

# JUDGING, EXPERTISE, AND THE RULE OF LAW

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## INTRODUCTION

We live in an era of hyper-specialization. Professionals across a spectrum of fields focus on mastering and practicing in narrow subspecialties.<sup>1</sup> This is hardly a surprise. As the scale of knowledge grows, it becomes increasingly difficult for any one person to stay on top of details and developments across a field, and specialization represents something of a natural division of labor. Law is no exception.<sup>2</sup> Bar associations have large numbers of sections to serve the needs and interests of lawyers who practice within narrow fields,<sup>3</sup> and large law firm websites commonly tout the specialized knowledge of their practice groups and individual lawyers.

Courts, too, have become specialized.<sup>4</sup> The federal judiciary features, for example, the Federal Circuit, bankruptcy courts, and tax courts. At the

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1. The phenomenon of the expert in a narrow field, or "technocrat," is hardly new.

The increasing complexity of production systems, managerial decision-making, and military preparedness has made the technical expert, with his esoteric knowledge, a key figure in our society. Even the realm of political decisions has become so overwhelmed with information, study groups, and research reports that legislation and political decisions have come under the influence of the expert.

Robert Perrucci, *Engineering: Professional Servant of Power*, 14 AM. BEHAVIORAL SCIENTIST 492, 492 (1971).

2. See, e.g., Lawrence M. Friedman, *Heart Against Head: Perry Miller and the Legal Mind*, 77 YALE L.J. 1244, 1249 (1968) (noting that "[n]o lawyer could grasp the whole of the legal system because the system became simply too big" and attributing the system's bulk primarily "to population growth, economic development, and social diversity"); Deborah L. Rhode, *The Profession and Its Discontents*, 61 OHIO ST. L.J. 1335, 1337 (2000) ("In many fields of law, increasing complexity has encouraged increasing specialization. Lawyers know more and more about less and less, and their intellectual horizons have correspondingly narrowed.").

3. The A.B.A., for example, has a wide range of sections, divisions, forums, centers, and commissions focused on different types of practitioners. See *ABA Groups*, AM. BAR. ASSOC., [http://www.americanbar.org/groups/view\\_all\\_groups.html](http://www.americanbar.org/groups/view_all_groups.html) (last visited Feb. 15, 2012).

4. Judicial specialization is, to a degree, the product of the same factors driving specialization throughout society. Yet, as Lawrence Baum has argued, on the whole "the movement toward greater judicial specialization has been a product of inadvertence rather than design." LAWRENCE BAUM,

state level, there are the Delaware Chancery Court and the Texas and Oklahoma Courts of Criminal Appeals, as well as family courts, drug courts, and probate courts. Indeed, Judge Posner has suggested that if (or when) the federal caseload becomes too great, “the federal judiciary will perforce switch to the European model of specialized courts. For specialization enables an indefinite increase in caseload to be more or less effortlessly accommodated. . . .”<sup>5</sup> Yet, despite the larger trend toward specialization, the iconic American judge remains a generalist. She sits on a court of general jurisdiction and adjudicates whatever disputes happen to come before her.

In recent years, however, there has been something of a backlash against the increasing division of intellectual labor. Dr. Jerome Groopman, for example, has suggested that “[s]pecialization in medicine confers a false sense of certainty.”<sup>6</sup> Specialists, he argues, are just as susceptible to cognitive biases as nonspecialists, yet are overconfident in their diagnoses.<sup>7</sup> Across an array of fields, critics contend that increasing specialization has left us with practitioners who too often fail to appreciate the big picture, and who cannot adequately integrate their narrow perspective concerning a situation into the larger framework necessary to generate optimal solutions.<sup>8</sup> In light of this, it seems appropriate to reconsider the virtues of the generalist judiciary, an institution that, viewed

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SPECIALIZING THE COURTS 5 (2011). Baum concludes that the primary driver of specialization is “an interest in shaping the substance of judicial policy.” *Id.* at 207. Pressures toward increased specialization are likely to be a product of caseload pressures as well. The business of the judiciary has increased in quantity to the point where adherence to all the adjudicative procedures of an earlier era is, as a practical matter, impossible. Courts have implemented a number of reforms to address these volume-related problems, including (at the appellate level) curtailment of oral argument and the widespread use of so-called “unpublished opinions.” See generally, e.g., THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS (1994); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996). The nature of judging at the trial court level has likewise changed, as evidenced by “the vanishing trial” and the rise of managerial judging. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL & LEGAL STUD. 459 (2004); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

5. Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1050 (2006).

6. JEROME GROOPMAN, HOW DOCTORS THINK 153–54 (2009).

7. *Id.* at 150, 154.

8. E.g., Eliot Freidson, *The Reorganization of the Professions by Regulation*, 7 LAW & HUM. BEHAV. 279 (1983). Jeff Lipshaw has explored related issues in the context of assessing the problems posed by interdisciplinary judgment and decision-making. See Jeffrey M. Lipshaw, *The Venn Diagram of Business Lawyering Judgments: Toward a Theory of Practical Metadisciplinarity*, 41 SETON HALL L. REV. 1 (2011); Jeffrey M. Lipshaw, *The Epistemology of the Financial Crisis: Complexity, Causation, Law, and Judgment*, 19 S. CAL. INTERDISC. L.J. 299 (2010).

against the backdrop of our increasingly specialized society, might seem to be something of an anachronism.

There already exists a relatively large body of literature outlining proposals for specialized courts and otherwise considering their perceived virtues.<sup>9</sup> I seek in this Article to engage this literature in two ways. First, I hope to demonstrate that the question of specialization is much more complex and contingent than most previous discussions have allowed.<sup>10</sup> The question is never just whether specialists will outperform generalists in some abstract sense—it instead requires consideration of an array of factors, such as the nature of the field of specialization, the institutional context in which specialization is to be implemented, and so on. There are also questions, distinct from any differences in the substantive results achieved via the two types of courts, about whether the two types of regimes are likely to differ in the extent to which they advance rule-of-law values. The goal of this analysis is to work away from, rather than toward, confident conclusions. Many of the questions involved are ultimately empirical in nature, and all will require comprehensive study. I offer intentionally speculative hypotheses about potential differences between specialists and generalists, with the hope that what results can serve as a catalog of factors to be considered in efforts to develop specialized courts and an agenda for future scholarly efforts.

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9. The most prominent pieces in the literature considering the question at a general level include: RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 245–46 (1996) [hereinafter POSNER, *THE FEDERAL COURTS*]; Lawrence Baum, *Specializing the Federal Courts: Neutral Reforms or Efforts to Shape Judicial Policy?*, 74 *JUDICATURE* 217 (1991); Paul D. Carrington, *The Obsolescence of the United States Courts of Appeals: Roscoe Pound's Structural Solution*, 15 *J.L. & POL.* 515 (1999); Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 *BYU L. REV.* 377 (1990) [hereinafter Dreyfuss, *Specialized Adjudication*]; Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 *N.Y.U. L. REV.* 1 (1989); Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 *CORNELL L. REV.* 634 (1973) [hereinafter Friendly, *Averting the Flood*]; Henry J. Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 *YALE L.J.* 218 (1961) [hereinafter Friendly, *Reactions*]; Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 *NW. U. L. REV.* 745 (1981); Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 *U. CHI. L. REV.* 603 (1989); Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 *S. CAL. L. REV.* 761, 776 (1983) [hereinafter Posner, *Will the Federal Courts of Appeals Survive*]; Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 *U. PA. L. REV.* 1111 (1990); Simon Rifkind, *A Specialized Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 *A.B.A. J.* 425 (1951); Sarang Vijay Damle, Note, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 *VA. L. REV.* 1267 (2005).

10. Baum's recent book is an important exception. He expressly acknowledges that "[t]he effects of specialization may be contingent on variables such as the specific form that specialization takes in a particular court, the other attributes of a court, and the conditions under which the court does its work." BAUM, *supra* note 4, at 40.

Second, I examine in greater detail one of the primary claims made in favor of specialized courts and judges, namely that they facilitate expert decision-making for the simple reason that judges on specialized courts will be (or will become) experts in the subject matter within the court's jurisdiction. Those making the case for specialization in the past have suggested, without much elaboration, that because of their expertise specialized judges will make better decisions, with "better" left largely undefined. I draw on research into the psychology of expertise to explore whether specialized courts and judges really can be expected to generate better decisions, and conclude that the case for expertise is overstated. Simply put, specialized judges will almost always have a claim to expertise in the weak sense that they will be more efficient in reaching conclusions than non-experts. These efficiency gains can be substantial, and they may sometimes be of dispositive weight in a world of rising caseloads. But, it is unlikely to be the case that the content of specialists' decisions will differ in some qualitative respect from—or be in some general sense "better than"—those of their generalist counterparts. At the same time, there may be process aspects of specialists' decision-making that should give us pause, and that must be balanced against the efficiencies gained through specialization.

The remainder of this Article proceeds as follows. Part I outlines some of the initial definitional difficulties embedded in discussions of judicial specialization, and briefly reviews the primary arguments offered for and against specialization. Part II offers an assessment of the specialization debate that is designed to enlarge both the breadth and depth of the inquiry. Part III surveys psychological research on expertise, with an eye toward gleanings its insights relevant to judging. Part IV synthesizes the work of the preceding two parts, drawing on both to further refine the analysis while introducing the suggestion that the choice between specialization and generalism is likely to have rule-of-law consequences.

## I. AN OVERVIEW OF THE DEBATE

### A. *The Scope (and Slipperiness) of the Inquiry*

An initial difficulty with assessing the merits of judicial specialization is that there is no ideal type of specialized (or, for that matter, generalist<sup>11</sup>)

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11. We might imagine that American judges have always been generalists—that in some relatively broad sense they were required and prepared to adjudicate any dispute governed by law. That is undoubtedly accurate as a depiction of what the American judiciary has looked like through

court.<sup>12</sup> It is relatively easy to take a rough cut at defining generalist

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most of our nation's history. For much of our nation's history, there simply was not that much law, and as a consequence it was not unrealistic to expect an individual to gain mastery over all of it. Judge Friendly used this observation as the basis for the suggestion that law professors might be better suited to the bench than practicing lawyers.

[W]hereas it was not unreasonable to expect a judge to be truly learned in a body of law that Blackstone compressed into 2400 pages, it is altogether absurd to expect any single judge to vie with an assemblage of law professors in the gamut of subjects, ranging from accounting, administrative law and admiralty to water rights, wills and world law, that may come before his court. Even the most experienced twentieth century judge, as he pirouettes among all these topics, must often feel himself a proper target for Dr. Johnson's shaft—"It is not done well; but you are surprised to find it done at all."

Friendly, *Reactions*, *supra* note 9, at 220 (quoting BOSWELL, LIFE OF JOHNSON 287 (Everyman's ed. 1925)). Of course, the focus of the typical law professor has shifted considerably since the time that Friendly wrote, such that he would likely not view the matter in precisely the same way were he writing today. His point about the wide array of subjects confronting the judge still stands.

Even so, while the term nowadays connotes the lack of specialization characteristic of judges on courts of general jurisdiction, our casual acceptance of that role as a natural baseline overlooks a struggle earlier in our history over the nature of law and judging. See John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 566 (1993) (describing the struggle in the early years of the American republic between those hostile to legal doctrine and the professionalization of law and "those who understood that the intrinsic complexity of human affairs begets unavoidable complexity in legal rules and procedures"); see also Charles H. Sheldon, *Due Process and the Lay Judge*, 21 LAW & SOC'Y REV. 793 (1988). The very fact that professional training is a prerequisite to most judicial positions represents the privileging of one form of generalism over another. Specialization, in turn, can take various forms as one further narrows the scope of a judge's responsibility away from the open subject matter of the legal generalist. Specialization can occur at varying breadths. A business court would arguably be less specialized than a patent court and a criminal court less so than a family court.

There is something of a temporal component to specialization as well. No judge on a generalist court begins his judicial career as a generalist in the sense that he has equal familiarity with the subject matters underlying all the disputes he will be required to adjudicate, and most such judges likely come to the bench from a relatively specialized practice that has provided no exposure to many subjects. One consequence is that the judges on generalist courts are arguably not generalist judges to the extent that the court's jurisdiction would imply, although with respect to individual judges the phenomenon becomes less pronounced over the course of a career. Another is that a certain amount of de facto specialization takes place on generalist courts, whether by the happenstance of a trial judge getting a case in an area in which she has experience or the more intentional practice of a judge on an appellate panel being assigned to write the opinion in a case as to which she has experience. See generally Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519 (2008).

12. In a sense, the difficulty begins with the concept of a judge, a term that connotes not some unified and uniform role, but rather one with varied responsibilities occupied by people with a wide array of qualifications and experience. See Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1914 (2001) (footnote omitted) ("[T]he judicial function . . . exemplifies an 'essentially contested concept' that requires normative and institutional articulation. How we choose to define that institution depends on our collective commitments and our resolved needs . . ."). There are, to take just one example, considerably more non-lawyer judges in the United States than most observers are likely to be aware of. See Nigel J. Cohen, *Nonlawyer Judges and the Professionalization of Justice*, 17 J. CONTEMP. CRIM. JUST. 19, 19–20 (2001); Cathy Lesser Mansfield, *Disorder in the People's Court: Rethinking the Role of Non-Lawyer Judges in Limited Jurisdiction Court Civil Cases*, 29 N.M. L. REV. 119 (1999). And in the case of multi-member courts, it may make sense to draw a distinction between the court and the individual judges on it, in the sense that the attributes of a collection of judges may amount to more (or less) than

courts: those with judges who have no designated subject-matter specialization (whether as a product of a jurisdictional limitation or otherwise), and who must accordingly hear and decide cases presenting virtually any legal issue.<sup>13</sup> Specialization, in contrast, involves a host of variables. Courts might be specialized in accordance with traditional boundaries between legal subject matters, such as tax law, or in accordance with features of the cases they hear that are not strictly legal, as might be the case with courts designed to hear cases involving scientific or business matters.<sup>14</sup> Specialization could likewise occur at varying breadths. One could imagine courts designed to hear, for example, only private law, or tort, or personal injury cases. It hardly seems farfetched to imagine that each of these variations would have differing effects on judges, processes, and outcomes. The nature of the bar that appears before the court seems likely to matter as well. The specialized court that hears cases primarily or exclusively through a specialized bar will be different from its counterparts that confront a generalist bar or a significant number of pro se litigants. The advocates play an important role in framing disputes and providing the raw materials of decision, and changes in the manner in which those inputs are provided will almost certainly manifest themselves in a court's output. A final evident variable is whether the court at issue is a trial or appellate court. Because of their different roles and orientations toward the dispute—trial courts will be relatively more focused on facts, appellate courts on law—it is easy to anticipate that specialization raises different concerns and would have different consequences in the two contexts. In all, careful consideration reveals that the question of what is at stake in the choice between generalism and specialization is more complex and contingent than previous analyses tend to recognize.

The concept of expertise is likewise slippery when applied to the judiciary. Although commentators tend to employ the terms “expert” and

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the sum of its parts. Cf. Adrian Vermeule, *The Judiciary is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005).

13. As a descriptive matter, state appeals court judges probably come closest to pure generalism, but even they are precluded from hearing disputes within the exclusive jurisdiction of the federal courts.

