Inside the Canadian Judicial System: Judges and Judging

F.C. De Coste

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BOOK REVIEW


F.C. De Coste*

Judging is the process of determining specific pieces of social history and of translating that history into propositions of law. In this, law's alchemy, a description of events in a world now past becomes transmuted to statements about right and obligation, about guilt and innocence; statements which bind the future. In the 1920s and 1930s, an upstart American realism raised a question—a simple, yet unnerving question—which challenged law's magic. To what degree, the realists inquired, does the social history of the judge, her sociology, determine the description of facts and their subsequent translation to law? This question has been at the heart of all mature theoretical discourse ever since. Theorists have argued that the relationship between law and life is either much more coherent and defensible than the realists suggested or much more contradictory and ideological than they had ever imagined.

Until quite recently, Canada's legal academy has been largely unaffected by post-realist discourse. Secure in a peculiarly long-lived accept-

* Assistant Professor, Faculty of Law, University of Alberta.

1 Hart and Dworkin are, of course, central to this strand of post-realist jurisprudence. See generally, R. Dworkin, LAW'S EMPIRE (1986). See also H. HART, THE CONCEPT OF LAW (1961). The post-realist defense of law's political and moral integrity has perhaps reached its final expression in Dworkin's Empire.

2 Here are located contemporary critical scholars and, especially, Unger. See generally M. Kelman, A GUIDE TO CRITICAL LEGAL STUDIES (1987); R. Unger, Social Theory: Its Situation and Its Task in POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY (1987). Incidentally, Unger's work, in my view, stands alone among critical scholars because it transcends the narrow agenda of Euro-American legal thought (particularly its enduring obsession with formalism) and contributes to the larger discourse of political and social theory. See also Rorty, Unger, Castoriadis, and the Romance of a National Future, 82 NW. U.L. REV. 335, 351 (1988) (arguing that Unger's work "has a better chance than most to be linked in the history books, with some...world-transforming event").

3 There have been some notable exceptions. See, e.g., P. Weiler, IN THE LAST RESORT: A
ance of positivism’s formalist and conceptualist story about law, Canadian legal academics continued—and yet continue—to produce scholarship modeled on an understanding of law and of scholarship now past. However, this has not been the practice of other disciplines in the Canadian academy. Canadian political scientists, in particular, quite early joined the debate that realism engendered. It is in this tradition that McCormick and Green, both political scientists, proudly situate themselves and their monograph.

Two introductory chapters provide an all too simple version of the role and history of the courts and a summary of federal and provincial appointment practices. A concluding chapter offers the authors’ recommendations for judicial reform. The substance of the book consists of seven chapters which report the authors’ findings on the social backgrounds of Canadian judges and on the perceptions held by Canadian judges on judicial role and practice. The authors’ report is based on data collected from three sources: interviews with ninety-one judges from all levels of court in Alberta and Ontario; interviews with an unspecified

4 See, e.g., Baker, The Reconstruction of Upper Canadian Legal Thought in the Late-Victorian Empire, 1985 LAW & HIST. REV. 219; Consultative Group on Research and Educ., Law and Learning (1983) (a report to the Social Science and Humanities Research Council)(see especially chapters 5, 6, 7 & 10). Blaine Baker points to the nature of Canadian legal academic production as evidence of the “enigmatic and unparalleled longevity” of positivism in Canada:

One sign of this persistence is the recent production by Canadian legal academics of small and modest treatise literature which, revealingly, is modelled closely after classical late-nineteenth-century forms and is based largely on English decisional law...There has not yet been a coherent functional, empirical, or ethical assault on the imported late-nineteenth-century Canadian version of legal conceptualism.


5 See e.g., J. Corry, Democratic Government and Politics (1946); Statutory Powers, in Legal Essays in Honour of Arthur Moxon 127 (J. Corry, F. Cronkite & E. Whitmore eds. 1953); J. Corry, Law and Politics (1959).


7 Forty judges were interviewed in Ontario during 1979 and 1980 and fifty-one were interviewed in Alberta in 1982 and 1983. The Ontario judicial interviews were supplemented by interviews of thirty-two trial lawyers, thirty crown counsel, and thirty-two court administrators. Id. at vi. The Alberta judicial interviews were supplemented by interviews of forty-four trial lawyers, fifteen court administrators, and nine crown counsel. Id.
number of retired Supreme Court of Canada justices; and basic biographical data collected on a sample of two hundred seventy-seven judges from across Canada. In this review, I will discuss both the authors' conception of their project and their report on the social histories and self-conception of the Canadian judiciary. These two inquiries are interrelated, and have much to do with the book's ultimate inadequacy.

