, et al., "Measuring Attitudes," p. 358; Scheb and Lyons, "Judicial Behavior", pp. 184–90. For specific discussion of how opinion elites and African Americans evaluate the Supreme Court in bluntly political terms, see Caldeira and Gibson, "Etiology of Public Support," pp. 655–58; and James L. Gibson and Gregory A. Caldeira, "Blacks and the United States Supreme Court: Models of Diffuse Support," *The Journal of Politics* 54 (1992), pp. 1120–45.

It is not unusual to find federal judges responding to such political skepticism by tearing a page out of Justice Spargo's playbook: they insist that their decisions, contrary to appearances, are entirely free of political concerns. One day after the Supreme Court decided *Bush v. Gore*, for example, Justice Clarence Thomas met with a group of high school students touring the Court building and announced that "I have yet to hear any discussion, in nine years, of partisan politics" among members of the Court.³⁴ Of course, an observer looking in on the Court might be tempted to see *Bush v. Gore* as an example of partisan politics. The five most conservative members of the Court (among them Justice Thomas) had stopped the recount process and handed the presidency to the conservative Republican candidate George W. Bush. The Court majority based its ruling on a novel constitutional claim that seemed to have been invented solely for the purposes of the case at hand – a fact that only heightened the appearance of partisanship. Justice Thomas nonetheless urged his audience to disregard appearances. "I plead with you that, whatever you do, don't try to apply the rules of the political world to this institution; they do not apply. The last political act we engage in is confirmation".³⁵ Justice Spargo could not have said it better himself.

In spite of all this, not all legal scholars agree that the appearance of judicial politics and the claims of principled reason are actually in conflict. Some scholars argue that the federal judge is a specific kind of political actor, committed to the "high politics" of "consistent ideological policy making" rather than to the "low politics" of "mere partisan favoritism". The high politics of judicial decision-making is not at odds with the legal character of the courts, in part because high politics itself is a principled competition between contending values and in part because governing majorities intentionally place judges on the bench in order to practice high politics from the outset. Law is not opposed to high politics; it is high politics and everyone knows it. A judicial vote cast on the basis of political values "is not merely the arbitrary expression of a justice's idiosyncratic views but rather is the expression and vindication of those views deliberately planted on courts by voters or policy-conscious legislators, governors, and presidents".³⁶

There is undoubtedly some truth to the distinction between high and low politics, but the introduction of this distinction does not really resolve the conflict between the judiciary's legal and political dimensions. As

34. *Bush v. Gore*, 531 U.S. 98 (2000). Linda Greenhouse, "The 43rd President: Another Kind of Bitter Split," *New York Times*, 14 Dec 2000, p. A1. For an example of similar remarks from a lower federal judge, see John M. Walker, Jr., "Current Threats to Judicial Independence and Appropriate Responses: A Presentation to the American Bar Association," *St. John's Journal of Legal Commentary* 12 (1996), pp. 45–58.

35. Greenhouse, "The 43rd President," p. A1.

36. Howard Gillman, *The Votes that Counted: How the Court Decided the 2000 Presidential Election* (Chicago: University of Chicago Press, 2001), pp. 6–7, internal citations and quotes removed. See also Peretti, *Political Court*.

I have noted, political partisans do frequently compete to install ideological fellow travelers on the bench. Yet once in office judges do not ordinarily style their decisions as expressions of political commitment, high or low. Whatever political factors may be at work in judicial decision-making, the typical judicial opinion presents itself as a declaration of what the law is. Judges do not describe or justify their votes in political terms, nor does the general public expect them to do so. Judges do not say, “I was put on this court because I am a conservative person who believes affirmative action programs should be dismantled and that is what I intend to do.” Instead, they say “affirmative action is unconstitutional”. Judges lay claims to impartiality, neutrality, independence, and legal principle to demonstrate that they have acted without regard to politics, not to indicate that judicial decision-making is a special form of politics. The problem is, of course, that such judicial claims are quite often difficult to believe.³⁷

IV. Legal Realism: Dead and Alive

I have argued that a substantial portion of the American public expects its judges to resolve disputes by reasoning impartially on the basis of legal principles, and that American judges regularly explain their decisions in terms consistent with public expectations of impartiality. At the same time, a substantial portion of the American public believes that the judicial process is permeated with politics, a belief that seems to be amply supported by the country’s highly political mechanisms of judicial selection and by the regular disagreement among judges handling politically charged cases. In public discourse, legal realism would appear to be both dead and alive.

I have suggested that the contradictory public meaning of legal realism creates the appearance of hypocrisy, stoking suspicions that judges may be affecting an air of legal impartiality in order to disguise the pursuit of political goals. Of course, the suspicion of judicial hypocrisy and actuality of judicial hypocrisy are not the same things. The former may or may not be indicative of the latter; without more direct information about how particular judges judge particular cases, one cannot say whether popular suspicions of hypocrisy accurately identify judges whom instrumentally

37. Martin Shapiro puts it this way: “If the [losing litigant] does not specifically consent in advance to the norm [governing his case], he must be convinced that the legal rule imposed on him did not favor his opponent. Thus the yearning for neutral principles of law found among contemporary lawyers. And if he did not consent to the judge he must be convinced that judicial office itself ensures that the judge is not an ally of his opponent. Thus the yearning for a professional and independent judiciary. Yet it is frequently difficult or impossible to convince the loser of these very things. . . . [As a result] contemporary courts are involved in a permanent crisis because they have moved very far along the routes of law and office from the basic consensual triad that provides their essential social logic.” See *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), p. 8. See also Patricia Ewick and Susan Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998), pp. 223–50.

deploy legal principles in order to advance political objectives or whether these suspicions misread judges whom sincerely grapple with a complex set of competing legal and political commitments. What one can say is that there will often be (regardless of actual judicial motivations in any given contentious case) lingering public doubt about the ability of judges to live up to their professed standards of impartial adjudication.³⁸

Such public suspicions are worth taking seriously, in part because they pose potential problems for judicial legitimacy. As Martin Shapiro has argued, disputing parties have always appealed to courts on the belief that judges are neutral between litigants.³⁹ When litigants doubt the neutrality of judges, defeat in court may look less like the rendering of justice than like the victorious litigant and the judge ganging up against the losing party.⁴⁰ Suspicions of judicial hypocrisy may thus discourage individual litigants from using and obeying the courts – and the effects of such suspicions may not stop there. Democratic government in general depends on the capacity of citizens to evaluate and control the performance of public officials. To the extent that citizens suspect judges of misrepresenting the way in which they arrive at their decisions, citizens may believe that they lack the information necessary to assess the operation of a powerful institution.⁴¹ This perception may lead the citizenry to doubt the trustworthiness of the government in general.