14. See Damle, *supra* note 9, at 1277. For proposals for such courts, see, e.g., Ad Hoc Committee on Business Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 947 (1997); Victor Williams, *A Constitutional Charge and a Comparative Vision to Substantially Expand and Subject Matter Specialize the Federal Judiciary: A Preliminary Blueprint for Remodeling Our National Houses of Justice and Establishing a Separate System of Federal Criminal Courts*, 37 WM. & MARY L. REV. 535 (1996).

“expertise” as though their meanings are self-evident,<sup>15</sup> their casualness masks considerable uncertainty and complexity. Some writers have suggested that the relevant expertise pertains to the process of judging itself, such that what is implicated, by its nature, is some relatively general skill.<sup>16</sup> It may exist in slightly different forms as between trial and appellate judges, but on this view, the expertise is trans-substantive.<sup>17</sup> Another approach regards judicial expertise as subject-matter specific, such that a judge might be viewed as an expert in, say, criminal law but not tax. One might also adopt a hybrid approach that conceives of judicial expertise as multi-dimensional.

Regardless of how one conceives of expertise, additional questions follow. Does “expertise” denote what is merely a relative status, or is there some qualitative difference that separates experts from all varieties of novice? If expertise is subject specific, how far does a given expert’s reach extend? How does one become an expert? Is experience the key, or is it largely a product of innate skills? If the former, and given the lack of any formal judicial training in the United States, is it experience as a lawyer that makes one an expert, or is it necessary to have experience as a judge? In theory, at least, most of these questions could be assessed empirically. Yet, assessing the quality of a judicial decision, and thus measuring many of the dimensions and effects of expertise, involves both practical and theoretical difficulties that counsel in favor of tentative, incremental assessment.<sup>18</sup>

As all this suggests, the concepts in play are elusive, and a wide range of variables will impact the performance of judges and judicial systems.<sup>19</sup> A comprehensive taxonomy, while theoretically possible to develop, would make for cumbersome analysis. Some simplification is thus in

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15. “Most commentators treat the concepts of *expert* and *expertise* as non-problematic. The concepts are presented as predetermined, temporally and spatially stable, quite often obvious, and even natural.” Gary Edmond & David Mercer, *Experts and Expertise in Legal and Regulatory Settings*, in *EXPERTISE IN REGULATION AND LAW 1* (G. Edmond ed., 2004).

16. “I accept unreservedly that our judges are specialized—to judging. . . . [T]he judge will have a skill at judging that comes from long practice in evaluating arguments of counsel, decisions of trial judges, and trial records, and that skill is a legitimate fruit of specialization in the function of appellate judging.” POSNER, *THE FEDERAL COURTS*, *supra* note 9, at 248–49.

17. By which I mean simply that it would apply to the act of judging regardless of variation in subject matter, size, or other aspect of the case. Cf. Stephen M. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 *DENV. U. L. REV.* 377, 377–78 (2010) (defining transsubstantivity in procedural rules, then outlining and critiquing the case for it).

18. See *infra* notes 76–79 and accompanying text.

19. See Edmond & Mercer, *supra* note 15, at 2 (elaborating on the assertion that “[q]uestions around what counts as expertise and who is an expert need to be examined in context”).

order. The discussion that follows, for the most part, will use the terms generalist and specialist in the informal sense in which they are typically used. That is, generalist will refer to the prototypical American judge who sits on a court of general jurisdiction, while references to specialized courts will contemplate those devoted to adjudicating some narrower segment of cases, defined by legal or factual subject matter. The analysis will focus on probing the nature and components of judicial expertise and their implications for the nature of judicial decision-making, all while attempting to remain agnostic on the question of which regime will generate better decisions.

### *B. The Arguments for Specialized Adjudication*

Broadly speaking, there are two types of arguments made in support of specialized adjudication. The first stems from the perceived expertise that specialized judges will bring to their task. Here, the claim is that specialists will make decisions that are in some qualitative and categorical sense better than those made by generalists. The second involves efficiencies arising primarily from specialists' familiarity with the factual or legal contexts in which the cases before them arise. This argument does not depend on specialized judges having any unique insights. The suggestion instead is that specialists will be able to resolve cases more quickly because they will start each case with a higher baseline of pertinent background knowledge.

#### *1. Expertise-based Arguments*

The expertise-based argument for specialization proceeds largely on the assumption that the complexity of the law generates the need for specialization. As Judge Henry Friendly put the matter more than three decades ago, this argument turns on whether the concepts embodied within the applicable law "are readily within the reach of any competent lawyer."<sup>20</sup> The complexity may be apparent on the surface of a statutory scheme, or may involve deeper difficulties in determining how a particular case fits within the doctrinal and policy contours of the applicable body of law.<sup>21</sup> Either way, the clear suggestion is that the specialist possesses a perspective that is inaccessible to the generalist, and that the specialist will

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20. Friendly, *Averting the Flood*, *supra* note 9, at 639.

21. *See* Jordan, *supra* note 9, at 747.



accordingly reach better results in individual cases.<sup>22</sup> As one commentator has recently put it:

Obsession with the generalist deprives the federal judiciary of potential expertise, which could be extremely useful in cases involving complex doctrines and specialized knowledge. . . . [E]ven if expert judges cannot necessarily ensure *right* answers, their decisions are more likely to fall within the subset of *better* answers owing to their greater experience and understanding of a field.<sup>23</sup>

Commentary making the case for specialization tends not to linger over the precise nature of the likely differences between the decisions of generalists and specialists, or to ponder approaches to measuring their relative quality.

A related but distinct argument in favor of specialization is that specialized courts will generate law that is more authoritative. In part, this draws upon the same depth of understanding believed to underlie the capacity for better decision making in resolving individual cases. That is, the specialist's greater understanding of the larger legal landscape applicable to a dispute will enable her to generate better law in resolving that dispute.<sup>24</sup> Although here again the precise qualitative metric tends to remain undeveloped, commentators have suggested that specialists will generate law that is more uniform and predictable.<sup>25</sup> That, in turn, will enable those who must comply with the law to structure their affairs accordingly,<sup>26</sup> and will facilitate the settlement of the disputes that do arise.<sup>27</sup> On top of all this, a specialized court will be better positioned "to understand when it is better to sacrifice accuracy (the 'right' result in every case) for the ease with which bright-line rules can be applied and how to draw the fine distinctions necessary when accuracy is more

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22. See BAUM, *supra* note 4, at 33 (identifying expertise as one of the "neutral virtues" associated with specialization, and contrasting it with efficiency). "When commentators speak of judicial expertise as something more than a source of efficiency, what they really mean is that expert judges will produce higher-quality decisions than nonexperts." *Id.*

23. Cheng, *supra* note 11, at 524; see also Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667, 1676 (2009) ("What commentators generally mean when they talk about expertise seems to be the possibility that expertise will enhance the quality of court decisions: more expert judges, who know more about the field in which they are deciding cases, are more likely to get decisions right.").

24. See Dreyfuss, *Specialized Adjudication*, *supra* note 9, at 378.

25. See Jordan, *supra* note 9, at 748.

26. See Dreyfuss, *Specialized Adjudication*, *supra* note 9, at 378; Friendly, *Averting the Flood*, *supra* note 9, at 639.

27. See Jordan, *supra* note 9, at 748–50.

important than administrative convenience.”<sup>28</sup> In short, the suggestion is that the specialist will possess a more comprehensive understanding of the complex legal machinery governing a subject, and will consequently be better able to tinker with that machinery in ways that will improve its performance.

There is also another variety of expertise-based argument. This argument depends less on the complexity of the applicable law and more on the complexity of the factual situations to which judicial expertise must be applied. Proposals for science and, to a lesser degree, business courts proceed from the understanding that the relevant complexity resides in factual settings rather than doctrinal complexity.<sup>29</sup> Yet the case for specialization remains the same—“expert” judges will be able to reach better decisions and generate better law because of their superior understanding of one of the key adjudicative inputs. The suggestion, here again, is that expertise will facilitate decision making in contexts that are beyond the capacity of generalists to understand.

## 2. *Efficiency-based Arguments*

Efficiency-based arguments for judicial specialization do not depend on the existence of qualitative differences between the outputs of specialist versus generalist courts. Instead, the claim is that specialized courts, because of their familiarity with the relevant legal or factual framework, will reach decisions more expeditiously. Put somewhat differently, while generalists courts could achieve the same level of quality as specialized courts, doing so would require an additional investment of time that might be unwise or impracticable given institutional constraints.<sup>30</sup>

Consistent with this rationale, some specialized courts are largely the product of overwhelmed dockets. The rationale for drug (and other

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28. See Dreyfuss, *Specialized Adjudication*, *supra* note 9, at 378.

29. See, e.g., Andrew W. Jurs, *Science Court: Past Proposals, Current Considerations, and a Suggested Structure*, 15 VA. J.L. & TECH. 1, 5–16 (2010) (surveying the history of proposals for science courts); Ad Hoc Committee on Business Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 947, 951 (1997) (referring to both complexity in “real-life social and economic activity” and complexity in legal doctrine as justifications for the creation of business courts).

30. Of course, efficiency-based justifications for specialization overlap to some extent with the expertise-based arguments. Judges who are experts will be more knowledgeable about either the legal or factual contexts in which cases arise and thus will be able to address them more expeditiously. See Dreyfuss, *Specialized Adjudication*, *supra* note 9, at 378 (“If, as common experience suggests, experts are better than laymen at dealing with matters in their special areas, the specialized judiciary should handle cases more efficiently, thereby reducing the number of judge-hours required to decide any given number of cases.”).

problem-solving) courts may be partly rooted in the sense that there is something unique about the judicial role in the types of cases involved, but such courts owe their existence in part to the overwhelming volume of drug cases.<sup>31</sup> One can tell a similar story about probate and bankruptcy courts, which to a great degree involve the processing of large numbers of largely uncontested, routine matters.<sup>32</sup>

There are also efficiency arguments that operate on an institutional level. For example, many commentators have suggested that there is a ceiling on the number of judges an appellate court can have while remaining functional.<sup>33</sup> When this ceiling is reached, specialization is necessary not as a result of any expertise-based gains, but simply because a system that does not allocate at least some of its cases by channeling them to specialized courts cannot function.<sup>34</sup> A court that has grown too large will find it difficult to coordinate its decision-making and otherwise keep abreast of itself. Further, the judges, unable to deliberate in a meaningful fashion, will start to act more like members of a legislative body.<sup>35</sup> Judge Posner has suggested that these factors make a trend toward specialization inevitable.<sup>36</sup>

### C. *The Arguments Against Specialized Adjudication*

The case against specialized courts and judges has four main components, which include: the potential for insularity; the prospect that specialized courts will have, in general, inferior judges; the suggestion that arguments based on expertise do not apply to the judicial role, at least in some contexts; and a concern over boundary and other administrative problems that will often arise in the wake of a separation of some portion

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31. See, e.g., Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1501–02 (2003) (identifying three “institutional imperatives” behind the rise of drug court: (1) docket pressures created by the war on drugs; (2) the perception “that the crush of drug cases led to a crisis in the courts;” and (3) judges’ dissatisfaction with limitations placed on their sentencing discretion).

32. See Jordan, *supra* note 9, at 767–78.

33. See, e.g., Dreyfuss, *Specialized Adjudication*, *supra* note 9, at 377–78; Posner, *Will the Federal Courts of Appeals Survive*, *supra* note 9, at 762–63.

34. See, e.g., Posner, *supra* note 5, at 1050; Posner, *Will the Federal Courts of Appeals Survive*, *supra* note 9, at 762–67.

35. Posner, *Will the Federal Courts of Appeals Survive*, *supra* note 9, at 762. Note that this conclusion is not universally accepted. See generally, e.g., William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996) (arguing that suggested difficulties associated with expanding the size of the federal judiciary are overblown).

36. See *supra* note 5 and accompanying text.

of cases from the broader judicial system. As is the case with arguments in favor of specialization, many of these arguments overlap with one another.

### 1. *The Potential for Insularity*

The concern over insularity arises from the potential for judges on a specialized court, cut off from the broader legal world, to lack the ability to gauge when doctrine has fallen out of step.<sup>37</sup> At the same time, because the areas of law most likely to be given over to specialized courts will be technical in nature, the public and the bulk of the bar are unlikely to monitor these courts' output closely.<sup>38</sup> The likely result is a bench and bar whose understandings are apt to be self-reinforcing—who are less inclined to question shared premises, more likely to develop an internal and potentially impenetrable language, and otherwise generally disposed to facilitate the evolution of their institution in such a way as to move it away from the mainstream.<sup>39</sup> For example, it may be that those who practice in a certain specialty are unified with respect to how governing statutes are to be interpreted, and follow that approach to its logical conclusion while the rest of the legal world experiments with a variety of approaches.<sup>40</sup> This institutional seclusion leads to further pathologies. Not only is the possibility for cross-pollination across areas of law reduced,<sup>41</sup> but so are the chances for percolation of theories and approaches that occur through their consideration by a range of different courts.<sup>42</sup> This lack of access to competing perspectives, in turn, increases the likelihood that the specialized court will generate suboptimal law even apart from the effects of insularity on the lawmaking process by depriving it of bases on which to reconsider prior decisions.

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37. See, e.g., Rifkind, *supra* note 9, at 425 (“In time such a body of law, secluded from the rest, develops a jargon of its own, thought-patterns that are unique, internal policies which it subserves and which are different from and sometimes at odds with the policies pursued by the general law.”).

38. Jordan, *supra* note 9, at 748.

39. See *supra* note 37.

40. Baum refers to this in terms of “assertiveness”:

Specialized judges who come to a court with experience in the subject matter of their court’s work or who develop that experience as judges can be expected to feel greater confidence in their judgment than their generalist counterparts. Because of this confidence, they are likely to be more assertive than generalists in their policymaking.

Baum, *supra* note 23, at 1677.

41. “Cross-pollination among legal theories is a significant source of change in the law since important patterns of reasoning sometimes emerge rather naturally in one field, yet can be meaningfully applied to other areas.” Dreyfuss, *Specialized Adjudication*, *supra* note 9, at 379.

42. See *id.* at 380; Jordan, *supra* note 9, at 748.

The dynamic extends beyond the lawmaking process. The specialized judiciary is likely to go about the process of finding adjudicative facts differently from a generalist judiciary, because the specialized judiciary will bring differing background understandings to the task.<sup>43</sup> It may not be possible to generalize about precisely how these differences will play out. To the extent that specialists within a given area share certain features in their backgrounds, their adjudicative factfinding might exhibit a broad consistency that would be lacking from generalists. Some features of consistently present fact patterns are likely to be ignored as familiar and irrelevant by those habituated to the patterns, while the non-specialist looking at the situation with “fresh eyes” might regard such a feature as significant. On the other hand, the existence of competing “camps”<sup>44</sup> within a specialty introduces the possibility of greater volatility, although it would likely be a more predictable, consistent volatility when contrasted with the perhaps more random volatility of a generalist court.<sup>45</sup> Some specialists would regard a specific situational feature as critical, while others would view it as insignificant or significant in a different way.

There is likely to be another difference between specialists and generalists in terms of the process of adjudicative factfinding. As developed below,<sup>46</sup> the specialist is likely to undertake such factfinding at a greater level of particularity. Because of her exposure to a larger number of similar situations in the past, she is likely to regard more of the features of the present situation as potentially significant inputs to the just resolution of the dispute.<sup>47</sup> If the features that the specialist regards as significant are different from those identified in the governing legal rules—if, for example, the specialist finds ten features of a given situation significant to the process of deciding a case, in an instance where the applicable rule of law suggests that decisions will turn on three factors—

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43. See Peggy C. Davis, “*There is a Book Out . . .*”: *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1547–59 (1987).

