

# NEW YORK UNIVERSITY LAW REVIEW

---

VOLUME 71

JUNE 1996

NUMBER 3

---

## THE ART OF JUDGING

STEWART G. POLLOCK\*

*In the second annual William J. Brennan, Jr. Lecture, New Jersey Supreme Court Justice Stewart G. Pollock explores the relationship between art and adjudication. The separation of powers, the federalist system, and the inherent constraints of the common law confine state courts. Notwithstanding those constraints, state courts have demonstrated creativity when interpreting state statutes and constitutions and when adapting the common law to changing conditions. Thus, Justice Pollock finds artistry in the work of state courts. He begins by exploring creativity in statutory interpretation. Then, Justice Pollock examines two areas of substantive law of great public concern: public-school-finance litigation under state constitutions and the common-law redefinition of the modern family. Justice Pollock demonstrates how state appellate courts, through public-school-finance litigation, have shaped the constitutional right to a public-school education. Justice Pollock then discusses how state courts have reacted to the changing composition of the American family. By recognizing these changes, state courts have redefined the family in areas as diverse as zoning ordinances, surrogacy agreements, and same-sex marriages. Common to all these endeavors is protection of the inherent dignity of the individual. Justice Pollock concludes that an appreciation of the similarities between art and judging may lead to a better understanding of the judicial process.*

Delivering the Brennan Lecture in Vanderbilt Hall is for me deeply moving. Justice Brennan graced the New Jersey Supreme Court for four years before starting his remarkable service on the United States Supreme Court. Also, this building is named for the former dean of this law school and the Chief Justice of the New Jersey Supreme Court with whom Justice Brennan served, Arthur T. Vanderbilt. For me, giving the Brennan Lecture in Vanderbilt Hall is something like playing left field next to Joe DiMaggio at Yankee Stadium.

---

\* Justice, Supreme Court of New Jersey. B.A., 1954, Hamilton College; J.D., 1957, New York University; LL.M., 1988, University of Virginia. I am grateful to my law clerks, Scott Resnik and Aviva Wertheimer, and to two student interns, Ilan Simon and Eric Twiste, for their enthusiastic assistance in preparing this Lecture.

Last year, the law school sponsored two extraordinary events marking milestones in the school's intellectual life. First, the school inaugurated the Brennan Lectures with Chief Judge Kaye's superb speech.<sup>1</sup> The following day, the Institute of Judicial Administration sponsored a stimulating conference on statutory interpretation. Then, in July, the law school invited judges and legal scholars to La Pietra, NYU's conference center in Florence, Italy. The law school called the conference an international summit on constitutional law.

The primary purpose of the conference was to discuss with justices from the Russian Supreme Court the development of an independent judiciary. Invitees included Justices Sandra Day O'Connor, Ruth Bader Ginsburg, and Stephen Breyer from the United States Supreme Court, as well as justices from the European Court of Justice and from the Constitutional Courts of Italy, West Germany, and Russia. Each morning we discussed constitutional principles such as federalism and the separation of powers. In the afternoons we toured the museums of Florence. As we toured the museums, I began thinking about the relationship between judges and artists and about judging as an art. The analogy between art and judging seems as apt in Manhattan, the home of some of the world's greatest museums, as in Florence.

Current trends in legal scholarship lend respectability to my ruminations. In recent years, scholars have considered law in relationship to other disciplines such as economics,<sup>2</sup> chaos mathematics,<sup>3</sup> literature,<sup>4</sup> music,<sup>5</sup> and even baseball.<sup>6</sup> In the short time that we will spend together, we cannot conduct an in-depth analysis of the analogy between artists and judges. As with any other analogy, moreover, at some point the comparison collapses. My thesis is not that under-

---

<sup>1</sup> See Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. Rev. 1 (1995).

<sup>2</sup> See, e.g., Richard A. Posner, *Economic Analysis of Law* (3d ed. 1986).

<sup>3</sup> See, e.g., Royce de R. Barondes, *The Limits of Quantitative Legal Scholarship Analyses: Chaos in Legal Scholarship and FDIC v. W.R. Grace & Co.*, 48 Rutgers L. Rev. 161 (1995).

<sup>4</sup> See, e.g., Richard A. Posner, *Law and Literature: A Misunderstood Relation* (1988); Sanford Levinson, *Law as Literature*, 60 Tex. L. Rev. 373 (1982); see also Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. Chi. L. Rev. 1477, 1496 (1995) (suggesting that literary capacities of imagination and sentiment are a vital part of "the equipment of a judge").

<sup>5</sup> See, e.g., Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. Pa. L. Rev. 1597 (1991) (reviewing *Authenticity and Early Music* (N. Kenyon ed., 1988) and comparing authentic performance movement in music to theories of statutory interpretation in law); see also Daniel Kornstein, *The Music of the Laws* (1982); Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 Colum. L. Rev. 1259 (1947).

<sup>6</sup> See *Baseball and the American Legal Mind* (Spencer W. Waller et al. eds., 1995).

standing the work of artists is essential to understanding that of judges, but that the analogy provides a useful metaphor to illuminate the judicial process, particularly the work of state appellate judges.

Admittedly, differences abound between judging and such creative endeavors as classical music, poetry, and the arts. No one need tell me that I am not the judicial equivalent of Johann Sebastian Bach, T.S. Eliot, or Vincent Van Gogh; not even Bruce Springsteen or Garry Trudeau.

Artists begin with a creative impulse. Judges do not begin at all until someone starts a lawsuit. Even the most activist judges do not create causes of action, but must wait for someone else to start the process. Once the process begins, most judges depend on the adversary system to shape the case. The process is inherently rational and controlled. Artists enjoy greater subjectivity and latitude in creating a work of art. Each activity emphasizes different values. Judges concern themselves with rights and justice. Although artists may share those concerns,<sup>7</sup> they express them in different ways. Most importantly, the judicial process ends in a decision enforceable by law. The artistic process ends with a work of art that may be inspiring, even transforming, but that does not command under penalty of sanctions.<sup>8</sup>

Differences between the disciplines, however, do not undermine the justification for comparing artists and judges.<sup>9</sup> Awareness of the differences may prevent inappropriate subjective judgments from creeping into judicial decisions.<sup>10</sup> To deny the similarities between artistic and judicial endeavors, however, would ignore the reality that judging, particularly in hard cases, is unavoidably creative. The comparison may also lend legitimacy to the proposition that judges may

---

<sup>7</sup> See John Russell, *The Meanings of Modern Art* 225 (1981) (noting that for some 20th century artists, truth, not beauty, is aesthetic criterion).

<sup>8</sup> See Laura S. Fitzgerald, *Towards a Modern Art of Law*, 96 *Yale L.J.* 2051, 2052 n.4 (1987) ("[T]he judge wields an immense coercive power unknown to the artist. A judge's legal picture is enforced, directly and often drastically altering the lives of the persons who inhabit the social canvas."); Robin L. West, *Adjudication Is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 *Tenn. L. Rev.* 203, 207 (1987) (asserting that judging, even as interpretive act, is exercise of power in ways in which literary or other artistic interpretation is not). Although artists have less power to enforce conformity with their views than do courts, an artist's devotees may influence the institutions that shape artistic preferences. See Levinson & Balkin, *supra* note 5, at 1610-12.

<sup>9</sup> The obvious remoteness of law and art permits focusing more clearly on the useful comparisons between them. See Levinson & Balkin, *supra* note 5, at 1653.

<sup>10</sup> See J.M. Balkin, *The Domestication of Law and Literature*, 14 *L. & Soc. Inquiry* 787, 794 (1989) (noting that characterization of law with reason leads to denial of one's own passions and prejudices by "clothing them in the garb" of reason).

"think feelingly."<sup>11</sup> Does anyone really want judges to be devoid of imagination, good sense, courage, and compassion?

