

RETHINKING THE JUDICIAL FUNCTION: LAW REFORM, POLITICS, AND
LEGAL INSTRUMENTALISM IN CONTEMPORARY JUDICIAL ACTIVITY

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RETHINKING THE JUDICIAL FUNCTION: LAW REFORM, POLITICS, AND
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The dissertation explores several overlapping themes—the push and pull of state-centered law, politics and the objectification of judges, and the appeal of law reform and legal change. The dissertation explores these themes by examining judicial involvement in reforming courts, focusing on instances where judges are involved in law reform projects in addition to or outside of their regular case work. The dissertation presents three case studies where judges have undertaken to work on courthouse design (Ch. 3), procedure for aggregate litigation (Ch. 4), and judicial education (Ch. 5). As a starting point, the dissertation suggests that if scholars care about judges bringing politics into the law, then we ought to examine the myriad of sites where this happens. In addition, if scholars expect to honestly scrutinize current hopes and fears about the project of law in this post-feminist, post-welfare state, post-postmodern era, then we must un-mask the face of law and treat judges as any other research subject.

In addition to showcasing the activities of contemporary judges, this “other” work serves as a point of entry into a discussion of the major differentiations in law, namely: law and the social, and law and politics. In examining judicial reform projects, the dissertation turns legal instrumentalism—using law as a tool for social change—into its own research subject. The case studies reveal, however, that using law as a tool is not always “instrumental” or efficient. The dissertation also focuses on

“law-making” other than through the written decision as a way to challenge assumptions about how, when, and why judges are political. The case studies reveal that judicial politics cannot be easily characterized as a confrontation between conservative and liberal politics. Judges participate in post-colonial politics (Ch. 3), law and development (Ch. 5), national security (Ch. 4) and foreign relations. Moreover, judges can be less strategic and less effective in pushing their ideological agenda than the literature would suggest. Finally, judicial practices of sociality—the ways that judges develop relations and connections—are partial and subject to the kinds of ambiguities that accompany most legal interactions.

BIOGRAPHICAL SKETCH

Toby Goldbach's research focuses on comparative dispute resolution institutions, with a particular interest in the transnational movement of law, judicial politics, and the meaning of legal change. Before joining the J.S.D. program at Cornell University Law School, Toby Goldbach completed her J.D. and an LL.M. (specializing in A.D.R.) at Osgoode Hall Law School, where she received the Legal & Literary Society Student Honour Award and the Professor Marilyn L. Pilkington Award. She served as Senior Law Clerk for Chief Justice Patrick LeSage (Superior Court of Justice, Ontario), and as research and policy lawyer for the Ministry of the Attorney General, Civil Justice Policy and Reform branch. As a J.S.D. student, she held the Rudolf B Schlesinger Research Fellowship (2011-2012). Toby Goldbach currently serves as a Postdoctoral Associate in the Graduate Legal Studies Program at Cornell University Law School.

To Jacob and Nathan

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LIST OF ABBREVIATIONS

ACSS	Aboriginal Conference Settlement Suites
ADR	Alternative Dispute Resolution
CSO	Civil Society Organization
IAJS	Institute for Advanced Judicial Studies (Israel)
IFI	International Financial Organization
IOJT	International Organization for Judicial Training
LSA	Law and Society Association
MAG	Ministry of the Attorney General (Ontario)
MDL	Multidistrict Litigation
NJC	National Judicial College (U.S.)
NJI	National Judicial Institute (Canada)
OCJ	Ontario Court of Justice
RCAP	Royal Commission on Aboriginal Peoples (Canada)
SCI	Supreme Court of Israel
SCJ	Superior Court of Justice (Ontario)
USAID	U.S. Agency for International Development

CHAPTER 1

RETHINKING THE JUDICIAL FUNCTION

1. Introduction

In 1998, the owners of a sports stadium in Ontario filed for protection from their creditors.¹ Following the timeline under the Companies' Creditors Arrangement Act (CCAA), the company and its creditors were due back in front of the court on Christmas Eve. Hearing the matter was one of the leading judges on the Commercial List (who later went to sit on the Ontario Court of Appeal). That day the judge brought to the dais a souvenir—a cheap plastic replica of the stadium, complete with retractable dome, which I had given to him as a light-hearted Christmas gift. I had to haggle and make multiple trades at the office holiday party to get hold of the mini

¹ Re Skydome Corp. (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div.); SkyDome Corp., Re, [1999] O.J. No. 1261 (Ont. Gen. Div. [Commercial List]). Quoted by Farley J. in Royal Oak Mines Inc., Re, 1999 CanLII 14843 (ON SC) At ¶22: “Aside from the question of the lienholders who have registered liens which but for the Initial Order granted by Blair J. (but subject to the comeback clause) would have priority over the DIP financing, I see no reason to interfere with this superpriority granted. It would seem to me that Blair J. engaged properly in a balancing act as to the \$8.4 million of superpriority DIP financing as authorized. I am in accord with his views as expressed in Re Skydome Corporation released Nov. 27, 1998, where Blair J. stated at p. 7: ‘This is not a situation where someone is being compelled to advance further credit. What is happening is that the creditor’s security is being weakened to the extent of its reduction in value. It is not the first time in restructuring proceedings where secured creditors - in the exercise of balancing the prejudices between the parties which is inherent in these situations - have been asked to make such a sacrifice. ... Implicit in his analysis and part of the equation is the reasonably anticipated benefits for all concerned which derive from these sacrifices. It would seem to me that Holden J.A. in his endorsement in Re Dylex Limited released January 23, 1995 implicitly engaged in this balancing of prejudices act where he observed: ‘I do not believe that the Bank of Montreal will be adversely affected by the making of this order. As a result of the bridge financing, new receivables will be generated which will assist in re-paying or securing the bridge financing.’”

stadium souvenir. More than likely my colleagues colluded to make this a difficult (but surmountable) task. Knowing that I was currently this judge's law clerk and that I would promptly give him the gift, my colleagues no doubt thought it would be entertaining to watch me "work for it".

When I gave the judge his gift, he was his normal quiet stoic self. I assumed my humor was lost on him. But, while listening to arguments and proposals on Christmas Eve, the judge brought the replica and set it on the desk of the dais, occasionally moving his finger across the top to open and close the retractable stadium roof. Open and close. Open and close.

Courts and judges are the public face of law. Judges personify lawyers' and the public's hopes and fears about the project of law. And yet judges find themselves in a precarious position, cast as both the heroes and villains in a narrative about whether law – and more specifically courts and adjudication – can yield positive results.

Law and development practitioners see judges as fulfilling a crucial role in supporting the rule of law in countries transitioning to democracy (Ginsburg 2012; Ginsburg 2003; Lutz and Sikkink 2000; Trubek and Santos 2006; Gloppen, Gargarella, and Skaar 2004; Seibert-Fohr and Müller 2012), or in guaranteeing a stable mechanism for resolving commercial disputes in countries seeking foreign direct investment (Trebilcock and Daniels 2008; Trebilcock and Mota Prado 2011; Haggard, MacIntyre, and Tied 2008). Development practitioners, economists and government officials appeal to judges for their practical and institutional support, for

their independence from politics and other government institutions (Russell and O'Brien 2001). Human rights scholars look to judges to protect socio-economic rights (Gross Stein 2010, 584; Rittich 2004). And particular courts – for example the South African Constitutional Court, the Israeli High Court of Justice, the Inter-American Court on Human Rights or the European Court of Justice - stand as emblems of humanitarian law and our collective aspirations for law and justice.

Outside law, scholarship seems to be growingly enamored by law and legalization (Abbott et al. 2000; Goldstein 2001; Halliday and Carrothers 2007; Davis 2004; Alter 2013).² Discussing the landscape of development studies in the “post-Cold War era” Davis (2004) writes:

Laws and legal institutions feature prominently in this new intellectual terrain. One reason for this is that economists have become more attuned to the potential economic functions of legal institutions. It is now widely accepted that markets are unlikely to function in the absence of bodies of contract law and systems of property rights... Similarly, political scientists are now well aware of the fact that the political arrangements that they tend to regard as being characteristic of developed societies-such as democracy, respect for human rights and the welfare state-are almost invariably defined and protected

² Halliday and Carrothers, 1136 We show that leading global institutions, with strong support from the United States, are building an international financial architecture with law as a principal foundation. Economic globalization, according to the ideology of international institutions, demands and reflects a normative framework that delivers the effective operation of laws and rules (Carruthers and Halliday 2006). As a result, law has emerged in the last decade as a primary instrument and significant outcome of global change (Stiglitz 2002; Beck and Levine 2003).

by legal norms and institutions, especially constitutions and the courts that interpret them.

Yet within law, scholars condemn judges for a myriad of wrongdoings: judges are accused of overstepping their role and “judicializing” politics (Zemach 1976; Reichman 2013; Chemerinsky 2006; Matsudaira 2011), of being in bad faith and in denial over their pursuit of “ideological projects” (Kennedy 1997), of being ill equipped to decide complex cases (Zumbansen 2012; particularly medical malpractice or complex commercial cases), of being inflexible, too slow, and of encouraging calculating and unscrupulous behavior in court (Galanter 2002, 291).

In the last ten years, scholars have also made rather apocalyptic (West 1985) claims about state-centered law: witness the vanishing trial (Galanter 2004), the empty halls of justice³ (Resnick and Curtis 2011), and the movement to privatize dispute resolution (Resnick 2014; Galanter 2002). Overlapping regulatory orders and jurisdictional redundancies bring legal scholars to the brink of confusion about the boundaries and relevance state centered law. Non-state legal forms of governance and private regulatory mechanisms such as the International Organization for Standardization or the World Bank governance indicators have captured our imagination (Davis, Kingsbury, and Merry 2012; Sarfaty 2013; Merry 2014). In some corners it seems that our task as legal scholars has merely become transforming the

³ “On many a day, the austere hallways of various grand courthouses on both national and international levels are empty. Demand and use, however, remain high in lower level courts, as trial level and administrative judges in many systems report overload and inadequate resources” (Resnick and Curtis 2011, 14).

processes adopted by international organizations into fair and transparent procedures (Kingsbury, Krisch, and Stewart 2005; Kingsbury 2005; Cassese 2005) – in order to make them *law-like*. Add to that legal scholarship’s “turn against law” (Galanter 2002) as a scholarly pursuit—toward legal pluralism, transnational private ordering (Riles 2011; Tomlins 2015)⁴, and indicators as governance (Davis, Kingsbury, and Merry 2012)—and we could be left wondering whether this is the “end of law.”

This dissertation explores these overlapping themes—the push and pull of state-centered law, politics and the objectification of judges, and the appeal of law reform and legal change. It does this by examining judicial involvement in innovating, adapting and reforming courts, focusing on instances where judges are involved in law reform and legal change in addition to or outside of their regular case work. As a starting point, I suggest that if legal scholars care about judges making law or bringing politics into the law, then we ought to examine the myriad of sites where this happens. In addition, if we as legal scholars expect to honestly scrutinize our current hopes and fears about the project of law in this post-feminist, post-Cold War, post-welfare state (Kennedy 2006b), post-postmodern era, I propose that we un-mask the face of law and treat judges as any other research subject.

⁴ Private global governance has gained ascendancy – both as an organizing concept and scholarly pursuit “Over the last two decades, global governance has increasingly become private governance – regulation through technical legal devices that take power out of the hands of public entities and put it in the hands of private individuals, corporations, armies” (Riles 2011). Dominant political ideology has been reoriented and restructured “to maximize its compatibility with the values and interests of multinational corporate enterprise” (Sarat, Douglas, Umphrey 2003, 5).

The dissertation presents three case studies, where judges have undertaken to work on courthouse design (Ch. 3), procedural reform (Ch. 4), and judicial education (Ch. 5). In addition to showcasing the activities of contemporary judges, these case studies serve as a point of entry into a discussion of two major differentiations (Schlag 2009) in law, namely: law and the social, and law and politics. By examining judicial reform projects, the dissertation makes legal instrumentalism – using law as a tool – itself into a research subject. However, the ways that judges innovate and reform may require us to rethink what we know about using law as a tool for social change. The case studies reveal that law as a tool is not always “instrumental” or efficient. Instead of developing solutions in response to problems that are identified in advance, there can be a connectedness or co-evolution of problems and solutions. Solutions often come in the form of tangible pragmatic things that we can see, do, and measure.

The dissertation focuses on “law-making” other than through the written decision as a way to humanize judges and challenge assumptions about how, when, and why judges are political. First, the case studies reveal that judicial politics cannot in every instance be easily characterized as a confrontation between conservative and liberal politics. Judges participate and are implicated in post-colonial politics (Ch. 3), law and development (Ch. 5), gender politics and national security (Ch. 4) and foreign relations. Second, while standard approaches to judges and politics depict judges as rational or irrational, a composite of their political ideology and public policy preferences, judges do not always proceed in such a straightforward fashion. As political actors, judges can be less strategic and less effective (but still rational) in

pushing their political or ideological agenda than the literature would suggest. The “primacy of policy preferences” (Epstein and Knight 1998, 9; Woll n.y.; Woll 2005) is not enough to explain judicial behavior. Finally, judicial practices of sociality—the ways that judges develop relations and connections—are subject to the kinds of ambiguities, hazards, and slippages that normally accompany social interaction and material practices (Keane 1997).

This introductory chapter proceeds as follows. The next part, Part 2, outlines in more detail the research questions that serve as the framework for the dissertation. Part 3 focuses on judicial functions and describes the effort of the dissertation to expand what we properly understand and judges’ work. Part 4 explains the goals of the dissertation in making judicial politics and object of study. Part 5 introduces the reader to Legal Instrumentalism, the appeal of law reform, and the problem-solution form. Part 6 describes the multi-method approach I undertook in the research for this dissertation. And finally, Part 7 provides a brief outline of the chapters and case studies that follow.

2. Research Questions

The descriptive questions that the dissertation asks include: what do judges—high *and* lower court judges—do? What do judges do when they are not sitting at trial or writing decisions? What part of this should be considered “judicial work”? How do judges make law other than through their casework?

The dissertation will demonstrate that judges engage in a considerable amount of “law-making” activity that cannot be found by reading decisions. This activity does

not necessarily relate to a particular dispute but it shapes the structure of dispute processing, effecting how facts, cases and legal actors are channeled (Fuller 1941; Frank 1949). Judges administer courts, develop criminal and civil trial procedure (Ch. 4), and consult on physical changes at the courthouse (Ch. 3). These activities have a facilitative impact on case-work and decision-making, changing the nature of disputing from the ground up. Inquiring into “extra-disputing judicial activity”⁵ gives us a more accurate picture of the work that judges do on a day to day basis. In addition, it foregrounds procedural law and court reform, and provides an account of the way practices and procedures change over time.

The dissertation also poses descriptive and normative questions about judicial engagement with politics. A great deal of the literature about how judges decide cases focuses on partisanship – the relationship between party politics and judicial decision-making or voting on multi-judge panels. In what ways are judges situated in political debates outside of their case-work? Do judges approach these politics differently? What is the role of politics in law reform and legal change? Here the dissertation demonstrates that judges are implicated in politics beyond the written decision, and posing all questions about judicial politics in a liberal versus conservative frame ignores the way that politics is really at the core of judging. I also suggest that when

⁵ I have coined this term as a kind of inverse of Legal Pluralism’s exploration of the everyday life of the law. Where legal pluralism examines what has been called “extra-judicial dispute resolution” (not all of what is law takes place in state-centered institutions), this dissertation explores “extra-disputing judicial activity” ((not all of what judges do is resolve disputes) (Engel 1980; Merry 1988).

we look at judges ethnographically – as people – we find that they can sometimes blunder and be ineffective in bringing about their ideological agenda.

Often questions about judges and politics gets framed as a concern about judicial independence – either the judiciary’s institutional independence from the other branches of government (Monahan and Shaw 2011; Dodek 2010),⁶ or a judge’s personal independence that enables her to decide in an impartial manner, free from pressures or inducements. What does judicial independence look like? How do judges maintain their independence? While impartiality “refers to a state of mind or attitude”, independence “refers to the ‘status or relationship to others’” (Valente 1985, quoted in Dodek 2010, 302). How do judges navigate these “relationships”? How do we make sense of independence constituted through relationships (e.g. what is the meaning of an “independent” relationship)? The dissertation suggests that judges experience politics as a series of partial connections (Strathern 1991), and that these partial connections in many ways resemble most legal actors’ engagement with the personal and the political.

The final effort of the dissertation is to make instrumental knowledge in law into a research subject. Legal scholarship, law and development programs, and law reform projects often involve instrumental reasoning and analysis. The idea that law is an instrument, tool or mechanism to achieve social or economic ends guides the way we currently do and think about law. The case studies examine *how* judges interact

⁶ Monahan and Shaw (2011) write that judges bring “an aura of credibility, authority and impartiality due to their institutional independence from the executive and legislative branches of government” (Monahan and Shaw 2011, 438).

with law-as-a-tool. They describe the ways judges innovate to bring about new court procedures and ask how judges come to know what they know about the best way to achieve their goals.

Legal instrumentalism relies on a particular set of knowledge practices and performances. Specifically, a problem-solution framework – “the orientation toward defining concrete, practical problems and toward crafting solutions” (Riles 2005, 976; see also Miyazaki 2010) – guides the way legal scholars and practitioners build knowledge about law reform and legal change. Especially in light of the doubts about law’s ability to produce positive social change, it may be time for scholarship to turn to analyzing the problem-solution framework rather than merely operating within it.

The dissertation is about bringing forward what is behind the scenes –judges themselves, their relationships, courthouses (Ch. 3), procedure (Ch. 4), judicial education (Ch. 5), as well as the methods, processes and practices, rather than or in addition to conclusions or outputs (Sarat and Silbey 1988). The dissertation has three interrelated goals: (i) to explore judges and judicial practice as an object of study; (ii) to probe or inspect relationships – judges’ sociality, their relationship to their work, the relationship between law and politics; and (iii) to present law reform and legal instrumentalism as objects of study, especially to mine for insights into contemporary legal thought and the supposed “end of law”.

3. Judges’ “Other” Work as an Object of Study

The standard objects when studying judicial institutions are judges’ decisions – the conceptual product (Pickering 1992) of judicial case-work. Scholars analyze the

impact of judicial decisions (Kapiszewski, Silverstein, and Kagan 2013) on the political realm. Or, scholars investigate behavioral or theoretical (Lasser 2004) “determinants of decisions” (Epstein, Landes, and Posner 2013)—how judges decide and the factors that go into judicial decision-making. This latter line of inquiry is often referred to as judicial process (Cardozo 1921) or judicial behavior literature.

There are two problems with the standard approaches to researching judges. First, scholarship barely touches on the products of judicial work that are not related to a specific case. Judges and court staff are well aware of the work that judges do on court reform, court administration, public relations, maintaining and improving the reputation of the court outside of case-work. Judges sit as administrative heads of court, assigning cases, deciding on judicial rotations, or even structuring the way cases are heard.

Second, we do not have an account of procedural and structural changes at court. Legal scholars are aware that legal knowledge is produced socially, but as it relates to judges and courts, they limit their view to one set of practices. Scholars explore the practices of knowledge formation during or about particular cases (Valverde 2003) but do not go further. In both instances, these are depictions of judges as they appear publicly. They are the “official portraits” (Lasser 1995) of judges, (also) the most visible and accessible sketches of a judge’s work and judicial involvement in politics and legal change. If we want an account of judicial practice – studying what judges actually do (Pickering 1992) – then we have to look beyond the written decision.

Extant scholarship treats judges as the hero or villain in law, approaching a kind of fantastical or nightmarish narrative (West 1985). Like Miyazaki (2013), I leave depictions of judges as rational or irrational actors behind, and instead observe the ways that judges have an “expanded and complex vision” of the work that they do and the place of the courts in legal system (Miyazaki 2013). I examine the ways that judges are “not simply decision makers” but are also researchers, report writers, educators, “*thinking subjects* engaged in dialogue with a variety of broader intellectual debates and projects” (Miyazaki 2013, 6, italics in the original).

3.1 Judicial Functions

Judges perform important “acts of making” (Pickering 1992, 3, ft1) which often come before or contribute to the progress of case-work and decision writing (Wolff 2013; Cover 1975). Judges engage in activity that does not necessarily relate to a particular dispute but which structures courts practices and thus affects legal change. “Extra-disputing judicial activity” – not all of what judges do is resolve disputes – shapes the structure of dispute processing and situates judges in highly political debates even while remaining significantly understudied.

Examples of “extra-disputing” court related activity include judicial innovations in court procedures to design “problem-solving courts” (Berman, Feinblatt and Glazer 2005) and “therapeutic judging” (for example, domestic violence courts, conciliation family courts) (Winick and Wexler 2003). Judges have also developed

case-management systems⁷ and procedures for multi-jurisdictional cases (Ch. 4). Judges participate in working groups (Ch. 3),⁸ jury amendments committees,⁹ civil justice reform projects¹⁰ and judicial research centers.¹¹ And, in addition, judges work with judges from other countries to design and implement case tracking and case reporting systems and communications technology, as well as to implement the transition from inquisitorial to adversarial criminal justice systems.

If judges' conceptual products ignite passionate debate, the work that they do to get there remains hidden, behind the scenes, not known, not discussed, and not cared about. Work such as developing and implementing new case-management systems such as a Simplified Procedure for claims under \$100,000 (Rule 76 of the Rules of Civil Procedure, Ontario) appear to be on the sidelines. Court procedures, case processing mechanisms (Ch. 4), judicial education – the kind of work that might be constitutive of decisions and declarations on rights and entitlements (Hart and Sacks 1958) – are the “quotidian, humdrum” (Riles 2011) legal devices that are

⁷ Telephone Interview with Judge (Retired) and former Chief Justice (Ontario) (October 15, 2014) [Judge K].

⁸ OCJ/MAG Joint Fly-In Court Working Group Report. August 2013 Justice Bode

⁹ For example Regional Senior Justice Bode is also on the Juries Review Implementation Committee which is working to implement the recommendations of Supreme Court Justice Frank Iacobucci to include better representation on Aboriginal jurors on panels. See Available at http://www.attorneygeneral.jus.gov.on.ca/english/juries_implementation_committee.asp

¹⁰ See for example the Honourable Coulter A. Osborne, Q.C., Civil Justice Reform Project, Summary of Findings and Recommendations, November 2007, available at www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp

¹¹ Interview with Staff (Attorney) at the Supreme Court of Israel, Israeli Courts Research Division in Jerusalem, Is. (March 12, 2014).

utilized to achieve (other) goals. But, if as Kapesweski, Silverstein and Kagan (2013) point out, “judges taking on more expansive roles in politics and governance... often engage in various kinds of legal creativity and innovation relating to procedure, remedies, case selection, and standing” (Kapesweski, Silverstein and Kagan 2013, 31-32), ignoring procedural and administrative interventions means that a particular kind of judicial foray into legal change mostly escapes review.¹²

Bryant Garth (1997) acknowledges the “judicial entrepreneurs of case management” in U.S. Federal Courts, who innovated to bring new procedures to bear in order to manage their dockets and bring cases to a close (see also Resnik 1982; Wolff 2013). Garth even writes that “the most famous judges became not the authors of great opinions but rather the leaders of new devices for resolving dispute- early neutral evaluations, court-annexed arbitrations and mediations, summary jury trials, mini-trials, and the like” (Garth 1997, 126). On the other hand, much of Garth’s writing on legal procedure is about the role of empirical research to measure “which of a variety of possible programs or reforms operates best,” especially during that period when the focus of law reform at court was the “the speedy, just, and inexpensive resolution of disputes” (Garth 1997, 106). Moreover, other than Garth, who was a law clerk for a federal judge of the District Court for the Northern District of California, there has been little inquiry into an internal story of change at court. As a result, legal

¹² For example, literature on internationalization of domestic law – ‘transjudicial borrowing’ or ‘judicial internationalization’ (HiiL) – examines the causes or extent to which judges use foreign legal material “as heuristic aids or persuasive arguments” in adjudication of domestic disputes. But this does not cover the way foreign law is being brought in other than through adjudication. EXAMPLES

scholarship has an under-developed story of reform and the principal mechanisms by which case processing and legal relations “are made to seem largely natural, normal, cohesive, and coherent” (Sarat, Douglas, and Umphrey 2003, 7).

Some recent scholarship explores judicial activities that go beyond deciding cases (Garoupa and Ginsburg 2013; Wolff 2013). For example, Garoupa and Ginsburg (2013) examine the regulation of “nonjudicial functions”, which, for them, ranges from “serving on law commissions, playing management roles, serving as public intellectuals, and even serving as interim executives” such as interim Prime Minister or acting President (Garoupa and Ginsburg 2013, 756). In addition to Garoupa and Ginsburg, much of the scholarship on judicial functions lumps all non case-related activity together as “non-judicial” or “extra-judicial services”, thereby grouping together for analytic purposes court-related activity with other non-adjudicative activities such as book tours, mock trials, “ethnic pride activities” (Epstein, Landes, and Posner 2013, 37) and speech giving. For example, Monahan and Shaw (2011) in their description of “extra-judicial service” include judges sitting on or as chairs of public inquires, special prosecutors, electoral boundaries commissions, the advisory council to the Order of Canada, which recognizes Canadians “for outstanding contributions to communities, to Canada and humanity,” as well as other federally constituted tribunals such as the Pensions Appeals board, and the Copyright board (Monahan and Shaw 2011, 437). Jeffrey Shaman (2011) cites the following as examples of extra-judicial services in the U.S.: appointment to government commissions such as an Electoral Commission in 1876, the Warren commission investigating the death of Kennedy, the

Sentencing Commission, appearance at public hearings, teaching and writing, charitable activities and other “associational activities” (Shaman 2011, 514-23).

While recognizing that “the distinction between a judicial and a nonjudicial function is in itself complicated and convoluted” (Garoupa and Ginsburg 2013, 756), Garoupa and Ginsburg (2013) define judicial functions simply as “activity exercised by a judge inside the courtroom” (Garoupa and Ginsburg 2013, 758).¹³ The judicial function is to make decisions at trial. Similarly, Adam Dodek (2010), who is concerned with judges acting as heads of public inquires and governmental commissions,¹⁴ also defines judicial function narrowly: “Simply put, judges interpret and apply the law to specific situations; they adjudicate; they decide disputes.” (Dodek 2010, 302) The judge’s “primary task” is to decide cases (Monahan and Shaw 2011). Because the standard approach is to look at judges’ work as being restricted to what happens inside the courtroom, the domain of *non*-judicial functions is thus quite expansive. For Garoupa and Ginsberg, “nonjudicial functions” are presumptively all activities “exercised by a judge outside of the courtroom” (Garoupa and Ginsburg 2013, 758).¹⁵

¹³ Karen Alter (2014) in her review of international courts and tribunals breaks down this courtroom function into four roles: enforcing state compliance with the relevant law, reviewing administrative decisions, reviewing the constitutionality of legislative and government actions and settling disputes, “perhaps the broadest judicial role.”

¹⁴ Other examples include head of commissions to set electoral boundaries, in Israel to administer elections, members or chairs of tribunals (land claims Canada) or Royal Commissions (aboriginal) argues in his chapter (p297).

¹⁵ Garoupa and Ginsberg write that “Impartiality, non-partisanship, and adjudication seem to be associated with a judicial function” (Garoupa and Ginsberg

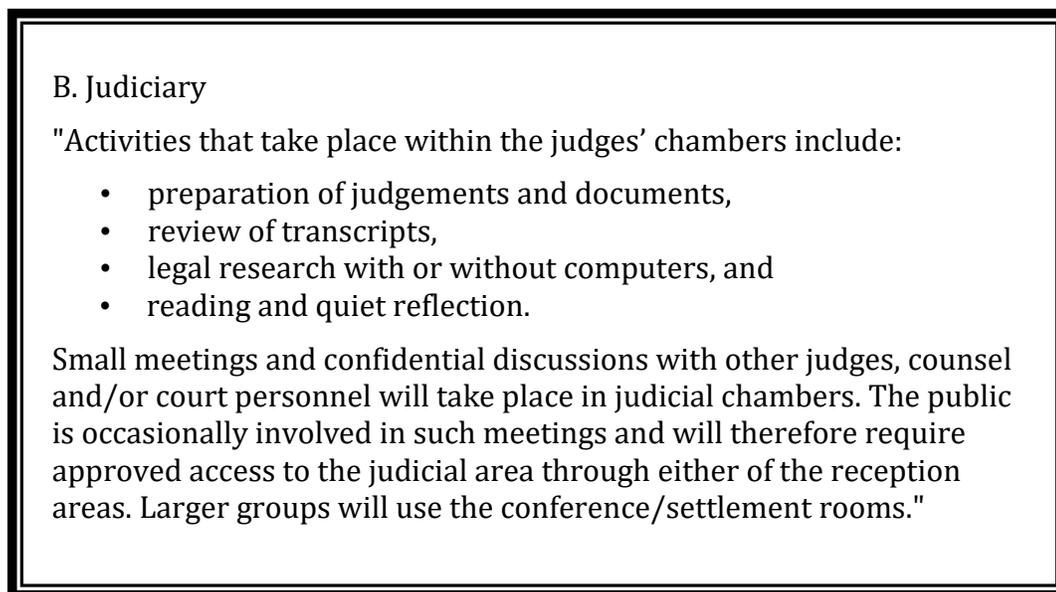
Codes of conduct and constitutive legislation that require judges to devote themselves exclusively to their adjudicative dispute resolution duties would seem to confirm the approach taken by these scholars. For example, the American Bar Association suggested Model Code of Judicial Conduct Canon 3 states that, “A judge shall conduct the judge’s personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.” More stringently, the Judges Act of Canada, Section 55 states, “No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties.” Similarly, the Basic Law of Israel, Judiciary (1984) states that “11. A judge shall not engage in an additional occupation, and shall not carry out any public function save with the consent of the President of the Supreme Court and the Minister of Justice.”

Nevertheless, Garoupa and Ginsberg must be in error. Judges engage in activity outside the courtroom, which even in their limited definition, Garoupa and Ginsberg would be hard pressed to exclude. Even *case-related* activity—activity required to complete the work that goes on inside the courtroom—often happens *outside* of the courtroom (Figure 1 below). Judges review briefs, pleadings, factum in their chambers; appellate court judges meet outside of the courtroom to discuss

2013, 756-7). They then posit a continuum of non-judicial functions such as arbitration, court administration, serving on judicial selection committees, chairing inquires or royal commissions, participating in law commissions or working groups that they consider more or less the judicial function.

findings; judges discuss materials and may request additional research from law clerks; and most obviously, judges compose written decisions outside of the courtroom.

Figure 1. Facility Program, Thunder Bay Consolidated Courthouse. *Description of Function (Ontario Ministry of the Attorney General 2007, 37)*



Moreover, the various codes of conduct allow judges to engage in activities “that are consistent with the obligations of judicial office” (U.S. Courts).¹⁶ The codes contemplate an analytic difference between activities which benefit judges and the administration of justice and activities outside that realm. The Code of Conduct for U.S. Federal Judges Canon 4 states that a judge may engage in extrajudicial activities, as long as those activities do not “detract from the dignity of the judge’s office, interfere with the performance of the judge’s official duties, [or] reflect adversely on

¹⁶ Code of Conduct for United States Judges | United States Courts Canon 4

the judge's impartiality" (U.S. Courts). The Judicial Conference, which assists in the administration of U.S. Federal Courts, contemplates that judges will sit on committees that deal with the legal system and the administration of justice, or that a judge will serve as an officer or director of "a nonprofit organization devoted to the law, the legal system or the administration of justice".

The Canadian Judicial Council in its discussion of impartiality distinguishes between "court conduct" and civic, charitable, religious and political activities. It also recognizes contributions that judges make "to the administration of justice" more generally:

Judges are uniquely placed to make a variety of contributions to the administration of justice. Judges... may contribute to the administration of justice by, for example, taking part in continuing legal education programs for lawyers and judges and in activities to make the law and the legal process more understandable and accessible to the public.

3.2 Legal Pluralism at the Court

Why choose the *courtroom* as the place to make the distinction between judicial and non-judicial functions? What are the analytic assumptions that ground such a division? In dividing judicial and extra-judicial functions as activities that happen in and out of the courtroom, Garoupa and Ginsberg project a very stable view of courts and judging. In their portrayal, the judicial function has remained stable over time, still consisting of sitting on trials or hearing appeals. Judges are staid and

dispassionate (Latour 2004), recycling the same skills through an endless cycle of parties and disputes.

Bruno Latour (2004), following observation at the Conseil d'Etat, reflects that "passion is the least appropriate term to describe the attitude of judges in the course of a hearing... Leaning back in their chairs, attentive or asleep, interested or indifferent, the judges always keep themselves at a distance... in court judges are entirely unmoved by a case in which only the claimant is passionately engaged" (Latour 2004, 78). When Latour writes that the nature of the Conseil depends "on the homogeneity of the world of files that are kept, ordered, archived, and processed, and upon the homogeneity of a staff that is renewed, maintained and disciplined" (Latour 2004, 76), he depicts an uncluttered, almost reassuring version of law and judicial institutions. In Latour's world of the Conseil d'Etat, the means, methods and mechanisms for resolving disputes remain the same: "whereas scientific research... engage[s] with turbulent or violent history of innovation and controversy, a history that is continually being renewed, law has a homeostatic quality which is produced by the obligation to keep the fragile tissue of rules and texts intact" (Latour 2004, 113). Judges are dispassionate both toward those in their courtroom and toward the legal system as a whole (it is corporate self-governance, standards and indicators and other non-state regulatory mechanisms that are the "sexy" fields of legal innovation).

What would happen if we examined "judicial functions" through the lens of legal pluralism (Travers 2010) and similar scholarly work that explores the everyday life of the law? From legal pluralism we learn that not everything about law-making

and legal regulation happens in state-centered institutions. Multiple normative orders regulate behavior (Michaels 2009b; Berman 2014). State enforceable rules represent only a small part of the complex of rules that govern conduct (Macdonald 1992), and the boundaries between state and non-state regulatory practices – those rules “about rights and obligations that emanate from a social field of practice” (Moore 1973)—can be easily blurred. Multiple often overlapping jurisdictional orders lay claim to legitimacy. Moreover, these normative communities (Berman 2014) interact. Thus, in order to understand “the role that ‘official’ law actually plays in a given social field, one has to understand the structures of ‘unofficial law’ operative in the same field: there is, consequently, no clear separation between legal norms and other social norms, including norms of justice.” (Macdonald 1992)

Another major insight of legal pluralism and legal consciousness literatures was that the legal institution could only be understood if scholars examined “the ways [a legal institution] is actually used” (Silbey and Bittner 1982, 299 quoted in Silbey 2005). Examining what “ordinary citizens” experience and understand as law revealed how “legality” is part of an ongoing process of social action. Law is durable and powerful because legality “suffuses and saturates” everyday life (Silbey 2005, 331). Legal consciousness scholars understood that legal interactions –whether perceptible or not—often happen outside of the normal or conventional places where we expect law to be produced (Friedman 2005).

In a similar way, a good part of the work for court reform happens outside of the courtroom, behind the scenes in meetings, through reports or commissions, outside

of the ‘normal’ places where we expect judges to do their work. Instead of looking at place – the courtroom – or focusing solely on or “transferable judicial skills” (see Dodek 2010), judicial functions scholars should inquire into both (i) subject matters that are related to the court as a workplace (Posner 2008) or institution; and (ii) whether the activities are adjudicative (decision-making on disputes) or non-adjudicative (Figure 2). Judicial activities would thus include “working with colleagues and staff” on matters related to hearing and deciding cases, even if those activities happen outside of the courtroom and do not involve adjudication (Epstein, Posner, and Landes 2013).

Figure 2. Judicial and Non-judicial Functions Revisited.

Institution Type of Activity	Court Related Judicial Functions	Non-judicial Functions, Unrelated to Court
Adjudicative	1 = Decisions, hearings, motions	2 = Public Inquiries, Special Prosecutors, Arbitration
Non-Adjudicative	3 = “Extra-disputing” judicial activities	4 = public speaking, academic writing, attending conferences

Box 3: those activities that are court related but non-adjudicative or not strictly adjudicative, highlights the subject of this dissertation. Examining court related work foreground procedural innovations and court reform as places where judges are changing the nature of disputing from the ground up. This focus also provides a window into some of the ways that practices and procedures change over time.

4. Judicial Politics

4.1 How Judges Interact with Politics

Exploring this extra-disputing judicial activity provides a more complete picture of the work that judges do in the contemporary legal world. It also allows the dissertation to intervene in the way that scholarship portrays judges and politics. Extant scholarship on judicial politics tends to simplify the type of politics and the type of interactions that judges have with the political – those various sites of governances and power relations. However, the ways that judges are involved in politics is not merely a matter of inserting their ideas or ideology into their decision-making.

For example, innovating to bring Aboriginal methods into the criminal trial (Ch 3) may be about modifying sentencing procedures, but it also puts judges at the center of a legacy of colonial relations. These are not the conservative/liberal politics that underlie the standard literature about judicial politics. Judges find themselves in the midst of post-colonial politics, international relations (Ch. 5), urban development and local politics (Ch. 3). Judges can be implicated in a history of power relations or changing mechanisms of governance in ways that are lost in standard approaches to studying judges and politics.

Looking at judges as an ethnographic object of study can also bring into view the ways that judges connect *and* separate themselves from the political and personal.

¹⁷ When we take a closer look at judges themselves (rather than their decisions), we have a better sense of the dual positions judges are in and the partial connections (Strathern 1991) to which they submit. Judges constantly navigate between closeness and distance (removal), between being political and independent, and the ways they do that may have something to tell us about how many legal actors are both political and removed.

Literature that addresses judges and politics tends to portray the judge as either a person who succumbs to her political preferences and ideology (Epstein and Knight 2013; and see discussion in Ch. 2) *or* as a thing, a tool that can be used to support political and socio-economic development. Scholarship about judges and politics can therefore be said to have taken a “two-forked turn” (Strathern 1991, 7). On one side, following the legal realist tradition, legal and political science scholars focus on how judges interpret the meaning of law and the facts presented in the courtroom. They seek to unmask the judge in order to understand the decision-making process and in order “to identify ‘significant, predictable, social determinants’ of decision and action” (Sarat and Silbey 1988).

¹⁷ The modern word political derives from the Greek politikos, ‘of, or pertaining to, the polis’. (The Greek term polis will be translated here as ‘city-state’.). But, ultimately, the city-state is composed of individual citizens (see Pol. III.1.1274a38–41), who, along with natural resources, are the “material” or “equipment” out of which the city-state is fashioned (see Pol. VII.14.1325b38-41). The political is person-al. The city state is hylomorphic – it is a compound of matter and form of a particular population – the citizen-body. There is a sense here of holding together things that are incompatible. Similarly, the judge must hold together that which does not combine.

On the other side, the scholarship—for example, in international relations, comparative constitutional law, and literature on law and development—seeks to understand judicial institutions as tied to the broader political context, imagining how judges bolster the Rule of Law and democracy (Ch. 5). There is a “whole and holistic” (Strathern 1991), micro and macro analytic at play. Scholars either focus on the parts, looking at judicial decisions as a composite of non-legal factors such as judges’ ideological preferences, or they perceive judges to be indispensable to the political structure, intimately connected to the larger political and economic system.

In this sense, scholarship portrays the judge as either a (fallible) person *or* as a thing. The judge is a person, affected by ideology, psychological factors, and behavioral quirks (Epstein and Knight 1998; Niblett and Yoon 2015; Segal and Spaeth 1993); *or* she is a tool, a functional instrument, a means to social ends, to support democracy, or the rule of law in development. As tools, judges – like law more broadly – are the things that we use to bring other things into the world, and the tools that we scrutinize based on other goals and aims. We rely on judges as we direct our attention elsewhere, “in favor of some larger context or ulterior purpose” (Harman 2005, 268), to politically big cases or substantive outcomes such as implementing democracy, protecting socio-economic rights, or facilitating economic development. Judges *are* what they *do* for us (Strathern 1988, 158). Even judicial independence (the impersonal) is instrumental (Dodek 2010 and see Ch. 2).

As a tool, the judge is an integral part of the “sociocentric structure” (Strathern 1991, 23). The judge is an integrated part of the “sociocentric structure”, with

important “functional roles” to play in politics, governance, and society (Kapiszewski, Silverstein, and Kagan 2013, 3). As a person, the judge is set against her “egocentric network.” Scholars focus on fragments – the judge’s jurisprudential network and the factors that go into a judge’s approach to decision-making in particular cases (Kapiszewski, Silverstein, and Kagan 2013, 3).

4.2 The Judge as a Role

Under both views, scholars eclipse the way in which the judge is a *role* or *position* constituted by a set of legal rules and expectations. Judicial relations are constituted by, for example, the Judges Act, RSC 1985, c J-1 in Canada or the Judiciary Acts in the U.S., and it is through these relations – between judges and other government officials, or judges and parties at court – that these persons “are defined in respect of one another” (Strathern 1999, 16). These rules and responsibilities place the person who acts as judge in a particular position toward government and private parties (Shapiro 1981) and has them carry out certain activities. The judge is thus neither a person nor a thing-in-the-world, but a legal category, a position constituted by a bundle of rules, responsibilities, and legal forms—such as remuneration, tenure, legal process—that create partial connections.

More accurately, the judge is neither *just* a person nor thing-in-the-world. A judge is not merely a composite of ideological preferences nor is she merely the thing that is integrated into the political socio-economic structure. Neither adequately conveys the experience of the judge. Instead of the person who continuously remains connected to political and ideological preferences, or the tool which removes itself

from connections in order to be useful, the dissertation suggests (a third way) that the judge is *both* integrated and removed.

As a society, we expect judges to be connected enough to be aware of social norms (Fiss 1979) and understand social context. Judges participate by observing court oration, witness accounts, and document review. For judges that hear trials, they are tourists in someone else's life, immersing themselves in a family feud (Waxman v. Waxman), details of workplace injury or a coffee shop killing (one of the longest criminal trials in Canada, R. v. Brown et al). Justice M. Sanderson of the Ontario Superior Court observed the dispute between Morris Waxman and his brother Chester in the longest running civil lawsuit in Ontario history. The two had worked together for forty years to turn their father's business into one of the most successful scrap metal companies in Canada.¹⁸ But, beginning in 1988, a battle – Chester remarked during his evidence that it had not been a “civil” action but rather a “war” that had “publicly split a once loving family into two hostile camps” (Waxman v. Waxman 2002) – over the family business ensued. In 2002, Justice Sanderson delivered a 609 page decision on five main actions. There were over a dozen actions in court relating to the matter, including an appeal to the court of appeal that was dismissed, and a request for leave to the Supreme Court of Canada which was refused.

¹⁸ The Hamilton Spectator tells the story of the humble beginnings of the family company, dating back to 1911 when the father, Isaac Waxman, a shoemaker from Poland lost his job and took to gathering bottles and scrap to earn a living (Hamilton Spectator July 11, 2007).

While we expect judges to have some connection and understanding, judges must maintain autonomy and distance from the parties. They must be unbiased and impartial (Russell 2001; Friedland 1995; Shetreet 2001; Burbank 2003). Moreover, the role of judge is created by effecting a separation. For example, consider ABA Model Code of Judicial Conduct, Rule 2.4 “External Influences on Judicial Conduct.” A judge must not be swayed by public opinion. She must also make sure to not allow “family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment” (ABA Model Code Rule 2.4 (B)).

How does a judge ensure that she is not and is not perceived to be influenced inappropriately by outside parties? In order to secure judicial independence from the other political branches, judges isolate themselves. To ensure impartial and unbiased treatment, judges manufacture a removal. In many ways, the judge must enable individuality or personhood to vanish. Often the most successful or valued judge does the work without being noticed—it is understood that appellate courts mention judges by name when they have made more egregious errors of law. The competent judge remains in the shadows and performs her functions invisibly. Judges are both prominent and vanished in a difficult exercise that constantly requires monitoring and mediation. This is aptly captured by Marilyn Strathern’s (1999) description of Hagan dancers. She writes: “Here..., it is the dancers’ own individuality which is being proclaimed. Again, however, it is not proclaimed through the dancers’ particular features. Indeed, a dance is only said to be a success if it becomes impossible to recognize the dancers; their decorations must act as a disguise, and are reckoned to

have failed if the personal identity of the dancer is perceived too easily.” (Strathern 1999, 38) Judges enact a separation, a fragmentation and removal. And it is through that separation that the relationship between judge and a party (plaintiff, defendant, accused, counsel, etc.) is created.

Judges thus maintain both distance and connection to the parties in the courtroom, to politics, ideology, to other branches of government and civil society. Terrance Halliday (2010), in examining how the rule of law and “core legal rights are institutionalized” in multiple cases of transitions “toward and away from political liberalism” aptly writes:

Repeatedly, the case studies show that the potential of judiciaries for political liberalism depends upon their social embeddedness. In relation to the executive arms of the state, too few benefits to state administration or reputation render them dispensable; too great affinity with state politics renders them impotent. In relation to political parties, too distant a position from the policy ideals of parties renders courts irrelevant; too deep an immersion of judges in party politics converts courts into yet another arena of politics and subverts justice from within. In relation to the bar, too attenuated a relationship leaves courts vulnerable; too integral a relationship with lawyers diminishes courts' authority. In relation to the public, too little public support denies judiciaries a primary source of legitimation; too much sensitivity to public opinion makes courts manipulable. (Halliday 2010, 219)

Independence produces an “integration” as the judge become an integral feature in the separation of powers and the “sociocentric structure” (Strathern 1991) that supports democracy. In contradistinction, the judge who is connected to her ideology and beliefs (is personal) becomes fragmented. The origins of the judge appearing capable or incompetent are both her connection to *and* independence from the parties before her, from politics and civil society. And no matter which perspective one takes – whether from the individual or from the societal/institutional – the judge is both connected and removed.

The judge must constantly navigate between distance and familiarity, and it is in this sense that the judge maintains *partial* connections (Strathern 1991). Judges navigate between closeness and distance in order to maintain independence and impartiality. In order to fulfill the obligations of her role, the judge enters into relationships that are both connected and removed, both political and independent. As scholars we have misrepresented and underestimated the complex movements judges make between being persons *and* things, between being close and maintaining distance. By turning judges into an ethnographic object, the dissertation can examine and describe these partial connections and incomplete relationships.

5. Law Reform and Legal Change

5.1 Lawyer’s Instrumental Method as Romantic

Robin West (1985) inspects the parallels between legal theory and categories of narratives in literature, and the ways our most impassioned thinking about law centers on ‘apocalyptic’ and ‘demonic’ mythologies:

The subject matter of legal theory is the "nature of law." This nature is partly revealed by the content of law—its history and political and economic underpinnings. Examining law as a "fact" can help us understand what law is and what it has been in the past. But law is also an ever-present possibility, potentially bringing good or evil into our future. The nature of law is also revealed, then, by our aspirations for and our fear of law: fantasies and nightmares revolving around power, reason, and authority. (West 1985, 146)

In 1985, West saw in the natural law lawyer the romantic who idealized a vision of a perfect union of law and morality. The lawyer seeking to understand universals and transcendent law employed a "romantic" jurisprudential method:

Like Frye's romantic, the natural lawyer [imagines] ... a perfect convergence of law and morality to the imperfect world we inhabit through the ahistorical, 'innocent' techniques of metaphor: idealization, reason, and faith... The natural lawyer's philosophical method, like the romantic's narrative method, is theoretically pure and willfully counterfactual... Experience does not ground the theory and method of the natural law tradition; innocence, faith, and reason do. (West 1985, 152)

Where West saw the lawyer who adopts Natural Law as the romantic, I want to suggest that today's romance (and dystopia) is found in law's potential – in reforming, perfecting, tinkering with legal codes, doctrines and regimes (Stoddard 1997; Kelman 1983; Scott 2004). It is the lawyer's instrumental method which analogizes a vision of

a perfect convergence of law and society. And it is the positivist lawyer armed with her instrumental method who is willfully counterfactual (Riles 2006; Abel 1982).

Years of ambiguous results with law reform projects and equivocal returns on the welfare state has led some law and society scholars to doubt law's promise as a tool to affect social change (Zumbansen 2013; Abel 2010; Hunt 2002; Trubek and Galanter 1974; Dingwall 2002). Ambivalence materializes in several forms—in malaise about legal instrumentalism's performance, in work that condemns the kind of “consequentialist thinking” that underlies legal instrumentalism (Abel 2010), in neo-Natural Law work that calls for a recommitment to Rule of Law principles (Tamanaha 2006), and in a general “pessimistic outlook that doubts the law's capacity as an effective tool for reform” (Hacker 2011).

And yet throughout, legal scholars and practitioners remain connected to and inspired by law reform and legal change. Annelise Riles (2006) observes that human rights lawyers continue to work in the area of human rights and law and development, notwithstanding a “profound and sophisticated skepticism” of the human rights regime:

What is interesting about all of these figures is that they elaborate critiques of the human rights regime in the very course of their own engagement with “doing” human rights work. The skeptical human rights lawyers in NAIL [New Approaches to International Law] are also teaching human rights law, serving as expert witnesses, training military commanders in human rights technologies, producing human rights

documents, going on human rights fact-finding missions, ordering military strikes, planning and implementing structural adjustment programs, and serving on university sexual harassment committees. (Riles 2006, 56)

Scholarship is tied to the idea of using law to achieve socio-political or economic outcomes.¹⁹ Development organizations find efficacy linking law reform with delivery outcomes (Ch. 5). For example, the World Bank's theme for its 2013 Law, Justice and Development Week was "Towards a Science of Delivery in Development: How Law and Justice Can Help Translate Voice, Social Contract and Accountability into Development Impact." Practitioners and scholars still find discussion of legal transplants – using legal 'best practices' from one jurisdiction and transferring them to another – relevant. If we are past "the social" (Kennedy 2006; Tomlins 2015), why does the law-as-tool persist? If we doubt law's efficacy as a means to an end, why do we still engage in these kinds of law reform projects? How do we remain connected to or inspired by law reform and legal change, despite law's checkered history as a tool for social change?

In order to engage with these questions, the dissertation examines how legal instrumentalism performs. The dissertation focuses on judges doing law reform and using law as a tool as a way to explore how legal actors engage with law reform and projects about legal change. Rather than adopting the pattern of policy analysis or normatively evaluating legal instrumentalism, the dissertation explores how legal

¹⁹ So much has law been called upon as the tool or aid for reform programs and non-law goals that Riles is able to call law "collateral" – collateral to other goals and projects which law is supposed to assist.

instrumentalism operates. It foregrounds and problematizes using law as a tool, paying attention to the way this concept features in the practices and processes of building legal knowledge.

Scholarship that condemns consequentialist thinking (Abel 2010) or warns against “the perils of legal instrumentalism” (Tamanaha 2006) does not examine why or how scholars, government officials or development practitioners remain attracted to the idea of law as a tool for social change. That is not its goal. The only way to engage with these questions is to make law reform and legal instrumentalism into an object of study. Specifically, the dissertation examines the problem-solution form that prevails in much of legal scholarship and law reform work.

Why use judges to study law reform and legal instrumentalism? I introduced above the idea that judges find themselves situated in a judge as a tool position and that one way to change the discourse about judges would be to problematize the judge as a thing-in-the-world that is ready-at-hand (Harman 2005). What we expect of law and legal change resonates with the ways that we imbue judges with our hopes and our despair (and the ways that both vanish from our view). Judges are the embodiments of our ideas about law and law’s promise. They are instantiations of our convictions about law-as-a-tool in the broad sense (our legal tools broadly defined). In this way questions about judges allude to concerns about legal instrumentalism, and vice versa.

5.2 Introduction to the Problem Solution Form

The instrumental approach dominates contemporary legal thinking. In its most simplistic form, the instrumental approach can be described as taking a problem-

solution form that (1) identifies a problem and (2) devises a legal solution (Ch. 2). The problem-solution form is one legacy of sociological jurisprudence and the legal realist movement (Ch. 2), which insisted on an examination of the effects and consequences of legal decisions. This in turn generated a practice of analyzing sociological goals in relation to law in the form of a problem and solution.

Several Law and Society scholars note the prominence of a problem-solution character in the way we think about law (Feeley 2001; Sarat and Silbey 1988; Stone 1988; Kelman 1983). For example, Sally Moore (2001) argues that under the technical functional explanation of law, law is a rational response to social problems: "In this explanation, law is a problem-solving, conflict-minimizing device, consciously arrived at through rational thought in the West and elsewhere." Similarly, Annelise Riles (2011) proposes that "technical character of law" includes a "problem-solving paradigm – an orientation toward defining the concrete practical problems and toward crafting solutions" (Riles 2011, 64-65).

Legal scholars also structure their scholarship in a problem-solution form. Feeley (2001) suggests that this problem-solution framework operates in both traditional doctrinal legal writing and sociological research. Feeley writes:

The standard law review article consists of three parts. A doctrine, rule, or principle is stated and examined for purpose and coherence. The author then demonstrates that this doctrine is inadequate: either there are too many exceptions or changing circumstances have made it outdated so that it cannot account for enough of observed practice to warrant retention. Finally, the

author proposes a solution: revision of the rule, a new rule, subdivisions within the existing rule, and the like...

Legal policy research follows a similar format: first, the goal or objective of a particular provision in the law (for example, a statutory provision, court ruling, doctrine) is stated; evidence is then presented to show that compliance or impact differs from what was anticipated; finally, suggestions are offered regarding ways to bridge the gap between practical and theoretical law (or, if the judgment is that the law is out of date, perhaps, vice versa). This is the basic form that most studies in law and social science adopt. (Feeley 2001, 183-184)

Deborah Stone (1988) traces the prevalence of a problem-solution analytic framework in legal scholarship and policy objectives, so that each has three parts: (i) something is good, bad, or part of a necessary trade-off (Problems); (ii) we do not currently have enough of what is good, have too much of what is bad, or a non-optimum balance in the trade-off (Goals); and (iii) we work to uncover how can the government [read: law] can remedy this situation (Solutions) (Stone 1988).²⁰

²⁰ Austin Sarat and Susan Silbey (1988) attribute the problem-solution form in law to “the pull of the policy audience”. They write that the influence of a policy audience makes legal scholars less concerned about “science” or methods and more concerned about “the consequences of particular courses of action” and the “capacity of social scientists to recommend solutions for immediate problems” (1988, 114). Sarat and Silbey (1988) observe that the problem-solution aesthetic even frames standard law and society presentations, “which begin with a policy problem, locate it in a general theoretical context, present an empirical study to speak to that problem, and conclude with recommendations, suggestions or cautions” (Sarat and Silbey 1988, 113).

If anthropologists frame the study of the Gift in terms of the problems and solutions created by persons and things (Miyazaki 2010, 263), we might say that legal scholars are concerned with the problems and solutions created by people and society (the social system).²¹

Recent scholarship questions whether the practice or operation of the problem-solution form is so straightforward (Riles 2006; Abel 2010). By making explicit the problem-solution analytic framework that assists in organizing legal knowledge, the dissertation seeks to understand how legal actors move to act on knowledge. Scholarship that makes explicit the categories which have been constructed for analytic purposes (Strathern 1988) serves as my foundation. My contention is that a problem-solution framework, which “entails a very particular ‘aesthetic’ or ‘constraint of form’” (Strathern 1988:180-181 in Miyazaki 2000, 39), operates and assists in legal knowledge practices.

I want to be clear that I do not think that operating within a modified (see discussion in Ch. 2) pragmatic paradigm means that scholars and practitioners adopt a completely technocratic legal practice. I accept the point made by Marianna Valverde

²¹ Even socio-legal scholarship which presents discrepancies between “law on the books” and “law in action” relies on a legal instrumentalist framework. The failure is not in presupposing law’s ability to do the work but rather this work generally locates problems in having chosen wrong objects or in problems with actualization and outcomes: “The problem of failed law reform is interpreted as a problem of perception not intention. The job of the sociologist of law is to provide such insight, to provide an empirically accurate view of legal practices so that lawmakers can create rights which have some chance of being vindicated.” (Silbey and Sarat 1988, 119; see also Hacker 2011).