44. See, e.g., R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105, 1170–71 (2004) (noting the existence of a division between two methodological approaches on the court).

45. The implications of this are less than clear. As Davis points out, the background understandings that judges bring to the determination of adjudicative facts will often be outcome-determinative. *Id.* at 1549. This can put parties lacking the resources or expertise to contest background understandings at a disadvantage, an effect that is likely to be greater in litigation before a generalist court because it will be more difficult to predict the background understandings of generalist courts as a general matter. While the background understandings of specialists are perhaps more likely to be deeply held, and thus more difficult to move, they will at least be more predictable, such that litigants will have notice that they ought to address them.

46. See *infra* Part II.B

47. See *infra* text accompanying notes 83–88.

this, too, could lead to a divergence between specialist and generalist regimes.

## 2. *The Potential Inferiority of Specialists*

The suggestion that judges on specialized courts will be inferior to their generalist counterparts has two strands. The first has to do with the perceived prestige of a position on a specialized court. As discussions concerning the potential expansion of the federal judiciary have underscored, prestige is an important part of what makes a judicial position attractive.<sup>48</sup> Several commentators have suggested that specialized judgeships are apt to be regarded as less desirable based on the repetitive nature of the cases likely to make up the court's docket<sup>49</sup> and the related likelihood that positions on specialized courts will be regarded as less prestigious than those on generalist courts.<sup>50</sup> As a consequence, the pool of potential judges for such a court will not include the most talented lawyers, and thus the talent level on any given specialized judiciary will be less than that of the generalist judiciary. One might continue this critique by suggesting that the nature of the job will exacerbate the problem. Being faced with a continuing stream of cases involving the same subject matter and roughly the same sorts of problems might more readily lead to desensitization. In this view, specialized judges will come to view a greater fraction of the cases before them as routine, compared with their generalist counterparts. Because we all tend to engage less deeply with that we regard as routine,<sup>51</sup> the argument would run, specialists will give a greater portion of their docket less than an ideal amount of attention. In sum, the limited nature of specialized courts' caseload might make the positions less desirable at the outset, and beget a comparatively lower level of performance from judges once they are on the bench.

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48. As one commentator has explained:

Because a federal judicial appointment represents a considerable financial sacrifice for top lawyers, its appeal must lie in its prestige and in the opportunity it offers to enhance the development of the law. The prestige of a federal judicial appointment has necessarily declined inversely to the number of authorized positions.

Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1496 (1995) (reviewing THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEM OF THE U.S. COURTS OF APPEALS (1994)).

49. See Dreyfuss, *Specialized Adjudication*, *supra* note 9, at 381.

50. See Dreyfuss, *Specialized Adjudication*, *supra* note 9, at 381; Jordan, *supra* note 9, at 748.

51. See, e.g., Ellen J. Langer, *Minding Matters: The Consequences of Mindlessness-Mindfulness*, in 22 ADVANCES EXPERIMENTAL PSYCH. 137, 137 (1989).

The second component of the argument focuses on the selection process. Here, the suggestion is that most members of the bar and general public are unlikely to pay great attention to a specialized court, which in turn produces a greater opportunity and incentive for repeat players to influence the selection process in such a way as to facilitate the creation of a court filled with judges who will rule in their preferred way.<sup>52</sup> When the government is one of the interest groups, there also arises the potential for a less effective separation of powers because specialist judges might be more likely to identify with the governmental interest when a government program is at stake. The rationale for this proposition is that the existence of the program is likely central to their career in a way that will not be true for generalist judges with respect to most of the matters that come before them.<sup>53</sup> Both of these effects might be enhanced by geography, in that specialized courts—particularly at the appellate level—are likely to be located at the seat of government.<sup>54</sup> These geographical differences can affect personnel. In other words, the appointees to a court located in a capital may differ in material ways from those to a court located elsewhere, and the presence of a court in a capital city might affect the worldview of those who must move there to accept an appointment.<sup>55</sup> Specialization will likely result in more geographic homogeneity as well, since the lawyers who possess the requisite specialization will tend to come from an urban practice, and often a particular sort of practice.<sup>56</sup>

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52. See Dreyfuss, *Specialized Adjudication*, *supra* note 9, at 379–80; Jordan, *supra* note 9, at 748; Posner, *Will the Federal Courts of Appeals Survive*, *supra* note 9, at 783.

53. Judge Posner has commented that:

The federal courts play their role as a buffer between the political branches and the citizen more effectively when they are composed of generalists than when they are composed of specialists. A generalist court provides some insulation; a specialist court is apt to be a superconductor. Specialists are more likely than generalists to identify with the goals of a government program, since the program is the focus of their career. They may therefore see their function as one of enforcing the law in a vigorous rather than a tempered fashion. In this respect the case for a generalist federal judiciary resembles the case for the jury—not despite, but because of, its lack of expertness.

Posner, *Will the Federal Court of Appeals Survive*, *supra* note 9, at 785.

54. *Id.* at 786.

55. For example, in an effort to determine whether there was any substance to the notion of a “Greenhouse effect” (that is, drift toward liberalism due to press coverage) on Supreme Court justices, Lawrence Baum studied justices who were appointed by Republican presidents since 1953 and served for at least ten years. He found the evidence to be “for the most part . . . consistent with the claims of a Greenhouse effect. Among the nine Republican justices who moved to Washington to join the Supreme Court, there were clear and substantial increases in liberalism for four and more limited or ambiguous increases for three others.” LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 149 (2006).

56. See DONALD D. LANDON, *COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE* 128–29 (1990); Herbert M. Kritzer & Frances Kahn Zemans, *Local Legal Culture and the*

### 3. *Skepticism Concerning the Value of Expertise in Law*

The third critique of specialization calls into question the notion that expertise is a meaningful concept in the context of a specialized judiciary. One version of this critique proceeds from skepticism regarding whether there is such a thing as expertise in law, or at least some areas of law. The suggestion is that legal reasoning has a core ideological component, coupled with the observation that the notions of expertise and specialization do not seem to apply to ideology.<sup>57</sup> As Judge Posner puts the point:

We think of a specialist not just as someone who knows a lot about a subject, but as someone to whom we are willing to entrust important decisions about it that affect us. This willingness depends on a belief that the specialist is objective, in the sense that his judgment is independent of personal values that we may not share, and that is not a sense that most people have about experts in constitutional law.<sup>58</sup>

Put differently, if expertise in law consists of the ability to fashion better arguments in favor of results that are ultimately a product of ideology rather than the ability to reason toward objectively better results, then the gains from expertise are, at best, illusory.

On this view, not only is the concept of subject-matter expertise suspect, but the fact that it is really ideology at work exacerbates the potential for interest groups to capture a court through manipulation of the selection process in such a way as to lead to the selection of their ideologically preferred candidates.<sup>59</sup> Of course, many of the commentators pressing this critique recognize that not all fields of law are created equally when it comes to the extent of underlying ideological conflicts. In areas where there is consensus on the premises underlying and policy goals driving the law, there is perhaps more room for objective expertise to develop, and thus for the implementation of specialization.<sup>60</sup> The relative maturity of a field will also matter. There may be greater variance between specialized and generalist courts (measured by the manner in which they

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*Control of Litigation*, 27 LAW & SOC'Y REV. 535, 546 (1993).

57. See Posner, *Will the Federal Courts of Appeals Survive*, *supra* note 9, at 780.

58. *Id.*

59. See *id.* at 781–82.

60. See Jordan, *supra* note 9, at 784.



resolve disputes and the legal standards they develop for doing so) in emerging fields of law than in established fields of law.

A different strand of this critique acknowledges the existence of judicial expertise, but contends that it is trans-substantive and operates at a more general level. Judge Friendly argued that “[t]he process is more important than the subject matter; and the judge can lay claim to being a specialist in that.”<sup>61</sup> The idea here is that the relevant expertise exists with respect to law and legal analysis in a broad sense, and is based on the implicit understanding that there is a commonality to law and legal standards. The essence of this view was colorfully captured by Justice Holmes: “I have long said there is no such thing as a hard case. I am frightened weekly but always when you walk up to the lion and lay hold the hide comes off and the same old donkey of a question of law is underneath.”<sup>62</sup> The generalist, perhaps, has the virtue of being able to cut through the seeming uniqueness of any given new situation to reach the conclusion that what it presents is ultimately just another variation on a familiar theme.

#### 4. *Boundary Problems*

The fourth critique of specialization concerns the phenomenon of boundary problems. The creation of courts whose jurisdiction is limited by subject matter requires the drawing of lines to distinguish cases falling within the court’s jurisdiction from those that do not. Further difficulties arise because disputes as they arise in the world, and as they present themselves to the legal system, do not regularly conform to the lines of division that might exist within an institutional structure.<sup>63</sup> This creates not only potential administrative difficulties, but also the possibility that specialized courts will develop their own, divergent body of case law with respect to issues that arise with some regularity in cases coming before a specialized court, but that are formally outside the court’s area of specialization.<sup>64</sup>

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61. Friendly, *Reactions*, *supra* note 9, at 222; *see also supra* note 16.

62. Letter from Oliver Wendell Holmes, Jr., to Frederick Pollock (Dec. 11, 1909), in 1 HOLMES-POLLOCK LETTERS 155, 156 (Mark DeWolfe Howe ed., 2d ed. 1961).

63. *See* Jordan, *supra* note 9, at 748.

64. *See* Jordan, *supra* note 9, at 748–50; Posner, *Will the Federal Courts of Appeals Survive*, *supra* note 9, at 787.

### 5. *A Fifth Approach: Emphasizing the Virtues of Generalism*

Another way to approach the comparison, which has largely remained only implicit in the literature, is to focus on the perceived virtues of generalist courts. Many of these are simply the converse of the critiques of specialization just described. For example, if specialists are susceptible to insularity and selection pressures, then the mere absence of those can be regarded as a virtue of generalists. But there are also affirmative virtues that arguably result. The generalist seems much more likely to be, in Isaiah Berlin's famous typology, a fox (someone who knows many things) rather than a hedgehog (someone who knows one big thing).<sup>65</sup> She will bring a greater array of perspectives and cognitive tools to any given question. If one accepts the proposition that law—perhaps especially statutory law—reflects a variety of competing and often conflicting aims,<sup>66</sup> then the generalist stands as more likely to be sensitive to and take account of these divergent ends.

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65. The reference, of course, is to the distinction popularized by Isaiah Berlin.

For there exists a great chasm between those, on one side, who relate everything to a single central vision, one system, less or more coherent or articulate, in terms of which they understand, think and feel—a single, universal, organising principle in terms of which alone all that they are and say has significance—and, on the other side, those who pursue many ends, often unrelated and even contradictory, connected, if at all, only in some *de facto* way, for some psychological or physiological cause, related to no moral or aesthetic principle. These last lead lives, perform acts and entertain ideas that are centrifugal rather than centripetal; their thought is scattered or diffused, moving on many levels, seizing upon the essence of a vast variety of experiences and objects for what they are in themselves, without, consciously or unconsciously, seeking to fit them into, or exclude them from, any one unchanging, all-embracing, sometimes self-contradictory and incomplete, at times fanatical, unitary inner vision. The first kind of intellectual and artistic personality belongs to the hedgehogs, the second to the foxes. . . .

ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY*, reprinted in *THE PROPER STUDY OF MANKIND* 436, 436–37 (Henry Hardy & Roger Hausheer eds., 1999).

66. One commentator has explained:

It is sometimes true that purposes are not hard to discern. But in difficult, controversial cases . . . there is generally no consensus regarding statutory purpose. Many statutes are compromises between conflicting purposes; many are the product of overlapping purposes that diverge in particular applications. Often a statute enacted for one purpose has unforeseen side effects. Indeed, when a case goes to court, this is generally an indication that different interests in society favor different understandings of purpose. It is not often true that only one of these understandings is reasonable.

Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2405 (2006) (reviewing STEVEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)).

This approach in turn raises the question of what the notion of expertise might mean in the judicial context. The specialist's knowledge will be comparatively narrow and deep, and the generalist's knowledge broad and shallow. The specialist will have a deeper appreciation for how a given case fits within the constrained universe of her specialty (in terms of both its legal and factual contexts),<sup>67</sup> while the generalist will have a greater appreciation for how a given case fits within the larger framework of the law, and how it may be similar in important respects to legal approaches outside the specific legal subject area in which it arises. Although most discussions of judicial expertise casually assume that true expertise requires the specialist's depth,<sup>68</sup> that assumption depends on a certain conception of the role of law that is not inevitable. Indeed, as developed below,<sup>69</sup> if one accepts the proposition that law should be something of a common language,<sup>70</sup> then it may be that judicial expertise can exist only at a broad level. On that view, the key is not expertise in, or familiarity with the particulars of, say, tax law, that matters, but rather an advanced ability to deploy the tools of legal analysis.

## II. AN ASSESSMENT OF THE DEBATE

Although the outline sketched in the preceding Part is somewhat truncated, it accurately captures the depth of the debate over the virtues of specialization. Intuitive judgments abound.<sup>71</sup> Yet, as the discussion reveals, there are tensions among some of the arguments, and conditions and qualifications to be assigned. For example, the suggestion that

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67. Such expertise seems likely to play out in three ways: (1) as expertise that will enable the judge to best make sense of the factual aspects of a particular dispute; (2) as expertise that will enable it to best make sense of the larger factual background and context in which the legal framework operates (legislative fact expertise; the sort of expertise that will facilitate the law declaration function); and (3) as expertise with respect to the content of the existing legal framework (e.g., complex regulatory schemes; this is the sort of expertise that might be called error correction or evasion expertise). A generalist appointed to a specialized court is likely to be able to acquire the third kind, but not so easily the first and second.

68. See *supra* note 23 and accompanying text.

69. See *infra* notes 240–42 and accompanying text.

70. I am not the first to use the language metaphor. See Friendly, *Reactions*, *supra* note 9, at 222 (“Any further development of such exclusive specialized courts seems likely to be in areas where a separate language is required—tax law, as it appears to some, because of the intricacy of the legislation, or patents because of the increasingly technical nature of some of the raw material.”).

71. See BAUM, *supra* note 4, at 210 (“To the extent that participants in the policy-making process think explicitly about how specialization might affect court outputs, they tend to act on the basis of folk theories that rest on common-sense notions of causality rather than on extensive and systematic analysis.”).

specialized courts are likely to foster a variety of groupthink<sup>72</sup>—members of the bench and bar will argue from shared premises—stands in tension with the suggestion that specialized courts will be hotbeds of competing factions susceptible to wild swings in approach as the power of the factions wax and wane.<sup>73</sup> Both stories read as plausible accounts, and one can even imagine a world in which both are at least partially true, though it seems unlikely that both would be accurate with respect to all specialized courts. Another example: the argument about the potential for capture of specialized courts at the selection stage suggests that specialized courts will tend to be less independent than generalist courts.<sup>74</sup> Yet Martin Shapiro suggests that specialization will foster the appearance of judicial independence, at least in public law cases, on the grounds that a member of a specialized judiciary is less likely to appear closely allied with the arm of government with whom a litigant is engaged in a dispute.<sup>75</sup>

A further problem arises out of the fact that it remains difficult to assess the quality of judicial output, which in turn makes it challenging to provide concrete support for arguments that one approach to institutional design is superior to another. As noted above, to some degree this difficulty stems from the ideological content of many areas of law, such that assessments of quality are to a large degree in the eye of the beholder.<sup>76</sup> The more general problem of legal indeterminacy contributes to the problem as well.<sup>77</sup> Legal rules, in a manner that is independent of ideology, can often be interpreted in multiple ways, with none of the possible interpretations being clearly the correct one.<sup>78</sup> And there is, on top of all this, a measurement problem. Even assuming the ultimate existence of a correct answer to any moderately complex legal problem, efforts to assess whether a given decision has reached that answer requires deep knowledge of both the applicable law and the particular facts and circumstances of the case involved. This requires, at a minimum, fully

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72. See *supra* Part I.C.1.