At the beginning of the book, the authors disclose the premise, purpose, and thesis of their project. The book's premise is that not all judicial decision-making is adjudication, because when engaged in clarifying ambiguous language in laws, courts are making policy. The authors' purpose is "to fill in some of the gaps in our understanding of how these [policy] decisions... get made...[in order] to describe and demythologize [judicial decision-making]" and thereby [this is their thesis] demonstrate that judges "cannot help but be influenced by factors such as their social backgrounds and the particular styles of decision-making they have unconsciously adopted." These proposals will strike anyone conversant with legal theoretical discourse as both familiar and familiarly off the mark. The thesis is clearly realist in nuance, as the authors "insist that, beneath the robes, judges are people much like the rest of us." Clearly, this is conceptually empty. Ronald Dworkin, for one, has taken much effort to point out that, without more, nothing of theoretical interest follows from the fact that authoritative judgements of law are made by people with moral and political convictions. Of course, he is correct because otherwise all discourse, whether legal, aesthetic or philosophical, automatically falls prey to an easy nihilism.

The American realists, however, were not nihilists—they provided a conceptual more. In one of its parts, realism proffered the principles of social science as a cure for what would otherwise realistically amount to law according to what the judge had for breakfast. In its other, more

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8 Id. Rather surprisingly, this data was collected exclusively from press releases announcing appointments.
9 See P. McCormick & I. Greene, supra note 6, at iv-v.
10 Id. at iv, 78-80.
11 Id. at v.
12 Id. at 119. The authors announce their realism throughout: See, e.g., Id. at iii, viii, 59, 138, 166, 244, 246.
13 See R. Dworkin, supra note 1. See also Dworkin, Law as Interpretation, in The Politics of Interpretation 249 (W. Mitchell ed. 1982)[hereinafter Law as Interpretation].
14 For the social science strain of legal realism, see Cook, Scientific Method and the Law, 13
radical aspect realism sought to demonstrate that legal reasoning was necessarily of a deeply political and ideological character. In short, in both its parts, American realism used its realist inquiry to bypass the easy and self-satisfied conceptualism of classical legal thought so that other projects and other proposals became possible. This is not true for the present authors—their realism is a threadbare realism—a realism without substance, and in consequence, without point. This poverty of view is not, however, at all fortuitous. It is bred of their founding premise which, in turn, devolves from an exceedingly simple and inadequate view of law and judicial practice. It is this view of law which leads the authors to so under-appraise the significance of what they call policy, especially as ideology, and to so under-evaluate the significance of their data, particularly as evidence of the ideology of legal professionalism.

The authors believe the judicial work consists of two, essentially different, moments: a law-following moment and a policy-making moment. In a fashion reminiscent of Herbert Hart, they distinguish the two in terms of the nature of legal language. When the language of law is clear—especially when it consists of “specific directives rather than general principles”—judges follow the law because they are “applying the law to...facts,” and because at such moments the law consists of “an objective set of standards.” When the language of law is ambiguous, however, and when judges are not, simply following the directions of the law’s language, instead of engaging in a process of clarifying its meaning, they are making policy or legislating.

15 For the more radical strain of realist thought, see generally Cohen, The Ethical Basis of Legal Criticism, 41 YALE L.J. 201 (1931); Cohen Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809 (1935); Cook, Privileges of Labor Unions in the Struggle for Life, 27 YALE L.J. 779 (1918); Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 POL. SCI. Q. 470 (1923); Hale, Law Making by Unofficial Minorities, 20 COLUM. L. REV. (1920).

16 According to Hart, language, including law language, is both immediately settled at some points and open-textured at others. It has, therefore, a “central core of undisputed meaning” and “a penumbra of language.” See, H. Hart, supra note 1, at 12, 123. However, the present authors do not approximate Hart’s sophistication.

