I Introduction

[The] problem here concerns the seeming impossibility of ascribing to subjectivity an ineliminable role in judging, without thereby imperilling the very possibility of judgments that are objective.¹
—David Bell

Wise Latinas and Judicial Identity

Prior to her nomination to the Supreme Court of the United States, Justice Sonia Sotomayor made statements in some of her speeches indicating that who she is influences how she judges. The reactions sparked by Justice Sotomayor’s now well-known “wise Latina” comment represent a powerfully and frequently expressed view that judges should decide cases based on the law rather than their own values or perspectives. The perceived tension between the subjective values of a judge and the objective value of the law has led to widespread and long-standing confusions about judicial decision making in the common law tradition. My goal in this book is to examine closely the dynamics of subjectivity in the judicial process and the nature of objectivity in law. I will argue that subjective judicial values have never been absent from common law adjudication and that objectivity, in the sense that is often assumed for law, has never been present in common law legal sources.

In the debates about Justice Sotomayor’s comment, inside and outside the US Senate Judiciary Committee, her remarks were rarely quoted in their full context. Here is a fuller (but still slightly edited) reproduction of what Justice Sotomayor said:

Whether born from experience or inherent physiological or cultural differences . . . our gender and national origins may and will make a differ-
ence in our judging. Justice O’Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. I am not so sure Justice O’Connor is the author of that line since Professor Resnik attributes that line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, as Professor Martha [Minow] has noted, there can never be a universal definition of wise. Second, 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. Let us not forget that wise men like Oliver Wendell Holmes and Justice Cardozo voted on cases which upheld both sex and race discrimination in our society. Until 1972, no Supreme Court case ever upheld the claim of a woman in a gender discrimination case. I, like Professor Carter, believe that we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. Many are so capable. As Judge Cedarbaum pointed out to me, nine white men on the Supreme Court in the past have done so on many occasions and on many issues including Brown. However, to understand takes time and effort, something that not all people are willing to give . . . Hence, one must accept the proposition that a difference there will be by the presence of women and people of color on the bench. Personal experiences affect the facts that judges choose to see. My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.

Justice Sotomayor is actually making two points here. One, which may be found in the “wise Latina” sentence itself, is that a Latina will be a better judge than a white man simply by virtue of her own life experiences. Another, which got lost in the noise surrounding whether we should want empathic judges, is whether a judge’s experiences and perspectives will and should inform her decisions.

At her confirmation hearings before the US Senate Judiciary Committee, several senators made statements and asked questions indicating their assumption that a judge’s own perspectives and values had no place in her courtroom. For example, in his opening statement, Senator Charles Grassley cited the wise Latina comment and articulated his view of the appropriate qualifications for justice of the Supreme Court of the United States:
[A]n impressive legal record and superior intellect are not the only criteria that we on this Committee have to consider. To be truly qualified, the nominee must understand the proper role of a judge in society—that is, we want to be absolutely certain that the nominee will faithfully interpret the law and the Constitution without bias or prejudice. This is the most critical qualification of a Supreme Court Justice—the capacity to set aside one’s own feelings so that he or she can blindly and dispassionately administer equal justice for all. . . . The Constitution requires that judges be free from personal politics, feelings, and preferences. . . . Just like Lady Justice, judges and Justices must wear blindfolds when they interpret the Constitution and administer justice. I will be asking you about your ability to wear that judicial blindfold. . . . I will be asking you about your judicial philosophy, whether you allow biases and personal preferences to dictate your judicial methods. . . . I am looking to support a restrained jurist committed to the rule of law and the Constitution. I am not looking to support a creative jurist who will allow his or her background and personal preferences to decide cases.  

Senator Grassley’s comments were reinforced by several members of the Judiciary Committee. Remarkably, these members of the Committee took this position with respect to Justice Sotomayor’s statements even though Justice Alito made similar comments during his confirmation hearings, which prompted none of the same reservations from these senators.  

