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Muckraking: The Case of the United States Supreme Court

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Abstract

Within the tradition of U.S. journalism, "muckraking" refers to reform-oriented investigative reporting undertaken to provoke public outcry and to promote institutional change. Although the decline of newspapers has reduced the resources available for certain kinds of investigative reporting, muckraking is still a common practice, and it can be found today in the calls for greater transparency that have accompanied the rise of the internet and the spread of digital information. In this article, I first outline a contemporary technology-driven vision of openness and access that appears to be global. I then consider how this new form of muckraking affects the United States Supreme Court and judicial legitimacy in the United States.

Key words

Transparency; judicial legitimacy; investigative journalism

Resumen

En la tradición periodística de Estados Unidos, la "prensa sensacionalista" se refiere al periodismo de investigación que busca provocar la protesta pública y promover el cambio institucional. El descenso de los periódicos ha reducido los recursos para el periodismo de investigación, pero la publicación de escándalos sigue siendo una práctica común, presente en los llamamientos actuales a una mayor transparencia que han venido de la mano del auge de Internet y la difusión de la información digital. Este artículo en primer lugar realiza una aproximación a la visión contemporánea de apertura y acceso que ha traído consigo la tecnología, y que parece ser global. A continuación analiza de qué forma esta forma de periodismo de investigación afecta a la Corte Suprema y la legitimidad judicial en los EE UU.

Palabras clave

Transparencia; legitimidad judicial; periodismo de investigación

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1. Introduction

Within the United States, the history of investigative journalism effectively began with muckraking, an early 20th century brand of reform-oriented reporting dedicated to exposing corruption and to provoking change (Filler 1961, Leonard 1986, Tichi 2004). In recent decades, the decline of print journalism and the re-shuffling of the news industry has weakened some aspects of the muckraking tradition in the United States (Flood 2009). Even so, the muckraking impulse is still very much alive in the push for greater transparency that has come with the rise of the internet and the spread of digital information. In this article, my goal is to examine how contemporary technology-driven muckraking is likely to affect the United States Supreme Court and judicial legitimacy.

I begin by surveying the context of digital information in which the Court now operates. As Bradley Manning belatedly and tragically encountered, the extraordinary fluidity of information today can have broad consequences for how public life is conducted and for how citizens relate to their governments (Savage 2013). Many figures have embraced the radical potential of digital information and have forecast a coming era of total transparency and deep democratic engagement (Greenberg 2012). I suggest that the U.S. Supreme Court has understandably been reluctant to heed these internet-fueled calls for openness because such calls are embedded in a political vision antithetical to the way in which the Court currently functions. It is not difficult to see why the justices might be concerned about the destabilizing effects that many believe the new era of ubiquitous, highly transmissible information will ultimately bring.

Nonetheless, I think that the U.S. Supreme Court actually has little to fear from digital information and the muckraking exposés that it promises. As I explain in the second part of this article, the greatest potential delegitimizing factor for the Court is the perception that the justices render their decisions on the basis of personal partisan preference rather than on the basis of legal principle and impartial reason. I argue that the distribution of more information will not create a political perception of the Court because such a perception is already quite common in the United States. Large majorities of Americans already believe that the justices decide cases on political grounds, and this belief co-exists with a generally held belief that the Court is an impartial arbiter of law. In short, there is no hidden truth for muckraking journalists to unearth for the notion that the justices are influenced by partisanship is an open secret.

In the final section of the article, I consider the factors that sustain this open secret. I argue that the Court carries on amid widespread suspicion because public skepticism about the judiciary is not tied to a public desire to debunk and reform. Evangelists of digital information often suppose that evidence of a conflict between what officials say and what they do will lead necessarily lead to a reckoning, with a newly informed public taking back the power that has been misused by institutions. I suggest that this assumption does not apply to the contemporary American judicial process—a context in which a suite of interests, habits, and affections keep people invested in the status quo.

2. The Court and open-source politics

The world is awash in information. By 2002, the amount of digitally recorded information matched the amount of analog recorded information for the first time in history; five years later, digital information accounted for 94% of all the recorded information on the planet (Greenberg 2012, p. 5). The immense and rapidly growing body of digital data is distinguished by one dominant characteristic: liquidity. “[I]nfinitely reproducible, frictionlessly mobile” digital information flows far more quickly and continuously than its analog predecessor ever could (Greenberg 2012, p. 5).