To think about suspicions of judicial hypocrisy in this way is to direct attention to the behavior of ordinary citizens and to emphasize the threats that such suspicions may pose for existing authorities. This is a sensible approach: the suspicions in question are public (and thus likely to tell us something about public behavior) and hypocrisy is broadly understood to

38. This does not mean that the contradictory meaning of legal realism will only or always generate suspicions of hypocrisy. Contradictory beliefs may be resolved into various kinds of stories that confer different legal meanings. See Ewick and Silbey, *Common Place*. My claim is that suspicion is one common consequence of an ambivalent public understanding, not that it is the only possible consequence.

39. Shapiro, *Courts*, pp. 1–64.

40. The Supreme Court appears not to have fully appreciated this problem in *White*, the decision that proved to be so useful for Spargo's defense of enthusiastic judicial politicking. Although judicial candidates may engage in highly political bids to win popular election or legislative confirmation, the *White* Court ruled that such activity poses no threat to judicial impartiality. Viewed in the context of the public suspicions I have discussed, this formal distinction between positions taken on the campaign trail and decisions rendered in court would appear to underestimate levels of public doubt about judicial impartiality. Indeed, the validity of this distinction was questioned by a majority of the Court. The four dissenters, joining two opinions written by Justices Ginsburg and Stevens, argued that politically unfettered judicial elections fostered the damaging impression that judges reach their decisions in court without paying serious attention to the specific arguments in the dispute at hand. Concerned that "the very practice of electing judges" undermined the government's compelling interest in an "actual and perceived" impartial judiciary, O'Connor made a case in her concurring opinion for banning judicial elections outright (*White* at 788). And, in his concurrence, Justice Kennedy supported judicial elections because he idealistically believed that such elections could be transformed into entirely nonpolitical affairs, not because he thought politically contentious elections would leave claims of judicial impartiality unscathed (*White* at 795–96).

41. Compare Dennis F. Thompson, "Hypocrisy and Democracy," in Bernard Yack, ed., *Liberalism Without Illusions: Essays on Liberal Theory and the Political Vision of Judith Shklar* (Chicago: University of Chicago Press, 1996), pp. 173–90.

be a pejorative term (and thus likely to be applied to undesirable behavior). Clearly, public suspicions of judicial hypocrisy must be countered if courts are to function as politically viable arenas of dispute resolution.

Yet I would argue that there is also another way of thinking about public suspicions of judicial hypocrisy, a way that directs attention to the behavior of legal actors and emphasizes how such suspicions may actually feed into a particular legal order.⁴² This is not to deny that suspicions of hypocrisy may threaten judicial legitimacy and must be countered. But it is to say that courts may also depend on the possibility of hypocrisy and, as a consequence, the mitigation of public suspicions will have its limits. For the judicial process, the possibility of hypocrisy may be both poison and cure.

The alternative approach I am describing flows directly from the work of other scholars. Political theorists Judith Shklar and Ruth Grant have each called for an expanded understanding of political hypocrisy.⁴³ Although they acknowledge the political dangers of hypocrisy, Shklar and Grant both argue that the costs of eliminating hypocrisy are likely to outweigh the dangers of its existence. Moreover, and more provocatively, they both claim that hypocrisy may actually play a critical role in making democratic politics possible. By implication, one could argue that the suspicions of judicial hypocrisy generated by the ambivalent public understanding of legal realism may represent substantially more than a threat to the status quo.

In the following two sections, I will examine how an enlarged view of hypocrisy's functions might be used to shed new light on the exercise of legal power. Can such an examination be undertaken without more direct evidence about judicial motivation? According to Judge Richard Posner, theories of legal behavior need not be built up from primary data on motivation in order to be useful.⁴⁴ When modeling the behavior of federal

42. I am not the first to claim that the ambivalent state of legal realism may ultimately sustain the current legal system. It has been argued that the contradictory state of legal realism is engineered by a legal elite in order to strengthen the elite's dominion over a docile public (John Brigham and Christine B. Harrington, "Realism and Its Consequences: An Inquiry into Contemporary Sociological Research," *International Journal of the Sociology of Law* 17 (1989), pp. 41–62). As will become clear below, my argument (and especially my critique of "courteous" legal power) shares some common elements with the argument made by Brigham and Harrington. But, in my view, Brigham and Harrington underemphasize the fact that the mixed legal and political dimensions of American judicial practice are widely acknowledged by judges and citizens alike. The task is to explain how the skew in legal power persists in the teeth of very public suspicions about judicial impartiality.

43. Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, 1964), p. x; Judith N. Shklar, *Ordinary Vices* (Cambridge: The Belknap Press of Harvard University, 1984), pp. 45–86; and Ruth W. Grant, *Hypocrisy and Integrity: Machiavelli, Rousseau, and the Ethics of Politics* (Chicago: University of Chicago Press, 1987). My approach differs from that of Shklar and Grant because I focus primarily on law and draw extended analogies to the American practice of courtesy.

44. Richard A. Posner, "What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)," *Supreme Court Economic Review* 3 (1993), pp. 1–41. Posner is not alone in taking this approach. Most rational choice scholars proceed in the same way.

judges, Posner explicitly disconnects his argument from direct information about actual judicial motivations, including information gleaned from his own experience.⁴⁵ He simply asserts an understanding of judicial behavior and then measures the value of his assertion by its capacity to generate new, empirically verifiable propositions about the judicial process. I follow Posner's lead below and stipulate that the public suspicions of hypocrisy reflect the real possibility that judges may behave hypocritically.⁴⁶

I recognize that scholars remain divided over the question of whether judges instrumentally manipulate the law or whether judges base their decision-making (at least in part) on sincere commitments drawn from the law itself.⁴⁷

45. Posner writes, "I doubt that *any* judge subjectively experiences his work in the way modeled in this article. I know I do not." See "What do Judges Maximize?," p.4, footnote 6, emphasis original. The distance Posner places between his theory and primary data on judicial motivation may also reflect the fact that the particular motives he ascribes to judges (desires for income and leisure, and the pleasures of playing the judicial game) would be difficult to verify directly (see Frederick Schauer, "Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior," *University of Cincinnati Law Review* 68 (2000), pp. 615–36). Similarly, we should expect that it would be difficult to verify acts of judicial hypocrisy. Since the law is wide open to different partisan interpretations in contentious constitutional cases, it will often be difficult to prove conclusively that a presiding judge is being insincere. This is not to say that judicial hypocrisy cannot ever be demonstrated (see Gillman, *Votes that Counted*). But it is to say that suspicions of judicial hypocrisy often will not be definitively confirmed.

