RESPONSES

*Response—The Honorable Lindsay G. Arthur**

What makes Judges Judge?

Then to the rolling Heav'n itself I cried,
Asking, 'What Lamp had Destiny to guide
Her little Children stumbling in the Dark?'
And . . . 'A blind Understanding!' Heaven replied.[1]

Judges are reasonably complex and more or less human, maybe almost as much so as other people: "If you prick us, do we not bleed? If you tickle us do we not laugh?"[2] We do not react simply to one course of indoctrination, we also have stomach aches; nor do we in splendid isolation balance equities, we also see people; nor are we concerned only with sustaining a judicial myth or finding in every decision its natural law or abiding smugly in our own superior morality: we also simply live, we also reflect our environments and our ancestors and our newspapers and all the people who talk to us and all the people who don't. For better or for worse, we cannot be dissected with a dull knife nor analyzed from a single premise. Even the best of sociological research may miss some factor of us; while sociologists are never simply blind men, neither are we simply elephants to be fully defined by the touch of our flank.

I.

Judges have psyches in the sense that each has a "mind functioning as the center of thought, feeling and behavior, and consciously or unconsciously adjusting and relating the body to its social and physical environment."[3] We have families: teen age daughters who talk to us about Beatles and sons who try not to mention hair. We have wives we get displeased with and homes with leaky roofs and neighbors with barking dogs and lovely martinis. All these, perforce, have impact, maybe more than our concepts of Congress or history. Maybe these are all part of Professor Skogan's "social and cultural milieu that forms the environment which shapes learning,"[4] but somehow a barking dog or a pulling child doesn't seem very cultural and, whatever their impact on a

---

* Judge, Juvenile Division—District Court, Minneapolis, Minnesota.

1. *Rubaiyat of Omar Khayyam*, No. 33.
2. Shakespeare, *Merchant of Venice*, Act III, Scene 1.
3. THE AMERICAN HERITAGE DICTIONARY 1055 (1969).
4. Skogan, *Judicial Myth and Judicial Reality* at 309, 312 *supra*.

judge who has fretted with them through a night, their sociological evaluation must almost defy measurement.

Judges belong to clubs and meet friends and listen to the chatter of the day. They play squash and get hit in the head by a fast ball and then go back to Court to decide a case. They see pretty girls, or get splashed by cars too close to the curb, or feel the warmth of the sun. They read books and escape with television and clean up after cats . . . and all of these make judges judge.

And they put on the robe! Whatever they were before, they are less so when the robe inducts them into an establishment. If they were poor, they suddenly are a little above average. If they were outside, they're inside. A pedestal, very small but a pedestal, is slipped under their clay feet and in some measure they are less a reflection of their individual heritage. Possibly, this mystical experience can explain Professor Skogan's report that "Among the judges themselves, we found a consistently high level of agreement on all items. . . . This consensus is especially striking because the socializing influence to which the judges were exposed was by no means homogeneous."[5] It is a real force, this robe; it should be taken into the equation. In 1960, the Minneapolis Municipal Court used some 38 lawyers for a week apiece to assist in reducing a case backlog: to a man, and without prompting, they acknowledged this impact of the robe.

II.

Judges have philosophies in the sense that each has a "system of motivating concepts or principles".[6] Each of the judicial classifications noted by Grossman and Sarat: law-interpreters, law-makers, or pragmatists,[7] or the tendency to establish criteria independent of statute as noted by Fahey,[8] all can readily be found in any multi-judge court; it is well that the sociologists note their impact. For surely a judge's motives in wanting to be and being a judge will affect his judging. He may wish to be a Coke or a Holmes and open new vistas of law, or a Marshall who builds the judiciary's power, or a Warren who uses it. Or he may like the niceties of a well run legal encounter or a particularization of an obtuse point. Or he may just like a job with

5. *Id.* 332 *supra.*

6. THE AMERICAN HERITAGE DICTIONARY 985 (1969).

7. Grossman & Sarat, *Political Culture and Judicial Research* at 177, 195-96 *supra.*

8. Fahey, *The Enforcement of the Illinois Felon Marijuana Law in Chicago* at 281, 298 *supra.*

security, status, and pension. Whatever his motives, as with his particular judicial and political concepts, his judging will reflect them . . . and, worse, if a judge who would be a law-maker is assigned cases involving only law-interpretation, his judging will reflect this also, just as surgeons and psychiatrists would do poorly in the other's cases even though both are physicians.

