

## WE LOST IT AT THE MOVIES: THE RULE OF LAW GOES FROM WASHINGTON TO HOLLYWOOD AND BACK AGAIN

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People don't understand what happens to you when you become a judge. When you take that judicial oath, you are transformed. You become a different person. You have a solemn obligation to be totally impartial and fair.

— Third Circuit Judge Edward Becker, testifying at Judge Samuel Alito's Senate confirmation hearing for Supreme Court Justice.

Essentially, *Roy Bean* goes way beyond being a *Dirty Harry* on the range, because there is no rational order to keep in Roy Bean's world; we're supposed to laugh in agreement when he takes a lawbook and tears out the page that doesn't suit his purposes . . . . He is the law, and there is no other, except for fools and weaklings who are "taken in."

— Pauline Kael, reviewing *The Life and Times of Judge Roy Bean*

Politicians pretend that there is a plausible jurisprudence that would not require judges to make their own value judgments. But they are simply wrong; there is no such jurisprudence. Value-free adjudication is not an option.

— Jeremy Waldron, reviewing Ronald Dworkin's *Justice in Robes*

During the Senate confirmation hearings on Judge Samuel Alito's nomination to the United States Supreme Court, some senators voiced concerns about memoranda Alito had written while in practice arguing that *Roe v. Wade*<sup>1</sup> should be overturned.<sup>2</sup> Judge

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1. *Roe v. Wade*, 410 U.S. 113 (1973).

Edward Becker assured the Senate that although Alito had at one time passionately advocated overturning *Roe v. Wade*, his ascension to the bench<sup>3</sup> had transformed him into a different person, and that this person would leave all such passions behind.<sup>4</sup> Alito himself agreed that his prior judicial philosophy was irrelevant to his conduct in future cases, stating that “[t]he judge’s only obligation . . . is to the rule of law, [which means that] in every single case, the judge has to do what the law requires.”<sup>5</sup>

During the hearings on Judge John Roberts’ nomination to the position of Chief Justice of the United States Supreme Court, Roberts similarly endorsed this entrenched notion of the judge as faceless conduit for the rule of law—and of the rule of law itself as a fixed and determinate set of rules. Invoking a well-known baseball analogy, he explained, “Judges are like umpires. Umpires don’t make the rules, they apply them . . . . 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.”<sup>6</sup>

And, with rare exceptions, nobody ever went to a courtroom drama to see the judge. Judges in film and television—if they are acting “appropriately judicial”—are barely noticeable at all.<sup>7</sup> That is, they are playing the role that Judge Becker, Chief Justice Roberts, and Justice Alito evoked in their confirmation testimony: the person who leaves all his prior attitudes behind and is transformed into a computer in robes—discerning the right and wrong of the situation and simply applying the law that is “out there,” and that admits to only one possible outcome. The problem is that this depiction of the

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2. See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 27 (2006) [hereinafter *Alito Confirmation Hearing*] (statement of Sen. Dianne Feinstein).

3. Judge Alito was appointed to the Third Circuit Court of Appeals in April 1990 and remained there until his appointment to the U.S. Supreme Court in January 2006. See *Alito Confirmation Hearing*, *supra* note 2, at 51 (statement of Sen. Frank Lautenberg).

4. See *id.* at 655–56 (statement of Edward R. Becker, Senior J., U.S. Court of Appeals for the Third Circuit).

5. *Id.* at 56 (statement of Samuel A. Alito, Jr.).

6. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) [hereinafter *Roberts Confirmation Hearing*] (statement of John G. Roberts, Jr.); see also Jan Crawford Greenburg, *Roberts Testifies, ‘I Have No Agenda’: Democrats Zero in on Civil Rights, Privacy*, CHI. TRIB., Sept. 13, 2005, § 1, at 1; David G. Savage, *Roberts Sees Role as Judicial ‘Umpire,’* L.A. TIMES, Sept. 13, 2005, at A1.

7. See *infra* text accompanying notes 25–32.

judicial role is not just an artifact of the big and small screen. Members of the lay public—a majority of them, according to a recent survey—are upset about what they perceive to be activist judges.<sup>8</sup> They, too, apparently believe that judges are like umpires.<sup>9</sup>

More surprising, or more disheartening, is the fact that pledging fealty to this same view of the judicial role remains *de rigueur* in the halls of Congress. In this venue, too, the fiction is maintained that the relationship between judge and law ought to be automatic, formulaic, and uninteresting. There is, then, a vast gap between public discourse and imagery on the judicial role and the discourse in the legal community, which regards as uncontroversial the proposition that “a judge’s choice of methodologies and . . . exercise of discretion are imbued with an inescapably political dimension . . . .”<sup>10</sup> This Article explores the connection between the depiction of the judicial role in cultural artifacts like movies and television shows and the very similar caricature of the judicial role that still holds sway in more serious non-fiction venues like Senate confirmation hearings and political campaigns.

This Article will posit the proposition that a feedback loop exists between law and popular culture, and that this loop has consequences for the shape of the legal system. It will explore the judicial role in popular culture, in which the judge is generally depicted either as a neutral or invisible placeholder for the rule of law or as biased, vulgar, or downright villainous. Drawing from legal theory, narrative theory, psychology, and prior work on popular culture and media studies, it will argue that the simplistic and prevailing notion

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8. Martha Neil, *Half of U.S. Sees ‘Judicial Activism Crisis’*: ABA Journal Survey Results Surprise Some Legal Experts, A.B.A. J. EREP. Sept. 30, 2005, at 1, <http://www.abanet.org/journal/redesign/s30survey.html>.

9. *Id.* Ironically, as one umpire has pointed out in an op-ed piece in *The New York Times*, umpires are actually more like judges. See Robert Schwartz, Op-Ed., *Like They See ‘Em*, N.Y. TIMES, Oct. 6, 2005, at A37. Umpires have to interpret the rules in ambiguous circumstances; they “often have no choice but to use discretion;” and they may do so within varying interpretive frameworks. *Id.* According to the author, some are “pitchers’ umpires,” some are “praised by batters,” and some have no strike zone, but take a case-by-case approach—itsself a methodology. *Id.*; see also Joseph Thai, *A Wild Pitch on Eavesdropping*, BOSTON GLOBE, Aug. 2, 2006, at A9; Posting of Jim Lindgren to The Volokh Conspiracy, [http://volokh.com/archives/archive\\_2005\\_09\\_11-2005\\_09\\_17.shtml#1126558476](http://volokh.com/archives/archive_2005_09_11-2005_09_17.shtml#1126558476) (Sept. 12, 2005, 16:54 EST) (quoting Hall of Fame umpire Bill Klem’s comment about whether a pitch was a ball or a strike: “It ain’t nothin’ till I call it.”).

10. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 974 (2002).

of judges and judging that currently dominates the discourse is inherently conservative and hegemonic. The Article concludes that this state of affairs is not simply familiar and comforting, but detrimental to the rule of law and the evolution of the judicial system.

### I. THE POPULAR CULTURE FEEDBACK LOOP

Popular interest in the judicial role spikes occasionally, either because of a particular issue that arouses passion or because of a high profile judicial vacancy, usually a vacancy on the Supreme Court. The last several years have been such a time: the Supreme Court decided a brutally close presidential election,<sup>11</sup> a lower federal court ordered Terri Schiavo disconnected from a feeding tube,<sup>12</sup> and after heated controversy and a few false starts, two vacancies on the Supreme Court were filled.<sup>13</sup> These and other events have fueled an ongoing national conversation about the judicial role, one notable for its intensity and polarization. In this conversation, the stark choice between two unrealistic options—the judge as neutral conduit or umpire and the judge as ideologically driven political activist—was a disturbingly dominant mode of argument. The argument has generated much heat, if not much light: those who believe that judges have devolved into “just another interest group”<sup>14</sup> have advocated a number of measures, some quite draconian, designed to keep judges out of the political arena.<sup>15</sup> Charles Geyh notes, for example, that after the Eleventh Circuit affirmed the order permitting removal of Terri Schiavo’s feeding tube,<sup>16</sup>

[c]onservative Republican[s] . . . offered a rainbow of proposals to curb the courts: impeach the miscreants; strip

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11. See *Bush v. Gore*, 531 U.S. 98 (2000).

12. See *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378 (M.D. Fla. 2005).

13. See Press Release, Supreme Court of the U.S. (Sept. 29, 2005), [http://www.supremecourtus.gov/publicinfo/press/pr\\_09-29-05.html](http://www.supremecourtus.gov/publicinfo/press/pr_09-29-05.html); Press Release, Supreme Court of the U.S. (Jan. 31, 2006), [http://www.supremecourtus.gov/publicinfo/press/pr\\_01-31-06.html](http://www.supremecourtus.gov/publicinfo/press/pr_01-31-06.html).