(2003) that there are many types of knowledge practices that operate in law and those practices are not mutually exclusive:

In general, there is no reason to assume a zero-sum relation between one type of knowledge format, or one rationality of governing, and rationalities and technologies of knowledge which may be different but are not necessarily opposite...

One problem with the zero-sum paradigm of knowledge production is that it assumes that there is some invisible hand that coordinates and harmonizes legal knowledge practices. Despite the highly hierarchical structure of courts and of statutes, legal knowledge practices are not articulated in a hierarchical unified system. The epistemological heterogeneity that characterizes law, mentioned at the outset, means that there is seldom direct competition among epistemologies and rationalities. ... Even within a particular legal field—even within one and the same judicial decision—it is possible to identify a number of mechanisms that enable courts to hold together pragmatist and antipragmatist, modern and nonmodern, knowledge practices in ways that would not be seen as valid in other fields. (Valverde 2003, 98)

In fact, the dissertation argues that in judges' work, several types of knowledge practices – pragmatic and anti-pragmatic (symbolic, cultural, “moralistic”) – often operate conjunctively (see e.g. Ch. 3). What the dissertation aims to do is observe and describe how legal instrumentalism *performs*. A problem-solution aesthetic or form shapes not just the way we study law, but also how we currently think about and *do*

law. There are, however, risks associated with the problem-solution form – the possibility that performance will be inadequate or that efforts will be rebuked (Miyazaki 2000). But the problem-solution form also generates anticipation for the moment of completion (Ch. 3). As Miyazaki (2000) notes about actors in Fiji, legal actors operate under an implicit ideal, problematize the efforts we make to achieve those goals (law in action versus law on the books research, ft) and then present the ideal model as a solution (Miyazaki 2000, 43).

The dissertation thus argues that law-as-a-tool is not always “instrumental” or efficient. Instead of developing solutions in response to problems that are identified in advance, there can be a connectedness or co-evolution of problems and solutions. Solutions often come in the form of tangible pragmatic things that we can see do and measure. This and the sense that a problem-solution form generates anticipation for the moment of completion may provide some explanation as to why legal scholars and practitioners remain connected to law’s promise and to the attraction of legal change.

6. Methodology

6.1 Data Collection

The dissertation takes a multi-method and analytically eclectic approach. It is based on multi-sited ethnographic field research conducted in Canada, Israel and the United States, where I interacted with judges from Canada, Israel, the United States, as well as judges from Brazil, Taiwan, Kenya, Ghana, and Cameron. The focus of my ethnography is on common law judges working in federal or state courts (as opposed to judges working in the area of international law). While I was able to access a

variety of judges at the international meetings, my focus is on those judges from Canada, Israel and the United States. I chose countries that have somewhat similar court structures (while Israel's court system is mixed, the judges that I worked with sit on court structured like a first appellate or final appellate US or Canadian court), and whose courts have regular interaction.

The dissertation juxtaposes three case studies of judges doing work that contributes (directly or indirectly) to court reform or procedural change. This allows me to focus more closely on the concepts of legal instrumentalism and law and politics (Bennett and Elman 2007, 178). The activities that I chose to focus on were brought to my attention by judges or court staff. These activities that were flagged to be as being moments of reform or change or work that was being done behind the scenes to improve the workings of the court. They were also chosen because of their differences – one an example of therapeutic judging, one transactional (Rubenstein 2001) or managerial judging (Resnik 1982), and the third, an example the interaction of domestic and international interactions. While I am not claiming that the extra-disputing work that these judges do is characteristic of all judges who work in state or federal courts, I do believe that their experiences have much to tell us about the topics at hand.

Anthropological research “pays close attention to specific actors’ own categories and the practical uses to which those categories are put” (Miyazaki 2013). This analytic concern was foremost in my mind. The judges’ and court staff’s own understanding of the work that they do and the conceptual categories of that work

shaped the questions and approaches adopted in the dissertation. Thus one element of the method was to conduct the project as an exercise in para-ethnography (Holmes and Marcus 2008).

Para-ethnography embraces “ethnographic projects [that] emerge out of a series of in-fieldwork collaborative articulations of orienting questions and concepts that the research situation is felt, if not understood, to present to its partners” (Holmes and Marcus 2008, 83-84). The researcher is a “collaborator in the sense of ‘integrating’ subjects’ “analytical acumen and insights to define the issues at stake in our projects as well as the means by which we explore them” (Holmes and Marcus 2008, 86). That I was successful in taking my research subjects’ “analytical acumen” into account was evident to me by the reactions I got when I described my project. One judge commented as follows: “Well the public tends to think that judges only work if they’re in the court. And you had an opportunity to peak behind the curtain and see that the court is a small part of what any judge does.”²²

My data consists of observations of meetings and informal conversations between judges, internal court and institute documents, photographs, audio recordings of speeches, prayers, semi-structured interviews conducted both in person and by phone with judges, court staff, ministry staff and law clerks, supplemented by code and doctrinal review. I conducted participant observation at the court opening ceremonies of the new courthouse in Thunder Bay, Ontario, at meetings of the IOJT,

²² Interview with Judge (Superior Court of Justice), at the Consolidated Courthouse, in Thunder Bay, Can. (April 23, 2014) [Judge D]

at the World Bank's "Law Justice and Development Week 2013" and as well at the Supreme Court of Israel.

Bernard (2011) writes that "...participant observation gets you in the door so that you can collect life histories, attend rituals, and talk to people about sensitive topics" (Bernard 2011, 258). The meetings of the IOJT and WB took place in Washington in November 2013, affording me a unique opportunity to spend close to a month in constant conversations with organizations involved in judicial education and training. These international judicial meetings about education and training are the laboratories where transnational conversations about legal norms happen in action. It is only through examining the conversation, discourse and practices of the judges that what we know might be reinterpreted and contested.

The year of focused participant observation and interviewing follows on three years as a law clerk for the Office of the Chief Justice of the Superior Court of Justice (Ontario) and a year working for the Ministry of Attorney General (Ontario) in the Family and Civil Justice reform branch. Following a first degree in law, I clerked at the Superior Court of Justice, the highest level trial court and first level appellate court in the areas of criminal law and administrative law. Working on "rotations" to replicate the articling experience at a big law firm, I worked with judges of the Commercial List, the Divisional Court (administrative law appeals) and judges sitting on civil trials (including estates, equity, and construction leans matters). In that year I worked on the Rogers Skydome bankruptcy (the arena for the Toronto baseball team the Blue Jays), the suit against Garth Drabinsky (a film and stage producer who was

subsequently convicted of fraud), and what became the longest running civil trial. Also around the court that year was the “Just Desserts” shooting and the beginnings of the Bre-X and Hep-C class actions. The following year I was asked to return to the court to serve as Senior Law Clerk, to conduct research for then Chief Justice Patrick LeSage and run the articling program. In that capacity, I travelled to and became familiar with the courts and judges from the other regions in Ontario.

That prior experience shaped how I conceptualized the dissertation, but it also meant that I was able to quickly reinsert myself into the judges’ world. I was able to gain access to internal documents, make meetings with architects and court staff, or interview chief justices and other appellate judiciary who might otherwise not have spoken with me.

6.2 Analyzing material

The dissertation seeks to emulate a work of anthropology. This distinguishes it from the standard quantitative approaches to studying legal procedure (Garth 1997) or judges and politics. Instead of trying to replicate the findings of previous scholarship on the impact of procedural changes (Cross 1997) or the correlation between politics and judicial decision-making, this dissertation takes a fresh approach to the issues of judicial functions, legal change, and judges and politics. The dissertation looks at what judges’ experiences can tell legal scholars and practitioners about law and politics or using law as a tool for social change.

Two main analytic approaches influence the interpretation of data. While the case studies are being juxtaposed rather than compared (similarities and differences

are brought into view rather than resolved), the analytic approach of comparative law most certainly influences the project. Comparative Law often employs thick descriptions (Michaels 2009a, 778), helping us to “interrogate the way our own cultural assumptions shape the questions we ask and the answers we find convincing” (Nelken 2012, 337). This approach has much to offer in exploring judicial practices and in challenging standard approaches to thinking about law.

Second, as mentioned, the dissertation adopts an anthropological approach, especially in describing and questioning the “world around us” and as an interrogation into relationships between analytic categories. Instead of trying to resolve dichotomies or “solve problems,” the anthropological approach would be to “‘make explicit’ (and re-appreciate) that propensity” (Miyazaki 2010, 258). One way to do this is to “hold opposites in view” or “redeploy a series of constructed opposites” (Miyazaki 2010, 258) such as means/ends, problem/solution or judges (law)/politics, “keeping contrasting analytical strategies and categories in view”.

This is a different course of action from conventional legal scholarship. But part of what is at stake here is exactly making an object of study out of what moves us and supports the work we do. The idea is to hold the character of problem-solution, means-ends in view and make them explicit. In anthropological terms this would be to demonstrate the way analytic aesthetics hold “across different kinds of engagements with persons and things”. The aim is to bring into view the problem-solution aesthetic by making an object of study of law reform projects – those projects that seek to find legal solutions for problems identified.

The dissertation is also very much a project which relies on holding incompatibles together (Strathern 1991) – judges with work that is not resolving disputes, making and applying law, legal instrumentalism and judges in politics. I self-consciously take this approach. These are the kind of “fictional” opposites and “contrasting analytical categories” that redeployed (Miyazaki 2010, 258) allow us to approach those taken for granted subjects – such as the judge, judicial independence, or law as a tool.

6.3 Complementarities between Subject and Methodology

As a final note regarding methodology, I do believe that there are important complementarities between the method and object of study that need to be made explicit. First, the dissertation examines performativity – action and activity. It takes a processual approach – looking at the methods and procedures used in making meaning (Travers 2010; Sil and Katzenstein 2010). And it does this while examining legal procedure and court administration.

More importantly for my purposes is the connection between ethnography and the investigation into judicial independence and judicial functions. This is very much a project about relationships – judges’ relationship to their work, the ethnographer’s relationship to her interlocutors, the relationships between law and politics and the social:

Social anthropologists route connections through persons. They attend to the relations of logic, of cause and effect, of class and category that people make between things; it also means that they attend to the relations of social life, to

the roles and behaviour, through which people connect themselves to one another. And habitually they bring these two domains of knowledge together, as when they talk about the relation between culture and society. (Strathern 1995)

My own experience of conducting ethnography was about having to maintain both distance and connection. Bernard (2011) writes: “Participant observation involves immersing yourself in a culture and learning to remove yourself every day from that immersion so you can intellectualize what you’ve seen and heard, put it into perspective, and write about it convincingly” (Bernard 2011, 258). The experience reminded me not only of what I saw judges doing physically (removing themselves or keeping to the side). The experience in many ways also reminded me of my experience working in law, in legal aid. In order to be effective, connections must be made. But in order to be effective, distance must also be maintained. Through law connections will always be partial. The same is obviously true for judges, though their experiences of maintaining distance and connection are constantly on display.

This dissertation is thus a project about partial connections and *incomplete* relationships: between judges and politics, ethnographers and their research subjects, legal practitioners and our “clients, or students and their projects. We make determinations about what are acceptable relationships and inter-actions in scholarship, work, professional life, and decision-making. On aim of the dissertation is to bring into view the ways that we dignify and make ourselves separate, as well as the

power dynamics in gaining access, acquiring trust, and establishing rapport as a judge, an ethnographer (Mikecz 2012; Conti and O'Neil 2007), or as a legal practitioner.

7. Chapter Outlines

The dissertation consists of a literature review (Chapter 2) and three examples of judges participating in different types of law reform project. Chapter 3 considers criminal justice reform in Canada, exploring trial court judges working in the area of sentencing reform, and the new consolidating courthouse in Thunder Bay, Ontario. This first case study looks at judges working to improve Aboriginal confrontation with the criminal justice system by incorporating Aboriginal justice methods into the sentencing phase of a criminal trial. In particular, this chapter describes the work of judges who were involved in the design of the Aboriginal Conference Settlement Suites, a conferencing area meant to emulate a traditional healing lodge which is part of the new consolidated courthouse in Thunder Bay.

Chapter 4 looks at reform of civil procedure and U.S. federal court judges who innovated to create specialized procedures in class action settlement hearings and non-class action mass tort litigation. This chapter takes a historical perspective to look at changes in aggregate litigation, the entanglement of public and private in mass torts' settlements, and judges' exploration of different procedures to facilitate and manage large complex settlement structure.

The final case study, Chapter 5, focuses on Israeli high court judges who were behind the establishment of an international organization for judicial training. The third case study follows a group of judges from the Supreme Court of Israel and the

District Court in Jerusalem, who established their national judicial training institute, a research division to conduct empirical research, and an international umbrella organization called the International Organization for Judicial Training (IOJT). This chapter explores judges' work in law and development, and the transnational movement of ideas about judicial independence, best practices in court administration, and the rule of law.

CHAPTER 2

LITERATURE REVIEW

1. Introduction

This dissertation reflects on the place of public or state-centered law in current legal thinking and practice by focusing on judges as ethnographic objects – considering judges as real people who work and practice at the nexus of law. In the process of describing judges’ work on court reform, the dissertation also challenges two main tenants of American legal thinking: the unbending faith in the power of law as a tool for social change and the conceptual separation of law and politics (Reichman 2010). Judges thus serve as entry points into conversations about law and politics, and law and the social.

Scholars and practitioners continue to think of law as a tool for social and socio-political change, and rightly so. However, we do not have an account of how law as a tool works in practice. In some sense we are operating blind, and in an endless cycle of hope and despair (Desai and Woolcock 2015; Kroncke 2012; Daniels and Trebilcock 2008). Scholars experience a similar frustration moving between law’s technical nature and its socio-political effects (Cohen 1935; Pound 1922). Western common law relies for its legitimate exercise on the technical, logical, formal application of legal rules and precedents (Dewey 1925; Epstein, Landes, and Posner 2013; Kennedy 2004; Kennedy 2006a). But law’s engagements are imbued with relationships that are both personal and political. Scholarship tends to view law as (wholly) political or a-political, and again we do not have a sophisticated account of how law is both technical *and* personal/political, and mediating between both.

Judges are at the center of both puzzles. They are at the center of conversations about the “appropriate” relationship between law and politics (Bickel 1962; Kennedy 1997; Lasser 2001; Nagel 1989; Balkin 2010; Barak 2006; Dodek 2010). And they are at the center of conversations about how to reform public law and procedures to be more “effective” (Galanter 2005; Resnik 1982; Wolff; 2013) and accessible (Winkler 2008 Winick and Wexler 2003).

The idea that law is a tool for social change, as well as challenges to the supposed separation of law and politics, was born from the “dispute” (Schlag 2009b; Riles 2005; see e.g. Cohen 1935; Llewellyn 1930; Frank 1970) between Legal Realism and Legal Formalism. Our ideas about law-making, legal change and judging have been profoundly affected by this juxtaposition of Legal Realism as against Legal Formalism (Riles 2005; Lasser 2004). How we think about judges and law, and the appropriate boundaries and functions of each has been shaped by the legacy of Legal Realism’s critique of Legal Formalism. Western “perspectives on judging... are dominated by a story about the formalist and the realists” (Tamanaha 2010, 1, 3).²³

The notion that judges were political or that law should be thought of as a means rather than an end were useful challenges to a formal technical application of the law. These challenges and analytic devices (e.g. referring to law as a means rather than an end) cemented into strongly held beliefs which have since impacted the thinking about and practice of law. The resulting impact on legal thought has been (i)

²³ Tamanaha still resides in this debate, but splits the baby Solomon style – balanced realism is both skeptical and rule-bound (6). Judges can manipulate precedent, but legal rules work nonetheless.

a reification of the ideas that were meant to challenge the canon of legal formalism, and (ii) an analytic divide or distinction between legal techniques (legal logic, legal concepts) and social and political outcomes (Riles 2005, 974; Kennedy 2006a).²⁴ Thus the distinction is often made between formal and substantive aspects of law (Fuller 1941). As Mitchel Lasser (2001) points out, Duncan Kennedy's "description of American judicial discourse establishes, and hinges on, the fundamental dichotomy between (1) a deductive form of judicial application of legal norms, and (2) everything else. Kennedy names this everything else 'policy'" (Lasser 2001, 865).

Our knowledge about law currently develops within this context of framing law as either a thing – a formal law thing – *or* as consequences, socio-political effects. The result is a differentiation (Schlag 2009a) of law from society and law from politics.

There has been some scholarly effort to investigate or rethink these widely held beliefs (Riles 2004; Riles 2011; Lasser 2004; Pottage 2014; Pottage 2011) or at least to complicate the relationship between Legal Formalism and Legal Realism. For example, Annelise Riles engages in projects which focus on the "technicalities of

²⁴ Kennedy writes that, "The way we think about justice in a system with a state has a particular form, which we can call Liberalism with a capital L... the crucial features of this very general structure within which we think about justice and the state are the organization of rights and powers in the integrated whole of CLT [Classical Legal Thought], and the idea that there is a sharp distinction between legal reasoning and general political discourse" (Kennedy 2006, xxiv). For a description of Kennedy's distinction between legal form and policy, see Lasser (2001). American legal thought in the last hundred years positions legal forms and technologies in an antithetical stance as against substantive sociological and political outcomes: the "important questions" such as public policy, versus the legal technicalities, the "techniques of their implementation" (Riles 2005, 974).

law,” re-conceiving the technical character of law as *including* ideologies, a “problem-solving paradigm” *and* “the form of technical legal doctrine and argumentation.” (Riles 2005, 976) Rather than pit outcomes and consequences as against technical legal forms, Riles sees them all as falling under the technical character of law.

In addition to presenting a more accurate picture of the work of the contemporary judge, this dissertation is also about complicating the relationship between Legal Realism and Legal Formalism. It explores Legal Realism’s foundational concepts and analytic devices which were used to challenge Legal Formalism, and makes anti-formalist thinking “into an ethnographic object in its own right” (Riles 2004, 778) by bringing those “ways of doing legal knowledge” (Riles 2005, 976; see also Valverde 2004; Valverde 2011; Coutin and Yngvesson 2009) into view. A century after the birth of Legal Realism and Legal Instrumentalism (Frankfurter 1916, 363; Pound 1908), it should now be time to inspect the claims that were made and the effects those claims have had on legal thought and practice.

This literature review will explain the foundational concepts, which will then form the basis for the investigations in the case study chapters. The chapter proceeds as follows. In the next section (Part 2), I will describe Legal Formalism and Classical Legal Thought (Kennedy 2006a) – what the twentieth century legal scholars were fighting against. In Parts 3 and 4, I will outline the critiques of Legal Formalism that have dominated the way legal scholars and practitioners think about judges, law, and legal change. I present some of the growing challenges to the conceptual legacies of Legal Realism, and then, in Parts 5 and 6, describe how the dissertation will build on

these more recent challenges in the dissertation's case studies of judges engaging in extra-disputing judicial work.

2. Legal Formalism Described

The “formal approach” (Frank 1931)²⁵ to law posits law as an independent discipline; one that is “systematic, logical, objective, neutral, and professional” (Meydani 2011, 20). We can see how these qualities are aspirationally extended to the judge. Learned Hand (1953) writes in “Contribution of an Independent Judiciary to Civilization,”

But an independent judiciary is an inescapable corollary of ‘enacted law’... Courts must reconstruct the past solution imaginatively in its setting and project the purposes which inspired it upon the concrete occasions which arise for their decision. To interject into that process the fear of displeasure or the hope of favor of those who can make their will felt, is inevitably to corrupt the event...

And so to sum up, I believe that for by far the greater part of their work it is a condition upon the success of our system that the judges should be independent... (Learned Hand 1953, 228, 234)

Duncan Kennedy (2006a) describes the idea of legal formalism through his narrative about the “rise and fall” of what he terms Classical Legal Thought (Kennedy 2006a). In the Classical Legal Thought period, legal rules distinguished between

²⁵ Jerome Frank (1931) writes, “There is a delightful intellectual discipline called “formal law” or “law-in-discourse.” It is a sort of intellectual game which cannot be played without a knowledge of those rules and principles.” (Frank 1931, 648).

private and public. Legal reasoning consisted of logical techniques of induction and deduction, and “democratically validated public power” provided the framework for private rights that “were ‘absolute within their spheres.’” (Kennedy 2006a, xi) Law was conceived of as a set of abstract principles, a self-justifying body of precepts that could be deduced or discovered through formal logical methods (Summers 1982, 61). The formal approach to law saw law as gapless, knowable and discoverable, as Dewey described: “for every possible case which may arise, there is a fixed antecedent rule already at hand; that the case in question is either simple and unambiguous, or is resolvable by direct inspection into a collection of simple and indubitable [sic] facts.” (Dewey 1924, 22)

Classical legal thinking about judges presupposed that judges applied pre-existing law to facts presented during the trial. Formal legal rules gave judges the methods to find a law that was *out there* (Epstein, Landes and Posner 2013; Cross 1997, 251).²⁶ Frank Cross (1997) writes: “The classic legal model is one of a formalism of neutral principles, in which judges almost scientifically apply analogical reasoning to the Constitution, prior precedents, or statutes to find the proper resolution of a case” (Cross 1997, 254).²⁷

Kennedy also posits that Classical Legal Thought was an *ordering*: “... the ordering of myriad practices into a systemization... through simplifying and

²⁶ The “objectivity of legal reasoning” is found in the way that “judges make new rules by developing the implications of legal principles that pre-exist them.” (Kennedy 2006, 243)

²⁷ Later, he writes, “Formalism implies some logical system of reasoning internal to the law and some consistency in application of this system” (Cross 1997, 261).

generalizing categories, abstractions that become the tools available when the practitioner (judge or advocate) approaches a new problem.”²⁸ And though Kennedy doesn’t state this in the Rise and Fall (but see Kennedy 2004), it is clear that a good deal of his and our understanding of Legal Formalism stems from Weber’s work comparing legal systems. Kronman (1983) in his explication of Weber provides this helpful breakdown of Weber’s four basic types of legal thought:

Figure 3 Weber’s four basic types of legal thought

	Rational	Irrational
Substantive	Substantively rational = “certain priestly or theocratic legal systems”	Substantively irrational = khadi justice – cases decided on an individual basis according to a “mixture of legal, ethical, emotional and political considerations”
Formal	Formally rational = Western Law – highly systematic and based on a logical interpretation of meaning	Formally irrational = deciding disputes on the basis of oracular pronouncements,

According to Weber, legal systems organized around substantive thought “refuse to recognize a boundary of any sort between law and ethics, but aim, instead, at the realization of certain ethical, political or religious ideas” (Kronman 1983, 78).

By comparison, formal legal systems are self-contained and rest on “a principled

²⁸ Anticipating the research agenda of the new Ethnography of Law, Kennedy continues, “These abstractions operate the way a technology operates on the design of physical objects: the concepts impose limits, suggest directions, provide one of the elements of style but do not uniquely determine outcomes.” (Kennedy 2006, 7-8)

distinction between legal and non-legal norms.”²⁹ Formally rational legal systems adopt the following five precepts:

[F]irst, that every concrete legal decision be the ‘application’ of an abstract legal proposition to a concrete ‘fact situation’; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a ‘gapless’ system of legal propositions...; fourth, that whatever cannot be ‘construed’ rationally in legal terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an ‘application’ or ‘execution’ of legal propositions (Weber 1926, 64).

3. The Rise of Law as a Tool for Social Change

3.1 Sociological Jurisprudence

Whereas Classical Legal Thought favored induction/deduction and distinct conceptual domains, Kennedy argues that in the modern period (pre-WWI to 1975), the dominant technique of legal reasoning shifted to balancing and substantive due process (Kennedy 2006a, xi). Once legal reasoning becomes about balancing, the abstractions “which had allowed Classical thinkers to place cases firmly within their sphere and then to reason deductively about the consequences, lost their operative power.” (Kennedy 2006a, xxiii, 251 of the original manuscript)

²⁹ Kronman does note that Weber uses “formality” in a variety of ways – to mean systemic application and rule-governedness, he also uses it to mean “a principled ‘separation of law from ethics’” a “self-contained” legal order (Kronman 1983, 78).

Kennedy attributes the transformation in legal thought to the popularity of pragmatism in U.S. philosophy, and the “triumph of a purely formal theory of marginal utility in economics,” both of which lead to “the dissipation of faith in the intrinsic justice of the rules, and discrediting the notion that they could be objectively developed or applied.” The effect was the “disintegration” of the previously impervious legal categories, “and the recession of the judiciary from the role of guardian of the integrity of fundamental legal relationships. ” (Kennedy 2010, 3)

Pragmatism influenced the early critiques of Legal Formalism by legal thinkers like Roscoe Pound and Oliver Wendel Holmes (Tamanaha 2009, 65), who advocated for social policy considerations in judicial decision-making. For example, Pound (1908) in *Mechanical Jurisprudence* complained that:

The conception of freedom of contract is made the basis of a logical deduction. The court does not inquire what the effect of such a deduction will be, when applied to the actual situation. It does not observe that the result will be to produce a condition precisely the reverse of that which the conception originally contemplated. (Pound 1908, 616)

Legal theorists such as Pound, Holmes, Rudolf von Jhering, and Eugen Ehrlich focused on the social nature of law. Pound argued that lawmakers needed to “take more complete and intelligent account of the social facts upon which law must proceed and to which it is to be applied” (Pound 1959, 350). Holmes (1897) similarly wrote of the judge’s duty to reflect on social outcomes: “I think that the judges

themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable...” (Holmes 1897, 467)³⁰

Advocating for a “sociological jurisprudence” (Pound 1907; Pound 1912), legal theorists challenged judges to be transparent about competing social interests and determine the significance of rules on the basis of consequences and social purpose (Pound 1959): law ought to be judged by the results it achieves (Pound 1908). Pound (1908) called for judges to engage in the “less ambitious but more useful labor of giving a fresh illustration of the intelligent application of the principle to a concrete cause, producing a workable and a just result.” (Pound 1908, 622)

3.2 Legal Realism – separating ends and means

A more virulent critique of Legal Formalism came from the Legal Realists who, like Felix Cohen, accused judges of “hiding” behind the “language of law” (Cohen 1935, 820). Cohen argued that formal legal language—the concepts and abstractions upon which judges relied—consisted of “fictions and metaphors” that were not themselves reasons for decisions, but were rather “poetical or mnemonic devices for formulating decisions reached on other grounds.”³¹ (Cohen 1935, 812)

Cohen wrote:

³⁰ Holmes continues, “I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where they are confident, and see that really they were taking sides upon debatable and often burning questions” (Holmes 1897, 468).

³¹ Dewey similarly challenged the order of premise and finding in decision-making, arguing that the method by which we think through problems consists of *finding* general principles which can serve as premises for conclusions: “As matter of actual

[I]n every field of law we should find the same habit of ignoring practical questions of value or of positive fact and taking refuge in "legal problems" which can always be answered by manipulating legal concepts in certain approved ways. In every field of law we should find peculiar concepts which are not defined either in terms of empirical fact or in terms of ethics but which are used to answer empirical and ethical questions alike, and thus bar the way to intelligent investigation of social fact and social policy. (Cohen 1935, 820)

Legal Realists argued that law should be thought of as a means to an end, the end being "the social forces which mold the law and the social ideals by which the law is to be judged" (Cohen 1935, 812). Karl Llewelyn (1930) wrote in *A Realist Jurisprudence*,

It seems patent that only a gain in realism and effectiveness of thinking can come from consistently (not occasionally) regarding the official formulation as a tool, not as a thing of value in itself; as a means without meaning save in terms of its workings, and of meaning in its workings only when these last are compared with the results desired. (Llewelyn 1930, 452).

Similarly, Pragmatist John Dewey (1924) distinguished between the decision and the means—the logical formal methods of law—by which the decision is derived.

fact, we generally begin with some vague anticipation of a conclusion (or at least of alternative conclusions), and then we look around for principles and data which will substantiate it or which will enable us to choose intelligently between rival conclusions." (23) Also Hans Kelsen, who wrote about law as means: "law is a means, a specific social means, not an end" (80), as a means, law is a "specific social technique of the coercive order" (79).

... [the] logical systematization with a view to the utmost generality and consistency of propositions is indispensable but is not ultimate. It is an instrumentality, not an end. It is a means of improving, facilitating, clarifying the inquiry that leads up to concrete decisions; It is most important that rules of law should form as coherent generalized logical systems as possible. But these logical systematizations of law in any field, whether of crime, contracts, or torts, with their reduction of a multitude of decisions to a few general principles that are logically consistent with one another while it may be an end in itself for a particular student, is clearly in last resort subservient to the economical and effective reaching of decisions in particular cases. (Dewey 1924, 19)

According to these scholars, Legal Realism meant being realistic about what law is and what it was doing: a “fidelity to nature [and] accurate recording of things as they are, as contrasted with things as they are imagined to be or wished to be” (Llewellyn 1931, 1224). Llewellyn and other Legal Realists argued that empirical research of the effects of laws and legal decisions was essential in order to ever have an intelligent discussion about “what Ought to be done in the future with respect to any part of law” (Llewellyn 1931, 1236).

In addition to calling for empirical research on the effects of law, Llewellyn’s goal in arguing that law was a means to an end, as with most Legal Realists, was to force attention to the way law was “manmade, something capable of criticism, of change, of reform.” Reform and change would be based not only “according to

standards found inside law itself (inner harmony, logical consistence of rules, parts and tendencies, *elegantia juris*)” but also in relation to societal goals and standards, the realm outside of the legal system which “law purports both to govern and to serve” (Llewellyn 1930, 442). Mitchel Lasser (2004) identifies this “now familiar conceptual framework” according to which a judge must justify her decisions on the basis of the “purposes and effects (the realm of the question ‘why?’), not in the window-dressing of verbal form” (Lasser 2004, 67).

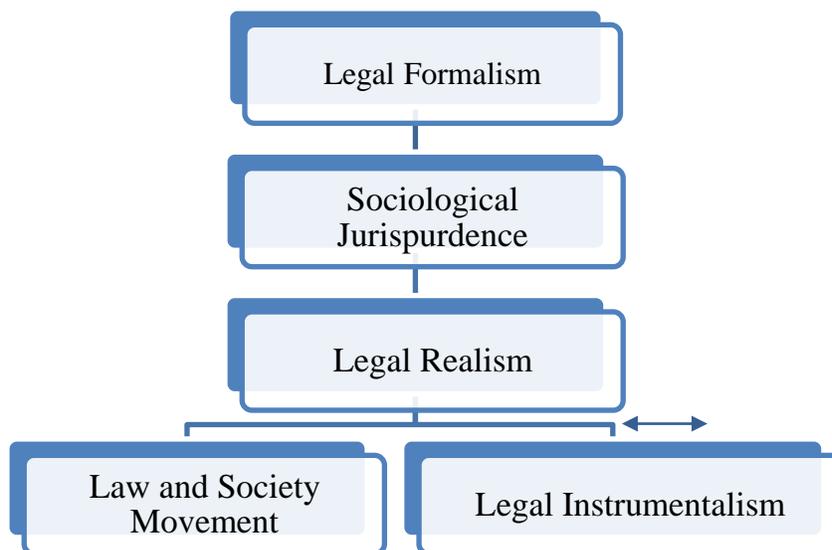
3.3 The Law & Society Movement

Legal Instrumentalism—the idea that law can be used as a tool for social change—was born out of sociological jurisprudence and Legal Realism (Figure 4 below), taking the directive to consider sociological outcomes or law-as-means one step further. Where sociological jurisprudence argued that judges needed to pay attention to the social consequences of legal decisions, legal instrumentalism suggests that law can be manipulated to bring about certain ends. In other words, once you identify the goals that you want to achieve, you can make, enact, craft X-law (and X law will be able to achieve such goals) (Hunt 1978; Hunt 1993; see also Abel 1973).³² The insistence on identifying and evaluating effects that was part of the Legal Realist

³² In sociological jurisprudence, the calls were to understand law’s effect on society, and perhaps to have law be more responsive to society, but whether law could actually make the positive and intended impact was not a question that was asked. Where sociological jurisprudence might be represented by X-law \models (implies) Y-outcome, Legal Instrumentalism is more aptly depicted by X-law \rightarrow (yields) Y-outcome (if X then Y), or to be more accurate, (if) Y-desired outcome \rightarrow (then) (pass/develop) X-law.

dogma (Llewelyn 1931, 1237) transmogrified into a belief about the ability of law to effect social change.³³

Figure 4 Progress of American Legal Thought



Through its conformity with legal positivism³⁴ and a functionalist sociological jurisprudence, an instrumental view of law became popular in the middle of the 20th

³³ For example, regarding the discipline of Conflict of Laws, Riles (2005) writes “How should we think about this strange turn of events in Conflicts - about the curious transformation of the Realist ideology that law should be tool-like into an actual tool of its own?”

³⁴ The law as a means approach also conformed to a growing emphasis on positive law, which originates in human action. Where natural law “issues directly from the nature of men or the nature of the relations of men, and as such need only be recognized by man,” positive law is law that is created through human will or agency, either by custom or by “legislation (in the broadest sense).” Hans Kelsen, “The Law As a Specific Social Technique,” 9 *U. Chi. L. Rev.* 75, 88 (1941) . John Gardner writes: What should a ‘legal positivist’ believe if not that laws are posited? And this, roughly, is what [legal positivism] says of laws. It says, to be more exact, that in any legal system, a norm is valid as a norm of that system solely in virtue of the fact that at

century, establishing a foundation for the “Welfare State” (Kennedy 2006b). An instrumental approach to law was also “in line with the Enlightenment vision of ‘progress’ understood as a project that gives effect to an ever expanding realm of the human capacity to control its conditions of existence” (Hunt 2002, 16).

The Law & Society movement helped cement instrumentalism in twentieth century legal thought.³⁵ The movement grew out of the Law and Society Association and its founding journal, the Law and Society Review, both established in the mid 1960s (1964 and 1966 respectively). While Law & Society scholars self-describe their

some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it or otherwise engaged with it. John Gardner, “Legal Positivism: 5 ½ Myths,” 46 *Am. J. Juris.* 199, 200 (2001). The “father” of modern legal positivism, H.L.A. Hart argued that rules, properly made attained validity such that their presence (rather than the threat of coercion) commands obedience or performance. H L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994). Taking this thesis further, Raz argued that rules or norms are of a certain type of reason that guides action. Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999). Legal positivists focused on how law does what it does. But, no theorist ignored that law was meant to do something social. It may not be part of what law is, and therefore not properly part of trying to explain law. Legal positivists concerned themselves with sources not merit. For Hart and Raz, rules are reasons “of a distinctively merit-independent type;” Gardner, “Legal Positivism: 5 ½ Myths,” 209. But law was still purposeful. Directly or indirectly, these ‘concept of law’ theorists made the functionality of law an important topic in legal theory (Riles 2004a). Law was a means (For Kelsen, the ‘means’ was the threat of force, for Hart it was rules which induced an internal feeling of compliance, and for Raz it was norms as reasons to exclude other reasons for actions) to bring about desired social conduct, even if for the legal positivists, law does not depend on its ends for its validity. Hans Kelsen argued that law was a specific type of social technique – a “specific social means” (Kelsen 1941: 20) – whose “value depends, rather, on ends that transcend law qua means” (1992: 31).

³⁵ Legal scholars cite an instrumental theory of law as the most prominent theory of the last 100 years: it is “almost a part of the air we breathe” (Tamanaha 2006, 1). In the extreme, law in contemporary society has little to no value of its own. Rather it is a means, “a tool or mechanism for doing things, an empty vessel that can be filled in any way desired to serve any end desired” (Tamanaha 2009, 21).

agenda as using social science methods to explain law and legal institutions within their social contexts (Silbey 2002), the orientation of the movement has always been toward seeking social change, “explor[ing] ways in which the legal profession might, or might not, provide leadership for progressive social change” (Silbey 2002, 861).³⁶ As an “heir” of Legal Realism, the Law & Society movement “while proclaiming itself the carrier of a new vision, evolved within a tradition that was largely hopeful about law and the possibilities for social change and reform through law (Silbey and Sarat 1987, 170).

Like the Legal Realists before them (Silbey and Sarat 1987), Law & Society scholars challenged formal doctrinal approaches to studying law “as inadequate to explain law as it is experienced and lived in and through society” (Seron, Coutin and White Meeusen 2013, 290). But this critique of doctrinal legal scholarship was “coupled with a commitment to the progressive values of scientific methods and pluralist politics” (Seron, Coutin and White Meeusen 2013, 290; Seron and Silbey 2004).

Law & Society scholarship also posited the analytic separation of law from society which was present in sociological jurisprudence and Legal Realism. According to Law & Society scholars, the “sources of law” are “socially derived”; the meaning of law is “not intrinsic to statutes or cases, but rather is dependent on extralegal factors”

³⁶ Roger Cotterrell (2013) discusses a similar phenomena in Swedish scholarship on the sociology of law; for example where the “legal machinery” might serve the “common good of the Swedish *social democratic* state” and might act as a technology to “build a thriving economy, a well ordered welfare system, and a cohesive and cooperative national community...” (Cotterrel 2013, 669).

(Seron and Silbey 2004). Carol Seron, a recent past president of the Law and Society Association, and Susan Silbey, president from 1995-96 summarize the foundational concepts of the movement: “These founding commitments to bridging social science and legal scholarship, progressive social change, a pluralist politics, and a critical perspective on law’s internal accounts continue to shape the field’s discourse and debates” (Seron and Silbey 2004).

4. Theorizing Judges and Politics

4.1 The Legacy of Legal Realism

In Classical Legal Thought, the judge’s power to mediate disputes “was identical whether the occasion of its exercise was a quarrel between neighbors, between sovereigns, or between citizen and legislature” (Kennedy 2006a). What moderated judicial power, legal theorists believed, was a judge’s adherence to general legal concepts and logical rules of application. Judges were seen to be dispassionate in their application of general principles of law to the facts presented in the case (Kennedy 2006a, 6).

It was these general principles, or rather the formal application of general principles and abstract methods, that twentieth century legal scholars critiqued as “a rigid scheme of deductions from a priori conceptions” (Pound 1908). Formalism presupposed an internally coherent and gapless legal system, in which the judge was the guardian of abstract legal concepts and fundamental legal relationships (Kennedy 2006a). But, beginning with Pound and Holmes and other “social” legal theorists (Kennedy 2003 2041?), legal scholars began to challenge the notion that judges

merely applied rules to the facts of the case. Holmes wrote that judges made decisions on the basis of other considerations, even if not articulated as such: “the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very grounds and foundations of judgments inarticulate, and often unconscious” (Holmes year 999). Pound (1931) similarly argued that judges started with the ideals they wanted to further, and then found reasons in support of their position:

More specifically, we find that in the judicial process a highly significant role is played by ideals by reference to which the starting points for legal reasoning are chosen, by ideals which determine what is "reasonable," by ideals by which the "intrinsic merit" of competing interpretations is determined, and by ideals which lead tribunals to extend one precept by analogy while restricting another to the narrow bounds of its four corners. (Pound 1931)

Again the Legal Realists were more derisive. They argued that the abstract principles upon which judges based their decisions were “legalist pretensions,” “mere rhetoric, designed to conceal the political character of their rulings” (Epstein, Landes and Posner 2013, 2).³⁷ Llewellyn wrote that judges creatively dealt with conceptual problems in cases as follows: “The way to deal with a situation is to look at the situation and its needs, and if no appropriate concept is available, then to make one.” Felix Cohen (1935) accused courts of delivering their judgments “in the language of transcendental nonsense.” According to Cohen, what judges of the time were actually

³⁷ Pound also took this line of critique, criticized “mechanical jurisprudence” – using concepts “not as premises from which to reason, but as ultimate solutions. So used, they cease to be conceptions and become empty words” (xx).

doing was creating new sources of economic wealth or power, and “[w]ithout a frank facing of these and similar questions, legal reasoning on the subject of trade names is simply economic prejudice masquerading in the cloak of legal logic” (Cohen 1935, 817).³⁸

In addition to challenging legal reasoning in decision writing, Legal Realists challenged the supposed conceptual distinction between “making” and “applying” law. A Legal Formalist description of the judge’s role was that she merely *applied* law to the facts of the case. To do more would usurp the role of the politician (Montesquieu 1914). Legal Realists argued, however, that there was no use distinguishing between *making* and *applying* law.³⁹ Judges made law when they decide cases, and the notion that judges merely applied pre-given law was unrealistic and a fallacy.

³⁸ In some sense Cohen was also speaking of the aesthetics of decision-writing: “Certain words and phrases are useful for the purpose of releasing pent-up emotions, or putting babies to sleep, or inducing certain emotions and attitudes in a political or a judicial audience. The law is not a science but a practical activity, and myths may impress the imagination and memory where more exact discourse would leave minds cold.” (Cohen)

³⁹ Duncan Kennedy writes: “If he is conscientious in carrying out this mental operation, carefully tallying all the bad consequences as well as the good, he will find himself constantly confronting the dilemma of his own political power. On the one hand, the rewriting of rules and the fashioning of ad hoc exceptions involve denying autonomy to private actors and assuming the power of choice among ends, a process postulated to be subjective, inherently arbitrary, and legitimate only when done democratically. Every act of judicial rule making is therefore in some measure an act of usurpation. On the other hand, the legislature may be corrupt or anaesthetized or simply overworked, and one of the parties may be attempting the legal murder of the other. Legal Formality 394]

Sociological jurisprudence and the Legal Realists' interventions into the thinking about judges and politics generated several enduring insights and lines of research, including: (i) that judges do not merely apply pre-existing law, (ii) that they do not decide (solely) based on precedent (“legalism” does not predict case outcomes), and (iii) that judges allow politics to influence their role as a judge.

Lasser (2001) writes that, “As Kennedy describes it, this viral strain of American critique, by explicitly and effectively disparaging the power of deductive reasoning, eventually imperiled such canonical distinctions as those between adjudication and legislation, and between law-application and lawmaking” (Lasser 2001, #). Yet, while there is a great deal of legal scholarship that seeks to demonstrate the fiction of analytic categories and divides (e.g. the fictitious divide between the public and private in law, procedural and substantive law, law and society, etc.) the distinction between law-application and law-making seems to be less controversial. Somehow it is less *political*. For example, scholars overtly or tacitly accept a distinction between making and applying law in arguing that judges who make law frustrate democratic principles (Shapiro 1981).⁴⁰ The second two insights—that judges do not decide (solely) on the basis of precedent and that the judicial function is

⁴⁰ Jerome Frank also took issue with the fictitious separate of “rules” from “facts”: “But ‘the facts’ of cases cannot be ignored for they alone could cause uncertainty in the decisions. Because (1) of the artificiality of its separation of ‘the rules’ and ‘the facts’ and because (2) of this snobbish attitude towards ‘the facts,’ law-in-discourse misleads the unwary as to the possibility of predicting specific decisions” (Frank 1931, 657).

political—has generated the lion’s share of scholarship on judges and politics. These will be considered in turn below.

4.2 How Judges Decide: Judicial Process

The second enduring insight from the Legal Realists’ challenge has been the view that judges have policy preferences and that they decide cases in line with their political views and ideologies. In the extreme, this view holds that judges always decide cases based on their personal ideological and policy preferences (Segal and Spaeth 1993; Epstein and Knight 1998; Weinshall-Margel 2011). The less extreme version is that judges revert or defer to their ideology and policy beliefs in “hard cases” (Dworkin 1975; Barak 2002; Dahl 1957). Scholarship that studies how judges decide is often labeled “Judicial Process” or “Judicial Behavior” research. Judicial Process literature concerns the way judges decide and whether and to what extent politics and personal ideology influence judicial decision-making. Judicial Behavior literature looks at the subjective attitudes of judges and the impact of judges’ political ideology (inputs) on their decisions (outputs) (Cross 1997). In 1981, Shapiro summarized this literature as follows:

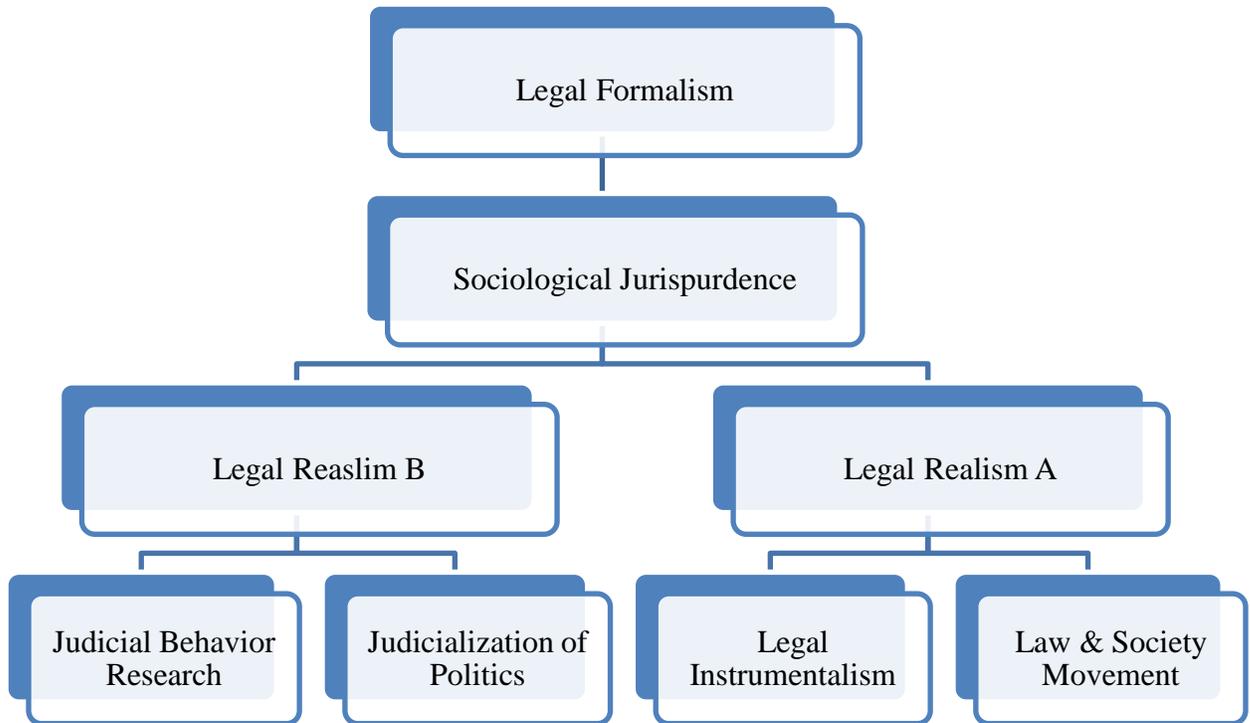
Much of the thrust of the judicial behavior literature has been toward showing that there has been a high correlation between judges’ political attitudes and their decisions for and against certain categories of litigants. This literature further suggests that these judicial attitudes fall into the same relatively coherent ideological patterns found in the national political culture. ... many judges are not entirely ‘neutral’ thirds but instead bring to the triad distinct

public policy preferences, which they seek to implement through their decisions (Shapiro 1981, 31).

According to Epstein and Knight (1998), C. Herman Pritchett started the trend of comparing large data sets of judicial decisions against policy preferences. Following Pritchett's findings from the 1940s, political scientists in the 1950s and 1960s applied behaviorist analysis to research judicial decision-making, using data on judicial voting patterns to demonstrate the correlation between decisions and ideological or attitudinal preferences (Weinshall-Margell 2011; Meydani 2011, 31; Cross 1997; Burbank 2011, 50). Segal and Spaeth (1993, 2002) conducted a series of well known studies about the voting patterns of US Supreme Court justices and their ideology prior to their appointment to the court.

Another view of judicial decision-making, a modified attitudinal model, suggests that, in addition to ideological preferences, judges seek to maintain the power of the court (Epstein and Knight year). Judges may not always vote in line with policy preferences. Instead, judges, constrained by "intra" and "extra-organizational" interests, may be limited in their ability to decide in line with their ideology. Scholars refer to the second as the rational choice model (Burbank 2011, 45; Meydani 31) or the strategic model (Epstein and Knight).

Figure 5 Relations in American Legal Thought, revised



4.3 What Judges Adjudicate: Judicialization of Politics

A third (or fourth) heir of the Legal Realist movement is scholarship regarding the “Judicialization” or “Legalization” of politics (Ferejohn 2002; Mandel 1994; see e.g. Lasser 2013) (see Figure 5 above). Judicialization of politics literature looks at the relationship between judges/courts and the other branches of government. Meydani poses the question as follows: “how do we define the different branches of state governance and what is the appropriate relationship between them?” (Meydani 11) Judicialization of politics scholars question whether an increasing judicial scope and authority to decide public policy matters impinges on democratic principles of

representation. For example, Michael Mandel (1994), a Canadian scholar writing less than 10 years after the Charter of Rights and Freedom was brought into force, laments that:

Canadian democracy used to consist of government through representative institutions such as Parliament, the Legislatures, municipal councils, and so on, elected by universal suffrage and answerable to those who elected them by those very electoral means. But these institutions, and others as varied as labour unions, hockey leagues, and universities, are now being pushed from centre stage and told what they can and cannot do by judges elected by and accountable to nobody. Not only accountably to nobody, but also lacking in any formal restraints, unless one wants to pretend that vague terms such as ‘fundamental justice’ or ‘distinct society’ retrains courts in any serious way (Mandel 1994, 2)

Judicialization of politics scholars warn that courts are becoming too involved in policy making. They argue that judges do not exercise restraint but instead actively pursue the kinds of cases that amount to policy and law-making rather than a strict application of the law.⁴¹ Scholars point to courts that have increased their power by expanding the court’s jurisdiction and authority to hear disputes, transferring disputes

⁴¹ Although, there is some sense, though, that judicialization of politics “is simply the label used for decisions one does not like” (Chemerinsky, quoted in Lindquist and Cross). Determination about whether a judge exercises activism or restraint “often requires subjective jurisprudential judgments about the interpretation of legal texts or the proper role of the judiciary in governance; and those judgments, in turn, often depend on one’s unique policy perspective” (31-32).

from the political realm into the judicial realm (Ohnesorge 2007, 109). For example, scholars cite the easing of Israel's High Court of Justice rules of standing which have made getting disputes before the courts much easier.⁴² Cross and Lindquist (2009) refer to this as institutional aggrandizement (Cross and Lindquist 2009; see also Ohnesorge 2007, 105).

As the embodiment of the kind of judicial activism that makes these scholars bristle, former Chief Justice of the Supreme Court of Israel, Ahron Barak (year), argues that any and every topic "can be resolved by a court" (Barak year 113). Law "fills the whole world," he writes. The mere fact that an issue is political does not mean it cannot be resolved in court. The effect of resolving something through law relates to its methodology "in the sense that law can take a view as to its legality. Trying to resolve by law may not be the most important or the best way to resolve the issue," (Barak 91) but there is no topic that law could not address.

Generally speaking, Judicialization of Politics scholars' list their concerns as follows: first, judges, who are unelected, should not make law. Second, democratic representation means that unelected judges should not adjudicate public policy matters (Meydani 2011 6; Cross and Lindquist 2009).⁴³ There are appropriate topics that

⁴² Scholars also equate rise of the High Court of Justice in Israel with decreasing power of political parties, inability of Knesset to govern.

⁴³ In order to measure the extent of the judicialization of politics through quantitative review of decisions, Cross and Lindquist (2009) delineate what they see as the elements of judicial activism. They utilize the following proxies for judicialization of politics: i-not deferring to other branches of government, ii- interpretive instability – overruling precedent, iii- expanding judges' authority to hear disputes, iv-result oriented judging.(Cross and Lindquist 2009, 32-42)

judges are meant to address and limits to the kinds of case judges should hear (for a discussion of the “political questions doctrine” see Nagel 1989). Third, judges should not be over the democratically elected legislature and should have limited power to strike down federal statutes (Waldron 2005). Judges should be limited in the extent to which they can adjudicate statutes which “emerge from the political process” (Dodek 305, ft 34, quoting Lamer para140).⁴⁴

Judicial behavior and judicialization of politics scholars share many of the same concerns. Generally speaking, both sets of scholars feel strongly about the separation of powers between the legislature and the judiciary, and both believe that law and policy decisions that impact society should only be made by elected officials (or those elected for the purposes of governing and making laws) (Frank 1949). Cross (year) summarizes the main issues this way,

All agree that politically motivated judicial decisions, unconstrained by precedent or reason, are incompatible with the legal model and fundamental constitutional principles. The ‘concept of unrepresentative judicial

⁴⁴ Courts should defer to the legislature’s interpretation so long as it is reasonable. The problem for democracy arises “when unelected judges encroach on the powers and prerogatives of popularly elected and accountable officials via the exercise of judicial review;” “even when the court is correct the net effect is a negative one” (Cross and Lindquist 2009, 21 quoting Thayer 1893). Thayer was worried that legislatures would rely on judicial review and ignore their own responsibility to meet constitution “counter-majoritarian government force”. On the other hand, Barak writes that “the enforcement of the rule of law requires judicial review of constitutionality of statutes. The rule of law leads to the conclusion that the final interpreter of the law should be the court, and not the legislature or the executive” “If one can rely on the objectivity, integrity, and balance that judges employ as creators of common law, why can one not rely on them to fulfill that same role as interpreters of the constitution and statutes?”

‘philosopher-kings,’ possessing authority to serve as a roving societal conscience, surely threatens the values of self-determination, accountability and representationalism that provide core notions of American political theory.’ 66”

Both judicialization of politics and judicial behavior literatures take the self-interested judge pursuing ideological goals as their starting point. The attitudinal and rational choice models of judicial behavior posit the judge as a strategic policy preference seeker, with either complete autonomy to pursue policy preferences (attitudinal model), or with some institutional constraints, for example to maintain the reputation of the institution (institutional affiliation) (rational choice) (Burbank 2011, 45). Perhaps less obvious, judicialization of politics scholars also assume actor preferences to be fixed and constant (Woll 6). Judicialization of politics scholars rely on the assumption that judges would seek to maximize their power by lowering standing requirements and expanding the realm of what is appropriately justiciable. In both sets of literatures, identities and interests are “exogenously given” and the focus is on actor generated outcomes (Wendt 1992, 391-92).

4.4 A Note on Judicial Independence

In legal scholarship, the concern about judges, politics and the separation of powers is also addressed through attention to judicial independence. Legal scholars in particular pay considerable attention to judicial functions and the impact of judicial independence on the rule of law and public confidence in the justice system (Dodek 2010). For example, Garoupa and Ginsberg (2013) are concerned that judicial foray

into work beyond the courtroom will threaten judicial independence. Monahan and Shaw (2011) worry that governments appoint judges to chair public inquiries not only because of their skill in hearing and evaluating evidence, but also because judges bring “an aura of credibility, authority and impartiality due to their institutional independence from the executive and legislative branches of government” (Monahan and Shaw 2011, 438).

Dodek (2010) warns that this “rent a judge” practice – using “judicial independence as a public policy instrument” in public inquiries and commissions – risks undermining the very notion of judicial independence. Dodek (2010) worries that the “dramatic rise” of the use of judges to chair public inquiries “has resulted in a ‘judicialization of politics’ of a different sort. The current political culture of independence and accountability has made judicial independence a highly valued political commodity that is frequently demanded by government officials.” (Dodek 2010, 305) Unfortunately, argues Dodek, this means that judges run “a real risk of judicial entanglement in highly political disputes” (Dodek 2010 313). This could cause the particular judge to be perceived as partisan (in past or future cases). Institutionally, this would eventually undermine public confidence in the justice system.⁴⁵

⁴⁵ The Canadian Judicial Council in its guidelines to Chief Justices regarding the appointment of federal judges to Commissions of Inquiry suggests that Chief Justices consider whether the subject matter essentially requires advice on public policy; whether it is an investigation into the conduct of governmental agencies; whether it is an investigation of particular individuals; and whether the judge is required because of particular knowledge or experience (Dodek 2010 315).