III.

Judges have politics. It's been well and cynically said that the only prerequisite to becoming a judge is to know the Governor. Professor Cook says the same more delicately: "The lawyer anxious for a judicial position prepares himself in various ways for the eventuality. He may shape his legal and political career more in respect to the recruitment requirements to the judicial office than the role expectations for its occupancy."[9] But in the American system of checks and balances, *was ist los?* President Roosevelt, after his epic struggle with an adverse court, surely felt that he was expressing the will of the people and not mere politics by appointing men of his own political persuasion to diffuse a court dominated by his opponents. Political politics determines appointments but even in state courts where judges are elected, a different and peculiar kind of politics controls continuance in power. A judge's decisions have little impact on his reelection since, as Grossman and Sarat state, "Most citizens do not know enough about the Courts to have any opinion"[10] and, as Skogan succinctly put it, ". . . the public is not concerned with the content of [a judges'] decisions . . . [but with] the importance of personal characteristics: honesty, humility, objectivity, and human sympathy."[11] And maybe the public, as usual, is right: Justice Cardozo said "In the long run there is no guarantee of justice except the personality of the judge."

The strength of the bar, particularly in reelection contests, cannot be overlooked, either by the sociologists or by judges contemplating reelection contests. It is generally recognized that the public looks to its lawyers for guidance in judicial selections . . . far more than do Governors or Senators. It is a mark for a profession needing marks that the bar generally supports objective, intelligent, working judges over

9. Cook, *The Socialization of New Federal Judges: Impact on District Court Business* at 253, 254-55 *supra.*

10. Grossman & Sarat, *Political Culture and Judicial Research* at 177, 203 *supra.*

11. Skogan, *Judicial Myth and Judicial Reality* at 309, 332 *supra.*

judges who kowtow to the lawyers . . . though maybe it is still self-interest: if I can win a case today because the judge fears my clout, I may lose a bigger one tomorrow when that judge fears tomorrow's adversary's greater clout. At any rate, in Minnesota, where a secret poll is taken of all lawyers in a district where there is a judicial contest, for a century, the public has followed the results of the poll in almost one hundred per cent of the elections! And this whether the poll supports the incumbent or the challenger.

Judges, or someone in their behalf, must become involved in politics if they want their salaries to increase. The setting of judicial salaries is political and, of necessity in an economy of steadily rising prices, involves judges in politics merely to retain their standard of living. It's one of the murkier aspects of our democracy that salaries of public officials have to be set by . . . public officials, without the intercession or even the advice of non-affected persons. And judges quickly learn that theirs is not an isolated branch of government: if judges' salaries are raised, so must governors' and sheriffs' and attorneys' general . . . and legislators'. The public damns adequate salaries, and damns inadequate officials.

IV.

Judges have preparation for their positions, but the quality of it varies, radically. Professor Cook's article well describes the "by guess and by God" methods usually applied: by the clerks and court reporters, by other judges if they have time, by the chief judge, if there is one and he is so inclined, or merely, as the Professor puts it "by the technique of the old-fashioned swimming lesson."[12] In my own case, I was more fortunate than most: I was able to sit with another judge for a week; since he was on petty crimes assignment that week, I acquired at least a passing recognition of procedures and one other judge's sentencing philosophies . . . in petty crimes.