46. The similarities between our arguments go beyond method. Posner, like me, attempts to illuminate judicial behavior by drawing analogies from non-judicial domains (we do, however, analogize from different practices: where I look at common courtesy, he examines the management of nonprofit enterprises, voting, the watching of theatrical performances, and the playing of games). Moreover, Posner and I rely on our analogies to arrive at some of the same claims. We both call into question the quality and importance of the reasoning in judicial opinions; we both call attention to the pleasures of framing disputes in legal terms; and we both argue that legal actors use the law to create a kind of alternative reality that provides refuge from the hard conflicts of social and political life. Nonetheless, my argument diverges from Posner's in critical respects. Posner acknowledges that judges have great discretionary power, but he denies that they use this power to advance political objectives because, like serious chess players, judges are completely engrossed with "certain self-limiting rules that define the 'game' of judging" ("What do Judges Maximize?," p. 28). The "suspicious layman" might suppose that judges sometimes advance their political goals through the law, but Posner considers this to be a form of "cheating" that would deny connoisseurs the pleasures of the judicial gamesmanship (pp. 28–29). I am not persuaded that the suspicions of the layman can so easily be set aside. As I have noted, there is little consensus on what constitutes faithful legal interpretation in contentious cases and, as a result, the law is open to a wide variety of renderings that favor different political camps. Thus, contrary to Posner, I would argue that the judicial "game" appears to be far more flexible and porous than the game of chess, and is therefore more likely to give the impression that it is subject to all sorts of influences outside the established rules. In other words, I would argue that in many iterations of the judicial game "playing by the rules" and "cheating" closely resemble one another. In any event, since Posner himself believes that judges should base their decisions on ideas of efficiency external to the law, he is ultimately forced to qualify his argument in a way that allows judges to import politics into their decision-making. "When a really new case arises," Posner writes, "the rules of the judicial game require the judge to act the part of legislator and therefore vote his values, although the rules do not require and may even forbid him to acknowledge that this is what he is doing" (p. 40). This qualification moves Posner away from his original position and closer to mine, though he still does not critique (as I do) the kind of legal power that is made possible by judicial "gaming".

47. See Gillman, "What's Law Got to Do With It?". For an interesting effort to resolve this debate on the basis of cognitive psychology, see Dan Simon, "A Third View of the Black Box: Cognitive Coherence in Legal Decision Making," *University of Chicago Law Review* 71 (2004), pp. 511–586.

Moreover, I have acknowledged that my account of public suspicions does not yield the direct data on motivations necessary to render definitive judgments about judicial authenticity or the lack thereof. But neither of these factors prohibit me from asserting the possibility of judicial hypocrisy as a working premise. On the contrary, one might say that my assertion is permitted by the divisions in scholarly debate and encouraged by the presence of public suspicions. The proof of the pudding, in any case, will be whether my approach leads to interesting propositions about legal behavior.

V. Hypocrisy and Common Courtesy

To begin to understand how suspicions of judicial hypocrisy may be bound up with a form of legal power, it is helpful to draw an analogy between the ambivalent public understanding of legal realism and the American practice of common courtesy, exemplified by the work of syndicated columnist and pre-eminent etiquette guru Judith Martin, known to her readers as Miss Manners.

Why use courtesy as an analogy for understanding law? To start with, courtesy, like law, is a rule-based system. Much of courtesy is made up by detailed rules of etiquette designed to govern a wide array of social situations. Indeed, courtesy handbooks and guides are literally crammed with the specific procedural dictates of etiquette covering everything from table manners (“Don’t encircle your plate with your arm”) to grieving the loss of a loved one (“One cannot refuse an invitation to be a pallbearer except for illness or absence from the city”).⁴⁸ Taken as a whole, the rules of etiquette form a prescriptive system that is recognizably law-like. Miss Manners puts it this way:

Both the law and etiquette provide rules for the promotion of communal harmony, according to the principles of morality and manners, respectively. The law addresses the most serious conflicts, including those threatening life, limb, and property, and dispenses such fierce sanctions as fines, imprisonment, and loss of life for the violation of its rules. With only the sanction of shame at its command, etiquette addresses conflicts for which voluntary compliance is generally attainable, and thus serves to avert antagonisms that might escalate into violations of law. In this respect, etiquette resembles international law, which seeks to avert war, but has only the sanction of shame with which to enforce its rules upon sovereign states.⁴⁹

It can be debated whether courtesy or law makes for a more efficient system of rules. Miss Manners argues, for example, that courtesy’s lack of

48. Elizabeth L. Post, *Emily Post on Etiquette* (New York: Harper & Row, 1987), pp. 18, 73. In general, see the long list of publications offered by the Emily Post Institute. <<http://www.emilypost.com/>>

49. Judith Martin, “The World’s Oldest Virtue,” *First Things* 33 (1993), p. 24.

institutional centralization gives it distinct advantages over law, allowing the rules of etiquette to be easily and continuously applied in a wide variety of settings without the formality, expense, or conflict of a court proceeding. Although the “sanction of shame” may appear to be a weak mechanism for enforcing courtesy, Miss Manners insists that shaming is actually quite effective – perhaps because her own “look of disapproval has been known to sizzle bacon.”⁵⁰ Contrary to Miss Manners, one could argue that the absence of centralization and coercive enforcement make courtesy inferior to the law. After all, Miss Manners herself often laments the boorish behavior of people who prefer to “act naturally” rather than politely, who stubbornly adhere to the retrograde courtesy codes of a bygone era, or who wish to invent their own personal “style” of manners. The existence of such behavior keeps Miss Manners busily employed wagging her finger at various offenders, but perhaps fewer people would behave discourteously in the first place if the rules of etiquette were promulgated by central institutions and backed by state force.⁵¹

Whatever one thinks about the relative efficiency of courtesy and law, however, there is a basic similarity between the two rule-based systems that is, for my purposes, of primary interest. The practice of courtesy as rendered by Miss Manners, like the legal practice of the American bench as represented in public discourse, is constantly dogged by charges of hypocrisy. Courteous behavior may reflect genuine personal decency or it merely may reflect the desire to appear genuinely decent; the truly gracious soul and the unrepentant rogue may both be unfailingly polite. It is therefore difficult to tell when courtesy is actually meant and when it is just being faked. As Miss Manners points out, courtesy can easily be used instrumentally and it often seems to be the case that “really mean people get the advantage of practicing ingratiating behavior.”⁵²

