2 Subjectivity, Objectivity, Impartiality

Subjectivity, Objectivity, Impartiality

[T]he Court’s impartiality is threatened if it appears, because of its own narrow membership, to lack an understanding of the broad range of people who come before it.¹ —Martha Minow

Must a judge disconnect her subjective values from her legal judgments? Is that the only way to ensure that the law is being applied rather than the judge’s own vision of justice? This chapter explains that the answer to these questions is “No.”

Here is a characteristic expression of the prevailing view that an objective legal judgment requires a judge to suspend his own subjective personal values and perspectives when deciding cases:

Objectivity, of course, has many meanings. Here, I mean the intellectual process by which a judge reaches beyond himself to understand, from the perspective of his or her community, the social values that he is to weigh and balance. Objectivity stands in opposition to the subjective values of the judge. . . . It means the judge frees himself, as far as he can, from all personal preferences. It means neutrality in the process of balancing. Objectivity means reflecting the deep consensus and the shared values of the society.²

I want to challenge the widespread assumption that “objectivity stands in opposition to the subjective values of the judge” as a predicate or prerequisite for common law judging. This understanding of objectivity encompasses the more general meanings of “mind-independence” and “the rule of
law and not of men” that I discussed in the previous chapter. Moreover, as I will explain later in this chapter, this understanding of objectivity in law can usefully be understood as “universality” (in the sense of a rule that can be applied in the same way to all similarly situated individuals and cases) and as “functional effectiveness” (in the sense that the legal process operates according to identifiable rules and yields results that are identifiably legal in relation to governing rules).

Objectivity is often used to describe a quality of judges who base their decisions only on preexisting legal rules rather than on personal preferences or perspectives. Objectivity also describes law as an external constraint on the decisions of judges. These meanings are related, but in their different reference points, they are quite different in application. For example, can legal rules be determinate? Can objectivity be measured in terms of determinacy? If legal rules are not fully determinate, can they still act as constraints upon judges?

As a result of the questions we tend to ask about the relationship of objectivity to law and judging, a great deal of attention has been paid to determining the linguistic meaning of legal rules, or what it means to say that a rule is being followed, or whether other influences on judging and law (such as morality) can be understood as objective. Much of the work on these questions has been motivated by skepticism about the possibility of finding an objective meaning of language, or of following the objective language of a rule, or of finding and following the objective meaning of a moral rule in a legal decision. These questions also relate to the problem of attempting to differentiate between variation within a practice and alteration of that practice. As an example applied to judging, we can ask how we know when judges are legitimately opting not to follow precedent as opposed to judges not feeling bound by precedent.

These questions assume that objectivity is the best means of understanding the relationship of law to judging. I understand the intuitive appeal of saying that objective judges refer to objective rules rather than subjective preferences when deciding cases in accordance with the law. As I mentioned in the previous chapter, the use of objectivity in relation to mind-independence and the rule of law in my argument is meant to cohere with these familiar understandings of objectivity in law and judging. The broader purpose of my argument, however, is to offer intersubjectivity as an alternative to objectivity, because it captures more fully the process by which a judge’s judgments acquire their received legal meaning and effect and because it incorporates the subjective element that is intrinsic to that process.
In this connection, Donald Davidson argues that any understanding of (or attempt to understand) another person’s use of language requires an underlying theory of linguistic meaning on the part of a semantically competent interpreter. Davidson’s position is useful in relation to my argument because he attempts to locate an intellectual and linguistic space in which an individual process of judgment can proceed that is both subjective and social, by recognizing that no judgment can be made in linguistic or social isolation. On Davidson’s account, attempting to remove the perspective of the individual from the process of judgment or to insulate the judgment from the individual’s perspective—as the judge or the community member—defeats the intersubjective process and social purpose of reaching a judgment. Davidson offers a way of thinking about the intrinsically subjective and intersubjective process of creating and communicating a judgment about the world, in the world. He defines intersubjectivity in terms of objectivity, which I would prefer to avoid, but his emphasis is that our understanding of the outside world cannot proceed except from individual judgments that are communicated to other individuals who then communicate with us. The judgment is always an individual judgment, but it cannot be conceived as a judgment in the absence of its communication to others.

**Impartiality**

In assuming that objectivity is required to legitimate the legal judgments made by judges, many scholars and judges assume that this sense of objectivity parallels judicial impartiality. In fact, impartiality and objectivity are often viewed as synonymous or coterminous concepts. I will argue, however, that it is important to disaggregate them. As I will use the term, impartiality means the absence of any personal stake or bias (or the genuine appearance of any personal stake or bias) in a case that could prevent the litigants from being treated fairly by the court. In contrast, I will use the term objectivity to mean the absence of any personal values or views that could influence the judge’s consideration of a case under the law. For reasons I will explain in this chapter and the next, the common law has long required the former but never the latter. Moreover, if we could find judges who were truly “objective” in this sense, who possess no views about the law or the world that might influence their understanding of particular cases, we should not want them deciding cases. We do not want judges with empty minds any more than we want judges with closed minds.

Differentiating impartiality from objectivity places the judge properly in
the judicial process. A lack of impartiality in a judge is a violation of due process for a litigant. The individual before the court has the right to an impartial judge whose views about her as an individual will not prejudice his decision and who possesses no personal stake in the outcome of the case. But the individual before the court does not have a right to a judge with no views about the law and with no value system of his own that frames his understanding of the law or the world. With this distinction in mind, the common law tradition requires judges to be impartial, but it cannot and does not expect them to be objective:

We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances. . . . The judge in our society owes a duty to act in accordance with those basic predilections inhering in our legal system (although, of course, he has the right, at times, to urge that some of them be modified or abandoned). The standard of dispassionateness obviously does not require the judge to rid himself of the unconscious influence of such social attitudes. In addition to those acquired social value judgments, every judge, however, unavoidably has many idiosyncratic ‘learnings of the mind,’ uniquely personal prejudices, which may interfere with his fairness at a trial. . . . The conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect. Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine. The concealment of the human element in the judicial process allows that element to operate in an exaggerated manner; the sunlight of awareness has an antiseptic effect on prejudices. Freely avowing that he is a human being, the judge can and should, through self-scrutiny, prevent the operation of this class of biases.

Once we distinguish impartiality from objectivity, we can see the difference between prejudices and values. We also can begin to appreciate the problem with referring to a judge’s values, experiences, and perspectives—as well as his prejudices, biases, and financial interests—as the subjective element of judging, and then contrasting this with the image of the objective, neutral, and dispassionate judge with a blindfold and scales. Two core institutional standards reinforce this differentiation of impar-
tiality from objectivity and emphasize impartiality, rather than objectivity, in the common law judiciary. First, the sort of improper interest that precludes a judge from deciding a case is a “direct, personal, substantial” interest in the case, “because his interest would certainly bias his judgment.” Similarly, the statutes codifying the standards for recusal indicate that a judge should recuse himself only where there is a bias specific to a litigant, or a case, or a financial interest. A judge is not required or expected to recuse himself simply because of general values or perspectives or because of personal characteristics such as race or gender. My argument here is that the differentiation of impartiality from objectivity tracks the basic distinction between the biases or prejudices that should lead to recusal and the values or perspectives that any judge brings to her judgments: “[N]eutrality in the absolute sense cannot be expected. ‘Personal bias or prejudice’ calls only for practical objectives. For example, prior judicial views will not disqualify. [I]t would be strange if a judge became less qualified the greater his judicial experience. Obviously, too, a judge is not prevented from sitting because he comes into every case with a background of general personal experiences and beliefs. There must be something unique.”

The claim that a judge cannot be impartial must be supported by specific factual allegations, and the determination that a judge’s impartiality has been compromised is left to that judge himself. The reasons for this are easiest to see when we consider impartiality in relation to judicial independence, which I will discuss further in chapter 5. A judge must determine for himself whether he possesses a bias that might interfere with his ability to decide a case fairly. Otherwise the judicial institution could be manipulated by having the parties rather than the courts determine which judges shall hear which cases.

