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THE HAND IN THE BREW: JUDGES AND THEIR COMMUNITIES

Thomas F. Burke & Lief H. Carter

PAUL W. KAHN, *MAKING THE CASE: THE ART OF THE JUDICIAL OPINION* (YALE UNIVERSITY PRESS 2016). PP. 256. HARDCOVER \$45.00.

DOUGLAS E. EDLIN, *COMMON LAW JUDGING: SUBJECTIVITY, IMPARTIALITY, AND THE MAKING OF LAW* (UNIVERSITY OF MICHIGAN PRESS 2016). PP. 280. HARDCOVER \$75.00.

I take judge-made law as one of the existing realities of life. There, before us, is the brew. Not a judge on the bench but has had a hand in the making.

—Benjamin N. Cardozo¹

Paul Kahn's *Making the Case* and Doug Edlin's *Common Law Judging* both address a fundamental conundrum.² Law claims to generate correct and dispositive resolutions of disputes by resorting to principles that transcend the interests of both the parties in cases and the judges who decide them. Yet law is indeterminate, at least for a significant chunk of the cases that divide jurists in the appellate courts. Judges in such cases do not simply discover the law the way an explorer is said to discover an island; as Benjamin Cardozo's quote above asserts, they create the law. But if judges create law, and if they disagree amongst themselves about what the best law should be, on what grounds can we say that a particular judge's decision is principled and valid, worthy of our respect? Is it not simply a reflection of that judge's worldview, or worse yet, the political party that brought him or her to office?

Kahn and Edlin address this problem in radically different ways. Edlin's book looks down on the matter from the Olympian heights of analytic philosophy. Kahn is writing from inside Cardozo's brewery, trying to show law students how to be better producers—and better readers—of legal opinions. What the two share is a determination to show that legal judgment should be understood not as the solving of a math problem nor merely an

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

2. PAUL KAHN, *MAKING THE CASE: THE ART OF THE JUDICIAL OPINION* (2016); DOUGLAS E. EDLIN, *COMMON LAW JUDGING: SUBJECTIVITY, IMPARTIALITY, AND THE MAKING OF LAW* (2016).

exercise in power but something else: a relationship between judges and the community that evaluates the judgment. Kahn and Edlin understandably focus on the judge side of the relationship, but thinking through their books makes us wonder if they ought to have considered the community side as well.

The backdrop for the Kahn and Edlin books is an array of intellectual developments that have utterly undermined the view of legal reasoning as the discovery of a pre-existing truth. As political scientists, we could of course give primacy to the long tradition of judicial behavior studies showing that rather than converging on “right answers” to legal questions, appellate judges of different political stripes regularly arrive at varying conclusions about the cases that come to them. But the matter seems much broader and deeper than that. Philosophical developments over the past hundred or so years have created a fascinating set of challenges for Anglo-American jurisprudence, highlighting the social construction of reality and undermining foundationalisms of all stripes. Not long before his death, Richard Rorty made the point in a lecture in Torino, Italy, when he addressed the conflict between Pope Benedict XVI’s fundamentalist vision of social order with his own philosophical tradition of pragmatism:

There is no neutral court of appeal that will help us decide between these two accounts of the human situation, both of which have inspired many acts of moral heroism. In the pope’s vision, humans must remain faithful to what he calls “the common human experience of contact with a truth that is greater than we are.” In the relativist vision, there never was, and never will be, a truth that is greater than we are. The very idea of such a truth is a confusion of ideals with power.³

With accelerating prominence in the twenty-first century, the model of humans as rational actors has also taken a hit. Daniel Kahneman and his late partner Amos Tversky have catalogued an immense array of cognitive illusions that are endemic to human reasoning. A human mind is, as Kahneman has put it, a machine for jumping to conclusions.⁴ Even more recently, Steven Sloman and Philip Fernbach, in their book, *The Knowledge Illusion*, show that the things we think “we know” are just thoughts picked up and copied from friends, peer groups, popular culture, and so on.⁵ Recent fMRI brain studies suggest that the brain is, if anything, wired to reject reason and objectivity, to perceive new rational and evidence-based assertions proposed by others as a potential threat to one’s own security. Confronted with a tightly reasoned argument, our first reaction is to reject it and show it is wrong.⁶ None of this should surprise any careful observer of the political career of Donald Trump and of the tens of millions who continue to identify him, in spite of daily and overwhelming evidence to the contrary, as a great man come to drain our nation’s swamp and restore it to greatness.