How does the practice of courtesy manage to soldier on under the constant threat of hypocrisy? Miss Manners has a ready answer: courtesy does not survive in spite of hypocrisy, but because of hypocrisy. Hypocrisy is essential to courtesy’s success, Miss Manners argues, because people are often separated by sharply conflicting opinions and interests. To know another person is not to love him. To argue that people can get along easily if they just get to know one another “trivializes intellectual, emotional, and spiritual convictions by characterizing any difference between one person’s and another’s as no more than a simple misunderstanding, easily resolved by frank exchanges or orchestrated ‘encounters’.”⁵³ It is the hypocrisy of courtesy – the insistence that individuals conform to an artificial code of decent behavior whether or not they actually like or respect one another – that makes social peace and smooth interaction possible, without

50. Judith Martin, *Miss Manners Rescues Civilization From Sexual Harassment, Frivolous Lawsuits, Dissing, and Other Lapses of Civility* (New York: Crown Publishers, 1996), p. 32.

51. For a general comparison between law and other rule-based systems, see Hart, *Concept of Law*.

52. Martin, *Rescues Civilization*, p. 15.

53. Judith Martin, *Common Courtesy: In Which Miss Manners Solves the Problem that Baffled Mr. Jefferson* (New York: Atheneum, 1985), p. 12.

unrealistically attempting to reconcile stubborn conflicts and without romantically wishing away deep differences. For Miss Manners, sincerity has far less promise of securing social co-ordination. When people do not agree, any public policy that begins with a call for honesty in human relations is likely to end with citizens shouting at each other in the streets. We are better off if we simply ask people to act politely. “It turns out”, Miss Manners writes, “that dear old hypocrisy, inhibitions and artificiality, daintily wrapped in a package called etiquette, were protecting us from forms of natural behavior that even the most vehement opponents of etiquette find intolerable.”⁵⁴

According to Miss Manners, then, it is the possibility of hypocrisy that makes courtesy into an indispensable social lubricant. Within the ideal world of true intimates, where there is perfect compatibility, hypocritical posturing would be destructive. But in actual society, where there is mutual dependence and conflicting interests, hypocritical behavior helps “false friends” make collectively useful arrangements without requiring deep agreement or genuine affinity.⁵⁵ Lord Chesterfield, the great eighteenth-century champion of courtesy who shared many of Miss Manners’ views, saw the same beneficial dynamic in the early practice of politesse among European aristocrats. Chesterfield argued that royal courts “are, unquestionably, the seats of politeness and good-breeding; were they not so, they would be the seats of slaughter and desolation. Those who now smile upon and embrace, would affront and stab each other, if manners did not interpose; but ambition and avarice, the two prevailing passions at courts, found dissimulation more effectual than violence; and dissimulation introduced the habit of politeness.”⁵⁶ The difference between Chesterfield’s court and Miss Manners’ America would seem to be a simple matter of scope.⁵⁷ Once popularized and spread beyond the ruling classes, the courtesies originally developed to pacify relations among courtiers now help democratic citizens get along.

Miss Manners’ account of courtesy may sound as if it is entirely grounded in considerations of utility, but she insists that it is not. If individuals valued courtesy solely because it helped enlist the co-operation of others, then they would stop being courteous the moment a more promising mode of behavior recommended itself. Good manners therefore cannot be merely a matter of self-control for the sake of self-advancement. Individuals must feel

54. Martin, *Rescues Civilization*, pp. 22–23.

55. Grant, *Hypocrisy and Integrity*, pp. 20–21. For a comprehensive account of how the rise of civilized manners is bound up with increasing social and political interdependence, see the following by Norbert Elias: *The History of Manners*, Vol. 1 of *The Civilizing Process*, trans. Edmund Jephcott (New York: Urizen, 1978, originally published 1939); *Power and Civility*, Vol. II of *The Civilizing Process*, trans. Edmund Jephcott (New York: Pantheon, 1982, originally published 1939); and *The Court Society*, trans. Edmund Jephcott (New York: Pantheon, 1983, originally published 1969). I will have more to say about Elias below.

56. Lord Chesterfield, *Letters*, ed. David Roberts (New York: Cambridge University Press, 1992), p. 144.

57. As I argue below, this appearance is misleading and illustrates a serious difficulty with patterning the judicial process after courtesy.

some kind of normative attachment to being polite if courtesy is to be widely and consistently observed.⁵⁸ “True, the polite approach usually does work better than the rude one when the goal is to change people’s minds, but Miss Manners can’t guarantee it”, Miss Manners writes. “Even if she could make that guarantee, though, Miss Manners wouldn’t want to bribe people to be polite. She believes they should be polite simply because it is the right thing to do. She believes that it is the moral choice.”⁵⁹

Politeness is a kind of moral choice, but it is not a matter of ethics. Miss Manners steadfastly maintains that manners and morals are distinct. Individuals may be tempted to call down moral condemnation on transgressions of etiquette, but Miss Manners contends that manners strictly “pertain to the outer person” and morals “belong in such interior realms as the conscience and the soul.”⁶⁰ Intentions matter a great deal in morality and they hardly matter at all in manners. A person performing a moral action for the wrong reasons is considered to be immoral. By contrast, a person acting courteously is considered to be courteous regardless of her motives – and that is why courtesy is decried for being hypocritical. And yet Miss Manners claims that courtesy has a moral dimension. The dictates of etiquette should be followed when they are convenient as well as when they are not.

How can courtesy acquire a moral dimension without actually being moral? In part, Miss Manners argues that courtesy achieves its “oughtness” through sheer habit. Courtesy is “best taught at the start of life, when learning without conviction is easiest.”⁶¹ Children should not be persuaded to be polite. They should be habituated to courteous behavior through a prolonged program of repetition enforced by the inflexible say-so of parents. The continuous drill of courtesy lessons during childhood produces adults who are disposed to follow the conventions of etiquette and who can be shamed whenever they stray from the path of courtesy. Adults schooled in courtesy need not be truly virtuous; they are committed to particular forms of conduct and need not actually accept the substantive notions of concern and respect behind these forms. It may be, of course, that the practice of polite conduct will occasionally encourage the development of genuine virtue. It may be that “if you write enough thank-you letters, you may actually come to feel a flicker of gratitude.” But the habit of courtesy is, at base, a habit of action. Manners provide a routine for negotiating social interaction, for putting “a decent cover over ugly feelings” while generally leaving the feelings themselves intact.⁶²

58. Also, since courtesy is enforced through disapproval, courtesy will not be consistently and widely observed unless feelings of shame are possible in all social interactions. See Elias, *Manners*, pp. 137–38.

