The Scandal of the Speaking Judge (Decision-Making as Performance)

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> We have seen stranger things in dreams; and fictions are merely frozen dreams, linked images with some semblance of structure. They are not to be trusted, no more than the people who create them.
>
> —*Neil Gaiman*

Abstract

In the Philippines, lawyers and laymen alike believe that when courts make decisions, they are completely value-free and non-political, and that to be so is a good thing. This belief has been elevated in popular discourse to the level of sacred ideal and in legal discourse enshrined as hard doctrine. This paper explored this belief as both philosophically and historically wrong. Judges do not merely interpret rules and facts; they actively create meanings and take part in building our normative universe. Yet the claim to neutrality was part of the ideology of colonization, which found it useful to have a superficially impartial judiciary to cloak a politics of nascent imperialism.

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Rituals

One of the popular rituals of modern organized society that adds legitimacy to many other rituals of an interpretive community is the separation between the judger and the judged. This role-playing is constitutive—it creates many people and objects: decisionmaker and decision; plaintiff and defendant; lawyer and client; the black robe, the gavel, the witness stand and, of course, the blind lady and her scales of justice.

This basic dichotomy is ancient and most notably paired with another separation—the ruler and the ruled. In older society, this twin of separations provided for a mode of contact between king and subject, fieflord and vassal, *datu* and *mamamayan.* Present society, however, has reconfigured this relation into the rhetoric of constitutionalism in two ways:

First, it has become a vital institution that articulates, in constitution-speak, the doctrine of Separation of Powers among the executive, legislature and the judiciary. No longer a mechanism of control over the governed, this Separation of Powers rationale has become a judicial theory of maintaining a mechanistic Newtonian balance among different public departments, not to promote efficiency, but to avoid abuses of power.[1] So in Laurel's immortalized words—

> But in the main, the Constitution has blocked out with deft strokes and in bold lines, allotment of power to the executive, the legislative and the judicial departments of the government. ...Who is to determine the nature, scope, and extent of such powers? The Constitution itself has provided for the instrumentality of the judiciary as the rational way. And when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the right which that instrument secures and guarantees for them...[2]

Second, it has become a vital support to the Due Process Clause. The deprivation of life, liberty or property now requires the mediation (intervention)

of an ideal: the cold, neutral and impartial judge. Civilized society has now tilted the balance; whereas the king *qua* judge was constrained only by a purely potestative sense of fair play, the modern judge is not only sworn to listen before she condemns, she is also textually bound to the Bill of Rights. The former license to control is now an edict of restraint.[3]

These two doctrines require ancillary mechanisms in the form of other doctrines or derivative principles. In the former, one may, for example, infer the corollary principle that the role of the judge is conceptually distinguishable from those of the executor and the legislator, that is, that there is an inherent difference among judging, executing and legislating. This point must be raised because this method of conceptual categorization is the source of the legitimacy of correlated claims still prevalent in the Philippines about the nature of the judicial function: that judging is law-application and fact-finding;[4] that law application is about interpretation;[5] that interpretation is a matter of applying the plain meaning of texts or reading *verba legis*. With respect to the latter, we may derive the claim, now canonical—and justifying the move from "is" to "ought"—that judges are (must be) detached from the active world of norm-building and are (must be) in fact objective appliers of received knowledge.[6]

The doctrines also converge to give meaning to that famous line about the judiciary being "the least dangerous branch"[7] and substantiate the nature of judicial reasoning as both a matter of logic (and therefore simultaneously analytical and inferential) and directional (that statutes, of which the Constitution is also a species, provide an imperative or a way by which questions arising therefrom could be decided).[8] Most importantly, they have given judges an escape from the kind of responsibility political officials in a democracy are usually subjected to: accountability for one's politics or, at the very least, the ideological implications of one's decisions.[9]

My aim in this article is to examine this ritual of decision-making. What I will try to do is show that this dominant institutional practice is ideological all throughout the judicial hierarchy.[10] The perception of value-free judgment essential to the stereotypical role of judges is myth; it is one that has become so entrenched as to have attained a high level of invisibility. We no longer question this myth partly

because we believe it and partly because we have been taught to believe it, whether or not our teachers knew what they were doing. This piece is thus a serving of this unspoken dimension of judging.

There is likewise a postcolonial aspect to judging. We usually forget that the mode of adjudication we now employ is part of a set of colonial artifacts we have grown accustomed to. This insight has explanatory value with respect to my concern about invisibility. It is relevant for lawyers and judges to remember that the Americans presented adjudication as a system that decides cases and controversies, shorn of any ideological and normative character as part of their larger project of colonization, and that the entry of the United States into colonialist status came at a time when formalism—the belief in the autonomy of the legal system—was its dominant legal ideology.[11]

My ultimate aim is to present a pitch for a reassessment of the role of judges in our society. The proposal that I make is for judges, once made aware of their political role, to embrace this function wholeheartedly not only because this is, so to speak, the way of the honest but because I think it is important for judges to take responsibility for their decisions and thus place their public actions within the reach of the democratic radar.

To aid my discussion, I will use J.L. Austin's theory of Performative Utterances, also known as the Speech Act Theory, to refashion the nature of judging and argue that judging is not a mere act of law application or interpretation but is actually law creation. The highlighting of the political and ideological role of judges and their relation to law is not new, at least in the United States.[12] Austin's theory of speech, however, presents a different angle that may prove helpful in presenting this project.[13]

Performative Utterances

The work of Oxford University philosopher John Langshaw Austin (along with that of Cambridge-based Ludwig Wittgenstein) broke the stranglehold of logical positivism on Anglo-American philosophy in the 1950s.[14] Austin criticized the limited view of many philosophers of his time about utterances being either

true or false, and that all others are "nonsense."[15] This is the statemental approach or the descriptive fallacy.[16]

In attempting to expand the then mainstream view of the role of language, he introduced what he referred to as "performative utterances" or statements that are not nonsensical, and yet are not true or false.[17]

