# Foreword

Richard A. Posner[1]

Remarkably little is known to the general public, or even to the practicing legal profession, about judges—the way they decide cases, the system they use to allocate work between staff (mainly law clerks) and themselves, their work ethic, their psychology, the extralegal influences that play on them. Much less is known about them than about other government officials, both executive and legislative, and other professionals, such as the lawyers who litigate court cases and the members of the various branches of the medical and military professions.

One reason is that, whereas these other professions I've mentioned are also very old, the legal profession, including the judiciary, hasn't changed a great deal, at least from the outside, compared to the other professions. The continuity between Roman law and legal institutions of the third century A.D. and modern law in most of the world, including the United States, is striking. And over this long period of gradual change, judges have developed a strategy of maximizing their autonomy, job security, and power. The strategy has several struts: secretiveness, impartiality (what Aristotle called "corrective justice," often misunderstood by modern jurisprudes), a pretense of passivity ("the law made me do it"), mystification (jargon), and political sensitivity.

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These are survival strategies and shouldn't be disparaged unduly because courts are valuable institutions of governance, and to maintain their power they need the strategies I've listed, though they tend to overuse them.

The ones I want to stress are secretiveness and passivity. Judges are far more reluctant to reveal the inner workings of their institution than other government officials and far more prone to deny the discretionary authority that they wield. Blackstone described English judges as the "oracles of the law," meaning that the law spoke through the judges the way Apollo spoke through the oracle at Delphi, and judges continue to represent themselves—though not by invoking the oracle at Delphi, no longer a familiar figure to Americans—to be transmitters rather than originators.

By being secretive and appearing passive, judges get away with exercising a good deal of power—benign power for the most part, but still power—which is to say discretion to confer real benefits and impose real costs, whereas the judge who mechanically applies the law—who is the law's ventriloquist's dummy—is transmitting rather than exerting power. (Actually that judge will often be fooling himself because often the law is not clear enough to be applied mechanically to the case before him.) Judges find facts, take many cases away from juries and decide the cases themselves, have largely created constitutional law by treating the Constitution's vague phrases as authorization rather than direction, and have done the same with many statutes. But they hide behind a veil of modesty. And they get away with it in part because their staffs, mainly law clerks, are almost as secretive as the judges. Because law is adversarial, secretiveness comes naturally, to judges and their staffs and to lawyers engaged in litigation or negotiation, both being forms of struggle.

How is the veil of secrecy to be penetrated? One tactic is the confessional. Judges will on occasion acknowledge the personal element in judging. The author of this book quotes a famous confessional passage by Cardozo. Earlier, Holmes had made a similar, though somewhat more guarded, confession (well, it wasn't *really* a confession because he was not yet a judge, though when his statement was published he was only months away from becoming one) when he said on the first page of his classic work *The Common Law* (1881): "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories,

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intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

Academic lawyers, notably in the eras of legal realism and critical legal studies, sought without success to strip the veil. Those movements faded, to be replaced by social scientific studies, in political science and later in economics and psychology as well, that sought, for example, by examining judicial behavior, often in statistical terms—correlating for example the political slant of federal judicial decisions with the party of the appointing president—to uncover the real springs of decision, masked by the rhetoric of judicial decision making and often outside the conscious awareness of the judge. This book uses a different technique, that of the interview. Mr. Cohen is a skillful and tenacious, though invariably courteous, interviewer. He has picked as the interviewees federal district judges who have presided in famous, publicity-attracting cases, cases most likely to challenge a judge's fidelity to a passive, formalistic—which is to say traditional—mode of judicial decision making, and he has focused the interviews on those cases.

We learn a good deal about these judges. And one thing we learn is that judges, even when in the hands as it were of a skillful and persistent and unawed interviewer, are very reluctant to acknowledge a personal element in judging even in the most atypical and challenging case. There have been plenty of cases involving the prosecution of con men; but Bernard Madoff was not a run-of-the-mine con man. There have been in the last half century more constitutional cases concerning sex than one can count; but the case in which one of Mr. Cohen's interviewees, Vaughan Walker (incidentally a former student of mine), ruled on the constitutionality of forbidding homosexual marriage was more novel and fraught than any since *Roe v. Wade*. And so with the other cases discussed in the book.

So the judges are guarded, and that is one limitation of the interview method of piercing the veil. But another is the problem of self-knowledge. There is no inconsistency in saying that Judge X is utterly sincere in disclaiming any personal element in his decisions yet some of his decisions cannot be explained in formalistic, but only in personal, terms. There is no inconsistency because few if any people have total self-awareness. Indeed, people are great self-deceivers. Judges' response to the occasional case in

which the conventional guides to decision making don't yield a result is likely to be influenced or even determined by priors (prior beliefs, which is to say beliefs they bring to the case rather than derive from evidence or the other orthodox materials of judicial decision making pressed upon them in the litigation) of which they may be unaware and by basic psychological dispositions, such as attitudes toward authority. And these priors and dispositions may not emerge in an interview because they reside for the most part at the unconscious level of thought.

The reader will learn a great deal about trial judges from this book, but the aura of mystery will remain.

R.A.P.