ARTICLES

Politicization: From the Law Schools to the Courts

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In my experience, the process of dispensing justice—the true business of the courts—is harmed in two ways by the politicization of the law schools. First, the education of law clerks and judges suffers. Second, we judges, like most people, are affected by our audience. Politicization of the universities reduces the quality of the responses of the audience and thereby impairs the incentives for good legal craftsmanship.

To explain these effects, I need first to describe how we appellate judges perform our assigned tasks. Courts apply law to cases. Cases are particular, concrete disputes. Law consists of general normative propositions. Because of the complexity of human affairs, these propositions, stated in their general form, are often vague and conflicting. They gain their meaning from their applications. Our craft consists of determining which general propositions apply, applying them in ways that make some practical and logical sense, and explaining our decisions in print so that other people can predict what courts will think the law is, conform their conduct to it, avoid burdensome and unpleasant entanglements with the law, and be protected by the law from predators. We use two techniques for most of this work, analysis of precedent and statutory construction.

The American system of law must be understood as a product of the English imagination. It has developed in a gradual and continuous course from the time of King Henry II in the twelfth century. English jurisprudence has always emphasized the decision by a particular judge about a particular case as a source of law, while on the Continent judges have a role more like that of an adjudication officer in an American administrative agency, whose decisions generally do not bind other adjudicators. The Continental approach has always relied much more heavily than the English on comprehensive general codes imposed from above. In the common law system that has developed in the English tradition our general propositions tend to be derived inductively, from the results in large numbers of particular cases. This particularized, inductive reasoning of the case approach to law leaves less room

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for imposition of comprehensive theories on the law than the Continental approach. It affords greater scope for taking advantage of the knowledge and insights of people active in various areas of human endeavor outside of what legislators, administrators, and judges know than does a system in which the law comes from the top down.

This inductive approach demands subtle thinking, requiring both intelligence and experience; hence the craft of using cases is less accessible to untrained people than would be a comprehensive scheme imposed from the top down. Any college student can read and understand the codes drawn up by Napoleon or Frederick the Great, but it takes considerable study and experience to understand the hearsay rule.

Because precedent has so much power in our jurisprudence, and because its use is so subtle, the quality of legal decisions depends heavily on the craftsmanship and intellectual honesty of our judges. We read a prior decision to determine what proposition explains why the facts of that particular case, in its procedural context, led to that result. The proposition is called the *holding* of the case, and it binds other judges in the same court and all courts below it. This reading is often difficult, because it requires judgment about what facts were material to the outcome and how the procedural context affected the result. Sometimes it is much easier for judges on a court to agree on a result they consider just than on the reasoning by which one reaches that result; thus a later court may need considerable craft to parse out those propositions that united the earlier court behind the result.

Where a statute regulates the conduct at issue, some of the subtleties of precedent are irrelevant in the first few years after its passage, but we nevertheless have a similar problem of applying general normative propositions to specific, concrete disputes. If a statute prohibits knowing transportation of hazardous wastes without a permit, does a person commit the crime if he knows he is transporting hazardous wastes, but doesn't know that his company's permit has expired? What if he knows he has no permit but doesn't know that the frozen spray paint in the back of his station wagon constitutes hazardous waste? How far down the sentence does the modifier "knowing" extend? After a few years, the accretion of cases construing the statute moves the intellectual process back toward the traditional common law craft of analyzing precedent, as the statute recedes behind the encrustation of cases that have construed it.

Though the craft I have described is interesting and demanding intellectual work, it is not removed from worldly affairs. The law determines how the coercive power of government shall be imposed: marshals with guns enforce the commands of judges. Courts decide what government agencies can do and whether people go to prison and lose or gain fortunes. Because of the coercive nature of the law we demand justice from the law, rather than the traditional academic desiderata of originality, creativity, and insight.