> They will be perfectly straightforward utterances, with ordinary verbs in the first person singular present indicative active, and yet we shall see at once that they couldn't possibly be true or false. Furthermore, if a person makes an utterance of this sort we should say that he is *doing* something rather than merely *saying* something.... Suppose, for example, that in the course of a marriage ceremony I say, as people will, 'I do'—(sc. take this woman to be my lawful wedded wife.) or again, suppose that I tread on your toe and say 'I apologize.' Or again, suppose that I have the bottle of champagne in my hand and say 'I name this ship the *Queen Elizabeth.*' Or suppose I say 'I bet you sixpence it will rain tomorrow.' In all these cases it would be absurd to regard the thing that I say as a report of the performance of the action which is undoubtedly done—the action of betting, or christening, or apologizing. We should say rather that, in saying what I do, I actually perform that action...[18]

Performative speech acts do not have truth value, and since the act of uttering the statement creates the referent, there is no external referent against which to measure the truth of the utterance.[19] Austin was also explicit in explaining that performative utterances need not take the standard form first person singular present indicative active: "There is at least one other standard form, every bit as common as this one, where the verb is in the passive voice and in the second or third person, not in the first. The sort of case I mean is that of a notice inscribed 'Passengers are warned to cross the line by the bridge only' or of a document reading 'You are hereby authorized' to do so-and-so. These are undoubtedly performative and in fact a signature is often required in order to show who it is that is doing the act of warning, or authorizing, or whatever it may be. *Very typical of this kind of performative—especially liable to occur in written documents of course—is that the little word 'hereby' either actually occurs or might naturally be inserted.*"[20]

Austin also spoke about "appropriate circumstances" for the use of performatives or things that are necessary for the smooth or 'happy' functioning of a performative:[21]

(1) There must exist an accepted conventional procedure having a certain conventional effect, that procedure to include the uttering of certain words by certain persons in certain circumstances;

(2) The particular persons and circumstances in a given case must be appropriate for the invocation of the particular procedure invoked;

(3) The procedure must be executed by all participants both correctly and completely;

(4) Where, as often, the procedure is designed for use by persons having certain thoughts or feelings, or for the inauguration of certain consequential conduct on the part of any participant, then a person participating in and so invoking the procedure must in fact have those thoughts or feelings, and the participants must intend so to conduct themselves; and

(5) The participants must actually so conduct themselves subsequently.[22]

It is readily apparent that these "felicity conditions" fit fully the ritual of judging: the judge is one appointed by a higher authority, say, the President, who has the authority to make such appointments[23]; she sits in a court that is duly constituted through a statute that confers on such court jurisdictional authority[24]; there are lawyers who have authority to appear before courts and bind their clients; and there are participants who submit to the jurisdiction of the court or are legally coerced into submitting to the court's jurisdiction. Once all these conditions are complied with, then its utterance is linguistically "happy" and thus legally binding. It is an instance of a decision rendered by a court acting within its jurisdiction. On the other hand, a court that acts without or outside its jurisdiction will be unable to bind the parties and its utterance is considered linguistically "unhappy" and legally "without force and effect." In the language of our Constitution, it is a decision rendered with grave abuse of discretion.[25]

The ritual of judging is a paradigmatic instance of performance on many levels. Decisions rendered by judges and courts all end in a verdictively: "WHEREFORE, and it being our well-considered opinion that the President did not act arbitrarily or with grave abuse of discretion in determining that the return of former President Marcos and his family at the present time and under present circumstances poses a serious threat to national interest and welfare and in prohibiting their return to the Philippines, the instant petition is hereby DISMISSED."[26]; "WHEREFORE, the petitions are partly granted. The Court rules that PP 1017 is CONSTITUTIONAL insofar as it constitutes a call by President Gloria Macapagal-Arroyo on the AFP to suppress lawless violence. However, the provisions of PP 1017 commanding the AFP to enforce laws not related to lawless violence as well as decrees promulgated by the President are declared UNCONSTITUTIONAL"[27];" IN VIEW OF THE FOREGOING, the Court resolves to DENY Vicente D. Ching's application for admission to the Philippine Bar."[28]; "WHEREFORE, finding the guilt of the accused Mikael Malmstedt established beyond reasonable doubt, this Court finds him GUILTY of violation of Section 4, Article II of Republic Act 6425, as amended, and hereby sentences him to suffer the penalty of life imprisonment and to pay a fine of Twenty Thousand Pesos (P20,000.00), with subsidiary imprisonment in case of insolvency and to pay the costs."[29] The character of these utterances is performative in the classical Austinian sense.

There is, nonetheless, a more fundamental claim that I would like to make, and this is that the entire decision-making process is radically performative: decisions over evidence or fact-finding, choice of applicable law and conclusions of law are all performative utterances *per se*; to decide is to act, which act always ushers in a new reality. This claim is empirical: it is not a critique about how judges should decide; it is a description of how judges actually decide and the effect of such choices on various legal relations. Every instance in the decision-making process is an isolated moment of creation summed up by the familiar imperative: *So Ordered.*

a. *Findings of Fact.*—the role of trial courts and, to some extent, the Court of Appeals involve the application of the rules of evidence in order to sort facts from

non-facts, truths from non-truths.[30] The theory is that our rules of evidence act as a filtering mechanism that discriminates among different versions of "what happened" or what amounts to truth-claims propounded by parties from different sides.[31] The doctrinal trope: evidence is the mode and manner of proving competent facts in judicial proceedings.[32]

The resulting metaphor is that of a judge as *finder* of fact—the locator of truth—and the mental movie it generates is that of a robed jurist with a magnifying lens looking for something that is "out there." This physical activity of "finding" produces its own ontology and epistemology: it assumes that the reality of facts produced by evidence exists objectively and that it is possible to know this reality through a methodology that is supposed to be faithfully adhered to by the judge. Thus, *ex post,* the judge's function is to go back in time to reconstitute a past already established and all that is needed is to access this past in order that an objective judgment may be made. It is as if the competitive process of producing evidence and the complex rules of exclusion and admission mastered by judges and lawyers are a form of automated machine that releases truth, and this objective truth is essential to the production of the final product: value-free judgment. As if the rules of evidence function like the free market system, and with its invisible hands produce equilibrium for the marketplace and truth for the court.