The bonanza of highly fluid digital information makes it easier than ever to publicize and distribute the work of governmental institutions like the United States Supreme Court. For example, SCOTUSblog provides comprehensive coverage of the Court's docket, broadly disseminating information that was once known only to a small circle of dedicated Court watchers (Scotusblog 2014). In addition, the Oyez Project maintains a multimedia archive with over 7,000 hours of U.S. Supreme Court audio, giving the public free access to oral arguments without requiring a journey to the Court to watch the live proceedings or a trip to Washington, D.C. to listen to recordings (Oyez Project 2011). Another way to access Court-related information is by visiting the Legal Information Institute, which houses a sprawling virtual repository that contains every Court opinion produced since 1992 and over 600 historically significant Court decisions (Cornell Law School, Legal Information Institute n.d.).

The glut of easily obtainable information has spawned demands in the United States for ever greater transparency from its highest court. Support for such demands is easy to find—except on the Supreme Court itself, where the justices have practiced a kind of passive aggressive resistance. The Court records oral arguments, for example, but it does not allow the audio to be broadcast live as oral arguments occur (Denniston 2012). Instead, the Court usually waits until the end of the term to make the recordings publically available. In only the most exceptional circumstances the Court will release recordings at the end of the day or week when a given argument occurs. The Court also maintains a website where it typically posts opinions within a few minutes of their release from the bench (Supreme Court of the United States 2014). But the site is not configured to handle the heaviest traffic and when requests have been made to supplement the site (for example, by emailing the text of the opinion to the press in addition to posting it to the site), the Court has declined to act (Goldstein 2012).

At other times, the Court has actively sought to suppress open communication about its work. For years, the Court allowed access to oral argument audio recordings solely for purposes of private education and research (Oyez Project 2011). Chief Justice Warren Burger originally imposed the restrictions in response to CBS News' broadcast of the Pentagon Papers' recorded oral arguments (New York Times v. United States 1971). The Chief Justice's decision was clearly intended to prevent broad dissemination of the audio recordings. Indeed, Burger went so far as to request that the Federal Bureau of Investigation determine how CBS News obtained the tapes (Irons 2005).

In another matter involving recorded oral arguments, the Court even threatened to pursue punitive legal action. Peter Irons, a professor at the University of California, San Diego, edited portions of twenty-three historic oral argument recordings and packaged them for sale (Irons and Guitton 1993). Although Irons had clearly violated the conditions governing the recordings' use, the Court attracted criticism for threatening to sue Irons and for taking a stand against the circulation of its work (New York Times 1993). It was only after a public outcry that the Court removed the restrictions limiting the use of audiotapes to research and education (Greenhouse 1993).

The Court has also banned cameras in its courtroom—and unlike the case of audio recordings, criticism has not yet overcome the Court's active opposition to public access on this front. The justices argue that video broadcasts will not only misinform the public by leading viewers to focus on dramatic moments, but also distort the judicial process by encouraging participants to play to the cameras (Marder 2012). Thus the justices suggest that cameras in the Court will erode judicial independence and legitimacy. Advocates of video counter the justices by arguing that television broadcasts and live streaming will educate the public and hold the judiciary accountable (Marder 2012). Advocates also complain that the justices are being too thin-skinned and are simply afraid that widely distributed

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video recordings might be used to make them look silly (Liptak 2011)—a complaint that gains force when one considers that many of the justices readily appear in public when given a chance to address specific audiences that they wish reach (Baum 2006, Baum and Devins 2010).

The charge of over-sensitivity has done little to soften the lines of disagreement. In fact, there is some indication that positions have hardened even further. After expressing support for courtroom cameras during her confirmation hearings in 2009, Justice Sotomayor reversed herself in 2013. "Every Supreme Court decision," Sotomayor said, "is rendered with a [written] majority opinion that goes carefully through the analysis of the case and why the end result was reached. Everyone fully explains their views" (Teicher 2013). According to Sotomayor, such detailed explanations of judicial decisions are not to be found during the oral arguments conducted in open court. Rather than being devoted to explication, oral argument is designed to be a "forum in which the judge plays devil's advocate with lawyers" (Teicher 2013). The broadcast of oral arguments would therefore be "more misleading than helpful" because viewers would be encouraged to seek reasoned justifications in a context where the justices are only concerned with "probing all the arguments" (Teicher 2013). With Sotomayor's change of heart, it is fair to say that cameras will not be arriving at the high court any time soon.