The implications of all this for jurisprudence are clear. Settling disputes justly so that they do not escalate into socially disruptive feuds seems to require independent and

3. RICHARD RORTY, AN ETHICS FOR TODAY: FINDING COMMON GROUND BETWEEN PHILOSOPHY AND RELIGION 17 (2010).

4. DANIEL KAHNEMAN, THINKING FAST AND SLOW 79 (2011).

5. See STEVEN SLOMAN & PHILIP FERNBACH, THE KNOWLEDGE ILLUSION: WHY WE NEVER THINK ALONE 16–18 (2017).

6. See HUGO MERCIER & DAN SPERBER, THE ENIGMA OF REASON 328–33 (2017).

neutral third parties to decide which of the contending arguments, framed by applicable legal principles, is the correct and true one. What are we to do, though, if there is no such thing as a “correct and true outcome,” but instead many mutually inconsistent yet plausible and justifiable answers to the legal questions that come before judges? If justice does not consist of discovering what the law truly commands, just what have judges been doing all these centuries to maintain social approval and the appearance of objectivity?

Edlin’s contribution toward answering these questions is modest: He tries to clear away some of the conceptual confusions he believes have clouded our understanding of legal judgment. Most of all he takes aim at the “objectivity/subjectivity” binary, the familiar trope in which judges are seen either as ruling according to some objective standards or merely imposing their own subjective wills.⁷ Wrapping ourselves up in worries about either objectivity or subjectivity, Edlin argues, is a dead end, because common law judging combines both objective and subjective elements. Instead we should be using a different set of concepts to understand legal judgments—individuality, impartiality, independence, and most of all, intersubjectivity.⁸ Because judges are people with life experience that bear on the cases before them, they necessarily draw on their own worldviews in forming legal judgments. But because law is a social practice, the judge’s legal conclusions are validated only when they are accepted through an intersubjective process by the legal community. Legal judgments, then, are claims about what that community considers valid, not the discovery of objective truths.⁹

Much of *Common Law Judging* is a critique of the ways in which “objectivity” has been used and misused in claims about legal judgment. Chapter Two reviews the concepts of subjectivity, objectivity, and impartiality from a variety of perspectives, including the philosophy of language and various branches of legal theory.¹⁰ Edlin uses the example of Justice Ruth Bader Ginsburg to examine how a judge’s personal experiences can, quite properly in his view, affect her legal judgments. In Chapter Three, the heart of the book, Edlin compares the “common law tradition of legal judgment” to Kant’s theory of aesthetic judgment.¹¹ Edlin argues that legal judgments, like aesthetic judgments, are individual conclusions that require validation from some community. This makes legal judgments “intersubjective.”¹² Chapter Four illustrates Edlin’s claims through an examination of the legal opinions in three cases.¹³ Chapter Five, somewhat of a tangent, argues that legislative efforts that stop judges from considering certain sources of law, or that regulate the types of evidence judges may consider, should be counted as attacks on judicial independence because they interfere with the judge’s reasoning process.¹⁴ In the concluding chapter, Edlin draws on a variety of examples, most prominently the dueling perspectives on affirmative action offered by Justice Sonia Sotomayor and Justice Clarence Thomas, to

7. EDLIN, *supra* note 2, at 19.

8. *Id.* at 7.

9. *Id.* at 10.

10. *Id.* at 20–51.

11. *Id.* at 54–63.

12. EDLIN, *supra* note 2, at 52–76.

13. *Id.* at 77–89.

14. *Id.* at 90–109.

illustrate his claims about subjectivity and intersubjectivity in legal judgment.¹⁵

Although *Common Law Judging* is modest in its aims, it is wildly ambitious in its sweep. Edlin catalogs and summarizes for scholars hundreds of years of academic pondering about the key concepts he examines. Virtually every thinker articulating every angle on the subject gets in on the act, from Thomas Aquinas to Hans Zeisel, from Sir William Blackstone to Martin Shapiro, from Thomas Hobbes and David Hume to Roscoe Pound and Judge Richard Posner, to take just a few of the names listed in the six-page “index of names” at the end of the book. Indeed, if you love endnotes and citations, this book is for you: Of the book’s 262 pages, just 125 are text. The other 137 pages include the aforementioned index of names, a more general index, a list of references, and the 728 endnotes Edlin has meticulously created. Many of the endnotes are deliciously meaty, and the conscientious reader will want to keep two bookmarks working at the same time.

