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# CLUES OF INTEGRITY IN THE LEGAL REASONING PROCESS: HOW JUDICIAL BIOGRAPHIES SHED LIGHT ON THE RULE OF LAW

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ONE of the fascinating dimensions of historiography is the tendency of genres of historical scholarship to come in and out of fashion. In the 1940s, when Mark DeWolfe Howe began his authorized biography of Justice Oliver Wendell Holmes, not many scholars could expect to penetrate the circles of family members, executors, law clerks, and disciples that restricted access to information about “their” judge. Moreover, few collections of the private papers of judges were available, and even fewer collections of their internal court papers. There were many reasons not to write judicial biography, and the major biographies of Supreme Court Justices could have been counted on the fingers of one hand. Fifty years later the situation is dramatically different. The number of judicial biographies has proliferated, and with some important exceptions, authorized biographies have virtually disappeared. The trend seems to be increasingly in the direction of comprehensive, heavily documented, unauthorized biographies simultaneously aimed at several reader audiences.<sup>1</sup>

I fear he will be forgotten in a generation or so; indeed I doubt that many law students today have any idea who he is. The people who get the attention are those with agendas; it is the virtues of the polemicist that attract notice, not those of the careful and invariably correct lawyer. [Thus] . . . Weinfeld . . . is [not] likely to survive. And that is, of course, far more of a negative reflection on our culture than on the judge.<sup>2</sup>

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\* Harvey Rishikof, Dean of Faculty of the National War College. The views expressed in this article are those of the author and do not reflect the official policy or position of the National Defense University, the National War College, the Department of Defense, or the U.S. Government.

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1. G. Edward White, *The Renaissance of Judicial Biography*, 23 REV. AM. HIST. 716 (1995).

2. WILLIAM E. NELSON, IN PURSUIT OF RIGHT AND JUSTICE: EDWARD WEINFELD AS LAWYER AND JUDGE 2 (2004). Professor William Nelson’s book illustrates the *modus operandi* of a formidable jurist. See *id.* at ix. It scrutinizes Judge Edward Weinfeld’s background

The larger phenomenon at hand is the rise of judicial biography as a genre. How does the increased inspection of judges' backgrounds illuminate their jurisprudence? Is the biographical examination of judges mainly an exercise in voyeurism, or does it serve a significant purpose in understanding the judicial process?

Like soldiers, federal judges are viewed as public servants enforcing the law, upholding the Constitution, and serving the Republic.<sup>3</sup> They are an exclusive class of political actors with a specialized culture, comprising a select group of approximately 874: 9 Supreme Court Justices, 179 appellate judges, and 677 district court judges.<sup>4</sup> In addition to the active judges, there also exists a critical corps of retired senior-status judges who continue to adjudicate cases.<sup>5</sup> For better or worse, they speak with clear voices, take public legal positions, and make decisions.

The stakes are high because there are no ties in the law. Judges articulate their decisions and opinions in print. Trial judges have unique power in that they shape trials by ruling on issues of evidence, fact, and law, and then issue an opinion to decide the case in the first instance. Appellate judges, although they see no witnesses or direct evidence, can dissent and explain why the majorities are wrong when ruling to uphold or reverse a trial judge.

Unlike others who wield power, judges often work without fanfare, away from klieg lights and cameras. Historically, they refrained from giving interviews, rarely wrote books, and avoided the limelight, preferring to let their opinions speak for themselves.<sup>6</sup> However, with the rise of mass media during the late-twentieth century, it became impossible to open a newspaper, watch the news, or surf the Internet without being presented with the latest sex or financial scandal involving the church, government, or Wall Street. All these former pillars of society—clergy, politicians, and bankers—seem to be drowning in a sea of hypocrisy, absence of shame, and potential criminality. How has such scrutiny affected the judiciary?

Recently, the University of Texas School of Law held a conference on

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in order to contextualize one of the enduring judicial careers of the twentieth century. *See id.*

3. *Federal Courts in American Government*, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/FederalCourtsInAmericanGovernment.aspx> (last visited Sept. 30, 2014).

4. *Federal Judgeships*, U.S. COURTS, [www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx](http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx) (last visited Sept. 30, 2014).

5. *Frequently Asked Questions*, U.S. COURTS, [www.uscourts.gov/Common/FAQs.aspx](http://www.uscourts.gov/Common/FAQs.aspx) (last visited Oct. 4, 2014) (“What is of a Senior Judge? The Rule of 80 is the commonly used shorthand for the age and service requirement for a judge to assume senior status, as set forth in Title 28 of the US. Code, Section 371(c). Beginning at age 65, a judge may retire at his or her current salary or take senior status after performing 15 years of active service as an Article III judge (65+15=80). A sliding scale of increasing age and decreasing service results in eligibility for retirement compensation at age 70 with a minimum of 10 years of service (70+10=80). Senior judges, who essentially provide volunteer service to the courts, typically handle about 15 percent of the federal courts' workload annually.”).

6. *See White, supra* note 1, at 716.

the emerging golden age of judicial biography and the Supreme Court.<sup>7</sup> A list of approximately thirty books on the Court since 1983 was provided as background for the discussion.<sup>8</sup> Indeed, the past three decades have yielded a rise in literature that analyzes judgeship. Should we view the rise of the judicial biography as a fallow extension of the increased public focus on the judiciary, or does it serve a purpose?

In parsing this matter, two central questions arise. First, how often do judges incorporate their own policy preferences into their decisions, and how openly does this appear in their work? Second, does biographical analysis of judges shed light on how a judicial philosophy formed or evolved over time?