Why have the members of the Court dug in their heels? One might argue that the justices have mistakenly opposed more exposure because they fail to appreciate the degree to which journalists covering the Court are supportive of the institution. After all, the history of Court coverage has generally been written by a dedicated Supreme Court press corps that avoids critical reporting in order to preserve its working relationships with the justices (Davis 2011).

The difficulty with projecting from past practice is that we live in a time when reporting and newsgathering can no longer be easily limited to a select corps of journalists and their chosen subjects. Digital information is easy to duplicate and distribute; as a result, it can readily be placed in the hands of ordinary people and used as a check on the abuse of power. This checking function is not, however, merely a matter of identifying and disciplining a few bad actors. As Julian Assange has argued, widely disseminated information may not only shine a bright light on individual corporate leaders and public officials using their positions to enrich themselves illegally, but also reveal the wrongdoing that routinely emerges from standard operating procedures among elites. The target is all "the regular decision-making that turns a blind eye to and supports unethical practices," including the "oversight not done, the priorities of executives [and] how they think they're fulfilling their own self-interest" (Greenberg 2102, p. 2). The widespread use of digital information will inevitably allow all decisions at every level to be continuously examined and corrected.

Assange's conception of complete transparency and endless scrutiny has generated friction with the mainstream news media (Keller 2011). Yet, in articulating his transformative vision, Assange harkened back to the news media's own historical roots by clothing the old promise of muckraking journalism in new garb. Muckraking, as Filler noted, "was concerned with the criticism and revaluation of *every* aspect of national life. The crusaders denounced rascality in government just as bitterly as they denounced it in corporation" (Filler 1961, p. 56, emphasis original). Assange stands in the same tradition. The revival of this old notion of relentless exposé, now powered by vast reservoirs of digital information, is bound to be seen as threatening by members of the Court.

We can get a clearer sense of the potential threat by envisioning the muckraking possibilities of digital information in its ultimate form: the deconstruction of existing schemes of decision-making and the founding of a new kind of self-governance. Advocates call this ultimate vision "open-source politics" (Kron 2012). The term borrows from the field of software design: open-source computer programming

allows an entire community of engineers to access a program's entire source code at all times—a method of software development that allows cooperation on a single project without centralized coordination (Shirky 2012).

The broad and continuous circulation of digital information permits the logic of open-source programming to be applied to politics. Ordinary people one day may be given access to all of the materials necessary for governance all of the time. In such a context, government will be completely open to the citizenry, with all official actions totally transparent and fully communicated. Moreover, the public will directly exercise power because policy will take its shape and direction from "non-moderated, self-organized" discussion and participation (Nitsche 2013). The beginning of such activity is already present in the way a significant of population of "participatory new consumers" use social media to filter, assess, and comment on news reports (Purcell *et al*. 2010). Open-source advocates push even further, insisting that the final aim of cooperation-without-coordination is to achieve digitally-enabled pure democracy. In this future world, whistleblowers will easily and regularly leak sensitive documents and information to the public (Piraten Partei 2012). More importantly, the people themselves will actively gather and disseminate vast amounts of information, and they will also actively expose, critique, and judge official actions (Shirky 2012). In this way, the public will capture control of the government and "create a transparent society by force" (Greenberg 2012, p. 317).

If we think of the U.S. Supreme Court as institution reliant on popular support in the same way that elected officials are (Bassok 2013), then the prospect of subjecting the justices to continuous, thoroughly democratic scrutiny may be a welcome one. Yet, whatever the role of popular support may be, it remains the case that the Court does not hold itself out as being directly dependent on the public and this creates real tensions with the notion of a newly empowered people.

For example, the open-source ideal is clearly at odds with the Court's current structure and function. It is true, of course, that the Court already performs many of its tasks in the open. Oral argument is a public event (Supreme Court of the United States 2013c) and the Court's decisions are all published as public documents (Supreme Court of the United States 2013a). But the Court is otherwise quite secretive. The weekly conference where justices discuss cases and cast their preliminary votes is closed to all but the justices themselves (Supreme Court of the United States 2013c). Although an occasional exposé of the Court's internal dynamics appears in the media (Crawford 2012), the interactions between the justices, their clerks, and the staff are usually kept strictly confidential.