14. Stephen B. Burbank, *Judicial Independence, Judicial Accountability and Interbranch Relations* 13 (Univ. of Pa. Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 06-29, 2006), available at <http://ssrn.com/abstract=922091>.

15. See Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911 (2006).

16. See *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223 (11th Cir. 2005), *aff’d* 357 F. Supp. 2d 1378 (M.D. Fla. 2005).

their jurisdiction; slash their budgets, disestablish their offices; and deprive Democrats of the power to filibuster nominees of a President committed to appointing “common sense judges who understand that our rights are derived from God.”<sup>17</sup>

In short, when certain judicial philosophies (or judges with certain backgrounds) are portrayed as the norm and others as deviations from the norm, these portrayals shape perceptions, and these perceptions have consequences. Popular culture both fuels and is fueled by these perceptions, and thus needs to be taken seriously.

And how do certain ideologies come to be viewed as neutral, natural, invisible, non-ideological? How do judicial philosophies that do not fit a particular mold come to be viewed as deviant, suspect, inappropriately political? Popular culture<sup>18</sup> plays an important role in this process. For many, popular culture is the primary source of information about the legal system.<sup>19</sup> As Richard Sherwin explains:

Culture provides the signs, images, stories, characters, metaphors, and scenarios, among other familiar materials, with which we make sense of our lives and the world around us. Being part of a community means that we perceive or interpret events in overlapping ways using shared cognitive and cultural tools and materials. Law is such a community, with its own materials and preferred tools of analysis, its own practices and habits of mind. But it is also the case that law’s stories and images and characters leach back into the culture at large. In this way, law is a co-producer of popular culture.<sup>20</sup>

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17. Geyh, *supra* note 15.

18. There is debate about the precise meaning of the term “popular culture.” One definition is the “‘beliefs, practices and wisdom of ordinary people . . . [which] tend[] to crystallize most commonly in print media, popular music, film and television’.” Stuart Weinstein, *Repressed Memory Revisited: Popular Culture’s Impact on the Law—Psychotherapy Debate*, in 7 *LAW AND POPULAR CULTURE: CURRENT LEGAL ISSUES 2004* at 404, 406 (Michael Freeman ed., 2005) (quoting MARGARET THORNTON, *ROMANCING THE TOMES: POPULAR CULTURE, LAW AND FEMINISM* 6 (2002)).

19. Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 *COLUM. J.L. & ARTS* 91, 95 (2005); Burbank, *supra* note 14, at 8.

20. RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* 5 (2000).

Popular culture helps people make sense of the world by making “certain ways of thinking and acting and being seem utterly normal and natural.”<sup>21</sup> This is not to suggest either that popular culture is a monolithic entity or that it necessarily imposes a monolithic view of law. Nevertheless, from the cacophony of media images, there tends to emerge a universe of acceptable, familiar-seeming images—stories and characters which we imbibe, interpret, and at least partially incorporate into our worldview.

These understandings and images become part of a feedback loop. Popular notions of what law is and ought to be, in turn, “contribute[] to the production of law”<sup>22</sup> in manifold ways. Popular notions of how a judge looks and acts and sounds—of what counts as judicial temperament or sound judging—will affect not only those who find themselves in the courtroom as litigants, witnesses, or jurors, but also those who vote in judicial elections, those who debate judicial qualifications, and those who follow or are affected by judicial decisions. Popular notions of judges and judging are part and parcel of evolving notions of judicial power and legitimacy. They will affect, for good or ill, who becomes a judge, who stays a judge, and the allowable scope of judicial power. They will affect the way judges conduct themselves on the bench and, in ways both salutary and unfortunate, the reception and even the content of their opinions.<sup>23</sup>

## II. THE INVISIBLE ICON

The phrase “the rule of law” exerts a strong hold on the popular imagination. It promises integrity, clarity, transparency, and due process. It is often said that the rule of law demands a government of law, not of men. The popular understanding of the judicial role constitutes a literal reading of this aphorism. In the popular imagination, the upright judge is not a person with characteristics

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21. Mezey & Niles, *supra* note 19, at 108.

22. SHERWIN, *supra* note 20, at 18.

23. Professor Burbank argues that it is legitimate and inevitable for courts of last resort “to take account of considerations that bear on the perceived legitimacy and continuing effectiveness of the judiciary as a whole.” Burbank, *supra* note 14, at 15. He distinguishes situations in which courts evade results that are required by positive law, which he calls “political” in a way “difficult to distinguish from the behavior of an elected politician,” from situations in which there is room for discretion, and judges consider the consequences of their decisions for the continuing ability of the court to function properly. *Id.*

and values, but simply a placeholder for the rule of law. He is justice, and not only is he blind, but, like the child covering his eyes in a game of hide and seek, he is also invisible (or so we like to think). Just as his blindfold prevents him from “being swayed by visual recognition,”<sup>24</sup> he himself is allowed few recognizable characteristics that would distinguish him from other judges. If he does have “character,” this is likely an indication that he is at best temperamentally unsuited for the job, and at worst incompetent, biased, or a criminal.

The traditional portrayal of the judge in American popular culture, as David Papke observes, has been as a flat rather than round character: an easily recognizable, stock character who “lacked individualizing detail and was also static.”<sup>25</sup> The default figure of a judge is a middle-aged white male<sup>26</sup> like the judge in *To Kill a Mockingbird*,<sup>27</sup> who occupies space in the galvanizing courtroom scenes but does nothing to advance the plot, or the judge in *12 Angry Men*,<sup>28</sup> who is portrayed as “almost secondary or peripheral.”<sup>29</sup> If he has any character at all, he is wise and fatherly—in the 1950’s *Father Knows Best*<sup>30</sup> omniscient tradition. He does not play favorites, and he does not bring preconceived notions—or any emotions—to the bench. Like the judge in *My Cousin Vinny*,<sup>31</sup> he might be a stickler for procedure and decorum, but he has little to say about substance. In the simplified pop culture lexicon, the portrayal of his lack of favoritism and preconceptions is, at the same time, a portrayal of a de-contextualized cipher—a man without opinions, values, politics, or even a life outside the bench. Indeed, he is the

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24. ANTHONY CHASE, *MOVIES ON TRIAL: THE LEGAL SYSTEM ON THE SILVER SCREEN* 13 (2002).

25. David Ray Papke, *From Flat to Round: Changing Portrayals of the Judge in American Popular Culture* 7 (Marquette Univ. Law Sch. Legal Studies Research Paper Series, Paper No. 06-24, 2006), available at <http://ssrn.com/abstract=902125>.

26. As one author points out, there have recently been a number of “African American actors playing tough, folksy judges.” ROSS D. LEVI, *THE CELLULOID COURTROOM: A HISTORY OF LEGAL CINEMA* 50 (2005). Levi mentions, for example, Ossie Davis in *The Client*, Paul Winfield in *Presumed Innocent*, and Danny Glover in *The Rainmaker*. *Id.* at 48–50.

27. *TO KILL A MOCKINGBIRD* (Universal Pictures et al. 1962).

28. *12 ANGRY MEN* (Orion-Nova Productions 1957).

29. STEVE GREENFIELD, GUY OSBORN & PETER ROBSON, *FILM AND THE LAW* 143 (2001).

30. *Father Knows Best* (CBS television broadcast 1954–1963).

31. *MY COUSIN VINNY* (20th Century Fox et al. 1992).

bench—a piece of furniture: immovable, fungible, and standard-issue. Or, as Judge Posner once complained, he is a potted plant.<sup>32</sup>

In American popular culture, most legal action takes place during dramatic criminal trials.<sup>33</sup> To be sure, there is a small canon of films about civil law, and particularly tort law, though these too are trial films.<sup>34</sup> Trial films are an especially difficult venue in which to raise questions about law, politics, and interpretation because most of the questions they portray are factual and evidentiary in nature. “[T]he trial film’s finale is often an unsophisticated revelation of some hidden essential truth—be it the facts of the case or the law’s inability to assess those facts fairly.”<sup>35</sup>

These films miss a host of opportunities to explore the role of politics in judging. For example, films about state trial courts, in which judges are often elected, elide distinctions between the partisan politics that put certain judges on the bench and keep them there and the political considerations—both high and low—that affect their allegiances and their rulings once on the bench.<sup>36</sup> Such films could include portrayals not only of judges beholden to those who appoint them,<sup>37</sup> but also of judges whose background<sup>38</sup> and values affect their sympathies, consciously or unconsciously.<sup>39</sup> The

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32. Richard A. Posner, *What Am I? A Potted Plant?*, THE NEW REPUBLIC, Sept. 28, 1987, at 23–25.

33. See Stefan Machura & Stefan Ulbrich, *Law in Film: Globalizing the Hollywood Courtroom Drama*, 28 J.L. & SOC’Y 117, 118 (2001) (noting the extent to which American adversary procedure dominates film and suggesting that the judge in Germany would play a different, stronger role); see also Stefan Machura, *Procedural Unfairness in Real and Film Trials: Why Do Audiences Understand Stories Placed in Foreign Legal Systems?*, in 7 LAW AND POPULAR CULTURE, *supra* note 18, at 148.

