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APPOINT, ELECT, DRAW STRAWS OR SELL TO THE HIGHEST BIDDER? ON JUDICIAL SELECTION PROCESSES*

NOMMER, ÉLIRE, TIRER AU SORT, VENDRE AU PLUS OFFRANT? À PROPOS DU CHOIX DES JUGES**

Roderick A. MACDONALD***

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*** F.R. Scott Professor of Constitutional and Public Law, McGill University; Titulaire de la Chaire F.R. Scott en droit constitutionnel et en droit public, Université McGill.

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PROLOGUE

Andrée Lajoie must surely rank as one of Canada's leading legal scholars of the 20th century. More significantly, that claim can be made both in relation to her scholarship published in French in Quebec and in France, and in relation to her scholarship published in English in—as she calls it—ROC, in the U.S., in the U.K. and in the antipodes. In recognition of the extraordinary pluralism of her work, as reflected in its bijuralism (and with her most recent published work on aboriginal legal traditions, multijuralism), its bilingualism and its multidisciplinarity, I have written this essay in both French and English.

I have had the extraordinary privilege of working with Andrée for almost 25 years—from the time of the SSHRC *Law and Learning Report* in the early 1980s, through the Macdonald Royal Commission on Canada's Economic Prospects, the Quebec Network of the Law in Society Programme of the Canadian Institute for Advanced Research, the *Équipe Théories et émergence du droit* of the CRDP, the Advisory Council of the Law Commission of Canada and, currently, two major multidisciplinary research projects on *Autochtonie et gouvernance* funded successively through VRQ and SSHRC's MCRI programme.

From these several encounters I have come to appreciate an intellectual quality she possesses and an attendant research methodology she deploys that are *rarissime* in academic circles today. What is that quality and what methodology does it animate? Andrée takes nothing—no statement, no conventional wisdom, and no apparent "starting point" of an argument—as definitive. Her scholarly quest is always to go behind the obvious, to seek out assumptions and presuppositions, to break every affirmation down into its smallest components, and then to expose these to detailed scrutiny, before engaging in a process of reconstruction. Under Andrée's critical gaze, what might first appear as banalities are suddenly revealed as the fundamental commitments that have driven legal development in particular directions. Her remarkable capacity to both show the complex set of beliefs and judgements that underlie these banalities, and then to challenge the intellectual logic that seems necessarily to flow from them is a wonder to behold. To say

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I have learned from Andrée would be a gross understatement. More accurately, I would say that, from Andrée, I have learned how to learn and, in the process, to love learning.

I have consciously attempted to cast this present essay in the manner of Andrée's scholarship and to emulate her approach to research. My topic—judicial selection process—is, from one perspective, tired. But in the manner she has come to perfect, my aim is to ask the questions that precede the questions usually asked about judicial selection—even where these questions might initially appear either anodyne or their answer self-evident. In so doing, I mean to situate the endeavour in a broader intellectual context and to illustrate that many of the debating points so popular in current discourse are simply irrelevant to an intelligent reflection about how this particular issue of institutional design should be addressed.

INTRODUCTION – UNE CRISE DE LÉGITIMITÉ ?

Certains sujets de discussion sont pérennes et ce, que la conversation soit entre profanes ou entre experts : on ne se lassera jamais de parler de météo, du Canadien de Montréal, de la Constitution canadienne. D'autres sujets, au contraire, ne sont que récurrents, leur actualité dépendant plutôt de leurs enjeux politiques, de l'intérêt circonstanciel qu'ils engendrent, ou encore d'un vide médiatique à remplir. Pourtant, que ces sujets soient éternels ou simplement récurrents, il est rare (surtout en milieu académique) que le fait de revoir un même problème en apporte une meilleure compréhension. Pis encore, si jamais un consensus quelconque émerge ou est sur le point d'émerger, ceux et celles dont la carrière est de commenter ces sujets – qu'ils soient des chercheurs, des professeurs, des prophètes ou des politiciens – trouveront toujours une excuse pour ressemer la discorde.

De toute évidence, la question du choix des juges semble être l'un de ces sujets récurrents. Depuis quelques décennies, et surtout depuis que la *Charte canadienne des droits et libertés* a rehaussé le profil médiatique des juges, la fonction judiciaire est devenue le cheval de bataille de chaque parti politique nouvellement élu, de

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chaque nouvelle génération de professeurs d'université et de chaque mouvement populiste émergent[1]. Ainsi, la première question à se poser est la suivante : pourquoi, en cet hiver 2007, revenir sur la question des processus pour choisir nos juges ?

Trois raisons interreliées viennent immédiatement à l'esprit. Premièrement, depuis quelques années, la question de l'imputabilité en matière politique fait les manchettes. Bien sûr, « l'affaire des commandites » y est pour beaucoup. Mais des histoires d'abus de comptes de dépenses par les fonctionnaires, des questions de conflits d'intérêt et d'abus de pouvoir par la police sous le couvert de guerre contre le terrorisme ou encore celles de politiciens qui changent d'allégeance pour l'avancement de leur carrière font aussi partie de nos journaux quotidiens. Ces disgrâces politiques et d'administration publique touchent par ricochet la magistrature. Parce que le système qu'adopte un pays pour choisir ses juges est révélateur de ses présupposés, non seulement à propos de la fonction judiciaire mais aussi à propos de ce qu'il entend comme étant une bonne gouvernance, il est normal que face à des doutes concernant l'intégrité du système politique, l'on se mette aussi à réfléchir à l'imputabilité et l'intégrité du processus de nomination des juges[2].

Deuxièmement, d'aucuns croient que nous faisons face à une crise de légitimité quant à nos institutions de gouvernance. On dit que la confiance envers le système politique est en chute libre : de moins en moins de citoyens et citoyennes sont membres de partis politiques et exercent leur droit de vote. Parallèlement, il semble que la confiance envers la magistrature soit aussi à la baisse : de plus en plus, certains groupes mettent en cause l'impartialité et l'indépendance des juges[3]. La question se pose dans sa forme actuelle

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1 Voir notamment, COMMISSION DE RÉFORME DU DROIT DE L'ONTARIO, *Appointing Judges : Philosophy, Politics and Practice* (Toronto : Commission de réforme du droit de l'Ontario, 1991).

2 K. MALLESON & P. RUSSELL, eds., *Appointing Judges in an Age of Judicial Power* (Toronto : University of Toronto Press, 2006).

3 Voir, par exemple, C. MANFREDI, *Feminist Activism in the Supreme Court : Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver : UBC Press, 2004) ; *Judicial Power and the Charter : Canada*

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en large mesure à cause de l'attaque massive des conservateurs de l'extrême droite américaine contre leur gouvernement. Depuis les 30 dernières années, les cours fédérales aux États-Unis ont été l'ultime ligne de défense contre le mouvement d'émasculation des programmes sociaux et d'égalité des années 1960. Pour cette raison, les Républicains ont essayé de politiser le processus de nomination des juges fédéraux comme stratégie pour avancer leur ordre du jour de « l'État minimal »[4]. Et comme tout le monde le sait, quant les États-Unis éternuent, le Canada attrape une pneumonie.

La renaissance d'un populisme canadien constitue une troisième raison pour laquelle le processus de sélection des juges est devenu un sujet d'actualité. Ce populisme revêt plusieurs caractères[5] – dont non le moindre étant anti-intellectuel ou anti-élitiste. Parce que nous vivons un stade dans notre évolution politique où ce populisme est souvent garant du succès électoral, plusieurs politiciens font appel aux affirmations simplistes qui répondent aux préjugés irréfléchis des citoyens et citoyennes. Comme le sénateur américain Roman Hruska du Nebraska l'a dit en défendant la nomination par Richard Nixon de G. Harrold Carswell à la Cour suprême des États-Unis : « Il n'est pas important qu'il n'ait reçu que des "C" lors de l'évaluation de sa performance en tant que juge. Plusieurs Américains ont aussi obtenu des moyennes de "C", et ils ont le droit d'être représentés par l'un des leurs à la Cour suprême. »

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and the Paradox of Liberal Constitutionalism (Toronto : Oxford U. Press, 2001) ; J. HIEBERT, *Charter Conflicts : What is Parliament's Role ?* (Montreal : McGill Queens, 2002) ; F.L. Morton, ed. *The Charter Revolution and the Court Party* (Peterborough : Broadview Press, 2000) ; D. SCHNEIDERMAN, *Charting the Consequences : the Impact of Charter Rights on Canadian Law and Politics* (Toronto : University of Toronto Press, 1997).

4 Pour une toute dernière étude empirique américaine, voir N. SCHERER, *Scoring Points : Politicians, Activists and the Lower Federal Court Appointment Process* (Palo Alto : Stanford University Press, 2005).

5 Sur cette question, voir H. ARTHURS, « Vox Populi : Populism, the Legislative Process and the Canadian Constitution » in R. BAUMANN and T. KAHANA (eds.) *The Least Examined Branch : The Role of Legislatures in the Constitutional State* (New York : Cambridge University Press, 2006).

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Bien sûr, en prenant mes distances face aux raisons contemporaines qui animent l'intérêt renouvelé envers le processus de nomination des juges, je ne veux pas laisser entendre que la question n'est pas importante. Je ne veux pas non plus dénigrer ni les efforts des professeurs qui s'intéressent en la matière, ni les démarches des législatures pour améliorer le processus déjà entrepris. Mon objectif est plutôt de resituer la manière dont cette question est abordée en milieu universitaire. À mon sens, la nomination des juges est moins une question de droit constitutionnel qu'une question d'administration publique et du « dessein des institutions »[6]. Vu sous cet angle, quelques questions fondamentales se posent :

D'abord, la question de la *forme* et de la *procédure* : il faut dresser une liste des processus d'ordonnancement social dont nous disposons actuellement pour prendre des décisions d'administration publique et se demander quels sont les avantages et les inconvénients de chacun d'entre eux dans le contexte du choix des juges ?

Ensuite, la question de *fond* : quels sont les objectifs à poursuivre dans un processus de sélection des juges et quelles qualités personnelles et intellectuelles les candidats à la magistrature doivent-ils posséder ?

Finalement, la question *opérationnelle* : comment s'assurer que le processus adopté garantisse que les candidat(e)s qui accèdent au poste de juge soient les plus compétents – et ce, sans oublier qu'en matière d'administration publique, « le mieux est habituellement l'ennemi du bien ».

I. Thinking about Processes of Social Ordering

When we begin to reflect upon the question of judicial selection it is only normal that our attention turns to matters of form and procedure. After all, even though public interest in the topic is

6 John Bell a dirigé une collection comprenant des études comparatives de cette question du dessein des institutions appliquée aux processus de sélection des juges. Voir J. BELL, *Judiciaries within Europe* (Cambridge : Cambridge University Press, 2006).

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generated by polemics about the supposed ideological biases of judges, most discussion today focuses on the manner by which judges come to occupy their office. Neither the nature of that office in a modern liberal democracy nor, concomitantly, the moral, temperamental and intellectual qualities that persons who perform that constitutional function should possess attract much attention. But these issues of form and procedure are not as simple as they might first appear. In order to situate the question "what process or processes should we deploy to select judges?" in its broader sociopolitical context, and to give a better sense of the institutional design issues the question implies, I have entitled the present section "thinking about processes of social ordering."[7]

An initial challenge is to understand the constitutional framework and governance system within which the judicial selection process takes place. While it may be conventional to think that a judiciary is a necessary branch of modern government, it bears remembering that the decision to establish a judiciary is a political choice.[8] Neither every legal order that has ever existed nor every state today has an official agency to resolve disputes—whether between citizens (private law), between citizen and state (administrative law), between citizen and society (criminal law), between orders and institutions of government (constitutional law), or whether about the fundamental principles of the constitutional order. A few societies have, in the past, eschewed the concept of third-party dispute settlement altogether. Some rely on unofficial

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7 The expression "processes of social ordering" is borrowed from Lon Fuller. See generally, K. WINSTON, ed., *The Principles of Social Order : Selected Essays of Lon L. Fuller* (2nd ed) (Oxford : Hart Publishing, 2002). For detailed discussion and assessment see W. WITTEVEEN and V. VAN DER BURG, eds., *Rediscovering Fuller : Essays on Implicit Law and Institutional Design* (Amsterdam : University of Amsterdam Press, 1998).

8 In much of what follows I am simply transposing the insights of Max Weber (i) on forms of authority generally, and (ii) on models of legal-rational authority specifically, to institutions for handling social conflict. See M. WEBER, *Economy and Society : An Outline of Interpretive Sociology* (Roth and Wittich ed, 1968), and for a recent interpretation see M. COUTU and G. ROCHER, *La légitimité de l'État et du droit : autour de Max Weber* (Ste-Foy : Presses de l'Université Laval, 2005).

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adjudicators—consensual arbitrators, for example. Some prefer to handle conflict through processes of conciliation and mediation rather than adjudication. Many societies envisage the submission of disputes to elders or a council of sages. Others simply let grandparents or family councils decide conflicts. A few delegate this responsibility to religious officials such as priests, rabbis and imams. And some even rely on the pronouncements of oracles. What is more, in liberal democracies today, a bewildering combination of all the above institutions usually co-exists alongside the official judiciary.[9]

Sometimes these various institutions operate within a framework of *ex ante* rules (a system of law, if you will); sometimes they are meant to decide issues *ex aequo et bono* (a system of Solomonic or cadi justice, if you will). There is, moreover, no necessary connection between law understood as *ex ante* rules and bureaucratic rationality as institutional decision-making form (many consensual arbitrators, for example, are meant to apply the same law as the regular courts when deciding disputes). Nor, conversely, is there a necessary connection between the absence of rules and *ad hoc* equitable decision-making processes (courts are often given an unfettered discretion to "do justice"). In other words, the particular characteristics that we, in Canada, ascribe first, to the notion of law (generality, intelligibility, non-contradiction, stability, prospectivity, etc.) and second, to the judiciary (independence, integrity, impartiality, rationality, etc.), are neither universally present in contemporary political systems, nor universally esteemed. Indeed, in more than a few legal systems the dispute settlement function is conceived as intensely collective and political. So, before we can evaluate the advantages and disadvantages of different possible selection processes, we need first to consider the questions "what do we imagine the judicial function to be? what types of institutions and practices do we consider to fall within the scope of that function? and what do we want our judiciary to do?"

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9 For a discussion of the possibilities, see Ontario Law Reform Commission, *Study Paper on Prospects for Civil Justice* (Toronto : Ontario Law Reform Commission, 1995).

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Once we have specified these systemic goals relating to our system of judicature, we need to think about the substantive outcomes we intend the judicial selection process to deliver: "What exactly are the qualities that we think characterize a good judge? And how can the judicial selection process be designed to ensure the appointment of persons having these qualities?" Again, this inquiry is complex, for it may well be that there is no perfect formula for answering the two questions just posed. Some States have understandings of the qualities of good judges that are quite different from ours. In addition, it may well be that we, ourselves, have different understandings of the qualities we seek in our judges depending on the kind of court on which they sit (for example, Small Claims Court, regular trial court, Court of Appeal, Supreme Court) and the subject matter being decided (for example, commercial law, family law, administrative law, criminal law, constitutional law, and so on).

The overall integrity of the process is a third dimension of the design decision. Even after we have decided what we want judges to do and the qualities we want to see in judges, we are still a long way from knowing what selection process to adopt. For we also need to decide whether achieving a close match between the outcomes produced by a given selection process and the substantive outcomes we desire is the only goal that we would attribute to a selection process. The point can be illustrated by posing the following (admittedly sharpened for rhetorical purposes) alternatives: Do we want a selection process that will generate the best candidates for the job, even if that process is secret, mysterious, anti-democratic, corrupt, costly and slow? Or do we want a process that is open, accessible, democratic, honest, efficient and cheap, even if it generates suboptimal appointments? Much of the challenge in institutional design is to recognize, organize and justify the inevitable trade-offs among the different goals—procedural and substantive—we seek to achieve.