Throughout the Sotomayor hearings, members of the Judiciary Committee failed to differentiate prejudices and biases from perspectives and experiences. Moreover, others who offered testimony at the Sotomayor hearings echoed the call to place objectivity and impartiality on one side of the scale of responsible judging and subjectivity and empathy on the other:

First, Judge Sotomayor has explicitly rejected the idea that there can be an objective stance in judging. . . . If there is no objective view, one can question whether there is any law at all apart from a judge’s personal choices. Second, there is the related issue of the role of personal experiences in judicial decision making. It would be hard to deny that judges are human and made up of their unique life journeys. Many judges recognize this and explain how they strive to remain impartial by putting aside their personal preferences. Judge Sotomayor’s position, however, has suggested that her personal background, her race, gender, and life experi-
ences, should affect judicial decisions. . . . In our courts, the rule of law should prevail over the rule of what the judge thinks is best.7

Even on the long list of missed opportunities for Senate Judiciary Committee hearings to frame a serious public discussion of the position and responsibilities of federal judges, Justice Sotomayor's hearings were a spectacular failure. The hearings demonstrate that the politics of the nomination process need to change. But that is not my subject here.8

The failures of the Sotomayor hearings may not be entirely the senators' fault. Their assertions that a judge must disengage her personal values and experiences so that she may dispassionately dispense justice according to law reflect a pervasive assumption in public and scholarly discussions of law and judging. The argument in this book is an effort to explain not just why Justice Sotomayor's comments about the importance of personal perspective for judicial perspective, and the influence of judicial perspective on judicial decision making, are correct, but why we need to understand the authentic dynamics of judicial decision making beyond the prevalent “either objective law or subjective preference” tropes.9 If we can stop talking about an abstract ideal of judging that has never existed in practice and that we should not want to exist, then we can begin talking more seriously and honestly about the ways personal experiences and perspectives benefit judicial decision making and when these personal experiences and perspectives may impede a judge's ability to decide a case fairly.10

Objective Laws and Subjective Judges

Law is supposed to be objective, and judges make law. So we might naturally conclude that the act of judging must also be objective. We might also assume that an element of subjectivity in judging undermines the objectivity of law. The point of this book is to explain that subjectivity in judging, properly understood, does not threaten the objectivity of law, properly understood. I will offer an account of the subjective element of judging that situates the judge in the process of judgment and argues against two prevalent but mistaken accounts of objectivity in law.

For law to be objective, the story goes, it must be applied by judges in the same way to everyone.11 But the law that judges make and the deliberative process by which they make it are not the same thing. That the law is objective (in a certain sense) and, once made, should generally be applicable to all similarly situated subjects, does not necessitate that the process by which it
is made must also be objective (in the same sense). The common law tradition does not equate the law and the process so rigidly. In this book, I hope to disentangle the judicial process and its legal product. More specifically, I will argue here that an important aspect of the common law judicial process is irreducibly and inescapably subjective and that this is not a bad thing. Indeed, the subjective aspect of the process is due as much to the nature of judging as it is to the nature of judges.

Concerns about objectivity in law and subjectivity in judging are familiar. The conventional view holds that judges must enforce the law “as written” or else the rule of law and democratic government are jeopardized. We are told that “a government of laws, and not of men” requires that we be governed by the objective rules of law rather than the subjective preferences of judges. Otherwise, we will be governed by the preferences of a coterie of unelected, unrepresentative, unaccountable, and unconstrained officials, rather than by the laws enacted by our elected representatives. Therefore, the story goes, judicial decisions must be made according to what the law says rather than according to what the judge says.

Concerns about the threat of judicial subjectivity pervade our discussions of judicial discretion, judicial activism, judicial supremacy, and judicial responsibility, and they frame our debates about legal language, legal rules, constitutional meaning, and constitutional interpretation. The perceived tension between the subjective values of judges and the objective qualities of law animates long-standing debates about formalism, realism, behaviorism, attitudinalism, originalism, and textualism. In many instances, these debates exaggerate the definitiveness of rules or the discretion of judges. And, of course, these debates may also lead one to wonder whether the views of, say, an originalist or a behaviorist, derive from that individual’s subjective preference for originalism or behaviorism.

My goal here is to reconsider the role that subjectivity plays and is meant to play in common law judging and to challenge certain assumptions that are typically made about objectivity in law. I will argue that, contrary to conventional views, the subjective element in common law judging is a necessary and valuable part of the judicial process. I will also argue that objectivity, in the strong sense that is often assumed for law, is not a plausible goal for judging. Our understanding of common law judging would benefit significantly if we replace the outmoded and inaccurate fixation on objectivity (and truth) with the more conceptually and descriptively accurate notion of intersubjectivity (and validity). Intersubjectivity means that the judge decides as an individual within a larger community, that the judge produces
judgments with the understanding that they must contain statements of justificatory reasons for legal conclusions, and that these conclusions depend on their evaluation and validation by the community as legal judgments. The judgments are constituted by both their subjective and intersubjective components. By reorienting the discussion of legal judgment in terms of intersubjective validity rather than objective truth, and by examining the relationship between individual responses and publicly articulated reasons in the form of universalizable propositions of law, I hope to explain the nature and value of common law judicial decision making.

