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Recommended Citation

Eva S. Nilsen, *Symposium: The Role of the Judge in the Twenty-First Century: Introduction*, in 86 Boston University Law Review 1037 (2006).

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Bluebook 21st ed.

Eva S. Nilsen, Introduction, 86 B.U. L. REV. 1037 (December 2006).

ALWD 7th ed.

Eva S. Nilsen, Introduction, 86 B.U. L. Rev. 1037 (2006).

APA 7th ed.

Nilsen, E. S. (2006). Introduction. Boston University Law Review, 86(5), 1037-1048.

Chicago 17th ed.

Eva S. Nilsen, "Introduction," Boston University Law Review 86, no. 5 (December 2006): 1037-1048

McGill Guide 9th ed.

Eva S. Nilsen, "Introduction" (2006) 86:5 BU L Rev 1037.

AGLC 4th ed.

Eva S. Nilsen, 'Introduction' (2006) 86(5) Boston University Law Review 1037

MLA 9th ed.

Nilsen, Eva S. "Introduction." Boston University Law Review, vol. 86, no. 5, December 2006, pp. 1037-1048. HeinOnline.

OSCOLA 4th ed.

Eva S. Nilsen, 'Introduction' (2006) 86 BU L Rev 1037

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SYMPOSIUM: THE ROLE OF THE JUDGE IN THE TWENTY-FIRST CENTURY

INTRODUCTION

EVA S. NILSEN*

The contents of this special issue of the *Boston University Law Review* are the product of a symposium on “The Role of the Judge in the Twenty-First Century,” held on April 21st and 22nd, 2006 at the Boston University School of Law. The symposium presented a rare opportunity for a distinguished group of federal judges and academics to exchange ideas about some of the most pressing and controversial subjects facing the courts. Over the course of two days, panelists explored a number of ongoing challenges to the judiciary, including threats to judicial independence, national security imperatives, exploding caseloads, increasing reliance on scientific and other expertise, and globalization. We were especially honored to have Seventh Circuit Judge Richard A. Posner deliver the keynote address and one of our BUSL alumni, First Circuit Judge Juan R. Torruella, deliver a luncheon address. I thank the editors of the *Law Review* for agreeing to publish the resulting papers and comments, and for their assistance with the many tasks that made the symposium a success.¹

The breadth and depth of the symposium’s subjects were daunting to the conference planners, all the more so because the topics were themselves moving targets. Over the next decades, judges will be required to apply laws to radically different circumstances as a result of a technological revolution we can only begin to imagine. Global threats, both political and environmental, will put immense stress on the institution of the judiciary and on the democratic process. The unpredictable and unprecedented nature of such developments makes all analyses of judicial change highly provisional, but also necessary, and as it turned out, highly stimulating.

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¹ The Dean and members of the planning committee especially thank law review editors and student volunteers for their work on both the symposium and this special issue. We also thank conference organizers Caitlin McCartan, Beth Guikema, and Michael Micale for their extraordinary work in making the symposium a success. Lastly we thank all the panelists and attendees for their lively contributions to the program.

The recent nominations to the Supreme Court of Chief Justice John Roberts and Justice Samuel Alito led to a great deal of public discussion about the role of the judge. President George W. Bush announced repeatedly that he would nominate judges who would apply, not make, the law. Judge Posner's keynote address and his article herein frame the symposium around this traditional jurisprudential question, but supply an unconventional answer.² Posner explores how appellate judges *really* decide cases, once the conventional materials such as precedent, statutes, and the Constitution are exhausted. Judges then operate within what he calls the "zone of reasonableness," where a judge might reasonably decide one way or the other. What motivates judges to decide as they do, and what normative lessons emerge from these conclusions? Posner divides conceptions of judging into formalistic, political, and pragmatic, and asserts that judges generally adopt a more or less pragmatic approach.