A fundamental requirement of justice in legal decisions is that like cases be treated alike. But which cases are alike, and which are different in ways that should matter? This process of classification requires a high degree of craftsmanship and intellectual honesty in the tasks of analyzing cases and construing statutes. Corruption of justice in its indictable form usually involves bribery, but justice may be corrupted even more pervasively by politicization than by bribery. A bribe may, in a corrupt system, determine whether a particular litigant wins or a particular criminal is wrongfully let loose to prey on others. But it is not worth anyone's money to pay a bribe for favoritism toward an entire class of litigants. However that is precisely what we find in a politicized system, where an entire class, race, or sex of litigants may be treated more or less favorably than persons whose conduct is materially similar. Bribery corrupts on a retail basis, but politicization corrupts wholesale.

Few judges, regardless of their personal political views, want to work in a politicized system of justice. If we do not feel that we are doing justice, we become alienated from our work. One's workday as a judge is most enjoyable and satisfying if one feels that one's work produced justice according to law, not coercion according to the political agenda of some group. Politicization slips through doors opened by poor craftsmanship, which leads to such failings as not recognizing significant procedural or factual distinctions between cases, or that some factual distinctions should make no difference to the outcome, or missing the parallels between usage of a word in one subsection of a statute and another. More grossly, poor craftsmanship explains failure to discover controlling precedent or statutory language. These failures, for all that they may sound technical, have the practical result that like cases are treated differently, while unlike cases are treated alike—and that means that people are treated unjustly. Where poor craftsmanship alone explains the failure, the injustice is arbitrary and capricious. But where poor craftsmanship combines with politicization, the injustice becomes systemic.

When legal craftsmanship is good, a judge often makes decisions with which he himself disagrees as a matter of policy. This is not to say that the law leaves no room for the exercise of judgment informed by a view of what may be socially desirable. Sometimes it does. But often it does not. For example, in a recent environmental law opinion I wrote, *Longview Fibre Co. v. Rasmusson*, 980 F.2d 1307 (9th Cir. 1992), we had to decide whether an effluent limitation under section 1313 of the Clean Water Act fell within the statutory words "any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." This depended on two things, whether the list of statutes modified "effluent limitation" or only "other limitation," and whether section 1313 limitations were a subset of section 1311 limitations. I thought that we would have more practical environmental law if section 1313 limitations were treated, for purposes of this statute, in the same way as section 1311 limitations. The lawyers who sought this result made plausible argu-

ments for it. But all three of us on the panel agreed that the statute, carefully and honestly interpreted, required a contrary result. Careful analysis required the conclusion that, just as "I saw a pod of whales flying into Ketchikan" can mean only that the speaker was flying into Ketchikan rather than the whales, the statute could mean only that the list applied to the more remote antecedent, and the failure to mention section 1313 in the list implied its intentional exclusion. I wrote the opinion rejecting the result that I would have preferred as a matter of policy. Judges frequently conclude that the law requires a result that they do not like, so there was nothing unusual about this. But in the context of a discussion about politicization it is worth mentioning that all three panel members agreed on the result, even though one was a Carter, one a Reagan, and one a Bush appointee.

I offer this anecdote as an example of a common occurrence: good legal craftsmanship in the approach to statutory construction and analysis of precedent often leads to agreement on the law, despite disagreement on preferred outcomes. Traditional unpoliticized judges do not have much difficulty concluding that the law is something other than what they would like it to be.

Democratic government requires this kind of legal craftsmanship, independent of policy preferences. After all, the presidents who appointed the three of us on the panel, whose philosophies we tend to share, are out of office. Either we read the law independently of our policy preferences, or we thwart the democratic process, which entitles the president and Congress to have the laws they promulgate applied to cases. If judges do not follow the laws made by the elected branches of government, democracy exists in name only.

Having described the danger inherent in the politicization of the judiciary, let me connect that danger to politicization of the university. Most people probably imagine that the journey from law school graduation to a position of great power in the American judiciary takes twenty years or so. Not so. For many students, it takes a couple of weeks. An increasing proportion of American judging is performed by law clerks, typically people who graduated during the previous year at the top of their class in the best law schools. Judges on high courts have long used young law graduates for such tasks as editing their opinions, checking citations of authority, and locating cases and statutes that should be considered. That is how we check and double check to avoid the defects of craftsmanship I described earlier. Traditionally, judges drafted opinions and law clerks edited them.