73. See *supra* note 44 and accompanying text.

74. See *supra* notes 52–55 and accompanying text.

75. See MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 27 (1981).

76. See *supra* notes 57–62 and accompanying text.

77. See generally Lawrence B. Solum, *Indeterminacy*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 488 (Dennis Patterson ed., 1999). The problem of indeterminacy includes to a metaphysical component, which is implicated by the possibility of the lack of any truly “correct” answers to some legal questions, and an epistemic one, which relates to our inability to ascertain the right answers to questions. See Ken Kress, *A Preface to Epistemological Indeterminacy*, 85 NW. U. L. REV. 134 (1990).

78. “There is almost always a zone of reasonableness within which a decision either way can be defended persuasively, or at least plausibly, using the resources of judicial rhetoric.” Posner, *supra* note 5, at 1053.

understanding the facts, the parties' arguments, and the governing legal materials. Thus, it requires an assessment process involving as much effort as the court's decisional process.

Movement beyond assessment of individual cases to a focus on the output of a court in more general terms presents even more difficulties. The decision in a specific case can at least be measured by the fit between the result reached and the set of potential results allowed for under applicable legal standards. Reviewing the collective output of a court, in contrast, might entail not only some effort to assess the quality of its decisions in individual cases—which, given the resource-intensive nature of the process as just described, requires resort to proxies in order to be practicable—but also monitoring for larger trends in the way in which cases are resolved. Over time, a court might change the content of the law or, less obviously, alter the results it reaches by shifting emphasis in the way standards are implemented. The desirability of such shifts, too, is the sort of thing that lies in the eye of the beholder. And lying behind all of these potentially intertwined effects are questions about causal factors. As Dreyfuss puts it:

[E]ven if one is comfortable examining the court's work and can comment with confidence on the ways in which the court has altered the law, there remains the problem of deciding whether the observed changes occurred because of the court's expertise, experience and deep appreciation of the issues at stake, or because it has been captured by special interests, or has succumbed to another one of the problems outlined above.<sup>79</sup>

It would thus be difficult to assess the effects of specialization even were one to engage in a comprehensive, retrospective analysis of decisions. Questions of institutional design, of course, require prospective forecasting of effects, which introduces additional complexity. Predicting the relative impacts of specialization versus generalism, then, is necessarily a speculative and contingent matter. The remainder of this Part thus represents an effort primarily at outlining hypotheses for how the choice between the two regimes might manifest itself in the output of the courts. Doing so necessarily involves addressing issues that are ultimately either normative or empirical in nature, and that accordingly cannot be conclusively addressed at this stage. The point of the discussion that

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79. Dreyfuss, *Specialized Adjudication*, *supra* note 9, at 384.

follows is not to achieve resolution, but rather to explore the dynamics of the choice at a deeper level and to demonstrate the complexities involved.

The task must begin with recognition of the purposes that courts exist to serve. One of the shortcomings of the existing literature is that it tends to speak to questions of generalization versus specialization without adequate sensitivity to these functions or the way in which allocation of responsibility for serving them is allocated amongst the different courts in the judicial hierarchy. In the traditional depiction, courts serve two primary purposes. The first is dispute resolution.<sup>80</sup> It is hardly an overstatement to suggest that the primary function of the American judicial system, at least in the civil context, is to provide a peaceful means of resolving disputes.<sup>81</sup> That, in turn, implies a concern with accurate resolution (bracketing for now the question of precisely what “accurate” means), for the simple reason that disputants will resort to the system only if it generates results within some tolerable range of accuracy.<sup>82</sup> The second purpose is the creation and refinement of legal standards—the law declaration role.<sup>83</sup> As a result of institutional design and justiciability rules, courts serve the law declaration function almost exclusively as a by-product of dispute resolution.<sup>84</sup> Even so, these functions often pull in different directions, and it may well be that the normative case for a generalist judiciary is stronger with respect to one function. In similar fashion, the arguments apply differently at each level of the judicial pyramid simply because the functions are emphasized to differing degrees at each tier.<sup>85</sup> Trial courts primarily serve the dispute resolution function, supreme courts serve the law declaration function, and intermediate appellate courts fall somewhere in the middle.<sup>86</sup>

There may be some aspects of the generalist/specialist divide that will make one model or the other more (or less) suitable with respect to both functions. Much of the case for specialization rests on the assumption that specialists’ greater subject-matter expertise provides a comparative

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80. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 640–47 (William N. Eskridge, Jr. & Philip P. Frickey eds., 2001); Kenneth E. Scott, *Two Models of the Civil Process*, 27 *STAN. L. REV.* 937, 937–38 (1975).

81. See SHAPIRO, *supra* note 75, at 1 (suggesting that the basis of courts’ social logic and political legitimacy stems from their dispute resolution function).

82. Cf. Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 *GEO. L.J.* 121, 137–38 (2005).

83. See Scott, *supra* note 80, at 938–40.

84. See HART, JR. & SACKS, *supra* note 80.

85. See Chad M. Oldfather, *Error Correction*, 85 *IND. L.J.* 49, 66–67 (2010).

86. Precisely where depends on whether the system under consideration is federal or state, and if the latter, which state.

advantage in the fulfillment of both functions, and that understanding seems to be at least partially accepted in the literature.<sup>87</sup> In this depiction, the specialist will be better able to cut to the heart of factual disputes and navigate complex doctrine. This arguably allows the specialist to outperform the generalist with respect to both functions. But this reasoning may be based on a misidentification of the nature of the relevant expertise. The specialist will have a greater familiarity with either or both of the governing law and the factual context in which disputes arise. As noted above,<sup>88</sup> however, substantive knowledge may not be the key to good judicial decision-making. It may be, as explored below,<sup>89</sup> that decision-making skill exists apart from substantive knowledge. There could be, of course, a positive correlation between the two. But it might also be the case that it is the generalist, with broad exposure to a range of legal problems, who is best positioned to cultivate this sort of expertise. Or perhaps decision-making skill bears no necessary relation to the presence or absence of concentrated substantive knowledge.

Although the literature has focused primarily on whether specialized courts and judges will generate better decisions measured in substantive terms, it is worth considering whether there are likely to be differences in the processes by which those courts and judges go about their jobs that might manifest themselves in other aspects of their output.<sup>90</sup> One might imagine, for example, differences between the two regimes in terms of how broadly the average judge in each searches for the information used to decide a case. It could be that, on average, generalists and specialists will differ in terms of the extent to which they are willing to seek information about a case beyond what the parties have put before them, to base decisions on such information, and more generally to draw on background information and intuitions they bring with them to a case.

Such potential differences in style hearken back to the distinction between the fox and the hedgehog. Dan Farber and Suzanna Sherry have made an analogous point in the context of gauging the effects of political ideology, arguing that current judicial selection processes

diminish the likelihood of appointing foxes rather than hedgehogs. The stronger the commitment to a particular ideology, the less open a judge will be to other perspectives. Instead of focusing on

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87. See *supra* Part I.B.

88. See *supra* note 61.

89. See *infra* Part III.D.

90. See *supra* note 65 and accompanying text.

ideological commitment, then, presidents and senators should be looking for evidence of the dispositional traits that have been shown to enhance judgment and good decision making. We should be seeking an openness to other perspectives, a willingness to revise one's views in the face of new information, and a refusal to adopt a single approach to decision-making.<sup>91</sup>

It seems to be a plausible hypothesis that generalists will, on average, tend more toward the intellectual humility characteristic of foxes than will specialists, for the simple reason that one seems more likely to have embraced a big idea that will apply to a large number of cases if one operates within the narrow confines of a specialty than if one hears a variety of cases.<sup>92</sup> But any such effect also seems likely to be context-dependent. Within the context of a routine case, for example, the specialist might be willing to account for a greater range of information in her decision making, while the generalist would tend to base her decision on the factors expressly identified in the governing legal standard. In less-routine cases, the effect may run in the opposite direction. In such cases it seems plausible that generalists will be more fox-like than specialists and more open to a broad array of information (at least in the sense that they will be relatively less likely than the specialist to have precommitted to a view of the subject matter or relevant subparts thereof).

I want to emphasize that I do not mean to foreclose consideration of the possibility that the differences will break out in different ways, or even that there will be no differences at all. The point of the exercise is not to generate confident conclusions, but instead to articulate potential consequences of the choice between generalism and specialism that have been overlooked or glossed over in past discussions. The next two subparts represent an effort to continue the exploration by focusing on the dispute resolution and law declaration roles.

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91. Daniel A. Farber & Suzanna Sherry, *Building a Better Judiciary*, in *THE PSYCHOLOGY OF JUDICIAL DECISION-MAKING* 291 (David Klein & Gregory Mitchell eds., 2010).

92. "Specialized judges who are expert in the subject matter of their court's work at the time they take their positions or who develop that expertise through constant work in one field tend to feel greater confidence in their judgment than their generalist counterparts. Because of this confidence, they are likely to be more assertive than generalists in their policy making." BAUM, *supra* note 4, at 35.



### A. *Generalist Judges and Dispute Resolution*

The argument for a generalist judiciary seems somewhat weaker within the context of the dispute resolution function. The judicial role in fulfilling this function is, of course, often limited. At the trial court level, judges occasionally serve as factfinders, but more often serve the dispute resolution function by narrowing the scope of the dispute presented to a jury through various rulings at and before trial. At the appellate level, the dispute resolution function (which is often, and in my view misleadingly, referred to as the error correction function) involves primarily the resolution of disputes over legal questions.<sup>93</sup>

As noted above, assessment of whether a particular regime is “better” at dispute resolution requires agreement on the metric by which to assess quality, which leads quickly into contested territory.<sup>94</sup> Even so, it seems safe to imagine that expert judges will generate better decisions at least in the sense that other experts will regard them as such. One might even provisionally accept that the decisions will be in some ultimate sense more just. Both phenomena seem likely to be products of specialists’ proclivity to assess a given situation by reference to a greater range of features than the generalist, or even doctrine, is likely to account for. The tax court judge, for example, may be able to appreciate the connections between pieces of a transaction in ways that a generalist cannot and, as a result, be led to rule on a dispute in a way and for reasons that are neither evident to the generalist nor clearly incorporated into the governing legal standard. At least in the short term, then, the increased accuracy in the two senses just identified may come at the expense of accuracy as measured by a formalist expectation that judicial decisions are to conform to rules of law.<sup>95</sup> Generalist judges, in contrast, are more likely to dispense justice that is relatively rough and rule-based. The generalist will be comparatively (and perhaps even, in some cases, absolutely) unable to appreciate the nuance and complexity of the factual situation or legal framework, and thus more inclined to rely on previously articulated legal standards to guide resolution. There is some empirical support for the assertion that judges who are experts in a given subject matter will

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93. See generally Oldfather, *supra* note 85.

94. See *supra* notes 78–81 and accompanying text.

95. To the extent that an expert judiciary updates the law to account for this greater range of factors, it will introduce a set of concerns addressed in the next part.

implement rules applicable to their decision making differently than their non-expert counterparts.<sup>96</sup>

In this regard, it may be helpful to consider Karl Llewellyn's distinction between "paper rules" and "real rules."<sup>97</sup> Paper rules are those included in the governing precedent or statutory text. Real rules are those that describe the actual manner in which official actors address the relevant category of behavior. Frederick Schauer illustrates the distinction by way of a simple example. In the case of a speed limit, the paper rule may be that vehicles may travel no faster than 65 miles per hour, while the real rule is that drivers will not be sanctioned unless they exceed 74 miles per hour.<sup>98</sup> Such a real rule may be tethered to the paper rule to some degree, but must also be the product of something else, which likely includes "the regularities of craft, of acculturation, and of judges because of their craft often having a shared sense of the purpose of some area of law."<sup>99</sup> Those forces are apt to operate more strongly upon the specialist than the generalist. Thus, a court of specialized, expert judges seems more likely to develop real rules that depart from the paper rules generated by legislatures or higher generalist courts. Generalists, in contrast, will not be as subject to the influence of these other factors, and will thereby be more inclined to decide according to the paper rule. Note that this does not mean there will be greater regularity in the decisions of the generalist court or that its decisions will be more rule bound. If the "shared sense of purpose" and other determinants of the real rule are sufficiently strong, the decisions of the specialist court might well be more predictable (to the properly informed observer) than those of the generalist court.

The difference can be characterized in yet another way. The difference between generalist and specialist judges echoes the differences between rules and standards.<sup>100</sup> Generalist judges will consistently find themselves

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96. For example, Deborah Merritt and James Brudney found that judges with practice experience relating to the NLRA published a lower portion of their opinions than those who did not (the publication decision being one governed by circuit rules). Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 69, 114–15 (2001). This research, of course, concerns judges with specialized knowledge who serve on generalist courts, which is undoubtedly a significant contextual factor, and thus any extrapolation from that work to a more generic consideration of specialists versus generalists must be undertaken with caution.

97. See Frederick Schauer, *Editor's Introduction to KARL LLEWELLYN, THE THEORY OF RULES* 1, 11–12 (2011).

98. *Id.* at 20–21.

99. *Id.* at 24–25.

100. See Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (contrasting rules with standards, which "tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation").

adjudicating cases as to which they lack both an expert's grasp of the situation and a firm sense of the background principles that ought to govern. They may thus be more inclined to rely on rules—in the form of relatively strict adherence to statutory language and precedent—where they are available. The specialist, in contrast, will be better situated to appreciate how this case differs from past cases, and to have a sense for whether those differences ought to be regarded as consequential in light of her understanding of the purposes of the law (even if, and perhaps particularly if, the differences in question are not accounted for under the articulated legal standards that govern the case).

Yet even if one accepts the suggestion that a specialized judiciary will generate better results, at least in terms of the dispute resolution function, there are other factors to consider. Accuracy, however assessed, is not the only end of adjudication.<sup>101</sup> There are process values that must be accounted for as well. In this regard, the specialized adjudicator will be less able to fulfill the role of the detached, reactive, neutral, “umpire” judge than her generalist counterpart. Because she possesses greater knowledge about the context in which the dispute arose and the governing legal framework, she is more likely to develop preconceptions regarding its proper resolution, and thus to be a more active participant in the litigation than what the canonical version of the adversary system calls for.<sup>102</sup> Under some conceptions of the judicial role, this stepping out of the umpireal posture itself undercuts legitimacy.<sup>103</sup>

One might also suggest that it is inappropriate to isolate dispute resolution in this way. That is, the exercise of the law declaration function (to which I will turn next) to some degree depends on the appropriate contemporaneous exercise of the dispute resolution function.<sup>104</sup> If the facts of the dispute have not been adequately found—something that requires judicial input either as factfinder or as trial supervisor—then there will be an insufficient foundation based on which to use the case as a vehicle for making appropriate law. Usually this lack of foundation will not present a problem. The appellate court will create law on the assumption that the dispute as presented to it accurately reflects the underlying facts and dispute, and issue its ruling as if that were so. The concern would arise in

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101. To take just one example, we also want a system in which litigants feel as though they were given a fair hearing. See Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871 (1997).