The application of a popular media culture to the judiciary may somewhat violate its traditional nature and role. However, if the biographical scrutiny of judging can elucidate policy preferences from judges' life experiences and evaluate their jurisprudence commensurately, then the rise of the judicial biography may arguably play the role of a brand-new, retrospective accountability mechanism.

## I. JUDICIAL CONDUCT WITHIN THE FRAMEWORK OF AMERICAN HISTORY

Comprehensive official accountability mechanisms for judges have existed from the beginning, when they were written into the Constitution.<sup>9</sup>

Although Article III contemplates removal by impeachment, no Supreme Court justice has ever been successfully impeached, though it was tried with Samuel Chase in 1804—1805.<sup>10</sup> The unsuccessful attempt to impeach Chase helped furnish the principle that justices are not removed for unpopular views or opinions.<sup>11</sup> The origins of this judicial independence stems from the paradigm-setting case of *Marbury v. Madison* in 1803, which established the Court's authority to rule unconstitutional a law passed by Congress, declaring, "It is emphatically the province and duty of the judicial department to say what the law is."<sup>12</sup> In the late 1930s, President Franklin Roosevelt's failure to "pack" the Supreme Court cemented the concept of an independent court.<sup>13</sup> These three historic events—*Marbury*, the failed impeachment, and the discredited court-packing—enshrined the American commitment to an independent judiciary as a counter-majoritarian institution that checks pure democratic or

7. See *A Conference on Judicial Biography and the Supreme Court*, U. TEX. SCH. L., <http://www.utexas.edu/law/conferences/judicial-biography/> (last visited Oct. . 4, 2014).

8. *Id.*

9. U.S. CONST. art. III, § 1.

10. WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 104—05 (1992).

11. *Id.*

12. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

13. When the court appeared to be rejecting his New Deal legislation, Roosevelt introduced legislation to add an additional justice, up to a maximum of six, for every justice then serving who was 70 years and 6 months old. REHNQUIST, *supra* note 10, at 133.

political rule.<sup>14</sup>

As reflected by these three events, any discussion of the American judicial culture requires a deep appreciation of American political and legal history. Many of the cherished values and rights now enjoyed by the citizens of the United States were borne of legal and political struggles.<sup>15</sup> The results of these debates helped shape our constitutional framework and have been passed down from generation to generation.<sup>16</sup> This is not to say, however, that once an issue has been “settled” in the constitutional sense, it is no longer open to debate.<sup>17</sup> In fact the opposite may be more the order of the day, whereby a past dissent resurrects itself to forge a majority for the next generation.<sup>18</sup> The best examples of this phenomenon are the early dissents by Associate Justices Oliver Wendell Holmes, Jr. and Louis D. Brandeis in the 1920s concerning the right of privacy, which eventually became the law forty years later under Chief Justice Earl Warren.<sup>19</sup> This tradition of a principled dissent has done much to support the concept of the individual voice standing for important values.

While this framework is well-established and categorically accepted, judges at the highest levels differ on the guidelines of jurisprudence.<sup>20</sup> Some earnestly assert that their personal backgrounds have no influence whatsoever on judging.<sup>21</sup> Others openly acknowledge that their analysis is heavily contingent on their roots and experiences.<sup>22</sup>

In his testimony before the Senate Judiciary Committee, Chief Justice Roberts employed a now-famous metaphor: “Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules . . . .”<sup>23</sup> Of course, as umpires are fond of saying, “They are not balls or strikes until I call them.”<sup>24</sup> In Justice Samuel A. Alito’s confirmation, the widely respected Third Circuit Judge Ed Becker noted, “When you take

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14. See *Marbury*, 5 U.S. at 177; WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 33, 307 (1987); REHNQUIST, *supra* note 10, at 104–05.

15. See Louis J. Sirico, Jr. *The Supreme Court and the Constitutional Convention*, 27 J.L. & POL. 63 (2011).

16. See *id.*

17. See *Katz v. United States*, 389 U.S. 347 (1967); *Olmstead v. United States*, 277 U.S. 438, 471–85 (1928) (Brandeis, J., dissenting).

18. See *Katz*, 389 U.S. at 347; *Olmstead*, 277 U.S. at 471.

19. See *Katz*, 389 U.S. at 347; *Olmstead*, 277 U.S. at 474.

20. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (hereinafter *Robert Hearing*) (statement of John G. Roberts, Jr.); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: S. Comm. on the Judiciary*, 109th Cong. 655–56 (2006) (hereinafter *Alito Hearing*) (statement of Edward R. Backer, U.S. Court of Appeals for the Third Circuit, Philadelphia, Pennsylvania); Sonia Sotomayor, *A Latina Judge’s Voice*, 13 BERKELEY LA RAZA L.J. 87, 91–92 (2002).

21. See *Roberts Hearing*, *supra* note 20, at 55.

22. See Sotomayor, *supra* note 20, at 91–92.

23. See *Roberts Hearing*, *supra* note 20, at 55.

24. Jim Lindgreen, *Roberts’ Umpire Analogy is Not Quite as Simple as It Seems*, VOLOKH CONSPIRACY (Sept. 12, 2005), <http://www.volokh.com/2005/09/12/roberts-umpire-analogy-is-not-quite-as-simple-as-it-seems/>.

that judicial oath, you become a different person. You decide cases not to reach the result that you would like, but based on what the facts and the law command.”<sup>25</sup>

Conversely, Supreme Court Justice Sonia Sotomayor has stated:

I . . . accept that our experiences as women and people of color affect our decisions. . . . Not all women or people of color, in all or some circumstances or indeed in any particular case or circumstance but enough people of color in enough cases, will make a difference in the process of judging . . . . As recognized by legal scholars, whatever the reason, not one woman or person of color in any one position but as a group we will have an effect on the development of the law and on judging.