59. Martin, *Rescues Civilization*, p. 82.

60. Martin, *Common Courtesy*, p. 9.

61. Martin, *Rescues Civilization*, p. 318.

62. Martin, *Common Courtesy*, pp. 11–12. For an extended meditation on the possibility of becoming what one pretends to be, see William Ian Miller, *Faking It* (New York: Cambridge University Press, 2003).

The sense that one ought to be polite stems not only from habit, but also from pleasure. Miss Manners' books and columns radiate the obvious joy she takes in being well-mannered, as do the writings of Miss Manners' eighteenth-century counterpart, Lord Chesterfield. Indeed, Chesterfield went to some length to make the importance of pleasure plain. He linked the courtesies employed in royal courts to the gratification of ambition and avarice, as I have already noted. More generally, Chesterfield linked courtesy to the satisfaction of self-love. A "mistaken self-love" is harmful, Chesterfield conceded, because it induces individuals to "take the immediate and indiscriminate gratification of a passion, or appetite, for real happiness." Yet the sensible indulgence of self-love is the defining characteristic of polite society. "If a man has a mind to be thought wiser, and a woman handsomer, than they really are, their error is a comfortable one to themselves, and an innocent one with regard to other people; and I would rather make them my friends by indulging them in it, than my enemies by endeavoring (and that to no purpose) to undeceive them." It is no use lamenting that self-love drives people to place so much stock in such shallow talk, for the "world is taken by the outside of things, and we must take the world as it is; you or I cannot set it right." Besides, the way of the world makes the pleasures of politeness available to everyone. The reciprocal practice of courtesy allows all to appease the vanities of each, binding the heart of every individual in polite society to the conventions of good manners. Thus, it is not only useful to be polite, but it also positively feels like the right thing to do. "Pleasing in company", Chesterfield noted, "is the only way of being pleased in it yourself."⁶³

VI. Hypocrisy and Legal Courtesy

My reading of Miss Manners suggests that the American practice of courtesy is rooted in habit, sustained by self-love, and always open to hypocrisy.⁶⁴ Taken as a whole, courtesy is structured to manage (rather than to ignore or alter) the stubborn facts of human disagreement and difference. In order for people to get along, it is unnecessary for interests to coincide or

63. Chesterfield, *Letters*, pp. 90, 61, 185, 88. Chesterfield traced his outlook to La Rochefoucauld, but antecedents can also be found in the writings of Machiavelli and of Guicciardini. See Francesco Guicciardini, *Maxims and Reflections (Ricordi)*, trans. Mario Domandi (Philadelphia: University of Pennsylvania Press, 1965). For a discussion of Machiavelli along these lines, see Grant, *Hypocrisy*, pp. 18–56. As Grant notes, an additional pleasure of hypocrisy (whether in courtesy or in politics more generally) is that it allows us to feel as if our public actions are governed by a meaningful moral code when it actually would be impossible to conduct public life on a strictly moral basis without improving the foundations of human nature.

64. It is worth emphasizing that in saying courtesy is open to hypocrisy I am not saying courtesy is only used by hypocrites. As I have mentioned, politeness may be the authentic expression of a gracious nature. Moreover, the existence of an agreed-upon code of courtesy provides a ready means for granting respect and giving praise to truly deserving individuals. My point is not to deny that courtesy is important for people of goodwill and genuine virtue, but rather to argue (i) that this is not the only set of people for whom courtesy is important; and (ii) that the overall operation of courtesy cannot be understood if we think of it simply as the way nice people treat one another.

for good feelings to prevail; courtesy works to secure social co-ordination so long as people are polite. Courtesy works, in other words, by allowing everyone a chance to engage in hypocritical behavior for the sake of mutually advantageous arrangements.

If one were to project a vision of the American judicial process based on the foregoing rendering of courtesy, what would one expect to see? At the most general level, one would expect to see legal reasoning presented as a method of handling endemic political conflicts. For disputes to be managed, it would not be necessary for individuals to check their political commitments at the courthouse door nor would it be necessary to haul political partisans before a judge so that they could be joyfully reconciled. Without requiring political conflict to be sequestered or transformed, law would work as a means of dispute management so long as all parties continued to argue in legal terms. Law, like courtesy, would be an artificial medium in which otherwise opposed parties could jointly find a means of moving on. From this perspective, the possibility of hypocrisy (defined as the opportunity to put distance between the political roots of a conflict and the conflict's courtroom rendering) would not be an aberration in legal reasoning so much as a basic condition of its operation. Everyone, including the judge, would be given the chance to be insincere in order to produce mutually useful arrangements. Indeed, it would be because legal actors are not always required to mean what they say that the judicial system would effectively process conflict and disagreement.

This conception of the judicial process is consistent with an ambivalent public understanding of legal realism and associated suspicions of hypocrisy. If patterned after the practice of courtesy, the judicial process would simultaneously allow room to acknowledge that judges are steeped in politics and to expect that judges reason impartially on the basis of legal principles. The expectation that judges enact the impartial rule of law would not necessarily cancel out the political views that judges (or other legal actors) bring into court any more than the expectation that people be polite would cancel out underlying differences of belief and opinion. Political interest and legal impartiality would co-exist in the same system – a fact that would naturally lead people to suspect that the law is open to instrumental manipulation. Although such suspicions would chip away at judicial legitimacy, they would also point to the very mechanism that allows legal actors to proceed when the cacophony of political views would otherwise defeat efforts to process disputes in mutually useful ways. The possibility of hypocrisy would at once threaten judicial legitimacy and permit the courts to function.

The correspondence between a courtesy-based conception of the judicial process and legal realism's ambivalent public meaning lends my analogizing plausibility. Of course, this correspondence may not be too surprising, since I initially appealed to courtesy on the grounds that it spawned suspicions similar to those generated by realism's ambivalences.

But, if we drill down more deeply, the analogy from courtesy yields additional propositions about legal behavior.

The basic assertion of the courtesy analogy is that judges will seek ways of accommodating litigant interests without necessarily altering the fundamental conflicts that gave rise to the legal dispute. Rather than emphasizing conceptual depth or logical rigor, the courtesy analogy simply requires judicial decisions to be thin. Disagreement is taken to be an irreducible element of free society; as a result, conflict is not to be finally resolved, but only to be more or less successfully managed.