## I

Stated most simply, judging consists of analyzing the facts of a case, selecting a dispositive rule of law, and applying that rule to the facts. The process, however, is more complex, requiring myriad choices at every step. Making these choices is an art as well as a science. If law were purely scientific, judges analyzing the same facts and applying the same rules of law would reach the same result for the same reasons. Often, however, a single case will produce several opinions. The differing results and rationales reveal the obvious, but often overlooked, point that judging is not just a science.<sup>12</sup>

Differences between judges can appear in activities as fundamental as describing the facts.<sup>13</sup> In a refreshingly candid law review article, Judge Patricia M. Wald discusses the latitude of appellate judges in "[c]onstructing the facts."<sup>14</sup> The latitude extends beyond selecting the controlling facts to characterizing them so as "to tow the story line into the safe harbor of whatever principles of law the author thinks should control the case."<sup>15</sup> In brief, the art of judging begins with the portrayal of the facts.<sup>16</sup>

---

<sup>11</sup> Paul Gewirtz, On "I Know It When I See It," 105 *Yale L.J.* 1023, 1032 (1996) (citation omitted); see Martha C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* 102-03 (1995) (stating that "literary aspects" of Justice Stevens's dissent in *Palmer v. Hudson*, 468 U.S. 517, 541-48 (1984), demonstrate respect for prisoner's dignity).

<sup>12</sup> See Shirley S. Abrahamson, Commentary on Jeffrey M. Shaman's *The Impartial Judge: Detachment or Passion?*, 45 *DePaul L. Rev.* 633, 641 (1996).

<sup>13</sup> For example, the case of *Baby Richard*, which centered on a biological father's custody suit of his son who was placed at birth with a prospective adoptive couple, is illustrative. In the intermediate appellate court, both the majority and the dissenting opinions separately described the facts. Charging that the majority had "patently distorted" the facts, the dissenting judge found that several factual clarifications were necessary. In *re Doe*, 627 N.E.2d 648, 656 (Ill. App. Ct. 1993) (Tully, J., dissenting), *rev'd*, 638 N.E.2d 181 (Ill.), *cert. denied*, 115 S. Ct. 499 (1994).

Controversy over the portrayal of the facts extended to the state supreme court. The majority charged that the dissent "departs from the record, misstates the facts and misinterprets the law." In *re Kirchner*, 649 N.E.2d 324, 340 (Ill.), *cert. denied*, 115 S. Ct. 2600 (1995). The dissent responded with its own version of the facts, entitled "Correction of Facts." *Id.* at 344 (McMorrow, J., dissenting).

<sup>14</sup> Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 *U. Chi. L. Rev.* 1371, 1386 (1995).

<sup>15</sup> *Id.*

<sup>16</sup> One of Justice Brennan's former law clerks, now a distinguished judge and scholar, recently wrote that factual, not legal, research can "bring home to a judge the realities of a law." Richard A. Posner, *Overcoming Law* 195 (1995).

The judge's art extends also to the description of the dispositive legal principles,<sup>17</sup> the selection of relevant authorities,<sup>18</sup> and the holding of the case.<sup>19</sup> At each stage, the judge makes choices that reflect his or her perception of the judicial role. A judge's perception of community values influences such basic choices as the existence of constitutional rights, the interpretation of a statute, or the extension of the common law. Similarly, the tone and breadth of an opinion reflect a judge's "style." Some judges paint in bold colors; others work in pastels. Some view their opinions as the judicial equivalent of the Sistine Chapel; others are satisfied to paint a Mona Lisa.

Several distinguished judges have commented on the relationship between artistic endeavors and judging. In *The Nature of the Judicial Process*, Justice Cardozo writes: "I have grown to see that the [judicial] process in its highest reaches is not discovery, but creation . . ."<sup>20</sup> In the same vein, Judge Learned Hand wrote:

I like to think that the work of a judge is an art . . . It is what a poet does, it is what a sculptor does. He has some vague purposes and he has an indefinite number of what you might call frames of preference among which he must choose; for choose he has to, and he does.<sup>21</sup>

Justice Brennan tacitly accepted the analogy:

"[T]he range of emotional and intuitive responses to a given set of facts or arguments [are] responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason . . . Sensitivity to one's intuitive and passionate responses, and awareness of the range of human experience, is therefore not only an inevitable but desirable part of the judicial process, an aspect more to be nurtured than to be feared."<sup>22</sup>

Supported by such authority, my endeavor is to explore the analogy between art and judging, particularly to appellate judging in state courts.

---

<sup>17</sup> Wald, *supra* note 14, at 1394-98.

<sup>18</sup> *Id.* at 1399-1408.

<sup>19</sup> *Id.* at 1398-99.

<sup>20</sup> Benjamin N. Cardozo, *The Nature of the Judicial Process* 166 (1921).

<sup>21</sup> *The Art and Craft of Judging: The Decisions of Judge Learned Hand* at xiii (Hershel Shanks ed., 1968).

<sup>22</sup> Byron R. White, *Tribute to the Honorable William J. Brennan, Jr.*, 100 *Yale L.J.* 1113, 1115-16 (1991) (quoting statement made by William Brennan in 1987 Cardozo Lecture to the Association of the Bar of the City of New York), reprinted in Justice William J. Brennan, Jr. *Freedom First* 27, 30 (Roger Goldman with David Gallen eds., 1994).

## II

Judges, like artists, are products of their time. Like judges, artists may follow the work of their predecessors. They also may reject the past and anticipate the future. Neither artists nor judges, however, can escape the time and place in which they live.<sup>23</sup> Justice Brennan recognizes as much. As he has said, "[c]urrent Justices read the Constitution in the only way that [they] can: as twentieth-century Americans."<sup>24</sup> Thus, judicial opinions are bound to reflect the pressures of the time. No wonder as the nation grows more diverse and ideologies change that the transformation should manifest itself in judicial opinions.<sup>25</sup>

Great judicial opinions resemble "high art,"<sup>26</sup> and some are of museum quality. At times, however, the judicial process, like artistic creation, may lack the glamour of the end result. Michelangelo, lying on a scaffold, neck aching, with paint dripping on his face, must have had doubts about the glory of painting the ceiling in the Sistine Chapel. Likewise, even the most dedicated judges, working in isolation, confronted with an unending procession of cases and worried about their daily preparation, may wonder about the nobility of their calling.

Like judges, artists make critical factual judgments. They ask: What shall I include? What shall I emphasize? How shall I depict my subject? Another similarity is that both judges and artists work within constraints. An artist cannot make a canvas larger than it is. Nor can the artist convert canvas into another medium.

## III

Among the most prominent constraints on state courts are those imposed by the federalist system and the separation of powers. Notwithstanding those constraints, state courts continue to originate imaginative responses to challenging problems. Respect for the legislature as a co-equal branch of government has inspired courts to use creativity when interpreting statutes. Similarly, respect for the United

---

<sup>23</sup> Art, like law, is "culture-specific," taking place in a particular culture and among a particular people. Both artists and judges reflect distinctive problems of a society. See James B. White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. Chi. L. Rev. 684, 691 (1985).

<sup>24</sup> William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433, 438 (1986); see also Cardozo, *supra* note 20, at 13 (noting that though judges try to view problems objectively, "we can never see them with any eyes except our own").

<sup>25</sup> See G. Edward White, *The American Judicial Tradition* 2, 462 (expanded ed. 1988).

<sup>26</sup> *Id.* at 466.

States Supreme Court as the ultimate arbiter of federal law has stimulated state courts to address one of the most compelling problems facing American society: defining and implementing the state constitutional right to a public education. Finally, the inherent constraints of common-law adjudication have not deterred state courts from redefining the basic societal unit in the United States, the family. The first illustration, statutory interpretation, concerns methodology. The last two—public school finance and the redefinition of the family—concern areas of substantive law. Together, they reveal the art of judging in state courts.

Let us turn first to statutory interpretation, the subject of the conference following last year's Brennan Lecture. Even with so constrained an activity, courts engage in the art of judging. The judge who relies on plain language, like one who looks to legislative history or statutory purpose, makes value judgments.<sup>27</sup> Statutory terms, legislative purpose and history, and rules of interpretation take judges only so far. Beyond that point, judges may engage in controlled creation when interpreting statutes.

Forty years ago, when I was a law student here, New York University School of Law offered a two-hour course in the legislative process. In that course, I read Professor Llewellyn's thesis that for every canon of statutory construction a countervailing canon existed.<sup>28</sup> That revelation shed new light on statutory interpretation, but hardly ended the debate about the appropriate role of courts when interpreting statutes.<sup>29</sup> Beneath diverse approaches to statutory construction lurk profound differences about matters fundamental to a constitutional democracy. These differences raise questions about the respective roles of the different branches of government, the power of courts to review legislative and executive action, and the allocation of responsibility between elected officials, such as legislators, and judges, who often are appointed.