Whether born from experience or inherent physiological or cultural differences, a possibility I abhor less or discount less than my colleague Judge Cedarbaum, our gender and national origins may and will make a difference in our judging. Justice O’Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases . . . . I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.<sup>26</sup>

However, while the statements of Justices Roberts and Sotomayor reflect differing outlooks, they matter little unless they are evaluated in conjunction with the judicial record. Judges may have strong views concerning how backgrounds should factor into jurisprudence, but these views have little relevance unless they arise in practice; Justice Roberts may view himself as an umpire, and Justice Sotomayor may express special empathy for the perspective of a Latina, but how do these stances manifest?

Critics of biography believe that more social scientific study of the judicial process will yield a sounder understanding of a judge’s analytical theories and results.<sup>27</sup> For commentators such as Judge Richard Posner, studies of the judicial process should be considered as an alternative to judicial biography due to of some of the inherent problems with biography in general and judicial biography in particular.<sup>28</sup> Judicial biographies too often focus on ideology or discovering the subject’s essential self.<sup>29</sup> These ideological biographies are prone to depart from truth, and the essential nature of the subject is often a fiction created by the biographer.<sup>30</sup> Writings on judges and courts are more constructive when they

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25. See *Alito Hearing*, *supra* note 20, at 655–56; see also Theodore A. McKee, *Judges As Umpires*, 35 HOFSTRA L. REV. 1709 (2007) (This law review was helpful in exploring how judges’ personal views influence their jurisprudence.).

26. See Sotomayor, *supra* note 20, at 91–92.

27. See Richard A. Posner, *Judicial Biography*, 70 N.Y.U. L. REV. 502, 503 (1995).

28. See *id.* at 516–21.

29. See *id.* at 503.

30. See *id.* at 504–05.

analyze cases and the deliberative process.<sup>31</sup>

However, there *will* be hard cases. In hard cases, “personal beliefs” should be made explicit for the purposes of transparency.<sup>32</sup> Judge Harry Edwards, former Chief Judge of the D.C. Circuit Court of Appeals, once explained:

While a judge typically will not need to resort to personal beliefs in deciding cases, some consideration of these beliefs may be unavoidable in the occasional “very hard” case where the legal arguments are indeterminate. In such a case, a judge’s informed and critical development of his [or her] beliefs is a prerequisite to intelligent resolution of the dispute. Further, in all cases, the nature of one’s personal beliefs should be consciously, rather than subconsciously, recognized.<sup>33</sup>

Therefore, as has been pointed out by scholars, judicial biography can serve a number of purposes. It can use a life history to give perspective on a period, illustrate a career path, and demonstrate links between personality and judicial decision-making.<sup>34</sup>

## II. THE FUEL FOR THE CONTROVERSY: BACKGROUNDS IN PLAY

The popular attraction of scrutinizing the background of a jurist was underscored and fueled by Associate Justice John Paul Stevens in a 2010 interview with the *New York Times*, in which he discussed his approach to cases and his World War II experience:

“It really was a unique period of time, in the sense that the total country, with very few exceptions, was really united,” Justice Stevens said. “We were all on the same team, wanting the same result. You don’t like to think of war as having anything good about it, but it is something that was a positive experience.”<sup>35</sup>

Moreover, Stevens appeared “unapologetic in saying that the justices’ backgrounds necessarily shaped their approaches to the law.”<sup>36</sup> He particularly noted, “I’ve confessed to many people that I think my personal experience has had an impact on what I’ve done . . . Time and time again, not only for myself but for other people on the court, during discussions of cases you bring up experiences that you are familiar with.”<sup>37</sup>

Justice Stevens explained that

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31. *See id.* at 521.

32. *See* McKee, *supra* note 25, at 1717.

33. *Id.* at 1718 (quoting Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 409–10 (1984)).

34. *See* Symposium, *Objectivity and Hagiography in Judicial Biography*, 70 N.Y.U. L. REV. 556, 567 (1995).

35. *See* Adam Liptak, *At 89, Stevens Contemplates Law, and How to Leave It*, N.Y. TIMES, Apr. 4, 2010, at A1.

36. *Id.*

37. *Id.*

[h]is military service, as a Navy cryptographer, informed his dissent in *Texas v. Johnson*, a 1989 decision holding that the First Amendment protects flag burning. “I know it’s not the popular position, but I’m still totally convinced I was right,” he stated. “I still think I was right, but I wouldn’t amend the Constitution or anything like that to straighten it out.”<sup>38</sup>

Perhaps one key to understanding a judicial philosophy stems from the early life experiences of a jurist. One cannot underestimate, however, how being on a court over time affects how a jurist begins to see the process of judging. For example, despite numerous prior decisions to the contrary, Justice Harry Blackmun eventually concluded that the death penalty is a violation of the Eighth Amendment, regardless of original interpretations of the Constitution.<sup>39</sup> In 1994, in *Callins v. Collins*, he proclaimed:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. . . . The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.<sup>40</sup>

What in Justice Blackmun’s background can explain this change after twenty years? Was it his time spent as the general counsel at the Mayo Clinic? Was it the seminars at the Aspen Institute in which he participated in as a Justice? Linda Greenhouse, based on her research on this point, contends that Blackmun’s *Roe v. Wade* decision was premised on his Mayo experience in that he originally viewed the case more through the lens of the fundamental personal liberty to receive medical care and the doctor-patient prism than a woman’s fundamental right to control her body.<sup>41</sup> Moreover, his Mayo research had also “persuaded him that the criminalization of abortion was a relatively recent phenomenon, without roots in the English common-law tradition.”<sup>42</sup>

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38. *Id.*

39. *Callins v. Collins*, 510 U.S. 1141, 1143–44 (1994) (Blackmun, J., dissenting).