Moreover, the Court is insulated from the public by design. Once justices have been confirmed, they hold their positions "during good behavior," a term that effectively ensures life tenure on the bench (Constitution of the United States, Article III, § 1). As I suggested above, this is not to say that the Court is completely unconnected from public opinion. Scholars have long argued that the justices must take popular views into account to ensure that their authority is respected and their rulings are implemented (McCloskey 1960, Bassok 2013). Even so, the Court is clearly the least democratic institution in the federal government and, according to the Framers, it was precisely this distance from the public that provided "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws" (Hamilton 1961, p. 469).

The Court is also embedded within a hierarchical judicial bureaucracy and sits atop a large network of inferior courts that it reviews and directs (United States Courts n.d.). The justices exercise near total control of their own docket, and they largely make the final determination of which cases to hear and what questions to address (Supreme Court of the United States 2013b). In this sense, the Court is a very long way away from the historical examples of ancient courts that allowed the litigants themselves to select the law that would govern their case as well as the judge who

would hear their arguments (Shapiro 1986). While the Court relies on litigants to bring cases, the Court does not exist only to resolve individual litigant disputes. The Court governs the legal system though its opinions, and in deciding cases the justices often use a specific conflict to establish broad policies that go well beyond the particular interests of the contending parties. For this reason, some commentators suggest that the Court is less a judicial body concerned with individual-level dispute management than a ministry of justice concerned with system-level control (Post 2001, Bybee and Narasimhan 2013). This is a far cry from open-source principles and members of the Court understandably resist innovations that could create entirely transparent, highly participatory, and non-hierarchical forms of politics.

3. Open secrets

To say the radical democratic potential of digital information is antithetical to the Court is not to say that the Court actually has anything to worry about. To be sure, the complete realization of the open-source ideal would fundamentally alter politics and society. But the ultimate fulfillment of open-source goals is not imminent, and for the foreseeable future, the Court is quite likely to weather the rising tides of liquid information. This is because the muckraking and checking functions of digital information put society on the road to open-source politics *only if* the exposure of government action leads to popular protest and reform. In fact, exposure does not always trigger such a public response (some of the original muckrakers came to realize this fact themselves—Grenier 1983).

As Evgeny Morozov notes, "Information can embarrass governments but you have to look at the nature of governments as well as the nature of information to measure this embarrassment factor" (Greenberg 2012, p. 268). In many societies, corruption is an open secret, already known to everyone. In such circumstances, publicity does not initiate a cycle of dissent and change. "Just go and take photos of their villas and summer houses they buy with their state salaries. It's already in the open, but exposure by itself in these countries doesn't lead to democratic change" (Greenberg 2012, p. 268).

The Court is in a similar position. Consider that the Court has long been subject to criticism that it decides cases on the basis of something other than the facts, law, and arguments in the dispute at hand. At the time of the Founding itself the Anti-Federalists argued against the ratification of the Constitution because Supreme Court justices would inevitably rule on the basis of their personal political preferences: "[I]ndependent of the people, of the legislature, and of every power under heaven," the justices were ultimately bound to "feel themselves independent of heaven itself" (Brutus 1985, p. 183). The Anti-Federalist critique undercuts the core justification for the Court's authority, turning the very independence that permits the Court to be impartial into a reason to distrust judicial power. Rather than being exemplars of principle and restraint, the justices exploit vast opportunities to pursue their own interests under the guise of unbiased adjudication.

One might imagine that the broad circulation of information demonstrating politically motivated decision-making by the Court would re-animate Anti-Federalist concerns, provoking criticism and calls for change. If true, then the age of free-flowing digital information would be bound to create an age of judicial crisis and transformation. Yet this is not the case because the belief that the Court operates on the basis of personal preference is *already* widespread. There is no need to wait for muckraking investigations by crusading citizens or journalists because the politics of Court decision-making is an open secret that everybody already knows.

Evidence of this open secret often surfaces in elite discourse. The debate over Professor Michael Stokes Paulsen's recent criticism of constitutional law provides an illustration. Paulsen, who is himself the co-author of a constitutional law casebook

(Paulsen *et al*. 2010), argued that constitutional law should be removed from the required law school curriculum in the United States because the subject is so saturated with politics that it "teaches bad habits" (Paulsen 2012). As articulated by the Court in its decisions, constitutional law teaches students that "any answer is as good as any other, that there [are] a variety of interpretive approaches from which to choose, and that you should argue from your preferred approach in order to reach your preferred result" (Paulsen 2012). Thus, according to Paulsen, constitutional law does not belong among other mandatory law school courses because it is thoroughly and inherently political.