For a judge, the variety of interpretative theories presents a confusing palette. It is as if Mary Cassatt, Marc Chagall, Romare Beardon, Jackson Pollock, and Norman Rockwell were standing behind a painter offering conflicting advice on each brush stroke. For the artist, the experience might be interesting, maybe even stimulat-

---

<sup>27</sup> William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479, 1538 (1987) ("[T]he current context and public values always exercise some influence on the interpretive enterprise.").

<sup>28</sup> Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 Vand. L. Rev. 395, 401 (1950).

<sup>29</sup> *Id.* at 401-06.

ing, but not likely to create a cohesive picture. For the judge who is trying to determine how to read a statute, the problem is similar.

The scholarly debate on statutory interpretation reflects a deeper unrest in society about the appropriate roles of courts. Current theories, notwithstanding their diversity, recognize that at some point statutory interpretation becomes an act of creation. Even Blackstone, hardly a free spirit when describing statutory interpretation, urged courts "to expound the statute by equity."<sup>30</sup> Similarly, Professor Llewellyn advised that "a court must strive to make sense *as a whole* out of our law *as a whole*."<sup>31</sup>

Current scholars have stimulated a renaissance in statutory interpretation. Even judges disagree among themselves. Justice Scalia<sup>32</sup> and Judge Easterbrook<sup>33</sup> champion reliance on statutory language. Judge Posner, on the other hand, supports an "imaginative reconstruction" of the legislators' probable intent.<sup>34</sup> Professor Dworkin posits a theory of "law as integrity" in which the judge "interprets not just the statute's text but its life, the process that begins before it becomes law and extends far beyond that moment . . . [H]is interpretation changes as the story develops."<sup>35</sup> Professor Eskridge encourages courts to interpret statutes dynamically by considering, among other things, "the subsequent evolution of the statute and its present context."<sup>36</sup> Thus, courts should "interpret statutes in light of their current as well as historical context."<sup>37</sup> Professor Sunstein advocates a prominent role for interpretive norms that would authorize judges to add or delete statutory requirements to agency-administered statutes, despite the plain meaning of those statutes.<sup>38</sup> Judge Calabresi goes one step fur-

---

<sup>30</sup> 2 William Blackstone, Commentaries \*91.

<sup>31</sup> Llewellyn, *supra* note 28, at 399.

<sup>32</sup> See, e.g., Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 512 (stating that meaning of statutes are "apparent from text"); Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1183 (1989) ("It is rare, however, that even the most vague and general text cannot be given some precise, principled content—and that is indeed the essence of the judicial craft.").

<sup>33</sup> See, e.g., Frank H. Easterbrook, The Supreme Court, 1983 Term—Foreword: The Court and the Economic System, 98 Harv. L. Rev. 4, 14-17 (1984) (arguing that economic legislation that is designed to serve private rather than public interest and is result of interest group lobbying should be strictly construed).

<sup>34</sup> Richard A. Posner, The Federal Courts: Crisis and Reform 286-90 (1985).

<sup>35</sup> Ronald Dworkin, Law's Empire 348 (1986).

<sup>36</sup> Eskridge, *supra* note 27, at 1483.

<sup>37</sup> *Id.* at 1554.

<sup>38</sup> See Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 496-97 (1989) (favoring addition of exception from regulation for food additives posing minimal cancer risk that patently covered all cancer-inducing substances). Professor Sunstein develops a set of interpretive norms—sensitive to constitutional structure, institutional design, the diverse functions and failings of government actors, and statutory



ther and contends that courts should update statutes by overruling them.<sup>39</sup>

As startling as those suggestions might seem, some state courts have already embarked on creative statutory interpretation. The brave would say that these courts engage in judicial legislation as a matter of necessity. Those who favor discretion over valor simply rewrite statutes without saying so. Numerous distinguished state court justices have openly acknowledged that courts expand and contract statutory language.<sup>40</sup> Although no judge would undertake that responsibility lightly, legislatures often welcome, either implicitly or explicitly, judicial legislation.

Sometimes that activity is described as "judicial surgery,"<sup>41</sup> a term that I shall eschew to avoid mixing metaphors. Perhaps a better analogy for a court when interpreting statutes would be to an actor interpreting a part in a play or to a musician playing a composition.<sup>42</sup> Those metaphors more aptly reflect the fact that courts merely interpret a script written by the legislature. Whether viewed as surgeons, actors, musicians, or artists, however, the point remains that an honest

---

regimes—with which to approach social and economic regulation. *Id.* at 505; see also *id.* at 507-08 (providing outline of principles to guide statutory interpretation). For criticism of Sunstein's approach, see Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. Chi. L. Rev. 1203, 1206, 1219-24 (1990) (critiquing Sunstein's canonical approach to statutory interpretation because, like approaches Sunstein rejects, it is incomplete, biased, and places excessive power in hands of judiciary).

<sup>39</sup> See Guido Calabresi, *A Common Law for the Age of Statutes* 2, 147-48 (1982) (proposing several techniques that courts might use to prevent anachronistic statutes from governing).

<sup>40</sup> See, e.g., Kaye, *supra* note 1, at 26-28 (acknowledging that courts may read a statute "in a way that appears contrary to its 'plain meaning'" but noting that "in nearly every statutory case that reaches a state's highest court there exists at least two plausible interpretations, each in some way supported by the text"); Ellen Ash Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. Pitt. L. Rev. 995, 1003-04 (1982) (noting that in cases raising constitutional problems "[i]t is sometimes feasible to consider a statute in a way that the language does not, on first literal reading" and providing examples); Joseph Weintraub, *Judicial Legislation*, N.J. L.J., Oct. 30, 1958, at 1 (using term "judicial legislation" to describe state court decisional process). See generally Edward F. Hennessey, *Judges Making Law* 33 (1994) (citing numerous rules of construction state and federal courts have used to interpret statutes).

<sup>41</sup> See *Chamber of Commerce v. New Jersey*, 445 A.2d 353, 363-64 (N.J. 1982) (listing cases in which courts have openly engaged in judicial surgery). To date, 193 decisions have used the phrase "judicial surgery." Search of Westlaw, Allcases & Allcases-Old databases (Mar. 11, 1996).

<sup>42</sup> See Levinson & Balkin, *supra* note 5, at 1608-09 (noting centrality of interpretation to law and to music and drama).

appraisal of the judicial role recognizes that courts creatively interpret statutes to effectuate legislative goals.<sup>43</sup>

State courts from Massachusetts to Mississippi and from New Jersey to California have interpreted statutes creatively.<sup>44</sup> Even the United States Supreme Court occasionally has done an interpretive legislative dance.<sup>45</sup>

---

<sup>43</sup> For example, in *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757 (1994), the United States Supreme Court divided 5-4 over the meaning of the term "reasonably equivalent value" in the Bankruptcy Code, 11 U.S.C. § 548(a)(2)(A). Writing for the majority, Justice Scalia interpreted "reasonably equivalent value" to mean "the price in fact received" at a state foreclosure sale, assuming compliance with the state foreclosure law. *Id.* at 1765. Justice Souter, writing for the dissenters, stated that the "plain meaning" of the term required a comparison of the price received at a noncollusive state foreclosure sale with "the worth of the item when sold." *Id.* at 1769 (Souter, J., dissenting). In this apparent linguistic debate, what actually divided the court was the majority's deference to "state regulation," *id.* at 1765-66, and the dissent's attempt to fulfill "the policies underlying a national bankruptcy law," *id.* at 1774 (Souter, J., dissenting). See Lawrence M. Solan, *The Language of Judges* 11 (1993) (suggesting that linguistic argumentation is often "window dressing" to mask some other agenda at root of judge's opinion).