Formalism is the "official" conception of judicial decision making, and the method that most appeals to law professors. This is partly due to their comfort with meta-principles such as originalism, textualism, and (more recently) Justice Breyer's concept of "active liberty." The political method of deciding cases assumes that judges vote their political preferences, and, therefore, that their decisions can be predicted based on political party affiliation. Posner suggests that the pragmatic approach is the one most favored by judges because it offers a solution to most problems, and is flexible enough to incorporate a degree of formalism and a degree of the political, or as he says "attitudinal," approach. It incorporates formalism in that the pragmatic judge is guided by precedent, statutes, and the Constitution, even when they go against her personal politics. It incorporates the political approach in that, within the zone of reasonableness, the judge may exercise her discretion and may rely on her ideological views. But doing so is not merely political, Posner argues, because ideology is about much more than political affiliation. Ideology is comprised of both cognitive and emotional factors determined by the judge's upbringing, education, religious and moral values, and life experiences. Posner urges recognition of and research on the role played by the personal, emotional, and intuitive in judging. He reminds us that "[e]motion is a form of thought, though compressed and inarticulate, because it is triggered by, and more often than not produces rational responses to, information."³

For Posner, judges are political actors and (sometimes) legislators who are motivated by the dual desires of making the world a better place and of playing the "judicial game" (the actual process or protocol of the judge's job, such as reading briefs, listening to arguments, negotiating with other judges, and writing opinions). There are, however, a number of checks on limitless

² Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049 (2006).

³ *Id.* at 1063.

discretion in the process, including the adversary system and the need to make conscious the methods used to reach a decision. Judge Posner concludes that if he is right about the significance of emotions in judicial decision making, there are strong reasons for us to insist on a diverse judiciary.

Professor Erwin Chemerinsky also takes issue with the formalistic conception of judicial decision making, and denies that there is any such thing as discretion-free judging.⁴ In his view, judges make law constantly, and in doing so they draw on their judgment, which is based on their ideology and experiences. He recalls Chief Justice John Roberts' claim, made at his confirmation hearing, that a judge should act as an umpire who simply calls the shots as he sees them. Chemerinsky responds that any first year law student knows this is an untrue picture of what judges do. Why then, he asks, does the myth persist? He blames it on the "false allure of formalism," judicial restraint, and deference to the elected branches. He argues that judges clearly decide cases based on their politics and other values, and that this is just as true of conservative judges as liberal ones. According to Chemerinsky, this disjunction between myth and reality is cause for concern. First, the formal myth allows judicial nominees to avoid questions about their views on issues that might come before them. This converts the nominating process into a charade and cheats the public out of necessary information. Second, it distorts judicial opinions because it allows judges to act as if their opinions are dictated purely by the law instead of revealing how they actually arrived at their positions. Chemerinsky's hope for the future rests on a change in legal consciousness – a revival of legal realism, candor about the complex methodology of opinion writing, concern for judicial independence, and, last but not least, catchy slogans to rebut conservative one-liners.

Professor Ward Farnsworth uses an empirical approach to examine similar questions about formalism.⁵ His study looks at the voting behavior of thirty federal appellate judges in criminal cases that produced dissents. He divides those cases into two categories: ones that involve the Constitution and ones that involve other sources of law. The study reports that any given appellate judge usually votes for the government about as often in one type of case as in the other. Farnsworth concludes that once a case is close enough to create dissent, the source of law involved tends to diminish in importance; the decision ends up being made on the basis of policy judgments that cut across the divide between constitutional and non-constitutional sources of law.

The next contribution on the question of decision-making methodology comes from First Circuit Chief Judge Michael Boudin.⁶ In his remarks, Boudin agrees with the other panelists that the actual work of judges today is

⁴ Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069 (2006).

⁵ Ward Farnsworth, *The Role of Law in Close Cases: Some Evidence from the Federal Courts of Appeals*, 86 B.U. L. REV. 1083 (2006).