5. Doubts About the Standard Narratives

“We should want ‘human reason [to be] something more than an instrumental mechanism for the execution of collective or individual decisions reached through the clash of interests, passions or appetites.’ (Kennedy 2006, 4)

5.1 Crisis of Faith

The idea that law could be used a means to affect social change dominated legal thought in the post WWII Welfare state period. However, by the late 1970s, scholars began to feel increasingly disillusioned with the idea of law-as-a-tool for social change (Abel 2010). In 1978, Philippe Nonet and Philip Selznick wrote:

A mood of diminished confidence in law pervades recent writings. Critics of law have always pointed to its inadequacy as a way of ministering to change and achieving substantive justice. Those anxieties remain, but today a new note is struck by repeated references to a crisis of legitimacy.... There is an attack on ‘liberal legalism’ itself, on the idea that the ends of justice *can* be served by a purportedly detached, impartial, autonomous system of rules and procedures. (Nonet and Selznick 1978, 4, emphasis in the original)

Scholars found that using law as a tool for social change produced negative or unintended consequences (Abel 1982; Hunt 2002) or was outright failure (Trubek and Galanter 1974; see also Dingwall 2002 and Hacker 2011).⁴⁶ Scholars also became

⁴⁶ Expressing skepticism on the Law and Society research project, Dingwall (2002) writes, “The result of thirty years mainly doing empirical work on topics of policy or public relevance is a view that none of it really matters very much. At best, scholars are conceptive ideologists ... We produce a range of ideas for others to pick up and

increasingly concerned that “meliorist policy adjustments fed by research [would] undermine the efforts to produce major structural change” (Sarat and Silbey 1988). In describing the enthusiasm and subsequent disillusionment of the Law & Development movement, Davis (2004) writes:

For a few brief years in the 1960s and the early 1970s, American legal academics joined with their colleagues in other disciplines to investigate these issues in an exercise now known as the "law and development" movement. Eventually, however, the principal participants in the exercise became disillusioned and lost their faith in the ability of law, much less legal scholarship, to contribute to development (Davis 2004, 141).

Even Law and Society Association scholars, by the mid-1990s, began to express “pessimism about law’s ability to live up to its promise” (Seron, Coutin and White Meeusen 2013, 292). Sally Merry (1995) in her presidential address to the Law and Society Association acknowledged that “our faith in the progressive possibilities of law has been shaken” and that it “is no longer clear that law can produce a more just society” (Merry 1995, 12). Merry described as an example, the Hawaiian sovereignty movement which worked with state law through its People’s International Tribunal but was still not able to exercise power.

use as they will, but we do not really have much influence on their choice.” Hacker (2011) is similarly fatalistic when she observes that a “pessimistic standpoint is in tension with the legitimacy of the field as able to produce valid data to inform law reform and moreover with the law and society project as a whole, since it questions the importance of studying the law if it is but a mirror of more dominant social forces”

In certain quarters of Law & Society scholarship, pessimism regarding law's ability to produce social change continues. In 2001, Robert Nelson warned against "an unrealistic view of law as a vehicle for achieving social justice and an unrealistic assessment of prospects for law and social science research to influence the direction of policy" (Nelson 2001, 34 quoted in Abel 2010). Malcolm Feeley (2007), LSA president from 2005-2007, expressed "skepticism about the contributions that social science can make to justice." Feeley acknowledges that even well-thought out social science research may not produce "enough to construct (or even advocate) effective programs to remedy the pathologies of the existing social order" (Feeley 2007, 758). At the very least, Daphna Hacker (2011) writes, scholars are beginning to doubt the "cause-and-effect science" of legal instrumentalism or "the ability of the law to engineer society" (Hacker 2011, 746).⁴⁷

Echoing these concerns, Stewart Macaulay (2016), LSA president from 1985-87, comments on the law-as-a-tool premise in legal scholarship:

Finally, in my 1984 lecture, I pointed to empirical research that established the indirect, subtle, and ambiguous way that law may have impact in the United States, particularly because avoidance and evasion are important ways that we deal with conflict. Much legal scholarship is concerned with the consequences of particular statutes or case or with questions of the legitimacy of various legal institutions. However, until recently, most of what appeared in law

⁴⁷ There is also a sense that the shift to theories about law's constitutive properties also reflects difficulties scholars have had with the law-as-a-tool paradigm (Goldbach 2014).

reviews just assumed that, for example, passing a law to protect consumers would protect consumers or that a law with certain characteristics would produce an efficient result. But to quote Ira Gershwin, “It Ain’t Necessarily So.” In recent years, more and more we are beginning to see articles in U.S. law reviews that recognize this and attempt to cope with the messiness that we find in the reality of law in our daily lives.

I advocate a new legal realism where anyone writing about a legal problem would keep these ideas in mind and add them to her analysis. The impact of law is always an empirical question, and we cannot just assume that words on paper have little legs so they can wiggle down off the page and enforce themselves. (Macaulay 2016 ; footnotes omitted)

5.2 A “New Legal Realism”?

While Judicial Behavior research is alive and well in both political science and law faculties (Weinshall-Margel), some scholars have begun to question the strict adherence to ideology and policy preference explanations of judicial behavior (voting and decision-making). In 1997, Frank Cross argued that the narrow focus of the attitudinal model, selecting only Supreme Court cases and, without explanation, substituting politics for economic self-interest, could only offer an incomplete explanation.

The attitudinal model's single-minded focus upon political ideology seems rather artificial. Even if judges have a utility function that centers on producing "desired outcomes," the attitudinal model suggests that the judge focuses only

on the desirability of the political outcome of the case. It is possible, however, that judges also obtain utility from the legal outcome of cases. (Cross 1997, 298)

Recent scholarship also challenges the findings of conventional judicial behavior literature. For example, Sunstein, Schkade, and Elman (2004) demonstrate that partisan politics is not always determinative of decisions. In examining the “panel effects” on federal judges’ voting patterns, the authors caution that: “there is a substantial overlap between the votes of Republican appointees and those of Democratic appointees. Ideology is hardly everything.” (Sunstein, Schkade and Ellman 2004, 306) To be sure, the composition of a three-judge panel does “dramatically” effect outcomes, “in a way that creates serious problems for the rule of law” (Sunstein, Schkade and Ellman 2004, 303).⁴⁸ But the authors present meaningful counterexamples. In particular, they do not find significant difference between Republican and Democrat judicial appointees in particular areas of law, including: criminal appeals, federalism and commerce clause cases, and takings claims, as well as minimal impact of panel members on each other in abortion and capital punishment cases.

⁴⁸In an Op-Ed piece for the NY Times, Schkade and Sunstein presented the problem of “luck of the draw” as follows: Consider, for example, a case in which a woman has complained of sex discrimination. In front of an appellate panel of three Democratic appointees, she wins 75 percent of the time. But if the panel has fewer Democratic appointees, her chances decline. With two Democratic and one Republican appointee, she wins 49 percent of the time; with one Democratic and two Republican appointees, she wins 38 percent of the time. And with a panel of three Republican appointees, she wins just 31 percent of the time; David A. Schkade and Cass R. Sunstein, *Judging by Where You Sit*, N.Y. Times, June 11, 2003, at A31.

Certain scholars critique Judicial Behavior literature on the basis of its narrow focus, which depicts judges as “autonomous, unifocal, and unidimensional personal-policy-preference machines” (Benesh 2003). Burbank (2011) writes that, “All of this suggests that just because parsimony is *useful* in modeling for purposes of statistical analysis does not mean that the results of those analyses are *sufficient* for thinking about human behavior, about law, or for that matter about politics” (Burbank 2011, 50). Similarly, Lee Epstein and Jack Knight now write that the policy goal explanator is an “extremely (un)realist(ic) conception of judicial behavior that has dominated the study of law and legal institutions for generations” (Epstein and Knight 2013).

As a result, several scholars have expanded their domain of inquiry into the determinants of judicial decisions beyond legal factors and ideology to also include other “incentives and constraints” that shape judicial behavior (Epstein, Landes, and Posner 2013). Several scholars have dubbed this expanded investigation the “New Legal Realism,” a catchphrase which Miles and Sunstein (2008) paper attribute to Cross’s 1997 paper, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*.⁴⁹

In 1997, Cross’s idea of a *new* Legal Realism was to build a research agenda that would test legal claims and allow for the operation of both attitudinal and legal

⁴⁹ The New Legal Realism conference is held in Madison in 2004. Since then started CRN in LSA, and made organization website publishing papers beginning in 2007.

perspectives.⁵⁰ Following on Cross's lead, political science and legal scholars expanded their factors of analysis to include various elements of "judicial personality."⁵¹ For example, both Baum and Dothan look at the influence of reputation goals and costs on judicial behavior. Lee Epstein and Jack Knight argue for a more "defensible realism" that recognizes the judge "as a human being" with several non-legal pecuniary and non-pecuniary goals—such as job satisfaction, getting along with peers, increasing leisure time, the desire for a good reputation, promotion prospects and "the intrinsic interest of the work and the power or prestige and pride or self-esteem (for example, the sense of satisfaction at being employed in a socially useful job) that the job confers on him."

Epstein (2013), writing with William M. Landes and Judge Posner, suggests that judges seek to maximize their preferences over large set of factors. Judges must

⁵⁰ Cross advocates the adoption of a new Legal Realism that would bridge the distance between political scientists and legal theorists. On the one hand, legal theorists he felt still stood by many of the formalist claims. Moreover, legal theory was not about testable claims. Even Critical Legal Studies, which challenged formal tenants and argued that the law was "radically indeterminate, makes no specific claims or predictions about the course of the law" (251). On the other hand, political scientists could be "correspondingly unconscious of the legal model" (253).

⁵¹ See e.g. Thomas J. Miles and Cass R. Sunstein "The New Legal Realism." This work is "an effort to understand the sources of judicial decisions on the basis of testable hypotheses and large data sets." It involves "the close examination of reported cases in order to understand how judicial personality, understood in various ways, influences legal outcomes, and how legal institutions constrain or unleash these influences." Compare with Nourse and Shaffer: Each of the varieties of new legal realism defines itself in part in opposition to the assumptions of neoclassical law and economics' theory of judging, its theory of the individual and the state, and its approach to legal scholarship. Neoclassical: "premise that individuals act as rational preference-maximizers who respond to incentives and views law as a price that shapes such incentives"

cope with time constraints and must allocate their time across various activities. Their preferences include ideological preferences as well as the influence of legalist reasoning (Epstein, Landes & Posner 2013, 3).⁵² They also include aspects of “careerism”: 1. Job satisfaction, 2. External satisfactions, 3. Leisure, 4. Salary/income, and 5. Promotion. In this approach, where the judge is conceived of as a participant in a labor market, the judge is,

motivated and constrained, as other workers are, by costs and benefits both pecuniary and nonpecuniary, but mainly the latter: nonpecuniary costs such as effort, criticism, and workplace tensions, nonpecuniary benefits such as leisure, esteem, influence, self-expression, celebrity (that is, being a public figure), and opportunities for appointment to a higher court; and constrained also by professional and institutional rules and expectations and by a “production function” – the tools and methods that the worker uses in his job and how he uses them (Epstein, Landes, and Posner 2013, 5).

This version of the New Legal Realism represents a new direction in research on judges and politics in that it demands moving beyond legal factors and ideology in explaining judicial behavior. However, others scholars, like Sally Merry (2006), Stewart Macaulay, Mark Suchman and Elizabeth Mertz (2010), and Victoria Nourse and Gregory Shaffer (2009) take a more expansive view a New Legal Realist agenda. For example, Merry (2006) argues that the New Legal Realism includes insights from

⁵² “There is more influencing a judge than class and ideology, and the “more” includes, but importantly is not exhausted, in legalist reasoning”

ethnography, legal pluralism, and research about law-in-action, expanding “the framework of legal realism in several significant ways.” The “new” is methodological, using “multi-sited ethnographic research” (Merry 2006). The objects of study are also new, researching “spheres of law unexamined by legal realism” (for example international law and human rights) and “law as it is practiced in everyday life”.⁵³

These insights will be discussed in greater detail in the next section, which outlines the dissertation’s theoretical interventions.

6. Theoretical Interventions

6.1 Multiple Sites of Law-Making

Applying insights from the more expansive New Legal Realism, this dissertation aims to reexamine the Legal Realist legacy in American legal thought. The starting point is to describe the more recent critiques of legal instrumentalism and judicial process literature. But the dissertation goes a step further, bringing law-as-a-tool and law (judges) and politics into view as objects of study, with the insights of New Legal Realism as foundation and inspiration. On this basis, the dissertation makes three significant interventions, which are described below.

The dissertation’s first intervention is to examine judge’s “other” work – judges’ law-making outside of the written decision. If the New Legal Realism means

⁵³ Reflecting this more expanded agenda, questions in the 10th Anniversary conference program include: “How shall we define today’s “New Legal Realism”? What can it contribute to improving legal education for an embattled new generation of lawyers and legal educators? Could a new form of legal realism help to bridge the divide between law-in-books and law-on-the-ground, bringing legal education closer to the practice of law-in-action?”

taking a law-in-context approach and a “ground-level up perspective” to research “the everyday lives” (Suchman and Mertz 2010, 561) of legal actors, then we ought to study the “everyday” work that judges do in their workplace, at court, and for their institution. Insights from legal pluralism also allow us to examine “the interactions and hierarchies” (Merry 2006) among these multiple sites where law is created.

Both judicialization of politics and judicial behavior scholars focus on the written decision as the place where politics is being legalized – where judicial activity has political implications and judges are involved in public policy making. But judges often engage in questions of governance or activities that involve the regulation of persons even when they are not sitting on trials or appeals. The ways that judges are involved in politics is not merely a matter of inserting their ideas or ideology into casework.

For example, judges in Ontario have been working on various law reform projects, attempting improve Aboriginal confrontation with the criminal justice system (Ch. 3). This includes projects that target Aboriginal participation in the criminal trial, such as integrating sentencing circles into the criminal trial or examining Aboriginal representation on the jury roll. Regional Senior Justice Bode from the Northwest Region in Ontario sat on the First Nation Jury Review Implementation Committee which was established to try to improve Aboriginal participation on juries.⁵⁴ Ontario judges were involved in establishing the Gladue Court, a court that applies principles

⁵⁴ Iacobucci Report, following which the Ontario government established separate advisory group and implementation committees. (now only one committee). (NAN Conference Report)

of restorative justice and allows judges to take into account “s. 718.2(e) of the Criminal Code and the consideration of the unique circumstances of Aboriginal accused and Aboriginal offenders.”⁵⁵ Judges have also been involved in reviewing and reforming the “Fly-In Court” procedure, which sets out the procedure for judges, prosecution and defense counsel who travel to northern remote communities for criminal matters. These other sites might be more “normatively laden” (Riles 2011) and more contentious than the lack of treatment would suggest. On the other hand, these may be law reform projects for which judges are particularly well suited and so their involvement complicates current acceptable views about judging and “law-making”.

Judicial behavior scholarship focuses on partisanship, judicial connection to party politics and the ways that this plays out in decision-making or voting on judicial panels. Once we expand the domain of inquiry of judge’s work to include court and judicial reform projects, we see that a great deal of judicial work is inherently political, and in ways that is not always about partisan politics. In other words, if we think of the judicial function in a more inclusive way – one that resonates with judges themselves – we can see how the “problem” of politics in law is “much more interesting, variegated, uncertain, complicated, far reaching, heterogenous, risky, historical, local, material” (Latour year) and relational than the literature presents. Politics – in the sense of governance, intervention, relationships of comity and power,

⁵⁵ (Court of our own), Ottawa in September 2000
<http://www.nanlegal.on.ca/upload/documents/legal-articles/a-court-of-our-own---more-on-gladue-courts.pdf>. See Chapter 3 for further discussion.

spheres of influence, diplomacy and bargaining⁵⁶ – is “indissolubly mingled” (Latour) with judging. And not merely in the left/right conception of politics that underlies extant scholarship.

6.2 Judges in Relationships: Independence and Partial Connections

Applying insights from ethnography and law-in-action studies, this dissertation reexamines the legacy of the law/politics divide. Legal realists were suspect of the “received set of rules and concepts as adequate indications” of what happens at court. They accused judges of bringing politics and personal ideology preferences into the decision-making process, challenging the belief that judges dispassionately applied the law to the facts presented to them in the case. Judicialization of politics and judicial behavior literature followed on the Legal Realist task of examining whether and to what extent judges engage with the political when they carry out their judicial functions. But what assumptions do these lines of research continue to harbor that would require making judges’ connection to politics visible (Greenhouse)? In other words, what assumptions still subsist about separate legal and political systems (Reichman)?

Cross (1997) notes that formalist claims continue to hold sway in legal thinking: “Classic unabashed formalism is no longer widely embraced. Nonetheless, its fundamental claims retain much of their appeal.” Similarly, Whitehead writes,

⁵⁶ It is interesting to see what political scientists Kenneth W. Abbot, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal think of as ‘legalization’ and to infer politicized as the inverse

According to legal formalism, judges can and should discover and apply these rules in an objective, value-free way. Because law consists of a “mind-independent reality,” a uniquely right answer always carries the day. Far from being a relic of the past, this positivist-formalist conception of the rule-of-law is still prominent today. Even ... contemporary thinkers... cannot escape the gravitational pull of the idea that objective rules must act as an external constraint on judges. (Whitehead 12)

Notwithstanding claims that “we are all legal realists now” (Singer 1988; Green 2005; Leiter 1997), Legal Formalism continues to inhere in the ideal of an impersonal, neutral, and independent judiciary. Political science scholarship on judicial behavior is founded on similar premises. There is still a sense that there can and ought to be an independent judiciary and a formal separation between them, the executive, and the legislature.⁵⁷

But what exactly do we mean by “judicial independence”? Dodek and Sossin write in the introduction to their edited volume on *Judicial Independence in Context* that judicial independence “is widely acknowledged as a political good, constitutional norm, and foundation for the rule of law. It is easier, however, to identify the normative value of judicial independence than it is to define its contents and scope”

⁵⁷ Ahron Barak, former Chief Justice of the Supreme Court of Israel, defines judicial independence in tone that harkens back to legal formalism: the “independence of the individual judge means that the judge is subject to no authority other than the law” (78). When a judge is independent, they are “unaffected by social or political influences” and have “the freedom to examine and criticize the other authorities” (Meydani 25).

(Dodek and Sossin 2010, 1). Similarly, L. Ralph Mecham, former Director of the Administrative Office of the United States Courts, writes, “Ever since Chief Justice John Marshall’s vigorous defense of judicial review, there has evolved a general consensus in America that judicial independence is a good thing, even if none of us know precisely what it is” (Zagel and Winkler 1995, 795).

Most explanations of judicial independence adopt an instrumental approach, reverting to the “critical connection” between judicial independence and judicial impartiality (Dodek 2010, 301). Judicial independence is what enables judges to decide a case free from pressures or inducements. Judicial independence is “not an end in itself, but serving other social and political objectives” (Dodek 2010, 298-299). Judicial independence is a tool and empty vessel to bring about judicial impartiality. It provides the structure for impartiality and the public’s perception of impartiality: “Freed from threats from the other branches, judges may be better able to render dispassionate judgments and apply the law fairly to the facts.... impartially deciding cases according to the rule of law...” (Cross 1997).

Instead of looking at whether judicial independence lends legitimacy and secures an impartial judiciary, a New Legal Realist ethnographic approach would look at the details of how judges execute judicial independence: *how* do judges enact a separation of law from politics? *How* do they maintain “independent” relationships? How do they *practice* judicial independence? The dissertation thus intervenes in the judicial politics literature by exploring judicial practices of sociality—how judges engage with politics, professional relationships, and how they navigate closeness and

distance. Even though *independence* invokes a sense of distance, its purpose and execution still sits within the context of relationships – e.g. the judge’s interactions with parties or other branches of government. As Le Dain J. stated in *R. v. Valente* (1985), impartiality “refers to a state of mind or attitude”, whereas judicial independence relates to the “status of relationships to others” (Valente 1985, Le Dain J. in Dodek).

The dissertation adopts the anthropological approach of applying judges to the notion of independence (Strathern, Gift); that is, it re-describes judicial independence and the law/politics divide with the help of judges’ realities (Strathern, Gift). In the preface to *Kinship*, Strathern writes: “Anthropologists use relationships to uncover relationships.” Here, the dissertation explores judges’ relationship to independence in order to uncover more general notions about the relationship between law and politics. Judges are connected to the lives and stories of those that come before them. But their relationships look partial when compared to other political actors. Judges are connected. But those connections are partial, as they are for anyone practicing in law. Rather than overcoming the dichotomy or tension between law and politics, the dissertation attempts to bring into view and describe the partial nature of these connections.

6.3 Pragmatism and Hope

The dissertation makes a third intervention into the literature by stepping outside the legal instrumentalism’s problem-solution paradigm, in order to explore the way knowledge about law reform and legal change gets produced (Valverde 2003).

Legal Realists first challenged Legal Formalism by challenging the idea that a formal application of law—legal logic and legal precepts—was an end in and of itself. Legal Realists influenced future scholarship, guiding scholars in the direction of considering law as a tool that could be used to affect social change. Initially, law-as-a-tool was constructed for analytic purposes (Riles 2005)—to distinguish the sociological or realist agenda from formalistic applications of law and legal precedent. The notion that law should be thought of as a means to an end, however, became reified as the idea that law *was* a tool and means to an end (Riles).⁵⁸

Recently, though, legal scholars have begun to “turn away from the modernist assumption” that law is produced and valued on the basis of its contribution to “social circumstances over time” (Pottage 2014, 149 quoting Greenhouse 2010, 806): “The once-innovative project of analysing ‘law in context’, or ‘law and society’, is being eclipsed by projects that do not expect law to function instrumentally...” (Pottage 2014, 149). For example, Annelise Riles (2005) takes up instrumentalism as an object of study, demonstrating a scholarly divide between instrumental (functional means) and interpersonal (social cultural expressive) genres of law (Riles 2011; Riles 2005).

⁵⁸ We are comfortable to maintain the premise that the law-as-tool metaphor (Riles) or problem-solution form is a reality (and not merely a knowledge practice or aesthetic under which we operate). Constructivism - Endogenous interests & identities: “historically constructed norms, ideas, and discourses needed to be analyzed”; principles and norms are not “independent” or “intervening” variables (Katz 1998 674) “In this view a full understanding of preferences requires an analysis of the social processes by which norms evolve and identities are constituted” ... “how ideational or normative structures constitute agents and their interests” (Katzenstein, Keohane, Krasner 1998, 675) intersubjective structures - interests that motivate action include: norms, identity, knowledge, and culture

Other projects seek to capture the techniques and knowledge practices that are specific to law (Summers), carving out legal knowledge as its own and particular type of knowledge, and seeing “law itself as a technology with its own techniques, aesthetics, and products”, with its own specific forms of technocratic knowledge (Pottage 2004; see also Riles 2004; Riles 2006).

The dissertation follows on that research, observing legal instrumentalism “in context” and exploring how a problem-solution form operates in law reform and legal change. Macaulay advocates for a New Legal Realism by arguing that “If we put law in context, we should begin to produce a more accurate picture of the legal system as it actually operates, as opposed to relying on ideological claims based on the idealistic images of law.” By the same token, if we as scholars and legal practitioners put our practices and the way we build knowledge in context, we can begin to produce a more accurate picture of how we engage with law as a tool. Instead of relying on idealized (and antiquated) claims about legal change, we can “take account, very concretely, of the possibilities and limits of the machinery which the law has at its disposal and in the light of that the precise character of the ‘product’ which it ‘makes’.” (Juridicial Technologies) (Murphy)

For their part, Nourse and Shaffer’s (2009-2010) idea of “contextual approaches” includes research “engaged in bottom-up, participatory forms of empiricism (what we dub “action studies”), based on philosophical pragmatism’s premise that one cannot know one’s ends until one assesses means because one’s means open up new understandings of ends” (Nourse & Shaffer 2009-2010, 70).

Nourse and Shaffer argue that, grounded in philosophical pragmatism, New Legal Realists “in sum, are skeptical of models that presume known goals” (115). Instead, New Legal Realists stress “the importance of revisability and learning” (137). This kind of research avoids top-down “head in the clouds” approaches. Theory and practice are connected, and goals are “ends-in-view” rather than the “end state of affairs”.

The Pragmatism approach to means and ends and understanding goals also guides the research in the dissertation. American pragmatism – which so influenced sociological jurisprudence and the early Legal Realists – deeply explored the link between means and ends. Early American Pragmatism, the philosophical approach most often attributed to John Dewey, insisted that one cannot fully conceive of the ‘ends’ without having in mind the ‘means’ by which the ends are attained. Joas writes:

Dewey speaks of a reciprocal relationship between an action's end and the means involved. In other words, he does not presuppose that the actor generally has a clear goal, and that it only remains to make the appropriate choice of means. On the contrary, the goals of actions are usually relatively undefined, and only become more specific as a consequence of the decision to use particular means. Reciprocity of goals and means therefore signifies the interaction of the choice of means and the definition of goals. Only when we recognize that certain means are available to us do we discover goals which had not occurred to us before. Thus, means not only specify goals, but they also expand the scope for possible goal-setting. 'Ends-in-view' are not,

therefore, vaguely conceived future situations, but concrete plans of action which serve to structure present action. Joas 1996, 154)

In this view, means and ends are indelibly connected. Ends do not exist, because they still lie in the future. “Ends” only exist in the present as “anticipations” (Joas 1996). Similarly and inversely, conceptual knowledge and deliberations on “anticipated futures” (Scott 2004) influence our view of the present. David Scott, for example, writes that our “interrogations of a given present” are distinctly related to “the projection of expectations about a hoped-for-future” (Scott 2004, 44).

Two important insights follow. First, pragmatism has an account of unintended consequences that has not been adopted by the theory of legal instrumentalism. Dorf and Sabel explain:

...a central theme of the pragmatism of Peirce, Dewey, and Mead is the reciprocal determination of means and ends. Pragmatists argue that in science, no less than in industry and the collective choices of politics, the objectives presumed in the guiding understandings of theories, strategies, or ideals of justice are transformed in the light of the experience of their pursuit, and these transformations in turn redefine what counts as a means to a guiding end. ... Pragmatism thus takes the pervasiveness of unintended consequences, understood most generally as the impossibility of defining first principles that survive the effort to realize them, as a constitutive feature of thought and action, and not as an unfortunate incident of modern political life. (Dorf and Sabel 57)

Second, far from being staid and somber, pragmatism is hopeful in a way that very much applies to law. Law in its instrumental form constitutes solutions in anticipation, and in that sense it is “both bounded and limitless” (Coutin and Yngvesson 2008).⁵⁹ In some sense, this is related to the problem-solution form which generates a sense of hope. The way that hope and fulfillment play out in the problem-solution paradigm forms the basis of anthropological work of Hirokazu Miyazaki (2000). Miyazaki explores the problem-solution rhetorical form in prayer and the ways that it generates faith and sense of fulfillment. Miyazaki writes:

...it is clear that by repeatedly presenting sets of questions and answers or problems and solutions, Fijian ritual participants experience intimations of an ultimate response. It is through the appreciation for, or ‘empathy’ (Bateson 1979:8) toward the completeness of these sets, I claim, that Fijian ritual participants experience the fulfillment of their faith, as the capacity repeatedly to place their own agency in abeyance” (Miyazaki 2000, 43).

Similarly, by working with law as if it is part of a set of problems and solutions, legal practitioners may also experience hints of “an ultimate” (positive) reaction in society (Stoddard; Torres). Truth, justice—the normative as intricately tied to the project of law—holds out hope for law reform and legal change. As a result,

⁵⁹ Law (as well as ethnography) is “limitless in that [its] potential for revealing truth can be directed toward a seemingly endless array of problems and projects.” In addition, the “truths” that law reveals are “already there—merely uncovered or made visible by particular techniques—and also new creations, brought into being through technology itself” (Coutin and Yngvesson 2008). Law and ethnography “are bounded in that, as technologies, each closes off other ways of knowing or revealing.”

despite skepticism about law's ability to produce social change, "sociolegal scholars consistently anchor their work in a concern with broad principles of justice implicit in the concept of law." (Feeley 2001)

Abel (2010) recounts LSA presidents who, despite disillusionment, urge law and society scholars "to promote progressive social change." He continues, as if to explain why, that "Law is intrinsically normative; its prescriptions embody societal ideals" (Abel 2010, 19). Even when legal practitioners have evidence of law's unsuccessful efforts in producing social change, this idea(l) still directs development projects, judicial reform, and human rights projects (Riles 2006; Stoddard 1997; Kroncke 2012).

The dissertation intervenes in the literature about legal instrumentalism, often framed as optimism versus skepticism (Davis and Trebilcock 2008) about law, by examining the way law as a tool operates and the way law reform projects unfold. I suggest that it is in the practices of legal change that we can find answers about the fidelity to the idea of law as a tool for social change.

7. Conclusion

In 1931, Pound admonished "the new juristic realists" on the basis that a "[f]aithful portrayal of what courts and law makers and jurists do is not the whole task of a science of law" (Pound 1931b, 700). In response to Pound's characterization and critique, Llewellyn undertook to describe the "common points of departure" for the legal realist movement. According to Llewellyn, these included the belief that law was "a means to social ends and not... an end in itself;" that law should be evaluated "in

terms of its effects, and an insistence on the worthwhileness of trying to find these effects” (Llewellyn 1931, 1236). The second area of commonality for legal realists was a “distrust of traditional legal rules and concepts insofar as they purport to describe what either courts or people are actually doing” and a “distrust of the theory that traditional prescriptive rule-formulations are the heavily operative factor in producing court decisions” (Llewellyn 1931, 1237). These two basic tenants – that law should be evaluated on the basis of its effects and a “distrust” of traditional theories of judging – were treated separately by the succeeding literature, but in Llewellyn’s opinion, they were indispensably tied together in the legal realist movement.

Thus, while readers might question a project that seeks to intervene in conversations about legal instrumentalism and conversations about judges and politics, the dissertation is being faithful to the project of the Legal Realists themselves. Both topics stem from the legacy of legal realism. In addition, viewed together, the dissertation challenges scholarship that takes projects of law-making as technical legal productions, as means for sociological ends. The legalization of politics and the politics of law-making and legal change are two sides of the same coin. The increase politicization of law through broadening the scope of judicial review is no more political and no less technical than judges in Japan investigating and then adopting a modified US jury system for serious criminal trials.

As Sarat and Silbey (1988) point out, the claim that “policy analysis is value free and apolitical, a technical inquiry concerning the efficiency of the relationship of possible means to predetermined ends... reflects, while it propagates, a vision of

knowledge and science independent of and removed from the sources of social power which it helps generate and support.” While most thinking about law other separates the conceptual from the social, the dissertation contends that we can only understand the way judges and instrumentalism and politics actually operate by continuing to hold all three in view.

CHAPTER 3
CRIMINAL JUSTICE REFORM, COURTHOUSE DESIGN, AND
THE ABORIGINAL CONFERENCE SETTLEMENT SUITES

If citizens can sense a basic congruence between the forms, materials, and workmanship of the courthouse, on the one hand, and the truth of what matters most to them as they conduct their business inside it, on the other hand, something approaching an authentic 'architecture of justice' will have been achieved. (Phillips 2006, 223)

The responsibility of a judge in this respect is not so very different from the responsibility of an architect as a creator of our public spaces. Public spaces also have great power to instruct or suggest, metaphorically or symbolically. Both in function and design, the buildings architects design will embody and reflect principles that tell the public who use or see them something about themselves, their government, and their nation. In doing so, those buildings can help us live together better as a community. (Justice Breyer 2006)



Figure 6. Thunder Bay Courthouse, Aboriginal Conference Settlement Suite Exterior*

*Unless otherwise specified, all pictures in the dissertation are my own, taken in the field. Copyright Toby S. Goldbach 2016.

1. Introduction

On April 23, 2014 MAG of the Attorney General in Ontario (“MAG”) unveiled a new consolidated courthouse in Thunder Bay, Ontario (Infrastructure Ontario 2014). The courthouse, which began operations one week earlier, consolidates two levels of trial court – the Superior Court of Justice (“the SCJ”) and the Ontario Court of Justice (“the OCJ”) – into one courthouse. The new courthouse houses fifteen courtrooms, including a larger courtroom for multiple offenders, as well as a conference settlement suite described by MAG as “a culturally relevant Aboriginal space designed for case conferencing, pre-trials, Gladue Courts and family and civil hearings” (Ministry of the Attorney General 2012-2013, 53).

Ontario is the site not only of the largest and busiest court system in Canada and one of the largest in North America (Ministry of the Attorney General 2012-2013, i), it is also hosts the largest number of people with Aboriginal ancestry – approximately 20% of the 1 million people with Aboriginal ancestry who live in Canada (Statistics Canada 2011). In addition, five of the twenty largest bands (the unit of government pursuant to the Indian Act) are located in Ontario. Almost half of the Registered Indian population in Ontario lives on reserves and settlements, but a large proportion of the population also lives in major urban centers in Thunder Bay, Sudbury, Sault Ste. Marie, Ottawa, and Toronto.

Thunder Bay is the largest community and the main urban centre for the eastern part of the Northwest judicial region. Eighty percent of the OCJ cases in Thunder Bay “originate with the Aboriginal population” (Facilities Management

Branch 2009, 5). From 2007-2009, the criminal law workload for OCJ judges in the Northwest region increased by approximately 10% and MAG expects overall docket numbers to increase.⁶⁰ MAG also projects that while the overall population in the Northwest Region is expected to decrease, over the next twenty-five years the Aboriginal population in Thunder Bay will increase as a result of urban migration.⁶¹

For the first time in Canada, a section of the courthouse was designed according to local native architectural design and justice principles. The Aboriginal Conference Settlement Suites (“the ACSS”) includes a circle room that emulates a traditional healing lodge, as well as several smaller meeting rooms for, as an example, accused meeting with defense counsel or victim services meeting with witnesses. The circle room can host sentencing circles,⁶² where criminal justice participants and members of the community meet to discuss the crime and its impact on the community. MAG explains that: “Recognizing that in certain regions Aboriginals comprise a substantial portion of court cases, it is important to explore ways that the courthouse design or spaces within the courthouse can respond to this uniqueness”

⁶⁰ Interview with Staff (Architect) at the Ministry of the Attorney General (Ontario) in Toronto, Can. (January 21, 2014). [Architect 1] During the period of consultations and facilities planning, the number of criminal matters in the Northwest Region rose. The percentage change of cases received between 2005-2006 and 2009-2010 increased 16%; the number of cases disposed rose 24% between 2005-2006 and 2009-2010 (Ministry of the Attorney General Change from 05-06 to 09-10 B13, B15).

⁶¹ The migration is a result of a newly built high school in Thunder Bay along with the migration to cities of all age groups for reasons of utilizing better health care facilities and employment opportunities (Phillet 2007, 2).

⁶² Similar to a traditional healing circle, at a sentencing circle, participants formulate conditions for allowing the offender to be reintegrated into the community. See discussion in section 3.1.

(Facilities Management Branch 2009). One of the judges that I spoke with described the goals of the new courtroom this way:

We're hoping that room will give us the opportunity to consult more broadly with the Aboriginal community about issues that impact on them that are justice system issues, like how do we safely keep people out of jail, how do we protect community interest, protect individual interests and at the same time have... some kind of reconciliation. We view the room as a place, one place, for that discussion to take place. And because it's clearly design to facilitate discussion about those issues, we hope it'll encourage that to happen more.⁶³

This chapter describes the new consolidated courthouse and the ACSS, with some focus on the court opening ceremonies that were held in April 2014. It examines the efforts Canadian judges have made to address problems for Aboriginal offenders in the criminal justice system, which indirectly but most certainly led to something like the ACSS being possible. The chapter focuses on judges in Ontario, more specifically judges in the Northwest region, who consulted on the new consolidated courthouse and who were instrumental in getting, and keeping, the ACSS on MAG's agenda. The chapter describes the work that these judges do to address Aboriginal confrontation with the criminal justice system, including incorporating Aboriginal justice teachings and procedures into the criminal trial. The chapter also describes how

⁶³ Interview with Judge (Ontario Court of Justice), at the Consolidated Courthouse, in Thunder Bay, Can. (April 23, 2014) [Judge A]

judges move beyond listening to cases and writing decisions to think about and work on questions about space and design. Finally, the case study serves as a means to examine the lessons of legal realism, investigating the practice of using law as a tool and the critique of judicial involvement in politics.

With respect to using law as a tool for social change, the chapter examines the way judges use legal initiatives to address Aboriginal confrontation with the criminal justice system. During the 1990s, various reports and commissions on Aboriginal offenders came to the conclusion that incorporating Aboriginal justice principles into the existing criminal justice system could address feelings of alienation as well as the disproportionate incarceration of Aboriginal offenders (The Task Force 1991; RCAP 1996a; RCAP 1996b; Dumont 1990; Law Reform Commission of Canada 1991; RCAP 1993; Manitoba, Hamilton, and Sinclair 1991). To this end, Parliament included an Aboriginal reference in its amendments to the sentencing provisions of the criminal code (Roberts and Melchers 2003). The federal government also funded community justice programs that would assist in bringing Aboriginal procedures into the criminal trial, and ministries and court services supported diversion programs to Aboriginal councils. Judges also participated, by conducting sentencing circles, by establishing the Gladue court, and by building infrastructure for Aboriginal justice.

The experiences of judges in the Northwest region, however, challenge standard thinking about legal instrumentalism. For example, there are measurables that would indicate the situation for Aboriginals and Aboriginal offenders has not improved. Incarceration rates have increased – not decreased – since the time that

legal initiatives were put into place (Roberts and Melchers 2003). Legal initiatives to include culturally appropriate methods have been co-opted and bureaucratized.⁶⁴ And yet, judges who know this may choose to continue to participate in law reform projects to address criminal justice system's treatment of Aboriginal offenders. Why? How do judges reconcile the continued use of law as a means to intervene? It would be easy to say that these judges are uninformed about the difficulties and mixed results. But that is often not the case. Instead, judges act amidst complications and irreconcilable contradictions – as do many legal actors (Riles 2006; Teubner 1998; Prado 2010; Hammergren 2006; Alter 2000; Desai and Woolcock 2015).

The standard law and society approach presented in earlier chapters is of legal actors who take a literal approach to using law as a tool for social change. The standard narrative is that legal initiatives can effect social change, those effects can be measured (presumably), and their effect can be evaluated as a success or failure. As a result, legal actors either wholeheartedly rely on law as a means to an end, or they disparage continued use of law as a tool when results are mixed (Davis and Trebilcock 2008; Kronke 2012; Trubek and Galanter 1974; Abel 2010). Ontario judges, by way of contrast, do neither. In practice, judicial law reform projects are more complicated than a simple means-ends relationship. As a result, in using law as a tool to address Aboriginal confrontation with the criminal justice system, judges in the Northwest region may doubt law's efficacy *and* continue to use it as a means to affect social change. This may appear contradictory, but it would be better understood as holding in

⁶⁴ Telephone Interview with Judge (Retired), May 2, 2014. [Judge B]

play (Strathern 1991) two irreconcilable lines of thinking: legal initiatives can and cannot be effective.

Ontario judges' work also highlights the ways that measuring legal effect remains elusive. Unwinding practical-material versus symbolic outcomes is more difficult than scholars would have us believe (Riles 2004; Riles 2005; Mattei 1994; see e.g. Stoddard 1997; Shaffer 2012, 237; Friedman 2005, 6-7; Abbott, Keohane, and Moravcsik 2000). This case study demonstrates that a mix of material and symbolic outcomes makes it difficult to definitively say that some legal intervention is or is not working. In that context, legal actors engage with law because positive outcomes may yield various symbolic effects. This chapter illustrates the broad and variable nature of "social change" (Reichman 2008, 189; Luhmann 2006).

Finally, judges' work in this area highlights the problematic almost abstruse nature of the separation between law and politics. Scholarship on judicial independence speaks of the separation between the judiciary and the government. And, in the ideal, the impartial judge decides cases according to the law without consideration of non-legal factors. Yet this case study illustrates the extent to which judicial work is immersed in the political. Judicial independence and impartiality are not things-in-the-world, but ideals, which judges strive to enact in practice. Many moments in a judge's work-life strains the notion of separation. As a result, judges constantly navigate their distance to the personal and political.

This chapter proceeds as follows. The next part (Part 2) briefly outlines the region's history, including colonial and postcolonial policies which have led to a

concern about Aboriginal offenders in the criminal justice system. Part 3 describes sentencing reforms and the courthouse project, both designed to incorporate culturally appropriate justice programs in order to address the difficulty Aboriginal offenders faced in the criminal justice system. Part 4 focuses in on the work of the judges in the Northwest region, their involvement in the design of the new consolidated courthouse, as well as other efforts not necessarily targeting sentencing reform. Parts 5 and 6 discuss the lessons of judges' other work for how we think about law as a tool for social change and the intersection of law and politics.

2. Context and Background

2.1 Local Legal History

In the late 1800s, a Dominion and Provincial land surveyor described Nipigon Crossing, the Canadian Pacific Rail crossing for the nearby Nipigon River at the northern part of Lake Superior:

The view from the elevated structure is simply enchanting. Over 100 feet below, the deep, dark waters are rushing madly towards the quiet bay to the south, while in full view, up stream, -among the richly foliated hills, lies Lake Helen, which in reality is but an opening of the river. Between this crossing and the bay, and sloping gently to the latter, is a magnificent spot. Glancing through an opening in the trees, we catch sight of an ancient post of the Hudson's Bay Company called "Red Rock," with its quaint white store and outbuildings nestling serenely in one of the loveliest of dales. It is evening as our express train passes this historic spot, and as the last rays of the setting sun

are illuminating the attic windows of the "Fort," ere it sinks to rest behind the pine-clad hills, many pleasant reminiscences of Swiss scenes are vividly recalled to mind (Roland 1887, 13).

Coates and Morrison (2008) argue that this kind of narrative tale of “Arctic exploration and adventure” is an artifact of southern creation: “The North remains... a snow-covered tabula rasa upon which Canadian writers, thinkers and artists have presented fanciful southern visions of the North” (Coates and Morrison 2008, 641). This sense of romance still persists. For example, in the forward to a collection of historical documents compiled by the Champlain Society, former Premier of Ontario, Bill Davis (1973), writes:

“Fort William on Lake Superior” is a phrase still capable of conjuring up a picture of colour and vigour, of doughty merchant adventurers and brave pioneer women. For several years the Thunder Bay region was an important funnel through which poured hundreds of men taking up the epic challenge of northern discovery.

But once the spectacular days of the Nor’wester were gone, the idea of industry and commerce blooming in northern barrens seemed to falter. The picture of Fort William, in southern Ontario eyes, became that of a place and social order belonging to the past. (Davis 1973, vii)

This Part consists of a very short description of local and legal history and introduces the impact of a colonial history on the criminalization of indigenous populations.

The city of Thunder Bay sits at the northern rim of Lake Superior in Ontario. Designated as a city following the amalgamation of Fort William and Port Arthur in 1970, Thunder Bay takes its name from the nearby body of water in Lake Superior. The area in and around Thunder Bay is known for its striking natural landscape, such as the “Sleeping Giant” – a land formation which, when viewed from the city, resembles a “reclining giant.”⁶⁵

The area in and around Thunder Bay and Lake Superior was once a hub of the fur trade, silver mining and the “frontier-probing Canadian Pacific Railway”. From the late 17th century until 1869 when the Hudson's Bay Company ceded control of a large area of land known as “Rupert’s Land,” French and British fur trading companies travelled the northwest region (Government of Manitoba n.d.). The Hudson’s Bay Company travelled along the quicker and easier northern trade route, whereas the French and then subsequently the Montreal based company, the North West Co., took a route through the St. Lawrence Seaway, using Fort William in the district of Thunder Bay as a depot along its trade route.

When the North West and Hudson’s Bay companies amalgamated in 1821, the trading route through the Thunder Bay district was abandoned. In this period following the amalgamation, the ‘local’ population consisted mostly of Hudson’s Bay Company personnel – either officers who met there for annual council meetings or

⁶⁵ The City of Thunder Bay describes the Sleeping Giant as its “50 million ton City mascot,” crediting an Ojibway legend which “identifies the Sleeping Giant as Nanabijou, who was turned to stone when the secret location of a rich silver mine was disclosed” (City of Thunder Bay 2016).

employees – and their dependents. In 1855, with the opening of a canal in Sault Ste Marie, the area saw a resurgence of commercial activity. Surveyors and prospectors flocked to the region. A boom in silver mining attracted investors from the United States and mines such as the Beaver Mountain Silver mine or the Rabbit Mountain Mining Region were founded.

Through the Treaty of Paris of 1763, the British imposed British common law on four provinces - Quebec, East Florida, West Florida, and Grenada – in the conquered territory. In 1774, the Quebec Act re-established French civil law in the Province of Quebec. French customary law governed except in matters of criminal law, where English law still obtained. In 1791, the Province of Quebec was divided into Upper and Lower Canada. As its first act, the Legislature of Upper Canada (now Ontario) reinstated English common law for property and civil matters (Wright 2012).⁶⁶ The land to the north and west – the “western Indian territory” (Dominion Lands or North-West Territories) remained under the administration of the Hudson’s Bay Company (xxi). Legal proceedings took place in Upper or Lower Canada, but otherwise the area remained largely ungoverned until the late 1800s.

In 1858, the Provisional Judicial District of Algoma was established. Col. John Prince, known for his “tough” justice, acted as the first judge for the District of Algoma (Wright 2012). In 1884, the government established the Provisional Judicial District of Thunder Bay with a District Court and Surrogate Court. A courthouse for

⁶⁶ Justice John deP. Wright (Retired 2015 from the Ontario Superior Court of Justice) is a regular contribute to the Green Bag.

federally appointed judges of the Provisional Judicial District was built in 1924 at 277 Camelot Street in Port Arthur. Set high atop a hill overlooking the bay, those approaching Port Arthur by water – one of the main methods of transport and commercial engagement – would easily see the courthouse.⁶⁷ The OCJ Courthouse was not built until 1974, at 1805 Arthur Street in Fort William.

In 1984 the federally appointed County and District courts were amalgamated into the District Court of Ontario. The Divisional Court, the District Court, and High Court (all federally appointed judges) were amalgamated in 1990, and eventually become known as Superior Court of Justice. Also in 1990, MAG divided the administration of Ontario courts into eight regions, including the Northwest Region. The administrative regions are the same for both levels of court; Court Services Division assists provincial and federally appointed judges (Courts of Justice Act, Section 71).

Taking up almost one half of the province, the Northwest region extends from the Minnesota border in the south to Fort Severn in the north, and from the Manitoba border in the west to the White River in the east. While it is the largest region geographically, the Northwest region is the smallest region in terms of overall civil, criminal and family matters (CSD Report 2012-2013). The Northwest Region contains less than 2% of the population in Ontario (OCJ Biennial Report 2008-2009). MAG

⁶⁷ “The attachment of the legal and judicial community to the 1924 Superior Courthouse is profound; certainly, part of that attachment is due to their appreciation of the fine architecture and dramatic setting of this building.” (Stacking 6.2, 96)

operates base courts in Thunder Bay, Fort Frances, Kenora, and Dryden, as well as 36 satellite courts, most of which are only accessible by air.

2.2 Colonial History

The history of indigenous peoples in the Northwest region is indicative of transitions from colonial governance to national unified government and the abuses of indigenous populations. Justice John deP Wright (2012), Superior Court judge for Thunder Bay and former member of the national advisory board for the Osgoode Society for Canadian Legal History, describes the legal history as follows:

I should say a few words about the Doctrine Of Discovery. At the time when Europeans were asserting claims to land in North America the prevailing philosophy which governed European nations amongst themselves was what we call the Doctrine of Discovery. Originally this doctrine held that if Europeans discovered terra nullius, that is uninhabited land, then ownership fell to the discoverer.

Embarrassingly, however, the land in North America was not uninhabited. European lawyers and philosophers then extended the concept of terra nullius to include lands that were not in the possession of ‘civilized’ peoples or were not being put to a proper ‘civilized’ use according to the European definitions of the term. (Wright 2012, 2)

Eight months after France ceded control of its lands under the Treaty of Paris 1763, the British Parliament issued a Royal Proclamation, introducing a policy on land acquisition forbidding any party other than the Crown from acquiring land (Calloway

2006). While the Royal Proclamation of 1763 “portrays Indian nations as autonomous political entities, living under the protection of the Crown,” it laid the foundation for both “safeguarding the rights of Aboriginal peoples and establishing a process to permit British settlement.”⁶⁸

Over the next seventy years, the British government purchased approximately twenty-seven pieces of land (Treaty Research Report). In 1850, W.B. Robinson negotiated two treaties for lands near Lake Superior and Lake Huron. Through these two agreements, Robinson acquired for the British government virtually the whole of the Upper Canadian northwest – an area totally over 50,000 square miles of land, which at the time was occupied by a population of approximately twenty-five hundred people.⁶⁹ The Robinson Treaties were inclusive, providing a schedule of reserves (3 under the Robinson-Superior Treaty and 21 under the Robinson-Huron agreement), provisions for the disposition of the land to settlers, registration of titles and the issuance of licenses for mining, wood cutting and other purposes (Wright). The treaties gave individual band chiefs the right to choose sites for reserves, “usually

⁶⁸ Royal Commission <http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637#chp3>

⁶⁹ Generally referred to as the Robinson-Huron Treaty, the agreement of September 9th called for the cession of the Lake Huron shoreline, including the islands, from Matchedash Bay to Batchewans Bay, and inland as far as the height of land. The agreement of September 7th, known as the Robinson-Superior Treaty, gave the Crown the shoreline of Lake Superior, including islands, from Batchewana Bay to the Pigeon River, inland as far as the height of land. The first contained 35,700 [Note 38] square miles of land, sold by a total Indian population of 1240 [Note 39]; the latter was occupied by 1422 [Note 40] people and contained 16,700 [Note 41] square miles of territory. <https://www.aadnc-aandc.gc.ca/eng/1100100028974/1100100028976#ft2b>

locations of longstanding usage such as a summer encampment where limited agriculture was practiced” (cite).

The Robinson treaties became the model for treaties with “Indians living north and west of the area ceded to the Province of Canada in 1850” and stipulated that “the Indians surrendered the land ... in return for certain reservations and financial benefits” (xxx). The treaties expressly included provisions that Reserve lands could not be sold without consent of the Chief Superintendent of Indian Affairs (cite), which echoed the Royal Proclamation of 1763. The treaty reserved limited portions of land to accommodate native hunting and fishing rights. It stated that the Indians were to have "the full and free privilege to hunt over the territory now ceded by them and to fish in the waters thereof as they have heretofore been in the habit of doing" [Note 43] except in areas that would become private property.

Through land acquisition and various incarnations of the *Indian Act*⁷⁰ – the federal statute dealing status, band governance and the management of reserve land – Canadian governments exercised control over native populations. Jonathan Rudin, Aboriginal Legal Services characterizes the settler policy as eradication followed by assimilation:

In the early 1800s, British government policy with regard to Aboriginal people was governed by the belief that over time, they would simply be eradicated as a people due to the impact of settler migration. When that did not occur, colonial governments prior to 1867 and Canadian governments since that time

⁷⁰ Indian Act, RSC 1985, c I-5; current version in force since April 2, 2015.

pursued a generally single-minded policy aimed at ensuring the disappearance of Aboriginal people in Canada. That the disappearance was to be accomplished primarily through assimilation—and a forced assimilation at that—rather than the physical destruction of a people does not lessen the immorality of the process. Nor does the manner in which the process was undertaken mean that there was not significant harm imposed on generations of Aboriginal people—harm that continues to be felt today (Rudin 2005, 25).

After Confederation in 1867, federal and provincial governments increasingly pursued policies of assimilation and criminalization. The federal government increased regulation on alcohol consumption and criminalized First Nations peoples' spiritual practices. For example, in 1884 and 1885 respectively, participating in potlatch ceremonies and sun dances became criminal offences.⁷¹ Governments restricted mobility and voting rights by requiring Aboriginal peoples to give up their status if they left the reserve community. First Nations children were forced to attend residential schools where physical and sexual abuse was rampant.⁷² And when the residential schools were closed down, provincial governments expanded the jurisdiction of child welfare agencies to include reserve communities, which resulted

⁷¹ <http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637#chp3>

⁷² Ibid. "In 1849, the first of what would become a network of residential schools for Aboriginal children was opened in Alderville, Ontario. Church and government leaders had come to the conclusion that the problem (as they saw it) of Aboriginal independence and 'savagery' could be solved by taking children from their families at an early age and instilling the ways of the dominant society during eight or nine years of residential schooling far from home."

in vast numbers of aboriginal children being taken and placed for adoption with non-Aboriginal families.⁷³

2.3 Aboriginal Confrontation with the Criminal Justice System

Recognizing the history and ongoing difficulties faced by native populations, Aboriginal justice advocates pushed for comprehensive investigation into Aboriginal alienation and their effects. Throughout the 1970s, 80s, and 90s, government commissions and public inquiries examined the causes and effects of systemic discrimination (Roberts; Culhane 1995, 151). In 1987, the Canadian Task Force on the Reintegration of Aboriginal Offenders as Law-Abiding Citizens published its final report.⁷⁴ Tasked with examining and recommending “changes for improving services to help incarcerated Aboriginals achieve successful social reintegration,” the Task Force wrote that crime,

is related to the socio-economic conditions experienced by Aboriginal people on and off reserves.... Aboriginal Canadians have a lower average level of education, fewer marketable skills, and a higher rate of unemployment. The infant mortality rate for Indian children is twice the national rate.... The rate of

⁷³ This expansion led to what has been referred to as the “60s sweep” or “60s scoop” where many Aboriginal communities lost most, if not all, of their children to the care of child welfare agencies. Those children who were successfully placed for adoption were almost never placed in Aboriginal homes, but rather were raised by non-Aboriginal families. Rudin Ipperwash 26

⁷⁴ The Report was published as *the Task Force on Aboriginal Peoples in Federal Corrections, Final Report* (Ottawa, Ontario: Ministry of the Solicitor General, 1987). Because of time constraints and perceived difficulty in obtaining reliable data, the Task Force consulted with experts rather than conducting empirical research. The Task force consulted with federal institutional staff and Aboriginal inmate groups, and the Correctional Service of Canada in Aboriginal communities.

violent death among Indian people is more than three times the national average.... Studies also suggest that Aboriginal offenders, perhaps to an even greater extent than non-Aboriginal offenders, come from backgrounds characterized by a high degree of family instability. Usually they have had a great deal of contact with various types of social services and criminal justice agencies.

Reports examined rates of imprisonment as a way to draw attention to the extent to which native populations were criminalized. Statistics comparing incarceration rates of Aboriginal people against incarceration rates of non-natives, or against population rates of aboriginal peoples, illustrated a disproportionate incarceration of aboriginal offenders. The Royal Commission on Aboriginal Peoples (RCAP) noted that in 1976, a sixteen year-old treaty Indian boy in the province of Saskatchewan had a 70% chance of a stay in prison by the age of twenty-five, while a non-Native Saskatchewan boy only had an 8% chance (RCAP 1996, 30).⁷⁵ In 1992, in the Prairie Provinces of Manitoba, Saskatchewan, and Alberta, Aboriginal people represented approximately 15% of the population, but their percentage of total prison

⁷⁵ Ministry of the Solicitor General, Ottawa, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* Royal Commission on Aboriginal Peoples (Ottawa: Canada, Minister of Supply and Services Canada, 1996), at 5, 24; see also DEP'T OF JUSTICE CAN., *FINAL EVALUATION ABORIGINAL JUSTICE STRATEGY 12* (2000), http://publications.gc.ca/collections/collection_2007/jus/J3-6-2000-1E.pdf ("Aboriginal people continue to be overrepresented among admissions to adult correctional facilities, as 15% of provincial/territorial admissions are Aboriginal peoples, while they represent 2.8% of the general Canadian population The [Canadian Centre for Justice Statistics] reported that in 1997/98, the total percentage of Aboriginal peoples sentenced to provincial/territorial probation was 12% – over four times the proportion of Aboriginal people in the Canadian population.").

population could be as high as 60% (Royal Commission on Aboriginal Peoples).

