

POLITICAL TRUST, PUBLIC JUSTIFICATION, AND JUDICIAL OFFICE

Paul B. Miller *

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I - INTRODUCTION

Recently, theorists have revived the age-old idea that, in democracies, government is good where public officials live up to norms of political trust. In revived form, the idea receives a new twist: government is good where officials act as good fiduciaries of the public and, by extension, officials are trustworthy (or more so) where subject to fiduciary legal constraints.¹ Elsewhere, I have lamented the juridification and, with it, the narrowing and desiccation of ideas about political trust in some fiduciary theories of government.² I have also suggested that fiduciary theorists would do better to focus on questions that draw links between their normative jurisprudential claims and work of republican political philosophy on representative government.³ Questions like: What does it mean to say that public offices are held on trust, with powers of public office to be executed representatively for the public? What are the positive indicia of representative action? What are the moral criteria of *good* representation? The interest held by these questions extends to

* Robert and Marion Short Professor of Law, Associate Dean for International and Graduate Programs, and Director of the Notre Dame Program on Private Law, Notre Dame Law School; Professeur invité, Faculté de droit, Université Paris – Panthéon-Assas (Fall 2022, at the time of writing). I am grateful for comments from Arthur Applbaum, Blake Emerson, Nikolas Kirby, and Jane Mansbridge and from participants in the Workshop on Good Government hosted by Harvard University’s Kennedy School of Government. Email: paul.miller@nd.edu

¹ See the essays collected in Evan J. Criddle *et al.* eds., *Fiduciary Government* (New York: Cambridge University Press, 2018).

² Paul B. Miller, “Principles of Public Fiduciary Administration,” in *Boundaries of State, Boundaries of Rights*, ed. Anat Scolnicov and Tsvi Kahana (Cambridge: Cambridge University Press, 2016), 251-270; Samuel L. Bray and Paul B. Miller, “Against Fiduciary Constitutionalism,” *Virginia Law Review* 106 (2020): 1479.

³ Paul B. Miller, “Fiduciary Representation,” in Criddle *et al.* eds., *Fiduciary Government*, 21; Paul B. Miller, “Political (Dis)Trust and Fiduciary Government,” in Paul B. Miller and Matthew Harding, eds., *Fiduciaries and Trust: Ethics, Politics, Economics and Law* (Cambridge: Cambridge University Press, 2020).

those addressed here: about how judges prove worthy of the trust reposed in them, and how they make and give effect to law through conduct that is genuinely representative.

This line of inquiry might seem inauspicious. Some have long had difficulty with the notion that unelected judges are public representatives.⁴ Those who allow it often do so without comment on how judicial power is wielded representatively.⁵ So, too, fiduciary theorists have struggled to show that judges have peculiarly “fiduciary” functions to discharge for the public, precisely because the private law exemplars upon which they draw are fiduciaries who wield power under mandates of representation.⁶

Not incidentally, skepticism of judicial power is perennial, arising for different reasons and often from opposite, often politically partisan, poles.⁷ The notion that judges hold offices on trust as representatives of the public might seem especially odd to American skeptics of judicial power given deep-seated divergences on adjudication that cleave American legal thought. Consider two opposing camps. The first - led by originalists and other textualists - is preoccupied with legal determinacy and judicial constraint, reflecting a distrusting skepticism (bordering on hostility) toward judicial discretion on the supposition that determinacy is a prerequisite of the law’s capacity to bind.⁸ The second - led by legal realists and various heirs - is preoccupied with legal

⁴ For some history (and a counternarrative), see Samuel Freeman, “Constitutional Democracy and the Legitimacy of Judicial Review,” *Law and Philosophy*, 9 (1990): 327; for critical discussion, see Stephen B. Burbank, “Judicial Independence, Judicial Accountability, and Interbranch Relations,” *Georgetown Law Journal*, 95 (2007): 909. For a trenchant critique of judicial review partly on the basis that it is democratically illegitimate, see Jeremy Waldron, “The Core of the Case Against Judicial Review,” *Yale Law Journal* 115 (2006): 1346.

⁵ There are, of course, exceptions. See Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2006).

⁶ For discussion, see Ethan J. Leib, David L. Ponet and Michael Serota, “A Fiduciary Theory of Judging,” *California Law Review* 101 (2013): 699 and Paul B. Miller and Andrew S. Gold, “Fiduciary Governance,” *William and Mary Law Review* 57 (2015): 513, 567-570.

⁷ Skepticism of judicial power is, arguably, but one manifestation of wider skepticism of power wielded within branches of government at remove from direct democratic legitimation. Consider, for instance, parallel skeptical arguments levied against the “administrative state.” See Philip Hamburger, *Is Administrative Law Unlawful?* (University of Chicago Press, 2014). I am grateful to Blake Emerson for emphasizing this point.

⁸ For critical discussion, see William Baude, “Originalism as a Constraint on Judges,” *University of Chicago Law Review* 84 (2017): 2213.

indeterminacy and judicial discretion, underlain by distrust of the appearance of legal justification, rooted in conviction that judicial discretion, despite pretenses to legality, is typically moved by extra-legal forces.⁹ Ironically, despite the antithetical positions that divide them, both camps suppose that judges can act representatively only where they give effect to determinate law and neither welcomes a trust-based understanding of judicial role morality.

The merits of a trust-based analysis of judges as public representatives may, then, not be obvious, especially in the United States. But that might be a good thing, for orthogonality might help one to see excesses in entrenched positions in American legal thought: one side overstating, the other understating, the determinacy of law; one side prone to denialism about discretion, the other missing the sense in which wide judicial discretion can be politically legitimate and properly juridical, being exercised representatively on the basis of practical reasons that the law makes publicly available.¹⁰

In this Chapter, I have eight aims. First, to explain what it means for the public to demonstrate trust, of two different varieties, in judges. Second, to explain the sense in which judges act representatively. Third, to identify several judicial virtues and to explain their significance to fitness for judicial appointment and public assessment of the trustworthiness of judges. Fourth, to examine the relationship between public justification and representativeness in adjudication. Fifth, to explain the sense in which law is, at once, pervasively determinate and pervasively indeterminate whilst being legally determinable consistent with the rule of law. Sixth, to note the sense in which judicial discretion is pervasive even if ordinarily properly legal (i.e., constituted

⁹ For sympathetic discussion, see Brian Leiter, "Legal Indeterminacy," *Legal Theory* 1 (1995): 481; for critical treatment, see Ken Kress, "Legal Indeterminacy," *California Law Review* 77 (1989): 283.

¹⁰ Leading accounts of the political legitimacy of official discretion have relatively little to say about judicial offices. See, e.g., Arthur Isak Applbaum, "Democratic Legitimacy and Official Discretion," *Philosophy & Public Affairs*, 21 (1992): 240.

by, and subject to, peremptory guidance supplied by law) and hence amenable of public justification. Seventh, to emphasize that judicial discretion entails risk of abuse, rendering generalized social trust in judges *and* realization of the rule of law equally dependent upon judicial good faith. Eighth, and lastly, to explain connections between judicial virtue, judicial good faith, the rule of law, and trust, noting that significant erosion in generalized social trust in judges has negative implications for the rule of law.

II – POLITICAL TRUST, JUDICIAL OFFICE, AND JUDICIAL VIRTUES

A. *Political Trust*

It has been suggested that powers of government in a democracy are premised on a distinctive political morality of trust, understood behaviorally in terms of acts of entrustment.¹¹ Moreover, this form of trust is distinctive: it is not a mere extrapolation of the nature and normativity of interpersonal trusting behavior. Whereas interpersonal trust is associated with trusting bonds (reflecting trusting attitudes) between intimates or acquaintances on matters of personal significance, political trust is different in its circumstances, indicia, and objects. Political trust refers to trusting behaviors demonstrated collectively by citizens toward public officials, most of whom will be strangers.¹² Demonstrations of political trust are usually made in circumstances of incomplete information, being premised not on direct observation of evidence of personal trustworthiness but rather upon public information about agencies and institutions, candidates, and officials. Furthermore, the foci of political trust are inherently public, being a matter of the proper discharge of official roles and associated powers in the public's interest.

¹¹ See generally John Dunn, "Trust and Political Agency," in Diego Gambetta, ed., *Trust: Making and Breaking Cooperative Relations* (New York: Sage, 2000).

¹² On collective trust and trust in strangers, see Annette Baier, "Trusting People," *Philosophical Perspectives*, 6 (192): 137.

These characteristics are so divergent from those of interpersonal trust that one might question whether political trust is a variety of trust at all.¹³ But, at least as a matter of democratic political morality, the notion that government is *entrusted* with authority and power for the benefit of the public is intuitively appealing. It supplies an evocative frame within which to articulate general normative standards for the exercise of governmental powers (meeting a trust reposed) and correlative expectations (expectations of a public being well served in the execution of public offices).