34. CHASE, *supra* note 24, at 104–19.

35. Jessica Silbey, *Patterns of Courtroom Justice*, 28 J.L. & SOC’Y 97, 111 (2001).

36. For a discussion of some of these influences, see Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1322–24 (1999) [hereinafter Bandes, *Patterns of Injustice*].

37. As one discussion of judges in film points out, AMISTAD (DreamWorks SKG et al. 1997) portrays a judge who is chosen for political reasons under the assumption that he will be sympathetic to the government position, but who displays unexpected independence. GREENFIELD, OSBORN & ROBSON, *supra* note 29, at 148.

38. In MUSIC BOX (Carolco Pictures 1989), the lawyers speculate that the Jewish judge’s background might affect him in a trial involving Nazi war crimes, but this turns out to be a non-issue. LEVI, *supra* note 26, at 47.

39. See, for example, the portrait of Judge Locallo in STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE (2005). See also Bandes, *Patterns of Injustice*, *supra* note 36, at 1321 & n.289 (discussing state court judges who are often

portrayal of the judge in *A Civil Action*,<sup>40</sup> not corrupt but certainly cozy with business, gives a glimmer of how this might be done.<sup>41</sup> Exploring such issues would require acknowledgment of race, class, and ethnicity. It would require recognizing the possibility of an empathetic divide between some judges and some litigants. Media's homogenizing process,<sup>42</sup> however, insures that this rarely occurs. Instead, judges who deviate from the role of invisible icon or wise father do so in ways that are not understandable, not contextualized, but simply wrongheaded. They tend to be partisan bullies like the judge in *The Verdict*;<sup>43</sup> racists like the judge in *Mississippi Burning*;<sup>44</sup> corrupt like the judge in *The Untouchables*;<sup>45</sup> or downright criminal, like the blackmailing judge in *Advise & Consent*,<sup>46</sup> the rapist judge in . . . *And Justice for All*,<sup>47</sup> or the murdering vigilante judges in *Judge Dredd*<sup>48</sup> and *The Star Chamber*.<sup>49</sup> Or sometimes they tend to be comedic partisan bullies like the "doddering old fools" who often preside in the *Rumpole* stories.<sup>50</sup>

Although for reasons of both space and expertise, I cannot give the daytime courtroom dramas the attention they deserve,<sup>51</sup> a couple of observations on that genre are in order. As Steven Kohm points

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former prosecutors or law enforcement officials, and their attitudes toward allegations that Chicago police had been torturing black male suspects).

40. *A CIVIL ACTION* (Touchstone Pictures et al. 1998).

41. As Anthony Chase points out, some aspects of the film's unusual approach may be a function of the fact that the film was based on a non-fictional work. See CHASE, *supra* note 24, at 113–16.

42. JEFFREY SCHEUER, *THE SOUND BITE SOCIETY: TELEVISION AND THE AMERICAN MIND* 36–37 (1999).

43. *THE VERDICT* (20th Century Fox 1982); see also Papke, *supra* note 25, at 20; Silbey, *supra* note 35, at 107–11.

44. *MISSISSIPPI BURNING* (Orion Pictures 1988).

45. *THE UNTOUCHABLES* (Paramount Pictures 1987).

46. *ADVISE & CONSENT* (Otto Preminger Films 1962).

47. . . . *AND JUSTICE FOR ALL* (Columbia Pictures 1979).

48. *JUDGE DREDD* (Hollywood Pictures 1995).

49. *THE STAR CHAMBER* (20th Century Fox et al. 1983).

50. GREENFIELD, OSBORN & ROBSON, *supra* note 29, at 147 (discussing the comic judge, particularly those in the British comic tradition).

51. Happily, others have done so. See, e.g., Steven A. Kohm, *The People's Law versus Judge Judy Justice: Two Models of Law in American Reality-Based Courtroom TV*, 40 *LAW & SOC'Y REV.* 693 (2006); Papke, *supra* note 25, at 29–30 (discussing Judge Judy); Michael M. Epstein, *Judging Judy, Mablean and Mills: How Courtroom Programs Use Law to Parade Private Lives to Mass Audiences*, 8 *UCLA ENT. L. REV.* 129 (2001).

out in a fine article comparing *Judge Judy*<sup>52</sup> with *The People's Court*,<sup>53</sup> *Judge Judy* and the other current examples of the genre are all about personality and not much at all about law:

[T]he official doctrine of the law recedes into the background and the opinions, hunches, and intuition of Judge Judy are pushed to the fore. There are no supporting judicial actors on the program to provide complementary or contrasting viewpoints on the disputes. There is no legal analysis after each case . . . . Instead, this model of law places Judge Judy at the very center of lawmaking, moralizing judgments, and the delivery of justice. In this television "reality," there are no other legal neighbors and there is no other law than the law of Judge Judy.<sup>54</sup>

The notion of law as guiding ideal, organizing framework, or limiting principle is absent in these shows. Or perhaps it is more accurate to say that law is affirmatively banished because the judge's good old-fashioned straight-talking common sense is so obviously superior. These shows focus on personality (and as Papke observes, most of the judges are "over-the-top, authoritarian egomaniacs").<sup>55</sup> Rather than explore the possible connections between personality and legal interpretation, they convey the impression that personality functions as a substitute for legal interpretation, and indeed, for law itself.<sup>56</sup>

What then of representations of the Supreme Court, where momentous legal issues are debated, as any civics lesson should teach? Here, too, the treatment of judges is disappointing. Even in the wake of non-fiction treatments like *The Brethren*<sup>57</sup> and *Closed*

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52. *Judge Judy* (CBS television broadcast 1996–current).

53. *The People's Court* (Warner Bros. Television broadcast 1981–current).

54. Kohm, *supra* note 51, at 703.

55. Papke, *supra* note 25, at 32.

56. Kohm argues that the older daytime courtroom shows, such as *The People's Court*, embody a very different conception of law, one which emphasizes the importance of due process as a guiding principle. Kohm, *supra* note 51, at 700–01. Generally he describes the judges in these shows as hewing to the model of "unwitting conduit" for a set of laws which are viewed as "inflexible neutral principles." *Id.* at 705–06. However, he notes that in *The People's Court*, other courtroom actors and even people on the street are given their say about the judge's ruling. *Id.* at 702. The ensuing dialogue, however, seems to establish that the law may be morally or ethically ambiguous, rather than legally ambiguous. *Id.* at 702–03.

57. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979).

*Chambers*<sup>58</sup> (not to mention the debacle of *Bush v. Gore*<sup>59</sup>), the topic of how Supreme Court justices discuss, negotiate, and reach decisions has remained below the radar.<sup>60</sup> Conflicts between justices are portrayed as characterological rather than ideological. For instance, as Laura Krugman Ray points out, *First Monday in October*<sup>61</sup> is essentially a romantic comedy about two bickering opposites who find they are “a perfect match.”<sup>62</sup> In contrast, as she notes, *The Pelican Brief*<sup>63</sup> is interesting in that it portrays justices as having ideological differences, albeit rather broad-brush differences (e.g., protector of the environment versus enemy of the environment) and albeit differences that are “subject to manipulation by sinister external forces . . . .”<sup>64</sup> Similarly, the television series *First Monday*,<sup>65</sup> though it depicts the Court deciding several controversial issues, “portray[s] the Court as unabashedly political, suggesting . . . that politics . . . is the only relevant factor in the resolution of a case.”<sup>66</sup> *Judgment at Nuremberg*,<sup>67</sup> although it depicts a judicial struggle to determine the right course of action, deals with momentous issues of positive versus natural law,<sup>68</sup> rather than issues of interpretation in situations in which the law is indeterminate, or, as Judge Posner says, in the “open area.”<sup>69</sup>

A counterexample—a situation in which conflicting jurisprudential ideas are effectively dramatized—appears in *The People vs. Larry Flynt*.<sup>70</sup> Even on the heels of several courtroom

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58. EDWARD LAZARUS, *CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT* (1998).

59. 531 U.S. 98 (2000).

60. Adam Burton, *Pay No Attention to the Men Behind the Curtain: The Supreme Court, Popular Culture, and the Counter-majoritarian Problem*, 73 *UMKC L. REV.* 53, 67 (2004).

61. *FIRST MONDAY IN OCTOBER* (Paramount Pictures 1981).

62. Laura Krugman Ray, *Judicial Fictions: Images of Supreme Court Justices in the Novel, Drama, and Film*, 39 *ARIZ. L. REV.* 151, 188 (1997).

63. *THE PELICAN BRIEF* (Warner Bros. Pictures 1993).

64. Ray, *supra* note 62, at 197.

65. *FIRST MONDAY* (CBS Television 2002).