Justice Cawsey in his report for the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta suggested that,

It is a well known and historically persistent fact that the Aboriginal peoples of Alberta have been dramatically and proportionately over-represented in jails and penitentiaries. Task Force research has determined that, over the past five years, the percentage of Aboriginals in jail has ranged from 29.7% to 31.5% for the total Aboriginal population. For 1989... the percentage is 31.1% compared to a 4% to 5% representation of the general population of Alberta. This information alone is sufficient to cause serious concern.⁷⁶

Across the country the situation was much the same. The Supreme Court of Canada in *R. v. Gladue* examined incarceration rates and population statistics federally. The Court wrote that “If overreliance upon incarceration is a problem with the general population, it is of much greater concern in the sentencing of aboriginal Canadians. In the mid-1980s, aboriginal people were about 2 percent of the population of Canada, yet they made up 10 percent of the penitentiary population.... By 1997,

⁷⁶ (Canada), supra note 48 at 6-4 Cawsey Report, Section 6 “Corrections”, page 6-4. *Justice on Trial (Cawsey Report), Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta*, March 1991 Appendix 2, Terms of Reference, p. 1 The Alberta Task Force conducted comprehensive research, combining submissions from law organizations, researchers, and native groups with statistical data. The report has been relied upon and heavily cited since its release in 1991. For example, the report was extensively reviewed and relied on by the federally established Royal Commission on Aboriginal People; see discussion infra.

aboriginal peoples constituted closer to 3 percent of the population of Canada and amounted to 12 percent of all federal inmates.”⁷⁷

The percentage of Aboriginal offenders in relation to the total population of offenders in Ontario jails was less dire than in Prairie and Western Provinces (8% in Ontario compared to 49% in Manitoba) (LaPrairie 1992, 5). However, Ontario has the largest off reserve Aboriginal population (LaPrairie 1992, 5). In 1990, nearly one-quarter of all off-reserve registered Indians lived in Ontario. In a paper commissioned by the Ipperwash Inquiry,⁷⁸ Jonathan Rudin notes that Ontario has the third-highest rate of over-incarceration of Aboriginal people in Canada (Rudin 2003, 4). That is, if one compares the percent of Aboriginal people in the general population against the percent of Aboriginal offenders within the corrections population, Ontario is only behind Alberta and Saskatchewan in the extent of over-representation of Aboriginal offenders in prison populations (Rudin 2003, 13). Rudin writes:

Aboriginal overrepresentation is often thought of as a problem in western Canada but, in fact, Ontario ranks third in terms of overrepresentation across the country. Aboriginal youth are overrepresented in Ontario correctional facilities at a much higher rate than Aboriginal adults. While recent sentencing amendments and Supreme Court decisions have led to a lowering of the overall

⁷⁷ See also Solicitor General of Canada, Consolidated Report, Towards a Just, Peaceful and Safe Society: The Corrections and Conditional Release Act -- Five Years Later (1998), at pp. 142-55. (Quoted in Gladue)

⁷⁸ "Aboriginal Peoples and the Criminal Justice System" by Jonathan Rudin, http://www.archives.gov.on.ca/en/e_records/ipperwash/policy_part/research/ last checked Jan. 30, 2016

jail population, the drop in Aboriginal admissions is much smaller than that of non-Aboriginal admissions. This is true in both the adult and youth justice spheres. This suggests that overrepresentation will continue to be a problem for the years to come.



Figure 7. Superior Court of Justice Courthouse 1924-2013, 277 Camelot Street, Port Arthur, Ontario



Figure 8. View of the “Sleeping Giant” from the former SCJ courthouse in Port Arthur



Above, Figure 9
ACSS Conference Room

Below, Figure 10
ACSS Conference Room Ceiling



Below, Figure 11 Roof of a healing lodge, copyright Ministry of the Attorney General (Ontario)





Figure 12. Thunder Bay Courthouse, 125 Brodie Street North, Thunder Bay, Ontario (Panoramic).



Figure 13. Thunder Bay Courthouse East Facing

3. Approaches to Ameliorating the Circumstances of Aboriginal Offenders

After some 500 years of a relationship that has swung from partnership to domination, from mutual respect and co-operation to paternalism and attempted assimilation, Canada must now work out fair and lasting terms of coexistence with Aboriginal people (RCAP 1996b).

3.1 Culturally Appropriate Programs

Commissions and public inquiries were tasked with the identifying problems and proposing solutions that would “ensure the Indian and Métis people receive fair, just and equitable treatment at all stages of the criminal justice process...” (The Task Force 1991) Socio-economic conditions were not the only factors that contributed to over-incarceration. Task forces and commissions found that systemic discrimination in the form of over-policing and other facially neutral policies also caused high levels of criminalization and incarceration.

One of the areas that received immense attention was the effect of the sentencing process on the Aboriginal population. Justice Cawsey, in a report for the government of Alberta, identified lack of knowledge of the impact of sentencing on Aboriginal offenders as a concern. The report recommended more interaction between the various criminal justice system providers, between those who impose sentences and those who implement them. In addition, it recommended that “ways be found to provide information and feedback to Prosecutors, Judges, and defence lawyers regarding viable and effective sentencing options for Aboriginals. Possible resources could be sentencing ‘experts’, sentencing panels and community groups” (The Task Force 1991, 6-4).

Other reports focused on the conflict between Aboriginal and Euro-Canadian justice values (Dumont YR; Mandamin 1993; The Task Force 1991; see also Ross 1992; Frideres 1993; Winterdyk and King 1999; Green 1998; Kwochka 1996; Quigley 1999). Reports and commissions suggested that Aboriginal feelings of alienation resulted from fundamentally different world views and conceptions of justice.⁷⁹ Aboriginal justice advocates argued that the conflict between justice values could be attributed to the history of Aboriginal exclusion from the design and delivery of justice services in Canada (Canada 1975).⁸⁰ As a result, one response was to incorporate Aboriginal justice methods and values into the existing criminal justice system (Silverman and Nielsen 1994; Kwochka 1996). Rupert Ross (1989), an Assistant Crown Attorney working in Aboriginal communities in northwestern Ontario, wrote:

⁷⁹ For example, the 1987 Canadian Task Force on the Reintegration of Aboriginal Offenders as Law-Abiding Citizens proposed greater attention to Aboriginal culture in federal correction facilities. According to the Task Force, traditional spiritual customs were already being practiced in Correctional facilities since 1972. The Task Force recommended giving Aboriginal Elders security access on par with Chaplains and developing policies regarding sweat lodges and other ceremonies in federal institutions. The Task Force wrote about “The Sacred Circle” and its representation of “balance and harmony which is the ideal state for human life and for the world” (Ministry of the Solicitor General, 1988). The task force’s report stated that, “Because of many Aboriginal peoples’ deep roots in their own culture, the delivery of service to those individuals must take their spiritual and cultural background into account, including such values as art, language, family and community. Aboriginal-specific programs and services are thus warranted whenever they are required to ensure the same opportunity and equality of results” (Ministry of the Solicitor General 1988, 15).

⁸⁰ Concern about Aboriginal experiences was first linked to Aboriginal exclusion from the design and delivery of justice services at a National Conference on Native Peoples and the Criminal Justice System in 1975; see *Native Peoples and Justice: Reports on the National Conference and the Federal-Provincial Conference on Native Peoples and the Criminal Justice System, Both Held in Edmonton, Feb. 3-5, 1975* (Canada, 1975).

Despite the inevitable conflicts, however, it remains my view that a great deal can be accomplished if we make conscious and sustained efforts to invite Native involvement in the court of sentencing deliberations. That involvement should, in my view, consist of fulsome representation of the background factors which gave rise to the offence as well as detailed presentations of community and individual views on sentencing alternatives. Finally, bands should be encouraged to establish and administer community rehabilitation and deterrence programs.... it is my sense that achieving these goals in Native communities frequently requires such Band involvement and that it is the lack of such involvement which has given rise to a significant portion of the dissatisfaction now being voiced from so many quarters. (Ross 1989, 14)

In its section on “Alternatives”, Justice Cawsey also reviewed the possibilities for legal pluralism. The Cawsey Report stated that it favored the view of the Canadian Bar Association (Alberta Branch) Native Law Subsection, which endorsed legal pluralism and recognized the common law foundation of Canadian criminal justice:

In the context of alternative native justice systems, we endorse the importance of legal pluralism within Canadian Confederation and recommend that priority should be given by governments in their allocation of criminal justice research funds to encourage the development as pilot projects of working models of contemporary native justice systems.... It is not unrealistic to anticipate that models of aboriginal justice systems can be worked out in a Canadian context,

which... can reflect the accumulated wisdom of both aboriginal law ways and the common law.⁸¹

Two developments ensued. First, justice councils and diversion programs developed outside the state legal system, with funding through the Aboriginal Justice Initiative (first established in 1991). Second, within the Canadian criminal justice system, judges, certainly not all but some judges, immersed themselves in Aboriginal circumstances, history, justice methods and teachings. In 1992, the leadership in the Kwanlin Dün community began discussions with Justice Barry Stewart and other justice officials to establish an alternative justice procedure. The first sentencing circle through the Kwanlin Dün Territorial Circle Court was held on March 31, 1992. The proceedings were held in a circle and included the judge, crown, defence counsel, court and probation workers, crime prevention coordinator, family members, elders and community members.⁸² (Satisfying Justice 9; see also Lilles 2002; Stuart 1991).

Seven years after the first sentencing circle was held, the Supreme Court of Canada considered the 1996 amendments to the sentencing provisions of the Criminal Code in *R. v. Gladue* ([1999] 1 SCR 688, 23 CR (5th) 197) (the aboriginal reference,

⁸¹ “Submission to the Task Force on the Criminal Justice System and Its Impact on the Indian and Métis People of Alberta” 1990 in *Justice on Trial*, Section 11, Page 11-5. The report wrote that the exact scope and extent of an Aboriginal justice system had to be negotiated between the Indian and Metis people and the federal and provincial governments.

⁸² Satisfying Justice, 9; Mayo, Yukon in the case of *R. v. Moses* (1992). 71 C.C.C. (3d) p. 247 (Y.T.C.).

see Roberts).⁸³ In dicta, the Court interpreted section 718(e) of the Criminal Code, which directs judges considering alternatives to imprisonment to give “particular attention to the circumstances of Aboriginal offenders,” as an instruction to approach the process of sentencing differently. Taking into consideration the circumstances of Aboriginal offenders meant taking into account “the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.”⁸⁴ Judges could appropriately consider including in a sentence “community-based sanctions” which align with Aboriginal “concept[s] of sentencing and the needs of people and communities” (para74).⁸⁵ In the search for a fit sentence the sentencing judge could conduct the sentencing process with the perspective of the Aboriginal offender’s community in mind (para38-39).

In response to the Supreme Court’s decision in *R. v. Gladue*, Ontario judges collaborated with Legal Aid lawyers to establish a “Gladue Court” in downtown

⁸³ Sentencing circles could be integrated into sentencing without legislative reform because of the common law discretion judges had in sentencing. The 1996 amendments to the sentencing provisions of the Criminal Code provided additional authority to conduct sentencing circles. The introduction of the conditional sentence allowed the community to craft a sentence for the offender which could be served in the community. And section 718.2 (e) allowed judges to conduct sentencing procedures which were culturally appropriate.

⁸⁴ *Gladue*, para 66.

⁸⁵ At paragraph 74, the Court wrote: “In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.” In *R. v. Wells* [2000] 1 S.C.R. 207, the court reiterated that section 718.2 (e) contemplated “the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.”

Toronto.⁸⁶ After a presentation by the Aboriginal Legal Services of Toronto at a conference of the Canadian Association of Provincial Court Judges, Judge Patrick Sheppard approached the presenters “and suggested that one way to address the challenge presented by Gladue was to create a court specifically for Aboriginal people.”⁸⁷ Following this, Professor Kent Roach of the University of Toronto, Jonathon Rudin of the Aboriginal Legal Services, an Aboriginal court-worker, Justice Sheppard, and three other Toronto Old City Hall Courthouse judges met to work out the details for a court that would implement the directives laid out in *R. v. Gladue*. The Gladue court opened in October 2001, and was the first Aboriginal court in an urban setting (Whonnock 2008). At the Gladue Court, “staff is trained to apply the Gladue decision and present the appropriate evidence” (Knazan 2003). A Gladue Caseworker writes a Gladue report, which focuses on the circumstances of the Aboriginal offender, and where appropriate “links that life story to broader issues facing Aboriginal people such as the intergenerational trauma of residential schools...” (Rudin 2006). The Gladue report might also suggest recommendations for sentencing.

In the Northwest Region, the Thunder Bay Indian Friendship Centre runs an Aboriginal Community Council Program funded by the Aboriginal Justice Strategy,⁸⁸ for justice programs within the local Aboriginal community. In addition to alternative

⁸⁶ Court of our own, Ottawa in September 2000
<http://www.nanlegal.on.ca/upload/documents/legal-articles/a-court-of-our-own---more-on-gladue-courts.pdf>.

⁸⁷ Ibid.

⁸⁸ AJS footnote Aboriginal Community Council Program, Gladue Services Program (Thunder Bay Indian Friendship Centre), (<http://justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/cf-pc/location-emplac/ont.html>)

procedures that are run during the course of a trial, the Aboriginal community runs diversion programs. The Friendship Centre provides counseling for matters that are diverted, where offenders come before them and work with resources in the community to address the issue brought before them. Judges (mostly the OCJ judges), conducted sentencing circles or incorporated Aboriginal justice methods into trials or as part of diversion programs. One judge from the Northwest region described his early experiences with sentencing circles:

Right from the get go – because I was presiding in remote northern communities – I had the opportunity to do what I’ll call traditional restorative justice. And what I mean by that is that I would see the leaders of the community, both spiritual leaders, the elders, as well as the political leadership, show up at court, knowing what the issue was, and speaking to the issue. They had prepared themselves, understood what the case was about, had spoken to the families that had been impacted by the behavior, and so were up to speed. And I was blown away, as were the lawyers, at the eloquence that we would hear in these traditional spontaneous events. ...

[I]t captured everything we think about in terms of restorative justice. The accused would speak, accept responsibility for what he did, express in a very considerate way his remorse, his understanding of the impact of his behavior ... and his shame in disturbing the community in the way he had. The victim, the victim's family, would typically forgive him, they would embrace; they would promise to change things, to make things better, so that this wouldn't

happen again. The leadership would talk about what they could do to make things better, and it might be in terms of dealing with a frustrated young person, trying to get them a job, or if there was a housing issue trying to get a house for people. So it was very, very constructive, very positive, very meaningful incredibly sincere, and very, very cathartic, because people were very emotional, there was tremendous commitment. And so I saw the best, and it was spontaneous and genuine. (Judge B)

3.2 Symbolism in Courthouse Architecture

Within this context favoring culturally appropriate justice programs, MAG set out to build a new consolidated courthouse in Thunder Bay.⁸⁹ Ministry architects who took lead on the construction of the courthouse identified a regional need for restorative justice and deliberately sought to accommodate that need into their designs. One MAG architect referred to this as a “facilities solution.” MAG’s consultation process with the various stakeholders identified a demand for “alternative ways” of dealing with the Aboriginal community (Architect 1 2014). In considering the area’s needs projected over the next thirty years, the operative question was “...what is it that we can do to help facilitate some of the proceedings and trials that are being

⁸⁹ MAG administers the justice system in Ontario, in particular through the Court Services division, which “manages more than 250 court offices in communities across the province.” The Court Services Division assists in scheduling cases and “facilitate[s] the delivery of other justice services, including civil and family mediation programs, victims' services”. Court Services manages the jury system “and provide the courtroom clerks, court reporters, registrars and court interpreters required for court proceedings.”

influenced by the community?” (Architect 1 2014) I detail the impact of these considerations in the construction of the ACSS in the next section.

In our interview, the MAG architect also stressed the immaterial aspects of courthouse design. The architect emphasized the symbolic import of the courthouse, and intimated that another way to include Aboriginal justice principles was to attend to the symbolic meaning and “intangible aspects” of the courthouse

We need to take... into account... how big the spaces are, what are the attributes of these spaces and what it is that we can do to help, whether it’s an emotional psychological, ...some of the intangible aspects of programming, designing, and building spaces. Because we know that those aspects influence by which cases are conducted because you are psychologically affected by the environment by which you operate in” (Architect 1 2014).⁹⁰

Courthouses are often designed to evoke meaning.⁹¹ For example, the glass walls of the South African Constitutional Court make judges visible to the surrounding

⁹⁰ The Facility Program Report 2007 summarizes “in order of priority, the factors supporting the need for a proposed Thunder Bay Consolidated Courthouse...: To present the appropriate courthouse image, one of openness, dignity and independence; To rectify, with a new location, the current deficiencies impacting operations and service delivery by modernization; To add needed building square footage in terms of number of judicial hearing rooms -courtrooms and Conference/settlement rooms – and all support spaces along with a solution for required future flexibility and potential for expandability.” (Phillet 2007, 2-3)

⁹¹ To this end, there is a community of architects that work strictly on courthouse projects: the Academy of Architecture for Justice within the American Institute of Architects holds a yearly international conference on Justice Design. In 2012 the Thunder Bay and ACSS group presented on the new construction of the courthouse and the inclusion of aboriginal design principles - Thunder Bay Courthouse, Aboriginal Conference Settlement Suite, Case Study, Speakers: Robert Gordon,

community, which is meant to evoke a sense of transparency (Law-Viljoen and Buckland 2006).⁹² Judges are not raised but are on the same eye-level as the lawyers, in order to convey “the sense of equality under the Constitution, to be reminded that people are not coming to plead or beg for constitutional justice, they are not deferring to oracles, they are South Africans...” (Sachs 2006) At the Supreme Court of Israel, the path to the courtrooms takes one up a stone ramp past a glass window wall that faces the city. Publicity for the Israeli Supreme Court explains that judges should see the people and the community, always keeping them in minds when they go to do their work: “The next thing you pass in the building on your way to the courtrooms is the law library. First you see the people, then you have a sense of the law, and then you can go and discharge your duty.”

For the Thunder Bay courthouse, architects consulted with the Aboriginal Legal Services of Toronto, the Aboriginal Community Health Centre, Aboriginal Legal Services, and the Sandy Lake First Nation Elders Council, in order to learn about Ojibwa, Cree and Anishnawbe justice principles which they worked into the design features of the new courthouse. Designers also borrowed symbols from

Director of Court Operations, Northwest and Northeast Regions, Ontario Darrell Mandamin, Aboriginal Liaison/ Interpreter Co-ordinator, Northwest Region & Elder, Whitefish Bay First Nation Frank Greene, FAIA Wei Chiao, OAA Claudina Sula, OAA, RAIC, NCARB.

⁹² Similarly, Justice Breyer notes the neoclassical elements in courthouse design, such as “blocklike massing, and heroically scaled public porticos, staircases, and sculptural elements,” which are meant to convey the authority of law imbued in the courthouse. The U.S. Supreme Court, designed by Cass Gilbert, features “Corinthian colonnaded white marble” and arches, rotunda and cupola in classical Greek Revival style to project the ideals of “fairness, dignity, continuity, and equality” (Beyer 2006, 12, 43).

Aboriginal teachings and merged aboriginal symbols with official government symbols. For example, the main entrance of the courthouse faces east to “the rising sun to symbolize the beginning of life” exterior landscape garden in the courthouse civic plaza to acknowledge “Mother Earth”. On the outside of the courthouse in the area where the ACSS is located, architects etched a motif of the Seven Grandfathers (Figure #). Based on Anishinabek seven grandfathers’ teachings, the Turtle, Buffalo, Wolf, Bear, Eagle, Sabe and Beaver represent teachings for Truth, Respect, Humility, Courage, Love, Honesty and Wisdom, respectively. The teaching on honesty, for example, explains that,

Long ago, there was a giant called Kitch-Sabe. Kitch-Sabe walked among the people to remind them to be honest to the laws of the creator and honest to each other. The highest honor that could be bestowed upon an individual was the saying "There walks an honest man. He can be trusted." To be truly honest was to keep the promises one made to the Creator, to others and to oneself. The Elders would say, "Never try to be someone else; live true to your spirit, be honest to yourself and accept who you are the way the Creator made you.

The design is an unbroken line “merging the seven figures into one interconnected” form (Figure #). The architects offer the explanation that the “unbroken line can be seen to represent the Seven Grandfathers, with each figure depending on another for its own formation” (Adamson Associates Architects 2011). Explanations of symbolic meaning for courthouse art and the design motif appear on plaques that are prominently displayed in the ACSS area (Figures # and #). Architects

also worked with the Elders Committee to design an eagle feather stick and flag (figures X) which can be brought out and displayed in the conference room during appropriate occasions.⁹³ The stick includes the animal symbols from the teachings of the grandfathers, as well as depictions of official symbols of provincial and federal governments. Included are images of the flags for Ontario and Canada, as well as Ontario's flower emblem, the trillium flower and the province's official bird, the Common Loon.⁹⁴

Judges, architects—those who are involved in the construction of courthouses—are attentive to the symbolic import of the physical structure that is the courthouse (Resnik and Curtis 2011).⁹⁵ The physical courthouse is itself symbolic, in that it is the “designated and enclosed area, which enables Law to organize what ought to be proper to its proceedings.” As the “solid artifact of law,” it “elicits a public fascination through the display of splendour and tradition” (Haldar 1994). Courthouses symbolize our grander projects – the embodiment of self-representation (Resnick,

⁹³ Interview with Staff (Court Services Division)

⁹⁴ The trillium which is found in the deciduous forests and woodlands of Ontario was adopted as an official symbol in 1937, for the purposes of having something to plant on the graves of Canadian servicemen overseas (cite). Of the Loon, the Legislature of Ontario writes: “Loon's eerie call is associated with the beauty and solitude of Ontario's wilderness.”

⁹⁵ Architects for the Thunder Bay courthouse described the symbolic function of the courthouse in various reports: “Participants in the consultation process were firm in the communication of the idea that the new courthouse must be representative of the ideals of the justice system, and as such, sited and designed as a significant building for the community” (Stacking). The mixture of government symbols with symbols and art that borrowed from aboriginal traditions expressed a responsiveness “to the local culture to instill community pride” (Final Report), and conveys the message of a new stage of sharing in the administration of justice.

Curtis & Tait 2013) and the hopeful aspects of law. In an interview following the unveiling of the new courthouse for the Supreme Court of Israel, then Chief Justice Meir Shamgar explained the importance of the new building for the public perception of a strong and independent judiciary:

The independence of the judiciary... serves the citizen who is coming to court. The judges, being brought up in a certain tradition, are normally not afraid of pressures surrounding them. But when you have the Knesset building on the one side, and the government ministries on the other hand, and then the highest level of the judiciary sitting in a decrepit old Russian monastery, there could be a misunderstanding in the eyes of the man in the street that this is some kind of inferior body. I believe that the justices of this court will write the same judgments even if they sit in the cellar of an old monastery. But in the eyes of the people, this could decrease their certainty--their belief in the existence of justice that could defend them, protect them (Freidman 1993, 80)

Similarly, in our interview, MAG architect noted the importance of the courthouse to the public perception, in this case, of fairness and inclusiveness:

The overarching view is that, yes, it's a courthouse and its primary function is the delivery of justice. However, at the same time, it's a very high profile civic institution, it's a civic building. And a civic building represents the community and it represents the value and importance of that community. What is it that we can do to instill in the community that this need not necessarily be this

adversarial image of justice. So, how we translate that in terms of its imagery and its function for a building is very important (Architect 1 2014).

At the court opening ceremonies, Michael Gravelle, Minister of Northern Development and Mines and MPP for Thunder Bay/Superior North also spoke of the representation of fairness embodied in the courthouse:

... when you come right down to it, when you walk into this building, it is the sense, it really is about justice, and it really is about a sense of a fairness that we have every expectation of achieving and reaching ... So this is a great day, of excitement, but it's also one where we get to increase our expectations and our dreams and that seeking of justice for all is alive and well as represented on this day. (Court Opening Ceremonies April 24, 2013).

The new courthouse in Thunder Bay thus embodies two typical ways of addressing Aboriginal confrontation with criminal justice system in Canada. First, it provides the infrastructure to conduct culturally appropriate Aboriginal justice programs within the existing system. Second, it conveys Aboriginal inclusion in the design and delivery of justice services by incorporating Aboriginal symbols and design principles into the physical structure of the building.

What were the judges' experiences working to address over-incarceration and feelings of alienation? The next part begins with the judges' work in the construction of the new courthouse and the ACSS, and then moves to a discussion of some other legal initiatives aimed at ameliorating the circumstances of Aboriginal offenders. The

next part also reviews the obstacles judges faced in the courthouse construction, as well as some of the events at the court opening ceremonies in 2014.



Figure 14. Courthouse Artwork.



Figure 15. Description of Artwork



**Figure 16. Procession of Dignitaries
During Opening Ceremonies**



**Figure 17. Eagle Feather Stick
and Flag**



**Figure 18. Description of Artistic Etchings on
building's exterior**

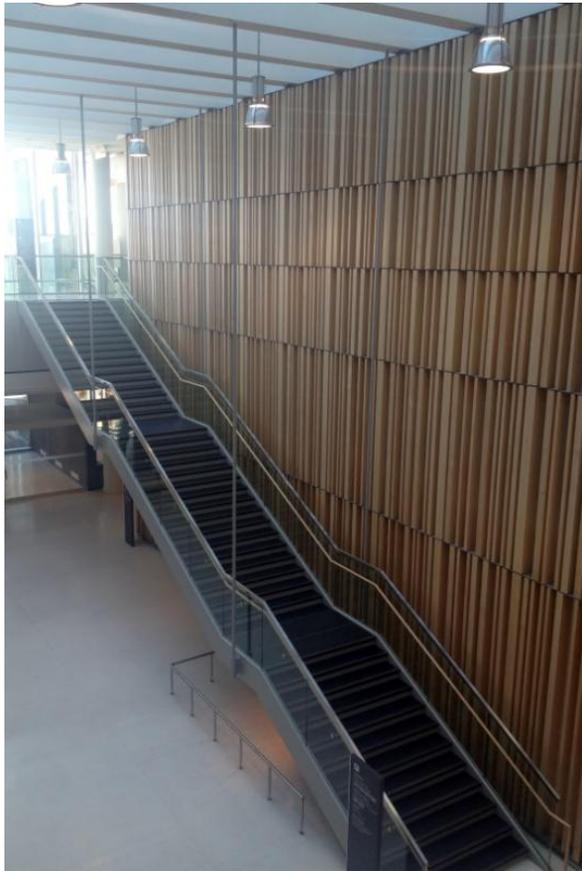


Figure 19. Courthouse Interior Stairs to Second Floor.

With the move to the Fort William part of Thunder Bay, design and elements within and on the exterior of the courthouse were used symbolically to reflect location. Stone and wood at the base of the courthouse and by the staircase (Figure #) invoke the landscape and “the natural elements of the Thunder Bay region” (Infrastructure Ontario News Release April 23). The textured glass on the south side of the courthouse (Figure # and #) is meant “to evoke the region’s many waterfalls.”



Figure 20. Thunder Bay Courthouse Southeast Facing



**Figure 21. Thunder Bay Courthouse
North Facing**

4. Ontario Trial Court Judges ‘Other’ Work

4.1 Courthouse Construction

The idea to consolidate the SCJ and OCJ courthouses had been in discussion for approximately twenty-five years. Though small in numbers, the local Bar serviced two courthouses, one in the historic district of Port Arthur and a second court in Fort William: “being separated by ten kilometers and a couple of railway tracks really placed them in an awkward position” (Judge A 2014). Regional Senior Justices⁹⁶ for both the OCJ and SCJ were involved in the sporadic discussions over the years.

Once the government publicly announced their intention to build a new courthouse, SCJ and OCJ judges met “regularly” with Ministry architects and the architectural firms to talk about courtroom size and workload: “how the building should function, what were our concerns about safety, security, just how the public

⁹⁶ Explanation of RSJ. Can give the list of those involved from Wei’s consultations: in particular, Justices Macartney, Fraser, Bode, and Pierce. RSJ Pierce for almost five years prior to the opening of the courts and RSJ Bode became involved approximately one year after he became RSJ)

should flow through the building.” (Judge A 2014) What was regularly? “We probably talked as judges amongst ourselves... for twenty four months or so, where I would say it was the subject of informal discussions almost on a weekly basis and formal discussions maybe 5-6 times a year for about twenty four months” (Judge A 2014). Judges – both OCJ and SCJ judges – met “fairly regularly” with MAG for about a year before the design work-up phase, and during the work-up phase, judges met with MAG staff and the design teams who were competing for the project.

Three design teams ultimately qualified to put forward proposals for the project, and the judges were part of the evaluation of their proposals:

[I]t became pretty obvious in the first three months or so after the initial presentations of the project ideas that one of them was quite weak in terms of design and it was just a much less concrete proposal, and so we then met with [the MAG architect] fairly regularly as they went back to the people who were making the proposals and said, you know, we need you to do this, we’ve got a concern about how traffic will flow, we talked about all those kinds of things. (Judge A 2014)

During the final design phase, in the “roughly eight to ten months before they actually put shovels in the ground,” judges met “a lot” (both judges emphasized this) to discuss the conceptual designs and collect feedback. All six OCJ judges had some form of input into the design and layout of the courthouse:

[A]ll of the judges examined plans when they became available and met with the architects collectively, and gave the architects our thoughts, criticism,

suggestions, and so on. And then going back before this building was built, there was a mock up of a small courtroom and the judges visited that, made suggestions and comments and so on. So the judges have spent quite a lot of time on this over the years, in various iterations of the planning... (Judge A, 2014)

Judges also met with Elders from the Aboriginal community, especially through the local Justice Committee.⁹⁷ The local Justice Committee “has all of the stakeholders and partners in justice.” It can recommend “any kind of procedural change that doesn’t impact a legislative change,” but instead addresses “process and directives.” The local Justice Committee usually met every six weeks, meeting every two weeks in the period immediately preceding and following the move to the new courthouse. On the day of the court opening ceremonies, one of the judges indicated that,

We’re having a local justice community meeting tomorrow ... we will probably have 15 or so stakeholders come to that meeting and we have interaction with half of those stakeholders every week or two. (Judge A 2014)

4.2 Sentencing Circles and the ACSS

Because over eighty percent of Thunder Bay’s cases originate within the Aboriginal population and overall docket numbers are expected to increase, OCJ

⁹⁷ In addition, throughout the building process, a committee of Elders from local native groups consulted with MAG. The Elders committee gave input on design, conducted ceremonies for the groundbreaking at the beginning of construction, celebrating and making a blessing for its completion, and assisted in the creation of a staff which will be available for local ceremonies (CSD?).

judges in particular felt it was important to increase infrastructure for Aboriginal justice programs. Judges were aware that the demographics in Thunder Bay are expected to change,⁹⁸ and were alert to their mandate from the Supreme Court of Canada in *R. v. Gladue*:

Well, it became pretty clear I think after amendments to the Criminal Code, what in 1996, and uh the Gladue decisions [sic] in 1999 and the subsequent decisions and our dockets which are significantly populated with a growing aboriginal population and the changing demographics of the aboriginal population in this jurisdiction that we had a lot of work to do in servicing that population. Uh, I think Gladue is a big (Judge A: “a driver”) it was a whack on the head to all of us, including myself, as an aboriginal woman that we had to do things differently. You know I had always sensed that, but you know, when you get the Supreme Court of Canada telling you that things are changing and you gotta change with the times and the population that you’re serving, it is a whack over the head. So I think that was the impetus for lots of the discussions. And the other thing was I think the Ontario Court has also seen a pretty, not a huge, influx of aboriginal judges that are members of the

⁹⁸ MAG Facility Program Report (2007) states that “While the total population of the Northwest Region is expected to decrease over the twenty-five year time frame, the aboriginal population in contrast will likely increase in Thunder Bay due to net migration.... (The migration is a result of a newly built high school in Thunder Bay along with the migration to cities of all age groups for reasons of utilizing better health care facilities and employment opportunities.)” The Report states that trials are longer and more complex, number of appearances and unrepresented accused has increased, also triggering the need for increased courts services and space (Phillet 2007, 2).

judiciary, whether on the justice of the peace bench, but they had always had a native justice of the peace program, so I think the Ontario Court has, in my view, been a leader in that area, in recognizing that this is a unique population with unique issues that are historically founded.⁹⁹

The Regional Senior Justice at the time when MAG first began meeting with local stakeholders spearheaded the proposal to build infrastructure for Aboriginal justice programs. He was involved in the beginning stages, in promoting the idea of a designated space that would be designed based on Aboriginal principles. “He, I think, put the issue on the table” (Judge A 2014) “And kept it there.” (Judge C 2014)

He was very ready to talk about the elephant in the room, so to speak, and challenge all of our notions of how to deliver justice differently and that began with an infrastructure issue. You know, this was an opportunity to build, the consolidated courthouse was an opportunity to design something that was amenable to a different way of doing things (Judge C 2014).

According to this former Regional Senior Justice, he became involved in the courthouse construction following a conversation at a meeting of the Chief Justice’s Executive Committee – the administrative group for the OCJ, composed of the Chief Justice, Associate Chief Justice, and the Regional Senior Judges.¹⁰⁰ Judges in other

⁹⁹ Interview with Judge (Ontario Court of Justice), at the Consolidated Courthouse, in Thunder Bay, Can. (April 23, 2014) [Judge C]

¹⁰⁰ The Ontario Court of Justice, in its Biennial Report 2008-2009 states that, “Section 36(6) of the Courts of Justice Act provides that the Chief Justice may hold meetings with the regional senior judges to consider any matter concerning sittings of the Ontario Court of Justice and the assignment of its judicial duties. Partly in

regions had been through the construction process with MAG. They had concerns and recommended that judges get involved at the earlier stages of design.¹⁰¹

[He] educated me about how important it is for judges to get involved in the design process because if you're not at the table, things happen and you end up unhappy with the result but you've missed the opportunity to change the course of things. So you've got to be there and you've got to be there in a constructive way, with a certain amount of knowledge, to understand how people operate.... So thanks to ---'s education, I was able I think to understand right away that it was important for me to take the time to talk to, to the architect (Judge B 2014).

Judge B recalls the genesis of the idea for a space designed for Aboriginal justice programs coming from a meeting with the MAG architect and the court's Ojibway Interpreter and Aboriginal Liaison, Darrell Mandamin:

Have you spoken to [the MAG architect]? Obviously you have... I think it's interesting to know what he has as a perspective in terms of my role, because, I

response to this provision, the Chief Justice has established the Chief Justice's Executive Committee (CJEC) to assist the Chief Justice with this work. CJEC is made up of the Chief Justice, the Associate Chief Justice, the Associate Chief Justice-Coordinator of Justices of the Peace, the seven regional senior judges, the President, President-Elect, and Vice-Presidents (Criminal and Family) of the Ontario Conference of Judges, and staff members from the Office of the Chief Justice. CJEC meets on a quarterly basis to establish province-wide policies within the Court. Subcommittees of CJEC are established to examine current issues and to formulate draft policies... . CJEC also serves as a forum for the exchange of information ...”

¹⁰¹ MAG -Architectural Design Standards for Courthouses constructing consolidated courthouses. See also in US Flanders – NCSC guide for courthouse design: Planning & Design Guide Court Facilities

can remember having dinner with him and our staff interpreter, Darrell Mandamin, in Kenora, and we were – I think it was dinner, it may have been lunch, but it was a meal anyway – and we were talking about various things and I think we were describing the way we set up court in the north, where it's an open square typically, to mimic as much as we can circle, and how everyone stays seated while court's on. So lawyers don't stand to make submissions and will remain seated and we even arraign the accused from a seated position, just to try to lower the formality a little bit, and increase the comfort level. ...

But, somehow the conversation then moved to what we could do in terms of courtrooms.... And we were lucky because [the architect] got inspired by our chatter and when we suggested that we have at least one room in this new courthouse that is going to, um, capture traditional aboriginal spirituality, he said yeah, let's try to do that (Judge B 2014).

After that meeting, the MAG architect set out to learn about different Aboriginal building designs and the court interpreter helped MAG arrange an Elders advisory council for the construction project. Judge B described his role following the initial meeting as protector and guardian of the idea of a designated space for Aboriginal justice:

I had two important tasks: one was to ensure that we got the room, and to get the room because of the way the formula works, we had to drop off a courtroom, so that they had done some sort of statistical analysis and said right,

the Thunder Bay Courthouse shall have X number of courtroom and they weren't going to budge from that number. ... the detailed planning, the way that the room looks now, I don't want to take any credit for that. Um, I gave some ideas, I think I empowered Darrell Mandamin to get really involved, and he and the architect went on like a house on fire. ... [Darrell is] capable of speaking eloquently and very knowledgeably about what this room should look like and how it should work, and why you need to do it here rather than there and why the circular walkway in is important and all that kind of thing, and that all comes from Darrell, and subsequently from his elder's council. But that's, you know, you have to give Darrell credit for all that. I just put him in a position to do it.

The courthouse now features a wing of the building devoted to Aboriginal justice needs. The ACSS includes an aboriginal conference settlement room at the center of the suite area, interview and consulting rooms for confidential conversations with counsel or meetings with victim services, the Native Court Worker Offices, a spiritual room, and public waiting areas (ACSS Slide Presentation for Architectural Conference) (figure X).

The design of the settlement room emulates a traditional healing lodge. Entrances align with the solar directions and the color scheme replicates an aboriginal medicine wheel: "North=White= Wisdom, South=Yellow=Kindness, East=Red=Honesty, West=Black=Strength" (Facilities Management Branch 2009, 19). The ceiling was built in a curvilinear layout with features symbolic of a starburst.

The suite of rooms is on the ground floor close to the courthouse's main entrance. This was a deliberate choice in order to facilitate public access outside of court hours. In the planning stage, the idea was that the room would be used for other kinds of ceremonies, such as weddings and funerals. It was designed so that it could be accessed on the weekend without the public having to access the entire building. The ACSS can also accommodate various proceedings such as: case conferencing, pre-trials, Gladue Courts, family and civil (not in-custody or low risk in-custody). Not all of the SCJ judges were enthusiastic about the outcome:

Now the Aboriginal room downstairs, it's the prettiest room in the building. But nobody knows how it's going to be used. And maybe it will turn out to be the gem of the building I don't know. It's not large, it's quite intimate. And it may be perfect for circle sentencing or other things, we'll have to see. It wasn't something that was asked for by the judges (Toby: by both) Well, not by our court. I shouldn't speak for both courts.... the origins of the aboriginal room are kind of mystical to me.¹⁰²

4.3 The Standardized Courtroom

In addition to the ACSS, judges in Thunder Bay consulted with MAG and the architectural firm to provide input on the design of the fifteen courtrooms and three settlement rooms. Judges were aware of the effect that the space and design would have on the processing of facts inside the courtroom. When I commented to one judge

¹⁰² Interview with Judge (Superior Court of Justice), at the Consolidated Courthouse, in Thunder Bay, Can. (April 23, 2014) [Judge D]

that generally my discussion in this chapter would address some of these underlying considerations – the architecture, structure of court, procedures for trials and settlements that shape the functioning of the courtroom – the judge agreed that layout affects how we receive information: “Well, you do [take layout for granted]. The kind of theatre you have affects the sort of experience you have when you go to the play or the opera or the concert” (Judge D 2014).

The details of how a court room is set up, where a witness box is placed, or how a judge or jury hears or sees the witness, impacts on the information that legal fact-finders are able to absorb. These details thus affect the production of facts in the courtroom (Spaulding 2012; Dahlberg 2009; Mulcahy 2011; Parker 2015). Justice Frank (1949) wrote in a realist vein that judges create facts through the process of a trial. Facts are also shaped through active social practices in relaying or sharing documents or oral evidence (Silbey and Ewick 2003). This is information tactically deployed.

Other than the ACSS, however, the courtrooms and settlement rooms follow the standard courtroom design which MAG has been unveiling across the province:¹⁰³

Let’s talk about the building first. It is true that we spent a tremendous amount of time thinking about what this building should look like and how it should

¹⁰³ In order to comply with accessibility guidelines, new courthouses feature standardized courtrooms, designed according to the Province of Ontario Architectural Design Standards for Courthouses (1999); see e.g. Baker v. York (Regional Municipality), 84 O.R. (3d) 279 (2006) Lack J. (allowing a claim for negligence). Similar guides for courthouse design in the U.S. include the National Center for State Courts guide for courthouse design: Planning & Design Guide Court Facilities.

function and, well, its design and use. Having said that is also true that [there are] many of the things that we said that we can't see in the building. There are lots of things that we suggested that really haven't panned out. It's not been an entirely happy process from our perspective. I mean we're, we think the building is great. But there were all kinds of things that we just, we would give very strong input on and it just would go nowhere. ...

We pushed fairly strongly for some different configurations of the courtrooms. Basically what we got back was this is the way it's being done across the province. Let's go with that. ...

They did think of things like accessibility and that is why there is a huge gap in various places. But we talked about prisoner location, prisoner boxes. We talked about witness box locations, and at the end of the day, what we ended up with was essentially the cookie-cutter [courtroom], not what we were talking about (Judge A 2014).

Judges expressed concern about many of the design features of the new courtrooms, in particular, the witness box, jury box, jury retiring rooms, the location of the prisoner's box, and the large gap between the judge's dais and the desk for the court clerk and stenographer (Judge A 2014; Judge C 2014). One judge took me down to a courtroom so that I could experience the standard design (Figure #). The judge had me sit in the dais and asked me what I noticed or experienced. I said that the lawyers' table felt far from the dais. The judge agreed and also expressed concern that

the defendant box was so far away that the accused would not feel part of the proceedings. The judge described a bail review hearing with two young accused:

... I decided I was going release them, but I wanted to say to them, because the parents were here: look your parents are posting a lot of money, don't let them down because they can't afford it and so on. So I was trying to engage them, from the dais, but my sense was it was like shouting down a football field, you know they are so far away that probably they can't see me... they're not close enough, it's not intimate enough to engage them (Judge D 2014).

This judge expressed concern that the chairs for the jury were in a row and bolted to the floor, so that jury members at the ends of the rows might have a hard time hearing and also seeing a witness. The benches for the public were hard wood and had no shape or form to them, "Would you want to sit all day on one of those watching a case?" The judge asked. The chair in the witness box was low in comparison to the exterior of the box. This could affect the ability of a judge or jury to hear the witness and see their expression or other visual information that comes through when a witness gives testimony.

Sometimes you get witnesses – maybe you've seen this in the courtroom? We see it especially with aboriginal witnesses who, if they're upset or embarrassed, it's like this (the judge demonstrates looking down and slumping). So the opportunity for the judge to see the witness, whether they're crying or their facial expressions it's not very good. So sightlines are poor (Judge D 2014).

The judge also indicated concern that the jury retiring room was far from the courtroom. If there's a trial with a number of evidentiary or other motions where the jury needs to be excluded, it may add a significant amount of time for them to be taken out and called back each time. Other judges expressed concern about the distance between the judge's dais and the public watching the court proceedings. MAG did accede to the judges' request for a European-style courtroom, with the ability to have the lawyers' tables turn so the lawyers face each other (Judge B 2014).

4.4 Location, Location, Location

In addition to implementing standardized courtrooms, MAG also excluded judges from discussions about the location for the courthouse. Independent of the judiciary, the province and city agreed on downtown Fort William as the site of the new consolidated courthouse. Judges were not invited to participate in the choice of location and were repeatedly told that discussion about location was "off the table."

We knew that was going to happen. And this was an opportune time to be accessible to the police, close to the police station, the hospitals, the network of community service providers and this location's got some that but not all of it. And we were really just told flat out don't even raise the issue of location because if you do you're not getting the courthouse. That's a city decision. [Judge A: that's a city and a province decision.] So we did. We backed off (Judge C 2014).

Judges and politicians indicated that one reason for choosing downtown Fort William and in particular making SCJ judges move from Port Arthur to Fort William

was local governments' promises for urban renewal and their efforts to stimulate the economy. This was part of a broader movement in the province to use new courthouse projects as "a way of kick-starting the distressed areas." One judge described a similar project for a new courthouse in Oshawa, approximately one hour from Toronto.

So in Oshawa they put the courthouse in a Brownfields site, which was a former battery plant. And so there were problems with lead pollution in the soil. It made it difficult for an ordinary private developer to re-develop that Brownfield, but the government had you know, the deep pocket, so that was a way of {dealing | in filling?} you know what was an awkward brown-field for the city of Oshawa.

And that mirrors what the government was doing in Thunder Bay. Because again it was a big fight as to where the courthouse should go. And the government insisted that it be an urban renewal project for so they positioned the courthouse in an area of downtown Fort Williams that was economically stressed as a deliberate way of rejuvenating the area (Judge B 2014).

In its promotion materials for the consolidated courthouse in Thunder Bay, Infrastructure Ontario boasts that "At the peak of construction, there were an estimated 320 construction workers on site daily." "Infrastructure investments like the Thunder Bay Courthouse are part of the government's economic plan that is creating jobs for today and tomorrow." At the court opening ceremonies, local city and provincial governments celebrated the revenue that was injected into the economically depressed

part of the city by providing local construction companies with work on the 4 year building project.

Judges in both courts, however, were not happy with the new location. They indicated that the courthouse was built in “a very rough area of town... part of the city that’s in decline”. One judge protested that the chosen location was “a ridiculous place to put the courthouse, you know right across street from the massage parlors and the area where the prostitutes gather” (Judge B 2014).

4.5 Additional projects

In addition to the new facilities in Thunder Bay, Ontario judges have been working on other law reform projects in an attempt to improve Aboriginal participation in the criminal justice system. Judges in the Northwest Region participated in a review and reform of the “Fly-In Court” procedure, which sets out the procedure for judges, prosecution and defense counsel who travel to northern remote communities for criminal matters. A judge from the Northwest Region also sat on a panel overseeing the implementation of recommendations to address the low participation of First Nations peoples on Ontario juries. Some of these initiatives are more recent, such as efforts to increase Aboriginal representation on the jury roll.

In Ontario, one in four First Nations communities lives in locations accessible only by air or by ice road during the winter. As a result, in the 1970s, MAG of the Attorney General of Ontario began conducting “Fly-In Courts” to allow a full court – i.e. a judge, Crown prosecutor, defense lawyers, police, victim services and other essential court staff – to meet in more remote communities. The accused, as well as

residents who were required to appear as witnesses, could attend court locally instead of travelling to the larger base courts in the south. Currently, the OCJ conducts criminal and family court hearings in 29 First Nations communities - 24 in the Northwest Region and 5 in the Northeast Region. There are no permanent courthouses in these communities. As a result, judges may conduct court in a school gymnasium or a community hall:

It's very difficult because the spaces that we operate in, in the North, are really awkward at times.... People come and go. The lawyers don't have retiring room, so they're busy chattering with their clients and with the Crown around the periphery of the space, so there's a tremendous amount of background noise... it's court in a marketplace, is how I describe it (Judge B 2014).

The same OCJ judge might sit in all the courts held in a particular community. Usually the same Crown prosecutor and court staff also attend: "This permits the judiciary and MAG staff to develop a relationship with the First Nations band Chief and others in the community. In some fly-in courts, a band representative or elders may provide input during the court proceedings." (Working Group Report on Fly-In Courts 2013).

The remote communities where MAG runs Fly-In Courts face their own particular set of problems stemming from colonialism, climate change, globalization and increased regulation. One of the communities served in the Northwest region, the Pikangikum reserve, is infamous for having the highest suicide rate in the world (Patriquin 2012). Over a 20 year period ending in 2011, 96 people – mostly youth –

committed suicide. With a population of approximately 2,400 people, their suicide rate in 2011 was 250 per 100,000, close to 20 times higher than the average rate in Canada “and far and away the highest in the world” (Patriquin 2012).¹⁰⁴

One of the judges I interviewed had been traveling to remote northern communities for thirty-two years, twelve as a defense lawyer and twenty-five years as judge. He spoke to me about the high suicide rate in Pikangikum and the disproportionate number of charges being laid in relation to the size of the population.

I went to some of the worst communities in the north – Pikangikum. I mean we used to go to Pikangikum, I can remember one time we went nine times in one month. This is for a community of twenty five hundred people, and out of that twenty five hundred, most of the people are not in the court, they are not capable of being in the court because they’re either too young they’re under twelve... So a very small group of families [is] generating a workload that is equivalent to a community of twenty five thousand people. It was incredible. The violence is just sickening... I mean these people survived so much and people that survived into the nineteen twenties and thirties were a smart, attractive, healthy people and when you see the damage of generation after

¹⁰⁴ Pikangikum has had one of the highest suicide rates for nearly twenty uninterrupted years. Patriquin describes desperate sociological conditions: “Consider how 80 per cent of its housing doesn’t have sewage pipes or running water; consider how the community of 2,400 had just over 3,600 lockups and nearly 5,000 calls for service to police last year. Consider how only two students graduated from high school last year. Consider how, as recently as 2008, fully 40 per cent of referrals to Tikinagan, northern Ontario’s First Nations childhood protection agency, were from Pikangikum. And consider the suicides, which have taken 96 lives—the vast majority of them young—in 20 years.” (Patriquin 2012)

generation of fetal alcohol spectrum disorder, it's really, really awful. Kids who are just not capable of functioning, they're just not competitive in today's world. It's really, really upsetting. I don't think people in Southern Ontario have any appreciation for just how bad it is (Judge B 2014).

The judge related very specific and connected knowledge about the communities he served. He expressed concerns for the youth in the communities, who had no job prospects, no connection to traditional income sources, especially since, as he recounted, Europe had banned seal trade. He described struggling “with the needs of some gas sniffer who is seen as a nuisance and is a member of a family on the outs, and maybe one of the reasons the kid is sniffing is because the family is so impoverished he's hungry and he sniffs as a way of managing his hunger pains. I mean that's a very realistic, I mean it may be shocking... but that's the reality” (Judge B 2014).

A Working Group on Fly-In Courts was formed in April 2012 as a joint initiative between the OCJ and the MAG to assess problems and make recommendations to improve the Fly-In Court's operations. Then Regional Senior Justice for the Northwest region, Justice Bode, co-chaired the Working Group with JoDee Kamm, Director of Court Operations for the Northwest region (a ministry position through Court Services Division). The Working Group reviewed the practices and procedures of fly-in courts in each community (NAN Conference Report), in order to identify “best practices used in some communities that could be more broadly applied, and to generate ideas and recommendations that could, if implemented,

improve the operation of these courts and the related justice service provided to these communities” (MAG 2013).¹⁰⁵

The Working Group consisted of over twenty members, including judges, staff from Court Services Division, MAG officials, the Deputy Grand Chief of the Nishnawbe Aski Nation (“NAN”) responsible for justice issues, representatives of NAN Legal, member of the defense and family bars, and police services. Under the auspices of the working group, Regional Senior Justice Bode also met with the band council from the Matawa First Nations to discuss moving the base court locations for the Summer Beaver and Webequie communities from Kenora to Thunder Bay. The council advised Justice Bode that moving those communities base court to Thunder Bay would make it easier to organize bail sureties. They also advised that accused from the Summer Beaver and Webequie communities sometimes enter guilty pleas simply because it is too difficult to arrange for witnesses to attend court in Kenora (NAN Conference Report).

The Working Group’s report, submitted in August 2013, recommended using video conferencing for routine court appearances in criminal matters such as set dates and adjournments (remands) to save the court’s time when it is in the community. The Working Group recommended providing dedicated child protection

¹⁰⁵ The Working Group took notice of the daunting socio-economic circumstances of these communities: As the mandate of the Working Group suggests, its work focused on the operation of the OCJ court system in fly-in remote communities. At the same time, the Working Group was very aware of the serious systemic problems that affect these First Nations communities. These systemic problems present broader policy issues for the justice system to grapple with as it tries to provide relevant and appropriate justice services for these communities.

case conference times on a pilot basis because these matters were getting dropped when criminal matters ran overtime. The group recommended providing designated youth court days and using video conferencing for pre-trial motions in child protection cases so that residents of remote communities can participate.

When we met Judge A drew my attention to the Working Group as an example of the work that the court was doing to try to improve Aboriginal peoples' interactions with the OCJ. In the same context, Judge A spoke with me about efforts to increase Aboriginal representation on the jury roll. Based on the Iaccabuci Report on First Nation's representation on Ontario juries, MAG established a First Nation Jury Review Implementation Committee.¹⁰⁶ The Iaccabuci Report also recommended a review of native court workers' programs, "to assess whether the work ... [is] being done effectively and do we need more resources attached to it. [We] are actually meeting tomorrow to discuss that particular issue, how to frame the recommendation to the minister, on how to revamp and reorganize that program." Judges expressed a need for the court workers' programs to be more involved in bail hearings helping to

¹⁰⁶ Iaccabuci Report, following which the Ontario government established separate advisory group and implementation committees. (now only one committee). Meeting 3: November 7-8, 2013, Toronto, ON meeting with Julian Falconer on peremptory challenges; "Members discussed the exclusion of First Nation people from jury rolls due to criminal records for minor offenses (Rec 14); translation services for jurors more comfortable using their traditional language (Rec 13), the need to increase jury compensation rates (Rec 16); and the proposal to establish a dedicated Assistant Deputy Attorney General (ADAG) for Aboriginal issues (Rec 5), where members requested to have input into the qualifications for this position, its role, and responsibilities. (NAN Conference Report)

find “release alternatives,” as well as doing more case management work or helping offenders or other parties access addiction services (Judge C).



Figures 22-24. Court Opening Ceremonies, April 2013

Figure 22. Drum Circle

Figure 23. Gift Exchange

Figure 24. Drum Circle and Procession.





