

Luck in the Courts

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A situation in which luck determines what happens in our lives is composed of two elements: (1) the existence of a multiplicity of possible outcomes, and (2) lack of control over the situation, namely that we have no way, or at least no meaningful way, to affect the outcome. Adjudication is a luck situation: law is indeterminate and in a decent society litigants are not supposed to have control over their judges. Can we minimize luck in adjudication? The primary way to do this is to make every decision given in the system resemble as much as possible the decision that would have been reached by the majority of the judges active in the system had they all been given the opportunity to decide the case at hand as a group. Put differently, luck in judicial decisions can be lessened by increasing the number of judges in panels. Even though in a decent society the option of controlling the conduct of judges is out of the question, several means do exist for litigants to employ some control over the identity of the persons who are to resolve their disputes.

INTRODUCTION

A situation in which luck determines what happens in our lives is composed of two elements: (1) the existence of a multiplicity of possible outcomes, i.e., any of two or more (good or bad) outcomes may occur, and (2) lack of control over the situation, namely that we have no way, or at least no meaningful

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way, to affect the outcome.¹ The paradigmatic case of a luck-determined situation, in which both these elements are easily observable, is of course playing the lottery.²

Our lives are pervaded by luck. The ancients understood this well, and accepted it as part of the nature of things. Modernity, whose hero is the autonomous decision-maker, seeks to suppress luck. Addressing the element of multiplicity of possible outcomes, modernity promotes the rule of law — a system of uniform legal rules to which all citizens are supposed to be equally subject. The law widely enforces a "reasonable conduct" standard, that is supposed to reflect generally accepted cultural norms, and it guarantees a "hard core" of social rights to assure all citizens a certain level of welfare that is independent of their innate skills and the social conditions under which they grew up. Addressing the element of lack of control, modernity takes great efforts to increase our control over nature, so as to eliminate to the extent possible the harm it inflicts. But, needless to say, luck is still as dominant in our lives as it was in the lives of those who lived in previous ages.

Judges have vast powers to affect the lives of other people. A judge can take away a person's freedom, children, assets or even, in some jurisdictions, her life. It is illuminating to compare the modes of operation typical of judges and legislatures in this respect. Legislators work as a group to influence another group of human beings — usually a large and undefined group of people. A judge is an individual who affects the life of another individual deeply. But the way judges affect our lives is to a great extent a matter of luck. First, as I shall show below, in many cases there exists a multiplicity of possible outcomes for resolving a legal dispute. Secondly, we are supposed to have no way of controlling the judges who determine our cases — in a decent society the basic norm we expect judges to abide by is impartiality.

Interestingly, the role of luck in adjudication is much more significant than we have been ready to admit to date. (Is modernity's notion of the rule of law embedded too uncritically in our minds?) Can we eliminate or minimize luck in adjudication? In Part I I shall provide some brief

1 S.L. HURLEY, *JUSTICE, LUCK, AND KNOWLEDGE* 106-09 (2003); THOMAS NAGEL, *MORTAL QUESTIONS* (1979).

2 But in many instances in which one out of a multiplicity of outcomes may materialize in our lives we do have a certain ability to cause one particular outcome to materialize even though the basic situation is one of lack of control. Whether we shall be healthy or ill is to a great extent beyond our control and thus a matter of luck. But we can still increase our chances of being healthy by not smoking, by eating a healthy diet, by watching our weight, by exercising, etc.

explanations regarding the sources of luck in adjudication. Most of my discussion, however, in Parts II and III, will be devoted to some preliminary thoughts regarding ways to reduce luck in adjudication, and what it might mean to live in a legal system that takes a commitment to reducing luck in adjudication seriously. (This discussion may also be read as providing modest suggestions to the literature on the institutional design of courts, currently an underdeveloped area of legal theory.) In Part II I shall focus on ways of reducing luck in adjudication by restricting the multiplicity of possible legal outcomes of disputes. Even though in a decent society the option of controlling the conduct of judges is out of question, in Part III I shall nonetheless discuss some ways of reducing luck in adjudication by "controlling" judges.

I. LUCK IN THE COURTS IN THE ERA OF REALISM

Multiplicity of possible outcomes is an essential element in a luck-determined situation. Minimizing the multiplicity of outcomes in adjudication is exactly what legal formalism tries to do. Legal formalism tries to turn the process of adjudication into a procedure, as if judicial decision-making was similar to flying a plane or changing a punctured tire, or as if it resembled the process of solving a geometrical problem. Acting according to procedures is not supposed to be influenced by the choices of the person applying the procedure. Rather, the outcome of the action is embedded in the procedure, so to speak.

As is well-known, however, legal realists (in the descriptive prong of their argument) showed that adjudication is not a matter of following procedure. Rather, at the center of the judicial decision-making process is the judge's exercise of discretion when faced with a large number of contents that suggest themselves and that are open to diverse interpretations. Realists therefore argued that the unique character, personality, life experience, world view and so forth of the judge affect the process of judicial decision-making and significantly contribute to it.

By placing the judge in the center of the legal decision-making process, legal realism set free "the devil of subjectivism" — the claim that adjudication is not a manifestation of the rule of law, but a demonstration of the rule of men. The main route by which post-formalist jurists sought to overcome the problem of the role played by the personality of the judge in adjudication is what I will call "determinacy through culture." The thinker who proposed the most fully-developed argument concerning this route was Karl Llewellyn. As is well-known, Llewellyn was a great admirer of the

decision-making processes of the common law. Early in the development of his thought, he embarked on the project of restoring the credibility of the common law within the framework of a realist perception of the law. Llewellyn sought to show that the decision-making processes of the common law are characterized by a reasonable degree of determinacy. He did this by presenting the common law as a cultural system.