John Locke viewed political trust as an implication of representative government, suggesting that governmental powers must, in a democracy, be exercised in the spirit of the trust implicit in a commission rendered to an incumbent government by a body politic.¹⁴ Madison and other founding figures likewise suggested that American democracy was born of the ashes of revolution from a desire for representative government, to be carried on by those who would meet the public's trust through conduct responsive to its interests.¹⁵ While contemporary republican theory is often skeptical about political trust (misleadingly taken to imply passive acquiescence in official discretion), other scholarship draws a line between the facticity of political trust (i.e., the extent to which lived experience of democratic government is in fact characterized by trust) and normative ideals of representative government (i.e., whether representative government implies that political representatives ought to act as if they enjoy commissions on trust, whether or not trust obtains).¹⁶

¹³ For critical discussion, see Rom Harré, "Trust and its Surrogates: Psychological Foundations of Political Process," in Mark E. Warren, ed., *Democracy and Trust* (New York, Cambridge University Press, 1999).

¹⁴ John Dunn, "The Concept of 'Trust' in the Politics of John Locke," in Richard Rorty, J.B. Schneewind and Quentin Skinner, eds., *Philosophy in History* (Cambridge: Cambridge University Press, 1984).

¹⁵ Philip Pettit, "Republican Theory and Political Trust," in Valerie Braithwaite et al., eds., *Trust and Governance* (New York: Sage, 1998); Brian P. Levack, "John Locke and Trust in Government," in his *Distrust of Institutions in Early Modern Britain and America* (Oxford: Oxford University Press, 2022).

¹⁶ See, e.g., Marc J. Hetherington, "The Political Relevance of Political Trust," *American Political Science Review*, 92 (1998): 791.

It is, I think, telling that the most stirring references to political trust come from strands of republican political theory.¹⁷ Political trust resonates with familiar republican accounts of the morality of legal and political authority as rooted in representation. Mechanisms and rituals of the investiture of power in public officials in democracies lend themselves to characterization in terms of a trust reposed and undertaken.¹⁸ Likewise, accountability: the moral and juristic logics of political representation suggest accountability to citizens, who exercise popular sovereignty partly through authorization and political discipline of representatives.¹⁹ Finally, concerns about domination find ready expression as moral defects of representation that involve abuse of trust (e.g., as vulnerabilities to exploitative, negligent, or capricious exercise of powers held on trust).²⁰

The connections between political trust, republicanism and representative government mean that political trust tends to be associated with elected office. Government through elected office implies *direct* relationships of representation of the sort favored within republican thought. By contrast, republican thought has greater difficulty with the notion of unelected officials as representatives. Familiar efforts to articulate the democratic *bona fides* of judicial office make the case in functional terms, presenting judges as a bulwark against caprice and oppression in the exercise of all forms of governmental power. While some have attempted to explain how judicial review of legislation can hew to republican values, mitigating counter-majoritarian problems,²¹

¹⁷ Pettit, “Republican Theory and Political Trust.” See also Evan J. Criddle, “Liberty in Loyalty: A Republican Theory of Fiduciary Law,” *Texas Law Review* 95 (2017): 993.

¹⁸ Paul Horwitz, “Honour, Oaths, and the Rule of Law,” *Canadian Journal of Law and Jurisprudence* 32 (2019): 389; Matthew Festenstein, “Political Trust, Commitment, and Responsiveness,” *Political Studies* 68 (2019): 446.

¹⁹ For critical analyses of variables impacting the effectiveness of accountability, see Cortney S. Rodet, “An Experiment in Political Trust,” *Journal of Behavioral and Experimental Economics* 57 (2015): 17 and Satoshi Kasamatsu and Daiki Kishishita, “Endogenous Political Trust and Political Accountability” *Journal of Politics* 86 (2024): 358.

²⁰ See Gerald J. Postema, “Trust, Distrust, and the Rule of Law,” in Paul B. Miller and Matthew Harding, eds., *Fiduciaries and Trust: Ethics, Politics, Economics and Law* (Cambridge: Cambridge University Press, 2020). See also Criddle, “Liberty in Loyalty.”

²¹ See Cass R. Sunstein, “Beyond the Republican Revival,” *Yale Law Journal*, 97 (1988): 1539 and Jerry Mashaw, “As If Republican Interpretation,” *Yale Law Journal*, 97 (1988): 1685.

republican theorists have been amongst the most vocal of critics of judicial power,²² advocating a judicial ethics in which restraint figures as an uber-norm.

I acknowledge that unelected judges are, necessarily, remote from democratic legitimation rooted in constituent power.²³ Unelected judges are not public representatives in the familiar sense of acting under a commission given directly by an enfranchised public, in the manner that an agent acts for a principal. Yet I maintain that in democracies judicial offices should nevertheless be understood as representative and as requiring genuinely representative conduct, consistent with a relational morality of political trust.

B. Judicial Office and Political Trust

The starting point lies in breaking free of a narrow model of trust. In philosophical literature, trust is often understood *transactionally*. Loosely inspired by the work of Annette Baier, behavioral trust is said to have a triadic structure: it arises where one person (A) trusts another person (B) with discretionary power in the care of some interest (C) that is important to A such that A necessarily places reliance on B.²⁴ This model has been influential because it supplies a simple yet tractable depiction of the relational dynamics of interpersonal trust and seems adaptable to collective trust. Another advantage is that it does not commit one to any particular, potentially controversial, conception of what “trust” consists in.

The difficulty lies with the misleading suggestion that trust always arises in a transactional way, through bilateral conduct whereby one reposes trust and another undertakes it. This suggestion is problematic because it encourages one to see trust only in interactions that mimic the triadic structure. Furthermore, the model reduces trust to authorization, such that one “finds”

²² Richard Bellamy, *Political Constitutionalism* (Cambridge: Cambridge University Press, 2007); Jeremy Waldron, “The Core of the Case Against Judicial Review.”

²³ For discussion, see Freeman, “Constitutional Democracy and the Legitimacy of Judicial Review.”

²⁴ Annette Baier, “Trust and Antitrust,” *Ethics* 96 (1986): 231.

political trust only where citizens directly authorize occupation of a public office and exercise of associated powers, typically through electoral demonstrations of trust. Even in respect of elected officials, this view is problematic given the implication that officials have authority and accountability relative to their constituents but not a wider public.

Missing in the triadic model is a fourth variable: (A) (entrusting party) trusts (B) (entrusted party) in respect of (C) discretionary power over a person, property or some other important interest, (D) *on the understanding that power will be exercised for a particular purpose or set of purposes*.²⁵ This fourth element captures the sense in which trust relationships are socially *purposive*, with other elements being reframed to account for deviations from a norm of trust invested transactionally. Transactional elements, where found, reflect use made by parties of formal and informal mechanisms through which voluntary obligations of trust might be incurred. But obligations of trust, and our understanding of what counts as compliance with them, are phenomena that can be made sense of only in light of the purposiveness of trust.

Given that political trust is a central case of collective trust, and of trust between strangers, one might not need much convincing that *this* form of trust is inherently purposive. After all, collective trust arises where collaboration and coordination are required (and its absence is felt as a precipitate or consequence of failed collaboration or coordination). Demonstrations of trust in these contexts enable us to join efforts and investment in social practices that are plainly purposive.

Furthermore, unlike interpersonal trust, which is more readily modeled transactionally, pertinent conduct (e.g., conduct construed as implicating an invitation, demonstration, receipt, acceptance, and/or vindication of trust) is often more attenuated and diffuse in collective trust;

²⁵ Compare Katherine Hawley, “Trust, Distrust and Commitment,” *Noûs* 48 (2014): 1 and Allison Hills, “Trustworthiness, Responsibility and Virtue,” *Philosophical Quarterly* 73 (2023): 743.

indeed, the latter arguably includes phenomena not amenable to transactional modelling at all (e.g., “automatic” or inherited trust).

With this in mind, I suggest that one ought to view political trust as a feature of all public offices, however filled, in recognition that they are indelibly impressed with public purposes and an expectation of fidelity to same. On this view, political trust is implied by the very concept of an office in democratic systems of government (whether an *individual* officeholder is trustworthy or has been invested with trust in an attitudinal sense is a different matter, as I explain in Part V).

C. Some Normative Upshots: Public Purposes of Judicial Office & Judicial Virtues

As might be evident, the above account has normative upshots that draw on republican political morality. But before I turn to those in Part IV, I shall here introduce some wider claims. I begin with characterization of public purposes attached to judicial offices.²⁶ I then outline a virtue-based account of judges’ character and behavior as indicia of fitness for office, understood relative to its purposes.

