

## IS AND OUGHT: HOW THE PROGRESSION OF *RICCI* TEACHES US TO ACCEPT THE CRITICISMS AND REJECT THE NORMS OF POLITICAL JURISPRUDENCE\*

*Man must not be allowed to believe that he is equal either to animals or to angels, nor to be unaware of either, but he must know both.*<sup>1</sup>

Conflict in the law between Is and Ought is nothing new. In a famous exchange, Socrates argued with Thrasymachus about the existence of an absolute and objective law.<sup>2</sup> There was no clear winner in the debate, and Socrates could not easily dismiss his rival's deeply cynical views on the nature of justice.<sup>3</sup> Socrates' optimism and Thrasymachus's cynicism have assumed various forms through the ages and continue to clash with one another—profoundly affecting the development of the law. The current form of this ideological battle is on display in the decision-making of the U.S. Supreme Court, which features the competing theories of the legal and political models of jurisprudence.

The recent decision *Ricci v. DeStefano*<sup>4</sup> provides a striking example of the relevance of political jurisprudence—a school of thought that combines legal realism with the learning and methods of political science.<sup>5</sup> Relying on extensive empirical data, political jurisprudence challenges traditional ideas regarding legal interpretation and the fundamental nature of judicial decision-making. Political jurisprudence is a dangerous yet compelling vision of law; it is also captivating because it reveals aspects of human nature that are not normally associated with judicial behavior. An exploration of human nature is necessary for a proper analysis of judicial decision-making. Much has been written about the depth and intricacy of human beings, and yet no consensus on

---

\* Winner of the third annual Chief Justice Leroy Rountree Hassell, Sr. Writing Competition, hosted by the Regent University Law Review.

<sup>1</sup> BLAISE PASCAL, *PENSÉES* 31 (A.J. Krailsheimer trans., Penguin Books rev. ed. 1995) (n.d.). “It is dangerous to explain too clearly to man how like he is to the animals without pointing out his greatness. It is also dangerous to make too much of his greatness without his vileness.” *Id.*

<sup>2</sup> See PLATO, *REPUBLIC* 12–31 (G.M.A. Grube trans., Hackett Publ'g Co. 1992) (c. 380 B.C.E.).

<sup>3</sup> “I say that justice is nothing other than the advantage of the stronger.” *Id.* at 14. The pervasiveness of self-interest is the heart of Thrasymachus's argument—influencing rulers to make decisions for their own benefit. Thrasymachus's view is essentially a savage realism regarding the nature of rulers. See *id.* at xiv–xv.

<sup>4</sup> 129 S. Ct. 2658 (2009).

<sup>5</sup> See Martin Shapiro, *Political Jurisprudence*, 52 KY. L.J. 294, 295 (1963–1964) (“Political jurisprudence is, among other things, an extension of the findings of other areas of political science into the realm of law and courts . . .”).

our motivations and true disposition has emerged.<sup>6</sup> This much, however, is certain: humans are conflicted creatures and our contradictory nature is on full display in the process of judicial behavior. *Ricci* reveals the duel between the pessimism of political jurisprudence and the optimism of an objective theory of law, with the unpredictable currents of human nature flowing underneath.

Part I of this Note explores the development of political jurisprudence, focusing on the contributions of Harold Spaeth and how his school of thought is a strengthened form of legal realism. Part II examines key contradictions in human nature and how the human disposition is the culprit for judicial irrationality. Part III examines *Ricci* as a conflict between political jurisprudence and an objective theory of law, uses *Ricci* to warn against the corrosive norms of political jurisprudence, and proposes a measured skepticism.

#### I. POLITICAL JURISPRUDENCE—A FORMIDABLE ADAPTATION OF LEGAL REALISM

##### A. *The Perpetual Conflict*

Idealism and skepticism have profoundly shaped the development of law. In American jurisprudence, modern ideas on legal interpretation and judicial behavior have proceeded from the perpetual conflict between formalism and realism. Legal formalism is “[t]he theory that law is a set of rules and principles independent of other political and social institutions.”<sup>7</sup> Legal realism is considered to be an uprising against formalism and judicial abstraction.<sup>8</sup> The father of American legal realism is widely considered to be Oliver Wendell Holmes,<sup>9</sup> who attacked the

---

<sup>6</sup> “The heart is deceitful above all things, [a]nd desperately wicked; [w]ho can know it?” *Jeremiah* 17:9 (New King James).

<sup>7</sup> BLACK’S LAW DICTIONARY 977 (9th ed. 2009). Compare Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 615–16 (1908) (arguing that a “mechanical” application of law is impractical and ultimately frustrates social progress), with Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186–87 (1989) (arguing that the establishment of generally applicable rules is essential for judicial process and promotes judicial accountability).

<sup>8</sup> See MICHAEL MARTIN, *LEGAL REALISM: AMERICAN AND SCANDINAVIAN* 10–11 (1997) (explaining that the development of American legal realism proceeded generally from the unique power of the American judiciary, the revolt against formalism, and the influence of pragmatism).

<sup>9</sup> *Id.* at 15; see also AMERICAN LEGAL REALISM 3 (William W. Fisher III et al. eds., 1993) (“Holmes heavily influenced American legal theorists of many stripes[, b]ut the Realists were especially indebted to him.”); Francis E. Lucey, *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493, 494 (1942) (“Realism is only a further development and refinement of Holmes’ Sociological Jurisprudence . . .”).

notion that law had the precision or logic of an objective discipline, such as mathematics.<sup>10</sup> In addition to Holmes's pragmatism, legal realism benefited from the ideas of the German free law movement, particularly its skepticism towards the traditional interpretations of legal rules.<sup>11</sup> Specifically, the German free law movement opposed legal positivism (the idea that law is simply the commands that issue from the State) and the historical school (the idea that law developed concurrently with culture).<sup>12</sup> Roscoe Pound is credited with introducing the ideas of the German free law movement into American jurisprudence.<sup>13</sup>

A certain group of legal scholars began to build on the skepticism of Holmes and Pound and developed the ideas of legal realism. The views of the realists diverged in many areas, but they typically shared several "common points of departure" from traditional legal theory.<sup>14</sup> While there were many different realist perspectives, Karl Llewellyn emerged as a leader of the new movement and was known as "one of the most articulate defenders of American legal realism."<sup>15</sup> Headed by legal scholars like Llewellyn and Jerome Frank, legal realism destabilized traditional ideas and argued that the nature of law is transitory, or in "flux," and that judicial decision-making is a key component to the development of law.<sup>16</sup> Concerned about the full implications of the jurisprudential ideas he helped to form, Roscoe Pound picked up his pen and urged this young band of skeptical thinkers to adopt some

---

<sup>10</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897). Why are we tempted to treat law as a purely logic-based system? "[T]he logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man." *Id.* at 466.

<sup>11</sup> MARTIN, *supra* note 8, at 20–21.

<sup>12</sup> *Id.* at 21 (noting that positivism and the historical school developed in opposition to the natural-law tradition). For an example of the German historical school of legal thought, see generally 1 CARL VON SAVIGNY, *THE HISTORY OF THE ROMAN LAW DURING THE MIDDLE AGES* (E. Cathcart trans., Hyperion Press, Inc. 1979) (1829) (tracing the development of the Roman law and its effects on Europe).

<sup>13</sup> MARTIN, *supra* note 8, at 22.

<sup>14</sup> Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1235–38 (1931). He describes the key characteristics of the movement as follows:

The *temporary* divorce of Is and Ought for purposes of study[,] . . . distrust of the theory that traditional prescriptive rule-formulations are *the* heavily operative factor in producing court decisions[,] . . . belief in the worthwhileness of grouping cases and legal situations into narrower categories than has been the practice in the past[,] . . . insistence on evaluation of any part of law in terms of its effects[, and] . . . [i]nsistence on *sustained and programmatic attack* on the problems of law along any of these lines.

*Id.*

<sup>15</sup> MARTIN, *supra* note 8, at 29.

<sup>16</sup> Llewellyn, *supra* note 14, at 1236.

humility.<sup>17</sup> Pound argued that the realist's dismissal of the "pure fact of law" is silly because the realist relies on the "pure fact of fact"—both of which are susceptible to preconceived ideas and bias.<sup>18</sup>

Legal realism, however, continued to spread throughout the legal profession and profoundly influenced the development of American law.<sup>19</sup> Generations of legal professionals have been influenced by legal realism, but its influence has not stopped there.<sup>20</sup> Karl Llewellyn argued that a lawyer's job is to successfully predict the actions of a court upon his client<sup>21</sup> and emphasized the importance of developing "hunching power."<sup>22</sup> Llewellyn forecasted the growing tendency to use quantitative studies to enhance the lawyer's predictions and noted the value of studying the action of the appellate courts to reduce uncertainty.<sup>23</sup> To make the very best predictions for his clients, the information gathered through empirical research would be invaluable. The realist influence progressed to Critical Legal Studies ("CLS"), a school of jurisprudence that has been fairly characterized as an extreme form of legal realism.<sup>24</sup> Llewellyn's predictions about the direction of jurisprudence would prove to be correct, but it did not come into being from the CLS scholars.<sup>25</sup> Instead, Llewellyn's vision would be more fully realized by intellectual forces largely outside legal culture.