<sup>44</sup> See, e.g., *Atlantic Richfield Co. v. State*, 214 Cal. App. 3d 533, 543 (Ct. App. 1989) (acknowledging use of "judicial excision" when literal interpretation would result in absurdity); *State v. Williams*, 343 So. 2d 35, 38 (Fla. 1977) (noting that "the Court may sever [an] unconstitutional provision [of a statute] and uphold the remainder"); *Threlkeld v. State*, 586 So. 2d 756, 759 (Miss. 1991) (construing forfeiture statute to include "innocent owner" exception not facially present in statute); *Town Tobacconist v. Kimmelman*, 462 A.2d 573, 582 (N.J. 1983) (explaining that "[w]hen a statute's constitutionality is doubtful, a court has the power to engage in 'judicial surgery' and through appropriate construction restore the statute to health"); *Commonwealth v. Butler*, 328 A.2d 851, 859 n.22 (Pa. 1974) (striking offending sentence in statute). But see *Johnson Controls World Servs., Inc. v. Barnes*, 847 P.2d 761, 767 (N.M. Ct. App.) (explaining that "[a]ny modification or departure from the language of . . . [a] statute rests with the legislature and not the courts"), cert. denied, 847 P.2d 313 (N.M. 1993). An oft-cited phrase in New Mexico's jurisprudence is "[t]his is a situation for legislative therapy and not judicial surgery." *Varos v. Union Oil Co.*, 688 P.2d 31, 33 (N.M. Ct. App. 1984) (quoting *City of Albuquerque v. Sanchez*, 466 P.2d 118, 119 (N.M. Ct. App. 1970)).

<sup>45</sup> See, e.g., *Califano v. Westcott*, 443 U.S. 76, 79-80, 89-90 (1979) (using equal protection analysis to interpret statute providing AFDC benefits only to families with unemployed fathers to include families with unemployed mothers rather than nullifying statute); *Welsh v. United States*, 398 U.S. 333, 343-44 (1970) (interpreting statute providing military service exemptions to those objecting to participation in war "by reason of religious training and belief" to include those with strongly held, nontheistic ethical objections). See generally Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 Clev. St. L. Rev. 301, 317-24 (1979) (stating that once "the court passes on the constitutionality of a[n] [underinclusive] statute . . . it concludes its essentially judicial business . . . . The remaining task is essentially legislative" and discussing several justifications for judicial extension—rather than invalidation—of statutes).

State courts have engaged in judicial legislation by narrowing<sup>46</sup> or broadening<sup>47</sup> statutory provisions, by adding<sup>48</sup> or deleting<sup>49</sup> statutory language, and by reading in requirements that were not in the plain language of the statute.<sup>50</sup> For example, the New Jersey Supreme Court has removed from a strikebreaker act the phrase "to supply from without the state" in order to satisfy a commerce clause challenge.<sup>51</sup> It has eliminated a requirement that an item be "used or intended for use" as drug paraphernalia to meet a vagueness challenge to a "head shop" law.<sup>52</sup> The court has read an exception for an "innocent owner" into a statute permitting the forfeiture of an automobile put to an illegal use.<sup>53</sup> To save a statute authorizing funding of an abortion to preserve a woman's life, the court read the statute also to cover abortions necessary to preserve her health.<sup>54</sup> Similarly, the court recently read into the Registration and Community Notification Laws, commonly known as part of Megan's Law, a requirement that a sex offender have a hearing before the public is notified of certain personal information about the offender.<sup>55</sup>

In a perfect world, the legislature would express itself with unmistakable clarity and in complete conformity with constitutional requirements. Legislators, like judges, however, must grapple with the

---

<sup>46</sup> See, e.g., *New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n*, 411 A.2d 168, 177 (N.J. 1980) (defining the phrase "to influence" narrowly in order to "free it from constitutional doubt or defect").

<sup>47</sup> See, e.g., *Schmoll v. Creecy*, 254 A.2d 525, 529-30 (N.J. 1969) (holding that statute allowing for recovery of damages by illegitimate child for wrongful death of mother be expanded to permit recovery for wrongful death of father).

<sup>48</sup> See, e.g., *Board of Managers v. Pension Bd.*, 449 S.W.2d 33, 38 (Tex. 1969) (supplying "necessary and proper words" to "poorly drafted" statute in order for it to "make sense").

<sup>49</sup> See, e.g., *Chamber of Commerce v. New Jersey*, 445 A.2d 353, 369 (N.J. 1982) (saving statute from invalidation under commerce clause attack by removing phrase "or to supply from without the State").

<sup>50</sup> See, e.g., *Threlkeld v. State*, 586 So. 2d 756, 759 (Miss. 1991) (construing forfeiture statute to include "innocent owner" exception facially not present in statute); *State v. DeSantis*, 323 A.2d 484, 494 (N.J. 1974) (salvaging obscenity statute by incorporating constitutional requirements of "fair notice" and "due warning" required by *Miller v. California*, 413 U.S. 15 (1973)); *State v. Profaci*, 266 A.2d 579, 583-84 (N.J. 1970) (saving from invalidation under First Amendment statute that prohibited "loud and offensive or profane or indecent language" by holding that speaker must have intended to incite, and was likely to incite, "an immediate breach of the peace" even though language was not in statute).

<sup>51</sup> See *Chamber of Commerce*, 445 A.2d at 369.

<sup>52</sup> See *Town Tobacconist v. Kimmelman*, 462 A.2d 573, 582 (N.J. 1983).

<sup>53</sup> See *State v. 1979 Pontiac Trans Am*, 487 A.2d 722, 728 (N.J. 1985).

<sup>54</sup> See *Right to Choose v. Byrne*, 450 A.2d 925, 938 (N.J. 1982).

<sup>55</sup> See *Doe v. Poritz*, 662 A.2d 367, 417 (N.J. 1995).

limitations of language.<sup>56</sup> Interpreting statutory language to conform to the legislative purpose without offending the legislature illustrates the art of judging.

#### IV

The federalist system also imposes prominent restraints on state courts. Sometimes, however, the United States Supreme Court expressly remits compelling issues to what it euphemistically describes as "the 'laboratory' of the states."<sup>57</sup> One such issue concerns public school finance, a striking example of state courts painting with broad strokes on a large canvas. In the landmark case of *San Antonio Independent School District v. Rodriguez*,<sup>58</sup> the United States Supreme Court decided that the equal protection clause of the United States Constitution did not protect public education as a fundamental right.<sup>59</sup> That decision effectively closed the doors of federal courthouses to public interest lawyers seeking to assure a specified level of education to all public school students in a state.<sup>60</sup> The decision also opened the doors of state courthouses for those advocates.<sup>61</sup>

With the exception of several states, notably Hawaii and California, most states rely substantially on local taxes to fund public education.<sup>62</sup> Because of that reliance on local taxes, primarily real estate taxes, the funds available for education often vary with the wealth of

---

<sup>56</sup> See Solan, *supra* note 43, at 116-17 (demonstrating inherent limitations of language and thus of plain language rule and supporting instead more flexible interpretative approach).

<sup>57</sup> *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

<sup>58</sup> 411 U.S. 1 (1973).

<sup>59</sup> *Id.* at 6, 40-41.

<sup>60</sup> William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. Rev. 597, 601-02 (1994).

<sup>61</sup> See *id.*; see also Daniel D. McClain, *Developments in State Constitutional Law: 1994, IV. Education*, 26 Rutgers L.J. 993, 1064-79 (1995) (analyzing state supreme court public school funding decisions); John C. Pittenger, *Equity in School Finance: The Federal Government's Role?*, 24 Conn. L. Rev. 757, 762 (1992) (arguing that school finance reform is likely to be "more effective" if guided by "decisions of state supreme courts"). See generally Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 Temp. L. Rev. 1325 (1992) (examining state supreme courts' interpretations of respective state constitutional requirements for education).