17 P. McCORMICK & I. GREENE, supra note 6, at 59, 78, 228-30.

18 Id. at 78.

19 The authors use “following,” “adjudicating,” and “interpreting” synonymously throughout.

20 P. McCORMICK & I. GREENE, supra note 6, at 7.

21 Id. See also id. at 228-30.

22 The authors define policy-making as “the process of clarifying ambiguous language in law,” id. at iv, and equate policy-making as such with “legislating.” Id. at 229.
domesticated and eviscerated version of realism. For if, as McCormick and Greene would have it, judicial practice is only subject to the realist challenge at the margins, then most judicial practice is, without more, salvaged from the vagaries of politics. What remains becomes political in a very antiseptic and peculiarly legal fashion.

Consider first the authors' report on the social histories of judges. Canadian judges, they report, "like all elites, tend to be drawn more from the established sectors of society." They are, as a consequence, disproportionately older, married males with "upper-class backgrounds" who tend to be affiliated with dominant religious, ethnic, racial and political groups. Prior to appointment, these judges were generally "high achievers," often as partners in larger firms. Of course no one would contest this report, but at issue is its significance, not its validity. The authors offer an appraisal which, true both to their view of law and to their version of realism, is at once both politically naive and legally misconceived.

According to the authors, the social histories of judges are only relevant when judges are policy-making and, even then, only indirectly. When the case is difficult because the language of the law is ambiguous, judges, the authors claim, typically attempt to legislate a meaning by discerning the view of the "average reasonable person." It is this unlikely view of matters at the margins that informs the authors' entire thesis.

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23 The term indefensible is used because legal thought has moved so far beyond such an understanding. If one wishes to maintain a dichotomy between law and politics—or, as the authors would have it, between law and policy—mere declaration no longer suffices. Instead, one must come to terms with the vast amount of recent literature on law as interpretation because that literature establishes the discourse in terms of which alone the dichotomy could possibly be maintained.

For a sampling of interpretive literature in addition to the founding symposia, Law and Literature: Symposium, 60 Tex. L. Rev. 373 (1982). Symposium on Interpretation, 58 S. Cal. L. Rev. 1 (1985). There is a long running debate between Owen Fiss and Stanley Fish, on the one hand, and Ronald Dworkin and Stanely Fish on the other. See Fiss, Conventionalism, 58 S. Cal. L. Rev. 177 (1985); Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739 (1982); Law as Interpretation, supra note 13. See also Dworkin, Please Don't Talk about Objectivity Any More, in The Politics of Interpretation 287 (W. Mitchell ed. 1983); Fish, Fish v. Fiss, 36 Stan. L. Rev. 1325 (1984); Fish, Still Wrong After All These Years, 6 L. & Phil. 401 (1987); Fish, Working on The Chain Gang: Interpretation in the Law and in Literary Criticism in The Politics of Interpretation 271 (W. Mitchell ed. 1983); Fish, Wrong Again, 62 Tex. L. Rev. 299 (1983).

24 P. McCormick & Greene, supra note 6, at v.

25 Id. at 59-80. The report is based on three sources: a biographical questionnaire completed by one-hundred-sixteen Alberta judges (with a sixty-seven percent response rate), an analysis of a random sample of press releases announcing two hundred seventy seven federal and provincial judicial appointments, and previously existing studies and reports on judicial backgrounds. Id. at 60-61.
with respect to the significance of judges' social histories.\textsuperscript{31} The thesis is that, upon comparing "the backgrounds of judges to those of average Canadians,"\textsuperscript{32} judges are not "in an ideal position to assess the views of the 'average reasonable person.'"\textsuperscript{33}

Even if it were true that judges sought to interpret law using this utilitarian calculus, the authors' appraisal of the impact of the judicial interpreter's social background woefully under-estimates the ideological significance of class, gender and race.\textsuperscript{34} Indeed the authors' analysis trivializes this impact. The fact that legal interpreters are disproportionately class-preferenced white males is a central feature of the judicial enterprise. This is cause for concern, not because judges become incapable of empathizing with the demographic majority but, much more critically, because their vision of the right, good and, more particularly, their view of what the world-in-law (including the worlds of others that appear before them) \textit{ought} to be, may become infected. Class, race, and gender are not issues of legal interpretation but of ideological position. The challenge is to determine whether law consolidates and expresses such a position or whether, as Dworkin and others suggest, constraint and rule by law is still possible.\textsuperscript{35}

Matters do not improve when the authors report on how judges conceive of their role and practice.\textsuperscript{36} With respect to judicial role, the authors make two inquiries of interest—first, why had the judges interviewed accepted a judicial appointment and second, what qualities

\textsuperscript{31} This view is unlikely because it is so idiosyncratic. \textit{See supra} note 22 (Discussing contemporary interpretation theory). \textit{See also infra}, note 31 (listing traditional texts on legal interpretation).