---

<sup>17</sup> Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 698 (1931) ("[T]here is nothing new in the assumption of those who are striking out new paths of juristic thought that those who have gone before them have been dealing with illusions, while they alone and for the first time are dealing with realities.").

<sup>18</sup> *Id.* at 700; see also Walter B. Kennedy, *Principles or Facts?*, 4 FORDHAM L. REV. 53, 58–64 (1935) (criticizing the tendency of the legal realists' "fact-fetish"). For Llewellyn's famous response to Pound, see Llewellyn, *supra* note 14.

<sup>19</sup> AMERICAN LEGAL REALISM, *supra* note 9, at xiii–xiv.

<sup>20</sup> *Id.* at xiv.

<sup>21</sup> KARL N. LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* 14–17 (11th prt. 2008) (1930).

<sup>22</sup> *Id.* at 104.

<sup>23</sup> Llewellyn, *supra* note 14, at 1244, 1250.

<sup>24</sup> See Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 257 (1997). CLS took the indeterminacy arguments of legal realism and applied its own brand of cynicism to various critiques of legal application, ranging from criminal justice to sex and race issues. See, e.g., David Kairys, *Introduction* to *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 1, 7–9 (David Kairys ed., Pantheon Books 2d ed. 1990) (1982). But see MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 10–13 (1987) (distinguishing legal realism from CLS).

<sup>25</sup> Cross, *supra* note 24, at 257 ("[T]endencies toward nihilism killed CLS.").

*B. From Llewellyn to Spaeth*

Enter political jurisprudence—a new and formidable legal realism<sup>26</sup> strengthened by empirical studies and advanced primarily by political scientists.<sup>27</sup> The essence of political jurisprudence is the notion “that judges *make* rather than simply discover law”<sup>28</sup> and the idea that courts are merely political institutions headed by judges who themselves are merely political actors.<sup>29</sup> Political jurisprudence removes any distinction between law and politics and attacks the notion that the judiciary is an independent branch of government.<sup>30</sup> Those familiar with the idea of the separation of powers in constitutional government would be understandably troubled by the ideas of political jurisprudence.<sup>31</sup> Quoting Montesquieu, James Madison reminded us that “there can be no liberty . . . if the power of judging be not separated from the legislative and executive powers.”<sup>32</sup> Alexander Hamilton assured us that “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the [C]onstitution . . . . [And] may truly be said to have neither FORCE nor WILL, but merely judgment.”<sup>33</sup>

Political jurisprudence would propose that Madison’s and Hamilton’s ideas of judicial independence are a myth and function merely as a support for a judge’s policy choices.<sup>34</sup> With the increased use of empirical methods, scholars have advanced various theories on judicial behavior. Theories range from the legal model (measuring the influence of law), to the attitudinal model (measuring the influence of judicial ideology).<sup>35</sup> The legal model seeks to explain judicial behavior by conformity to legal principles,<sup>36</sup> while the attitudinal model seeks to explain judicial behavior through the individual values and attitudes of judges.<sup>37</sup>

---

<sup>26</sup> See Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 834 (2008) (“We believe that much of the emerging empirical work on judicial behavior is best understood as a new generation of legal realism.”).

<sup>27</sup> Shapiro, *supra* note 5, at 294.

<sup>28</sup> *Id.* at 295 (emphasis added).

<sup>29</sup> *Id.* at 296.

<sup>30</sup> *Id.* at 302.

<sup>31</sup> See generally U.S. CONST. arts. I–III.

<sup>32</sup> THE FEDERALIST NO. 47, at 240 (James Madison) (Lawrence Goldman ed., 2008).

<sup>33</sup> THE FEDERALIST NO. 78, at 291 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

<sup>34</sup> Shapiro, *supra* note 5, at 297.

<sup>35</sup> Miles & Sunstein, *supra* note 26, at 832–33.

<sup>36</sup> JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 48 (2002).

<sup>37</sup> *Id.* at 86.

The attitudinal model of judicial decision-making has chiefly been advanced by Harold Spaeth, a political science professor at Michigan State University.<sup>38</sup> Spaeth has compiled empirical information regarding Supreme Court decision-making<sup>39</sup> and has written several influential books about the attitudinal model.<sup>40</sup> Spaeth's attacks on the notion of judicial impartiality are intriguing for those who question decisions like *Marbury v. Madison*,<sup>41</sup> *Dred Scott v. Sanford*,<sup>42</sup> and *Roe v. Wade*,<sup>43</sup> but they reveal a deep cynicism.<sup>44</sup> To Spaeth, judges are policymakers who conceal their actions through sham legal reasoning and false objectivity.

The ideas of Spaeth and the political scientists should be deeply disturbing to those who adopt "the unsophisticated view" that judges should decide cases free from their own biases and policy preferences.<sup>45</sup> The norms associated with Spaeth's attitudinal model are corrosive to the rule of law. In fact, judges' adoption of the premises and values associated with political jurisprudence would cause them to openly violate ethical rules of conduct and sworn oaths.<sup>46</sup> Yet the arguments that Spaeth makes about judicial behavior deserve some attention, regardless of whether the results provoke discomfort or disbelief. Political jurisprudence goes too far and seems blind to its own bias, but it does provide some value toward a better understanding of the factors that contribute to judicial decision-making.<sup>47</sup> Can a school of thought that attacks judicial legitimacy and independence actually end up contributing to judicial integrity and promoting the rule of law?

---

<sup>38</sup> See Wayne Batchis, *Constitutional Nihilism: Political Science and the Deconstruction of the Judiciary*, 6 RUTGERS J.L. & PUB. POL'Y 1, 10 (2008) ("Perhaps the most ambitious and influential conception of judicial behavior to emerge from the wealth of political science literature on the Supreme Court is Harold Spaeth's 'attitudinal model.'"); see also Howard Gillman, *What's Law Got to Do with It? Judicial Behaviorists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 466–67 (2001).

<sup>39</sup> See Harold Spaeth et al., *The Genesis of the Database*, THE SUPREME COURT DATABASE, <http://supremecourtdatabase.org/about.php> (last visited Oct. 22, 2010).

<sup>40</sup> See, e.g., DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING (1976); JEFFREY A. SEGAL, HAROLD J. SPAETH & SARA C. BENESH, THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM (2005); SEGAL & SPAETH, *supra* note 36; HAROLD J. SPAETH, SUPREME COURT POLICY MAKING: EXPLANATION AND PREDICTION (1979).

<sup>41</sup> 5 U.S. (1 Cranch) 137, 147–48 (1803) (articulating the power of judicial review).

<sup>42</sup> 60 U.S. (19 How.) 393, 421–22, 426–27 (1856) (affirming in a dubious and now-discarded decision, the constitutionality of slavery and regarded blacks as non-citizens).

<sup>43</sup> 410 U.S. 113, 153–54 (1973) (holding in a controversial decision a right to terminate pregnancy. This case is recognized as a case driven by a purely political result).

<sup>44</sup> For example, Spaeth attacks the trappings of the judiciary—black robes, courthouses, ritualized proceedings—as mythological devices to project objectivity and conceal the policy-making biases of the judges. SEGAL & SPAETH, *supra* note 36, at 26.

<sup>45</sup> *Id.* at 6.

<sup>46</sup> Batchis, *supra* note 38, at 1, 5–6.

<sup>47</sup> See sources cited *infra* note 54.

### C. *A Dangerous Remedy*

The desire for judicial legitimacy could be better realized by understanding and appreciating certain aspects of political jurisprudence.<sup>48</sup> The attitudinal model serves most profitably as a tool for introspection and focused criticism. Legal realism was used by modern legal thinkers to check the excesses and arbitrariness of judicial formalism, and the information provided by the attitudinal model can check judges' bias and policy-making. The attitudinalists themselves recognize their connection to the realists.<sup>49</sup>

Fundamentally, the attitudinal model is used to argue that courts decide cases in a manner consistent with the ideological attitudes and values of the individual judges.<sup>50</sup> The attitudinal model has been primarily focused on Supreme Court decision-making; that is where the theory may truly be relevant. According to the attitudinal model, all Supreme Court Justices are judicial activists. The attitudinalists argue that the Justices are free to indulge their personal policy preferences for several reasons: their unlimited tenure makes them unresponsive to either public opinion or the other branches of the government, the Supreme Court is the court of last resort, and legal rules governing decision-making do not constrain the Court's discretion.<sup>51</sup> Attitudinalists arrive at their conclusions by assigning scores that correspond to a spectrum of ideological values.<sup>52</sup>

Recently, studies of judicial politics have grown considerably in legal scholarship,<sup>53</sup> but the empirical study upon which much of the scholarship is based is not without criticism.<sup>54</sup> Weaknesses aside, the

---

<sup>48</sup> My arguments for and against political jurisprudence are mostly focused towards Harold Spaeth's attitudinal model. Political jurisprudence is a growing discipline with various points of emphasis and divergent schools of thought. Within the empirical study of the law, there is the legal model, attitudinal model, and rational-choice model.