<sup>62</sup> See William E. Thro, *The Significance of the Tennessee School Finance Decision*, 85 Educ. L. Rep. 11, 13 (1993) (stating that every state, except Hawaii, relies substantially on local real estate taxes to fund public education); U.S. Dep't of Commerce, *1992 Census of Governments, Public Education Finances*, No. 1, at 18 tbl. 13 (1995) (showing that California, as well as New Mexico and Washington, also rely primarily on sources other than local property taxes to fund public education).

the taxing district. A wide disparity sometimes separates "property poor districts" from "property rich districts."<sup>63</sup> In the northeast, the wealthy districts tend to be in the suburbs and the poor ones may be in the inner cities.<sup>64</sup> Elsewhere, the wealthy districts may be in the cities and the poor ones in the rural areas.<sup>65</sup> No matter where located, wealthy districts can offer educational programs that often are not available in the poor districts—for example, foreign languages, sophisticated science laboratories, and even courses in music and art.<sup>66</sup>

Several themes run throughout school finance litigation. One theme centers on providing students in poor districts with the same educational opportunities that wealthy districts provide to their students. Following that theme, education advocates have emphasized the need for equality in spending.<sup>67</sup> Some of these advocates view money as a proxy for performance. A second theme emphasizes performance and satisfaction of educational standards.<sup>68</sup> That theme emphasizes defining the elements of a constitutionally adequate education before deciding the amount of money school districts should spend.<sup>69</sup> Choosing one theme or another calls for judicial artistry at its best. For nearly a quarter of a century, the courts in New Jersey have striven to meet that need. In nine opinions in two separate cases, *Robinson v. Cahill* and *Abbott v. Burke*, the New Jersey Supreme Court has addressed the funding of public education.<sup>70</sup>

The first case, *Robinson v. Cahill*, resulted in six separate decisions. In those decisions, the court set the agenda for the Legislature to design an adequate system for financing public education. Eventually, the court reluctantly, but decisively, closed the public schools.<sup>71</sup>

---

<sup>63</sup> See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 199 (Ky. 1989); *Abbott v. Burke*, 575 A.2d 359, 383 (N.J. 1990).

<sup>64</sup> See *Abbott*, 575 A.2d at 382 (defining and distinguishing rich suburban districts from poor urban districts).

<sup>65</sup> See *Rose*, 790 S.W.2d at 195 n.7 (finding that "those counties with a high population . . . would produce many times more revenue than counties not so blessed").

<sup>66</sup> See *id.* at 197; *Abbott*, 575 A.2d at 395-97.

<sup>67</sup> See generally Richard J. Stark, Education Reform: Judicial Interpretation of State Constitutions' Education Finance Provisions—Adequacy vs. Equality, 1991 Ann. Surv. Am. L. 609, 610-11 (examining interplay between adequacy and equality theories and their use by state courts in education reform litigation).

<sup>68</sup> For a discussion regarding this theme of educational adequacy, see Symposium, Educational Adequacy: A Theory and Its Remedies, 28 U. Mich. J.L. Ref. 481 (1995).

<sup>69</sup> Stark, *supra* note 67, at 610-11.

<sup>70</sup> See *Robinson v. Cahill*, 358 A.2d 457 (N.J. 1976); *Robinson v. Cahill*, 355 A.2d 129 (N.J. 1976); *Robinson v. Cahill*, 335 A.2d 6 (N.J. 1975); *Robinson v. Cahill*, 351 A.2d 713 (N.J. 1975); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Robinson v. Cahill*, 306 A.2d 65 (N.J. 1973); *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Abbott v. Burke*, 495 A.2d 376 (N.J. 1985).

<sup>71</sup> *Robinson*, 358 A.2d at 459.

Weeks after the last decision, the Legislature adopted a statute designed to meet the constitutional requirement.<sup>72</sup>

The decisions of the United States Supreme Court and the New Jersey Supreme Court reveal how different approaches to the art of judging can yield strikingly different results. The first decision in *Robinson v. Cahill* required the New Jersey Court to determine the constitutional basis for relief. A trial court had predicated relief on the equal protection clause of the United States Constitution.<sup>73</sup> Then, the United States Supreme Court in *Rodriguez* foreclosed relief under the federal equal protection clause.<sup>74</sup> The New Jersey Supreme Court, therefore, turned to two clauses in the state Constitution.<sup>75</sup> One clause guarantees certain fundamental rights, such as those protected by the equal protection clause of the United States Constitution.<sup>76</sup>

Ultimately, however, the New Jersey Court relied on the more specific language of the clause that guarantees a "thorough and efficient system of free public schools."<sup>77</sup> In rejecting a fundamental rights analysis, the court stated that it saw no difference between education and other essential local services, such as police and fire protection or public health services.<sup>78</sup> Not wanting to compel equality of spending for those other services, the court focused on the specific constitutional guarantee for a public education.<sup>79</sup> The text of the New Jersey Constitution did not expressly compel the choice of one clause over the other. Nor did it dictate the timetable for the other branches of government to meet the court's mandate. The decision to remedy the inequity in school finance involved major policy choices. In identifying the constitutional right, defining it, and determining the timetable for its enforcement, the court devised a response to meet the needs of society. The process was not merely discovery, but creation.

---

<sup>72</sup> See N.J. Stat. Ann. § 18A:7A-1 to -52. (West 1989) (Public School Education Act of 1975).

<sup>73</sup> *Robinson*, 303 A.2d at 276.

<sup>74</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6, 40-41 (1973).

<sup>75</sup> For a discussion of state supreme courts and their interpretations of state constitutions, see generally Robert F. Williams, Foreword: A Research Agenda in State Constitutional Law, 66 Temp. L. Rev. 1145 (1993).

<sup>76</sup> See N.J. Const. art. I, ¶ 1.

<sup>77</sup> The clause states: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the state between the ages of five and eighteen years." N.J. Const. art. VIII, § 4, ¶ 1.

<sup>78</sup> *Robinson*, 303 A.2d 273, 285-86 (N.J. 1993). Chief Justice Weintraub saw no difference between education and any other essential local service. *Id.* at 284. The Court refused to decide the case on the claim that the equal protection clause "demands inflexible statewide uniformity in expenditure" for education, or any other local service. *Id.*

<sup>79</sup> *Id.* at 273.

The second opinion in the *Abbott v. Burke* trilogy,<sup>80</sup> decided in 1990, reflects both themes. The court wrote that "the Constitution does not mandate equal expenditures per pupil," only that each student receive an education that is "thorough and efficient."<sup>81</sup> If each district provides a minimum level of education, it can satisfy the constitutional mandate, even if other districts exceed that level. The court continued, however, "[w]hatever the legislative remedy . . . it must assure that these poorer urban districts have a budget per pupil that is approximately equal to the average of the richer suburban districts, whatever that average may be."<sup>82</sup> In the most recent opinion, the court ordered "substantially equivalent funding" while recognizing that "equality of dollar input will not assure equality in educational results."<sup>83</sup> Thus, the tension persists between equality in spending and quality of education.

Across the United States, school finance litigation appears as a triptych of three overlapping panels.<sup>84</sup> The first panel ends with the United States Supreme Court's decision in *Rodriguez*.<sup>85</sup> The second and third panels, with overlapping figures and themes, portray the role of state courts.<sup>86</sup> The second panel begins with the first decision of the New Jersey Supreme Court in *Robinson v. Cahill*.<sup>87</sup> This panel represents the first time that "a state supreme court relied exclusively on a state constitutional provision as a basis for school finance reform."<sup>88</sup> The third panel begins with a montage of decisions in Mon-

---

<sup>80</sup> *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990).

<sup>81</sup> *Id.* at 369.

<sup>82</sup> *Id.* at 409.

<sup>83</sup> *Abbott v. Burke*, 643 A.2d 575, 580 (N.J. 1994).

<sup>84</sup> William E. Thro, the Assistant Attorney General of Colorado and an expert on school finance law, has divided the history of school finance litigation into three "waves." Thro, *supra* note 60, at 598. The metaphor of a triptych is more apt in these remarks.

<sup>85</sup> *Id.* at 601. The first panel extends from the late 1960s until the United States Supreme Court's decision in *Rodriguez*, in which litigants based their claims on the federal Constitution's equal protection clause. *Id.* at 600. Under this "equality theory," litigants argued that education was a fundamental right, that wealth was a suspect class, or that the state school finance system was irrational. *Id.* at 601 n.23.

The "equality theory" was first used in *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971). In that case, the California Supreme Court held that the state's school financing plan, which was based upon local property taxes, violated the equal protection guarantees of both the state and federal constitutions. The court held that the disparities in educational expenditures by district, because of the varying wealth of individual neighborhoods, significantly impacted the quality of education, thus denying students in the poorer districts equal protection of the law. *Id.* at 1244-47. That holding led plaintiffs in more than two-thirds of the states to file suits based on a similar equal protection claim.

<sup>86</sup> See Thro, *supra* note 60, at 601-02.

<sup>87</sup> 303 A.2d 273 (N.J. 1973).