This entire metaphorical set revolves around the basic trope of "finding" and assumes a role of language assigned to it by the logical positivists; an assumption that facts exist as facts and that therefore statements *about* facts are only either true or false.[33]

What we have here is a case of theory grossly unfit with reality, and Austin sought to debunk this by showing that there is more to language than the description or reporting of reality and that its function is not limited to verification. This is what is known as the constative fallacy.[34] In every instance in which a judge declares that "the court has found/established as a fact" something or anything, what she has really done is to make a choice among multiple sets of hypothesized and hypothesizable fact situations.[35] This choice is imaginative and not compelled by rules. Situations where judges extrapolate facts from evidence are not rare.[36] Indeed, the more the case relies on a finding of fact (such as in criminal cases), the

less the immunity from this creative space of judges: more facts give judges more opportunity to differentiate between several proferred versions of the material events.

Judges are also prone to making "common sense" conclusions out of facts presented by litigants; when they do, they engage in slippery and foundational argumentation. Common sense arguments are slippery because the line that separates common sense from what is not is rather movable; they are foundational because once a judge resorts to it, she moves herself out of the boundaries of the known universe in order that she may take the position of a detached observer and thus universalize her insight.

It is only when the court finds something as a fact that such fact is truly established. Prior to the event of finding, there is, both as a matter of law and ontology, nothing. Indeed, a court, despite conflicting truth-claims of parties, may effectively declare to have found *nothing* by declaring a state of equipoise.[37] This metaphorical role of fact-finding is therefore performative: the act of stating is the act of creating.[38]

It may be worth emphasizing that even the Supreme Court is engaged in fact-finding, not in the sense of holding hearings for presentation of evidence, but to the extent that it routinely chooses and picks from facts found by the lower courts. It is in this power to re-state and re-arrange the facts that the court's power to narrate is most potent. Justices are already arguing in their narration of facts. The facts as narrated in a decision must be such that they are able to follow from the conclusions already made by judges prior

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Narration is *always* imaginative. Regardless of what the lower courts found as fact, the final version of the facts is for the Supreme Court to decide; indeed, even in those cases where the Supreme Court decides to adopt the lower court's findings, the Supreme Court's *appreciation* of those very same facts may still depart from the lower court's.[40]

b. *Conclusions of Law.*—the second aspect of decision-making is related to (1) the choice of law applicable and (2) the conclusion arising from that choice. This, along with the fact-finding role of judges, completes the formalist equation Jerome Frank so famously criticized: (Law) X (Fact) = Decision.[41]

The choice of which law is applicable requires a categorization external to the law; the laws themselves do not provide guidelines as to how they are to be interpreted, and even when they do (in the guise of preambular or policy statements), such guidelines are always hortatory and easily trumped by counter-principles or transcendent policies.[42] For example, in *Serrano v. NLRC*,[43] the Supreme Court dealt with the question of what sanction was applicable to an employer who failed to furnish the employee a notice of termination in a situation where it was established that the employer had lawful ground for severing the employment relation.

Having already decided to overrule itself because the existing precedent did not provide for an effective deterrent, the Court had to grapple for the basis of the new rule. The majority and the minority votes effectively narrowed down the choice of category between constitutional law and contract law. The minority chose constitutional law and argued that the absence of notice amounted to a violation of the Due Process Clause, the result of which was the nullity of the act of termination, which would then have resulted in reinstatement with backwages. The majority, on the other hand, saw the failure to give notice as a contractual breach which did not result in the act being null but only "ineffectual," which resulted in the employee receiving backwages without being reinstated. The choice of law is therefore, tautologically, about choice—an act that the judge ultimately

performs through that creative moment of speaking. Before she speaks, there is absolute epistemological uncertainty.

This creativity is even more manifest in the act of overruling. When judges depart from precedent, they violate one of the key felicity conditions that allow the utterance to have performative force.[44] In order to persuade the people that the decisions they make have principled justification, justices often rely on the doctrine of *stare decisis*.[45] This support is not available to them when they overrule. The case of *Serrano* is a touchstone of judicial performativity considering that it is the decision that overruled the so-called Wenphil doctrine and that it itself has just been recently overruled.[46]

Mixing Facts and Law. Judges are just as free, if not more so, when they make conclusions out of the facts and the law they have mixed in the judicial cauldron. This is when judicial creativity goes on overdrive. Through the parsing of texts, judges are able to re-use and modify the metaphor of finding; whereas evidence allows the judge to find facts, interpretation allows her to "find" meaning. But words are always pregnant with theory—they stand on the shoulders of multiple assumptions. There is no textualist position.[47] The role of text is not to provide meaning but to furnish a material arena for debating symbols. The text is a hyperlink to the signs that make meaning possible and because different judges respond to identical texts, the demand for interpretive certainty is an ideal that can never be approximated.[48] The impossibility of interpretive certainty opens the creative possibility, effectively transforming the ritual of interpretation to that of performance.

Background to the Foreground

The acceptance of the idea that both fact-finding and law-interpretation are but levels of the larger project of performative decision-making serves to pierce the veil of the traditional metaphors that describe the judicial function. This piercing allows for a new sensitivity, a capacity for transforming the discourse on judging—whereas before the goal was the mastery of the technical skills of applying rules, now it is understanding the normative value of each and every

performance; whereas before the standard for evaluating decisions was its coherence with doctrine, now it is its relevance as political choices; whereas before judgments are infallible, now judgments are ideological statements susceptible to interrogation.[49]

If judges are role-players in the language game of decision-making, what do they act out? I think that any answer must take into account the history of the judiciary itself. Our public institutions are imbued with the inertia of colonialism and the story of the judiciary is part of this colonial narrative. It is time to realize that our ability to understand the identity of our institutions must be informed by our experience as a colony and that institutional historiography is indispensable to making explicit the assumptions of our present practices. We must therefore foreground the background.