Several claims are implicit in the courtesy analogy's basic assertion. First, for the assertion to have force, judges must attempt to accommodate litigant interests in a "courteously thin" fashion. Secondly, litigants must accept the courteous decisions that courts offer. And, thirdly, it must be the case that the root disagreements otherwise left untouched by courteous judicial action *should be* left untouched.

In my view, the first two of these claims are plausible and empirically valid; together they paint a portrait of soft legal power that not only appeals to habit and pleasure but also purports to serve the needs of judges and citizens alike.⁶⁵ The third claim – that courteous judicial decisions rightly ignore deeper conflicts – is mistaken, though it may well seem reasonable to many participants in the judicial process. The soft power of a courtesy-based court system does not leave well enough alone; on the contrary, it tends to insulate larger inequalities of power from serious legal challenge.

Let me begin with the first claim that judges will accommodate litigant interests and do so courteously. As I have indicated, state and federal judges in the USA possess sharply conflicting views of the law that certainly appear to be anchored in conflicting political commitments. These conditions give birth to the suspicion that law and legal principle may be set aside by political judges bent on advancing their own agendas. Such suspicions, as I have also indicated, place a claim on judicial attention because judges, regardless of political inclination, can do little if courts are not viewed as legitimate. Thus, before a judge may use the law for her own purposes, she must ensure that recalcitrant, politically-divided parties are willing to bring their disputes before the court and obey its rulings. Judges must win co-operation and acceptance from citizens; they must find ways of structuring judicial decision-making and judicial decisions to elicit the consent of contending parties.

Judges therefore have a strong incentive to accommodate litigants – and there are several reasons to believe that their accommodations are

65. I have developed several of these ideas elsewhere. See Keith J. Bybee, "The Liberal Arts, Legal Scholarship, and the Democratic Critique of Judicial Power," in *Legal Scholarship in the Liberal Arts*, Austin Sarat, ed. (Ithaca: Cornell University Press, 2004), pp. 41–68; and "The Political Significance of Legal Ambiguity: The Case of Affirmative Action," *Law & Society Review* 34 (2000), pp. 263–90.

often “thin” in the way that the courtesy analogy would require. First, evidence suggests that the effort to accommodate litigant interests limits judicial leeway to pursue political preferences without altogether removing it. At some level, it always remains possible to use law as a pose, as a cover that can be manipulated by legal actors to mask political commitments. This is the possibility that I have discussed at the level of American public discourse, but other scholars have identified this possibility in judicial practices across countries and across history.⁶⁶ These findings suggest that adjudication can often be flexibly adapted to serve political purposes; like courtesy, law can always be kept on the surface.

Secondly, it is clear that many American legal actors positively value courtesy. Since the late 1980s, “civility codes” have been developed and formally adopted by at least 41 separate bar associations, including the American Bar Association, and by nine different courts, including the Supreme Courts of Utah and Wisconsin, and the Seventh Circuit Court of Appeals.⁶⁷ The practice of legal civility has been actively promoted by the American Inns of Courts, a national legal association with 325 chapters and over 75,000 active and alumni members.⁶⁸ The importance of legal civility has also been publicly endorsed by two of the justices currently sitting on the United States Supreme Court.⁶⁹ Moreover, legal civility has been discussed in terms that would be familiar to any of *Miss Manners’* readers. Critics have decried the artificiality of legal civility, arguing that it can all too easily be manipulated by selfish “slicksters”.⁷⁰ In response, legal “civilitarians” have emphasized the importance of utility by presenting civility as a means for efficiently facilitating

66. See, e.g., Shapiro, *Courts*.

67. My tally undoubtedly undercounts the number of civility codes. To my knowledge, the most comprehensive list of professional codes for lawyers and judges is maintained by the American Bar Association (ABA Website. Visited 30 July 2004. <<http://www.abanet.org/cpr/profcodes.html>>). The ABA list is incomplete. It does not include, for example, the civility code adopted by the Utah Supreme Court in 2003 (Utah State Courts Website. Visited 30 July 2004. <<http://www.utcourts.gov/courts/sup/civility.htm>>); the civility code adopted by the Boston Bar Association in 1997 (see Cathleen Cavell, “Please Please Me: Voluntary Civility Standards for Lawyers.” Massachusetts Government Website. Visited 30 July 2004. <<http://www.mass.gov/obcbo/please.htm>>); and the civility code adopted by a federal district court in *Dondi Properties Corp. v. Commerce Savings & Loan Ass’n*, 121 F.R.D. 284 (N.D.Tex.1988) – see Committee on Civility of the Seventh Federal Judicial Circuit, “Interim Report,” April 1991, reprinted in 143 F.R.D. 371, 414–15. Moreover, I have compiled the bulk of my tally from the ABA list by examining the titles of the professional codes. It is likely that many bar associations and courts with civility codes have appended these codes to existing standards of professional conduct that do not themselves mention “civility” or “courtesy” in their titles.

68. <<http://www.innsocourt.org/>> Visited 30 July 2004. In 1992, the most recent year for which I could find specific figures on judicial membership, one-quarter of all federal judges and more than 500 state judges were active members of an American Inn of Court chapter (Seventh Circuit, “Interim Report,” pp. 413–14).

69. See Paul L. Friedman, “Taking the High Road: Civility, Judicial Independence, and the Rule of Law,” *New York University Annual Survey of Law* 58 (2001), pp. 187–202; and Ginsburg, “Judicial Voice”.

70. See, e.g., Joseph N. Hosteny, “Civility or Honesty? Which Should You Choose?,” *Intellectual Property Today* (January 2002), pp. 18–19.

interactions between legal adversaries. Civilitarians have also emphasized the importance of habit by urging law schools and law firms to expose their newest recruits to civility training. And they have emphasized the importance of pleasure by contrasting the quiet comforts of professional courtesy with the misery and frustration of “Rambo-style” litigation.⁷¹

Indeed, evidence indicates not only that many legal actors positively value courtesy, but also that courts actually manage to arrive at courteous accommodations much of the time. Scholars have found that American judges often produce fragmented and incomplete decisions rather than sweeping statements of principle. Instead of being models of well-specified justification, judicial opinions often appear to be piecemeal, ramshackle affairs cobbled together to dispose of the case at hand. The ambiguities and inconsistencies of such opinions mean that the bulk of any given dispute often goes unaddressed. Thus, in many instances, the key judicial decision is to leave matters undecided. Cass Sunstein, the leading scholar in this area, argues that such “minimalist” judicial decisions serve the “great goal” of a free society: to make agreement possible when agreement is necessary, and to make agreement unnecessary when it is impossible.⁷² Miss Manners might simply say that these decisions are “polite”.

