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## Judging Well

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## JUDGING WELL

FRANCIS J. MOOTZ III\*

### ABSTRACT

*Can judges interpret the law in a manner that is objectively verifiable, or do judges necessarily – even if unconsciously – inject their own predispositions and biases into their decisions? It is difficult to decide whether such a question is frivolous in the post-Realist age, or whether it is the single most important question that we can ask about our legal system. I endorse both responses. The question, as phrased, is both vitally important and unanswerable on its own terms. Rather than seeking an elusive objective standard by which to measure the correctness of “a judgment,” I argue that we need to develop a vocabulary to assess whether judges are “judging well,” because it is the activity of judging well that serves as the cornerstone of the rule of law.*

*The article unfolds in three parts. First, I briefly review Professor William Popkin’s admirable work as a starting point for analysis. Drawing on Kantian aesthetics, Popkin defends the ability to assess non-deductive judgments. I develop his conception of “ordinary judgment” along different lines, arguing for a conception of “judging well” that is rooted in practical reasoning as articulated rhetorically. Leslie Paul Thiel brings contemporary work in neuroscience to bear on what I term “rhetorical knowledge.”*

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\* Professor of Law, McGeorge School of Law, University of the Pacific, [jmootz@pacific.edu](mailto:jmootz@pacific.edu). I would like to thank Brian Larson for very helpful comments on an earlier draft. I dedicate this essay to Anthony M. Kennedy, Jr., Associate Justice of the United States Supreme Court. I was fortunate to get to know Justice Kennedy during my service as Dean because, among other notable accomplishments in his career, he is the longest serving adjunct faculty member at McGeorge. Justice Kennedy embodies the rhetorical ideal of “wisdom speaking eloquently,” and during his long tenure he certainly has judged well.

*I conclude that judgment is a foundational capacity deeply rooted in the structure of our brain and intrinsic to our sense of self. We cultivate rhetorical knowledge through interpretive experiences that provide us with dynamic resources to exercise judgment in changing circumstances. Law judges exhibit this fundamental activity in a disciplined manner. Judgment is real and constrained, even if it is neither deductive nor rationally defensible as an objective fact.*

*I defend my account by assessing the opinions in *Hively v. Ivy Tech Community College*, the Seventh Circuit case that held that discriminating against LGBT employees is a form of sex discrimination under Title VII. The multiple opinions provide competing conceptions of judging well, and I assess them in light of my theory.*

*Judging well is not a mysterious or rare event. It is something that we do and see every day. By attending to how we judge well, we can best preserve the fragile structures that subtend the operation of our legal system and engender hope that the quest for justice, however, imperfect and halting, can continue.*

#### INTRODUCTION

Can judges interpret the law in a manner that is objectively verifiable, or do judges necessarily—even if unconsciously—fall prey to their own predispositions and biases when judging? It is difficult to decide whether such a question is frivolous in the post-Realist age, or whether it is the single most important question that we can ask about our legal system. I endorse both responses in this essay. The question, as phrased, is both vitally important and unanswerable on its own terms. Rather than seeking an elusive objective standard by which to measure the correctness of “a judgment,” I argue that we need to develop a vocabulary to assess whether judges are “judging well,” because the activity of judging well serves as the cornerstone of the rule of law.

I take a familiar tack in contemporary hermeneutical philosophy by rejecting the tendency to assume that one must choose between striving to achieve objective truth as apprehended in the “view from nowhere” or be relegated to the exercise of a largely unconstrained subjective will. Legal practice is relentlessly “in between” these falsely opposed alternatives.<sup>1</sup> “Judging well” is an activity that can be understood and assessed from the pragmatic intellectual comportment that I describe in this article.

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1. See FRANCIS J. MOOTZ III, THE UNBEARABLE IN-BETWEENNESS OF LAW, IN *READING RICOEUR THROUGH LAW* (Eileen Brennan, Marc de Leeuw, & George H. Taylor, eds., forthcoming 2020).

This article is organized in three parts. First, I briefly review two books by Professor William Popkin that serve as a touchstone for my analysis. Second, I critique the theoretical orientation of Popkin's approach and provide an alternative philosophical grounding for his arguments and conclusions. I draw on pragmatism, rhetoric and hermeneutics, as informed by contemporary studies of judgment, to articulate how we can assess whether a judge has judged well. Finally, I conclude by describing judging well as critically important to defending the rule of law in the post-realist and post-modernist age. I bring the theoretical issues to bear in the context of a recent Court of Appeals case that generated multiple opinions on whether discrimination on the basis of sexual orientation is cognizable under Title VII as discrimination because of sex. These competing opinions provide a basis for assessing my theory of judging well. Judging well is not a mysterious event. It is something that we do and see every day. By attending to how we judge well, we can best preserve the fragile structures that subtend the operation of our legal system and engender hope that the quest for justice, however imperfect and halting, can continue.

#### I. ORDINARY JUDGING VERSUS OBJECTIVE JUDGEMENT

How can judges discern the meaning of the law? Our common law heritage suggests a murky practice of the ineffable law "working itself pure" through centuries of casuistic decision-making by judges seeking the just resolution in the individual case before them. In the age of the legislative and administrative state, however, this comforting common law myth is largely irrelevant. In many cases, a judge is faced with a textual articulation of "the law" in the form of statutes and regulations. The judge cannot hide behind the "brooding omnipresence in the skies" for the basis of her judgment: she must declare the meaning of a particular legal text for the case at hand.

William Popkin's work on legal judgment serves as a starting point for my analysis. I am not engaging a "straw man" as my interlocutor. Popkin has written persuasively about the role of judges, particularly with regard to statutory interpretation. My goal is to refine and recast his arguments by bringing the emphasis from assessing judgments to characterizing what it means to judge well. This shift is premised on a serious critique, but because my analysis is congenial to his general conclusions it is my hope that Popkin might endorse my thesis.

Popkin has written a comprehensive and persuasive history of the changing contours of statutory interpretation as we moved from a common

law system to a positivist system rooted in democratic legislation.<sup>2</sup> He was motivated by the crisis of confidence that arose after the relative consensus of the Legal Process school fractured into competing theories about how judges interpret, and should interpret, statutes. On one hand, we assume that judges engage in activities that can be assessed by objective criteria with analytic rigor, permitting us to ensure that judges are following the law created by the democratically elected legislature. On the other hand, no single theory of statutory interpretation appears capable of capturing—and certainly not definitively directing—this practice, nor does it appear feasible to develop such a comprehensive theory. Popkin confronts this crisis by looking to the long historical development of current judicial practice. He concludes that judges inevitably must engage in lawmaking to some extent, and that this “ordinary judging” ensures that statutes remain effective as the passage of time and emergence of new contexts presents challenges of interpretation. He insists that the best means of “justifying judicial discretion in statutory interpretation is to accept the notion that judging is an ordinary activity, neither grounded in any exceptional skill or expertise, nor threatening to usurp legislative power.”<sup>3</sup>

Ordinary judging depends on human capacities that enable us to exercise judgment in situations of unresolvable uncertainty. Popkin argues that these capacities are real and can be deployed in a reasonable manner with integrity, rooting them in a unique combination of Kantian aesthetic judgment and Aristotelian practical reasoning. Kant famously distinguished “taste” (as to which there can be no objective accounting) and “beauty” (as to which we make claims that solicit the considered judgment of all persons).<sup>4</sup> Popkin contends that judges draw on the latter capacity, in that they recognize that there is no unifying common sense of judgment that operates immediately, but that they can make modest and persuasive claims to correctness that should appeal to all.<sup>5</sup> But this analysis goes only so far. Judges do not interpret statutes as stand-alone artifacts in a museum. Instead, judges work within a political organization that grounds virtually all social activity. Aristotelian *phronesis* (practical wisdom) and the American Pragmatist movement capture this broader, problem-solving character of judging. The “Aristotelian judge adopts a broader perspective than the Kantian judge, taking account of how

2. WILLIAM D. POPKIN, *STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION* (1999).

3. *Id.* at 208.

4. IMMANUEL KANT, *CRITIQUE OF THE POWER OF JUDGMENT* (2001).

5. See POPKIN, *STATUTES IN COURT*, *supra* note 2, at 217–18. I have made a similar claim by reading Chaïm Perelman’s idea of appealing to a “universal audience” within the nontheistic natural law tradition. See Francis J. Mootz III, *Perelman’s Theory of Argumentation and Natural Law*, 43 *PHIL. & RHETORIC* 383–402 (2010).

judgments fit, both substantively and institutionally, into the larger political system.”<sup>6</sup> Practical wisdom reflects our temporality. “Change forces the judge to look beyond the statutory author to the future audience and that, in turn, forces the judge to ask questions that cannot insulate him from becoming engaged in policy concerns and judicial choices that have not been resolved by the historical legislature.”<sup>7</sup>

Popkin concedes that his construction of a theoretical justification drawing from two very different traditions raises significant questions that cannot be fully addressed in his historically oriented book.<sup>8</sup> Recently, he provides a more detailed account of judgment that draws solely on Kantian aesthetics. In *Judgment*,<sup>9</sup> Popkin sets out to determine the basis for declaring that an interpretation of law is “substantively correct,” and not just a matter of the judge’s subjective “will.”<sup>10</sup> On one hand, a judge is not like a consumer who reviews a restaurant on Yelp according to mere subjective preference,<sup>11</sup> but neither is he like God, who is an unfathomable lawgiver who must be obeyed rather than scrutinized.<sup>12</sup> Popkin considers two plausible analogies for the work of a judge: sports officiating and art criticism.

The work of sports officials to judge ongoing play by the rules of the game may appear similar to the work of law judges, as suggested by Chief Justice John Roberts’s famous testimony that judges are like baseball umpires who simply call the balls and strikes.<sup>13</sup> Popkin finds this analogy inapt. Sports officials rarely explain their rulings other than to cite the rule in question, and their discretionary decisions are rarely subject to review of any kind, although technology now provides the means to challenge calls based purely on visual acuity, such as whether a player stepped out of bounds.<sup>14</sup> In sports, maintaining the flow of the game is prioritized over

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6. See POPKIN, STATUTES IN COURT, *supra* note 2, at 219.

7. *Id.* at 229.

8. *Id.* at 215.

9. WILLIAM D. POPKIN, JUDGMENT: WHAT LAW JUDGES CAN LEARN FROM SPORTS OFFICIATING AND ART CRITICISM (2017).

10. *Id.* at xv.

11. *Id.* at 3–4.

12. *Id.* at 5–12.

13. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 1 (2005) (opening statement of John G. Roberts, Jr., nominee) (“Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire. . . . And I will remember that it’s my job to call balls and strikes and not to pitch or bat.”), transcript available at <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/>.