Llewellyn did not use the word "culture" when speaking about the law; he resorted instead to the concept of "tradition." However, had he been writing in the last two decades of the twentieth century — the years of the "cultural turn," when the concept of culture became central in many fields in the humanities, the social sciences and law³ — he would most certainly have used this concept in his portrayal of the law.⁴

Llewellyn's argument rests on two pillars, which can be viewed as partly overlapping.⁵ The first relates to the content of the law and to the modes of thinking typical of the common law, which, Llewellyn argued, have a deep effect on the manner in which judges and lawyers operate when they perform legal tasks, and which considerably restrict the scope of what they can think or do. Judges and lawyers working within the same legal system will therefore act similarly, and their handling of similar legal problems will not vary significantly.⁶

The second pillar that Llewellyn used to support his argument about the determinacy of the common law relates to the professional culture of jurists in general, and of judges in particular. Llewellyn speaks about adjudication in terms of a "craft," that is, as a profession with a repertoire of do's and

3 BEYOND THE CULTURAL TURN: NEW DIRECTIONS IN THE STUDY OF SOCIETY AND CULTURE (Victoria E. Bonnell & Lynn Hunt eds., 1999); CULTURE AND ECONOMY AFTER THE CULTURAL TURN (Larry Ray & Andrew Sayer eds., 1999); William Sewell Jr., *The Concept(s) of Culture*, in BEYOND THE CULTURAL TURN: NEW DIRECTIONS IN THE STUDY OF SOCIETY AND CULTURE, *supra*, at 35, 36-37; Richard Shweder, *Culture: Contemporary Views*, in 5 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 3151 (2001).

4 Several times in his writings Llewellyn speaks about the law that is created and applied in the courts in terms of "culture." *See, e.g.*, KARL LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 113 (Paul Gerwitz ed., 1989) [hereinafter LLEWELLYN, THE CASE LAW SYSTEM]; KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 49-50 (1960) [hereinafter LLEWELLYN, THE COMMON LAW TRADITION]; Karl Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 4 HARV. L. REV. 1223, 1250 (1931).

5 *See generally* Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607 (2007).

6 LLEWELLYN, THE COMMON LAW TRADITION, *supra* note 4, at 19-61, 119, 154-57, 201, 203; LLEWELLYN, THE CASE LAW SYSTEM, *supra* note 4, at 11, 66-76, 80.

don't's that craftspeople internalize in the course of acquiring professional experience (without being highly aware of the nature of these rules or of the influence of these rules on them). According to Llewellyn, the work practices and the ways of argumentation commonly used by judges operate as a repertoire of professional rules of this type, and channel judges to non-subjective modes of action. Furthermore, Llewellyn claimed, judges' actions are constantly scrutinized and monitored by others who operate within their professional culture. Judges' opinions are read by other judges, by lawyers and by legal scholars. Readers react positively to judgments that comply with the norms that are accepted within their group, and negatively to judgments that deviate from them. This process of reading and criticism ensures that judges' decisions will comply with criteria acceptable to the professional culture of lawyers and judges.⁷

But what exactly is the problem that Llewellyn manages to solve? Llewellyn persuasively argues that there is objectivity in the law, that is, that the legal culture within which judges operate severely constrains them, so that they cannot decide in a highly subjective manner. Llewellyn had it right. The law created and applied in the courts is indeed a cultural system. The collapse of formalism does not mean unbridled subjectivism.

But Llewellyn fails to resolve the problem of multiplicity of outcomes in the law. At the root of Llewellyn's failure lies the unique relationship between human beings and the cultures within which they live. Culture constitutes human perception, thinking and conduct. But culture does not constitute thought and human conduct in the rigid way that genetics determines human existence (or that of any other living creature) on the biological level. Human beings have agency. To be human is to constantly make choices within the context of a cultural repertoire of options. To be human is to be creative and innovative.

In a similar vein, the legal culture constitutes the legal subject — the jurist. Hence, jurists who were socialized in the same legal culture will operate according to its contents and their actions will be similarly structured. But the legal culture does not erase the legal subject. To be a judge is constantly to make choices within the context of the cultural repertoire of the law. To be a judge is to be creative at least sometimes. Llewellyn's argument, therefore,

7 LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 4, at 26, 53, 154-57, 205, 213-35; LLEWELLYN, *THE CASE LAW SYSTEM*, *supra* note 4, at 2, 76-77; WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 219 (1973). Similar arguments were advanced by Felix Cohen in his seminal *Transcendental Nonsense and the Functional Approach*. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843-45 (1935).

cannot show that the law can ensure one clear predetermined answer for many of the problems that arise within it in a way that removes the particular, random, unique, personal choices of the judge who is authorized to decide them.⁸

Legal realism's devastating attack on formalism turned the question of law's determinacy into a central issue of twentieth-century jurisprudence.⁹ What is the connection between law's indeterminacy and luck in adjudication? The answer is that law's indeterminacy means that there exists a multiplicity of outcomes in adjudication. The other source of luck in adjudication, lack of control, derives from the fact that judges are randomly assigned by the system to resolve legal disputes. Thus, it is the combination of law's indeterminacy and the randomness in assigning judges to proceedings that makes adjudication a luck-determined situation. (Note that even if in many cases lawyers can fairly accurately estimate how a specific judge will rule in a particular case, this is of little help to litigating parties so long as judges are randomly assigned to resolve disputes, as if litigating parties participated in a lottery in which judges are the prizes.)