In the last few years, however, most of us have gone to a system in which law clerks draft opinions, and judges edit them. This is a change for the worse, in my view, but it is a fact. Some judges always did this, but it used to be a secret, because it was inconsistent with what judges thought they should do. You can tell that law clerk drafting is the general rule now, because

people no longer feel a need to cover it up. I occasionally receive law clerk applications from students who have had summer jobs working in judges' chambers while in law school and enclose as their writing samples opinions published under those judges' names. Chief Justice Rehnquist, in his book *The Supreme Court: How It Was, How It Is,* says that after conference, "I ask the law clerk to prepare a first draft of a Court opinion . . . that I may very well substantially rewrite."[1] Case loads are greater than they used to be, and public and Congressional tolerance of delay is less, so our fellow judges praise or condemn us more for promptness and efficiency in disposing of large case loads than for the quality of the dispositions. This leads to greater delegation of opinion writing to law clerks.

Those who write know the importance of a first draft. One can spot errors of analysis much more easily as one writes than one can reading someone else's polished work, when correctness of the main points may satisfy, so that mistakes in peripheral matters slip by. When judges become editors, their craftsmanship becomes less important to what is published, because their role in writing it is smaller. The craftsmanship and philosophies of law clerks become more important. The president and the Senate of the United States have much less influence over the product of the federal judiciary if law clerks do the writing, and the professoriate more.

This is not to take away from the impact of law school education on judges. I went onto the bench seventeen years after graduating from law school, not an unusually short or long time. The legal education I obtained at Harvard Law School remains an important part of my intellectual capital. My basic approach to the craft, and the values that infuse my work, are heavily influenced by my college and law school professors. I still quote my professors. So do my colleagues. To the extent we were well or badly trained, our education improves or impairs our opinions. But the country no longer has the luxury of waiting fifteen or twenty years for deficiencies in legal education to produce deficiencies in judicial opinions. Deficiencies now affect judging immediately because of the delegation of opinion writing to law clerks.

Obviously, politicized education of judges and law clerks has to affect their work. Any substantial change in the education of professionals affects their work. Politicization probably has not gone as far in law school education as it has in some other fields, but it has gone far enough to have perceptible effects.

The effect I notice most is subtraction. The best graduates of the best law schools know less law, and much less history and government, than they used to know. To test this impression, I reviewed the resumes of some of my best law clerks—very capable, unpolitical, high ranking graduates of selective law schools, mostly Harvard and Columbia. Their first year curriculum was generally what it always has been, civil procedure, contracts, criminal law, torts, and property.

But contracts and tort law are sometimes deconstructed rather than elaborated, so that the student learns that the rules are nonsense without learning what the rules are. As one of my law clerks put it to me, there is less focus on the law and more on the underlying political questions affecting the law, especially in the elite schools. Contracts, property, and civil procedure seem to have been watered down. The students often learn less than used to be taught about estates in land, future interests, and the common law forms of action. Land lasts forever, and therefore property law has an especially high degree of continuity, but recent graduates often do not even know the words for some of the applicable concepts. Much of the policy analysis is interesting, but I generally cannot use it to write a decision on where the burden actually must fall under existing law. When policy analysis is substituted, in an opinion, for reliance on precedent or statutory construction, in all likelihood the deficiency of craftsmanship will cause like cases to be treated differently, or it will thwart a democratically selected policy choice made in legislation.

During the second and third year, the traditional curriculum consisted mostly of such courses as constitutional law, legal ethics, corporations, evidence, taxation, labor law, accounting, administrative law, commercial transactions, antitrust law, conflict of laws, estate planning, federal courts, family law, business planning, securities regulation, admiralty, insurance, and economic regulation. These courses have been partially displaced by "Law and . . . " courses, such as "Law and Political Theory," "Law and Literature," "Gender and the Law," "Law and Economics," "Thinking about Thinking," "Critical Legal Theory," "Law and Violence against Women," "Race, Racism and American Law," and "AIDS and the Law." One wonders what the content might be in a Minnesota Law School offering called "Feminist Theory of Donative Transfers." Donative transfers are gifts. The kind complicated enough to require study in law school typically concerns gifts in trust to reduce taxes, as when a couple earning a high combined income puts an inheritance in trust for their children's education so that the interest can accumulate subject to a lower tax rate. No doubt feminist theorists have concerns with the accumulation and distribution of money through donative transfers, but feminist theory cannot offer much practical assistance in the drafting of one of these trusts, or the decision in a tax case involving such a trust.