14. POPKIN, JUDGMENT, *supra* note 9, at 20.

ensuring that every call is correct, and officials undertake no effort to persuade the audience of the correctness of their decisions.<sup>15</sup>

On the other hand, “unlike the sports official and like the law judge, the critic tries to persuade the audience that he has got it right.”<sup>16</sup> Food critics and art critics, as opposed to Yelp reviewers, claim to offer a reasoned basis for concluding that a particular effort is worthy of praise, for reasons that are neither entirely subjective nor capable of purely objective analysis.<sup>17</sup> Both criticism and law judging are interplays of formal and substantive considerations,<sup>18</sup> and involve the application of general criteria to a specific instance.<sup>19</sup> This analogy, though, does little to temper the question that motivates Popkin’s inquiry: can judging be more than merely the exercise of will? By proposing aesthetic criticism as the best analogy to law judging, he sets the stage for a more detailed inquiry into the Kantian analysis of “subjective universals” which depends upon objective claims that cannot be demonstrably proved.<sup>20</sup>

Kant’s effort to justify the integrity of judgments about beauty as more than mere subjective taste is premised on the claim by the critic that her judgment should garner the assent of the audience, even if that assent may not be logically compelled. Popkin expressly embraces a rhetorical reading of Kant’s *Critique of Judgment*.

This perspective on judging remains troubling to many people because, without criteria that can provide an objective anchor, all the judicial opinion can do is lift itself up by its own bootstraps. Judging is, at best, an effort at rhetorical self-justification addressed to a knowledgeable audience to whom it is accountable. The Kantian judge’s effort to make objective judgments by relying on judicial rhetoric to justify an opinion should come as something of a surprise given Kant’s view that rhetoric “merits no respect whatever,” although it will find support in a recent book by Scott Stroud. Stroud makes a determined effort to “reclaim rhetoric as part of Kant’s project of moral improvement.” The author laments that Kant’s negative comments about rhetoric have had the unfortunate impact of preventing a serious defense of Kant’s view of rhetoric.<sup>21</sup>

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15. *Id.* at 27–30.

16. *Id.* at 33.

17. *Id.* at 42.

18. *Id.* at 52–60.

19. *Id.* at 61–67.

20. *Id.* at 83.

21. POPKIN, JUDGMENT, *supra* note 9, at 103–04 (quoting Robert J. Dostal, *Kant and Rhetoric*, 13 PHIL. & RHETORIC 223 (1980) and SCOTT R. STROUD, KANT AND THE PROMISE OF RHETORIC 8

. . . .

An important inference from this perspective on objective judging is that the judge must accept the responsibility for convincing the audience that the judicial opinion is a conscientious attempt to reach the right legal decision. There is no place to hide – not the text, the linguistic and substantive canons, the legislative purpose, legislative history, or predictions of the future. The criterion for good judging is how well the judge makes those choices and accepts that responsibility.”<sup>22</sup>

Popkin concludes that commentators must assure the public that the reality of judging is appropriate in our constitutional democracy, even if the judgments are not certain and subject to objective assessment. “Law judging (like art criticism) is objective only in the sense that the judge presents his or her judgment as deserving of acceptance by the audience. The judicial opinion’s rhetoric demands agreement from the audience to which he or she is accountable, which may or may not be forthcoming.”<sup>23</sup>

In the end, then, Popkin reaffirms the problematic nature of judicial decision-making but he seeks at least partial refuge in Kant’s analysis of aesthetic judgment by way of analogy to the work of art critics. In general, Popkin’s conclusion is certainly correct, and his use of Kant may inspire faith in the enterprise of judging. However, reading Kant through a rhetorical lens is problematic when compared to a straightforward analysis of the rhetorical and hermeneutical dimensions of practical judgment. Popkin’s analysis can be strengthened by eliminating his reference to Kant’s *Critique of Judgment* and appealing directly to these ancient traditions to defend the activity of judging well. Instead of dropping the uncomfortable instability of practical reasoning from his account and concentrating on Kantian aesthetics, Popkin would have been better served to do precisely the opposite.

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(2014)).

22. *Id.* at 105.

23. *Id.* at 139.



## II. JUDGING WELL AS PRACTICAL REASONING

My thesis is straightforward. Longstanding traditions of interpretation and rhetoric, most recently carried forward in pragmatism and exemplified in legal practice, provide us with the conceptual resources to judge well. These same traditions enable us to assess whether another person is judging well. A judge does not have recourse to an objective defense for any particular judgment, but she does have recourse to non-subjective capacities in rendering a judgment. Similarly, we can make a principled claim about whether she has judged well. I develop this thesis in three steps. First, I critique Kantian aesthetics as a model for judging well, following the arguments of philosopher Hans-Georg Gadamer in his resuscitation of Aristotelian practical reasoning. Second, I develop the rhetorical dimensions of judging well in terms of Chaïm Perelman's "new rhetoric" as an extension of Gadamer's hermeneutics. Finally, I argue that this hermeneutical and rhetorical account of practical reasoning is rooted firmly in our faculties and human capacities and is not simply a regrettable failure of cognitive reasoning. I conclude that my analysis provides an accurate account of judging well. Admittedly, it may be more difficult to explain the integrity of judging to a lay public that embraces the folk psychology of a sharp distinction between objects and subjects, but we must begin with an accurate account before undertaking the task of persuading the public.

*A. The Critique of Kant's Aesthetics*

Popkin originally drew from both the Aristotelian tradition of practical reasoning and the Kantian tradition of judgment to ground judgment in law. In his recent book, he looked solely to Kant's *Critique of Judgment*. This was an unfortunate turn. The Kantian tradition has done much to undermine the long tradition of practical reasoning that found a strong voice in Aristotle and continued until the emergence of the modern natural sciences as the sole criterion of knowledge. Kant does not provide a credible justification for law judging; in fact, just the opposite is true. Kant's philosophy is an important source of our current crisis of confidence in the integrity of judgment.

In *Truth and Method*,<sup>24</sup> Hans-Georg Gadamer presents a phenomenology of understanding, challenging the exclusivity claimed by the model of the natural sciences. Gadamer begins his work with an extensive account of how truth emerges in the experience of art, arguing

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24. HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall, trans. rev., 2d rev. ed. 1989).

against the subjectivization and formalization of aesthetic judgment.<sup>25</sup> Gadamer shows that Kant was pivotal in the final, decisive shift from the humanist tradition to the scientific model, inasmuch as Kant relegated judgment to the aesthetic realm and divorced it from the full moral and political ramifications of the humanist tradition of judgment. Kant's *Critique of Judgment*

[C]onstituted a turning point. It was the end of [the humanist] tradition but also the beginning of a new development. . . . The radical subjectivization involved in Kant's new way of grounding aesthetics was truly epoch-making. In discrediting any kind of theoretical knowledge except that of natural science, it compelled the human sciences to rely on the methodology of the natural sciences in conceptualizing themselves.<sup>26</sup>

By reducing judgment to aesthetics and acknowledging the lack of a theoretically secure basis similar to that which he articulated in the *Critique of Practical Reason*, Kant wholly undermined the tradition of moral and political judgment having a sound basis in its historically unfolding character.<sup>27</sup> Kant defended the judgment that emerges from the corresponding genius of the artist and viewer to embrace the work of art as a formal object through the process of aesthetic differentiation.<sup>28</sup> Against this reductivism, Gadamer argues that the experience of art is in fact a model of our knowing relation to the world, and thus is fundamental rather than peripheral.<sup>29</sup> In Kantian terms, Gadamer is arguing that the three Critiques were published in inverse order of their significance for human understanding.<sup>30</sup>

Gadamer concludes by distinguishing two senses of "experience" in the German language: one is a fleeting, adventurous occurrence (*Erlebnisse*), and the other is a deeper constitutive relation with something

25. See *id.* at 3–169 ("Part One: The Question of Truth as it Emerges in the Experience of Art").

26. *Id.* at 40–41.

27. *Id.* at 38–39. It is not so much that Kant rejected the capacity for judgment, but that he constrained its role so significantly. By retaining a narrow realm of judgment that his successors, such as Hannah Arendt, then tried to resuscitate and draw out of his work, Kant devalued rather than promoted the role of judgment in human life. See Ronald Beiner, *Hannah Arendt on Judging*, in Hannah Arendt, *Lectures on Kant's Political Philosophy* 89–156 (Ronald Beiner, ed., 1982). Beiner gathered material published by Arendt from which he draws a speculative overview of how she intended to expand Kant's views on judgment before her untimely death.

28. GADAMER, TRUTH AND METHOD, *supra* note 24, at 85–92.

29. *Id.* at 70.

30. Rudolph A. Makkreel, IMAGINATION AND INTERPRETATION IN KANT: THE HERMENEUTICAL IMPORT OF THE *CRITIQUE OF JUDGMENT* 170 (1990) (arguing that Gadamer reads Kant too narrowly, and that Kant would acknowledge the inversion of his works and the ubiquity of judgment).

or someone that yields knowledge (*Erfahrung*).

The pantheon of art is not a timeless present that presents itself to a pure aesthetic consciousness, but the act of a mind and spirit that has collected and gathered itself historically . . . For this reason, we must adopt a standpoint in relation to art and the beautiful that does not pretend to immediacy but corresponds to the historical nature of the human condition. The appeal to immediacy, to the instantaneous flash of genius, to the significance of “experiences” (*Erlebnisse*), cannot withstand the claim of human existence to continuity and unity of self-understanding. The binding quality of the experience (*Erfahrung*) of art must not be disintegrated by aesthetic consciousness.

This negative insight, positively expressed, is that art is knowledge and experiencing an artwork means sharing in that knowledge.

This raises the question of how one can do justice to the truth of aesthetic experience (*Erfahrung*) and overcome the radical subjectivization of aesthetic that began with Kant’s *Critique of Aesthetic Judgment*. . . .

. . . .

. . . Does not the experience of art contain a claim to truth which is certainly different from that of science, but just as certainly is not inferior to it? And is not the task of aesthetics precisely to ground the fact that the experience (*Erfahrung*) of art is a mode of knowledge of a unique kind, certainly different from that sensory knowledge which provides science with the ultimate data from which it constructs the knowledge of nature, and certainly different from all moral rational knowledge, and indeed from all conceptual knowledge—but still knowledge, i.e., conveying truth?

This can hardly be recognized if, with Kant, one measures the truth of knowledge by the scientific concept of knowledge and the scientific concept of reality. It is necessary to take the concept of experience (*Erfahrung*) more broadly than Kant did, so that the experience of the work of art can be understood as experience.<sup>31</sup>

We need not reluctantly conclude that Kant’s tepid acceptance of a reduced realm of judgment is the strongest case to be made for law judging.

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31. GADAMER, TRUTH AND METHOD, *supra* note 24, at 97–98.