My position should not be misunderstood as an argument against objectivity or for subjectivity. A distinction I will develop further in the next two chapters is that the objective aspects of the laws produced through the judicial process should be understood as separate from the judge’s process of judging and communicating her decision. However estimable objective truth or objective judgment may appear in the abstract, common law judges do not decide cases in the abstract. Within the common law tradition, the point is that “the idea of objectively good judgments, as distinct from judgments that are good under certain (perhaps quite broad ranges of) conditions and from the perspectives of (perhaps highly relevant sets of) people, appears fundamentally untenable.”

Common Law Judges

The problem with an expectation of objectivity in common law judging is that it is not the common law’s expectation. Common law judges must resolve concrete legal disputes about claimed legal injuries presented by the parties whose legal rights are at stake. As a result, by reifying objectivity as an ideal for common law judging and judgment, the authentic process of legal judgment will inevitably appear partial (in both senses of that term). By treating impartiality as synonymous with objectivity, and subjectivity as the opposite of both impartiality and objectivity, we are left with no room for a subjective element in responsible judging. By distinguishing impartiality from objectivity, however, and by recognizing that a judge may be impartial while still bringing her own values to her judgments, we are left with a more expansive and realistic view of the process by which judges formulate legal judgments and how those judgments acquire their salience as authoritative legal sources.

Objectivity is not the goal of the judicial function and subjectivity is not the price of judicial dysfunction. Instead, we should expect impartiality as
the goal of common law judging and understand subjectivity as a necessary corollary of genuine judicial independence and the traditional function of common law judges. The process of common law judging combines the individual perspectives of judges with a recognized form of legal argumentation that is expressed to a larger community. A judge’s perspective on the law is an essential part of that judge’s contribution to the law. The expression of the individual response within the forms of legal judgment ensures that the judgment will be recognized as a source of law and enhances the judge’s contribution to the common law system and process.

The search for objectivity in common law judging is an attempt to eliminate the judge from the judgment. This search is not just impractical and unavailing; it is undesirable. By integrating the judge’s personal response as a component of the formal legal judgment, the common law process and the law it produces remain dynamic and organic. In addition, by ensuring that the judge does not disconnect himself from his judgments, the common law expects that judges will remain personally accountable and responsible to their institution and to the people their institution serves.

In this book, I argue that common law judging requires four interrelated components: individuality, impartiality, independence, and intersubjectivity. The first three of these components are familiar and are understood in various ways. The fourth is not well understood at all in relation to law and the judicial process. I hope to clarify each of these aspects of common law judging and their various relationships with one another. Throughout this book, I will distinguish each of these elements from objectivity. In doing so, we can arrive at a fuller and more accurate appreciation of common law judicial law making and of the law that judges make. Moreover, by contrasting these four components with objectivity, I hope to eliminate some fundamental misconceptions about the common law, some misguided criticisms of common law judges, and some cynicism about the common law system.

The criticism of common law judges for acting subjectively takes many familiar forms: judges should “not legislate from the bench,”26 “judges have grounded particular constitutional rulings in their own preferences rather than in law,”27 “it is illegitimate for judges to impose their own values in place of those of the legislature,”28 a judge must “overcome her own subjective preferences for a given outcome, so as to make decisions based on the legal merits of the case,”29 etc. Sometimes these criticisms are well-founded. Sometimes these criticisms fundamentally misconstrue the nature of the common law system and its traditional judicial process. For example, to the extent that “legislating” is taken as synonymous with “law making,” the
criticism of judicial legislation betrays a basic misunderstanding of the common law tradition. In that tradition, judges make law.\textsuperscript{30} So when certain critics suggest that judges should “leave the law making function to the legislature,” they indicate that they do not understand the tradition itself.\textsuperscript{31} On the other hand, when that criticism is meant to indicate that judges should not make law in the same way legislators do, the criticism might have more force, if judges ever did (or could) make law in the way legislators do.\textsuperscript{32}

Other legal traditions have sought to reduce or restrict the subjective elements of the judicial process. The civil law system employs a very different jury system,\textsuperscript{33} where it employs juries at all, and has a very different conception of judicial authority and responsibility. Leaving certain (usually constitutional) courts aside,\textsuperscript{34} the civil law tradition—at least as historically and theoretically understood—does not assign a lawmaking function to courts and expects courts to apply the code to the facts and deduce the correct result.\textsuperscript{35} This reflects the conventional view that civil law judges reason deductively while common law judges reason inductively.\textsuperscript{36} The reality is more complex,\textsuperscript{37} of course, but the classical vision of law as a science remains a distinctive feature of legal education and culture in the civil law tradition.\textsuperscript{38}