Figure 25. Attorney General of Ontario Madeline Meilleur



Figure 26. Example of Standardized Courtroom

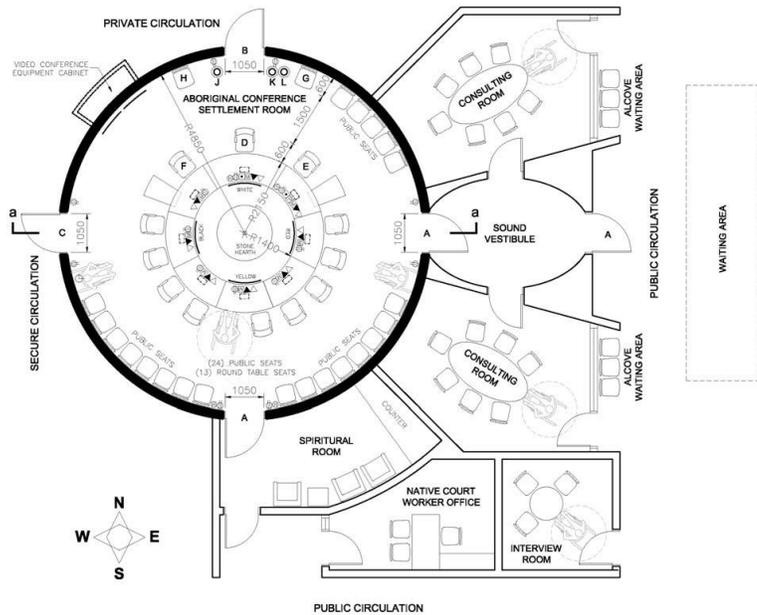


Figure 27. Aboriginal Conference Settlement Suite
179.3 sq. m. (1930 sq. ft.)
Copyright Ontario Ministry of the Attorney General

LEGEND	
▲	DATA
▲	TELEPHONE
■	DURESS BUTTON
■	MICROPHONE
■	COURT PAGING
■	ELECTRICAL
■	HEARING IMPAIRED STATION
■	CLOCK
■	RECESSED FLOOR BOX
A	PUBLIC ENTRY
B	PRIVATE ENTRY
C	SECURE ENTRY
D	JUDGE, JUSTICE of the PEACE, DEPUTY JUDGE, ADJUDICATOR
E	COURT REGISTRAR/CLERK
F	COURT REPORTER
G	SPECIAL CONSTABLE (IF REQUIRED)
H	COURT SERVICES OFFICER (IF REQUIRED)
J	CANADIAN FLAG
K	ONTARIO FLAG
L	EAGLE STAFF

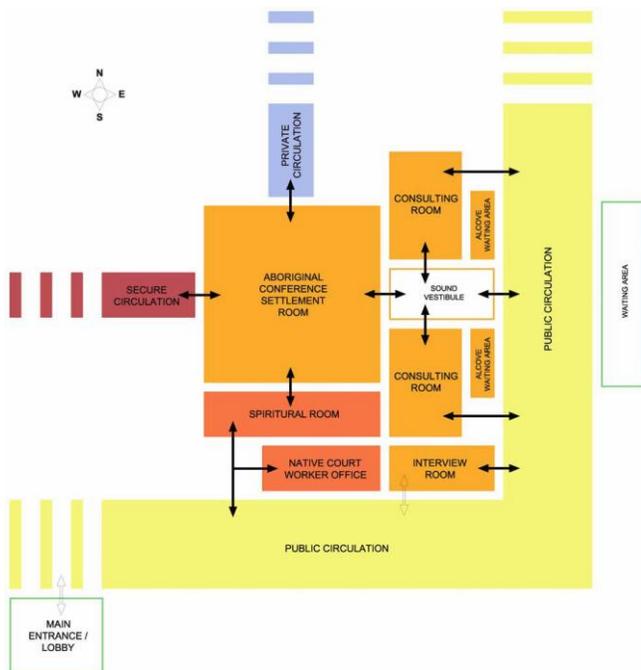


Figure 28. Functional Relationship. Copyright Ontario Ministry of the Attorney General

5. Law as a Tool for Social Change

5.1 Stepping Through

Between 1996 (following the enactment of the sentencing reforms and more permanent establishment of the Aboriginal Justice Strategy) and 2008, the proportion of Aboriginal offenders in provincial and territorial institutions increased 11% (Calverly 2010, see also Roberts and Melchers 2003).¹⁰⁷ In 1996-97, the proportion of Aboriginal offenders in provincial institutions was 16%;¹⁰⁸ by 2008-09, Aboriginal offenders were 27% of the total population in provincial and territorial institutions, whereas the proportion of total population only grew from two or three percent to four percent (Calverly 2010).¹⁰⁹ Statistics listed in the Aboriginal Justice Strategy Final Report for 2011 based on Statistics Canada, Adult Correctional Services in Canada,

¹⁰⁷ Data going back to 1996 is only available for provincial and territorial custody. However, custodial admissions into provincial or territorial institutions account for most of the offender population. For example in 2008, provincial and territorial admissions accounted for 68 percent of all admissions, where as federal institutions only accounted for only 2 percent of custodial admissions (Calverly 2010).

¹⁰⁸ Statistics Canada, “Aboriginal Peoples in Canada” Canadian Centre for Justice Statistics Profile Series, June 2001, Table 7 , 18, available at <http://www.statcan.gc.ca/pub/85f0033m/85f0033m2001001-eng.pdf> and Statistics Canada, “Changing profile of adults in custody 2006/2007” available at <http://www.statcan.gc.ca/daily-quotidien/081215/dq081215b-eng.htm>. The proportion of Aboriginal offenders remained between 15 and 18 between 1989-90 and 1998-99. Statistics Canada reports that between 2004 and 2008, total custodial admissions for all offenders increased from 211,970 to 262,067 (a rate of increase of 4.23 per cent), with the sharpest increase occurring between 2004 and 2005. During this same period between 2004 and 2008, the proportion of Aboriginal offenders of the total population in custody increased from 19 to 26 per cent.

¹⁰⁹ Some part of this may be attributed to the higher growth rate in the Aboriginal population as compared to the general population. For example, between 2001 and 2006, the Aboriginal population increased by 20.10 percent (47 percent between 1996 and 2006), whereas the non-Aboriginal identity population grew by only 4.9 percent for the same period. Final

2008-09, Juristat, Fall 2010 suggests that Aboriginal offenders, while only 3% of the population in 2006, accounted for 21% of accused on remand, 18% of offenders in federal custody, and 18% of the population on probation (AJS Report 4.1.2). The proportion of Aboriginal offenders serving their sentence in the community (the proportion of conditional sentences that were given to Aboriginal offenders) also increased, from 11% in 1998-98 to 20% in 2008.¹¹⁰

When comparing proportion of imprisonment to proportion of population, Ontario is the third worst province for over-incarceration, and has remained third since the Criminal Code amendments to the sentencing provisions were put into place. Ontario Regional Chief, Stan Beardy, reflected the ongoing issue of over-incarceration in his speech at the court opening ceremonies:

I am here today as a First Nation leader, to offer First Nation perspective onto this event. As we can all appreciate, the establishment of this new building while good for Ontario and Superior Court within the city of Thunder Bay, it is somewhat a sad day for me. Sad day because I think of all my people that are in jail today, because we're, First Nations representation overwhelms the justice system at the present time. And I want to say it again, and I'll say it

¹¹⁰ Overall, conditional sentences as a percentage of total custodial admission to provincial, territorial and federal programs increased from 5.1 per cent in 1998/99 to 14.2 per cent in 2008. Parliament of Canada, "Bill C-9: An Act to amend the Criminal Code (conditional sentence of imprisonment)", available at http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/Bills_ls.asp?lang=E&ls=c9&Parl=39&Ses=1&source=library_prb#endnote18 (last checked May 17, 2011).

Statistics Canada, Adult correctional services, admissions to provincial, territorial and federal programs, available at <http://www40.statcan.gc.ca/101/cst01/legal30a-eng.htm> (last checked May 17, 2011). Calverley, "Adult correctional services".

here again: that Canada has a good legal system. But there's no justice for the First Nation people, the justice system does not protect First Nation people. Despite legislative and policy efforts to address the issue of overpopulation overrepresentation of First Nations people within the criminal and family justice systems statistics show that things are getting worse. Based on statistics of July 2013, I want to share some information with you. Kenora district jail, July 2013 held 139 individuals. 103 of them were First Nations people. Fort Francis district jail held 19 individuals, 16 were first nation people. Thunder Bay district jail held 118 individuals, 64 were First Nations. Thunder Bay correctional centre held 93 individuals, 53 were first nation people.

What can Aboriginal justice advocates expect of the ACSS when other sentencing reforms or the Gladue decision seems to have had little impact on incarceration rates? More pointedly, why bother? Why try to improve sociological circumstances by changing legal institutions or legal infrastructure?

One judge expressed to me his "frustration with sentencing circles." His early encounters with sentencing circles were spontaneous and genuine. They were "more like a town hall meeting where everyone was invited to speak and they did" (Judge B 2014). In his view, sentencing circles did not maintain their constructive cathartic nature. He felt that sentencing circles were less meaningful when a restorative justice coordinator is only there because he's paid to do a job:

It's a lot less significant than when the Chief and Council show up because they're concerned about you. If it's just the restorative justice coordinator who

shows up and that's his job, it's not the same thing, is it. And you know, the victim and the victim's family are dragged in you know kicking and screaming by the restorative justice coordinator to have a circle because that's what's been scheduled and your parents are there because they've been told to show up by the justice coordinator, it's not the same thing. And we have seen sort of mixed results going forward, it's better than nothing, it's better than not having it, but it's not nearly the same thing as a true traditional restorative justice event (Judge B 2014).

"I'm a huge proponent of restorative justice," He said. "But it's really easy to fake it. And when you fake it, it's not very effective, and it discredits the idea of Restorative Justice." This judge also described ways in which socioeconomic circumstances were deteriorating for Aboriginal communities. The judge told me: "It's been very discouraging. Things are worse now than when I started by a long shot. That's awful to have to recognize that." But this judge was involved in spearheading the idea for the ACSS. What was his motivation? Why would he continue trying to affect change this way? I put this to him as directly as I could.

TG: I guess my question really is how do you still be optimistic enough to say to [the court interpreter], ok, let's go meet with the with architect to try something new, to build an actual physical space... in the courthouse... because you have to somehow be maintaining some level of optimism.

Judge B: I think I can answer it this way. I think reserves are a really bad idea. But at the same time I think we need to appreciate how important it is to

protect Aboriginal languages, protect and promote them, but make sure people are in a place where they have a chance to be economically independent, to be free from the tyranny of the band office. So certainly what was going on in terms of that Aboriginal Conference Settlement Room, it was an opportunity to show Aboriginal people that what they have is valuable in the bigger world, and that they have something to share and that they can be Aboriginal in a bigger community, living in the city and working in the city, going to school, getting a high degree of education, doesn't mean you have to give up being an aboriginal person...

When the judge answered, it felt like a moment of side stepping, or stepping through. I presented two options: either be optimistic about the possibilities for law or be a skeptic (Davis and Trebilcock 2008). In a sense, the judge walked through the question and presented an option that was neither. At the very least, the judge recognized an optimism that was both concrete and symbolic. As an example of the intangible or diffuse positive effects he spoke to, the judge pointed to the interpreter, who does not live on reserve, but is “being recognized as being a valuable person because of his traditional skill set” (Judge B).

5.2 Symbolic Instrumentalism

The standard approach to law reform and law as a tool intimates a focus on outputs – law reform effects that are measurable in a tangible way. For example, Carothers notes the attention to “Rewriting constitutions, laws, and regulations” in the law and development community (Carothers 1998; Daniels and Trebilcock 1999).

Similarly, most of the analysis of Aboriginal justice programs focuses on the implementation of programs, how much programs have been funded, or how much money is being spent.

In its Final Report for 2011, the Department of Justice details the AJS's "Effectiveness." It notes that the Aboriginal Justice Strategy funded 214 community based justice programs in 2011-12 and that those programs served 634 communities "by providing access to alternative, culturally relevant justice programming". Without access to Aboriginal Justice Strategy funding, access to justice programs would be reduced. In total, the federal government contributed \$85 million to the Aboriginal Justice Strategy over the five-year period from 2007 to 2012. The Department of Justice website highlights that the AJS "currently funds approximately 275 community-based programs that serve over 800 communities."

In the same 2011 report the Department of Justice outlines significant outcomes for the Aboriginal Justice Strategy's goals: a decrease in rates of crime and victimization in Aboriginal communities, greater responsibility in justice administration, and reflecting Aboriginal cultural values in justice administration.¹¹¹ This echoes the goals of decrease over-incarceration and increase participation that was articulated as early as 1975, at the National Conference on Native Peoples and the Criminal Justice System in Edmonton, Alberta. There, concern about Aboriginal

¹¹¹ Similarly, the Department of Justice details the expected impact of its intervention as providing "actual access to and participation in community-based justice programs" and "the achievement of the following long-term outcomes: Reduced crime and incarceration rates in communities with funded programs and Safer and healthier communities."

confrontation with the criminal justice system took the form of concern for over representation of aboriginal offenders in Canadian jails, plus Aboriginal feelings of alienation; and both were linked to Aboriginal exclusion from the design and delivery of justice services.

Is the Aboriginal Justice Strategy achieving these desired outcomes? The Department of Justice writes, “Over the years, the federal government has addressed [over-representation in the criminal justice system] with a continuum of policies, programs and initiatives to address the disproportionate rates of crime, incarceration and victimization experienced by Aboriginal people.” And yet a “disproportionate number of Aboriginal people” continue to be “in conflict with the law.” In the Final Report, the continued over-representation, the possibility that over-representation of Aboriginals in prisons is worsening over time, and the existence of the AJI/AJS since 1991 serve as “Program Rationales,” not evidence of failure.

A related conflict between stated goals and measurable outcomes can be found in the area of judicial education and training (Armytage 2015). Livingston Armytage (2015) writes: “crucially, no systematic assessment of behavioral change on the part of judges as learners currently exists. Nor is there any assessment of impact or results in attaining any stated goals of judicial education... Indeed, it is surprising funding bodies have not already insisted on being provided with evidence of results from their investments” (Armytage 2015, 171). Desai and Woolcock (2016) find a comparable situation in judicial reforms and rule of law programs more generally. They write that the “general enthusiasm for ‘building the rule of law’ as a signature development

objective is matched only by the absence of a coherent track record on which it might be realized” (Desai and Woolcock 2016, 156).¹¹²

The current approach to legal instrumentalism sets up law-as-a-tool as an actual instrument (rather than a metaphor) (Riles 2005). As a result, reformers expect material tangible measurable results from their legal instrument. However, in some instances, tangible measurable are not indicators of change (Stoddard 1997). In other instances, indicators may not measure or may not be able to measure the desired change. In response, scholars and practitioners often have one of the following reactions. They might choose proxies, a measurable to stand in for goals that may be more difficult to measure (World Bank). They might remain hopeful for future positive outcomes despite mixed results (Trubek),¹¹³ or call the whole project a failure. Law and Development scholar, Kevin Davis, describes the first wave of the Law and Development movement:

For a few brief years in the 1960s and the early 1970s, American legal academics joined with their colleagues in other disciplines to investigate these issues in an exercise now known as the "law and development" movement.

Eventually, however, the principal participants in the exercise became

¹¹² Similarly, Daniels (check cite) writes: In the case of judicial reform, much effort has been expended on technical reforms designed to expedite court processes and improve judicial productivity through, e.g., installation of computers in court offices, case management systems, oral hearing procedures, and professional training programs for judges. The evidence does not suggest, however, that these forms of intervention dramatically enhance the quality of a country's legal system...

¹¹³ Even Ontario Regional Chief Stan Beardy went on to express hope in the individuals and institutions who are working to reconcile inequities in the legal system.

disillusioned and lost their faith in the ability of law, much less legal scholarship, to contribute to development. Thus the law and development movement in the United States died a noisy and well-documented death.

Law reform produces whole hearted optimists and skeptics (Davis and Trebilcock 2008). Neither approach seems rational.

The experience of judges in the Northwest region remind us that: 1. long term effects of law reform projects are difficult if not impossible to measure (especially in terms of causality)¹¹⁴; and 2. Law reform can have both material and symbolic effects (effects that can then instigate norm diffusion), which again makes effectiveness difficult to measure.¹¹⁵

6. The Politicization of Judges

6.1 The Opening Ceremonies

In attendance for MAG's "Ribbon Cutting Ceremony" were the Regional Senior Justices of both courts, as well as several politicians and elders – Madeleine Meilleur, Attorney General of Ontario; Cathy Rodger, Councillor, Fort William First Nation on behalf of Georjann Morriseau, Chief, Fort William First Nation; Stan

¹¹⁴ Epitomizing the difficulty in measuring substantive legal change, Terence Halliday and Bruce Carruthers (2007, 2009) develop the concept of "recursivity," the connoting the "multidirectional, diachronic process of legal change" (Shaffer).

¹¹⁵ Shaffer distinguishes between symbolic legal change, change "on the books in terms of constitutional, statutory and administrative law revisions, or the creation or modification of agencies and courts" and practical change, change "in terms of established patterns of institutional and individual behavior". He notes that "much of traditional law scholarship focuses on the symbolic," that accounts for changes in "formal law and institutional structures" as opposed to "institutional and social practice" (Shaffer)

Beardy, Ontario Regional Chief; Michael Gravelle, Minister of Northern Development and Mines and MPP for Thunder Bay/Superior North; Bill Mauro, Minister of Municipal Affairs and Housing and MPP for Thunder Bay/Atikokan; and Keith Hobbs, Mayor of Thunder Bay – who collectively were referred to as “the dignitaries.”

The court opening ceremonies began with a drum circle in the courtyard in front of the building, followed by a gift exchange and short procession through the foyer (Figure #). Members of local First Nations conducted a drum circle, led a procession through the courthouse atrium, and said prayers. The Attorney General and Deputy Attorney General both joined the procession and danced to the podium. Staff from the Court Services Division organized a gift exchange between politicians and local elders, trying to emulate First Nations practices and traditions. Despite their efforts, the gift exchange ended up being hurried and frantic. The exchange was initially set up outside by the drum circle, but because it was too cold, everyone moved inside. Staff from Court Services Division scurried to move the tables with the gifts, which were placed under the stairs because the rest of the atrium had already been set up for speeches. The Deputy Minister quickly tried to look inside his bag to inspect the contents and dropped it. The Attorney General’s aid kept checking the schedule and the time to make sure the dignitaries kept to the itinerary.

After the official ribbon cutting, several dignitaries spoke about the development of the court and expectations for a new kind of operation of justice. The Attorney General spoke of the importance of maintaining tradition and culture, and the

two aboriginal speakers mentioned problems their communities face in the criminal justice system. Ontario Regional Chief, Stan Beardy stated:

I am fortunate to be able to say that there are individuals and institutions across Ontario who are dedicating their careers in reconciling the inequities in the legal and justice systems ... these relationships where all parties work together in a respectful productive way, will lead to better outcomes for First Nations people and citizens and government bodies and academic institutions. ... When we made treaties a long time ago, it was very simple: one is that we said we would co-exist peacefully, [and] two is that we would share and that we would have a collaborative effort going forward. So those are still our aspirations today and these are the principles that the First Nations across Ontario are working towards, partnership with other governments.

In contrast, local municipal and provincial politicians spoke about the number of jobs that were created during the years of construction and the way the courthouse will continue to bring commercial benefit. The Minister of Northern Development spoke of the over 300 people who worked on the construction project and the potential benefits “from an economic point of view” of the courthouse being located in the south side of Thunder Bay. The Minister of Municipal Affairs and Housing was candid about the close to 100 billion dollar commitment over 11 years toward infrastructure “in its very forms around the right across the province of Ontario,” the courthouse facility being one of those infrastructure projects and support for urban renewal:

As I've mentioned the efficiency of justice services is the point it's the focus of what we're doing here today. The end game. But there are significant other benefits that will accrue from the creation of this courthouse. We know that. We know that significant employment was created. ... It's my belief that this facility will be part of in the future a rejuvenation of the downtown core. ... We need to create critical mass; it's not much more difficult or complicated than that. That, I believe, will be one of the longer term benefits that accrues from this project.

6.2 The Politics of Social Processes

The debate about judges in politics focuses on the ways that judges bring their politics to bear in cases brought before them. The concerns are that judges will affect the outcomes and rights of parties by deciding according to their politics and ideology, or that judges are engaged in a kind of 'judicial capture' by expanding what judges consider to be justiciable. Overall, scholarship seems to insinuate that just as judges choose their ideological affiliations, they also choose which part of legal politics they wish to engage. Judges are "strategic actors" (Epstein) who seek to "achieve their goals" within the confines of "the preferences of other actors, the choices they expect others to make, and the institutional context in which they act" (Epstein).

But judges are often thrown into a politics in the sense of being constituted as political actors because of the particular roles they play (Wendt; Barnett and Duval). The courthouse as a tool for urban renewal is a stark example. But judges are often empowered through a "social process of constituting what actors are as social beings"

(Barnett and Duvall).¹¹⁶ Their position of power is expressed both through social constitution and in their interactions (both in and out of court) “which, in turn, affect [their or] the ability of others to control the circumstances of their existence” (Barnett and Duval). Even in rote cases such as public intoxication, theft or misdemeanor assaults, judges who fly in to remote northern communities are implicated in the way power and politics plays out in the legal system. Through the Fly-In Courts, judges are physically brought into a history of confrontation and subordination; the judge is inserted into Canadian colonial and post-colonial politics. Political matters as they relate to aboriginal peoples do not just arise in land claims, disputes over treaty rights or fishing rights –the well publicized cases of the Supreme Court of Canada. They also arise in the “small” or “unimportant” cases which ultimately contribute to an overall experience of alienation and over-incarceration.

This assertion is not new. But it is significant in this context to recall that judges do not always “seek to etch their political values into law” or “use the law to achieve their ideological or partisan ends” (Epstein Ann Rev). They may also find themselves immersed in policy-making because of pre-constituted relations of power. Moreover, politics may not always manifest as the left-right politics that so dominates U.S. scholarship. Judges in the Northwest region continuously re-enact the politics of culture (Weiner 1999; Demian 2003; Demian 2006) and a history of confrontation between Euro-Canadian governments and First Nations peoples. Whether by

¹¹⁶ They are by right of their “social identities and capacities” part of the “underlying social structure and systems of knowledge that advantage some and disadvantage others” (Barnett and Duvall).

physically attending at remote northern communities or reserves through the Fly-In Court program, or conceptually considering the circumstances of Aboriginal offenders and orienting themselves to the particular history of confrontation between Euro-Canadian settlers and the First Nations people as mandated in section 718.2 (e). Judges interact with a politics that is historical *and* ongoing.

On the other hand, whatever connection judges do have is (and must be) partial. Both Regional Senior Judges for the OCJ and SCJ attended the opening ceremonies. But their role was strictly as observers. While “the dignitaries” gave speeches, exchanged gifts, and marched through the atrium, the judges sat in unmarked chairs at the far right edge of the atrium. They did not make speeches or join the group of “dignitaries” that were escorted on a tour of the facilities. They were mostly invisible and were barely acknowledged by the Municipal and Provincial politicians. Some of the speakers thanked the Regional Senior Judge in their speeches, but not by name, or some generally thanked “the judges.” The Minister of Northern Development thanked the dignitaries by name, and “also certainly members of the judiciary”. The judges kept their distance. They sat quietly, out of view and off stage.

Judicial process and judicialization of politics literatures envision a judge’s capacity to know his or her policy preferences, which she can then manifest because of increasing judicial power. What these literatures miss is the partial nature of judges’ connections. The image of the judge in politics does not consider the way a judge must maintain a distance and effect a removal from connections. The literature misses the daily and mundane ways that judges must work to maintain an appearance of

independence. Judges must remove themselves from connections and relationships in an ongoing process of affecting separation and distance. The limit of what law and legal actors can do to affect change is an experience that lawyers (Kroncke), judges, legal aid workers, human rights practitioners (Riles) all experience.

7. Conclusion

Historically, the settling of disputes, the dispensing of laws, or the imposition of penalties took place in public at sites that were significant for their natural landscape – elevated sites, or places that had significant physical features “like megaliths, great trees, large water meadows... clearings or springs” (Dolemyer 2005, 260). In time, this developed into constructing significant buildings for the hearing of public matters. Architects, judges and courthouse designers speak of the justice and democratic principles which “society associates with our justice system and its embodiment in the courthouse” (Greene 2006, 63). Justice Woodlock, who worked with Supreme Court Justice Breyer (former Chief Justice of the 1st U.S. Circuit Court of Appeals) on the Boston Federal Courthouse, describes the courthouse as “the Law’s citadel of civilized honor” (Woodlock 2006, x).¹¹⁷

¹¹⁷ In his paper titled, “Drawing Meaning from the Courthouse,” Justice Woodlock writes that the “open courtroom, where the public has the opportunity to observe formal proceedings for the resolution of its legal disputes” is at “the core of this nation’s cultural and constitutional values of democratic transparency” (Woodlock 2006, 155-156).

But if there is a symbolic attachment to the courthouse it is also very clear its material import.¹¹⁸ It is a place where documents that are “basic to our lives” are stored - land titles, deeds, marriage licenses, and probate (Seale 2006). The courthouse may represents high values – “the ‘ought to be’ in human relations everywhere” (Phillips 2006, 222-223) – but it is also always the scene of very “real” sometimes traumatic life matters - divorce, jail, victimization.

In telling the story about judges who think about and consult on their physical space, this chapter presented the courthouse as an artifact of law with both material and symbolic purpose (Munn 1986). Obviously the courthouse is a place where judges hear cases and write decisions. But it is also imbued with meaning in the “metaphors and allegorical dimensions of space that mobilize sensation and affect” (Silbey and Ewick 2003, 87). “Indeed,” writes Justice Breyer (2006) of courthouse architecture, “the story that a building tells through its design may be as important to the community it serves as its function” (Breyer 2006, xx).

As this dissertation works to demonstrate, legal tools – judges, law reform projects, statutory amendments, and legal procedure – similarly contain and project material and symbolic content. Judges spoke with me of having to work with the material and immaterial, of justice and big concepts but also of people and realities.¹¹⁹

¹¹⁸ Resnik aptly captures the material-symbolic tension in describing the office-like and “purely instrumental” approach to the design of Federal courthouses in the U.S. in the 1980s as a disaster (cite). On the other hand, the purely symbolic structures, those “empty halls of justice” (Resnik’s examples) have lost something in their unadulterated staidness.

¹¹⁹ Interview judge from Brazil

But in addition, judges have a responsibility to act and decide, regardless of the proportions of real and ideal in the matters before them. As Kim Lane Scheppelle (2012) argues:

The architect and the judge share an aspiration to achieve justifiable projects in the world... As a result, both judges and architects merge real and ideal in their work; the description of facts in a legal opinion blends seamlessly with the construction of what ought to happen next (at least if a judicial opinion is well-constructed), and the peculiarities of a specific site are taken up into the aesthetics of a building (at least if a structure is well-designed). (Scheppelle 2012, 354)

In discussing the new Thunder Bay courthouse and judges' efforts to address the circumstances of Aboriginal offenders, this chapter seeks to provoke thinking about how law-as-a-tool is more or less material *and* symbolic (Riles 2005). Like the courthouse, legal instrumentalism must retain some symbolic content (Resnik 2012). The legal tool cannot be solely about outcomes – ends. Legal actors continued engagement with law reform projects in the face of disappointing outcomes points to a more complicated relationship between means and ends. Courthouse (and judges), like law-the-tool, is always “both concretely present and transcendent of [its] context” (Keane, xiii).

Similarly, judges, in practice, must constantly mediate between closeness and distance. While judicial behavior and judicialization of politics literatures focus on the judge as strategic actor pursuing her ideological agenda, this chapter describes judges

who are physically inserted into local politics and post-colonial histories, judges whose practices include removing or separating themselves from the goings-on around them, and engagement that is both political and rational-bureaucratic. The micro-examination of judges' political and social practices should be familiar to most legal actors who mediate (often painfully) between engagement and the impersonal.

CHAPTER 4
CIVIL JUSTICE REFORM, FAIRNESS HEARINGS,
AND MASS TORT “GLOBAL SETTLEMENTS”

“Federal judges tend to be biased toward settlement. We are the kitchen help in litigation. We clean the dishes and cutlery so they can be reused for the long line of incoming customers. Settlements are the courts' automatic washer-dryers.” Jack B. Weinstein (2009)

1. Introduction

This chapter examines U.S. Federal court judges who innovate in developing procedure for settling complex aggregate litigation. In particular, the chapter focuses on federal district court judges who have developed procedure for settling class action law suits and non-class action suits relating to mass tort litigation (Hensler 2001).¹²⁰ This chapter moves the closest to examining judges’ case-related work. But this development in civil procedure and aggregate litigation is still significant for two reasons. First, these procedures represent a hybrid of private and public models. The paradigmatic case pits multiple individual plaintiffs against large corporate defendants or government agencies responsible for product failure causing injury or death to potentially vulnerable claimants such as cancer patients, women, and veterans (Mullinex 1999, 415). As a result, aggregate litigation has been likened to public law

¹²⁰ This chapter will focus on Federal district court judges. Especially following the enactment of the Class Action Fairness Act, jurisdiction requirements have made it easier to remove class actions to federal courts (Mullinex 2003, 528).

litigation or regulation as quasi-administrative law. In addition, the settlement process combines elements of private non-court negotiation features with judicial review and in some cases open and public “fairness hearings.” Second, and significantly, judges do a considerable amount of thinking and development of court procedure outside of the courtroom. Nevertheless, there is little scholarship on this rule making process.

There has been a great deal of scholarship examining the judicial role in facilitating settlement and the public policy of aggregate litigation for mass tort claims. Scholars engage in well worn debates about the judicial function, public law litigation, and alternative dispute resolution (Mullinex 1999). In a familiar move, the debates pit expediency and efficiency concerns against litigants’ representative rights and democratic deliberation. Burbank and Silberman (1997) note that “[l]itigation reform efforts in the United States have sounded a consistent theme of the need to reduce expense and delay. Such rhetoric should come as no surprise because it is a common rallying cry for civil justice reform world-wide” (Burbank and Silberman 1997, 676).

The standard claim is that settlement and ADR more generally assist judges in dealing with overloaded dockets. Settlement presents an efficient, high quality approach to dealing with burgeoning litigation. On the other hand, several scholars argue that when judges actively participate in litigants’ settlement negotiations, they move beyond the judicial function. Judges should be detached and removed, and any departure from that role threatens perceptions of impartiality and the structure of judicial independence. Moreover, moving dispute resolution out of the courtroom and

into private boardrooms and conference suites deprives society of public debate and expression of norms.

This chapter uses a historical perspective to follow judicial involvement in the development of procedure to manage complex litigation. Judges' experiences working with aggregate settlement structures challenge standard formulations of legal instrumentalism and judicial politics. On the surface, the political issues in class actions and mass tort litigation seem to align with the standard conservative-liberal, left-right debates: on the right, private individual control over adjudication yields efficient results. On the left, privatized dispute resolution threatens public debate about norms and values.

Notwithstanding numerous presentations, however, the politics of mass tort settlements is not as straightforward as the standard debates would suggest. Fairness hearings and the resolution of non-class action mass tort cases highlight the enmeshing and entanglement of the public and private. This chapter also suggests that using law as a tool for social change is not as controlled as legal scholars would like to think. The fashioning of legal tools to address product failures and mass injuries developed in piecemeal fashion and often solutions addressed problems that had already passed and replaced with new problems. Moreover, the development of aggregate settlements demonstrates the reciprocal relationship between means and ends (or, in this case, procedure and substance) in law and casts doubt on standard accounts of legal instrumentalism that seek to treat means and ends as separate and controllable.

This chapter focuses on settlements of mass tort litigation, in particular the “settlement class action” and “global settlements” in non-class action aggregate litigation. Before proceeding further, I will define what is meant by these terms. Settlement class actions are those actions where the parties bring the proposed settlement to the judge at the same time as the request for class action certification. In those circumstances, a “fairness hearing” is required by Rule 23 (e) of the Federal Rules of Civil Procedure.

In any litigation, a settlement represents a contract between the plaintiff and defendant (Rubenstein 2006). Because a class action binds plaintiffs even if they absent from the proceedings, a judge must review the settlement to ensure that it is “fair, reasonable, and adequate” (Brummer 2004). A class action settlement “is not a simple two-party transaction, for it involves a representative releasing claims of absent class members. Such a triangulated agreement triggers judicial review” (Rubenstein UCLA 2006 1467-68). The judge reviews the settlement in a public forum, acting “in the public interest” – in a sense as an agent of absent class members (Molot 2003, 114-15).

Particularly when the parties bring a motion for certification at the same time as proposing a settlement, as is the case in the settlement class action, judges cannot rely on parties presenting facts through opposition and contest. In addition, the judge may have had little information prior to the request to approve the settlement. Since the parties no longer sit as adversaries, “the judge stands alone, dependent for

information on one-time adversaries who have joined in a nonadversary request” (Schwarzer 1996, 223).¹²¹

Global settlement is a term often used to describe the settlement structure of non-class action mass tort litigation. Mass tort litigation might occur where large numbers of claims for injury or fatality stem from use of or exposure to the same product, often “high profile products manufactured by leading corporations” (Hensler 2001b 884; see also Shuck 1995, 950). Examples in the U.S. include asbestos, Agent Orange, Bendectin, Dalkon Shield and breast implants (Hensler, 59 Brook L Rev 961). Harold Koh describes mass tort litigation as those cases that attempt “to sort out large-scale disasters, toxic torts, and products liability imbroglios: ostensibly private lawsuits that are now increasingly infused with the public interest.” (Koh 162 UPa 1530)

Some mass tort cases proceed as class actions. Others might aggregate large number of plaintiffs, but in situations where class certification is not appropriate because of differences in injuries, in extent of liability or availability of defenses, or in cases where the injuries have not matured (Issacharoff Witt 2004).¹²² Judges, litigants,

¹²¹ The Manual for Complex Litigation, 4th, recognizes the difference between the two types of settlements. In the class action suit, the manual recommends two hearings: “First, counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation. In some cases, this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by parties. If the case is presented for both class certification and settlement approval, the certification hearing and preliminary fairness evaluation can usually be combined.” (320)

¹²² Mature torts are “torts that over time develop repetitive fact patters and repeat-play constituencies” Issacharoff Witt 2004 1573

and special masters have also developed “bureaucratized, aggregate settlement structures” (Issacharoff Witt 2004 1573) in non-class aggregate litigation. To be sure, some cases still proceed to trial, but “just as often” judges and litigants work to create “mass tort compensation funds” like those used as part of the global settlements in the 9/11 Responders litigation (Judge Hellerstein) (Hellerstein, Henderson Jr., and Twerski 2012), Zyprexa (Judge Weinstein) (Erichson 2013), the BP Oil Spill, and the Boston Marathon case (Judge George A. O’Toole Jr.) (Koh 162 UPa 1530).

Another procedural mechanism that has significantly influenced settlements in mass tort litigation is multi-districting, where cases are transferred to one judge for the consolidation and coordination of pretrial proceedings (Burbank and Silberman 1997, 689).¹²³ Multidistrict litigation (“MDL”) may address antitrust law suits, litigation in relation to natural disasters, employment practices, securities, products liability (Hansal 2004, 2). Mass tort cases that have proceeded as multi-district litigation include the Agent Orange, Zyprexa (a drug used to treat schizophrenia), Benedictin,

¹²³ Created by congress in 1968, pursuant to 28 U.S.C. § 1407. Hansal (2004) notes that the “Creation of the panel was driven largely by the filing of almost 2,000 antitrust suits in 35 U.S. District Courts, containing 25,623 separate claims for damages for price-fixing against manufacturers of electrical equipment in the early 1960’s. That avalanche of litigation led Chief Justice Earl Warren, in 1962, to create the Coordinating Committee for Multiple Litigation for the United States District Courts.... In the Electrical Equipment Conspiracy Litigation, the Coordinating Committee created a national deposition program and a steering committee of plaintiff’s counsel to streamline the electrical equipment cases. In the first civil trial, Philadelphia attorney Harold Kohn recovered a verdict of \$ 28.9 million in favor of his client, Philadelphia Electric.” From 1968 to 2002, the panel centralized 179,071 civil actions for pretrial proceedings. n9 Of that number, 139,975 actions have been terminated and 39,096 remain pending. Judicial panel on multidistrict litigation <http://www.jpml.uscourts.gov/>

Dalkon Shield, and Asbestos litigation (MDL No. 875). MDL that is not settled or otherwise resolved before trial is disaggregated, with the individual cases returned to the original transferor district. As a result, MDL brings with it enormous pressure to settle in advance of trial.

Two insights become evident if we shift the examination of procedural change to the judge's perspective. First, the use of particular procedures may wax and wane, their popularity in the legal community may rise and fall (Mullinex 2013, 532), but the judge's responsibility to litigants remains. Judges must decide those "matters that come before the court;" they cannot "avoid cases that present difficult, controversial, or unpopular issues" (ABA Model Code Canon 2).

Judges must act and work with the tools available. From a historical perspective (see for example Yeazell), attempts to manage dispute resolution through procedural intervention evoke the image of the bulge in a balloon that moves around but never disappears. Scholarship assumes a rationality and causality which it consistently has difficulty proving. Yet, there is no stable set of cases, which, absent the particular procedure, would unfold in a consistent way. There is no "original state" of litigation. Rather, litigation is constituted by a set of procedures. Here in particular there is an integral reciprocal relationship between means and ends.

The second insight is that the scholarly tale often obscures the work of judges. In these portrayals of civil litigation, judges are either complicit in problematic procedures (Resnik 2014; Erichson 2014), move beyond their appropriate functions, or fall prey to the whims of powerful litigants (Coffee 1995) and the "dramatic expansion

of the scope of substantive liability” (Redish and Kastanek 2006). The minutia of judicial activities is often absent.

This chapter describes procedural reforms in aggregate settlements, focusing on the work of U.S. federal court judges who innovated to create specialized procedures in class action settlement hearings and non-class action mass tort litigation. This chapter proceeds as follows. The next section, Part 2 provides a brief historical overview of the development of aggregate litigation and judge-led settlements. Part 3 explores the standard debates about the judicial role in facilitating settlements in mass tort litigation. Part 4 takes a closer look at the judges’ experiences both in and out of court to craft new mechanisms for settling large complex trials. Finally, Parts 5 and 6 challenge the standard formulations of legal instrumentalism and judicial politics. The experiences of judges in this area demonstrates that takes a historical perspective to look at changes in aggregate litigation, the entanglement of public and private in mass torts’ settlements, and judges’ exploration of different procedures to facilitate and manage large complex settlement structure.

2. History of Class Action and Aggregate Settlements

2.1 Federal Rules of Civil Procedure

The development of fairness hearings for settlement class actions and judicial involvement in global settlements for mass tort cases involves and implicates several histories – the creation of the Federal Rules of Civil Procedure, the evolution of class actions and Rule 23 (e), the rise of mass tort cases and MDL, as well as the expansion of court-connected ADR and judge-led settlements. Reviewing these histories

illustrates the context of procedural change in an institutional or court-related perspective. This part briefly describes the development of the Federal Rules and these procedural techniques that led to the current state of settlement class actions and global settlements in non-class action mass tort litigation. This part also briefly introduces the rationales for these procedures and motivations in managing complex cases.

The history of judicial involvement in crafting nation-wide procedural rules could begin in 1934, when Congress passed the Rules Enabling Act. The Rules Enabling Act gave authority to the Supreme Court to prescribe rules for the district courts relating to “the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions” (Holtzoff 1058). The Court is restricted from effecting or modifying any substantive right, but judges are able to prescribe “general rules of practice and procedure...”¹²⁴ Before the enactment of the Federal Rules, technical procedural issues were said to dominate civil actions. Procedural rules were rigid and led to dismissals based on technicalities rather than substantive rights (Subrin and Main 2014, 1843). Procedure had become an end in and of itself.

In 1938, Congress passed the Federal Rules of Civil Procedure. The new rules merged equity and rules for common law claims. They were trans-substantive,

¹²⁴ AUTHORITY FOR PROMULGATION OF RULES TITLE 28, UNITED STATES CODE § 2072. Rules of procedure and evidence; power to prescribe (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals. (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

applying to any civil action (Subrin 1989, 1874-75). The drafters of the new rules sought to make procedure an instrument of substantive rights so that causes of action would be decided on their merits: “The Federal Rules were premised on the notion that, once the parties learned the relevant facts, cases would either settle or go to trial” (Subrin and Main 2014, 1843). The drafters of the new rules sought “to strik[e] down the ancient shackles that bound legal procedure to a remote past” and “bring about the disposition of every case on the merits ... overlooking any discrepancy or error that does not actually affect the substantive rights of the parties.” (Holtzoff 1955, 1059 Quoting Chief Justice Hughes speech at meeting of American Law Institute held in Washington on May 9, 1935).

Since then, the drafters’ goals have been described as functional, eliminating the distinction between common law and equity, and bringing simplicity and flexibility to allow cases to be decided on their merits (Subrin 1989, 1874-75; Koh 2013, 1527). The new rules were an attempt to make the requirements for going to court consist of simple, nontechnical language, combined with “a liberal philosophy with regard to construction, amendment, joinder, discovery, and party control, all designed to lower barriers to trial and to promote adjudication on the merits, not on the pleadings.” (Koh 2013, 1527 quoting Charles Clark). Judge Weinstein described the Federal Rules as promoting access to justice:

Few disagree that the Federal Rules were intended by their drafters to open wide the courthouse doors. The authors sought to air out the courts and let the sunlight of substance shine into them; they were sweeping away the dirt and

cobwebs built over centuries of tinkering with process. ... The drafters' commitment was to a civil practice in which all parties would have ready access to the courts and to relevant information, a practice in which the merits would be reached promptly and decided fairly. Every claimant would get a meaningful day in court. In the golden age of federal civil procedure, the federal courthouse was the beacon to which those with serious substantive grievances could turn for direction toward justice.” (Weinstein 1989, 1906)

Equity Rule 38,¹²⁵ which allowed for class actions, was carried over as Rule 23 in the new Federal Rules of Civil Procedure. Robert Lee Carter (1989), former U.S. District Court judge for the Southern District of New York who presided over the settlement of a class-action antitrust suit against the N.B.A., described the origins of Rule 23 on the occasion of the 50th anniversary of the Rules of Civil Procedure. He wrote that Rule 23 was one of the “prime embodiments of the drafters' abstract ideal of the role of procedure” (Carter 1989, 2184). The drafter’s ideal that, instead of hindering claims, procedural rules would “advance the disposition of claims on their merits” was most evident in rules allowing joinder of parties (Rule 11) and was “taken to its furthest development in Rule 23” (ibid). Rule 23 would avoid multiple suits that

¹²⁵ “Thus federal equity rule 38 of 1912 said merely: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." Here the emphasis fell on community or solidarity of interest among the members of the class deriving from the existence of a common question.” Kaplan 1967, 376

rested on similar claims; the principal goal, however, was the vindication of substantive rights” (ibid).

The 1938 rule continued the practice of categorizing class actions as either “pure, hybrid, or spurious” (Holtzoff 1955, 1070). Categorizing class actions was confusing (Kaplan 1967, 380) and a vestige of technical rules that “distract[ed] attention from the real issues” (Kaplan 1967, 381). The first major revision to class action rules thus took place in 1966 (Frank 1989, 1884), when Rule 23 was amended to get rid of the equity categories (Burbank Silberman 1997 684). Simplifying the class action requirements reasserted the drafters’ original intention to facilitate access to the court. (Miller Albany L Rev). The “historic 1966 rules package” continued to expand the scope of civil actions (Mullinex 417-18), ushering in “a golden age of class action litigation” (Mullinex 2013, 518).

In the late 1960s and early 1970s, new federal legislation created substantive rights which could be enforced through litigation (including the Civil Rights Act in 1964 and 1968, the Voting Rights Acts in 1965 and the Civil Rights Attorneys' Fees Awards Act in 1976). The legislation had the effect of increasing rights to litigation (Mullinex 417-418; Weinstein 1989, 1911; see also Miller 1979). Mullinex writes that “[b]etween 1966 and the mid-1970s, federal courts were transformed by the influx of massive class action cases seeking remediation for alleged violations of various constitutional, federal, and state laws” (Mullinex 2013, 519). In 1966 the Rules Advisory Committee also clarified that dismissing a class action required approval of

the court and notice to class members of any proposed settlement (Notes of Advisory Committee 1966).¹²⁶

2.2 Mass Torts

Throughout the late 1970s and early 1980s (Mullinex 2013, 521), tort litigation on product liability, occupational health and environmental continued to expand, “much of it displaying features sufficiently distinctive and recurrent to constitute a discrete legal phenomenon deserving of its own moniker—the ‘mass tort’” (Shuck 1995, 947). The asbestos litigation itself was “a public health calamity of major proportions. Approximately 20 million workers suffered occupational exposure in the U.S.,” several hundred thousand people died from exposure, and many more suffered from exposure-based illnesses (Issaccharoff Witt 2004 1619).

Deborah Hensler and Mark Peterson (1993) argue that the mass tort litigation of the late twentieth century arose both because of exposure to toxic substances, as well as mass manufacturing and distribution capabilities:

Our modern economy rewards manufacturers for capturing large market shares, thereby creating a potential for exposing millions of persons to products, some of which are found to be dangerous after they are put on the market. More than thirty million pregnant women used Bendectin. An estimated four to six million Americans (women and their offspring) were exposed to DES during pregnancy... Tens of millions of American workers

¹²⁶ available at <http://uscode.house.gov/view.xhtml?path=/prelim@title28/title28a/node85/titleIV&edition=prelim>

were exposed to asbestos on their jobs. When so many persons are exposed, even very rare injuries can produce thousands of claims (Hensler and Peterson 1993, 1015, footnotes omitted).

Of course, several scholars have documented a history of comprehensive personal injury litigation brought against “large industrial concerns” as far back as the industrial revolution. Issacharoff and Witt (2004) document “work injuries” of the late 19th and early 20th century, which accounted for over twenty percent of all personal injury litigation (Issacharoff and Witt 2004, 1581). Issacharoff and Witt demonstrate the adaptive nature of legal actors, where “[w]ork accidents, followed by the early mass disasters and then automobile accidents each provided a new stage on which repeat players emerged to manage the resolution of personal injury disputes” (Issacharoff Witt 2004 1618).

Some mass tort cases proceeded as class actions. Judge Robert Parker (Cimino, 751 F. Supp. 649, 650) certified a class action claim related to asbestos litigation. The trial he presided over was conducted over 133 trial days. The docket sheet was 529 pages, with 25,348 pages of transcript and 373 court orders (Willging 1999). Both Agent Orange and Dalkon Shield law suits resolved through class action settlements (Mullinex 2013, 521).¹²⁷

¹²⁷ In re “Agent Orange” Prod. Liab. Litig., 818 F.2d 145, 174 (2d Cir. 1987) (approving Judge Weinstein’s class certification of the Agent Orange class and settlement fund).

But as Hensler and others have pointed out, the 1960s rules committee did not want class action procedures to be used to deal with mass accident or mass tort litigation. John Frank, a member of the Rules Committee in 1966, stated,

I could not be persuaded, I think, ever to allow a mass accident to be treated as a straight class action, because the values are so tremendous, and the premium it puts... on counsel to go a little soft and take it a little easy[,] is just too frightening to contemplate. (1963 Minutes, supra n. 34, at 9-10, quoted in Burbank Silberman 1997).

Mass tort litigation has been described as quasi-class action litigation (Erichson 2013, 1022). Mass torts, with their “interstate character, and their sheer size – often involving persons in differing stages of exposure to or injury from a product or condition” (Judge Niemeyer 1997) pushed the limits of aggregation under Rule 23.¹²⁸ In 1990 Chief Justice Rehnquist commissioned an ad hoc judicial committee to study the particular problems raised by the asbestos litigation (Miller Albany L Rev, 134).¹²⁹ The Judicial Conference also requested the Standing Committee to “direct its Advisory Committee on Civil Rules to study whether Rule 23 of the Federal Rules of Civil Procedure should be amended to accommodate the demands of mass tort litigation” (1996, FJC 2).

¹²⁸ See generally *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)

¹²⁹ In addition to complex issues of aggregation, Mass tort litigation in the 1980s led to bankruptcies of major companies. For example, Dalkon Shield claimants received proceeds from the sale of A.H. Robins, Co. (Hensler 1995).

Recognizing the increase in mass tort litigation,¹³⁰ Judge Niemeyer, Chairman of the Civil Rules Advisory Committee wrote in his Introduction to Advisory Committee's Working Papers:

Intentionally or not, we may be coming to rely on civil litigation not only for individualized dispute resolution, but also, through the class action device, to bring about changes in the safety of products, in the disclosure requirements of securities laws, in disclosures connected with banking and insurance billing methods, and in, the method for compensating broad segments of society affected by singular torts. Indeed, in a few instances, Congress has passed legislation relying on class action procedures. (Niemeyer 1997, x)

These new types of aggregate cases instigated new procedural innovations (Shuck 1995, 947). Judges used a variety of approaches to manage mass tort litigation (Hensler Brook 1031). The Rules Advisory Committee drafted a specific provision in Rule 23 to address settlement class actions. Judges also responded by shifting the emphasis from class certification to multi-districting. A “denial of class certification and the subsequent accomplishment of a mass non-class settlement” became typical of mass tort litigation (Erichson 2013; see also Shuck 1995, 947; Mullinex 1999 420).

Hensler (1993) writes:

¹³⁰ There was a dip in 1980s: federal class action filings have plummeted in the last few years, from over 3000 in 1975 to about 600 in the year ending June 31, 1987. (Weinstein 1989, 1911) Lull in the 1980s, then increased use “What a difference a few years make or may seem to make. Class actions are visible again, and serious attention is being given to revisions in Rule 23.41” Burbank Silberman 1997

If courts have failed to deliver on the promise of justice in mass personal injury litigation, it is not for want of trying. When courts first began to grapple seriously with mass personal injury litigation in the 1980s, they focused their attention on managing pretrial development of the cases-i.e., pleadings, discovery and motion practice. Judges who found themselves dealing with thousands of like cases... fashioned a variety of rules and practices to reduce duplicative activities and minimize transaction costs. But streamlining and expediting pretrial case development alone does not lead inevitably to efficient or equitable case disposition. Efficient disposition of a large volume of litigation concentrated within one or a small number of courts requires some type of aggregative or collective procedure. As a result, when courts have been precluded from using formal aggregative techniques, they have tended to adopt informal means of collective disposition. (Hensler 1993, 1031-32)

2.3 ADR and Judge Led Settlements

The “informal techniques” Hensler mentions included ADR—Alternative Dispute Resolution—and case management. Throughout the 1970s, appeals to ADR grew so that ADR has developed into a full-fledged and established movement (Mayer, *Beyond Neutrality*, 7): “Although the replacement of adjudication with arbitration had been frequently proposed earlier, the notion that there was an array of modalities for addressing disputes, with varying suitability to different kinds of disputes, gained new and widespread acceptance” (Galanter 2002, 296).

Marc Galanter (2002) follows the history of the growth of ADR as a movement. His account is largely one of critique of the traditional legal system being repeated and growing until there was a whole-sale crisis on hand. While the occasional newspaper editorial complained about the number of unjustified lawsuits in the early 1960s, by the 1970s, the legal system was under attack by the media, community activists, and consumers demanding greater participation (see also Menkel-Meadow 1991-92, 2006).¹³¹

Two messages were consistently repeated: first, that the courts were overloaded, and, second, that alternative methods provided a ‘faster, cheaper and better’ response to disputes. Increasingly, the opinion was that the courts were inefficient and unable to meet the growing demand for litigation. ADR could address the “litigation explosion” that threatened to overwhelm the adjudicative institution.¹³² Frank (1989) on the 50th anniversary of the Federal Rules of Civil Procedure aptly summed up the prevailing sentiment:

The fact is that... we have come into a slump in civil procedure. The combination of expense and delay make the dominant motif in dispute settling ADR: Alternative Dispute Resolution. The courts are doing so badly that the disputants are running away from them; the people are looking for other ways

¹³¹ Marc Galanter, (2002-2003) 81 Texas Law Review 285 (the ‘too much law sentiment’ reflects a broader socio-cultural wave in favour of deregulation and privatization at the expense of government, regulation, taxes and public goods).

¹³² Galanter, “The Turn Against Law”, *supra* note 88 at 295 (there was a “general consensus that the courts should scale back their excursions into problem solving and that their quantitative burdens should be addressed... by promoting the use of alternative dispute resolution”).

to settle their disputes whether within the government, as with court-administered ADR, or outside it, with arbitration. (Frank 1989, 1884)

The “judges’ reaction to the perception that things were ‘out of control’ was to ‘take control’” (Subrin and Main year, 1861). In 1976, Chief Justice Warren Burger hosted the Pound Conference on “The Causes of Popular Dissatisfaction with the Administration of Justice” because of concern with the work load of federal and state courts. The conference is “widely hailed as the ‘big bang’ moment in the development of ADR in the United States” (Moffitt 2009, 1238). The Chief Justice called for systemic reforms, including increased use of ADR (Moffit 2009, 1238).¹³³ The Law Enforcement Assistance Act provided support for community mediation and

¹³³ In Canada, the Canadian Bar Association, following similar developments in the U.S., began to urge lawyers to see their primary function as problem solving and to embrace ADR as one way to do so. ADR, especially mediation, was still attracting criticism; see A MacEachern “Chief Justice Puts Boots to ADR” *Lawyers Weekly* (October 26, 1989) in Pirie, “Critiques of Settlement Advocacy”, *supra* note 77 at 291 (B.C. Supreme Court Chief Justice Allan MacEachern stated: ADR is often supported by well-intentioned people who, for a variety of reasons, are anxious to reorganize society and procedures of courts with naïve, theoretical concepts of humanity and efficiency... society’s decent people need the no-nonsense, straightforward procedures of courtroom litigation to fight unreasonable claims and not the “soft” procedures ADR offers”). However, By the mid 1990s, the Canadian Bar Association specifically called for ADR to be considered an integral component of the civil justice system rather than as an alternative. Canadian Bar Association Task Force on Systems of Civil Justice, *Report of the Task Force on Systems of Civil Justice* (Ottawa: CBA, 1996). At the same time, the adversarial adjudicative model continued to attract criticism. A 2001 Task Force on the Discovery Process in Ontario reported that the cost and delay associated with discovery were barriers to access to justice. The task force recommended changes intended to address the problems that were as a result of “the adversarial culture of litigation.” Osborne, *Civil Justice Reform Project*, *supra* note 25 at 2. ADR continued to “penetrate” the court model. Pre-trial conferences, which had once been used to help prepare parties for trial, became settlement conferences, with judges acting as mediators or facilitators helping (or encouraging) parties to reach agreement.

neighborhood justice centers, and foundations such as the Hewlett Foundation began investing in research related to ADR (Mayer 2004, 159).

Throughout the 1980s, lawyers and the adversarial court system continued to be vilified. At the same time, ADR became established in the academic and professional realm. In 1983, faculty, students, and staff from Harvard University, Massachusetts Institute of Technology and Tufts University founded The Program on Negotiation at Harvard Law School as a special research project.¹³⁴ And, in what became foundational to negotiation theory, Axelrod produced research on the Evolution of Cooperation using the Prisoner's Dilemma game to explore strategies for cooperation.¹³⁵ ADR appealed to social activists who had "a desire to find better ways to deal with disputes in the family or in the community" (Mayer 2004, 159). ADR "was part of a social movement that was advocating for more 'democratic' participation in social institutions, with a general feeling that disputants should be more involved in the resolving of disputes" (Menkel-Meadow "Pursuing Settlement"6).¹³⁶

¹³⁴ Mnookin, Robert and Susan Hackley, "Welcome to the Program on Negotiation (PON)" (Harvard Law School, 2008). Available at <http://www.pon.harvard.edu/about/>.

¹³⁵ Menkel-Meadow, "Why Hasn't the World Gotten to Yes?" *supra* note 32.

¹³⁶ Pirie notes that the reason ADR has been popular is because it has been able to meet the goals of various parties: neighborhood justice centers want procedures that will improve communication and strengthen communities. Corporate business interests align more with efficiency and economic goals. Court-annexed programs are meant to decrease dockets, and in that way they increase access to the court system; they also increase litigant's satisfaction with court system. He notes that these reasons depict "fundamental contradictions" in the modern rise in popularity of ADR; Pirie, "Critiques of Settlement Advocacy", 293. See also

Federal judges became active users and promoters of various ADR techniques (Yeazell 657-58; Burbank Silberman 1997, 695). Congress approved amendments to the Federal Rules of Civil Procedure (Rule 16) “to make settlement an explicit part of the managerial functions of judges” (Moffitt 2009, 1238; Order Amending the Federal Rules of Civil Procedure, 461 U.S. 1097 (1983)).¹³⁷ Court-annexed mediation and arbitration became a regular part of the techniques judges used to manage cases in the pretrial phase. Molot writes that settlement, negotiation and other ADR techniques were part of a movement that transformed the judicial role from a passive arbiter at litigation into,

an active manager of pretrial practices. Partly on their own initiative, partly at the urging of superiors, and partly in accordance with legislative directions and amendments to the Federal Rules, judges utilized a variety of measures to control pretrial litigation. Some judges sought to make litigation speedier and less costly by actively regulating the numerous depositions... Other judges promoted alternative dispute resolution, often requiring parties to participate in settlement conferences in their chambers and sometimes even urging settlement in ex parte meetings with each party.” (Molot 421; see also Yeazell 657-58; Civil Litigation Management Manual 2010, 88)

¹³⁷ “Federal judges no longer decry flight from the courts; they encourage and even may require it. They are no longer agnostic about settlement; they are true believers willing to preach their message to a captive audience..... So-called court-annexed arbitration has become a mainstay in the arsenal of alternatives to litigation that courts seek to offer, whether on a voluntary or a mandatory basis.” (Burbank Silberman 1997 695)

2.4 Settlement Class Actions and Rule 23(e)

By the mid 1990s, the Federal Judicial Center was able to report that in four districts that were part of an empirical study,¹³⁸ 39% of a total of 152 cases certified for class action were certified “for settlement purposes only”. In approximately 18% of all certified class actions (28 cases), the proposed settlement “was submitted to the court before or simultaneously with the first motion to certify.” In 24 of those 28 cases, “the court approved the settlement without changes” (FJC 1996).