40. *Id.* at 1145–46.

41. See LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY 92, 223 (2005).

42. *Id.* at 92.



Similarly, Justice Ruth Bader Ginsburg raised eyebrows when she commented to *USA Today* that during oral argument her male colleagues seemed to downplay the trauma of a 13-year-old girl who had been stripped-searched by Arizona school officials looking for drugs.<sup>43</sup> “They have never been a 13-year-old girl . . . . It’s a very sensitive age for a girl. I didn’t think that my colleagues, some of them, quite understood.”<sup>44</sup> In the end the Court ruled 8-1 in the girl’s favor.<sup>45</sup> Ginsburg further noted, “Women belong in all places where decisions are being made. I don’t say (the split) should be 50-50 . . . . It could be 60% men, 40% women, or the other way around. It shouldn’t be that women are the exception.”<sup>46</sup> Ginsburg then went on to reveal:

“You know the line that [Justice Sandra Day O’Connor] and I keep repeating . . . that ‘at the end of the day, a wise old man and a wise old woman reach the same judgment’? But there are perceptions that we have because we are women. It’s a subtle influence. We can be sensitive to things that are said in draft opinions that (male justices) are not aware can be offensive. The differences between male and female justices, she said, are “seldom in the outcome.” But then, she added, “it is sometimes in the outcome.”<sup>47</sup>

The issue of a “wise old man or woman” alluded to by Justice Ginsburg stemmed from an earlier controversy over the aforementioned speech given during a symposium at the University of California School of Law at Berkeley by then-Court of Appeals Judge Sonia Sotomayor.<sup>48</sup> In that speech, Judge Sotomayor said, “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”<sup>49</sup> The conference’s theme was “Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation.”<sup>50</sup> During Justice Sotomayor’s confirmation process, the “wise Latina woman” comment was a source of much debate and analysis.<sup>51</sup>

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43. Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY (Oct. 5, 2009), [http://www.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg\\_N.htm](http://www.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm) (“One of Ginsburg’s liberal colleagues, fellow Clinton appointee Stephen Breyer, saw it a little differently. He said he had a hard time understanding the girl’s claim that her rights had been violated. ‘I’m trying to work out why is this a major thing to, say, strip down to your underclothes, which children do when they change for gym,’ Breyer said. ‘How bad is this?’ Ginsburg retorted that school officials had directed Redding ‘to shake (her) bra out, to shake, shake, stretch the top of (her) pants.’ She later told USA TODAY, ‘Maybe a 13-year-old boy in a locker room doesn’t have that same feeling about his body. But a girl who’s just at the age where she is developing, whether she has developed a lot . . . or . . . has not developed at all (might be) embarrassed about that.’”).

44. *Id.*

45. *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364 (2009).

46. Biskupic, *supra* note 43.

47. *Id.*

48. *See* Sotomayor, *supra* note 20, at 92.

49. *Id.*

50. *Id.*

51. Frank James, *Sotomayor’s ‘Wise Latina’ Line Maybe Not So Wise*, NPR (May 27, 2009), [http://www.npr.org/blogs/thetwo-way/2009/05/sotomayors\\_wise\\_latina\\_line\\_ma.html](http://www.npr.org/blogs/thetwo-way/2009/05/sotomayors_wise_latina_line_ma.html).

Part of the point of Sotomayor's speech was that the life experiences of women and minorities in the law affect their work, "leading to an ultimate outcome of greater overall justice."<sup>52</sup> Disagreeing with Federal District Court Judge Miriam Goldman Cedarbaum, Sotomayor revealed conversations she had with Cedarbaum in which her colleague had argued that judges should consciously "strive to . . . keep their gender and race or ethnicity from impacting their decisions." For Sotomayor, as she explained in her talk:

While recognizing the potential effect of individual experiences on perception, Judge Cedarbaum nevertheless believes that judges must transcend their personal sympathies and prejudices and aspire to achieve a greater degree of fairness and integrity based on the reason of law. Although I agree with and attempt to work toward Judge Cedarbaum's aspiration, I wonder whether achieving that goal is possible in all or even in most cases. And I wonder whether by ignoring our differences as women or men of color we do a disservice both to the law and society.<sup>53</sup>

She then provided an example of how women judges impact the judicial process in ways observed by legal scholars:

I further accept that our experiences as women and people of color affect our decisions. The aspiration to impartiality is just that—it's an aspiration because it denies the fact that we are by our experiences making different choices than others. Not all women or people of color, in all or some circumstances or indeed in any particular case or circumstance but enough people of color in enough cases, will make a difference in the process of judging. The Minnesota Supreme Court has given an example of this. As reported by Judge Patricia Wald, formerly of the D.C. Circuit Court, three women on the Minnesota Court with two men dissenting agreed to grant a protective order against a father's visitation rights when the father abused his child. The *Judicature Journal* has at least two excellent studies on how women on the courts of appeal and state supreme courts have tended to vote more often than their male counterpart to uphold women's claims in sex discrimination cases and criminal defendants' claims in search and seizure cases. As recognized by legal scholars, whatever the reason, not one woman or person of color in any one position but as a group we will have an effect on the development of the law and on judging.<sup>54</sup>

It is in this context that she made the comment about a "wise Latina woman" that proved to be so explosive:<sup>55</sup> "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."<sup>56</sup> The statement on its face raises the issue of how judges from dif-

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52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

ferent backgrounds bring a different perspective to the law. But if the law is based on impartial logical syllogisms and is different than politics, why should background per se make a difference?