<sup>49</sup> SEGAL & SPAETH, *supra* note 36, at 86–87 (“The attitudinal model represents a melding together of key concepts from legal realism, political science, psychology, and economics. . . . [It] has its genesis in the legal realist movement of the 1920s.”).

<sup>50</sup> *Id.* at 86. “Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.” *Id.*

<sup>51</sup> *Id.* at 111.

<sup>52</sup> *See id.* at 312–26 (discussing the research method behind the attitudinal model). The authors explain: “While not everyone would agree that every score precisely measures the perceived ideology of each nominee, Fortas, Marshall, and Brennan are expectedly the most liberal, while Scalia and Rehnquist are the most conservative.” *Id.* at 321.

<sup>53</sup> Bryan D. Lammon, *What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naive Legal Realism*, 83 ST. JOHN'S L. REV. 231, 236–37 n.15 (2009).

<sup>54</sup> *See, e.g.*, Batchis, *supra* note 38, at 1 (criticizing the attitudinal model from the perspective of a political scientist who is formerly an attorney); Cross, *supra* note 24, at 252–54, 279, 321, 324, 326 (proposing legal recognition of the attitudinal model and

research of political jurisprudence can help to pinpoint areas of bias and subjectivity. The cataloguing of judicial voting tendencies may in fact provide further insight into how judges rule. In fact, Spaeth and a co-author Jeffrey Segal claim to have significant levels of success in predicting judicial attitudes and votes.<sup>55</sup> Prediction success rates that hover around ninety percent<sup>56</sup> should not be casually dismissed, especially when the authors posit the idea that the biases of the Justices are more predictable indicators of judicial behavior than the law that is supposed to constrain them.

This is precisely why the ideas behind political jurisprudence are a dangerous remedy to judicial activism. The resurgent emphasis on the dangers of mixing politics and law may have had some effect,<sup>57</sup> but empirical evidence of judicial policy-making could pinpoint particular areas where bias and self-interest tend to taint judicial reasoning. Judicial activism is not limited to a particular point of view or political ideology.<sup>58</sup> Matching judicial decisions with the stated ideology of judges and then comparing their analysis with the law (for example, the Constitution) can raise awareness to biased judgments and at least provide nominal deterrence through shame. Judges typically resent the label of “judicial activist,” and they will emphatically proclaim their

---

identifying its shortcomings); Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 LAW & SOC. INQUIRY 89, 124–129 (2005) (attempting to reconcile the differences between the legal and political science approaches to understanding judicial decision-making); Michael J. Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733, 1739–48 (2003) (criticizing Segal and Spaeth’s text; see SEGAL & SPAETH, *supra* note 36); Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685, 742–47 (2009) (discussing the view that the question of judicial policy-making is how much it occurs, not whether it occurs).

<sup>55</sup> SEGAL & SPAETH, *supra* note 36, at 324. Segal and Spaeth have achieved some measure of success with the attitudinal model:

For example, Spaeth was able to predict accurately 88 percent (92 out of 105) of the Court’s decisions between 1970 and 1976 and 85 percent of the justices’ votes. In a looser test, we accurately predicted the majority and dissenting coalitions in 19 of 23 death penalty cases, and similar percentages of other civil liberties cases.

*Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 15–18 (1990) (arguing that the temptation to engage in judicial activism is not confined to a particular political point of view).

<sup>58</sup> See David Halberstam, *Earl Warren and His America*, in *THE WARREN COURT: A RETROSPECTIVE* 12, 14–17 (Bernard Schwartz ed., 1996) (describing the “optimist and activist” Warren as receptive to the needs of ordinary people); Herman Schwartz, *Introduction to THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* 13, 21 (Herman Schwartz ed., 2002) (describing the rulings of the Rehnquist era as mirroring Ronald Reagan’s political agenda).



fidelity to the rule of law when they have an opportunity to ascend the ranks.<sup>59</sup>

Empirical studies may have limited but important use in tracking the decision-making of a prospective justice. Empirical research that reveals, for example, the tendency of an appellate judge to place great weight on a specific portion of a statute or to emphasize one aspect of the law at the exclusion of the whole, may reveal the extent to which the judge is injecting his or her own values into the decision-making process. The political process can adjust to that information accordingly.

Limiting the understanding of judicial decision-making solely on the current realities is focusing on the Is, while an understanding focused solely on the manner in which judges should behave is focusing on the Ought. The “temporary divorce”<sup>60</sup> of Is and Ought does not promote a clear understanding of the law. To compel judges to carry out their functions in accordance with the law, it is necessary to have a proper understanding of both Is and Ought. Political jurisprudence is most helpful as a descriptive tool for what Is. The danger lies in stopping at what Is and adopting the deep cynicism that leads to a disregard as to how judges Ought to act. Left without a normative principle for judicial behavior, the law begins to reflect Thrasymachus’s cold vision of “justice.”<sup>61</sup> Instead of applying to all, law becomes a tool for the strong to exert their will over the weak.

There is clearly a disconnect between the jurisprudential schools of thought that emphasize the Is (the attitudinal model) and those that emphasize the Ought (the legal model).<sup>62</sup> A combination of both approaches would be most effective in understanding judicial decision-making and holding judges accountable for their decisions. Although the ideas of the attitudinal model ought not to be taken lightly,<sup>63</sup> perhaps another consideration can check its excesses. Before examining a current example of political jurisprudence, it is useful to discuss the impact of human nature on judicial decision-making in general.

---

<sup>59</sup> See *infra* p. 200 and notes 110–112.

<sup>60</sup> See Llewellyn, *supra* note 14, at 1236.

<sup>61</sup> PLATO, *supra* note 2, at 14.

<sup>62</sup> See Cross, *supra* note 24, at 326 (noting that incorporating the ideas of both the attitudinal and legal models could help bind judges to the rule of law).

<sup>63</sup> Frank Cross gives a sobering description:

Legal scholars have good reason to be wary of the attitudinal model. This is the arbitrary or personal judicial lawmaking of which the defenders of the legal model warned: the rule of men, not of law. While opinions are written in terms of legal doctrine, the attitudinal model joins the tradition of legal realists and critical legal scholars in dismissing the language as merely a legitimating myth. . . . [The attitudinal model] is ultimately more significant and threatening than CLS or even legal realism.

*Id.* at 263–64.

## II. CONTRADICTIONS IN HUMAN BEINGS, CONTRADICTIONS IN LAW

In his argument against blind faith in reason, Pascal states: "Reason's last step is the recognition that there are an infinite number of things [that] are beyond it. It is merely feeble if it does not go as far as to realize that."<sup>64</sup> An exploration of human nature underlies a sound understanding of judicial decision-making. What are human beings? What is our purpose? What motivates human behavior, self-interest or good will? Are humans fundamentally good, evil, or somewhere in between? The answers to these questions and countless related others inform our understanding of human nature. The wide array of opinions regarding human nature<sup>65</sup> should at least lead to the conclusion that humans are exceptionally complex and that ideas regarding human nature are wildly contradictory. Two failures of human nature directly contribute to the limited capabilities of law and to the divide between the attitudinal and legal model: the misplaced faith in the powers of human reason and the reality of fundamental human depravity.

Against the damning evidence mounting daily, human beings generally continue to think highly of themselves.<sup>66</sup> Our failure to understand the natural world and repeated inability to apply what we do know do little to shake the confidence we have in our own capabilities. The idea that reality can be fully comprehended by humans and used to control their own lives can be traced back to Plato, Aristotle, and Thomas Aquinas.<sup>67</sup> According to this view, truth unrealized is still knowable because of the human capability to access and use reason.<sup>68</sup> The sophist Protagoras sums up this humanistic view: "Man is the measure of all things, of the beings that . . . they are, and of the nonbeings that . . . they are not."<sup>69</sup> Variations of this inflated optimism in human nature are expressed in a myriad of ways ranging from John Locke<sup>70</sup> to William Ernest Henley.<sup>71</sup> The folly of placing full trust in our

---

<sup>64</sup> PASCAL, *supra* note 1, at 56.

<sup>65</sup> For a small sample of the wide diversity of opinion on human nature, see generally *THE NATURE OF MAN* (Erich Fromm & Ramón Xirau eds., 3d ed. 1971).

<sup>66</sup> "Good sense is, of all things among men, the most equally distributed; for everyone thinks himself so abundantly provided with it, that those even who are the most difficult to satisfy in everything else, do not usually desire a larger measure of this quality than they already possess." RENÉ DESCARTES, *DISCOURSE ON METHOD* (John Veitch trans., E.P. Dutton & Co. 1953), *reprinted in THE NATURE OF MAN*, *supra* note 65, at 136.

<sup>67</sup> JOHN A. EISENBERG, *THE LIMITS OF REASON: INDETERMINACY IN LAW, EDUCATION, AND MORALITY* 2 (1992).