After recovering the experience of truth in art, Gadamer expands his inquiry to the historical nature of human understanding as captured in the famous account of the “hermeneutic circle,” in which one can understand a text only by understanding its parts, but one can only understand the parts by understanding the text as a whole. Acknowledging the historical flow at work, rather than attempting to isolate moments in time for discrete analysis, resolves the paradox. We seek to understand by projecting our pre-judgments in a motivated, rather than timeless, manner. Gadamer emphasizes that understanding occurs only in application: I experience the historical trajectory of the work of art in this moment, and I derive meaning from a text for present purposes.

The [hermeneutic] circle, then, is not formal in nature. It is neither subjective nor objective, but describes understanding as the interplay of the movement of tradition and the movement of the interpreter. The anticipation of meaning that governs our understanding of a text is not an act of subjectivity, but proceeds from the commonality that binds us to the tradition. Tradition is not simply a permanent precondition; rather, we produce it ourselves inasmuch as we understand, participate in the evolution of tradition, and hence further determine it ourselves. Thus the circle of understanding is not a “methodological” circle, but describes an element of the ontological structure of understanding.<sup>32</sup>

Any attempt to stand apart from artifacts in an objective manner betrays an experience that is always historically situated and rooted in present concerns.

We do not have to speculate how Gadamer’s philosophy might connect with law judging, because Gadamer explicitly makes the case. At a critical juncture of his explication of our historical nature, Gadamer famously turns to legal interpretation as a model of the experience of knowing.<sup>33</sup> Gadamer rejects the assumption that the practical work of law judges obscures deeper truths about the nature of interpretation and judgment.

In fact the situation seems to me just the opposite. Legal hermeneutics serves to remind us what the real procedure of the human sciences is. Here we have the model for the relationship between past and present that we are seeking. The judge who adapts the transmitted law to the needs of the present is undoubtedly

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32. *Id.* at 293.

33. *Id.* at 324–41 (“The Exemplary Significance of Legal Hermeneutics”).

seeking to perform a practical task, but his interpretation of the law is by no means merely for that reason an arbitrary revision.<sup>34</sup>

The “adaptation” at work is inevitable because the judge is always applying the law to the present case, rather than adopting the pretense of timeless pronouncements of meaning, and yet this adaptation occurs within a community and historical tradition that permits the participants to understand the evolution of the law as something more than the exercise of “arbitrary” subjectivity by the judge.<sup>35</sup> Gadamer insists that all understanding is interpretative, by which he means that it occurs in application of the unfolding tradition to a question.<sup>36</sup> The nature of law judging is not a cause for embarrassment or lament; instead, it is a particularly vivid example of what occurs in all understanding.

Gadamer does not propose a method that judges can follow to ensure an objectively valid interpretation. Rather, his project is to outline a “philosophical hermeneutics,” which rests on an ontological claim that all human understanding is interpretive, in the sense that understanding occurs only in the application of tradition to a question at hand. Experiencing art is a playful encounter that draws us outside of ourselves, tapping into our hermeneutical nature. Following Gadamer’s critique of Kant and his argument that law judging exemplifies human understanding, we are now much better positioned to recast, and then to answer, Popkin’s angst about how we can assess whether judges are acting in an objectively correct manner rather than exerting their subjective will.

We must rephrase Popkin’s question because it buys into a subject-object bifurcation that Gadamer expressly targets. Gadamer critiques Kant for endorsing a shared subjectivism in the aesthetic realm. More broadly, he argues against the view that a text is a discrete object whose true meaning is discerned by the interpreter, as a subject, using appropriate

34. *Id.* at 327–28.

35. Gadamer argues:

The work of interpretation is to concretize the law in each specific case—i.e., it is a work of application. The creative supplementing of the law that is involved is a task reserved to the judge, but he is subject to the law in the same way as is every other member of the community. It is part of the idea of a rule of law that the judge’s judgment does not proceed from an arbitrary and unpredictable decision, but from the just weighing up of the whole. Anyone who has immersed himself in the particular situation is capable of undertaking this just weighing-up.

*Id.* at 329.

36. Gadamer expressly states that law judging reveals what happens in all interpretation.

When a judge regards himself as entitled to supplement the original meaning of the text of a law, he is doing exactly what takes place in all other understanding. . . . Application does not mean first understanding a given universal in itself and then afterward applying it to a concrete case. [Application] is the very understanding of the universal—the text—itsself.

*Id.* at 340–41.

methodologies. He characterizes interpretation as a “fusion of horizons,” in which meaning emerges from the encounter between a reader motivated by a question and a text that has a history of previous applications.<sup>37</sup> We cannot measure the work of the judge against the fixed meaning of the text, because understanding resides neither in the subject nor the object, but in the fusion of horizons.

### *B. Judging Well and Rhetorical Knowledge*

An ontological claim that genuine understanding involves a fusion of horizons that occurs in the application of tradition to a question recasts Popkin’s central question, but does not answer it. How can we better characterize this fusion in order to test the appropriateness of particular interpretations? Popkin correctly turns to the rhetorical tradition to provide an answer, but he does so only by working against the grain of his Kantian foundation. In contrast, Gadamer’s philosophical hermeneutics rejects the Kantian approach and expressly embraces the rhetorical tradition.<sup>38</sup>

Gadamer argues that rhetoric’s constitutive role in political society in ancient Greece is paralleled today by the sustaining power of hermeneutical appropriation of traditionary materials.<sup>39</sup> Acknowledging Chaïm Perelman’s important contribution to rehabilitating the full scope of ancient rhetoric, Gadamer applies the rhetorical idea of political truth

37. Gadamer uses more provocative terms, characterizing the interpreter as “prejudiced” in the sense of having prejudgments, and the text as having a “history of effects,” so that it can never be encountered as if for the first time. Rather than a subject decoding an object, there are two “horizons” at play as the traditionary text is applied in the present. The metaphor of a “fusion of horizons” is meant to capture the fact that neither persists in exactly the same manner after the experience of understanding.

In fact, the horizon of the present is continually in the process of being formed because we are continually having to test all our prejudices. . . . [U]nderstanding is always the fusion of these horizons supposedly existing by themselves. . . .

If, however, there is no such thing as these distinct horizons, why do we speak of the fusion of horizons and not simply of the formation of the one horizon, whose bounds are set in the depths of tradition? . . . Every encounter with tradition that takes place within historical consciousness involves the experience of a tension between the text and the present. The hermeneutical task consists in not covering up this tension by attempting a naive assimilation of the two but in consciously bringing it out. . . .

. . . In the process of understanding, a real fusing of horizons occurs—which means that as the historical horizon [of the text, for example] is projected, it is simultaneously superseded. To bring about this fusion . . . is the problem of application, which is to be found in all understanding [and is, in fact, the central problem of hermeneutics].

*Id.* at 306–07.

38. See FRANCIS J. MOOTZ III, RHETORICAL KNOWLEDGE IN LEGAL PRACTICE AND CRITICAL LEGAL THEORY 6–10 (2006).

39. See *id.* at 9–10.

grounded on the probable to the hermeneutical experience, arguing that “[c]onvincing and persuading, without being able to prove . . . are obviously as much the aim and measure of understanding and interpretation as they are the aim and measure of the art of oration and persuasion.”<sup>40</sup> A prominent venue for this hermeneutical experience today is the legal system, which is premised on the production and interpretation of authoritative texts as sources of governing authority rather than on the performance and reception of speeches before the citizens of the polis. Rejecting the scientific impulse to reduce law to a disciplined methodology of deduction, Gadamer describes the hermeneutical experience in terms of a rhetorical engagement in the form of a conversation between judge and text.

The model of conversation may seem naive and forced,<sup>41</sup> but Gadamer’s point is to emphasize that neither text nor interpreter remain the same after interpretation. The text’s “history of effects” has been augmented, as has the interpreter’s understanding. Rather than something *done to* a text, or *extracted from* a text, interpretation is a rhetorical *event*. The hermeneutic experience of the judge parallels the need for a rhetor to conceive a speech only in connection with the particular audience that will be addressed on a particular occasion. To better understand this phenomenon, we turn to Chaïm Perelman, who further elucidates the rhetorical dimensions of judgment that Gadamer identifies.

In his first major work, Perelman demonstrated that arguments about justice could not be rationally assessed because they go beyond formal logic.<sup>42</sup> This unsettling conclusion led him to develop an informal logic of justice,<sup>43</sup> rejecting the Cartesian championing of certain truth and its resulting skepticism.

The imperialism of rationalist dogmatism finds its counterpart in the nihilism of positivistic scepticism. Either each question is resolved by finding the objectively best solution and this is the task of reason, or truth does not exist and every solution depends upon

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40. HANS-GEORGE GADAMER, ON THE SCOPE AND FUNCTION OF HERMENEUTICAL REFLECTION (G. B. Hess & R. E. Palmer trans.), in PHILOSOPHICAL HERMENEUTICS 24 (David E. Linge ed. trans, 1976).

41. Consider Sandy Levinson’s classic observation: “As Chairman mao pointed out, a revolution is not a tea party, and the massive disruption in lives that can be triggered by a legal case is not a conversation.” Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 386 (1982).

42. See Ray D. Dearin, *Justice and Justification in the New Rhetoric*, in PRACTICAL REASONING IN HUMAN AFFAIRS: STUDIES IN HONOR OF CHAÏM PERELMAN 155, 156 (J.L. Golden & J.J. Pilotta eds., 1986).

43. CHAÏM PERELMAN, THE NEW RHETORIC AND THE HUMANITIES: ESSAYS ON RHETORIC AND ITS APPLICATIONS 56 (William Kluback et. al. trans., 1979).

subjective factors: reason can be no guide to action.<sup>44</sup>

Finding that Kant's majestic effort to salvage practical reasoning and judgment has failed,<sup>45</sup> Perelman returns to the rhetorical tradition to understand how it is possible to secure adherence to claims about justice that cannot be definitively proven.<sup>46</sup> With Lucie Olbrechts-Tyteca, he famously articulates the "new rhetoric."<sup>47</sup>

Drawing from Aristotle's models of dialectic and rhetoric, Perelman argues that reasoning about questions of justice has an epistemological status that lies between the exceedingly narrow realm of formal deduction and irrational adherence.<sup>48</sup> He distinguishes rational thought—in which the truth of the matter can be known definitively through careful reflection—from acting reasonably in circumstances in which the truth of the matter is uncertain and multidimensional. Our challenge is to act reasonably rather than coercively despite a profound lack of certainty caused by limited time, incomplete information, and changing circumstances; disagreements about the relevant guiding principles; and the resulting inability to reach a complete consensus. In the legal system, arguments are made, judgment is issued, and action is taken without objectively-verifiable knowledge about the questions in the case at hand.<sup>49</sup>

The exigencies of the juridical order, which continues through all kinds of upheavals as long as it has not been entirely or partially replaced by a new order, clearly show us what is unfeasible in the advice of Descartes, asking us to make a *tabula rosa* of all our opinions. . . . Nobody has ever seriously put in doubt the totality of his opinions, for they test each other reciprocally: One keeps those which, up to the present moment, have best resisted the testing. This, however, does not guarantee them absolutely against all subsequent tests.