The public purposes of judicial offices in democracies that, like ours, feature written constitutions and judge-made law are: first, to provide for the interpretation and/or to enforce valid legislated laws; second, to provide for interpretation and upholding of the constitution through judicial review of government action alleged to contravene the constitution; third, to enable the declaration, enforcement, and development of the common law where not preempted; fourth, to provide for the public hearing and redress of grievances recognizable in equity and to provide for the development and dispensation of equity where not preempted; and fifth, to establish, define and abide jurisdictional limits that define the authority of courts to decide on questions of law and

²⁶ Here, I draw inspiration from the work of Brad Wendel on role morality for lawyers. See W. Bradley Wendel, “Public Values and Professional Responsibility,” *Notre Dame Law Review*, 75 (1999): 1.

equity, and to provide for the policing of these limits in respect of subordinate courts, thereby protecting the separation of powers.²⁷

In presenting this list, I do not mean to deny controversy over how judges should understand these purposes. That would be absurd, for there is obviously deep disagreement about methods of constitutional interpretation, and about the kinds of inequity that ground the exercise of equitable jurisdiction, to give just two examples. The point is not that there's no controversy over how one ought to *understand* purposes attached to judicial offices; it is that we can agree on what some of these purposes *are*. Furthermore, the above list is meant not to be definitive or exhaustive, but rather reasonably comprehensive and plausible.

How does one prove morally fit for judicial office? I think that the bedrock of judicial role morality is best conceived in terms of virtues: excellences of character strongly correlated with role fulfillment. I here simply endorse Larry Solum's influential account, according to which the virtues prized in a judge include: (1) *judicial incorruptibility and sobriety* – demonstrated in a refusal to entertain considerations of personal advantage, pecuniary, political or otherwise, when discharging one's functions as a judge, as well as sound regulation of one's desires (including desires for honor); (2) *judicial courage* – shown in steadfastness about making legally indicated (required or well-justified) decisions, especially where unpopular; (3) *judicial temperament and impartiality* – reflected in sound regulation of one's emotions and maintenance of neutral disposition toward parties to a dispute; (4) *diligence and carefulness* – shown in commitment to properly discharging the burdens of office, especially where associated demands are high, competing demands are present, and progress is difficult; (5) *judicial intelligence and learnedness*

²⁷ This statement of the purposes of judicial office is consistent with similar accounts of the importance of reason-giving and public justification to judicial role morality. See, for a recent example, Darrell A.H. Miller, "Historical Analogy and the Role Morality of Reason-Giving," *Duke Law Journal Online*, 73 (2024): 233, 236-240.

– having and/or developing intelligence and requisite knowledge of applicable law; and (6) *craft and skill* – a demonstrated ability to communicate with candor and effectiveness in the courtroom, in and across chambers, and through public reasons for judgment.²⁸

I don't claim that the above account is perfectly rendered. Rather, I invoke another plausible sketch that is valuable in that it permits articulation of normative upshots of the idea that judges execute their offices as a matter of political trust. I would note two upshots, in particular: *first*, that like all public offices, judicial offices are not self-executing, so if the purposes that animate them are to be realized at all, they will be realized through practical deliberation and behavior that evidences fidelity to purpose; and *second*, that possession of the above-noted virtues is a measure of fitness for judicial office, being correlated with fidelity to the public purposes of judicial office *as well as* success in their realization, just as correlative vices signal lack of fitness and are predictive of poor performance or abuse of powers of office.²⁹

III – THE EXECUTION OF JUDICIAL OFFICES: ADJUDICATION AS REPRESENTATIVE ACTION

A. *Representation, Political and Otherwise*

Judges in democracies, like other public officials, hold offices constituted and defined by law. Hence, the question whether and in what sense judges are representatives is as much one of law as it is of the normative significance of facts about social and political practices.³⁰ This difference is overlooked in discussions about politics and adjudication. It is often assumed that judges are not and cannot be representatives if unelected. Implicit is the further assumption that

²⁸ Lawrence B. Solum, "The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection," *Southern California Law Review*, 61 (1988): 1735; Lawrence B. Solum, "Virtue Jurisprudence: A Virtue-Centred Theory of Judging," *Metaphilosophy*, 34 (2003): 178.

²⁹ On which, see further Lawrence B. Solum, "Judicial Selection: Ideology versus Character," *Cardozo Law Review*, 26 (2004): 659 and Lawrence B. Solum, "A Tournament of Virtue," *Florida State University Law Review*, 32 (2004): 1365.

³⁰ See Nicole Roughan, "Office-holding and Officiality," *University of Toronto Law Journal*, 70 (2020): 231.

the only modality of public representation is political representation, grounded in mandates conveyed by way of the exercise of constituent power.

Both assumptions are, I think, questionable. Representation is a cluster concept that has several distinct meanings.³¹ One can be a legal representative without also being a political representative. While this is obviously true of representation enabled by private law, it is also true of representation structured by public law. Reflection on some basic features of legal representation might allow one to see how political representation is often undergirded by, without being coterminous with, legal representation.

As was true of political trust, if for different reasons, accounts of representation tend to overemphasize transactional elements. In the case of trust, those elements were facts suggestive of bilateral entrustment. In the case of representation, they are mechanisms of authorization. The assumption is that one must identify, for each relationship of representation, some founding transactional moment (i.e., an originating and regulative act, or chain of acts, of authorization). For legal representatives, it might be consent, contract, or the proper invocation of a general power-conferring legal rule. For political representatives, it is a matter of having been duly elected.

The habit of associating representation with authorization is understandable because it reflects the influence of evocative philosophical treatments. Notably, in the *Leviathan*, Thomas Hobbes suggested that representatives “bear the person” of those who have authorized them to act on their behalf.³² For Hobbes, authorization is, at once, central to the legitimacy of a claim to

³¹ As emphasized in Hanna Pitkin, *The Concept of Representation* (University of California Press, 1967).

³² “[A] *Person*, is the same that an *Actor* is, both on the Stage and in common Conversation; and to *Personate*, is to *Act*, or *Represent* himselfe, or another; and he that acteth another, is said to beare is *Person*, or act in his name ... and is called in diverse occasions, diversely; as a *Representer*, or *Representative*...” Thomas Hobbes, *Leviathan* (Richard Tuck, ed.) (Cambridge: Cambridge University Press, 1996): 112.

represent another and the lynchpin of attribution rules, whereby consequences of acts undertaken by a representative are attributed to principals at law and/or as a matter of social practice.

Quite apart from this, transactional elements are (a) relatively easy to identify in rituals of authorization; (b) commonly treated in law as essential to the legal validity of a mandate of representation; and (c) echoed in mechanisms meant to secure accountability in representation, as well as in our conception of defects of representation (e.g., of acting *ultra vires* a mandate). Indeed, authorization is essential to varieties of representation enabled by law. Some of these varieties are, in turn, associated with political representation.

However, legal and political representation are not *reducible* to mechanisms of authorization.³³ Representation is purposive and thus performative: it is something to be *done and accomplished* – to be practiced, recursively, or achieved – through performance of a role, execution of an office, or action upon a mandate. Put otherwise, authorization to represent is given in contemplation of it being *borne* by a representative through conduct. Analyses that reduce representation to its transactional prerequisites overlook its character as a modality of social presence (i.e. of making persons present via a representative) and interaction (e.g., of bring the personhood of those represented to life via mediated transacting, cooperating, coordinating, etc.).

B. Representative Action (Generally)

What does it mean to represent another? Here, it is useful to revisit the Roman conception from which Hobbes drew inspiration, according to which representation involves the *bearing of another person* (e.g., their legal, moral or other social personality) or *bearing the identity of a group* (e.g., bearing its legal person, moral interests, or cultural history and social identity).³⁴ The

³³ As contrasted with non-transactional mechanisms of authorization, including, notably, the effect given to general provisions of law (e.g., for representation by default, or in circumstances of necessity).

³⁴ Daniel Lee, “Hobbes and the Civil Law: The Use of Roman Law in Hobbes’s Civil Science,” in David Dyzenhaus and Thomas Poole, eds., *Hobbes and the Law* (Cambridge: Cambridge University Press, 2012): 210.

Romans conjured the idea memorably by suggesting that representation is akin to acting, with representatives, like actors, donning the “mask” of a person whose life they are in some measure to enact.³⁵ As an actor enacts a role, so too do representatives participate in social life *as*, or *for*, another (e.g., by exercising a legal capacity, asserting an interest, or making or disputing a claim). The representative quality of action is a matter of its being decisively other-regarding; for example, being oriented toward enabling a principal’s voice to be heard, or realizing individual or shared commitments, interests, beliefs, or preferences.³⁶ Representative conduct must therefore be intelligible as having been undertaken with warrant, for or on behalf of another.³⁷

Plainly, this account of representation dovetails with the account provided earlier of political trust. I said that demonstration of political trust in officeholders is entailed by the very idea of a public office in democracies, insofar as the legal incidents of office-holding are impressed and constrained by public purposes. The latter define the *telos* of public offices. We have thus arrived at a direct link between representation and political trust: in democratic systems of government, every public office exists for, and is intended to be executed in advancement of, public purposes, such that officeholders “bear the public” in acting for ineluctably public purposes. This is, by implication, true of judicial offices.

However, this raises an important question: how may we infer that conduct by a judge – an appearance, a comment, a line of questioning, a decision, an order – was undertaken in an official capacity?

³⁵ P.W. Duff, *Personality in Roman Private Law* (Cambridge: Cambridge University Press, 1971): 3, 19.