<sup>68</sup> *Id.*

<sup>69</sup> PLATO, *THEAETETUS* I.103 (Seth Benardete trans., Univ. of Chicago Press 1986) (n.d.).

<sup>70</sup> JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 5 (Thomas P. Peardon ed., Macmillan Publ'g Co. 1952) (1690) ("The state of nature has a law of nature to govern it, which obliges every one; and reason, which is that law, *teaches all mankind who will but*

own capabilities is also revealed in the biblical account of the proud Babylonian king, Nebuchadnezzar, and his reduction to a mere beast.<sup>72</sup> Reason “returned” to Nebuchadnezzar after he was humbled and recognized that he was lower than the Most High.<sup>73</sup> A proper estimation of our capabilities and limitations would help us to use reason and logic appropriately. An understanding that there are limitations in human ability would allow reason to be more effectively applied.

The presence of bias and subjective belief within human consciousness should also be accounted for when examining the capabilities of human reason.<sup>74</sup> Various psychological studies have shown the extent to which personal beliefs affect mental processes, ranging from interpretation to the function of memory.<sup>75</sup> It is healthy to recognize the obvious limits of reason without requiring the complete embrace of irrationality. Detecting the limitations in reason presupposes a baseline level of competency.<sup>76</sup> Part of reason’s failure is its “restless, domineering quality.”<sup>77</sup> This domineering quality is expressed in the insistence that repeated human failures that result from using reason are not reflective of the supposed capabilities of reason to arrive at the

---

*consult it* that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions . . .” (emphasis added)).

<sup>71</sup> William Ernest Henley, *Invictus*, in JOSEPH M. FLORA, WILLIAM ERNEST HENLEY, 28, 28–29 (1970) (“Out of the night that covers me, / Black as the Pit from pole to pole, / I thank whatever gods may be / For my unconquerable soul. / In the fell clutch of circumstance / I have not winced nor cried aloud. / Under the bludgeonings of chance / My head is bloody, but unbowed. / . . . / It matters not how strait the gate, / How charged with punishments the scroll, / I am the master of my fate: / I am the captain of my soul.”).

<sup>72</sup> *Daniel* 4:28–33 (English Standard) (“‘Is not this great Babylon, which I have built by my mighty power as a royal residence and for the glory of my majesty?’ While the words were still in the king’s mouth, there fell a voice from heaven, ‘O King Nebuchadnezzar, to you it is spoken: The kingdom has departed from you, and you shall be driven among men, and your dwelling shall be with the beasts of the field. And you shall be made to eat grass like an ox, and . . . time shall pass over you, until you know that the Most High rules the kingdom of men and gives it to whom he will.’ Immediately the word was fulfilled . . .”).

<sup>73</sup> *Id.* at 4:37 (“Now I . . . praise and extol and honor the King of heaven, for all his works are right and his ways are just; and those who walk in pride he is able to humble.”).

<sup>74</sup> DAVID G. MYERS, *THE INFLATED SELF: HUMAN ILLUSIONS AND THE BIBLICAL CALL TO HOPE* 53 (1980) (“In every arena of human thinking our prior beliefs bias our perceptions, interpretations, and memories. . . . [W]e fail to realize the impact of our prejudgments. Our tendency to perceive events in terms of our beliefs is one of the most significant facts concerning the workings of our minds.”).

<sup>75</sup> *Id.* at 53–60.

<sup>76</sup> C. STEPHEN EVANS, *FAITH BEYOND REASON: A KIERKEGAARDIAN ACCOUNT* 14 (1998) (“For reason would have to possess a certain competence even to [recognize] where it is incompetent.”).

<sup>77</sup> *Id.* at 96–97 (explaining Søren Kierkegaard’s views on the deficiency of reason as follows: “Insofar as reason is confident that it will always be victorious in its continued quest, it will necessarily reject any claim that there is an *ultimate* mystery, anything that is in principle resistant to reason’s domination and control.”).

truth, but merely a veiled claim of omniscience.<sup>78</sup> Human reason also fails because of its “egoistic or selfish” tendencies and hides itself through claims of neutrality and objectivity.<sup>79</sup> Even though pure objectivity is very difficult, if not impossible, to obtain, it does not follow that striving for impartiality should be abandoned.<sup>80</sup> It is reasonable to expect judges to hear a dispute, read a statute, apply the law, or make a decision without being partial to the facts or doctrines that fit their values.

Political jurisprudence is helpful because it reveals the presence of human irrationality and bias in judicial decision-making. Frequently, however, the ideas of political jurisprudence are articulated without reference to another crucial aspect of human nature: fundamental human depravity. Sin has left humans in the position where we are unable to consistently use our mental or moral faculties correctly and are incapable of doing anything pleasing to God.<sup>81</sup> Fundamentally, sin is the delusion that humans, individually, are ultimately sovereign.<sup>82</sup> Thus, human corruption is woven into every part of human existence: soul, mind, and body.<sup>83</sup> Being afflicted with the same condition, scientists and philosophers are unable to diagnose humans correctly or to understand the extent of our corruption.<sup>84</sup> Fundamental human depravity has warped the use of the mind and polluted the process by which humans gather information.<sup>85</sup> The complete faith that early philosophers and scholars place in the capabilities of humans to access and use reason correctly is misplaced.<sup>86</sup>

The exclusion of human depravity from the calculus of judicial behavior seems to create a superiority complex in the new legal

---

<sup>78</sup> *Id.* at 97 (explaining further Kierkegaard's view).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 98.

<sup>81</sup> A. W. PINK, GLEANINGS FROM THE SCRIPTURES: MAN'S TOTAL DEPRAVITY 83 (1969).

<sup>82</sup> EVANS, *supra* note 76, at 97.

<sup>83</sup> PINK, *supra* note 81, at 83–84 (“Depravity is all-pervading, extending to the whole man. . . . As found in the understanding, it consists of spiritual ignorance, blindness, darkness, foolishness. As found in the will, it is rebellion, perverseness, a spirit of disobedience. As found in the affections, it is hardness of heart, a total insensibility to and distaste for spiritual and divine things.”).

<sup>84</sup> *Id.* at 119.

<sup>85</sup> *Id.* at 137.

<sup>86</sup> *Id.* (“It is not strange that blind reason should think it sees, for while it judges everything else it is least capable of estimating itself because of its very nearness to itself. Though a man's eye can see the deformity of his hands or feet, it cannot see the bloodshot that is in itself, unless it has a mirror in which to discern the same.”).

realists.<sup>87</sup> The problem is that the realists are just as prone to irrationality and bias as those who hold to formalistic views of law. Political scientists and legal theorists who brush off the idea of complete human depravity must still contend with the notion that complete faith in empirical research is a mistake. The error lies in the assumption that the principles of the scientific method can be used to sufficiently explain phenomena in human social interaction.<sup>88</sup> The scientific method, with its great advances in contributing to our understanding of the material world (in fields such as physics, engineering, and chemistry), provided a glimmer of hope in the world of uncertainty present in human relationships.<sup>89</sup> Human behavior, however, does not have the precision of mathematical formulas, and human unpredictability is a significant barrier to achieving certainty, or near certainty, in social science research. The social sciences (including political science) are thus limited in their ability to understand political, much less legal, behavior.<sup>90</sup>

Thus observations about human bias should not be selectively applied only to judges and legal formalists. Understanding human limitation requires an appreciation of the full spectrum of human motivation—both the rational and irrational. Pascal counsels: “Let us then conceive that man’s condition is dual. Let us conceive that man infinitely transcends man, . . . for who cannot see that unless we realize the duality of human nature we remain invincibly ignorant of the truth about ourselves?”<sup>91</sup> Jurisprudence reflects the duality present in man’s nature. The best jurisprudential theories recognize the limited human capabilities to discern and exercise reason, and they take account of the capacity for human evil and error. Political jurisprudence functions best when juxtaposed to the legal model to help us understand judicial

---

<sup>87</sup> Notice the dismissive tone of the attitudinalists: “Those who wish to argue that the Court merely follows established legal principles in deciding cases (yes, such views exist, as we have documented in Chapters 2 and 7) certainly have their work cut out for them.” SEGAL & SPAETH, *supra* note 36, at 432.

<sup>88</sup> CHARLES A. BEARD, *THE OPEN DOOR AT HOME: A TRIAL PHILOSOPHY OF NATIONAL INTEREST* 6–7 (Greenwood 1972) (1934).

<sup>89</sup> *Id.* at 7 (“Into the world of human affairs, torn by political and economic controversies, natural science came with a healing promise to mankind. . . . [I]t seemed perfectly reasonable to suppose that the method of natural science—observe facts and draw rules—would solve social ‘problems’ just as it had solved mechanical problems.”).

<sup>90</sup> *Id.* at 10–13 (explaining the development and limitations of the major social sciences, including insight into the growth and effectiveness of political science).

