

If Research Agenda Were Honest

Jasper L. Tran[†]

Had da Vinci been alive today, he would unquestionably say that a scholar “who loves practice without theory is like the sailor who boards ship without a rudder and compass and never knows where he may cast.”¹ Accordingly, it is unsurprising that aspiring scholars are often asked: What is your research agenda?² In my field of intellectual property law, for example, the proper response may be that my research interests,

[†] Jasper L. Tran is an associate at Milbank LA. The usual obligatory (throat-clearing) disclaimers apply, including those you, Gentle Reader, typically use or are thinking of.

¹ See *Leonardo da Vinci Fellowship Research Grant Program*, GEORGE MASON UNIV. CTR. FOR INTELL. PROP. X INNOVATION POL’Y (July 2021), <https://cip2.gmu.edu/wp-content/uploads/sites/31/2021/07/C-IP2-Leonardo-da-Vinci-Research-Grant-Program-Details.pdf> [https://perma.cc/P7LF-SX2X] (supposedly quoting Leonardo da Vinci; whether he actually ever said this is questionable). This GMU fellowship is named after da Vinci himself and what he stood for.

² E.g., Mary Renck Jalongo & Olivia N. Saracho, *From Novice to Expert*, in *WRITING FOR PUBLICATION* 273, 283 (2016) (“A common question at interviews for higher education positions is ‘What is your research agenda?’”); *How to Help the Bottom Billion: An Interview with Paul Collier*, 5 *YALE J. INT’L AFF.* 7, 9 (2010) (“What is your research agenda” on [Your Field Here] (e.g., economics)?); *Un-Planning Development: An Interview with William Easterly*, 5 *YALE J. INT’L AFF.* 17, 19 (2010) (same); *Avoiding the Cardinal Sins of Foreign Aid: An Interview with Nancy Birdsall*, 5 *YALE J. INT’L AFF.* 21, 22 (2010) (same). For instance, Dr. Fauci penned a “biodefense research agenda” following the September 11 attacks. Anthony S. Fauci, *Bioterrorism: Defining a Research Agenda*, 57 *FOOD & DRUG L.J.* 413, 413 (2002). I have often been asked why I write, and, as a follow-up, what I write about, which is another way to probe at what my research agenda is. This essay, stemming in part from my continuous contemplation of what my answers to these questions truly are and in part from my festering frustration at being too long unable to figure them out, is my long-overdue response. See also, e.g., STEPHEN KING, *ON WRITING* (2000) (explaining why the author writes); ANNIE DILLARD, *THE WRITING LIFE* (1989) (same).

informed by my education³ and experience,⁴ are in patents and litigation. In particular, my next three research projects may be along the lines of: (1) efficiencies and trade-offs between *ex ante* patent regulation and *ex post* litigation,⁵ (2) the nexus among patent, litigation reform, and separation of powers, and (3) litigation's role in the U.S. innovation economy.⁶

While these research areas in and of themselves⁷ appear terribly interesting (at least on paper), the research agenda, needless to say, comes with the usual implied caveat that it may very well change—or perhaps become more refined—in light

³ I received my STEM degrees from University of California at Berkeley.

⁴ I have practiced patent litigation as an attorney for seven years and patent prosecution as a patent agent for approximately two years.

⁵ See generally Barbara H. Fried, *Ex Ante/Ex Post*, 13 J. CONTEMP. LEGAL ISSUES 123 (2003); Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129 (2004).

⁶ *Leonardo da Vinci Fellowship*, *supra* note 1, at 3. For “a list of potential research topics based on empirical and theoretical gaps in the scholarly literature about IP rights, as identified by the [Leonardo da Vinci Fellowship] Grant Committee . . . that are ripe for scholarly contributions,” see generally *id.* Were I to lack novel IP research topics, I would (gratefully, of course) exploit—for inspiration—this regularly-updated, curated list whose authors have already done the heavy lifting of the preemption check.

Relatedly, I should have tied my prior publications to these new research projects, but I will save you the trouble of reading a long string of self-citations. I have no doubt that you are more than capable of being able to easily locate my patent publications online in this age of information overload, for the world being always available at your fingertips.

⁷ For in-depth analysis and origin of “in and of” themselves, see generally MARTIN HEIDEGGER, *BEING AND TIME* (1962); JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* (1943).

of the unearthed research,⁸ or potential future changes in law,⁹ either by legislation¹⁰ or by courts.¹¹ Indeed, if Sisyphus were a scholar, his field would be patent law.¹²

⁸ Who couldn't be cited here? PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* 153 n.11 (1998) ("Who could be cited here? Who couldn't?"); see also Deborah L. Rhode, *Legal Scholarship*, 115 *HARV. L. REV.* 1327, 1335-36 (2002) ("Grant Gilmore once famously responded to *Yale Law Journal* editors: 'you have requests for authority. I AM the authority.'"); Orin S. Kerr, *A Theory of Law*, 16 *GREEN BAG 2D* 111, 111 (2012) ("Some claims are so obvious or obscure that they have not been made before."); cf. Abner J. Mikva, *Goodbye to Footnotes*, 56 *U. COLO. L. REV.* 647, 648 (1985) ("If footnotes were a rational form of communication, Darwinian selection would have resulted in the eyes being set vertically rather than on an inefficient horizontal plane."). But see Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 *VA. L. REV.* 279, 282 (1962) ("Every legal writer is presumed to be a liar until he proves himself otherwise with a flock of footnotes."); *Challenging Law Review Dominance*, 149 *U. PA. L. REV.* 1601, 1601 n.16 (2001) ("[A]uthors fail to appreciate the three cardinal principles of law review writing: (1) all propositions must have support, (2) support should try to match the proposition as closely as possible, and (3) support from any source is better than no support at all."); Richard Delgado, *How to Write a Law Review Article*, 20 *U.S.F. L. REV.* 445, 451 (1986) ("Essentially, each assertion of law or fact that you make in the body of your article will require a footnote.").

⁹ See, e.g., *Holden v. Hardy*, 169 U.S. 366, 387 (1898) ("[I]t is impossible to forecast the character or extent of these changes; but in view of the fact that . . . amendments to the structure of the law have been made with increasing frequency, . . . the law [will] be forced to adapt itself to new conditions of society."); WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN* 169 (1974) ("Law, like engineering, changes fast."); GRANT GILMORE, *THE DEATH OF CONTRACT* 98 (1974) ("[L]aw is process, flux, change."); Daryl Lim, *AI & IP: Innovation & Creativity in an Age of Accelerated Change*, 52 *AKRON L. REV.* 813, 874 (2018) ("The law must embrace change and innovation as an imperative in a journey towards an ever-shifting horizon."); Julian Velasco, *The Copyrightability of Nonliteral Elements of Computer Programs*, 94 *COLUM. L. REV.* 242, 242 (1994) ("In order to 'promote progress,' however, copyright law must respond to changes in technology."); see also BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 10 (1928) ("There is change whether we will it or not.").

¹⁰ E.g., Oliver Wendell Holmes, Jr., *Common Carriers and the Common Law*, 13 *AM. L. REV.* 608, 630 (1879) ("[I]n substance the growth of the law is legislative."); see also CARDOZO, *PARADOXES*, *supra* note 9, at 9 ("[T]he legislature generally changes the law for the worse.").