My concern with the proliferation of "Law and . . . " courses is less what they teach than what they displace. The law needs criticism, and intense topical issues often stimulate worthwhile insights. But students and teachers cannot divert much time, money, and intellectual energy to these things without taking away from something else. Some law students now graduate with little or no formal training in First Amendment law. It is tragic if less knowledge about our Constitutional guarantee of freedom of speech is transmitted in order to free the time, money, and energy for some topical con-

cern. Though more dismal than tragic, the substitution of political stimulation and criticism for a course in insurance law leaves students ignorant of an exceedingly complex body of law which controls much of the money transferred through state court adjudications. The amount of legal education that can be purveyed in the three years of law school is finite; hence curriculum choices necessarily involve subtraction as well as addition.

This is not to say that "Law and . . . " courses necessarily have little value. One of my most useful courses turned out to be a third year elective on law and psychiatry taught by Alan Dershowitz and Alan Stone. A law clerk has advised me that "poverty law" was where he learned civil procedure. But the proliferation of electives in place of the traditional curriculum means that I cannot count on a law clerk's understanding of the law that we will need to apply in our cases. If I see too many "Law and . . . " courses on an applicant's resume, I am likely to reject it.

Nor do I quarrel with a critical approach to established rules of law. Some traditional rules are unjust or pointless, and students ought to learn what the rules are, how they came to be the rules, and what is wrong with them. Critical thinking about established legal doctrines, and consideration of underlying philosophical presuppositions and political interests, may add enlightening elements to classes in which knowledge of substantive law is transmitted. But the number of classroom hours and practical homework hours is insufficient to transmit the body of law that must be mastered for minimal competence.

My concern is with loss of knowledge. Entertaining opportunities to debate interesting topical issues tempt students away from tedious but often very important courses. They look to me like self-indulgence on the part of the professors. The work of a practicing lawyer or judge requires all of the traditional knowledge and more, and little from among electives such as those that I have listed. I have not yet had occasion to need a law clerk's work on feminist hermeneutics.

Rules of law are thought by students at the most selective schools to be easy to learn and boring to teach. The law faculties see themselves more as a part of the university and less a part of the profession than formerly. But the rules are not so easy, and they are not boring at all in application. Cases in the law often look boring and hypertechnical at a superficial level, but they become fascinating once study proceeds to a level deep enough to enable one to understand them fully. There are a lot of legal doctrines. They are sometimes hard to understand and often hard to apply. They look boring or easy only to people who have insufficient knowledge and experience to which to relate the abstractions of doctrine. The political chatter law students hear about pushing the law in this direction or that, and about legislating a better society through creative litigation, does not prepare them as well, even for those very tasks, as study of established bodies of law according to traditional standards

of craftsmanship. If one represents a tenant about to be wrongfully evicted from an apartment, one needs to know whatever will enable him to win, not to waste time railing about why the power of landlords in the political system might cause him to lose.

The notion that law is just a cloak for the exercise of power by white males, or a means by which others can exercise power, offers a good excuse for not studying much law. All you have to do is get power and impose your will. Imagine how many homework hours that saves. Imagine the embarrassment and boredom it avoids for a professor without knowledge to enrich discussion of the rules with anecdotes about how they apply to cases. Imagine the sense of superiority and righteousness such meta-law philosophizing creates in young people who might otherwise feel inadequate about their ability to help future clients with their legal problems.

The learning lost cannot be filled in later. The economics of practice force lawyers to specialize in areas narrow enough so that they do not have to keep up with the whole developing body of law. Most lawyers have to spend more of their time on the telephone and dictating letters than reading law books. Few clients can afford to pay lawyers to continue their legal education, so what is not obtained in law school is not obtained at all. Substitution of attacks on legal doctrines as arbitrary assertions of power for teaching of the doctrines causes what it condemns. To the extent that legal knowledge and the craftsmanship it generates evaporate, there is nothing left but imposition of preference by arbitrary exercise of judicial power.