In relation to judicial decision-making, Dean Pacifico Agabin has made the important step towards this foregrounding by viewing the reconstruction of the Philippine Supreme Court as part of the multiple aims of colonization.[50] The inference here is that the system of adjudication was not simply a part of the colonial administrative machinery that would ensure peace and order, but an essential ingredient in promoting the dual ideologies of colonization and *laissez faire*.

The ideology of colonization was a method of control that provided the colonizer a superficially impartial procedure that allowed its politics of nascent imperialism to be justified. One of the exemplar cases involved the tug-of-war between Governor-general Leonard Wood and the Philippine Assembly over the power to appoint members of different government corporations.[51] In this case, the colonial Philippine Supreme Court, using the separation of powers principle, nullified the act of the Filipino Philippine Assembly creating the Board of Control which exercised such appointive authority, to the dismay of Wood, a highly unpopular executive. Paradoxically, this decision, which was sustained by the U.S. Supreme Court,[52] is now famous for Holmes' criticism of the Court's formalism.[53] It is in this context that Agabin notes: "With respect to the review of executive action by the Philippine Supreme Court during the colonial period, the American

dominated Court had to perform a legitimating function for the actions taken by the American governor-general. While the power of the executive had been challenged before the Supreme Court a number of times, the latter consistently either upheld the validity of executive action taken by the Governor-general, or refused to take jurisdiction on the grounds that it was a political question."[54]

At the same time, the ideology of economic liberalism became a rationalizing instrument in the hands of the judiciary. The turn of the twentieth century was an opportunity for the Republicans to flex the military muscle of the United States primarily for purposes of expanding its economic opportunities in Latin America and in Asia.[55] In lieu of the Christian cross, the new colonizer brought with it the free market ideology of classical economics that guaranteed the protection of its material investments in the new colony.[56]

While the Spanish effort was for the *indio* to see god the way they saw god, the American enterprise was to make the Filipino see law the way they saw law. It was this project of visual identity that gave effective substance to the colonization. Thus, the protection of property rights that characterized the judicial philosophy of the *Lochner* era[57] was able to gain foothold on Philippine soil. This had the effect of altering the conditions of legality; and the relation of human beings to objects was radically redefined. It is no difficulty imagining how the judiciary played an important role in enforcing this philosophy.[58]

The characteristic feature of the way these ideas became entrenched is their invisibility. Judicial decisions are most wholesome when couched in impartial language and judges' ability to pacify public dissent has a lot to do with the apparent objectivity of their reasoned elaborations.[59] This fact amazes considering that decision-making is almost always the taking of sides and the privileging of one position over another. The form of a decision is always couched in neutral tongue, hiding the substance that is ultimately partial. Unlike the ideology of ordinary politics, which commonly favors its own transparency and is easily shown to be so, the ideology of judicial politics thrives on its opacity. In turn, this opacity serves as an optimum breeding ground for colonial social engineering.

What then is the result of this powerful combination of colonial imposition and political ideology, insofar as the courts are concerned? It is the ideological

It is the ideological performance or the acting out by judges of the out-and-out politics of the colonial government cloaked in the image of black robes and carried through blind lady justice's scales. This ideological performance, now hidden, has become entrenched in the rhetoric of the public and, most importantly, in the teachings of the law schools where generations of future lawyers and judges are trained to believe that the metaphors of fact-finding and law-interpretation are actually true.

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What is more, the reiteration of ideology effectively normalizes, thereby further contributing to the invisibility. What was once subject to debate is now norm-*al* and the paradigm that validates the canon stands uncontested. We need to ask: why do judges reason the way they do? Is the kind of reasoning they employ a universal medium for adjudicating controversies? Is universal reasoning even possible? Is judging metaphysical? Let me elaborate on these questions by highlighting some differences. After applying Speech Act Theory to the doctrine of *stare decisis*, Pintip Dunn makes the following pragmatic point: "Judges are 'liars.' They 'routinely engage in delusion.' They occupy a paradoxical position in this world, one in which their function requires

them to make law, while their legitimacy depends on the fiction that they interpret law. It is a strange fiction, but it is a necessary one. The legitimacy of the judicial system requires that the rule of law be above the whims of the individual personalities who happen to occupy positions on the Supreme Court at any given time. Rather, the rule of law must be grounded in objective analysis and immutable logic, reasoning that does not change with the changing of personnel. Otherwise, there would be no reason to accept the decisions of the Court as the governing framework for our society."[60]

1. Not all judges are liars in the sense that most of them probably truly believe that documents such as the Constitution, statutes and the Rules of Court effectively constrain action. And even those who delude themselves probably also believe that they are engaged in the exercise of discretion or that their judicial utterances come within the range of statutorily permissible utterances. More important, it is possible that most of them also honestly think that they are not engaged in the perpetuation of some political or ideological hegemony.

What judges should realize is that they do not work in isolation; every decision that they make alters the legal space which affect human beings all the time. Ideological discourse is important to make explicit the effects of judicial decision-making in our society. We must be open to the possibility that our bandied incapacity for ideological conversations is the result of more than four centuries of subjugation, of inability to speak and engage in discursive exchange. Discourse is a mark of political consciousness. We should also consider the possibility that the reason why we do not see the politics of judicial discourse is because we have been looking with the eyes of a colonial. Is it appropriate to import the American divide between conservatives and progressives in viewing the politics of our judges? Should we instead develop a discourse of ignorance, or of corruption, or of postmodern ethics for our judges?

2. The fiction of a judge as an interpreter and not a legislator is not necessary. To embrace the reality that law-creation is a judge's field of play is to raise the bar of responsibility. A judge escapes responsibility by hiding behind discretion to cover his choice. But a polity aware of the creative function of judging is empowered

to ask *why* a specific choice was made among a multitude of choices. In such a polity, it is not rules but discourse itself that is the source of constraint against atrocity, judicial or otherwise. It is a polity that asks the question: why?

3. Dunn commits the fallacy of exaggeration by arguing that "the legitimacy of the judicial system requires that the rule of law be above the whims of individual personalities who happen to occupy positions on the Supreme Court at any given time." Of course, the rule of law abhors whimsicalities. But I doubt whether the rule of law requires that judges be fungible—they are not and never will be. Each and every judge is unique because every human being carries with her the baggage of personal history, the weight of culture and unavoidable genetic predispositions.