As our own writing on the subject attests,¹⁶ we are highly sympathetic to Edlin’s account of legal reasoning as an intersubjective process that cannot be understood by invoking either pure subjectivism or strong objectivity. Aesthetic judgment does seem a useful analogue in those respects. That said, legal reasoning has quite different and much more urgent social functions than reasoning about aesthetics. Legal reasoning is used to justify taking away people’s money, their reputations, even their lives, and to resolve disputes between parties that might otherwise disturb the peace of the whole community. As Robert Cover observed decades ago, law is founded in coercion and implicit threats of violence.¹⁷ Thus the study of legal reasoning seems to require close analysis of the process by which legal judgments are validated. But Edlin’s account sidesteps such analysis. Edlin tells us that whether a legal judgment is valid depends on its acceptance by “the community.”¹⁸ Fair enough, but that of course raises the question of what to do when “the community” is divided, as is often the case, for example, in American constitutional law. Indeed many of the overheated claims about objectivity and subjectivity in law that Edlin is criticizing arise precisely because there is so much division in the legal community.

Take for instance Edlin’s analysis of Justice Sotomayor and Justice Thomas’s use of personal experience in the affirmative action cases. Sure, it is fine for them to draw on their personal experiences, but how exactly are we to decide which of them has made the better argument? Are both of their legal judgments valid because some part of “the community” has accepted them? Or are both invalid because neither has been accepted by the whole community? Because Edlin does not examine the building blocks of legal judgment, the modes of legal reasoning that ground the evaluations of legal community, he cannot generate any way to critically analyze worse and better legal arguments, so he cannot get inside the intersubjective process whose broad outlines he is describing. As a result, it is not clear exactly what counts as validation or acceptance in Edlin’s account.

Edlin’s focus on the judge’s side of the intersubjective process obscures the work that “community” is doing in his account; it seems to presume a relatively unified and

15. *Id.* at 115–22.

16. LIEF H. CARTER & THOMAS F. BURKE, *REASON IN LAW* (9th ed. 2016).

17. Robert Cover, *Violence and the Word*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 203–38 (Martha Minow et al. eds., 1995).

18. EDLIN, *supra* note 2, at 6.

healthy community for legal judgments. But what if such a community does not exist? What if the community validates legal judgments that fail to resolve social disputes, or that result in actions that are disastrous for society? This seems to be where the analogy to aesthetics breaks down, as the reception of legal judgments has consequences for the work that law and legal institutions do in society. In this respect Edlin's book, for all its scholarly rigor, seems to raise more questions than it answers.

Paul Kahn's *Making the Case* starts where Edlin ends, with the claim that legal judgments are acts of persuasion rather than discovery.¹⁹ But Kahn does not take for granted, as Edlin's account seems to, the functioning of this intersubjective process. It takes artistry, charisma, even a kind of magic, Kahn maintains, for judges to persuade others that their rulings are correct.²⁰ And, he argues, many of them today do not seem to be up to the job.²¹ They write long opinions filled with citations and quotations, "as if writing an opinion has become a task of cutting and pasting."²² The rise of word processing and the consequent ease of cut, copy, and paste may be the proximal causes here, but like Richard Posner,²³ Kahn thinks a deeper, more troubling cause is at work: All this cutting and pasting, he says, "is more than likely a sign of judges who can no longer confidently respond to the accusation that their work is just politics in another form."²⁴ Kahn accordingly aims his book at law students, the next generation of judges, whom he fears are being miseducated about opinion-writing. Students, he says, read highly edited segments of cases that stress holdings, and so see them more as bundles of rules rather than as the works of rhetorical art they are.²⁵ Kahn insists instead that to read a case opinion is to experience a performance—dicta and holding both matter!—and that students need to learn to appreciate what goes into both great and muddled performances.²⁶