<sup>88</sup> William E. Thro, Note, To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation, 75 Va. L. Rev. 1639, 1645 (1989).

tana,<sup>89</sup> Kentucky,<sup>90</sup> and Texas.<sup>91</sup> These decisions focus not on funding, but on the quality of education.<sup>92</sup> In these decisions, courts have found school finance systems unconstitutional not because of inadequate funding alone, but because they failed to provide an acceptable level of education.<sup>93</sup> This panel remains an unfinished work, as state

---

Unlike in New Jersey, New York's "second panel" of litigation was unsuccessful. In 1974, suit was filed by 27 property-poor school districts, the boards of education of four of New York's five largest cities, and a number of school children and their parents residing in property-poor school districts. See *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982), appeal dismissed, 459 U.S. 1139 (1983). In 1982, the New York Court of Appeals held that the current school finance system was not violative of either the federal or New York State Constitution. See *id.* at 365, 369.

In *Levittown*, the court followed the United States Supreme Court's ruling in *Rodriguez*, and held that education was not a fundamental right under the United States Constitution. The court further concluded that education, although important, was not a fundamental right under the state constitution. Thus, in applying the rational basis test, the court found that the disparities in funding by school districts were rationally related to the legitimate state interest of preserving local control. See *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 664-65 (N.Y. 1995) (restating *Levittown* holding but finding *Levittown* inapplicable to claim that "minimally acceptable educational services are not being provided").

The court also found lacking the plaintiffs' claim that the state education clause required equality of educational offerings throughout the state. Instead, the court stated that the education clause guaranteed, at a minimum, "a sound basic education." See *id.* at 665 (quoting *Levittown*, 439 N.E.2d at 369). Thus, because the plaintiffs failed to advance a claim "of a deprivation of 'minimal acceptable facilities and services' or [of] 'a sound basic education,'" the court rejected the plaintiffs' education clause claim. *Id.*

<sup>89</sup> See *Helena Elementary Sch. Dist. v. State*, 769 P.2d 684, 690 (Mont. 1989) (holding that "the state has failed to provide a system of quality public education granting to each student the equality of educational opportunity guaranteed under Art. X., Sec. 1, Mont. Const.").

<sup>90</sup> See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215 (Ky. 1989) (holding that legislature "has failed to establish an efficient system of common schools").

<sup>91</sup> See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989) (holding state's school financing system unconstitutional under Texas Constitution); see also Thro, *supra* note 60, at 603 (describing how "third wave" of school finance litigation began with plaintiff victories in Montana, Kentucky, and Texas in 1989).

<sup>92</sup> See Thro, *supra* note 60, at 603 ("In these suits, the emphasis has been on differences in the quality of education delivered, rather than the resources available to the districts." (citations omitted)).

<sup>93</sup> See *id.* The third panel differs from the second panel in three fundamental ways. First, the plaintiffs have shifted the basis of the litigation from "equality suits," which focused on the equality of the expenditures, to "quality suits" which emphasize that all "children are entitled to an education of at least a certain quality and that more money is necessary to bring the worst school districts up to the minimum level mandated by the state education clause." *Id.* The focus therefore shifted to the quality of the education delivered, rather than the difference in the amount of funds allocated. Thus, courts have found school finance systems unconstitutional because of the quality of the education provided, not because of inadequate funding. See *id.* Notwithstanding a shift from "equality" to "quality" suits, tension still exists between the two theories.

Second, the third panel focuses on state education clauses, as opposed to state equal protection guarantees. By basing the litigation on state education clauses, court rulings have few implications for other areas of the law. See *id.* Third, state courts in the third



courts continue to balance the need for standards and money in defining the constitutional right to a public education.<sup>94</sup>

## V

Thus far, we have considered judicial artistry when construing statutes and defining constitutional rights. Common-law decision-making also can inspire judicial creativity. Traditionally, family law has been the responsibility of state courts. During the last half of this century, state courts, reacting to fundamental changes in the way people live, have evolved a changing definition of the basic unit of society, the family.

In 1956, when Penny and I were married, fifty percent of American households consisted of traditional nuclear families. By "nuclear family," I mean a husband and wife living together with one or more natural or adoptive children. Although we are looking forward to our fortieth anniversary on June 9, we have become something of an anachronism.

By 1990, only twenty-six percent of American households consisted of nuclear families.<sup>95</sup> With increasing frequency, American families consist of single parents, unmarried cohabitants, or same-sex

---

panel may be more willing to provide detailed guidance in specifying a remedy. See *id.* at 604 ("[C]ourts have been more sweeping in their pronouncements and their willingness to take control of the financing of education.").

<sup>94</sup> See, e.g., *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. 1995).

New York is currently in the midst of the "third panel" type of litigation. See *id.* The plaintiffs in *Campaign for Fiscal Equity* allege that the state's public school finance scheme fails to provide New York City's children with "an opportunity to obtain a sound basic education as required by the [New York] State Constitution." *Id.* at 664. Defendants filed a motion to dismiss the plaintiffs' complaint for lack of standing and for failure to state a cause of action. See *id.* at 664 n.3.

In its ruling, the New York Court of Appeals stated that the court's prior decision in *Board of Education, Levittown Union Free School District v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982), appeal dismissed, 459 U.S. 1139 (1983), interpreted the state education clause to assure that the state would provide "minimal acceptable facilities and services," but did not guarantee the "equality of educational offerings throughout the state." *Campaign for Fiscal Equity*, 655 N.E.2d at 665. Thus, "[i]n order to satisfy the Education Article's mandate, the system in place must at least make available an 'education', a term we interpreted to connote 'a sound basic education.'" *Id.* (quoting *Levittown*, 439 N.E.2d at 369). The Court of Appeals specifically stated that the *Levittown* ruling left open the possibility that a school finance system that failed to provide a "sound basic education" would violate the state education clause. *Id.* Therefore, the court denied the defendants' motion to dismiss plaintiffs' complaint. *Id.* at 670.

<sup>95</sup> Steve W. Rawlings & Arlene F. Saluter, Bureau of the Census, U.S. Dep't of Commerce, *Household and Family Characteristics: March, 1994*, at vii (1995). Of a total of 97,107,000 households, only 25,058,000 were comprised of a married couple and their own children under the age of 18, thus accounting for approximately 26% of all American households from 1970 to 1994.

parents.<sup>96</sup> As of 1993, more than one-fourth of American children were living in single-parent homes, more than double the number in 1970.<sup>97</sup> By 1994, there were an estimated 11.4 million single parents, representing about thirty-one percent of all parent-child arrangements in the United States.<sup>98</sup> By contrast, in 1970, there were only 3.8 million single parents, representing only thirteen percent of all families with children.<sup>99</sup> Even more surprising, in 1994, about thirty-eight percent of all single parents had never been married.<sup>100</sup> The proliferation of unmarried cohabitants is even more dramatic. From 1970 to 1993, the number of unmarried, cohabiting couples increased from 523,000 to 3.5 million.<sup>101</sup> Now there are six unmarried couples for every one hundred couples who are married, compared with one for every one hundred in 1970.<sup>102</sup>

As can be expected with a concept so central to society, some courts have accepted, while others have resisted, changes in the definition of "family." Initially, courts confronted redefining the family in cases concerned with zoning ordinances that restricted property to single-family residential use. The disparate results reflect the tension in society between preserving a traditional definition of the family and what some consider a more functional definition that recognizes changing lifestyles.

For example, the United States Supreme Court has concluded for zoning purposes that six unrelated students do not constitute a family.<sup>103</sup> The New Jersey Supreme Court, however, has reached the opposite result, holding that ten unrelated college students are a family under applicable zoning ordinances.<sup>104</sup> Notwithstanding its rejection of unrelated students as a family, the United States Supreme Court later accepted a grandmother and her ten-year-old grandchild as a

---

<sup>96</sup> See generally Martha Minow, *The Free Exercise of Families*, 1991 U. Ill. L. Rev. 925, 930-32 (noting that traditional American nuclear family has been subsumed by range of alternatives, including single-parent families and cohabiting unmarried adults); Libby Post, *The Question of Family: Lesbians and Gay Men Reflecting a Redefined Society*, 19 *Fordham Urb. L.J.* 747, 748 (1992) (stating that "the heterosexual two-parent, bread-winner father and homemaker-mother family is now the exception to the rule").

<sup>97</sup> Arlene F. Saluter, Bureau of the Census, U.S. Dep't of Commerce, *Marital Status and Living Arrangements: March, 1993*, at xi (1994). In 1993, 27% of children under 18 lived with one parent, up from 12% in 1970. *Id.*

<sup>98</sup> Rawlings & Saluter, *supra* note 95, at xiii.