³⁶ In representation of corporations, conduct undertaken by a representative is intelligible as such (i.e., as representative) relative to corporate purpose(s). Paul B. Miller, “Corporate Personality, Purpose, and Liability,” in Elizabeth Pollman and Robert B. Thompson, eds., *Research Handbook on Corporate Purpose and Personhood* (Cheltenham: Elgar, 2021): 222.

³⁷ That is, intelligible as responsive to, and is motivated by, the interests, needs, mission, goals, plans, preferences, express purposes, and directions, as applicable, of a person or group represented.

C. Representative Action by Judges

As I have explained in work on corporate officeholding, these questions, and the difficulties that sometimes arise in resolving them, are a product of the phenomenon of duality of capacity entailed by representation.³⁸ Cognitively mature and intact natural persons are presumed to act in their own person for the sake of attribution of conduct and its normative consequences. But representation implies that one acts for another, such that the representative's actions and their consequences will be attributed to someone else (a principal and/or beneficiary). Representatives, then, act in *another* capacity – a representative, fiduciary, and/or, as it were, official, capacity – when enacting a mandate of representation. Duality of capacity – the fact that conduct may have been undertaken personally *or* representatively – generates an inherent risk of attribution problems: difficulty in determining whether conduct was *genuinely* representative or should be treated as if it were.

Often, we rely on tokens in inferring that conduct is representative on the basis of *appearances* (i.e., the presence of cues). Tokens of officiality are (mostly implicit) references to authority. Official action is accompanied by tokens so that it might be more readily identified as such. Tokens include institutional setting and occasion, ceremonial or other distinctive proceedings, official dress, the use of titles, and the use of official channels of communication. Tokens and their phenomenology vary by office held. But for judges and other public officials, they draw upon and are used within public fora in which official action is customarily taken (think of the public spectacle of judges enrobed, conducting hearings in public courtrooms, issuing orders and reasons through institutional channels). If one seeks a symptomology of government performance – i.e., of perceptions of government as *good* (in a state of reasonable fitness) or *bad*

³⁸ Miller, “Corporate Personality, Purpose, and Liability.”

(in a state of decline) – one might look to patterns of social reliance on tokens of officiality, with tokens supporting patterned inferences of officiality when things are going well, and widely questioned where not.

Tokens are not the only indicia of representative action. Furthermore, they are imperfect, for they are not characteristics of action as such, but rather its social setting. Direct indicia reflect the nature of representation as such: bearing the person or identity of another by discharging a mandate to act for their purposes. Thus, in resolving attribution issues by direct assessment, attention ought to be focused on the existence of an intelligible relationship between conduct and official purpose(s), such that one can infer (or not) that the conduct was taken in execution of the office, on the understanding that the performance of an office is just the enactment of its purposes.

In respect of judges, this means that substantive assessment of representativeness is a matter of the intelligibility of judicial behavior relative to the public purposes of judicial office. Fidelity to purpose can be assessed soundly only by evaluating what is publicly known about judicial behavior relative to purposes for which a judge is authorized to act. Behavior that clearly indicates that a judge has acted upon a collateral purpose might reflect legal error but might alternatively ground an inference of abuse of office.

IV – PUBLIC JUSTIFICATION UNDER CONDITIONS OF LEGAL INDETERMINACY

Judges perform non-adjudicative functions. Nevertheless, adjudication is focal to judicial office, and much controversy over judicial power is directed at adjudication. Hence, my focus here on representativeness in the exercise of adjudicative powers. And with that in mind, let us return to a contrasting yet complementary set of distortions in American legal thought about how the law constrains judges in deciding cases. Recognizing the distortions *as distortions* is important, for

they make it more difficult to understand how judges might prove faithful to the trust on which they hold office.

A. Some Preliminaries: The Nature of Law and Law's Publicity

First, two preliminaries: in what follows, I take it (a) that law is meant to supply authoritative normative guidance to all members of a political community, and that judges play an essential role in enabling law to effectively fulfill this function;³⁹ and (b) that publicity in the execution of judicial offices is essential to their democratic legitimacy.⁴⁰

As to the first point: the guidance supplied by law is meant to be and often is relied upon appropriately by the public without need for recourse to judges. But the guidance function of law is not self-executing: law contemplates judicial administration because actual and claimed violations of law, challenges to the validity of laws, conflicts and gaps in the law, and genuine uncertainty about law are all inevitable and generate disputes that require authoritative public resolution. This is something judges are meant to provide.⁴¹

As to the second point, it might be thought to have been addressed through the discussion earlier of tokens of authority and the objective intelligibility of judicial behavior as advancing purposes constitutive of judicial office. However, neither suffices as publicity, for both might be found absent adequate public notice of cases and the resolution by judges of issues of general law that they raise. Republican political morality and the rule of law require more. They require that adjudication reflect robust commitment to public practical deliberation in law making, interpretation, enforcement.

³⁹ I have more to say about this in Paul B. Miller, "The New Formalism in Private Law," *American Journal of Jurisprudence*, 66 (2021): 175.

⁴⁰ Applbaum, "Democratic Legitimacy and Official Discretion."

⁴¹ See generally Larry Alexander and Frederick Schauer, "Law's Limited Domain Confronts Morality's Universal Empire," *William and Mary Law Review*, 48 (2007): 1579.

B. Norms (and Facets) of Publicity in Practice

How are these commitments to be met by, and in relation to, judges? Some answers are implicit in familiar features of judicial administration. First, candidates for judicial appointment are announced publicly and assessment of their qualifications is undertaken in public, based on information made publicly available. Second, rituals of appointment to public office (notably, the swearing of oaths) are undertaken publicly, and may be viewed as a formal demonstration of political trust (i.e., deliberate entrustment and solemn acceptance of a trust reposed).⁴² Third, pre-hearing filings and hearings are presumptively public: open courts enable the public to see justice being done, where it is done, and to witness and to evaluate judicial craft.⁴³ Finally, decisions are announced publicly and are presumptively to be accompanied by public reasons for judgment.⁴⁴

The latter two sets of practices and associated norms – of open courts and provision of public reasons for judgment – are central to the sustenance of a democratic conception of law as a site for, and record of, public practical deliberation (i.e., of *publicly reasoned* normative guidance). Practices of public deliberation and justification enable citizens to better understand and evaluate the guidance the law supplies. They also support judges' claim to deliberative representativeness: that is, to be deliberating upon and deciding cases for and on behalf of the public.

So far, we have considered institutional facets of publicity; it remains for us to consider formal and substantive *qualities* of public justification Honour, Oaths, and the Rule of Law. What kinds of practical deliberation and judgment are involved in interpreting, enforcing and in making law, and in dispensing and developing equity? To the extent that these deliberations and judgments are

⁴² Horwitz, "Honour, Oaths, and the Rule of Law."

⁴³ Jeremy Waldron, "The Rule of Law and the Importance of Procedure," *Nomos* 50 (2011): 3.

⁴⁴ See generally Frederick Schauer, "Giving Reasons," *Stanford Law Review* 47 (1995): 633.

meant to be specifically *legal* – involving identifying, evaluating, generating, expounding, determining, rendering determinate, or giving effect to *legal* reasons⁴⁵ for action – how is a judge meant to engage with authoritative sources of law, and to reckon with their authority (e.g., their peremptoriness and exclusivity)? In what sense are legal reasons distinctively legal? In what sense are legal reasons also – always, or sometimes – moral reasons? And what does it mean to say that a judge has made proper use of legal reasons, and/or engaged soundly in whatever fresh moral judgment the law permits?⁴⁶

These are, of course, hard questions. I do not pretend to answer them here. Rather, I hope to say just enough in response to them to break some loggerheads in American legal thought on the judicial role, whether and how judges give effect to law in their judgments, and how one is meant to read publicly issued reasons for judgment in a culture typified by robust commitment to public justification.

C. Fault Lines in American Legal Thought

Confronting questions of the sort just noted, one finds American legal thought riven by old but still-unresolved debates between strict rule formalists and certain legal realists. These debates have always had political undercurrents, and these have only become stronger as partisan enmity has increased. But there are also differences of principle: notably, on the prevalence and moral upshots of judicial discretion as well as on the sources and legal upshots of the constraints the law

⁴⁵ For present purposes, I shall treat equitable reasons as a subset of legal reasons, notwithstanding that judicial reasoning in equity is somewhat distinctive. Paul B. Miller, “Equity as Supplemental Law,” in Dennis Klimchuk, Irit Samet and Henry Smith, eds., *Philosophical Foundations of the Law of Equity* (Oxford: Oxford University Press, 2020): 92.

⁴⁶ Fresh moral judgment, as contrasted with inherited moral judgments that underlie existing law and might be reflected in its posited morality. See Paul B. Miller, “Juridical Justification of Private Rights,” in Michael Crawford, Simone Degeling, and Nicholas Tivieros, eds., *Justifying Private Rights* (Oxford: Hart Publishing, 2020): 105.

places on interpretative and other judicial methods. Unfortunately, debate is fueled by warring misconceptions about how the law guides by constraining judges in the decisions they reach.