When the matter is put in this way, it is obvious that the choice of judicial selection process confronts us with deciding how to structure the relationship between means and ends. Compare the following claims. Albert Einstein is famously reported as having said in 1941: "Perfection of means and confusion of goals seem, in

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my opinion, to characterize our age." By contrast, another equally astute observer, Forrest Gump, opined in 1991: "If you don't know where you're going, you're unlikely to wind up there." While neither was a scholar of the humanities, each stumbled on one of the central concerns of modern life that plague professional philosophers and political theorists: are the difficult issues of social life more related (i) to deciding the goals we should be pursuing, with the means for doing so being relatively uncontroversial; or (ii) to the selection of means to achieve what are relatively easily agreed upon goals?[10]

Obviously these two dimensions of judicial selection are intertwined. One cannot be addressed without attending to the other. Nonetheless, it is important to start somewhere. I begin, then, by assuming a positive answer to the initial question whether we really do need judges. Some type of third-party dispute-settlement mechanism to handle "trouble-cases" appears to be an almost inescapable feature of human societies.[11] Notice, however, that it is a big leap from this abstract conclusion about the organization of social institutions to the very particular conclusion that we need officially-named, professionally-trained judges sitting in bureaucratically-organized, constitutionally-protected courts deciding both matters of everyday human disagreement and issues of high constitutional import. This leap notwithstanding, in Canada today we accept the need for designated officials charged with applying

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10 I derive this statement of the problem from Lon Fuller, "Means and Ends," in *The Principles of Social Order*, *supra*, note 7 at 66-67, who notes that Isaiah Berlin was clearly in the Einstein camp (means are uncontroversial, goals are contested), while Aldous Huxley was in the Gump camp (goals are uncontroversial, means are contested) on this question.

11 See notably, K. LLEWELLYN and E.A. HOEBEL, *The Cheyenne Way* (Norman : University of Oklahoma Press, 1941) ; A. KOJÈVE, *Esquisse d'une phénoménologie du droit : exposé provisoire* (Paris : Gallimard, 1981). I leave aside for the moment whether it is necessary that these dispute-settlement mechanisms need, necessarily, involve human beings as opposed to, say, computers.

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general rules of law to the resolution of particular disputes.[12] Hence the importance of deciding how to select people to serve on these "primary law applying institutions": courts.[13]

Judicial selection processes have two distinct facets. To begin, any selection process requires a preliminary decision as to what class of persons will be eligible for selection. Thereafter, and regardless of how the pool of eligible candidates is determined, the process requires that someone or more people actually get chosen to serve as judges. These are both ethical choices that together instantiate what Aristotle called "distributive justice."[14] Recall the formal properties of distributive justice: a benefit, a class of beneficiaries, and a criterion of distribution. In the judicial selection process, the benefit to be distributed is a "judicial office"; there is a class of beneficiaries—"people seeking judicial office" or at the very least "people seeking judicial office who have met the minimum standard"; and there is a criterion of distribution—"whatever we decide are the criteria to be applied in determining who should be selected."

Of course, being purely formal, Aristotle's concept of distributive justice was not meant to suggest particular content to these three elements. That is, in Book V of the *Nicomachean Ethics* Aris-

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12 For the most part, it is assumed that these designated officials will be judges, although the reality of legal interpretation and application is much more complex—embracing any public official that interacts with citizens (police, clerks, inspectors), specialized decision-making tribunals (administrative boards and tribunals), consensual arbitrators, and so on. Of course, a distinction can be taken between officials whose primary task is law application—courts, parliamentary delegates exercising a "statutory power of decision," consensual arbitrators—and those who interpret and apply law in the course of performing some other function—the police, inspectors, clerks, and so on. The focus here is on the first group, who may, broadly speaking, be called "judges" whether or not they are actually members of the official judiciary. See generally, on administrative tribunals, P. ISSALYS, *Précis de droit des institutions administratives* (2nd ed) (Cowansville : Éditions Yvon Blais, 2002).

13 The expression "primary law applying organ" is from J. RAZ, *The Concept of a Legal System* (Oxford : Clarendon Press, 1971) who uses it to distinguish the judicial function strictly speaking from other judging activities.

14 ARISTOTLE, *Nicomachean Ethics*, Book V.

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totle was not concerned to describe the specifics of how to distribute justly any particular benefit (here, judicial office): What is judicial office? Is it a singular concept? Is it an institutional or *ad hoc* activity? etc. Nor, once the benefit was identified, did he set out any substantive guidelines about how to decide a particular class of eligible beneficiaries (here, candidates for selection): Should all persons be eligible? Should a screening formula or minimum standards be adopted to winnow the pool? etc. Nor was he not concerned to announce specific rules and principles—the criterion or criteria of distribution—by which any particular benefit (here, judicial office) should be attributed: Should we put the decision to a vote? Should we draw straws? Should we let the chief magistrate decide? etc.[15] Nor, lastly, did he offer suggestions about how to decide the actual processes by which each of these questions would be addressed, and the distributive decision would be made: How do we go about making those decisions about distributive criteria and ultimately about specific beneficiaries?[16] These are the questions to which I now turn.

A. An Inventory of Processes of Social Ordering

The title of this essay uses the words "appoint, elect, draw straws, or sell to the highest bidder" to suggest some of the processes that might be adopted for choosing judges. Each of these possibilities is a reflection of a different process of social ordering; each rests on a fundamentally different decision-making logic.[17]

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15 In other words, Aristotle did not purport, like for example, RAWLS, *A Theory of Justice* (Cambridge : Belknap Press, 1971) ; WALZER, *Spheres of Justice* (New York : Basic Books, 1985) to provide a universal criterion or criteria of distribution.

16 Strictly speaking this last question was not of concern to Aristotle, since it addresses questions of procedure and not the properties of justice per se. For discussion, see J. ELSTER, *Local Justice : How Institutions Allocate Scarce Goods and Necessary Burdens* (New York : Russell Sage, 1992).

17 See the discussion in L. FULLER, "The Role of Contract in the Ordering Processes of Society Generally" and K. WINSTON, "Introduction" in *The Principles of Social Order*, *supra*, note 7 at 187 and 26. See also W. WITTEVEEN,

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Consider first an appointments process. Any such process presupposes that somebody—or, less commonly, some body—will be doing the appointing. In these types of third-party decision process one normally assumes that the appointer will have an *ex ante* set of criteria, as well as sufficient information about the potential beneficiaries of the process that these criteria may be applied, in the exercise of judgement, to determine the most suitable candidate.[18]

An ordinary election process, by contrast, necessarily presupposes a collegium of persons who will vote on the matter. Electors normally are not expected to offer any justification for their choice, nor are they constrained to decide among eligible candidates on the basis of *ex ante* criteria or any particular merit that candidates might have. When applied to the selection of judges, the electorate is usually presumed comprise all citizens entitled to vote.[19]

A process of drawing straws is, like flipping a coin, a deliberate resort to the inexorable logic of chance. Of course, many design rules may be necessary to frame the lottery whenever more than two candidates are present. Nonetheless, once this framing occurs, the process implies neither the exercise of human judgement, nor the need for candidates to justify their candidacy on any substantive grounds.

"Rediscovering Fuller : An Introduction" and R.A. MACDONALD, "Legislation and Governance" in *Rediscovering Fuller*, *supra*, note 7, at 21 and 279.

18 There are, of course, a variety of third-party processes. These range from the highly styled form of process known as adjudication, through consultative processes, through third-party processes involving the simple imposition of the decision-maker's will. See R.A. MACDONALD, "A Theory of Procedural Fairness" (1981) 1 *Windsor Yearbook of Access to Justice* 3. Moreover, a third-party appointments process does not automatically require that the decision to be taken meet even a minimum standard of rationality—it could be simply a capricious choice.

19 Notice again, that there is no requirement as to the composition of the collegium of voters. Like Aristotle's concept of distributive justice, elections are a "form" of social ordering. Moreover, an electoral process does not require electors to attend to any particular criteria ; nor does it require that electors deliberate together before voting ; nor finally does it require that they justify their vote. When judges in the Supreme Court decide appeals they are engaged in a particularly stylized form of electoral process.

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A process of selling to the highest bidder is a reflection of market principles. Let those who want the job the most, bid the most to receive it. Today, we imagine that the currency of the market will normally be legal tender, but the market might be structured so that bids may be made in other forms (including promises of future performance). Whatever the currency, however, the process is driven solely by how much candidates are willing to pay.

Manifold other processes of social ordering beside these four (and their multiple variants) could be adapted for application to judicial selection. One might imagine a process of divine or oracular revelation. At some point one or more candidates will demonstrate the tell-tale evidence of God's approval. Admittedly, in these types of process it is necessary to agree, in advance, both on which God or which oracle will have the power to make the selection, and on what will be taken as conclusive evidence of God's or the oracle's will. On such theological questions, many wars have been fought and it is not immediately clear how the process for selecting the selector could be decided except by reference to some one or other of the processes of social ordering already canvassed.

The different mechanisms just reviewed all assume a decision process involving something beyond the mere will of those who may be seeking the benefit to be distributed. But not all decision processes, just like not all processes of conflict resolution, actually require external decision-makers or an *ex ante* institutional rule that inexorably produces an outcome.[20] There are diverse ways of delegating responsibility to those who will ultimately be the beneficiary. For example, one idea might simply be to let those who seek judicial office settle the matter by agreement among themselves. Still, multi-party negotiations are extremely difficult to manage and there is no guarantee that agreement could be reached.

Another idea might be to let the candidates for judicial office pick a third person to help them resolve the selection dilemma, but

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[20] See R.A. MACDONALD and P.-O. SAVOIE, "Une phénoménologie des modes alternatifs de règlement des conflits : résultat, processus et symbolisme" in C. EBERHARD, ed., *La quête anthropologique du droit* (Paris : Karthala, 2006) at 275.

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to confine the role of this person to that of an adviser, a facilitator, or a mediator. Conciliation processes are well known in situations where one is meant to resolve existing conflict about past events, but are rare when the outcome sought is forward looking. As with contractual processes, there is no guarantee that the mediation will produce agreement among aspiring candidates for judicial office.

Lastly, one might imagine a process where self-interest can be structured to produce an optimal outcome. Consider the standard example of two siblings in a conflict about how to divide up a chocolate bar. How would they do that fairly? Assuming the absence of a neutral third person like a parent to make a "fair" cut, they would need a procedure they could manage themselves. Enter the old adage "one person cuts and the other picks first." Having second choice would normally ensure that the person doing the cutting came close to producing equal shares.[21] In cases involving the distribution of public offices, however, it is difficult to imagine how self-executing party-party processes could be effectively deployed without some mechanism for pre-screening candidates.[22]

Each process heretofore canvassed locates the decision externally to the body to which the candidate is to be named. In some cases, the decision is by institutional rule (chance, markets, elections), in some by third-party selection (appointments), in some by inter-candidate agreement (contract, mediation, competition). But these do no exhaust the possibilities. It is also possible to organize most of these processes in a logic of self-replication. In self-replication processes, the choice will be made internally, for example, by a Supreme Court simply co-opting its replacement members. The distinctive feature of this process lies in the locus of decision, and not the form (a vote, an adjudicative allocation,

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21 For a detailed elaboration of this hypothesis, see R.A. MACDONALD, "Law Day and Chocolate Bunnies" in *Lessons of Everyday Law* (Montreal : McGill-Queens University Press, 2002) at 19.

22 In Shakespeare's *Merchant of Venice*, only three suitors came forward to seek the hand of Portia—the price of a wrong guess being sufficiently high to dissuade the casual applicant.

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choosing by lot from a previously narrowed pool of applicants) or the manner by which the decision is taken.[23]

What conclusions may be drawn from this preliminary review of different processes of social ordering? First, although some initially may seem implausible, they are not purely hypothetical examples: every one has been tried somewhere as a means for choosing judges. The Greeks drew lots to determine the roster of judges for the upcoming year. Mediation and party-nominated arbitration between aspirants for public office (including judgeships) are frequent in theocratic traditions, as is recourse to divine revelation. Anthropologists report that many Micronesian societies pick judges through processes of trial by battle, or simply by one candidate outspending the other on bread and circuses. The majority of U.S. states elect their judges. In Canada, both federal and provincial judges are selected through an appointments process. Finally, much official adjudication in Canadian administrative law, for example grievance arbitration under collective agreements, involves litigants in selecting particular decision-makers from a roster of ostensibly merit-identified candidates.

Second, and notwithstanding these various precedents, not all processes can be easily adapted to the endeavour of judicial selection in Canada today. Either inherent features of certain processes that may be seen as strengths in other decision-making contexts render them unsuitable or suboptimal for choosing judges, or the number of procedural steps required to make them functional in a mass society so complicate them as to counsel against their adoption. The former defect attaches, notably, to oracular decision-making or selecting judges by drawing straws, while the latter problem is most particularly present in respect of party-party processes (contract, mediation, organized self-interest).

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[23] For an example of self-replication process, see the rules relating to the election of new members of the Royal Society of Canada : www.rsc.ca/index.php ?&page_id=1&lang_id=1. The recruitment and tenure of professors at most universities also are organized as self-replication processes.

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Third, whatever process is picked, perfection is impossible. Social arrangements are not infinitely pliable. Every social ordering process rests on a set of assumptions about the character of the problem to be solved, the outcomes to be achieved, and the time and energy that can be plausibly invested in coming to a decision. As a consequence, it is inevitable that we either will have to adapt one or more processes of social order so they may be deployed to achieve our desired goals, or we will have to adapt our goals so they can be fitted within the structural parametres of the process or processes we choose.

B. The Calculus of Process Choice

The above conclusions about processes of social ordering were derived without specific reference from two of the three central considerations that should inform decisions about selecting a process for choosing judges—namely, "what do we imagine the judicial function to be?" and "what exactly are the qualities that we think characterize a good judge?" Nor did these conclusions flow from a considered discussion of the particular *process* goals that one associates with public decision-making in a liberal democracy.[24] Rather, the object was (1) to identify the main social ordering processes deployed today in Canada, (2) to assess summarily whether they could be adapted to the endeavour of choosing judges, and (3) to open up inquiry into how choices *about which process to adopt* should be made.

In thinking about choosing any particular decision process an initial consideration must always be whether there are specific substantive outcomes that one desires the process to generate. Some decision processes are designed simply to produce outcomes—flipping for it provides an answer without presuming that one of the outcomes is preferable to any of the others. Some processes are

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[24] For a review of these process goals in the context of public administration generally, see R.A. MACDONALD, "The Acoustics of Accountability" in A. SAJO, ed. *Judicial Integrity* (Leiden : Nijhoff, 2004) 171 ; in relation to the judicial process, see L. EPSTEIN and J. SEGAL, *Advice and Consent : The Politics of Judicial Appointment* (Oxford : Oxford University Press, 2005).

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relatively indifferent as to substantive outcomes but are designed principally to record preferences—elections processes, markets, and oracular processes record the preferences of, respectively, electors, candidates, and oracles. Some processes (most typically appointments and self-replication processes) aim explicitly at substantive outcomes—making judgements according to *ex ante* criteria of merit, however merit is defined. Much of the debate about judicial appointments processes is really a surrogate for these outcome orientations. Contesting interests typically frame arguments based on assumptions they make about the likelihood any particular process will generate the appointment of candidates they favour.[25]

In addition, almost all decision-making processes are multiform and nested. That is, they imply a complex regression and are dependent on one or more prior meta-choices about the structuring rules of the process. For example, even in the simplest "one cuts . . ." process it is still necessary to determine who the "one person" will be. Suppose the rule of choice were "older cuts"; it would be necessary to justify why that, as opposed to younger, taller, heavier, and so on, is the allocational criterion. Even if the initial decision were itself to be decided by a deliberate resort to chance—flipping for it—one person has to "flip," and the other has to "call it." If we were to come up with a chance rule "odds I win, evens you win" we would still have to decide who gets "odds" and who gets "evens." Finally, if we were to attempt to resolve this last question by playing "scissors, rocks and paper" we would still have to agree, first, to decide upon this game as a way to begin the decision-making process. Like considerations apply to electoral processes (how is

[25] The most self-conscious reflections of this "means have no independent value but only serve predetermined ends" approach to judicial appointments may be found in recent U.S. scholarship in relation to appointments to the Supreme Court. Compare, for example, T. PARRY-GILES, *The Character of Justice : Rhetoric, Law, and Politics in the Supreme Court Confirmation Process* (East Lansing : Michigan State University Press, 2005) ; L. OWENS, *Original Intent and the Struggle for the Supreme Court : The Politics of Judicial Appointments* (Lewiston : Edwin Mellon Press, 2005) ; R. DAVIS, *Electing Justice : Fixing the Supreme Court Nomination Process* (Oxford : Oxford University Press, 2005).