<sup>99</sup> *Id.* In 1994, approximately 9.9 million of these single parents were women versus 1.6 million men. *Id.* at xvi.

<sup>100</sup> *Id.* at xvii.

<sup>101</sup> Saluter, *supra* note 97, at vii.

<sup>102</sup> *Id.* at viii.

<sup>103</sup> See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2-3, 7 (1974).

<sup>104</sup> See *Borough of Glassboro v. Vallorosi*, 568 A.2d 888, 894-95 (N.J. 1990).

family.<sup>105</sup> Although the blood ties between grandparent and grandchild were not identical to those in the traditional nuclear family, they sufficed to constitute a "family" in the eyes of the Court. In comparison, the Missouri Court of Appeals has ruled that an unmarried couple living together with two children of the male cohabitant and one child of the female cohabitant are not a family.<sup>106</sup> At least in Missouri, a nonnuclear family unrelated by blood or marriage does not constitute a family.

Courts have been compelled to react to changes in family structure in landlord-tenant disputes concerning nonconventional families. The New York Court of Appeals, for example, has ruled that a surviving homosexual companion of a tenant who had leased an apartment is entitled to protection under New York City's rent control laws as a surviving family member.<sup>107</sup> Similarly, the Alaska Supreme Court rejected a landlord's objection on religious grounds to renting to an unmarried heterosexual couple.<sup>108</sup> In contrast, a California Court of Appeals ruled that a landlord's constitutional right to the free exercise of religion freed him from the obligation under antidiscrimination laws to rent to an unmarried couple.<sup>109</sup> No coherent theory explains these disparate results.<sup>110</sup> They represent the uncoordinated efforts of different courts grappling with a seismic sociological change.

With changes in family structure, courts have recognized in law, as architects have recognized in building design, that form follows function. When resolving issues concerning adoption, support, and custody, state courts have accepted as families people unrelated by blood, marriage, or adoption. Across the nation, state courts are reexamining the roles of biological ties and other legal relationships in the family. Courts consider those relationships against a background of new technologies, medical advances, and evolving life styles.<sup>111</sup>

---

<sup>105</sup> See *Moore v. City of East Cleveland*, 431 U.S. 494, 498-99 (1977).

<sup>106</sup> See *City of Ladue v. Horn*, 720 S.W.2d 745, 747, 750-52 (Mo. Ct. App. 1986).

<sup>107</sup> See *Braschi v. Stahl Assocs.*, 543 N.E.2d 49 (N.Y. 1989).

<sup>108</sup> *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska), cert. denied, 115 S. Ct. 460 (1994).

<sup>109</sup> See *Donahue v. Fair Employment Hous. Comm'n*, 2 Cal. Rptr. 2d 32, 46 (Ct. App. 1991), review dismissed, 859 P.2d 671 (Cal. 1993).

<sup>110</sup> See Walter Wadlington, *Domestic Relations: Cases and Materials* 11-12 (3d ed. 1995) (describing *Swanner* and *Donahue* and concluding need for scholarly efforts to conceptualize modern family).

<sup>111</sup> See Barry R. Furrow et al., *Health Law* § 22-2 (1995) (noting that question of "[w]hat constitutes a family" is at heart of legal debate over "utilization of assisted conception technology").

For example, until recently, courts refused to recognize same-sex marriages.<sup>112</sup> Two years ago, however, the Hawaii Supreme Court reversed a trial court's dismissal of a suit by a same-sex couple to compel the director of the state department of health to issue them a marriage license.<sup>113</sup> The court ruled that denial of a license could constitute sex-based discrimination and ordered the trial court to review the application for the license under the strict scrutiny required by the Hawaii Constitution's guarantee of equal protection.<sup>114</sup> No matter how one reacts to the opinion, all must acknowledge its recognition of a previously unrecognized form of marriage.

In another example, the *Baby M* case, the New Jersey Supreme Court confronted a conflict made possible by medical technology.<sup>115</sup> In that case, William Stern signed a surrogacy contract with Mary Beth Whitehead pursuant to which Mrs. Whitehead was to be inseminated with Mr. Stern's sperm, carry their child to term, and on birth to deliver the child to the Sterns.<sup>116</sup> Mr. Stern agreed to pay Mrs. Whitehead \$10,000 upon completion of the contract's terms.<sup>117</sup> A dispute arose because Mrs. Whitehead, after giving birth, found that she could not honor her promise to give up the baby.<sup>118</sup> Although no legislation specifically addressed surrogacy contracts, the court decided the case by application of long-standing principles of family law: the legislative prohibition and general public policy against baby selling, the law requiring strong evidence before terminating parental rights, and various other laws regulating adoption and custody.<sup>119</sup> Because the surrogacy arrangement conflicted with these laws and policies, the court found it invalid.<sup>120</sup>

---

<sup>112</sup> See, e.g., *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (upholding denial of marriage license to same-sex couple); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (upholding state statute denying marriage license to same-sex couple by defining marriage as a "union between persons of the opposite sex"), appeal dismissed, 409 U.S. 810 (1972); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) (upholding state's refusal to issue marriage license to two men); see also *Adams v. Howerton*, 673 F.2d 1036, 1038, 1040 (9th Cir.) (upholding federal immigration law and concluding that Congress intended to exclude same-sex marriages for citizenship purposes), cert. denied, 458 U.S. 1111 (1982); *Burkett v. Zablocki*, 54 F.R.D. 626, 626 (E.D. Wis. 1972) (dismissing suit by two women to compel issuance of application for marriage license).

<sup>113</sup> *Baehr v. Lewin*, 852 P.2d 44, 54 (Haw. 1993).

<sup>114</sup> *Id.* at 67 (holding that sex is "suspect" category for purposes of equal protection analysis under Hawaii Constitution).

<sup>115</sup> *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

<sup>116</sup> *Id.* at 1235.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1236-37.

<sup>119</sup> See *id.* at 1240-50 (explaining conflict with existing statutes and public policies of New Jersey).

<sup>120</sup> *Id.*

Another vexing problem concerns claims of custody by unwed biological fathers. The problem arises when the biological mother surrenders the child at birth, the child bonds with the adoptive parents, and the biological father then seeks custody. Two highly publicized cases from the Supreme Courts of Iowa<sup>121</sup> and Illinois<sup>122</sup> have strengthened the rights of biological fathers by ordering adoptive parents to return custody of children to the natural parents. In contrast, the New York Court of Appeals<sup>123</sup> and the California Supreme Court<sup>124</sup> have ruled that unwed fathers may veto the adoption of their newborn children only if they "promptly" demonstrate their willingness to assume responsibility as parents. Consistent with that proposition, the Florida Supreme Court has held that an unwed biological

---

<sup>121</sup> In re B.G.C., 496 N.W.2d 239 (Iowa 1992), centered around the adoption of "Baby Jessica" by Jan and Robby DeBoer. After the DeBoers accepted custody of Jessica, Jessica's biological mother, Cara Clausen, revealed that she had misrepresented the identity of Jessica's biological father, Daniel Schmidt. Schmidt later reunited with Clausen and contested the DeBoers' adoption of Jessica, asserting that he never consented to the termination of his parental rights. *Id.* at 241.

The Iowa Supreme Court ruled in favor of Schmidt, finding that abandonment was not established and that he had done everything reasonably possible to assert his parental rights once he discovered that Jessica was his child. *Id.* at 246. The state supreme court in the DeBoers' home state, Michigan, ultimately ruled that the Michigan courts did not have jurisdiction to modify the Iowa ruling under the Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act. In re Clausen, 502 N.W.2d 649, 656-60 (Mich. 1993). After the U.S. Supreme Court denied the DeBoers' petition for certiorari, 114 S. Ct. 1 (1993), the DeBoers surrendered Jessica, then two-and-one-half years old, to her biological parents.