Rather than decry Paulsen's claims, the professors responding to his critique agreed that the Supreme Court's jurisprudence is essentially a political enterprise (Lund 2012, Levinson 2012). At the same time, the professors debating Paulsen also insisted that constitutional law remains law. Judicial reasoning is results-oriented, and it is also the authoritative language of the courts. Mastery of this forked tongue "is among the most important skills that competent practicing lawyers must acquire" (Lund 2012). "We are training *lawyers*, and, whether we like it or not, it is the essential job of the lawyer to manufacture non-frivolous arguments, whether sincerely believed or not, that are designed to serve the interests of a client" (Levinson 2012, emphasis original). To Paulsen's respondents, the undeniable fact of the matter is that constitutional law cannot be purged of either law or politics; it is simultaneously practiced as both.

Given the long history of academic literature portraying the Court as a political actor (Bybee 2011a), one might expect professors to be unfazed by the assertion that constitutional law is shaped by partisanship and preference. Yet the news media also shares this understanding of the Court. For example, coverage of Supreme Court nominations regularly portrays judicial decision-making as a political activity driven by partisan preference (Bybee 2011b). Such political renderings in news reports frequently co-exist with conventional presentations of judicial decision-making as a principled activity, a matter of conscientiously seeking criteria of judgment beyond the dictates of partisan policymaking. In this vein, Elena Kagan's testimony before the Senate Judiciary Committee during her confirmation hearings was simultaneously reported as a reasoned and impartial elaboration of a jurisprudential approach *and* as a tightly scripted performance by a self-interested nominee bent on hiding the true sources of her legal views (Bybee 2011b). The thought that justices may espouse principle and follow preference at the same time seems to be no more surprising to journalists than it is to law professors.

This split-level understanding of the high bench is hardly limited to elites. The public at-large also holds a political view of the Court, and this political view exists alongside a widespread belief that the Court is a trusted and fair arbiter. Consider the public perceptions of the Supreme Court's healthcare reform decision, *National Federation of Independent Business v. Sebelius* (2012). Before the Court rendered its landmark decision, there was general speculation that the five conservative justices might vote to strike down all or part of the Affordable Care Act, while the four liberal justices would vote to uphold (Katyal 2012). The anticipated split mapped perfectly onto the positions staked out by the political parties, fueling great public discussion about the influence of political factors on judicial decision-making (Klein 2012). Such political perceptions of the Court were clearly reflected in public opinion polls, with surveys showing the Court's approval rating reaching a new low (Liptak and Kopicki 2012a), and over half of Americans expecting the justices to base their healthcare ruling on something other than legal analysis (Barnes and Clement 2012, New York Times/CBS News 2012a). At the same time, there was also clear evidence that the public did not view the Court solely as a political institution. Roughly equal majorities of the healthcare law's supporters and opponents had a favorable view of the Court (Pew Research Center 2012), and the Court's overall approval rating and level of trust remained higher than other

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national institutions (Liptak and Kopicki 2012a, Newport 2012). It is true that when given a choice among a number of factors that might influence the Court's healthcare decision, large numbers of Americans agreed that "national politics," "whether the justices' themselves hold liberal or conservative views," and "whether a justice was appointed by a Republican or Democratic president" were all likely to play a major role as motivating factors (Kaiser Family Foundation 2012a). Even so, throughout the months leading up to the Court's decision, the most important motivating factor consistently selected by the largest percentage of Americans was "the justices' analysis and interpretation of the law" (Kaiser Family Foundation 2012a).

The Court's actual decision differed from general expectations, with Chief Justice John Roberts joining the four liberal justices to uphold virtually all provisions of the Affordable Care Act. The Court's surprise resolution was greeted with largely the same mix of public views present during the run-up to the ruling. On one hand, political perceptions of the Court were clear: the Court's approval rating dipped slightly lower after issuing its judgment, and a majority of Americans said that the Court based its decision on the justices' personal or political beliefs (Liptak and Kopicki 2012b). On the other hand, the public continued to see the Court as something other than a political institution: the Court's overall approval rating still remained higher than other national institutions (New York Times/CBS News 2012b). Further, when given a choice among a number of possible motivating factors, Americans continued to believe that the single most important influence on the decision was "the justices' analysis and interpretation of the law" (Kaiser Family Foundation 2012b).