The civil law judicial function is meant to emphasize predictability and fairness in terms of preexisting legal rules rather than innovation or substantive development of law through judicial reasoning.\textsuperscript{39} Judicial opinions in the civil law tradition tend toward brief summation of applicable standards and conclusory phrasing of their application.\textsuperscript{40} Judges typically do not sign opinions because judges do not make law and the decisions they reach should, in principle, be the same decision that any other judge in that tradition would reach in the same case. In fact, even constitutional courts in civil law nations, such as the German Federal Constitutional Court, which were designed to function quite differently from traditional civil law courts,\textsuperscript{41} remain strongly influenced by the tradition’s emphasis on the text’s constraint of judicial authority rather than by the judiciary’s construction of the text’s meaning.\textsuperscript{42}

The common law takes a very different historical and institutional view of the judge’s role\textsuperscript{43} and the judicial process.\textsuperscript{44} Legal reasoning in the common law always considers rules in relation to factual circumstances and recognizes the reciprocal interaction of each upon the other.\textsuperscript{45} In the common law tradition, judicial opinions are lengthy and reflect the author’s personality.\textsuperscript{46} The judge writes and signs her opinion and that opinion serves as binding or persuasive authority for lawyers and judges in later cases. Moreover, by signing an opinion, the judge affirms that this is the opinion that he en-
dors as the best articulation of the law. The judge’s identity and reasoning are important, because if that judge were replaced with a different judge, the result might be different, a reality that strikes some people as an admission that judge-made law is just an expression of judicial biases, goals, and ideologies. But in fact this simply recognizes “the unavoidable intrusion of . . . humanity into the business of judging.” The common law has incorporated the subjective element in the business of judging at various stages of the judicial process. For example, along with the writing of opinions, particularly on appellate courts, the often underappreciated influence of oral argument on the personal response and reasoning of individual judges is a significant institutional and cultural recognition of the role of subjectivity in judicial decision making.

The recognition that judicial identity matters for judicial decision making does not mean that law must, therefore, cease to matter. Judging is both an individual and a dynamic process. The enduring authority of precedent in the common law tradition results from the position of the judge in the judicial hierarchy and, ultimately, by the persuasive force of the judge’s reasoning when her opinion is read and analyzed by later judges and attorneys. This is why judicial opinions are usually signed and published in the common law tradition. Moreover, this is why concurring and dissenting opinions are also published. Sometimes the majority opinion is mistaken. The common law tradition therefore values the thought process of every judge, because any judge might get something right, even if he was unable at that time to persuade the rest of his colleagues on the bench in the course of deciding a particular case. The common law judicial process is heuristic at its core and in its components. The law is always subject to evaluation through the analytic process of considering the reasoning of judges in prior cases and evaluating the merit of that reasoning in the current case. Of course, stare decisis places certain institutional constraints and contours on that process, but stare decisis itself reflects a judicial practice and a resulting legal norm that are intended to ensure the fairness of the law and the process of its creation and evaluation.

Common Law Objectivity

This book argues against two prevalent views of objectivity in law: subjectivism and strong objectivism. To explain why these views reflect inaccurate conceptions of legal objectivity, I will draw on some philosophical analysis of objectivity. The philosophical literature on objectivity is vast.
phers conceptualize objectivity in metaphysical, epistemological, and semantic terms. Metaphysical objectivity focuses on what exists in the world external to us, but it is not necessarily limited to the physical world. This category could include, for example, an external moral reality or a mathematically postulated but not yet observed physical particle. Epistemological objectivity concerns how we acquire knowledge of that external world. Semantic objectivity examines the conditions under which our statements about the external world may be determined to be true or false. Philosophical positions on objectivity can be organized into four categories: (1) subjectivism denies objectivity wholesale and claims that the existence or meaning of the world depends entirely upon our individual beliefs about the world, (2) minimal objectivism is the view that the existence or meaning of the world is determined by our shared understanding of the world, (3) modest objectivism is the view that the existence or meaning of the world is determined not by what we may happen to believe, but rather by what we would believe under ideal epistemic conditions, and (4) strong objectivism is the view that the meaning or existence of the world never depends upon what we may believe about the world.

Although nothing in my argument depends on this point, I might add a fourth type of objectivity, between minimal and modest objectivism. It seems to me that there may be a place for determining the existence and meaning of the world in reference not to an entire community or to ideal conditions, but rather to a particular community under ordinary conditions. We can call this mediated objectivism, according to which the received meaning of, say, law or art is determined through a process of considered judgment by a community that has particular training or expertise in formulating and evaluating judgments of this type. The process of making and evaluating these judgments constructs a broader meaning for a larger political, legal, or social community.