¹¹ “Judicial lawmaking, namely the notion that courts go beyond the narrow confines of precedent (or metaphorically ‘balls and strikes’ per U.S. Supreme Court Justice John Roberts) to revise old laws or make new ones, certainly has a long history of thought and is well documented.” Jasper L. Tran, *The Myth of Hush-A-Phone v. United States*, 41 IEEE ANNALS HIST. COMPUTING 6, 21 n.88 (2019) (quoting John G. Roberts, Jr.). Now that I have properly quoted and cited myself, I shall proceed to reuse most of the citations from that cited footnote as well. *See, e.g.*, *Cash v. Califano*, 621 F.2d 626, 628 (4th Cir. 1980) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 70 (1765) (“Judicial declaration of law is merely a statement of what the law has always been. ‘For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law.’”)); Thomas M. Cooley, *Codification*, 20 AM. L. REV. 331, 333 (1886) (observing that “decisions continue to accumulate as causes arise which present aspects differing at all from any which preceded; and a great body of laws being made under the statute which is and can be nothing but ‘judge-made law’”); THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 139 (1973) (“[T]he Constitution is what the judges say it is.” (1907)); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98-141 (1921) (discussing “the judge as a legislator”); JEROME FRANK, LAW AND THE MODERN MIND 37 (1930) (noting “the fact that the judiciary frequently changes the old legal rules”); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163-66, 172-77 (1982) (arguing that courts have used subterfuges and aggressive interpretations to rid the system of laws); Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 979-93 (2008) (discussing how judges make policy); *cf.* Learned Hand, *Sources of Tolerance*, 79 U. PA. L. REV. 1, 12 (1930) (explaining that judges “must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.”).

¹² *See also* Jasper L. Tran, *In Defense of Excellence*, 73 VAND. L. REV. EN BANC 71, 89 (2020) (“[I]f Sisyphus were a scholar, his field would be higher education.”); *cf.* Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (a Report on the State of the Art)*, 97 GEO. L.J. 803, 829 (2009) (“[A]cademics—with aspirations to intellectual excellence—are thus destined to play out the myth of Sisyphus. The main difference, of course, is that Sisyphus had a real rock to push up a real hill.”). *See generally* ALBERT CAMUS, THE MYTH OF SISYPHUS (1942). *But see, e.g.*, John F. Duffy, *The Festo Decision and the Return of the Supreme Court to the Bar of Patents*, 2002 SUP. CT. REV. 273, 285; *cf.* FRIEDRICH NIETZSCHE, THE GAY SCIENCE § 341 (1882) (discussing the “eternal reoccurrence” of “the greatest weight” as an antidote to Sisyphus’s boulder pushing).

But if my research agenda were *honest*,¹³ my response would unapologetically¹⁴ be that I have no research agenda¹⁵ and that I, like Toni Morrison and possibly many others, mostly write about what I want to read that has yet to be written.¹⁶ To

¹³ This phrase and the essay's title, to the extent that they are not obvious, allude to the Honest Ads series, which features short parody videos with titles like "If Politicians Were Honest." See *If Politicians Were Honest*, YOUTUBE (June 20, 2016), www.youtube.com/watch?v=wu-TRicxPN0; cf. WILLIAM GRAHAM SUMNER, PROTECTIONISM: THE -ISM WHICH TEACHES THAT WASTE MAKES WEALTH 138 (1885) ("[I]f all men were honest, honesty would have no commercial value. Some say that a man cannot afford to be honest unless everybody is honest."). And as true in any work of scholarship, it is important for readers to be on the same page on the usage of terms and their definitions. To that end, the term "honest," as used here, probably means (for lack of a better description) being authentically, genuinely, and sincerely frank, sprinkled with a generous pinch of sass—being direct, unfiltered, and cheeky (without being rude), and forgetting (or perhaps ignoring) the long-internalized unconscious lessons of always remaining courteous and polite to avoid embarrassment. Cf. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it . . ."). And the scope of what I mean by being "honest" covers the sole scenario of when someone or something were to be honest about oneself or itself, not just broadly any topics but refraining from professing directly about oneself or itself.

¹⁴ Cf. ORISON SWETT MARDEN, ROUND PEGS IN SQUARE HOLES 76 (1922) ("I never like to hear, as one often does, a person refer to his calling in an apologetic way."). By "unapologetically," I mean being intellectually fearless in the journey of going wherever the lowercase-t truth leads me. Physically as well as intellectually, "the only thing we have to fear is fear itself—nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance." See Franklin D. Roosevelt, U.S. President, First Inaugural Address (Mar. 4, 1933).

¹⁵ See Bryan P. Schwartz, *Interview with Lee Stuesser*, 39 MANITOBA L.J. 297, 308 (2016) ("I find sometimes, with the younger scholars, they keep talking about research agendas and I don't know about you or other people, but when I came to [University of Manitoba's Faculty of Law], I had no research agenda. I said to them I would like to write, but if you're going to tell me what my agenda is for the next three or four years, it won't work. What happens is through your interest in your teaching—I think of courses or some of the other interests that you already had—you start writing and you start growing, because you have the freedom to write.").

¹⁶ See Rebecca Sutton, *Write, Erase, Do It Over: Interview of Toni Morrison*, AM. ARTSCAPE, no. 4, 2014, at 2,

wit, I do what I like—write what I like to read, read what I like to write, praise the readings I like, and criticize the readings I dislike.¹⁷ Instead of writing for the public (or more precisely, for legal academics) or for editors, I write for myself.¹⁸ Rather than asking “What does the public want?” or “What do the editors want?” I ask “What do I want to say? What is there in my heart craving for expression? What have I lived or felt or thought that is my own, and has its root in my inmost being?”¹⁹

https://www.arts.gov/sites/default/files/nea_arts/NEA%20Arts_2014_no4_web.pdf [<https://perma.cc/U76J-Q7FH>]. (“I wrote the first book because I wanted to read it. I thought that kind of book, with that subject—those most vulnerable, most undescribed, not taken seriously little black girls—had never existed seriously in literature. No one had ever written about them except as props. Since I couldn’t find a book that did that, I thought, ‘Well, I’ll write it and then I’ll read it.’”); *see also* Cheryl Strayed, *Introduction, in THE BEST AMERICAN ESSAYS 2013* xv, xvi-xvii (Cheryl Strayed & Robert Atwan eds., 2013) (“Behind every good essay is an author with a savage desire to know more about what is already known.” The essays “grapples and reflects with serious and humor. They philosophize and confess with intellect and emotion.” Their “engine is curiosity,” which “is what makes them so damn fun to read.”); *cf.* RALPH WALDO EMERSON, 10 *THE JOURNALS AND MISCELLANEOUS NOTEBOOKS OF RALPH WALDO EMERSON* 315 (1960) (“Happy is he who looks only into his work to know if it will succeed, never into the times or the public opinion; and who writes from the love of imparting certain thoughts [and] not from the necessity of sale—who writes always to *the unknown friend*.”); HENRY WADSWORTH LONGFELLOW, MICHAEL ANGELO (1883) (“[I]n every block of marble / I see a statue—see it as distinctly / As if it stood before me shaped and perfect / In attitude and action. I have only / To hew away the stone walls that imprison / The lovely apparition, and reveal it / To other eyes as mine already see it.”). Take this essay, for example; I wrote it because I wanted to read it. The point of any essay or piece of legal scholarship is to provoke and evoke—to make readers think. If you walk away from this piece thinking about research agenda a bit differently, I have accomplished my goal.