<sup>91</sup> PASCAL, *supra* note 1, at 34–35 (“What sort of freak then is man! How novel, how monstrous, how chaotic, how paradoxical, how prodigious! Judge of all things, feeble earthworm, repository of truth, sink of doubt and error, glory and refuse of the universe! . . . Know then, proud man, what a paradox you are to yourself. Be humble, impotent reason! Be silent, feeble nature! Learn that man infinitely transcends man, hear from your master your true condition, which is unknown to you.”).

behavior.<sup>92</sup> The effects of human nature and the battle between realism and formalism are revealed in dramatic fashion in the Supreme Court. A recent decision provides additional support for the measured usefulness of political jurisprudence.

### III. A CURRENT EXAMPLE: *RICCI V. DESTEFANO*<sup>93</sup>

The fascination with the United States Supreme Court continues to grow, and with good reason—it remains the most powerful judicial body in the entire world. From the range of its rights and the reach of its jurisdiction, the Court exerts a powerful influence.<sup>94</sup> John Marshall’s brilliance in *Marbury v. Madison*<sup>95</sup> secured the power of judicial review and raised the Court to a new position of power and influence.<sup>96</sup> The power of judicial review transformed “[t]he least dangerous branch” of our federal government into a court of law that wields extraordinary power.<sup>97</sup> Current constitutional law doctrine holds that the Court is the final arbiter on the meaning of the Constitution.<sup>98</sup> On this stage, we witness the duel between legal realism and legal formalism. Recently, this battle occurred when eighteen firefighters sued the city of New Haven, Connecticut, over its refusal to certify promotion-conferring test results.<sup>99</sup> The progression of this controversial case to the pinnacle of the federal judicial system occurred concurrently with the historic elevation of the first Hispanic Justice to the Supreme Court.

---

<sup>92</sup> See Cross, *supra* note 24, at 309–11 (noting that “[t]he lack of integration of the attitudinal and legal models is most unfortunate.”).

<sup>93</sup> 129 S. Ct. 2658 (2009).

<sup>94</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 149 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835).

<sup>95</sup> See 5 U.S. (1 Cranch) 137 (1803).

<sup>96</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 1–14 (1962) (“Congress was created very nearly full blown by the Constitution itself. The vast possibilities of the presidency were relatively easy to perceive and soon, inevitably, materialized. But the institution of the judiciary needed to be summoned up out of the constitutional vapors, shaped, and maintained; and the Great Chief Justice, John Marshall—not singlehanded, but first and foremost—was there to do it and did.”).

<sup>97</sup> *Id.* at 1.

<sup>98</sup> See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) (stating that “judicial authority to determine the constitutionality of laws . . . is based on the premise that the ‘powers of the legislature are defined and limited’” by the Constitution. (quoting *Marbury*, 5 U.S. (1 Cranch) at 176)).

<sup>99</sup> *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 145–150 (D. Conn. 2006), *aff’d*, 530 F.3d 87, 87 (2d Cir. 2008), *rev’d*, 129 S. Ct. 2658, 2681 (2009).

A. *The Ascension of Justice Sotomayor*

As the newest Justice recognizes, personal values play a substantial role in judicial decision-making: “I . . . accept that our experiences as women and people of color affect our decisions. The aspiration to impartiality is just that—it’s an aspiration because it denies the fact that we are by our experiences making different choices than others.”<sup>100</sup> The rise of Sonia Sotomayor to the Court is a compelling story.<sup>101</sup> Justice Sotomayor came from humble beginnings and overcame significant childhood adversity to achieve significant academic and career success.<sup>102</sup> President Obama selected a well-qualified candidate who demonstrated work ethic and capabilities consistently throughout her career. Her nomination and eventual confirmation by the Senate are historic for several reasons, most notably for the fact that she sits as the first Hispanic, and only the third woman, on the Court.<sup>103</sup> Justice Sotomayor was a unique and inspired choice to serve on the Court, and her ascension to the top of the legal profession is an inspirational story of American social mobility.<sup>104</sup> Justice Sotomayor’s nomination to the Court is significant for another reason: it marks the further inroads of the norms of legal realism into American jurisprudence.

In a 2001 lecture now famous for its candor, then-appellate judge Sonia Sotomayor explained how personal experience affects judicial behavior: “Personal experiences affect the facts that judges choose to see . . . . I simply do not know exactly what that difference will be in my judging. But I accept there will be some [differences] based on my gender and my Latina heritage.”<sup>105</sup> Justice Sotomayor’s comments indicate the powerful influence that legal realism has had on American

---

<sup>100</sup> Sonia Sotomayor, *A Latina Judge’s Voice*, 13 BERKELEY LA RAZA L.J. 87, 91 (2002).

<sup>101</sup> See Sheryl Gay Stolberg, *A Trailblazer and a Dreamer*, N.Y. TIMES, May 27, 2009, at A1.

<sup>102</sup> *Id.* (noting the following: learned she was diabetic at eight; lost her father at nine; raised primarily by a hard-working mother; accepted into Princeton and became respected for her diligent work ethic—e.g., during summers she familiarized herself with the literary classics her elite peers had known already and took for granted; accepted into Yale Law School and later wrote on to the Law Review; became a prosecutor, then a commercial litigator; nominated by first President Bush and confirmed as a federal district judge in the Southern District of New York; nominated by President Clinton and confirmed as a judge on the Court of Appeals for the Second Circuit).

<sup>103</sup> *Id.*

<sup>104</sup> David Gonzalez, *For Puerto Ricans, Sotomayor Prompts Pride[] and Reflection*, N.Y. TIMES, Aug. 7, 2009, at A13.

<sup>105</sup> Sotomayor, *supra* note 100, at 92. The comments that received the bulk of the public’s attention repeated the same themes: “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.” *Id.*

jurisprudence. The open recognition and defense of bias by a well-qualified, federal appellate judge indicates how the norms for judicial behavior continue to move away from the rule of law. Expecting judges to overcome their biases and apply the law without letting their personal experience interfere is now considered by many to be a quaint and simplistic view.<sup>106</sup> That is unfortunate, because it is possible to have a sophisticated view of jurisprudence that expects judges to adhere to a higher standard.<sup>107</sup>

Justice Sotomayor's candid discussion of bias in the law is to be commended in some respects, because she at least acknowledged what other judges refuse to address. Upon her nomination to the Supreme Court, however, the transparency was gone. To endure the heightened scrutiny that has recently accompanied Supreme Court nominees,<sup>108</sup> she proceeded carefully through the nomination process.<sup>109</sup> A heated public debate erupted over the candid comments she made on the expectations of judicial behavior while still an appellate judge.<sup>110</sup> She avoided any further controversy by responding carefully to questions about her judicial temperament.<sup>111</sup> Instead of explaining more about her philosophy, she told the Senate Judiciary Committee what most of us wanted to hear: "My personal and professional experiences help me to listen and understand . . . with the law always commanding the result in every case."<sup>112</sup> Justice Sotomayor's comments during confirmation proceedings are markedly different from her earlier admission to being influenced by sex and ethnicity.

Among other reasons, Justice Sotomayor is a significant figure because she is a contemporary example of the formidability of political jurisprudence. Justice Sotomayor's statements indicate that she shares the attitudinalists' idea that "the fairy tale of a discretionless judiciary

---

<sup>106</sup> See, e.g., Bruce Weber, *Umpires v. Judges*, N.Y. TIMES, July 12, 2009, at WK1.

<sup>107</sup> See *Leviticus* 19:15 (New King James) ("You shall do no injustice in judgment. You shall not be partial to the poor, nor honor the person of the mighty. But in righteousness you shall judge your neighbor.").

<sup>108</sup> The recent trend of contentious political battles over Court nominees can be traced to Reagan nominee Robert Bork. Judge Bork's candid answers regarding his judicial philosophy led to the defeat of his nomination. For his own account of the contentious nomination proceedings, see BORK, *supra* note 57, at 271–93. "This episode confirms, it must be feared, that none of the institutions of the law are free of the increasing politicization of our legal culture." *Id.* at 293.

<sup>109</sup> The Supreme Court nomination process itself has become an area of research for the attitudinalists. See SEGAL & SPAETH, *supra* note 36, at 206–22 (detailing past empirical results for nominations to the Supreme Court).

<sup>110</sup> Adam Liptak, *Path to Court: Speak Capably but Say Little*, N.Y. TIMES, July 12, 2009, at A1 (referencing Sotomayor, *supra* note 100, at 92).

<sup>111</sup> *Id.*

<sup>112</sup> Peter Baker & Neil A. Lewis, *Judge Focuses on Rule of Law at the Hearings*, N.Y. TIMES, July 14, 2009, at A1.



survives.”<sup>113</sup> Does the level of public outrage at Sonia Sotomayor’s earlier admitted judicial philosophy indicate a lack of sophistication on the part of the American public, or can judges rationally be expected to follow the law objectively?<sup>114</sup> The scrutiny behind Sotomayor’s statements grew as knowledge spread of her involvement on the Second Circuit with *Ricci v. DeStefano*.