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44. *Id.* at 112.

45. *Id.* at 125.

46. As Dilip Gaonkar summarizes, Perelman offers rhetoric "as an alternative theory of argumentation that can provide grounding for philosophy, jurisprudence, and the human sciences in the wake of that colossal failure of the logicist tradition in philosophy from Descartes to logical positivism." Dilip Parmeshwar Gaonkar, *The Retrieval of Rhetoric, the New Rhetoric, and the Rhetorical Turn: Some Distinctions*, 15 *INFORMAL LOGIC* 53, 58 (1993).

47. CHAÏM PERELMAN AND LUCIE OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* (John Wilkinson & Purcell Weaver trans., 1969).

48. *Id.* at 62.

49. CHAÏM PERELMAN, *JUSTICE, LAW AND ARGUMENT: ESSAYS IN MORAL AND LEGAL REASONING* 149 (William Klubach et. al. trans., 1980).



Thus rationality, as it presents itself in law, is always a form of continuity–conformity to previous rules or justification of the new by means of old values. . . . Law teaches us, on the contrary, to abandon existing rules only if good reasons [drawn from other existing rules] justify their replacement.<sup>50</sup>

Joining Gadamer, Perelman argues that legal argumentation and judgment is a model of how all human understanding works. They both look to Aristotle’s account of practical judgment to explain the reasonableness of working through problems conversationally rather than methodologically, drawing from existing elements of shared agreement to resolve a contemporary problem for the moment rather than for all time.

I have previously argued that Gadamer and Perelman are developing an account of “rhetorical knowledge” that is no less a form of knowledge than logical or empirical knowledge.<sup>51</sup> Rhetorical knowledge is a practical accomplishment that achieves neither apodictic certitude nor collapses into a relativistic irrationalism. Consequently, rhetorical knowledge can sustain legal practice as a reasonable—even if not thoroughly rationalized—social activity. Although rhetorical knowledge is a social achievement rather than an intellectual elaboration, it is properly characterized as knowledge. We can *know* the just result in a legal case and we can *know* the solutions to math problems; it is simply the case that our knowledge of justice is rhetorical rather than logical.<sup>52</sup>

There is an important distinction, but both are forms of knowledge. In a seminal article, Robert Scott explains:

Seeing in a situation possibilities that are possibilities for us and

50. *Id.* at 169–70.

51. See MOOTZ, RHETORICAL KNOWLEDGE, *supra* note 38. This is not to say that we should simply reverse the Cartesian prejudice by falsely aggrandizing rhetorical knowledge and devaluing logical knowledge. In short, “it is important to seek to understand rhetoric as a way of knowing not the way.” Robert L. Scott, *On Viewing Rhetoric as Epistemic: Ten Years Later*, 27 CENTRAL STATES SPEECH J. 258, 259 (1977).

52. What I am calling “rhetorical knowledge” has a proud and strong tradition reaching back to the sophists. See MOOTZ, RHETORICAL KNOWLEDGE, *supra* note 38, at 36–42. Philosopher Calvin Schrag has articulated a conception of “communicative praxis” that draws from both philosophical hermeneutics and rhetoric, providing a ground for ethics in the “incarnation of the logos within discourse and action in a hermeneutic of everyday life. Communicative praxis announces and displays reason as discourse. . . . In entering discourse the logos is decentered and situate within the play of speaker and hearer as they seek consensus on that which is talked about.” CALVIN O. SCHRAG, COMMUNICATIVE PRAXIS AND THE SPACE OF SUBJECTIVITY 193 (1986). Judgments about the appropriate course of action in a given situation can be reasoned about, and reasonable, under Schrag’s account because they arise from the “responsibility of an engaged and decentered moral self as it responds to the prior thought and action already inscribed within a historicized polis,” rather than being an ethical judgment issued from an “interior construct of a centered and sovereign subject” of the kind touted in the Kantian tradition. CALVIN O. SCHRAG, THE RESOURCES OF RATIONALITY: A RESPONSE TO THE POSTMODERN CHALLENGE 175–76 (1992).

deciding to act upon some of these possibilities but not others must be an important constituent of what we mean by human knowledge. The plural pronoun in the foregoing sentence is vital. As social beings, our possibilities and choices must often, perhaps almost always, be joint. . . . The opacity of living is what bids forth rhetoric. A remark in passing by Hans-Georg Gadamer seems to me to be an important insight: the “concept of clarity belongs to the tradition of rhetoric.” But [contrary to one’s assumption about what clarity implies] few terms are more relative than that one nor call forth more strongly a human element. Nothing is clear in and of itself but [rather clarity is achieved] in some context for some persons.

Rhetoric may be clarifying these senses: understanding that one’s traditions are one’s own, that is, are co-substantial with one’s own being and that these traditions are formative in one’s own living; understanding that these traditions are malleable and that one . . . may act decisively [with others] in ways that continue, extend, or truncate the values inherent in one’s culture; and understanding that in acting decisively . . . one participates in fixing forces that will continue after the purposes for which they have been immediately instrumental and will, to some extent, bring others who will inherit the modified traditions. Such understanding is genuinely knowing and is knowing that becomes filled out in some particulars by participating rhetorically.<sup>53</sup>

Although Scott was not writing about law judging in particular, his work underscores why Gadamer and Perelman both find legal practice to be an exemplar of rhetorical knowledge.

### *C. The Grounds of Practical Judgment*

One might still argue that rhetorical knowledge is just a fancy name for a kind of cognitive failure. The assumption behind this critique is that logical and demonstrative truths are the ground of genuine reasoning, but that we necessarily fall short of achieving this desired rigor in certain “soft” disciplines. Put simply, critics will argue that rhetorical knowledge that is activated hermeneutically and defended rhetorically can at most serve as a “second best” effort to be rational, and that judges should be

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53, Scott, *supra* note 51, at 261.

held to a higher standard. Gadamer and Perelman do not answer this critique as much as flip it on its head. They argue that practical reasoning and its hermeneutical-rhetorical character form the core of our reasonableness. It is a fundamental mistake to aspire to achieve a context-free objectivity, because this aspiration fails to accord with the reality of reasoning and judgment. Put another way, Kant's *Critique of Judgment* addressed a ubiquitous human capacity, whereas the ambition of the *Critique of Pure Reason* can never be fulfilled.

We may defend this reversal by looking to contemporary work in neuroscience, which underscores the hermeneutical and rhetorical nature of thinking and judgment. Leslie Paul Thiele demonstrates that the very heart of judgment is practical wisdom, as articulated by Aristotle and developed by Gadamer and Perelman.<sup>54</sup> But he cautions that identifying this capacity and linking it to the operation of our brains does not mean that we can provide a full theoretical defense of judgment. Indeed, it is precisely the vital importance of this foundational capacity that renders it immune to abstract theorizing, inasmuch as theorizing is a cognitive skill relatively recently developed in the evolutionary process that builds on the foundational capacity to judge that has developed over millennia.<sup>55</sup> The goal of a theoretical inquiry into practical judgment is not to develop a "how to" guide, but rather to appreciate how this capacity can be augmented and promoted. As Gadamer insists, we can never step outside of our prejudiced pre-understanding completely, but it is possible to neutralize some particularly unhelpful prejudgments by confronting other horizons.<sup>56</sup>

Humans had been exercising judgment for millennia before the idea of reasoning to a conclusion took hold. Experience was the basis of judgment rather than logic, and heuristics became deeply embedded in the functioning of our brains.<sup>57</sup> This is not to celebrate an irrational approach to life. Rather, it is to recognize that refined cognitive processes build on our ability to judge, rather than supplant that ability. "The point is simply

54. LESLIE PAUL THIELE, *THE HEART OF JUDGMENT: PRACTICAL WISDOM, NEUROSCIENCE, AND NARRATIVE* (2006).

55. Thiele expresses doubt that we can "gain theoretical access to the essence of this mysterious faculty" because the "human capacity for judgment is an evolutionary adaptation and a product of history," which means that it "has no enduring, unified, and immutable set of characteristics." *Id.* at 13. One of Thiele's epigraphs summarizes the point well: "A systematic theory of [practical judgment] would be a contradiction in terms." *Id.* at 17 (quoting Robert Harriman, *Theory Without Modernity, in PRUDENCE: CLASSICAL VIRTUE, POSTMODERN PRACTICE* 19 (Robert Harriman ed., 2003)).

56. Thiele endorses Gadamer's extension of Kant's focus on aesthetic judgment, which he summarizes as: "Good taste, like good judgment, can be developed. And the judgments that ensue from this sort of knack, while not strictly verifiable or falsifiable, are available (as Kant also observed) to informed debate." THIELE, *supra* note 54, at 44.

57. *Id.* at 17–69 (Chapter 1: "An Intellectual History of Judgment").

that moral judgment can and does occur in the absence of abstract theorization and principled argument.”<sup>58</sup> However, developing and reflecting on principles is still important.

Once articulated, principles may take on lives of their own, circling back to influence basic assessments and evaluations. In this respect, judgments are developed and transformed by way of the ‘reflective equilibrium’ established between the socially cultivated sensibilities inhabiting our guts and the theoretically formalized principles that emerge from our mouths. Speech is where the unconscious and the conscious meet, grapple with each other, and produce the ‘considered judgments’ that we find ourselves willing and able to defend. Only by finding their voice do judgments rise above the primitive and impoverished.<sup>59</sup>

We can learn to refine judging by augmenting our experience and learning from that experience, even while acknowledging that we cannot secure a timeless truth. Thiel emphasizes that experiential learning is essential to the development of judgment because it affects the established neural pathways, a process that Gadamer characterized as a “fusion of horizons.” “Many are disposed to believe—perhaps academics more so than others—that we can (and should) *think* our way into new ways of doing. But the far more common phenomenon is that we *do* our way into new ways of thinking.”<sup>60</sup> As Aristotle emphasized, one does not learn to be virtuous in school; rather, one becomes virtuous by acting virtuously. Thiele concludes that the practical wisdom of judging “is embodied learning mindful of its own limits,”<sup>61</sup> including the inability to fully rationalize or explain how a judgment is reached.<sup>62</sup>

58. *Id.* at 73.

59. *Id.* For an excellent defense of “reflective equilibrium” as the appropriate standard for the acceptability of a judgment, see Catherine Z. Elgin, *Considered Judgment* (1996).