My feeling, as I have noted, is that politicization affects personnel mainly by subtracting from their legal knowledge. My own hiring practices, though, may cause me to underestimate the damage done. I consciously reject resumes that look politicized. I began doing this, and have been doing it more and more, because of stories I have heard from and about other judges. One had a law clerk who cried in chambers and refused to assist in the preparation of a decision that she thought was insufficiently favorable to environmental concerns. One had a law clerk who told numerous lawyers outside the court that an opinion on homosexuals was about to come down, but that she had not written it and did not agree with it. One had a law clerk who tipped off a "public interest" group about a politically unacceptable decision of his judge. Since the Anita Hill testimony, I suspect that many of us in public positions are more concerned about the risk of staff disloyalty than we were before. Some law students on the Left do not apply to judges appointed by Republican presidents, and I tend to hire law clerks who share my concern with craftsmanship. I am probably hiring from among the less politicized students, so do not see the more blatant harm resulting from politicization.

One cannot reasonably suppose that law students remain unaffected by the politicized environment of so many of their schools. Harvard students tried to destroy the careers of two law students who wrote a tasteless parody; because tastelessness has never been a hanging offense for students, their peers must

have inferred that the antifeminist aspect of the parody was what made it a capital offense. Georgetown Law School tried to destroy the career of a law student who disclosed that admission standards differed for minority students; because disclosure of institutional secrets has been enshrined as whistle-blowing since the Pentagon Papers, the students must have inferred that the political implications of this particular institutional secret were what made it too dangerous to reveal. At NYU Law School, students refused to brief one side of a moot court argument on denial of custody to a lesbian mother, because they thought no legitimate arguments could be made on that side. A professor at Harvard Law School has been castigated as anti-woman for leading a class discussion in criminal law about false accusations of rape. Another, a visiting professor of contract law, was attacked as anti-woman in order to prevent the school from inviting him back, for such offenses as quoting the Byron line "whispering 'I will ne'er consent'—consented." He quoted the line in connection with the contracts problem of a firm's saying "we will sell only on the terms of our invoice" and then selling on the conflicting terms of the customer's purchase order. No one can spend three intense years in that kind of environment without learning that groups holding considerable power in the university loathe speech with the wrong content about topics important to them, and that those who say the wrong things will have little peer or institutional protection. They have to learn that many ideas may not be expressed, many subjects may not be discussed, and any discussion on matters of political salience has to avoid offending groups powerful in the university. People tend to internalize the "is" as the "ought," and devalue freedom of speech, when they spend three intense years in an environment that punishes speech for its content. Freedom of speech in America cannot long survive an infusion into the legal system of personnel who have learned to devalue it.

The second way in which politicization of the universities affects the courts is by shaping our audience. For judges, as for anyone who produces an intellectual product, the product is affected by its audience. Unlike practicing lawyers, we cannot make more money by performing our work better. Our reward for quality is self-respect and the respect of others, that is, of our audience. The kind of intellectual product that is valued and appreciated by an audience affects what we produce.

We judges are necessarily isolated from the bar. We cannot chat with our friends in practice about cases pending before us. Nor do we talk nearly so much as people might think with each other. The custom on my court, and many others, is for conferences on cases to be limited to one brief discussion immediately after oral argument. Subsequent discussion of cases takes place by written memoranda sent over the electronic mail system. The only people to whom we talk a lot about our work are our law clerks. They are our primary aural audience.

The audience for our written opinions consists largely of practicing lawyers

and other judges, but we do not hear much from them. Their interest in our opinions lies more in how they can or must use them than in how good they are. If I write a stupid, poorly informed opinion, misconstruing a statute and misunderstanding controlling precedent, there is a good chance that no trial judge and no practicing lawyer will tell me so. Those who find the result useful, even though poorly grounded, may even write favorable articles for legal newspapers about the opinion, in order to give it maximum publicity for use in future cases. Among the practicing lawyers who do not find the result useful, few will find it economically practicable to sacrifice the billable time necessary to write a critical article. In addition, they may feel that criticism, in the face of *stare decisis*, would be spitting into the wind.