### B. Thrust and Parry in Ricci

Affirmative action and race-based employment decision-making provoke strong feelings on both sides of the political aisle. The attitudinalists’ claim that policy preferences govern judicial decision-making exists, at least in part, in cases that revolve around the problem of racism in the United States.<sup>115</sup> In *Ricci*, Frank Ricci and seventeen other firefighters filed a lawsuit against Mayor John DeStefano and other officials of the city of New Haven when the city refused to certify test results that would have resulted in the firefighters receiving promotions.<sup>116</sup> The promotions within the fire department enabled candidates to achieve the rank of lieutenant or captain and were predicated on the candidate’s performance on an objective test; many firefighters invested a significant amount of time, effort, and material resources to prepare accordingly.<sup>117</sup> Frank Ricci, who suffers from dyslexia, spent over \$1,000 on test materials and payment to his neighbor to read him the written materials on tape; Ricci then used the audio tapes while studying from eight to thirteen hours per day in preparation for the exam.<sup>118</sup>

The candidates took the promotion exam in November and December 2003.<sup>119</sup> The top ten candidates for the lieutenant position

---

<sup>113</sup> SEGAL & SPAETH, *supra* note 36, at 8.

<sup>114</sup> See Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 SUFFOLK U. L. REV. 35, 35–36 (1996) (“The public expects the law to be static and predictable. The law, however, is uncertain and responds to changing circumstances. To the public, justice means that an obviously correct conclusion will be reached in every case. But what is ‘correct’ is often difficult to discern when the law is attempting to balance competing interests and principles . . . . A confused public, finding itself at odds with the results of particular judicial decisions, experiences increased cynicism about the law.”).

<sup>115</sup> For the attitudinalist’s treatment of affirmative action issues, see SEGAL & SPAETH, *supra* note 36, at 157.

<sup>116</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2671 (2009).

<sup>117</sup> *Id.* at 2664 (stating that test results would determine the order for consideration).

<sup>118</sup> *Id.* at 2667.

<sup>119</sup> *Id.* at 2666. For the lieutenant position, the top ten candidates were eligible for immediate promotion. Seventy-seven candidates completed the exam (forty-three whites, nineteen blacks, and fifteen Hispanics), and thirty-four of those passed (twenty-five whites,

were all white, and the top nine candidates for the captain position included seven whites and two Hispanics.<sup>120</sup> City officials on the Civil Service Board (“CSB”) were concerned that the test results discriminated against minority candidates and through a series of meetings with the test developer, Industrial/Organizational Solutions (“IOS”), deliberated over whether to certify the results of the exam.<sup>121</sup> IOS repeatedly affirmed the objectivity of the test it had assembled and argued that there was no better alternative; city officials, however, continued to express reluctance to certify the results, arguing that there were other tests that could be administered that would not lead to the disparate results of the IOS test.<sup>122</sup>

Initially, the firefighters became aware of CSB’s concern over the test results but were unaware of their individual scores.<sup>123</sup> After the city refused to certify the results, the firefighters filed suit, alleging that the city violated the prohibition against disparate treatment contained in Title VII of the 1964 Civil Rights Act and argued that they had a constitutional claim under the Equal Protection Clause of the Fourteenth Amendment.<sup>124</sup> Curiously, the district court granted

---

six blacks, and three Hispanics). For the captain position, the top nine candidates were eligible for an immediate promotion. Forty-one candidates completed the exam (twenty-five whites, eight blacks, and eight Hispanics), and twenty-two of those passed (sixteen whites, three blacks, and three Hispanics). *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 2665–71. The CSB met with IOS five times and listened to several witnesses at the final two meetings. IOS charged the city \$100,000 to create and administer the exam, which sought to test the candidates on the requisite skills, abilities, knowledge, and tasks essential for service as a firefighter lieutenant or captain. IOS surveyed a number of captains, lieutenants, and battalion chiefs to create the test material. All of the test assessors assembled by IOS were of a superior rank to those being tested and came from outside Connecticut. Sixty-six percent of the panelists were minorities, and two minority members were a part of each of the nine three-member assessment panels. *Id.* at 2665–66.

<sup>122</sup> *Id.* at 2669–70. The city’s reluctance seems to have originated with City attorney Thomas Ude and City chief administrative officer Karen DuBois-Walton. The CSB relied on several witnesses to help it reach a decision—an industrial/organizational psychologist, a black fire program specialist for the Department of Homeland Security, and a Boston College professor who specialized in “race and culture” as applied to standardized tests. *Id.* at 2668–69. The industrial/organizational psychologist was a direct competitor of IOS, who had not studied the IOS test in detail and yet offered opinion to support the city’s suspicion of the results. *Id.* at 2668; *see also id.* at 2685, 2687 n.2 (Alito, J., concurring) (noting the city’s questionable decision to rely heavily on the testimony of a direct competitor of IOS and largely ignore the testimony of Fire Chief William Grant (who is white) and Fire Chief Ronald Dumas (who is African-American), both of whom approved the test).

<sup>123</sup> *Id.* at 2667. Even without knowing how they had performed, several firefighters, including Frank Ricci, argued that the test results should be certified. *Id.*

<sup>124</sup> *Id.* at 2671–72; *see also* 42 U.S.C. § 2000e-2(a) (2006) (“It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

summary judgment to the defendants, even though the court had conceded that a jury could rationally infer that New Haven city officials worked behind the scenes to sabotage the promotional exams.<sup>125</sup> The court also ruled that the city officials' motivation to "avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent" under Title VII.<sup>126</sup>

Frank Ricci and the firefighters appealed to the Second Circuit Court of Appeals. After full briefing and oral argument, the court of appeals curiously decided to devote a one-paragraph, unpublished summary order to affirm the district court.<sup>127</sup> Justice Sotomayor was a member of the panel that issued the per curiam opinion. The opinion is notable for its brevity and reveals the possibility of bias being masked through court procedure. The per curiam opinion admits the difficulties experienced by Frank Ricci and other New Haven firefighters but finds no merit in the Title VII claim.<sup>128</sup>

The decision by the Second Circuit to render a shockingly brief per curiam opinion in a case that features obvious constitutional issues should be scrutinized in light of Justice Sotomayor's past admissions regarding judicial behavior. Understanding the process of judicial decision-making requires moving past an analysis based solely on legal considerations.<sup>129</sup> Political jurisprudence is helpful in bringing

---

compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .").

<sup>125</sup> *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 162–63 (D. Conn. 2006) (stating that city officials knew that if the exams were certified, Mayor DeStefano would suffer politically at the hands of the local African-American community). The court characterized the firefighters' argument as asserting that if the city could not prove that the disparities on the exams were due to a specific flaw inherent in the exams, then the results should be certified. *Id.* at 156.

<sup>126</sup> *Id.* at 160. In rejecting the firefighters' equal protection claim, the district court concluded that the actions of city officials were not racially based because all of the applicants took the same test and that "the result was the same for all because the test results were discarded and nobody was promoted." *Id.* at 161.

<sup>127</sup> *Ricci*, 129 S. Ct. at 2672. At a later time, the court of appeals withdrew the unpublished summary order, and issued a similar, one-paragraph per curiam opinion that fully embraced the reasoning of the district court; three days later, with a vote of 7 to 6, the court of appeals denied rehearing en banc. *Id.* (rehearing en banc was denied over the written dissents by Chief Judge Jacobs and Judge Cabranes); *see also Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008) (per curiam); *Ricci v. DeStefano*, 530 F.3d 88, 88 (2d Cir. 2008) (order denying en banc hearing).

<sup>128</sup> *Ricci*, 530 F.3d at 87 (per curiam) ("We are not unsympathetic to the plaintiffs' expression of frustration. Mr. Ricci, for example, who is dyslexic, made intensive efforts that appear to have resulted in his scoring highly on one of the exams, only to have it invalidated. . . . To the contrary, because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected.").

<sup>129</sup> *See SEGAL & SPAETH, supra* note 36, at 53. It isn't necessary, however, to take the equally false view that the law is only a camouflage for political will. The attitudinalists go

awareness to the factors that shape a judge's choices. Several years before *Ricci*, Justice Sotomayor revealed factors—race and sex—that influence her decision-making.<sup>130</sup>

A 7-to-6 vote, with Judge Sotomayor in the majority, resulted in a denial of rehearing en banc.<sup>131</sup> The per curiam opinion concealed the policy-making preferences of the appellate court. Judge Calabresi in his concurring opinion determined that the firefighters presented a difficult issue that did not need to be decided because the district court had adequately supplied the reasons for granting summary judgment for the defendants.<sup>132</sup> How do we know that Justice Sotomayor's personal values and biases were not the deciding factor in her decision to cast her vote against rehearing en banc?<sup>133</sup> Did her experiences blunt her appreciation for the injustice experienced by Frank Ricci and the seventeen other firefighters because they largely belonged to a dominant racial majority? In light of her prior admission on how experience affects the decision-making of judges, it is reasonable to conclude that her experiences as a member of a racial minority had an effect on her ability to apply the law that would benefit members of a racial majority. Her vote would have made a difference in the appellate outcome, at least to some degree. How do we know that Justice Sotomayor interpreted Title VII correctly in light of the facts?<sup>134</sup> What effect did the fact that the majority of the aggrieved firefighters were white males have on the meager per curiam opinion?