Do litigants find courteous judicial actions acceptable? Evidence suggests that they often do. The ambiguous, incomplete judicial opinion itself invites litigant compliance.⁷³ By failing to articulate the entire principled basis of a decision or by offering a compromise ruling, a judge can simultaneously recognize the conflicting claims of both litigants, even as she ultimately rules in favor of one party over the other. No one is likely to be entirely satisfied with the result and, considered as devices for securing deep consensus or as exercises in principled logic, ambiguous judicial decisions are rightly deemed failures. Yet, by leaving many dimensions of the dispute open and the principled underpinning of the opinion under-developed, ambiguous decisions reward victorious litigants with less than they might have won and divest defeated litigants of less than they might have lost. Both winner and loser might have done better, but they also could have done worse. Moreover, both winner and loser are left with a flexible legal framework that over time can be invoked to meet different demands and adapted to address developing disputes.

71. See Seventh Circuit, “Interim Report”; Committee on Civility of the Seventh Federal Judicial Circuit, “Final Report”, June 1992, reprinted in 143 F.R.D 441; and Friedman, “Civility”. The term “civilitarian” comes from Randall Kennedy, “The Case Against Civility”, *The American Prospect* 9 (1 Nov 1998 – 1 Dec 1998). Available at American Prospect Website. Visited 30 July 2004. <<http://www.prospect.org/print/V9/41/kennedy-r.html>>

72. Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999), p. 50. See also Edward Levi, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1949).

73. Shapiro, *Courts*; Sunstein, *One Case*.

Independent of the attractions found in ambiguous judicial decisions, litigants may be satisfied simply when the judicial process treats them with courtesy and respect.⁷⁴ In part, litigants weigh the quality of treatment heavily because popular culture has habituated them to basic ideas of decency and fairness. Litigants carry their ideas of decent treatment into court and expect their ideas to be confirmed, even if the judge's ultimate decision is not in their favor. The quality of treatment also matters for reasons of pleasure. To be treated with courtesy and respect by a court is to be given the gratification of being recognized as a rights-bearing individual with equal standing in the community of citizens. Litigants often care less about controlling the judicial process than about how that process goes about assigning and confirming their status.

The evidence I have reviewed thus far suggests that basic assertion of courtesy analogy is empirically valid. Broadly speaking, the judicial process does seem to produce politely thin decisions that litigants accept. Yet the larger normative question remains: Is such a judicial process desirable? Reasoning from Miss Manners' conception of courtesy, one would most likely say yes. Without naïvely hoping to alter the recalcitrant differences of interest and opinion that divide us from one another, the judicial process attempts to facilitate the making of mutually-beneficial arrangements. We should celebrate the fact that the hard conflicts of life can often be softened and rendered tractable by the language of legal politesse. Contending claims that cannot be courteously expressed are best not expressed at all.

Yet there are a number of reasons to reject this complacent conclusion. Within the terms of Miss Manners' own approach, it is not clear that the reign of legal courtesy will always be benign. Miss Manners links the practice of courtesy to habit and pleasure, for example, but there is no guarantee that prevailing habits or preferred pleasures will serve collective interests. Law schools train thousands of students every year to "think like a lawyer" by re-framing issues in terms of legal argument, but it is questionable whether a habitual reliance on legal terms provides the most fruitful way of framing problems and formulating policies.⁷⁵ Similarly, many

74. Tom R. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990); Tom R. Tyler and Yuen J. Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (New York: Russell Sage Foundation, 2002). Individuals weigh the quality of treatment most heavily when evaluating their direct experiences in court, but the quality of treatment also informs more general evaluations of court performance (Tyler and Huo, *Trust in Law*, pp. 177–97). When looking beyond the favorability of outcomes, it is important to note that the quality of treatment is not the only factor influencing individual acceptance of (and satisfaction with) judicial decisions. Individuals also rely on inferences about judicial motives and, to a lesser extent, on more general societal beliefs about legitimacy and community. Inferences about motive and the quality of treatment each have a distinct impact on individual evaluations (Tyler and Huo, *Trust in Law*, pp. 76, 193–94). The importance of motive underscores a point I have already made: in one sense, suspicions of hypocrisy are always detrimental to courts and must be mitigated if the judiciary is to be effective.

75. Donald L. Horowitz, *The Courts and Social Policy* (Washington, D.C.: Brookings, 1977); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991); and Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994).

Americans may be gratified by having their day in court, but it is debatable whether the desire to experience the supposed “majesty of the law” promotes a beneficial relationship to the judiciary.⁷⁶

If one moves beyond the terms of Miss Manners’ approach, the pitfalls of legal courtesy come into even sharper focus. Miss Manners’ writings usefully illuminate the particulars of American courtesy, but others have studied the evolution and operation of manners more systematically, and their work calls attention to larger dynamics that are barely visible from Miss Manners’ more parochial position. Norbert Elias, for example, has traced the development of European manners from the early middle ages to the mid-twentieth century.⁷⁷ Like Miss Manners, Elias takes etiquette to be a self-conscious molding of conduct necessary to make co-ordinated social action possible. Yet Elias also differs from Miss Manners in crucial respects. Elias argues that civilized manners are inextricably tied to the development of the modern state: in order to understand the finely-calibrated, comprehensive controls that constitute civilized conduct, the growth of state-centric chains of social interdependence must be charted and the rise of state monopolies over taxation and violence must be documented. Courtesy is not the handiwork of generic individuals confronted with the general problem of co-ordinating their action; instead, it is the consequence and hallmark of a particular political order. On Elias’s terms, then, it is misleading to suggest that the only differences between Miss Manners and her eighteenth-century counterpart Lord Chesterfield are differences of degree. Moreover, it is inaccurate to assume that courtesy necessarily facilitates accommodations among equals. Codes of courtesy mark off and counter-pose the groups that comprise a given polity, providing a means of reinforcing existing hierarchies across classes. Courteous accommodations are mutual but they are by no means perfectly symmetric.

76. Ewick and Silbey, *Common Place*. The fact that courtesy may be collectively problematic does not mean that it is not beneficial for select groups. Indeed, as Elias notes (*Court Society*, pp. 78–104), etiquette may become preposterously burdensome and still serve the interests of ruling elites.