Most of *Making the Case* is Kahn's account of what a legal opinion must do if it is to be persuasive. Kahn illustrates this account through persuasive and unpersuasive opinions drawn from his specialty, constitutional law. In Chapter Two he argues that legal opinions must invoke a familiar "narrative," a way of seeing the case that fits in with familiar themes.²⁷ For example, in a case concerning violent video games, Supreme Court justices who contend that "the government often overreacts to the purported dangers of new media" are met with the theme that "scientific knowledge has led to better government regulation."²⁸ In Chapter Three he argues that judges must find in the constitutional provisions and statutes they interpret an "us," a purpose for the law that the polity, we the people, share.²⁹ Chapter Four considers the tension judges confront between, on one hand, the raw text of laws, statutes, and constitutions, and on the other hand, the body of case

19. KAHN, *supra* note 2, at 1–18.

20. *Id.* at 12–13.

21. *Id.* at 11.

22. *Id.*

23. RICHARD A. POSNER, REFLECTIONS ON JUDGING 78–94 (2013).

24. KAHN, *supra* note 2, at 12.

25. *Id.* at 10–11.

26. *Id.* at xiv.

27. *Id.* at 18–45.

28. *Id.* at 31–32.

29. KAHN, *supra* note 2, at 46–87.

law and precedents that claim to interpret the texts.³⁰ Chapter Five examines facts and how judges muster them.³¹ In the concluding chapter, Kahn argues for a humanistic, “inside” account of law as a balance to social, scientific, “outside” accounts that treat law merely as policymaking or an arena of political power.³²

This brief and pedestrian summary does Kahn’s book an injustice. He is a wonderful writer, passionate about the art of opinion-writing and the more mysterious elements of the judge’s performance. We found Kahn’s account of what makes for persuasive legal reasoning highly persuasive. That said, we wonder whether the problem of judicial persuasion as Kahn frames it can be solved simply through better opinion-writing. Aside from rhetorical skill, one requisite for persuasion is an audience that is capable of being persuaded, and it is not clear that the audience for American constitutional law still has this capacity. Laurence Tribe, the author of an eminent constitutional law textbook,³³ wrote in 2005 that he declined to produce a new edition of the book because he despaired that the typical techniques of legal analysis could integrate “the deep and thus far intractable divisions between wholly different ways of assessing truth and experiencing reality, divisions both cultural and religious in character” that embody contemporary constitutional law.³⁴ The chasm within the community for constitutional law judgments is, of course, not just over the interpretation of particular doctrines but also the proper techniques of interpretation. Kahn chooses not to grapple with these divides. Although his approach is clearly at odds with many versions of originalism, for example, he does not acknowledge how contested it is. (Nor does he consider the big fight over his favored purpose-oriented approach to statutory interpretation.) So when Kahn argues that, for example, a Thomas opinion is not persuasive,³⁵ we can imagine the response of Thomas and his sympathizers in the legal community: It is persuasive to us! As Thomas Keck’s *Judicial Politics in Polarized Times* demonstrates, the divides so evident in the American political community today are often reflected, rather than repaired, in our legal system.³⁶

To believe that legal judgments are objective, that judges divine the law through their legal expertise, that their worldviews and life experiences have nothing to do with their conclusions, requires a kind of faith that is mostly gone. The move to an intersubjective understanding of judging, though, requires a different kind of faith. One must believe that judges, through the power of their rhetoric, can bring an increasingly diverse and politically polarized community together. The extent to which this is true of the United States in 2017 seems to us an open question. In any case, the functioning of the intersubjective process clearly depends just as much on the characteristics of the community as on the rhetorical technique of judges that is the focus of Edlin and Kahn.

30. *Id.* at 88–134.

31. *Id.* at 135–72.

32. *Id.* at 173–79.

33. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (3d ed. 2000).

34. Laurence H. Tribe, *The Treatise Power*, GREEN BAG, Spring 2005, at 9, available at http://www.greenbag.org/v8n3/v8n3_articles_tribe.pdf. Our thanks to Sanford Levinson who, in his foreword to our book *Reason in Law*, pointed to Tribe’s comments in considering the capacity of legal reasoning to bring communities together. CARTER & BURKE, *supra* note 16, at xi–xvi.

35. KAHN, *supra* note 2, at 28–30; *Brown v. Entm’t Merchs. Assoc.*, 564 U.S. 786, 821–40 (2011) (Thomas, J., dissenting).

36. THOMAS M. KECK, *JUDICIAL POLITICS IN POLARIZED TIMES* (2014).