66. Burton, *supra* note 60, at 77.

67. *JUDGMENT AT NUREMBERG* (Roxlom Films Inc. 1961).

68. Moreover, as one discussion of the film argues, “the film looks at the role of judges in enforcing laws . . . [but provides] surprisingly little actual articulation [of the War Crimes Panel Chairman’s reasoning].” GREENFIELD, OSBORN & ROBSON, *supra* note 29, at 154.

69. Richard A. Posner, *Foreword: A Political Court*, 119 *HARV. L. REV.* 31, 40 (2005).

70. *THE PEOPLE VS. LARRY FLYNT* (Columbia Pictures 1996).

scenes involving Flynt engaging in colorfully outrageous behavior, and (along with his lawyer) barely surviving a sniper attack outside the courtroom,<sup>71</sup> the portrayal of the argument before the Supreme Court in *Hustler Magazine, Inc. v. Falwell*<sup>72</sup> holds its own as gripping drama. This scene focuses on the argument by Flynt's attorney, and features an active bench with several judges exploring the scope and weight of competing constitutional values with obvious difficulty.<sup>73</sup> The scene effectively depicts the Court's determination to focus on the abstract First Amendment issue, despite distaste for the speaker, the magazine, and the content of the speech (a depiction of Jerry Falwell having incest with his mother in an outhouse).<sup>74</sup> Nevertheless, the unanimous Supreme Court decision is presented as vindicating the film's unambiguous viewpoint that Flynt was entirely in the right.<sup>75</sup> The nod to interpretive leeway in the Supreme Court argument scene might be better interpreted as a dramatic buildup toward the Court's discovery of the correct legal answer.

In short, popular culture offers few models of judges honestly grappling with difficult substantive legal issues in a context in which more than one right answer is possible. It offers few examples of political or ideological commitments, or even background and life experience, as legitimate influences on legal interpretation. These influences serve to label a judge "colorful": a kook, an eccentric, a political hack, a manipulator, or a crook.<sup>76</sup> And though we might tolerate colorful characters in the movies or on television, we are meant to understand that they are clearly an inappropriate influence in the actual halls of justice, where, as Justice Alito assured the

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71. *Id.*

72. 485 U.S. 46 (1988), *rev'g* *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986).

73. THE PEOPLE VS. LARRY FLYNT, *supra* note 70. I owe thanks to Michael Asimow for drawing this film, as well as REVERSAL OF FORTUNE (Sovereign Pictures et al. 1990), and PENALTY PHASE (New World Television 1986), to my attention as films containing richer portrayals of judges and the judicial role. See also Francis M. Nevins, *Tony Richardson's* The [sic] Penalty Phase: *Judging the Judge*, 48 UCLA L. REV. 1557, 1580 (2001) (describing the judge in *Penalty Phase* as facing a moral crisis over whether to destroy his career in a "foredoomed attempt to save the life . . . of a warped and violent white racist who . . . demonstrably committed a cold-blooded and brutal murder").

74. THE PEOPLE VS. LARRY FLYNT, *supra* note 70.

75. *Id.*

76. See *supra* text accompanying notes 36–56.

Senate, “in every single case, the judge has to do what the law requires.”<sup>77</sup>

### III. WHAT WE SHOULD TALK ABOUT WHEN WE TALK ABOUT JUDGES

There are many pressing questions about the scope of the judicial role that ought to be publicly discussed. Federal judges are given life tenure and salary protection, yet are situated “within an institution that is exposed and vulnerable to a wide array of controls by the political branches.”<sup>78</sup> How much latitude should the political branches have in shaping and guiding the judiciary—at the confirmation stage, at the impeachment stage, and in between? To what extent is it appropriate to evaluate judicial candidates by reference to their political and ideological values? To what extent is it appropriate for a judge to bring his political and ideological values to bear in evaluating a case? Or, more accurately, is it possible to decide a case without reference to such values? And what are the costs of assuming these decisions are value-free and of failing to inquire into candidates’ ideological and political views? Politics, in some sense of the term, will always play a role in judicial decision-making. That is inevitable. In some respects it is desirable; though when it is desirable is precisely the question that should be debated.

The conventional discourse on these issues proceeds along two tracks which are in direct, albeit unacknowledged, opposition. On the one hand, the discourse proceeds as a high-minded fantasy of the sort Judge Becker described: the judge newly born, a slate wiped clean, a paragon of fairness unsullied by passion or politics.<sup>79</sup> On the other, it proceeds as a frank recognition of hardball partisan politics. It is common for presidential candidates to promise to nominate judges with certain ideologies, as President Bush promised to nominate judges in the mold of Justices Scalia and Thomas.<sup>80</sup> During

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77. *Alito Confirmation Hearing*, *supra* note 2, at 56 (statement of Samuel A. Alito, Jr.).

78. Ferejohn & Kramer, *supra* note 10, at 977.

79. *See Alito Confirmation Hearing*, *supra* note 2, at 655–56 (statement of Edward R. Becker, Senior J., U.S. Court of Appeals for the Third District).

80. *See, e.g.*, David G. Savage, *More than Just the Oval Office at Stake*, LATIMES.COM, Oct. 2, 2000, <http://edition.cnn.com/2000/ALLPOLITICS/stories/10/02/latimes.scotus/index.html> (noting that “Bush sa[id] he would choose new justices in the mold of Antonin Scalia and Clarence Thomas”). *But see The Situation Room* (CNN television broadcast Oct. 12, 2005),

the Roberts confirmation hearings, amid accusations of political activism on the bench, Senator Lindsey Graham said: “Elections matter. The president won. He told us what he was going to do, and he did it”—nominate a conservative to the court.<sup>81</sup> How do these discourses co-exist, and why isn’t there more discussion about the tension between them?

As Judge Posner observed, “[c]onstitutional cases . . . are aptly regarded as ‘political’ because the Constitution is about politics and because cases in the open area are not susceptible of confident evaluation on the basis of professional legal norms.”<sup>82</sup> To unpack what is meant by “political” in this sentence, and then to discuss the ways in which politics *ought* to shape constitutional interpretation, requires an ongoing, nuanced, and careful discussion. Though judges make value judgments, we hope they will not merely impose their own preferences. But the distinctions between value judgments and preferences are not bright-line differences.<sup>83</sup> As I have argued elsewhere, “[p]olitics, ideologies and theories of governance and interpretation shade into one another.”<sup>84</sup> For example, consider the complex mix of political values reflected in the *Erie*<sup>85</sup> opinion:

The goals *Erie* allowed [Justice Brandeis] to achieve—improving the social efficiency and practical fairness of the system, and bringing the government into proper constitutional balance—were dear to his heart and his Progressive values. They were also fully consistent with his vision of the Constitution, which was, in turn, deeply intertwined with his emotional and political commitments.<sup>86</sup>

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available at <http://transcripts.cnn.com/transcripts/0510/12/sitroom.02.html> (asserting that Bush, in fact, never made such a promise).

81. Savage, *supra* note 6 (quoting Sen. Lindsey Graham).

82. Posner, *supra* note 69, at 40 (referring to cases not directly controlled by precedent).

83. See Jeremy Waldron, *How Judges Should Judge*, N.Y. REV. BOOKS, Aug. 10, 2006, at 58 (reviewing RONALD DWORKIN, *JUSTICE IN ROBES* (2006)).

84. Susan Bandes, *Judging, Politics, and Accountability: A Reply to Charles Geyh*, 56 CASE W. RES. L. REV. 947, 950 (2006) [hereinafter Bandes, *Judging, Politics, and Accountability*]; see also Susan Bandes, *Erie and the History of the One True Federalism*, 110 YALE L.J. 829, 882 (2001) [hereinafter Bandes, *Erie*] (reviewing EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000)) (illustrating this point with the example of Justice Brandeis and his opinion in the *Erie* case).

85. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

86. Bandes, *Erie*, *supra* note 84, at 882.

Justice Brandeis can be judged partially by his craftsmanship—his skill at drafting opinions, and his scrupulousness in use of precedent—but ultimately, his measure as a judge will be taken in light of his jurisprudence, and whether it advances “the values we have chosen as a society.”<sup>87</sup> The political discussion about, for example, whether the jurisprudence espoused by Justices Scalia and Thomas will advance salutary societal values and whether additional judges should be appointed who share their jurisprudential philosophy, is exactly the discussion a society devoted to the rule of law ought to conduct.

The preceding paragraph used the term “politics” as a way of looking at the world—a theory about the balance between government and the governed and about the balance among governmental branches. But the term “politics” can also refer, less loftily, to the grubby realm of party politics. It would be fruitful to explore the relation between political parties and judging: for example the effect of politics on who gets to be a judge or the ways in which party affiliation influences judicial conduct on the bench. There is, increasingly, “striking evidence of a relationship between the political party of the appointing president and judicial voting patterns.”<sup>88</sup> Whether this bespeaks a tight fit between party affiliation and jurisprudential philosophy, or suggests a loyalty or even a sense of indebtedness on the part of the appointee is an interesting question. Whether loyalty and indebtedness reflect a kind of politics that should not shape judicial decisions is also an interesting question, one that cannot be discussed without first teasing apart the subtle variations subsumed under the term “politics.”