Strict rule formalists overstate the extent and misstate the mechanisms of constraint, over-claiming the extent of legal determinacy to be found in close textual and historical analyses of laws for which text is meant to be especially authoritative (written constitutions and legislation). Correlatively, there is a tendency attribute the rule-ishness of precise rules to all textually-posed legal norms, to minimize the extent to which the law invites or requires the exercise of discretion by judges in resolving questions of law, and to overlook or abhor the notion that legal judgment might often involve (indeed, might require) the exercise of moral judgment.⁴⁷ Proponents of more sophisticated variants on rule formalism – most of them, academics - soften or forswear some of these claims.⁴⁸ But in doing so, they risk losing the appeal of strict rule formalism, which leans heavily on the disciplinary effect of posited law on adjudication.

By contrast, legal realists typically understate the extent to which posited law constrains judges, over-claiming on the breadth and/or the implications for judges of persistent (or real) legal indeterminacy, while minimizing the extent to which apparent indeterminacy can be resolved.⁴⁹ Correlatively, there is a tendency to exaggerate the extent to which law permits the exercise of wide discretion by judges in deciding questions of law, and to assume that legal indeterminacy generates a discretion that must be exercised for non-legal reasons. Hence, the refrain that appellate judgments on legal issues in respect of which applicable law is vague should be understood as

⁴⁷ See Antonin Scalia, “The Rule of Law as a Law of Rules,” *University of Chicago Law Review*, 56 (1989): 1175 and Larry Alexander, “With Me, It’s All er Nuthin’”: Formalism in Law and Morality,” *University of Chicago Law Review*, 66 (1999): 530. It often escapes notice, especially amongst those who think of formalism exclusively in pejorative terms, that very few sophisticated scholarly formalists are strict rule formalists. See Miller, “The New Formalism in Private Law.”

⁴⁸ See, e.g., William Baude, “Is Originalism Our Law?” *Columbia Law Review*, 115 (2015): 2349; and William Baude, “Originalism as a Constraint on Judges,” *University of Chicago Law Review*, 88 (2017): 2213.

⁴⁹ See generally Steven J. Burton, “Reaffirming Legal Reasoning: The Challenge from the Left,” *Journal of Legal Education*, 36 (1986): 358.

reflecting the personal political, moral, religious, or other collateral purposes of the judge. As was true of formalism, these claims are tempered or rejected by some scholarly realists, many of whom regard law as a potentially effective guide to conduct.⁵⁰ However, here, too, the unflinching variants tend to dominate attention.

At the heart of debates between strict rule formalists and realists are unresolved differences of opinion about the source, extent and implications of indeterminacy in adjudication. There are two sources of legal indeterminacy.⁵¹ There is *factual indeterminacy*, generated by uncertainty about facts material to the legally proper disposition of a case that is practically irresolvable by resort to more and better evidence. A judge facing factual indeterminacy must settle it by making findings of fact, and these findings might influence treatment of issues of law, but judicial resolution of factual indeterminacy is not guided by law, *stricto sensu*. Additionally, there is *legal indeterminacy* in a narrow sense, bearing on the guidance supplied by law as such, considered independently of findings of fact. Legal indeterminacy has many causes including the (often intentional) use by lawmakers of vague language, conflict of laws, and normative uncertainty.⁵²

Strict rule formalists and realists make different things of indeterminacy.

Strict rule formalists have a two-fold strategy. The first is to say that it is the duty and mundane task of a judge to resolve factual indeterminacy by making dispositive findings of fact. Resolution of factual indeterminacy is ordinary business in adjudication, particularly at the trial level. The second is to argue that the extent of legal indeterminacy is less than meets the eye, being relatively uncommon and mostly resolvable through the application of methods that are the stock-

⁵⁰ See, e.g., Michael S. Green, “Legal Realism as a Theory of Law,” *William and Mary Law Review* 46 (2005): 1915 and Hanoeh Dagan, “Doctrinal Categories, Legal Realism, and the Rule of Law,” *University of Pennsylvania Law Review*, 163 (2015): 1889.

⁵¹ See generally Leiter, “Legal Indeterminacy” and Brian Leiter and Jules L. Coleman, “Determinacy, Objectivity, and Authority,” *University of Pennsylvania Law Review*, 142 (1993): 549.

⁵² See Timothy A.O. Endicott, “Linguistic Indeterminacy,” *Oxford Journal of Legal Studies*, 16 (1996): 667; and Courtney M. Cox, “The Uncertain Judge,” *University of Chicago Law Review*, 90 (2023): 739.

in-trade of lawyers (e.g., use of analogical reasoning to reconcile or distinguish precedents). Resolution of legal indeterminacy, it is suggested, usually simply requires that one double down on exacting lawyerly analysis of posited law, ferreting out the determinacy that is to be found there. To give up on that effort is illicit: it amounts to an abdication of duty.

Some realists have argued that indeterminacy is so pervasive as to render fictional the notion that law significantly constrains adjudication.⁵³ Factual indeterminacy and the power of judges to resolve it means that, whatever their “duty,” in practice judges have wide latitude to shape findings of fact to match their sympathies, with significant downstream implications for the disposition of legal issues. Legal indeterminacy, in turn, entails that judges enjoy wide discretion in deciding questions of law. Much law is expressed in vague terms, and even precisely worded laws require contextual judgment in application; hence, posited law rarely indicates a singularly correct disposition of a legal issue.⁵⁴ If one is to truly understand adjudication, realists say, one must look beyond law to the influence of various social and psychological factors, including the judge’s personal preferences.⁵⁵ That is: one ought to eschew the notion that the law significantly constrains adjudication and, if one insists that the law nevertheless guides judges, one must substitute a loose and hedged conception of guidance for that of the strict rule formalist, who claims for it precision, peremptoriness, and exclusivity.

Amongst the most significant sequelae of this debate are divergent perspectives on the political authority of posited law. Strict rule formalists lean heavily on the political authority of posited law, associating it with pedigree (i.e., authoritative sources of law) and linguistic precision

⁵³ Frederick Schauer, “Legal Realism Untamed,” *Texas Law Review*, 91 (2013): 749.

⁵⁴ Endicott, “Linguistic Uncertainty”; and Timothy A.O. Endicott, *Vagueness in Law* (Oxford: Oxford University Press, 2000).

⁵⁵ Brian Leiter, “American Legal Realism,” in Martin P. Golding and William A. Edmundson eds., *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Wiley-Blackwell, 2004): 50.

in legal texts and in the interpretation of same. For the strict rule formalist, the effectiveness of law as constraint is a direct function of judges' (and our) readiness to engage with *law as such*; that is, on the basis that its positivity is to be taken seriously. Realists, by contrast, tend to question the political authority of posited law and are, by extension, skeptical (at best) about the value of traditional lawyerly methods focused on elucidating law as posited.⁵⁶

Related sequelae, especially evident in the politics of the moment, are reflected in a surprising and somewhat ironic convergence on indeterminacy as fodder for skepticism about judicial power. On the part of strict rule formalists, there is denialism about judicial discretion in the face of indeterminacy, rooted in worry that discretion cannot be cabined and that, untethered, it is an affront to the rule of law and a threat to democracy. Strict rule formalists manage their skepticism by emphasizing the determinacy and legally-resolvable (merely apparent) indeterminacy of law as evidence of its capacity to constrain judges. Celebrated decisions are those in which reasons for judgment have an air of legal inevitability about them, with the judge engaged in mere reportage, having followed the law where it leads. Hardly a celebration of judicial power, this. But there is pairwise skepticism in legal realism, especially in the politics of legal indeterminacy in the constitution. Whereas purposivists of yesteryear might have found reason for cheer in the latent potential of constitutional indeterminacy, the freshly aggravated realists of the here-and-now see something sinister: space for judicial usurpation and overstepping, disguised by a veneer of legal justification.⁵⁷ Here, too, then, profound skepticism about judicial power. But notice that the pairwise skepticisms are a predictable result of an underlying schism: the formalist, convinced of the law's determinacy but wary about the risk of roguish and clever lawyerly evasion

⁵⁶ Schauer, "Legal Realism Untamed."

⁵⁷ Josh Chafetz, "The New Judicial Power Grab," *Saint Louis University Law Journal*, 67 (2023): 635

by judges who would not be bound; the realist, convinced of the law's indeterminacy and worried that legal justification is a mostly a ruse for judges who cannot and thus will not be bound.

D. Moving Forward: Coming to Terms with Legal Indeterminacy and Judicial Discretion

The warring claims that underlie convergent skepticism of judicial power in American legal thought are rooted in a matched pair of errors. These are errors that might well have tragic consequences, fanning, as they do, reported low levels of attitudinal trust in judges in America.⁵⁸ The errors are: first, the claim that the law can meaningfully constrain and guide judges only where it is determinate; and second, that law is pervasively indeterminate and hence incapable of meaningfully guiding and constraining judges. The common root of both errors lies in the contrastive characterizations of the law's capacity to guide and constrain, as well as the refusal to recognize that the law can meaningfully *guide* – supplying authoritative normative guidance – without *constraining* judges in the eye-wateringly robust sense of eliminating or minimizing judicial discretion in determining the law and in elucidating the reasons it supplies.