¹⁷ *See* VIRGINIA WOOLF, *THE DEATH OF THE MOTH* 116 (1942) (“We highbrows read what we like and do what we like and praise what we like.”). What I want to write sometimes appears as if it has a mind of its own. And after an idea starts appearing on papers, it takes on a life of its own and writes itself.

¹⁸ *See* JOHN BURROUGHS, *THE SUMMIT OF THE YEARS* 5 (1913).

¹⁹ *Id.*; *see also* ORISON SWETT MARDEN, *GETTING ON* 254 (1910) (“I am just intoxicated with my work. I cannot get enough of it. I just ache every

As one's own ideas, especially on perspective and whole view, change as she gains experience,²⁰ her writings after all become just little fragments of her fleece left upon the hedges of life.²¹

morning to get to my task, and I leave it with the same regret at night that a born artist lay down his brush when the twilight cuts him off.”).

²⁰ Karl N. Llewellyn, *Foreword*, in *THE BRAMBLE BUSH* vii (1930); *see also id.* (“The young fellow who wrote these notes just isn’t here anymore, and the job he did has its own virtue”); Richard A. Epstein, *The Reflections and Responses of a Legal Contrarian*, 44 *TULSA L. REV.* 647, 652 (2008) (“There is no question that the Richard Epstein of 2009 does not have precisely the same world view as the Richard Epstein of 1968.”); Joshua A. Braun, *A Response to Commentators on ‘the Imperatives of Narrative: Health Interest Groups and Morality in Network News’*, 7 *AM. J. BIOETHICS* W1, W1 (2007) (citing Alan Shapiro, *Why Write?*, in *THE BEST AMERICAN ESSAYS 2006* 197, 197-207 (Lauren Slater & Robert Atwan eds., 2006)) (“[I]f you’re not ashamed of what you wrote one year ago, you’re not making intellectual progress. One effect of publishing, however, is that by the time your words have eked their way into print, you may already have moved on in your thinking.”).

²¹ Oliver Wendell Holmes, Jr., *Preface*, in *COLLECTED LEGAL PAPERS* (1920).

To turn this footnote-heavy²² essay²³ into publishable scholarship,²⁴ it should also have a roadmap paragraph like a

²² *E.g.*, *Challenging Law Review Dominance*, *supra* note 8 at 1601, 1606 (satirically “defend[ing] the traditional imperatives of the law review article format, its hyper-prolixical verbosity and its footnote-heavy citation style,” and concluding “that in the battle between form and substance, substance is largely overrated”); Mikva, *supra* note 8, at 653 (“In my early days on Law Review, I was told that the footnotes are the real measure of worth in legal writing.”); *Editor’s Preface*, 1 CONST. COMM. 1, 1 (1984) (asking rhetorically whether “footnotes [are] not the incredibly prolix proof of diligence that decorate so much of American legal writing”). The other sources cited at note 8 concur. While the adornment of footnotes may be merely ornamental, shouldn’t controversial writings or implications—if astute readers were to read between the lines—be buried in footnotes?

²³ This *essay* in and of itself stays true to the definition of the word “essay,” which as a verb means to attempt, to try, to test, or to practice. *See, e.g.*, MICHEL DE MONTAIGNE, *ESSAYS* (1580); RALPH WALDO EMERSON, *ESSAYS* (1841 & 1844); Aldous Huxley, *Preface*, in *COLLECTED ESSAYS* (1960). Unlike other types of prose writings, an essay is “a way of thinking,” a truly free “form of thought,” very much like “a poem” in the sense that it “leans to informality, play, explosiveness, surprise, and intuition,” while losing no rigor. *See* Interview with Douglas Glover, by Benjamin Woodard (Fiction Writers Rev. Nov. 21, 2019), <https://fictionwritersreview.com/interview/a-barbarian-on-a-pillaging-expedition-an-interview-with-douglas-glover/>. To wit, the essay—perhaps counterintuitively—requires a certain kind of rigor in the reading and deep understanding of the text one is writing about in order to make the creative leaps. *See id.*

²⁴ *Compare, e.g.*, Stephen L. Carter, *Academic Tenure and “White Male” Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065 (1991) (arguing that law reviews, like patents, ought to be useful, novel, and nonobvious), and EUGENE VOLOKH, *ACADEMIC LEGAL WRITING* (2010) (same), with *What Is A Scholarly Paper?*, 24 GREEN BAG 2D 77, 78 (2020) (outlining Green Bag’s custom of publishing papers “based on how original, interesting, well-researched, well-written, potentially useful, and good spirited they are”). *But see, e.g.*, *Editor’s Preface*, *supra* note 22, at 1 (“The quality of scholarly journals is so variable that nearly anything can be published somewhere.”); Jason Mazzone, *Copyright Easements*, 50 AKRON L. REV. 725, 729 (2016) (“With the advent of digital self-publishing tools, . . . anything can be published *somewhere*.”); Sonja R. West, *The “Press,” Then & Now*, 77 OHIO ST. L.J. 49, 90 (2016) (same).

proper law review paper.²⁵ Without further ado,²⁶ Part I traces the historical origin of requesting research agenda in higher education institutions, including law schools,²⁷ to make certain noncontroversial and thus obvious claims that are esoteric but well-cited; it has been removed for clarity's sake.²⁸ Part II explains the rationale behind the traditional imperatives of the research agenda's requirement, their essentially unreadable verbosity, and their unnecessarily long format.²⁹ "This part is so dense and yet flaky it has swallowed itself in a Dough-Boy vortex and is now believed to be part of a legal theory pound cake, inferentially observed only by occasional citation from authors attracted to its buttery goodness."³⁰ Part III is the sole original thought in this entire essay, but it appears both underdeveloped and fairly trivial when compared to the general tradition of legal scholarship.³¹ This part basically amounts to arguing that drafting a research agenda that may eventually be scrapped not only is pointless but also tends to

²⁵ See, e.g., *Ex Ante*, 5 GREEN BAG 2D 1, 3 (2001) ("[M]ost law review articles . . . begin[] with the 'roadmap' paragraph."). But what happens when a seemingly substantive research agenda "is dressed up to look like a law review article, and it passes?" Ross E. Davies, *An Irony of Electronics: On a Form or Two of Serious Legal Scholarship*, 1 J.L. 219, 221 (2011).

²⁶ Cf. WILLIAM SHAKESPEARE, *MUCH ADO ABOUT NOTHING* (1600) (what the title says); accord, e.g., *Aaron v. SEC*, 446 U.S. 680, 703 (1980) (Burger, J., concurring) ("[T]his dispute, though pressed vigorously by both sides, may be much ado about nothing."); *Bingham's Tr. v. Comm'r*, 325 U.S. 365, 377 (1945) (Frankfurter, J., concurring) (noting *Dobson v. Comm'r*, 320 U.S. 489 (1943), as "surely a case of much ado about nothing").