Thinking about the relationship between judicial impartiality and judicial independence leads to the second institutional basis for distinguishing impartiality from objectivity. In the common law tradition, judges cannot be removed from office for their legal judgments. The basis for this constitutional protection of the judiciary’s independence is closely linked with the judiciary’s impartiality. Because judges are expected to determine the law’s meaning and application on the basis of their own legal judgment, rather than on the basis of personal prejudice or external influence, the judiciary merits the unique institutional protections it enjoys. If judges cannot point to a basis in the law for their legal rulings, they will no longer be able to justify their institution’s independent position and role in public life and government. Judges are expected to decide impartially because they are
uniquely positioned, constitutionally and institutionally, to decide that way. Their position places significant obligations upon them, individually and as members of a larger community, to explain their judgments by reference to authoritative legal sources and forms of legal reasoning.

In relation to the courts’ institutional independence, the distinction between impartiality and objectivity can help us analyze politically charged cases such as *Bush v. Gore*. As Howard Gillman observed, we cannot simply equate or correlate decisions traced to judicial party affiliation with decisions based on improper judicial partisanship. My point is not that the Court decided *Bush v. Gore* correctly, or that the decision was not improperly influenced by partisan behavior on the part of certain justices. My point is that we cannot simply point to the party affiliation of the justices in the majority and conclude on this basis alone that a decision was improperly influenced by partisanship. Put another way, we need to do more than assert that certain justices lacked objectivity because they share an ideological perspective with the litigant who prevailed in the case. As Gillman points out, we must determine, on the basis of specific aspects of the judges’ actions or decisions, whether the impartiality of certain justices was compromised by partisanship. Perhaps, in *Bush v. Gore*, there are specific facts toward which we might point. In any event, differentiating impartiality from objectivity allows us to evaluate judicial behavior in a manner that is more precisely linked to the actions of a particular judge in a particular case.

**Objectivity**

The longstanding view of objectivity as the opposite of subjectivity has led people to assume that since judges should not decide cases in an entirely subjective way, they must decide in an entirely objective way. There is a problem, though, with seeing subjectivity and objectivity solely in oppositional terms. First, subjectivity and objectivity are strictly oppositional only if we assume that the relevant meaning of objectivity is strong objectivity. Second, the meanings of “objective” used to describe law and to describe judges do not overlap perfectly. The existence and meaning of the law may be identified in a meaningfully objective sense, but the process by which the law is identified does not necessarily operate in the same way. What people (officials, citizens, litigants, jurors) believe and do in reference to the law is what determines its meaning and existence. In other words, in terms of objectivity, the process of identifying legal norms should be understood differently from the norms themselves, and since the production and identification of
legal norms must involve human expression and perception, it is misleading to think of these norms or processes in strongly objective terms.\textsuperscript{42} Similarly, the process of judging involves reference to legal norms and the production of legal norms, and the use of the term “objective” to describe both the norms and the judges leads to misleading accounts of the law and the judiciary. Rather than asking whether the law or the judge is objective, we need an account of the process and faculty of judgment in which the judge and the pertinent legal norms interact in the formulation of a judicial decision that is itself identified and evaluated as an independent legal source.

Anxieties about the truth or reality of legal norms lead people to want to place them on an ontological scale that looks something like this: “law seems more ‘objective’ than literary criticism but less objective than science or arithmetic,”\textsuperscript{43} and the more objective, the better. So we find ourselves in debates concerning whether law is more like science or ethics or literature. Law is related to and different from all those things, but as I will explain in this section, the objectivity that is often assumed for law is not a useful means of assessing the nature of these relationships.\textsuperscript{44}

Do we need a more refined understanding of objectivity or an alternative concept? I have no more interest than anyone else in arguing over the proper word we should choose to describe something. In my view, the concept of objectivity has become so philosophically and legally and politically loaded that I prefer to differentiate it from the concept that I will propose in its place. Nevertheless, it is important to situate my argument within the ongoing discussion, which means continuing to address the concept of objectivity itself.

John McDowell’s work on the nature of objectivity in ethics offers an interesting response to the claim that there can be no objective (mind-independent) ethical reality. McDowell argues for an alternative understanding of realism that is not tied to a scientifically oriented naturalism:

\begin{quote}
[T]he issue can be whether persuading someone counts as giving him reasons to change his mind, the challenge can be put as a query whether a mode of thought that engages subjective responses allows for a sufficiently substantial conception of reasons for exercises of it to be capable of truth. . . . [H]aving the concept involves at least inklings of a place it occupies in a rationally interconnected scheme of concepts, and we should aim to exploit such inklings in working out an aesthetic, so to speak. . . . A ranking of sensibilities would flow from that, rather than being independently constructed[,] . . . and used to deliver verdicts.\textsuperscript{45}
\end{quote}
McDowell offers here an understanding of ethical reality that does not depend on either externally existing moral facts or on internally generated moral intuitions. Instead, McDowell locates the reality of ethics in the shared normative conclusions reached through a process of subjective responses and communicated reasons that are based on those responses. The process involves evaluation of these reasons for belief and action, and the evaluations are then used to reach judgments (verdicts).

McDowell’s account of ethical reality prioritizes and harmonizes subjective responses and a heuristic process of reasoning about those responses in the formation of ethical judgments that can meaningfully be claimed as true or real. McDowell’s view recognizes a place for subjective responses and reasoned conclusions that are themselves the basis for our understanding of our experience. In other words, we process our subjective responses through a learned and shared process of reasoning and expression through which we form judgments of what is right (or beautiful or just):

\[\text{T}\text{he position I am describing aims, quite differently, at an epistemology that centres on the notion of susceptibility to reasons. . . . The aim is to give an account of how such verdicts and judgements are located in the appropriate region of the space of reasons. No particular verdict or judgement would be a sacrosanct starting-point, supposedly immune to critical scrutiny, in our earning the right to claim that some such verdicts or judgements stand a chance of being true.}\]

Our developed capacity for making and communicating judgments based on our subjective responses and the susceptibility to reasons requires genuine effort and the acquisition of knowledge. To make accurate or adequate ethical (or aesthetic or legal) judgments, one must possess some familiarity with the relevant concepts, some knowledge of the processes of analysis and articulation, and some experience with incorporating a subjective response within a reasoned conclusion.\[\text{The critical point here is that the process of making evaluative judgments is a distinctively human process, which can meaningfully be called objective on the basis of justificatory reasons that are then evaluated by and within a constituted community. This might be understood as a form of mediated objectivity.}\]

There are many ways this process might work, and two of these are Kantian aesthetic judgment and common law legal judgment.

As I explain more thoroughly in chapter 3’s discussion of aesthetic and legal judgment, intersubjectivity indicates that we need something more
than a minimally objective consensus of opinion about meaning; the recognition of a dynamic process of evaluating judgments in a community contemplates a place for judgments that deviate from a preexisting consensus and yet may still be validated as legitimate or even correct judgments. Intersubjectivity in legal and aesthetic judgment produces meaning through reception, evaluation, and translation. To begin addressing intersubjective judgment in legal terms, in the next section I consider some of these issues in relation to the trial process as the traditional institutional starting point for the production of legal judgments.

**Trials and Truths**

The goal of the trial process is sometimes understood as translating into and through legal evidence the historical events that are at issue in a given case. Even here, people frequently confuse more abstract conceptions of objectivity and truth with the determination of factual and legal issues at trial. The physical and testimonial evidence that is presented at trial to establish the relevant facts of the case can be thought of in terms of mind-independence or objective truth, but that will quickly become misleading. For example, the physical evidence (a gun or a pair of eyeglasses) exists in the world apart from what we may think about it. The testimonial evidence exists as an independent record of the perceptions, recollections, and opinions of the people who testify. But what the physical and testimonial evidence means, how that evidence is deemed to be relevant and probative of the legal issues, depends upon the conclusions of the judge or juror whose role is to determine the legal truth of what happened and how the facts established in court relate to the law.