Stuart Taylor, a conservative legal commentator for the *National Journal*, criticized the Sotomayor speech along these lines, arguing that such an approach privileged “identity politics” over legal analysis:

Indeed, unless Sotomayor believes that Latina women also make better judges than Latino men, and also better than African-American men and women, her basic proposition seems to be that white males (with some exceptions, she noted) are inferior to all other groups in the qualities that make for a good jurist.<sup>57</sup>

As pointed out by Stuart Taylor in his analysis of the Sotomayor speech

Any prominent white male would be instantly and properly banished from polite society as a racist and a sexist for making an analogous claim of ethnic and gender superiority or inferiority.

Imagine the reaction if someone had unearthed in 2005 a speech in which then-Judge Samuel Alito had asserted, for example: “I would hope that a white male with the richness of his traditional American values would reach a better conclusion than a Latina woman who hasn’t lived that life”—and had proceeded to speak of “inherent physiological or cultural differences.”<sup>58</sup>

While the Supreme Court’s authority would be tainted by rulings based on “inherent physiological or cultural differences,” its appointment process does appreciate cultural interests and ethnic or geographic backgrounds.<sup>59</sup> At the beginning of the Court’s history there was a “western seat,” and at the turn of the century, a “Jewish seat,” a “Catholic seat,” and later a “black seat.”<sup>60</sup> The assumption was that “eastern” judges would have a different sensibility than “western” judges.<sup>61</sup> Over time, however, these sectional, religious and racial identifiers have fallen away.<sup>62</sup> Court watchers noted that with Justice Stevens’ retirement, the Court no longer included a Justice with a military or Protestant background,<sup>63</sup> depriving the Court of these functional views. Moreover, since Justice Thurgood Marshall’s retirement there is no Justice on the Court

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57. Stuart Taylor, *Identity Politics And Sotomayor: The Judge’s Thinking Is Representative of the Democratic Party’s Powerful Identity-Politics Wing*, NAT’L J., May 23, 2009, available at [http://www.nationaljournal.com/njmagazine/or\\_20090523\\_2724.php](http://www.nationaljournal.com/njmagazine/or_20090523_2724.php).

58. *Id.*

59. *Id.*

60. See Adam Liptak, *Stevens, the Only Protestant on the Supreme Court, Week in Review*, N.Y. TIMES, Apr. 11, 2010, at wk 1.

61. Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 61 (1994).

62. See Liptak, *supra* note 60.

63. See NAT’L CONSTITUTION CENT., *Here’s Another Take on the Importance of Diversity: Does the Supreme Court Need a Military Veteran?*, CONST. DAILY (June 1, 2011), <http://blog.constitutioncenter.org/2011/06/heres-another-take-on-the-importance-of-diversity-does-the-supreme-court-need-a-military-veteran/>.

who has defended an accused in a capital case.<sup>64</sup>

The essential reason that the possibly improper overemphasis of identity is less important (or worrisome) is that legal opinions are published, and the reasoning of a Justice's view is open for all to read and analyze. Since culture war issues such as abortion often raise questions regarding the religious affiliation of a justice, the debate is couched in state's rights and the appropriate role of government or the conflict of different theories over rights allocation.<sup>65</sup> Judges who feel that their background has an impact must find an outlet through which to express their views outside the realm of judicial opinions. The previously cited statements of Stevens, Blackmun, and Ginsburg are all examples (Justice Sotomayor's assertion falls into a new category, since it is not a reflection on a prior ruling, but a prescription for future cases.).<sup>66</sup>

So, what makes judges "tick" has spilled past formal, published opinions and into the public discourse, becoming what is now a growth industry; these motifs are crystallized in increasingly popular judicial biographies.

### III. BIOGRAPHY AS LEGAL HISTORY

The focus on the Supreme Court biography seems natural due to the Court's power at the pinnacle of the judicial branch. In the words of Justice Robert Jackson's witticism concerning the Court, "We are not final because we are infallible, but we are infallible only because we are final."<sup>67</sup> To be accurate, though, under the Constitution's Article V, it is the amendment process or the will of the people that is final.<sup>68</sup>

Another reason that the Supreme Court Justices incur biographical analysis is that they possess the greatest degree of intellectual freedom on how to interpret the Constitution. Different philosophies tend to be associated with different Justices—"Oliver Wendell Holmes's skeptical pragmatism, William J. Brennan's expansive liberalism, Antonin Scalia's insistent originalism."<sup>69</sup> As Laurence Tribe has pointed out, the Constitution floats in an "invisible . . . ocean of ideas, prepositions, recovered memories, and imagined experiences," called the "dark matter."<sup>70</sup> To decipher the invisible Constitution, Tribe posits six distinct but overlapping modes of interpretation—"geometric, geodesic, global, geological, gravitational, and gyroscopic."<sup>71</sup> As he concludes, this competition over effective

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64. *Biographies of Current Justices of the Supreme Court*, U.S. SUPREME CT., [www.supremecourt.gov/about/biographies](http://www.supremecourt.gov/about/biographies) (last visited Oct. 5, 2014).

65. See GREENHOUSE, *supra* note 41, at 93–94.

66. See *id.*; Sotomayor, *supra* note 20, at 91; Biskupic, *supra* note 43; Liptak, *supra* note 35.

67. Eugene C. Gerhart, *Robert H. Jackson: Lawyer's Judge*, 62 COLUM. L. REV. 395, 397 (1962).

68. U.S. CONST. art. V.

69. See Jeffrey Toobin, *After Stevens: What Will the Supreme Court be Like Without Its Liberal Leader?*, THE NEW YORKER, March 22, 2010.