In truth, our legal system is *at once* comprised of countless laws that are indeterminate in the abstract but that prove at the contextually-enriched occasion for their enforcement to be determinate *and* countless other laws that prove indeterminate both in the abstract and at contextually-enriched moments of enforcement. Put simply: our law is at once pervasively legally determinate *and* pervasively legally indeterminate but (and more on this shortly) legally determinable. Our understanding of the practice and ethics of adjudication should acknowledge these facts about law as well as salient differences between adjudication that gives effect to

⁵⁸ David F. Levi, Raymond J. Lohier Jr., Diane P. Wood and Jeffrey S. Sutton, "Losing Faith: Why Public Trust in the Judiciary Matters," *Judicature*, 106 (2022), online: https://judicature.duke.edu/wp-content/uploads/2022/09/FAITH_Summer2022-1.pdf; Benjamin H. Barton, "American (Dis)Trust of the Judiciary," *Institute for the Advancement of the American Legal System* (September 2019), online: https://iaals.du.edu/sites/default/files/documents/publications/barton_american_distrust_of_the_judiciary.pdf

determinate laws and that which gives effect to indeterminate laws by making a legal determination (i.e., by making an indeterminate law determinate in its implications for the disposition of legal issues presented by a case and, by virtue of stare decisis, for analogous cases in the future).

For the sake of clarity, let me explain further what I mean by determinacy and indeterminacy. A law is determinate where the content of posited law, traced to authoritative sources of law and interpreted reasonably in light of material facts of a case, provides singular indication of the legally sound disposition of a legal issue raised by the case. By contrast, a law is indeterminate where its content, ascertained as just noted, does not provide singular indication of a legally sound disposition but rather supports multiple dispositions amongst which a judge must choose.

Again, our law is pervasively determinate.⁵⁹ Many legal rules are formulated with such precision as to enable their ready application to core cases (usually, cases representative of the social problem or prospect the law was meant to address). Intentionally vague legal rules are often also determinate when viewed in connection with the material facts of a case and (in the case of legislated rules) lawmakers' objects. Both observations will, I trust, leave the tax lawyer and the torts lawyer equally nonplussed. The tax lawyer lives in a world of, one might say excessive, *ex ante* legal determinacy, and the tort lawyer in a world in which vague standards often admit of easy and uncontroversial application *ex post*, even if one might - especially if one is a torts professor - delight in the intellectual challenge afforded by hard cases.

It merits emphasis that laws can be determinate even if their determinacy is not immediately apparent. Discerning the determinate implications of a law can be burdensome. But that does not render a law indeterminate. There is important truth in a more modest variant on the

⁵⁹ Kress, "Legal Indeterminacy."

strict rule formalist's call upon judges to double down in their study of posited law in the face of apparent indeterminacy. Again, stock lawyerly methods exist for resolving apparent indeterminacy. Where, as is the case in common law and equity, the authority of a rule is a function of it being supported as a matter of common reason (the collective wisdom of judges, in different cases, seeing reason in the rule),⁶⁰ a judge in a given case may arrive at legal determinacy only after considering different formulations of the rule and by reflecting on the analogies and distinctions that have shaped its evolution. And, as emphasized by some formalists, difficulties ascertaining the meaning and implications of a statutory provision taken in isolation may be resolved through resort to other legal material (e.g., objects clauses, the statutory scheme, and evidence as to motivating social problems or prospects).⁶¹

Where applicable law is determinate, a judge can properly discharge the obligations of their office only by detailing the law's implications and by giving effect to them, subject to rare exceptions (bases for suspended enforcement) licensed by law or in equity.

However, again, our law is also pervasively indeterminate. For instance, many legal rules are, by design, given vague formulation, on the understanding that they are to guide conduct in varied circumstances (e.g., reasonableness standards).⁶² The decision to adopt a vaguely formulated legal rule predictably generates a risk of indeterminacy that cannot be resolved by more profound thinking about the law or by analyzing the rule in light of the material facts of a dispute. In such cases, lawmakers ought to be understood as having delegated to the law's addressees – judges, but also, citizens – the responsibility to engage their capacities for practical reason in

⁶⁰ Gerald J. Postema, "Classical Common Law Jurisprudence (Part I)," *Oxford University Commonwealth Law Journal*, 2 (2002): 155; and Gerald J. Postema, "Classical Common Law Jurisprudence (Part II)," *Oxford University Commonwealth Law Journal*, 3 (2003): 1.

⁶¹ See, e.g., William Baude and Stephen E. Sachs, "The Law of Interpretation," *Harvard Law Review* 130 (2017): 1079; and Samuel L. Bray, "The Mischief Rule," *Georgetown Law Journal* 109 (2021): 967.

⁶² Endicott, "Linguistic Indeterminacy."

deliberating upon the rule so as to give it effect in the deliberative contexts in which they find themselves. Indeed, one might say that some vague laws can *only* guide effectively if taken up in this way, and that their prevalence indicates faith in our ability to discern and derive actionable practical reasons from the law.

Intentionally vague laws are, I think, best understood as typically *indeterminate but legally determinable*. These laws await, in the first instance, determination by citizens aiming for comportment with the law⁶³ and, in the second, authoritative determination by a judge called upon to decide whether there was comportment with the law. Obviously, the burdens of judgment can be high and they are not evenly distributed. A conscientious citizen might fail in a good faith effort to act in conformity with the law, and their failure might be marginal. A judge, whose determination will be authoritative, might be genuinely morally conflicted where their conclusions are at odds with those of a litigant who acted in good faith. But there is nothing amiss if the rule itself is sound (i.e., if lawmakers had good moral reasons for positing the rule and for formulating it vaguely, shifting interpretive burdens to the law's addressees). Furthermore, judges are not bereft of guidance and hence constraint from indeterminate laws. Vague laws guide, and the guidance they supply is peremptory and exclusive. It is only that, being vague, the guidance is general, and the constraints looser, consistent with the expectation that citizens and judges derive actionable practical reasons from the content of posited law through context-relative practical reasoning.

V – JUDICIAL GOOD FAITH, GENERALIZED SOCIAL TRUST IN JUDGES, AND THE RULE OF LAW

Recognition that the law is, at once, pervasively determinate and pervasively indeterminate holds important lessons. These lessons might be especially salient at a time of heightened skepticism of judicial power.

⁶³ Obviously, not all citizens will have this, or any, aim relative to laws meant to guide and govern them.

A. Taking Stock: Some Pathologies of American Legal Thought

On the one hand, it is dangerously misleading to treat, or to present, indeterminate laws as though they were determinate so as to minimize judicial discretion, for that is not merely deceptive, but also a concession to the view that judges cannot exercise a properly *legal* discretion (i.e., make discretionary decisions on exclusively legal grounds). It also won't do to suggest, as some strict rule formalists have, that lawmakers should try to buttress judicial legitimacy by replacing vague laws with more precisely formulated ones, or that judges should do the same, hemming in intentionally vague laws in via cramped interpretation.⁶⁴ Efforts to root out vague laws are sometimes futile⁶⁵ and might otherwise sacrifice the advantages of vague language.⁶⁶ Vagueness in law is sometimes pernicious, sometimes not. The danger in denialism about legal indeterminacy lies in the support it provides for a false image of adjudication and false set of beliefs about the scope and limits of the judicial role. A public primed to view discretion in the enforcement of vague laws as illicit can be roused to irrational distrust of judges in ways that may prove difficult to remediate precisely because judicial discretion permeates the administration of justice.

On the other hand, it is erroneous – and, I think, also dangerous – to deny that determinate laws are determinate and that recognition of a law's determinacy is robustly constraining of judicial behavior. If a judge is to give effect to a law with determinate significance, as required by the public purposes that ground their office, they must faithfully follow the law where it leads, retracing their steps in reasons for judgment. To suppose that determinate laws are determinate in appearance but indeterminate in practice because judges are capable of clever subterfuge is just to

⁶⁴ Scalia, "The Rule of Law as a Law of Rules," 1883.

⁶⁵ As where a social coordination or conflict problem is so complex that lawmakers must respond with vague laws, if they are to provide effective law at all.

⁶⁶ Endicott, *Vagueness in Law*.

indulge a corrosive cynicism about what is typical of the character and intentions of judges. The cynicism is corrosive because of its latent political nihilism: if it were true that judges cannot be relied upon to give effect to determinate laws, aspirations to the rule of law and everything that turns on its realization, including democratic government, must be thought rooted in collective delusion. The danger lies in this sort of cynicism becoming deeply rooted: fomentation of cynical distrust of judges may mean that people come increasingly to think that the law's promises are mostly a farce, adjudication mostly smoke and mirrors, and democratic government mostly bent to the will of elites for whom talk of legality is mere rhetoric meant to placate a restive public.