The dissent from the order denying the rehearing framed the dispute very differently from the majority opinion: "This appeal raises important questions of first impression in our Circuit—and indeed, in the nation—regarding the application of the Fourteenth Amendment's Equal Protection Clause and Title VII's prohibition on discriminatory employment practices."<sup>135</sup> Instead of addressing the important questions raised by the New Haven firefighters, the court of appeals turned a blind eye.

---

too far when they claim that "the legal model and its components serve *only* to rationalize the Court's decisions and to cloak the reality of the Court's decision-making process." *Id.* (emphasis added).

<sup>130</sup> See Sotomayor, *supra* note 100 and accompanying text.

<sup>131</sup> *Ricci*, 530 F.3d at 88.

<sup>132</sup> *Id.* at 88–89.

<sup>133</sup> See Sotomayor, *supra* note 100, at 92.

<sup>134</sup> It is easier to criticize Judge Sotomayor's decision because she spoke publicly about the nature of judicial decision-making. Of course, the same questions apply to the other six appellate judges who voted against a rehearing en banc.

<sup>135</sup> *Ricci*, 530 F.3d at 93. The dissent argued that the questions presented by the New Haven firefighters were "indisputably complex and far from well-settled." *Id.* at 94 ("Presented with an opportunity to address *en banc* questions of such 'exceptional importance,' a majority of this Court voted to avoid doing so.") (citation omitted).

In a law review article written over ten years before *Ricci*, Justice Sotomayor tellingly stated: “A confused public, finding itself at odds with the results of particular judicial decisions, experiences increased cynicism about the law.”<sup>136</sup> Justice Sotomayor, however, does not go far enough in criticizing judges’ inability to apply the law consistently or interpret text reasonably.<sup>137</sup> The realism advocated by Justice Sotomayor is correct as far as it diagnoses why there are divergent results in legal decisions (external factors weigh heavily on the reasoning capacity of judges), but her appeal to realism is incorrect because it stops short of demanding more. Instead of using the knowledge of human bias and weakness to help curb the tendencies toward partiality, Justice Sotomayor recasts inconsistency in law as a virtue.<sup>138</sup> Perhaps due to their own biases in favor of a malleable legal culture, the realists give up the fight against partiality. The public’s cynicism towards the legal profession is much more sophisticated than Justice Sotomayor or the new realists care to concede and is directed at judicial realists who use the convenient truth of human indeterminacy to exert their own will.

The Supreme Court reversed the decisions of the lower courts and held that the city officials of New Haven acted in violation of Title VII when they refused to certify the IOS exam.<sup>139</sup> The Court held that the firefighters suffered discrimination under Title VII, which forbids not only intentional discrimination (“disparate treatment”), but also, in some instances that present no discriminatory intent, a disproportionately adverse effect on minorities (“disparate impact”).<sup>140</sup> Both sides used Title VII as a basis for their argument: the Court petitioners alleged that the city’s refusal to certify the exam results was a violation of the disparate-treatment provision, while the city responded that its decision was appropriate because the tests “appear[ed] to violate” the disparate-impact provision.<sup>141</sup> The Court determined that the district court’s error

---

<sup>136</sup> See Sotomayor & Gordon, *supra* note 114, at 35–36.

<sup>137</sup> Instead, Justice Sotomayor chides critical lawyers who “join[] a chorus of critics of the system.” *Id.* at 36.

<sup>138</sup> “Much of the uncertainty of law is not an unfortunate accident: it is of immense social value.” *Id.* at 37 (quoting JEROME FRANK, *LAW AND THE MODERN MIND* 7 (Anchor Books 1963) (1930)).

<sup>139</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664 (2009).

<sup>140</sup> *Id.* at 2672–73. A plaintiff seeking relief from disparate-treatment discrimination must establish that an employer had a discriminatory intent for taking a job-related action. A plaintiff seeking relief from disparate-impact discrimination must establish that an employer uses “a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.” *Id.* (citing 42 U.S.C. 2000e-2(k)(1)(A)(i)).

<sup>141</sup> *Id.* at 2673 (quoting Brief for Respondents at 12 *Ricci v. DeStefano*, 129B S. Ct. 2658 (2009) (Nos. 07-1428 & 08-328)) (beginning its analysis with the premise that absent

was in thinking that a decision based on avoiding a disparate impact cannot, as a matter of law, constitute discriminatory intent, the necessary component for disparate treatment.<sup>142</sup>

In recognition of the inherent conflict between the desire to avoid racial preferences on the one hand and the reality of racially sensitive hiring practices on the other, the Court used the “strong basis in evidence” standard and held that once a promotion process has been selected by a municipality, with its selection criteria made clear, the test results may not be invalidated on the basis of race.<sup>143</sup> In light of the district court’s grant of summary judgment and the Second Circuit’s *curiam* affirmation on behalf of New Haven, the Supreme Court’s decision to grant summary judgment on the Title VII claim for Frank Ricci and the other firefighters is remarkable.<sup>144</sup>

The Court also explored the extent to which the Reverend Boise Kimber and other members of the African-American community exerted their influence on the city officials of New Haven.<sup>145</sup> As the controversy

---

a valid defense, the city’s refusal to certify the results would violate the disparate-treatment prohibition).

<sup>142</sup> *Id.* at 2673–74. The Court held that Title VII provides express protection of “bona fide promotional examinations” and noted the “legitimate expectation” generally fostered by municipal promotional exams. *Id.* at 2676 (“As is the case with any promotion exam, some of the firefighters here invested substantial time, money, and personal commitment in preparing for the tests. Employment tests can be an important part of a neutral selection system that safeguards against the very racial animosities Title VII was intended to prevent. Here, however, the firefighters saw their efforts invalidated by the City in sole reliance upon race-based statistics.”).

<sup>143</sup> *See id.* at 2675–77 (stating the standard appropriate to resolve tension between disparate-treatment and disparate-impact by limiting employer’s discretion to make decisions based on racial qualifications). The Court recognized that the invalidation would result in “upsetting an employee’s legitimate expectation not to be judged on the basis of race.” *Id.* at 2677.

<sup>144</sup> *Id.* at 2677, 2681. The Court arrived at this conclusion by considering whether the promotional examinations “were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative.” *Id.* at 2678. The Court concluded: “[T]here is no strong basis in evidence to establish that the test was deficient in either of these respects.” *Id.* at 2678–80 (finding that the city ignored evidence supporting the exam’s validity, and finding that a change in the weighting formula, “banding” (rounding the scores and grouping into ranks) as well as using an assessment center for evaluation were not equally valid, less-discriminatory test alternatives). The Court also highlighted the tension between Title VII and the constitutional guarantee of equal protection. *Id.* at 2682 (Scalia, J., concurring) (“Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on . . . those racial outcomes.”).

<sup>145</sup> *Id.* at 2684–85 (Alito, J., concurring) (“Reverend Kimber’s personal ties with seven-term New Haven Mayor John DeStefano . . . stretch back more than a decade. . . . According to the Mayor’s former campaign manager (who is currently his executive assistant), Rev. Kimber is an invaluable political asset . . . . Almost immediately after the test results were revealed . . . Rev. Kimber called the City’s Chief Administrative Officer . . . because he wanted ‘to express his opinion’ about the test results and ‘to have

surrounding the test results grew, there were clear indications that the Mayor and other city officials had made up their minds to disregard the exam scores, and that the officials sought to conceal their policy preferences from a public that was expecting honest deliberation.<sup>146</sup>

The dissent defended the Second Circuit's per curiam affirmation of the district court by arguing that the exam results were "sufficiently skewed to 'make out a prima facie case of discrimination' under Title VII's disparate-impact provision," and argued that New Haven's actions were "race-neutral."<sup>147</sup> It is hard to fathom how rejecting valid test scores by qualified applicants, who happen to be white, to placate a vocal minority constitutes race "neutrality." Qualified applicants were ignored because of the color of their skin. The dissent also had no problem with the secretive political maneuverings of New Haven city officials.<sup>148</sup> Thus the Court majority in *Ricci* recognized the discrimination on the part of the city of New Haven and found a Title VII violation on behalf of the firefighters. The lower courts and the dissent found that the city's decision to avoid a potential Title VII violation by refusing to certify the test results was appropriate and non-discriminatory.<sup>149</sup>

*Ricci* has much to say about race and the law, but it is also notable for its depiction of political jurisprudence. *Ricci* is important because it reveals the ease with which judges can use the law to fit their own preconceived notions and features a compelling conflict between the Is and Ought of law. Political considerations led officials of New Haven to discriminate on the basis of race, and a segment of "Is" judges sided with them by condoning the policy choice made by officials caught between the disparate-impact and disparate-treatment provisions of Title VII. The firefighters prevailed, however, as a result of the "Ought" judges who affirmed a more absolute stance against race-based hiring practices.