*Bush v. Gore* is an example of a judicial decision that was, arguably, inappropriately political in every sense of the term sketched above.<sup>89</sup> First, it may have been an improper incursion by the judiciary into the role of the political branches.<sup>90</sup> Second, there

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87. *Id.* at 883; see also EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 305 (2000).

88. CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 147 (2006).

89. Louise Weinberg, *When Courts Decide Elections: The Constitutionality of Bush v. Gore*, 82 B.U.L. REV. 609, 615–16 (2002).

90. *Id.* at 636–38.

were many aspects of the case that suggested the decision violated the rule of law in service to the lowest, least appropriate form of politics—the desire to see a particular set of litigants, and indeed a particular political party, win a particular case.<sup>91</sup> And not just any case but one determining which political party would rule the country, and, along the way, appoint additional judges to the federal courts (including the very court deciding the matter—the Supreme Court itself).<sup>92</sup> In short, terms like “politics” and “political” encompass a range of conduct from broad ideological and constitutional influences to decisions based solely on the identity of the parties or the self-interest of the decision-maker. If we use the word “political” too broadly and indiscriminately, we will not even attempt to distinguish low or partisan politics from arguably more legitimate political influences.

Moreover, to have a useful discussion about the role of the judge, it would be helpful to distinguish state from federal court.<sup>93</sup> The role of the state judiciary, which is not subject to Article III constraints and protections, consists of both appointed and elected judges, and is less often involved in federal constitutional interpretation, raises a different set of concerns.<sup>94</sup> Discussions of the preference for judicial neutrality and the aversion to judicial activism generally begin by considering the countermajoritarian difficulty.<sup>95</sup> The countermajoritarian difficulty (and I do not suggest that it *is* or *ought to be* a difficulty, merely that it has for some time been perceived as one)<sup>96</sup> is said to arise from the fact that federal judges are appointed, rather than elected.<sup>97</sup> Since the judicial branch is in

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91. *Id.* at 645–46.

92. See, e.g., Jed Rubenfeld, *Not as Bad as Plessy. Worse.*, in BUSH V. GORE: THE QUESTION OF LEGITIMACY 20 (Bruce Ackerman ed., 2002); Vincent Bugliosi, *None Dare Call It Treason*, THE NATION, Feb. 5, 2001, at 11; Bandes, *Judging, Politics, and Accountability*, *supra* note 84, at 959–60.

93. Such a discussion would have been quite germane and helpful, for example, in both the *Schiavo* case and *Bush v. Gore*, since both concerned the scope of a state supreme court’s power to construe state law.

94. See, e.g., Bandes, *Judging, Politics, and Accountability*, *supra* note 84, at 949–55; Kathryn Abrams, *Some Realism About Electoralism: Rethinking Judicial Campaign Finance*, 72 S. CAL. L. REV. 505, 512 (1999).

95. See Burton, *supra* note 60 (discussing the countermajoritarian difficulty and its effects on portrayals of the U.S. Supreme Court).

96. See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002).

97. See *id.*

this sense “undemocratic,” or at least unaccountable (since federal judges are granted life tenure), it ought not act as a “super-legislature” and impose its own preferences.<sup>98</sup> State judges do not have life tenure and are often elected.<sup>99</sup> A nuanced discussion of the constraints on state and federal judges ought to take note of this difference.

It would also be useful to distinguish lower courts from the United States Supreme Court, since concepts like adherence to the rule of law and activism have very different meanings in the two venues. The role of precedent in the Supreme Court is a topic that tends to get aired in confirmation hearings, though not necessarily in a way that conveys how much room there is to “adhere” to *Roe v. Wade*, for example, while interpreting it in a variety of ways, or even undercutting it.<sup>100</sup> A less obvious point is that interpretive leeway, ambiguity, and ideology play a role not just on the high court but in lower court decision-making as well. Indeed, even legal scholars tend to underestimate the amount of discretion employed by lower court judges.<sup>101</sup> Lower courts often decide cases in which precedent does not dictate a particular outcome. As Jeremy Waldron succinctly put it, “[E]ven when he applies a precedent, the judge still has to make value judgments of his own.”<sup>102</sup> Moreover, in the majority of cases, no reviewing court will determine definitively whether the “wrong” decision was made.<sup>103</sup> It is accurate to say, though, that ambiguity and interpretive leeway play virtually no role in popular representations of lower court decision-making.

In the degraded common discourse, none of these distinctions can be made and none of these questions can be addressed because

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98. Savage, *supra* note 6 (reporting that the Republicans on the Senate Judiciary Committee complain that the Supreme Court has become a “super-legislature”).

99. Bandes, *Judging, Politics, and Accountability*, *supra* note 84, at 5, 16.

100. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (reaffirming yet diluting the central holding of *Roe v. Wade*, 410 U.S. 113 (1973)); see also Maura Reynolds, David G. Savage & Richard Simon, *Alito Tells Skeptical Democrats He Would Keep an Open Mind*, L.A. TIMES, Jan. 11, 2006, at A1; *Confirmation Hearings on Federal Appointments Before the S. Comm. on the Judiciary*, 108th Cong. 55–75 (2003), excerpted in *Senators Pressed Roberts, Got Few Legal Opinions*, CHI. TRIB., July 21, 2005, § 1, at 14; Roundtable, *Thomas on Trial: Did High Court Nominee Run from His Past or Tell It Like It Is?*, ROCKY MOUNTAIN NEWS, Sept. 22, 1991, at 93.

101. See Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 295–308 (2005).

102. Waldron, *supra* note 83, at 54.

103. Bandes, *Judging, Politics, and Accountability*, *supra* note 84, at 957–58.

all of politics is placed in one basket and labeled unacceptable. This coarse categorization creates a strong incentive to deny the role of politics in judging. The result, as I will discuss later, is not to bar politics from the bench, but to enshrine and insulate one particular type of politics and ideology—the type that appears neutral, natural, and apolitical. This is the most dangerous type of politics of all because it not only claims pride of place, but declares itself invisible, inevitable, and beyond the reach of democratic discourse.

#### IV. WHY WAL-MART WON'T SELL JON STEWART'S BOOK

The missing elements both in the media portrayals of the judicial role and in the popular discourse are ambiguity and complexity. As I will argue later, these are distinctly liberal qualities and their absence skews the discourse on the judicial role in a distinctly conservative direction. This section explores several factors that account for the failure of mainstream media to portray judges as complex characters grappling with complex judicial issues. I suggest that the answer is over-determined. The requisites of a number of genres converge. These include the perceived expectations of film and television audiences, the countermajoritarian difficulty and the concomitant demands of the judicial voice, and, on the most basic level, deeply rooted psychological preferences for certainty and narrative cohesion.

One salient fact about judges in the media jumps out immediately: media, as suggested above, rarely distinguish state judges from federal; elected judges from appointed; judges who must apply law handed down from a superior court from judges actually in a position to make law.<sup>104</sup> Most film and television judges are in trial court, and they do mostly fact-finding (and the occasional in-chambers scolding). The substantive legal issue they rule on most often is guilt or innocence. In short, they are state criminal court trial judges. Thus, the countermajoritarian difficulty would seem to have little relevance to their conduct. It is more accurate to say that the requisites of the genre demand that a “proper” judge should not impose his preferences, period.

The more intractable problem arises from deep divisions about what counts as “preference.” This is the crux of the matter, of

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104. See *supra* text accompanying notes 36–42.

course. In order to have a real discussion about this issue, we would need to unpack notions of ideology, politics, interpretation, and the scope of judicial review. We would need to discuss the influences that shape a judge's worldview—his life experiences, religious and political commitments, empathies, antipathies, and blind spots. We would need to discuss the extent to which these are germane to decision-making and the extent to which it is possible, or for that matter desirable, to “rise above” them or “put them aside.” We would need to accept that there is no one right answer, no “rule” of law that tells the judge how to do “what is required,” and no such thing as a judge who comes to the bench as a blank slate, ready and able to decide every case “correctly.” We would need to accept the indeterminacy of the Constitution and other legal texts, and begin from the premise that there is a range of reasonable or responsible opinion about legal issues. This is a terrifying prospect. It is bad enough that we've had to give up on the comforts of *Father Knows Best*<sup>105</sup> and *Leave It to Beaver's*<sup>106</sup> Ward Cleaver. Do we really need to give up the silver-haired omniscient judge as well?