The need for structured training of judges, both by way of indoctrination of new judges and in-service training of sitting judges, is an elemental priority. No program of judicial training should be started or carried on without reading Professor Cook's article.[13] Colleges for Trial Judges and Juvenile Court Judges are in their early stages at the

12. Cook, *The Socialization of New Federal Judges: Impact on District Court Business* at 253 *supra.*

13. *Id.*

University of Nevada on grant from the Fleischmann Foundation, but they are yet formative. The failures of the federal seminars: emphasis on civil rather than both civil and criminal and too narrow a selection of problem areas included in the curricula[14] and their successes: teaching new tools of judicial administration[15] and judicial motives[16], should give guidance to others who are launching on programs of judicial training. Certainly the easiest, the democratically safest, and the most effective way to improve the judiciary is through structured indoctrination and on-going training. Changing the methods of selecting judges is probably undesirable and maybe impossible in a politicized democracy. Controlling judges is dangerous because of the obvious and immediate advantages of abuse. Training is effective, wanted, and possible. Professor Cook established guidelines.

V.

Judges have preferences; but mostly it's coincidental if they can pursue them. Assignments are rotated: in large courts by judges going from one type case to another type every month, or quarter, or year, whether they want to or not; in small courts by the natural variety of cases itself determining a change in type from case to case whether the judge wants to or not. Yet judges usually have one or two types of cases which they can hear better than others. The modern trend towards a single, consolidated trial court, highly desirable for administrative efficiency, exacerbates the inability of a particular judge to become expert in a field of his choice and to stay with that expertise since the consolidated mass-court, particularly in metropolitan areas, places the assignment power in a senior and often remote Chief Judge . . . who is human and therefore enjoys power. In analyzing a judge's judging, among all the other influences: does he want the particular assignment? His preferences will, because he also is human, affect his willingness to learn, to participate, to politicize.

VI.

Judges have pronouncements which constrict them. Trial judges are bound by appellate decisions, and not because these are necessarily wise

14. *Id.* 269-270.
15. *Id.*
16. *Id.*

but because the need for uniformity and predictability of law in all cases is usually deemed more important than the need for niceties of wisdom in a particular case. People need to know what the law is and thus they need to know that what was the law in a given situation yesterday will be the law in the same situation tomorrow, unless it is quite demonstrably wrong in tomorrow's world, so that they can gear their conduct accordingly. So courts are constricted by Holmes' "dead hand of the past", and this constriction has its impact which sociological analyses must note.

And courts, even from their ivory towers, must regard public attitudes. Professor Grossman considers courts to be undemocratic in their non-responsiveness,[17] as though they were some un-blooded machines that gave automatic print-outs. But judges are not, and should not be un-public. They read newspapers and sense public attitudes. They are not unaware of the need to preserve the judicial myth.[18] Juvenile Court judges across the country are quite aware that four of their number, all superior in ability, were defeated in the 1970 elections for being more concerned with treating children than with punishing them. Judges are not unaware that economic issues have more immediate impact than libertarian or ideological objectives.[19]

Some courts even conceive there to be a "natural law" applicable to all cultures in all ages, possibly of divine origin which, if found, supercedes all laws, precedents, constitutions, politics, or public wishes.[20] Aside from theological considerations, such a concept is greatly undemocratic, unless it be also assumed that the will of the demos is itself divinely inspired. The concept has less present adherence, but it must be regarded in any study of influences of judicial decision. In studying how a particular seed grows, you cannot consider only the amount of sunlight it receives, the direction of the winds, or the effect of big trees around it, or any one factor: it is a product of all of them. All judges have been exposed to the concept of Natural Law. It has had its impact. Maybe it should have more.

---

17. Grossman & Sarat, *Political Culture and Judicial Research* at 177, 206 *supra.*

18. Skogan, *Judicial Myth and Judicial Reality* at 309 *supra.*

19. Schmidhauser, Berg & Melone, *The Impact of Judicial Decisions: New Dimensions in the Supreme Court—Congressional Relations, 1945-1968* at 209, 235 *supra.*

20. Skogan, *Judicial Myth and Judicial Reality* at 309, 313 *supra.*

VII.