It is interesting to note that even though the question of law's determinacy was a central issue of twentieth-century jurisprudence, the existence of luck in adjudication and its implications for litigating parties and for the design of the judicial system have not been addressed in the wide-ranging debates held on the issue of the nature of adjudication in the post-formalist era. In the following pages I wish to present some preliminary thoughts on this issue. Specifically, I wish to address the question whether we can take any measures to reduce the element of luck in adjudication. In an era that has internalized the realist perception of judges as located and operating in a culture, the option of reducing luck in adjudication by way of restricting the multiplicity of outcomes available to judges is unfeasible. Rather, as I shall argue in Part II (and this is my central argument in this Article), in this era the way to reduce luck in adjudication is to make every decision

⁸ For a critique of Llewellyn's stance on this point, see Charles Clark & David Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 *YALE L.J.* 255 (1961).

Llewellyn himself was aware of this. His writings reveal a heroic effort to show that certainty prevails in the law but, beside it, an acknowledgement of the particular judge's contribution to the determination of the judicial decision's contents, in a way that undermines the certainty of the law. See, e.g., LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 4, at 24, 49. See also TWINING, *supra* note 7, at 219.

⁹ Paul Gewirtz, *Editor's Introduction* to LLEWELLYN, *THE CASE LAW SYSTEM*, *supra* note 4, at ix, xvii.

taken in the system resemble as much as possible the decision that would have been taken by the majority of the judges active in the system had they all been given the opportunity to decide the case at hand as a group. Whereas formalism tries to eliminate luck in adjudication by eliminating the multiplicity of options available to judges, in a realist era the way to do that is to create, to the extent possible, a situation in which all the judges address the issue and the majority view determines the outcome.

I wish to avoid the impression, however, that it is my position that the consideration of reducing luck should always be preferred over all others. Other considerations could be relevant to the shaping of the judicial decision-making process, and they may need to be granted preference over the consideration of reducing luck. I wish to emphasize, therefore, that my intention is a modest one, namely, to make some suggestions as to how the judicial decision-making process might look if we took the commitment to reduce luck in adjudication seriously.

II. REDUCING LUCK BY REDUCING RANDOMNESS

A. Large Panels as a Way of Reducing Luck

Let's assume that a case is brought to trial. Let's assume that the options before the judge are only two: the defendant can be found guilty or not guilty, liable or not liable. In a realist era, the legal culture within which judges operate considerably constrains the decisions they can make (the legal culture creates "objectivity" in the judges' decision-making process). Therefore, we may assume that most judges operating within the system would reach the same decision in the case, if they were called upon to decide it. However, since the legal culture within which the judges operate does not entirely constrain their decisions and allows them significant latitude for the expression of their world views, personalities, dispositions, life experience, and so forth, some of the judges operating within the system would reach the opposite decision.¹⁰

Let's assume that we are dealing with a criminal case, and that the

¹⁰ It is noteworthy that in many cases legal decisions are not binary. For instance, the amount of damages (including punitive damages) to which a plaintiff is entitled, the length of a sentence of a person convicted of a crime, the specific provisions of child custody and visitation rights arrangements — in all such cases, there are always more than two possible outcomes, which means that the element of luck in adjudication is increased.

distribution between these two groups of judges is 60% for acquittal and 40% for conviction. If John is brought to trial, the system would randomly assign one of the judges to the case. (This randomness is of the same quality as the randomness that pertains in a lottery or in a roulette game.) John faces a 40% chance of conviction (undoubtedly, a very high chance). This is so, even though if John were tried by a panel composed of all the judges in the system, he would be acquitted. If John is convicted, he would certainly be justified in saying to himself, with increasing frustration, in the long idle hours in jail: "Had I had more luck, I would have been tried by another judge and I would have been a free man now."

So, clearly, if we want to eliminate the element of luck in adjudication entirely, the way to do it is by requiring all judges in the system to try all cases. Needless to say, that would be extremely costly. But we can reach the goal of eliminating luck in adjudication, or at least the more modest goal of reducing luck in adjudication, by opting for an intermediate alternative: each case would be heard neither by one randomly assigned judge nor by all the judges, but by a panel composed of several judges. Put differently, the main way of reducing the luck involved in adjudication is to establish large judicial panels. The higher the number of judges in the panel, the lower the randomness of the decision reached in the proceedings, i.e., the smaller the element of luck involved in the adjudication.

Let's return to John. With one randomly assigned judge trying his case, he has only a 60% chance of acquittal. With all the judges collectively deciding his case he has a 100% chance of acquittal. The larger the panel handling John's case, the higher the likelihood of his acquittal. Thus, if we assign three judges to John's case, the odds of acquittal rise to 64%; if we assign five judges, the odds of acquittal rise to 68%, and so forth.

As noted, any increase in the number of judges in a panel entails costs. Therefore, the system can operate only if the number of judges in the panel increases solely in cases where the implications for the litigants involved are serious: criminal proceedings in which defendants face harsh sentences, custody battles, and so forth. Similarly, the system can empanel a large number of judges when the outcome of the judicial proceedings will have considerable implications for large numbers of people, as would be the case in important constitutional and economic decisions.

Indeed, it was in this spirit that Maimonides noted: "Capital cases cannot be tried by less than twenty-three, that is, the Small Sanhedrin."¹¹ From a marginal note by Maimonides it is clear that he intended that this principle

11 THE CODE OF MAIMONIDES: THE BOOK OF JUDGES 17 (Abraham M. Hershman trans., Yale Univ. Press 1949) (*Laws of Sanhedrin* 5:2) [hereinafter MAIMONIDES, BOOK

should be applied not only in capital cases but in most criminal cases: as the direct consequence of a decision in a criminal case is very significant for the defendant, such a decision should not be left to a randomly assigned judge but should be made by a large panel of twenty-three judges (the "Small Sanhedrin").¹²