In all senses of objectivism (but not subjectivism), the existence or meaning of the world is determined in some manner beyond or outside one’s own perspective or belief. These notions of objectivity may apply best in different circumstances (i.e., judgments of taste are subjective, judgments of fashion are minimally objective, judgments about color are modestly objective, and scientific judgments are strongly objective).

The objectivity often assumed for law is strong objectivism, even though it is the least defensible form of objectivity from a philosophical perspective. Michael Moore is probably the most prominent legal scholar who defends strong objectivity in law on philosophical grounds. Moore’s view is
that we ordinarily attempt to understand the world around us, the physical and the moral worlds, and that we attempt to use language to describe them as accurately as we can. Natural objects, evaluative concepts, and legal norms have an existence that we encounter and attempt to explain. That is to say, trees, fairness, and malice have a true meaning, and we use our language correctly or incorrectly to correspond to that reality. Moore’s view has been extensively criticized.

On the other end of the spectrum, legal realists take a subjectivist view of law. This view seems motivated by the observation that law cannot be understood in strongly objectivist terms. In other words, because the meaning or existence of the law always depends upon judgments about the law’s content or applicability, legal realists deny that the law exists as a genuine constraint on judicial behavior. Legal realists seem to ignore or deny the possibility that law may exist and possess meaning in minimally or mediatedly or modestly objective terms. As I will argue in the next two chapters, the law is not best understood in strongly objective terms and, despite subjectivist protestations, the law does function as a meaningful influence on judicial decision making.

Contemporary subjectivist views of law assume a rigid “subjective preference vs. objective law” dichotomy:

In the traditional legal model, judges use as their guidelines the standards set in constitution, statute, precedent, or court rule. Inputs are carefully screened to avoid the personal and subjective in favor of the neutral and objective.

Subjectivists then observe that law understood in this way does not fully determine judicial rulings, therefore judicial rulings are not controlled by neutral and objective legal rules. But demonstrating that judges do not decide cases according to this model cannot establish that the law is not influencing judicial decision making, because this model has so little to do with the way law actually functions in judicial decision making. To begin with, different sources of law and areas of law should not be regarded as operating monolithically and uniformly in judicial reasoning. We need to categorize different sources of law (such as constitutions, statutes, and precedents) and analyze their different operative nature and force in legal reasoning and judicial decision making. Additionally, as I explain in more detail in the next chapter, in thinking about legal objectivity, we need to distinguish the legal norms produced by the judicial process and the judicial process itself. The
strong objectivity of law rejected by legal realists is not a form of objectivity that can possibly capture the function of legal sources or the operation of the judicial process in the common law tradition: “The nature of the common law, however, is that subsequent cases alter prior precedential cases, yielding a new rule. . . . A ‘rule’ in the common law is not some abstract principle of law, but the interaction of an abstract principle with the facts of the present case. Later cases necessarily refashion the prior rule.”

The fundamental problem with equating legal objectivity with strong objectivity, or criticizing law and judging for failing to exhibit strong objectivity, is that it results in an unnecessarily blinkered vision of judicial decisions as determined by either legal rules or judicial attitudes. A finer understanding of legal objectivity would allow that neither laws nor attitudes are ever absent from judicial decision making. The better approach, then, is to consider more carefully and realistically the manner in which the law and judicial values are translated into judicial decisions:

At some level, every law student, lawyer, and judge understands that a judge’s values can influence the choices that a judge makes and that judicial decision making cannot always be explained with reference to legal doctrine alone . . . [J]udicial decisions are influenced by law and personal preferences in complex and varying combinations . . . value preferences influence case outcomes, but the universe of possible outcomes is constrained and channeled by legal text and precedent that judicial independence protects against encroachment.

The judicial process cannot simply be reduced to a “law-based and preference-based decision-making dichotomy” according to which judges act either “as detached and neutral arbiters of rules in contests between combatants” or “judges employ law as a shill to conceal nakedly political decision making of a sort best reserved for Congress or the people.” We need to consider more accurately the relationship between judicial values and legal doctrine in the process of judicial decision making, a process that incorporates the judge’s response to the facts and law at issue in a case within a formal written opinion that communicates the judge’s reasoning and ruling to the parties and to the public.