⁶ Michael Boudin, *The Real Roles of Judges*, 86 B.U. L. REV. 1097 (2006).

quite different from their historical roles of resolving criminal and civil disputes. Judges are indeed lawmakers, but, Boudin cautions, this role can only remain beneficial and secure if it is employed with due regard for the legislature. When courts act as reformers and effect dramatic innovation, they set themselves up against the democratic process and invite a backlash. He notes the Supreme Court's steady drift into the citation of foreign law, and anticipates further changes in the Court's role as it considers broadly worded treaties that provide authority for finding new rights and obligations. According to Boudin, the judiciary increasingly will be called upon to connect private individuals or entities with the bureaucratic state, a role he describes as a blend of "protector of citizenry, ombudsman, and implementer of state administrative regulation."⁷ Although Posner, Chemerinsky, Farnsworth, and Boudin address the age-old dispute over whether judges must interpret and not "make" law, the symposium demonstrated that this question cannot be answered in the abstract. Indeed, a central premise of this symposium is that the twenty-first century presents new challenges to the judiciary – challenges which may sometimes leave existing law and procedure in a kind of limbo. Human cloning, computer data mining, and computer-generated judicial profiles are obvious examples, but so is a low-tech circumstance like exploding caseloads. Posner's pragmatism, with its emphasis on "what works," might fill the legal void when new challenges arise. But precisely what are the pragmatic solutions available to the law and the judiciary? This symposium provided some preliminary answers to that question.

Procedures for a New Era

Professor Judith Resnik uses architecture – the changing nature of federal courthouse buildings – as a lens through which to inspect the changing nature of federal courts.⁸ She observes that there has been a dramatic shift over the past thirty years, as cases once decided in courtrooms before Article III judges are now decided by administrative agencies and private providers. This has been facilitated by Congress, with its willingness to delegate much of the Article III power to non-Article III judges.

Resnik laments the "wilting" of open court adjudication. She sees courthouses as symbolic of the democratic principles embodied in the adjudicatory process; courthouses were the place for previously overlooked constituencies to bring lawsuits to enforce the federal laws that guarded their rights. Courthouses and trials in open court provided a forum to showcase relationships between principles of equality, successful market-based economies, and public and private accountability. Resnik ends somewhat pessimistically with a prediction that in the next century the public will be less able to pursue rights through public processes.

⁷ *Id.* at 1098.

⁸ Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101 (2006).

Professors Eric Green and Robert Bone pursue some of the implications of changes in the way private and public disputes are resolved. Consider what happens in the typical American trial court. The image of two parties pleading their cases before a neutral judge or jury is no longer the norm. Today, trial judges conduct fewer trials and increasingly oversee plea bargains, supervise mediations, and manage large and complicated civil cases through pretrial stages. Multi-party cases such as mass torts, antitrust cases, and class actions where millions of dollars are at stake are on the increase. Cases may have hundreds of parties, be tried in multiple jurisdictions, and involve a number of judges and mediators seeking to resolve the issues. We have not yet determined how active a judge should be in these practices, how possible and important it is for a judge to remain neutral in conducting them, what procedures a judge should employ, and what societal values are at stake.

Professors Bone and Green respond quite differently to the issues presented by these changes. Bone's approach is to step back from the process and consider how procedural rules should be formulated.⁹ Are rules simply roadmaps or are they a reflection of a shared normative vision? Should rules be the same for all cases, or different for different kinds of cases? Should judges actively promote settlement? Bone argues that until we do serious normative research we cannot definitively answer these and other important questions. Such an effort, in his view, must begin with a theory of the relationship between procedure and substantive law, emphasizing that rules of procedure must take into account substantive policy preferences. Procedural choices must be balanced against the error costs they generate, but this depends on the substantive values at stake, which in turn requires that litigation goals be stated and evaluated. He applies his theory to three areas where reform may be desirable: settlement, aggregation, and discretion. In all three areas, he argues, it is essential to recognize that we must first determine our substantive policy choices and then design rules to realize them.