60. THIELE, *supra* note 54, at 110. Thiele connects this insight to the functioning of our brains. Good judgment, almost everyone since Aristotle agrees, cannot be taught. It has to be gained through experience. That is why Aristotle deemed politics a field of study and practice unfit for the young. But Aristotle never tells us what it is about experience, as opposed to formal pedagogy, that lends itself to the cultivation of judgment. Cognitive neuroscience helps us understand. Formal pedagogy well conveys explicit information. Most of the knowledge that goes into our practical judgments, however, is implicitly acquired. It is absorbed obliquely. Notwithstanding the tremendous benefits of formal education, the cultivation of good judgment demands whole-brain learning. That is primarily offered in the school of life. To properly educate intuition, we must concern ourselves with the awesome task of understanding – and improving – the lessons learned in this academy.

*Id.* at 161–62. For this reason, the rhetorical tradition of arguing a case from both sides is one of the best experiential learning techniques. *Id.* at 157. Of course, this is the core of the activity that judges use to hear arguments and to reach a judgment.

61. *Id.* at 112.

62. This position draws from the tradition of Heidegger’s “being-in-the-world,” see MARTIN HEIDEGGER, *BEING AND TIME* 49–58 (§§12–13) (Joan Stambaugh trans., 1996), as exemplified in

Law judges exemplify the nature of judgment. By focusing on the case at hand and offering a written defense of their judgment, they are in a position to check their prejudgments against the long history of judging that they participate in, even if they could never completely disclose all of the factors that led to the judgment.<sup>63</sup> Judging is narratively constructed.<sup>64</sup> Indeed, our very selves, including perception and memory, are narratively formed.<sup>65</sup> For law judges this primal reality is augmented and enhanced by the tradition of writing opinions in support of their judgments, and these opinions in turn add to the broader legal narrative, which shapes the understanding of future judges.

### III. JUDGING JUDGING WELL

I have argued that judgment is a foundational capacity deeply rooted in the structuring of our brain, and intrinsic to our very selves. We cultivate rhetorical knowledge through interpretive experiences that provide us with dynamic resources to exercise judgment in changing circumstances. Law judges regularly exhibit this foundational capacity in a disciplined manner. Ironically, Popkin’s concern—how can we legitimate the activity of law judges by reference to other professions?—puts the question backwards. It is the exemplary practice of law judges that can help us to understand and defend the integrity of judgments more generally. Judgment is real and constrained, even though it is neither deductive nor rationally defensible as an objective fact.<sup>66</sup> But Popkin was not concerned only with the integrity

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Merleau-Ponty’s philosophy of the flesh that grew out of MAURICE MERLEAU-PONTY, *PHENOMENOLOGY OF PERCEPTION* (Colin Smith trans., Routledge & Kegan Paul, 1962). See M.C. DILLON, *THE LIVING BODY*, IN MERLEAU-PONTY’S *ONTOLOGY* 130–50 (1988). For an overview of contemporary work on “embodied cognition,” see ROBERT A. WILSON & LUCIA FOGLIA, *EMBODIED COGNITION*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Spring ed. 2017), <https://plato.stanford.edu/archives/spr2017/entries/embodied-cognition/>.

63. THIELE, *supra* note 54, at 144–47. Bad judging occurs when a law judge attempts to avoid judging at all, pretending that the law can be articulated through rational deductions from fixed rules.

Because judgment always pertains to things particular, contingent and concrete, it cannot be reduced to a wholly deductive enterprise. In this sense, practical judgment is similar to musical improvisation: training in theory is most helpful, but responsive flexibility is key. The difference in quality between a novice punching out the required notes and master musician interpreting a score is patent. It is the difference between mechanically heeding the letter of the law and skillfully realizing its spirit.

*Id.* at 6.

64. *Id.* at 201–76.

65. *Id.* at 203–16 (“The Neurological Construction of the Self”).

66. As Thiele explains:

Practical judgment is an aptitude for assessing, evaluating, and choosing in the absence of certainties or principles that dictate or generate right answers. Judges cannot rely on algorithms. Their efforts always exceed adherence to rules and are not tightly tethered to law. Still, the practical judge reveres good rules and laws. The word judge, after all derives from the Latin *judicem*, which refers to a speaker (discus) of law (*ius*). The activity of judging,

of first-order judgments. His project sought to determine how we can assess whether a particular judgment has integrity and is not just a manifestation of will. I have argued that we should understand judgment as an activity rather than an object of inquiry, and yet Popkin's question persists. How can we *know* that a law judge is judging well; how can we judge judging well?

It should be apparent that this question calls for a judgment, and we can expect no more and no less than a judgment. The scholar's judgment of assessment is no different from the judgment of the law judge that is under question. It would be foolish to purport to provide a deductive judgment that can be assessed according to objective criteria. I can only exercise judgment, and my assessment of whether a law judge has judged well is subject to the same determination of whether I have judged well. In the manner of the law judge, I can establish that I am judging well by defending my judgment as a productive hermeneutical reading of the tradition and a persuasive rhetorical elaboration of the judgment. And so, too, for my critics. In other words, it is only in application that I can establish the validity of my scholarly argument. In what follows, I assess a recent Court of Appeals case regarding the scope of Title IV protections for gays and lesbians to assess if the judges judged well. My goal is to redeem the preceding argument in the exercise of judging a court's judgment.

#### *A. Sexual Orientation Discrimination under Title VII: Respecting Authority*

Title VII of the Civil Rights Act of 1964 declares it to be unlawful for an employer to discriminate "because of" an employee's "race, color, religion, sex, or national origin," and affords a civil remedy to the affected employee.<sup>67</sup> Since the controversial Act was passed, there has been

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though not circumscribed by the boundaries posed by tenets and precepts, is complementary to rule-making and rule-following. The exercise of judgment relies on rules, principles, and laws for support, even as it transcends or transforms them. Hence Aristotle's man of practical wisdom, the *phronimos*, does not ignore rules and models, or dispense justice without criteria. He is observant of principles and, at the same time, open to their modification. He begins with *nomoi* – established law – and employs practical wisdom to determine how it should be applied in particular situations and when departures are warranted. Rules provide the guideposts for inquiry and critical reflection.

When established principle of law comes to serve as a final destination rather than a launching pad for inquiry and deliberation, practical judgment is precluded.

*Id.* at 5.

67. 42 U.S.C. § 2000e-2(a) (2012).

extensive litigation over its scope. With regard to race, the Supreme Court has recognized “disparate impact” discrimination as a violation,<sup>68</sup> permitted some measure of “affirmative action” to overcome disparities rooted in past discrimination,<sup>69</sup> and prohibited an employer from discarding the results of a promotion test merely because the results had a disparate impact.<sup>70</sup> Many of the principles articulated in these cases are equally applied in cases alleging sex discrimination.<sup>71</sup> These cases each inspired passionate dissents and engendered ongoing debate about how best to interpret the provisions of Title VII. Recently, the Seventh Circuit Court of Appeals, sitting *en banc*, held that discriminating against gay employees is a form of “sex” discrimination under Title VII.<sup>72</sup> I use this case to assess the activity of judging well.

I begin with the initial panel opinion.<sup>73</sup> The facts before the court were simple. An adjunct teacher filed a bare-bones *pro se* complaint with the EEOC alleging that she was passed over for full-time teaching positions and other forms of promotion because she is a lesbian. The straightforward legal question presented was whether the statutory proscription of “discrimination on the basis of . . . sex” forbids discrimination based on an employee’s sexual orientation. The panel unanimously determined that claims for sexual orientation discrimination are not cognizable under Title VII, as had been established under unanimous precedent in the Circuit.<sup>74</sup> And yet, as explained below, the panel signaled its uncertainty about this result.

First, it is interesting to note that Judge Ripple declined to join the bulk of the opinion, aligning himself only with the straightforward analysis that Circuit precedent had clearly determined that sexual orientation discrimination is not a violation of Title VII. Was this judging well? Judge Ripple might be characterized as adopting a “rule following” approach in this case, which is to say that he regarded the only valid judgment to be finding the case at hand within the scope of an established rule. A panel cannot overturn settled Circuit precedent, and so there is seemingly

68. *Griggs v. Duke Power*, 401 U.S. 424 (1971).

69. *United Steel Workers of Am. v. Weber*, 443 U.S. 193 (1979).

70. *Ricci v. DeStefano*, 557 U.S. 557 (2009).

71. *See, e.g.*, *Johnson v. Transp. Agency, Santa Clara*, 480 U.S. 616 (1987) (extending the Weber analysis of affirmative action based on race to address imbalances due to past discrimination to cases involving sex discrimination).

72. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. en banc 2017).

73. *Hively v. Ivy Tech Cmty. Coll.*, South Bend, 830 F.3d 698 (7th Cir. 2016) (vacated by rehearing en banc October 11, 2016).

74. Ultimately, the Court sitting en banc overruled four cases that established the clear rule in the Circuit. *See Doe v. City of Belleville, Ill.*, 119 F.3d 563 (7th Cir. 1997); *Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000); *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1088 (7th Cir. 2003).

nothing left to say once the application of the rule is clear. Unfortunately, Judge Ripple chose not to write a concurring opinion to explain why he did not join the entire opinion. He might have been registering disagreement with the court's presumptuousness of writing beyond the settled rule, or he might have disagreed with the court's particular analysis of the weaknesses in the precedential rule. In one important respect, then, Judge Ripple has not judged well because he has not explained the basis of his judgment nor sought to persuade the audience that there is good reason not to join the full opinion. As Popkin emphasizes, there is a special kind of judgment that seeks to command respect by persuasion, rather than simple authority (as in the case with sports officiating).<sup>75</sup>

Judge Rovner's opinion for the panel demonstrates several qualities of judging well. In the first section of his opinion he states that the straightforward legal issue is whether discrimination on the basis of sexual orientation is cognizable under Title VII's ban on sex discrimination. In the second part of his opinion he first establishes the baseline doctrinal rule that is unequivocal and uniform in the circuit: the claim is not cognizable. Moreover, multiple efforts to amend Title VII expressly to include sexual orientation discrimination have not resulted in any amendments, despite the fact that Congress was well aware of the case law and the statement by multiple courts that the situation required a legislative intervention.<sup>76</sup> The court notes that it "could make short shrift of its task" by simply citing precedent and affirming the district court's dismissal of the action.<sup>77</sup> However, the Equal Employment Opportunity Commission (EEOC) had recently criticized the uniform interpretations by Courts of Appeals, and so the panel felt compelled to consider this new challenge. The panel acknowledged that the EEOC had criticized "courts—and pointed particularly to this circuit—that 'simply cite earlier and dated decisions without any additional analysis' even in light of the relevant intervening Supreme Court law."<sup>78</sup> The EEOC concluded that discrimination on the basis of sexual orientation was inherently sex

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75. One would not expect a detailed explanation in a run of the mill case in which quibbling over details of the opinion appears unwarranted. This case does not fit that mold. The panel likely assumed that there would be an en banc hearing, and the issue was incredibly important in jurisdictions across the country. Interestingly, Judge Ripple joined with Judge Flaum's concurrence in the en banc decision that found in favor of the plaintiff, but on different grounds than the majority. *Hively*, 853 F.3d at 357 (Flaum, J., concurring). Perhaps if Judge Ripple had written a concurring opinion in the case before the panel it might have aided in the argument and decision of the en banc court.