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the candidate list determined? who votes? is the decision by plurality, majority, super-majority? is there just one round?) and to appointments processes (what criteria are to be applied? is appointment by a single person or a collegium, and if the latter, what decision-making process will the collegium adopt?). In other words, given the range of substantive and procedural goals one seeks to achieve in designing processes of judicial selection, it is unlikely that a single process will prove satisfactory.[26]

Furthermore, regardless of the particular selection process in issue, the criteria of distribution adopted, and the precision with which the benefit to be distributed is specified, it is still necessary to decide who will fall within the class of potential beneficiaries. In some situations the very definition of the problem answers this question: if there are only three siblings in the family, absent some extraordinary event such as the discovery of a previously unknown sibling during the decision process, parents have little difficulty determining who will be the beneficiaries of, say, their affection. But is fixing the pool of candidates for judicial office as easy as that? Unless one takes the position that anybody should be eligible for selection (for examples, babies, non-citizens, persons resident in psychiatric institutions, and inmates of penitentiaries) a pre-screening mechanism will have to be built into the process. Consider both the manner in which the pre-screening occurs, and the substantive criteria by which it operates.

Procedurally, a pre-screening may happen at a single moment through the application of determinate, *ex ante* threshold criteria of eligibility. We might, for example, decide that only applicants of a certain age, or from a certain region or province, should be retained for further consideration. Alternatively, we might undertake a pre-

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[26] There are, in fact, two separate questions here. The first is whether an identical process should be deployed regardless of the institution to which a person is being appointed, and regardless of the specific task that the appointee is meant to perform. This question is addressed in the next section of this essay. The second question is whether, for appointment to any particular institution or task, there is a single process that may be effectively deployed. For a discussion of why this is unlikely, see R.A. MACDONALD, "Prospects for Civil Justice" in *Study Paper on Prospects for Civil Justice*, *supra* note 9, at 5.

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assessment of all applicants' files in order to determine a smaller pool of "well qualified" candidates (those with a law degree, or those with previous experience in analogous institutions). On other occasions, we narrow a field by organizing some type of round-robin competition among applicants. People who want to be judges put their name in a hat and we organize a series of competitions, like the World Cup soccer rounds to get to a pool of 64. From the pool of 64 we then organize a draw in order to reduce the field to 32, then 16, then 8, then 4, then 2, and then a winner. To manage the round-robin tournament, any number of decision processes could be imagined: voting, a quiz, an oratorical competition, and so on. Moreover, it would not even be necessary for the same decision process to be adopted for selecting winners at each stage of the tournament. Nor, would it be necessary for the knock-out process to be carried to a final decision. The tournament might end once a field of, say, eight candidates emerge, and at that point, some other selection process could be adopted or deployed.

Viewed substantively, these pre-screening criteria can be of two broad types. Sometimes, we recur to criteria aimed at deciding the class of beneficiaries independently of any factor related to the substance of the decision to be taken (for example, only people born in calendar years divisible by four are eligible). That is, the screening is meant simply to reduce the scale of the decision-making task. On other occasions, we attempt to deploy criteria that are at least contingently related to the substance of the decision to be taken. Take, for example, the Canadian rule that only people who have been members of a recognized bar association for 10 years may be named to a judgeship.[27] In such cases, criteria aimed at narrowing

[27] I use the word "contingently" advisedly. Just how contingently related a criterion may be will depend on how one answers questions about the "role of the judiciary" and about the "qualities of a judge." Is it so obvious that membership in a bar association for 10 years should be a *sine qua non* for selection as a judge of the Small Claims Court, or for a State's highest constitutional court (in Canada, the Supreme Court of Canada) ? On what assumptions about the requirements for the job, and on what assumptions about the character of those who have been practicing law for 10 years does such a criterion rest ?

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the pool of potential candidates (the class of beneficiaries) actually elide into criteria for selection (the criteria of distribution).

These last observations illustrate that the endeavour of judicial selection is centrally about institutional design, and more particularly about "the manageability of social tasks." In order for any decision-maker's choice to be meaningful it is necessary to reduce the possible options to a number that is within the ordinary human intellect to apprehend.[28] The point here is not the obvious structural one—for example, that as a practical matter, it is unworkable to have an electoral process where every voter is also a candidate. It is rather that where there is a single or a small number of decision-makers there are limits to their capacity to absorb and weigh all relevant information. While in theory an executive nomination process could be organized for an unlimited pool of candidates, in practice only those candidates implicitly and informally pre-selected by the decision-maker will enter that decision-maker's consciousness as possible nominees.

What then are the process goals that inhere in the endeavour of selecting judges? Not surprisingly there is a strong consensus among academic commentators, lawyers, judges, politicians and citizens as to what these process goals should be. The typical listing includes political accountability, openness, inclusiveness, accessibility, institutional integrity, incorruptibility, efficiency, timeliness, responsiveness to identified selection criteria, valid assessment of abilities, and low cost.[29]

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[28] For a discussion of this question, see L. FULLER, "Freedom as a Problem of Allocating Choice" (1968) 112 *Proceedings of the American Philosophical Association* 101. Admittedly, if the process does not require the application of human intellect—a lottery for example—the number of potential candidates can be unlimited. Likewise, as long as the process is structured so that bids can be communicated efficiently, a market can be in theory unlimited. In practice for auctions, however, the fixing of a floor bid eliminates several potential bidders from the outset.

[29] The list is derived from C. BAAR, "Comparative Perspectives on Judicial Selection Processes" in *Appointing Judges*, *supra* note 1; see, for an application of these criteria in different settings, K. MALLESON & P. RUSSELL, eds., *Appointing Judges in an Age of Judicial Power*, *supra*, note 2.

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How well do the various social ordering processes already canvassed measure up when these process goals are plotted against it ?

1. Self-interest: *advantages*—fast; cheap; empowers candidates; inclusive; *disadvantages*—not accountable; not transparent; not accessible; no valid assessment of abilities;
2. Recourse to a mediator: *advantages*—empowers the parties; fast; non-adversarial; *disadvantages*—power imbalances; not transparent; no general rules;
3. Contractual arbitration: *advantages*—empowers the parties; fast; non-adversarial; *disadvantages*—power imbalances; not transparent; not inclusive; no general rules;
4. Divine or oracular revelation: *advantages*—fast and cheap; *disadvantages*—whose divinity? whose oracle? doesn't tell us much about the criteria of selection;
5. A tournament of judges or round-robin competition: *advantages*—it is a competition so the cream rises to the top; *disadvantages*—what about those who don't apply? who sets out draw or the seeding? what are the criteria?
6. Sale to the highest bidder: *advantages*—fast and cheap; generates money for the state; the person who wants it most gets it; *disadvantages*—is desire for the job the best indicator? perverse consequences; borrowing money and rewarding friends;
7. Deliberate resort to chance: *advantages*—impartial; fast; *disadvantages*—not clear who should be in the pool; no reference to competence;
8. Elections: *advantages*—democratic; accountable; transparent (except in Florida with hanging chads); *disadvantages*—very expensive; crass; open to corruption;
9. Appointments: *advantages*—not crass; judgement can be built in; third-party process; *disadvantages*—political; not transparent; diffused accountability; expensive.

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Not surprisingly, this comparative assessment yields mixed messages.[30] Each process privileges certain goals, and discounts others. How one ranks them, therefore, depends on the relative assessment one makes of the importance of each of these process goals. It is not a foregone conclusion that openness will always trump efficiency, timeliness and low cost. Nor is it obvious that political accountability should always trump institutional integrity and incorruptibility. Nor even would we always want to say that strong responsiveness to identified merit selection criteria should always have precedence over accessibility and inclusiveness. Finally, there may be occasions where the perfect is the enemy of the good: we may be satisfied with a process that is open, efficient and inexpensive despite the fact that we have no guarantee that it will deliver the candidates who would be absolutely top-ranked on their merits.[31]

Often these process criteria will be ranked differently depending on the judicial office for which candidates are being selected. Here are some everyday examples. It may well be that in a landlord-tenant tribunal, a consumer tribunal or a small claims court selection process, accessibility and inclusiveness may well be high-order goals. In a Supreme Court selection process, low cost, efficiency and timeliness will not count nearly as much as political accountability, valid assessment of abilities and openness. In appointment to a specialized tribunal such as a patents court, an air transport safety board, a nuclear licensing commission, or a professional discipline tribunal institutional integrity and responsiveness to identified criteria will be the central goals.

When all these process considerations are taken into account, it seems that regardless of how they may be ranked for individual

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30 A good review of how debates have played out on these process questions is provided by C. KENDALL, "Criticism and Reform : A Survey of Canadian Literature on the Appointment of Judges" in *Appointing Judges*, *supra*, note 1, at 211.

31 Of course, such arguments are likely to be made most frequently by those who, historically, have had at least some chance of being selected. For a recent analysis which tangentially notes the politics of such affirmations, see K. MALLESON, "Rethinking the Merit Principle in Judicial Selection" (2006) 33 *Journal of Law and Society* 126.

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types of court, no one process will produce a sufficient responsiveness to a sufficient number of process goals to merit adoption in any particular case. Inevitably some combination (or some menu of combinations) will be needed. The combination could be serial (one process followed by another), a *métissage* (a blend or hybrid of two or more processes), or even concurrent. Before addressing how such process combinations can be imagined, however, it is important to consider the second question that conditions all judicial selection processes: what kind of person do we want the process to identify?

II. Qui voulons-nous choisir comme juges ?

La piètre qualité des discussions populaire et politique sur la question du choix des juges est l'un des éléments les plus surprenants du débat actuel. Parfois, en lisant les dires des politiciens et d'autres intéressés, il est difficile de voir des arguments rationnels à propos de la nomination des juges et à propos du type d'individus qui devraient être nommés. Dans presque tous les cas, on présume que les juges ne sont pas capables de juger autrement que par un réflexe provenant de leurs présupposés idéologiques, leur classe sociale, leur genre et leur appartenance à un parti politique donné[32]. Que les commentaires proviennent de la droite ou de la gauche, tous tendent à instrumentaliser la fonction judiciaire et le rôle des juges. En effet, c'est comme s'il n'y avait pas de critère substantif

[32] Pour quelques études américaines, voir, notamment, C. SUNSTEIN *et al.* « Ideological Voting on Federal Courts of Appeal : A Preliminary Investigation » (2004) 90 *Virginia Law Review* 301 ; J. PERISUE, « Note : Female Judges Mater : Gender and Collegial Decision-making in the Federal Appellate Courts » (2005) 114 *Yale Law Journal* 1759. S. GOLDMAN, *Judicial Conflict and Consensus : Behavioural Studies of American Appellate Courts* (Lexington : University of Kentucky Press, 1986). Au Canada, les études sont à la fois moins nombreuses et moins polémiques. L'auteur le plus prolifique est sûrement Peter McCormick qui a publié plus d'une douzaine d'études depuis 1990. Voir, par exemple, « "With respect . . ."—Levels of Disagreement on the Lamer Court » (2003) 48 *McGill Law Journal* 89 ; voir aussi, A. HEARD, « The Charter in the Supreme Court of Canada : The Importance of Which Judges Hear and Appeal » (1991) *Canadian Journal of Political Science* 24.

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applicable au choix de juges autre que de toujours décider selon les préjugés de celui ou ceux qui en font la sélection.

L'objet de cette partie est d'établir une liste de qualités des juges qui ne sont pas simplement des affirmations abstraites. Pour ce faire, il faut d'abord poser quelques questions d'ordre « structurel et institutionnel » à propos de la magistrature au Canada aujourd'hui. Ensuite, nous mettrons l'accent sur les qualités humaines que doivent posséder ceux et celles qui aspirent à la magistrature.

A. Les facteurs structurels

La question de la sélection des juges est souvent abordée comme si elle n'avait qu'un seul objectif à poursuivre et un seul élément de décision : comment trouver le (ou la) candidat(e) idéal(e) ? Cette manière de poser la question est trompeuse, et ce, pour deux raisons. D'abord, tous les êtres humains sont différents. Il est donc périlleux de chercher un modèle unique et abstrait pour évaluer les candidatures. Le processus de sélection n'est pas comme le choix du meilleur premier ministre de tous les temps : on vise l'avenir et non pas le passé. Ajoutons que les juges agissent dans un cadre institutionnel et que ce cadre impose certaines contraintes à la fois sur la manière dont certaines candidatures sont retenues ou écartées et sur le processus de nomination lui-même. Nous explorerons ces contraintes en posant cinq questions préliminaires : (i) Pourquoi avons-nous besoin de juges et non de machines ? (ii) Dans quelle mesure la Constitution canadienne limite-t-elle nos options ? (iii) Selon cette constitution, qu'est-ce qu'un juge ? (iv) Que font les juges au juste ? et (v) Tous les juges font-ils la même chose ?[33]

[33] En termes aristotéliens, les deux premières questions répondent au critère de « définition de bénéficiaires ». Les questions trois à cinq répondent au critère de « définition de bénéfice à distribuer ». Ni l'un ni l'autre n'aborde le critère de « critères de sélection », question que j'aborderai dans la section suivante.

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(i) Pourquoi des juges et non des machines ?

La question n'est pas si farfelue. Après tout, plusieurs citoyens croient que l'art de juger ne consiste en rien de plus que de lire un texte de loi, et de l'appliquer à une situation précise. De plus, il y a aussi des juristes qui sont convaincus qu'il est possible de transformer le syllogisme juridique en une formule de pure logique déductive. Depuis quelques décennies, ces juristes travaillent sur l'application des protocoles de la logique booléenne afin de rendre le processus judicaire plus prévisible et la justice plus objective[34]. Ces efforts ont un double objet – premièrement, montrer, par le biais des statistiques, que les juges prennent des décisions selon des critères et des facteurs personnels n'ayant rien à voir avec la spécificité de la cause devant eux[35] ; deuxièmement, montrer qu'il est possible, pour tous les conflits juridiques qui pourraient se présenter, de programmer un ordinateur pour les résoudre. Il n'y a pas de doute, l'État pourrait faire des économies considérables et en même temps permettre aux justiciables de sauver beaucoup de temps et d'énergie si la plupart des décisions « de masse » étaient prises par les ordinateurs[36].

Toutefois, relativement peu nombreuses sont les causes portées devant les tribunaux où la décision est aussi simple. En effet, quand le résultat juridique est plutôt clair, les avocats arrivent à un règlement. Plus de 95 % des causes sont réglées de cette manière. Des causes vouées à l'échec arrivent devant les tribunaux presque

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34 Le fondateur du mouvement fut Lee LOEVINGER, « Jurimetrics—The Next Step Forward » (1949) 33 *Minnesota Law Review* 455. Ce mouvement a connu beaucoup d'intérêt jusqu'aux années 1960. Voir notamment G. SCHUBERT, *Comparative Judicial Behaviour* (New York : Oxford University Press, 1969).

35 Voir « Symposium : Science and the Judicial Process » (1965) 78 *Harvard Law Review* 1500.

36 Toutefois, même les auteurs qui s'intéressent plus à « l'adjudication de masse » ne voient pas l'usage des ordinateurs comme une solution magique. Voir J. MASHAW, *Bureaucratic Justice : Managing Social Security Disability Claim*s (New Haven : Yale University Press, 1983).