The public's Janus-faced view of the Court's healthcare reform decision mirrors the public's overall assessment of the Supreme Court, as well as their views of state courts and of courts in general (Bybee 2010, Gibson 2012). At every level of the court system, large majorities of Americans see political influence at work in judicial decision-making, even as they continue to trust the courts and to support their independence. Given the disposition of popular perceptions, it strains credulity to argue that the onrush of digital information and intensification of scrutiny will unmask the Court's politics. Indeed, rather than wondering how judicial legitimacy might survive when liquid information floods into the public sphere and muckraking the Supreme Court becomes the order of the day, the better question is how the courts manage to maintain legitimacy in the first place when they are widely understood to be partisan and impartial at the same time.

4. Interests, habit, and affection

The theory behind the muckraking function of digital information is that the public will swiftly criticize and correct corrupt behavior once it has been exposed. However, in the case of the U.S. Supreme Court, it appears that the public already believes that ostensibly illegitimate judicial behavior occurs and nonetheless continues to have trust and confidence in the high bench. How is the open secret of judicial politics sustained?

The answer, I would argue, is that a cluster of factors keep ordinary people invested in the status quo at every level of the system. These factors function largely because of, rather than merely in spite of, the contradictions inherent in the hybrid legal-political judicial process (Bybee 2010). Consider first the issue of usefulness: one way to think about the tension between the principled explanations offered by judges and the political motivations already suspected by the public is to say that the tension reflects the utility of a highly procedural legal system. Judicial proceedings facilitate engagement and coordination between people who otherwise disagree about substantive ends by creating a formal set of procedures that leave the roots of conflicts largely untouched. On this view, it is unnecessary for disputing parties to personally transform or genuinely reconcile in order to reach a settlement

because the judicial process's goal is not to arrive at an objectively correct or perfectly just outcome so much as it is to employ a method for coping with conflicts—a way of negotiating limited areas of consensus while allowing great regions of disagreement to remain intact. Litigants are neither required to abandon their partisan passions at the courthouse door nor asked to realize their significant, yet ordinarily unobtainable normative ideals of impartiality and principle. Instead, they must only agree to couch their conflict in legal terms.

The procedural system makes civil peace possible when the cacophony of competing claims in the community would otherwise defeat efforts to manage conflict. Everyone, including a judge, is given the chance to frame their interests in law's independent tests and doctrines, lending their views an appearance of importance and weight that may not have much of a connection to underlying substance. The presence of so many poseurs in the system naturally leads the public to suspect that the judicial process is subject to instrumental manipulation. Yet even though such suspicions chip away at judicial legitimacy, they also point to the very mechanism that attracts people to judicial dispute management, for it is the possibility of hypocrisy that at once threatens public support for the judiciary and makes the courts useful. The system endures not in because it overcomes the contradiction between instrumental action and impartial principle, but because it relies on this contradiction to suit law to the individuals which it governs. In other words, it is because individuals simultaneously wish to preserve their own particular interests and to feel they are living up to impersonal standards that the judicial process operates on two conflicting planes at once.

Apart from the interests in dispute management and principled appearances that generally attract people to law, a broad law-sustaining habit can also be found within the larger community. H.L.A. Hart called it the "habit of obedience"—a general disposition to follow law that manifests itself in daily behavior (Hart 1994, p. 24). The habit is a reflexive response that can take the form of "unreflective, effortless, engrained" compliance when legal dictates are easy to follow, as in the case of automatically and unthinkingly driving on the right side of the road (Hart 1994, p. 52). The habit is also a routine behavior in areas of life where the demands of law are more exacting and following the rules "runs counter to strong inclinations" (Hart 1994, p. 52). When it comes to paying taxes, for example, the habit of obedience exerts influence and the fact of compliance "for some considerable time past" makes it likely that people will continue to comply in the future (Hart 1994, p. 52).

As Hart noted, the habit of obedience requires "no general conception of the legal structure or of its criteria of validity" (Hart 1994, p. 114). Most people are inclined to follow law either out of deference to the way in which things have always been done or out of fear of being punished should they disobey. Thus the habit of obedience is suited to the discordant amalgam of principles and passions within each of us. It breeds attachment to the legal system by relying on the ease of inertia and the interest in avoiding penalty, all without requiring individuals to be persuaded by rational argument, to embody the normative ideals expressed in legal rules, or to possess much legal knowledge.