The rule of law is consistent with the notion that because different human beings are indeed different, changes in the membership of the Supreme Court may involve changes in the way things are decided. What the rule of law requires is transparency: that decisional change be openly explained in order that they may be debated. This transparency is indispensable to approximating the idea of a noise-free communication between the body politic and their agents.

4. It is no longer easy to make claims about objective analysis and immutable logic. Objectivity is always a conclusion that rests on some foundational notion that always turns out to be subjective; the line between objectivity and subjectivity has proven to be quite mobile. In most cases, claims to objectivity simply hide from view overtly subjective beliefs. The role of judicial analysis should move away from the metaphor of finding to the reality of creation by allowing assumptions to surface.

Just as important, because fairness is a matter of convention, we must be conscious of the conditions that make fairness possible. Fairness, like objectivity, is situated. The same goes for logic. Reason can take many pathways and equally reasonable propositions do exist.[61] The choice among reasonable propositions is a performative utterance.

5. If the body politic accepts "political" choices of presidents and legislators while at the same time denying the same role for judges, it is because that same body politic has *believed or has been made to believe* in the rhetoric of the bench

and the bar. The governing framework for accepting decisions of judges is entirely positivist—all judicial decisions should be accepted because they have pedigree, that they can be traced to an ultimate source of authority: the Constitution. This framework is a thesis of disempowerment. The assumption that judicial decisions should be accepted because they are authoritative has little place in a discursive community. Judgment should not be the end but the beginning, a renewal of the endless cycle of debate. If democracy is to flourish, it must be condemned to deliberation. We should start asking questions that seek to de-normalize, thereby creating the rhetoric of adjudication. By constituting the ruling discourse as The Other, we may perhaps become more conscious of what we are truly doing and simultaneously open up some space for imagination.

Conclusion

Legendary physicist John Archibald Wheeler used the catchphrase "participatory universe" for the radical theory that the universe is not just "out there," objective and ready to be discovered, but shaped in part by the very questions we ask about it and the information we receive in answer to them.[62] He tells the story of three baseball umpires who define balls and strikes according to their world views: "I call 'em as I see 'em," brags the first one, evidently an empiricist; "I call 'em the way they are," proclaims the realist; and the third explains: "They ain't nothing until I call 'em," making Wheeler's point.[63] In this Article, I have sought to propose the idea that the world of adjudication, just as the universe described by Wheeler, is participatory, and to the extent that this is so, judges possess the ability, like the Christian god, to create through the powerful act of uttering.

In *Mabanag v. Lopez Vito*,[64] the Supreme Court decided that the question of whether the Congress counted properly its own members for purposes of ratifying the Parity Rights Amendment is a political one, effectively allowing the amendment that has had significant effects on the environment. In *Javellana v. Executive Secretary*,[65] the Court declared the ratification of the 1973 Constitution effective notwithstanding the dubious procedure adopted by President Marcos. In *Estrada*

v. Desierto,[66] the Court, applying a "totality of circumstances test," declared Erap Estrada to have resigned notwithstanding his own claim that he never did.

Each of these cases may be criticized on doctrinal or logical grounds: *Mabanag's* fault is probably the inability to count; the *Javellana* court's error could have been the failure to appreciate that the procedure adopted by Marcos was totally alien to the 1935 Constitution; and the *Estrada* Court's error could have been that they should have listened to what Erap was saying instead of what Angara wrote down in his diaries; after all, Erap is still alive and the best speaker of his own intentions. We could go on and on debating the doctrine and the logic of the decisions; but this kind of debate misses the flesh and blood of the cases.

Mabanag is the story of a struggle against continued economic domination of the United States in post-independence Philippines. The ultimate passage of the Bell Trade Act granted citizens of the United States – mainly American businesses – free access to Philippine resources like timber and mining as a condition precedent to the grant of independence.

Josue Javellana's story is now familiar with us. Marcos wanted to stay in power despite the term limits in the 1935 Constitution and so used his martial law powers as a ruse to stifle the opposition and get the kinds of provisions he wanted.[67]

Erap's story is recent and familiar. Here we have a president who earned the ire of the middle class, the *intelligentsia* and the Church despite his astounding mass appeal. He wanted to stay on but could not because the critical mass needed for a revolt had already been breached. He became alone, started fearing for his safety and therefore left Malacanang.

Judicial reasoning has a way of distorting these narratives. Because present judicial rhetoric is couched in the form of truth statements, decisions tend to marginalize the importance of the judicial utterance itself in the development, if not fruition, of these events. Indeed, the paradigm requires that they be liars, that they bury themselves in positivist legality through the metaphor of law-application. But judges, through their work, are essential participants in the political processes. It was the Court that allowed the Parity Rights Amendment to push through; it was the Court that paved the way for the effectivity of the 1973 Constitution; it was the Court that legitimized the succession to the presidency of Macapagal-

Arroyo. These utterances are not algorithmic; they are not the product of a search for facts made in a vacuum. They are deliberate choices that affect the lives of a political community.

One may argue, of course, that judges are responsible for their decisions because they sign them and that it therefore makes no sense to talk about responsibility because they already are. The species of responsibility that concerns me is quite different. First, it is one thing to say that the judge's ruling is hers; quite another to say that the judge's ruling is decisive. Second, it is one thing to say that the judge's decision was based on the facts and the law of the case; quite another to say that the judge's decision was based on her *interpretation*, which I reiterate is always creative, of the facts and the law of the case.

Ultimately, it is not for the simple act of deciding that judges should be liable, but for the creativity that they bring to that act. When a judge decides, she isn't disclosing a hidden, pre-existing reality. Rather, her very utterance/act contributes to the reality of the situation and in many instances, even *makes* it. This is the meaning of the claim that judging is political and, therefore, ideological. Judges therefore, are not merely passive but active participants in the political process. They are builders of the reality of our normative universe. When they speak, they do so as *homo significans* – meaning makers. And that should not be scandalous.