The legal concepts that structure and govern the trial process are not directed solely toward a simple investigation or reconstruction of historical events. The historical facts are, of course, a crucial part of the process, but they do not make up the values, virtues, and shortcomings of the adversary trial process. At trial, the evidence must be presented in a manner that ideally ensures the fairness of the process and the rights of the litigants, with particular regard for the criminal defendant. This is one of the many reasons that in our discussions of the legal world we would be better off thinking in terms of intersubjective validity rather than objective truth. Our discussions will benefit because thinking this way can help us to identify mistakes in the identification or interpretation of the law and in the determination of the facts and to distinguish such errors from failings of the trial
process itself. We need concepts and terms that allow us to differentiate instances of failure due to a lack of objectivity from instances where a lack of objectivity is not a failure.

The trial process operates in a manner that can usefully be called objective in terms of its functionality and leads to what can appropriately be called a truth that is produced by that process. But the process is not designed to be objective in the sense that it must be external to human knowledge or understanding, and the process may not discover the historical truth. These are facts, not failures, of the common law trial system. There are meaningful senses of objectivity and truth that are helpful in a careful discussion of the judicial process, but those should be objectivity in terms of functional effectiveness rather than mind-independence, and truth in terms of a legal truth that is produced rather than the historical truth that is discovered.

In any trial, there are facts about what actually happened. Someone did or did not kill someone else. Someone was or was not wearing her glasses when an accident occurred. It may be helpful to think about the historical truth as existing apart from what anyone may think about it, but the legal truth of what the evidence establishes at trial is determined through a process that combines subjective and objective elements. That is the design of the system. A jury can responsibly decide what the facts of a case are and may still not correctly find what really happened. A juror can reasonably believe that a defendant is guilty and may still correctly conclude that the prosecution has not established the defendant’s guilt beyond a reasonable doubt. Indeed, the burden of proof in a criminal trial is specifically intended to require jurors who may believe the defendant is “probably” guilty, to find that person not guilty if the prosecution is not able to meet its burden of proof.

Legal reasoning tends to distinguish sharply between facts and values, facts and rules, factual issues and legal issues, etc., but these distinctions result in a necessarily truncated diagram of a composite process of reasoning. The cognitive tasks of discerning facts and applying rules are always evaluative. This does not mean, however, that all evaluations are equally valid in light of the operative facts and legal rules. So while we may sometimes separate facts from values and rules in describing our reasoning process, we cannot reach a fully considered judgment without also seeing how the facts and values relate to one another. Legal judgments may result in rules, but we should not forget that these rules were themselves derived from facts, values, and preexisting rules.

The process of determining the salient facts and applying the operative rules in a given case are not isolated or discrete moments of analysis, although
for convenience we tend to speak about them that way. The relevance of facts depends upon the applicable rule, and the rule’s application depends upon the factual determinations.\textsuperscript{62} Moreover, the salience of different facts will depend upon the judge’s view of which legal rule is applicable, which facts are most important in a case, and which facts the evidence has established (and judges may disagree about all of these).\textsuperscript{63} Different judges’ values, perspectives, and experiences will influence which facts they find most compelling\textsuperscript{64} and how those facts should figure in their legal reasoning toward a judgment.\textsuperscript{65} Disagreements that sometimes arise among witnesses, parties, lawyers, jurors, and judges about which facts the evidence tends to prove or which statutory or precedential rules are properly applicable result from the perceptions, recollections, experiences, and backgrounds of these individuals.\textsuperscript{66} This does not mean that the law is not functioning as law or that facts are not determined in court. It means different actors in the judicial process undertake different functions and obligations, on the basis of their own perspectives and experiences, and the law that is made through this process depends upon all of them, at different times and in varying dimensions.\textsuperscript{67}

**Legal Sources and Valid Judgments**

An argument that judging should seek validity rather than truth challenges a widely and powerfully held view that objectivity in law demands a search for legal truth in judging. This view is often assumed (for different reasons) by strong objectivists and subjectivists and is sometimes associated with legal positivism. I have addressed strong objectivism and subjectivism already,\textsuperscript{68} and here I will continue my discussion of this point with respect to the function of legal sources in legal reasoning by addressing legal positivism.

In general, legal positivism is characterized by a commitment to at least two core principles: (1) that authoritative legal sources such as constitutions, judicial decisions, and legislation may be identified as a matter of social fact (the “sources thesis”\textsuperscript{69}), and (2) that there is no necessary connection between the law and morality (the “separability thesis”\textsuperscript{70}). These tenets frame positivism’s claim to concentrate our jurisprudential attention “on the distinction between law as it is and law as it ought to be.”\textsuperscript{71} The claimed importance of this distinction sometimes leads to the view that a virtue of positivism is its focus upon the truth of statements of or about the law and that this focus should motivate our understanding of the role of legal sources in legal reasoning, particularly for judging claims under the law.\textsuperscript{72} On this view, legal reasoning is distinguished from other forms of reasoning by its dependence
upon authoritative legal sources according to which legal arguments are articulated and evaluated by a community of judges, lawyers, and others.\textsuperscript{73} Among other things, the effort to keep legal reasoning autonomous from other forms of reasoning will help to ensure that adjudicative outcomes are determined by legal sources and not by extra-legal values that might otherwise be smuggled by judges into their legal decisions. According to this conception of legal positivism, statements about the law may be determined to be true or false solely with regard to the content of legal sources and their anticipated application in legal reasoning.

My purpose in this section is not to defend legal positivism; it is to defend my argument by anticipating and preempting certain criticisms that are commonly made against positivism and might also be made against my position. In thinking about these claims it is useful to differentiate, as Frederick Schauer does, among different meanings or versions of legal positivism. Schauer suggests three: conceptual positivism, decisional positivism, and normative positivism.\textsuperscript{74} Conceptual positivism is the theoretical claim that “morality is not a necessary condition of legality.”\textsuperscript{75} This describes, in effect, positivism’s commitment to the separability thesis. Decisional positivism “is a view about the role of posited law in legal decision-making.”\textsuperscript{76} This represents positivism’s commitment to the sources thesis. Normative positivism is a view of conceptual positivism as itself a socially constructed thesis about the meaning of law. In other words, normative positivism sees the separation of law from morality as presupposing a conception of law that is, by definition or conceptual extension, necessarily distinct from morality. This view of positivism is normative in the sense that a positivist conception of law should be chosen as the conception of law “because of the good that such an understanding will produce.”\textsuperscript{77} The good that may be engendered by a positivist conception of law might include, for example, fostering an individual and societal perspective of moral distance from or evaluation of the law.\textsuperscript{78}

Joshua Cohen’s discussion of legal positivism reflects a common understanding of the purpose of judging as getting to the truth of how the law applies in a given case and, more simply, what the law is (as opposed to what the law ought to be): “The notion of truth is also fundamental in our understanding of reasoning. Thus, truth is tied to judging, in that judging whether p is closely connected to judging whether p is true. . . . Truth is connected as well to norms of thought and interaction that call for accuracy in representation, sincerity in expression, consistency, ‘getting it right,’ and being attentive to how things are and not simply how we wish them to be.”\textsuperscript{79} Cohen defends the concept of truth against various forms of the claim that truth
cannot be invoked in public discourse about democratic politics (because of the challenges of cultural diversity, moral relativism, ideological pluralism, etc.). He frames his analysis of truth as a response to John Rawls’ argument that political judgments should not “use (or deny) the concept of truth. . . . Rather, within itself, the political conception does without the concept of truth.”