Skepticism about judicial power rooted in sensitivity over legal indeterminacy reflects misapprehension about (a) how the law guides conduct, and (b) what it means for judges to uphold the law in treating it as a source of exclusive and peremptory normative guidance. At its root is the false belief that law meaningfully guides only to the extent that it is *directive* and experienced by its addressees (*pace* Austin) as *command*, *supplanting* practical deliberation and thus altering ordinary practical reasoning.⁶⁷ On this view, law is thought to guide by diktat and the judge's role is narrowed, inviting the tired analogies by which judges are likened to umpires or referees: the rules of the game are fixed *ex ante*, with the judge merely trading on close knowledge of those rules in giving them effect *ex post*. Where the law is determinate, these analogies at least capture the sense in which the law compels conduct by direct indication of what is lawful and what is not. But the law does not always guide by direct indication, and is not generally to be thought of as bypassing the deliberative exercise of our capacity for practical reason. Rather, it often assumes and thus calls for the situated, generative, exercise of practical deliberation, including derivation of actionable practical reasons from the vague content of posited law.

⁶⁷ See Hart's criticisms of Austin's command model of law in H.L.A. Hart, *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, 2012).

B. Determinable Laws and Grassroots Specificationism

The prevalence of indeterminate laws in mature legal systems means that we routinely rely on creative practical deliberation by citizens and judges alike in specifying the law's guidance *in order* to realize the law's aims. We may call this a strategy of *grassroots specificationism*. As is true of "specificationism" in ethics, so in law, certain norms, to be properly applied, must be *specified* at or near to the point of their application, when taken up in practical deliberation in circumstances in which the norm is at issue in some immediate sense.⁶⁸ Laws that are indeterminate because of intentional vagueness are rendered situationally determinate by a citizen or a judge deriving practical reasons from the law in order to decide what is *supported* by way of compliance with it. They are in this sense indeterminate but rationally determinable.

Much of the work of judges in developing common law and equity can be viewed as *institutional* work of grassroots specificationism. And, where courts take notice of downstream customary interpretation of law, they may be understood as developing judge-made law in *concert with* citizens or, perhaps, *in negotiation over* and *review of informal* work of grassroots specification. Whether supplied or ratified by judges, grassroots specification hones the meaning of vague laws, incrementally reducing the extent of their indeterminacy. Where undertaken with mind to the reasonableness of citizens' informal work of specification, grassroots specification is an important form of public practical deliberation about interpretation (i.e., about determining what the law supports or requires).

Lest it be thought otherwise, none of this is in any way inconsistent with the rule of law. The rule of law requires that the law prove fit as a source of authoritative normative guidance. The law's fitness is a function of its capacity to be relied upon, not merely passively as a given to be

⁶⁸ See generally John Oberdiek, "Specifying Rights Out of Necessity," *Oxford Journal of Legal Studies*, 28 (2008): 127.

implemented, but as a source of guidance to be *put to use* by persons with a capacity for practical reason. To be amenable of reliance in this sense, indeterminate laws must provide tractable guidance such that they can be given sensible grassroots specification: it must be possible for the citizen or judge to derive actionable practical reasons from the law, on the understanding that the law not merely expects but requires them to do so.

Taking seriously both our capacity for practical reason and the peremptory nature of reasons supplied by vague laws implies that one ought not to see a threat to the rule of law in pervasive legal indeterminacy. The threat lies instead in treating as indeterminate laws that are determinate and in treating indeterminacy as licensing resort to non-legal considerations. Judges may avert to non-legal considerations only where they have proper occasion to make new law.

C. The Specter of Abuse of Discretion

On this last point, let me be plain: pervasive legal indeterminacy entails judicial discretion and so, *ipso facto*, an ineliminable systemic risk of abuse of discretion. Discretion may be exercised for collateral purposes. This risk, again, is inevitable and accompanies *all* official discretion, not just that vested in judges. In respect of judges, the risk is mitigated by the determinacy of law where law is determinate but is, again, heightened in respect of intentionally vague laws insofar as vague formulation generates a looser intelligibility of legal justification (i.e., in explaining how a result *followed* from and so was properly *guided* by law).

This has underlain the “real reasons” skepticism voiced by many realists; namely, that the legal reasons a judge identifies for a decision might not be their “real” or motivating reasons. But notice this skepticism for what it is: it an *assertion* or *prediction* of routine abuse of office. After all, judges are duty-bound to uphold laws, whether vague or precise, and to give reasons with candor, demonstrating how the law was upheld. “Real reasons” skepticism, again, indulges a kind

of nihilism: it implies that judicial power is incapable of being regulated by law and thus denies the possibility of drawing lines between legal propriety and abuse. These claims are empirical and yet are rarely accompanied by evidence, much less evidence sufficient to establish their veracity.

I should emphasize that abuse of judicial discretion imperils democratic government and the rule of law for reasons that we can appreciate by confronting the nihilistic view. Abuse of discretion by judges violates a core principle of republican political morality, for it entails arbitrariness, involves a failure of representation (i.e., of proper execution of a public office for public purposes) and thus of democratic governance, and thwarts the rule of law.

But it is also important to understand the risk for what it is: no judge can be confused about their official charge. A judge who knowingly exercises a legal discretion for a collateral purpose knowingly violates the public warrant upon which they hold public office.

It is the specter of abuse of discretion by judges that haunts the strict rule formalist and realist alike. But for both, and for those caught in between, it is unproductive. If one wishes to move beyond paralyzing fear of the risk of abuse of discretion, whilst also acknowledging it, how might one make an advance?

D. Judicial Good Faith

A starting point is the realization that we are inevitably dependent on judges for the regular demonstration of *good faith* in the execution of their offices.⁶⁹ By “good faith” I mean keeping faith with freely undertaken obligations *because* one recognizes that they are obligations. “Faith,” in the sense relevant here, is the attitudinal state of commitment to the proper performance of one’s voluntary obligations. Relevantly, in many contexts good and bad faith partake of the relational

⁶⁹ Steven Burton, *Judging in Good Faith* (Cambridge: Cambridge University Press, 1992). The significance of good faith to judicial role morality might be linked to a broader conception of institutional integrity in government. On the latter, see Nikolas Kirby, “An ‘Institution-First’ Conception of Public Integrity,” *British Journal of Political Science*, 51 (2021): 1620–35.

normativity of trust. A person who acts in good faith is often meeting a trust demonstrated in the relational context in which an obligation was voluntarily incurred; and will, by establishing *bona fides*, prove trustworthy in the more robust sense of inviting and rewarding trusting attitudes. Correlatively, one who acts in bad faith often proves untrustworthy by showing indifference to a trust reposed, including trusting attitudes that might have underlain a demonstration of trust.

The pertinence of good faith to our discussion of judicial office and judicial role morality is, I hope, clear. Drawing on Burton's analysis,⁷⁰ we may understand the *object* of judicial good faith to be execution of obligations attendant upon a judicial office in accordance with its public purposes. The *nature* of judicial good faith is commitment to the proper performance of the obligations of office, in full awareness that judicial offices are public offices that require fulfillment of public purposes. The *content* of the standard has motivational and behavioral components: a judge will act in good faith in the context of adjudication where they act for reasons given by law (or, where appropriate, posit law for objectively sound moral reasons) and issue public reasons for judgment that reflect their actual or motivating reasons.

The political trust demonstrated in judges impliedly encompasses trust in their propensity to act in good faith. If demonstration of trust in judges entails trust in their *bona fides*, judicial good faith may be as important to realization of the rule of law as are indicia (e.g. the clarity and prospectivity of laws) most closely associated with the concept. If law is to be effective as an authoritative source of normative guidance, we shall often have to look to judges alone to resolve, clarify, expound or otherwise render that guidance more fully determinate or otherwise practically useful. In respect of intentionally vague laws, we must rely upon judges to act in good faith in reaching determinations that are *indicated* but not *provided* by law. Equally, the rule of law is

⁷⁰ Burton, *Judging in Good Faith*.

vulnerable not merely to formal defects in the quality of our laws (e.g., lack of clarity) but also to the morally defective exercise of judicial power. Put otherwise: the rule of law is vulnerable to judicial bad faith, just as – and *because* – it is underlain by expectations of judicial good faith.

Our dependence on the good faith of judges means that evidence of good faith and allegations of bad faith are central to the social significance of demonstration of political trust in judges; our understanding of what it means for judges to meet that trust; and the stakes of maintaining reasonable levels of generalized attitudinal or social trust in judges.

First, consider good faith and the demonstration of trust in judges. I have said that judges occupy their offices on the footing of political trust – an “objective” form of collective trust, demonstrated behaviorally through investment of a person in an office for the pursuit of public purposes. The expectation that judges as officeholders fulfill purposes constitutive of their office implies a trust reposed in and undertaken by them to act in good faith in heeding and enforcing guidance supplied by law. This in turn grounds a professional moral duty of good faith.