Notes

1 Myers v. United States, 272 U.S. 52 (1926). ("The doctrine of separation of powers was adopted [not] to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.")

2 Angara v. Electoral Commission, 63 Phil. 139 (1936).

3 This generalization is reflected in the law school curriculum: the first semester course in political law concerns the structure and distribution of power in the government; the second semester course in constitutional law is a course on the Bill of Rights.

4 *See* Co v. Electoral Commission, 199 SCRA 692 (1991).

5 *See* Ty v. Trampe, 250 SCRA 500 (1995).

6 *See* Galman v. Sandiganbayan, 144 SCRA 43 (1986). ("The courts of the land under its aegis are courts of law and justice and equity. They would have no reason to exist if they were

allowed to be used as mere tools of injustice, deception and duplicity to subvert and suppress the truth, instead of repositories of judicial power whose judges are sworn and committed to render impartial justice to all alike who seek the enforcement or protection of a right or the prevention or redress of a wrong, without fear or favor and removed from the pressures of politics and prejudice!") *See also* Austria v. Masaquel, 20 SCRA 1247 (1967). ("A judge should never allow himself to be moved by pride, prejudice, passion, or pettiness in the performance of his duties.")

7 One might find fascinating just how this line has journeyed from fact to fiction, from a declarative statement to a metaphor. In essay No.78 of *The Federalist Papers,* Hamilton declares: "Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."

8 *See* Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory,* 94 Yale L.J. 1 (1984).

9 As I will show later, it is not important that judges actually declare their ideology. Filipino judges are notorious for their apparent lack of ideology, whatever the reason(s) may be. But there is no such thing as an absence of ideology or, with specific reference to judges, judicial philosophy. There is, in most cases, only an absence of discourse that uncovers the unarticulated ideology.

10 To argue that decision-making is political is not to say that it is identical to the politics of elected officials like legislators and the President. At a lower level of generality, there is, indeed, a distinction between execution, legislation, and adjudication. But the level at which theory converge is what matters, and this point of contact is the level of a specific kind of policy-making where choices lie no longer with impersonal institutions but with human beings.

11 *See* Thomas Grey, *Langdell's Orthodoxy,* 45 U. Pitt. L. Rev. 1 (1983).

12 The Legal Realists and the Critical Legal Scholars are most known for highlighting this area of debate. Jerome Frank, in *Law in The Modern Mind,* wrote about the subject I am attempting to problematize:

> Why, then, do judges deceive the public? Because they are themselves deceived. The doctrine of no judge-made law is not, generally speaking, a "*lie*"—for a lie is an affirmation of a fact contrary to the truth, made with knowledge of its falsity and with the intention of deceiving others. Nor is it a "fiction"—a false affirmation made with knowledge of its falsity but with no intention of deceiving others.
>
> It is rather a myth—a false affirmation made without complete knowledge of its falsity. We are confronting a kind of deception which involves self-deception. The self-deception, of course, varies in degree; many judges and lawyers are half-aware that the denial of the existence of judicial legislation is what Gray has called "a form of words to hide the truth." And yet most of the profession insists that the judiciary cannot properly change the law, and more or less believes that myth. When judges and lawyers announce that judges can never validly make law, they are not engaged in fooling the public; they have successfully fooled themselves.

13 *See* Pintip Hompleum Dunn, *How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis*, 113 Yale L.J. 493 (2003). In contrast to Dunn, however, I consider both judging and overruling as identical performances. My normative framework also radically departs from Dunn's thesis insofar as I urge judges to dispense with the lie out of the act of judging.

14 THE NORTON ANTHOLOGY OF THEORY AND CRITICISM 1427 (Vincent Leitch ed., W.W. Norton & Co. 2001).

15 J.L. AUSTIN, *Performative Utterances, in* PHILOSOPHICAL PAPERS (3rd ed., 1979) [hereinafter Austin, *Utterances*] ("We have not got to go very far back in the history of philosophy to find philosophers assuming more or less as a matter of course that the sole business, the sole interesting business, of any utterance—that is, of anything we say—is to be true or at least false.")

16 J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 3 (J.O. Urmson and Marina Sbisa eds., Oxford University Press 1975) (1955) [hereinafter Austin, *How To*] ("It has come to be seen that many specially perplexing words embedded in apparently descriptive statements do not serve to indicate some specially odd additional feature in the reality reported, but to indicate (not to report) the circumstances in which the statement is made or reservations to which it is subject or the way in which it is to be taken and the like. To overlook these possibilities in the way once common is called the 'descriptive fallacy'....")

17 *See id.* at 6-7. ("The term 'performative' will be used in a variety of cognate ways and constructions, much as the term 'imperative' is. The name is derived, of course, from 'perform,' the usual verb with the noun 'action': it indicates that the issuing of the utterance is the performing of an action—it is not normally thought of as just saying something.")

18 Austin, *Utterances*, *supra* note 17.

19 *See* Dunn, *supra* note 15, at 496.

20 Italics supplied.

21 Austin, *How To*, *supra* note 18, at 13-14.

22 *Id.* at 14-15.

23 CONST. art. VII, sec. 16 ("The President shall nominate and, with the consent of the Commission on Appointments, appoint the heads of the executive departments, ambassadors, other public ministers and consuls, or officers of the armed forces from the rank of colonel or naval captain, and other officers whose appointments are vested in him in this Constitution. He shall also appoint all other officers of the Government whose appointments are not otherwise provided for by law, and those whom he may be authorized by law to appoint. The Congress may, by law, vest the appointment of other officers lower in rank in the President alone, in the courts, or in the heads of departments, agencies, commissions, or boards. The President shall have the power to make appointments during the recess of the Congress, whether voluntary or compulsory, but such appointments shall be effective only until disapproved by the Commission on Appointments or until the next adjournment of the Congress.")

CONST. art. VII, sec. 17. ("The President shall have control of all the executive departments, bureaus, and offices. He shall ensure that the laws be faithfully executed.")

24 Batas Pambansa Blg. 129 (Judiciary Reorganization Act of 1980)

25 *See* CONST. art. VIII, sec. 1.