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uniquement dans les situations de poursuites purement stratégiques, où l'une des parties avec une cause perdue à l'avance cherche à épuiser l'autre. De plus, dans bien des cas, le conflit ne concerne pas la règle applicable, ou l'application de la règle à une situation de fait donnée. Le conflit se situe plutôt au niveau des faits. Et souvent quand le juge se prononce sur les faits, les parties sont en mesure de régler leur dispute. Ceux qui prônent l'usage des ordinateurs, le font dans un contexte où les faits sont déjà établis clairement. Pour trancher les questions de fait, le jugement humain est inévitable.

Prenons un exemple classique – la règle « aucun véhicule n'est permis dans le parc » –, pour illustrer deux éléments que ceux qui croient aux ordinateurs ignorent ou décident d'oublier. Le droit est normatif : il n'est pas simplement descriptif d'une situation. Être normatif veut dire que le législateur, par exemple, a quelque chose en tête, un but, en édictant la règle. Pour saisir le sens de la loi, il est nécessaire de connaître plus qu'une définition du dictionnaire. Voici pourquoi : (1) Quelles définitions doit-on retenir (le mot « véhicule » comprend-il, en plus des automobiles, les « véhicules » qui sont les pièces de théâtre par lesquelles une actrice dévoile ses talents ?); (2) Dans quel contexte se sert-on du mot (est-ce que l'on parle d'un règlement municipal affiché au bord d'un endroit boisé, d'une pancarte affichée dans un terrain de stationnement, qui pourrait nous avertir, par exemple, que le stationnement est fermé ?); (3) Quels sont les objectifs poursuivis par le législateur (le mot comprend-il les poussettes, les planches à roulettes, les chaises roulantes, les bicyclettes, les jouets (camions, trottinettes…), qui sont tous des véhicules au sens du dictionnaire ?).

Ensuite, si la règle est incertaine, c'est qu'il existe des facteurs extérieurs qui conditionnent son application. Même si en réponse à une question précise, « est-ce que vous avez explicitement envisagé ce type de véhicule – une automobile, par exemple ? », le législateur répond affirmativement, il n'est pas toujours évident qu'il (ou le juge, ou encore la société en général) désire que la prohibition s'applique à toutes les situations impliquant ce type de véhicule. Parfois, il peut y avoir des facteurs qui n'entrent pas précisément dans l'imagination du législateur et qui ne touchent pas la question de définition de l'objet – littéralement ou selon les buts poursuivis

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par le législateur – mais un jugement de valeur sociétale (une ambulance qui entre dans le parc pour récupérer quelqu'un qui a souffert d'une crise cardiaque, un chauffeur qui, pour éviter un enfant qui a subitement sauté dans la rue devant lui, a fait dévier son auto et est entré dans le parc, ou un char d'assaut monté sur un pied de commémoration militaire).

Selon nos technologies actuelles, il n'est pas possible de programmer un ordinateur pour rendre les jugements de cette nature. En d'autres termes, même dans le cas des règles les plus simples, l'acte de juger est un acte d'interprétation qui exige l'exercice du jugement humain. Bien sûr, dans plusieurs cas, ce ne sont même pas les juges qui l'exercent en première instance. En matière pénale, c'est le policier qui comprend que l'ambulance n'est pas un véhicule prohibé ; en matière civile, ce sont les avocats qui, en interprétant le droit de manière semblable, sont capables de régler les conflits ; et en général, c'est le citoyen qui, face à une telle interdiction, va décider de son propre chef que la chaise roulante et le jouet ne sont pas visés, mais que la planche à roulettes et les bicyclettes le sont. Aussi longtemps que nous entretiendrons une conception infantile de l'art de juger – l'application quasi automatique des règles abstraites aux situations particulières et spécifiques – nous ne cernerons jamais les qualités requises des futurs juges.

(ii) Quel est le cadre institutionnel dans lequel nos juges sont appelés à exercer leurs fonctions ?

Souvent les critiques les plus sévères du système actuel de nomination des juges émanent de ceux et celles qui ne connaissent presque rien du cadre constitutionnel et institutionnel du Canada dans lequel les juges doivent agir. Bien que le système judicaire du Canada soit, en principe, unitaire, et qu'il n'existe pas, comme aux États-Unis, une compétition de compétence entre les tribunaux dits fédéraux et les cours provinciales, le processus de sélection des juges est double. Tous les juges des tribunaux supérieurs – les cours de l'article 96 de la *Loi constitutionnelle de 1867* – sont nommés par le gouverneur général, tandis que tous les juges des cours inférieures – notamment la Cour du Québec et ses semblables – sont de nomination provinciale. S'il existe de la compétition au

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niveau des nominations, elle concerne plutôt le statut des tribunaux que leur compétence juridictionnelle.

Les articles 96 à 100 de la *Loi constitutionnelle de 1867* encadrent une certaine conception de la magistrature. Les juges sont inamovibles, et sont nommés jusqu'à l'âge de 75 ans. Les juges doivent être choisis parmi les membres du barreau de la province où ils seront appelés à siéger. Leurs salaires et leurs bénéfices sont fixés par le Parlement et ne peuvent pas être réduits. Telle que complétée par la *Loi sur les juges* qui impose le critère que les juges doivent pratiquer pendant au moins 10 ans et par le jugement de la Cour suprême dans le *Renvoi sur la rémunération des juges*[37], cette structure vise l'impartialité et l'indépendance des juges – indépendance des influences politiques (que ce soit des gouvernements qui les ont nommés, que ce soit des citoyens) et impartialité (devant l'une ou l'autre des parties devant eux)[38]. Trois autres éléments de ce cadre institutionnel sont à noter.

Premièrement, la *Loi constitutionnelle de 1867* fait en sorte que les personnes nommées juges doivent être avocat ou avocate. Cela veut dire, au Québec, par exemple, que non seulement les notaires sont exclus, mais aussi que toute personne avec une formation juridique (un professeur de droit, par exemple) n'étant pas membre en règle du Barreau est également inadmissible. Et, évidemment, le gouverneur général ne peut pas nommer les individus ne possédant pas une formation juridique. Pourquoi ? Faut-il conclure que certains caractères nécessaires à la magistrature sont exclusifs à la profession d'avocat ? Si oui, lesquels ? Ce n'est sûre-

37 (1997) 3 R.C.S. 3 ; plus récemment, voir *Association des juges de la Cour provinciale du Nouveau-Brunswick c. Nouveau-Brunswick (ministre de la Justice)* (2005) CSC 44.

38 Constatons qu'à part l'exigence de nomination par le gouverneur général pour les juges de l'article 96, ce cadre constitutionnel ne vise pas directement le processus de sélection. Toutefois, il envisage la définition de bénéficiaires, et indirectement le processus de nomination parce qu'il véhicule l'idée d'inamovibilité – faut-il lire cela comme exigeant qu'il faut élire les juges à vie ou pour un terme fixe et non renouvelable ? Le *locus classicus* sur ces questions demeure W. LEDERMAN, « The Independence of the Judiciary » (1956) 34 *Revue du barreau canadien* 769, 1139.

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ment pas la connaissance des règles juridiques. D'autres – les professeurs de droit, par exemple – en connaissent autant, et dans certains domaines comme le droit fiscal, d'autres – les comptables, par exemple – en connaissent plus. De plus, tout le monde admet qu'il est impossible pour un juge de connaître toutes les règles juridiques – le procès servant souvent à instruire le juge sur le droit.

Deuxièmement, ces dispositions exigent que les juges soient nommés à vie (en effet, jusqu'à l'âge de 75 ans) et qu'une procédure devant les chambres réunies du Parlement soit nécessaire pour les destituer de leurs fonctions. Pourquoi ? Si actuellement la majorité des juges qui ont atteint l'âge de 65 ans profitent de la règle de 80 – une combinaison d'années de service et d'âge totalisant 80 ans – pour devenir surnuméraires ou prendre leur retraite, pourquoi ne pas les nommer pour un terme, non renouvelable de 15 ou 20 ans ? Y a-t-il quelque chose de magique (ou de mauvais) qui arrive aux juges à l'âge de 75 ans, mais aux autres travailleurs à l'âge de 65 ans ?

Troisièmement, le cadre prévoit une sorte de garantie de salaire et de bénéfices (qui devraient comprendre, selon certains, le stationnement souterrain gratuit) pour les juges qu'aucun autre fonctionnaire ne possède. Pourquoi ? Imaginez qu'à la suite d'une sévère déflation tout le monde au Canada voit sa rémunération diminuer de 15 %. Pourquoi l'indépendance des juges exige-t-elle qu'ils échappent aux conditions économiques générales ? Selon quelle logique doit-on conclure que l'indépendance de tous nos juges est plus importante que l'indépendance des sous-ministres ?[39]

Le cadre constitutionnel et institutionnel actuel est un curieux mélange de principes historiques et de pragmatisme politique. Si certains éléments sont les restants de la lutte entre le roi d'Angleterre et le Parlement, d'autres sont issus d'une certaine conception du rôle du juge qui n'est pas nécessairement adaptée à la situation

[39] Cette question est évoquée par Nicholas D'OMBRAIN, « Établir la rémunération des juges » et par Richard Simeon, « Interdépendance et non pas indépendance » in *Établir la rémunération des juges* (Ottawa : Commission du droit du Canada, 1999) aux pages 75 et 89.

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de la fonction judicaire aujourd'hui, ni aux qualités que nous désirons pour nos magistrats.

(iii) Selon le droit constitutionnel canadien, qu'est-ce qu'un juge ?

S'il faut préciser de quelle manière le cadre institutionnel de nomination des juges sert indirectement à définir la catégorie de leurs « bénéficiaires » potentiels, il faut aussi cerner le sens qu'on attribue au mot « juge » – c'est-à-dire, préciser la nature du « bénéfice » à distribuer. La jurisprudence de la Cour suprême relative à l'article 96 de la *Loi constitutionnelle de 1867* et à l'article 11 de la *Charte canadienne des droits et libertés* aborde cette deuxième question. La Cour suprême articule un test fonctionnel pour fixer la notion de « juge » : toute personne qui exerce une fonction judiciaire – qui a compétence pour trancher les disputes affectant des droits et des obligations – est juge, et par conséquent, doit posséder l'indépendance institutionnelle conformément à la *Charte*.

Il est important de noter que l'article 11 ne vise pas le processus de sélection des juges. Bien sûr, si l'article 96 s'applique aux cours supérieures des provinces et la *Loi sur la Cour suprême* aux juges de la Cour suprême du Canada, rien ne s'oppose à ce que les autres juges – que ce soit les juges fédéraux ou les juges provinciaux – soient élus. Rappelons que, suivant l'article 11, on entend non seulement les juges des cours fédérales et provinciales dénommées « cours » – la Cour fédérale et la Cour du Québec par exemple – mais aussi les membres des tribunaux administratifs exerçant ce que la Cour suprême a qualifié de fonction judicaire – le Tribunal canadien des droits de la personne et le Tribunal administratif du Québec, par exemple.

La Cour suprême a posé quelques critères substantifs pour fixer la portée de l'article 96 de la *Loi constitutionnelle de 1867*. Cet article fait en sorte que les membres des organismes administratifs provinciaux qui exercent des fonctions réservées exclusivement aux cours supérieures doivent être nommés selon le processus de l'article 96 – c'est-à-dire, par le gouverneur général – et ceci même si ces personnes occupent des fonctions au sein d'un organisme administratif créé par la province – le Tribunal des professions et la

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Régie du logement, par exemple[40]. Il est donc à noter que face à cette définition constitutionnelle élargie de la notion du juge, la question de la nomination de juges touche aussi bien des fonctions et des institutions qui ne sont pas des cours proprement dites. Pour cette raison, imaginer que la question de sélection des juges ne s'applique qu'aux membres de la magistrature comme telle, et plus largement qu'aux membres des tribunaux administratifs exerçant les fonctions de l'article 96, est mal comprendre l'idée de base de la fonction judicaire.

Aujourd'hui, le cadre institutionnel édicté par l'article 11 s'applique à tous les « juges », nonobstant leur titre, le gouvernement qui les a nommés et l'organisme au sein duquel ils et elles travaillent. Mais, comme déjà mentionné, cet article ne vise pas le processus de sélection. D'autre part, l'article 96 – y compris son processus de sélection – s'applique à tous ceux qui exercent une fonction de « cour supérieure », no-nobstant leur titre et l'organisme au sein duquel ils et elles travaillent. On peut ainsi conclure qu'il existe des « juges 11 et 96 », des « juges 11, mais pas 96 », et des « juges ni 11, ni 96 ». À part la première catégorie, la Constitution canadienne n'impose aucune restriction sur le mode et le processus de leur sélection.

(iv) Que font les juges au juste – éléments du mandat judiciaire ?

Passons maintenant à une autre question touchant la définition du « bénéfice » à distribuer – c'est-à-dire, le poste de juge. Que font les juges au juste ? En d'autres termes, comment comprendre la substance du « bénéfice » – c'est-à-dire, être juge ? Donner une réponse à cette question nous oblige à situer le rôle du juge dans le contexte actuel. La tradition voulant que la fonction du juge soit simplement de résoudre les causes qui lui sont soumises n'est plus exacte.

En grande partie, notre conception de ce que font les juges (tout comme notre perception de ce que font les avocats) est forgée

40 Voir P. HOGG, *Constitutional Law of Canada* (Toronto : Carswell, 2005) chapitre 7.3.

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par les médias. Les émissions de télévision, le cinéma et les spectacles comme *Judge Judy* ou *People's Court* nous donnent une certaine image du rôle du juge. Ce sont évidemment les produits de l'industrie culturelle américaine. Avons-nous de bons portraits médiatiques de ce que font nos juges au Canada ?

Commençons en examinant les tâches actuellement accomplies par un juge « ordinaire » ou de première instance. Quel pourcentage du temps du juge se passe en audience ouverte ? Quel pourcentage est voué à la préparation des dossiers et à la confection des jugements ? Et même en nous limitant à la fonction d'audition, quel pourcentage du travail du juge est consacré à l'audition des requêtes « en chambre » et quel pourcentage est consacré à des causes ? Récemment, on a estimé qu'à travers une année entière, les juges consacrent à peu près le même nombre d'heures à entendre les causes *stricto sensu* que les jeunes professeurs consacrent aux classes – c'est-à-dire (y compris les vacances d'été) environ 250 à 300 heures (ou cinq ou six heures par semaine). De la même manière que la conception du travail des professeurs comme étant principalement d'enseigner en salle de cours est fausse, la perception de la tâche des juges comme étant principalement l'audition des causes est inexacte. Cette même étude a trouvé que les juges consacrent entre 2500 et 3000 heures par année à leur fonction de juge[41].

Ceci dit, prenons néanmoins la salle d'audience pour faire le tour de ce que font les juges. Au Canada, le système judiciaire peut être qualifié d'adjudicatif selon un modèle contradictoire. Les juges entendent les parties (ou plus précisément leurs avocats) et ensuite ils décident. En principe, ils n'ont pas un rôle dominant dans le déroulement du procès. Même en appel, ce sont les parties qui décident de la nature de leur cause – bien sûr, les juges posent les questions, mais uniquement dans le but de comprendre l'argument des parties ou de tester leurs limites. Mais il existe plusieurs autres formes d'audition – les « conférences préparatoires » et la médiation

41 Des statistiques précises sont difficilement récupérables. Un portrait général est peint, toutefois, dans le rapport *Modèles d'administration des tribunaux judiciaires* (Ottawa : Conseil canadien de la magistrature, 2006).

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judiciaire, par exemple. N'oublions pas non plus les recours collectifs. Et qui sont les parties ? Sauf en matières pénale et familiale, la plupart des litiges impliquent des personnes morales – les entreprises, l'État, les syndicats, les fiducies, etc. – et non pas des personnes physiques.