An example of the application of this line of thought, which assumes that luck in judicial decisions can be lessened by increasing the number of judges in the panel, appears in a decision by Judge Richard Posner.¹³ A manufacturer was accused of negligence for having supplied AIDS-contaminated blood products to its clients. The question was whether to allow a class-action against the manufacturer to go forward — a claim, in other words, which would be considered by six jurors and one judge and would decide the claims of *all* the members of the class — or else to permit thousands of separate proceedings against the manufacturer to take place in numerous jurisdictions (both state and federal) and before large numbers of judges and jury panels. Judge Posner ruled that a class action should not be allowed in this case. Prior to the case that reached Judge Posner's court, thirteen other courts had already heard plaintiffs' claims against the manufacturer, and twelve of them had rejected them. Losing the class action would definitely have resulted in the manufacturer's bankruptcy. Additionally, if the new jury (by now, the fourteenth in number) were to find for the plaintiffs (unlike the overwhelming majority of its thirteen predecessors), it would decide the future of an entire industry. In a class action, therefore, the incentive of the manufacturer to settle was far greater than if it faced a series of separate proceedings. For all these reasons, Judge Posner ruled that there was no room for a class action in this case.

In the spirit of this argument, Kornhauser and Sager write that if it is assumed that judges reach the normatively "correct" result more often than the "incorrect" one, then increasing the number of judges dealing with a case increases the probability of reaching the correct result. Increasing the number of judges is similar to permitting multiple attempts to draw the correct die

OF JUDGES]. I am grateful to Rabbi Yaakov Cohen, Rabbi Harel Gordin and Itamar Brenner for their assistance concerning Halakhic sources.

12 "The rules obtaining in capital cases obtain also in cases involving flogging and those involving banishment." *Id.* at 32 (*Laws of Sanhedrin* 11:4). *See also* Mishnah, *Sanhedrin* 4:1 (capital cases by twenty-three); Babylonian Talmud, *Sanhedrin* 33b (the "capital cases" category includes flogging and banishment cases).

13 *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995); *see also* Warren F. Schwartz, *Long Shot Class Actions* (Berkeley Program in Law & Econ., Working Paper No. 22, 1999), available at <http://repositories.cdlib.org/blewp/22>.

from a bag containing two types of dice — dice with the correct answer and dice with the incorrect one, when the number of dice representing the correct answer is bigger than the number of dice representing the incorrect one.¹⁴

B. A Sum Total of Rulings by Judges from All Instances

If the insight about the inverse relation between the size of a panel and the extent of luck in adjudication is correct, we can derive from it an additional conclusion concerning the way courts should reach decisions.

Let us assume that *X* sues *Y* for the sum of 100. The Magistrate's Court accepts the claim. In an appeal to the District Court, the ruling is upheld by all three judges in the panel. In an appeal to the Supreme Court, the claim is rejected by two of the three justices on the panel and accepted by the third. As the law currently stands, *X*'s claim would be rejected.

Now let us assume that *X* is accused of assault, and convicted by the Magistrate's Court. In an appeal to the District Court, *X* is convicted by all three judges in the panel. At the Supreme Court, *X* is acquitted by a majority of two of the three justices on the panel. As the law currently stands, *X* would be acquitted.

The two examples reflect an important feature of the usual pattern of judicial decision-making: when several judicial instances deal with a case, the views of low instance judges are "erased" and do not have any effect on the results.

This approach is a relic of the past. In the era of formalism, adjudication was perceived as a professional task. In a professional context it made sense to say that, judged by the standards of the profession, some professionals were better than others. The assumption was that there was one correct answer to every legal problem, that the better jurists were appointed and promoted up the judicial hierarchy, and that therefore the judges sitting on higher courts were the most professional of all and the most able to identify the correct answers to legal problems. But in a realist era, even though we have to admit that an element of professionalism still exists in the law to a significant extent, we also realize that to live in the law and to make legal decisions the law takes much more than the application of professional skills — it takes the normative world view that is the product of a person's personality, disposition, life experience, and so forth.

¹⁴ Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 *YALE L.J.* 82 (1986).

If we accept that judges on higher courts do not necessarily have a normative advantage over judges on lower courts, and if we accept that judges invest their personalities, disposition, life experience, and so forth in their rulings, and if we are to preserve the insight that large panels are the main method for reducing luck in adjudication, we will want to take into account the opinions of lower-court judges. The way to do this is to attach some value to the judges' decisions, based on the hierarchical level of the court on which they sit.

For example, we may adopt the following scale: the ruling of a Supreme Court justice will have a value of 1; the ruling of a district judge will have a value of $2/3$; the ruling of a magistrate will have a value of $1/3$. If the case was litigated at a Magistrate's Court and an appeal was submitted to the District Court but not to the Supreme Court, the ruling of the district judge will have a value of 1 and that of the magistrate will have a value of $2/3$. (The different weight accorded to judges of different instances is meant to take into account the professional element that is part of decision-making in the law.)

Since the number of judges hearing a case on appeal is generally larger than the number of judges who decided the case in the lower court, assigning values as suggested will empower the judges in the higher courts, but, at the same time, it will also ensure that some weight is also given to the decisions of judges in lower courts. This approach may also lessen the number of appeals filed with the Supreme Court in cases where the Magistrate and District Courts concur in their rulings.

The application of this line of thought to the above examples will lead to the following results. In the case of the monetary claim, the claim would be *allowed* because the sum total of all the judges who accepted it comes to $10/3$ out of $16/3$. Nevertheless, the claim would only be accepted at the rate of $10/3$ (the sum total of the values of judges who accepted the claim) divided by $16/3$ (the sum total of the values of judges who dealt with it) that is 83.33% of the value of the claim. (According to the current legal situation, however, the claim will be *rejected*.)

Similarly, in the case of the criminal proceedings, *X* would be *convicted* because the sum total of the rulings in favor of conviction also comes to $10/3$ out of $16/3$. (Under the current legal regime, *X* will be *acquitted*.) If *X* is incarcerated, the length of his sentence will also be determined by factoring the decisions of all the judges involved.