²⁷ "Just what did you expect to find" in this footnote? Mikva, *supra* note 8, at 653 n.4. Omitting Parts I-III and their abstruse sources also eliminated the customary "*See infra* Part I" citation and the likes that would have gone here.

²⁸ See *Challenging Law Review Dominance*, *supra* note 8, at 1601.

²⁹ See *id.* On law reviews' conventional usage of *id.*, I too "sometimes wonder whether that really is shorthand for *idem*, or whether it refers to the presumed ego of the authority, author, or editor." Mikva, *supra* note 8, at 653. See generally SIGMUND FREUD, *THE EGO AND THE ID* (1923).

³⁰ *Challenging Law Review Dominance*, *supra* note 8, at 1601-02.

³¹ *Id.* at 1602.

suck; it too has ultimately been omitted for lack of support.³² Part IV briefly—but not tautologically—concludes.³³

³² See *id.* at 1601-02. To be clear, research agenda has a purpose—it is for readers to discern what kind of scholar the author seeks to become: intellectual property, technology law, or health law, for example. Nevertheless, research agenda—not unlike life—should be understood backwards but must be written forwards. See SØREN KIERKEGAARD, *JOURNALEN JJ:167* (1843), reprinted in 18 SØREN KIERKEGAARD SKRIFTER 306 (1997) (“Life can only be understood backwards; but it must be lived forwards.”).

³³ The phrase “Part IV briefly concludes” is habitually employed to end a law review’s roadmap paragraph. See, e.g., Mary Ziegler, *Substantial Uncertainty: Whole Woman’s Health v. Hellerstedt and the Future of Abortion Law*, 2016 SUP. CT. REV. 77, 79; David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915, 1919 (2005). It appears, however, that Eleventh Circuit Judge Gerald Tjoflat’s clerks, who are obviously former law review editors, exported this practice to the roadmaps of his judicial opinions. See *Mitchell v. Hillsborough Cty.*, 468 F.3d 1276, 1278 (11th Cir. 2006) (Tjoflat, J.) (“Part IV briefly concludes.”); *In re Sunshine Jr. Stores, Inc.*, 456 F.3d 1291, 1296 (11th Cir. 2006) (Tjoflat, J.) (same); *United States v. Maxwell*, 446 F.3d 1210, 1211 (11th Cir. 2006) (Tjoflat, J.) (same); *United States v. Smith*, 459 F.3d 1276, 1281 (11th Cir. 2006) (Tjoflat, J.) (same); *Bourgeois v. Peters*, 387 F.3d 1303, 1307 (11th Cir. 2004) (Tjoflat, J.) (same); *Daewoo Motor Am., Inc. v. Gen. Motors Corp.*, 459 F.3d 1249, 1261 (11th Cir. 2006) (Tjoflat, J., concurring) (same); *Williams v. Consol. City of Jacksonville*, 381 F.3d 1298, 1301 (11th Cir. 2004) (Tjoflat, J., dissenting) (same); *United States v. Bidwell*, 393 F.3d 1206, 1207 (11th Cir. 2004) (Tjoflat, J.) (“Part III briefly concludes.”); *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344, 1368 (11th Cir. 2008) (Tjoflat, J., dissenting) (same); *United States v. Yates*, 438 F.3d 1307, 1320 (11th Cir. 2006) (Tjoflat, J., dissenting) (same); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004) (Tjoflat, J.) (“Part V briefly concludes.”); *Peoples v. Campbell*, 377 F.3d 1208, 1211 (11th Cir. 2004) (Tjoflat, J.) (same); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1263 (11th Cir. 2004) (Tjoflat, J.) (“Part VI briefly concludes.”); *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1193 (11th Cir. 2007) (Tjoflat, J.) (“[P]art VII briefly concludes.”).

IV. If Research Agenda Were Serious and If Judges Were Honest³⁴

A proper conclusion to any work of scholarship ought to say something insightful³⁵ about potentially fruitful avenues for further research.³⁶ To that end, if my research agenda were

³⁴ See *Challenging Law Review Dominance*, *supra* note 8, at 1601-02 (jumping straight from Introduction to heading IV).

³⁵ It goes without saying that insight usually requires long periods of research, contemplation, analysis, rationalization, and thinking of counterarguments and rebutting them. It seldom arrives while tackling an issue directly or on a first pass. Nonetheless, the “full treatment of this notion’s wisdom is beyond the scope of” this short essay. Kenneth S. Reinker, *NOPEC: The No Oil Producing and Exporting Cartels Act of 2004*, 42 HARV. J. ON LEGIS. 285, 291 n.28 (2004). And I obviously “could have made stronger arguments” and said something more insightful about the issue of if-research-agenda-were-honest, “but making stronger arguments is beyond the scope of” this essay as well. See *Challenging Law Review Dominance*, *supra* note 8, at 1606. To not put too fine a point on it, I willingly acknowledge that there are stronger arguments that go into “dimensions of our problem that are beyond the scope of what” this essay has discussed “(although they are certainly not beyond what a full treatment of the issues requires), and I shall mainly leave it to readers” to figure out what those stronger arguments are. See Frank I. Michelman, *Rejoinders*, 86 CALIF. L. REV. 469, 469 (1998).

³⁶ See, e.g., Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1134 (1996) (“In conclusion, I think it important to offer a few remarks on where we stand and where we ought to be going, particularly with regard to avenues for ongoing legal research.”).

serious, this essay might³⁷ merely be the first in a series³⁸ on, for example:

- if-the-law-was-honest,³⁹
- if-law-schools-were-honest,⁴⁰

³⁷ Cf. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 448 (1975) (Blackmun, J., concurring) (“The simple truth is that . . . most attempts to predict the future, will never be completely accurate.”); Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct*, 2003 COLUM. BUS. L. REV. 345, 357 (2003) (“‘It is always hard to make predictions, especially about the future.’ Instead of making predictions,” just “wait to see what happens.” (quoting Yogi Berra)). *But see* DILLARD, *supra* note 2 (“One of the things I know about writing is this: spend it all, shoot it, play it, lose it, all, right away, every time. Do not hoard what seems good” for another project; “give it, give it all, give it now. The impulse to save something good for a better place later is the signal to spend it now.”).

³⁸ Don’t “we all know the aphorism . . . that behind every joke is a grain of truth”? *E.g.*, Deno Himonas, *Utah’s Online Dispute Resolution Program*, 122 DICK. L. REV. 875, 876 (2018).

³⁹ An exemplar that comes to mind is the (in)famous Powell Memo, penned several months before Powell’s appointment to the U.S. Supreme Court, that urged corporations to substantially invest in a long-term, full-scale, multidimensional campaign and create pro-private-enterprise institutions, such as think tanks and lobbying arms, to challenge and reverse the cultural and jurisprudential dominance of Leftist ideas and policy. *See Confidential Memorandum from Lewis F. Powell Jr., Attack on the Free Enterprise System*, to Eugene B. Sydnor Jr., Chairman of Educ. Comm., U.S. Chamber of Commerce (Aug. 23, 1971), <http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumPrinted.pdf> [<https://perma.cc/U2ZJ-8SVH>]. *See also* Robert W. Gordon, *Professors and Policymakers: Yale Law School Faculty in the New Deal and After*, in *HISTORY OF THE YALE LAW SCHOOL: THE TRICENTENNIAL LECTURES* 75, 112 (Anthony T. Kronman ed., 2004) (“If you really want to know the effects of the law in action, put the people who are supposed to comply—[for example,] Wall Street lawyers and bankers—under oath and cross examine them.”).