70. See LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION xiv (2008).

71. *Id.* at 155.

interpretive approaches to meaning is the struggle: “It is not the visible or invisible character of our constitutional commitments but their irreducible ambiguity and multidimensionality that ensures our continuing struggle over their meaning.”<sup>72</sup> Given this struggle over possible interpretive techniques, how a Justice comes to identify with one over another over time begs for biographical clues since the stakes are so high for the constitutional vision and the understanding of rights.<sup>73</sup>

Finally, perhaps the most notable reason by which the Supreme Court is ripe for biographical dissection is the aura of mystery that surrounds it. As Walter Bagehot once noted in describing the British Crown, “A little mystery is a good thing.”<sup>74</sup> The chambers are isolated, tight communities where the judges have chosen all the employees. Each Justice has two secretaries, a court aide, and four law clerks, although the Chief Justice is allowed one more.<sup>75</sup> “The permanent staffs are lean, fiercely loyal, competent, and long-serving. These public servants are loath to write kiss-and-tell memoirs. Though occasionally books such as *The Brethren*,<sup>76</sup> *Closed Chambers*<sup>77</sup> or *The Nine*<sup>78</sup> have been written to pierce the black veil, these are the exceptions and not the rule.”<sup>79</sup>

The Federal Judicial Center (FJC) has in its latest *Guide to the Preservation of Federal Judges’ Papers* emphasized how important this resource should be for history writing:

Perhaps the greatest potential contribution to be made by judges’ papers is toward broad studies of legal history. The papers of federal judges can help to explain a wide variety of topics related to law and public life, including the evolution of legal doctrine, court enforcement of federal legislation, and popularly organized litigation campaigns. Judges’ papers can also be useful for analyzing a specific case or related cases. Unfortunately, the relative scarcity of judges’ collections in repositories, and the difficulty in locating these scattered papers, have deterred many researchers from taking advantage of this kind of historical resource.<sup>80</sup>

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72. *Id.* at 211.

73. *Id.*

74. Harvey Rishikof, *The United States Supreme Court: The Cult of the Robe in the National Security Enterprise*, in *THE NATIONAL SECURITY ENTERPRISE: NAVIGATING THE LABYRINTH* 249 (Roger Z. George & Harvey Rishikof ed., 2011).

75. *Id.*

76. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979).

77. EDWARD P. LAZARUS, *CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT* (1998).

78. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2007).

79. Rishikof, *supra* note 74, at 249.

80. See BRUCE A. RAGSDALE & JONATHAN W. WHITE, *FED. JUDICIAL HISTORY OFFICE, A GUIDE TO THE PRESERVATION OF FEDERAL JUDGES’ PAPERS* 4–5 (2d ed. 2009) (The guide notes, “Judicial biography has attracted increased attention in recent years, as demonstrated by the growing number of scholarly publications not only on Supreme Court justices, but also district and appellate court judges, such as Learned Hand, Sarah T. Hughes, Willis Ritter, Edward Weinfeld, and John Minor Wisdom. These biographies rely in part on personal papers, which bring life and texture to the official records of those

The *Guide* then goes on to detail how to preserve papers and encourages the keeping of private case-related files, chambers papers, other court-related activities, and non-judicial activities.<sup>81</sup> Interestingly, the *Guide* also includes examples of when the papers should be released and under what conditions researchers may have access: at the death of the jurist; after all the jurists with whom the jurist has served have died; or, with the permission of the jurist, following their death, access will require permission of surviving spouse, and subsequently, the executor for fifteen years following the death of the judge's last surviving spouse.<sup>82</sup>

As an institution, judges support and recognize the need for maintaining their papers, allowing others to experience their deliberative process at an appropriate time in the future.<sup>83</sup> This is one of many ways that the institution, as a whole, demonstrates a commitment to transparency and legitimacy. Therein lies the significance of the judicial biography enterprise: if such analysis explicates the impact of backgrounds on jurisprudence (or lack thereof), biographical dissection of judges becomes much more than a public-interest spectacle; it is a powerful retroactive accountability mechanism. Here, judges' off-the-bench statements may be properly assessed in full jurisprudential context, rather than by speculative predictions at the time.

For obvious reasons, Supreme Court Justices are the most popular targets for judicial biography. This reflects not only the power wielded by the Justices, but also an uneven selection from the judiciary. The modern tendency for presidents is to choose justices from the appellate ranks, increasingly adding to the public prominence of appellate judges.<sup>84</sup> These judges have the advantage of already having been confirmed by the Senate and may have "signaled" their legal tendencies in thoughtful opinions and dissents. Also, appellate judges are empowered to overturn the rulings of trial judges, thereby setting the parameters for the legal debate of the higher court, a vital function to the judging process.<sup>85</sup> Hence, trial judges may not garner the attention they deserve from biographers, despite the fact that they wield substantially more evaluative power than appellate judges, who can only overturn "clearly erroneous" trial

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judges' courts. In his study of Judge Weinfeld, William Nelson found that only 'an unusually rich collection of personal papers' enabled him to trace the challenges that Weinfeld faced in establishing his professional career. The authors of Judge Ritter's biography acknowledged that their book 'would be seriously deficient' without access to the judge's papers. The 'voluminous' papers of Judge Hughes allowed the biographer to recount the full career of one of the most important women leaders in Texas public life during the mid-twentieth century.'").

81. *Id.* at 10.

82. *Id.* at 37–41. (Appendix A: Survey of Access Restrictions Placed on Manuscript Collections by Federal Judges; Access Policies for Selected Research Collections of Federal Judges Who Have Donated Their Papers to Manuscript Repositories.).