26 Marcos v. Manglapus, 177 SCRA 668 (1989).

27 David v. Macapagal-Arroyo, G.R. No. 169777 (April 20, 2006).

28 In Re: Vicente Ching, 316 SCRA 1 (1999).

29 People v. Malmsteadt, 198 SCRA 401 (1991).

30 *See* John Reed, *Evidence As Proof, reprinted in* FLORENZ D. REGALADO, REMEDIAL LAW VOLUME II app. G. ("When evidence of fact A is offered to establish fact B the judge is required to pass on the rationality of the connection and the presence – or absence – of inference, and he couches his ruling in terms of relevance between the fact offered (A) and the fact to be established (B). It will be observed that the concern is over the rationality of a leap from a known fact to an unknown fact, and an evaluation by the judge of the strength of such a connection once the leap is made. In the former, the judge controls what evidence is being presented, and in the latter the judge controls the use of the same.")

31 Indeed, even in those cases where the parties do not disagree on "the facts" and thus are entirely willing to stipulate thereon, whether in civil or criminal cases, it is *non sequitur* to conclude that the subject of the stipulation are the "real" facts of the case; the best that can be said is that the facts are conventional or matters that have been agreed upon.

32 Bustos v. Lucero, 81 Phil 640 (1948). A statutory definition of evidence can be found in the RULES OF COURT, rule 128, sec. 1 ("Evidence is the means, sanctioned by these rules, of ascertaining in a judicial proceeding the truth respecting a matter of fact"). Case law has also emphasized the use of "perceptive and reasoning faculties" as a means of ascertaining such truths (*Baguio Country Club Corp. v. NLRC*, 118 SCRA 564 [1982]). It is further interesting to note that courts see the concept of proof as the consequence or result of evidence (*see* FLORENZ REGALADO, REMEDIAL LAW COMPENDIUM, VOL. 2 note at 667), the assumption of course being that a truth capable of being empirically established can in fact be shown (proven) to exist in the form articulated by the court.

33 The doctrine of *res gestae* assumes as true statements made by a declarant unable to come to court when the statements are made either immediately prior to, during, or after a startling occurrence that is the basis for such statements or when the statements accompany an equivocal act and are seen as the verbal part of such an act (*See* RULES OF COURT, rule 130, sec. 42). Speech Act Theory refers to such statements as "perplexing words embedded in apparently descriptive statements that do not serve to indicate some specially odd additional feature in the reality reported, but rather serve to indicate (not to report) the circumstances in which the statement is made or reservations to which it is subject..."(*See* Austin, *How To, supra* note 18, at 3)

34 Austin, *How To, supra* note 18, at 3. ("Not all true or false statements are descriptions, and for this reason I prefer to use the word 'Constative.' Along these lines it has by now been shown piecemeal, or at least made to look likely, that many traditional philosophical perplexities have arisen through a mistake—the mistake of taking as straightforward statements of fact utterances which are *either* (in interesting non-grammatical ways) nonsensical *or else* intended as something quite different.")

35 The adversarial system rests on the belief that the role of litigants and their lawyers is to present and collate parcels of information that constitute the pieces of a larger jigsaw puzzle of truth. This description, however, is both underdeterminative and naive—there is both a creative (if not manipulative) and rhetorical aspect to presentation of evidence and argumentation.

36 For example, where the Court ruled in *Estrada v. Desierto* (353 SCRA 452 [2001]) that former President Joseph Estrada had indeed vacated the Office of the President solely on the basis of accounts made in a private document that had been published in major newspapers, in spite of Estrada's own statements that he fled the Presidential Palace "for the sake of peace."

37 *See* Sapu-an, et al v. Court of Appeals, 214 SCRA 701 (1992). ("When the scale shall stand upon an equipoise and there is nothing in the evidence which shall incline it to one side or the other, the court will find for the defendant.")

38 I have not even gone to the role of lawyers which, as should be obvious to everyone who has some knowledge of lawyering, and probably even just pop culture, is both rhetorical and performative in the Austinian sense.

39 In 1994, Chief Justice Artemio Panganiban began the use of an "outline" in the writing of his decisions. Each ponencia was divided by sub-headings into "The Facts," "The Issues," and "The Ruling of the Court." Although the ruling is sometimes given prior to the discussion of the issues, the Court's "statement of facts" is always narrated first, as the rationale basis for the conclusions of law.

40 *Aberca v. Ver* (160 SCRA 601 [1988]), with respect to the lower court's dismissal of a suit for civil damages against former military officials because no evidence could be shown on alleged violations of human rights; *People v. Godoy* (243 SCRA 64 [1995]), with respect to the lower court's findings that the plaintiff had indeed been raped; *Barredo v. Garcia* (73 Phil 607 [1942]), on the finding of the lower court of liability for a vehicular collision; *Davao Sawmill v. Castillo* (61 Phil 709 [1935]), on the lower court's characterization of a piece of machinery as movable property; *Oposa v. Factoran* (224 SCRA 792 [1994]), on the nature of Timber Licensing Agreements.

41 Jerome Frank, *What Courts Do In Fact*, 26 Ill. L. Rev. 645 (1932).

42 For example, Art. 110 of the LABOR CODE states that claims for laborer's wages shall be given first preference when distributing credits. But in *Republic v. Peralta* (150 SCRA 37 [1987]), the Supreme Court stated: "We believe and so hold that Article 110 of the Labor Code did not sweep away the overriding preference accorded under the scheme of the Civil Code to tax claims of the government or any subdivision thereof which constitute a lien upon properties of the Insolvent. It is frequently said that taxes are the very lifeblood of government. The effective collection of taxes is a task of highest importance for the sovereign. It is critical indeed for its own survival. It follows that language of a much higher degree of specificity than that exhibited in Article 110 of the Labor Code is necessary to set aside the intent and purpose of the legislator that shines through the precisely crafted provisions of the Civil Code."

43 323 SCRA 445 (2000), Motion For Reconsideration, 331 SCRA 331 (2000).