Because of the increased appearance of actions where the proposed settlement to resolve and dismiss the action was brought at the same time as the request for certification, the 1996 Rules Advisory Committee sought to add a specific provision to address “settlement class actions” (Hensler). The Rules Committee proposed to create a category of settlement class actions and provide “authority for judges to certify such classes in response to the parties’ joint request” (Hensler, 31). The Rules Advisory Committee delayed enacting the clause and, following the Supreme Court’s decision in *Amchem*, dropped the matter entirely.

In 2003, the Rules Committee added requirements to Rule 23(e). Before a court can approve a class action settlement, it must hold a hearing and make findings

¹³⁸ empirical data on all class actions terminated between July 1, 1992, and June 30, 1994, in four federal district courts: the Eastern District of Pennsylvania (E.D. Pa., headquartered in Philadelphia), the Southern District of Florida (S.D. Fla., headquartered in Miami), the Northern District of Illinois (N.D. Ill., headquartered in Chicago), and the Northern District of California (N.D. Cal., headquartered in San Francisco)

that the settlement has met a “fair, reasonable and adequate” standard.¹³⁹ Conducting a fairness hearing for a settlement class action may include the presentation of witness, experts, and affidavits, including a statement with the agreement (FJC Manual for complex lit 4th 322). The Rules also mandate that the court make findings supporting a conclusion that the settlement is fair, reasonable and adequate: “The findings must be set out in sufficient detail to explain to class members and the appellate court the factors that bear on applying the standard.”

The new rules also delineate procedure for objectors. Class member and non class members who object to the settlement can appear and testify. However, objectors cannot withdraw an objection without review from court in order to allow the judge to review any agreements made between objectors and counsel.

3. Standard Debates in Aggregate Settlements

3.1 Efficiency versus (Inefficient) Unintended Consequences

The literature on class action settlements, fairness hearings, multi-district litigation and non-class action global settlements is immense. Law schools such as

¹³⁹ Subdivision (e)(1)(c) “confirms and mandates the already common practice of holding hearings as part of the process of approving settlement...” Amendments to Rule 23 (e) included “criteria” for fairness hearing: the court can only approve a settlement following a hearing and a finding that the settlement “is fair, reasonable, and adequate.”The Committee Notes affirmed the desirability of resolving a class action through settlement, but confirmed that “court review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement.”Report of the Judicial Conference on Class Action Settlements Committee notes on Rules 2003 amendment 28 USC App, FEDERAL RULES OF CIVIL PROCEDURE, TITLE IV: PARTIES available at <http://uscode.house.gov/view.xhtml?path=/prelim@title28/title28a/node85/titleIV&edition=prelim>

Northeastern University and University of Chicago regularly host conferences and publish symposium volumes which examine procedure for aggregate litigation (see e.g. University of Pennsylvania Law Review 137 1989;¹⁴⁰ Brooklyn Law Review 59 1993; Texas Law Review 73 1995; Cornell Law Review 80 1995; Fordham Law Review 78 2009; Washington Law Review 90 (3) 2013 Symposium of the Institute of Law and Economic Policy, “What is the role of the judge in aggregate litigation?”; University of Pennsylvania Law Review 162 2014). Often these conferences and publications happen in conjunction with public hearings of the Rules Advisory Committee.

The literature tells a familiar story. Litigation, in need of reform, is subjected to procedural interventions. Case management, court-annexed ADR, settlement and other pretrial techniques are endorsed because they provide faster more efficient means to dispose of cases. New procedures – different legal techniques that are more or less conventional (e.g. summary judgment) or alternative (e.g. ADR) – are tools, the means to manage civil actions and ensure that litigation is more efficient, accessible, fair, etc.

¹⁴⁰ U of Pennsylvania LR 1989: Conference on October 7 and 8, 1988 at Northeastern University School of Law attended by two hundred judges, lawyers, law professors, and students “to hear twenty of the country's leading proceduralists honor, assess, and question the now venerable Rules” (Forward, Subrin) Subrin presents a set of recurring questions regarding expansion of rights, trans-substantivity, the politics underlying the Federal Rules and procedural rulemaking, the impact of rules on “the ultimate disposition of lawsuits,” and the effects of techniques (goals) such as “flexibility, open-ended texture, simplicity, and broad grants of judicial discretion” (Subrin 1989, 1874-75).

The literature also enacts fairly standard debates that we see elsewhere: scholars identify procedures that increase efficient processing of disputes or worry about substantive rights and access to justice; scholars reflect on the separation of powers and seek to articulate the appropriate boundaries of the judicial function (Erichson 2013; Moffitt 2009); or suggest reforms that represent best practices for democratic expression of public values. Researchers at the Federal Judicial Center identified three central issues in the debates about class actions, which generally speaking apply to most aggregate settlement:

Broadly stated, three central issues permeate the debate. First, does the aggregation of numerous individual claims into a class coerce settlement by raising the stakes of the litigation beyond the resources of the defendant? Second, does the class action device produce benefits for individual class members and the public—and not just to the lawyers who file them? And, finally, do those benefits outweigh the burdens imposed on the courts and on those litigants who oppose the class? (Willging, Hooper and Niemic 1996, 2)

This section outlines the common critiques and narratives regarding settlement class actions, fairness hearings and global settlements. As the other chapters demonstrate, these debates harbor underlying assumptions about law's operation as an instrument of other goals, as well as the differentiation and appropriate boundaries of law and politics.

* * * * *

Looking back at the early stages of judicial intervention in case management, Jonathan Molot (2003) writes that

judges with too little time on their calendars to hold trials for all of their civil cases felt obligated to intervene during pretrial not only to ensure that the main event in litigation was efficient and fair, but also to ensure that pretrial was indeed the main event. If judges did not intervene, overzealous litigants might not only inflict harm on their immediate adversaries, but also clog dockets and thereby deprive future litigant of their day in court. (Molot 2003, 39-40)

Similarly, Sabin and Main (2014) argue that the prompt resolution of cases is a “virtue” of the present state of civil litigation. They note that since 1990, the median time for terminated cases to be disposed is approximately seven to eight months: “This efficiency is achieved because more cases are resolved earlier in the litigation process. With trial ... being a ‘pathological event,’ the reduction in the number of cases surviving motion for summary judgment improves the overall time to disposition numbers.” Settlement class actions—class actions certified solely for the purpose of settlement—efficiently dispose of multiple claims.

Detractors, however, argue that settlement class actions raise fairness concerns and questions about whether absent class members are being adequately represented. A traditional description of counsels’ roles in the litigation process would hold that “because the class counsel and class representative advocate most directly on behalf of the class, and have at least theoretically the largest stake in a favorable outcome in the litigation, it is assumed that zealous representation through these two agents,

supplemented by the appropriate procedural safeguards, will ensure the protection of absent members' constitutional rights to due process." (Brummer 2004 1042) Scholars argue, however, that settlement class actions create perverse incentives for counsel to settle claims early, regardless of the adequacy of the settlement, in order to secure large attorney fees.

Class counsel might settle claims for less than they are worth "in exchange for quick and substantial fees (a sell-out or sweetheart deal)" or they might file cases with little merit "in the hopes of extracting nuisance fees (a strike suit)" (Rubenstein 2006, 1442). Aggregating cases may also create incentives for plaintiffs' attorneys to expand the number of claimants, even those claimants "with questionable losses or grounds for liability" in order to put pressure on the defense to settle. Rather than evidencing efficiency, this move "may further diminish the compensation available to more meritorious plaintiffs with significant losses, and drive up transactions costs."

(Hensler)

Plaintiff's counsel is also in a position to put "extortive pressure" on defendants "through the sheer mass of aggregated claims" (Neimeyer 1997, xi). Redish likens plaintiff attorneys to bounty hunters, who "[m]otivated as much or more by considerations of personal greed than civic responsibility... made a career out of apprehending these criminals, thereby qualifying for the rewards. In this manner, the bounty hunters effectively furthered the public interest by seeking to promote their own personal economic interests." In reviewing the testimony before the Civil Rules Advisory Committee on proposed amendments to Rule 23 in 1996 Judge Niemeyer

describes the “paradigmatic case” where the attorneys “representing the plaintiffs’ class settled the case, obtaining for each class member a \$5.50 refund. The attorneys received in excess of \$10 million in fees.”

Scholars are also concerned that judges are enticed by the prospect of settlement. Judges too have an interest in moving the matter to settle in order to remove the action from the judge’s docket “not an unimportant factor in a time of onerous caseloads” (Rubenstein UCLA L Rev 1445). In addition, judges who participate in trying to broker the deal, either directly or by scheduling pretrial events that induce the parties to settle, begin to have a vested interest in seeing the matter settle, again, potentially at the cost of fairness.

Shuck concludes that overall, the legal actors in the “mass tort drama” include “self-serving, entrepreneurial plaintiffs’ lawyers; foot-dragging defense counsel; and overwhelmed, desperately improvising judges”. Rather than helping to achieve the corrective justice goals of tort litigation, these actors “have subordinated important public goals and the needs of individual claimants to their own interests. Notoriously convoluted proceedings enrich lawyers, consultants, and expert witnesses while demoralizing, and often impoverishing, the law’s supposed beneficiaries” (Shuck 1995, 942).

3.2 The Judicial Role

A second debate and set of critiques revolves around the appropriate judicial role. In an adversarial system, the ideal judge is independent and impartial. The judge does not substituting his or her preferences for the “governing body of law”. Judges

rely on the parties to the dispute to both initiate the dispute and frame the issues (Molot 66). Molot describes this as the judge's institutional competence and constitutional authority. The judicial role is thus characterized by two guiding principles: judges are impartial and detached so that their decision will not be and will not appear to be based on personal preferences or ideology. Second, judges decide based on legal standards applicable to the dispute framed by the parties.

Molot believes that judges can and ought to “update their role and take on new responsibilities as they confront new litigation demands” (Molot year 74). Judges properly perform “nontraditional functions,” such as managing pretrial practice or reviewing mass tort settlements. These actions push the boundaries of judges’ institutional competence and constitutional authority; but to do otherwise would be to “abdicate their responsibility to afford justice” (Molot 2003, 74). Nevertheless, the judicially imposed settlement conference strays from the appropriate judicial role, and constitutes the “worst offender in the arsenal of judicial management tools” (Molot 2003, 43).

Several scholars take particular issue with judicial involvement in mass tort settlements in non-class action law suits, for example, Judge Weinstein’s action to approve the parties’ negotiated settlement and impose caps on attorneys’ fees in *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 271-72 (E.D.N.Y. 2006) (Erichson, 2013 ft 37). Erichson takes particular issue with Judge Hellerstein’s intervention in the 9/11 non-class action mass tort settlement. In that case, the parties had originally consented to a settlement that would have provided payouts totaling \$575 million to

\$657.5 million. Judge Hellerstein rejected the first settlement on the basis that it did not adequately compensate plaintiffs. The parties returned with revised terms, increasing the total amount to between \$625 and \$712.5 million, with ninety-five percent of the funds allocated to the most severe injuries (Erichson 2013, 1020). Erichson (2013) queries how Judge Hellerstein had the authority to approve or reject a settlement when the matter was not brought before him as a class action (indeed he refused to certify, get quote): “I understand, of course, why a judge might wish he had that power. Overseeing a case gives a judge a strong investment in the outcome as well as a sense of what outcome might be just.” (Erichson 2013, 1016)

Certain scholars argue that in the class action settlement context, the judge’s decision to approve a settlement in a class action claim is not based on legal standards. Judges often do not have enough information to assess settlements, and the parties before them are no longer adversaries. Several scholars also argue that in particular, the fairness hearing puts the judge in an untenable position. In essence, they are required to conduct an inquiry into the fairness and adequacy of the class action settlement. In that case, judges must embrace an inquisitorial role. However, coming from an adversarial system, “judges are not well equipped to undertake specialized investigatory oversight of the settlement process... they have no formal training in fact gathering... they have no staffs, [and] they do not leave the courtroom to make surprise spot inspections...” (Rubenstein year, 1474)

On the other hand, Justice Posner states that the judge acts as a fiduciary, especially in protecting the interests of absent class members. The judge must evaluate

“not only the substance of the claim, but also the conduct of the plaintiffs’ attorneys, the merits of the settlement, and the agreement regarding attorneys’ fees... (Brummer 1064-5?) The judge must take “positive action or conduct” in order to “exercise alertness” and closely scrutinize (1066) the settlement agreement in order to ensure “adequate representation for absent class members (Achem) (1067), especially where the settlement has “questionable antecedents” (1067). (see also Weinstein in re Zyprex)

3.3 Democratic Debate

Owen Fiss (1979) wrote that the judicial function is “to give concrete meaning and application to our constitutional values.” Courts exist “to give meaning to our public values, not to resolve disputes” (Fiss 1979, 29). Constitutional cases might manifest this role most clearly, but the same applies to civil and criminal cases: Adjudication—dispute resolution in open public hearings—“is the social process by which judges give meaning to our public values” (Fiss 1979, 2). Litigation is thus a kind of democratic debate about social values, where public hearings facilitate public debate about legal norms (Resnik).

Following Fiss’ line of argument, in particular his seminal article, “Against Settlement,” Judith Resnik warns that funneling the enforcement of rights into private litigation and encouraging private settlement encroaches on democratic adjudication of civil rights. Taking the debate about social norms out of the courtroom and into judicial chambers means less public participation (Wolff U PA) and no record of the public expression of norms.

Similarly, some scholars argue that class action settlements and aggregate negotiated settlements do not provide plaintiffs the opportunity to publicly voice their concerns. Plaintiffs lose the opportunity “to voice their feelings that they have been wrongfully harmed by defendants... In the face of aggregation, mass personal injury litigation inevitably becomes more of a financial transaction than a dispute over defendants' culpability and plaintiffs' monetary and nonmonetary losses (Hensler Brook L Rev 59 at 1032).

Following a similar argument, Redish and Molot argue that directing the debate about public norms into the private realm undermines democracy. While elected officials “may legitimately make normative choices and strike political compromises on behalf of their constituents... there is no comparable argument for vesting policymaking discretion with politically insulated judges.” (Molot 2003, 62) Class action litigation in particular has effectively turned a legal device that was meant to be a tool for implementing substantive law into its own source of substantive rights. Class actions, Redish argues, have “effectively transform[ed] the essence of the governing substantive law... not ... through the democratic process of legislative amendment, where the electorate may measure its chosen representatives by how they voted on the proposed revisions of existing law.” (Redish year, 73-74) The actual operation of class action law suits turns a mere procedural device into a bounty, a private deterrence and enforcement mechanism.

Such a dramatic modification of the substantive law through resort to an avowedly procedural device contravenes the fundamental democratic notions

of representation and accountability, because the process effectively deceives the electorate. As a result of this deception, the electorate is unable to judge its elected representatives by examining how they voted on these important modifications of enforcement models, because those representatives have never been asked to vote on the issue. The democratic process is substantially undermined as a result.” (Redish 82)

4. Developing procedures to facilitate aggregate settlements

Peter Schuck (1995) observes that procedural change in the area of mass torts litigation reflects “relentless efforts” by judges, insurance companies, and plaintiff and defense counsel to manage risk and “achieve transactional efficiency, horizontal equity, and greater predictability” (Schuck 1995, 950). Schuck argues that the era of mass tort litigation is, in particular, marked by the procedural innovations initiated by the judiciary:

The movement of courts toward managerial judging, spurred by mass tort litigation, has entailed some of the most far-reaching innovations in judicial history. These innovations include novel claims aggregation techniques, statistically-derived outcomes, administration of discovery, damages assessments, advanced courtroom technologies, more systematic alternative dispute resolution efforts, and coordinated federal-state court proceedings.... a relatively small number of judges (and their special masters) have become repeat players, adept at routinizing the extraordinary. (Shuck 1995, 956-57 footnotes omitted)

Judges worked both in and out of the courtroom to devise methods to manage mass tort claims and aggregate complex litigation. In court, judges utilized several pre-trial methods in order to encourage settlement. Non-binding "mini-trials" would produce "hypothetical verdicts" and induce settlements short of a full trial. Hearings for individual representative plaintiffs would provide information to plaintiffs and defendants on likely outcomes. And "statistical or sampling adjudication," allowed judges to adjudicate a random sample from the total population of cases and combine the sample outcomes to yield statistics on the results for all cases.

Out of court, judges participated in rule making and drafting non-binding manuals based on experience and best practices. Schuck notes that the judges involved in mass tort litigation established professional organizations and participated in informal consultations "that actively facilitate[d] learning and coordination in mass tort cases" (Schuck 1995, 957). The procedural techniques to settle mass torts, whether as class actions or as non-class action claims (managed through MDL judges) "constitute a firm, self-conscious judicial commitment to the project of systematizing and refining mass tort litigation into a distinctive genre with its own rules and practices" (Schuck 1995, 957). This section details the parties and settlement features in some of the leading cases, and then goes on to describe judicial activities in the rule-making process.

4.1 Innovation in Settlement

In 1995, Roger Cramton reviewed different types of mass tort cases that had sought to proceed as class actions: millions of claimants who were exposed to

asbestos; the settlement of claims for faulty breast implants;¹⁴¹ class of owners of Ford Broncos and GM pickup trucks; and attempted certification and settlement of claims against allegedly defective plumbing installed in three million mobile homes and an even larger number of “site-built homes” (Cramton 1995; 812). Judge Weiner of the Eastern District of Pennsylvania had at one time 125,000 Asbestos cases before him (Hansal 2004, 3; and see Labaton 1991). Sam Pointer Jr. (1995), the transferee judge in the breast implant litigation (MDL-926) worked with “colleagues from the state bench” to coordinate cases through informal means, noting that as of May 1995, 400,000 breast implant recipients had registered for the global settlement (Pointer 1995).

Judge Jack Weinstein, Senior Judge of the Second Circuit, U.S. District Court, Eastern District of New York helped facilitate the settlement of litigation regarding Agent Orange and Zyprexa, an antipsychotic drug (Cornell LJ 1995; UPa 1989, 1909). The Zyprexa litigation consolidated hundreds of thousands of claims in relation to antipsychotic medication and allegations that the drug company failed to warn uses of dangerous side effects. The Judicial Panel on Multidistrict Litigation transferred more than 30,000 cases to Judge Weinstein: “Almost all of these individual Zyprexa claims have been settled. ... Had all such cases been tried, they would have overwhelmed our courts for many years” (Weinstein 2009, 1266)

¹⁴¹ In re Silicone Gel Breast Implant Prods. Liab. Litig. (Lindsey v. Dow Coming Corp.), Nos. CV92-P-10000-S, CV94-P-11558-S, MDL No. 926, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994) (Judge Sam C. Pointer).

The Agent Orange litigation consolidated more than 600 cases (Minow 1997) in relation to allegations of exposure to toxic chemicals during the Vietnam War. As part of the settlement, Judge Weinstein approved a distribution plan notwithstanding inconclusive proof that injuries resulted from exposure (Minow 1997, 2014).¹⁴² Erichson (2009) writes: “Having played a central role in litigation over Agent Orange, asbestos, DES, tobacco, breast implants, handguns, and Zyprexa, Judge Weinstein has seen his share of complex disputes” (Erichson 2009, 1120). Martha Minow (1997) described Judge Weinstein’s approach as “inclusive” and “aspirational,” proceeding “even when imperfectly achieved” (Minow 1997,2015).

Judge Weinstein also heard litigation for asbestos related injuries. Judge Weinstein (1989) reveals a personal and community-wide perspective (Minow 1997):

Four thousand years ago, members of some societies in Southeast Asia were buried under sheets of asbestos. Now millions of our citizens are buried with asbestos in their lungs...

The first cases to come to my attention, more than a decade ago, had their genesis in the Brooklyn Navy Yard. There, workers ... built the huge aircraft carriers and battleships that helped win World War II. They labored in heavy asbestos dust without ventilation or masks.

... I remember the testimony of one young woman of about twenty-four who had gone through a difficult divorce. She testified that if her father, who had

¹⁴² In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1396 (E.D.N.Y. 1985) affd in part and rev'd in part, 818 F.2d 179 (2d Cir. 1987)

died a sudden, painful death, had been alive, "he would have saved my marriage." Perhaps he would have; asbestos affects real people, sometimes for generations, and in ways we cannot always predict. (Weinstein 1995)

Alvin K. Hellerstein, Senior Judge of the U.S. Southern District of New York heard all of the claims by responders to the 9/11 attacks.¹⁴³ This included first responders such as police and fire fighters, as well as private contractors who worked to clear away debris and who allegedly suffered injuries or died from exposure to hazardous environments. More than 10,000 responders initially brought tort actions including claims of respiratory illness as a result of working at the crash site or as a result of transporting debris to the landfill site. Judge Hellerstein denied certification of a class action but worked with Special Masters to facilitate a global settlement (Erichson 2013) of claims from “more than sixty thousand postcollapse responders who, over a ten-month period, engaged in round-the-clock rescue, recovery, and debris-removal efforts” (Hellerstein, Henderson, and Twerski 2012).

Judge Hellerstein and the Special Masters created a database to manage information from discovery of the claimants. They developed mandatory discovery questions for plaintiffs to answer, which gathered “core” information about specific work performed, availability and use of protective equipment, nature and severity of injuries. The information was entered into a searchable database, which correlated severity of injury with level of causation. The database allowed “the court and the

¹⁴³ Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 408, 115 Stat. 230, 241 (2001) (codified as amended at 49 U.S.C. § 40101 (2006)).

parties to manage discovery and to choose cases for further and intensive discovery and early trial in order to make it possible for the parties to negotiate a comprehensive settlement of the massive litigation.” (654)¹⁴⁴

Judge Hellerstein (2013) reflected on the settlement process of litigation which, at that point, had been ongoing for over six years:

I have no question that the discipline imparted by the program, the information gleaned from the database, and, most importantly, the evaluations expressed in the initial report of the Special Masters led to the comprehensive settlement of the cases, ratified by over 99 percent of the plaintiffs opting into the settlement. This exercise, merging judicial management and control of the litigation processes with the autonomy of each side’s attorneys in prosecuting and defending their cases, I believe, created a process that was fair, efficient, and economical. (Hellerstein, Henderson and Twerski 2013, 665)

4.2 Change by committee

Out of the courtroom, judges were active in the rule-making process to craft procedural rules that could address changing patterns in litigation. By act of June 19,

¹⁴⁴ Erichson (2013) commends Judge Hellerstein and the Special Masters, who “took several important steps that set the stage for settlement, and these steps nicely illustrate the ways in which effective judicial management of complex litigation can pave the way to a negotiated resolution (Erichson 2013, 1017) (including phased discovery process, database of information about plaintiffs, individual bellwether trials) The important point is that judges can facilitate settlement in mass disputes by managing the litigation to bring key information to the surface. Discovery and trials, sensibly sequenced, provide information about claimants and claim values. Judges facilitate settlement by scheduling trials so that parties feel pressure to take negotiations seriously. 25 And bellwether trials in mass litigation provide data points that can move the parties toward mass resolution” (1019)

1934, ch. 651, 48 Stat. 1064 (subsequently 28 United States Code, § 2072), Congress authorized the Supreme Court to prescribe general rules of civil procedure for the district courts.¹⁴⁵ In 1958, Congress amended the act, delegating to the Judicial Conference an ongoing responsibility to study “the operation and effect of the general rules of practice and procedure in the federal courts” and make recommendations for changes to the Supreme Court (Kaplan 1967, 357).¹⁴⁶

The chief judge of each circuit and a district judge from each regional circuit sit on the Judicial Council. The Judicial Council membership as of March 2016 includes twenty-six judges (thirteen circuit and thirteen district court judges), Chief Justice John Roberts, two judge observers and the Director of the Administrative Office of the U.S. Courts.¹⁴⁷ The Judicial Conference’s Committee on Rules of Practice and Procedure, commonly referred to as the “Standing Committee” (28 U.S.C. § 2073(b)) reviews and coordinates recommendations from five advisory committees, including the Advisory Committee on the Rules of Civil Procedure (“the Civil Rules Advisory Committee”) (28 U.S.C. § 2073(a)(2)).

¹⁴⁵ The rules, and subsequent amendments, were not to take effect until (1) they had been first reported to Congress by the Attorney General at the beginning of a regular session and (2) after the close of that session. (Fed Rules of Civ Pro Congress) Committee Notes prepared by the Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure, Judicial Conference of the United States, explaining the purpose and intent of the amendments are set out in the Appendix to Title 28, United States Code, following the particular rule to which they relate

¹⁴⁶ Congress enacted Section 331 of Title 28 of the United States Code; Governance & the Judicial Conference, United States Courts available at <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference>.

¹⁴⁷ Judicial Conference Members, available at <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference>.)

In the 1960s, the rule-making committees revised many of the procedural rules “to expand the scope of the civil action” (Mullinex 1999, 418). Prior to the “substantial” amendments (Mullinex 1999, 418) to the Rules of Civil Procedure in 1966, the Advisory Committee prepared a preliminary draft of amendments. The Standing Committee published and circulated the draft in March 1964. Even though the Advisory Committee deliberations were closed (Miller 2009, 133), the Committee sought comment from the bench and bar. The Advisory Committee presented the revised draft to the Standing Committee in 1965, who then referred the proposed rules to the Supreme Court, and ultimately to Congress (with a dissent from Justice Black).

Approaching rule 23, then, ... the Committee strove to sort out the factual situations or patterns that had recurred in class actions and appeared with varying degrees of convincingness to justify treatment of the class *in solido*. The revised rule was written upon the framework thus revealed, after a preliminary analysis which resulted in shearing away and dealing separately with the special situations of derivative actions 118 and actions relating to unincorporated associations.

The Committee started with the well-agreed proposition that there is no basis for a class action unless the class is so numerous as to make individual joinder impracticable, questions of law or fact exist common to the class, and the representative parties are proper champions of the class. These "prerequisites" to any class action are set out in new subdivision (a), a somewhat improved

version of the text of the rule of 1912 and of the opening language of the 1938 rule. Kaplan 1967, 386-387

In the 1970s, federal judges took a more significant role in the Civil Rules Advisory Committee (Burbank Silberman 1997). In 1988, amendments to the Rules Enabling Act formalized the rule-making process whereby committees would provide notice and comment to the public, and provide preliminary rule revisions to the Standing Committee.

During the period of the next significant attempt to revise Rule 23 in the 1990s, the Advisory Committee, Chaired by Judge Patrick Higginbotham, held a series of hearings on proposed changes, including regularly scheduled meetings, conferences at the University of Pennsylvania, New York University, Southern Methodist University, and University of Alabama (Judge Paul V. 1997: Judge Paul V. Niemeyer, Chairman of Civil Rules Advisory Committee introduction describing process of hearings on Rule 23). The Advisory Committee published proposed changes in August 1996, followed by a six-month commentary period. Judge Niemeyer recalls,

During the six-month commentary period that followed, we received hundreds of pages of written commentary and testimony from about 90 witnesses at hearings in Philadelphia, Dallas, and San Francisco. Comments and testimony were received from the entire spectrum of experienced users of Rule 23—plaintiffs' class action lawyers, plaintiffs' lawyers who prefer not to use the class action device, defendants' lawyers, corporate counsel, judges, academics, journalists, and even persons who had been class members. The Committee

was impressed both by the breadth and depth of the comments and, I feel confident in concluding, many Committee members became better informed of the difficult and unresolved policy decisions that underlie current application of Rule 23. (ix)

The Advisory Committee met in at the University of Pennsylvania on February 16 and 17, 1995 to continue its effort to gather feedback about the operation of Rule 23. Judge Schwarzer spoke on the issue of settlement classes, observing that settlement classes had the perception of being susceptible to abuse. During the discussion that followed participants expressed both the concerns and interests of litigants:

It was asked how the rule can be structured so there is a true case-or-controversy on the Rule 23(e) presentation? What will work, as a practical matter? If the rule cannot make it happen, it can create a process. It is not uncommon to have a case filed with settlement and class certification presented at the same time. As a matter of economic reality, these are defendant-driven settlements. Defendants want global settlement and mandatory classes, but do not want to set up a class action framework that will invite claims until they know the claims can be settled. All parties are-under enormous pressures to settle - emanating in part from the court. Defendants must have total peace. (Working papers, 211, minutes of meeting page 17)

The Advisory Committee attempted several measures to address the issue of settlement classes and the concern that “once class representatives and class

adversaries join together in urging approval, the court often lacks the vigorous adversary presentation needed to test the settlement.”¹⁴⁸ In 1996, the Committee published a proposal to adopt Rule 23(b)(4), which would “explicitly authorize[e] certification for settlement purposes, under Rule 23(b)(3) only, in cases that might not qualify for certification for litigation purposes” (2015-10-22-Rule-23-subcommittee-report).

The committee delayed recommending the provision while the U.S. Supreme Court considered two settlement class action cases: *Amchem* (1997) and *Ortiz* (1999). Ultimately, the proposal was abandoned following the Supreme Court’s decision in *Amchem*: “Following several years of open discussion and public conferences, the Advisory Committee recommended seven modest revisions, only one of which... survived the implementation process.”

In 2001, the Advisory Committee revisited the issue of how to address issues of class certification and settlement of claims. In April, the Committee met at the Administrative Office of the United States Courts. The meeting was chaired by Judge David F. Levi, U.S. District Court for the Eastern District of California. The minutes of the meeting note that judges commonly dealt with the combined events (certification and settlement) by provisionally certifying a class “for purposes of considering the settlement, provisionally approving the settlement, and providing

¹⁴⁸ Advisory Committee on Rules of Civil Procedure Agenda Book - January 2002 (Draft Minutes April 23-24, 2001 Civil Rules Advisory Committee) at page 20?:

notice to class members” (Minutes) Because Rule 23 did not directly mention provisional certification as a possible means to address settlement class actions,

An alternative version of Rule 23(e)(1) was prepared overnight and presented for review. The starting point was an effort to spell out the distinction between a class that has been certified and a class "that would be certified for purposes of the settlement, voluntary dismissal, or compromise." This effort was recognized as ungainly and potentially confusing. (Advisory Committee on Rules of Civil Procedure Agenda Book - January 2002 (Draft Minutes April 23-24, 2001 Civil Rules Advisory Committee 21-22)

The Civil Rules Advisory Committee met again on October 22 and 23, 2001, at the University of Chicago Law School, in part to review and discuss proposals for clarifying the procedure for approving settlement class actions. Discussion included proposals to codify the standard that was being used in some cases, and identifying a fair and efficient number and timing of opt-outs from the class. Amendments were proposed and adopted in 2002 clarifying the authority of the class representative to settle claims and mandating a role for the court in approving settlement class actions (voluntary pre-certification dismissals).

Currently, the Honorable David G. Campbell and Professor Edward H. Cooper sit as the chair and reporter, respectively, of the Advisory Committee on the Rules of Civil Procedure (“the Civil Rules Advisory Committee”). Eleven additional judges from district courts and courts of appeal serve as members of the Civil Rules Advisory Committee. The Committee established a Rule 23 Subcommittee to specifically

inquire into class action procedures. The Subcommittee has solicited submissions and held “mini-conferences” regarding approval criteria, Amchem and class certification, the status of objectors and what to do if there is remaining funds following distribution of the award.

In addition to serving on rules committees, judges have drafted informal statements of rules and suggestions for practice and procedure, including Guidelines for Ensuring Fair and Effective Court-Annexed ADR. Under the auspices of the Court Administration and Case Management Committee, several judges participated in drafting and revising the Civil Litigation Management Manual, 4th (2010), which provided “hundreds of pages of sample forms” included in the appendix to the manual. Participating in the subcommittee was: District Judge Ronald B. Leighton (chair), District Judge Julie A. Robinson, District Judge Benson E. Legg, and District Judge Steven D. Merryday.

5. Connection between tool and object of tool

The debates regarding fairness hearings and judges’ participation in global settlements entail several assumptions about legal change and law’s efficacy as a tool: namely, a straightforward relationship between an identifiable problem and a devisable solution arrived at through rational thought, and a blurring of the line between measuring effect and modifying procedures with the expectation that modifications will have a particular effect.

Judges’ experiences in modifying procedure and crafting settlement structures challenge standard approaches to legal instrumentalism. First, here too judges worked

to figure out solutions through doing. Judges related experiences of improvising, working with informal devices and ad hoc arrangements to consolidate and coordinate cases, for example that involved both state and federal courts (Schwarzer 1995, 1531).

Second, change is always happening. There is no moment in time where legal actors reached the ideal procedure and stopped tinkering, for the moment satisfied that everything worked properly. There is a kind of non-teleological “institutional evolutionism” (Schuck 1995, 944) and “incremental system-building” where judges develop and select “among competing institutional designs” (Schuck 1995, 944).

There is also a sense that the solutions developed addressed problems whose time had already passed. Judge Niemeyer (1997), in an introductory memorandum to the Standing Committee described the process of hearings in 1996 in using class action device in mass tort litigation. He states that the Advisory Committee,

received persuasive testimony from those involved in 1966, when the class action rule in its present form was adopted, that no such class action use [for mass tort cases] was on the minds of the Civil Rules Advisory Committee members. The changes then enacted to Rule 23 were aimed at the rising civil rights litigation and other aggregation of damage claims, but as the comments then observed, they were never aimed at mass torts.

Judge Niemeyer then quoted the testimony of John Frank, Esq. who was a member of the Rules Committee in 1966. The legal context in 1966 was “a world to which the litigation explosion had not yet come. The problems which became

overwhelming in the 80's were not anticipated in the 60's." (Niemeyer Introduction 1997 xi)

Participants reflected similar sensibilities at a 2001 meeting of the Civil Rules Advisory Committee at the University of Chicago. One of the participants remarked that the proposed changes in 2001 to address the "combined events" of settlement and class certification were "sensible" but did not address "the current crisis": "As so often happens, a proposed revision seeks to fight the wars of the past" (Advisory Committee 2001, 24).¹⁴⁹

Third, the differentiation of substance and procedure is problematic in practice and particularly problematic in procedural reform. Scholars consistently point to the interplay between procedural change and reform of substantive rights as if it were by coincidence. Linda Mullinex (1999), for example, points to the Rules Committee revamping and liberalizing the joinder rules in 1966, the creation of the MDL statute in 1968, and Congress' enactment of "sweeping substantive legislation" that created "new substantive rights" as independent factors that contributed to the late twentieth century type of complex litigation. Mullinex suggests that readers can also note that during the same period of time, federal courts were "expand[ing] standing doctrines to liberally permit access to the federal court" (Mullinex 1999, 420). These occurrences

¹⁴⁹ Over a longer view of time legal change looks less jarring. Yeazell argues that what the Federal Rules did in 1938 was shift the emphasis of the trial to pre-trial procedures, and that facilitating settlement in aggregate procedures is merely part of that effort. This was the "new shape of lawsuits" (Yeazell 648, ft 56)

were separate initiatives that “coincided” and “uniquely converged” in the mid to late 1960s (Mullinex 1999, 420).

In practice, however, procedure and substance (means and ends), engage in a reciprocal relationship.¹⁵⁰ Judges concern themselves with both the type of litigation – the substantive rights that form the basis of the litigation – and the procedural mechanism that can be sued to process cases. Indeed, this was the call and goal of Legal Realism. Portraying “the core of judging as the declaration of rights independent of the effort to actualize them,” overlooks “the practical dimension of adjudication” (Sabel in *Harv L Rev*).¹⁵¹ On the other hand, Mullinex does note that the flexibility of the 1966 rule amendments “basically invited complexity, encouraging attorneys to join everyone and everything into one civil action” (Mullinex 1999, 419). Similarly, Moffitt argues that in practice, litigation and settlement are intertwined (Moffitt 2009, 1206).

The de-differentiation (Schlag 2009) of procedure and substance poses difficulties for measuring or quantifying the impact of reforms. Molot (2003) calls

¹⁵⁰ In a similar way, Subrin and Main (2014) suggest a reciprocal relationship between form and action. They argue that once data collection in the federal courts “focused on details that could be counted, such as the length of time from case commencement to termination and the number of terminated cases each year” by judge and by court, “[n]ot surprisingly, judges turned their attention to the variables by which they were being evaluated.”

¹⁵¹ Robert Lee Carter (year), U.S. District Court Judge for the Southern District of New York from YEARS argued that civil rights and other “public rights” litigation had a “special dependence” on the class action device. Statutory causes of action and equal protection cases were brought as class actions (2185). Some of those cases would not have been able to proceed if not as a class” “This was certainly true of the struggle against segregation in public education.... A lone plaintiff was extremely vulnerable to the pressure of intimidation by state and local officials, and it was not above those officials to bring such pressure to bear.” (2185-86)

attention to scholarship that question whether judicial settlement practices “actually reduces litigation expenses and increases the likelihood of settlement” (Molot 2003, 92). Are there cases that, absent judicial intervention, would still have settled? (Molot 2003, 92) How does one identify some absolute number of cases that would otherwise have been brought? Does aggregate litigation join some amount of claims that would inevitably have been brought, or merely increase the number of claims? Do aggregate settlements reduce or expand dockets? (Molot 2003, 53; see also Minnow 2012).¹⁵²

Again, Pragmatism suggests that we discover goals “only when we recognize that certain means are available to us.” Means suggests which goals are available by “expand[ing] the scope for possible goal-setting.” Thus, in procedural reform, “success itself may breed problems by creating demand in the form of new cases. Francis McGovern states it succinctly: ‘The more successful judges become at dealing ‘fairly and efficiently’ with mass torts, the more and larger mass tort filings become.’” (Willging 1999, 5) One Federal Judicial Center researcher refers to this “more simply as the ‘highway’ or ‘Field of Dreams’ phenomenon, depending on one’s frame of reference” (Willging 1999, 5-6).

¹⁵² A fifth panel member suggested that if the proposal largely tracks and formalizes existing practice, it would be better to “leave it alone.” Tinkering affects the mind-set of lawyers and judges; they look for reasons for the change apart from confirming present practice. The judges he works with do these things anyway. The changes will inhibit settlement. Judges will think there must be a reason for these changes, and will “put the brakes on.” Additional, Advisory Committee on Rules of Civil Procedure Agenda Book, Draft Minutes Civil Rules Advisory Committee, October 22, 23, 2001 page -24-

6. Challenging Narratives Law and Politics

The debate about the judicial role in encouraging and reviewing settlements rests on arguments that the appropriate role for the judge is to be passive, removed, and impartial. Yet what is obscured by these arguments? Whom does judicial independence benefit? Fiss argued that the appropriateness of a passive role for the judiciary might be put into question by “inequalities in the distribution of resources”: “These inequalities give the judge every reason to assume a more active role in the litigation, to make certain that he is fully informed and that a just result will be reached, not one determined by the distribution of resources in the natural lottery or in the market.” (24) The dilemma of ensuring access to justice and balancing that against the need to ensure judges are and appear to be impartial is live elsewhere in litigation, with self-represented accused and “pro se” litigants.

Henderson argues that settlement class actions exceed the “legitimate limits of adjudication.” He creates an exception for public law litigation, which would also exceed those limits but justifies intervention, in order to protect civil rights “that are seriously threatened by institutional abuses of power” and “powerless victims of institutional abuse”. However, as tort litigation also presents many instances vulnerable litigants – mental health patients, breast cancer survivors, first responders, and veterans.

Similarly, the standard formulations of judges and politics – trying to identify left/right liberal/conservative politics – in settlement of aggregate claims ends up

being non-definitive (see table 1 below). Settlements are said to protect business interests and privatize rights:

One of the contemporary challenges facing the federal courts is said to be the so-called "caseload explosion." That very characterization, of course, obscures important questions about the success and functioning of the courts: which members of society are bringing greater numbers of federal suits, why are they doing so, and what would be the social and political costs of denying them access to a federal forum for resolution of their disputes? (citations omitted) (Carter 1989, 2180-81)

Thus, those with a more liberal bent should want trials: efficiency is a code word for doing away with substantive rights. On the other hand, liberals should not want trials because repeat players do better at trial than one time individual claimants. Conservatives want claims to be aggregated because that will provide predictability and finality to the number of claims. But liberals want aggregated claims because they allow plaintiffs to assert small claims where they would not otherwise have incentive to launch expensive litigation. Etc. Politics shift depending on one's vantage point.

Figure 29. Political vectors in Aggregate Litigation

<u>Vector type</u>	<u>“Right”</u>	<u>“Left”</u>
Law	Private	Public
Parties	Defendant	Plaintiff
Settlement Purpose	Efficiency	Quality
Individual Rights- preferred Litigation Type	Individual	Aggregated
Corporate Rights- preferred Litigation Type	Aggregated	Individual
Disposition (with public record)	Settlement	Litigation
Regulation	Litigation	Legislation/Admin

Global settlements and fairness hearings also turn the public/private distinction on its head, acting as “new, hybrid form[s] of dispute resolution that share attributes of both the private law and public law models” (Mullinex 414). The fairness hearing consists of an open, public hearing into the fairness of an otherwise private settlement. Absent class members become “the public” as the judge strives to “protect the public interest” reviewing the settlement for fairness and adequacy (Molot 52). In addition, judges publish reasons outlining the extent to which fairness and adequacy criteria are met. Is a settlement class action with a fairness hearing open public information or private dispute resolution? A study conducted by the Federal Judicial Center in 2004 indicated that very few cases had sealed settlement agreements (0.44%), and that class actions only represented six percent of those agreements (0.026% or 76 cases in a survey of a total of close to three hundred thousand cases).

In response to your research request, we examined 288,846 civil cases that were filed in a sample of 52 districts. We found 1,270 cases with sealed settlement agreements (0.44%). That is one in approximately 227 cases. In 97% of the cases with sealed settlement agreements, the complaint is not sealed. Generally the only thing kept secret by the sealing of the settlement agreement is the amount of settlement.

Among cases with sealed settlement agreements, almost one-quarter (22%) were actions typically requiring court approval of settlement agreements. This includes cases involving minors or other persons requiring special protection (13%), actions under the Fair Labor Standards Act (7%), and class actions (6%). (Advisory Committee 2004, 50)

Moreover, the structures of settlements in class and non-class actions resemble administrative law, as they both “offer alternative avenues for creating and implementing social policy” (Molot 2003). In addition to displaying similarities in their “mechanisms of social ordering” (95), class actions and administrative law display procedural parallels in their “reliance on judges to monitor an agent’s actions on behalf of a principal, to weigh diverse interests rather than just apply legal rules...” (See also Rubenstein 1439; Issacharoff Witt 2004) In non-class action global settlements, judges rely on procedural mechanisms to control discovery or assist in administering a settlement – for example approving and controlling a large escrow fund – which often operate like public administration agencies (Nagareda).

What Fiss was initially inquiring into was the dynamic between the ‘individual’ and ‘large aggregations of power’ (43) and the way the judicial institution could provide support in a way that gave meaning to public values. Instead of arguing that judicial interventions reflect liberal or conservative ideological preferences, it may be more interesting and prudent to focus on locations of power (Burbank and Silberman 1997; Yeazell): “The most important developments in civil justice in the United States in the last two decades have concerned power: who has it and who should have it, both in litigation and in making the rules for litigation.”

For example, Yeazell studies the location of power as it shifts from appellate trial level courts. Procedures that emphasize pre-trial motions and negotiations influence the ability of courts to finish cases without a final disposition. He notes that judges “now devote the bulk of their civil work to such pretrial tasks—ruling on discovery disputes, deciding joinder issues, conducting pretrial and settlement conferences.” Those tasks are often effectively dispositive, but because pre-trial rulings are often not appealable, authority to control and manage the litigation process shifts to trial level judges. Cases that settle “guarantee that appellate courts will play no role in the suit... Judicially encouraged settlement, to the extent that it succeeds, thus extends the reach of trial court power.” (Yeazell 1994, 656) But Yeazell notes that analysis is ambiguous and similarly depends on one’s vantage point: “If one sees dispersed, preferably local, power as a guiding principle of U.S. political institutions, keeping power at the tribunal of first instance will seem a natural product of social evolution and a source of desirable flexibility.” (Yeazell 1994 675)

CHAPTER 5

JUDICIAL FUNCTIONS IN THE INTERNATIONAL DOMAIN: INTERNATIONAL JUDICIAL EDUCATION AND TRAINING

1. Introduction

In 1976, then Tel Aviv District Court Judge, Dr. Shlomo Levin, travelled to a National Judicial College (“NJC”)¹⁵³ training session in Reno, Nevada. Described as “a man of vision,”¹⁵⁴ Dr. Levin was one of the first foreign judges to study at the Advanced Institute for Judges hosted by the NJC.¹⁵⁵ When he returned home, Dr. Levin met with President Gusman of the Supreme Court of Israel (“SCI”) to recommend that Israel set up a similar institution. President Gusman was agreeable, and they set to work on creating a domestic training institute for judges.¹⁵⁶

¹⁵³ The National Judicial College, *The Key to An Inspired Judiciary, Organizational Profile 2010-2011* (on file with author). As a private not-for-profit created in 1963, the NJC trains U.S. federal and state court judges as well as judges from South America, Europe, Asia, Middle East and Africa. It currently averages 95 courses or programs per year, with an annual operating budget of US \$8.6 million for training over 3000 judges attending from over 150 countries. Since its founding, it has presented 85000 judicial education certificates.

¹⁵⁴ Interview with Staff (Attorney) at the Supreme Court of Israel, Israeli Courts Research Division in Jerusalem, Is. (March 12, 2014).

¹⁵⁵ Interview with Judge E (retired) of the Supreme Court of Israel, in Jerusalem, Is. (March 6, 2014). The idea of a foreign judge attending the NJC was so new, that the Director became confused on introducing Justice Levin at the course graduation. Other attendees were introduced by name and home state: “One of the stories is that in the end they delivered the certificates. Everyone was American. So they started to say, Mr. so and so from the state of [blank]. Then it came to [Justice Levin] and [the director] hesitated.... [and] said, ‘The Republic of Israel’.”

¹⁵⁶ Interview with Judge E (Supreme Court of Israel).

The Israeli judiciary established a training institute for judges in 1984. Fifteen years later, Dr. Levin – by then a judge and the Deputy President¹⁵⁷ of the SCI – and retired judge, Professor Amnon Carmi (Haifa University Faculty of Law) attended a meeting in Sao Paulo, Brazil. At that meeting, judges from North and South America, Israel, and Europe worked on plans to establish an international umbrella organization that would bring together several existing national training institutes. In 2002, the International Organization for Judicial Training (“IOJT”) was formally established. The SCI supplied the administrative office, and the Israeli judiciary hosted the first IOJT conference in 2002.

Since the first conference in 2002, member institutions have met every two years for an international conference co-hosted by a local training institute and the IOJT executive. As of August 2015, the IOJT’s membership included 123 member-institutes from 75 countries (IOJT 2016). More than 200 people attended a recent biennial conference in Washington, DC.¹⁵⁸ Under the auspices of the IOJT, judges from Israel have travelled to Chili, Rwanda, and Kenya to help local judges plan courses and set up local training institutes.¹⁵⁹

¹⁵⁷ Dr. Levin was a judge at the Supreme Court of Israel from 1980-2003 and Deputy President from 1995-2003.

¹⁵⁸ “IOJT attendee list as 102313 revised,” on file with author, and see Appendix, Table 3, below.

¹⁵⁹ Interview with Judge F (retired) of the Supreme Court of Israel, in Jerusalem, Is. (March 6, 2014).

Much scholarly attention has been paid to finding a global “juristocracy” (Hirschl 2004) in constitutional law (Kennedy 2009; see e.g. Stone Sweet 2009; Jackson 2010; Dunoff and Trachtman 2009; Choudry 2006; Bomhoff 2008; Hirschl 2009).¹⁶⁰ But there is little scholarship regarding role that all judges – including high court and first and second instance judges – play in the international sphere, in the transnational movement of ideas (Koh 1996; Koh 2003) about court structure, procedure, case management and court administration. Similarly, scholarship examines the way legal norms circulate, the source of institutional change within national legal systems, and the way “transnational legal processes” increase the role of courts “within national legal systems, sometimes providing courts with new leverage to increase their authority in relation to executives” (Shaffer 2012, 245). However, there is little scholarly attention to judges as actors in these transnational processes (Hammergren 2006).

In contrast, Justice Kirby (2008), former High Court of Australia and Court of Appeal of New South Wales judge and member of the Judicial Reference Group of the UN High Commissioner for Human Rights, observes that “a distinctive feature of the present age has been the increase in dialogue between judges and other lawyers across national boundaries” (Kirby 2008 171). Justice Kirby identifies communication

¹⁶⁰ Scholars who do not focus exclusively on constitutional courts tend to limit their research to the highest national courts, which will still include constitutional review where a constitutional court does not exist as a separate institution. This is the case in Israel, the U.S. and Canada where the highest court is seized with constitutional matters; see for example, Kapiszewski, Siverstein and Kagan 2013; Dickson 2007; Dothan 2015; Mak 2013.

between judges that is both about substantive law as well as “procedures for conducting trials, appeals and the work of the courts generally” (Ibid).

One of the primary venues where judges discuss ideas about court management and procedure is the judicial education and training seminar. Lawyers, development practitioners, justice experts, and government officials all participate in training judges. But increasingly, judges travel internationally to educate their peers and take part in sharing knowledge and experiences.¹⁶¹ Though less well known, judges serve as educators and directors of training institutes (Strong 2015; Dawson 2015) and interact internationally in that capacity. The judiciary in “most countries,” writes Justice Kirby (2008) “have become involved in activities of judicial education, in global and regional meetings designed to promote the exchange of experience and ideas and contact with international bodies concerned with shared questions of legal doctrine, the administration of justice and human rights” (Kirby 2008, 174). Notwithstanding this widespread involvement, the specifics of judicial education and training programs remain unknown in terms of their place in the industry of rule of law programs,¹⁶² the number of judges who act as educators,¹⁶³ and the mechanisms that secure their participation.

¹⁶¹ Interview with Senior Legal Counsel/Program Director for National Center for State Courts International, in Washington, D.C. (November 21, 2013). See for example, the Information Brochure of the National School of Judiciary and Public Prosecution (Poland) (on file with author).

¹⁶² Miller and Armytage (2008) review the extent of the rule of law industry: the World Bank finances approximately 600 projects related to legal and judicial reform. Other development agencies include the UNDP, the Asian Development Bank, the U.S. Agency for Development (USAID), UK’s Department for International

This chapter explores judges' work internationally in judicial education as an example of "extra-disputing" judicial activity—work undertaken by contemporary judges, which moves beyond the specific case but which still affects courts and the operation of trials. The chapter explores how judges became involved in judicial education, their political practices, and methods for exchanging ideas and information about best practices.

Conventionally, judicial education refers to teaching judges substantive law, whereas judicial training involves instruction on "judgecraft"—court procedure or skills for leadership and judging (Wallace 2003). Together, judicial education and training "assist judges in acquiring the knowledge, skills, and attitudes necessary to perform their judicial responsibilities fairly, correctly, and efficiently" (Wallace 2003, 358; NASJE, 4). Education and training programs address everything from substantive review of human rights legislation, "social context" education (NJI 2009),¹⁶⁴ judicial

Development (DfID), The International Cooperation Agency in Japan (JICA) and Germany's Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ). The Asian Development Bank committed 350 million USD to capacity-building and court reform in Pakistan alone. For Rule of Law promotion in Afghanistan and Cambodia, USAID committed close to 50 million USD.

¹⁶³ Interview with Senior Legal Counsel/Program Director for National Center for State Courts International, in Washington, D.C. (November 21, 2013). Informal conversation with Director at the American Society of International Law in Washington, D.C. (November 11, 2013). Even though they do not practice International Law, Federal and State court judges who are engaged in judicial education internationally have joined ASIL forum because there is little other infrastructure for dialogue about courts and judges internationally.

¹⁶⁴ The National Judicial Institute (Canada) defines "social context" as "a broad term that encompasses the aspects of the decision-making milieu that are linked to social diversity. Diversity is often associated with disadvantage and stratification. The *Ethical Principles for Canadian Judges* provide that 'Judges should conduct

ethics,¹⁶⁵ and anti-corruption measures (Armytage 2015; Wallace 1998; Rittich 2004), to alternative dispute resolution procedures (NJI 2010; Wanis-St. John 2000), leadership competencies, skills training on docket management software (Armytage 2013), as well as dealing with witnesses, court interpreters, and unrepresented accused (NCSC 2008).

Judicial education and training is commonly associated with rule of law initiatives and development projects (Wallace 2003, 356; Archie 2013; Hammergren 2006; Reiling, Hammergren, and Di Giovanni 2007). The association is instrumental: those in favor of judicial education and training argue that a strong and independent judiciary will support the rule of law and economic development (Hammergren 2008; Botero 2003; Thomas 2011; Halliday 2012; Trebilcock and Daniels 2008).¹⁶⁶ As an example, the Senegal Training Center promotes its work as contributing to “delivering credible, independent and impartial justice” and “enhancing the rule of law.”

As Chapters One and Two explain, contemporary legal thinking is dominated by this kind of instrumental approach to law. Those chapters explore how legal instrumentalism takes a recognizable “problem-solution” form (Riles 2011, 64-65;

themselves and proceedings before them so as to assure equality according to law.” (NJI 2009).

¹⁶⁵ Telephone Interview with Judge (appellate level, provincial court, Canada) (Jun. 24, 2014) [Judge G].

¹⁶⁶ In the post-Washington Consensus era of development, U.S. government aid organizations, especially USAID—the US Agency for International Development—felt that strengthening the courts was critical to advancing democracy and supporting economic development by stabilizing discussions between private parties; (quote) The “mantra repeatedly stated by all IFIs” was that “good law increases investment, which in turn stimulates economic growth” (Halliday 2012, 273). See discussion *infra* Part 3.

Miyazaki 2010, 263) that works by (1) identifying a problem and (2) devising a legal solution (Moore 2001; Feely 2001). Chapter Three suggests that by operating in this problem-solution form, legal actors adopt the same basic approach even if outcomes are not always positive (see also Riles 2006; Abel 2010). In another challenge to the idea of law as a tool for change, this chapter suggests that law reform projects do not always maintain the problem-solution form. In other words, even the construction of the problem and solution is not as straightforward as legal instrumentalism would suggest.

The structure of legal instrumentalism and its problem-solution form implies that legal solutions develop in response to sociological problems that have been previously identified. Does this correspond to judges' experiences? How does legal instrumentalism operate in the context of judicial education and law and development? This chapter demonstrates that judges' work in international judicial education is pragmatic (Dorf and Sabel 1998), but not in the way that extant thinking about legal instrumentalism would suggest. This case study demonstrates that legal techniques are not always employed in response to a preexisting and identified problem. Rather, the problem itself may be generated and articulated in the process of working *with* legal solutions. In many ways, judicial education and training grew into a veritable industry contemporaneously with the development of the idea to strengthen judicial institutions in order to support economic and democratic development (Strong year 3). Problems and solutions thus developed in tandem, as part of the cultural "field" (Pickering and Stephanides 1992, 163).

Judges' experiences in international judicial education and training also highlight the tendency of law reform projects to unfold in contradictions and trigger incompatible norms and goals that somehow manage to hold together (Strathern 1991). Law reform projects may contain conflicting norms or goals – such as judicial education and judicial independence, which are brought into conflict when judges attend “training junkets” that threaten the public’s perception of the judiciary.¹⁶⁷ As scholars, our instinct is to resolve difference or explain contradiction. These conflicts, however, did not resolve for judges. Judges were aware of conflicts *and* of their inability to resolve them. This chapter argues that subsisting contradictions is an inherent feature of legal instrumentalism.