It may also be argued that, if composition of large panels is the way to reduce the element of luck in adjudication, we can merge the two lower tiers

of the system (the trial court and the first court of appeal) into one combined instance, and resolve the dispute by the enlarged panel.¹⁵

C. The Independence of Each Judge's Decision-Making Process

If we hold that a large judicial panel is an advisable way of lessening the luck of the judge's unique contribution to the contents of the judicial decision, we must also ensure that each of the judges in the panel makes his or her decision alone, without any influence from other judges. Allowing the judges in the panel to be influenced by their colleagues undermines the rationale for having judicial decisions made by a large panel. So we must ensure that members of judicial panels will reach their decisions independently, without influencing one another.

We may look at this issue from a different angle. We may say that it is not enough for us to believe strongly in the norm of impartiality when it comes to relationships of judges and litigants. If we believe in impartiality, we should also not let judges be "controlled" by other judges.

In this context too, we may learn from Maimonides, who writes on this issue:

Any judge in a capital case, whose vote — either for acquittal or for conviction — voices not his own carefully considered opinion but that of a colleague, transgresses a negative command. Concerning him, Scripture says: *Neither shalt thou bear witness in a cause to turn aside* (Exod. 23:2). It has been learned by tradition that this injunction means "Do not say when the poll is taken, it is good enough if I follow So-and-so; but give expression to your own opinion."¹⁶

Maimonides furthermore notes:

It has been learned by tradition that in capital charges we do not begin with the opinion of the most prominent judge — lest the others not considering themselves competent to differ with him accept his opinion. It is mandatory that everyone should voice his own view.¹⁷

15 A major argument against combining the courts as suggested here is that it might reduce the extent to which opinions of the Supreme Court would serve as precedents and guidance for lower courts. If this were to happen, consistency in adjudication throughout the system would decrease, and the extent of luck in the system would increase.

16 MAIMONIDES, BOOK OF JUDGES, *supra* note 11, at 30 (*Laws of Sanhedrin* 10:1).

17 *Id.* at 30 (*Laws of Sanhedrin* 10:6).

Maimonides, then, understands that when judicial decisions with far-reaching consequences are concerned, one must not only ensure that they will be reached by a large panel of judges, but also that the members of the panel should reach their decisions independently, without influencing one another. Maimonides understands that it is not enough for us to believe strongly in the norm of impartiality when it comes to the relationships of judges and litigants. (Litigants may "control" their judges only via the legal arguments put forward by their lawyers orally and in their written briefs.) Rather, we should not let judges be "controlled" by other judges either. Again, note that Maimonides applies these rules not only to capital cases, but to the majority of criminal proceedings.¹⁸

Kornhauser and Sager¹⁹ claim that prior consultation among judges improves the quality of decisions because it exposes the judges to arguments and ideas to which they could not have arrived by themselves. In principle, this is true. Francis Bacon wrote that an hour's discourse with a friend will make us wiser than a day's meditation.²⁰ Concerning judicial proceedings, however, this is a questionable line of thought, for two reasons.

First, the logic of judicial proceedings is that the parties' lawyers present arguments and ideas to the judges. Furthermore, we can be sure that these arguments and ideas will be varied to a certain extent because all judicial proceedings involve at least *two* adversaries. Hence, the fruitful dialogue mentioned by Kornhauser and Sager unfolds, to some extent, in the context of the arguments that the parties' lawyers develop before the judges.

Second, and this is the main point in the present context, the empirical data unequivocally indicates that individuals are considerably affected by the views of others in their surroundings, particularly if these views are unanimous. Even in clear cases, such as when people rely on their senses to make a judgment, they will withdraw from views they had previously held if they contradict those of others, and particularly when the opposition they face is unanimous.²¹ Similarly, two separate studies about the effect of consultations among judges on the way judicial decisions are made found that consultations could have a far-reaching effect on the views that judges express in their rulings. Thus, the authors of both studies argue that a "Democratic" judge would vote in a "Democratic" way the greater the number of Democratic

18 See *supra* note 12 and accompanying text.

19 Kornhauser & Sager, *supra* note 14. For a view identical to the one presented here, see Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 344 (2004).

20 FRANCIS BACON, *Of Friendship*, in *THE ESSAYS* 138 (John Pitcher ed., 1985).

21 Sunstein et al., *supra* note 19, at 301, 339, 342.

judges on the panel, to the extent that a panel composed only of Democratic judges would tend to adopt the most extreme Democratic rulings. And the same applies to Republican judges and Republican panels. These studies also show that, at times, judges identified with one party would join judges identified with the other party when these judges are the majority of the judges on the panel. (Judges with a specific ideological identity withdraw when this identity represents a minority in the panel.)²²

So far, I have assumed that consultation among judges would focus on the case at hand. Consider, however, the possibility that, as a result of the exposure of a judge's decision in the course of consultations, other judges could change their decisions for ulterior motives. These ulterior motives might include, for instance, the desire of a junior judge to be assigned by a senior judge to participate in high-profile panels, or the desire of a judge who is participating in deliberations on a temporary basis to impress the permanent judges on the court, or implicit horse-trading between judges (I will vote with you in this case, and you will vote with me in another case).²³ If we assume that judges may be motivated in such ways as well, then this is an additional reason for forbidding consultations among judges.²⁴

It might be that all of this invites extrapolation from the legal arrangement that applies to the relationship between trustees and beneficiaries. When a trustee administers a beneficiary's property, he may have a conflict of interests. On the one hand, a trustee must act to promote the beneficiary's interests; on the other, in his actions to promote the beneficiary's interests, the trustee may be placed under pressures that will lead him to promote the interests of third parties. (For instance, a trust fund could be pressured to buy shares of the bank that owns the trust fund.) In such situations, the accepted way of overcoming the problem of conflict of interests is to create "Chinese walls" between trustees and those who might pressure them, mechanisms that will ensure that the trustees are able to operate independently, with the

22 *Id.* at 330, 332-33, 337, 344; Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1764 (1997); *see also* Tracy Isaacs, *Cultural Context and Moral Responsibility*, 107 ETHICS 670 (1997); Tracey George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992); Nicola Gennaioli & Andrei Shleifer, *Judicial Fact Discretion* (2006) (unpublished manuscript, on file with author).