Pleasure also bolsters the judicial process. The reliance on pleasure may be somewhat difficult to see, since the judicial process looks like an unlikely place to find any kind of contentment or delight. Indeed, legal procedures are often formal and boring, and this appears to be so on purpose. The dullness of law serves the goal of dispute management, helping to create a procedural rendering of events that is more tractable than the messy particulars of actual experience. And yet, law does have its pleasurable features.

To begin with, law creates a kind of sanctuary in which the brutalities of a dispute may be given a stylized and intellectually refined gloss, the very legal procedures that induce boredom may also foster an appealing sense of shelter and relief

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(Posner 1993). Pleasure is also found in the way legal procedures assign and confirm status, conveying a public message about individual worth through the manner in which disputing parties are treated (Tyler 1990, Tyler and Hou 2002). When the judicial process deals with litigants in a way that appears to be "polite, respectful, and unbiased," then people are more likely to accept judicial decisions and rate the legal system positively, regardless of how their case is finally resolved (Tyler and Hou 2002, p. 12). To demonstrate solicitude for complaints and to allow individuals to relate their side of the story is to treat people as rights-bearing subjects that deserve to be valued. This legal showing of respect does not change the fact that one party in a dispute may end up getting the better of the other, any more than polite flattery increases the actual beauty of a person's appearance or the true stature of his achievements. In both cases, the pleasure is in how things are said and how affairs are conducted, not in the ultimate outcome or in any concrete change in underlying conditions.

The judicial process is also sustained by the need to maintain power. As a matter of historical fact, law has frequently been used to shore up hierarchies (Bybee 2010). In the United States, law and the courts have been used to solidify and maintain the subordination of women, the domination of African Americans, and the marginalization of the LGBT community, to name only a few examples. Powerful groups are clearly drawn to the legal system as a stable means of securing their position. Yet weaker groups also find reason to support the prevailing order because there is more than one way to seek advantages from the judicial process.

Most ordinary individuals have only "occasional recourse to the courts" and are invested in the outcome of their particular case (Galanter 1974, p. 97, Albiston 1999). For such one-time litigants, the only result that matters is the disposition of the dispute in which they are involved. By contrast, repeat players, with multiple and ongoing engagements in the judicial process, have smaller stakes in specific outcomes; they use their resources to manage their disputes with an eye toward influencing the rules of the legal game that will govern litigation in the future. Repeat players are consequently willing to settle when it makes strategic sense to do so, taking a loss in a specific case for the sake of preserving favorable rules in an entire run of cases. The individual, one-time litigant facing an organized, well-resourced repeat player may aggressively push for a preferred outcome and manage to claim the pleasure of winning her case. At the level of the specific dispute, such a result lends law "a flavor of equality," suggesting that differences in position between the two parties do not determine judicial decisions (Galanter 1974, p. 135). The resource differences are nonetheless reflected at the level of legal rules where the wise management of victories and defeats permits repeat players to structure the overall system to their advantage. Two different senses of "good enough" settlements and two different kinds of winning are thus in play. The legal system may widely distribute acceptable results and feelings of victory, all the while ensuring that individual winners do not threaten the position of those organized, powerful groups with the wherewithal to shape their litigation with an eye toward the long term.

Beyond the differential distribution of victory, the judicial process also serves the powerful without entirely alienating the powerless by strategically deploying broad assurances of fairness. Equal treatment is guaranteed to all, but only in a formalized and individualized fashion that favors specific groups (Haltom and McCann 2004). The result is a legal system that maintains an air of universal benefit even as it systematically advances the interests of the few.

5. Conclusion

There is much more to be said about the role of interest, habit, and pleasure in sustaining public faith in the judicial process and the rule of law (for example, Bybee 2010). The account of these sustaining factors offered here is not designed

to paint a complete picture, but to suggest why more publicity about the politics of judicial decision-making is unlikely to destabilize popular opinion. As I have argued, a large majority of the public already thinks of the United States Supreme Court as a hybrid body: an institution that simultaneously engages in politics and law as it conducts its business of dispute management. Most people do not have a sense of appropriate judicial action that is violated by news about partisan preferences and political considerations on the high bench. Contrary to the claims of advocates of open-source democracy (and to the claims of their muckraking antecedents), greater transparency and communication about judicial decision-making is more likely to confirm than to disrupt the public's contradictory perceptions of the judiciary. Members of the Supreme Court should realize that when secrets are open, public exposure is not a radical act.

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