44 *See* Dunn, *supra* note 15 at 505.

45 *Id.*

46 *See* Agabon v. NLRC, 442 SCRA 573 (2004).

47 Stanley Fish, *There Is No Textualist Position*, 42 San Diego L. Rev. 629 (2005). ("The instant I try to *construe* the words, the instant that I hear the sounds *as* words, the instant I treat them as language, I will have put in place some purpose—to give direction, to give orders, to urge haste, to urge outlaw behavior—in the light of which those sounds become words and acquire sense. *Words alone, without an animating intention, do not have power, do not have semantic shape, and are not yet language....*") (Italics supplied.)

48 Cardozo puts it best when he declares: "We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own." (*in* THE NATURE OF THE JUDICIAL PROCESS [Yale University Press 1921] at 13)

49 The classic ideological statement is *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803). In THE AMERICAN SUPREME COURT, Robert McCloskey titled his essay on the seminal case as "The Establishment of the Right to Decide: 1789-1810." He introduces his essay with the observation that "Americans have always experienced a peculiar difficulty in accommodating themselves to one of the least contestable observations...—that the Supreme Court is a willful, policy-making agency of American government." The ideological setting is well known, and that is the contest between the Federalists and the Republicans for a dominant vision of the nascent federal system. "The decision is a masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in the other."

50 Pacifico A. Agabin, *The Politics of Judicial Review Over Executive Action: The Supreme Court and Social Change*, *in* UNCONSTITUTIONAL ESSAYS 167 (University of the Philippines Press 1996).

51 Government of the Philippine Islands v. Springer, 50 Phil. 259 (1927). All the American members of the Court voted for nullifying the statute, while all of its Filipino members, except for one, dissented.

52 75 U.S. 519 (1927).

53 Springer v. Government, 275 U.S. 519 (1927) (Holmes, J. dissenting). ("The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. Property must not be taken without compensation, but with the help of a phrase (the police power), some property may be taken or destroyed for public use without paying for it, if you do not take too much. When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on. To make a rule of conduct applicable to an individual who but for such action would be free from it is to legislate-yet it is what the judges do whenever they determine which of two competing principles of policy shall prevail.")

54 Agabin, *supra* note 48.

55 FRANK HINDMAN GOLAY, FACE OF EMPIRE: UNITED STATES-PHILIPPINE RELATIONS, 1898-1946 17 (Ateneo de Manila University Press 1997). ("Less than a week after the passage of McKinley's intervention resolution precipitating war with Spain, the navy's Asiatic Squadron under Commodore George Dewey wrecked Spanish naval power in the Far East in the battle of Manila Bay. News of the dimensions of Dewey's victory electrified Americans, opening a vista of territorial expansion, commercial gain, and enhanced political stature. Overnight, American belligerency toward Spain on behalf of nearby Cuba was transformed into an imperialist thrust into the far western Pacific, the consequences of which are still unfolding.")

56 Golay, *id.* ("In his annual message to the new Congress [after the assassination of President McKinley], President Roosevelt emphasized the priority attached to Philippine legislation but cautioned legislators to proceed carefully in extending self-government to the Filipinos. The president was more enthusiastic over the [Philippine] commission's plans to speed economic development, concluding that 'nothing better can be done for the islands than to introduce industrial enterprises.' To accomplish this, the president urged Congress to pass laws by which 'every encouragement will be given to the incoming business men of every kind.")

57 Lochner v. New York, 198 U.S. 45 (1905). ("Liberty of contract relating to labor includes both parties to it; the one has as much right to purchase as the other to sell labor. There is no reasonable ground, on the score of health, for interfering with the liberty of the person or the right of free contract, by determining the hours of labor, in the occupation of a baker. Nor can a law limiting such hours be justified a health law to safeguard the public health, or the health of the individuals following that occupation.") *See also* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (Oxford University Press 1995).

58 Agabin, *supra* note 48. ("It was at this stage of Philippine economic development that the American-dominated judiciary became a model to the Philippine Judiciary in the protection of property interests against the assaults of the Filipino legislature. In declaring both an executive order (regulating the price of rice) and its enabling statute unconstitutional, the Supreme Court adopted a rigid and absolutist approach to the Constitution and set itself up as the reviewing branch of economic legislation.")

59 For example, one might find interesting how the court system is able to channel violence, especially in a colonial environment. On its face, the court system is a peaceful forum for the adjudication of cases and controversies, one that has the effect of providing a means by which the parties may settle their disputes without having to engage in self-enforcement. But submission to the jurisdiction of the court actually legitimizes the monopoly of government coercion.

60 Dunn, *supra* note 15.

61 OLIVER WENDELL HOLMES, JR., THE COMMON LAW *available at* http://www.gutenberg.org/etext/2499. ("The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-

men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.")

62 *See* Hans Christian von Baeyer, INFORMATION (2003).

63 *Id.*

64 Mabanag v. Lopez Vito, 78 Phil 1 (1947) ("In view of the foregoing considerations, we deem it unnecessary to decide the question of whether the senators and representatives who were ignored in the computation of the necessary three-fourths vote were members of Congress within the meaning of section 1 of Article XV of the Philippine Constitution. The petition is dismissed without costs.")

65 Javellana v. Executive Secretary, 50 SCRA 30 (1973). ("ACCORDINGLY, by virtue of the majority of six (6) votes of Justices Makalintal, Castro, Barredo, Makasiar, Antonio and Esguerra with the four (4) dissenting votes of the Chief Justice and Justices Zaldivar, Fernando and Teehankee, all the aforementioned cases are hereby dismissed. This being the vote of the majority, there is no further judicial obstacle to the new Constitution being considered in force and effect. It is so ordered.")

66 Estrada v. Desierto, 353 SCRA 452 (2001). ("IN VIEW WHEREOF, the petitions of Joseph Ejercito Estrada challenging the respondent Gloria Macapagal-Arroyo as the de jure 14th President of the Republic are DISMISSED.")

67 *See* AUGUSTO CESAR ESPIRITU, HOW DEMOCRACY WAS LOST (New Day Publishers 1993).