83. *See id.* at 2.

84. *Biographies of Current Justices of the Supreme Court*, *supra* note 64 (noting the backgrounds of each justice).

85. FED. R. CIV. P. 52(a).

rulings.<sup>86</sup>

The power of the trial judge and the value of biography is on display in William E. Nelson's *In Pursuit of Right and Justice*, an account of the life of Judge Edward Weinfeld.<sup>87</sup> It is important to note that Nelson was a Weinfeld clerk and had the total cooperation of the Weinfeld family.<sup>88</sup> In addition, Nelson clerked for Justice Byron White in the 1970 term.<sup>89</sup> Professor Nelson offered three reasons for his biography on Judge Edward Weinfeld that went beyond pure admiration of the New York district court judge:

1. Judge Weinfeld's background and rise to prominence paradigmatically illustrates how Catholic and Jewish immigrants (and their children) generally were assimilated into New York City (and the United States at large) in the early twentieth century.<sup>90</sup>

2. Drawing from the full wealth of Judge Weinfeld's papers, Professor Nelson opines that the record "enables us to examine the compromises [Weinfeld] had to make in order to attain professional advancement," specifically the social-cultural compromises and "sacrifices" he navigated to become assimilated, even sometimes including "family relationships;"<sup>91</sup>

3. Professor Nelson asserts that Judge Weinfeld was the "the pre-eminent trial judge of twentieth-century America." For Nelson, Weinfeld exemplified a style of progressive apolitical restraint (marked by a hesitancy to make new law and a refusal to make policy), close attention to the facts before him, and a desire "only to do justice between the parties."<sup>92</sup>

Any of these three claims alone would suffice to warrant a biography. The first two—an assimilation story and the story of the private sacrifice for public obligation and success—speak to how one individual's struggle can be paradigmatic for a whole cohort of individuals or a morality play for those who strive for perfection in a profession. The final justification (into which the first two feed)—the judging style of a trial judge—speaks to the issue of this essay: how does one's background shape a judge's jurisprudence, and how do trial judges exercise their discretion?

Weinfeld's background represents the quintessential story of a child of immigrants encouraged by the establishment to embrace a new American culture at the turn of the twentieth century:

Like most children of Jewish immigrants of his era, Weinfeld appears to have been eager to absorb the school system's message of assimi-

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86. *Id.*

87. NELSON, *supra* note 2.

88. *Id.* at ix.

89. *Id.* at 291.

90. *Id.* at 2-3; Renee Ann Cramer, *Review of In Pursuit of Right and Justice: Edward Weinfeld as Lawyer and Judge*, 15 L. & PUB. BOOK REV. 187, 187-90, available at <http://www.lawcourts.org/LPBR/reviews/nelson305.htm>.

91. NELSON, *supra* note 2, at 3; Cramer, *supra* note 90.

92. NELSON, *supra* note 2, at 4-5; Cramer, *supra* note 90. These three reasons have not convinced all the critics. This section quotes liberally from Renee Ann Cramer's review but I do not in the end agree with her final assessments of the book.

lation. Like other children, he may have paid a price for being assimilated. One child of immigrants, perhaps more sensitive than most, was “appalled,” for example, “to think what an immense transformation I had to work on myself in order to become what I have to become”—a transformation involving “a kind of treason in it: treason toward my family.” Here, it might be worth noting that, while Weinfeld always remained a dutiful son to his parents, he became quite distant after their death from his brother, Morris, and other more distant relatives, and he was never close to his wife’s family.<sup>93</sup>

Weinfeld’s early assimilation into American society informed a judicial philosophy, which in description closely resembles the role of the umpire described by Justice Roberts.<sup>94</sup> In Chapter 7, “The Making of A Judge,” Nelson explains, “Once Weinfeld was on the bench, politics ceased, as he sought wisdom from nonpolitical sources so as to make himself into an outstanding judge.”<sup>95</sup> This wisdom was collected in Weinfeld’s green, leather-bound “commonplace book” into which he copied quotes and sources of inspiration to guide and shape his “judicial persona.”<sup>96</sup> Weinfeld relied upon Old Testament teachings and sought guidance from Chief Justices John Marshall and Charles Evans Hughes, Justices Oliver Wendell Holmes and Louis D. Brandeis, and Judges Augustus N. Hand and Learned Hand.<sup>97</sup> Many of the quotes in the book concern the concept of impartiality, as well as the need for exhaustive work, dignity, aloofness, adequate study, and reflection.<sup>98</sup> These quotes give us insight into Weinfeld’s judicial style and temperament, which are detailed in Chapter 8 (“The Patriarch: Edward Weinfeld’s Judicial Style”) and Chapter 9 (“The Liberal: Edward Weinfeld’s Judicial Values”), and which further the claim that Weinfeld’s legal style was nonpolitical.<sup>99</sup>

For example, in the interest of fairness, unlike many trial judges, Judge Weinfeld would not discuss settlement with the parties since he did not want to be seen to be bringing about a settlement that might differ from the jury’s conclusion.<sup>100</sup> He viewed himself as a “fact judge” who could “find the law” to resolve an issue.<sup>101</sup> In case after case, he transformed or circumvented unresolved questions of law into fact questions.<sup>102</sup> Nelson attributes this deep instinct to cabin his own “discretion” to his first year on the bench in a case of first impression, *Austrian v. Williams*, when his decision to apply federal law over state law in a trustee bankruptcy case was subsequently overruled by the Court of Appeals.<sup>103</sup> Nelson then goes on to catalogue six cases where the technique of restricting his own dis-

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93. NELSON, *supra* note 2, at 19.