Cohen argues that “a political conception of truth is . . . a genuine conception of truth.” By truth, Cohen sometimes indicates that he understands truth in relation to “our practices of making and defending assertions, in our reasoning, and in ordinary understandings about the content and the correctness of thoughts.” So Cohen does not assume a strongly objectivist notion of political truth. Instead, Cohen argues that “political justification . . . should proceed on a terrain of argument that can be shared.” The problems with Cohen’s view arise when he shifts his discussion from political to legal conceptions of truth. As I explain in the next section, Cohen’s defense of truth in relation to legal judgment will inevitably lead us back to the confusions created by the assumed relationship between truth and objectivity.

Cohen intends his argument about truth to extend into the field of law and legal judgments. For example, in his discussion of Thomas Hobbes and legal positivism, Cohen writes:

Hobbes’s thesis is about legal validity, not about justice. The idea is that legal validity is fixed entirely by an act of authority, and not at all by moral rectitude. . . . That position is legal-positivism, which is consistent with the view that there are natural standards of rectitude to be used in evaluating laws. But Hobbes was arguably (only arguably) led to his legal positivism from positivism about justice itself: auctoritas non veritas facit justitiam. As Hobbes says, there are no unjust laws, because, antecedent to the sovereign’s law-making activity, there is no just or unjust distinction for laws to be answerable to. So when Hobbes says that truth does not make law, he means that legal validity does not depend on truths about rightness. But that is in part because there are no normative truths available prior to authority that might enter into determinations of legal validity. If that is indeed the rationale for legal positivism, then it follows as well that the truth—that is, truths about what is just and unjust, right and wrong—cannot figure in assessing valid laws as just or unjust, because the justice-making facts, too, are exercises of sovereign legislative authority.
There are several points in this excerpt that are important for my argument. First, Cohen correctly indicates that legal positivism is typically characterized by the separability thesis, a general claim that legal validity is not preconditioned upon the law’s satisfying a standard of moral rectitude. But when Cohen goes further and attributes to legal positivism the view that “there are no unjust laws because, antecedent to the sovereign’s law-making activity, there is no just or unjust distinction for laws to be answerable to,” his statement may be true of Hobbes, but it is not true of all legal positivists. In fact, Cohen has made two mistakes here. He has failed to recognize that legal positivism is not inconsistent with moral realism and he has glossed over the distinction between inclusive positivism and exclusive positivism. I will address each of these mistakes in turn.

Commentators frequently misconstrue the separability thesis as a claim not just that law may be identified without recourse to morality but also as a claim that there is no morality through which law may be identified. Properly understood, however, legal positivism does not hold a view on the meta-ethical question of whether moral truths or facts exist. Put differently, a legal positivist can also be a moral realist. In addition, legal positivists disagree with one another about whether moral claims can enter into determinations of legal validity. Exclusive legal positivists argue that the identification of a law as valid can never depend on its moral worth, because this would violate the separability thesis. Inclusive legal positivists believe that the identification of a law as valid can depend, within a given jurisdiction, upon its compliance with a normative moral criterion.

Legal positivists argue that their theory helps to keep the identification of the law distinct from the moral evaluation of the law, and this is the first point that Cohen missed in the last sentence of his quotation. By arguing that legal positivism does not allow for moral assessment of the law, Cohen assumes either that legal positivism is committed to moral relativism or noncognitivism or that disagreements about moral truth preclude moral evaluation of the law. Whichever Cohen meant as a criticism of positivism, the criticism is unfounded.

The excerpt from Cohen also touches on his misperception of the sources thesis. The differentiation and identification of authoritative legal sources produces a “limited domain” of concepts and norms according to which lawyers and judges formulate and evaluate legal arguments. In H. L. A. Hart’s terms, a rule of recognition allows for the establishment of a legal system and a process of legal reasoning: “in the simple operation of identifying a given rule as possessing the required feature of being an item on an authori-
tative list of rules we have the germ of the idea of legal validity." The use of the term “validity” here is neither accidental nor coincidental. In the identification of certain sources as legal sources, we can see that certain arguments validly refer to the sources recognized by the community as legally authoritative and certain arguments do not. The rule of recognition functions as a “social rule” insofar as legal rules are validated through their acceptance by a legal community. In the next chapter, I will develop an account of the validation of legal judgments through the common law process of their formulation and communication in a larger community.

The role of the rule of recognition in identifying legal sources for purposes of legal reasoning is perhaps its most crucial function. In fact, Hart emphasized this point in a passage that clarifies the value of thinking of law and legal reasoning in terms of validity rather than truth:

[Some argue] that the rule is meant to determine completely the legal result in particular cases, so that any legal issue arising in any case could simply be solved by mere appeal to the criteria or tests provided by the rule. But this is a misconception: the function of the rule is to determine only the general conditions which correct legal decisions must satisfy in modern systems of law. The rule does this most often by supplying criteria of validity.

For Hart, the value of legal sources for legal reasoning is not to predetermine the outcome of a legal dispute, but to prescribe the distinctive sources and processes by which the outcome will be determined. Hart emphasized this role of legal sources for legal reasoning specifically in relation to the justification of judicial decisions, for the judges who write them and for the community to whom and for whom they are written.

Here we see the problem with conceiving of judging as a search for legal truth contained within existing sources of law: it is not an accurate depiction of legal positivism or of common law judging. It also is not a meaningful criticism of my argument to indicate that I do not assign this role to legal sources in legal reasoning. Legal sources are crucial to legal reasoning, but not because they contain statements of legal truth that judges must locate and articulate in their judgments. We recognize a legal outcome as valid when the sources and process are employed properly in a legal judgment. As Hart explained, we should think of a legal judgment not as finding the truth dictated by the sources, but rather as the result of a process validated by reference to the sources. In fact, this understanding of legal positivism helps us to
see why Hart himself did not believe legal standards are best conceived in
terms of their objectivity and why he believed that positivism did not need
to conceive of the objectivity of moral standards at all.98 In his discussion of
truth in relation to law as well as politics, Cohen misconstrues positivism
and the role of authoritative sources in legal reasoning.

Inclusive positivists and exclusive positivists discuss the relationship be-
tween law and morality in the rule of recognition in terms of validity rather
than truth, as a means of differentiating legal validity from moral truth.99
One problem with failing to recognize the difference between legal validity
and moral truth is that it might lead to a view that there is no differentiation
of morality and law in the common law tradition.100 The separability thesis
means, however, that whatever we may believe about the existence of moral-
ity, those beliefs have nothing to do with determining the existence of law.
And according to the sources thesis, wherever we may believe we find au-
thoritative sources of morality, we all can agree about where we find the au-
thoritative sources of law.

In characterizing positivism (in the person of Hobbes) by its rejection of
moral truth, Cohen does not seem to engage the theory on its own terms. In
addition, even if we take Cohen’s direct reference to Hobbes to indicate that
he meant to direct his criticisms solely at exclusive positivism, they are still
inapposite. Exclusive positivists generally do not argue that judges do not or
cannot engage in moral reasoning when making legal decisions.101 Further-
more, positivists generally agree that morality will usually influence the
evaluation and development of the law.102 Cohen believes, along with many
others, that the combination of conceptual positivism and decisional posi-
tivism leaves positivists with no place for morality in the process of legal rea-
soning by reference to legal sources. Similarly, because I accept that legal
sources possess a unique importance in legal reasoning, one might assume
that I must be a decisional positivist and a conceptual positivist, and accord-
ingly that I cannot argue that there is a place for a judge’s values (moral or
otherwise) in the judicial process. As I have explained, Cohen misunder-
stands positivism on this point. Moreover, positivists are not alone in recog-
nizing that legal sources may be identified without reference to their moral
worth and in acknowledging the centrality of legal sources for legal reason-
ing.103 Relatedly, while it is open to question whether conceptual positivism
ettains decisional positivism,104 nothing about decisional positivism neces-
sitates any commitment to conceptual positivism. My argument explains
the place for a judge’s values and perspectives within the communication of
a legal judgment to a legal community. The process of legal judgment by ref-
ference to legal sources does not preclude consideration of judicial values in the judicial process. The process of legal reasoning in accordance with legal sources allows us to distinguish the judge’s values from the judgment’s value. As I discuss in the next chapter, the communication, evaluation and validation of a judge’s reasoning in his legal judgment requires the use of conceptual, rhetorical, and doctrinal sources and modes that distinguish the judgment as distinctively legal. For positivists and nonpositivists, the evaluation and reception of a judgment is often framed in terms of validity rather than truth, because its significance as a legal judgment depends upon its reference to authoritative sources. The sources do not and cannot, however, fully determine the judgment’s meaning.