76. *Hively*, 830 F.3d at 701–02.

77. *Id.* at 699.

78. *Id.* at 703 (quoting *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641 \*8, n.11 (July 16, 2015)).



discrimination because the categories cannot be completely disentangled, the employee is suffering associational discrimination on the basis of sex, and the discrimination is rooted in gender stereotypes that constitute sex discrimination.<sup>79</sup>

The panel opinion discussed each of these grounds in turn. First, the Supreme Court's recognition of gender stereotypes as a form of sex discrimination covered by Title VII<sup>80</sup> caused lower courts to distinguish situations in which the discrimination was premised on sex as opposed to sexual orientation. But the case law was inconsistent and unsatisfactory. Ultimately, these lines of doctrine became hopelessly confused.

Lesbian women and gay men upend our gender paradigms by their very status—causing us to question and casting into doubt antiquated and anachronistic ideas about what roles men and women should play in their relationships. Who is dominant and who is submissive? Who is charged with earning a living and who makes a home? Who is a father and who a mother? In this way the roots of sexual orientation discrimination and gender discrimination wrap around each other inextricably. In response to the new EEOC decision, one court has bluntly declared that the lines are not merely blurry, but are, in fact, un-definable. See *Videckis v. Pepperdine Univ.*, No. CV1500298, 2015 WL 8916764, at \*6 (C.D. Cal., Dec. 15, 2015) (“Simply put, the line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.”) Whether the line is nonexistent or merely exceeding difficult to find, it is certainly true that the attempt to draw and observe a line between the two types of discrimination results in a jumble of inconsistent precedents.<sup>81</sup>

The opinion recounts in some detail the difficulties courts have encountered, making clear that the doctrinal line is not defensible in a principled manner.

The court then reviewed recent Supreme Court decisions articulating constitutional rights prohibiting unequal treatment of gay persons as a backdrop to a changing legal landscape. On this point the panel was more restrained. It rejected the implicit suggestion that the recent gay rights jurisprudence should lead the court to protect gays against discrimination, and acknowledged that if the Supreme Court wished to extend the scope of its gay rights jurisprudence that it was incumbent upon the Court to

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79. *Id.*

80. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

81. *Hively*, 830 F.3d at 706.

express this directly.<sup>82</sup>

The final and most persuasive argument discussed by the court is the analogy to associational discrimination in race discrimination cases. Courts have repeatedly found that discrimination against an employee because she is married to, or otherwise associates with, a person of a different race is discrimination “because of” race.<sup>83</sup> The panel concluded that the same reasoning should apply to a case in which an employee is discriminated against “because of [her wife’s] sex.”

Consequently, if Title VII protects from discrimination a white woman who is fired for romantically associating with an African-American man, then logically it should also protect a woman who has been discriminated against because she is associating romantically with another woman, if the same discrimination would not have occurred were she sexually or romantically involved with a man.<sup>84</sup>

And yet, the panel again acknowledged that the Supreme Court had never taken a case to correct the unanimous rulings of the lower courts, nor had Congress enacted any of a number of proposed amendments to correct the reading of Title VII. Reluctantly, the opinion ends by recognizing that the “writing is on the wall” that workplace discrimination on the basis of sexual orientation is socially unacceptable, but until “the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent.”<sup>85</sup>

The panel opinion is an example of judging well. The court accepted that precedent compelled the answer to the appeal, but recognized the need to express how the clear doctrinal rule was highly suspect, both in terms of the first precedent that set the course and also in light of developments culminating in the EEOC opinion that the courts were misreading Title VII. The panel explains that it is bound by a rule of decision, even as it acknowledges that the effective history of Title VII can no longer support the precedential decisions, if they ever were correct. A bold panel might have simply declared the precedent outdated, pushing the case to an *en banc* hearing or to the Supreme Court in a more aggressive manner. But this would have risked abrogating the judicial role in this case, which is to interpret the law in application to the facts before it from within the

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82. *Id.* at 713–15.

83. *Id.* at 715–17.

84. *Id.* at 717.

85. *Id.* at 718.

tradition.<sup>86</sup>

The deeper elements of judging well, which I briefly summarize, are implicit in this lawyerly approach. Before assessing the opinions, it is helpful to review our philosophical reconstruction of judging well. We begin with “ordinary judging,” which is a human capacity that is ubiquitous, unavoidable and foundational in human life. Judging is much more deeply rooted than later cognitive developments that Kant explored in their “pure” forms. Judging requires experience in the sense of *Erfahrung*: which becomes part of a dynamic, continuous and cumulative process that nourishes the development of our “common sense.” Cognitive science reveals the degree to which we adapt through experience to enable more productive judging. Judging well is not deductive nor inductive, but rather involves a reciprocal fusion of horizons. Interpretation occurs only in the application of a text in a concrete setting, under the conditions of what Gadamer terms the “logic of the question and answer.” Judging and interpretation are deeply connected then, and the vibrancy of interpretive practices correlates with the integrity of resulting judgments. This all is captured by Popkin’s distinction between declarative judging undertaken by a sports official vested with full authority, and rhetorical judging undertaken by a critic or law judge that seeks to persuade an audience of the validity of the judgment.

We see evidence of these elements in the majority opinion. The court recognizes that the text of Title VII has a history of effects, in that its meaning has been shaped over time as courts have sought to apply it to different circumstances and contexts. Meaning is not a datum that is stagnant and fully knowable for all circumstances and times. Our ability to understand and then to judge doesn’t work in that manner. Title VII has a complex history embedded in the legal, social and political system that continues to unfold. The key is that the court understands that meaning unfolds through time. Meaning is not first one discrete experience and then another. Under these unavoidable conditions, judging is not simply serving as a neutral umpire and calling objective balls and strikes. To judge well requires the law judge to exhibit hermeneutical discernment

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86. The qualifier “in this case” is intentional. My point is not that judging well always requires following a clearly stated rule. In important cases the moral considerations may be so weighty as to lead a judge to refuse to enforce a rule. Consider the phenomenon of northern judges enforcing the Fugitive Slave Acts of 1793 and 1850 despite their clear moral opposition to slavery. See ROBERT COVER, *JUSTICE ACCUSED* (1975). There may be times when one must ignore a rule to try to prevent grave injustice, or to resign in the face of the conflict. However, in most such cases there is likely to be some argument grounded in legal principles if the judge acknowledges the grounds of judging well. See, e.g., RONALD DWORKIN, *THE LAW OF THE SLAVE-CATCHERS*, *TIMES LITERARY SUPPLEMENT* 1437 (Dec. 5, 1975) (reviewing Cover’s book and concluding that judges could have found the Acts unconstitutional).

and rhetorical persuasiveness in declaring the meaning of the text for the case at hand, without a safety net of certain answers. This capacity is foundational; we exercise it constantly in daily life. What makes judging well daunting is that the law judge must strive to judge in good faith and not permit unacceptable motivations to interfere with her judgment.

*B. Sexual Orientation Discrimination under Title VII: Deciding on the Merits*

We may turn now to the opinions rendered *en banc*, a setting in which the court is able to reconsider and reject its own precedents.<sup>87</sup> In this important and divisive case there is surprising agreement among the judges as to what is at stake. Although free to act in the absence of contrary Supreme Court authority, the court proceeds by attempting to judge well rather than simply asserting its will. In a sense, it is only in the *en banc* setting that the judges are able to exercise the full scope of judgment because they are not bound by the precedent of previous panels and there is no direct Supreme Court precedent on the question presented.

The court begins by noting that the precedential rule was first stated in *dicta* and then followed in subsequent cases without any analysis, that other Court of Appeals panels were beginning to question the rule and urge reconsideration *en banc*, and that the broad judicial support for gay rights had led to bizarre contradictions in current law, leading the court to “conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination.”<sup>88</sup> The court emphasizes the truism that it cannot amend or update the statute, but instead is limited to interpreting the legal text.<sup>89</sup> As Popkin puts the issue: a law judge seeks to render a correct judgment rather than to exercise her will.

Statutory interpretation does not have a single metric, and the court clearly rejects an intent-based inquiry that amounts to asking whether the congressional drafters would be surprised by a decision about the statutory meaning.<sup>90</sup> But the court goes farther by emphasizing that statutory meaning is dynamic and historical rather than fixed in time. “The goalposts have been moving over the years, as the Supreme Court has shed more light on the scope of the language that already is in the statute: no

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87. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (*en banc*).

88. *Id.* at 341.

89. *Id.* at 343.

90. *Id.* at 344–45 (citing *Oncal v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) and other cases that have developed Title VII doctrine beyond anything arguably foreseen by the drafters).

sex discrimination.”<sup>91</sup> Essentially, the court acknowledges that its task is to define the meaning of the statute in light of the effective history of the text and in proper application to the circumstances of the present, which are shaped by intervening developments. This is not to say that the court is changing the meaning, but only that it is considering that the original circuit decision in *dicta* was incorrect on the basis of what we now understand about the meaning of the statute.

The court offers two arguments. First, it utilizes the “comparative” approach of deciding whether “sex discrimination” has occurred by changing only the gender of the aggrieved person and determining if the employer would have acted similarly.<sup>92</sup> This test works well in stock cases, such as by asking whether an applicant would have been hired with all the same credentials and experience if she were male rather than female. When sexual orientation is the basis for decision, however, the employer can assert that men and women are treated exactly the same: neither is welcomed if they are in a same sex relationship. Indeed, the dissent exploits the many weaknesses in the court’s use of the comparative approach, which is an evidentiary tool to prove discriminatory intent rather than a method of statutory interpretation.<sup>93</sup> The court’s lead argument is not persuasive precisely because it seems to be using a technical maneuver to shield the substantive decision. The dissent applies the comparative approach in an overly narrow manner,<sup>94</sup> but the result is a battle that amounts to quibbling over formal approaches rather than getting to the heart of the issue.