Étant donné la diversité des devoirs du juge, il est naïf de croire que le modèle du juge et de la personne qui devrait être choisie comme juge soit celui véhiculé par Hollywood. Une bonne compréhension du rôle des juges aujourd'hui au Canada nous amène à réaliser que leurs tâches sont complexes, diverses, souvent proactives, parfois incitatives, très souvent purement administratives. L'image du sage indépendant et impartial qui écoute et tranche ne reflète plus la réalité de l'activité judiciaire[42]. De nos jours, le juge agit plus comme le gestionnaire des causes qui veille au bon déroulement du procès et parfois incite les parties et leurs avocats à régler une affaire. En cherchant l'image moderne du rôle des juges, ne doit-on plutôt les considérer comme des membres du *Ministère de résolution de conflits*, avec toutes les subtilités et nuances que cela implique ?[43]

(v) Est-ce que tous les juges font la même chose ?

Il est aussi commun d'imaginer que tous les juges font la même chose (plus ou moins) et que tout processus judiciaire est identique. Voilà un autre mythe – aussi inexact que celui de croire que tous les employés de cuisine font la même chose, que ce soit chez Harvey's ou au Ritz-Carlton.

Quels sont les paramètres de différences les plus importants ? D'abord, il y a un bon nombre de tribunaux et de juges qui font

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42 Ceci ne veut pas dire que les qualités recherchées parmi les juges ne sont plus celles qu'Aristote énumère comme *phronesis* (bon jugement pratique) et de *spoudaios* (maturité de jugement). Ces qualités restent aussi importantes qu'autrefois, mais elles ne sont plus suffisantes.

43 Aux États-Unis, on parle depuis longtemps du « juge gestionnaire ». Voir, notamment J. RESNICK, « Managerial Judges » (1982) 96 *Harvard Law Review* 374.

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affaire avec les personnes physiques – typiquement les tribunaux de première instance. Les poursuites criminelles, les disputes de famille ou de protection de la jeunesse, etc. Cependant, les cours les plus connues ne sont pas les tribunaux de première instance, mais plutôt les tribunaux d'appel. Devant ces cours, il est assez inusité que les parties paraissent personnellement. En plus, il est rare que les nouvelles preuves *viva voce* soient offertes. Au sommet de la hiérarchie se trouve la Cour suprême, où l'on entend toutes sortes d'arguments – souvent de nature constitutionnelle. Les tribunaux de première instance se consacrent à la détermination des faits, les cours d'appel au droit et la Cour suprême aux arguments politiques.

Mais cette formule simpliste cache une complexité extraordinaire. Examinons les extrêmes de la hiérarchie judiciaire comme illustration. La Cour suprême est souvent appelée à décider des questions juridiques complexes. Pensez à la difficulté de décider si la définition du mariage comme un statut entre un homme et une femme va à l'encontre de la garantie d'égalité selon la *Charte canadienne des droits et libertés*. L'exemple du véhicule dans le parc peut nous rappeler la complexité d'interprétation des mots « égalité » et « discrimination ».

À l'opposé, prenons un juge siégeant à la division des petites créances de la chambre civile de la Cour du Québec qui doit établir des dommages-intérêts à la suite d'une plainte par un voisin que les enfants de l'autre ont endommagé ses jardins de fleurs. Est-ce qu'une décision dans un tel cas implique la connaissance de la toute dernière décision de la Cour suprême sur la définition de ce qui constitue la faute et la responsabilité des parents, ou est-ce qu'elle évoque aussi la sagesse et le bon sens ? Peut-on prétendre que les qualités humaines que l'on recherche chez un juge sont les mêmes dans les deux cas ?[44]

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44 La nature de la fonction judiciaire en Cour suprême a fait couler beaucoup d'encre. Elle n'est pas la même au niveau des cours des petites créances. Sur cette dernière question, voir cependant S.C. MCGUIRE et R.A. MACDONALD, « Judicial Scripts in the Dramaturgy of Montreal's Small Claims Court » (1996) 11 *Canadian Journal of Law and Society* 63.

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Entre ces deux pôles, on trouve maints autres types de situations et maints autres types de tribunaux. Il y a des tribunaux commerciaux décidant des litiges en matière de propriété intellectuelle, de faillite, de réorganisation corporative, de sûretés réelles, etc. Il y a aussi des cours en matière familiale – divorce, garde des enfants, successions. Sommes-nous certains que les qualités que l'on recherche chez un juge qui fait du droit de la famille sont les mêmes que celles recherchées chez un juge qui prend des décisions en matière commerciale telles que les acquisitions et les fusions des entreprises ? Ajoutons un autre élément. Pouvons-nous affirmer que la connaissance des règles de droit est plus centrale en matière corporative qu'en matière familiale, ou est-ce qu'il y a d'autres critères également significatifs ?

De plus, pensons à toutes les institutions de droit public. Par exemple, les organes des tribunaux administratifs qui font des adjudications : comités de discipline, régisseurs de la Régie du logement, qui décident des dizaines de milliers de causes par année, le tribunal d'appel de la CSST, l'arbitrage des griefs, etc. L'adjudication de masse répond-elle aux mêmes critères que d'autres actes judiciaires ? Et finalement, il faut noter que souvent, en matière de droit public, la décision judiciaire n'est pas directement une décision de fond, mais plutôt une décision d'attribution de compétence. Dans ce rôle, le juge agit comme une sorte de maître de cérémonie pour attribuer les disputes aux différents organes de règlement de conflit.

(vi) Au-delà des mythes

En ce qui concerne les processus de sélection des juges, la conclusion qui découle de ces cinq réflexions sur le cadre constitutionnel et institutionnel dans lequel nos juges sont appelés à travailler et sur la diversité des tâches qu'ils et elles accomplissent comme magistrats peut se résumer ainsi. Le système judiciaire de common law a trouvé ses origines dans la spécialisation des tribunaux ; avec les *Judicature Acts* du XIX^{e} siècle, le Parlement britannique a essayé de ramener toutes les diverses cours dans un système intégré et de donner à la Court of Queen's Bench (au Québec, la Cour supérieure) une compétence générale et illimitée. En même temps,

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le Parlement a également essayé de standardiser le processus de nomination des juges et sa conception des qualités d'un juge idéal. Pour servir aux cours de compétence générale, il faut des juges omnicompétents et omniscients[45].

En 2007 au Canada, la situation n'est plus semblable. Depuis les années 1960, le phénomène inverse commence à se manifester. La spécialisation est devenue le modèle dominant – des avocats spécialisés, des tribunaux spécialisés, des juges administratifs spécialisés. Toutefois, il y a des contre-courants. La *Charte canadienne des droits et libertés* ainsi que la constitutionnalisation progressive des questions politiques et de la vie quotidienne peuvent se percevoir comme la tentative de ramener (au moins formellement) tout sur un modèle abstrait et unitaire et de contrer la diversité évidente (en termes substantifs) de la fonction judicaire contemporaine. Dans quelle mesure ce monolithisme formel et cette spécialisation substantielle auront (ou plutôt devraient avoir) un impact sur notre conception des capacités et des qualités personnelles que l'on recherche parmi les candidats à la magistrature, sur le processus de sélection et sur la manière dont on les choisit ?

B. Quelles sont donc les qualités de ceux et celles qui devraient être choisis ?

Dès qu'on examine de près la fonction judicaire, la diversité des tâches confiées aux magistrats et la diversité de contextes dans lesquels les juges remplissent leurs fonctions, il est évident que, sauf à un niveau extrêmement général, il ne peut y avoir une formule unique pour cerner les qualités recherchées chez nos juges. En effet, la question doit se poser non pas au singulier, mais au pluriel : étant donné ce que nous attendons d'un juge dans un contexte spécifique, quelles sont les qualités et capacités que nous pensons

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45 Sur cette histoire voir L. HUPPÉ, *Le régime juridique du pouvoir judiciaire* (Montréal : Wilson & Lafleur, 2000) ; S. SHETREET, *Judges on Trial. A Study of the Appointment and Accountability of the English Judiciary* (London : North Holland Publishing, 1976) ; *The Law Lords and the Lord Chancellor : Historical Background*, www.dca.gov.uk/constitution/reform (décembre 1999).

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être essentielles pour les personnes choisies pour remplir ce poste en particulier ?

Avant d'aborder cette question, il est important de noter qu'en affirmant que la diversité des fonctions judiciaires doit impliquer une diversité en ce qui concerne les qualités recherchées chez les juges, ceci ne mène pas nécessairement à la sélection de juges selon des critères sociodémographiques ou ethnoculturels. Il est commun aujourd'hui d'imaginer que la diversité sociodémographique des juges devrait être un critère dominant dans le processus de sélection – le choix des juges n'étant qu'un exemple de la recherche d'égalité dans la société. Ceux et celles qui revendiquent la diversité, toutefois, ont une conception assez restreinte de ce qui constitue la diversité : ils et elles ne désirent qu'une diversité formelle. En d'autres termes, ils et elles ne mettent l'accent que sur les différences visibles : le genre, la race, le handicap physique, et dans le mesure où le candidat en fait mention, l'orientation sexuelle. Parfois, cette conception formelle de la diversité touche aussi l'ethnie (si la personne porte un symbole l'identifiant comme telle) ou la religion.

Cette préoccupation purement formelle est néfaste. D'abord, cet inventaire ne recoupe que certaines exclusions visibles tout en en excluant d'autres : comment sait-on que des traits visibles comme la taille, la couleur des cheveux ou des yeux, etc., ne sont pas ressentis par ceux et celles qui les possèdent comme des exclusions injustes ? Ensuite, il ne vise que des exclusions visibles et laisse dans l'ombre d'autres exclusions sociodémographiques aussi dévastatrices – notamment la classe sociale, le fait qu'un individu soit un cerveau droit ou un cerveau gauche, etc. Souvent, on évoque l'argument en faveur de ce type de diversité selon un modèle statistique peu sophistiqué comme si le critère unique devait être la représentativité sociodémographique. Poussé à l'extrême cet argument rejoint le discours du sénateur Roman Hruska déjà noté[46].

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[46] Au Canada, l'article de référence est toujours B. WILSON, « Will Women Judges Really Make a Difference ? » (1990) 28 *Osgoode Hall Law Journal* 507. Deux études récentes de Kate Malleson sont particulièrement pertinentes : K. MALLESON, « Justifying Gender Equality on the Bench : Why Difference

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Toutefois, ce ne sont pas ces exclusions formelles qui devraient nous préoccuper. La diversité de la magistrature à promouvoir est plutôt une diversité substantive. L'objectif qui doit nous préoccuper se résume ainsi. Il est important que nous fassions une évaluation des tâches qu'accomplissent actuellement nos juges, et de faire cette évaluation sur une base qui nous permet de distinguer entre toutes les différentes institutions judiciaires et quasi judiciaires. Ensuite, il faut dresser une liste des habiletés et qualités que nous recherchons chez les personnes aptes à mieux remplir les fonctions précises ainsi identifiées. Pour ce faire, nous commençons par certains critères bien connus, pour ensuite passer aux critères qui nous permettent de peser ces critères différemment selon le poste de juge en question.

(i) Les qualités des juges

Ce n'est pas l'objet de cet essai d'élaborer en détail les qualités que doivent posséder les candidats pour un poste de juge. Toutefois, tant le législateur[47] que les commentateurs ont proposé une

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Won't Do » (2003) 11 *Feminist Legal Studies* 1 ; « Rethinking the Merit Principle in Judicial Selection » *supra*, note 31.

47 Voir, par exemple, *Loi sur les tribunaux judiciaires* (L.R.Q., c. T-16), *Règlement sur la procédure de sélection des personnes aptes à être nommées juges*, c. T-16, r. 5, disponible à l'adresse : http://www.canlii.org/qc/legis/regl/t-16r.5/20070117/tout.html, art. 18 : « (1) Le comité détermine l'aptitude du candidat à être nommé juge. À cette fin, il évalue les qualités personnelles et intellectuelles du candidat ainsi que son expérience. (2) Il évalue notamment le degré de connaissance juridique de cette personne dans les domaines du droit dans lesquels le juge exercera ses fonctions, sa capacité de jugement, sa perspicacité, sa pondération, son esprit de décision et la conception qu'elle se fait de la fonction de juge. » Voir aussi la *Loi modifiant le Code des droits de la personne* L.O. 2006 c. 30 qui modifie l'article 32(3) de la loi ainsi : « (3) Le processus de sélection pour la nomination des membres du Tribunal est un processus concurrentiel et les critères utilisés pour évaluer les candidats comprennent ce qui suit : 1. L'expérience, les connaissances ou la formation en ce qui concerne le droit en matière de droits de la personne et les questions s'y rapportant. 2. Les aptitudes en matière d'impartialité de jugement. 3. L'aptitude à mettre en œuvre les pratiques et procédures juridictionnelles de rechange qui peuvent être énoncées dans les règles du Tribunal. »

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liste de facteurs. Selon les auteurs, les caractères sont de trois ordres : les qualités professionnelles, les qualités personnelles et les qualités institutionnelles.

Parmi les qualités professionnelles on peut signaler (1) la connaissance objective – non seulement du droit, mais des procédures et des normes déontologiques ; (2) l'impartialité – non seulement en ce qui concerne les parties à juger, mais aussi à propos de la question à décider ; (3) l'indépendance – par ceci on comprend l'idée que le juge doit juger selon le dossier se trouvant devant lui ou elle, sans référence à sa propre carrière et aux possibilités d'avancement ; (4) le bon jugement et la maturité – non seulement à propos de la situation particulière devant lui ou elle, mais aussi quant à la nature humaine et l'expérience humaine ; (5) le respect pour le rôle du juge et le processus adjudicatif[48].

Il est à noter que ces qualités sont très diverses dans leur application. Est-ce que, par exemple, la connaissance objective et le bon jugement en matière fiscale sont identiques à la connaissance objective et le bon jugement en matière de droit de la famille ? Est-ce que l'impartialité et l'indépendance en matière de poursuites en responsabilité contre la Couronne sont identiques à l'impartialité et l'indépendance en ce qui concerne les poursuites contre la mafia ? Est-ce que l'indépendance et le bon jugement en matière de poursuites contre les prétendus « terroristes » sont identiques à l'impartialité et le bon jugement en ce qui concerne les poursuites syndicales contre les multinationales ? Est-ce que l'impartialité et la connaissance objective sont identiques en ce qui concerne les questions environnementales et en ce qui concerne l'application de la *Charte canadienne des droits et libertés* ? Finalement, dans quelle mesure le juge doit-il suivre une décision antérieure manifestement dépassée, et s'il décide de l'écarter, comment rédiger le

48 Cette liste est tirée de C. BAAR, « Comparative Perspectives on Judicial Selection Processes » in *Appointing Judges*, *supra*, note 1 at 15 ; de L.B. SOLUM, « A Tournament of Virtue » (2005) 32 *Florida State University Law Review* 1365 ; et de P. NOREAU et C. ROBERGE, *Applied Judicial Ethics* (Montréal : Wilson & Lafleur, 2006).

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jugement ? Est-ce que les normes d'équité peuvent être invoquées, et si oui, y a-t-il des limites ?

Établir les qualités personnelles recherchées est également difficile. Bien que l'on puisse affirmer que la sobriété, le courage, la diligence, l'incorruptibilité, la modestie et la retenue soient des traits que doivent posséder tout juge, il n'est pas clair que leur application dans les cas concrets soit facile. Ces devoirs sont-ils du même ordre quand le juge siège uniquement en appel et entend des arguments des avocats bien préparés, ou quand le juge siège en Cour des petites créances et entend des parties qui ne sont pas représentées par des avocats ? De la même manière faut-il conclure que la modestie et la retenue se traduisent de la même façon face à un avocat qui abuse d'un témoin et face à un témoin qui refuse de répondre aux questions posées ? Le juge austère en matière pénale grave – par exemple, une accusation de meurtre – serait-il adéquat en matière de jeunes contrevenants ? Est-ce que le juge doit montrer une retenue quand la partie la mieux munie cherche systématiquement à exploiter une partie sans ressources ?