Shifting our thinking away from truth and toward validity in our understanding of legal judgments allows us to recognize that a judgment is legally valid even though we may continue to disagree about its moral value. Indeed, one value of legal judgments as distinctive and authoritative legal sources, which thereby constitute part of the limited domain of law, is that they resolve social conflicts while allowing the underlying moral disagreements to continue.105

**Judgment and Justification**

Considering objectivity in law in terms of truth is not the only way to claim objectivity as a value of law. The “uniform applicability” aspect of objectivity as applied to law requires that legal norms should be created in a “universalizable” form.106 But many arguments for objectivity in law do not differentiate between universality and functional effectiveness, on the apparent assumption that universality entails a rule that will yield the same result whenever it is applied, by whomever it is applied.107 The challenge here, however, lies in “determining the extent to which ideology or intellectual perspective governs the selection of universals.”108 In other words, by assuming that the objectivity of a legal rule is defined by its differentiation from the judge who applies it, universality and functional effectiveness are elided in a way that leads people to conclude that a rule that can be applied consistently but is not applied by a judge in a particular case results from a cognitive error or ideological prejudice of the judge who failed to apply the rule. But, in fact, the functional effectiveness of the judicial process in a common law system sometimes depends upon a judge’s ability to determine that a rule should not be applied in a particular case, or that a rule should be changed.109 Legal rules in a common law system may be understood as “de-
feasible,” but that does not alter the objective quality of the rule or the objective quality of the process. It does mean, however, that functional effectiveness is an aspect of universality and not a synonym for it.

In distinguishing these aspects of the judicial process, we must carefully disconnect the judge’s response to a case from his formulation of a judgment that resolves the case. The judge’s personal response to a case—the facts, the parties, the evidence, the arguments—is not meant to be homogenized or standardized. But each judge is expected to respond as a judge, in an intellectually consistent manner. The judge’s response remains a judicial response, because a measure of principled consistency is expected in his aggregated responses. Principled consistency does not mean that the responses of individual judges are necessarily moral responses, although they frequently may be. Instead, principled consistency is used here more broadly to connect the personal reaction of the judge to the public mode of expressing her legal judgment: “To be a principled adjudicator involves more than just acknowledging the true ground of decision; it also requires being consistent within and across cases. . . . Decision according to principle, then, is decision according to a publicly stated ground that is consistent with the grounds the judge uses to decide other cases.” These varied judicial perspectives ensure that legal doctrine will be refined over time through the common law judicial process. In this sense, the judicial process contains an indispensable and inescapable subjective element: the judge.

The objective elements of the judicial institution and process remain objective: (1) the recognized sources of law, (2) the accepted forms of legal reasoning, (3) the function of source-based legal norms explicated through accepted forms of legal reasoning. The mistake is to think that objectivity means only one thing here. Moreover, the mistake is to assume that the presence of objective elements in the law must preclude any presence of subjectivity in the judicial process. The subjective values of judges can figure into the formulation of objective (universalizable) legal rules through an objective (functionally effective) judicial process.

**Value Judgments and Legal Judgments**

Barbara Herrnstein Smith argues that judges need not attempt to hide the relationship between their values and perspectives and the judgments they reach. As long as judges are reflective, consistent, and responsible, they should recognize the importance of their values for their judgments. In addition, rejecting objectivity as a goal for judging would improve our under-
standing of the genuine force and meaning of justification in legal judgment and would, as Smith points out, require objectivists to defend their professed denial of a legitimate place for individual values in legal judgment:

Non-objectivist judges cannot insist that their own perspectives, as shaped by their experiences, assumptions, values, and goals, had nothing to do with their rulings. Nor can they insist that the particular contexts—venues, societies, cultures, historical moments, and so forth—in which their rulings were framed had no effect on those rulings. Non-objectivist judges need not and, if they are self-consistent, will not deny the operation and possibly significant effect of all these factors in shaping the rulings they issue. Objectivist judges, however, do deny them: indeed, it is precisely the denial of the operation of such contingent factors . . . that defines a judge—or judgment, or justification—as objectivist.114

Judgments must be justified. Smith’s point is that nonobjectivism actually requires judges to “take individual responsibility for their rulings” because judges can no longer claim that their rulings were “generated by pure deduction from objective principles grounded in nature, history, scientific fact, scripture, or revelation.”115 As Smith argues, and as I will explain more fully later in this chapter, the justification for legal judgments must ultimately derive not from objective truth or a denial of individual perspective, but instead from the most persuasive argument toward a conclusion that is expressed in legal form as a legal source.

The values and perspectives of the judge are as important to her judgment as the legal sources and forms of argument through which the judge articulates her judgment. In fact, the capacity of a judge to respond in accordance with the norms and practices that guide her as an official and through an enlightened understanding of the different perspectives of the actors involved in the case before her are what allow her response and her institution to be impartial in a meaningful sense (in relation to the concern raised in this chapter’s epigraph).116 As Smith explains, a candid recognition of the role that individual values play in judging might very well encourage judges to be more introspective and reflective when judging and to feel more personal responsibility and accountability for the judgments they reach.

Many important judges and scholars of the common law do not shy away from its incorporation of individual values and personal responses in the process of adjudication.117 Together with Justice Sotomayor, some prominent judges have acknowledged the importance of their individual experi-
ences and perspectives in their work on the bench.\textsuperscript{118} These individual responses and perspectives are discussed in different terms, such as emotion or empathy, and they also may embrace broader experiential components that inform a judge’s decision making. These elements of a judge’s decision, when properly understood, do not supplant or controvert the decision’s legal merit or substance. Instead, they help to constitute the meaning of the law through its application to the actions of people governed by it. The translation of these responses in the production of legal norms through the judicial process is the common law method of establishing the content of the law as a practical influence on people’s lives in a community (also known as a jurisdiction) and concomitantly as a social and institutional expression of the values the members of that community understand the law to embody. The judge articulates the reasons for her judgment in a manner that will be recognized as legitimate by the parties, the profession, and the public. The public justification of her decision in the formulation of her judgment, and the evaluation of her judgment by a larger community, is the “intersubjective” aspect of decision making that I will discuss further in the next chapter.\textsuperscript{119}

The most prominent and controversial examples of the perceived influence of individual values and perspectives on legal judgments tend to involve Supreme Court decisions. This is not because the values of other judges on other courts do not play an equally important role in their decision making, and I will discuss some decisions of these courts in chapter 4. It is instead because the nature of the issues confronted by the Supreme Court, the role and position of that Court in the judicial and political system, and the public attention paid to the Court heighten public awareness and scrutiny of its decisions and of the justices who make them. A judge deciding a constitutional case must, perhaps more than most, consider her personal response to the case and the impact of the constitutional concept at issue in relation to the litigants before her and, by extension, all future litigants who would be governed by the Court’s conception of that constitutional provision. That is to say, the judge must consider what the concepts of privacy or due process or equality mean for an individual who claims that a law violates a constitutional provision. That consideration cannot be accomplished without the personal response of the judge, because the constitutional provision cannot and should not be abstracted from the meaning of these concepts for those who are governed by their meanings.\textsuperscript{120}