The court then turns to the associational theory of discrimination as its second argument in favor of reversing circuit precedent. In the wake of the Supreme Court’s decision in *Loving v. Virginia*,<sup>95</sup> courts acknowledged that it is discriminatory to treat people on the basis of the race of those whom they associate with. Some courts extended this theory to Title VII liability for “discrimination because of race.” Because race and sex are not treated differently in the statute,<sup>96</sup> the court held that an employer cannot

91. *Id.* at 344.

92. *Id.* at 345–47.

93. *Id.* at 359 (Sykes, J., dissenting). Judge Sykes argues forcefully that “the comparative method of proof is an evidentiary test; it is not an interpretive tool. It tells us nothing about the meaning or scope of Title VII.” Hively, 853 F.3d at 366. She contends that the court is using this thought experiment “as a rhetorical device to conjure an entirely new understanding of the term ‘sex discrimination’ for use in the Title VII context . . .” *Id.* at 367.

94. *Id.* at 366 (Sykes, J., dissenting) (“The court’s reasoning essentially distills to this: If we compare Hively, a homosexual woman, to hypothetical Professor A, a heterosexual man, we can see that Ivy Tech is actually disadvantaging Hively because she is a woman.”).

95. *Loving v. Virginia*, 388 U.S. 1 (1967).

96. The court is certainly correct that “race” and “sex” are treated equally by the statute, but this obscures the interesting, if not downright bizarre, politics that led to the inclusion of “sex” in the

discriminate because of the sex of an employee's partner. The court carefully unfolds this conclusion as the result of a process of slowly learning the scope of racial discrimination and now extending that doctrine to discrimination based on the sex of an employee's partner. This is the necessary foundation upon which the court can employ the comparative theory to conclude that sexual orientation discrimination is "because of sex."

The court explains that its "decision must be understood against the backdrop of the Supreme Court's decisions, not only in the field of employment discrimination, but also in the area of broader discrimination on the basis of sexual orientation."<sup>97</sup> It was against this historical trajectory of decisions that the EEOC concluded that it was not legitimate to attempt to distinguish discrimination on the basis of sex from discrimination on the basis of sexual orientation. The court draws the same conclusion and reverses the circuit precedent.

The logic of the Supreme Court's decisions as well as the common

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statute. When Title VII was being debated in the House of Representatives there were numerous attempts by conservatives to derail its passage, especially by proposing "poison pill" amendments that would make the statute unattractive to some of its supporters. The category of "sex" was added at the last minute on the motion of Howard Smith, a conservative Virginia Democrat who was intent on derailing the enactment of Title VII. Interestingly, Representative Smith was a strong proponent of equal rights for women and the Equal Rights Act even as he fought against civil rights measures that included race. Liberal supporters of the bill, led by Representative Manny Celler of Massachusetts, immediately spoke against the amendment for fear that including gender discrimination would weaken support for the bill among conservative men. However, the women Representatives in the House joined with the conservative southern Democrats to adopt the amendment. As Chief Justice Rehnquist later noted in the first case to recognize hostile work environment sexual harassment as a violation of Title VII:

The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. 110 Cong. Rec. 2577-84 (1964). The principal argument in opposition to the amendment was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. *See id.* at 2577 (statement of Rep. Celler quoting letter from United States Department of Labor); *id.* at 2584 (statement of Rep. Green). This argument was defeated, the bill quickly passes as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex."

*Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 63-64 (1986). This history signals that Title VII is far more complex than it appears on its face to modern eyes. How should courts interpret a "poison pill" amendment that becomes law? On the other hand, scholars have argued that the enactment of the bill with "sex" was the product of opportunistic hard work by progressive women representatives who turned a defensive maneuver against the conservatives in a successful effort to provide equal rights to women in the workplace. *See generally*, Clinton Jacob Woods, *Strange Bedfellows: Congressman Howard W. Smith and the Inclusion of Sex Discrimination in the 1964 Civil Rights Act*, 16 S. STUDIES 1 (2009); Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQUALITY 163 (1990).

97. *Hively*, 853 F.3d at 349.

sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discrimination on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line.<sup>98</sup>

Having judged the application of Title VII with historical sensitivity, the court concludes by noting that it has not resolved all the issues relevant to regarding sexual orientation discrimination as sex discrimination.<sup>99</sup> The unfolding of legal meaning in changing contexts and in response to new situations will continue.

We can highlight the approach adopted by the majority by considering it in light of the concurring and dissenting opinions. Judge Posner's concurring opinion starkly exhibits his "pragmatist" approach to judging. Judges generally seek the meaning of a statute by looking for an "original" meaning as understood at the time of enactment, or for an unexpressed intent or purpose that can guide the application of the statute in situations not contemplated by the drafters.<sup>100</sup> Posner offers a third alternative: "Finally and most controversially, interpretation can mean giving a fresh meaning to a [legal text]—a meaning that infuses the [legal text] with vitality and significance today."<sup>101</sup> More expressly, he suggests that the fifty-year-old Title VII "invites an interpretation that will update it to the present" because "it takes years, often many years, for a shift in the political and cultural environment to change the understanding of the statute."<sup>102</sup> On this basis, one might conclude that Judge Posner is rectifying a social problem that has emerged by updating an anti-discrimination statute to address biases that were not addressed by the original enactment, perhaps because the biases did not fully exist at that time.

I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of "sex discrimination" that the Congress that enacted it would not have accepted. This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch. We should not leave the impression that we are merely the obedient servants of the 88<sup>th</sup>

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98. *Id.* at 350–51.

99. *Id.* at 351.

100. *Id.* at 352 (Posner, J., concurring).

101. *Id.* Judge Posner cites the Sherman Antitrust Act and the willingness of courts to update the statute by analyzing monopoly power in terms of modern economic understanding.

102. *Id.*

Congress (1963-1965), carrying out their wishes. We are not. We are taking advantage of what the last half century has taught.<sup>103</sup>

Judge Posner rebukes the majority for pretending to “interpret,” when in fact they are “updating” Title VII to correct what we have come to see as an omission in the list of persons protected.

Judge Posner explains that an ordinary understanding of the meaning of “sex discrimination” would likely not include discrimination on the basis of sexual orientation, thereby rendering the statute anachronistic in light of our contemporary understanding that gays and lesbians are not making a “choice” about their sexuality, are “normal in the ways that count,” and “play an essential role” in our country.<sup>104</sup>

The compelling social interest in protecting homosexuals (male and female) from discrimination justifies an admittedly loose “interpretation” of the word “sex” in Title VII to embrace homosexuality: an interpretation that cannot be imputed to the framers of the statute but that we are entitled to adopt in light of (to quote Holmes) “*what this country has become*,” or, in Blackstonian terminology, to embrace as a sensible deviation from the literal or original meaning of the statutory language.<sup>105</sup>

It is difficult to see this as anything other than the exercise of will by a judge acting as lawmaker. Judge Posner reveals clearly that he is making a policy choice: “I don’t see why firing a lesbian because she is in the subset of women who are lesbians should be thought any less a form of sex discrimination than firing a woman because she is a woman.”<sup>106</sup>

Judge Posner does not embrace the philosophical underpinnings of judging well. He starts by recognizing that the statute doesn’t mention “sexual orientation” and that the framers did not have this category in mind when Title VII was enacted, and then acknowledges that this requires the court to explain how the statutory meaning is now changing

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103. *Id.* at 357. Judge Posner notes that homosexuality “was almost invisible in the 1960’s” and thus, the drafters of Title VII did not consciously target a bias. *Hively*, 853 F.3d at 353. Judge Posner chides the majority for attempting to smuggle changing social attitudes into their analysis by loosely referring to Supreme Court cases that expanded anti-discrimination principles. *Id.* at 355–56.

104. *Id.* at 354–55.

105. *Id.* at 355.

106. *Id.* at 355. Since Posner expressly avoided Loving’s association theory in his opinion, *Hively*, 853 F.3d at 356, this same argument could be used to establish discrimination on the basis of weight as a form of discrimination because of sex. While it might be eminently sensible and just to conclude that discrimination against someone in the “subset of women who are obese” deserves protection no less than someone who is fired for being a woman, this would certainly would be viewed as judicial willfulness, extending civil rights protections to entirely new classes of plaintiffs.



after fifty-three years.<sup>107</sup> This opposition of the time of the drafting and the present is artificial. The statute doesn't mention "sexual harassment," "disparate impact," or "voluntary affirmative action," either, but the courts have continually elaborated these meanings of the statute since it was enacted. Against Judge Posner's assumption that we reach a point in social development that requires the courts to suddenly "update" the statute years later, the meaning of a statute is the product of the history of its effects as it is applied in specific cases. It is not the case that statutes "frequently [in the sense of not rarely] are interpreted on the basis of present need and understanding rather than original meaning,"<sup>108</sup> but rather that every interpretation of a statute occurs only in application to the case at hand. There is irony in concluding that Judge Posner's thoroughgoing pragmatist perspective is too beholden to the mirage of "original meaning" that can later be cast aside at the appropriate moment for updating the law.<sup>109</sup>

In contrast, Judge Flaum concurred in the judgment but adopted a less wide-ranging justification for his conclusion.<sup>110</sup> He did not join Part III of the majority opinion, which uses the Supreme Court's gay rights cases as contextual support for the holding. Judge Flaum strives to make the case simple, straightforward and noncontroversial. In essence, he concludes that an employer cannot discriminate on the basis of sexual orientation without knowing the sex of the employee and her partner. Consequently, the employment action is "necessarily, in part, discrimination" because of sex.<sup>111</sup> This effort to simplify the case as a matter of syntax comes off as an effort to ignore the context of the decision and to avoid the judicial role. Judge Flaum would surely criticize the conclusion that "because of sex" can be read as "because of coital activity," under simple interpretive principles, even though this legitimate reading would easily incorporate sexual orientation discrimination into the statute. There is no linguistic fault with this analysis, but it obviously misses the contextual meaning and historical development of the meaning of the statutory text under review.

From the opposite side, in her dissenting opinion Judge Sykes accuses the majority of usurping legislative power precisely in the manner celebrated by Judge Posner. Judge Sykes regards the interpretive question as relatively easy and straightforward. "An employer who refuses to hire homosexuals is not drawing a line based on the job applicant's sex. . . . To

107. *Id.* at 353.

108. *Id.*

109. For my critique of the presuppositions of new textualism, see Francis J. Mootz III, *Getting Over the Originalist Fixation*, in *THE NATURE OF LEGAL INTERPRETATION: WHAT JURISTS CAN LEARN ABOUT LEGAL INTERPRETATION FROM LINGUISTICS AND PHILOSOPHY*, 156–90 (Brian G. Slocum, ed., 2017).

110. *Hively*, 853 F.3d at 357 (Flaum, J., concurring).