As Richard Sherwin has written, we oscillate between two extremes: “radical disenchantment (or ‘skeptical postmodernism’) on the one hand and a reactionary nostalgia for Enlightenment rationality and control on the other.”<sup>107</sup> There is little more frightening than giving up on omniscience. The idea that this is not an either/or choice, that the opposite of omniscience need not be anarchy, is not only a threatening idea, but a sophisticated one. It imposes a responsibility on the populace to debate and take seriously questions about the nature of our legal institutions and the proper scope and content of constitutional governance. As I will discuss shortly, this is hardly a filmic or TV-friendly debate. But the problem is no media creation.

Judges adopt the mantle of omniscience for a number of reasons. First, judges may not realize that their perspective is partial or open to question. The example of the “nine old men” of the *Lochner* court illustrates this problem.<sup>108</sup> Sometimes judges hold beliefs that shape

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105. *Father Knows Best*, *supra* note 30.

106. *Leave It to Beaver* (CBS television broadcast 1957–1963).

107. SHERWIN, *supra* note 20, at 8.

108. *See* Bandes, Erie, *supra* note 84, at 857–58.

their “most deeply held assumptions and first principles”<sup>109</sup> but that do not appear to be beliefs at all. Rather, they seem neutral and natural—just part of the way the world works. It has been argued that the *Lochner* court was in precisely this position; its beliefs about liberty of contract did not seem to qualify as ideological value choices at all until the world began to change, exposing the beliefs as contingent and contested.<sup>110</sup>

Whether or not judges understand that they are choosing among options, they have strong reasons to couch their opinions as if no such choice exists. I have elsewhere drawn on the work of Robert Ferguson and Robert Cover to explore these reasons.<sup>111</sup> As Ferguson argues, “the judicial opinion . . . seeks to achieve the rhetoric of inevitability, a rhetoric which admits of no freedom of choice on the part of the judge.”<sup>112</sup> Cover explains:

[T]his rhetoric must give the impression “of bowing . . . to the inexorable force of crystal clear demands,” so that regardless of his decision in any case, the judge may experience himself as a moral person who is simply bowing to irresistible forces that transcend his own conscience or sense of justice.<sup>113</sup>

Thus, the decision to adopt this tone may be deeply ingrained or it may be a pragmatic means of warding off cognitive dissonance or accusations of partiality. As Ferguson explains, this formalist approach is “not just a legal philosophy that can be put aside,” but “an innate psychological impulse,” an integral part of the genre of the legal opinion.<sup>114</sup> It is “a way to reassure the reader that [judges] are rising above normal human predilections and that their conclusions are compelled by logic;”<sup>115</sup> as well as “to convince a

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109. *Id.* at 858.

110. *Id.*; see also Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 108 (1991).

111. See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 377–78 (1996).

112. *Id.* (quoting Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 213–16 (1990)) (footnote omitted).

113. *Id.* at 378 (quoting ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 233 (1975)).

114. Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 208 (1990).

115. Bandes, *Erie*, *supra* note 84, at 868.

democratic society that independent judges work within the spirit of justice for all.”<sup>116</sup>

Moreover, the judge without “human predilections” is a synecdoche for a rule of law that operates in a purely cognitive realm. Questions of character traits, preferences, perspectives, and choices raise the specter of a rule of law overtaken by emotion. The emotion/reason dichotomy has been central to law’s most cherished self-conception: a system that can be applied without human fallibility.<sup>117</sup>

In short, judges clothe themselves in the garb of inexorability, and we like it that way. As a Wal-Mart spokeswoman said when the Wal-Mart chain refused to sell Jon Stewart’s *America (the Book)*<sup>118</sup> because it contained a photo of nine nude figures with the heads of the Supreme Court justices pasted on them, “[A] majority of our customers may not be comfortable with that image.”<sup>119</sup> Yet, if their customers are representative, they, like a majority of Americans in a recent poll, cannot name more than one Supreme Court justice.<sup>120</sup> Inexorability, infallibility, and invisibility go hand in hand. A judge with defining features or strong character raises all the uncomfortable questions about whether he has an “agenda.” The vaunted anonymity of the Supreme Court—our inability to watch the justices deliberate on television, and—all but once or twice—even to hear their voices over the radio, protects not only the dignity of the office (or so it is claimed), but also the image of the omniscient functionary: faceless, fungible, and fair.

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116. Ferguson, *supra* note 114, at 208.

117. Susan A. Bandes, *Introduction*, in *THE PASSIONS OF LAW* 1, 6–7 (Susan A. Bandes ed., 1999).

118. *AMERICA (THE BOOK): A CITIZEN’S GUIDE TO DEMOCRACY INACTION* (Jon Stewart et al. eds., 2004).

119. Edward Wyatt, *Banned in Wal-Mart*, N.Y. TIMES, Oct. 22, 2004, at E4 (quoting Karen Burk).

120. They can, however, name two of Snow White’s seven dwarfs. Zogby International, *New National Poll Finds: More Americans Know Snow White’s Dwarfs Than Supreme Court Judges*, <http://www.zogby.com/Soundbites/ReadClips.dbm?ID=13498> (last visited Jan. 28, 2007). The Zogby poll also found that twice as many could identify the most recent winner of *American Idol*, Taylor Hicks, as could identify the most recent justice confirmed to the U.S. Supreme Court, Samuel Alito. *Id.*

## V. THE BINARY SYSTEM

Either/or choices are attractive, even seductive: a government of law versus a government of men; good versus evil; right versus wrong; hero versus villain; reason versus emotion; neutrality versus bias; the judge as potted plant versus the judge as super-legislator. Ambiguity and indeterminacy make many people anxious. As psychologist Jerome Kagan observed, there is a hardy preference for stable essences and simple ideas.<sup>121</sup> The rule of law is a simple idea—a stable essence—at least if we read out all the tensions inherent in the concept. The tensions between consistency and fairness, and between individual autonomy and the police power, cannot be captured in simple, stable ideas. They require an ongoing conversation about competing values. Such conversations are challenging under the best of circumstances. And these are *not* the best of circumstances. In current times, we ought to be having a deadly serious discussion about the function of the rule of law. For example, does it require deference to the President's executive order setting up military commissions at Guantanamo Bay, or does it require that the commissions themselves adhere to norms of due process?<sup>122</sup> If the latter, are international norms relevant or binding, or do we look solely to domestic precedent?<sup>123</sup> And is the answer one that can evolve in light of changing circumstances, such as increasingly serious threats to the safety of the country? Movies and television have not proved to be the best of vehicles for exploring these issues, so crucial to the shape of our democracy.

The visual mass media have, on the whole, flattened and oversimplified complex legal issues such as the scope of the judicial role. Yet it would be both simplistic and mistaken to claim that there is something inherent in the media that leads to these flat character portrayals and black or white treatments of issues. First of all, some of the drive toward simplicity can be ascribed to the pull of deeply rooted generic narrative conventions. The desire for a definitive ending, a clear moral, and recognizable heroes and villains long predates the advent of movies and television. There has always been

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121. JEROME KAGAN, *THREE SEDUCTIVE IDEAS* 67 (1998) (“Three of the hardest preferences are for ideas that imply stable essences, possess symmetry, and are simple.”).

122. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

123. *See, e.g., Symposium: “Outsourcing Authority?” Citation to Foreign Court Precedent in Domestic Jurisprudence*, 69 ALB. L. REV. 645 (2006).

a “deep and basic human need for narrative coherence . . . . Narrative stabilizes, or appears to stabilize, a frighteningly complex world.”<sup>124</sup> A well-formed, satisfying narrative tends to track the expectations of the genre.<sup>125</sup> Therefore, as I have suggested, “[w]e can begin from the assumption that narrative coherence is itself a conservative force, in that it creates verisimilitude and a sense of meaning by drawing on familiar cultural and narrative expectations.”<sup>126</sup>

Moreover, the expectations and limitations of the legal genre may differ depending on the medium. For example, mainstream television series need sympathetic characters who will keep viewers tuning in.<sup>127</sup> In contrast, film may have more room to challenge viewer expectations.<sup>128</sup> Thus, Naomi Mezey and Mark Niles found that as to network television,

there are clear good guys, bad guys, and law usually works pretty well . . . . In contrast . . . [t]here are . . . a greater percentage of films that allow for negotiated or oppositional readings, readings that find the moral framework more ambiguous, and the legal system more unreliable, more random, more corrupt.<sup>129</sup>

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124. Bandes, *Patterns of Injustice*, *supra* note 36, at 1318.

125. *See id.* at 1310.

126. Susan Bandes, *Running Away with the Circus: Untapping the Subversive Potential of Civil Litigation's Narratives*, 50 DEPAUL L. REV. 575, 581 (2000).

127. This is a dictate with which non-network television, notably HBO, has been playing in interesting ways, for example in *The Wire*, *Deadwood*, and *The Sopranos*. Cartoons may also be allowed more room for subversion. *See, e.g.*, Kevin K. Ho, Comment, “*The Simpsons*” and *the Law: Revealing Truth and Justice to the Masses*, 10 UCLA ENT. L. REV. 275, 279 (2003).