\textsuperscript{32} \textit{P. McCormick} \& I. Greene, \textit{supra} note 6, at 61.

\textsuperscript{33} \textit{Id.} at 60.

\textsuperscript{34} The authors offer neither justification nor sources for this claim. This is not at all surprising since neither contemporary interpretation theory nor traditional texts on legal interpretation support such a view. Regarding the former, see sources cited \textit{supra} note 22 (discussing contemporary interpretation theory). Regarding the latter, see \textit{Maxwell on the Interpretation of Statutes} (P. Largan 11th ed. 1962); G. Cockram, \textit{The Interpretation of Statutes} (1975); R. Cross, \textit{Statutory Interpretation} (T. Bell & P. Kurland 2d ed. 1987); R. Dickerson, \textit{The Interpretation and Application of Statutes} (1975); J. Evans, \textit{Statutory Interpretation Problems of Communication} (1988).

\textsuperscript{35} \textit{See e.g.} R. Dworkin, \textit{supra} note 1. \textit{See also Moore}, \textit{A Natural Law Theory of Interpretation}, 58 S. Cal. L. Rev. 279 (1985).

\textsuperscript{36} Their report on the judicial role is contained in Chapter 5. \textit{P. McCormick} \& I. Greene, \textit{supra} note 6, at 118-66. Their reports on judicial practice are contained in Chapters 6 through 9. \textit{Id.} at 167-246 Chapters 4, 5, 8, and 9 are, by far, more interesting. Chapter 4 presents the results of questions having to do with why lawyers accept judicial appointments and, once judges, how they view ideal judicial characteristics. \textit{Id.} at 83-117. Chapter 5 presents the authors' findings of trial court understanding of judicial decision-making, \textit{Id.} at 118-66. Chapters 8 and 9 present the results of Alberta judges' assessment of the importance of precedent and of the propriety of judicial legislation. \textit{Id.} at 211-46. Chapters 6 and 7 are less interesting because they largely consist of descriptions of appellate and Supreme Court of Canada procedures. \textit{Id.} at 167-210.
did those judges most admire in other judges? Their report regarding the first inquiry reveals an amazing banality in the decisions by lawyers to accept judicial appointments. The authors report that the judges interviewed accepted appointments for either practical or idealistic reasons. Practical reasons are defined as having to do with "a desire to escape negative features of the practice of law," including boredom, burnout, dissatisfaction with the business aspects of private practice, and pragmatic calculations such as security and independence. Idealistic reasons are reasons which the authors think declare "something intrinsically attractive about the bench," including views that appointment presents new challenges within the profession, or that it represents, as either an honor or a reward, the pinnacle of a legal career. These reasons are plainly of the self-referencing, careerist variety, and one could reasonably expect the authors to provide an explanation, especially since any coherent mention of public service among the responses is absent.

With respect to the matter of qualities admired in other judges, the authors report that their respondent judges "value the qualities of diligence and industry, of humaneness, of patience and courtesy, of a knowledge of the law and intelligence, of a sense of fair play and decisiveness." These responses are striking in their omission of public service, and the authors do not provide any analysis in response, preferring instead to categorize responses in terms of the values they think are represented. However, as discussed below, the authors fail to provide any explanation for this omission.

Their failure in both these instances has, I think, everything to do with their failure to take seriously the central, unifying characteristic of their response group—namely, that their respondents are all legal professionals. Had they done so, the authors could have avoided succumbing to excessive judge admiration and could have framed questions more likely to have provided a mature explanation of their results. For instance, they could then have inquired into whether responses regarding both appointment and admired qualities are related to socialization within the profession. Such inquiries probably would have suggested at

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37 Id. at 81. The first inquiry was made of both Ontario and Alberta judges. Id. at 84. The second inquiry was made of Alberta judges only. Id. at 115.

38 Id. at 85.

39 Id.

40 Id.

41 Id. at 115.

42 Id. at 113.

43 The authors do sometimes mention this fact and occasionally draw instruction from it. See e.g., id. at 117 (where the authors associate the judicial admiration of industry with judges having been high achievers in private practice). See also id. at 165 (where the authors associate a lack of collegiality with the judges' independent work experience as practicing lawyers).