To the extent that we have an audience other than our law clerks, that responds in a way we can see or hear, it consists mostly of legal academics and legal periodicals. That audience shares the politicized culture of the university. When a judge writes an opinion that advances the interests of groups powerful in that culture, the judge will be praised. When an opinion does not advance those interests, it will be damned or ignored. Good craftsmanship will not save from condemnation an opinion on the politically disfavored side, nor will bad craftsmanship prevent the highest praise for an opinion that advances the preferred side. Any judge knows that if he or she cares to be famous, widely praised in universities, the object of adulation among the greatest number of law clerk applicants, and invited to speak at the largest number of universities, the most efficient means is a novel and creative opinion favoring the interests of those groups that are now politically favored in universities. Since novelty and creativity often are at odds with careful statutory construction and analysis of precedents, the means of gaining honor and repute tend to undermine intellectually honest craftsmanship of high quality.

I do not remember the system working in this way in the sixties, when I was in law school. Craftsmanship then seemed to affect reputation more, and results seemed to affect it less, than now. Most of us at Harvard thought badly of Justice Douglas's opinions, even though we generally agreed with him, because their craftsmanship was often deficient. We generally had the highest respect for Justice Harlan's and Justice Jackson's opinions, even though we often disagreed with them, because the level of craftsmanship was high. During the criminal law revolution, which was then occurring, nearly all of us as students agreed with the majorities in the 5-4 decisions liberalizing the law, yet we often had more respect for the opinions written by the dissenters.

The effect of the former system was to create an incentive among judges who valued their reputations to do good work. It is my impression that, among legal journalists and among professors and students, our reputations as judges now depend only on the bottom line. For people whose political preferences matter more to them than their professional skills, the relevant question is not "How well have you applied the law to the case?" but "Which

side are you on?" The current system creates an incentive to reach the result favored politically in university and legal journalism circles, regardless of whether it is reached by an intellectually honest, craftsmanlike analysis of the law.

Among the intensely felt political preferences that now animate academic culture, individual liberty and freedom of speech seem to rank fairly low. I cannot think of another time in American history, except perhaps in the South during the decade or two preceding the Civil War, when the most important public issues could not be candidly discussed, even in the universities. Last year at the University of Minnesota Law School the administration asked all students to sign a pledge, to be signed by a witness as well and returned to the administration. The pledge not only abjured "expressions of bigotry," but also said that silence amounted to "endorsement" of "bigotry and hatred." Thus speech was in effect *required* to combat "the impact of racism, sexism, homophobia, and other forms of intolerance." If one is required to speak about race, gender, and sexual orientation, and may only speak in accord with the doxology, the discussion can have no important diversity of opinion, nor can it contribute to enlightenment and improvement. If one side of a moot court problem is unarguable, and if the line of poetry most often used to describe the contract doctrine of "the battle of the forms" exposes the speaker to condemnation as sexist, we cannot expect any useful discussion of sexual orientation or gender issues from the law schools. Though the law schools proclaim endorsement of diversity, the culture of the law schools appears to oppose diversity where it matters most: in thought and in speech.

Preservation of individual liberty of thought and speech seems to me to be the highest political value. But it is no longer regarded as the most sacred object of the legal endeavor in the law schools. Freedom of thought and speech is now balanced against other interests, such as the avoidance of what is called "hurt" to those who disagree with some speech and the advancement of favored political interests. The decline of respect for legal craftsmanship, and of teaching of the body of knowledge needed to perform it, undermines democracy. The people cannot exercise their power through their representatives if the law they make is not carefully and seriously applied. The devaluation of freedom of thought and speech undermines individual liberty. Politicization of the law schools threatens these values by impairing the education of law clerks and judges, and by changing the incentives of judges through the responses of our audience.

Note

1. William H. Rehnquist, *The Supreme Court: How It Was, How It Is* (New York: William Morrow and Company, 1987).