A good example of an actual judge whose particular judgments illustrate this point is Ruth Bader Ginsburg. While this is not the place for an extended
excursus into judicial biography, Justice Ginsburg’s experiences can help us understand her public statements and legal judgments. Ruth Bader Ginsburg began her legal education in 1956 at Harvard Law School as one of nine women in a class of 552. They were welcomed by Dean Erwin Griswold by being asked “what [they] were doing in law school taking a place that could be held by a man.” Her academic performance earned her a place on the Harvard Law Review. After her husband (who was a year ahead of her at Harvard) took a job with a firm in Manhattan, Ginsburg requested that Harvard allow her to complete her degree at Columbia Law School so that she, her husband, and their young daughter could remain together. Harvard refused. So Ginsburg transferred to Columbia, served on the Columbia Law Review, and graduated in 1959 as the valedictorian of her class. But she received no job offers. Justice Felix Frankfurter declined to hire her as a clerk due to her gender, Judge Learned Hand told her he did not hire women as clerks because of his use of “salty language,” and her professor at Columbia, Gerald Gunther, had to prevail upon (and provide guarantees to) Judge Edmund Palmieri for him to hire her as his clerk. As it turned out, Ginsburg performed so well that Judge Palmieri hired another woman to succeed her.

In 1963, Ginsburg joined the Rutgers Law School faculty in Newark. While at Rutgers, Ginsburg helped to found the Women’s Rights Law Reporter and began working with the American Civil Liberties Union. Ginsburg cofounded the ACLU’s Women’s Rights Project, coauthored the first casebook on gender discrimination, accepted a position as the first tenured woman on the Columbia Law faculty, and taught the first course at Columbia on Women and the Law. Through her work with the ACLU, Ginsburg was involved in nine cases before the Supreme Court that established gender discrimination as a constitutional violation; Ginsburg argued six of these cases and prevailed in five. Ginsburg argued that gender shared with race both social characteristics and a related history of legally sanctioned subordination and discrimination, and she patterned her approach in these cases after the NAACP strategy in establishing racial segregation as a constitutional violation.

As a result of these experiences, commentators frequently discuss Ginsburg’s opinion in United States v. Virginia (VMI) as the culmination and realization of her efforts as an advocate for gender equality before the Court through her authored judgment as a member of the Court. Indeed, Ginsburg said so herself. While her decision in VMI supports the point I am making, I want to focus instead on a few dissenting opinions that reveal the
influence of perhaps less-evident personal experiences on the formulation and expression of Justice Ginsburg’s legal judgments.

When Ginsburg was asked at her Supreme Court confirmation hearings before the Senate Judiciary Committee if her experiences had made her particularly sensitive to issues of discrimination, this was her response:

I am alert to discrimination. I grew up during World War II in a Jewish family. I have memories as a child, even before the war, of being in a car with my parents and passing a place in Senator Specter’s State [Pennsylvania], a resort with a sign out in front that read: “No dogs or Jews allowed.” Signs of that kind existed in this country during my childhood. One couldn’t help but be sensitive to discrimination, living as a Jew in America at the time of World War II.139

Ginsburg also expressly linked the realization of what it meant to live as a Jew in Europe during World War II with the end of racial segregation by law in the United States. As she put it at her confirmation hearing, “One of the influences on Brown, I think, was a war we had just come through, in which people were exterminated on the basis of what other people called their race. And I don’t think that apartheid in the United States could long outlive the Holocaust.”140 And in an exchange with Senator Carol Moseley Braun, Ginsburg was asked about the efforts to disenfranchise blacks that led to the Voting Rights Act of 1965 (the VRA)141 and the Shaw v. Reno142 litigation. In response, Ginsburg recounted her first personal exposure to socially entrenched racial discrimination:

I remember going with my husband to an Army camp when he was in the military service. We passed a sign that said—I thought it said, “Jack White’s Cafe.” But it didn’t. It said, “Jack’s White Cafe[.]” I had never seen such a sign. I was fully adult, indeed pregnant at the time, so it was not so long ago that such things existed in the United States. I am sensitive to that history. When I spoke about Brown v. Board of Education, earlier today, I mentioned specifically the deprivation of the very basic right to cast one’s ballot that existed for so long in the United States for black people.143

This brief discussion of Justice Ginsburg’s background and comments can help us perceive, in some of her notable opinions as a Supreme Court justice, the influence of her experiences as a Jewish woman who lived
through legalized racial discrimination and World War II. For example, in *Shelby County v. Holder*, the Court ruled that § 4(b) of the VRA was unconstitutional because it relied upon outdated factual findings in support of its requirement that certain states and counties have changes to their voting regulations “precleared” by the federal government (the US Department of Justice or a three-judge court). The basic premise of the majority in *Shelby County* was that “things have changed dramatically” since the VRA was first enacted.

In her dissent in *Shelby County*, which was joined by Justices Breyer, Sotomayor, and Kagan, Justice Ginsburg comprehensively reviewed the history of voting rights discrimination and deprivation in the United States and the attendant “failure to fulfill the promise of the Fourteenth and Fifteenth Amendments.” She reviewed the passage of the VRA, the effectiveness of the VRA’s preclearance provision, unrelenting efforts to discriminate against minority voters, repeated congressional reauthorization of the VRA in 1970, 1975, 1982, and 2006, the extensiveness of the hearings conducted by Congress prior to the 2006 reauthorization, and specific attempts to disenfranchise black and Latino voters leading up to the 2006 reauthorization.

Ginsburg’s dissent in *Shelby County* was motivated by her view that our nation has not changed so much since the passage of the VRA to allow the Court to disregard the basis for Congress’s reauthorization of the statute. In reviewing the legislative record developed by Congress in reauthorizing the coverage formula under § 4(b), Ginsburg observed that “the covered jurisdictions have a unique history of problems with racial discrimination in voting. Consideration of this long history, still in living memory, was altogether appropriate.” One person whose memory Ginsburg refers to here is herself. As she recounted before the Judiciary Committee, she lived through the period that culminated in Congress passing the VRA, and as she said, “it was not so long ago that such things existed in the United States.” We cannot separate Ginsburg’s view of the constitutional basis for congressional reauthorization of the VRA from her personal experience as a witness to racial prejudice or from her sensitivity to the history of “deprivation of the very basic right to cast one’s ballot that existed for so long in the United States for black people.”

In an earlier case involving a challenge to a redistricting plan under the VRA, *Miller v. Johnson*, Ginsburg dissented and drew upon another aspect of her personal experience in formulating her judgment. *Miller* involved the creation of a “majority-minority” voting district in Georgia. The majority upheld the invalidation of the proposed voting district and concluded that a
district cannot be constructed on the basis “of purported communities of interest” when the goal was simply “maximizing the District’s black population.” The Court ruled that the proposed district failed strict scrutiny even though it would have complied with the Justice Department’s interpretation of preclearance under the VRA as maximizing majority-minority districts in Georgia. According to the majority in *Miller*, maximizing black voting districts amounted to an assumption that race alone creates a shared voting interest apart from otherwise divergent “political, social, and economic interests within the [proposed] District’s black population.”

In contrast with the majority, Justice Ginsburg was untroubled by the notion that voters might share interests largely on the basis of their race or ethnicity. That view was almost certainly informed by her experience of being born and raised in Brooklyn’s Flatbush area and, as she said, growing up in a Jewish family during World War II. She began her dissent by emphasizing, as she would later in *Shelby County*, that “for most of our Nation’s history, the franchise has not been enjoyed equally by black citizens and white voters.” Consequently, after considering carefully the other factors that contributed to the formulation of the proposed district in *Miller*, Ginsburg addressed the majority’s main contention that the overriding factor was race. In Ginsburg’s view, this was politically justifiable and constitutionally defensible because, as she put it in her dissent (and as many of her former neighbors in Flatbush could have attested), “ethnicity itself can tie people together.” Moreover, as Ginsburg went on to explain, creating districts in recognition of ethnic or racial ties was nothing new and was a simple recognition of a political reality: “To accommodate the reality of ethnic bonds, legislatures have long drawn voting districts along ethnic lines.” To fail to treat race in the same manner as ethnicity would, in Ginsburg’s view, amount to denying to black voters exactly the protection that the VRA was enacted to ensure. As with *Shelby County*, Ginsburg’s discussion in *Miller* cannot be divorced from her personal experiences of minority communities in the United States and the shared political affinities among minority voters and that the VRA was meant to ensure the full participation of minority voters in the political process.