44 See e.g., id. at 117, 188, 208, 258.
least three things: that the admired qualities are very much a transfer to
the judicial realm of the qualities of industriousness and gentlemanly
conduct which are valued in private practice; that public service re-

sponses with respect to appointment were absent because such motiva-
tions are largely absent in private practice; and that the two categories
of responses are, in consequence, related, and only intelligible, in terms of
the profession’s ideology, especially its deep and enduring belief in indi-

vidual initiative and meritocratic hierarchy. By ignoring the importance
of professionalism, the authors missed the opportunity to do any of this,
because they thereby forbade themselves the means of articulating the
inquiry.

The authors deliver their report on judicial practice in three major
parts: one describes trial court understanding of its decision-making pro-
cess, a second describes judicial understanding of precedent, and a third
describes judicial responses to the propriety of judicial legislation. In
each instance, the authors fail to adequately analyze the data and here as
elsewhere, this arises from a lack of consideration for the respondents’
legal professionalism.

Take first their report on trial judges, namely, that trial judges differ
in terms of the amount of discretion they see themselves as having: from
virtually no discretion to total discretion. The authors interpret this
information as confirmation of their version of realism. Whether or not
this is true surely depends on an analysis of why judges interpreted the
authors’ open-ended question: “is there a general process by which you
reach a decision on a particular case?” as an inquiry about discretion, if
only because what judges say they are doing may not correspond with
what they are actually doing. This analytic inquiry, as to why legal pro-

fessionals, including judges, think the nature of their practice somehow
turns on the degree of discretion practiced, would unavoidably have led
the authors to conclude that law is, at some very fundamental level, dis-

tinct from politics because, unlike politics, law is not a matter of discre-
tion. Unfortunately, the authors did not pursue such an inquiry,
notwithstanding their conclusion that “most judges are extremely un-
comfortable with the notion of judicial power” appears to demand it.


45 See e.g., McKay, The Rise of the Justice Industry and the Decline of Legal Ethics, 68 WASH.
46 The authors also report on appeals courts and on the Supreme Court of Canada but, for the
most, these reports merely describe court process. See P. McCORMICK & I. GREENE, supra note 6,
at 167-210. Each of the three major inquiries were made only of Alberta judges.
47 The authors designate these responses as strict formalist. See id. at 123.
48 The authors designate these responses as intuitivist. Id.
49 Law, it turns out, is not a decision-making process as it allows for “little discretion on the
part of judges.” Id. at 138.
50 Id. at 121.
51 Id. at 119.
Their treatment of judicial responses to the questions regarding the value of precedent and the propriety of judicial legislation is no more successful. With respect to the former, the authors report that a solid majority of the judges think that precedent is "an important and valuable part of judicial decision-making."\(^{52}\) They further state that most judges seek to follow precedent and will consciously depart from precedent only on the most narrowly technical and careful grounds. With respect to the propriety of judicial legislation, they report that the vast majority of judges think either that they have no law-making role or that their law-making role is rare and occasional.\(^{53}\) Once again, the issue is not the accuracy of these reports, but their significance. That question ultimately turns on why judges would disclaim discretion in their decision-making; upon why they think discretion, whether or not they actually have it, is so important. Unfortunately, instead of inquiring into what about legal professionalism could possibly lead judges to conceive of their practice in such an unempowering fashion, the authors conclude that their findings about precedent raise the need for further empirical research and that their findings about discretion confirm their notion of realism.\(^{54}\)

In conclusion, *Judges and Judging* is fundamentally flawed. It takes an empirical verification of unsurprising truths about judicial backgrounds and judicial self-conception as demonstrative of a misconceived realism, instead of as a reason for further inquiry as to why judges would share such social history and belief in the first place. The book thereby avoids the much more sophisticated and critical task of associating judicial history and belief with professional socialization, as a process of ideological confirmation and formation. This failure is not without cost.\(^{55}\) The law's professional ideology, particularly its belief that practice is an expertise-excluding power, has a sharp political point. It insulates judicial actors from political criticism and, at the same time, absolves them from moral and political responsibility for the social production of judicial work. The failure cannot be excused. No less than legal scholarship, scholarship in the field of political science is always predicated on theory. The scholar's choice is to have this by design or by default.

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52 Id. at 214.
53 Id.
54 Id. at 223-27.
55 The cost, incidentally, is aggravated by the authors' declaration that they are disclosing law from the inside and, thereby, revealing what it is really like.