102. For an outline of a version of the canonical, reactive judge, see Oldfather, *supra* note 82, at 139–45.

103. *Id.* at 140 (describing Lon Fuller's participation thesis).

104. See *supra* note 84.

situations where the underlying facts were systematically skewed by the trial-level judiciary (whether generalist or specialist) in a way that in turn leads to the skewing of the law. What could conceivably result is a body of law based on an inaccurate understanding of the way the world that it governs works.

*B. Generalist Judges and Law Declaration*

It seems reasonable to suspect that the law created by generalist and specialist judiciaries will differ along at least three dimensions: content, form, and stability. Of these, content is probably the easiest to appreciate. As developed above,<sup>105</sup> the case for specialized courts proceeds to a considerable degree from the understanding that they will generate different, and in the proponent's estimation better, law than generalist courts. Anticipated differences in content, then, are not merely a consequence but rather one of the aims of specialization. Beyond that, all that it seems possible, in the abstract, to say about the content of law generated by specialized courts is that it is likely to conform more closely to what experts in the field—or at least some subset of experts in the field—deem appropriate.

One can engage in considerably more speculation about potential differences in form. Start with the proposition that judicial lawmaking as a process relies to a large degree on the finding of “legislative facts.” Legislative facts are not the facts of the immediate dispute before the court (the “adjudicative facts”), but rather the sorts of background understandings—of how the world works in general and in the specific type of situation before the court, how people and institutions respond to incentives, and so forth—that underlie conclusions about the content of the best rule of law for a specific situation.<sup>106</sup> Members of specialized judiciary confronted with an opportunity to make law are likely to reach different conclusions about applicable legislative facts than would their generalist counterparts for reasons that track those affecting their respective factfinding abilities. As a group, such judges will have greater familiarity with the relevant subject area, and most likely greater expertise, and as a consequence are likely to have a different understanding of the background against which they are making law than would generalists.

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105. See *supra* Part I.B.1.

106. The distinction between legislative and adjudicative fact-finding originated with Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942).

Not only is the specialists' understanding likely to differ with regard to its content, it is also likely to be qualitatively different in a sense independent of content. The most likely difference will be in its particularity. The specialist is likely to regard more of the features of the factual landscape surrounding a given dispute as constituting appropriate inputs for reaching a "just" resolution of that dispute. This, in turn, will have the likely result of making the legal rules generated by specialist judiciaries less categorical. Put differently, just as there may be echoes of the distinction between rules and standards when it comes to dispute resolution,<sup>107</sup> so might specialized courts create more standards and fewer rules than would the generalist judiciary (and if they do not, there may be greater variance between the paper rules and the real rules because of the play of expertise in the context of adjudicative factfinding).

Some recent Supreme Court cases may illustrate this dynamic. One frequent criticism of the Court in recent years is that, because of the justices' backgrounds, they lack an appropriately nuanced understanding of what takes place at the trial level (or perhaps more generally of how the law operates "on the ground").<sup>108</sup> As a result, this critique continues, the Court is prone to generating decisions that articulate bright-line rules that prove to be unworkable in practice. The treatment of the interaction between hearsay and the Confrontation Clause in the Court's opinion in *Crawford v. Washington*<sup>109</sup> provides one example. In *Crawford*, the Court, in an opinion authored by Justice Scalia, adopted a seemingly bright-line test that turns on the "testimonial" nature of a hearsay statement.<sup>110</sup> A number of commentators reacted to the case by noting the practical difficulties it would create.<sup>111</sup> Subsequent opinions suggested that the line was nowhere near as bright as it first appeared.<sup>112</sup> And the Court's recent decision in *Michigan v. Bryant*,<sup>113</sup> in which a majority of the Court

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107. See *supra* note 100 and accompanying text.

108. See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal*, 60 DUKE L.J. 1, 86–87 (2010) ("The Justices do not have the time, trial-court experience, or on-the-ground information to evaluate the consequences that procedural changes may have on private enforcement of substantive law or what alternative enforcement mechanisms should be established if litigation pathways are impaired."); Cf. Hillel Y. Levin, *Iqbal, Twombly, and the Lessons of the Celotex Trilogy*, 14 LEWIS & CLARK L. REV. 143, 156 (2010) ("[W]e should be wary of drawing the conclusions that some have that the Supreme Court does not understand trial court practice, or that we would be better off if there were more Justices with trial court experience.").

109. 541 U.S. 36 (2004).

110. 541 U.S. at 53.

111. See, e.g., Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747 (2005).

112. See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009); *Davis v. Washington*, 547 U.S. 813 (2006).

113. 131 S. Ct. 1143 (2011).

concluded that a gunshot victim's statements to police concerning the identity of the shooter were nontestimonial, prompted a dissenting Justice Scalia to characterize the Court as "the obfuscator of last resort."<sup>114</sup> Part of the point I am striving to make here is akin to Dan Farber's case against certain types of legal scholarship.<sup>115</sup> Farber's suggestion was that law itself is not (or at least ought not to be) "brilliant" in the sense that it is susceptible to unconventional, paradigm-shifting insights for the simple reason that law values predictability and stability, and thus is inherently incompatible with brilliance.<sup>116</sup> The point does not transfer completely, as brilliant legal scholarship of the sort Farber targeted tends to be more startling and novel than most judicial decisions, even the innovative ones. But I have a sense—which conversations with my IP colleagues regarding the Federal Circuit seem to confirm—that specialist judges will be more inclined to strive for something like brilliance and innovation than generalists.<sup>117</sup>

One might also hypothesize that generalist judges will—again, on average—generate law that is more understandable than will specialists. In part, this is a function of capacity. If a generalist judge lacks the ability to appreciate the intricacies of a situation in the way that an expert can, then he will likewise be unable to account for that intricacy in the law that he creates. On the other side, the specialist will often succumb to the tendencies toward jargon and "inside baseball" that seem to afflict experts of every stripe. Such judges, after all, will be writing largely for specialized audiences, and thus may feel less need to write their decisions in a manner that a lay audience can understand.

In a related vein, some have argued that the law created by generalist judges is likely to be more stable than that created by specialized courts. Judge Posner suggests that divisions in ethical, political, and economic thought among specialists would be more likely to lead to volatility in law. This volatility could occur in two ways: through the operation of internal court dynamics, or via external pressures. First, there is the likelihood that

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114. 131 S. Ct. at 1168 (Scalia, J., dissenting) ("[T]oday's opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles. Instead of clarifying the law, the Court makes itself the obfuscator of last resort.").

115. Daniel A. Farber, Commentary, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986).

116. *Id.* at 924–29.

117. But there is a counterpoint here. If, as I have suggested, generalists will be more likely to engage in formalist reasoning, then they can be led astray in a different way. Farber speaks to this, too. "Lawyers are more impressed by experience than by logic in part because they know perfectly well that any chain of argument has a weak link. . . . [T]he sheer force of a complicated logical argument will (and should) persuade people to adopt conclusions they regard as ridiculous." Daniel A. Farber, *Brilliance Revisited*, 72 MINN. L. REV. 367, 373 (1987).

“experts are more sensitive to the swings in professional opinion than an outsider, a generalist, would be.”<sup>118</sup> Not only are experts perhaps more susceptible to faddishness than generalists at the individual level, but there is arguably also a greater potential for any given trend to take hold within a specialized judiciary. This is function of both size and geography. Specialized courts are likely to be smaller and more geographically concentrated than generalist courts, both of which are factors that may make it easier for a single way of thinking to take hold over an entire court.<sup>119</sup> The monopolization of viewpoint is, in turn, likely to create a tendency for courts to make more questions legal. Put differently, a specialized court seems more likely to allocate the power to decide certain issues to itself rather than to juries.<sup>120</sup> Second, specialized courts are likely to be more susceptible to external pressures.<sup>121</sup> A smaller portion of the citizenry is likely to be interested in such a court, meaning that a relatively small number of interest groups are likely to play a significant role in the selection process. In addition, a specialized court presents an easier target for the political branches. On the whole, then, a generalist judiciary seems likely to be more independent (and less accountable, in at least some senses of judicial accountability) than a specialized court. This is not to suggest that generalist courts are immune from the sorts of external pressures that generate volatility. As Peggy Davis’ study of courts’ use of psychological parent theory revealed, generalist judges and courts are often too willing to accept theories from other disciplines without sufficiently careful consideration.<sup>122</sup>

As the discussion in the preceding paragraph suggests, the presence of specialized courts seems to create greater potential for balkanization. This can occur in two ways. The first comes with respect to the resolution of problems common to both specialized and generalist courts, such as those relating to procedure. As specialist courts develop their own culture, there is an increasing chance that they will resolve these common questions in a

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118. Posner, *Will the Federal Courts of Appeals Survive*, *supra* note 9, at 781.

119. *Id.* at 786.

120. This sort of phenomenon, though not in the context of specialized courts, is described in Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

121. See Dreyfuss, *Specialized Adjudication*, *supra* note 9, at 379–80; Jordan, *supra* note 9, at 748; Posner, *Will the Federal Courts of Appeals Survive*, *supra* note 9, at 783.

122. Davis, *supra* note 43, at 1593. “[T]he uses uncovered by this study were often incautious. Courts have frequently accepted the theory on the basis of one-sided presentations, rendering case-specific results of its acceptance questionable. Developments in the law based upon psychological parent theories have been far reaching, yet they too have resulted from one-sided deliberations.” *Id.* (footnotes omitted). There might be a tie-in here to a larger point about the tension (or perhaps even incompatibility) between law and science.

materially different manner than their generalist counterparts. Although there will almost always be a generalist court at the top of the judicial pyramid with responsibility for policing uniformity, it is unrealistic to assume that such a court will be able to monitor the courts underneath it closely enough to ensure full uniformity. Indeed, it may be that the court of discretionary jurisdiction will tend to defer to the specialized court.<sup>123</sup> The second is more dramatic. Over the long term, one might expect to see at least some specialized bodies of law continue a path of separate development to such an extent that they become not merely different legal dialects, but completely distinct languages.

It bears mention again that the analysis in this subpart is necessarily speculative and provisional. It represents an effort to anticipate ways in which the processes and outputs of specialist and generalist judiciaries might differ, and suggestions as to what the content of those differences might be. The point is primarily to identify the considerable work that remains in order for us to understand the tradeoffs involved in any move toward specialization. A considerable amount of both theoretical and empirical exploration will be necessary to our understanding. The next Part, which draws on psychological research on expertise, serves as an example of one type of analysis and investigation that remains.

### III. THE PSYCHOLOGY OF EXPERTISE

As the preceding discussion revealed, the existing literature on judicial specialization generally fails to grapple in depth with the nature of the expertise that specialized judges or courts might possess. As it happens, psychologists have conducted a considerable amount of research into the nature of expertise, and this part explores the implications of that work for judicial specialization. As the discussion will reveal, the psychology of expertise remains a field in development, such that one must resist the temptation to draw firm conclusions from it. This is doubly so because none of the work has focused on judging, and very little of it has addressed the possibility or parameters of decision-making expertise. As a result, the discussion that follows will serve not as the basis for broad prescriptive claims, but rather as a source for critical assessment of prior assertions about the nature of judicial expertise, the identification of factors relevant to the design of specialized courts, and facilitating the generation of informed hypotheses that might be tested in future work.

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123. This was, at least initially, the Supreme Court's stance vis-à-vis the Federal Circuit and patent law. See Peter Lee, *Patent Law and the Two Cultures*, 120 YALE L.J. 2, 42–43 (2010).



A. *Defining the Concept of “Expertise”*

There are at least two approaches one can take to defining the concept of expertise. The first, which I will call the *relative approach*, conceives of expertise in terms of relative knowledge levels.<sup>124</sup> On this view, an expert is simply someone who knows more about the topic at hand, and expertise is a relative rather than an absolute characteristic. Thus, for example, in any group there will be individuals recognized as the best people to consult in order to solve a specific problem, whether it is the best place to order a pizza from or how to interpret an x-ray.<sup>125</sup> Whenever someone is in position to provide useful information to another, that person counts as an expert relative to the person seeking the information. The implications of this approach extend beyond such situational happenstance and into what are typically regarded as fields of expertise. One such implication is that status as an expert is not limited only to those fortunate enough to have some necessary combination of talent and drive, but is also open to novices who devote the time necessary to acquire the requisite knowledge.<sup>126</sup>

A second approach to expertise, which I will call the *qualitative approach*, regards it as involving the crossing of a qualitative threshold. This approach presupposes that there is a phenomenon—“expertise”—that exists apart from mere knowledge of a subject matter. One of the premises underlying this vein of research exploring expertise is that there are psychological similarities amongst different kinds of experts, ranging from elite athletes to the proverbial rocket scientists and brain surgeons, which can be isolated and assessed.<sup>127</sup> On this view, expertise exists as a characteristic that is distinct from both generalized talent or intelligence and a long tenure of experience in a given subject matter. As one psychologist put the matter, “[e]xperts certainly know more, but they also

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124. HARALD A. MIEG, *THE SOCIAL PSYCHOLOGY OF EXPERTISE: CASE STUDIES IN RESEARCH, PROFESSIONAL DOMAINS, AND EXPERT ROLES* 2–9 (2001).

125. On this view, anyone can end up in a situation in which they will function as an expert. “[T]he interaction involved in consulting an expert or, respectively, being consulted as an expert is based on a simple fact: There is somebody who seems to have knowledge that someone else is in need of.” *Id.* at 43.

126. Michelene T. H. Chi, *Two Approaches to the Study of Experts’ Characteristics*, in *THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE* 23 (K. Anders Ericsson et al. eds., 2006).

127. See K. Anders Ericsson, *An Introduction to Cambridge Handbook of Expertise and Expert Performance: Its Development, Organization, and Content*, in *THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE* 3, 9 (K. Anders Ericsson et al. eds., 2006).

know differently.”<sup>128</sup> Note that, in addition to the divide between the two approaches, there is also the potential for a divide over whether these approaches can coexist. One might regard both conceptions of expertise as legitimate, or one might deny either the status of relative experts as true experts or the existence of experts who possess qualitatively superior expertise.

While this second approach regards expertise as distinct from subject-matter knowledge, the concepts nonetheless remain connected. As the idea is typically phrased, expertise is domain-specific.<sup>129</sup> Contrary to the common perception that expertise is merely the product of some general underlying talent, research reveals that basic measures of intelligence do not do well as predictors of the development of expertise in a given domain.<sup>130</sup> Just as Michael Jordan’s talents on the basketball court did not carry over to the baseball diamond, so, too, might the elite philosopher make only an average lawyer, and vice versa.<sup>131</sup> Thus, the difference between experts and novices reflects not merely the presence of similar skills in greater amounts, but also the possession of different (though surely overlapping) skill sets the expert acquired along his lengthy journey to that status.