*Burwell v. Hobby Lobby Stores, Inc.* offers another example of the traceable influence of Ginsburg’s experiences and perspectives on her judicial decisions. In *Hobby Lobby*, the majority ruled that the Religious Freedom Restoration Act of 1993 (RFRA) precludes the government from requiring a closely held for-profit corporation to provide funding for contraceptives to its employees, in violation of the religious beliefs of the corporation’s own-
ers, through a group health plan or insurance coverage under the Affordable Care Act.

Justice Ginsburg dissented. Although she challenges several aspects of the majority’s reasoning, I will focus on two. First, in reading her explanations of her disagreements with the majority opinion and with Justice Kennedy’s concurring opinion, Ginsburg’s experiences as a religious minority seem particularly pertinent. Kennedy and the majority chose to focus on the employers’ exercise of “their religious beliefs within the context of their own closely held, for-profit corporations.” In contrast, Ginsburg believed the focus should be on the provision of health care to “employees who do not subscribe to their employers’ religious beliefs.” The correct inquiry under RFRA, Ginsburg explained, is whether “the contraceptive coverage requirement ‘substantially burden[s] [their] exercise of religion.’”

According to Ginsburg, this inquiry was almost entirely avoided or ignored by the Court. Here Ginsburg links her consideration of the religious beliefs of employees who do not share the views of Hobby Lobby’s owners with her consideration of the health care that is denied to those employees as a result of the Court’s ruling. Ginsburg noted that this inquiry is proper under the Free Exercise Clause of the First Amendment, because “[a]ccommodations to religious beliefs or observances [of Hobby Lobby’s owners] . . . must not significantly impinge on the interests of third parties.” More specifically, Ginsburg emphasizes that the effect of the Court’s ruling is to deny women who work for Hobby Lobby, but do not share the religious beliefs of Hobby Lobby’s owners, access to contraceptives under their health care plan. Consistent with her personal experiences and professional efforts, Ginsburg focuses on the rights and interests of women:

Any decision to use contraceptives made by a woman covered under Hobby Lobby’s or Conestoga’s plan will not be propelled by the Government, it will be the woman’s autonomous choice, informed by the physician she consults. Even if one were to conclude that Hobby Lobby and Conestoga meet the substantial burden requirement, the Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women’s well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence. To recapitulate, the mandated contraception coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children. The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life
threatening. And the mandate secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain.¹⁶⁹

Ginsburg’s experiences as a law student and as a lawyer involved dealing with prejudices based on her gender. Along with the others I have mentioned, Ginsburg has noted the specific challenges she faced not just as a Jewish woman, but especially as a mother.¹⁷⁰

Ginsburg did not dissent alone in *Hobby Lobby*, *Shelby County*, or *Miller*. The other two women on the Court, Justices Sotomayor and Kagan, joined her *Hobby Lobby* dissent along with Justice Breyer. The *Hobby Lobby* majority, therefore, consisted only of men. This point was not lost on Ginsburg. In an interview about the decision, Ginsburg indicated that the male majority on "the Court has a blind spot today."¹⁷¹ But she also remains hopeful that "justices continue to think and can change. . . . They have wives; they have daughters. By the way, I think daughters can change the perceptions of their fathers."¹⁷² So we do not have to wonder whether Justice Ginsburg believes that a judge’s experiences and perspectives influence her decisions. She has told us, in her judgments and in her statements, that she does. And this is as true for the Court’s majority opinion in *Hobby Lobby* as it is for Ginsburg’s dissenting opinion.

This analysis of the influence of a judge's personal experiences and values on her understanding of the law and her judgments in particular cases could be produced for any judge. My point here is not that there is any simple or universal experience of gender, race, religion, or ethnicity. My point is that a person’s experiences as a Jewish woman, or a Latina, or a white woman raised on an Arizona ranch,¹⁷³ or a black man raised in poverty in Georgia during the 1950s and 60s,¹⁷⁴ do influence the perspectives of those individuals, and those perspectives, in turn, influence the understanding each of those judges has of the law. We can locate some of these similarities and differences in their responses and judgments. We find that Justice O’Connor wrote the principal precedent on which Justice Ginsburg relied in her *VMI* judgment.¹⁷⁵ But we also find that Justices O’Connor and Ginsburg disagreed about whether Congress possessed the power to provide a "a federal civil remedy for the victims of gender-motivated violence"¹⁷⁶ under the Commerce Clause by regulating “violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce."¹⁷⁷ And one of the cases in which Justice Thomas chose to speak during oral argument, *Virginia v. Black*,¹⁷⁸ involved the burning of a cross at a Ku Klux Klan rally. During his
questioning of Deputy Solicitor General Michael Dreeben at oral argument, Justice Thomas said:

Mr. Dreeben, aren’t you understating the—the effects of—of the burning cross? . . . [I]t’s my understanding that we had almost 100 years of lynching and activity in the South by the Knights of Camellia and—and the Ku Klux Klan, and this was a reign of terror and the cross was a symbol of that reign of terror. . . . [M]y fear is, Mr. Dreeben, that you’re actually understating the symbolism on—and the effect of the cross, the burning cross. . . . [I]t was intended to have a virulent effect. And I—I think that what you’re attempting to do is to fit this into our jurisprudence rather than stating more clearly what the cross was intended to accomplish and, indeed, that it is unlike any symbol in our society. . . . [T]here was no other purpose to the cross. There was no communication of a particular message. It was intended to cause fear . . . and to terrorize a population. 179

Thomas’s comments at oral argument altered the atmosphere in the courtroom,180 and their influence can be found in the language and reasoning of the majority opinion.181 Of course, we cannot know what impelled Justice Thomas to speak, but given the substance of his comments and of his dissenting opinion in this case,182 it is difficult to deny either that his experiences in the racially segregated South were an important factor or that his position as the only black justice on the Court enhanced the influence of his comments upon his colleagues.183

Just as we should not assume that all women share the same perspective based on their gender experience or that all black people share the same perspective based on their racial experience, we also should acknowledge that some experiences are shared.184 Shared or not, however, we should not pretend that judges will or should suspend their personal experiences and perspectives so that they can judge from an imagined place of abstract neutrality or objectivity.185 The influence of these personal values on a judge’s response to a case cannot be excised from her broader understanding of the purpose and meaning of the law that she interprets and applies in her judgments.186 To be sure, this influence will be more evident in certain cases or for certain judges. But leaving aside certain instances of misconduct or failures of impartiality, the element of subjectivity in judicial decision making does not detract from the distinctive nature of the opinions as legal judgments or of the judgments as contributions to a broader understanding of the law.
In all these cases, a judge must render a legal judgment that incorporates an individual response within formal and institutional constraints, which allow the law to develop in a manner that the legal community can recognize and validate as a legal judgment. The judge and the community can justify a decision as impartial not because the judge’s values played no role in her judgment, but because her judgment is consistent in principle, form, and content with existing modes of legal reasoning that are distinctive of the judiciary as an independent institution.\textsuperscript{187} The response of a judge must be contained in and constrained by the formal elements of legal reasoning,\textsuperscript{188} and these elements ensure that a judge’s decision will be recognized as a legal judgment by the legal community and by the public.\textsuperscript{189}