Scholars also look to judges meeting with colleagues from other countries as evidence of the existence of a global judicial community, through which ideas are disseminated internationally. And, as Chapter Two discussed, scholarship about judges and politics generally posits that judges are strategic actors who seek to legalize their policy or ideological preferences. With respect to the international sphere, scholars speak of a global judicial dialogue or a global community of courts, where judges meet internationally and exchange ideas – a kind of global rights convergence (Mak year, 4). But to what extent are judges actually forming such transnational epistemic communities (Haas 1989; Haas 1992)? How do judges actually interact with their “global community”? We know little of the specifics or details. And, on closer look, judges do not appear to be as strategic or effective as the literature would

¹⁶⁷ See discussion *infra*, Part 5.

suggest. In the context of meeting to discuss judicial education and the rule of law, judges made connections, but they were partial and awkward as judges attempted to emulate ministerial or business relations. Judges' attempts at effecting relationships with their counterparts from other countries could be clumsy. Where judges are portrayed as strategic actors pursuing self interest, instead, I found disjointed exchanges and sometimes ineffective encounters.

This chapter delves into the work of the IOJT and the Israeli judges who established it, using that organization as a site through which to consider an example of an important "extra-disputing" activity for contemporary judges. The chapter explores the material, physical and performative ways that judges exercise sociality and distance. It also considers those objects that disappear from view – judges' other work, their participation as agents of transnational education projects, and the specifics of the connection between judicial independence and the rule of law. In exploring judges' interactions with legal instrumentalism and global politics, my aim is to engage with both the tool-like and social aspects of judicial education and legal reform.

The chapter proceeds as follows. The next part sets the stage for the rest of the chapter, describing the socio-legal context in Israel and the methodology that was employed in conducting this research. Part 3 presents the scholarly context, by describing in greater detail the standard narratives that are told about judicial education and judges in the global domain. Part 4 examines judges' involvement in judicial education and training, focusing on the Israeli judges' international activities

through the IOJT. It describes the origins of the IOJT, and recounts the interactions that took place at a recent IOJT conference in Washington, DC. Parts 5 and 6 begin to think about what judges' experiences in this area of judicial administration and court reform can tell legal scholars and practitioners about the two major issues that motivate this dissertation: 1) the use of law as a tool for social change, and 2) the relation between law and politics. It does so by assessing how law-as-a-tool and law-and-politics operate "in action". The chapter concludes with reflections on what judges' international work has to say about law as a tool and about law and politics more generally. The chapter argues that legal actors participate in law reform projects in ways that are partial and complex, and in a manner that tends to hold incompatible "things" (goals, concepts, norms) together (Strathern 1991, 35). Legal actors also function in a less strategic manner than our current thinking about law would suggest.

2. Context & Background

2.1 Socio-legal Context in Israel

There is a kind of uneasiness that persists in Israel. The country's founding concept of a "Jewish state in a democracy" is an existential paradox (Shachar 2002; Lahav 2009). Ran Hirschl (2013) writes that Israel is "arguably one of the world's capitals of embedded, near-oxymoronic contradictions ..." (Hirschl 2013, 327) Israel defines itself as a Jewish and democratic state even though one fifth of its citizenship is not Jewish. Even within the Jewish population the meaning of what it is to be a Jew is contested (Hirschl 2013; Sapir 2006; Barzilai 2010; Shetreet 1984; Edelman

1994).¹⁶⁸ And the only branch of Judaism formally recognized by the state is Orthodox “despite fact that more than two-thirds of the world’s Jews – on whom Israel relies for essential symbolic, material, and strategic support – continue to live outside Israel and do not subscribe to Orthodox stream of Judaism” (Hirschl 2013, 327).

Nothing is "ישר" [yashar] - straightforward or direct. Foreign relations with neighbors are strained. Men and women serve in the state army—men for a period of three years and women two years—immediately after high school. New apartment buildings in Tel Aviv are built with bomb shelters in each unit (as opposed to the shared or common bomb shelters of the older apartment buildings). Even the status of the Occupied Territories is not simple (Morley 2005; Mnookin, Eiran and Gilad 2014; Rubin 2009). Although the Israeli military withdrew from the Gaza Strip, its legal status and whether Israel continues to “occupy” Gaza pursuant to international law depends on whether Israel has “effective control” of the territory, “a concept that is intimately linked with, but not entirely dependent upon, military ground presence in the territory” (Bashi and Mann 2007).¹⁶⁹

¹⁶⁸ The Israeli High Court of Justice has confronted these issues, especially with respect to interpreting the meaning of The Law of Return 5710-1950 § 1 (Isr.) “Right of Aliyah: 1. Every Jew has the right to come to this country as an *oleh*”; see HCJ 72/62 Rufeisen v. Minister of the Interior P.D. 16 (4) 2428 (1962) (Isr.); HCJ 58/68 Shalit v. Minister of the Interior P.D. 23 (2) 477. 3. (1969) (Isr.); HCJ 1031/93 Passaro and the Movement for Progressive Judaism v. Minister of the Interior P.D. 49 (4) 661 (1989) (Isr.); and, HCJ 2901/97, 5070/95 Naamat v. Minister of the Interior (2002) (Isr.).

¹⁶⁹ While Israel maintains a military force and settlements in the West Bank, the government withdrew all military presence – “disengaging” – from the Gaza Strip. Section 2(a)(3.1) of Government Resolution No. 1996, dated June 6, 2004: “Israel will evacuate the Gaza Strip including all existing Israeli towns and villages, and will

There are thirty-four political parties in the Knesset (parliament) for one hundred and twenty seats (BBC 2013).¹⁷⁰ In addition to the major and long-standing parties Likud, Kadima, and Labor, there are also religious parties such as Shas (representing the Sephardi ultra-Orthodox), the NRP and United Torah Judaism, a party representing the interests of Russian immigrants (Israel Beitenu), a communist party, the United Arab List and Balad, the Arab nationalist list. No political party since 1948 has won a majority of seats, which means that coalitions are a permanent feature of Israeli politics. Between 1995 and 2006, following the assassination of Prime Minister Yitzak Rabin, the Israeli population elected five different Prime Ministers.

The legal system is similarly complicated. Justice Eliezer Rivlin (2012) characterizes the Israeli legal system as a composition of several chronological “layers” (Rivlin 2012). Religious rabbinical courts operated in Palestine for thousands of years before the state of Israel was proclaimed in 1948. Going through two colonial periods –the Ottoman Empire and the British mandate periods –the legal system is now a pastiche of civil code law, common law, Islamic and Jewish religious law with limited jurisdiction by subject matter (Eisenberg, Fisher and Rosen-Zvi 2011;

redeploy outside the Strip... Upon completion of this process, there shall be no permanent presence of Israeli security forces on the ground in the areas to be evacuated.” There was an initial plan to have some Israeli presence at the border between Gaza and Egypt, but the government did not pursue this; Government Resolution No. 4235 of 11.9.2005 (“...the IDF will withdraw its forces from the territory of the Gaza Strip, including from the area of the border between the Gaza Strip and Egypt (‘Philadelphi Route’).” The agreement is available at the website for the Ministry of Foreign Affairs, <http://www.mfa.gov.il/MFA>.

¹⁷⁰ Israel’s electoral system is based on strict proportional representation. See Knesset, The Electoral System in Israel, http://www.knesset.gov.il/elections16/eng/about/electoral_system_eng.htm.

Salzberger 2007; Reichman 2013; Shetreet 2011). There is no constitution, but between 1958 and 1992, the Knesset passed a series of “Basic Laws” setting out the overall legal framework for, for example, the Knesset (1958), the Judiciary (1984), the Army, Human Dignity and Liberty (1992), and Freedom of Occupation (1992) (Hacker 2011; Woods 2009).

The Supreme Court of Israel (SCI) is the highest court, acting as High Court with original jurisdiction in petitions against government agencies and ministers and as the Supreme Court in appeals from the District or Magistrate Courts. Sitting as both the High Court of Justice and the Supreme Court (the final appellate court), the SCI hears cases covering matters of national security (Shetreet 2001, 235-36; Reichman 2010, 451) – such as the legality of targeting killing (Raguan 2010) – as well as claims by Palestinians (Shetreet 1984, 982; Edelman YR, 32)¹⁷¹ and questions about “who is a Jew,” the answer to which has practical implications since Jews are entitled to immediate citizenship on immigrating to Israel (Hirschl 2013; Sapir 2006).

Just during the time of my short field visit, events arose relating to SCI cases on army service, voter fraud, and secular-religious conflicts. On my first day in the field, my hosts rushed home to see the news coverage of the “sea of black hats” in Jerusalem (Kershner 2014a; Kershner 2014b). That day, Haradim (Jewish ultra-

¹⁷¹ The Supreme Court, sitting as the High Court of Justice, heard a petition by residents of the village Rujeib in the West Bank challenging the government's decision to construct the settlement Elon Moreh; see Prime Minister's Office, Israel State Archives, The "Elon Moreh" High Court Decision of 22 October 1979 and the Israeli Government's Reaction http://www.archives.gov.il/ArchiveGov_Eng/Publications/ElectronicPirsum/ElonMoreh/

orthodox Israelis) had demonstrated in front of the Knesset as parliament voted on new legislation that would require some form of conscription for yeshiva students (Kershner 2014a; Levush 2014), the SCI having struck down the long-standing exemption two years earlier in *Resler v. Knesset* (HCJ 6298/07 21 February 2012) (see Ettinger and Cohen 2012; Sapir, Barak-Erez and Barak 2013).

During one of my interview days, the SCI was scheduled to hear Cinema City's petition requesting the decision requiring Sabbath closure be reversed (Eisenbud 2014).¹⁷² As an embodiment of "incompatibles that hold together," (Strathern 1991) the courthouse for the SCI is located across the street from a new multiplex theater, Cinema City, which is inside a shopping complex that also houses a Bible museum, a Smurf Village and "Noah's Ark". One of my informants advised me that then President of the Supreme Court, Asher Grunis, had come under criticism when he ordered the bridge that connects Cinema City to the Supreme Court courthouse to be closed. But inside the court, one "senior official" was quoted as saying, "Everyone needs to cry out... There are buildings here that have no connection between them - a government building with all its symbolism, which is being connected to a shopping center. The Supreme Court has a symbolic value we want to preserve. The fact that it is connected by a bridge to such a building, which even overshadows it in height, is simply inappropriate and grating" (Hasson 2014).

¹⁷² The petition had to be postponed so judges of the SCI could attend the funeral of a retired member of the court, and I was informed that subsequently the judge told the parties to "go away and work it out on their own." Informal conversation with Staff, Israeli Association for Judicial Studies (March 2014).

The courthouse itself exemplifies a kind of chaos that somehow holds together. Each courtroom is a different size; with almost every space separating into multiple layers (this latter feature is similar to Israel's first mall in Tel Aviv, the Dizengoff Center). Paul Goldberger (1995) of the New York Times wrote on the courthouse opening:

Curiously, for a building that is as inviting as this one, the design is fairly complex: there is no clear front door and no simple pattern to the organization... [The building] doesn't look the same from one side to the other, and were it not for the rich Jerusalem stone that by law covers this and every building here with a warm, sensuous, even texture, the Supreme Court might well seem like a disjointed mix of elements. (Goldberger 1995).

Having been temporarily immersed in these contradictions and subsisting tensions, the idea of "incompatibles that hold together but do not resolve" (Strathern 1991) became a touchstone for my analysis of law and politics and law as a tool. While this chapter is oriented toward international or transnational judicial activity, the socio-cultural and legal context in which Israeli judges find themselves very much guided how I saw and interpreted the discussions that were going on around me.

2.2 Attending the IOJT Conference and the WB Law, Justice, and Development Week

In conjunction with a domestic judicial institute or organization, the IOJT hosts an international conference every two years. The World Bank group hosts a "Law,

Justice, and Development Week” yearly on varying themes.¹⁷³ I was particularly fortunate in that both conferences were held in Washington in November 2013. This provided a unique opportunity to observe transnational conversations on judicial education, and to compare a judge’s conference and a gathering of development industry experts. The meeting themes were: “Judicial Excellence through Education” (IOJT) and “Towards A Science of Delivery in Development: How Can Law and Justice Help Translate Voice, Social Contract and Accountability into Development Impact?” (WB)

At the IOJT conference, I attended meetings, plenary sessions, the general assembly and social events, during which time I conducted participant observation, paying particular attention to who the judges were interacting with (whether with judges from their own country or outside their circle), the locale or environment for the different activities, the methods for exchanging knowledge and information, and what attendees did during these activities.

I devised three sets of short general questions that I could ask any participant:

1. What brings you here; what were you hoping to get out of the conference? What are

¹⁷³ The event is organized by the legal departments in the World Bank, International Finance Corporation (IFC), Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID). Attendees include lawyers from each of the World Bank group institutions, plus “colleagues from other development organizations, government officials, academicians, civil society organizations and other experts in the field,” The World Bank Group, LJD Week 2013 Post-Event Summary 5 (2014), <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:23384728~menuPK:445676~pagePK:64020865~piPK:51164185~theSitePK:445634,00.html> .

the benefits/challenges of developing relationships with judges from other countries?
2. What do you think is the most important issue in judicial education? 3. How would you describe what you do at these meetings? How do you understand or share information about concepts like “best practices” or the “rule of law”? I also asked these short questions to judges who attended the World Bank Law, Justice and Development week.

Senior Vice President and General Counsel in her opening remarks articulated instrumental goals, stating the aim of the conference as discerning “how law and justice concepts, tools and knowledge can be harnessed to improve development delivery. If designed and implemented in the right way, law and justice mechanisms can make a difference.”¹⁷⁴ The World Bank President summarized their theme in his opening remarks:

How do you contribute to a science of delivery that uses these legal and political constructs to deliver real results for the world’s poor and vulnerable?
...At the World Bank Group we believe applying the science of delivery to law and justice issues involves two related, but distinct, outcomes. First, it means building better legal and justice systems that deliver justice directly. This

¹⁷⁴ The theme was to explore how using the three “law and justice mechanisms” – voice “ensuring that all stakeholders participate and are heard”, social contracts to “fully and fairly define the rights and obligations of parties” and accountability to hold “relevant actors responsible and ensur[e] recourse is available when obligations are not fulfilled” – might assist the “science of [development] delivery,” Anne-Marie Leroy, Senior Vice President and World Bank Group General Counsel, Welcoming Remarks, Law, Justice and Development Week 2013, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:23506523~pagePK:210058~piPK:210062~theSitePK:445634,00.html>

involves working with legal and judicial systems, including courts, alternative dispute resolution institutions, law enforcement agencies and legal practitioners. Second, it means using principles, grounded in law and notions of justice, to deliver just and equitable outcomes. This would apply to any service, be it health, education, urban development, or economic development. Using a justice lens in development is fundamental to the Bank's mission of ending extreme poverty and boosting shared prosperity (paragraph breaks removed).¹⁷⁵

The World Bank Group scheduled Willy Munyoki Mutunga, Chief Justice of the Supreme Court of Kenya to speak on "Just Development" (unable to attend, his speech was read by the Honorable Lady Justice Pauline Nyamweya, of the Supreme Court of Kenya), as well as judges from Kenya, Ghana and Niger to speak on "The Transparency, Independence and Accountability of the Judiciary in Africa." It hosted a panel on "Courts and the Science of Delivery in Latin America," which focused on International Development Research Centre funded research regarding complex litigation affecting development and the judiciary's role in monitoring development outcomes. The LJD week concluded with a round table panel of judges from Sao Paulo on "Delivering Justice to the People."¹⁷⁶

¹⁷⁵ Jim Yong Kim, President, World Bank Group, Opening Remarks at the Law, Justice and Development Week 2013, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:23507046~pagePK:210058~piPK:210062~theSitePK:445634,00.html>

¹⁷⁶ Law, Justice and Development Week 2013: Towards A Science of Delivery in Development, Program Agenda, (2013) (on file with author and available at)

In addition to attending the World Bank meeting, I was also part of a group of students from Cornell University Law School who carried out a survey on behalf of the Global Forum on Law, Justice and Development – a consortium of well over one hundred partners including universities (such as Cornell Law School), courts, professional organizations, judicial training institutes, and World Bank partners. The survey was a short questionnaire filled out following each session/panel by the student and a session attendee. In total 144 participants were surveyed about their participation at the Law, Justice, and Development Week. Executing the survey served as an impetus to meet and speak with participants at the WB conference.

The following March 2014 I travelled to Israel to conduct interviews and further participant observation. I attended at the SCI courthouse, where I visited the Institute for Advanced Judicial Studies (“IAJS”) offices and conducted interviews with judges of the Supreme Court of Israel as well as staff at the IOJT and the Israeli Courts Research Division (“ICRD”), an independent judiciary-based applied research unit.

Judges in Israel are very reluctant to be interviewed. So much so, that one of my hosts commented that if I was able to interview and record judges of the SCI then my committee should award me the doctorate on that basis alone. I was able to interview two judges who have now retired from the court. I contacted other judges, including then President of the Supreme Court, Asher Grunis, who told me when I met

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:23384728~menuPK:445676~pagePK:64020865~piPK:51164185~theSitePK:445634,00.html>.

him in Washington to visit with him when I came to Israel. But on arriving, I was told that President Grunis felt that since I was able to interview the two judges, I did not need to meet with him. A third judge who had been very involved in the IOJT was overseas when I was in Israel. I attempted to contact him several times, including through introductions from other contacts but he never responded.



Figure 30. Supreme Court of Israel Building



Figure 31. Bridge from the Supreme Court of Israel to shopping mall and Cinema City



Figures 32-33. Glass Wall in Supreme Court of Israel Building and View of City





**Figure 34. Historical Legal Museum
in Supreme Court of Israel**



**Figure 35. View of Cinema City from walkway to the
Supreme Court building**

World Bank Law Justice and Development Week Theme: Towards A Science of Delivery in Development¹⁷⁷	IOJT Conference Theme: Judicial Excellence through Education¹⁷⁸
<p>Days 1 and 2 (November 18-19) explores the emerging concept of “Science of Delivery in Development”, in particular how law and justice can help shape it;</p> <p>Day 3 (November 20) or “Africa Day”, co-organized with the African Development Bank, will be devoted to an in-depth focus on critical legal issues in Africa’s development process; and</p> <p>Day 4 (November 21) will explore current legal, policy and institutional issues of common interest to International Financial Institutions (IFIs).</p>	<p>Day 1 (November 4) Leadership and Judicial Education; and Judicial Skill Building</p> <p>Day 2 (November 5) Judicial Education in Support of the Rule of Law</p> <p>Day 3 (November 6) Technology and Judicial Education</p> <p>Day 4 (November 7) Judicial Education and the Academy</p>

3. Standard Narratives

3.1 Judicial Education and Rule of Law

This Part describes the standard narratives about judges in the international domain, specifically, (1) about the connection between judicial education, judicial independence and the rule of law, and (2) about the development of a global judicial dialogue between judges of different states. As much as possible, I limit the discussion to domestic state court and high court judges, excluding for now a review of literature about judges serving on international courts and tribunals.

¹⁷⁷ World Bank Group, Law, Justice and Development Week 2013 Program Agenda, Towards A Science of Delivery in Development: How Can Law and Justice Help Translate Voice, Social Contract and Accountability into Development Impact? (on file with author and available at)
<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:23384728~menuPK:445676~pagePK:64020865~piPK:51164185~theSitePK:445634,00.html>

¹⁷⁸ Program, Washington CD

The IOJT's mission "to promote the rule of law by supporting the work of judicial education institutions around the world," echoes a current phenomenon placing judges and judicial education at the center of the rule of law, democracy, and law and development programs (Trebilcock and Daniels year, 58; Daniels and Trebilcock 2004; Rittich 2004; Miller and Armytage 2008; Ohnesorge 2007; Gloppen, Gargarella, and Skaar 2003; Ginsburg 2010). Judicial education and the Rule of Law have become rallying cries among development experts, civil society and international organizations (Dezalay and Garth 2002; Desai and Woolcock 2015; Haggard, MacIntyre and Tiede 2008; Daniels and Trebilcock yr 111; Ohnesorge 2007). For example, in describing the prevailing consensus about development after 1995, David Kennedy writes:

The most important and visible institutional object of attention has been the judiciary. Judges and reliable courts seem like good ideas for lots of reasons: to enforce private arrangements, support criminal prosecution, fight administrative corruption, and review government actions for their respect of human rights, including the right to property. Moreover, many development professionals became convinced that the reputation of national judges was an important element in the investment decisions of foreign investors. It is not clear that foreign investors in fact use courts at home that often – that they expect to when investing abroad.... Nevertheless, for a period at the turn of the century, having a "reformed" judiciary with powers of judicial review became

a sign for national willingness to respect investors' rights and allow profit repatriation. (Kennedy 2006, 159)

Development practitioners stress that an educated judiciary will be efficient, independent and accountable, and will have the necessary skills to support the development of democratic institutions and encourage trade and investment. The World Bank asserts that a well-trained judiciary forms part of the mandate to reduce poverty “since a capable and accountable state creates opportunities for poor people, provides better services and improves development outcomes” (World Bank 2012).

International financial institutions and civil society organizations such as the World Bank, the American Bar Association, the International Association of Women Judges and the National Center for State Courts (U.S.), quasi-governmental institutions such as Justice Coopération Internationale (France) (“JCI”), the Federal Judicial Affairs (Canada) or international organizations such as the Council of Europe all administer education and training programs for judges to support development or the rule of law. The JCI in its promotional materials describes the motivations for a program it undertook in Lebanon between 2005 and 2014 supporting “capacity building”:

... for actors attached to the Ministry of Justice to adopt the principle of training would lead to a less expensive, faster, more reliable and professional judicial system, given the number of judges and other justice professionals who will be trained, the reduced average time of litigations and the

simplification of procedures. The objectives of access to justice for citizens and judicial efficiency would then be achieved.”¹⁷⁹

The standard view of legal instrumentalism would suggest that practitioners identified strong judicial institutions as a solution to the problem of poor economic performance or low levels of foreign direct investment. And, correspondingly, they recognized judicial education and training as the way to target judicial independence, efficiency, and the rule of law in such a way as to produce strong and independent judicial institutions.

According to the standard narrative, the history of the growth of judicial education and training would go something like this: following the failures of World Bank and IMF conditionality programs in the 1990s, international financial institutions and U.S. aid organizations recognized the importance of institution building as the path to development (Di Giovanni 2013; see also Ohnesorge 2007; Kennedy 2006). Stable efficient legal institutions supporting property rights and the rule of law were identified as the institutional foundation for foreign direct investment and a functioning market economy (Daniels and Trebilcock 2004-5; Trubek and Santos 2006). The judiciary was then called upon to create and maintain the institutional environment that would support and enable development. The World Bank looked to judicial institutions to secure the foundations for a stable state that would foster

¹⁷⁹ Justice Coopération Internationale, Support to the Professionalization of Judicial Actors and Capacity Building of the Judiciary (on file with author).

“private sector growth” by “ensuring compliance of private sector actors and citizens with legal and regulatory frameworks.”¹⁸⁰

An independent judiciary became central in supporting emerging democracies (Ohnesorge 2007; Carothers 2006; Nicholson and Pitt 2012; Ajani 1995; Halliday 2012) and other social policy objectives (Dodek 2010). Judges, in strengthening human rights and the rule of law, could support an expanded view of development that included socio-political and ethical dimensions (Trubek and Santos 2006, 9; see e.g. Sen 2004). Since courts in their role as intermediary oversee and monitor the state and protect citizens, the judiciary could help to ensure governmental accountability. The National Association of State Judicial Educators, states in its Principles and Standards of Judicial Branch Education pamphlet that “Courts have a critical role in free societies to ensure that the rule of man does not overtake the rule of law (NASJE 1).

As a result of the emphasis on an independent judiciary as an instrument in economic and democratic development, a well-trained judiciary formed specific and key elements of rule of law and law and development programs (Carothers 2009). The role of education and training became a central part of judicial reform programs because: “Inadequate judicial education and professional training, as well as insufficient emphasis on judicial ethics, hamper the effectiveness of judiciaries and of individual judges in many countries throughout the world” (Carothers 2009, #).
Judicial education and training—arming judges with the technical, legal, and practical

¹⁸⁰ Legal Vice Presidency of the World Bank, *The World Bank: New Directions in Justice Reform*, (May 2012) (on file with author).

skills they need to ensure a well-functioning court—could ensure public trust and confidence in the justice system, and engender judicial independence, democracy, and development (Armytage 1996; Armytage 2013; Wallace 2003). Paul M. Li (1976), executive director of the California Center for Judicial Education and Research (1973-1993) recognized that “A well-informed and expert judiciary, a body of judges equipped with the best working tools and techniques of the judicial craft, is a necessary part of every state justice system” and one of the “most effective, and perhaps an indispensable, means of enhancing the fair and efficient administration of justice” (Li 1976, 78, 80).

Parts 4 and 5 below revisit this history of the development of international judicial education and training from the perspective of the judiciary. Those parts consider the increasing popularity of international judicial education and training in light of the Israeli judges’ experiences and based on information obtained from other judges participating in the IOJT.

3.2 Global Judicial Dialogue

The second story often told about judges who interact internationally relates to the development of a *global judicial dialogue*. International Relations scholars—especially those scholars interested in the transnational movement of law—examine international and transnational judicial exchanges. Following Anne-Marie Slaughter who coined the term “A Global Community of Courts” (Slaughter 2003; Wiener and Liste 2014; Canor 2006), others have found a Global Judicial Dialogue (Frishman 2013; L’Heureux Dubé 1998), Judicial Internationalization (HiiL), or the

Judicialization of International Relations (Alter 2014; see also Keohane, Moravcsik, and Slaughter 2000; Stone Sweet 1999; Olsen 2016). Scholars suggest the presence of a global or transnational judicial dialogue, and look to a common judicial enterprise that transcends states and unites judges.

For example, the research institute, the Hague Institute for the Internationalization of Law (HiiL) declares that “Judicial Internationalization is *happening*.” HiiL argues that, “[d]espite the continued relevance of national legal orders,” (HiiL 4) contemporary judges are part of an internationalizing world, which includes an “incremental process whereby judges cite the decisions of their foreign counterparts, engage in transnational dialogues, attend conferences and generally show themselves to be highly attentive to developments beyond their own national borders.” (HiiL 2-3)

Scholars point to two sets of activities or practices that act as mechanisms in the judicialization of international relations (HiiL ix; Romano, Alter, and Shany 2014). The first is the activity of citing foreign law in judicial decisions, often referred to as cross-referencing. Because disputes are increasingly subject to international treaties and take place in “a more complex global environment,” judges increasingly engage with foreign or international law (Mak yr; Jackson 2010; HiiL 12). Claire L’Heureux Dube, justice of the Supreme Court of Canada from 1987-2002, writes that citing foreign courts is no longer a matter of courts deferring to one or two Supreme Courts: “cross-pollination and dialogue between jurisdictions is increasingly occurring... Judges around the world look to each other for persuasive authority, rather than some

judges being ‘givers’ of law while others are ‘receivers.’ Reception is turning to dialogue.” (L’Heureux-Dubé 17; see also Benvenisti and Downs 2014)

Other than reading each other’s cases, how do judges exchange ideas? Scholars discuss a second mechanism in the judicialization of international relations, nothing that judges engage in direct dialogue, meeting directly at court visits or at conferences (Slaughter 2004, 216; Weiner and Liste), contributing to epistemic networks and a global community of courts.¹⁸¹ Michael Moore (2009), former judge of the Federal Court of Australia (1994-2011) explains how

Judges from many and sometimes disparate national legal systems are interacting with each other with greater frequency and, in a sense, as a form of increasingly acknowledged fellowship. The interaction can simply take the form of one judge creating and another reading a judgment on an issue of common concern. It may involve extracurricular dialogue. It may involve meetings, workshops, conferences or judicial exchanges.

Both Slaughter (2003; 2004) and Vicki Jackson (2010) point to a growing body of judicial networks that affects the work that judges do. This scholarship is tied to the idea of epistemic communities– the network of professionals who share systems of belief (a common policy enterprise) and “intersubjective, internally defined criteria for weighting and validating knowledge in the domain of their expertise (Haas 1992,

¹⁸¹ HiiL published an Inventory list of Face-to-Face Judicial Dialogue – as well as a “Dialogue Initiated and hosted by academic institutions and/or NGOs (conferences, seminars, etc.)” – as Appendix A to its publication on its 2008 Law of the Future Conference.

3).” The literature on the emergence of a judicial community through social practice (Weiner & Liste 2014; Slaughter 2004; Jackson 2010) can tend to the teleological, pointing to transnational connections as the harbinger of a harmonized international consensus on human rights and procedural fairness (Mak 2013, 4).

In contrast, David Law and Wen-Chen Chang (2010) offer up a skeptical perspective, questioning whether judicial meetings or conferences actually have any effect. With respect to constitutional law, they write that judge-to-judge dialogue and judicial networks, “as eye-catching as they may be, have limited impact on constitutional adjudication” (Law and Chang 2010, 527)”. As to the broader or more general phenomenon of a global judicial dialogue, they write:

Actual interaction between judges, especially of the face-to-face variety that receives such emphasis in the literature, feels at once both glamorous and vaguely conspiratorial. Existing accounts of this species of judicial dialogue, cobbled together from snippets and reports of closed meetings in Bangalore and Johannesburg and New Haven tantalize the reader with glimpses of something elusive and, for that very reason, seemingly important... The resultant sense, perhaps, is that of being privy to the inner life of opaque “judicial networks” that engage in de facto global governance, or the exercise of power without authority, as part of a “new world order.” ...

The opposite and more skeptical view would be that the entire notion of J2J [judicial to judicial] dialogue boils down to the unexceptional and inconsequential claim that judges enjoy a growing range of opportunities to

socialize over cocktails and have also learned to e-mail one another. On this view, one might be forgiven for thinking that the “global community of courts” constituted by “transnational judicial dialogue” is a toothless development that bears more resemblance to “a literary salon writ large” than an innovation in global governance... (Law and Chang 2010, 534)

Law and Chang are correct to point out that the empirical research on judge to judge dialogue is haphazard and unmethodical.¹⁸² Moreover, the details of the activities or the format of judicial encounters remains vague. Are judges forming networks and what does that mean, specifically? The next part (Part 4) considers the development of international judicial education from the perspective of judges, and examines international judicial networks formed through judicial education and training. It focuses on the IOJT as a case study, in order to discern the details of judicial interactions around the issues of court administration, case management and procedure.

¹⁸² Nevertheless, it would be wrong to definitively conclude that judicial interactions have no effect. For example, judges of the Supreme Court of Japan traveled to the United States, the United Kingdom, Germany and France to investigate both jury and mixed tribunal models before instituting the *Saiban-in Seido*, a mixed judge/lay person model common in civil law jurisdictions (Goldbach, Brake, Katzenstein 2013). Canadian judges travelled to Mexico to assist in the transition from inquisitorial to adversarial criminal justice systems (Telephone Interview with Judge, appellate level court, Canada (Jun. 24, 2014) [Judge G]). One judge travelled to Mexico eight times in two years to work on criminal law and judicial ethics. Finally, the commercial court in Ghana – established in 2005 – as well as court-connected ADR – established in 2010 – were very much the product of conversations with judges in Tanzania, Uganda, Denmark, the U.K. and Canada (Date-Bah 2007; Cofie 2007).

4. Judges “other” work - International Judicial Education and Training

4.1 Judicial Education in Common Law Countries

This section describes the development of judicial training in common law countries, the establishment of judicial training institutes and their expansion into the international sphere. It then moves to a more focused recounting of the development of judicial education in Israel, and the establishment of the IOJT. This part also reviews the kinds of work and interactions that take place through the IOJT, including a detailed recounting of events at the 6th International IOJT conference.

While judicial education was the norm in countries of the Civil Law tradition, in 1993, Livingston Armytage, then Education Director of the Judicial Commission of New South Wales, was merely introducing the idea of judicial education to judges in Australia and the general Common Law audience:

In civil law countries, with their tradition of career appointments, aspiring or probationary judges are trained accordingly. In common law countries, however, with their preference for mid-career appointments, the process has until recently been entirely unformalised. There has, however, recently emerged an increasing recognition of the need for and value of structured training or education for the judiciary. This tendency has not, however, emerged without considerable debate and controversy (Armytage 1993, 540-541)

In Common Law adversarial jurisdictions, many lawyers and judges were opposed to the idea of judicial education (Armytage 1995). Lawyers were concerned

that judges would rely on information that was not introduced at trial by the litigants. Specifically, they felt it would be inappropriate if judges, “fresh from a new educational program, [would] not permit a challenge to their expertise.... A judge, or court, that claims ownership of a subject is not an ideal tribunal” (Stevenson 1991, 482).

Judges for their part were concerned that a requirement to partake in training programs would weaken judicial independence (Dowsett 1998). If government or public organizations were involved in creating the content of judicial education, there was concern that external agencies would be telling judges how to think. For example, Justice Dowsett (1998) expressed the following concerns at an annual Judicial College of Australia colloquium:

It is very easy to assume that any form of education must be beneficial to some degree, or at least not harmful. In general, I agree. However, as with any other innovation affecting an ancient institution, it is as well that we take time to consider how such a programme may affect the substance of the judiciary and public perceptions of it. ...

How can an education programme undermine judicial independence or the perception of judicial independence? I suggest that there are at least three ways in which such a programme may have negative effects in this area. The first, and most obvious, is that a programme which is apparently sponsored by and/or controlled by government would seriously affect perceptions of the separation of the judiciary from government. There would be the real risk of a

perception that government was telling judges what to do and how to do it.

(Dowsett 1998, #)

Moreover, judges promoted after working for several years—the frequent practice in common law jurisdictions—felt that they did not need additional training. Armytage observed that “...by reason of their position and experience, [judges] had difficulty acknowledging a need for formalised continuing education, particularly if it [was] externally imposed. Judges are also understandably challenged by any suggestion that they may be anything but consummately competent” (Armytage 1993, #). Former Chief Judge of the U.S. 9th Circuit Court of Appeals, Clifford Wallace, recalled his early experiences with judicial education in a recent edition of the journal published by the IOJT:

When I first began working with countries overseas in the 1970s, I remember well many chief justices rejecting the idea of judicial education. They would often refer to it as ‘training’ and insist that judges would not have been appointed if they did not have the knowledge and techniques to be judges and that, therefore, judicial training is superfluous. Indeed, some chief justices were offended by the idea. But that was then, and since that time, there has been a common recognition among most judicial leaders worldwide that appropriate judicial education to advance skills and knowledge is a vital part of improving the judiciary. (Wallace 2014, 13)

What changed? When did judicial education institutes begin to proliferate?

Judges took leadership in promoting judicial education as early as the 1960s and 1970s. The U.S. institute that hosted Dr. Levin in 1976 – the National Judicial College (NJC) (est. 1963) – was one of the first institutes promoting a more formalized judicial education program (Armytage 1996). Support for the NJC came from Chief Justice Warren Burger, who publicly endorsed the idea of judges participating in continuing judicial education (Armytage 1996, 13).¹⁸³

Canadian and Australian judicial education programs developed roughly at the same time: Australia's move toward formalized judicial education began in 1983 with the support of Justice Michael Kirby, then Chairman of the Australian Law Reform Commission and later President of the New South Wales Court of Appeal (Armytage 1996, 17). In Canada, the Canadian Judicial Council, the judicial oversight body in Canada, began conducting seminars for superior court judges in 1971, followed by the establishment in 1974 of the Canadian Institute for the Administration of Justice, an independent university-housed research institute that also would conduct education programs for judges and members of administrative tribunals (McDonald 1991, 457)

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¹⁸³ *Id.* at 13. The Federal Judicial Centre, established by Congress in 1967 (28 U.S.C. §§ 620-629), to provide research and education support to federal judges, also conducts education and training for judges and court staff. Chronicling the history of judicial education, Armytage notes that, by 1986, all U.S. states provided some form of education for its judges and that in most states some amount of classes were mandatory.

¹⁸⁴ Starting in 1980 with a seminar for federal judges on how to write judgments, the Canadian Institute for the Administration of Justice (CIAJ) began organizing educational programs on behalf of the federal judicial regulatory body, the Canadian Judicial Council (CJC). With the CIAJ still independent of judicial control however,

In the twenty to thirty years that followed, more judicial institutes and training centers opened. Examples include training centers in Germany (est. 1973), Israel (est. 1984), Canada (National Judicial Institute, est. 1988), Argentina (the Institute Superior de la Magistratura in Argentina (Foundation Institute of Magistracy which includes the Judicial School, est. 1989), India (National Judicial Academy, 1993), Moldova (est. 2007), Poland (est. 2009), Macedonia (est. ?), and Burundi (operational in 2010). Judges took on various roles, including serving as teachers, board members and trustees, and directors of training institutes. Several institutes, such as the IAJS in Israel, were founded as independent non-profit organizations, where judges manage operations and direct the curriculum.

the CJC founded an education institute that would be governed and operated by judges. Established in 1987, the idea of the Canadian Judicial Centre (which eventually became the National Judicial Institute) was to start an institute “controlled by and responding to the needs of all judges,” Stevenson *supra* note , at 488.

TABLE 1: Sample of Member Organizations, by year established¹⁸⁵

Organization	Country	Est.	Training Institute*/CSO/Umbrella
The National Judicial College	USA	1963	Institute
Ecole Nationale d'Administration de la Magistrature	Cameroon	1964	Govt
Instituto Superior de la Magistratura	Argentina	1967	Institute
Escuela Judicial de Costa Rica	Costa Rica	1971	
National Center for State Courts	USA	1972	CSO
Center for Judiciary Education and Research	California	1973	Institute
Japan International Cooperation Agency	Japan	1974	Gov't (arm's length)
National Association of State Judicial Educators	USA	1975	Umbrella
Institute of the Federal Judiciary (formally Instituto de Especializacion Judicial)	Mexico	1978	Institute
Institute of Advanced Judicial Studies in Israel	Israel/	1984	Institute
Sri Lanka Judges Institute	Sri Lanka	1984	Institute
Judicial Commission of New South Wales	Australia	1986	(regulatory body)
Escuela Judicial	Colombia	1987	
Escola Paulista da Magistratura	Brazil	1988	Institute
National Judicial Institute	Canada	1988	Institute
National Association of Women Judges	USA	1989	CSO
International Association of Women Judges	Int'l	1991	CSO/Umbrella
National Institute of Magistracy	Romania	1992	Institute
NCSC International Programs	USA	1992	CSO
Judicial Conference of Australia	Australia	1993	CSO
National Judicial Academy	India	1993	Institute

¹⁸⁵ EXPLAIN information source

Academia Judicial	Chile	1994	Institute
Judicial Administration Training Institute	Bangladesh	1995	Institute
Judicial Training Institute (Institute of Continuing Judicial Education of Ghana)	Ghana	1995	Institute
Latvian Judicial Training Center	Latvia	1995	Institute
Judicial Training Centre (CCEJ)	Senegal	1995	Institute
The School of Magistrates	Albania	1996	Govt
Centre for Judicial Studies	Australia	1996	CSO
Judicial Studies Institute	Ireland	1996	Institute
Philippine Judicial Academy	Philippines	1996	Institute
National Judges College	China	1997	
Judicial Education Institute of the Eastern Caribbean Supreme Court	Saint Lucia	1997	Institute
Commonwealth Judicial Education Institute	International (Canada)	1998	Umbrella
Institute of Judicial Studies	New Zealand	1998	
Institute of Judicial Administration-Lushoto	Tanzania	1998	Institute/CSO
Ecole Nationale de la Magistrature et des Greffes	Madagaskar	1999	
European Judicial Training Network	EU	2000	Umbrella
International Organization for Judicial Training	International (Israel)	2002	Umbrella
The National Judicial College	Australia	2002	Institute
Centre de Formation Professionnelle de la Justice (CFPJ) Professional Training Center for Justice	Burundi	2003	Institute (operational 2010)
Justice Academy of Turkey	Turkey	2003	Institute- Govt
Judicial Studies Institute	Uganda	2004	Institute
Academy for Training of Judges and Public Prosecutors	Macedonia	2006	Institute
The National Institute of Justice	Moldova	2006	
The Judicial Training Institute	Belgium	2007	
Judiciary Training Institute	Kenya	2008	Institute
National School of Judiciary and Public Prosecution	Poland	2009	Institute

Gesellschaft für Internationale Zusammenarbeit	Germany	2011	CSO (private)
Judicial College	UK	2011	Institute
Justice Cooperation International	France	2012	CSO

* In Civil Law countries, judicial training institutes are usually a branch of a justice ministry. The institutes in Common Law Countries such as Australia, Canada or Israel usually have NGO not-for-profit status.

Within the last 25 years, many existing institutes extended their training internationally, establishing programs or divisions to work with or train judges from other countries. The National Center for State Courts, established in 1972, established an international programs division in 1992. The National Judicial Institute (“NJI”) in Canada began hosting educational programs through its international collaboration group (ICG) at least as early as 2003. In Israel, the Supreme Court took on greater role in international activities both through the office of the president and through the growing international activities of the IAJS.¹⁸⁶ And judges, not just development practitioners, began travelling internationally to meet with and train their peers in other countries.

¹⁸⁶ Edna Azrieli began working in the office of the President of the Supreme Court of Israel in 1998. She had no court experience but was put in the role of Director of International Relations in the office of Supreme Court President Aharon Barak because of her language abilities, a position which she maintained for 15 years. Interview with Staff (Retired) at the Supreme Court of Israel, in Jerusalem, Is. (March 20, 2014) and see Alon Hadar, *Finked Out*, HAARETZ (Dec 08, 2005), <http://www.haaretz.com/beta/finked-out-1.176179>.

4.2 The Israeli Institute for Advanced Judicial Studies

In Israel, Dr. Shlomo Levin, former Deputy President of the Supreme Court (retired), worked with judges from the time that he was a district court judge to establish the domestic training institute for judges. The IAJS, now operational for over thirty years, is managed by an all judge board of directors, which has included Justice Eliezer Rivlin,¹⁸⁷ who was Deputy President of the Supreme Court while serving on the board of the IAJS; Justice Asher Grunis, Chief Justice of the Supreme Court of Israel until 2015; Judge Bilha Gillor, President of the Haifa District Court; Judge Zvi Zylbertal, Deputy President of the Jerusalem District Court; Judge Yigal Mersel, Judge of the Jerusalem District Court; and, Dr. Levin, sitting as director at the time of writing.

The IAJS started small, with courses specific to different areas of law. As of the time of writing, it hosts approximately 50 courses for judges throughout Israel, including general interest courses such as Judging and Literature, as well as mandatory classes for judges that specialize in monetary tort damages.¹⁸⁸ Most of the IAJS classes are voluntary. My informants reported that, even still, approximately 85% of Israeli judges participate in the classes at one time or another.¹⁸⁹ One person, usually a judge is responsible for each course to deliver a working plan for the course to the מנהל

¹⁸⁷ Judge of the Supreme Court of Israel (1999-2012) and Deputy President (2006-2012).

¹⁸⁸ Interview

¹⁸⁹ Interview with ____ (March 6, 2014). A limited number of courses are mandatory, for example for new judges or from specialized courts such as the family or labor court. Classes are usually limited to 40 persons per course. Informants advised that judges get time off to participate in IAJS classes.

(menahel: the principal or manager), and for calling lecturers and organizing discussion groups.

The IAJS also hosts a one week course and evaluation for new judicial candidates seeking appointment to the bench. This course is particularly interesting to indicate the extent to which the IAJS is immersed in the judicial system in Israel. The Judicial Appointments Committee in Israel sends all candidates to the IAJS, essentially for evaluation and review. Each class comprises 21 people, lasting one work week from Sunday to Friday. The judicial candidates participate in a host of activities: classes, moot trials, discussion groups, and writing exercises. Three judges, with at least one judge from the Supreme Court of Israel, plus a professional psychologist run each session. At the end, the course leaders provide an evaluation and recommendation to the judicial appointments committee. The recommendations on judicial nominations supplied by the IAJS are not binding, but “usually the committee gives a lot of weight to this recommendation.”¹⁹⁰

4.3 Establishment of the International Organization for Judicial Training

In 1999, fifteen years after establishing the IAJS, judges from Israel met with their colleagues from, among other countries, Brazil, Uruguay, Chile, the Netherlands, France, the U.S. and Germany in Sao Paulo, Brazil.¹⁹¹ Collectively, these judges established the First International Congress of School of Judges and signed a declaration of intent, committing to the exchange of information in the field of

¹⁹⁰ *Id.*

¹⁹¹ In total there were twenty-two judges from twelve countries.

educating and training judges, and to working on creating or expanding networks and cooperative initiatives and to exchange principles and methods of training. The “The Sao Paulo Proclamation,”¹⁹² expressed their intention to establish an international body that would connect the various national or domestic institutes so that they might work together and exchange ideas. Some members of the original group – Dr. Levin, Justice Luis Solano of Costa Rica and Justice Rosa Jansen of the Netherlands – and other key figures in judicial education held a “Preparatory Convention” in Jerusalem in 2001 with the aim of establishing an international body that would bring together the various judicial training organizations.¹⁹³

The first conference for the IOJT was held in Jerusalem in March 2002. In attendance were from 40 representatives from 24 countries including Canada, the U.S., Madagascar, Germany, Italy, as well as representatives from the Council of Europe and the World Bank.¹⁹⁴ The conference was held during the second Intifada (Palestinian uprising), one week after the bombing of a popular café in Jerusalem, Café Moment, killing 11 – including a security guard who worked at the Jerusalem Magistrate's Court – and injuring 54.¹⁹⁵ It is sad and yet oddly typical that memories of

¹⁹² Declaration of Sao Paulo; attached as Appendix B.

¹⁹³ Jerusalem Declaration of the Preparatory Conventional Aimed at Establishing an International Body of Judiciary Training Organizations, December 6-8, 1999, (on file with author), Appendix C.

¹⁹⁴ Interview with Judge E and see IOJT, About Us, <http://www.iojt.org/page~aboutus.html> (last visited August 9, 2015).

¹⁹⁵ Israel Ministry of Foreign Affairs, *In Memoriam, Uri Felix* (Mar. 9, 2002) <http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Victims/Pages/Uri%20Felix.aspx>; and see 31 *Journal of Palestine Studies* 199, 205 (Summer 2002).

the first conference are mixed in with one of the worst months of the second Intifada, a paradigmatic case of trying to do anything in Israel.

My informants described what it was like to organize the conference during the Intifada, how it was difficult to obtain visas for visitors. One chuckled, asking me if I wanted to hear this history of how the IOJT started (it was the same kind of laugh that my host had when telling me that the town where he worked was bombed that day – as if to make it normal by laughing). Another, and again with a kind of nervous laughter, told me how difficult it was to secure a visa for one participant who had a Muslim sounding name and was in Morocco the week before at another conference – even though this was the delegate from the World Bank. My informants expressed pride that, except for one judge in the U.S., everyone who registered attended.

In preparation for the first conference, the first Secretary General, Amnon Carmi, drafted statutes for the institute. The Director of Israeli courts agreed to house and finance the office for the Institute in Israel. At this first conference the name International Organization for Judicial Training was decided upon and the establishing statutes were approved.¹⁹⁶ Attendees elected Dr. Shlomo Levin, Director of the Israeli Institute for Advanced Judicial Studies as IOJT President. They also elected five regional vice-presidents, a Secretary-General and Treasurer, and established an Executive Committee and various additional committees. The Secretariat, Edna Azreili, had no legal background but was part of the Office of the President of the SCI because of her fluency in multiple languages. Together with Amnon Carmi and the

¹⁹⁶ Appendix D? Uncertain.

core judges of the IOJT in the early years, Mrs. Azreili researched judicial institutes and sent out letters and emails to introduce the IOJT and expand its membership.

Since the first conference, the IOJT has held conferences every two years, in Ottawa (2004), Barcelona (2007), Sydney (2009), Bordeaux (2011) and Washington (2013),¹⁹⁷ and most recently in Recife, Brazil (November 2015).¹⁹⁸

4.4 International Conferences on the Rule of Law and Development

I attended the 6th International Meeting, co-hosted by the U.S. National Center for State Courts (“NCSC”), in Washington, D.C. from November 3-7, 2013. The theme for the conference was “Judicial Excellence through Education.” Two weeks later, I attended the World Bank, Law, Justice, and Development Week, and conducted interviews with judges and judicial educators in between. In this section, I will describe in detail the events, interactions, and conversations that I observed at the IOJT meetings, with some reference to events at the World Bank meeting as it related to judicial education.

The IOJT held its Board of Governors meetings, plenary sessions, breakout sessions, and the General Assembly in the ballrooms and conference rooms of the Hyatt Regency in Capitol Hill. The IOJT also organized several social events, including a reception at the U.S. Supreme Court in the Upper Great Hall, a dinner at the Library of Congress and tours of Capitol Hill and historic neighborhoods. Each

¹⁹⁷ IOJT, Conferences <http://www.iojt.org/page~conferences.html> (last visited Aug. 9, 2015). See also Vastina R.Nsanze, Report on IOJT Conference Sydney 25-29 October, 2009, Institute of Legal Practice and Development (November 2009).

¹⁹⁸ IOJT Newsletter Vol. 1 (Summer 2014), <http://www.iojt.org/page~newsletter.html> (last visited Aug. 8, 2015).

morning the full group met in a large ballroom in the basement of the Hilton Hotel for plenary sessions, which were followed by breakout sessions throughout the rest of the day. At the back of the ballroom, the IOJT set up translation booths with multiple translators (in Spanish, French and English). There was no translation available for the break out groups. Judges from the United Arab Emirates were able to bring their own translator, although this became disruptive for those nearby.

The meetings were divided into thematic days. The first day the thematic topics were “Leadership and Judicial Education” and “Judicial Skill Building.” Sessions included discussions on leadership skills, judicial ethics, “Judicial Education as a Social or Institutional Change Agent,” education for adult learners, “judgecraft,” and how to involve judges in training programs. The thematic topic on the second day was “Judicial Education in Support of the Rule of Law.” Break-out sessions included “Judicial Education in Support of Justice System Reform, Independence, and Accountability,” and “International Framework for Judicial Excellence.” The topics for day three and day four respectively were “Technology and Judicial Education” and “Judicial Education and the Academy.”

In and out of the break-out sessions, judges exchanged stories about the work they did and reflected on how other judges’ practices related to their own. A Canadian judge described to me his conversation with a judge from Jamaica, where the death penalty is still in effect: “In one day he sentenced three men to hang.” This was “an eye opener.” This judge was also interested to learn about the processes for appointment in other countries, which “brought home the importance of the role of the

judiciary, in terms of the administration of justice” and society at large. “The judiciary must be absolutely independent of government interference.”¹⁹⁹

In break-out sessions or in Q&A, judges raised several concerns about judicial education and training. They raised concerns that the public’s perception was that judges were taking time away from judging, but also that it was difficult to convince judges of the benefits of education and training when it would add additional time to their work-life. Judges expressed concern about the source of funding for training programs, and the public’s perception that judges go on “weekend retreats.”²⁰⁰ Judges also raised the issue that it is hard to know the effect training actually has on judges;²⁰¹ the difficulty of ensuring security for courses that are online so judges can share sensitive information; and how to involve judges who really do need training but self-assess that they do not.²⁰²

I undertook to ask judges how they developed or exchanged knowledge about crucial concepts (Riles 2000) such as the “rule of law” or “best practices”. When I spoke with a senior judge from Australia, she stated that the rule of law was a fundamental principle that underpins how courts fulfill their role when they engage

¹⁹⁹ Interview with Superior Court Judge, former Senior Judge of the Unified Family Court (Canada), in Washington, D.C. (November 3-7, 2013) [Judge H].

²⁰⁰ Presentation by Judge and Chief Justice of Trinidad and Tobago at the IOJT International Conference, November 4, 2013.

²⁰¹ Interview with former Court of Appeal Judge (Senegal) and Director of the National Centre for Judicial Training of Senegal, Washington D.C. (November 6, 2013).

²⁰² Conversation with Judges from Australia in small group breakout during the session, Leadership Skills for Judges, IOJT International Conference, Washington D.C. (November 4, 2013).

with the public. In other words, instead of judges supporting the rule of law, the rule of law supported the work that judges do.²⁰³ A Canadian judge responded that best practices was about sharing unique initiatives that you would not otherwise know about and that are adaptive to your situation.²⁰⁴ Best practices according to another Canadian judge was about having humility and being reflective while sitting on the bench. This judge recounted how he heard a second degree murder trial six months after being appointed to the bench; “the jury believes that I know everything, that I am the great equalizer,” he said. Primarily it was important to come to the role of judge with humility.²⁰⁵

Judges indicated the ways that the practical and ideal must hold together for them in their work. Justice Sachs, in his speech called it the “grand ideas of ages feeding into the daily lives of people” (Albie Sachs, opening plenary WB Law, Justice and Development Week). A Canadian Senior Family Judge described an online depository in his jurisdiction, where judges could share their processes and orders, in response to my question about best practices. For example a judge could share a child protection order, and other judges could look at it and comment on it.²⁰⁶ One judge’s response to my question about trying to improve the rule of law through judicial education and training focused on practicalities:

²⁰³ Interview with Judge, Supreme Court of Queensland (Australia) in Washington, D.C. (November 3-7, 2013) [Judge J].

²⁰⁴ Interview Judge H.

²⁰⁵ Interview with Judge Superior Court of Justice (Canada), in Washington, D.C. (November 3-7, 2013) [Judge I].

²⁰⁶ Interview Judge H.

I think that at the conference I saw workshops that judges sat in on [that deal] with very practical issues that judges are coping with. I think this took the main part of the conferences ... practical lectures, exchanging of experience... how to administer the court, court administration, and the way you can watch the witnesses, the way you sit in a panel. All those issues are very practical. And then there is of course the overall idea, common idea, of the rule of law that you have to protect the rule of law to ... everybody according to his system.²⁰⁷

Judges continually spoke to me about judicial independence. Both in formal settings such as panels or informally in interviews, when the topic of the rule of law was raised, judges often redirected the conversation to the issue of judicial independence. The judges' approach was to think of the rule of law in the context of judges' practices of sociality—the ways that judges develop or remove themselves from relations and connections. For example, when asked to identify the most important issue in judicial education, the Canadian Senior Family Judge spoke about the need for independence in judicial education. He spoke of his apprehension when asked by others to attend training because they will be setting the agenda and it could lead to a perception of bias in future cases. He was thus selective about the speaking engagements he attended and where he chose to make public appearances.²⁰⁸ At a panel on the topic Judicial Education in Support of the Rule of Law, Federal Judge and Director of Instituto Superior de la Magistratura in Argentina presented

²⁰⁷ Interview Judge F.

²⁰⁸ Interview Judge H.

Argentina's successful program of having high school students participate in mock trial exercises. The judge conveyed how positive perception of the justice system increased once students personally experienced how difficult it was to decide.²⁰⁹

One of the questions I asked judges was their perspective on the purpose of an international meeting and interacting with judges from other countries. Many judges answered that the purpose of meeting judges from other countries was to share best practices, get ideas to implement at home, and learn what others do or learn other ways of doing things. But on asking this question, several judges also expressed disappointment that there was little organized activity that would facilitate exchange between judges of different countries. There was little coordinated conversation on how to approach judicial education and training.

Participants also acknowledged that the conference format was not the best learning format for adult learners: most panels followed a speaker then questions format.²¹⁰ Sessions led by more senior educators or institute directors who had been involved in judicial education for many years were interactive. For example the

²⁰⁹ Most recently the mock trial was televised and had high ratings. When I interviewed a Canadian judge and asked about the meaning of "best practices," this was the example that he recalled. Interview Judge H.

²¹⁰ In response to the question, "What advice would you give us to improve sessions such as this in the future?" in the World Bank Law, Justice, and Development Week 2013 survey, many attendees indicated that there was not enough time reserved for questions and participation by the "audience". For example, one participant indicated that "I think they have spent too much time on presentations and not enough time for discussions. I think next time they had better make more time for questions and reaction." Attendees also felt that panels were too broad, or sometimes the speakers did not match, and that "panelists presented information that strayed from the intended focus of the panel." Law, Justice and Development Week Survey Data (on file with author).