<sup>122</sup> In re Doe, 638 N.E.2d 181 (Ill.), cert. denied, 115 S. Ct. 499 (1994), involved an infant known as "Baby Richard," who was surrendered by his birth mother and adopted by another couple. The birth mother told the biological father that the child had died at birth. *Id.* at 181. Fifty-seven days after the child was born, the mother admitted to the father that the statement about the baby's death was a fabrication. *Id.* at 182. The father attacked the adoption, contending that his consent was necessary. *Id.* The trial court rejected that argument, reasoning that the father's consent was unnecessary because he had not demonstrated an interest in the child during the first month of the child's life. *Id.* The Illinois Supreme Court reversed, concluding that the evidence did not support the lower court's finding, and awarded custody to the natural father. *Id.* at 183. By the time the father obtained custody, Richard was almost four years old. *Id.*

<sup>123</sup> See, e.g., *Robert O. v. Russell K.*, 604 N.E.2d 99, 103-04 (N.Y. 1992) (barring biological father from contesting adoption 18 months after child had been placed with adoptive parents because action was not "prompt" under state statute); In re Raquel Marie X., 559 N.E.2d 418, 425 (N.Y.) (stating that "a father who has promptly taken every available avenue to demonstrate that he is willing and able to enter into the fullest possible relationship with his under-six-month-old child should have an equally fully protected interest in preventing termination of the relationship by strangers"), cert. denied, 498 U.S. 984 (1990).

<sup>124</sup> See In re Kelsey S., 823 P.2d 1216, 1237 (Cal. 1992) (holding that Constitution protects rights of biological father who "sufficiently and timely demonstrate[s] a full commitment to his parental responsibilities").

father may not prevent adoption of his child if he did not support the mother emotionally during her pregnancy.<sup>125</sup>

The most controversial custody decisions involve the rights of homosexual parents and their partners. Throughout the 1970s, the prevailing notion in judicial opinions was that gay partners made bad parents.<sup>126</sup> Homosexual parents rarely succeeded in gaining custody of their children. Just twenty years ago, a New York trial court denied custody of a ten-year-old daughter to her lesbian mother, characterizing the mother's relationship with her partner as "clandestine deviate conduct."<sup>127</sup> Nine years later, the Supreme Court of Virginia denied custody to a homosexual father, writing that "his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law."<sup>128</sup> In a more recent case, the Virginia Supreme Court awarded custody of a three-year-old boy to his maternal grandmother rather than to his lesbian mother.<sup>129</sup> The court wrote that since certain conduct inherent in lesbianism can constitute a felony in Virginia, the mother's lifestyle was relevant to determining custody.<sup>130</sup>

As the century draws to a close, however, some courts, many of them in the northeast, have considered the homosexuality of a parent irrelevant, absent proof that the parent's sexual orientation has harmed the child. The Supreme Judicial Court of Massachusetts rejected a trial court's conclusions that growing up in a lesbian household was necessarily bad for a child.<sup>131</sup> A finding of parental unfitness, the court wrote, "must be predicated upon parental behavior which adversely affects the child."<sup>132</sup> Absent "evidence suggesting a correlation between the mother's homosexuality and her fitness as a parent," the court held that a parent's homosexuality was not determinative of a parent's fitness.<sup>133</sup> Similarly, the New York Appellate Division in 1984, just eight years after the New York trial court had

---

<sup>125</sup> See *In re Baby E.A.W.*, 658 So. 2d 961, 965 (Fla. 1995) (holding that trial court "may consider the lack of emotional support and/or emotional abuse by the father of the mother during her pregnancy" in making determination of father's abandonment, thus negating need for his consent to adoption), cert. denied, 116 S. Ct. 719 (1996).

<sup>126</sup> See Rhonda R. Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties*, 11 U. Dayton L. Rev. 275, 329 (1986) (stating that gay parents are often denied custody due to belief that "if gay parents have custody, the children will be harmed because of the immoral environment").

<sup>127</sup> *In re Jane B.*, 380 N.Y.S.2d 848, 854 (Sup. Ct. 1976).

<sup>128</sup> *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985).

<sup>129</sup> *Bottoms v. Bottoms*, 457 S.E.2d 102, 107 (Va. 1995).

<sup>130</sup> See *id.* at 108 (describing such illegal conduct as "another important consideration in determining custody").

<sup>131</sup> See *Bezio v. Patenaude*, 410 N.E.2d 1207, 1215 (Mass. 1980) (disagreeing with trial court's finding that lesbianism renders mother unfit to further her children's welfare).

<sup>132</sup> *Id.* at 1216.

<sup>133</sup> *Id.*

condemned same-sex relationships, acknowledged that "the mere fact that a parent is a homosexual does not alone render him or her unfit as a parent."<sup>134</sup> In 1982, a superior court in Vermont likewise awarded sole custody of two young boys to their homosexual mother rather than to their heterosexual father.<sup>135</sup>

Unmarried couples have made similar advances. Last year, the New York Court of Appeals ruled that the unmarried companion, whether male or female, of a child's biological mother could adopt the mother's child.<sup>136</sup> In reaching that result, the court rejected a strict reading of New York's adoption statute that would have restricted the right to adopt to the mother's married male partner.<sup>137</sup> Similarly, the New Jersey Appellate Division recently ruled that a lesbian could adopt her partner's twin children without prejudicing the partner's maternal rights.<sup>138</sup>

Brush stroke by brush stroke, state courts are painting a new portrait of the American family. To some, the portrait is appalling; to others, it is confusing; and to still others, it realistically portrays the most recent stage in the evolution of the family.

When we look at issues as disparate as school finance and the redefinition of the family, the question arises whether they have anything in common. Justice Brennan's jurisprudence provides an answer. Fundamental to Justice Brennan's jurisprudence is his belief in the inherent dignity of every individual. That belief sustains his compassion "for the poor, for the members of minority groups, for the criminally accused, for the displaced persons of the technological revolution, for alienated youth, for the urban masses, for the unrepresented consumer—for all, in short, who do not partake of the abundance of American life."<sup>139</sup> Respect for the dignity of the individual sustains both the constitutional right to a public education and the changing definition of the family.

When viewed from a sufficient distance, judges share a common purpose with creative actors such as artists, musicians, and poets. The

---

<sup>134</sup> *Guinan v. Guinan*, 477 N.Y.S.2d 830, 831 (App. Div. 1984).

<sup>135</sup> See *Madeiras v. Madeiros*, 8 F.L.R. 2372, 2373 (Vt. 1982) (finding that mother's homosexuality did not have negative effect on children).

<sup>136</sup> *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995).

<sup>137</sup> *Id.* at 401 (basing its interpretation on "the spirit behind the modern-day amendments: encouraging the adoption of as many children as possible regardless of the sexual orientation or marital status of the individuals seeking to adopt them").

<sup>138</sup> *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 536 (N.J. Super. Ct. App. Div. 1995).

<sup>139</sup> Nat Hentoff, *The Justice Breaks His Silence*, *Playboy*, July 1991, at 120, 155 (quoting 1986 speech to ABA's Section on Individual Rights and Responsibilities), reprinted in *The Playboy Interview*, Justice William J. Brennan, Jr. *Freedom First*, supra note 22, at 18, 25.

lawyer-turned-poet Archibald MacLeish captured the essence of the shared endeavor in an essay entitled *Art and Law*.<sup>140</sup> After asking rhetorically how lawyers and judges might define the "business of the law," he continued:

The business of the law is to make sense of the confusion of what we call human life—to reduce it to order but at the same time to give it possibility, scope, even dignity.

But what, then, is the business of poetry? Precisely to make sense of the chaos of our lives. To create the understanding of our lives. To compose an order which the bewildered, angry heart can recognize. To imagine man.<sup>141</sup>

What, then, can we conclude from the comparison of the work of artists and judges? Several conclusions emerge. Both artists and judges are products of their time and place. The work of both requires critical judgments. Both work within constraints. Each makes subjective judgments. Judges, even those committed to the plain meaning of statutes, cannot escape their background, experience, and basic beliefs about law and society. Finally, the judge, like the artist, studies the human condition and tries to make sense of the chaos of life.<sup>142</sup> Recalling these sometimes forgotten attributes of the art of judging may lead to a deeper appreciation of both the role of courts and the judicial process.

---

<sup>140</sup> Archibald MacLeish, *Riders on the Earth, Essays and Recollections* 82 (1978).

<sup>141</sup> *Id.* at 85-86.

<sup>142</sup> "Beauty is something wonderful and strange that the artist fashions out of the chaos of the world in the torment of his soul." W. Somerset Maugham, *The Moon and Sixpence* 99 (Signet Classic 1993) (1919).