---

some influence' over the City's response. . . . Rev. Kimber adamantly opposed certification of the test results—a fact that he or someone in the Mayor's office eventually conveyed to the Mayor.").

<sup>146</sup> *Id.* at 2685–86.

<sup>147</sup> *Id.* at 2696 (Ginsburg, J., dissenting) ("[City officials] were no doubt conscious of race during their decisionmaking process . . . but this did not mean they had engaged in racially disparate treatment."). The dissent found the plight of the white firefighters was enough to provoke the Court's sympathy, but contended that petitioners "had no vested right to promotion." *Id.* at 2690. The dissent considered the history of racial discrimination as germane to the required analysis, and argued that the majority "fail[ed] to acknowledge" that other cities have utilized better tests that yielded less racially influenced results. *Id.*

<sup>148</sup> *See id.* at 2709 (Ginsburg, J., dissenting) (responding to Justice Alito's concurrence: "That political officials would have politics in mind is hardly extraordinary, and there are many ways in which a politician can attempt to win over a constituency—including a racial constituency—without engaging in unlawful discrimination. . . . The real issue, then, is not whether the mayor and his staff were politically motivated; it is whether their attempt to score political points was legitimate (*i.e.*, nondiscriminatory).").

<sup>149</sup> *See id.* at 2709–10 (Ginsburg, J., dissenting).

The “Ought” judges rejected the city’s policy choice to escape the tension of Title VII’s dual provisions by recognizing that race-based discrimination can occur by disparate treatment, even though the city intended to avoid discrimination on the issue of disparate impact.

Biased decision-making by courts should be a cause for concern. Instead of widespread resignation to political decision-making, a healthy skepticism and focused criticism can help restore judicial legitimacy.

### C. *How Measured Skepticism Promotes the Rule of Law*

The cynicism inherent in political jurisprudence is a strong response to the limitations of formalism, but it is an overcorrection. Overcorrection may be another unique aspect of human nature.<sup>150</sup> Rejecting the cynical nature of the attitudinal theory and adopting a measure of skepticism can be a healthy development in the rule of law. *Ricci* illustrates the extent to which personal bias influences federal judicial decision-making. Those who care about judicial fidelity to the law should appreciate the criticisms of the new legal realism. The new legal realists should also understand that they are just as prone to bias as the judges they examine. It is also important to note the limitations on the assertions of political jurisprudence.

One limitation is that attitudinalists have concentrated much of their research on the Supreme Court, thereby presenting a distorted picture of widespread judicial decision-making.<sup>151</sup> Only a small percentage of cases appealed to the Court are actually heard,<sup>152</sup> and these cases typically present unique problems.<sup>153</sup> Thus the theories of political jurisprudence have limited explanatory power—the significance of the attitudinal model decreases as analysis moves away from the Supreme Court.<sup>154</sup> In fact, research suggests that precedent significantly constrains appellate court judges from indulging their policy-making preferences.<sup>155</sup> Naturally, the claims of political jurisprudence are more

---

<sup>150</sup> SIR WALTER RALEIGH, *THE CABINET-COUNCIL (1658)*, reprinted in *THE WORKS OF SIR WALTER RALEIGH*, KT. 37, 89 (Oxford Univ. Press 1829) (“It is the nature of men, having escaped one extreme . . . to run headlong into the other extreme, forgetting that virtue doth always consist in the mean.”).

<sup>151</sup> Cross, *supra* note 24, at 285.

<sup>152</sup> SEGAL & SPAETH, *supra* note 36, at 250 (only five percent of paid cases and one percent of *in forma pauperis* cases).

<sup>153</sup> Cross, *supra* note 24, at 285–86. It should not be surprising that personal values make a significant difference in deciding close cases. *Id.* at 286.

<sup>154</sup> See *id.* at 287–88 (suggesting that research supports legal model in lower courts).

<sup>155</sup> See Donald R. Songer, *The Circuit Courts of Appeals*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 35, 42, 44–45 (John B. Gates & Charles A. Johnson eds., 1991) (“[T]he proportion of cases in which judges had an opportunity to fashion legal rules consistent with their personal preferences seldom exceeded 10 percent.”).



significant in explaining the behavior of judges who retain the benefit of good-behavior tenure. The attitudinalists' reliance on political labels, moreover, can be simplistic.<sup>156</sup> "Conservative" and "liberal" labels are crude, prone to change over time, and do not take account of judges' changing their minds.<sup>157</sup> Reducing legal decisions to labels that are prone to change over time prevents a nuanced understanding of court decisions.<sup>158</sup>

A final criticism of political jurisprudence is its reluctance to understand the normative aspect of empirical research. The tendency to associate empirical research with objectivity is just as mythic as the formalists' concealment of bias beneath archaic legal principles. Buried within the attitudinalists research is a normative system that shapes the development of the law. Justice Sotomayor reminds us that "personal experiences affect the facts that judges choose to see."<sup>159</sup> The same logic extends to the researchers within political jurisprudence. Complete resignation to judicial partiality is the wrong course because it replaces the rule of law with a camouflaged political will. Legal realism is a reality in human experience, but the unabashed acceptance of realism in the adjudicative process is unacceptable. The tendency for judges to indulge in their own biases is a reality in human experience, but it should be resisted as much as possible. The judicial norms of legal realism should be fought with its own weapon of skepticism.

#### CONCLUSION

Ultimately, a measure of legal uncertainty and inconsistency is to be expected because of inherent contradictions and weaknesses in human nature. *Ricci* is important because it helps reveal the extent to

---

<sup>156</sup> See Peter H. Schuck, Op-Ed., *Court Sense*, L.A. TIMES, July 15, 2009, at A25 ("Real people and real judges mix liberalism on some issues with conservatism on others.").

<sup>157</sup> See Andrew D. Martin & Kevin M. Quinn, *Assessing Preference Change on the U.S. Supreme Court*, 23 J.L. ECON. & ORG. 365, 365-67 (2007) ("[I]t is . . . possible that the worldviews, and thus the policy positions, of justices evolve through the course of their careers."). Compelling evidence has been amassed that indicates that justices change their policy preferences over time. See *id.* at 373-81. The implications of this current research threaten the claims of the attitudinalists. See *id.* at 381-82 ("This finding goes against much of the prevailing wisdom in judicial politics research and calls into question the results from a large body of research that explicitly assumes temporal stability of preferences.").

<sup>158</sup> How would the attitudinal model explain the difference between the respective approaches of Justices Scalia and Thomas, the arch-conservatives? Compare *Gonzales v. Raich*, 545 U.S. 1, 33-41 (2005) (Scalia, J., concurring) (applying a broad application of the Commerce Clause, upholding congressional regulation over noneconomic local activity as pertaining to medical marijuana), with *id.* at 57-74 (Thomas, J., dissenting) (arguing that the majority's interpretation of the Commerce Clause is overly broad and divorced from textual support).

<sup>159</sup> Sotomayor, *supra* note 100, at 92.

which personal bias is fused with human judgment and shows us that subjective feelings associated with race can and do affect judicial decision-making. *Ricci* takes on an added level of significance by taking account of Justice Sonia Sotomayor's role in the development of the dispute. Coupling Justice Sotomayor's candid admissions of bias in judicial decision-making with the wildly divergent results of the federal courts in *Ricci* shows us that the claims of the legal realists should be thoughtfully considered. Political jurisprudence reminds us that human bias can be found precisely where it is most harmful.

Not unlike Thrasymachus, however, the attitudinalists go too far in their cynicism and overstate their case.<sup>160</sup> There is ample evidence supporting the idea that many judges decide cases by inserting typical fact patterns into long-settled and rational legal machinery. Political jurisprudence seems to lose much of its force as the evaluation of judicial behavior descends into the lower levels of the judiciary. Additionally, proponents of political jurisprudence are not free from their own biases and tendencies to interpret reality according to their own personal values. The human propensity for self-interest and bias should inspire caution in all schools of jurisprudence.

Judicial partiality is harmful to the dispensing of true justice. The norms of political jurisprudence are corrosive to the distinction between law and politics—a distinction that is necessary to the preservation of justice. Ironically, the diagnostic power of political jurisprudence can be a valuable tool to restore or enhance judicial legitimacy. The empirical information gathered by the attitudinalists can provide an extra measure of accountability to federal judges who, owing to their good-behavior tenure and the infrequency of impeachment, may have little incentive to respect the law. Perhaps a greater degree of humility will take us even further:

Let man now judge his own worth, let him love himself, for there is within him a nature capable of good . . . . Let him despise himself because this capacity remains unfilled . . . . Let him both hate and love himself; he has within him the capacity for knowing truth and being happy, but he possesses no truth which is either abiding or satisfactory.<sup>161</sup>

A proper jurisprudence does its best to capture both Is and Ought and requires a proper understanding of both human depravity and human dignity.

*Robert F. Noote IV*

---

<sup>160</sup> See PLATO, *supra* note 2, at 12–20.

<sup>161</sup> PASCAL, *supra* note 1, at 30.