Passons aux qualités institutionnelles. La plupart des auteurs mettent l'emphase sur la manière dont le juge agit alors qu'il siège au procès. Toutefois, être juge veut dire qu'on est membre d'une institution et qu'il y a des devoirs qui y sont associés. Parce que la magistrature est à la fois une grande bureaucratie et plusieurs petites bureaucraties, il est plus facile de comprendre que les qualités dites « institutionnelles » sont plus généralisées que les qualités personnelles. La collégialité, la productivité, soutenir les autres juges en difficulté, etc., sont aussi importantes que d'autres qualités, étant donné que la magistrature en général et les juges d'une cour particulière doivent travailler ensemble, et que souvent les causes sont plaidées (en cours de route) par plusieurs juges. Toutefois, il y a trois éléments qui sont assez individualisés.

D'abord, le juge doit respecter l'institution judiciaire – ce qui veut dire qu'il doit avoir le courage de dénoncer ses collègues qui ne font pas leur tâche. Ensuite, le juge doit manifester une loyauté et une fidélité à l'institution. Il ne faut pas toujours nommer les superstars comme juges, parce que l'institution exige qu'on nomme aussi des juges qui aiment faire de la routine et gérer les petites causes qui n'auront pas pour effet de rehausser leur « réputation ».

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Et finalement, le juge doit annoncer, expliquer et rédiger ses jugements pour les justiciables qui comparaissent devant lui. Souvent les jugements sont rendus comme si leur lectorat principal était les professeurs. De plus, les jugements sont souvent rédigés pour le bénéfice des avocats. C'est comme si on percevait l'obligation primordiale du juge de respecter la fonction *stare decisis* du système (rendre un jugement dont les avocats peuvent se servir pour conseiller leurs clients futurs) et non pas de respecter la fonction *res judicata* de leur fonction (rendre justice au justiciable et lui expliquer dans un langage qu'il ou elle comprend, la décision et les motifs de celle-ci). Évidemment, la nécessité de le faire et la manière dont on le fait ne sont pas identiques en matière corporative qu'en matière familiale ou de consommation ; ni même ne sont-elles identiques à tous les niveaux des tribunaux. À la Cour des petites créances, c'est la partie qui est la plus importante ; en Cour suprême (surtout en litige institutionnel et constitutionnel), il se peut que ce soit les avocats et les professeurs et le grand public qui soient les plus visés.

(ii) Comment pondérer ces facteurs ?

Cet inventaire de qualités de ceux et celles qui postulent un poste de juge est impressionnant. On pourrait penser que très peu de personnes possèdent toutes les qualités requises. En effet, c'est le cas. Pensons à toutes les personnes que l'on connaît – peu importe le domaine d'expertise. De tous ces individus, y en a-t-il un seul à qui on donnerait une note de A pour chacune des qualités identifiées ? La perfection n'est pas de ce monde. Rappelons qu'une moyenne de .300 est pas mal pour un frappeur de baseball. En d'autres termes, notre conception des qualités des juges est en large mesure aspirationnelle. Nous avons notre liste de critères, et nous avons des humains faillibles. Comment réconcilier ces deux réalités ?

D'abord, je crois que nous devons abandonner notre quête du juge parfait. Ensuite, nous devons abandonner l'idée que nous pouvons objectivement déterminer, dans un bassin de candidats donné, le ou la meilleur(e) candidat(e). Nous pourrons, bien sûr, identifier quelques candidats qui sont, en un mot, meilleurs que les autres. Mais comment ? Il se peut que le candidat qui se classe premier

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quant aux qualités professionnelles se classe dernier en ce qui a trait à ses qualités personnelles ; il se peut que le candidat qui se classe premier quant aux qualités personnelles et professionnelles obtienne une note d'échec sur les qualités institutionnelles. Ce qui rend la décision plus difficile est le fait qu'à l'intérieur de chacune de ces qualités, les compétences peuvent varier. Par exemple, il se peut que le candidat qui se classe premier quant aux connaissances objectives, se classe dernier quant à l'indépendance. De la même manière, il se peut que le candidat qui se classe premier en ce que concerne la sobriété, le courage et la diligence, se classe dernier quant à la modestie et la retenue.

N'oublions pas que les êtres humains ont tous leurs forces et leurs faiblesses. Nous ne sommes ni des anges, ni des démons. Toutefois, nous pouvons tout de même déduire de la nature même de la fonction judiciaire certaines qualités essentielles. Plusieurs juges extrêmement doués – citons en exemple Francis Bacon – possèdent presque toutes les qualités voulues, sauf l'incorruptibilité[49]. Mais l'absence de cette qualité fut un empêchement majeur à sa carrière de magistrat. Combien d'autres qualités sont essentielles ? Pour répondre, il faut revenir à notre question « tous les juges font-ils la même chose ? ». Nous avons déjà noté que les différents États ont des conceptions assez diverses sur la nature de la tâche judiciaire. Cette question n'est pas étrangère au système politique canadien, bien que nous y répondions de manière institutionnelle.

Au Canada, nous distinguons entre les décisions politiques, législatives, administratives et judiciaires. Selon la Constitution, il existe certains types de décisions qui, par leur nature, sont des décisions judiciaires. Par le passé, les gouvernements ont essayé de déléguer certaines de ces fonctions-types aux organismes administratifs multifonctionnels. Selon la Cour suprême, cette structure de gouvernance n'est plus possible, et donc, nous devons distinguer nettement entre la décision judiciaire et tout autre type de décision de gouvernance. Plusieurs suggèrent que cette position

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49 Deux excellentes histoires du phénomène de corruption judiciaire en common law sont J. BORKIN, *The Corrupt Judge* (New York : Potter, 1962) et J.T. NOONAN, *Bribes* (Berkeley : University of California Press, 1984).

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est incohérente pour la simple raison que les tribunaux prennent plusieurs décisions de nature non judiciaire. S'il faut protéger la fonction judiciaire des influences qui pourraient la corrompre, ne faut-il pas s'assurer que les juges ne prennent pas de décisions autres que judiciaires ? Ceci dit, la Cour suprême ne semble pas reconnaître le problème et rend régulièrement des décisions à caractère législatif et administratif[50].

Il y a deux autres dimensions contextuelles qui pourraient influencer la manière de peser ces critères. D'abord, il se peut que la balance entre ces critères varie selon le type de cour en question : Cour suprême, Cour d'appel, Cour supérieure, cour inférieure, cour des petites créances, cour municipale. Ensuite se pose la question de savoir si la nature de la cause aura le même effet. Nous avons déjà évoqué l'idée que la nature de la cause va affecter le contenu de chacun de ces critères – que l'impartialité en matière de droit de la famille pourrait être différente de celle nécessaire en matière de droit constitutionnel, par exemple. Ici il faut aussi décider si l'impartialité est plus importante en droit de la famille qu'en droit constitutionnel, et si l'indépendance est plus importante en droit pénal et en droit de l'immigration qu'en droit de la faillite. L'objectif visé en soulevant ces questions n'est pas de dresser une liste parfaite et pondérée – un peu comme on le fait avec le système de pointage en matière d'immigration. Il est plutôt de rappeler que le système n'est pas, et ne pourra pas être unitaire.

Le processus d'intégration de tous ces critères me rappelle ma jeunesse comme chef de voyage de canot-camping. Pour faciliter l'organisation des tâches nous avions pris l'habitude de les diviser. L'un de nous avait la responsabilité d'acheter la nourriture, un autre d'arranger le transport, etc. Pendant le voyage lui-même, il y avait une division semblable du travail. L'un de nous prenait en charge le terrain de camping, un autre devait faire des réparations nécessaires à l'équipement, un autre nettoyer le tout, et ainsi de

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50 La décision récente de la Cour suprême dans l'affaire *Chaoulli c. Québec (Procureur général)* (2005) 1 R.C.S. 791 a suscité beaucoup de commentaires sur le rôle du pouvoir judiciaire. Voir L. SOSSIN, C. FLOOD et K. ROACH, *Access to Care, Access to Justice : The Legal Debate Over Private Health Insurance in Canada* (Toronto : University of Toronto Press, 2005).

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suite. L'une des tâches les plus importantes était la cuisine. Comment choisir le cuisinier ? Veut-on un gourmand qui prend toujours beaucoup de temps ? Un cuisinier utilitaire, qui fait le repas vite mais inintéressant ? Un chef assez compétent, rapide, mais peu soucieux de la propreté ? La réponse à donner, notez bien, peut varier.

Selon certains, ce sont ceux qui ont acheté la nourriture (les avocats !) qui devraient décider seuls qui devrait être le chef cuisinier. Comme nous l'avons vu, donner le choix à ces personnes veut dire qu'elles vont choisir des personnes qui leur ressemblent, et vont choisir parmi leurs membres. Mais, pour un voyage de canot-camping, peut-on affirmer que le chef gourmand est toujours le meilleur choix ? Un individu capable de cuisiner à feu ouvert n'est-il pas plus utile que celui qui n'est pas capable de fonctionner sans des outils sophistiqués, un four à gaz et des épices ? Si la nouvelle cuisine est belle à voir, est-elle bonne à manger ?

Pour conclure, le jugement dans chacun de ces cas dépend de plusieurs facteurs et constitue l'exemple type de la décision polycentrique. Si c'est le cas pour la manière dont ces critères doivent être pondérés, cela l'est d'autant plus quand il faut, en plus, décider quelle procédure de sélection nous permet de mieux faire cette pondération dans chacune des situations de nomination visées. C'est vers la réponse à cette question qu'il faut nous tourner maintenant.

III. Putting the Pieces Together

A number of structural conclusions about the judicial selection process may be drawn from the first two sections of this essay. Some relate to the forms and limits of different processes of social ordering and the relationship of these forms and limits to the process goals to which we wish to attend in the selection process. Others relate to qualities we expect from judges in the different institutional settings within which they function and the relationship of any particular process to the identification of these qualities.

As concerns the first set of issues, it is apparent that no one (and no once-off) process alone will adequately serve as a selection

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method for judges. To begin, viewed as an instantiation of distributive justice, judicial selection involves at least three discrete stages. The initial stage is to define the pool of eligible beneficiaries. This involves a political choice (for example, to exclude persons without legal training, or require that eligibility depend on having a particular place of residence). The second stage involves the exclusion of candidates who are judged unsuitable for reasons personal to them (for example, having an addiction, or an unexpunged criminal record). Finally, there is the actual choice of a particular candidate from among the pool of eligible and non-excluded beneficiaries.

Moreover, most processes require considerable prior structuring (whether of the candidate pool, the criteria of selection, nomination to a selection panel, the decision rules of an election) so that they can be made to work for this purpose. That is, even a process that appears as a once-off decision (for example, drawing straws or deploying a randomized computer programme) presumes a prior establishing of the group from which the choice will be made.

Then, because every social ordering process has the vices of its virtues, it is likely that the best choices will result from a combination of processes each of which is particularly responsive to a different process goal. That is, adopting a single process for application at every stage of the process will produce suboptimal results unless one is prepared to totally discount one or more of the process goals already identified as important to the endeavour of selecting judges.

Finally, the choice of process will depend on the lexical ordering of substantive goals one associates with a particular judicial role. Certain processes are more adapted to choosing judges to occupy certain types of offices. Here one can analogize to jury selection. The initial choice of juror determined by lot is confirmed, once it is determined that he or she has no preconceived notions, or prejudices either favourable to or unfavourable to a criminal accused. Sometimes we should expect no more from our judges. There is no reason to conclude that a one size fits all approach will optimize the chances of selecting the best judges for all courts and for all cases.

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As for the second element of the equation, "what kind of person do we want the process to identify?" a number of other criteria are in play. One may start with an institutional observation. Not every judicial (or quasi-judicial) office requires the same abilities; and not every judicial (or quasi-judicial) office requires them in the same balance. This consideration plays out in several ways. Consider the various generic prerequisites that are often thought essential for judges. Why should one have to have been a lawyer to be a judge of the Small Claims Court (especially in Quebec) since the primary role here is to resolve disputes fairly and quickly? Again, given its increasingly political role, it is not all that clear that a prior practice as a lawyer should be an essential qualification for appointment to the Supreme Court of Canada.

A similar set of questions arises when reflecting on the relative balance between knowledge, character and personality, for example, in picking judges to serve on particular courts. When is expertise so important that it outweighs ill-humour, and when is good judgement so important that it outweighs knowledge and expertise? Might it be that we expect judges who daily confront litigants and witnesses in the flesh to be more humane than those who only deal with lawyers pleading appeals?

In addition, it may be that the relative importance of these abilities may differ depending on the substantive area in question, or on the particular judicial function in issue. Not only is it important to pay attention to the tasks that judges are actually performing and make judgements of suitability on that basis, it is probably crucial now to accept that the day of the omnicompetent and omniscient Superior Court judge is now past. The more we accept the need for judicial specialisation not just substantively, but in relation to tasks—case management, mediation, injunctive relief, motions court, etc.—the more likely we are to pluralize understanding of the characteristics and qualities we expect in judges depending on the judicial function for which they are being selected.

A last substantive consideration is this. It may be that some factors that we wish to take into account in selecting judges are simply independent of the personal characteristics of the person being named, but rather have to do with given or chosen "identities"—sex, race, ethnicity, sexual orientation, religion, etc. When,

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if ever, does it matter more "what" a person is (or is perceived to represent), than "who" a person is (or is perceived to be)?

To these two instrumental elements—process and substance—that should be accounted for in any selection process, one might add a third, aspirational, consideration. We should be modest in our expectations about the endeavour. A comprehensive review of the extant legal literature suggests excessive preoccupation with the judicial selection process, as if the integrity and quality of the judiciary were forever guaranteed by a good selection process. There are two flaws in this line of reasoning. First, human beings change over time. To assume that the person selected as a judge at age forty or fifty is fully formed and will cease to grow and mature morally and intellectually is absurd. Indeed, many of the most important characteristics that we desire in judges may not be completely identifiable at the time of selection. Moreover, many may be traits that can only develop through time with experience in performing the very task of judging.

A second sign of immodesty among those who are preoccupied with judicial selection is that they assume, having selected the "perfect" judge, that the task of ensuring a wise and responsible judiciary is completed. To assume that, once selected, judges are possessed of some magical capacity of self-direction and, if need be, self-correction flies in the face of all we know about human beings acting within institutional settings.[51] Many of the most

[51] This is one of the most powerful arguments for designing systems of court administration to enhance the courts capacity to function collegially—for example, by providing resources necessary for internal management, for creating democratic and accountable structures of governance, and possibly for establishing limited-term appointments for chief justices on the model of university governance. These issues go well beyond the scope of this study, but their impact on the life-long learning of judicial appointees should not be minimized. See, for discussion of the situation in Canada, C. BAAR, *Judicial Administration in Canada* (Montreal : McGill-Queens University Press, 1981) ; J. DESCHÊNES, *Masters in their own House* (Montreal : Canadian Judicial Council 1991) ; T. ZUBER, *The Ontario Courts Inquiry* (Toronto : Queen's Printer, 1987) ; M. FRIEDLAND, *A Place Apart* (Ottawa : Canadian Judicial Council, 1995); *Alternative Models of Court Administration*, *supra* note 41.

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important lessons judges learn about how to best perform the judicial task flow from a wise and thoughtful management of the court to which they are appointed. Their assignment to certain kinds of cases, to sit in panels with certain judges, to assist in certain judicial governance tasks, etc., are all decisions taken by a Chief Justice or court administrator after a candidate assumes office. Given that these are also all decisions that profoundly shape the career of appointees, should we be so certain that we have only one chance to get it right—the moment of selection?

Put in the language of institutional design, the point is this. If we over-invest in failsafe mechanisms during the selection process, we are most likely to commit ourselves to choosing the candidate with the least downside risk over the candidate with the greatest upside potential. Ought this really to be the implicit logic that drives our choice of judicial selection processes?