But political trust is not the only variety of collective trust pertinent to government and to judges. Indeed, it is arguably secondary, being partly contingent upon another form of collective trust: generalized social trust. Generalized social trust is a collective measure of subjective and intersubjective trust, reflected in the beliefs, attitudes, and moral emotions of members of a collectivity.⁷¹ Generalized social trust is, then, “attitudinal”: for members of a collectivity to trust another person or group is for them to form certain attitudes, beliefs, and/or moral emotions (“trusting attitudes”) toward that other person or group, rooted in a conviction in or openness toward the other’s trustworthiness. Trusting attitudes are a familiar reflection of bonds that arise within close personal relationships. But they also arise in, and are important to, relationships

⁷¹ See generally Karen Jones, “Trust as an Affective Attitude,” *Ethics* 107 (1996): 4; and Paul R. Faulkner, “Finding Trust in Government,” *Journal of Social Philosophy*, 49 (2018): 626.

between strangers, especially but not only those integral to large-scale social cooperation and coordination.

E. Generalized Social Trust, Trusting Expectations of Judicial Good Faith, and Distrusting Suspicion of Judicial Bad Faith

Generalized social trust as I shall use the term here refers to the prevalence and level(s) of trusting attitudes within a society toward strangers and include any of a number of possible objects, including government officials.⁷² Of special significance, generalized social trust in government is often viewed as an indicator of social perceptions of the quality of government (though the reliability of some purported measures, including opinion polls, is variable).⁷³ Reports on generalized social trust in government are often offered as evidence about whether government is “good” in the sense of being perceived as trustworthy.⁷⁴

Of course, much has been said of late about declining levels of generalized social trust by Americans in our government and in the United States Supreme Court.⁷⁵ I have no basis for evaluating (because it is usually unclear) what these reports measure, whether the measurements are accurate, and if they are related to rational bases upon which might find government, an institution, or public officials trustworthy or untrustworthy. Nevertheless, I take it that generalized social trust is a real phenomenon and that, even if difficult to measure, where levels of generalized

⁷² See Eric M. Ulsaner, “The Study of Trust,” in Eric M. Ulsaner, ed., *The Oxford Handbook of Social and Political Trust* (Oxford: Oxford University Press, 2018).

⁷³ See generally Stephen Greasley, “Trust in Government, Performance Information and Democracy,” in Sue Llewellyn, Stephen Brookes, and Ann Mahon, eds., *Trust and Confidence in Government and Public Services* (New York: Routledge, 2013); and Philip Keefer, Carlos Scartascini, and Razan Vlaicu, “Trust, Populism, and the Quality of Government,” in Andreas Bågenholm et al, eds., *The Oxford Handbook of the Quality of Government* (Oxford: Oxford University Press, 2021).

⁷⁴ For discussion, see Eric M. Ulsaner, “Trust, Democracy and Governance: Can Government Policies Influence Generalized Trust?” in Marc Hooghe and Dietlind Stolle, eds., *Generating Social Capital* (New York: Palgrave, 2003).

⁷⁵ Russell J. Dalton, “The Social Transformation of Trust in Government,” *International Review of Sociology* 15 (2005): 133; Steven W. Webster, “Anger and Declining Trust in Government in the American Electorate” *Political Behavior* 40 (2018): 933; Nina Varsava, “Precedent, Reliance, and Dobbs,” *Harvard Law Review* 136 (2022): 1845; and Tonja Jacobi, “The Fragile Legitimacy of the Supreme Court,” *Emory Law Journal*, 73 (2023): 281.

social trust change significantly, those changes can be deeply salient, however precipitated. They might reflect changed perceptions of the legitimacy of government, governmental institutions, or officials, and of law and public policy.

Generalized social trust in government is salient also given its important, if contingent, relationship to political trust.⁷⁶ First, the contingency: within wide margins, public offices are likely to be filled and executed in ways that effectuate political trust without any noticeable variation tracking shifts in levels of generalized social trust. Now, the relationship: notwithstanding that political trust withstands ordinary fluctuation in levels of generalized social trust, deep and persistent declines in generalized social trust in government, governmental institutions and public officials promises to be destabilizing. Settled, pervasive attitudinal *distrust* undermines the capacity of government to win acceptance of its laws and of its legitimacy, placing it in peril until trust is restored.⁷⁷

The literature suggests that generalized social trust can be an unruly and fickle thing.⁷⁸ It may be moved by any and all social forces that impact social perceptions of the trustworthiness of strangers, including negative forces that implicate distrust in social division (like fear, envy, anger, prejudice, discrimination, and enmity) as well as positive forces that implicate trust in experiences of community, empathy, shared identity, and solidarity.

If (and it is a big “if”) levels of generalized social trust are to have a rational basis, they will reflect relevant indicia of the trustworthy character of, and behavior by, public officials. I have already indicated how judges prove trustworthy. They ought to possess, cultivate, and manifest

⁷⁶ Kenneth Newton, Dietland Stolle, and Sonja Zmerli, “Social and Political Trust,” in Eric M. Ulsaner, ed., *The Oxford Handbook of Social and Political Trust* (Oxford: Oxford University Press, 2018).

⁷⁷ For discussion, see Kevin Vallier, “Political Trust,” *Brigham Young University Law Review* 47 (2021): 1275

⁷⁸ For a literature review, see Peter Nannestad, “What Have We Learned About Generalized Trust, If Anything?” *Annual Review of Political Science* 11 (2008): 413.

judicial virtues of the sort canvassed in Part II. Further, as explained in Parts III and IV, they ought to respect the public nature of judicial office by acting in genuinely representative ways: in ways intelligible as advancing public purposes attached to their office. In adjudication, this implies robust commitment to public justification and to deliberating and deciding in good faith. Judges must demonstrate publicly – through public explanation of *motivating* reasons – that the law was given effect (in respect of determinate laws), rendered determinate (in respect of indeterminate laws), or posited for reasons responsive to the good of the community.

Fulcra for assessment of the trustworthiness of judges are matters of public record: a comprehensive public record of qualifications (including potentially disqualifying factors) disclosed prior to appointment; decisions made and public reasons for judgment authored or endorsed while in office; public appearances and remarks made prior to and after appointment; and any other robust public evidence pertinent to evaluation of a judge's integrity and impartiality.

If we may return to good faith and the trustworthiness of judges: it warrants notice that, in times of relative political normality, most people – including lawyers – take the appearance of good faith reflected in publicly issued reasons for judgment as evidence supporting an inference of good faith in fact, and hence as trust-reinforcing. That is not to say that one infers anything else (for instance, that the reasons are correct or even persuasive). However, the trust-reinforcing effect of routine public administration of justice is important. Unfortunately, these are not normal times. Accusations of judicial bad faith abound, are sometimes made casually, and often reflect a decided refusal to trust – or even to engage – the appearance of good faith behavior.

If circumstances are such that many will not identify and respond dispassionately to evidence of trustworthiness, including evidence of good and bad faith, one should not therefore conclude that low levels of generalized social trust in judges are to be lightly dismissed as irrational

or inscrutable. Rather, one has all the more reason to worry: first, declines in attitudinal trust can be self-reinforcing, leading to spiraling distrust, and second, even if poorly reasoned, they might nevertheless be socially and politically consequential. The health of a democracy turns on the existence of a decent baseline level of generalized social trust in governmental institutions and officials. If accurate, reported declines in generalized social trust in American government and governmental institutions, including the Supreme Court, should inform policy analysis of our court system and judicial appointments processes. Policy options that take the existing highly polarized political landscape for granted and that are plays for partisan advantage can be predicted to make matters worse; those focused on removing or mitigating political influence might help judges themselves, and the public, to view judges not as political actors but as public servants. Hard as it might be to imagine, in that context one might view a judge (or sitting government, or institution) as “good” whether or not one approves on substantive grounds the actions they take, because of the public justifications they have offered for actions in apparent good faith.

V – CONCLUSION

In democracies, “good government” is contingent on the faithful exercise of powers of public office by officials responsive to the public nature of the mandates under which they hold office. In republican political theory and beyond, the expectation that officeholders be robustly responsive to the public purposes that define their mandates is said to reflect the notion that public offices are held on political trust. But trust-based analyses of public office are usually presented within a constrictive lens emphasizing popular sovereignty, direct political representation, and constituent power. This framing suggests that elected public officials alone hold office as a matter of political trust.

I have challenged the narrowness of this view. I have argued that trust-based accounts of good government can and should inform our understanding of judicial office and judicial role morality. Judges, too, I have argued, hold public office as a matter of political trust and are expected to act in a genuinely representative way by advancing public purpose(s) constitutive of their office. They prove worthy of the public's trust through demonstration of judicial virtues, plain commitment to the impartial pursuit of public purposes, and by fostering a healthy culture of public justification.

Equally, I have expressed worry about corrosive cynicism about law, democratic political morality, and the judicial role at this fractious time in American politics. Nihilistic views about law (e.g., those that suppose that law is incapable of guiding and constraining judges) and pessimistic views about judges (e.g., those that presume judicial vice and foment distrust of judges on political grounds) all have an element of self-fulfilling prophecy about them at least as a matter of the health of our political culture. Judges can only do their part to uphold the law and its rule if we believe that judicial integrity is possible and are willing to credit judges who manifest it just as we call out those who do not.