77. Elias, *Manners; Power and Civility; Court Society*. Just as Elias gives us a more comprehensive diachronic account of manners, Erving Goffman provides a more comprehensive synchronic account. See *The Presentation of Self in Everyday Life* (Garden City, NY: Doubleday Anchor Books, 1959). Like Miss Manners, Goffman views courtesy as a kind of working consensus, a thin agreement about the terms of interaction that will be honored, rather than an expression of authentic graciousness (p. 175). But Goffman also complicates the distinction between sincerity and hypocrisy. Goffman does not specifically link sincerity or hypocrisy to the performance of any given role; instead, he argues that there are natural cycles from sincerity to cynicism (and back again) associated with the performance of many different roles (pp. 17–21). More provocatively, Goffman resists easy distinctions between the “reality” of sincere action and the “artificiality” of hypocrisy. The common sense tendency is to see the honest performance of a role as an “unintentional product of the individual’s unself-conscious response to the facts of his situation” and to see the false performance as merely contrived (p. 70). This common sense tendency is part of the “ideology” of the honest performance: it buttresses the notion that a person actually is who she presents herself to be. But for Goffman, the key fact is that honest performance and the false performance are both performances. It is misleading to say one is more “real” than the other; both are fragile efforts to control the definition of a situation by selectively emphasizing preferred information. By closing the distance between sincerity and hypocrisy, Goffman strengthens Miss Manners’ claims by democratizing them, suggesting that we are all performers constantly involved in the production and management of impressions.

All of this suggests that a courtesy-based judicial process would manage disputes in a way that protects and sustains prevailing distributions of power. Evidence appears to bear out this suggestion. The civility codes that have been instituted around the country, for example, have been explicitly deployed as defensive measures against a growing number of lawyers and judges with new interests contrary to the time-honored values of the profession.⁷⁸ The problem is not that the judicial process literally could not be run on the basis of these new interests, but that a judicial process so constituted would allocate institutional resources differently and would no longer be “civil”.⁷⁹ Legal courtesy promises to lift judges, lawyers, and litigants above the fray of contending interests in order to make available new opportunities for dispute settlement. But legal courtesy is not neutral; it is organized around a specific order and dedicated to keeping people in their proper place. Although the specific mechanism is different, the end result is one that has been confirmed by three decades of sociolegal scholarship: the individualized processing of discrete legal conflicts yields systematically skewed results.⁸⁰

VII. Conclusion

When public expectations of impartial judicial behavior are placed alongside public observations of judicial politics, the practice of judicial

78. In the case of lawyers, the perceived new interest is in winning at all costs and making as much money as possible; in the case of judges, the perceived new interest is in making one’s personal views prevail in written opinions (thus it is not the proliferation of judicial dissents *per se* that is a threat to civility, but the unvarnished manner in which dissents are expressed). See Seventh Circuit, “Interim Report” and “Final Report”. See also Ginsburg, “Judicial Voice”.

79. Indeed, Justice Spargo’s open politicking (i.e., his attempt to speak what most judges leave unspoken) can be understood as a challenge to prevailing modes of judicial civility. From the perspective of current standards, a bench filled with Spargos would be unacceptably “rude”. The same dynamic is evident in contemporary efforts to maintain civility in Congress. Since 1997, members of Congress have openly worried about declining legislative civility and attempted to address the problem by commissioning studies, holding hearings, and convening bipartisan retreats. Observers have linked the decline to a shift in political commitments away from specific government institutions and toward personal re-election efforts and perpetual campaigning. Congress has grown less civil, in other words, because members of Congress increasingly practice a different kind of politics. See “Civility in the House of Representatives – Transcript,” 17 Apr 1997 and 1 May 1997”. United States House of Representatives Website. Visited 30 July 2004. <<http://www.house.gov/rules>> Kathleen Hall Jamieson, “Civility in the House of Representatives – Executive Summary, March 1997”. United States House of Representatives Website. Visited 30 July 2004. <<http://www.house.gov/rules/jami01.htm>> Kathleen Hall Jamieson and Erika Falk, “Civility in the House of Representatives: An Update.”; “Civility in the House of Representatives: The 105th Congress.”; “Civility in the House of Representatives: The 106th Congress.” Annenberg Public Policy Center Website. Visited 30 July 2004. <<http://www.appcpenn.org/pubs.htm>> For additional arguments that link civility to a particular political order, see Kennedy, “Against Civility” and Virginia Sapiro, “Considering Political Civility Historically: A Case Study of the United States”, unpublished conference paper, Annual Meeting of the International Society for Political Psychology, Amsterdam, The Netherlands, July 1999.

80. See Marc Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change,” *Law and Society Review* 9 (1974), pp. 95–160 and the essays collected in Herbert M. Kritzer and Susan Silbey, eds., *In Litigation: Do The “Haves” Still Come Out Ahead?* (Stanford: Stanford University Press, 2003).

decision-making becomes suspect: it looks as if judges are merely affecting a fidelity to legal principles as they pursue their own goals. Working from the premise that such suspicions may reflect the actual possibility of hypocritical behavior, I have analogized the judicial process to the practice of common courtesy. I have suggested that the possibility of hypocrisy, in either courteous conversation or formal adjudication, permits mutual arrangements to be made without attempting to alter stubborn differences. At the same time, I have suggested that courteously thin accommodations, whether achieved in polite society or in court, may be employed to sustain existing hierarchies.

If my argument is correct, then the possibility of hypocrisy should not only be seen as a threat to judicial and democratic legitimacy, but also a basic feature of the judicial process with its own distinctive set of uses. Judicial decisions should consequently be assessed for the ways in which they attempt to craft courteous accommodations – an assessment that requires detailed attention to the imperatives of judicial legitimacy, the value of ambiguous judicial opinions, the role of legal habit, the seductiveness of law’s pleasures, and the maintenance of unequal power.

It is true that not every judicial action can be classified as a courteous *modus vivendi* for disputing litigants. American courts do occasionally issue sweeping, substantive decisions that give a decisive victory to one party and may even redistribute power to groups at the bottom of the political order. Such decisions contravene the conventions of legal politesse; indeed, they may be said to have greater power precisely because they are transgressive, just as a blunt remark takes on greater force when it is uttered in polite company. Yet to be transgressive is not necessarily to be permanently destabilizing. If courtesy remains the judicial norm, then sweeping rulings may ultimately be evaluated by their capacity to establish new terms on which both the pursuit of mutual accommodations and the protection of prevailing inequalities may continue.

Whether or not a given judicial decision clearly falls into the category of courteous accommodations, the detailed assessment of specific judicial actions is the work of future articles. In this article, I have outlined an analytical framework consistent with the public meaning of legal realism and informed by leading understandings of common courtesy. To my mind, this analytical framework, as well as the propositions about legal behavior that it suggests, represent one of the many possible harvests of cultural analysis.

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