Green speaks from the perspective of an actor within the process by examining some of the challenges of mediation.¹⁰ He comes at this topic as an experienced mediator, having fostered a settlement in the celebrated Microsoft case, among many others. He was active as an academic and mediator at the beginning of the alternative dispute resolution (ADR) movement, and played a major role in structuring what has become the norm in mediation today. Green obviously revels in the flexibility and creative potential of a process that allows participants, including judges, to adapt their roles to the specific demands of cases; but he recognizes that there are some basic and unsettled issues to explore. What are the roles of the judge and the mediator in a case? What should these participants do vis-à-vis the parties? How can a mediation system

⁹ Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155 (2006).

¹⁰ Eric D. Green, *Re-Examining Mediator and Judicial Roles in Large, Complex Litigation: Lessons from Microsoft and Other Megacases*, 86 B.U. L. REV. 1171 (2006).

take account of increasingly complex scientific and statistical data? Why do some mediations succeed and others fail? Should the court play a role in encouraging mediation or a particular settlement? Green favors a strong judicial role, which he agrees may require new procedural rules. In the end, Green concludes, everyone wants outcomes that satisfy all parties. His remaining questions seem to call for just the kind of procedural and substantive normative research recommended by Professor Bone.

Larger Caseloads and Increasing Specialization

Other challenges that affect judges are those that arise from larger caseloads, more complex cases, and the increasingly specialized nature of litigation. Some commentators argue that complex cases absorb inordinate judicial resources, drawing some judges away from more routine cases and increasing the burden on others. Unless we increase their numbers, judges may not be able to devote enough time to cases, thereby risking erroneous decisions. Specialized courts are invoked by many as a potential solution to the problem that increasingly specialized knowledge is required to decide complex cases.

Professor David Faigman, however, argues that more judges and specialized courts will not be enough. He calls on judges to learn science. In his view, “[s]cientifically illiterate judges pose a grave threat to the judiciary’s power and legitimacy.”¹¹ Judges today are required to adjudicate issues turning on complex questions of economics, statistics, science, social science, and mathematics. Scientific and technological advances and the increasing use of expert witnesses tax the generalist judge. Since the *Daubert* decision, judges have been the gatekeepers of specialized evidence such as DNA, fingerprints, accident reconstruction, and so on. Judges were slow to accept this gatekeeper role, and some still resist their responsibilities in criminal cases that involve fingerprint analysis, firearms identification, arson and explosion analysis, and handwriting identification. Faigman insists that judges must become more adept in science and the scientific method. At the very least, he maintains, judges should be capable of critically reading statistics and analyzing scientific studies; this is crucial because those who lack this ability tend to think of scientific knowledge as categorical or certain, rather than probabilistic.

Faigman cites the example of violence predictions in sexual predator cases, which have very low accuracy rates. In order to balance the defendant’s rights with the risk of harm to potential victims, the judge needs to know the particular research methods used to establish probabilities. If she does, she will understand what most do not: “No clear relationship exists between burdens of proof and probability estimates.”¹² Faigman’s research shows that it is equally important for the judge to be cautious about drawing general conclusions from one set of facts that may not be relevant to another. He adds

¹¹ David L. Faigman, *Judges as “Amateur Scientists,”* 86 B.U. L. REV. 1207, 1207 (2006).

¹² *Id.* at 1215.

that the benefits of a scientifically educated judiciary run both ways: scientists can then bring their insights to bear on justice, and judges can encourage scientific development by making stricter demands on witnesses before they are allowed to testify regarding scientific evidence.