⁴⁰ Law schools famously overstate the career benefits of enrollment. *See, e.g.*, Brian Z. Tamanaha, *Is Law School Worth the Cost?*, 63 J. LEGAL EDUC. 173, 181, 186-87 (2013). The “back of the envelope figuring of the worth of attending law school is unrealistic in projecting a 50-year return. Female law students in particular would be prudent to anticipate a much shorter career span.” *Id.* at 181. And it is not hard to imagine that “[p]eople applying to

- if-law-reviews-were-honest,⁴¹
- if-law-students-were-honest (or if-law-review-editors-were-honest⁴²),

law school expect it to lead to a professional career with a comfortable income. Do they realize that many graduates will be forced by economic necessity to depend on 20 years of government aid to survive financially?” *Id.* at 186. Accordingly, “depending on the cost and the law school being considered, the chance that a law degree is not worth the cost runs from significant to almost certain, particularly for those who must borrow to finance the bulk of their legal educations. A few people in these situations end up as winners (in corporate law jobs [for example]), beating long odds, but most do not.” *Id.* at 187.

⁴¹ See, e.g., Charles E. Hughes, *Foreword*, 50 YALE L.J. 737, 737 (1941) (“I recall that at one time [Oliver Wendell Holmes, Jr.] admonished counsel who had the temerity to refer to [law reviews] in argument that they were merely the ‘work of boys.’”). Apart from references like Blackstone, Coke, and Littleton, pre-1900 judges would belittle lawyers if anything other than a judicial opinion was cited. Justice Cardozo described this early distrust of law reviews as a “vague terror of the nihilistic and explosive power of thinking and of theory” and law “[t]eachers being notoriously given to thinking, one can never know what they may do in unsettling the foundations of the established legal order.” Benjamin N. Cardozo, *Introduction*, in SELECTED READINGS IN THE LAW OF CONTRACTS viii-ix (1931). “[T]he law review credential is false” and the law review “experience is illusory.” E. Joshua Rosenkranz, *Law Review’s Empire*, 39 HASTINGS L.J. 859, 861 (1988). See also Harold C. Havighurst, *Law Reviews and Legal Education*, 51 NW. L. REV. 22, 24 (1956) (“Whereas most periodicals are published primarily in order that they may be read, the law reviews are published primarily in order that they may be written.”); *Editor’s Preface*, *supra* note 22, at 1 (“On a list of Things The World Needs Most . . . law review[s] would probably rank somewhere between winter baseball and more kitchen gadgets.”); Stephen G. Breyer, *Response of Justice Stephen G. Breyer*, 64 N.Y.U. ANN. SURV. AM. L. 33, 33 (2008) (“There is evidence that law review articles have left terra firma to soar into outer space.”); Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1314 (2010) (“In recent years legal scholarship has undergone changes so fundamental as to suggest the need for a reassessment of law as an academic discipline, as a subject of study, and as an intellectual institution.”).

⁴² See, e.g., J.C. Oleson, *You Make Me [Sic]: Confessions of a Sadistic Law Review Editor*, 37 U.C. DAVIS L. REV. 1135 (2004); Delgado, *supra* note 8, at 451. “Flipping through the footnotes” is undoubtedly “one of the first

things an articles editor does when he or she receives a manuscript. If your footnotes are sporadic and devoid of signals, two thoughts are likely to go through the editor's mind: first, the author is inexperienced, and second, the law review (and possibly the editor) is going to have to put in the signals and textual footnotes." *Id.* See also Ross E. Davies, *The Most Important Article of All Time*, 5 GREEN BAG 2D 351, 352 (2002) ("[T]hose who run law journals want people to buy and read their work product. Which means marketing. Which means boasting. . . . [W]hen law journal editors shifted temporarily from the editorial pages to the advertising section, they could make the marketing mavens at Coca-Cola and R.J. Reynolds look like pikers."); *Challenging Law Review Dominance*, *supra* note 8 at 1602 ("In recent years, law reviews have been criticized for letting the patients run the asylum, in other words, letting those law students, recently demoralized as 1Ls, edit and shape professors' work. Law professors, meanwhile, worry about the integrity of their law review submissions because they have seen direct proof that these students—having arrived at law school with excellent recommendations, stellar LSAT scores, and excellent college grades—are largely incompetent."). But "[p]resumably the student editors had stopped reading by th[at] point and didn't notice the insult." Paul Horwitz, *Our Boggling Constitution; Or, Taking Text Really, Really Seriously*, 26 CONST. COMM. 651, 660 n.36 (2010).

- if-intellectuals⁴³-were-honest⁴⁴ (or if-law-professors-were-honest⁴⁵),

⁴³ See generally RICHARD A. POSNER, PUBLIC INTELLECTUALS (2009).

⁴⁴ Books written by intellectuals, for the most part, have no utility. See, e.g., Bryan Caplan, *A Waste of Paper*, ECONLOG (Aug. 10, 2015), www.econlib.org/archives/2015/08/wasted_paper.html [<https://perma.cc/4B5M-BNFR>]. “A university library is supposed to be a warehouse of great thoughts. But the vast majority of the books seemed literally indefensible. Lame topics, vague theses, and godawful writing abounded.” *Id.* And “90% of the books screamed, ‘If writing stuff like this wasn’t a ticket to tenure, no one would write it.’” *Id.* See also AINSWORTH RAND SPOFFORD, A BOOK FOR ALL READERS 3 (1900) (“Most books are but repetitions, in a different form, of what has already been many times written and printed. . . . Most writers are mere echoes, and the greater part of literature is the pouring out of one bottle into another.”). Richard A. Matasar, *Defining Our Responsibilities: Being an Academic Fiduciary*, 17 J. CONTEMP. LEGAL ISSUES 67, 109 (2008) (“Some scholarship is simply bad, not refereed, trivial, self-serving, self-referential, poorly written, narrowly focused, unjustified, and written merely because it is required.”); accord Brian Leiter, *Why Blogs Are Bad for Legal Scholarship*, 116 YALE L.J. POCKET PART 53, 57-58 (2006); Patrick J. Schiltz, *Legal Ethics in Decline*, 82 MINN. L. REV. 705, 788-90 (1998); Carter, *supra* note 24, at 2081-82.