A. Choosing the Choosers

The judicial selection process as practiced in most western liberal democracies having either a civil law or common law constitutional tradition ultimately boils down to a meta-choice. The central question is less "what process to choose?" than it is "how to choose the choosers?" In other words, regardless of the specific process of social ordering (or particular process hybrid) that is adopted, what really matters is who the decision-makers within that process will be.[52] To illustrate the point it is helpful to review the three basic process archetypes that are most often deployed today. These archetypes are: (1) an appointments process; (2) a popular electoral process (which, given the cost of elections, is practically—although indirectly—a market process); (3) a "merit"

[52] There are, nonetheless, some processes where this meta-question does not really arise in this form. If the selected process is a lottery, the only pertinent question relating to the "chooser" at the moment of choice concerns his or her incorruptibility—not his or her judgement ; so too with an auction. In both cases the substantive issues are resolved at the moment of determining of the pool of eligible candidates. At this stage of the process, obviously, the question of "choosing the choosers" does arise.

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selection process.[53] To make each operational ultimately requires determining who should be the choosers, both at the time of fixing the pool, and at the time of selecting individual candidates.

1. An appointments process—executive, legislative (Parliament), judicial (judges), lawyers, parties

Despite their apparent simplicity, appointments processes are typically quite complex. The defining feature of an appointments process is this: the person (or institution) making the appointment need not attend either to the "will of the people" (as in a popular election process) or to some objective assessment of the "merit" of potential appointees. Appointments processes are an exercise of what Fuller characterizes as "managerial direction." Regardless of how much formal or informal consultation precedes the decision, ultimately the decision is taken by a particular person or body.[54]

(a) The appointer

In most contemporary discussions about judicial appointments processes, it is assumed that the appointment will be made, as it is for both federal and provincial judges in Canada today, by the executive branch. This need not be the case, either in theory or in practice. The appointment of members of certain adjudicative panels of administrative agencies is often made by the legislative body (or council) of that agency—for example, the benchers of a

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53 See, for an international comparative review K. MALLESON & P. RUSSELL, eds., *Appointing Judges in an Age of Judicial Power*, *supra*, note 2. For a brief canvassing in a particular context see, SPECIAL COMMITTEE ON JUDICIAL APPOINTMENT, CANADIAN ASSOCIATION OF LAW TEACHERS, *Submissions on the Meech Lake Accord to the Special Joint Committee of the Constitutional Accord* (1987). In the United States see RESEARCH AND POLICY COMMITTEE OF THE COMMITTEE FOR ECONOMIC DEVELOPMENT, *Justice for Hire : Improving Judicial Selection* (New York : CED, 2002).

54 See L. FULLER, "Irrigation and Tyranny" in *The Principles of Social Order*, *supra*, note 7 at 207, and compare, on the role of consultation in such processes, M.A. EISENBERG, "Participation, Responsiveness and the Consultative Process" (1978) 92 *Harvard Law Review* 409.

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law society appoint the discipline committee. Sometimes, as in consensual arbitrations, the parties themselves appoint the adjudicator.[55]

These other processes are a salutary reminder that "appointment" is a process of social ordering and that the power of appointment may be vested in any number of institutions. Consider the legislature for example. In relation to the judicial function, actual appointment by a legislative body is rare, although the standard mechanism for choosing the speaker of the House of Commons or naming an ombudsman is parliamentary nomination.[56] Generally, however, the role of a legislative body is, as in the United States, limited to giving advice about and consenting to an executive nomination.[57] These might best be characterized as mixed appointment systems, in that neither the President nor the Senate can alone make the selection. It is also conceivable that the nomination and confirmation processes could be reversed. Parliament would nominate a candidate and the executive could exercise a veto over the nomination. Or again, Parliament might forward a list of candi-

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55 In such cases, two separate questions arise. The first relates to the actual choice of decision-maker. Typically when we consider judicial decision-making the assumption is that the court itself (usually by assignment through the Chief Justice) will determine who hears which cases. In consensual arbitrations, the parties select the arbitrator. But often they will have agreed to select that arbitrator from a list of accredited arbitrators of the International Chamber of Commerce. The appointments question then becomes : "Who controls ICC list of accredited arbitrators ?"

56 It is, of course, an interesting question whether a vote of Parliament should be understood as an electoral or as an appointment process. Because one associates "elections" with popular elections by the people, it is not common to consider selection processes by an identified collegium as elections. For present purposes, these processes will be conceived as appointments processes, on the grounds that they are not exercises of popular sovereignty.

57 *Constitution of the United States*, Article II, section 2, para. 2. The process envisioned is one that assumes a presidential nomination, confirmation by the Senate, and then formal appointment. In the third paragraph of the section, Article II also imagines that the President may appoint without Senate consent when the Senate is not in session although the Commission expires at the end of the next session of the Senate, if it has not been confirmed by the Senate during that next session.

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dates, from which the executive would be constrained to select—a pre-selection role actually contemplated for the provinces in the Meech Lake Accord in respect of nominations to the Supreme Court of Canada.[58]

These variations on executive nomination and appointment do not, however, exhaust the possibilities. In some countries, there is a self-replicating appointments process: judges choose their successors.[59] Typically, but not always, such systems presume that Parliament, the executive, or some independent body will already have generated an obligatory short list of suitable candidates. In these self-replicating processes, one sees a parallel to the Canadian practice of informal consultations between the executive and the Chief Justice of the relevant court. The difference is, of course, that in Canada, the appointment itself is made by the executive and not by the Court.

Still another appointment system is that advocated by, among others, Benjamin Franklin. At the time of the drafting of the American Constitution, Franklin proposed (not entirely facetiously) that a committee of lawyers should be constituted to appoint judges. His assumption was that lawyers would be inclined to select the most able of their fellows in order to eliminate them as competitors for clients.

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58 The proposed *Constitution Amendment Act, 1987*, which sought to implement the Meech Lake Accord, contained a proposal in the form of an addition of section 101C to the *Constitution Act, 1867* to require the Governor-in-Council to appoint a person whose name appears on a list of candidates submitted by a province.

59 See generally, G. GUARNIERI, "Appointment and Career of Judges in Continental Europe : The Rise of Judicial Self-Government" (2004) 24 *Legal Studies* 169. As noted, *supra*, note 23, this model is followed by many organizations, such as learned academies and universities. As with collegial elections of parliamentary officers, since the central issue is "who does the selection ?" here also the process is, in substance, an appointment rather than an electoral process.

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(b) Consultative pre-appointment processes

All these appointments processes have a common feature—a designated person or a select group of people picks who will be named as a judge. Nonetheless, no appointment process escapes the criticism that, if left to its own devices, the appointing body will make choices for reasons that should be extraneous to the selection process. In the case of executive appointment, most often the criticism is that the appointer will be overly influenced by partisan political considerations. But this is to misunderstand the issue. Why should any particular candidate be excluded simply because of a close association with the political party making the appointment?[60]

The real question is how to ensure that partisan appointments are made from among a pool of candidates who are deemed to be "qualified" for appointment. What "qualified" might mean is examined in the discussion of "merit-selection" processes. For the moment it is sufficient to note that most suggestions for improving judicial nominations presume either a prior consultative process, or *ex post* advice and consent procedures. The goal is to complement the strengths of a nomination process (political accountability, timeliness, expediency, low cost) by palliating its deficiencies (lack of openness, insufficient attention to identified selection criteria, and uncertain assessment of abilities). Experience to date in Canada suggests that neither *ex ante* nor *ex post* consultative processes have fulfilled expectations. The reasons are not hard to fathom and may be traced in the manner in which these processes have been designed.

An *ex post facto* parliamentary advice and consent process is a relatively recent innovation in Canada and to date, has only been applied in relation to the nomination of judges to the Supreme Court of Canada. Unlike the U.S. process, a parliamentary com-

60 This, of course, is the argument raised by critics on both the left and the right. For discussion, see Cass SUNSTEIN, *et al*. "Ideological Voting on Federal Courts of Appeal : A Preliminary Investigation" (2004) 90 *Virginia Law Review* 301.

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mittee enters the scene on a truly *ex post facto* basis. The appointment has been made (although the official commission has not yet issued), and the committee hearings involve little more than superficial questioning of the appointee. Presumably, should questioning reveal that an appointee is an axe-murderer or, unbeknownst to anyone till that time, has been taking bribes as a judge, the appointment will be withdrawn. In the everyday case, however, only some of the risks inherent in exclusive executive nomination will be palliated. Transparency and institutional integrity may be enhanced, but there is little guarantee that a genuine vetting of competence and other desirable personal characteristics will occur.

For this reason, there is strong support for the continuation of *ex ante* advisory panels. Yet these panels are also a mixed blessing. In Canada, they have served a useful but limited function.[61] Because their mandate is limited simply to vetting the dossiers of persons who have indicated a desire to be appointed to the bench and characterizing the applicant as "recommended or not recommended," they do not really serve as much of a check on the quality of candidates. The bar for achieving a recommended rating is low, there is no mechanism by which the relative merits of candidates may be assessed, and the former rating of "highly recommended" has been suppressed. In addition, surprisingly little attention is paid to ensuring appropriate diversity of members of the advisory committees, and not surprisingly their membership is dominated by the legal profession. One would have thought that the legal profession could do its own evaluation of the suitability of candidates and leave these panels the task of assessing the personal, temperamental, and moral character of applicants for judicial office. Finally, the current proposal by the government to institutionalize a role for

61 See CANADIAN JUDICIAL COUNCIL, "Judicial Appointments : Perspective from the Canadian Judicial Council" February 20, 2007 available at : http://www.ccm-cjc.gc.ca/article.asp?id=3072. See also, Federal Commissioner of Judicial Affairs, "Federal Judicial Appointments Process" available at : http://www.fja.gc.ca/jud_app/index_e.html#Judicial.

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the police highlights the biggest risk of advisory panels as currently structured.[62]

Because both *ex post* parliamentary review, and *ex ante* advisory panel review are non-substantive, they do not really address the rationale for formalizing consultative processes. Consultation ideally should assure the public that the process is transparent, that there are identifiable standards being applied to the evaluation of candidacies, and that candidates are being impartially evaluated on the basis of these criteria. Currently, both processes operate in such a way that they can be used to provide the Governor-in-Council cover against claims that the process is occult and inappropriately partisan.[63]

2. An electoral process—direct, indirect, advice and consent

In the common law world, the primary alternative to executive appointment is popular election. Once again, however, it is important to note that elections are a process that can be deployed in myriad situations. For example, if the federal cabinet were to vote on which candidate to appoint, some sort of electoral process would be engaged. This would be true in cases where benchers of a law society select members of a discipline committee, or where a certified body of arbitrators elects new members to join its ranks. None of these are considered here as examples of judicial election.

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62 For a comparative survey of judicial appointments commissions, see K. MALLESON, *The Use of Judicial Appointments Commissions : A Review of the US and Canadian Models*, (London : Lord Chancellor's Department Research Paper No. 6, 1997).

63 By far the best system in Canada is that applicable to the Cour du Québec. See COUR DU QUÉBEC, "Appointments and Calls for Nomination" available at : http://www.tribunaux.qc.ca/mjq_en/c-quebec/fs_anglais_nominations_appels_candidatures.html.

Moreover, the Quebec process is carefully structured under a regulation made pursuant to the *Courts of Justice Act*, R.S.Q. c. T-16. See the *Regulation respecting the procedure for the selection of persons apt for appointment as judges*, available at : http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=3&file=/T_16/T16R5_A.HTM.

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For comparative purposes, electoral process will be restricted to those where the citizenry elects members of the judiciary—either by direct election, or through an indirect process such as an electoral college chosen specifically to select judges.

(a) Popular elections

The most important criterion for differentiating the various models for judicial selection by election is the definition of the electorate. Typically, where electoral processes are in place, the electorate for the judiciary is the same as for other public offices. No special subset of citizen voters is contemplated—although it could be.[64] In addition, judicial election processes are typically direct, single round, first past-the-post contests. Each elector votes for the person who, having won the election, will be named to the position.

Electoral systems (and especially direct electoral systems) differ from most appointment systems in two important respects. First, electors inevitably believe that the point of the election is to ensure that judges will advance the political goals and values they hold without significant attention to the constraints of an adjudicative process. That is, as in everyday political elections, the process is meant to be driven by the electorate's prediction of litigation outcomes should a particular candidate be chosen.[65] In addition, elec-

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64 Until the advent of universal suffrage, all electorates presupposed policy choices about eligible voters—whether these were based on net worth, ethnicity, religion or gender. Today, special constituencies survive in relation to many administrative agencies—self-governing professions, marketing boards, etc.—and in some provinces, in relation to eligibility to vote in municipal elections. Of course, it is also an interesting question whether the principle of "no taxation without representation" should apply so as to permit corporate taxpayers to vote. Since corporations are also heavy users of courts, an argument might also be made that were judicial elections to be contemplated, they should be permitted to vote.

65 To the extent that adjudication can be understood in its classical sense—as the presentation of proofs and arguments about the application of *ex ante* rules to specific circumstances (see L. FULLER, "The Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review* 353)—the case for election

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toral processes usually presume that judges are not chosen for life, but have limited terms and must stand for periodic re-election. These two features can make the judge a slave to popular opinion, and compromise the independence and impartiality one associates with the judicial office. For this reason, many electoral systems have sought to palliate the perverse effects of a re-election requirement. Some provide that election is for life, or for a relatively lengthy term of office (say, 12-16 years) without possibility of re-election. Others that require that a judge standing for re-election be positively dis-elected before any election process to choose a successor be launched.[66]

An additional complication that attends elections for a fixed time period is the difficulty of managing case-loads when the re-election of an entire judiciary must be organized. This would include special rules for completing cases on a roster and for maintaining continuity if an entire bench should fail to be re-elected. These are, among other reasons, why every judicial electoral system has a number of institutional constraints built into the process. The point here, of course, is that every procedural mechanism of this

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is considerably weakened. Consider, however, the impact of the "indeterminacy claim" on the possibility of this form of third-party decision-making (see R. UNGER, *The Critical Legal Studies Movement* (Cambridge : Harvard University Press, 1983) and compare, L. Solum, "On the Indeterminacy Crisis : Critiquing Critical Dogma" (1987) 54 *University of Chicago Law Review* 462). Moreover, given the manner in which modern constitutional review under the *Charter of Rights and Freedoms* and the application of increasingly general and political standards like "best interests of the child," it may well be that the key questions in judicial selection are not only attitudinal but ideological.

66 On varieties of electoral systems and their impacts see N. LOVRICH, *et al.* "Assessing Judicial Elections : Effects Upon the Electorate of High and Low Articulation Systems" (1985) 38 *Western Political Quarterly* 276 ; A. HANSSEN, "The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation : The Election versus the Appointment of State Judges" (1999) 28 *Journal of Legal Studies* 28.

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type undermines the "popular sovereignty" rationale for elections in the first place.[67]

Those who argue in favour of popular electoral processes suggest that they are much more likely to generate a judiciary that is socio-demographically representative of the population—more women, more visible minorities, etc. There is evidence that U.S. states with judicial election processes have been more successful in diversifying the bench than those with appointments processes, but this does not seem to be the case with the federal judiciary. Nor does Canadian experience suggest that an executive appointments process, in comparison with other selection process, disproportionately excludes women and visible minorities.

What is gained in terms of transparency and political accountability by adopting an electoral system must be balanced by the perverse consequences of electoral politics generally. These include, for example, the fact that election campaigns are extremely costly. Recently it was estimated that an election to the Supreme Court of Ohio would cost $3 million.[68] There are also studies indicating that judges tend to decide cases in favour of those who financially support their campaigns. Of course, others argue that this is reasonable since contributors will support candidates who broadly share their socio-political ideology and it is normal that, thereafter, their decisions should reflect this ideology. In addition, far from enhancing accessibility and inclusiveness, in the U.S. judicial elections typically reduce to two person contests. Through the operation of the political primary system, each major party screens its potential candidates so as to generate a single candidate.

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67 See the "National Summit on Improving Judicial Selection" (2001) 34 *Loyola of Los Angeles Law Review* 1353-1512 for several articles dealing with palliatives for different modes of judicial election.