Professor Jeffrey Rachlinski, along with co-authors Professor Chris Guthrie and Magistrate Judge Andrew J. Wistrich, asks whether we should rely more extensively on specialized courts to meet the demands of heavier caseloads, increased time pressures, and ever more complex cases.¹³ To answer this question, he conducted an empirical study assessing whether U.S. bankruptcy judges rely on the same cognitive heuristics as other judges and make the same judgment errors. His research team presented hypothetical scenarios to 113 bankruptcy judges, and found that they were less susceptible than generalists to certain kinds of errors, but equally susceptible to other kinds of errors. Additionally, within that same study, Rachlinski evaluated the influence of experience, political party, race, and gender, and found that none of those factors affected how error-prone a judge was. However, Rachlinski did find that bankruptcy judges, perhaps even more so than generalist judges, reached different outcomes depending on their political orientation. He suggests that this finding may counsel against over-reliance on specialized courts. The more specialized courts we have, Rachlinski warns, the more politicized our courts could be.

Judicial Politicization and Independence

In his 2004 year-end report, Chief Justice Rehnquist noted a strained relationship between Congress and the federal judiciary, which he attributed to increased criticism of judges by members of Congress.¹⁴ The subject of judicial independence, and the related issues of judicial activism and accountability, major concerns within and beyond the legal community, framed a number of discussions at the symposium.

Panelists approached the topic of judicial independence and politicization from many perspectives. Does the Constitution provide an adequate framework for ensuring the proper measure of judicial accountability and independence? Are these virtues currently at risk? How should we select judges so as to minimize politicization of the judiciary? Does life tenure adequately protect judges from political pressures and other improper influences? Is it even possible for a judge to leave her politics outside the courtroom? Is Congress overstepping in its attempts to limit federal

¹³ Jeffrey J. Rachlinski et al., *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227 (2006).

¹⁴ William H. Rehnquist, *2004 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts, D.C.), Jan. 2005, at 1, 2-4, available at <http://www.uscourts.gov/ttb/jan05ttb/2004/index.html>. Chief Justice Rehnquist noted that the Court has historically been criticized as activist when judges vote to overturn congressional acts or make decisions outside the mainstream. *Id.*

jurisdiction? Related to these questions is the contentious debate about whether the Supreme Court should be permitted to consult foreign sources of law when deciding constitutional cases.

Professor Michael Gerhardt reminds us that there has been an ongoing debate about judicial independence since the drafting of Article III.¹⁵ He discusses the sharply divergent views on whether judicial independence is a procedural or substantive value. Those who classify judicial independence as procedural point to the constitutional strictures designed to keep judges accountable, such as jurisdictional limitations and impeachment. Others, who argue that the Constitution substantively protects judges against political interference, point to life tenure as designed to do so.

Gerhardt examines the rhetoric about judicial independence within the Senate during judicial nominations, particularly statements about “what judges do.” As evidence of efforts to control federal judges, Gerhardt cites recent proposed legislation that would have curbed federal jurisdiction and limited the citation of foreign law. According to Gerhardt, this same political constituency believes that judges should be impeached for “bad acts,” including their decisions, regardless of intent. Gerhardt argues that the impeachment standard for judges has always required a finding of bad intent as well as a bad act, and that the act must constitute serious misbehavior unrelated to the content of judicial decisions.

Professor Sanford Levinson poses a foundational challenge.¹⁶ He wants to know what we mean by the concept of “judicial independence.” Levinson notes strong agreement among symposium panelists that judicial independence is a good thing, worthy of protection, but asks, independence from what? Can there be too much judicial independence? The problem in answering these questions, he opines, is the difficulty of separating the debate from the politics surrounding it; one’s views on judicial independence may well be influenced by one’s attitude toward judicial decisions. Despite this problem, Levinson’s answer is not to abandon the concept. Rather, his aim is to provoke a “long overdue conversation” about the nature of judicial independence,¹⁷ and to caution against sacrificing important values such as public accountability on the altar of judicial independence.

Levinson suggests that reflection on three applications of the independence ideal could help us better understand its meaning and value. These are, first, the methods of selecting judges; second, formal and informal pressures brought to bear on judges that shape their decisions; and third, measures that exist to remove judges from office (what he calls involuntary leave-taking). Ultimately, Levinson expects that such a clarification will lead us to balance divergent values through the political process.