The term “honest,” as used here, does not necessarily mean that intellectuals lack “intellectual honesty.” See generally, e.g., Edwin Baker Gager, *The Duties of Attorney*, 21 YALE L.J. 72, 74 (1911). “By intellectual honesty I mean thinking straight and seeing clear and applying the results fairly to the case in hand.” *Id.* A counterexample is when a lawyer “persistently reasons himself into statements of law and claims of fact and courses of conduct which he thinks the necessities of his case impose, while the dispassionate observer finds it difficult to differentiate between his conduct and that of the confessedly dishonest man.” *Id.*

⁴⁵ “Many legal educators defending the value of a law degree . . . have made supremely confident statements without pointing to data to back their claims, at most offering a few anecdotes about past grads who did well outside of law (invariably graduates a generation or two earlier when tuition and debt were far lower) and steadfastly ignoring or downplaying the undeniably bleak debt and jobs numbers.” Tamanaha, *supra* note 40, at 178, 187. Therefore, “[l]egal educators who vouch for the value of a law degree without offering concrete numbers to back up their claims deserve the skepticism that greets all sales agents who are pitching a product for a living.” *Id.* See also *Challenging Law Review Dominance*, *supra* note 8 at 1603 (“Professors publishing in law reviews can and do bump up their citation count by citing to their own previously published articles. Some

- if-judges-were-honest⁴⁶ (or if-judicial-opinions-were-honest⁴⁷),

authors even cite to their own forthcoming works, using the current article like a coming-attraction trailer, and still others go so far as to cite to other legal publications that intend to publish, in substantial part, the very work doing the citing. Not all of this effort has to do with an unexamined childhood need to feel special; some of these efforts are exercises in good old-fashioned career advancement and narcissism.”); Frank H. Easterbrook, *What’s So Special About Judges?*, 61 U. COLO. L. REV. 773, 777 (1990) (“Professors need not be faithful to the past. They are out to understand the past and change the present; obedience to a dead hand is not part of the formula of good scholarship. A free mind is apt to err—most mutations in thought, as well as in genes, are neutral or harmful—but because intellectual growth flows from the best of today standing on the shoulders of the tallest of yesterday, the failure of most scholars and their ideas is unimportant.”); Michael J. Madison, *The Lawyer as Legal Scholar*, 65 U. PITT. L. REV. 63, 63 (2003) (“Law professors love to talk about themselves.”); *Editor’s Preface*, *supra* note 22, at 1 (“Scholars are not, as a rule, the best of writers.”).

⁴⁶ See, e.g., Steven Lubet, *Poker Courtroom*, 6 GREEN BAG 2D 203, 203 (2003) (“An inscrutable judge hides the ball, but if you [lawyers] complain to the court you might find yourself skating on thin ice . . .”).

⁴⁷ See, e.g., Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721, 721 & n.1 (1979) (“Should judicial opinions set forth the courts’ real reasons for their decisions? . . . Are the prevailing arguments that judges present to each other in the decision conference, before they vote on a case, the same as the reasons that are set out in the subsequent opinions? . . . The questions relate to honest judges on an honest court.”); Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 905 (2009) (“[T]he truth is judges decide cases and they need reasons to justify their choices. Normative arguments are of crucial importance to the rule of law; they are the way we show respect to the losing party in a real world dispute.”).

- if-lawyers-were-honest⁴⁸ (or if-associates-were-honest),⁴⁹
- if-state-bars-were-honest,⁵⁰

⁴⁸ See, e.g., Homer Greene, *Can Lawyers Be Honest?*, 152 N. AM. REV. 194, 194 (1891) (quoting BLACKSTONE, *supra* note 11, at 67) (“There is a popular opinion in America that lawyers, as a class, are dishonest. . . . It is not a new opinion either. It dates from a ‘time whereof the memory of man runneth not to the contrary.’”); *Notes for a Law Lecture* (1850), in COLLECTED WORKS OF ABRAHAM LINCOLN 282 (Roy P. Basler ed. 1953) (“There is a vague popular belief that lawyers are necessarily dishonest.”); Steven Lubet, *Moral Adventures in Narrative Lawyering*, 2 GREEN BAG 2D 179, 179 (1999) (“Lawyers, and trial lawyers in particular, are often condemned as deceivers and misleaders, as flimflam artists who use sly rhetorical skills to bamboozle witnesses, turning night into day. In this conception, lawyers tell stories only in order to further seduce and beguile the hapless jurors who fall prey to the advocate’s tricks.”); STEVEN LUBET, THE IMPORTANCE OF BEING HONEST 100 (2008) (same); Steven Lubet, *Bullying from the Bench*, 5 GREEN BAG 2D 11, 15 (2001) (“[W]hy should lawyers be polite when the court itself insults and demeans them? . . . Lawyers may talk behind the judge’s back, but in the courtroom it pretty much has to be ‘Yes, Your Honor,’ and ‘Thank you, Your Honor,’ lest the client suffer.”). The term “honest,” as used here, does not necessarily mean the lack of “truthfulness” (MODEL RULES OF PRO. CONDUCT r. 4.1 (Am. Bar Ass’n, Discussion Draft 1983)), the lack of “candor” (*id.* at R. 3.3), or “mak[ing] a false or misleading communication” (*id.* at R. 7.1) in violation of the Model Rules of Professional Conduct that lawyers ought to abide by.

⁴⁹ See, e.g., Myriam E. Gilles, . . . *and from the Associate*, 25 LITIG. 9 (1998).

⁵⁰ It is “no secret . . . that modern American law schools are obliged to be part of an accreditation cartel, operated by the American Bar Association and the Association of American Law Schools, in conspiracy with the state bars. The central mission of this cartel, conducted under the cover of enforcing supposed educational standards, is to increase lawyers’ profits by driving up the price of entry into the profession, which restricts the supply of lawyers.” John H. Langbein, *Blackstone, Litchfield, and Yale: The Founding of Yale Law School*, in HISTORY OF THE YALE LAW SCHOOL: THE TERCENTENNIAL LECTURES 17, 20 (Anthony T. Kronman ed., 2004).

- if-law-firms-were-honest⁵¹ (or if-partners-were-honest⁵²),
- if-secretaries-were honest,⁵³
- and if-clients-were-honest⁵⁴ (including if-defendants-were-honest and if-plaintiffs-were-honest).

⁵¹ “[I]f firms take care to make sure their employment practices are objective, and see that associates receive factual, honest information throughout the employment relationship, the firms may reduce the number of potential lawsuits.” Charles G. Bakaly Jr., *The Impact on Law Firms*, 1 LAB. LAW. 501, 502 (1985). And firms should evaluate “their associate review processes, making sure they are objective and honest.” *Id.* at 504. See also Ronald J. James, *Personnel Management for Law Firms*, 1 LAB. LAW. 515, 517 (1985) (“We [law firms] have to take the same bitter pill we give to our clients when we tell them to sit down and move to more candid, more regularized formal evaluations, to be honest in those evaluations, and to preserve what is said to people.”).

⁵² See, e.g., MARK HERRMANN, *THE CURMUDGEON’S GUIDE TO PRACTICING LAW* (2006); Mark Herrmann, . . . *From the Partner*, 25 LITIG. 8 (1998); Mark Herrmann, *How to Write: A Memorandum from a Curmudgeon*, 24 LITIG. 3 (1997).

⁵³ See, e.g., Mark Herrmann & Laura Bozzelli, *A Secretary Speaks*, 33 LITIG. 50 (2007).

⁵⁴ See, e.g., LUBET, *IMPORTANCE OF BEING HONEST*, *supra* note 48, at 54 (“You [clients] can lie to the public and you can lie to the court, but you are far better off telling the truth to your lawyer.”); Mark Herrmann, *Litigating In-House: Silver Linings and Clouds*, 38 LITIG. 46, 47-49 (2012).