128. However, a long running television series may have more room to develop a range of characters, rather than, for example, one “prototypical” judge. *Law & Order* takes advantage of this possibility, showing its prosecutors appearing before a number of different judges with different approaches to law. Thus one author argues that

*Law & Order* episodes regularly discuss whether the judge’s role is to interpret the law as written or to make law by novel interpretations of statutes or establishing new precedents . . . [and thus] the series is a good example of how legal fiction can provide a better, more realistic, understanding of why judges are asked to, or are simply tempted to, make laws, than many public affairs forums where the legitimacy of such judicial law making is simply denied.

TIMOTHY O. LENZ, CHANGING IMAGES OF LAW IN FILM & TELEVISION CRIME STORIES 29 (2003). Moreover, it may be possible for a long running show on network television to develop a single judicial character who more realistically reflects the ambiguities of judging. Papke refers to Judge Amy Gray in the series *Judging Amy* (CBS television broadcast 1999–2005) as a “‘rounded’ judicial character.” Papke, *supra* note 25, at 26. Both this show and *Picket Fences* (CBS television broadcast 1992–1996) are beyond the scope of my current expertise.

129. Mezey & Niles, *supra* note 19, at 114.

The question of expectations and limitations is itself complicated. In the media context, these come from several sources, and the perceived requisites of ratings, box office, and advertising loom large.<sup>130</sup> As viewers, are we getting what we want, or, as Michael Moore vividly suggested in *Bowling for Columbine*,<sup>131</sup> in sequences both poignant<sup>132</sup> and hilarious,<sup>133</sup> are we being insufficiently challenged? Another source of limitation, as Mezey and Niles discuss, was the infamous Hays Code, which was in force from 1934 to 1968 and which regulated not only on-screen kissing but also the way in which law could be portrayed.<sup>134</sup> For example, it stated that “[t]he courts of the land should not be presented as unjust.”<sup>135</sup> As the authors note, “much of the content of contemporary popular American film continues to fit the crude model of ideology reinforcement that we associate with Hollywood film during the Hays Code and with the vast majority of network television.”<sup>136</sup>

In short, it is tricky to discuss the *requisites* of media or properties *inherent* in media. There are pressures; there are concerns; there are expectations; and sometimes there are even legal limitations, but there is also choice. I was struck, for example, by Pauline Kael’s review of the 1962 film *Billy Budd*,<sup>137</sup> directed by Peter Ustinov and starring Ustinov as Captain Vere, Terence Stamp as Billy, and Robert Ryan as Claggart.<sup>138</sup> Kael liked the movie, but she was troubled by Ustinov’s direction and performance:

As Ustinov presents the film, the conflict is between the almost abstract forces of good (Billy) and evil (Claggart)

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130. *See id.* at 167–70. It is beyond the scope of this Article to consider the commercial considerations (for example, the increasing consolidation of media outlets) that drive decision-making as to what gets produced, aired, and marketed.

131. BOWLING FOR COLUMBINE (Dog Eat Dog Films et al. 2002).

132. Moore included a moving and eye opening sequence about a little boy in Flint, Michigan, who shot another child. *See id.* He showed why his mother was not at home supervising her child, examining both what she needed to do under welfare-to-work policies and the dearth of affordable day care for her child while she was working. *See id.*

133. Moore filmed a comic sequence designed as a riff on shows like *COPS* (Fox Network television broadcast 1989–current), which tend to show young black males being forcefully subdued after allegedly committing violent crimes. *See BOWLING FOR COLUMBINE, supra* note 131. His sequence depicted the arrest of a white collar criminal. *See id.*

134. Mezey & Niles, *supra* note 19, at 135–37.

135. *Id.* at 136.

136. *Id.* at 139.

137. BILLY BUDD (Anglo-Allied Pictures et al. 1962).

138. PAULINE KAEL, *Billy Budd, in I LOST IT AT THE MOVIES* 234, 234–39 (1965).

with the Captain a human figure tragically torn by the rules and demands of authority. Obviously. But what gives the story its fascination, its greatness, is the ambivalent Captain . . . . Vere is the evil we *can't* detect: the man whose motives and conflicts we can't fathom. Claggart we can spot, but . . . it is the Captain, Billy's friend, who continues the logic by which saints must be destroyed.<sup>139</sup>

Kael saw no reason why Captain Vere could not have been portrayed as a more ambiguous character.<sup>140</sup> She noted that in the novella, there was a question about his soundness of mind, and there were concerns about his motivations for the unseemly haste with which he ordered Billy executed.<sup>141</sup> This was not a story about a casualty of justice, but about the nature of justice and the nature of the human beings who must administer it, sometimes in terrible circumstances.<sup>142</sup> Kael wished the movie told this more complex, important, and affecting story—the story she believed Melville was trying to tell.<sup>143</sup> To her, there was nothing inherent in the medium to prevent this; it was merely an issue of how the director and actors interpreted the text.<sup>144</sup> Of course, the movie and the review are more than forty years old;<sup>145</sup> perhaps our tolerance for complexity has diminished since then.

All caveats aside, however, there are certain characteristics of modern American media that pose hurdles to complex treatment of judges and judging. Jeffrey Scheuer's *The Sound Bite Society*<sup>146</sup> examines many of these hurdles. Although it does so primarily in the context of television, much of its analysis is generally applicable to audio-visual media, which, as Todd Gitlin says, “share a texture” and come together in a “torrent [that] is seamless.”<sup>147</sup> As Scheuer explains, the “grammar” of television is driven by both technological and commercial considerations, and it is difficult to separate the

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139. *Id.* at 236–37.

140. *See id.* at 236.

141. *Id.* at 236–37.

142. *See id.* at 239.

143. *Id.* at 238–39.

144. *Id.*

145. *Id.* at 234.

146. SCHEUER, *supra* note 42.

147. TODD GITLIN, *MEDIA UNLIMITED: HOW THE TORRENT OF IMAGES AND SOUNDS OVERWHELMS OUR LIVES* 7 (2001).

two.<sup>148</sup> He argues that a central characteristic of television is its abhorrence of boredom, confusion, and stasis.<sup>149</sup> “[It] has a deep structural bias toward appearances and *concreteness*—immediacy in time and space—and against generality or abstraction.”<sup>150</sup> This bias renders substance much easier to depict than process: the image of a judge wrongly depriving Terri Schiavo of sustenance is much easier to depict, for example, than the image of a judge properly deferring to the language and intent of a statute or the credibility determination of a lower court. Television resists complex messages, “militat[ing] against a vision that emphasizes . . . abstraction, . . . ambiguity and nonbinary thinking.”<sup>151</sup> It “rewards simpler messages,”<sup>152</sup> emphasizing individuals rather than structures, groups, or social movements, and stock characters rather than complex, ambiguous ones.<sup>153</sup> Thus, its preference is for sharply delineated heroes and villains engaging in dramatic conflicts that can be visually depicted in simple terms and definitely resolved. It has an aversion to “root causes and long-term effects, context and environmental factors, abstract ideas or arguments, generalities [or] evolutionary change.”<sup>154</sup>

These preferences present serious obstacles to the creation of complex portraits of judges and judging. The media thrive on conflict, and the simplest conflicts to depict are those between the good judge and the bad judge or the right decision and the wrong decision (on the merits). As it happens, many interest groups thrive on precisely the same sort of conflict: they arouse passion by decrying particular decisions on the merits, irrespective of precedent, process, or other rule of law values. What gets lost is the depiction of men and women deliberating in good faith on complex social issues that have no definitive answers but afford a spectrum of reasonable approaches. Indeed, the very notion of *deliberating* is part of the problem: sitting on a bench and thinking just isn’t very filmic. What also gets lost is the notion that judges are human and that, though

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148. SCHEUER, *supra* note 42, at 68.

149. *Id.* Gitlin makes precisely the same point about films. See GITLIN, *supra* note 147, at 71–117.

150. SCHEUER, *supra* note 42, at 73.

151. *Id.* at 9–10.

152. *Id.* at 34.

153. *See id.* at 75.

154. *Id.* at 74.

frightening, this is also unavoidable and even desirable. We don't really want an army of Ward Cleaver clones deciding every case.