23 In this sense, there is a crucial difference between judges and parliamentarians, who are not only permitted to consult with one another before reaching a decision, but are also allowed to horse trade.

24 *See also* Richard Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259 (2005).

beneficiaries' interests as their exclusive concern. This line of thought is relevant to the relationships between judges and the litigants who appear before them. If at the center of the legal perception of the institution of the trustee is the notion that a trustee is someone who administers the affairs of another, a judge is the trustee par excellence, since no one determines another person's fate more than a judge. (Indeed, the duty incumbent on judges to abide by the norm of impartiality might be viewed as an expression of the approach that sees the judge as a trustee of the litigating parties.) Hence, if there is room for applying to judges perceptions borrowed from the law of trusts, we must ensure that judges, as trustees, will operate under conditions of a "Chinese wall." When judges weigh their handling of the litigants' affairs, they will be guided solely by the litigants' concerns, and will not be influenced by other factors, such as the views of other judges on the case (and, needless to say, by outside factors such as a judge's personal relationships with other judges on the panel or a judge's dependence on another judge in the panel).

This line of thought leads to the conclusion that we have to consider radical changes in several practices currently considered obvious in the operation of judicial panels:

- (1) Consultation among judges during judicial proceedings will be forbidden.
- (2) Each judge will be required to write his or her own opinion.
- (3) Each judge will be required to write his or her opinion alone, without prior knowledge of the views of (or the opinions written by) the other panel members.²⁵

D. Demanding Decisions by a Special Majority

Large panels are a necessary, but at times insufficient, method for reducing luck in adjudication. If we want to eliminate or reduce luck in adjudication, we should also insist, in some cases, on a special majority.

²⁵ The most troubling aspect of a rule forbidding consultation among judges is that it would severely diminish the ability of courts to serve as institutions of social change. To take one example, the decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), would have not been reached had it not been for the lengthy discussions among the Justices of the Supreme Court of the United States. This reconfirms a well-known juridical phenomenon, that a tension often exists between the interests of individual litigants and considerations having to do with society as a whole.

Let's assume that there are 100 judges in the system, and that one of them is a racist. If John belongs to a racial minority, then if only one judge is assigned to handle John's case, John has a 1% chance of being tried by a racist judge. But if a panel composed of three judges is assigned to his case, this chance drops to 0%. In this case, a simple majority of one will suffice to eliminate the element of luck from the proceeding.

Let's assume that there are 100 judges in the system, 49 of whom are racists. In such a case, only if 99 judges deal with John's case is the chance of John's case being determined by racist judges (a minority among the judges in the system) eliminated, and, again, a simple majority of one will suffice to eliminate the element of luck from the proceeding.

These are extreme examples. Most real-life cases fall in between: we can assume that the distribution among a given group of people (say, judges) would usually be something between 99:1 and 51:49.

As we do not know ahead of time the distribution of the positions of the judges acting in a system in the various cases that come before them, we are left with no better rule than that in cases having significant effect on litigating parties, if we want to eliminate or reduce the element of luck in adjudication, we need to insist on a special majority in the panels. Thus Maimonides:

If the court is divided, some voting for acquittal and others for conviction, the majority opinion is followed. This is a positive biblical command, as it is said to incline after the many (Exod. 23:2). It applies to civil cases, to matters pertaining to what is forbidden and what is permitted, to what is clean and what is unclean, and to other non-capital cases. But in capital charges, in the event opinions differ as to whether the accused is liable to death, if the majority is for acquittal, he is acquitted; but if the majority is for conviction he is not put to death unless those who are for conviction exceed those who are for acquittal by at least two. It has been learned by tradition that this is what the Law meant by the injunction Thou shalt not follow a multitude to do evil (*ibid.*), that is, if the multitude is leaning toward what is unfavorable, e.g. toward executing the accused, do not follow it, unless it comprises a clear-cut majority, exceeding those who are for acquittal by (at least) two.²⁶

²⁶ MAIMONIDES, BOOK OF JUDGES, *supra* note 11, at 26 (*Laws of Sanhedrin* 8:1). See also Mishnah, *Sanhedrin* 4:1.

Maimonides, then, is in favor of requiring special majorities when the outcome of the trial has serious consequences for the litigant.

Concerning decisions by juries, it is interesting to note that the rule that prevails in the United States is that the jury must decide unanimously on convictions or acquittals.²⁷ A rule of this type obviously grants to a minority of one maximum power over the decisions of all the other participants in the panel.²⁸ To preclude the element of luck in such situations, therefore, the correct decision-making rule is one that requires that decisions be reached by a special majority, that is, with a majority that is more than half plus one but is less than unanimity. Indeed, the special majority approach is the one adopted in most legal systems that have jury trials.²⁹

E. Repeat Games

Parties that participate in a large number of legal proceedings have an advantage over parties that rarely participate in such proceedings, with regard to the reduction of the luck inherent in the operation of the court system.

In a classic article, Marc Galanter drew a distinction between two types of litigants: one-shotters and repeat players.³⁰ One-shotters are litigants who go to court only once or at most a few times in their lives, and the outcomes of the litigation that they are involved in — divorce proceedings, suits for damages — are highly significant for them. Repeat players, including major corporations, insurance companies, banks, the state, municipal authorities and so forth, are in court routinely and do not normally view any single litigation as an exceptional event.