Judges have procedures; and it is well they do. With all the great philosophical and human pressures that are put upon a judge . . . and often it is necessary to decide against these . . . a case is, and in justice must be, decided according to the reliable and pertinent evidence produced. However bad a person may seem in the newpapers, his conviction will depend on evidence, as weighed by jurors, not by reporters, or television viewers, or sociologists, or politicians, or judges. Courts are constrained by their rules and thus emotions are constrained and . . . to the extent that such is ever possible . . . laws, not men, govern particular situations. Men collectively should surely govern the law, but laws collectively should as surely govern the man.[21]

The production and presentation of evidence is a function of humans, and so it will never be of equal competence or completeness in any two cases. Lawyers too are human, some are more skillful than others, some are more skillful on a particular day than others are on that same day. Some have better staff work behind them. Some have more money to spend. And most who are publicly employed, whether as public prosecutors or public defenders, are given too little compensation for motivation and too little time for preparation.[22] Judicial decisions must be analyzed in the light of evidence, and this is beyond the control of judges; its measurement may be beyond the control of sociologists, yet it may still be the most important reason why a judge judges a particular case.

There is a new form of evidence: the expert analysis. It is a field that cannot help but grow as society's complexities grow. The law says that experts may only analyze the facts in court when it is beyond the ken of the average juror to make his own analysis. With all of the new "____ologies" impacting upon us, and with the increasing fervor of Americans to sue professionals for allegedly careless professing, there will certainly be an increase in the complexity of our litigation, requiring the assistance of experts in order to educate the jury and court as to the meaning of particular facts in a particular case. Professor Burnham amply demonstrates the importance of the political scientist in voter registration cases.[23] Similarly other disciplines, heretofore confined

21. Fahey, *The Enforcement of the Illinois Felony Marijuana Law in Chicago* at 281 *supra.*

22. *Id.* 297.

23. Burnham, *A Political Scientist and Voting-Rights Litigation: The Case of the 1966 Texas Registration Statute* at 335 *supra.*

within ivy, are sure to enter the judicial crucible and thus similarly to have their impact on how judges judge. The oldest of limitations, money, will unfortunately be of major importance: someone must pay for an expert from the East to testify in the West, if only his airplane ticket or, if by deposition, the lawyers' airplane tickets. Only great causes can afford great experts.

VIII.

And lastly . . . maybe it should be firstly . . . judges have personalities. They have prejudices and stomach aches and pride and stalled cars and inspirations and hangovers and far visions and sore feet. All judges try, and most succeed in reducing the impact of "gastronomical jurisprudence",[24] but few reduce its effect to zero.

For after all judges are . . . thanks be to Heaven . . . human. They are not computers controlled by always knowable inputs. Neither are they scientists indifferently imposing inexorable rules. They are only humans, judging only humans, hopefully themselves in turn to be similarly judged.

*Response—Werner F. Grunbaum**

> What subject indeed is so vast as the law of the State? But what is so trivial as the task of those who give legal advice? . . . Now all this amounts to little so far as learning is concerned, though for practical purposes it is indespensable.
>
> Cicero, *Laws* I. iv. 14

The courts, legal practitioners and the academicians who study them are influenced by and react to the climate of opinion and events around them. Sometimes they tend to react rapidly. Other times they tend to resist change. But they cannot excape the influence of their environment.

Recently, legal practitioners have emphasized such activities as consumer lawyering and legal aid. Law school academics thus responded[1] both to the world around them and to those young law

24. Skogan, *Judicial Myth and Judicial Reality* at ____, ____ *infra.*

* Professor of Political Science, University of Missouri-St. Louis.

1. *See, e.g., The Law Schools and the Minority Group Law Students, A survey for the A.A.L.S. Committee on Minority Groups,* 1970 AALS PROCEEDINGS 9-91.