But⁵⁵ that was only if I were being completely honest.⁵⁶

Actually, the intellectually fearless Richard A. Posner (who is eminently more qualified) has already written a whole book on the topic of if-judges-were-honest,⁵⁷ so I would just read his book and probably skip this one. Consider some⁵⁸ of his potentially nonobvious professions (or more precisely, confessions), observations, or generalizations of how he, as a judge, thinks if he were to be honest about it:

⁵⁵ Recall the customary usage of the word ‘but,’ which negates anything that goes before it: “the salient point in the statement is the one that comes after the ‘but,’” Benjamin Brown, *Some Say This, Some Say That: Pragmatics and Discourse Markers in Yad Malachi’s Interpretation Rules*, 3 INT’L J. LANGUAGE & L. 1, 3 (2014), and “everything before the ‘but’ is bullshit,” DAVID CANTER & GAVIN FAIRBAIRN, *BECOMING AN AUTHOR: ADVICE FOR ACADEMICS AND OTHER PROFESSIONALS* 82 (2006). And “bullshit” simply means a “lack of connection to a concern with truth” or an “indifference to how things really are.” See generally HARRY G. FRANKFURT, *ON BULLSHIT* 33-34 (2005).

⁵⁶ The term “*completely* honest,” as used here, necessarily implies certain “individual differences in people’s level of honesty,” as “everyone’s character would have some degree of honesty and some degree of dishonesty simultaneously.” CHRISTIAN B. MILLER, *HONESTY: THE PHILOSOPHY AND PSYCHOLOGY OF A NEGLECTED VIRTUE* 169 (2021). “Who would quarrel, for example, with the broad and essential proposition that a lawyer has the duty of acting with the highest ‘degree of honesty, forthrightness’” Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 706 (2006) (quoting *Singleton v. Foreman*, 435 F.2d 962, 970 (5th Cir. 1970)). And “the generally high levels of honesty in the way that business is conducted in the U.S. is attributable to the fact that most . . . top managers and directors have developed a strong taste for honesty and forthrightness.” Jonathan R. Macey, *A Pox on Both Your Houses: Enron, Sarbanes-Oxley and the Debate Concerning the Relative Efficacy of Mandatory Versus Enabling Rules*, 81 WASH. U. L.Q. 329, 335 (2003).

⁵⁷ RICHARD A. POSNER, *HOW JUDGES THINK* (2008).

⁵⁸ Cf. JACQUES HADAMARD, *AN ESSAY ON THE PSYCHOLOGY OF INVENTION IN THE MATHEMATICAL FIELD* 29 n.1 (1945) (St. Augustine observed that *intelligo*, which means “to select among,” is the Latin root word for “intelligence.”). Posner’s book contains many more similarly honest statements, which make it worth reading in its entirety. See *id.*

- “Most judges who oppose abortion rights do so because of religious belief rather than because of a pragmatic assessment of such rights.”⁵⁹
- “A judge in a nonjury proceeding who has to decide whether to believe a witness’s testimony will often have formed before the witness begins to testify an estimate of the likelihood that the testimony will be truthful.”⁶⁰
- Judges are more inclined to convict a criminal defendant than jurors because “judges learn that prosecutors rarely file cases unless the evidence against the defendant is overwhelming.”⁶¹
- “[J]udges whose background is law teaching rather than private practice tend to be harder on the lawyers who appear before them.”⁶²
- “Appellate judges promoted from the trial court may be more likely than other appellate judges to vote to affirm a trial judge.”⁶³ And “a former trial judge promoted to the court of appeals may be more likely to focus more on the ‘equities’ of the individual case . . . and less on its precedential significance than would his colleagues who had never been trial judges.”⁶⁴
- “Most judges blend the two inquiries, the legalist and the legislative, rather than addressing them in sequence.”⁶⁵

⁵⁹ POSNER, HOW JUDGES THINK, *supra* note 57, at 13.

⁶⁰ *Id.* at 65.

⁶¹ *Id.* at 68.

⁶² *Id.* at 74.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 84. Posner defines “legalism” as the process of judicial decisionmaking that is not governed strictly by logic or the reasoned

- “Accustomed to making nonlegalist judgments in the [nonroutine cases], the judge is likely to allow nonlegalist considerations to seep into his consideration” of the routine case.⁶⁶ Yet, “many, maybe most, judges would if asked deny that they bring preconceptions to their cases[.]”⁶⁷
- “Intuition plays a major role in judicial as in most decision making.”⁶⁸ In fact, “most judges are (surprisingly to nonjudges) unmoved by the equities of the individual case,” and “few judges are fully inoculated against the siren song of an emotionally compelling case.”⁶⁹
- “Judges like to refer to” the other two branches “as the ‘political branches,’ as if the federal judiciary itself were not a politically powerful branch of government.”⁷⁰ Put succinctly, “judging is ‘political.’”⁷¹

How about the following entries from a representative sample of other judges, the first of which was Posner’s colleague?

- Judge Diane Wood: “Justices who publish separate opinions are always addressing the

application of the law—text and prior decisions—to facts. Posner calls a judge who adheres to this process a “legalist” and one who does not a “nonlegalist.” *Id.* at 11 & 369-70. Factors that influence judicial decisionmaking include political and personal characteristics, “such as race and sex; personality traits, such as authoritarianism; and professional and life experiences, such as having been a prosecutor or having grown up in turbulent times,” all of which generate preconceptions, often unconscious. *Id.* at 11.

⁶⁶ *Id.* at 85.

⁶⁷ *Id.* at 72. For an exceptional exception, see Henry J. Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 YALE L.J. 218, 231-38 (1967).

⁶⁸ POSNER, HOW JUDGES THINK, *supra* note 57, at 107.

⁶⁹ *Id.* at 119.

⁷⁰ *Id.* at 287.

⁷¹ *Id.* at 369.

future—maybe the distant future, maybe the immediate future, but never the immediate outcome of the case before the Court. That battle has been waged and resolved.”⁷²

- Judge Dennis Jacobs: “[T]he problem at bottom is really a lack of respect by lawyers” and judges for laypersons.⁷³ “Judges need a heightened respect for how nonlawyers solve problems, reach compromises, broker risks, and govern themselves and their institutions.”⁷⁴ To wit, judges and “lawyers lack humility in approaching great matters” of “the moral imagination; the scientific method; the practical arts of healing, politics, and entrepreneurship; the promptings of loyalty, faith, and patriotism; and the experience and expertise found elsewhere and among others.”⁷⁵
- Justice Roger Traynor: “The fiction that a court does not make law is now about as hallowed as a decayed and fallen tree” because “a modern judge is quite aware that his customary language indeed makes law.”⁷⁶

⁷² Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CALIF. L. REV. 1445, 1456 (2012); accord Michele Goodwin, *Reading Erwin Chemerinsky*, 88 U. CHI. L. REV. 1633, 1641 (2021) (“[G]reat dissents are jurisprudence in exile. They set the stage for future generations of jurists and scholars.”).

⁷³ Dennis Jacobs, *The Secret Life of Judges*, 75 FORDHAM L. REV. 2855, 2861 (2007).

⁷⁴ *Id.*

⁷⁵ *Id.* at 2862; see also John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 34 (1978) (“lawyers are a cocky lot”).