I hope to engage different readers in different ways with my argument. This book is an argument against subjectivist and strong objectivist understandings of law and judging. In general, when I refer to objectivity in law, I am referring to strong objectivity, because that is the understanding so of-
ten assumed in discussions of law and judging. In addition to arguing against subjectivism and strong objectivism, my argument is an effort to move past a pitched battle that has either been won or cannot really be joined. I want to think about subjectivity as it actually operates in the formulation of legal judgment and to suggest a way of thinking about the reception of that judgment as a legal source through an intersubjective process of communication and evaluation.

Subjectivity is not a synonym for bias, arbitrariness, idiosyncrasy, or solipsism.76 Judges decide for themselves, but they do not decide for themselves alone.77 Acknowledging an element of subjectivity in judging is not conceding that “anything goes” or that one can no longer evaluate the quality of a judge’s decision.78 On the contrary, the common law tradition requires judges to communicate their judgments to the parties and the public, and it presupposes a broader systemic process of appraising the merit of those judgments. The communication of legal judgments demands justificatory reasons for decision and action. The integrity of the process is predicated on the responses of judges, expressed as legal judgments and communicated in a form that is recognized by the community as fulfilling the individual’s and the institution’s judicial function.79

Subjectivity alone cannot sustain a formal legal judgment. The recognition of a subjective element in judging does not require us either to abandon a conception of meaningful legal norms or to seek a form of judging that eliminates or exaggerates judicial personality in judicial decision making.80 This reductive, either-or mentality (“either judges enforce legal rules or the rules do not matter”—“either judges are political actors pursuing ideological agendas or they are neutral umpires applying the law”) utterly fails to capture the authentic common law judicial process.81 Instead, we need to see the interaction between an individual judicial response and a formally articulated legal judgment.82

The subjective element in judicial decisions remains a source of discomfort and discontent for many scholars and students of the common law system. My hope is to alleviate some of that discomfort by demonstrating that the personal and subjective aspect of judging can be accepted and valued once it is situated within the complementary aspects of common law judging that require the public justification of an intersubjective judgment cast in universalizable terms. As long as we can agree that the existence and meaning of law are not best understood as entirely external to a shared human process of communication and evaluation, and as long as we can agree that law has some existence and meaning external to individual perception
and belief, then we can proceed to consider the process of judging as it actually operates in the common law tradition.

Legal discussions of objectivity tend to focus on the determinacy of law as an external standard of governance and as a distinctive basis for legal reasoning. Law functions as a standard against which the actions of citizens and officials can be assessed and according to which the decisions of judges should be reached. Owen Fiss’s expression of this point captures a widely held view: “Objectivity in law connotes standards. It implies that an interpretation can be measured against a set of norms that transcend the particular vantage point of the person offering the interpretation. Objectivity implies that the interpretation can be judged by something other than one’s own notions of correctness.” Many people would stop there; fortunately, Fiss did not. He went on to say that “the idea of an objective interpretation does not require that the interpretation be wholly determined by some source external to the judge, but only that it be constrained.”

Legal Judgment and Legal Truth

The focus on objectivity in law also leads quickly to discussions of legal truth. The problem here, however, is that the tendency to conceive of objectivity in law as a form of strong objectivity results in serious misconceptions of the nature of the judicial process and the legal judgments the process produces. I will argue in the next two chapters that we would be much better served in our discussions of law by moving away from thinking in terms of truth for many of the same reasons that we should move beyond discussions of objectivity. H. L. A. Hart expressed this point in this way:

[T]he Judge’s function is, e.g., in a case of contract to say whether there is or is not a valid contract upon the claims and defences actually made and pleaded before him and the facts brought to his attention, and not on those which might have been made or pleaded. It is not his function to give an ideally correct legal interpretation of the facts, and if a party (who is sui juris) . . . fails to make a claim or plead a defence which he might have successfully made or pleaded, the judge in deciding in such a case, upon the claims and defences actually made, that a valid contract exists has given the right decision. The decision is not merely the best the Judge can do under the circumstances and it would be a misunderstanding of the judicial process to say of such a case that the parties were merely treated as if there were a contract . . . [S]ince the judge is literally deciding
that on the facts before him a contract does or does not exist . . . what he does may be either a right or a wrong decision or a good or bad judgment and can be either affirmed or reversed . . . What cannot be said of it is that it is either true or false. 86

I take Hart’s observation here to be not that it is meaningless to speak of law in terms of truth. It is, for example, true that the creation of a contract in the United States requires an offer, an acceptance, and consideration. 87

Hart’s point is that talking here about truth does not assist, and will often confuse, our understanding of the law and the process of judging. The judgment is that there is a contract. Inserting “it is true that” at the front of that sentence adds nothing of meaning to that sentence. Saying it is true is another way of saying it is a judgment. And we cannot accurately say that (it is true that) a contract existed 88 between the plaintiff and the defendant apart from the judgment that was reached. This is the problem of applying strong objectivism to law. The legal truth of whether a contract existed between the plaintiff and the defendant is determined by the judgment. There is no metaphysical reality of the contract that can conflict with the legal reality. 89 But there can be dissenting judgments, which from a higher court will be superseding judgments. In an important sense, these judgments function as acts of legal speech that simply are. 90 Properly understood, they are not and cannot be “true” or “false.” 91 The articulation of them as judgments affects the legal world simply by virtue of a judge saying or writing them, because that authority in this context belongs to judges.