The nature of that journey is a significant factor. It is not enough, in order to become the sort of expert who “knows differently,” simply to accumulate experience within a domain. Doing so will, to be sure, lead to improved skills, as common experience suggests that almost anything becomes easier upon repetition. But for most people, the accrual of experience leads to a plateau of acceptable performance beyond which

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128. Paul J. Feltovich et al., *Studies of Expertise from Psychological Perspectives*, in *THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE* 41, 57 (K. Anders Ericsson et al. eds., 2006).

129. This is a consistent theme of the literature. *Id.* at 47 (“There is little transfer from high-level proficiency in one domain to proficiency in other domains—even when the domains seem, intuitively, very similar.”). Domain-specificity necessarily applies in the context of relative expertise as well. My being well situated to tell others where to order a pizza does not mean that I will be able to provide similar guidance with respect to sushi, or that I would be properly regarded as the pizza expert in a different context.

130. *See id.*; *see also* Ericsson, *supra* note 127, at 10.

131. This is not to deny the existence of the occasional Bo Jackson or Deion Sanders (both were dual-sport athletes), but only to assert that they are rare.

There is a general belief that talented people display superior performance in a wide range of activities, such as having superior athletic ability and superior mental abilities. However, if we restrict the claims to individuals who can perform at very high levels in a domain, then it is clear that people hardly ever reach an elite level in more than a single domain of activity. . . . There is little transfer from high-level proficiency in one domain to proficiency in other domains—even when the domains seem, intuitively, very similar.

Feltovich et al., *supra* note 128, at 47.

additional experience does not result in improvement.<sup>132</sup> At that point, performance is likely to remain constant, or even decrease, with subsequent experience unless the aspiring expert engages in deliberate efforts to improve performance.<sup>133</sup> Further improvement requires a program of deliberate, structured practice, in which participants focus on systematically identifying and eliminating shortcomings, and obtain feedback that allows them to refine their performance.<sup>134</sup> Research suggests that, as a general matter, ten years of experience involving this sustained devotion to improvement is required to reach the highest levels in a domain.<sup>135</sup> On this conception, expertise stands as something of an absolute and the category of experts includes only truly exceptional individuals within a given area.<sup>136</sup>

None of the above discussion is to suggest that innate talent or intelligence is irrelevant. Two relevant subcomponents of general intelligence are *fluid intelligence*—reasoning ability in its general form—and *crystallized intelligence*, which concerns “the possession and use of knowledge to solve problems.”<sup>137</sup> Domains will differ in the extent to which fluid intelligence is utilized in the exercise of expertise. For some skills, such as the repetitive motions involved in swinging a golf club or shooting a basketball, fluid intelligence comes into play only at the learning stage.<sup>138</sup> Others, “such as the analogical reasoning typical of the law, involve varied mappings, the development of mental models of a situation, and extensive knowledge.”<sup>139</sup> For these skills, fluid intelligence

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132. Ericsson, *supra* note 127, at 13. “The path to expertise is not fully monotonic. Plateaus are reached at which the person is comfortable and confident. But it’s necessary to move off such plateaus to advance. This involves some discomfort and considerable effort. It may involve unlearning some aspects of what brought one to a comfort-level of expertise.” John Horn & Hiromi Masunaga, *A Merging Theory of Expertise and Intelligence*, in *THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE* 587, 601 (K. Anders Ericsson et al. eds., 2006).

133. Feltovich et al., *supra* note 128, at 60.

134. See Horn & Masunaga, *supra* note 132, at 601; see also K. Anders Ericsson, *The Influence of Experience and Deliberate Practice on the Development of Superior Expert Performance*, in *THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE* 683, 692–94 (K. Anders Ericsson et al. eds., 2006).

135. *Id.* at 689.

136. See Chi, *supra* note 126, at 22. Under this definition of expertise, some of the understandings outlined in the preceding paragraphs need to be qualified, for “there is a tacit assumption in the literature that perhaps these individuals somehow have greater minds in the sense that the ‘global qualities of their thinking’ might be different. For example, they might utilize more powerful domain-general heuristics that novices are not aware of, or they may be naturally endowed with greater memory capacity.” *Id.*

137. Earl Hunt, *Expertise, Talent, and Social Encouragement*, in *THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE* 31, 32 (K. Anders Ericsson et al. eds., 2006).

138. *Id.*

139. *Id.* at 32–33.

remains important, and the development of expertise involves not pure automation of the relevant conduct, but rather “requires the development of schema that can guide problem solving. To some extent the use of such schema can reduce the burden on working memory, thus shifting the balance between” fluid and crystallized intelligence.<sup>140</sup>

It is one thing to say what expertise is, and another to identify those who qualify as experts. Of course, under a view of expertise as merely involving the possession of relatively more knowledge, the task requires nothing more than a contextual assessment of comparative knowledge levels. But if one takes a qualitative approach, the task can become more difficult, depending on the nature of the underlying domain. Some provide objective criteria. Sports are perhaps the most obvious example, but the dynamic exists in any domain in which it is possible to demonstrate consistently superior performance, such that the novice observer can appreciate the presence of expertise.<sup>141</sup> But few fields of human endeavor are susceptible to such easy assessment. In other domains, “it is difficult for non-experts to identify experts, and consequently researchers rely on peer-nominations by professionals in the same domain.”<sup>142</sup>

### *B. The Mechanisms and Effects of Expertise*

Unsurprisingly, perspectives on the mechanisms through which expertise manifests itself depend on which approach to defining expertise one takes. Under a relative approach, the thought processes of experts differ from novices only in degree. The expert has a greater store of knowledge to draw on, and perhaps has structured the knowledge in a more effective way.<sup>143</sup> Novices may need to devote more of their attention to the rules of a game or other basic information. In time, however, that information becomes internalized and automatically accessible, enabling cognitive resources to be focused elsewhere.<sup>144</sup> Beyond that, however, the manner in which information is retrieved, processed, and implemented is the same as is true for novices. For those who regard expertise as existing only in a relative form, efficiency is the sole reason for bringing expertise to bear on a problem. As Harald Mieg puts the point, “[t]he core of the expert’s role consists of providing experience-based knowledge that we

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140. *Id.* at 33.

141. Ericsson, *supra* note 127, at 3.

142. *Id.* at 4.

143. Chi, *supra* note 126, at 22.

144. MIEG, *supra* note 124, at 21–22 (describing the transformation from “declarative knowledge”—knowledge about what—to “procedural knowledge”—knowledge about how).

could attain ourselves if we had enough time to make the necessary experience.”<sup>145</sup>

Research conducted under the qualitative approach, in contrast, suggests that experts go about their tasks in a manner that is qualitatively different from novices. In part, this may be because they do, in fact, “think differently” from novices. “For example, they might utilize more powerful domain-general heuristics that novices are not aware of, or they may be naturally endowed with greater memory capacity.”<sup>146</sup> The differences are also attributable to the different knowledge structures developed by experts.<sup>147</sup> To simplify, novices tend to see trees, while experts see forests. Relative to novices, experts organize information into units that are larger in scope, deeper in reach, and conceptually more abstract.<sup>148</sup> Presented with a problem, experts are able to see more features, and better appreciate its “deep structure,” than are novices.<sup>149</sup> This places experts in a better position to access, assess, and implement their accumulated knowledge in a manner appropriate to the situation presented.<sup>150</sup> Research suggests, for example, that expert and novice chess players looking at the same chessboard see different things.<sup>151</sup> The novice sees a collection of pieces, while the expert sees a collection of relationships among pieces.

The expert’s ability to peer more deeply into problems can be both a blessing and a curse. As a general matter, experts are more able than novices to engage in metacognition—reflecting on, and critically assessing, the nature of their own thinking about a problem or situation—which in turn puts them in a better position to recognize when what they face is nonroutine and to make adjustments in response.<sup>152</sup> Even within an expert’s home domain, however, there lies the potential for

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145. MIEG, *supra* note 124, at 43.

146. Chi, *supra* note 126, at 22.

147. “Expertise is appropriately viewed not as a simple (and often short-term) matter of fact or skill acquisition, but rather as a complex *construct* of adaptations of mind and body, which include substantial self-monitoring and control mechanisms, to task environments in service of representative task goals and activities.” Feltovich et al., *supra* note 128, at 57.

148. See Feltovich et al., *supra* note 128, at 50–53. “Human information processing is limited to seven chunks at a time. By *chunking*, human experts—in chess and other domains—are able to reduce domain-specific information complexity. This ability is based on the perception of domain-specific meaningful patterns. In other words, experts *see* constellations.” MIEG, *supra* note 124, at 20 (emphasis in original).

149. Chi, *supra* note 126, at 23.

150. Feltovich et al., *supra* note 128, at 54–55.

151. J. FRANK YATES, JUDGMENT AND DECISION MAKING 373 (1990).

152. See *id.*; Chi, *supra* note 126, at 24 (“Experts have more accurate self-monitoring skills in terms of their ability to detect errors and the status of their own comprehension.”).

overconfidence and the tendency to overlook the details of a situation.<sup>153</sup> Moreover, the scale of experts' knowledge structures can sometimes inhibit their ability to appreciate when the deep structure of a problem differs from what is typical in the domain, which might in turn limit their ability to fashion non-standard solutions.<sup>154</sup>

Those limitations aside, experts tend to produce superior results for many kinds of tasks. "Experts excel in generating the best solution, such as the best move in chess, even under time constraints, or the best solution in solving problems, or the best design in designing a task."<sup>155</sup> Part of this may be a function of experts' ability to avoid falling prey to the sorts of cognitive biases that skew much human thought away from the ideal of rationality.<sup>156</sup>

### C. *Expertise and Creativity*

The relationship between expertise and creativity remains murky, with competing strands of research articulating contrasting—though perhaps ultimately compatible—perspectives. One view holds that expertise fosters, and indeed is necessary for, creativity.<sup>157</sup> From this perspective the primary driver of creative thought is the possession of a comprehensive knowledge of the relevant domain, which allows the actor to generate novel solutions to problems based on a full appreciation of the key components of that situation and the larger context in which it arises.<sup>158</sup> What appears to the outside observer to be a creative "leap" involves instead the expert appreciating the connections between the various components of her knowledge base. The advanced chess player, able to appreciate the position of the pieces on the board at a greater level of abstraction than the novice, will naturally be able to see effective moves that the novice will be unable to anticipate and may even perceive as counterintuitive. In similar fashion, an advanced engineer will be

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153. *Id.* at 25.

154. *Id.* at 26–27.

155. *Id.* at 23.

156. Karol G. Ross et al., *Professional Judgments and "Naturalistic Decision Making,"* in THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE 403, 405 (K. Anders Ericsson et al. eds., 2006) ("Many studies have found that when experts perform in their domain in their natural context, bias is alleviated and experts yield good judgments.").

157. For an overview, see Robert W. Weisberg, *Expertise and Reason in Creative Thinking,* in CREATIVITY AND REASON IN COGNITIVE DEVELOPMENT 7 (James C. Kaufman & John Baer eds., 2006).

158. *Id.* at 38 ("The creative thinker, no different from the noncreative thinker, uses his or her knowledge to deal with the situations he or she faces. The main difference between creative versus noncreative thinkers is the knowledge they bring to a situation within their area of expertise.").

relatively more able than a novice to connect seemingly distinct strands of knowledge to solve a problem.

The second view regards expertise and the logical application of expert knowledge as hindrances to creative thought.<sup>159</sup> For example, Dean Keith Simonton suggests that while a baseline amount of domain-specific expertise is necessary for creativity, formal training that extends beyond that level can have a negative effect.<sup>160</sup> From this perspective, the expert stands as too much of an insider, someone whose thought patterns will be filled with preconceived notions arising out of the received wisdom. The relative novice, in contrast, is not shackled by dominant approaches, and is therefore more likely to be open to considering, and giving effect to, new ways of thinking about problems. Indeed, Simonton asserts that creativity is fostered not by intense focus on a single domain, but rather through exposure to, and work in, different genres and methodologies. “These effects are analogous to overtraining and crosstraining in sports. Creativity is nurtured by crosstraining and hindered by overtraining. It is more crucial for knowledge to be broad than deep.”<sup>161</sup>

#### *D. Decision-making Expertise*

As Frank Yates and Michael Tschirhart point out, researchers and laypeople alike tend to assume that those with subject-matter expertise will consequently make superior decisions within their domain of expertise.<sup>162</sup> There is undoubtedly a necessary connection between the two, in that one cannot effectively make decisions within a domain without at least some baseline level of substantive knowledge.<sup>163</sup> Yet, they argue, “[e]quating decision-making and subject-matter expertise effectively assumes that there is no such thing as decision-making expertise per se.”<sup>164</sup> On this view, decision-making constitutes a subset of the larger phenomenon of problem solving, with a “decision” defined as “a

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159. See generally Dean Keith Simonton, *Creative Genius, Knowledge, and Reason*, in CREATIVITY AND REASON IN COGNITIVE DEVELOPMENT 43 (James C. Kaufman & John Baer eds., 2006).

160. *Id.* at 45.

161. *Id.* at 48.

162. J. Frank Yates & Michael D. Tschirhart, *Decision-Making Expertise*, in THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE 421, 426 (K. Anders Ericsson et al. eds., 2006).

163. “For instance, it would be impossible for a layperson who knows nothing about the law to consistently make decent legal decisions on behalf of clients.” *Id.*

164. *Id.*

commitment to a course of action that is intended to yield results that are satisfying for specified individuals.”<sup>165</sup>

Research exploring the possibility of decision-making expertise is underdeveloped, and is hampered in part by the difficulty involved in measuring the quality of a decision. One perspective focuses simply on the results produced by decisions.<sup>166</sup> Another focuses more on process, on the theory that decisions are made in the face of uncertainty, such that their consequences can be affected by events that cannot be anticipated or controlled.<sup>167</sup> This latter view recognizes that even what counts as the best possible decision, given the information known at the time, could turn out to have bad results. There is, of course, a further complication in that observers will often disagree about the relative desirability of decisional outcomes, whether actual or anticipated.<sup>168</sup> Yates and Tschirhart suggest that the “implicit subjectivity” of decision problems “represents a significant and challenging departure from most expertise scholarship, which prizes unambiguous performance criteria.”<sup>169</sup> This, coupled with the likely operation of cognitive biases in the process of determining who counts as an expert,<sup>170</sup> leads them to conclude that “our assumptions about who is or is not a decision-making expert might not be as good as we hope.”<sup>171</sup>

In an effort to advance the inquiry, Yates and Tschirhart outline what they call the “process-decomposition perspective,” in which they break the process of making a decision into its components. Their underlying assumption is that “[i]f each element is executed well, this should

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165. *Id.* at 422.

There are several major decision varieties: ‘choices,’ which entail the selection of a subset from a larger collection of discrete alternatives (e.g., a class of ten new graduate students from a pool of 100 applicants); ‘acceptances/rejections,’ which are special cases of choices in which only one specific option (e.g., potential marriage partner) is acknowledged and must be accepted or not; ‘evaluations,’ which are statements of worth that are backed up by commitments to act (e.g., a \$310,000 binding bid on a house); and ‘constructions,’ which are attempts to create ideal decision problem solutions given available resources (e.g., a department’s budget or plan for fighting a fire).

*Id.*

166. *Id.* at 423–24.

167. *Id.* at 424.

168. “The specification of beneficiaries [of a decision] is critical, implicating what is arguably the single feature of decision problems that distinguishes them more sharply from more general problems—*differences among people in the values they attached to decision results.*” *Id.* at 423 (emphasis in original).