The combination of subjective responses within recognized forms of reasoning and decision making allows a community to evaluate and incorporate that judgment as an authoritative source of law or as a source of potential development of the law. As I will explain further in the next chapter, the bases for a judge’s majority or dissenting opinion must be articulated in a manner that allows the judge to claim the assent of other judges who will review that decision in the future.\textsuperscript{190} These forms of reasoning, particularly when judges disagree with one another, should properly be conceived in terms of validity or persuasiveness, rather than objectivity or truth, because the full meaning and value of a judgment cannot be determined when the judgment is written.\textsuperscript{191}

In an important sense, every judgment implicates a judge’s values, and the value of any judgment is determined by its ability to persuade other judges of its correctness as a legal result.\textsuperscript{192} There is good reason to believe that judgments are more likely to endure in their persuasive influence if they engage the judge’s own values and articulate that judge’s view of the impact of the law for those governed by it. This is a further element of the common law process in constitutional adjudication: a lower level of abstraction increases the judge’s focus on those individuals who are most directly affected by the law. The more a judge is sensitive to “the lived lives of individuals” in articulating her judgment, the more likely that judgment will continue to exert doctrinal influence in the future.\textsuperscript{193} And the more distant the ruling is from its concrete applications, the less likely future lawyers and judges will find it persuasive.\textsuperscript{194}

In other words, every legal judgment is a value judgment.\textsuperscript{195} Read carefully, Ginsburg’s dissents in \textit{Shelby County}, \textit{Miller}, and \textit{Hobby Lobby} can help us see that the purpose and content and application of the Voting Rights Act or the Religious Freedom Restoration Act or the Fifteenth Amendment...
or the First Amendment—the meaning of these laws—cannot be understood in isolation from individual responses and underlying values of the judge who is interpreting them. In writing her dissenting opinions, Justice Ginsburg articulates not only her view of the mistakes in the majority’s reasoning and conclusion, she also expresses her implicit hope that the majority’s “justices continue to think and can change.” In this respect, the substantive development of the law depends on the subjective responses of judges. According to values intrinsic to the common law, a legal judgment claims the assent of other judges who may consider the matter in the future as a universalizable norm, and it is also defeasible and subject to reevaluation and revision.

The Judge in the Judgment

We need to move beyond the familiar civic phobia that judges will decide cases on the basis of their own values rather than the law. We need to recognize that when judges decide on the basis of the law they are deciding on the basis of their own values. Every time. The familiar concern either fundamentally misconceives the common law tradition or misconstrues the personal and public dynamics evident in all judicial decision making. As MacCormick reminds us, this concern also overlooks the overarching point that every aspect of the judicial decision-making process, including the judicial decision itself, occurs within a system of law:

Legal decisions presuppose legal disputes. That is, they presuppose cases in which one party makes some kind of a claim about or from another person. . . . Particular rulings will have to take their place under constraints of consistency, coherence, and a reasonable evaluation of consequences in an existing even if incomplete corpus of law. So the parties and the judges have only quite restricted freedom of manoeuvre as they try to work through to a reasonably justifiable conclusion justified as a conclusion of law in the case seen as a legal case. The concept of universalizability, which I propound as essential to that of justification in law . . . is a concept limited by the requirements of legality and the Rule of Law. Judges have to universalize rulings as best they can within the context of an existing and established legal order.

It is useful here to connect MacCormick’s work with Brian Tamanaha’s. In his response to characterizations of law as a political and ideological in-
strument and of judges as political actors pursuing ideological motivations by legal means, Tamanaha argues for a return to or a reconstruction of a non-instrumental view of law and judging. Tamanaha is motivated in part by his concern that these characterizations exaggerate the subjective aspects of judging and thereby deny the objective qualities of law. Tamanaha seeks to rescue the concept of objectivity from its modern critics and to reclaim a more meaningful account of objectivity, which better accounts for its genuine meaning and force in the common law tradition.

In pursuing this argument, Tamanaha emphasizes, as MacCormick does, the preexisting formal, doctrinal, and institutional parameters within which a judge’s response must be incorporated in a legal judgment:

Judges indeed approach the law from the standpoint of their personal views. More immediately, however, they see the law from within the lens of the legal tradition into which they have been indoctrinated, and from within the conventions of legal practice and judging in which they participate. The totality of the legal tradition—the legal language, the corpus of legal rules, concepts, principles, and ideas, legal processes and practices, hierarchical legal institutions, the craft of lawyering—has the effect of stabilizing legal meaning and providing restraints on the influence of the subjective views. Law is a socially produced and shared activity that participants are not free to do in any way they desire. . . . This account incorporates . . . the influence of background views on how people see the world, merely adding the reminder that the legal tradition itself is such a body of background views, which becomes an integrated aspect of the judge’s own perspective.

Tamanaha’s observations connect well to MacCormick’s discussion and help us see that a judge’s subjective response is not exogenous to the legal tradition within which the judge functions. The judge’s perspective and subjective response are themselves always formed and expressed within the background of a shared legal tradition and legal community.

We need judges with broad and varied experiences on our courts. The more breadth in personal experience and perspective that judges can bring to the law, the more that the law will reflect, over time, the plural community that it governs and through which judicial decisions acquire their full meaning as sources of law. The inherently public, justificatory aspect of common law judicial decision making both predetermines the form a legal judgment must take and creates the community or communities that will
evaluate and validate the judgment’s legal status. By referring to the forms of legal argument and the sources of legal authority, the judge both acknowledges his membership in the legal community and offers his judgment as a contribution to that community. The judge decides as an individual whose judgment must be formulated and expressed within the common law tradition of legal process, legal argument, and legal sources. The judgment cannot depend entirely on the judge’s values or experiences, but it also cannot be entirely disconnected from them. A judge’s failure to articulate his judgment in accordance with the forms of argument and legal sources of the common law tradition will undermine or extinguish his judgment’s legal validity and status as a legal source.

The long-standing tendency to conceptualize law and judging in dichotomous subjective-objective terms has led to some overheated, but undercooked, depictions of judging:

Judges are said not to have discretion; they do not decide their cases; rather it is the law or the Constitution speaking through them that determines the outcome. Judges, in short, are the mouthpieces of the law. To deny the falsity of the foregoing, we adopt an ostrich posture . . . We do so because we have given judges the authority to play God with regard to the life, liberty, and property of those who appear before them. . . . Such autotheistic power ought not to be vested in mere mortals. . . . Over the last century, dominant legal models include mechanical jurisprudence, which posited that legal questions had a single correct answer that judges were to discover. The most apparent legacy of this model is the assertion that judges in deciding their cases ‘find’ the law, as though it were a bedbug in a mattress. . . . Currently, the vogue is ‘post-positivism,’ for whose adherents the only required influence of the law is a subjective influence that resides within the judge’s own mind.

It seems from this quotation that even the dichotomy of “objective law vs. subjective preferences” can be inverted so that the law itself need only be a subjective influence on what judges tell themselves they are doing. This tendency has led us to a situation in which scholars argue over the best conception of judging in terms of the “legal model” (according to which a “judge aims to interpret the law accurately, without concern for the desirability of the policies that result”), the “attitudinal model” (according to which “judges act directly on their policy preferences without calculating the consequences of their choices”), or the “strategic model” (according to which
“judges choose among alternative courses of action, [and] they think ahead to the prospective consequences and choose the course that does most to advance their goals in the long term”\(^{210}\). These scholars usually assume that a judge’s perspectives and values will remain static throughout his time on the bench.\(^{211}\)

We need a conception of judging that allows for the influence of value judgments on legal judgments and that considers the influence of legal rules on judicial discretion, one that apprehends the dynamics of individual responses to facts and law within a process that constructs the meaning of the standards according to which those facts and rules are understood. We also need to accept the possibility that this process of judging may not be reducible to a single model of judicial behavior. I discuss this alternative conception of judging in more detail in the next chapter.