The physical document makes it tempting to think that a contract might exist regardless of what the judge decides. We point to the signed paper. 92 And, of course, the physical document is going to be an important piece of evidence for the judge to consider. But this is why lawyers speak the way they do. Lawyers in this sort of case will say that the court must determine “whether the document is what it purports to be.” The existence and meaning of the contract as a legally binding fact cannot be settled simply by pointing to a document. Parties can intend to create a contract but legally fail to do so. 93 And parties can create contractual obligations that neither of them intended. 94

Once the judgment has been reached, what we need the legal process to do is to evaluate the judgment that has been reached. Is the judgment correct? How was the decision to enforce a contract in the circumstances of that case received by other judges? Answering those questions offers much more to our understanding of the law. Validity, I will argue, is a much more useful
concept and term for thinking about how we answer evaluative questions about legal judgments. In terms of my argument, once a judgment has been reached, the intersubjective reception of that judgment as valid is an evaluation that the judgment was proper. For purposes of this book, the operative understandings of objectivity and truth involve a reference to a standard or perspective external to the judge, which validates the judgment, because it can be evaluated as distinct from the subjective preferences and values of the judge. In an effort to distill these various conceptions of objectivity in a way that will allow me to discuss them usefully here, I will focus mainly on objectivity in terms of “mind-independence” and “the rule of law and not of men.” Mind-independence means that the existence and meaning of legal norms is determined through a process external to the perceptions or beliefs of an individual. The rule of law aspect of objectivity means that the existence and content of legal norms is determined through a process that identifies these norms as legal sources, which play a uniquely important role in legal reasoning. Both conceptions capture the philosophical and legal sense that objectivity delineates a basis for judgment beyond or besides the subjective preferences of the judge.

Impartiality, Intersubjectivity, and the Art of Judging

As I explain in chapter 2, thinking about law in terms of objectivity has produced important scholarship, but it has also resulted in confusion about what objectivity means and how it applies to law and judging. One of the many problems with the use of objectivity in discussions of judging is that the term is sometimes used to refer to a quality in judges and sometimes to refer to a quality in rules. I will distinguish different forms of objectivity and explain how they result in different understandings of law. I will distinguish objectivity from impartiality and situate my argument within the existing discussion of issues of subjectivity and objectivity in law and judging. I also begin in chapter 2 to suggest an alternative to thinking of law and judging as only subjective or objective. My point here is not that the dichotomy is false; it captures something important about our relationship to the world and a judge’s relationship to the law. It also, however, sharply restricts and ultimately distorts our best understanding of the judicial process in the common law tradition.

The purpose of chapter 2 is to explain that we should distinguish among the formulation of legal judgments by judges, the legal norms expressed in
those judgments, and the evaluation and reception of those judgments by the community. Functional effectiveness is the term used to describe the objectivity associated with the judicial process of reviewing the evidence, arguments, and sources that are distinctive of the common law tradition and arriving at the legal judgments that articulate legal norms. Universalizability or universality is the term used to describe the legal norms of a jurisdiction that are produced through the judicial process and articulated in a legal judgment (or in some other fashion recognized by that jurisdiction as generating an authoritative source of law). Intersubjectivity is the process by which the legal judgments issued by judges are evaluated by a larger constitutive community. My overarching point in this chapter is to argue that however we conceive of objectivity in law, we should distinguish among the objectivity of judges and judging, the objectivity of legal sources and judgments, and the process of evaluating and validating those judgments by the larger legal or political community. The focus on objectivity and the failure to differentiate the objectivity of law, the objectivity of judging, and the evaluation of judgments has led to serious misrepresentations and distortions of the process of adjudication and the operation of legal sources in legal reasoning.