169. *Id.*

170. *Id.* at 425.

171. *Id.* at 426.



contribute significantly to the adequacy of the resulting decision.”<sup>172</sup> They identify ten “cardinal issues” that “arise repeatedly in real-life decision problems.”<sup>173</sup> Several of these appear to play an especially significant role in judicial decision-making. The “options” element concerns the decider’s ability to recognize the alternatives available.<sup>174</sup> The goal is not simply to maximize the number of options under consideration, but to achieve an optimum balance of quantity and quality. Here they recognize a connection with the research on creativity “since, by definition, highly creative individuals are especially good at crafting new and useful alternatives.”<sup>175</sup> Another element—the “possibilities” element—concerns the ability to anticipate the outcomes that might follow from various courses of action.<sup>176</sup>

Having identified the options and recognized the possibilities, a decision maker must make a prediction concerning the most likely result associated with choosing an option. This, Yates and Tschirhart refer to as “judgment”—“an opinion as to what was, is, or will be the state of some decision-relevant aspect of the world.”<sup>177</sup> They note that this aspect of decision-making has been addressed by more previous work than any other element they identify.<sup>178</sup> “And the most consistent expertise conclusion has been this: *Subject matter experts often exhibit much worse judgment accuracy than most people expect.*”<sup>179</sup> Yates attributes this in part to the existence of two fundamental types of judgment processes. The first, “formalistic procedures,” “are similar to the application of rules such as those in probability theory or regression analysis.”<sup>180</sup> The second, which he calls “substantive procedures,” “entail the person attempting to envision how ‘nature’ literally would (or would not) create the event in

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172. *Id.* at 426–27.

173. The issues are: “(1) need, (2) mode, (3) investment, (4) options, (5) possibilities, (6) judgment, (7) value, (8) tradeoffs, (9) acceptability, and (10) implementation.” *Id.* at 427.

174. *Id.* at 431.

175. *Id.*

176. Yates and Tschirhart explain that:

Clearly, a truly expert decider would be good at anticipating possibilities. Yet, the possibilities issue as such has gone largely untouched in decision research. Nevertheless, work framed in other ways arguably has implications for it. This includes research demonstrating people’s difficulty even imagining the sometimes bizarre behaviors of common real-life non-linear systems.

*Id.* at 432.

177. *Id.* (emphasis omitted).

178. *Id.*

179. *Id.* (emphasis in original).

180. *Id.* at 433.

question.”<sup>181</sup> While substantive reasoning can be quite powerful, its nature encourages overconfidence and error.

To a considerable degree, phenomena affecting decision-making expertise track those concerning expertise more generally. Expert decision makers take more features of a situation into account, and represent that information to themselves in a different way, than novices do.<sup>182</sup> As experience within a domain increases, decision makers organize the features of a situation into chunks that are increasingly large and increasingly linked.<sup>183</sup> Although here, too, the line dividing those with expertise from those who are merely experienced is unclear, research suggests that “[e]xperts make distinctions that novices or experienced nonexperts ignore.”<sup>184</sup> “Also, novices’ representations of alternatives will remain closely tied to the information that is explicitly presented. . . . In contrast, the representations that eventually develop in experts’ minds will be in terms of higher-level, more abstract principles or concepts. . . .”<sup>185</sup> Finally, expert decision makers will be faster, reaching a stage at which “the task changes to one of classification rather than true decisionmaking.”<sup>186</sup>

#### *E. Expert Political Judgment*

A final body of research that bears consideration is Philip Tetlock’s work on expert political judgment.<sup>187</sup> Tetlock’s project was, in effect, to attempt to isolate the components of “good political judgment,” and he did so primarily by getting experts to make predictions about future states of the world and then, over time, assessing whether those predictions came true. The entire undertaking is, as he readily acknowledges, a slippery task, in large part because disagreements turn on more than ascertainable factual claims. Instead, they involve “hard-to-refute counterfactual claims about what would have happened if we had taken different policy paths and on impossible-to-refute moral claims about the types of people we should aspire to be—all claims that partisans can use to fortify their positions against falsification.”<sup>188</sup> While Tetlock acknowledges the

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181. *Id.*

182. *See* YATES, *supra* note 151, at 372–73.

183. *Id.* at 373.

184. *Id.* at 374.

185. *Id.*

186. *Id.* at 375.

187. *See generally* PHILIP E. TETLOCK, *EXPERT POLITICAL JUDGMENT* (2005).

188. *Id.* at 4.

impossibility of eradicating all the subjectivity from the inquiry, he maintains that it is possible to assess them by reference both to the correspondence between experts' predictions and reality and to the coherence of the processes by which they approach the task.<sup>189</sup>

Tetlock concluded that, overall, experts' judgment was not good. As he puts it, "[h]umanity barely bests the chimp."<sup>190</sup> "[V]ariation in forecasting skill is roughly normally distributed, with means hovering not much above chance and slightly below case-specific extrapolation algorithms."<sup>191</sup> Tetlock found that demographic and life-history factors bore very little relationship to forecasting success. "It made virtually no difference whether participants had doctorates, whether they were economists, political scientists, journalists, or historians, whether they had policy experience or access to classified information, or whether they had logged many or few years of experience in their chosen line of work."<sup>192</sup> Nor did ideology or other factors relating to worldview or disposition correlate with forecasting success.<sup>193</sup>

What did matter, Tetlock found, was the process by which experts approached the predictive task. Drawing on Isaiah Berlin's famous fox-hedgehog distinction,<sup>194</sup> he found a "dimension [that] did what none of the measures of professional background could do: distinguish observers of the contemporary scene with superior forecasting records, across regions, topics, and time."<sup>195</sup>

Low scorers look like hedgehogs: thinkers who 'know one big thing,' aggressively extend the explanatory reach of that one big thing into new domains, display bristly impatience with those who 'do not get it,' and express considerable confidence that they are already pretty proficient forecasters, at least in the long term. High scorers look like foxes: thinkers who know many small things (tricks of their trade), are skeptical of grand schemes, see

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189. *Id.* at 6–7. Tetlock's tests echo the results- and process-oriented approaches discussed by Yates and Tschirhart. *See supra* notes 166–67 and accompanying text.

190. *Id.* at 51.

191. *Id.* at 65.

192. *Id.* at 68.

193. *Id.* at 71–72. He considered not only experts' distribution along the traditional left-right spectrum, but also institutionalists (those inclined toward faith in international institutions) and realists (who were disinclined to subordinate national interests to international institutions), and doomsters (who regard ecosystems as fragile and have a generally pessimistic view of humanity's ability to avoid a downward trajectory) and boomsters (who believe in the tendency of ecosystems to rebound and human ingenuity to resolve crises). *Id.*

194. *See supra* note 65.

195. *Id.* at 75.

explanation and prediction not as deductive exercises but rather as exercises in flexible ‘ad hocery’ that require stitching together diverse sources of information, and are rather diffident about their own forecasting prowess, and . . . rather dubious that the cloudlike subject of politics can be the object of clocklike science.<sup>196</sup>

Looking beyond the simple fox-hedgehog divide, Tetlock found that “hedgehog extremists making long-term predictions in their domains of expertise” were the worst performers.<sup>197</sup> The best were “foxes making short-term predictions within their domains of expertise.”<sup>198</sup> In all, he concludes that “the performance gap between foxes and hedgehogs . . . is statistically reliable, but the size of the gap is moderated by at least three other variables: extremism, expertise, and forecasting horizon.”<sup>199</sup>

Tetlock reasons that these results are consistent with other research on cognition. Hedgehogs, he suggests, “bear a strong family resemblance to high scorers on personality scales designed to measure needs for closure and structure—the type of people who have been shown in experimental research to be more likely to trivialize evidence that undercuts their preconceptions and to embrace evidence that reinforces their preconceptions.”<sup>200</sup> Hedgehog experts perform especially poorly because their expertise better equips them to discount contrary evidence as well as to characterize evidence as bolstering their beliefs. Extremism magnifies the effect.<sup>201</sup> Meanwhile, foxes are more self-critical and more inclined to anticipate criticism from others, and consequently more likely to give due consideration to all information that bears on their position.<sup>202</sup> For foxes, expertise pays dividends, since it enhances their ability to assess all information. In all, Tetlock’s use of both quantitative and qualitative methods led him to conclude that “[f]oxes have better judgment than

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196. *Id.* at 73–75.

197. *Id.* at 80.

198. *Id.* The quotes referenced in this and the preceding footnote occur in the context of Tetlock’s discussion of his calibration measure. His discussion of his discrimination measure reveals a similar dynamic.

199. *Id.* at 81.

200. *Id.*

201. Tetlock explains:

[T]he combination of a hedgehog style and extreme convictions should be a particularly potent driver of confidence, with the greatest potential to impair calibration and discrimination when forecasters possess sufficient expertise to generate sophisticated justifications (fueling confidence) and when forecasters make longer-range predictions (pushing potentially embarrassing reality checks on over-confidence into the distant future).

*Id.* at 82.

202. *Id.* at 82.

hedgehogs.”<sup>203</sup> Foxes are not great at it, falling well short of statistical forecasting models, but they do manage to avoid the big mistakes that afflict hedgehogs. Foxes’ success, he concludes, arises out of their “more balanced style of thinking about the world—a style of thought that elevates no thought above criticism.”<sup>204</sup>

#### IV. JUDGING, EXPERTISE, AND THE RULE OF LAW

The scope of our legal system, and thus of the matters that courts must adjudicate, is vast. A recent volume of West’s *Northwestern Reporter* includes cases concerning subjects as varied as insurance,<sup>205</sup> probate,<sup>206</sup> procedural due process,<sup>207</sup> investigative stops,<sup>208</sup> attorney discipline,<sup>209</sup> divorce,<sup>210</sup> involuntary commitment,<sup>211</sup> workers’ compensation,<sup>212</sup> freedom of information,<sup>213</sup> governmental immunity,<sup>214</sup> unemployment compensation,<sup>215</sup> contracts,<sup>216</sup> the Indian Child Welfare Act,<sup>217</sup> expert witness testimony,<sup>218</sup> medical malpractice,<sup>219</sup> civil rights,<sup>220</sup> secured transactions,<sup>221</sup> taxation,<sup>222</sup> and on and on. Each of these cases was decided by a generalist court, and for most it is easy to appreciate the allure of the

203. *Id.* at 117. Tetlock ultimately concludes that:

[I]t does sometimes help to be a hedgehog. Distinctive hedgehog strengths include their resistance to distraction in environments with unfavorable signal-to-noise ratios; their tough negotiating postures that protect them from exploitation by competitive adversaries; their willingness to take responsibility for controversial decisions guaranteed to make them enemies; their determination to stay the course with sound policies that run into temporary difficulties; and their capacity to inspire confidence by projecting a decisive, can-do presence.

*Id.* at 164.

204. *Id.* at 118.

205. *D & S Realty, Inc. v. Markel Ins. Co.*, 789 N.W.2d 1 (Neb. 2010).

206. *In re Estate of Muncillo*, 789 N.W.2d 37 (Neb. 2010).

207. *Scott v. County of Richardson*, 789 N.W.2d 44 (Neb. 2010).

208. *State v. Passerini*, 789 N.W.2d 60 (Neb. 2010).

209. *In re Lucas*, 789 N.W.2d 73 (N.D. 2010).

210. *McReath v. McReath*, 789 N.W.2d 89 (Wis. Ct. App. 2010).

211. *State v. Brown*, 789 N.W.2d 102 (Wis. Ct. App. 2010).

212. *Swiss Colony, Inc. v. Deutmeyer*, 789 N.W.2d 129 (Iowa 2010).

213. *Practical Political Consulting, Inc. v. Secretary of State*, 789 N.W.2d 178 (Mich. Ct. App. 2010).

214. *Dextrom v. Wexford Cnty.*, 789 N.W.2d 211 (Mich. Ct. App. 2010).

215. *Sykes v. Nw. Airlines, Inc.*, 789 N.W.2d 253 (Minn. Ct. App. 2010).

216. *Podraza v. New Century Physicians, LLC*, 789 N.W.2d 260 (Neb. 2010).

217. *In re Interest of Ramon N.*, 789 N.W.2d 272 (Neb. Ct. App. 2010).

218. *State v. Huber*, 789 N.W.2d 283 (S.D. 2010).

219. *Schmiedt v. Loewen*, 789 N.W.2d 312 (S.D. 2010).

220. *Collins v. City of Kenosha Hous. Auth.*, 789 N.W.2d 342 (Wis. Ct. App. 2010).

221. *Premier Cmty. Bank v. Schuh*, 789 N.W.2d 388 (Wis. Ct. App. 2010).

222. *Nw. Wisc. Cmty. Servs. Agency, Inc. v. City of Montreal*, 789 N.W.2d 392 (Wis. Ct. App. 2010).

suggestion that a court specialized in the area would have been able to grapple more easily with the case. Tax codes and other complex statutory schemes, to take just one example, do not often readily reveal their nuances to the occasional user. Those who work with them learn how the pieces fit together, and where the tensions, inconsistencies, and gaps are. It seems intuitively correct, then, that such judges would reach substantively better conclusions than their generalist peers.

But consideration of the psychology of expertise should give us pause. As outlined above, American courts serve two functions, dispute resolution and law declaration, which are differentially distributed throughout the institutional hierarchy.<sup>223</sup> And, again, the quality of a judicial decision will often be a contestable matter.<sup>224</sup> This plays out somewhat differently in the two contexts. Questions of dispute resolution have theoretically correct answers—what the contract requires, whether the defendant was negligent, whether the trial court properly instructed the jury, and so forth. It is sometimes possible to detect error—such as when DNA evidence proves that a defendant was wrongly convicted—but neither consistently, nor reliably. An assessment of the relative qualitative performance of specialized courts is thus theoretically possible, but practically difficult. With respect to the lawmaking function, the question of quality lacks even these benchmarks. Measured by content, at least, there is no objective standard by which to say one is better than another. The question of whether specialization will result in better decisions, measured in terms of their content, is thoroughly value-laden.

One lesson to be drawn is that law is a field in which there is no clear means of establishing who counts as an expert. It is easy to rank tennis and chess players, and not much more difficult to do so with pitchers and quarterbacks. When it comes to judges, however, there is no common metric even for generalists.<sup>225</sup> To the extent it makes sense to distinguish between expert and nonexpert judges (as opposed to, say, regarding all or most judges as experts in some more general domain such as legal reasoning), the distinctions must necessarily be the product of rough consensus. As Yates and Tschirhart point out, such consensus is likely to

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223. See *supra* Part I.