111. *Id.* at 358.

put the matter plainly, heterosexuality is not a *female* stereotype; it is not a *male* stereotype; it is not a *sex-specific* stereotype at all.”<sup>112</sup> The majority’s use of the comparative method is merely a “rhetorical device”,<sup>113</sup> the invocation of *Loving*, *Obergefell* and other constitutional decisions to suggest a *zeitgeist* favoring gay rights is doctrinally irrelevant,<sup>114</sup> and the majority ignores the special significance of *stare decisis* in the statutory realm.<sup>115</sup> The dissent makes a straightforward point: Judge Posner accurately describes the basis of the majority opinion, but it is an extra-judicial assertion of will rather than a pragmatic act that should be celebrated.

The court’s new liability rule is entirely judge-made; it does not derive from the text of Title VII in any meaningful sense.

....

It’s understandable that the court is impatient to protect lesbians and gay men from workplace discrimination without waiting for Congress to act. Legislative change is arduous and can be slow to come. But we’re not authorized to amend Title VII by interpretation. The ordinary, reasonable, and fair meaning of sex discrimination as that term is used in Title VII does not include discrimination based on sexual orientation, a wholly different kind of discrimination. Because Title VII does not by its terms prohibit sexual-orientation discrimination, *Hively’s* case was properly dismissed.<sup>116</sup>

Judge Posner encourages honesty about the willful nature of the majority’s opinion, whereas Judge Sykes indicts the majority’s covert strategies for imposing its will.

Judge Sykes places no stock in the original intentions of the drafters, and she argues that the text of the statute is the anchor of interpretations.<sup>117</sup>

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112. *Id.* at 357, 365, 370 (Sykes, J., dissenting).

113. *Id.* at 367.

114. *Id.* at 367–69, 372. Judge Sykes argues that the curiosity of federal constitutional law protecting the right of gays and lesbians to marry, even though Title VII does not prevent discrimination against them in the workplace, is simply a matter of noting the difference between a constitutional restraint on governmental behavior and a statutory restraint on private behavior. *Id.* at 372. Moreover, she argues that the fact that the Supreme Court did not apply the intermediate scrutiny constitutional standard to gay rights indicates that the Court did not regard sex discrimination as one and the same with sexual-orientation discrimination. *Id.*

115. *Hively*, 853 F.3d at at 372–73.

116. *Id.* at 372–74.

117. *Id.* at 359, 361–62.

From this perspective, the case is “momentous”<sup>118</sup> because “[j]udicial statutory updating, whether overt or covert, cannot be reconciled with the constitutional design.”<sup>119</sup> Judge Sykes finds that the court has exercised its will to augment the statutory law, rather than remaining restrained, but her critique is rooted in a misunderstanding of the nature of interpretation and the qualities of judging well in situations that lack objective, logical, and precise answers. Judge Sykes describes her new textualist theory of judging as obedience to fixed meanings.

Respect for the constraints imposed on the judiciary by a system of written law must begin with fidelity to the traditional first principle of statutory interpretation: When a statute supplies the rule of decision, our role is to give effect to the enacted text, interpreting the statutory language as a reasonable person would have understood it at the time of enactment. We are not authorized to infuse the text with a new or unconventional meaning or to update it to respond to changed social, economic, or political conditions.

....

. . . That is why a textualist decision method matters: When we assume the power to alter the original public meaning of a statute through the process of interpretation, we assume a power that is not ours. The Constitution assigns the power to make and amend statutory law to the elected representative for the people. However, welcome today’s decision might be as a policy matter, it comes at a great cost to representative self-government.<sup>120</sup>

Judge Sykes indicts the majority for brazenly ignoring the original (and fixed) meaning of the statute in order to revise the rule so as to take account of social changes.<sup>121</sup>

It is clear that this approach to statutory interpretation is ill-founded, and therefore will interfere with judging well. First, positing meaning as being “fixed” at a given historical point in time ignores how all historical knowledge is hermeneutically recovered no less than other forms of interpretation.<sup>122</sup> Judge Sykes’s arguments proceed from faulty metaphysics, and therefore are not persuasive as cast. Even accepting her presupposition that how a reasonable person would have understood the

118. *Id.* at 359.

119. *Id.* at 360.

120. *Id.*

121. *Id.* at 373 (“The court’s new liability rule is entirely judge-made; it does not derive from the text of Title VII in any meaningful sense.”).

122. I make this argument in detail in Mootz, *supra* note 109.

statutory text at the time of enactment is unchanging and can be discerned objectively, Judge Sykes would have difficulty explaining why “sex” could not be interpreted as referring to activity engaged in by two persons. Dictionary definitions confirm this alternative ordinary meaning of “sex.”<sup>123</sup> It would appear that discrimination on the basis of a person’s sexual orientation is “discrimination based on . . . sex” in the sense that the discrimination is based on the sexual activities of the employee. Such an argument would not be judging well, which is why Judge Flaum would not pursue it. It would not be judging well because it would ignore the context, purpose, and development of Title VII. And so, Judge Sykes cannot pretend to find certainty in the ordinary meaning of the statutory words alone.<sup>124</sup>

This is not to say that the majority’s opinion is “correct” or that Judge Sykes is wholly unpersuasive in her dissent. For example, she ends her opinion by referring to the principle that *stare decisis* has special force with regard to statutory interpretation. This principle is grounded in the desire for stability in statutory law, and the recognition that Congress may amend the statute if the authoritative judicial interpretation is unwelcome. This principle has no necessary relation to the notion of fixed textual meaning, but it can serve as a good institutional argument against frequent changes in authoritative interpretations of statutory language that would lead to uncertainty. One must draw a line between reversing a previous interpretation and understanding the statute in light of its history of effects.

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123. See, e.g., THE OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/sex> (last visited Jan. 12, 2018) (listing the first definition as “sexual activity, including specifically sexual intercourse,” and the second definition as “Either of the two main categories (male and female) into which humans and most other living things are divided on the basis of their reproductive functions.”); MACMILLAN DICTIONARY, [https://www.macmillandictionary.com/us/dictionary/american/sex\\_1](https://www.macmillandictionary.com/us/dictionary/american/sex_1) (last visited Jan. 12, 2018) (listing the first definition as “the activity in which people kiss and touch each other’s sexual organs, which may also include sexual intercourse, and the second definition as “males or females considered as separate groups.”); CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/sex> (last visited Jan. 12, 2018) (listing the first definition as “the state of being either male or female,” and the second definition as “physical activity between people involving the sexual organs.”).

124. This point is obvious and unavoidable because meaning is always contextual, but there are degrees of context that judges deem acceptable. No judge would conclude that firing someone for participating in the Boston Marathon would be actionable as an employment decision “because of [a] race.” It is always possible to think of absurd meanings that ignore the context of a polysemous word such as race. My point is that the word “sex” has two meanings closely related to the context of sexual harassment law. The fact that “sex” refers both to gender and coitus is not a frivolous coincidence given the focus of Title VII to address harassing behavior premised on gender bias and also harassment that is sexual in nature. I offer this argument as an example of how one might use “plain meaning” strategically to support the result, although this would not be judging well.

And, of course, this line drawing calls upon nothing less than the capacity to judge well.

I have assessed the degree to which competing opinions in the *Hively* case exemplify judging well. One does not judge well by following a methodology, no matter how capacious that methodology might be defined. Judging well acknowledges the ontology of understanding as an “application” in a practical context, a fusion of horizons within a tradition that propels the tradition forward. This does not empower the judge to exercise her unrestrained will, as there is no subject-object opposition in a fusion of horizons. Judging well requires the interpreter to be open to the effective-history of the text. By embracing this way of knowing, a judge can achieve rhetorical knowledge about the meaning of a text, which is to say that the judge may articulate a reasonable meaning in application to the case at hand, even if she cannot declare meaning as a function of deductive reason.

It bears emphasis that judging well does not call on a judge to choose to adopt a strategy, as this would be an exercise of will. As Gadamer insists, philosophical hermeneutics provides a phenomenology of understanding, an ontological description of “what happens to us over and above or wanting and doing.”<sup>125</sup> To judge well, the judge must comport herself in accordance with the nature of rhetorical knowledge. This means to hold herself open to the text as it has been received in the tradition and to relinquish subjective goals that would be achieved by imposing meaning on the text.

### CONCLUSION

In this article, I have provided the philosophical backdrop for an account of “judging well” that productively reframes the debate about the integrity of judicial practice in the modern administrative state. My account expressly accepts more leeway for judges than traditional jurisprudential accounts that assume that every case has one correct answer, but this article has argued that this leeway exists whether it is expressly acknowledged or not. By working from an accurate ontology of understanding, we can provide plausible accounts of how law judges may refrain from imposing their will, and instead judge well.

Judging well is not a deductive exercise that can be assessed in terms of logic, nor is it an empirical inquiry that can be assessed in terms of method. Popkin’s account of “ordinary judging,” when placed on a stronger philosophical basis, takes account of a real capacity that may be

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125. GADAMER, TRUTH AND METHOD, *supra* note 24, at xxviii.

deployed with more or less integrity. In other words, we can judge well or poorly, and can be judged to have judged well or poorly. Judging well draws on hermeneutical and rhetorical capacities that have evolved and developed over millennia. These capacities reflect the way our minds work. Consequently, judging well creates (rhetorical) knowledge and rejects a subjective imposition of meaning. Longstanding traditions have studied these capacities, which were essential to humanity's social and political development. An account of judging well that is grounded in an account of interpretation, persuasion, and judgment is sufficient to sustain the rule of law.

The Enlightenment, for all of its salutary effects, led us to neglect the vital foundation of reasonableness and prudence that subtends all knowledge, including knowledge generated through the exercise of reason in a logically rigorous, but abstract manner. Our contemporary definition of "genuine" knowledge as the knowledge of certainties has caused defenders of the legal system to make implausible claims that judges can simply "follow the law" in a manner that can be assessed objectively. While this might be construed as a harmless and "noble lie" that supports the legitimacy of judging, bad metaphysics is corrosive of legitimacy and the rule of law.<sup>126</sup> Only by directly addressing what it means to judge, and what it means to judge well, can we best facilitate the rhetorical knowledge upon which our democracy depends.

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126. At least since the time of the legal realists there has been a vigorous debate as to whether legal officials are best served by being honest about the nature of their practice, or whether it is best to engage in Plato's "noble lie" so as to secure the consent of the governed. However, many defenders of honesty only address the necessity of stopping the noble lie, and fail to offer an account of interpretation and judgment that is not simply a matter of the judge's predilections. See Jason Iuliano, *The Supreme Courts Noble Lie*, 51 U.C. DAVIS L. REV. 911 (2018). This article begins the process of articulating a competing ontology of understanding that does not simply disabuse us of our wrongheaded assumptions. In the absence of an account of rhetorical knowledge there can only be despair when the noble lie is revealed.