¹⁵ Michael J. Gerhardt, *What’s Old Is New Again*, 86 B.U. L. REV. 1267 (2006).

¹⁶ Sanford Levinson, *Identifying “Independence,”* 86 B.U. L. REV. 1297 (2006).

¹⁷ *Id.* at 1299.

The Judicial Role in an "Age of Terror"

Ninth Circuit Judge Stephen Reinhardt takes up the second of Professor Levinson's suggested studies.¹⁸ His remarks concern the pressures that have been brought to bear on judges, particularly during wartime, which is precisely when the need for judicial independence is greatest. Reinhardt's view of the global war on terror as a "war without end" suggests to him that we may need to reconsider the balance that courts struck between government and liberty interests during wars past. More so than in past conflicts, courts must not bow to the pressure to dilute basic individual rights in the name of "the national interest." Reinhardt urges judicial backbone in cases such as the Bush Administration's treatment of American prisoners in Guantanamo and its domestic surveillance program. Although Judge Reinhardt agrees with other symposium participants that recent technological advances may necessitate new forms of expertise, he is confident that judges' primary role will remain what it has always been: "weighing, balancing, exercising independent judgment, and safeguarding the Constitution."¹⁹

Professor Geoffrey Stone puts the tension between civil liberties and national security in historical perspective.²⁰ He points out that judges usually defer to the government, and that doing so might seem logical. After all, the stakes are high and a mistake could prove costly; judges lack expertise on national security issues; and the court's credibility could otherwise suffer. But examining the historical record indicates that these concerns do not validate judicial deference. Stone points to the decision to uphold bans on anti-government speech in World War I, the Japanese American internment in World War II, and the numerous anti-Communist laws during the Cold War. Eventually, all three became cause for profound regret; these cases have come to be regarded as "constitutional failures and as black marks on the Court's reputation."²¹ A policy of deference presumes that those making the decisions are taking relevant factors into account. This presumption, however, ignores political realities and the tendency of government officials to exaggerate dangers to national security while undervaluing civil liberties. Stone is optimistic that the Court has learned from the mistakes of the past, as evidenced by the Nixon-era *Pentagon Papers* case, the enemies-list wiretapping case, and the recent cases involving prisoners of war at Guantanamo. These cases, in Stone's view, discarded the "logical" presumption favoring the government's national security measures in exchange for a "pragmatic" presumption of close judicial scrutiny.

¹⁸ Stephen Reinhardt, *The Judicial Role in National Security*, 86 B.U. L. REV. 1309 (2006).

¹⁹ *Id.* at 1313.

²⁰ Geoffrey R. Stone, *Civil Liberties v. National Security in the Law's Open Areas*, 86 B.U. L. REV. 1315 (2006).

²¹ *Id.* at 1327.

The Place of Foreign Law in the American Judicial System

Some recent assaults on judicial independence have focused on the Supreme Court's citation of foreign law in constitutional cases. Professor Steven Calabresi's article does not claim, as some opponents have, that the citation of foreign law breaks new ground; he tells us that the Supreme Court has always relied on foreign law, although it has done so more frequently in modern times. But Calabresi does present a provocative plea for caution, suggesting that the Court should have due regard for American exceptionalism.²²

Calabresi urges the Court to be selective when using foreign legal sources, and to avoid the practice in constitutional cases that raise controversial social and moral issues. In Calabresi's view, issues like abortion and homosexual privacy manifest a clash between an elite legal culture and mass popular culture. Most Americans, he argues, perceive the Constitution as a quasi-religious document crafted in response to America's unique historic position as a country built by people seeking to escape oppression. The document embodies America's mission; it is "not merely a law [but] our state written book of common prayer."²³ On the other side, Calabresi claims, stands a legal elite that too often invokes lawyerly approaches to produce a mechanical result at odds with longstanding popular beliefs. Reliance on foreign law is part of this: when the Court decides highly contested social issues in consultation with foreign law, it risks ignoring or diluting what Americans perceive to be its exceptional place in the world, and adopts an untenable role as a social change agent. Calabresi does not, however, object to the invocation of foreign law and norms to determine "evolving standards of decency" in Eighth Amendment cases. This is in part because of a long tradition of doing so in such cases, and in part because looking abroad may temper the harsher side of American moralism.