224. See *supra* notes 78–81 and accompanying text.

225. For a sustained effort to develop criteria to rank judges, see Stephen J. Choi & G. Mitu Gulati, *Mr. Justice Posner? Unpacking the Statistics*, 61 N.Y.U. ANN. SURV. AM. L. 19 (2005); Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23 (2004); Stephen J. Choi & G. Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299 (2004).

arise out of a flawed process, fraught with cognitive bias.<sup>226</sup> And as the preceding parenthetical suggests, the analysis must confront the domain-specific nature of expertise. The domains in which a judge works might plausibly be defined broadly, such as legal reasoning or legal decision-making, or narrowly, such as tax law or evidentiary rulings. Mid-level domains might include fact-finding, rule-identification, and the crafting and refinement of legal standards. A given judge might be skilled along one or some combination of these dimensions. And even a judge on a specialized court will have to adjudicate questions outside her specialty. Bankruptcy judges, for example, do not simply consider questions under the Bankruptcy Code, but instead “hear disputes from across the legal spectrum, confronting matters sounding in contract, tort, property, labor, and almost every other area of civil law.”<sup>227</sup> If the bankruptcy judge is said to have a domain of expertise, then, it may be in a process rather than a subject matter.<sup>228</sup>

Whatever the domains of expertise that judges may possess, the architecture of the American judiciary suggests that any gains resulting from expertise are almost certain to be of the efficiency rather than qualitative sort. Even if one accepts the proposition that there exists a form of expertise in which its holders cross some threshold that enables them to make qualitatively better decisions,<sup>229</sup> and that law (or some parts of law) is a discipline in which that sort of expertise is attainable, the processes of judicial selection are unlikely to provide us with a judiciary that possesses that sort of expertise. Part of the problem is with the pool. The practice of law as generally undertaken does not reliably involve the sorts of processes necessary to cross the threshold. Lawyers who accrue experience in a given specialty are apt to reach a plateau of acceptable performance and remain there.<sup>230</sup> Law practice does not mimic the sort of deliberate, structured practice necessary to continue to advance one’s abilities. The fortunate lawyer will have senior colleagues who, through the early years of her career, provide feedback on her work. But even this largely disappears after a few years, at which point her feedback will come from results and the reactions of her clients and peers, all of which is

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226. See Yates & Tschirhart, *supra* note 162, at 450–52.

227. Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 751 (2010).

228. See *id.* (emphasis in original) (“Bankruptcy may be a specialized *process*, with its own rhythms that differ from litigation in other forums, but the *substance* of bankruptcy cases is not specialized.”).

229. See *supra* Part II.A.

230. See *supra* note 132.

unstructured and sporadic. Her development does not parallel that of the professional athlete, whose entire career is overseen by coaches charged with identifying areas for improvement and developing plans to achieve it. The lawyer's expertise is therefore likely to be a relative expertise. She will have been in a similar situation before, and thus will not have to expend time and energy wading through caselaw or a statutory scheme, or familiarizing herself with the processes by which the governing legal standards are implemented. But, she will often not have a good sense of whether her approach in those past situations was as effective as it could have been or of specific ways she should proceed differently this time.

A specialized court or judge's expertise will likewise be relative. Just as there is nothing about the practice of law that ensures the development of qualitative expertise, neither does the role of judge involve incremental increases in the difficulty or complexity of the cases one must decide. Indeed, the small amount of empirical research bearing on differences between generalist and specialist judges is consistent with this suggestion.<sup>231</sup> The specialized court is therefore likely not to produce greater insight in some absolute sense, but rather roughly equivalent insight more quickly. As Yates and Tschirhart reveal, the subject-matter expert may have a comparative advantage in terms of identifying decisional options, but this does not inevitably translate into superior judgment.<sup>232</sup> Tetlock's work reinforces this conclusion, suggesting that it is cognitive style rather than expertise that drives decisional quality.<sup>233</sup> The gains that result will not be negligible. A judge in familiar territory will undoubtedly be able to decide cases more efficiently than one who must make some degree of acquaintance with the subject matter with each new case. But it is important to recognize that any preference for a regime of specialists must be based on an accounting that considers both decisional quality and the amount of time that must be invested in each decision. There is, in other words, no assurance that the specialist's decisions will be qualitatively better (assuming, again, some agreed metric for assessing quality) than the generalist's, especially removing time and resource constraints from the analysis.

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231. See Baum, *supra* note 23, at 1671. Baum characterizes a body of research conducted by Jeffrey Rachlinski, Chris Guthrie, and Andrew Wistrich as "provid[ing] significant evidence, perhaps unsurprising, that the basic reasoning processes of generalist and specialist judges do not differ fundamentally." *Id.*; Cf. William K. Ford, *Judging Expertise in Copyright Law*, 14 J. INTEL. PROP. L. 1, 49 (2006) ("While the evidence is not decisive, this study suggests that specialization does not improve copyright decisions.").

232. See *supra* note 173–80 and accompanying text.

233. See *supra* Part II.E.



Of course, quality measured by content or result is not the only aspect of judicial decision making to be accounted for in making the choice for or against specialization. Indeed, the focus might more profitably be on process differences between the two types of regimes rather than on substance. In this view, the focus would be on whether there are meaningful differences between the two regimes in terms of the manner in which judges operating in them go about making decisions, or differences in the manner in which those decisions are implemented or articulated.<sup>234</sup> Such differences, of course, might in turn affect decisional content in systematic ways. As the research on decision-making suggests, an approach focused on process may be superior to one focused purely on result.<sup>235</sup> But, as the procedural justice literature demonstrates,<sup>236</sup> there are senses apart from content in which process is consequential. We might as a society desire a system in which courts are responsive to parties, where decisions track governing law, or where there are more rules than standards, to a greater extent than we would value any specific content of rules.

Tetlock's revelation that cognitive style seems to drive decision making points the way to another possibility, which is that of devoting efforts to creating judicial processes that mimic fox-like cognitive styles. Adversarialism performs this function to some degree, ensuring that courts receive at least two perspectives on an issue. That benefit may be lost, however, if judges reach a point where they are merely categorizing rather than considering<sup>237</sup> the alternatives, and as a consequence, achieving a meaningful impact on cognitive style might require strengthening the effects of adversarialism.<sup>238</sup> In the context of multi-member courts,

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234. For example, Ori Aronson has recently argued that specialization may promote democratic values. See Ori Aronson, *Out of Many: Military Commissions, Religious Tribunals, and the Democratic Virtues of Court Specialization*, 51 VA. J. INT'L L. 231 (2011). He suggests that institutional heterogeneity may further democratic deliberation by providing distinct institutional homes for different voices and perspectives, enhance pluralism by ensuring "that multiple normative visions are active and visible at all times[.]" advance the cause of access to justice because different institutional arrangements provide different sorts of avenues to reach the judiciary, and enhance systemic transparency by "mak[ing] visible the doctrinal, institutional, and ideological divisions and distinctions that pervade the legal order." *Id.* at 265–71.

235. See *supra* note 167.

236. See Tyler, *supra* note 101.

237. See *supra* note 186 and accompanying text.

238. For example, we might consider implementing a "framing arguments" mechanism, pursuant to which a change to the format of judicial opinions—requiring that they include party-generated statements of the issues—would encourage judges to be more responsive to the parties. See Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743 (2006).

generalism might provide an advantage by increasing the likelihood of the need to accommodate divergent perspectives on a panel. Others have proposed similar mechanisms to ensure ideological diversity on panels.<sup>239</sup>

There is a final set of concerns. The strongest arguments for a generalist judiciary seem to require the acceptance of a certain conception of law, and in turn of the judicial role. Stated simply, the conception of law that seems to underlie the generalist judiciary is one in which law strives to be something of a common language.<sup>240</sup> There are at least two ideas at work here. One is that the expertise relevant to judging exists at a similarly broad level. In that view, the key is not expertise in or familiarity with the particulars of, say, tax law that matters, but rather an advanced ability to deploy the tools of legal analysis. The second idea extends beyond the act of judging to the impact of that act on the relationship between the law and those who are governed by it. It goes beyond the notion of a government of laws and not of men to the suggestion that legitimacy entails a government of laws that can be understood and adhered to by more-or-less ordinary people. The generalist judiciary can further these goals not only by preventing the sort of balkanization that is likely to occur if separate judiciaries have responsibility for their own areas of law, but also by serving as a more general barrier to needless technicality and complexity in the law. The presence of the generalist effectively requires specialist lawyers to translate their arguments into the

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239. See Emerson H. Tiller & Frank B. Cross, Colloquy, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215 (1999) (suggesting requirement that each federal court of appeals panel include at least one Democrat and Republican appointee). Additionally, Cass Sunstein and his co-authors suggest that:

Ideological tendencies, whatever they are, can be distorting. In general, the existence of diversity on a three-judge panel is likely to bring the law to light and perhaps to move the panel's decision in the direction of what the law requires. The existence of diverse judges and a potential dissent increases the probability that the law will be followed. And even where the law is unclear, it is valuable to have competing views about how it should be understood.

CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, *ARE JUDGES POLITICAL?* 135 (2006).

240. The suggestion here is akin to James Boyd White's characterization of law "as a language, as a set of ways of making sense of things and acting in the world." JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* xiii (1990). Thus:

In every opinion a court not only resolves a particular dispute one way or another, it validates or authorizes one form of life—one kind of reasoning, one kind of response to argument, one way of looking at the world and its own authority—or another. . . . Much of the life and meaning of an opinion (or a set of opinions) thus lies in the activities it invites or makes possible for judges, for lawyers, and for citizens; in the way it seeks to constitute the citizen, the lawyer, and the judge, and the relations among them; and in the kind of discoursing community it helps to create.

*Id.* at 101–02.

common language of the generalist, which in turn facilitates the generality of law. This barrier provided by the generalist is hardly impermeable. It is not difficult to find examples of needless technicality and complexity in the law created by generalists. Nonetheless, one can easily imagine generalism serving as an antidote to some of the more severe pathologies that might afflict the law under a regime based more on specialization.

This conception of law appears to be consistent with most theories of legality. A prominent example is Lon Fuller's list of eight requirements for the "inner morality of law:"

[T]he attempt to create and maintain a system of legal rules may miscarry in at least eight ways; there are in this enterprise, if you will, eight distinct routes to disaster. The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective changes; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.<sup>241</sup>

Of course, whether a generalist judiciary truly is more effective than a specialized judiciary in satisfying Fuller's requirements presents an empirical question as to which one can presently offer only speculation. As outlined more fully in Part I, one can make a plausible argument that generalist courts populated by generalist judges will do a better job, relative to the alternatives, of satisfying requirements one (achievement of rules), four (making rules understandable), five (avoiding contradiction), seven (maintaining consistency), and eight (maintaining congruence between rules and their administration). Insofar as it is appropriate to conceive of specialist judges as possessing some form of expertise, such effects might result because the experts are (at least implicitly) following

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241. LON L. FULLER, *THE MORALITY OF LAW* 38–39 (1964). For a more recent treatment of these ideas, see SCOTT J. SHAPIRO, *LEGALITY* 392–98 (2011).

rules that are more complex than, and somewhat counter to, the governing doctrine as it has been articulated.<sup>242</sup> Or it may be that the experts are more broadly, and less tangibly, assigning value to more data points in reaching a decision than the applicable rules provide for, and thus deciding according to some intuitive assessment of the equities.<sup>243</sup> Either way, such results would be in tension with Fuller's requirements. Rules of law created by generalists might typically resemble the decisional processes of novices in taking account of the more apparent features of a situation. To the extent that rule-ness is desirable, that will be a plus. The law declared by specialists, in contrast, is likely to be less precise, in the sense of being rule-like and generalizable, than that declared by generalists.

It is also worth considering the possibility that research exploring creativity and decision-making expertise captures what qualitative approaches to expertise regard as constituting the difference between experts and novices. The qualitative expert may be one who has the knowledge base of a relative expert (to a high degree), and who has also developed a sort of process-based facility, whether it be creativity, decision-making skill, or the sort of superior cognitive approach outlined by Tetlock. The situation becomes even more complex when one attempts to apply it to the judicial role. Our society is ambivalent about the desirability of judicial creativity. On the one hand, a creative judiciary might be viewed as an important—perhaps even necessary—source of solutions to pressing social problems.<sup>244</sup> In similar fashion, judicial creativity might be applied to the resolution of discrete disputes between litigants as to which formal law provides little guidance.<sup>245</sup> On the other hand, a judge who reaches a creative result might be accused of acting contrary to the institutional logic of the adversary system, which relies upon and must be responsive to the parties' conception of their disputes.<sup>246</sup>

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242. It is easy to appreciate how there might come to be a mismatch between the levels of generality at which the legal standards articulate the law and the depth at which a specialist analyzes it. A statute or line of precedent will have been developed largely by generalists. Even though subject-matter experts often play a role, such as in statutory advisory committees, the product will have been filtered through the generalist lawmaker. The mere existence of that filter seems likely to affect the work product of the specialist advisors, and the lawmakers themselves are likely to modify what is proposed before it is enacted. Thus, the rules and standards that result are likely to identify a limited set of factors as appropriate for consideration, while the specialist/expert will tend to look beyond that limited set of factors to more deep structural considerations. See *supra* Part II.B.

243. See *supra* Part II.D.

244. *E.g.*, CHARLES MONROE HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE AND AUDACIOUS JUDGES* 130–31 (1996).

245. See generally Sarah Evans Barker, *Beyond Decisional Templates: The Role of Imaginative Justice in the Trial Court*, 92 MARQ. L. REV. 667 (2009).

246. See Oldfather, *supra* note 82, at 139–43.

More broadly, a creative judicial decision seems more likely to be regarded as one that is insufficiently deferential to the political branches or otherwise of the sort susceptible to the amorphous but undoubtedly pejorative “judicial activism” label.

The entire inquiry into the relative merits of specialization vis-à-vis the rule of law is subject to a possible qualification: Embedded within this discussion is a conception of law as necessarily consisting of a unified whole, which must collectively satisfy these requirements. Having a common language is important only if there is some commonality to the tasks in which all lawyers and judges are engaged. If, on the other hand, criminal law and patent law and workers compensation law and so forth are sufficiently different in a qualitative sense, then this unified conception of law may be erroneous. On that view the better approach would be to discard the notion of “law” as inherently including common threads that run through all these areas and instead having distinct bodies of law each of which should be assessed by Fuller’s criteria. In this latter world, there may be benefit to not having them share a common language, in which case many of the arguments for a generalist judiciary as I have defined it would fall away.<sup>247</sup>

#### CONCLUSION

It would be ironic, to say the least, were I to conclude an article that draws heavily on research touting the cognitive prowess of Berlin’s foxes by offering confident solutions. Attempts to import the findings of psychological research into the legal system are always tricky,<sup>248</sup> and doubly so when that research itself leads to no easily delineated conclusions. The standard admonitions against the incautious importation of the results of psychological experimentation into “real world” settings take on additional salience when the setting is one in which there are conflicting views as to the ultimate goals to be achieved. Courts and law serve multiple, often incompatible, ends. Though the conclusions must therefore necessarily be modest and qualified, they are nonetheless significant. Determining whether judicial specialization makes sense in

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247. Aronson suggests something along these lines: “The concept of the ‘court’ as a solid, identifiable, coherent, and persistent institutional entity is revealed to be obsolete. What most states and countries have, in fact, is a profusion of *courts*—multiple, diverse, and continuously changing devices of legal ordering and dispute resolution.” Aronson, *supra* note 234, at 297 (emphasis in original).

248. See generally Gregory Mitchell, *Why Law and Economics’ Perfect Rationality Should Not Be Traded for Behavioral Law and Economics’ Equal Incompetence*, 91 GEO. L.J. 67 (2002).

any given context is a considerably more complex question than most previous analyses have allowed for. And claims that expertise necessarily translates into superior decision-making are likewise subject to considerable qualification, if they are not outright suspect.

Questions of specialization and expertise exist throughout society, as debates over the wisdom of specialization in medicine and academia attest. They also exist throughout law. The psychology of expertise has implications not merely for judging, but also for the design and operation of institutions and roles like administrative agencies and expert witnesses. My analysis suggests that it may be appropriate to revisit those contexts as well.