Repeat players have a distinctive advantage over one-shotters in all that

27 Edward P. Schwartz & Warren F. Schwartz, *And So Say Some of Us . . . What to Do When Jurors Disagree*, 9 S. CAL. INTERDISC. L.J. 429, 444-45 (2000).

28 *Id.* at 458.

29 In England, the requirement is that ten out of twelve jurors should agree to convict. In Australian states, the requirement is that between nine and twelve jurors should agree to convict. In Ireland and in Northern Ireland, ten out of eleven or twelve jurors should agree to convict. In South Africa, before the derogation of the jury system, the requirement was for seven out of nine jurors to agree to convict. In California, the state constitution was amended and a provision was stipulated requiring that ten out of twelve jurors should support conviction (except for capital offenses). Other countries — Scotland, Europe, South American countries, Russia — rely on a simple majority. *See id.* at 444-45.

30 Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits for Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). For a series of articles dealing with Galanter's article, see 33 LAW & SOC'Y REV. 795 (1999).

concerns the reduction of luck in adjudication. Repeat players manage to distribute their legal affairs among a large group of judges. By doing so, repeat players avoid the risks associated with being subject to the ruling of one randomly assigned judge. Indeed, in his ruling not to allow a class action against the manufacturer of blood products,³¹ Judge Posner turned the manufacturer into a repeat player, thus enabling it to reduce its exposure to the element of luck in adjudication.

All of this is not available to one-shotters. This point, like the discussion below concerning the possibility of reducing luck through arbitration, indicates that the poor are more seriously affected by luck in adjudication than the wealthy.

III. REDUCING LUCK BY LETTING LITIGANTS CHOOSE THEIR JUDGES

"Whoever selects the judges controls the verdict."

A.B. Yehoshua, *A Journey to the End of the Millennium*³²

A. Choosing Judges

I noted that a situation in which luck determines what happens in our lives is composed of an element of multiplicity of possible outcomes and an element of lack of control. Thus far, I have discussed ways of reducing luck in adjudication by addressing the element of multiplicity of possible outcomes. I now wish to discuss ways of increasing the control of litigants over their judges as a means of reducing luck in adjudication.

The most extreme way of controlling a judge is, of course, a bribe. In a decent society, one that insists that judges abide by the norm of impartiality, the least degree of affiliation between a judge and a litigant disqualifies a judge. However, even in a decent society, several means do exist for litigants to employ some control over the identity of the persons who would resolve their disputes.

Many legal systems permit litigants to choose the "judges" who will adjudicate their disputes in the form of arbitration proceedings.³³ Similarly, in legal systems where jurors participate in the judicial decision, parties are usually allowed to choose the jurors.

³¹ See *supra* text accompanying note 13.

³² A.B. YEHOSHUA, *A JOURNEY TO THE END OF THE MILLENNIUM* 186 (1999).

³³ Arbitration proceedings enjoy a clear advantage over legal proceedings in courts from several additional perspectives. Since arbitrators make their living from this occupation, they have a strong incentive to improve the quality of the "product" they

Judicial proceedings in state courts are subsidized; litigants bear only a small part of the costs involved. By contrast, the full costs of arbitration proceedings are imposed on the litigants. Consequently, only the wealthy can resort to arbitration, and, in that way, they control the identity of the persons resolving their disputes and reduce the element of luck in their case.³⁴ Therefore, if we wish to ensure that those who are not wealthy have the same privilege that the wealthy can acquire, we must strive for a situation in which proceedings unfolding in the state's courts will also provide the litigating parties the opportunity to choose the judge who handles their case.³⁵ The question therefore is whether litigants should be allowed to choose the judge who will hear their case, even when the proceedings (whether civil or criminal) are conducted in the state's courts.

Technically, litigants can easily be granted the power to choose the judge who will hear their case. All the lawyers in the country could be supplied with on-line information about the dates on which each judge is free to hear new cases. The parties' lawyers can then be given a limited period of time (say, two weeks) from the start of the proceedings, during which they must try to come to an agreement as to the identity of the judge who will hear their case. Only if the lawyers cannot agree will the court system step in to assign a judge to the case.

But granting decision powers to the parties (through their lawyers) could also lead to some undesirable results. Judges would probably be interested in being chosen by as many parties as possible, and might therefore choose

are trying to sell, namely, their reputation. This encourages arbitrators to behave fairly, professionally, and agreeably. The reverse is true for judges. Judges are monopolistic. The relationship between the way they fulfill their roles and the way they will be rewarded is quite loose. No wonder, then, that many of the ills affecting monopolistic situations are also evident in the way certain judges fulfill their roles. On this issue, see William Landes & Richard Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 237, 238, 254-55 (1979).

34 Uri Weiss makes an additional connection between law's indeterminacy and class. He argues that the poor are more risk-averse than the wealthy (and that women are more risk-averse than men). Therefore, the more the law is indeterminate, the more the poor (and women) will tend to enter unfavorable compromises within the context of their transactions with the wealthy (or respectively with men). Thus, law's indeterminacy transfers wealth from the poor to the wealthy (and from women to men). Uri Weiss, *The Regressive Effect of Law's Indeterminacy* (2005) (unpublished manuscript, on file with author).