Honorable William F. Dressel, Judge and President of the National Judicial College in Reno, incorporated small break-out discussion groups into his session. Professor Jeremy Cooper, Director of Tribunals Training at the Judicial College in London and Judge of the Upper Tribunal and of the First Tier Tribunal (Mental Health), engaged his group in a trivia game about the conference. Most sessions led by judges or educators, however, consisted of presenting examples of programs conducted in their home country, with some time left at the end for questions. Examples include: describing the NJI course, “Educating Judges about Social Context” in Canada,²¹¹ or recounting the establishment of a judicial training center in Macedonia with the help of the “European Centre for Judges and Lawyers” at the European Institute for Public Administration. Few sessions included smaller group interactions or one-on-one discussions. Even when there were break out groups, judges expressed disappointment that people tended to stick with people they knew or with judges from their own country.

Most of the communication at the meetings was anecdotal, each person telling their own story and experiences. Presentations consisted of descriptions of the programs run by a domestic training institute as panelists shared anecdotes about their successes and challenges. The presenters, especially the judges who were involved in training, related projects or classes they taught as examples of the kind of work their organization did. For example, at the World Bank, Law Justice and Development Week, Justice Doherty recounted her experiences witnessing the suffering of women

²¹¹ Cd materials

and children in conflict zones. The presentation by the Director of the Institute for Magistrates in Argentina described above is also a case in point. Even where there were questions, participants would take the opportunity to tell their own stories: they would convey anecdotes about their experiences as educators, either using that experience to complain and ask for advice or to challenge the speakers.

The starkest example of narration as a format for knowledge transfer was the keynote speaker at the World Bank, Law, Justice and Development Week, former judge of the Constitutional Court of South Africa, Albie Sachs.²¹² Sitting perched on a stool, as a grandfather regaling his heirs with stories of his life, Justice Sachs spoke “off the cuff,” recalling his work on three major cases that came before the Constitutional Court. First he told the story of the case of dealing with HIV medication – “Can judges prescribe drugs? When human rights are involved in such a profound way; when all the evidence showed that they drug was safe... when all the evidence before us showed that the doctors were clamoring... not only can we but we must, it’s our duty under the constitution.” He also recalled the case of a woman who lived in a shanty-home with her three children and was asking for housing. He could not apply technical land law but had to find way of correlating rights of *umbuntu*, thus finding value in the idea of “meaningful engagement”. The audience, attentive, cheered widely when he said that development must now include access to fundamental rights

²¹² Albie Sachs, Keynote Address at the Opening of the Law, Justice and Development Week 2013, (November 18, 2013) (video) at <http://www.worldbank.org/en/news/video/2013/11/18/albie-sachs-at-law-justice-and-development-week-2013>. (Last visited Aug. 9, 2015)

and fair process and that judges are already used to working in the principled way that development now requires.

At both conferences, participants shared their personal experiences on several scales (Strathern 1995; Strathern 1991; Riles 2000) orally, in their power point presentations or in questions to presenters, and on paper, in pamphlets or other promotional materials such as personal business cards. Between the slides, pamphlets and business cards, participants presented several types of artifacts of the person. Both at the World Bank and at the IOJT, provisions were made for sharing pamphlets and brochures from various organizations. The IOJT also had a Knowledge Fair where organizations set up booths to promote their institutes and share their experiences.

4.5 Activities in Between Conferences

Initially, Justice Levin had the idea that the IOJT would be directly involved in law and development projects. He envisioned that the IOJT would coordinate with the World Bank and provide a group of experts who could travel to various countries to assist in either educating judges or helping judges establish their own judicial education institutes.²¹³ The structure of the World Bank, which is organized according to regions would not allow for a thematic subgroup. As explained to me by one of my informants,

Actually [the] IOJT along the years tried to be in touch with World Bank to see if they can cooperate ... It didn't work out, the World Bank has its own system of how to do it, they usually allocate funds to country and sort of approve the

²¹³ Interview with Judge E.

project to ... they give money to the country. Actually Justice Levin's idea was to establish a team of experts from all over the world that could travel from one developing country to another and assist in what they need. But this is all very nice, but without a budget it can't work, and uh, funding from the World Bank didn't work out in this kind of framework... this idea did not come to fruition because of the World Bank's focus on regions.²¹⁴

Judges in Israel have been able to undertake some international travel to assist judges with education development. According to my informants, Israeli judges have travelled to Rwanda, Kenya, and Costa Rica in their capacity as members or instructors of the IOJT/IAJS, sponsored by the Israeli Ministry of Foreign Affairs. Under the auspices of the IOJT, Justice Levin met with judges in South America to develop judicial training program. Justice Rivlin travelled to Kenya to help judges develop their judicial training institute. The trip to Kenya was described to me as follows:

They have the facilities, the place, nice location, but they have some problems with teachers with teaching there. We spent about a week there, we changed views, and we tried to bring them our experience, building and managing a school for judge, and now Kenya, the Kenyan school is part of the IOJT.²¹⁵

In addition to limited travel, the IOJT executive in is contact to review institutes who seeking memberships. For the most part, however, contact between

²¹⁴ Interview with Staff (Retired) of the Supreme Court of Israel.

²¹⁵ Interview with Judge F.

representatives of member organizations takes place at the international conferences that are held every other year. I asked my interviewees what communication or activities there were in between the biennial conferences. The response was consistent – everyone is busy and the organization does not have any money to pursue other activities. Initially the founders thought the regions could meet in between the biennial conference. But other than the judicial institute in the Philippines which organized a conference to introduce the IOJT to its region, this did not happen.

The organization maintains limited contact through the internet. Recently (Summer 2014), the IOJT distributed a newsletter detailing some recent activities of the organization, including Justice Rivlin’s trip to Uzbekistan and a request by the UN Counter Terrorism Committee, to assist in developing judicial education that could be delivered worldwide “in the field of application of rule of law in matters related to the ways judicial systems contend with terror related matters” (IOJT Newsletter). The IOJT also publishes annually an online journal, with the most recent issue, Vol. 3, published in 2015 and available for download on the IOJT website.



Figures 36-37. Above IOJT Conference Plenary Session. Below IOJT Conference Breakout Session.



Figure 38. Sign to Institute for Advanced Judicial Studies' offices in Supreme Court of Israel Building

Figures 39-41. World Bank Law, Justice, and Development Week





**Figures 42-43. Dinner Reception for IOJT Conference
at Library of Congress, Washington D.C.**



5. Relationship between means and ends in judicial education and training

According to the standard narrative, judicial education has a purpose—it is a tool to strengthen courts and the judiciary, to make judges more independent, increase public confidence in the justice system, and make judges more accountable (Armytage 1995, 164).²¹⁶ As we saw in part 3, the standard story suggests that: lawyers and development practitioners identified democratic and/or foreign direct investment deficiencies; they identified that stable courts (strong justice institutions) would improve the rule of law and/or economic development (Miller and Armytage year), and they then identified that judicial education and training would promote a strong and independent judiciary.

However, if we consider the development of judicial training institutes from the perspective of judges, we find that judges’ relationship with their “tool” has not always been straightforward. The problem-solution form that dominates legal instrumentalist thinking fails to explain much about judges’ involvement internationally in judicial education and training. First, judicial education internationally developed pragmatically, where “means” and “ends” were reciprocally related. There was an interaction between the choice of tools (means) and the definition of the goal (ends). Second, judges often figured out solutions by *doing*. And, third, judges continued to move forward in their task even though they were aware of tensions and contradictions that arose through the process of their law reform projects.

²¹⁶ The IOJT panel titled, “Judicial Education in Support of Justice System Reform, Independence & Accountability” is a case in point.

In the standard view of legal instrumentalism that forms the basis for thinking of law as a tool for social change, scholars attribute an epistemic and temporal separation of means and ends. Scholars speak of legal instrumentalism as if there are sociological problems that we can identify, and solutions that we will develop in response. An independent problem “hovers above” (Pickering 1992) and directs the formation of legal solutions. By way of contrast, Alain Pottage writes that, historically, “the animating principle of legal actions” was to be found within the formula of the action itself” (Pottage 2014, 157). Objects and endpoints – “matters of concern” – were “not found in nature, ready to be discerned and acted upon by law through the exercise of cognitive and practical reason, but [were] instead immanent in the legal operations and transactions that act upon them” (Pottage 2014, 154). Similarly, both David Scott (2004) and Andrew Pickering (1992) invite us to see problems as structured by “the cultural field of resources that provides the instruments for their formulation and possible attainment” (Pickering & Stephanides 1992, 163; and see Scott 2004). Our hopes and expectations for the future are bound up in the methods we use for their attainment. In other words, resources and tools structure how we see problems. What we see as a problem to be solved, and the kinds of questions we ask are influenced by the “problem space” (Scott 2004) or cultural field. The interests themselves, our questions are “structured by the cultural field of resources that provides the instruments for their formulation and possible attainment” (Pickering & Stephanides 1992, 163).

Here, the growth of judicial education as a global phenomenon preceded, or at least developed at the same time as, the identification and articulation of the problem. Solutions were not constructed in response to identified problems. The notion that judicial education would assist in strengthening the rule of law developed and became intuitive as judicial education institutes were being established (Miller and Armytage 2008). Worldwide, judges have been involved in judicial education and training for over 50 years (see Table 1, above). In Israel, judges established a training institute for Israeli judges in 1984, and then, beginning in 1999, worked to establish the International Organization for Judicial Training (IOJT). Rule of law initiatives developed alongside the increased transnational activity of judges as educators. The tool—judicial education and training—and its object—the rule of law and judicial independence—co-formed, co-evolved and co-impacted.

Judges also became involved in judicial education and training for various reasons, not always to solve identified problems or concerns. Rather than exhibiting strategic behavior, many judges responded with a kind of “do-first” approach. When asked why they became involved in judicial education, several judges indicated that they attended the IOJT conference because they were asked, either by a Chief Justice or by someone that they knew who worked in one of the judicial training institutes. One judge was asked to come by the director of his national judicial institute who was the former chief justice for his court. Another judge indicated that he attended because he saw an advert on the domestic judicial training institute website and had always been impressed with their courses. One judge told me that he became involved in

teaching because the Chief Justice at his court thought he would be good at it. This judge has travelled to Mexico, Latin America, Africa and Moldavia for judicial education projects.

When I asked the Israeli judges about their decision to become involved in the IOJT, one judge told me that he started as a student at the IAJS when he became a judge. Then he became one of the teachers, then management and then he became involved with the IOJT. As for the second judge, the following was our exchange:

TG: For you two specifically, what was your interest in being involved in education, in these organizations? What is the motivation for you?

Judge E: (laughs) It is a difficult question. I don't know. When I started with it, this is the reason that I started with the local institute. When I met with other people in the world I saw that there is a common interest to meet together and speak together. And it was only natural that I should do something that nobody did. So when nobody does something, do it yourself if you want.

In discussing the particular (and peculiar) operations and techniques that law adopts to express itself, Pottage asserts generally “that legal technique is about making rather than knowing” (Pottage year 149). This resonates with early Pragmatism. As a philosophical statement on metaphysics, Pragmatism asserted that the truths we seek are made in the course of working on solutions. Ideas ... become true just in so far as they help us to get into satisfactory relations with other parts of our experience. (1907: 34). The pragmatism of Dewey which so informed legal realist thinking was built on “the notion that truths are established in the course of the pursuit of collective projects

in the world... Truths work. They are created in the course of goal-oriented activities” (Tamanaha 2006, 63). Similarly, theories about conceptual knowledge formation speak to a link between “new” and “old” knowledge.²¹⁷ We move from the known to the unknown, using models or mediums that already exist. Marilyn Strathern writes: “The only way that reality can be grasped, then, is through a medium that already has a form of its own” (Strathern 1991, 7).

In that fashion, Israeli judges built on organizational structures that were familiar to them—modeling their organizations on U.S. institutes such as the Federal Judicial Center or the National Judicial College, and establishing an umbrella organization which would bring already existing national institutes together. They adopted models and utilized tools that were known to them, often working on legalistic projects like producing declarations or reports. At meetings to establish the IOJT in Sao Paulo and Jerusalem, attendees articulated *do-able* goals for the group: establishing a not-for-profit society; publishing an organization journal or newsletter (currently they have both a newsletter and a journal, the first edition of the journal was published in 2013); identifying all the judicial schools and directors worldwide; and,

²¹⁷ In trying to understand conceptual practice in theoretical mathematics, Andrew Pickering reviews various accounts of the “discovery” of quaternion. His review leads him to conclude that in the process of modeling, the mathematician does not try to construct a mathematical system out of nothing; instead she moves from the known to the unknown. Pickering shows modeling processes that chain knowledges back to their origin. The process of devising solutions also combines *free moves* – “genuine choices” consisting of “tentative and revisable trials that bring with them no guarantee of success” – with “forced moves”; see Andrew Pickering, *From Science as Knowledge to Science as Practice*, in *SCIENCE AS PRACTICE AND CULTURE* (Andrew Pickering ed. 1992).

organizing an “international congress of judicial training organizations” in Jerusalem in 2001. The Jerusalem and Sao Paulo declarations stated that: “it is of the utmost importance to exchange information and ideas on the various national programs” because establishing a network or forum would improve the exchange of information. At the same time, the Sao Paulo declaration acknowledged that these networks for exchange and sharing information already existed.

There is one final way that the construction of the problem and solution was not as straightforward as legal instrumentalism might suggest. With respect to judicial education and training, there were several instances where the execution of the solution was incongruous to the goal; and there are aspects of judicial education and training that continue to be problematic. Judges talked about the specific needs of adult learners, only sometimes jokingly stating that the format for the IOJT stood in contradiction to everything that people knew about adult learners (for example that adults only retain 5% of the information they receive through lectures whereas 50% of learning happens when discussing with peers) (Armytage 2013; Armytage 1993). In countries where judicial education is voluntary, judges noted that the people who need training the most do not sign up for classes. Classes that mixed high and lower court judges could be a problem, or one judge gave the example of a Chief Justice who answered every question throughout the course.

A recurring discussion focused on the *tension* between judicial education and the rule of law. At the final plenary session on Judicial Education and the Academy, titled, “Collaboration between the Academy and Judicial Training Institutes:

Challenges and Opportunities,” judges discussed the problem of “training junkets.” A judge from the High Court of Kenya spoke of externally funded training which took place in a resort town. People see judges “going on trips to coastal towns and having a good time,” and their confidence in the justice system diminishes. Moreover, the judge estimated that out of the 500 judicial officers attending a UNHCR training, only ten work on human rights, or if 500 judges attend a USAid funded trip, only five handle drug cases. Education funded by external donors often advances the donors needs and not the needs of judges.

In an interview following the IOJT meetings, Judge Joan Churchill,²¹⁸ retired judge, Immigration Courts, former President of the National Association of Women Judges and member of the International Association of Women Judges pointed out the “inherent contradiction” for the IOJT in linking judicial training and judicial independence. As she understood it, one of the objectives articulated by the IOJT was to inspire confidence in the judiciary; yet holding training sessions in resort areas was often perceived as an abuse. In addition, training may be improper if judges are being influenced by outside organizations. The media often criticizes training, especially if organizations that are seen to have particular agendas invite judges to participate. Training may seek to improve the judiciary, but executing or implementing judicial

²¹⁸ Interview with Judge Joan Churchill, in Chevy Chase, MD. (Nov. 13, 2013). Judge Churchill indicated to me that she wanted her identity known.

training continues to cause problems for impartiality and public confidence in the justice system.²¹⁹

Judge Churchill considered the inherent contradiction as a challenge to the whole concept of judicial training. And yet most judges did not seem deterred. Strathern discusses incompatible things that do not dissolve or resolve but somehow hold together (Strathern 1991, 27). Initially Strathern speaks of the Feminist who is asked to be more than herself in order to grasp others' story and issues, to "[hold] in one's grasp what cannot be held... [and] make the body do more than it can do...."²²⁰ (Strathern 1991, 27). She moves on to describe other situations—like writing ethnography—that cannot facilitate an “integration” because of internal differences or fundamental connections to other things. She points out, however, that incompatible things can sometimes hold together. Training, funding, judicial independence, the ideal and execution are sometimes incompatible, but for the judges involved they “hold together.” The presence of incompatibilities—and the tension and uneasiness of contradictions that do not resolve—is endemic not only to judging (or in other words, the Herculean task of finding fit and consistency with all precedent, relevant statute

²¹⁹ See also presentation by The Hon. Georgina R. Jackson Justice of the Court of Appeal for Saskatchewan Regina, Saskatchewan, Canada, Session 1.3: Judicial Education as a Social or Institutional Change Agent (on file with author also available at <http://www.iojt-dc2013.org/Presenter-List/Georgina-Jackson.aspx> , slide 10, Judicial Independence and Impartiality. Jackson identifies these “Institutional Issues”: “Who pays for funding, Are strings attached to funding, Who decides programming, How is the organization that provides programming structured, Is programming balanced, Do the judges have the choice to attend or not, Does competition exist”.

²²⁰ Id. In trying to address the problem of intersectionality for Feminist theory, Strathern argued that Feminism does not resolve into other aspects of one's identity, but are connected in a partial manner.

and constitutional principles Dworkin, 1094), but also to legal instrumentalism. With this in mind, it might be possible to move past frustration with the cycle of optimism and despairing confessionals that are characteristic of law and development scholarship (Davis Trebilcock 2008; Kroncke 2012; see e.g. Trubek Galanter 1974;). The “continued and intransigent popularity of [law and development] efforts despite its equally intransigent track record of failure” (Kroncke 2012, 485) is not so much a paradox but a feature of using law as a tool for social change.

6. Social practices and quasi-strategic behavior in global judicial dialogue

International judicial education stands as an example of judicial engagement in politics beyond the individual case. It also highlights that judicial politics cannot always be easily characterized as a confrontation between conservative and liberal politics. Judges express interest in law and development, foreign relations, internationalization and globalization. Further, international judicial education highlights that the “primacy of policy preferences” is not always enough to explain judicial behavior (Epstein and Knight 1998, 9). Standard approaches to judges and politics depict judges as rational or irrational, a composite of their political ideology and public policy preferences. There is a kind of perfection that pervades this literature. But judges can also be awkward and ineffective. Even if we find a judge that exhibits rational and strategic behavior, judicial practices of sociality—the ways that judges develop relations and connections—are subject to the kinds of ambiguities, hazards, and slippages that normally accompany social interaction and material practices (Keane 1997, 7).

Judges interested in developing relationships through the IOJT adopted corporate methods for networking or building connections—distributing gift bags with pens, smart phone accessories, and other “swag.” The IOJT meeting opened with an early evening reception. Attendees received a tote bag—a light satchel designed as a computer bag—embossed with the IOJT logo, a pen and USB plug with the NCSC logo, the program, visitors’ map, and a disc with the conference papers. At both conferences, I witnessed participants combing through the business cards they collected, as if they were prized possessions or an accumulation of gifts (Munn 1986; I saw one man carefully organize his cards as he listened to a lecture, as if symbolizing all of the relationships that he would take home with him once the meetings finished). The business card was so much a presence at meetings that a business card holder with the IOJT insignia was given as a gift at the Library of Congress dinner. During cocktails, participants and spouses talked, took pictures, and viewed the Library spectator’s room. At the dinner, each person had a gift waiting for them at their place-setting, emulating wedding favors that are customarily set out at weddings in the U.S. Inside the gift box was a business card holder with the name of the IOJT, and a Thank You card for attending.

Israeli judges were aware of and interested in the possibility of improved foreign relations through the IOJT. Judges and IOJT staff proudly informed me that past attendees to IOJT conferences have included a delegate from the Ministry of Justice from Jordan, judges from Egypt, the Palestinian Authority, Iraq, Iran, Abu Dhabi and Pakistan. I was also informed of new members following the 2013

conference, including the Judges' Institute in Sri Lanka and the judicial institute in Sierra Leone. Judges and IOJT staff proudly told me about these exchanges with judges from countries that had no relations with Israel. For an organization founded in part by Israeli judges and whose first two conferences were in Jerusalem, judges and staff felt these interactions were an accomplishment. One judge told me, "I think it's a miracle because [the IOJT] consists of countries that some of them don't speak with each other, but it's different with judges and educators who put aside all politics and cooperate."²²¹

The conferences were seen as a forum where Israeli judges could interact with their counterparts, even from countries where relations were strained. IOJT staff recounted a conference where judges from Israel and Iraq were on the same panel:

In Sydney we had the Chief Justice of Iraq as one of the members, and he had a session which was with two other Chief Justices; it was moderated [by] Justice Rivlin. And everybody was [wondering] whether he would cooperate, and it went beautifully. And we have a very nice justice from Pakistan, from the Supreme Court [of] Pakistan, who participated in at least Barcelona, certainly in Sydney, and in Bordeaux, I think three [times]. Again, Pakistan doesn't have formal relations with Israel, but yet he got very friendly with Rivlin, and I got very friendly with him... I wanted him to locate the Supreme Court of Afghanistan and all that, which we can't do, and things like that.²²²

²²¹ Interview with Judge F.

²²² Interview Staff (Retired) SCI.

The Israeli judges were aware that assisting institutes in other countries could potentially improve Israel's reputation internationally. And the opportunity for positive perception of the Israeli judiciary must also be recognized by the Ministry of Foreign Relations, which has funded IOJT board member trips (delegations = המשלחות, from לשלוח = to send) to Rwanda, Kenya, and countries in South Africa.²²³

But judicial engagement in epistemic community building, or their foray into foreign relations, was not always effective. Inter-conference trips were met with limited success. With respect to the recent trip to Kenya to help those judges establish an educational school, the itinerary was broad and it was unclear how much was accomplished. One of my informants described technical obstacles that stood in the way of sharing information:

Look they... wanted to and they did go, and our Ministry of Foreign Affairs encouraged it. But it was not pointed enough... As you said, it was like, they initially went to understand what they really need and how you can assist them... Israel is already advanced; you are connected to the lawyers. Everything is online. Can you do it in Kenya? Their request were very broad, so I think they went there to know [the] system a little closer and judge for themselves... Because if you get a request like we would like assistance in

²²³ Though not without its controversy; see e.g. Tomer Zarchin, *Five Days of Work in One-month Vacation? State Pays Airfare*, HAARETZ (Oct 20, 2009), <http://www.haaretz.com/beta/five-days-of-work-in-one-month-vacation-state-pays-airfare-1.5827>.

court computerization, what would it mean? Do they have computers in every court? What does it mean really?²²⁴

The notion that judges are engaged in global networks and epistemic communities is more complicated when we examine those networks more closely. There were several instances when I interviewed judges who seemed more entrenched in their own ways of doing things after hearing about training methods used in other countries. Judges themselves noted that conference attendees tended to stick with people they knew or with judges from their own country. There was also mismatches in the exchange: a judge from Cameroon brought up the unfortunate but obvious problem of learning about best practices from other countries but then not having the infrastructure to implement the technology required. One judge complained to me that he trades business cards with judges, but people rarely stay in touch. They all trade business cards like prizes but then he never hears from anyone.²²⁵

In addition, judges have no provision for maintaining connections on an ongoing basis. For example, the IOJT never heard from the Palestinian judge again:

We had not this time in Washington but in the first conferences also delegates from the Palestinian authority and all was completely on professional basis.

And never did we talk about politics. But he didn't appear anymore in the last two conferences, I don't know what happened. I know his name but I don't

²²⁴ Interview Staff (Retired) SCI.

²²⁵ Interview Judge G. I was struck by how disappointing or awkward the gift was when finally revealed. I saw one attendee from the IOJT conference using the gift at the WB conference the following week. But mostly the gift came across as anti-climactic.

know. He was invited but he never came. I don't know why. We thought we could do many things together if he wanted to.²²⁶

Both staff and judges mentioned connections with the Jordanian Ministry of Justice that were also unable to advance:

I'll tell you a story. One of our neighbors is Jordan. Several years ago a delegation from Jordan came also to one of our conferences. And I met with the Jordanian school of judges. They have a school of judges very similar to the French school of judges, a very good institute. And I told him you know, we are neighbors, why don't we exchange delegations and information, and he was very open. He said in our country, all is politics. So try to do it, send a letter to the president of the Supreme Court, and we'll see. And we did it. And we never got an answer. So when politics involved, you can do nothing.²²⁷

In Ottawa, we had an Egyptian judge and ministry of Justice from Jordan, but otherwise, we tried to engage the Jordanian institute to become a member but we didn't succeed, as many letters as we wrote.²²⁸

Does this mean that judges are not political? I do not want to suggest that judges try something that they are not equipped for and so therefore failed. Rather my claim is that judges made connections in a partial manner,²²⁹ that judges can only

²²⁶ Interview with Judge E.

²²⁷ *Id.*

²²⁸ Interview with Staff (Retired) SCI.

²²⁹ “Rather, there is a sense of holding in one’s grasp what cannot be held —of trying to make the body do more than it can do – of making a connection with others in a partial manner.”

make connections in a partial manner, and that this is common experience amongst many legal actors.

One of the cases Justice Sachs recounted at the World Bank was about access to very expensive dialysis treatment. The patient was dying of renal failure, but the court had to deny the petition. “It was so painful,” Justice Sachs recalled, “We knew his life depended on our decision, and we had to say no...” Those stories that Justice Sachs told were his stories, but then again, they were not. They were stories about other people’s lives. In many ways the same is true for most legal actors—they are intimately involved in other people’s lives but they are allowed and required to separate themselves.²³⁰ With respect to the case about the provision of medical treatment, Justice Sachs continued,

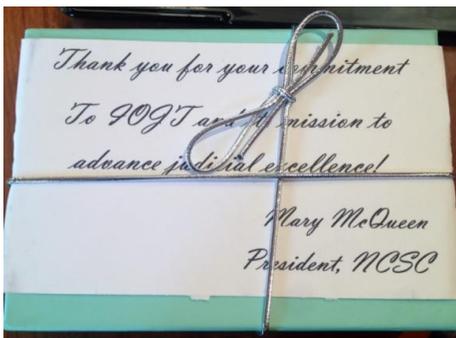
And I still remember saying to Counsel, he was so worried that if he didn’t get his argument right then his client was going to die. I remember saying to him, Mr. so and so, you presented your case with great dignity, it’s not just for client but everyone in his circumstances... and I wanted him to hear that so he would feel that you can function as a lawyer in cases that you don’t win...”²³¹

²³⁰ Jill Switzer in *Above the Law* suggests this legal self-assessment “... before taking the plunge into law school and a debt-ridden life...” Number three: “Can you detach from the emotion of your client’s case? It’s not your case, it’s hers, and the need for cool, unemotional, and rational responses is critical...” Oct 28, 2015

²³¹ Albie Sachs, Keynote Address at the Opening of the Law, Justice and Development Week 2013, (November 18, 2013) (video) <http://www.worldbank.org/en/news/video/2013/11/18/albie-sachs-at-law-justice-and-development-week-2013> (last visited Aug. 9, 2015)



Figures 44-45. Compare Black Tie Black and Gold Setting (Copyright The Knot.com) (left) with IOJT Library of Congress table setting (above).



Figures 46-47. Participants Gift at IOJT Library of Congress Dinner.

7. Conclusion

This chapter presents judges' international activities in education and training as an example of extra-disputing work that affects the administration of justice and the operation of courts. Judges act as teachers, directors of institutes, board members and executive officers. They travel abroad to work with their counterparts on judicial ethics, alternative dispute resolution, and the establishment of commercial courts. Israeli judges established an international organization to act as an umbrella organization that would bring together the various national judicial training institutes. They have also traveled abroad in delegations funded by the Ministry of Foreign Affairs to assist newer training institutes in developing their curriculum.

Judges' experience with judicial education provides insight into using law-as-a-tool for development or social change. First, the questions that judges asked about the problems to be overcome reflected their experienced present, which included the solutions at hand. For many legal actors, the objects or endpoints of law reform projects are immanent in the methods we use to bring them about. Here, the goal for strong judicial institutions to support the rule of law was wrapped up in the training institutes and education initiatives, the foundation for which was already being laid in the 1970s and 1980s. Judges established training institutes and the IOJT using methods they were familiar with—conferences, charters, proclamations. Second, legal actors often employ their tool based on its inherent practicality and not with objects or endpoints clearly in mind. Judges in Israel became involved in teaching or training institutes because it seemed like a good idea or because they were asked to. I heard

similar stories from judges who attended the IOJT conference in Washington. These judges were interested in helping and doing good work even if they did not explicitly intend to solve democracy and development problems. Both of these observations—that goals were immanent in the methods used to bring them about and that judges engaged with their tool without clear objects in mind—challenge the way we normally think about legal instrumentalism.

Third, judges' experiences highlight the way in which using law as a tool can engender conflicts and incongruous goals. "Training junkets" damage the public's perception that judges were independent and impartial. But these conflicts did not lead judges to abandon the project altogether. The IOJT continues to explore the normative and optimistic, as evidenced by articles in the recent edition of its journal: "Judicial Education in Promoting the Rule of Law"²³² and "World Bank Support for Judicial Systems Serving Good Governance."²³³

Finally, judges' practices of sociality and their missteps in engaging with politics have much to teach us about how legal actors engage with the personal and political. The international judge exhibits aspects of "making connections with others in a partial manner."²³⁴ On the one hand, judges in international education and training stand as an example of how everything is connected—judicial education supports judicial independence and the rule of law, which are connected to democracy and

²³² Surendra Kumar Sinha, *Judicial Education in Promoting the Rule of Law* 3 JUD. EDUC. & TRAINING 119 (2015).

²³³ Anne-Marie Leroy, *World Bank Support for Judicial Systems Serving Good Governance*, 2 JUD. EDUC. & TRAINING 92 (2014)

²³⁴ Strathern 1991 *supra* note , at 27.

development. On the other hand, for judges, the political and personal is partial and fragmented. Judges engage in a form of politics: the IOJT held its first conference during the second intifada, and judges meet with colleagues from countries that do not speak to each other. But there is no provision or structure for maintaining ongoing relations. Israeli judges rely on the Foreign Ministry to fund delegations, and on private donors or civil society organizations to support the work of the IOJT. Thus, judges are both connected and removed. This way of experiencing the personal and political is not limited to judges.

CHAPTER 6

CONCLUSION

Even Judges Like to Innovate

On June 23, 2010, Judge Alvin Hellerstein held a seven-hour fairness hearing to review a proposed agreement settling the claims of responders to the attacks against the World Trade Center. As judge for all tort claims assigned to the U.S. District Court for the Southern District of New York under the Air Transportation Safety and System Stabilization Act (ATSSSA) (Hellerstein Henderson Twerski 2013, 654 (WashU)), Judge Hellerstein held two hearings to determine if the “Settlement Process Agreement” was fair, reasonable, and adequate. At a first hearing on March 19, 2010, Judge Hellerstein rejected the settlement that the parties had agreed to, as providing “too much money for the lawyers, for reserving too much money for unlikely claims in the future, and for providing too little money for the settling Plaintiffs.” At the second hearing in June, Judge Hellerstein approved the revised aggregate settlement providing approximately \$700 million to settling plaintiffs.

Judge Hellerstein’s rejection and subsequent approval of a non-class action tort settlement received a great deal of attention. But the settlement does not stand alone, especially with respect to consolidating mass numbers of cases and moving away from the normal course of adversarial presentation of facts at trial. The fairness hearing represented a culmination of work both in and outside of the courtroom to aggregate claims and devise multiple methods of resolving disputes. Multidistrict litigation – which consolidate cases for pretrial processing at the federal district court level – class action “fairness hearings,” and case-managing discovery provided Judge Hellerstein

with the tools to conduct the seven-hour hearing on the settlement between plaintiffs and defendants. Each of these could be seen as an incremental departure from the prototype of the adversarial trial (Shapiro 1981). But then again, the prototype itself is “something of a façade” (Shapiro 1981, 37).

Beyond mass tort litigation, judges work on court reform in a variety of contexts. Judges from Toronto, Vancouver, Phoenix and New York are reforming civil litigation through the International Insolvency Institute by developing guidelines for cross border communication in insolvency cases. Judges report on recommendations for meeting the needs of unrepresented litigants (common in landlord and tenant as well as family law matters) and for simplified procedures for claims under a certain dollar amounts, and compile guidelines for other forms of complex litigation. In the criminal law context, judges sit as chairs and commissioners of the U.S. Sentencing Commission, develop methods to bring information about the circumstances of Aboriginal offenders to sentencing judges, and use alternative methods for constructing sentences.

The dissertation thus makes a simple and central claim: judges participate in law reform projects and produce legal change, but not just by writing decisions. Judges take part in a multitude of activities that affect dispute processing, but whose remnants are not necessarily found in the artifact of a decision. Robert Merton (1949) once argued that people occupy an array of roles, a "complement of social relationships" as opposed to the singular status/role projected by traditional social theories. In a similar vein, the dissertation argues that judges occupy an array of roles,

and partake in an assortment of activities as judges. These under-researched and undocumented activities work to construct the court system. However, these roles and their social processes are not visible in scholarship that strictly adheres to decision-making as judges' work.

Several things fall into place once we re-conceptualize judges and the roles they take on. The core concern for the constitutional exercise of judicial power becomes the cornerstone of how we delineate between judicial and "extra-judicial" functions. Instead of focusing on judicial independence – which on its own has no independent meaning – or whether judges act in or out of the courtroom, locus of power and accountability can ground the analysis of the judicial function. In other words, rather than rethinking what is appropriate conduct for judges, the dissertation presented a reimagining of how we evaluate appropriate conduct for judges.

Furthermore, the standard narrative that decision-making is a process of ideological intrusion into the law presents as under-inclusive and overly broad. Decision-writing is not the only site of politics in law. Judges interact with and are implicated in politics in ways that do not neatly fit into differentiated stories about law and politics. Investigating whether liberal judges decide liberally or choose to use liberal precedents in bolstering their decisions, while parsimoniously sound-bitey, ignores those 'other' politics – post colonial politics, politics of the global north/south, urban and inter-judicial politics. Those investigations simplify locations of power and the judicial experience with the personal and the political.

Most depictions of the judicial function also display a simplified and parsimonious story about law reform and legal change. Legal change happens through the written decision or possibly (and increasingly more frequently) by government enacted statute. But this portrayal of legal change ignores legal actors' constant efforts to identify "best practices," the behind the scenes tinkering and the multiple methods employed to make courts more effective, efficient, fair, and accessible.

Robert Merton wrote about "theories of the middle range" - those theories that lie between "minor but necessary" working hypotheses "that are not generalized at all" and the "all-inclusive systematic efforts to develop a unified theory" (Merton cite). In many ways this dissertation speaks to the idea of developing a contemporary and also "middle range" theory of the judicial function. While parsimonious theories yield short, clear, and easily digestible "statement of facts" (Warren 2002), longer, more complex or ambiguous information can supplement and provide critical information. In this case, producing thick descriptions was not just about countering thin descriptions of judges' work or judges and politics. The goal of the dissertation was to produce thick descriptions in areas dominated by quantitative research (e.g. research on U.S. civil procedure or the Judicial Behavior literature). In addition, the dissertation sought to challenge extant notions about appropriate subjects for ethnographic research.

The dissertation explored judicial reform and judges' other work in three case studies. The first case study described the efforts of judges in Canada to reform sentencing procedures in order to address problems for Aboriginal offenders in the

criminal justice system. It focused on judges in the Ontario Northwest region, who consulted on the construction of a new consolidated courthouse and the Aboriginal Conference Settlement Suites, designed to emulate a traditional healing lodge. A second case study considered the development of fairness hearings as the means to approve settlements in complex aggregate litigation. That chapter examined activities of federal district court judges producing a procedure which is effectively a hybrid of private and public models for settling disputes. The third case study examined judges' international work. That chapter explored judges who travel internationally as educators and directors of judicial training institutes. Focusing on Israeli judges, the chapter challenged the way that international judicial education has become a solution to law and development and rule of law concerns.

Each case study informs our ideas about judicial politics and knowledge practices in law reform projects. Together, the case studies demonstrated that there can be reciprocity between problems and solutions when using law as a tool for social change. The order of identifying a problem and finding a solution is not always so clear. Solutions are generated in moving from the known to the unknown. Questions and answers, problems and solutions are shaped by the extant "problem space" (Scott 2004), which clarifies "the particular questions that seem worth asking and the kinds of answers that seem worth having" (Scott 2004, 4). Judges' work on court reform also illustrates that knowledge can be developed "in action." Judges did what they knew how to do and figured the rest out along the way. Moreover, judges became

involved in criminal law reform or in judicial education for various reasons – not always to solve problems.

The case studies demonstrate that law reform projects are rarely a simple matter of implementing best practices. Legal instrumentalism is messy. Using law as a tool may require implementing incompatible goals or using methods that conflict with objectives. Legal instrumentalism is rarely as simple as finding the right piece of legislation or legal rule that will solve the problem as posed, and yet judges continue. Law reform “holds together” the incompatible (Strathern 1991) – the symbolic and material, the real and ideal, the big concepts like justice with the everyday experiences of people – which provides a clue as to why legal actors continue to engage with law as a tool despite disappointing outcomes. The practice of law reform points to a more complicated relationship between means and ends.

Finally, the dissertation studied varieties of judicial politics and the practice of judicial independence: the material, physical, and performative ways that judges exercise sociality and distance. When I arrived at the Supreme Court of Israel for my meetings at the IAJS/IOJT office, the security did not know where the office was. Nor did the staff at the Office of the President recognize the name of the secretary who has worked at the IAJS for over 20 years. The IOJT meetings went similarly unnoticed. There was no security at the conference. Israeli judges had a security detail, but there was no general security and no screening to get into the conference (as opposed to World Bank meeting). One judge indicated that he was proud that no one knows that chief justices from all around the world gather: “you get all these judges together with

all of their politics, but there is no media there, no attention, and so they can meet and talk like people.” Judges practice a disappearance from view.

But judges also manifest as political actors because of the particular roles they play. We expect judges to be connected, for example, when asking sentencing judges to consider the unique circumstances of Aboriginal offenders in Canada. Judicial behavior scholars look for ways that judges pursue partisan goals through their decisions. At the core rests a belief that law and politics can be differentiated. But judges are continually immersed in politics, through pre-constituted relations of power; and not just partisan politics – local urban politics, national security, gender politics. Judges’ other work illustrates that judicial politics exhibits aspects of “making connections with others in a partial manner” (Strathern 1991). The personal and political is partial and fragmented.

In many ways, judges embody our expectations for law. The progress of legal thinking – away from the formal application of law, to a consideration of social consequences and effects, all the way through to scholars’ interest in legal pluralism and non-state forms of governance – has been funneled through the judge. Each stage makes an appearance as a prescription for appropriate judicial behavior. We can therefore use judges to reflect more broadly back onto ourselves, to investigate our assumptions about law and politics, and law as a tool for social change. And there is much to learn from the stories we normally tell ourselves about judges as well as those we choose to leave out. What are the various vectors of power for legal actors? What are the pulls to and escapes from the personal lives and troubles of our clients,

research subjects, parties at trial? How do legal actors negotiate structural and institutional relations of power (Barnett and Duvall)? What are the ways that legal actors imbue law with hope? How do various legal actors practice legal problem-solving?

Judge Hellerstein (2013) recounts a criminal matter that came before him. The defendant intended to enter a guilty plea, which would have affected his immigration status. Judge Hellerstein determined that the defendant did not have the requisite criminal intent, and asked a friend to provide pro bono assistance for the immigration issues. The case resolved in the defendant's favor. Judge Hellerstein writes:

Several weeks later, when Orozco came before me again, his immigration lawyer had good news to report. Immigration had agreed to adjust Orozco's status, so he could gain American citizenship derivatively from his wife. And the Assistant United States Attorney moved to dismiss the case against Orozco... Orozco was free.

Orozco, weeping, fell to his knees, thanked me profusely and wanted to kiss my hands, if the Marshals would only let him.

APPENDIX A – SAO PAULO DECLARATIONS

DECLARATION OF SAO PAULO

On the occasion of the First International Congress of Schools of Judges, held in Sao Paulo, Brasil, on March 6-7, 1998, we, the undersigning parties, either representatives of schools of judges or persons responsible for training and schooling of judges,

Considering that it is of the utmost importance to exchange information and ideas on the various national programmes on initial and permanent training of judges;

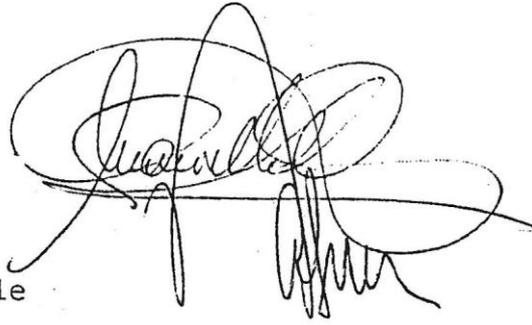
Considering that it is important that national schools of judges cooperate in this respect with each other and inform each other on the national developments in this area;

Considering that it is important to exchange principles and methods of training and schooling of judges;

Considering that it is well known to the undersigning parties that there already exist networks and cooperative initiatives between various schools of judges and/or persons responsible for training and educating judges;
express the intentions:

1. To improve the exchange of all useful information in the field of initial and permanent training and schooling of judges;
2. to work on the expansion and creation of a network;
3. to continue the cooperation between each other, started at this conference;
4. to respond to the questionnaire, which will be distributed by the Sussman Institute for Training of Judges in Jerusalem, Israel, by May 1, 1998;
5. to organise a preparatory meeting of representatives of schools of judges and/or persons responsible for training and schooling of judges, in Jerusalem, Israel, in December 1998;
6. to inform other schools of judges and/or persons responsible for training and schooling of judges about this initiative.

J. Abraham Mantaras; Uruguay



|

J. Haroldo Brito Cruz;

Chile

J Leonor Etcheberry; Chile



Dagmar A. de As Catharina
r; The Netherlands

Armando Gomes Leandro;

Portugal



Luiz Fernando Solano Carrera; Costa Rica

• Daniel Lecrubier ; France

(Shlomo Levin;



,,) Robert Payant; United States of



Rodo

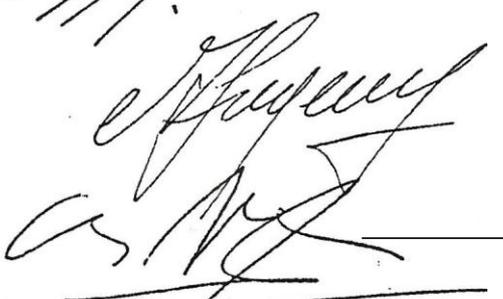
Urtubey; Argentina



R

li Rosi; Argentina

Alberto Lugones;



Claus Vreden;

Rosa Helena Maria Jansen, The Netherlands

Sidnei A. Beneti; Brasil

Sidnei Mattio Beneti.

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/I
/I

Donaldo Armelin; Brasil

[REDACTED]

APPENDIX B – ADDITIONAL TABLES

TABLE 2: Past and Present IOJT Members by Order of Membership²³⁵

Founding Members	Country
Institute of Advanced Judicial Studies	Israel
National Judicial Institute	Canada
Judicial Academy	Chile
National Judges College	China
Escuela Judicial	Colombia
Latvian Judicial Training Center	Latvia
Judicial Studies Institute	Ireland
Lithuanian Judicial Training Center closed	Lithuania
Ecole Nationale de la Magistrature et des Greffes	Madagaskar
Mexican Federal Judiciary Training Institute	Mexico
The National Institute of Justice	Moldova
Philippine Judicial Academy	Philippines
National Institute of Magistracy	Romania
National Center for State Courts	USA
Rule of Law Foundation Ceased operations	USA
Members by Application	
Judicial Commission of New South Wales	Australia
The Judicial Training Institute	Belgium
Centre de Formation Judiciaire de Dakar	Senegal
Federal Court of Australia	Australia
Royal School for Training Judges and Prosecutors	Cambodia
Judicial Training Center	Mongolia
Judicial Training Institute	Bangkok
Judiciary Leadership Development Council	USA
Law and Economic Center, School of Law, George	USA
Continuing Judicial Education Council	Solomon Island
Judicial Education and Development, New Jersey	USA
Federal Judicial Affairs	Canada

²³⁵ IOJT, Members, <http://www.iojt.org/page~members.html> , (last visited Aug. 9, 2015).

Shanghai Judges Training Center	China
Sichuan Judges College	China
Studiecentrum Rechtspleging	The Netherlands
National School of Judges of Ukraine	Ukraine
Ecole Regionale Superieure de la Magistrature	Benin
Judicial Training Center	Serbia
JERITT Project, Judicial Administration Program	USA
National Judicial Academy	India
National Judicial Academy	Nepal
Commonwealth Magistrates' and Judges' Association	UK
Ecole Nationale d'Administration de la Magistrature	Cameroon
Judicial Training School	Vietnam
Vietnamese Judicial Academy	Vietnam
Judicial Studies Institute	Uganda
Ecole Nationale d'Administration et de Magistrature	Congo
The National Judicial College	USA
Ecole Nationale d'Administration et de Magistrature	Benin
Instituto de Capacitacion del Poder Judicial	Mexico
Institute for the Rule of Law and Governance	USA
Centre for Judicial Studies	Australia
Judicial Studies Committee	Scotland
Leadership Institute in Judicial Education	USA
The Judiciary of Gambia	Gambia
Centre de Formation et de Documentation Judiciaires	Guinea
Judicial Education Center	St. Lucia
National Judicial Education Program	USA
Federation of Law Societies of Canada	Canada
The Judicial College	UK
Russian Academy of Justice	Russia
Ecole Nationale d'Administration et de Magistrature	CAR
Training Center for Judges and Prosecutors	Ethiopia
Escuela Judicial de Costa Rica	Costa Rica
Judicial Training Institute	Ghana
Judiciary School of the Spanish General Council for	Spain
Asociacion de Magistrados y Fundionarios de la	Argentina
Estonian Law Center Foundation closed	

The School of Magistrates	Albania
Academy for Training of Judges and Public	Macedonia
Centre d'Estudis Juridics i Formacio Especialitzada	Spain
Judicial Training Center of the Republic of	Montenegro
Unidad de Capacitacion Institucional UCI Escuela de	Guatemala
Ecole Nationale de la Magistrature	France
National Judicial College	Australia
Institute of Judicial Studies	New Zealand
Judicial College of Victoria	Australia
Federal Judicial Center	USA
Escuela Nacional de la Judicatura	Dominican Republic
Australasian Institute of Judicial Administration	AIIA
Institute of Continuing Judicial Education of Georgia	USA
The Supreme Court of Ohio Judicial College	USA
American Society of International Law	USA
Oromia Justice Sector Professionals Training and	Ethiopia
The Judicial Training Center	Slovenia
The Pacific Islands Committee of the Ninth Circuit	USA
The Institute of Legal Practice and Development ILPD	Rwanda
The National School of Judiciary and Public	Poland
The National Council of Justice	Hungary
The National Institute of Justice	Bulgaria
Escola Nacional de Formacao e Aperfeicoamento de	Brazil
The High Institute for the Magistracy	Morocco
Justice Study Center of The Americas	Chile
Commonwealth Judicial Education Institute	Canada
National Association of State Judicial Educators	USA
Administrative Office the Courts Education Division	USA
Escola Nacional de Formacao e Aperfeicoamento de	Brazil
Judicial Studies Board for Northern Ireland	Ireland
Judicial Education Board of Singapore	Singapore
Justice Academy of Turkey	Turkey
Justicna Akademia Slovenskej Republiky	Slovak Republic
Delhi Judicial Academy	India
Kenya Judiciary Training Institute	Kenya
Judicial Academy	Croatia

Centro De Capacitacion Judicial De Centro America Y	Costa Rica
Deutsche Richterakademie	Germany
Centre De Formation Des Professions De Justice	Togo
Canadian Institute for the Administration of Justice	Canada
Trinidad and Tobago Judicial Education Institute	The Republic of
Instituto de Estudios Judiciales del Tribunal Superior	Mexico
Escuela Judicial del Estado de Campeche	Mexico
Red de Escuelas Judiciales de las Provincias	Argentina
Instituto de Formación de Servidores Públicos del	Mexico
The Supreme Court of Seychelles	Seychelles
Institute of Judicial Administration-Lushoto	Tanzania
The Supreme Court of Estonia	Estonia
Centro de Capacitacion Judicial Electoral	Mexico
General Council of the Courts of Mongolia	Mongolia
Centro de Estudios Judiciales del Chaco	Argentina
Judges Academy, Judicial Yuan	Taiwan
Centre de Formation Professionnelle de la Justice au	Burundi
Academy for the Judiciary, Ministry of Justice	Taiwan
Escola Paulista da Magistratura	Brazil
Sri Lanka Judges Institute	Sri Lanka
Papua New Guinea Centre for Judicial Excellence	Papau New Guinea
High School of Justice Georgia	Georgia
College of Schools of the Brazilian State Judiciary-	Brazil
Lawyers' Training Center Republic of Uzbekistan	Uzbekistan

TABLE 3: Foreign (non-U.S.) attendees at the 2013 IOJT International Conference in Washington, DC by Country, Organization and Position (excluding 72 US attendees, of which at least 16 were judges)

Organization	Function	Country
School of Magistrates	Professor	Albania
Center for Judicial Studies	Director	Australia
Court of Appeal, Supreme Court	Justice	Australia
Judicial College of Victoria	Director of Education	Australia
Supreme Court of Queensland	Justice	Australia
National Judicial College of		Australia
Supreme Court of Western	Chief Justice	Australia
Family Court of Australia	Justice	Australia
National Judicial College of	Chair Programs Advisory	Australia
Federal Circuit Court	Judge	Australia
Australasian Institute of Judicial	Executive Director	Australia
Judicial Commission of New	Chief Executive	Australia
Judicial Commission of NSW	Education Director	Australia
Supreme Court of Bangladesh	Justice	Bangladesh
International Criminal Court	Head of the International	Belgium
Judicial Training Institute (IGO-	Director	Belgium
Youth in Action for Development	Chairman	Benin
Bhutan National Legal Institute	Director	Bhutan
Court of Bosnia and Herzegovina	Judge	Bosnia
	Judge	Brazil
Supreme Court of the State of	Justice - President of Judicial	Brazil
National Institute of Justice	Deputy Director	Bulgaria
National Institute of Justice	Director	Bulgaria
Centre de Formation	Deputy Director	Burundi
Centre de Formation	Director	Burundi
CTB/Burundi	Assistant Technique National	Burundi
Royal Academy for Judicial	Vice President	Cambodia
Ecole Nationale d'Administration	Director General	Cameroon
Ecole Nationale d'Administration	Chef de la Division de la	Cameroon
Ecole Nationale d'Administration	Chef de la Section Judiciaire	Cameroon
National Judicial Institute	Senior Advisor	Canada

Court of Quebec	Chief Judge	Canada
Court of Quebec	Judge	Canada
Provincial Court of British	Chief Judge	Canada
National Judicial Institute	Academic and Education	Canada
National Judicial Institute	Senior Advisor	Canada
Family Court Branch - Superior	Senior Family Justice	Canada
Court of Appeal for Saskatchewan	Justice	Canada
National Judicial Institute	Senior Advisor	Canada
Court of Queen's Bench of Alberta	Justice	Canada
National Judicial Institute	Executive Director	Canada
Provincial Court of British	Judge	Canada
Court of Queen's Bench of Alberta	Justice	Canada
Conseil de la Magistrature du	Secrtaire	Canada
Commonwealth Judicial Education	Chairperson	Canada
NB Court of Appeal/National	Justice	Canada
Superior Court of Quebec	Judge	Canada
Nova Scotia Court of Appeal	Justice	Canada
National Judicial Institute	Executive Education Officer	Canada
Superior Court of Ontario Canada	Justice	Canada
National Judicial Institute	Senior Director International	Canada
Ecole Nationale de Formation	Manager	Chad
Academia Judicial	Deputy Director	Chile
Academia Judicial	Director	Chile
Supreme Court of Estonia	Head of Judicial Training	Estonia
Federal Justice Professionals	Director	Ethiopia
Addis Ababa University	Lecturer	Ethiopia
Ecole Nationale de la Magistrature	Judge	France
Court of Appeal of Colmar	Prosecutor General	France
Ecole Nationale de la Magistrate	Senior Judge	France
German Judicial Academy	Director	Germany
National Office for the Judiciary	Head of Department	Hungary
Supreme Court of the Republic of	Deputy Chief Justice	Indonesia
Supreme Court of the Republic of	Director of Supreme Court	Indonesia
Changes for Justice Project -	Judicial Training Expert	Indonesia
Strengthening the Lesotho Justice	Judicial Capacity Building	Ireland
Central District Magistrate Court	President	Israel

	Professor	Israel
Supreme Court of Israel	President	Israel
IOJT	Administrative Director	Israel
Institute of Advanced Judicial	Director	Israel
IOJT	Secretary General	Israel
	Professor	Israel
IOJT	President	Israel
University of Haifa	Professor	Israel
Supreme Court of Israel	Justice	Israel
Kyoto Women's University	Professor	Japan
Judiciary	Magistrate	Liberia
European Institute of Public	Director	Luxembourg
Supreme Court of Mauritius	Justice	Mauritius
Institute for Judicial and Legal	Director	Mauritius
Secretary of Public Administration	Chief of Office	Mexico
Judiciary Federal Institute	Director	Mexico
Poder Judicial del Estado de	Dra. En Ciencias Penales y	Mexico
High Court of Justice of Mexico	General Director of the Institute	Mexico
Judicial Council of the State of	Director of the Institute of the	Mexico
The Judicial General Council of	Chairman	Mongolia
SSR		Netherlands
SSR	LL.M and MPA	Netherlands
District Court	Judge	New Zealand
District Courts of New Zealand	Chief Judge	New Zealand
Institute of Judicial Studies	Director	New Zealand
Ministry of Justice	Deputy Secretary	New Zealand
Institute of Judicial Studies	Chair	New Zealand
Adejuwon Rotimi Adedayo &	Barrister	Nigeria
Lagos State Judiciary		Nigeria
Lagos State Judiciary		Nigeria
Philippine Judicial Academy	Chancellor	Philippines
Philippine Judicial Academy	Professional Lecturer II	Philippines
National School of Judiciary and	Judge - Head of International	Poland
Supreme Court of Singapore	Organizational Development	Singapore
Subordinate Courts of Singapore	District Judge	Singapore
Subordinate Courts	Senior Executive	Singapore

General Council for Judiciary	Councillor	Spain
Judicial School - Spanish General	Director	Spain
Sri Lanka Judge's Institute/Judicial	Director/Judge	Sri Lanka
	Senior Assistant	Sri Lanka
Judicial Service Commission of	Magistrate/Registrar of the	Sri Lanka
Judicial Service Commission of	Chief Magistrate	Sri Lanka
Judicial Service Commission of	Judge	Sri Lanka
Sri Lanka Judge's Institute/Judicial	Academic	Sri Lanka
Judicial Service Commission of	Senior Assistant	Sri Lanka
Judge Academy-The Judicial	Judge	Taiwan
Judges Academy -Judicial Yuan-	Judge	Taiwan
Office of the Judiciary of Thailand	Deputy Secretary-General	Thailand
Judiciary of Trinidad & Tobago	Chief Justice	Trinidad and
Judiciary of Trinidad and Tobago	Justice/Chairman	Trinidad and
Justice Academy of Turkey	Judge	Turkey
Justice Academy of Turkey	Judge	Turkey
Supreme Court of Uganda	Justice	Uganda
Judicial Studies Institute	Justice (Rtd.)	Uganda
Commerical Court of Kyiv	Judge	Ukraine
High Commercial Court of	Judge	Ukraine
USAID Ukraine FAIR Justice	Deputy Chief of Party	Ukraine
Abu Dhabi Judicial Department	Judge	UAE
Abu Dhabi Judicial Department	Assistant Judge	UAE
Abu Dhabi Judicial Department	Judge	UAE
Judicial Institute for Scotland	Deputy Director	United
Judicial College	Executive Director	United

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