94. Compare *id.*, with *Roberts Hearing*, *supra* note 20, at 55.

95. NELSON, *supra* note 2, at 114.

96. *Id.* at 123.

97. *Id.* at 126–27.

98. *Id.* at 127.

99. *Id.* at vii.

100. *Id.* at 136.

101. *Id.* at 139.

102. *Id.*

103. *Id.* at 140–41.



cretion by turning “unresolved law into fact determination” is put on display—*United States v. Toney*; *United States v. Bethlehem Steel*; *United States ex rel. Elkins v. Gilligan*; *Vulcan Society v. Civil Service Commission*; *United States v. Greater Blouse, Skirt & Neckwear Contractors Ass’n*; and *United States v. Kaplan*.<sup>104</sup>

This fact-based approach—restricting decisions to the case and curtailing his own personal discretion to the case and facts—was at the core of how Weinfeld reconciled his unwillingness to incorporate his own policy preferences with his awareness that policy was an inevitable ingredient of the law.<sup>105</sup> By refusing to participate in plea-bargaining as a matter found in the law, Weinfeld ensured that juries made the decision on how policy trade-offs should be made, per the institution’s preference as a court of law.<sup>106</sup> Weinfeld focused on individuals and the purview of the court’s power to enforce “due process and the equal protection of the law.”<sup>107</sup> These principles were enshrined in the court as a social policy and therefore were his legitimate tools of advocacy, an institutional advocacy.<sup>108</sup>

For Nelson, this “Weinfeld approach” avoided the politicization of decisions because of his unique view of equality and justice, which eschews Justice Sotomayor’s assertion that her ethnic background necessarily impacts her jurisprudence:

Weinfeld did not pursue a vision of equality that divides society into classes and interest groups at war with each other. Thus, he never had to focus on the perverse question whether a judgment in a case would give a particular group or class more or less than its fair share of the societal pie. This question . . . creates a sharp dichotomy in the thinking of a judge between fidelity to law and considerations of social policy. Judges who focus on the question can never decide any issue of law without favoring some social groups or interests over others . . . [H]er vision of justice will always be controlling—it will prescribe how much of a role preexisting legal doctrine will play in the determination of cases.<sup>109</sup>

Weinfeld’s approach of focusing on the individual was different because the case became about the individual rather than a grand social policy: he was administering the institutional mandate of protecting freedom and curtailing violations and abuses.<sup>110</sup> With this approach he could give full reign to his discretion as an institutional matter:

He saw only individuals, not groups and classes, in the litigants who came to his court. For him, equal justice was not about the distribution of wealth and power, but about the behavior of government to-

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104. *Id.* at 141–53.

105. *Id.* at 139.

106. *Id.* at 145.

107. *Id.* at 157.

108. *See id.* at 171.

109. *Id.* at 170–71.

110. *Id.* at 171.

wards citizens. . . . since his vision was different—it required only that he adhere consistently to the rule of law—it never created a conflict with the imperative of fidelity to law that a judge with a vision of equality as distributive justice would face. Instead, it directed fidelity to law.<sup>111</sup>

Indeed, on the left, critics dismiss the notion of separating law and politics as naïve and contend that the rule of law itself is a result of power relations between different cultures.<sup>112</sup> In fact, it is not views of the world that “divide[ ] society into classes and interest groups at war with each other.”<sup>113</sup> Rather, realities of the world—unequal distributions of wealth and power, for instance—affect that division, which is often maintained by the rule of law.<sup>114</sup> To these commentators, the “American mono-culture” into which Weinfeld was assimilated is a fallacy and an offensive abrogation of multiculturalism.<sup>115</sup>

Conversely, critics on the right view the use of “due process and equal protection” to protect the individual in the face of the exercise of executive power, for example, as a classic case of judicial activism and an imperial judiciary.<sup>116</sup>

However, both sides fail to grasp that the “Weinfeld approach,” at the trial level, was an attempt to cabin trial judge discretion and simultaneously advocate an institutional role for courts. The overruling of a Weinfeld opinion—a rare occurrence—became a matter of judicial interpretation by the appellate or Supreme Court, as envisioned by Tribe’s five-part scheme of judicial analysis, where once again discretion is at its highest.<sup>117</sup> This approach for Weinfeld, and in the end Nelson, argues for a legal institutional role for the court, whereby the judge acts on behalf of the values of the rule of law, rather than imposing an individual policy preference.

#### IV. CONCLUSION

The questions introduced earlier were: (1) How often do judges incorporate their own policy preferences in their decisions, and how openly does this appear in their work? (2) Does biographical analysis of judges shed light on how their judicial philosophy formed or evolved over time?

There should be little doubt that one of the only satisfactorily comprehensive methods for exploring such queries is judicial biography. In fact, with respect to the most prominent jurists in the United States today, it’s hard to imagine a world in which such studies would not be commonplace or would be undertaken with only limited access to the judicial record.

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111. *Id.*

112. *See* Cramer, *supra* note 90.

113. *Id.*

114. *See id.*

115. *Id.*

116. McKee, *supra* note 25, at 1710, 1717.

117. TRIBE, *supra* note 70, at 155.

In the end, the paradox of judging is to be as impartial as possible while somehow capitalizing on one's life experience as a guide. As researchers continue to look for clues to unravel the motivations and mechanisms which shaped the approaches of our most important jurists, it appears that judicial biography is here to stay. Biographies are retrospective, and hence will most likely never assist presidents and senators in either predicting the tendencies of jurists or in selecting them for the upper echelons of the legal system. Rather, judicial biographies serve a higher purpose, layering comprehension of the individual practice of jurisprudence.