⁷⁶ Roger J. Traynor, *Transatlantic Reflections on Leeways and Limits of Appellate Courts*, 1980 UTAH L. REV. 255, 258-59 (1980); see also William A. Fletcher, *Standing: Who Can Sue to Enforce A Legal Duty?*, 65 ALA. L. REV. 277, 287 (2013) (“Common law courts have always been reluctant to say openly the degree to which they are changing the law. They much prefer

- Justice Robert H. Jackson: “[D]ispassionate judges” are “mystical” beings, just like “Santa Claus or Uncle Sam or Easter Bunnies.”⁷⁷

to emphasize the degree to which their decisions are consistent with, even compelled by, decisions reached in earlier cases.”); LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 21 (1980) (“No serious scholar treats the lawmaking power of judges as anything but an established fact . . . Some of the most blatant lawmaking” of judges “gets covered by the fig leaf of ‘interpretation.’”); *accord supra* note 11. *Contra* Frank H. Easterbrook, *Judges as Honest Agents*, 33 HARV. J.L. & PUB. POL’Y 915, 915 (2010) (“defend[ing] the proposition that when implementing statutes, judges should be honest agents of the enacting legislature”); Guido Calabresi, *Being Honest about Being Honest Agents*, 33 HARV. J.L. & PUB. POL’Y 907, 907 (2010) (“[I] am completely in favor of the proposition as stated: that judges should be the honest agents of the enacting legislature.”); *The Essayes or Counsels, Civill and Morall*, in 15 THE OXFORD FRANCIS BACON 1, 165 (Michael Kiernan ed., 2000) (1625) (“*Judges* ought to remember, that their Office is *Jus dicere*, and not *Jus dare*; *To Interpret Law*, and not to *Make Law*, or *Give Law*.”); Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 529 (2019) (similar).

⁷⁷ United States v. Ballard, 322 U.S. 78, 94 (1944) (Jackson, J., dissenting); *see also* Pub. Utils. Comm’n v. Pollak, 343 U.S. 451, 466 (1952) (Frankfurter, J., concurring) (Judges “must think dispassionately and submerge private feeling on every aspect of a case. . . . But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware.”); Karl N. Llewellyn et al., *Law and the Modern Mind: A Symposium*, 31 COLUM. L. REV. 82, 83 (1931) (“Judges read the evidence they get with an eye to their views of justice; ‘the facts’ take shape in court in the light of the result to be achieved.”). *Contra* ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 32 (2008) (“Appealing to judges’ emotions is misguided because . . . [g]ood judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions.”); FRANK M. COFFIN, *ON APPEAL COURTS, LAWYERING, AND JUDGING* 255 (1994) (“Judges, no less than lay persons, are subject to instant responses to inflammatory stimuli,” including “repugnance to or liking [of] a party.” Yet, “[s]uch reactions do not, in most judicial chambers, flourish under the light of intense study”); ROBERT SATTER, *DOING JUSTICE: A TRIAL JUDGE AT WORK* 78 (1990) (similar).

Yet, Posner has criticized judges’ common usage of analogies. *See* Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 15 (1998) (“Judges can rarely resist analogies, a form of ‘evidence’ (if it can be called that) that is generated by ingenuity rather than by knowledge.

It should be clear by now that I could go on, but life is short,⁷⁸ time is limited, and less often means more⁷⁹—though literally speaking, less also means less.⁸⁰ Enough has been said about my research agenda. The point should have been not only easy to see but also impossible to express in just several words.⁸¹ To say any more would probably spoil it.⁸² I shall therefore neither test your patience nor doubt your intelligence.⁸³

Nonetheless, in thinking about what is, and is not, properly a research agenda, I want to leave you Gentle Reader⁸⁴ with

Analogies are typically . . . inexact and often . . . misleading.”); *accord* FRANCIS BACON, *NOVUM ORGANUM* 56 (Open Court, 1994) (1620) (“The human understanding on account of its own nature readily supposes a greater order and uniformity in things than it finds. . . . [I]t devises parallels and correspondences and relations which are not there.”).

⁷⁸ *E.g.*, STEPHEN KING, *FIRESTARTER* 70 (2016) (1980).

⁷⁹ *See* *Andrea del Sarto* (1855), in 2 *THE POEMS & PLAYS OF ROBERT BROWNING* 352, 353 (1932) (“less is more”); *cf.* *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 757 (7th Cir. 2012) (Posner, J.) (quoting WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2 (1603)) (“Brevity is the soul of wit and tediousness its limbs and outward flourishes.”).

⁸⁰ Horwitz, *supra* note 42, at 678.

⁸¹ Ross E. Davies, *Tribute to Chief Judge Diane P. Wood*, 71 N.Y.U. ANN. SURV. AM. L. 17, 21 (2015).

⁸² *Id.*; *cf.* Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. 1681, 1686 (1996) (“Some things must never be asked. To raise questions about whether there is a ball and what it looks like is bad form. It would show a lack of ‘good judgment.’”); Steven Lubet, *Tilt*, 58 ME. L. REV. 129, 130-31 (2006) (“[E]very lawyer understands (at least on an intellectual level) the lurking danger in asking one question too many,” which is “later rationalized (though never excused) with the self-justification that ‘it had to be said.’ Well, it almost certainly did not have to be said, especially if it was disrespectful, rude, crude, loud, or inconsiderate.” Some “extra question must never be asked; it leads only to catastrophe.”). For an obligatory *But see* citation (Horwitz, *supra* note 42, at 654), see generally, e.g., PLATO, *THE REPUBLIC* (c. 380 BC) (illustrating Socratic dialogue using Q&A interrogative method).

⁸³ *See* Davies, *Tribute*, *supra* note 81, at 21.

⁸⁴ *See, e.g.*, SAMUEL TAYLOR COLERIDGE, *I THE FRIEND* 3 (1812); CHARLOTTE BRONTË, *JANE EYRE* 341 (Oxford 1864) (1847); MARK TWAIN, *THE INNOCENTS ABROAD* 233 (1869); W. E. B. DU BOIS, *THE*

something to pore over and chew on—a story “about the boy who had an irrational fear of kreplach, a Jewish dumpling that makes many mouths water. His mother, determined to overcome the problem, showed him the ingredients” of just dough and meat.⁸⁵ He observed with equanimity as she “folded one corner of the dough over the meat, and then a second and a third. Then the mother folded over the final corner. The boy’s face turned red. ‘Kreplach!’ he screamed, and ran in terror from the room.”⁸⁶ Now, “[t]hree folds make an interesting exercise, but they only bring us to the periphery of the problem; until the fourth fold, the meat and dough just aren’t kreplach.”⁸⁷ The ultimate question is whether this honest essay has successfully garnered that last fold and turned into a research-agenda kreplach.⁸⁸

SOULS OF BLACK FOLK vii (1903); *Honea v. King*, 243 S.W. 74, 75 (Ark. 1922) (quoting complaint alleging false publication); JOHN UPDIKE, *A MONTH OF SUNDAYS* 3 (1973) (page 3 of any edition).

⁸⁵ Richard D. Friedman, . . . *A Rendezvous with Kreplach*, 5 GREEN BAG 2D 453, 458 (2002).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See also Davies, *Irony*, *supra* note 25, at 221-22 (discussing whether blogging can be folded “into law-review kreplach”).