Professor David Seipp, on the other hand, argues that those who would limit the Supreme Court's citation of foreign law invoke bad history and bad law.²⁴ Historically, he points out, there have never been broad complaints about the Court's reference to foreign law, with the exception of post-revolutionary distrust of English case law. Professors Seipp and Calabresi agree that citing foreign law is an old practice, which Seipp attributes to the founders' desire to show "decent respect to the opinions of mankind." They part company, however, over the truth and value of American exceptionalism, and whether or not the founders intended the Constitution to be an expression of America's religious mission. Seipp argues that the objection to foreign citation is "a new

²² Steven G. Calabresi, "A Shining City on a Hill": *American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335 (2006).

²³ *Id.* at 1340.

²⁴ David J. Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 B.U. L. REV. 1417 (2006).

complaint about a very old practice” – a complaint that derives from a mixture of xenophobia, anti-intellectualism, and political opportunism.²⁵

In Seipp’s view, the protests also invoke bad law. Opponents to citation of foreign law fundamentally misconstrue the distinction between binding precedent and persuasive authority. When U.S. courts cite foreign law, that law is treated as neither binding precedent nor an authoritative ruling. Foreign law is not controlling on the court that cites it or on any future court that considers the subject. To object to courts’ use of foreign law, Seipp insists, is to misunderstand how courts use foreign law.

Predictions for the Future

Professor James Lindgren applies his knowledge as an empiricist to hazard some predictions for the future, acknowledging at the outset that predictions are difficult.²⁶ Nonetheless, he discerns a number of trends in legal studies and the legal profession. New statistical methods may facilitate prediction, meaning lawyers and judges will have to be better trained in using statistical data. Computers, databases, and blogs may substantially supplant libraries and physical books. The potential readership for law blogs that are more current and accessible than other sources may reduce the researcher’s reliance on law reviews. Lindgren also suggests that lawyers will need to adjust to a mushrooming of controversial tools, such as data-mining, and its consequent loss of privacy; advanced lie-detector tests, perhaps incorporating brain scans; and artificial intelligence, which he predicts will develop at a staggering pace. He concludes his discussion of predictions by reporting that, according to a recent study, the American public views judges favorably, despite predictions by some academics that the Court would lose legitimacy after its decision in *Bush v. Gore*.

First Circuit Judge Juan Torruella steps back from the particulars of judging to remind us that the work of future courts will be deeply connected to global demographic and environmental issues.²⁷ He notes that large-scale immigration, perhaps up to fifteen million people each decade, puts a strain on all resources, including the courts. Torruella predicts that caseloads will become dominated by immigration and civil rights issues. He poses questions about potential problems facing courts in areas of voting, internal passports, deportations or mass arrests, and treaties. He asks finally how courts will prepare for issues they will undoubtedly face involving terrorism, transnational health, and electronic surveillance.

These symposium papers, although diverse in perspective and focus, have at least one common thread. They each recognize that even though judges will

²⁵ *Id.* at 1435.

²⁶ James Lindgren, *Predicting the Future of Empirical Legal Studies*, 86 B.U. L. REV. 1447 (2006).

²⁷ Juan R. Torruella, *What Will Determine the Role of the Judiciary in the Twenty-First Century?*, 86 B.U. L. REV. 1461 (2006).

continue to struggle with age-old questions regarding their proper role and methods, they will also face new challenges that will require significant revisions to their methods and goals. Some of these challenges will come from rapidly developing technology, some from expanding caseloads and the shift toward specialization, and some from the need to interpret the Constitution in times of a potentially endless “war on terror.” These papers present fresh and provocative ideas on some of today’s most important issues. We hope that they provoke your interest.