35 It is noteworthy that some people are so poor that they cannot afford any of the costs involved in litigation. So it might be the case that the relevant distinction for the present discussion is not between the wealthy and the poor but between the wealthy and the less wealthy.

not to write innovative and trailblazing opinions, but rather routine and "conformist" ones. Judges might also choose not to write opinions that take a clear stand in favor of one group of parties or another (for instance, opinions favoring women in family conflicts, or taxpayers against the tax government, or defendants in criminal proceedings, and so forth).³⁶ By contrast, however, it could be claimed that these results are in fact desirable, that is, that this is the proper way for judges to act, at least in the lower courts. It can also be argued that the existence of judges who take clear stands in favor of one group of litigants or another exacerbates the problem of luck in adjudication and also violates the norm of impartiality.³⁷ Additionally, we can also overcome the problems associated with litigants' selection of judges by formulating strict rules that will preclude the publication of any information about the identity of the more popular as opposed to the less popular judges. But this is a question requiring further study, beyond the scope of the current discussion.³⁸

³⁶ See Landes & Posner, *supra* note 33, at 239-40.

³⁷ See also David Heyd, *Beyond Freedom and Dignity*, 3 MISHPAT U-MIMSHAL 649, 658 (1996) (Hebrew) (author's translation):

"Unquestionably, the inability to foresee the judge's ruling . . . is a constitutive element in the parties' readiness to accept it. The greater the judge's transparency, the more effectively this aim will be attained. The goddess of justice, her eyes covered, is blind not only to the identity of the litigants; she is also free from any loyalties to a world view that systematically and predictably shapes her interpretation of the law. In other words, litigants seek judges who will not only refrain from discriminating against them personally but who will not be ideologically fixated against their case a priori.

³⁸ At least three additional considerations have to be taken into account in this context: (a) If judges of low instances are the pool from which most judges of Supreme Courts are selected, judges appointed to Supreme Courts will be people accustomed at writing technical, procedural, uncreative and non-innovative opinions. We would thus lose the prospect of Supreme Courts serving as engines for social change. (We would lose the *Brown* of the legal world.) (b) There are two stages in the careers of low instance judges. In the first stage, a judge expects to be promoted to the higher instances. She therefore suppresses her personal inclinations and does the utmost to write decisions that mimic potential opinions of the higher courts in the system. In the second stage, the judge realizes that her chances for promotion are slim. In this stage (arguably one of a much longer duration than the first stage), the judge openly expresses in her opinions her unique personal agenda and positions. Thus the problem of lower court judges writing conformist and characterless opinions is relevant only to some of the lower-court judges, namely those who are still at the early stages of their careers. (c) It might be the case that the way to assist the poor is not by making courts act in a manner resembling arbitration but rather by subsidizing arbitration for the poor (e.g., by providing them with vouchers for arbitration).

B. Compromises

Another way of reducing luck in adjudication is by settling a dispute out of court or, if legal proceedings have already been initiated, by settling a dispute before the judge has had the opportunity to rule on it.

I defined a situation in which luck determines what happens in our lives as composed of an element of multiplicity of possible outcomes and an element of lack of control. The desirability of a compromise, from the parties' point of view, is that it enables them to eliminate both sources of exposure to luck. This is in contrast to arbitration, which allows the parties to take care only of one of these sources, that of lack of control, and to a limited extent only.

The literature dealing with the behavior of business people in contractual relationships claims that they prefer to settle their differences through compromise agreements they can control rather than transfer their disputes to the decisions of judges.³⁹ A similar argument was also noted concerning parties involved in divorce proceedings.⁴⁰ In both cases, avoiding uncertainty due to lack of control was mentioned as an important consideration.

Similarly, the literature dealing with parties to contracts agrees on the fact that even when parties do sue for breach of contract, they generally do not let the proceedings reach the stage of a judge issuing a ruling. Rather, the parties reach a compromise that ends the proceedings before that. Thus, Marc Galanter shows that initiating legal proceedings is a move that from the beginning is not intended to bring the dispute to a judicial resolution, but is intended rather to bring the other party to negotiate a compromise. In the course of legal proceedings, Galanter argues, the parties gauge each other's relative legal strength and display firmness, in order to influence the terms of the eventual compromise agreement between them. Galanter coined the term "litigotiation" to describe this process.⁴¹

39 Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 45 (1963); Hugh Beale & Tony Dugdale, *Contracts Between Businessmen: Planning and the Use of Contractual Remedies*, 2 BRIT. J.L. & SOC'Y 45 (1975); Marc Galanter, *Contract in Court; Or Almost Everything You May Or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577; see also Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 22 (1983) [hereinafter Galanter, *Reading the Landscape*]; Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986).

40 William L.F. Felstiner & Austin Sarat, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663 (1989).

41 See Galanter, *Reading the Landscape*, *supra* note 39; Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268 (1984). For a similar claim concerning parties involved in divorce proceedings, see

Similarly, Lisa Bernstein points out that even in the diamond trade, which uses professional and non-public mechanisms of its own to settle disputes between its members, most of the judicial proceedings that begin between parties end in compromise.⁴² Again, loss of control is an important consideration here as well.

Many litigants, then, and particularly business people, are well aware of the element of luck inherent to judicial decisions, and they therefore refrain from reaching the stage of having a judge rule on their disputes.

CONCLUSION

Legal realism has placed the issue of law's indeterminacy at the center of twentieth-century jurisprudential discussion. Uncertainty in adjudication results from the multiplicity of outcomes available in adjudication, given the substantive content of the law. Thus, luck lies at the heart of the justice system. The association of justice with luck is troubling. Interestingly enough, however, the concept of justice has not been associated with the concept of luck in twentieth-century jurisprudence. This Article, written from an institutional perspective, has tried to make some suggestions as to how adjudication might look if we gave luck its due weight in the context of doing justice. The Article invites further reflection upon the issue. "We are all realists now."⁴³ True, but the realist endeavor is not yet complete.

Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

42 Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 124 (1992).

43 LAURA KALMAN, LEGAL REALISM AT YALE 1927-1960, at 229 (1986); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCES 2 (1995); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988).