Chapter 3 develops an alternative conception of judging, one that is influenced by Immanuel Kant’s aesthetic theory. In this chapter, I explore a number of connections between common law legal judgment and Kantian aesthetic judgment. In brief, Kant described a process of judging art that involved an individual’s personal, internal response, which is then communicated and claimed as a shared judgment for all viewers of the work of art. I argue in chapter 3 that this mode of response and reasoning captures more fully the common law process of judicial decision making than the familiar alternatives. Connecting Kantian aesthetic judgment with common law legal judgment avoids the misguided and widespread view that the subjective element of judging somehow compromises the integrity of the process or the decision or, conversely, that principled judging requires that a judge disregard his personal values or perspectives when judging. As with Kantian aesthetic judgments, common law judicial efforts to articulate legal doctrine from the perspective of the individual judge are necessarily evaluative and communicative. Kant’s theory helps us to see that a human judgment (of law or art) exists apart from the individual who reached that judgment, but cannot be abstracted entirely from the human beings who make, evaluate, and share those judgments. Similarly, we see why it is difficult to assess judgments of law or art through falsifiable models or measurements.
Why aesthetic theory as a way of examining judicial decision making? Whatever may be the case in the civil law tradition, there is an undeniable element of art in legal judgment in the common law world. But I do not mean this simply in the “lawyering is an art not a science” sense. I mean that the formulation of a legal judgment mirrors the process of aesthetic judgment in that an individual’s subjective response and considered conclusion are proffered to a larger community with a claim that that community will share the individual’s view, and the community then engages in an intersubjective evaluation through which the received meaning of the judgment is determined. Kantian aesthetic theory describes this relationship between the individual judgment as an independent and interdependent judgment through the reception of that judgment within a broader constitutive community. In the common law tradition, the parallel of aesthetic and legal judgment is a valuable way to understand the contribution of a judge’s opinion to the developing understanding of the law within a broader legal and political community. There is an individual and communal sense of justice that correlates well with a sense of beauty, and there is an aesthetic to legal reasoning. When we read an exceptional legal opinion—one that concentrates on the important factual circumstances, that captures correctly the application of the law to these facts, that reaches the proper outcome for the right reasons—we do not just think it is right. We feel it. There is a momentum to these opinions that builds through their structure and reasoning. Powerful legal arguments have an emotional force. Art and law combine human faculties of thought and feeling, reason and passion.103

In chapter 4, I provide some examples of judicial decisions in which the relationship between the subjective and intersubjective elements of judicial decision making are evident and in which the individual responses of judges are then translated into legal judgments that form precedents for future judicial decisions. By changing and developing property law, tort law, and criminal law, judges in the United States and the United Kingdom function within their institutions when fashioning doctrine and applying legal standards that then guide and govern behavior, and as I argue in this chapter, we should understand a fundamental aspect of this decision making process to be the judges’ individual responses to the cases they are asked to decide.

In chapter 5, I explore the meaning of judicial independence in terms of judicial individuality. More specifically, I consider legislative attempts to interfere with the internal reasoning process of judges as a threat to judicial independence. And I challenge conceptions of judicial independence that focus exclusively or predominantly on institutional independence. By ex-
amining cases from the United States and the United Kingdom, I argue that the core value of institutional independence is the protection of an individual judge’s authority and autonomy to decide for herself what legal sources and evidence she finds applicable and persuasive in reasoning toward and articulating her legal judgments.

The supposed paradigm of an ideal judge as a neutral, dispassionate referee whose own individuality is suspended in the application of the law has been contrasted with the empathetic judge who inappropriately allows her personal life experiences to dictate her legal decisions. Through this false contrast we have lost sight of the actual common law judge and common law judging. The problem arises because of our various reactions to the realization that judges are “not fungible, like grains of sand or particles of wheat, that the pronounced economic and political views of the man within the judge sometimes influence the judge’s decisions.”104 Our reactions have tended to deny that personal experiences and perspectives should matter to judicial decisions105 or to deny that judicial decisions are based on anything other than personal perspectives and preferences.106 Distinguishing intersubjectivity from objectivity and distinguishing objectivity from impartiality are important steps in locating the value of appropriate individual responses in judicial decisions and differentiating these responses from improper prejudices or biases that undermine the legitimacy of judicial decisions.107

Justice Sotomayor’s recognition that the different experiences and perspectives of judges have an impact on their decisions seemed to some like a concession or a confession. We need to move beyond the binary “subjective vs. objective” vision of judging to an approach that integrates the personal and interpersonal elements of judging. Judging is a human endeavor. And in this endeavor, blindfolds leave judges blind. In the common law tradition, judges must judge with their eyes open. We need to recognize that a full understanding of the common law tradition requires a more refined understanding of judging, one that saves space for the full complexity of the individuals who render judgments according to law.