

offices. The street matters both because it tells us what law is in ways that cannot be grasped by looking at high courts alone. And, it also holds out the promise of progressive social change that was the hallmark of the scholarship of Joseph Gusfield, Murray Edelman, and Jacobus tenBroek. I would like to see more on visual sociology of law; but in this framework, the visual would have to become a concern of editors of “the *Review*.”

The editing is quite severe. Something like constitutional law teachers feel the need to do for their undergraduates. This makes the collection accessible to student readers in the sense that the works are not too long. But it also deprives them of the challenge of slogging through the scholarship that grounds their enterprise. In the final analysis, the collection is very tight and will be a big help in situating the field for scholars newly interested in law.

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*Judging Judges: Values and the Rule of Law*. By Jason E. Whitehead. Waco: Baylor University Press, 2014. 253 pp. \$49.95 cloth.

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The rule of law has fallen on hard times. Today political scientists and legal scholars often deride the notion that law can constrain judges as a naïve mythology. Supreme Court justices are characterized as voting in “liberal” or “conservative” blocs, as if political ideology alone determines how they decide cases. In *Judging Judges*, Jason Whitehead seeks to rescue the idea of the rule of law from academic critics and to revitalize it for a post-Realist era.

The faith in the rule of law began unraveling as a result of two academic movements in the twentieth century. First, the Legal Realists banded formal, mechanistic conceptions of judging and demonstrated instead how law and politics were deeply interwoven in the judicial mind. Then came along positivist social scientists who endeavored to use judicial voting data to show judges decided cases on the basis of ideological preferences rather than objective legal principles.

Coming to terms with these twin movements is not easy. Judges, even those who accept that law requires political choices, reject the idea that they decide cases on the basis of personal preferences and they insist that law matters. Academic critics insist the evidence is to the contrary, that such thinking is either self-delusion or deceitful.

So which is it? Are judges deluded or do academics misunderstand how law works? Whitehead argues that positivist studies focusing on judicial voting patterns mischaracterize the way that law constrains judges in a post-Realist context. Once untethered from its formalist trappings, law is better understood as a set of historically evolving, politically contingent professional practices and habits of thought, rather than objective principles that mechanically lead to correct decisions. Thus, rule of law is about a sense of fidelity; it happens when judges feel internally bound by their best understanding of the relevant professional norms and practices, not when they reach “correct” decisions.

This post-Realist reconceptualization of the rule of law builds on earlier work by Howard Gillman (2001), which Whitehead sets out to more fully elaborate and build an empirical account using interviews with 25 state and federal appellate judges.

In the most important part of the book, Chapter One, Whitehead develops his theory of rule of law and distinguishes it from conventional views. Canvassing classic writings on the subject, he explains that traditional views were positivist and formalist; embracing an “outside in” view of law as a set of external rules “discovered through the use of disinterested human reason” which judges applied “in an objective, value-free way” (p. 12).

Realism rendered such views untenable, so Whitehead argues we must focus less on external rules and decisions, and more on the subjective, socially accepted standards which motivate judges. Empirically, there can be any number of such standards as legal and professional norms constantly evolve and are contested. But normatively judges must be motivated by “fidelity” to the norms they themselves believe make up the shared social practice of law. Judges uphold rule of law whenever they hold the proper attitude of fidelity and consider it their mission to follow their best understanding of the shared professional norms and rules.

Whitehead identifies three sources or social practices that produce a sense of fidelity to law: the socialization of the legal-professional community into a sense of “stewardship” over law; the proper attitudes about the function of legal language and doctrine; and the acceptance of judicial virtues such as fairness, impartiality, and integrity.

In the remainder of the book Whitehead uses his interviews with judges to explicate a typology of four judicial values or attitudes about fidelity to law: “formalist,” “good faith,” “cynical,” or “rouge” attitudes. These four can be placed on a continuum; formalism and good faith attitudes are consistent with the rule of law, cynical and rogue attitudes are incompatible with it.

In Chapter Two, Whitehead explains that judges with “formalist” attitudes tend to focus on technical legal rules and often believe there to be only one correct way to decide cases under the

appropriate rules and principles. In Chapter Three, he focuses on how judges with “good faith” attitudes are willing to acknowledge ambiguity in legal rules and agree that judges can reasonably disagree in cases, but they still see their duty as finding correct answers based in their understanding of legal norms and practices.

By contrast, in Chapters Four and Five, Whitehead explains how “cynical” and “rogue” attitudes undermine the rule of law. Cynical judges see legal and professional standards as infinitely malleable and use them instrumentally to justify results that they reach for non-legal reasons. Rogue judges make a virtue of admitting that they feel unconstrained by law, they insisting that judges who suggest otherwise are deceiving themselves or misleading others. Whitehead’s typology defines different judicial attitudes rather than judges. Thus, individual judges may hold different attitudes over time or even express multiple attitudes in the same opinion.

*Judging Judges* makes an important contribution to the literature on judging and rule of law. It brings together in a readable volume much of the literature about the rule of law and it is impossible to do justice to the nuance of its theoretical arguments in a short review. Positivist scholars will be unconvinced by the hermeneutic approach of this book, which leaves untested in any falsifiable way its central premise that judges feel constrained by legal norms and values. Others will take issue with its typology of judicial attitudes about fidelity to law. Not only are the boundaries between attitude types not always clear, but the discussion leaves underdeveloped some critical questions regarding the value of judicial candor regarding the limits of legal-based reasoning and the way politics actually enters into hard cases.

But in the end, one cannot argue with Whitehead’s thesis that understanding the rule of law requires scholars to look beyond external judicial decisions and to take more seriously the internal, subjective ways that judges think. This is a must read book for those interested in the normative dimensions of the rule of law as well as those who wish to move beyond the stale debates between “attitudinalists” and “legalists” in the study of judicial behavior.

## Reference

- Gillman, Howard (2001) “Review: What’s Law Got to Do With It? Judicial Behavioralists Test the ‘Legal Model’ of Judicial Decision Making,” *26 Law & Social Inquiry* 465–504.