#### VI. PAYING ATTENTION TO THE MAN BEHIND THE CURTAIN

The crucial point underlying this discussion of judging is that these media conventions, and the portrayals they spawn, are not value-neutral. Even the invisible iconic judge—the baseline against whom all other judges are judged—has both defining characteristics and a judicial philosophy. But these are so deeply ingrained, and so thoroughly taken for granted, that they simply go without saying.<sup>155</sup> The demographic norm is a white male norm, and deviations from that norm appear just that—deviant. The judge appears neutral to the extent he exhibits no characteristics that depart from this norm. Noticeable emotion, an instinctive empathy or lack of empathy toward particular litigants, reference to one's background influences and their effect on the decisional process,<sup>156</sup> or the acknowledgment of ambiguity or uncertainty are examples of characteristics that would set the judge apart from the norm. As I have argued, judges exhibiting such characteristics tend to be dismissed, marginalized, demonized, or otherwise tagged as defective.<sup>157</sup>

When the judicial role is portrayed as divided into two starkly different camps—the invisible placeholder for the rule of law and the injudicious character—both sides of the divide play an essential role. The latter role—emotional, partial, noticeable, corrupt, or criminal—reaffirms for us what the good judge is not. As Patricia Ewick and Susan Silbey have so eloquently argued, the subversive shores up the

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155. Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2308-09 (1990) [hereinafter Bandes, *The Negative Constitution*].

156. However, recent confirmation hearings provide dramatic examples of a twist on this generic expectation: the conservative judge who offers his humble background as assurance—implicit or explicit—that he is more compassionate than he might seem. Clarence Thomas, for example, invoked his boyhood in a tenement in segregated Pin Point, Georgia, and the advice he received from one early mentor to “just along the way, help someone who is in your position.” Ronald Taylor, *Nominee Invokes His Humble Beginnings*, WASH. TIMES, Sept. 11, 1991, at A1; see also Fred Barbash, *Thomas Molds Hearing to Play Up His Heritage; Tactic Holds Off Tough Scrutiny of His Record*, S.F. CHRON., Sept. 11, 1991, at A1; Lee May, *Hometown Support Is Rock-Solid: Nominee Seen as a Hero Wronged*, L.A. TIMES, Oct. 12, 1991, at A6. Similarly, Samuel Alito, whose record raised concerns that he had little empathy for workers, the poor, or other less than powerful groups, talked about his Italian immigrant father who grew up in poverty, and his own upbringing in “an unpretentious, down-to-earth community.” Jonathan Zimmerman, *Alito's Mythical Feel-Good America*, L.A. TIMES, Jan. 28, 2006, at B17 (quoting Alito); see also Jeffrey Rosen, *Judicial Exposure*, N.Y. TIMES BOOK REV., Jan. 29, 2006, at 27.

157. See *supra* text accompanying notes 40–50.

hegemonic.<sup>158</sup> The traditional, “ideal” conception of the rule of law, in which “the law attends to what is general and universal” and is “animated by aspiration for disinterested decision making and impersonal treatment,”<sup>159</sup> is so obviously contradicted by the frequent behavior of actual judicial actors that it could not be sustained if it were the only story available.<sup>160</sup> Thus, it works in tandem with the conception of law as “a pragmatic, perhaps vulgar, account of the routine practices of biased, differentially endowed, and fallible actors.”<sup>161</sup> These parallel discourses work together to preserve the status quo by picturing departures from the idealized version as isolated and particularized. As Ewick and Silbey put it:

[F]irsthand evidence and experience that might potentially contradict [the] general truth is excluded as largely irrelevant. By effacing the connections between the concrete particular and the transcendent general, hegemonic ideologies conceal social organization. As a consequence, power and privilege are preserved through what appears to be the irreconcilability of the particular and the general.<sup>162</sup>

If the neutral judge is one who sees the legal world as simple and determinate, then not only the vulgar, comic, or corrupt judge, but any judge who doesn't fit the mold, is acting improperly. Thus the judge who acknowledges complexity, indeterminacy, and perspective is branded as non-neutral or ideological. Indeed, the fiction of the neutral judge helps elide the contradiction, discussed earlier, between “judge as blank slate” and “judge as spoils of the election.” If a reference to judges in the mold of Justices Scalia and Thomas is used and understood as code for “judges who will simply apply the law as written and not impose their own preferences,” then it becomes a non-ideological act to appoint people sharing this philosophy. Under this understanding, appointing judges like Roberts and Alito is not a political act because their jurisprudence is not a philosophy at all; it is simply proper, unmarked, unbiased judging.

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158. See PATRICIA EWICK & SUSAN SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 226–27 (1998).

159. *Id.* (what they call “before the law”).

160. *See id.*

161. *Id.* at 227 (what they call “with the law”).

162. *Id.* at 231.

But, as Jeffrey Scheuer puts it, “how complex a world one chooses to see . . . is a quintessentially ideological decision.”<sup>163</sup> In other words, the preference for a simple, black-and-white worldview is itself an ideological preference. Dangerously—and with a powerful assist from popular culture—this preference becomes normalized. Alternative approaches become tainted. The worldview that encompasses abstract notions like systemic causes and collective harms and rights, rather than merely concrete constructs like individual autonomy and simple causal chains, is liberal in nature. It permits a more expansive view of governmental or corporate accountability, since wrongdoing by entities is often causally complex.<sup>164</sup> It makes it more likely that those challenging the status quo will gain access to the courts, since plaintiffs seeking to challenge entrenched interests may assert shared or intangible harm.<sup>165</sup> It permits an expanded view of government liability, since it does not demand that rights and duties conform to those recognized under the common law.<sup>166</sup>

Likewise, the judicial philosophy that accepts ambiguity and indeterminacy and admits to the possibility of a broad range of good faith opinion is essentially liberal in nature. And that philosophy is then placed in the basket of “ideological, political, activist” judging, and compared, to its great disadvantage, to the ideology-free, value-neutral judging that supposedly characterizes those who describe themselves as textualists. In this view, an ideological judge is one who is open to claims that challenge the status quo, and the claims themselves (e.g., civil rights claims) are repackaged as special interest pleadings, class warfare, or ideological posturing. And thus, when Justice Alito was asked his views on civil rights and other aspects of his jurisprudential philosophy, he and his defenders argued that it would be wrong for him to answer.<sup>167</sup> They depicted the questions as demands to engage in low politics or to make unsavory promises to take care of special interests.<sup>168</sup> Senator Hatch argued

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163. SCHEUER, *supra* note 42, at 16.

164. See Susan Bandes, *Not Enough Blame to Go Around: Reflections on Requiring Purposeful Government Conduct*, 68 BROOK. L. REV. 1195, 1197–98 (2003).

165. See Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 250–58 (1990).

166. See Bandes, *The Negative Constitution*, *supra* note 155, at 2291–93.

167. See Savage, *supra* note 6.

168. See *id.*

that the Senate should apply “a judicial, not a political, standard.”<sup>169</sup> Senator Brownback railed against the idea that “spots on the Supreme Court [are] reserved for certain ideologies . . . causes or interests.”<sup>170</sup> And Justice Alito explained that a judge cannot have an agenda, only a “solemn obligation” to the rule of law.<sup>171</sup>

In short, the very idea of a jurisprudential philosophy is positioned as an activist idea—a deviation from the norm. The effect in the Alito and Roberts confirmation hearings was to privilege, normalize, and insulate a particular jurisprudential philosophy—one that sees protection of civil rights as an agenda and one that rejects viewpoint epistemology, ambiguity, or the evolution of legal thought as ideological. And an additional irony—or bonus, depending on where one stands—is that an essential part of this normalized ideology is its very rejection of the idea of keeping an open mind. As Justice Thomas once proudly declared, “I’m not evolving.”<sup>172</sup> And thus, putting such a judge on the bench may be, for his supporters, a gift that keeps on giving.<sup>173</sup>

In these ways, the popular culture feedback loop poses a real threat to the Court’s countermajoritarian function, and to perceptions of law’s legitimacy in general. In the popular version of the American judicial system, both on the big and small screen and in the wider theater of governmental and public debate, protection of entrenched interests and dominant ideologies is equated with the rule of law. And the very act of raising alternative conceptions of the role of the courts is marked as ideological and agenda-driven. Alternative voices exist, both in the public discourse and, occasionally, in the movies and on television. It is just very difficult to hear them.

As lawyers and legal academics, we have something important to contribute, and even a chance of being heard. Although there is much to debate about the proper scope of judging, there are some notions to which no serious lawyer subscribes. One is that all any judge has to do, in any case, is simply “what the law requires.”

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169. Charles Babington & Amy Goldstein, *Alito on Day 1: ‘A Judge Can’t Have Any Agenda’: Court Nominee to Be Questioned by Senators Today*, WASH. POST, Jan. 10, 2006, at A1.

170. *Id.*

171. *Id.*

172. Clarence Page, *Extending an Olive Branch (with Pits) to Justice Thomas*, CHI. TRIB., June 3, 1998, at 19 (quoting a remark Justice Thomas is said to have made in his chambers).

173. See SUNSTEIN, SCHKADE, ELLMAN & SAWICKI, *supra* note 88, at 247.

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*WE LOST IT AT THE MOVIES*

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There are reasons why some of those who know better are willing to perpetuate this caricature, but no good reasons—at least none that are worth the costs. This is theater with consequences, and it is our obligation to play a larger role.