68 See "Campaign Cash Mirrors a High Court's Rulings," The New York Times, October 1, 2006, available at : www.nytimes.com/2006/10/1/us/01judges.html ?_r=1&oref=slog.

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(b) Indirect elections, advice and consent processes

Recognizing the democratic justification for elections, but the undesirable consequences of direct elections, some states have opted for indirect judicial election processes. One model is that based on the electoral college process that is used in the United States presidential selection process. The idea is that voters would elect a panel that is given the authority to, itself, deliberate and make the judicial selection. In theory, electors would not pledge to vote for a particular candidate, but would rather state a series of beliefs that would guide their choices. They would serve a mandate of say four years, and would have responsibility for selecting judges during that period—presumably according to merit-based criteria (as tempered by the same judgements that affect the appointments processes). Of course, there is every reason to believe that party-based politics would be as present in an electoral college process as in a direct election.

As a variation, some jurisdictions also contemplate an indirect process where the persons then elected engage is some other process such as an advisory nomination or a consent process to a prior nomination. That is, popular will is reflected not only in the election of members of the judicial selection committee, but is also present when candidates proposed by such an electoral college are brought before a "judiciary committee" of the legislature for vetting of the nomination. In this model, the same advice and consent process as one finds in executive nomination processes is present, but the nomination of candidates is made by an elected "selection committee." In these types of electoral processes, many of the advantages (transparency, accountability) of elections may be achieved without a number of the perverse consequences attending to popular elections.

From the above review, it follows that the value of elections as an expression of democratic will does not necessarily track the other process values one associates with judicial selection. Nonetheless, indirect elections, especially through a mechanism of an electoral college may serve a useful function, either in producing the action choice of judges, or as will be discussed below, in producing a slate of candidates for ultimate selection by the executive

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branch. Indeed, depending on the extent (and finality) of the electoral college's mandate, the process may well elide into a "merit selection" process.

3. A merit selection process—*ad hoc*, bureaucratic

The third main form of judicial selection, frequent in civil law countries, can be described as a merit selection process. Two key features distinguish a merit selection process from an appointments process or an election process.

First, a merit process is, in principle, one in which the "expert panel" effectively makes the selection. Several variations, some of which approach an advice and consent process, may be imagined. Depending on the constitutional system in place, it may be that the Governor-General or President will actually sign the commission and make the appointment, or that the choice must be confirmed by an electorate. But in these cases only one name would be submitted to the relevant appointing body. Alternatively, the "expert panel" would submit two or three names to the Governor-General or to the electorate for each position, and the choice would have to be made from that list of names. In other words, by contrast with the current practice in Canada where judicial selection panels are merely advisory to the executive, and with the current practice in the United States where the Senate merely responds to the choices of the executive branch, in a merit selection process the "expert panel" would actually be vested with significant decision-making initiative.[69]

The second distinguishing feature of a merit selection process is the grounds upon which the selection is to be made. In a direct election, the underlying presumption is that the electorate will

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[69] This feature is what distinguished a "merit process" from the judicial selection panel processes adopted in many U.S. states and in Canada. The existing processes have no authority to nominate persons for appointment. The role is merely to act as a screen. See CANADIAN JUDICIAL COUNCIL, "Judicial Appointments : Perspective from the Canadian Judicial Council" *supra*, note 61 ; see also, Federal Commissioner of Judicial Affairs, "Federal Judicial Appointments Process" *supra*, note 61.

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choose judges who will transform the values and interests of the majority electorate into law. In an executive (or political) appointments process the same basic assumption is made, with the addition of at least two other factors. Since the appointment of judges is a political act, it will inevitably be influenced by the same factors that shape ordinary political decision-making: will this appointment enhance my chances of re-election? Is this person the best qualified among those who will advance my political agenda?[70] Most of the present features that condition both electoral and appointments processes are designed to fold into these systems some attention to merit—while nonetheless retaining priority to considerations of political accountability. In a merit process, the reverse priority is present. How does one design the system so that considerations of merit predominate, but political accountability is present?[71]

As a principle, once the decision is taken to establish a merit selection process, many of the same considerations that arise in respect of an advisory committee process for executive appointments will arise. That is, where the executive establishes a judicial selection panel that actually exercised "decision-making" power, the ostensible role to be performed by this panel (the identification and recommendation of persons appropriate for appointment) would always be conditioned by political considerations. The egregious political grandstanding by the current Conservative government in Ottawa in its loudly proclaimed decision to include institutional representatives from police forces on advisory panels illustrates

70 A detailed discussion of the politics of judicial appointment is provided in N. SCHERER, *Scoring Points*, *supra*, note 4.

71 For the sake of argument I am assuming that the other process values identified—openness, transparency, expediency, etc., are design decisions that can be achieved within any of the three processes by properly organized second-order structuring rules. The central difficulty in all such processes is less a matter of deciding what the criteria of merit might be (see below section B) than it is of deciding how to determine whether any particular candidate is meritorious. For one proposal to "measure objectively" the presence or absence of merit see S. CHOI and G. GULATI, "A Tournament of Judges ? " (2004) 92 *California Law Review* 299.

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that even when the objective is "merit" and the role is merely "advisory," playing politics is inevitable.[72]

This said, experience with such panels around the world[73] suggests that the following considerations must be addressed:

(1) What kind of merit selection should be put into place? Should it be a subjective process involving the assessment of a curriculum vitae and interviews—of the sort that universities undertake when appointing professors? Should it be a process that involves an examination or an objective test?

(2) What kinds of considerations should be tested for? Should there be psychological tests? Tests of the law? Tests on personality? Tests relating to judicial temperament? Reputational surveys?

(3) What kinds of criteria should inform the testing process? The most important questions here are "who sets the questions?" and, of course, "who grades the answers?"

(4) Who determines the composition of the committee? These types of processes have been criticized as simply a type of governing from behind the curtain, simply moving the selection process, while still politicized, onto an entirely unelected committee. Might the panel be elected rather than appointed? And if elected, by whom?

(5) What kind of panel is it? This is a question of institutional design: should the selection panel be *ad hoc* and task specific, or should it be part of a permanent bureaucratic structure?

(a) Ad hoc *judicial selection committees*

In most common law jurisdictions that have considered expert panels for judicial selection, the institutional choice is to establish

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72 See CANADIAN JUDICIAL COUNCIL, "Judicial Appointments : Perspective from the Canadian Judicial Council" *supra*, note 61.

73 For one detailed evaluation see K. MALLESON, "Assessing the Performance of the Judicial Service Commission" (1999) 116 *South African Law Journal* 36.

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ad hoc committees. These committees are established by and accountable to the body—for example, the federal Cabinet or the Attorney-General—to which they ultimately will report. Members are typically appointed for a limited term and the committees are constructed to represent various constituencies—most often provincial law societies, although some members are drawn from the lay public. While no such panels exist in Canada, the closest model is that applicable to the appointment of judges to the Court of Quebec. This model could well be adapted to an *ad hoc* "merit selection" committee.[74]

The selection and composition of these panels raise several concerns. In the first place, while there is a good argument that members should not be directly elected, it may be that indirect election of at least some members should be contemplated. Of course, to avoid creating another layer of bureaucracy, the easiest fashion to do this is to permit a standing committee of Parliament, say a justice or human rights committee, to propose nominees to the panel. This would balance the power of the executive with that of Parliament, and avoid duplicating an advice and consent process for appointments to the selection panel. Second, it is not clear why it is that certain constituencies should be guaranteed a place on these committees. Presumably judges serve all Canadians, not just lawyers. Moreover, to privilege certain constituencies on the basis of substantive knowledge is to defer to that standard as the primary criterion of merit—a dubious proposition at best.[75] Third, it is not clear that the criteria to be applied are identical whatever the court to which the person is to be appointed. One might well adjust the composition of the panel depending on whether one were seeking appointees as appellate judges, trial judges, small claims court judges, family court judges, and so on.

Finally, the mandate of these panels bears on their design. Because the task they are assigned differs from today's provincial advisory committees in Canada in that they would actually be

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74 See *supra*, note 63.

75 See L. SOLUM, "A Tournament of Virtue" *supra* note 48, at 1368-1384 for a discussion of judicial virtues.

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called upon to make a (or a small number of) nominations rather than simply recommendations, a much more finely grained set of criteria for assessment would be required. That is, the current system of screening the dossiers of persons who apply for appointment as a judge and concluding that a given candidate is recommended or not recommended is inadequate. To create a real merit selection panel presumes a much more active role for the panel, which may involve: (1) advertising for candidates for specific positions; (2) interviewing candidates; (3) developing and publishing detailed lists of selection criteria; (4) developing proxies for criteria that are difficult to assess comparatively; and (5) providing the constitutionally authorized appointing authority with detailed reasons for particular recommendations.

(b) Bureaucratic selection processes

The importance of the substantive considerations just noted has led many countries to develop relatively bureaucratized processes of judicial selection. Again, there are different models of bureaucratization. On the one hand, the process could be organized through an existing administrative office—say the Commissioner of Judicial Affairs—but the fundamental structure of the career of a judge be left intact. Alternatively, one might imagine a system like that present in many civil law countries today, where the bureaucratic process complements a conception of the judiciary quite different than that of the common law—namely, judging as a public service career not dissimilar to that being pursued in the regular public service. There are a number of reasons why the civil law model of a judicial career could not readily be adapted to Canadian practice.[76]

Nonetheless, there is no reason in principle why certain features of this model could not be transposed. For example, is it offensive to the concept of the independence of the judiciary to provide for

[76] Consider the review of different models of judicature discussed in J. BELL, *Judiciaries in Europe*, *supra*, note 6, and in particular Chapter 7 "Factors Shaping the Character of the Judiciary."

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qualifying examinations, interviews, pre-examination educational opportunities, in-service training and regular performance reviews for judges seeking promotion to another court, and even detailed promotions systems for candidates seeking appointment to an administrative position within the court system? As applied to the selection process, one could imagine an equivalent to a civil service commission to assist, say, the Commissioner of Judicial Affairs in managing the appointments process. While the current civil service commission process is less public (and therefore less transparent) and probably more bureaucratic than one would want for judicial appointments, given the relatively fewer number of judges to be appointed (only about 1000 federal judges in all) it would be possible to imagine such a process that applies not just to judges, but also to senior Governor-in-Council appointments to administrative tribunals.

Of course, judges and chief justices might well complain about losing parts of their management prerogatives and the bar might complain about losing its privileged position in the process, but the main objection would lie elsewhere. The real question is whether the political arm would accept such a process. It might be that a true merit process could never be put into place for accountability reasons, but the panel would at least provide a better screening than current panels.

B. The Ethics of Choice

It is one thing to assess the extent to which any particular process does or does not advance the process and substantive goals that should be pursued in the judicial selection endeavour. It is quite another to decide how it is that the actual choice—by whomever it is made—should be undertaken. In other words, if we assume certain characteristics that judges should possess—incorruptibility and sobriety, courage, temperance and impartiality, diligence and carefulness, intelligence and learnedness, craft and skill, practical wisdom[77]—we need to be able to determine these virtues. But

[77] The list is from L. SOLUM, *supra* note 48, at 1369-1385.

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more than this, we presumably would wish to see the same virtues in any panel charged with selecting, or even simply screening, candidates for judicial office.

This is, admittedly, not a viewpoint that all share. The justification for the two most common judicial selection processes does not lie in claims of abstract merit or judicial excellence. In executive appointments processes, virtue is exhausted in the electoral decision itself. An executive, having been elected, is presumed to thereafter make appropriate decisions and is authorized to do so. In direct electoral processes it is also never assumed that electors are meant to act virtuously. Electors vote for their self-interest and the outcome is defined in terms of its responsiveness to the expression of that self-interest. That is, even though in both cases there is, impliedly, attornment to the notion of judicial excellence, the systems are designed to achieve that outcome by proxy. Neither aims specifically at identifying excellence, or at developing measures and processes through which it can be assessed.

1. Whence virtue?

Yet, the virtuous assessment of virtue should be the substantive core of the judicial selection endeavour. There are four distinct moments in a selection process where the demands of virtue are salient. First of all, it is important to ensure that the pool of potential candidates is cast as broadly as possible. To date in Canada we have simply assumed that those interested in a judicial appointment will apply. Is it sufficient to rest on this assumption or should there be an active recruitment campaign to solicit applications?

Second, having generated a pool of applicants it is necessary to develop criteria for screening out those who are tainted by "judicial vice" relating to, for example, having a criminal record, succumbing to an addiction, and failing to meet what are thought to be minimum competence standards. Today many mechanisms for ferreting out these disqualifications are in place: RCMP background checks, soliciting confidential assessments from those who know candidates (peers, superiors, inferiors, clients, and so on). It might also be possible to catch other vices even as late as an interview

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state. But the best guarantee that they will be noted is the passage of time. It is rare that any person will have history without having a past, and history is the best test for the absence of vice. This suggests that, at least for certain types of selection processes, one would not want to appoint persons who had not been in the public eye for at least 20-25 years.

Third, it is important to test for the presence of positive qualities and characteristics—most of which are impalpable. Does the candidate understand, and is the candidate committed to the basic constitutional values of the rule of law and democratic governance? As with personal vice, this virtue can best be tested over time. Its presence or absence need not be deduced solely by looking at a person's performance as a judge, or even as a lawyer. Rather, the measure of judicial virtue is most often found in a person's conduct in everyday, informal settings—in how one acts as a friend, neighbour, parent, spouse, colleague, employer, consumer, or member of a voluntary association.

And finally, it is necessary to detect those who have the virtue of practical wisdom. I return to this below. While it is possible to imagine protocols for recognizing and assessing the first three criteria, it is extremely difficult to test for the fourth. Indeed, the difficulty is so great that some American authors have suggested proxies for doing so,[78] but, as always, the difficulty is that the qualities that are most important to detect are the qualities for which quantifiable data is least available. And by contrast, the qualities for which quantifiable data are present may, if adopted, lead to strategic behaviour designed precisely to meet the quantification. In other words, it is very easy to mistake measurability for merit. Moreover, once such criteria are announced, ambitious judges will orient their behaviour in order to score well according to announced

78 See S. CHOI and G. MULATI, "Choosing the Next Supreme Court Justice : An Empirical Ranking of Judge Performance" (2004) 78 *Southern California Law Review* 23, and S. CHOI and G. MULATI, "A Tournament of Judges," *supra*, note 71.

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criteria—an affliction well known to all university professors employed by institutions that deploy "performance pay" systems.[79]

2. A virtuous panel

What, then, is likely to be a reasonable process for thinking about judicial virtue? Implicit in the above comments is the belief that the best way to make assessments of virtue is by acting virtuously oneself. This claim moves reflection about judicial selection to the terrain of ethics and more particularly to reflection about different approaches to ethics. A dominant feature of modern life is the assumption that moral or ethical decision-making is simply about deducing propositions of right conduct in the abstract and then applying these propositions to one's conduct in particular cases. This is a "morality of duty."[80] But there is another account of ethical conduct that is more attuned to our expectations of judges. We might call it a "morality of aspiration" or virtue ethics.[81]

Being a virtuous person, however, is not just about one's responsibilities towards others; it is also about responsibilities towards oneself. It is about the goals one sets for oneself and the standards against which one assesses one's own conduct. It means imagining one's life not as the influence one may have had on others, but as the influence others have had upon oneself. In this aspirational reference point we see images of what it would mean to be a worthy member of a judicial selection committee.

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79 For a careful discussion of the perverse incentives of the "measurable, objective" criteria proposed by Choi and Mulati, see L. SOLUM, "A Tournament of Virtue" *supra*, note 75 at 1388-1398.

80 This morality of duty has been captured by Judith Shklar in the expression "legalism"—the attitude that holds ethical conduct to be a matter of following the rules laid down. See J. SHKLAR, *Legalism* (Cambridge : Harvard University Press, 1964).

81 A fine introduction to virtue ethics is Nancy SHERMAN, *The Fabric of Character : Aristotle's Theory of Virtue* (Oxford : Clarendon Press, 1989). For its application to law see L. SOLUM, "Virtue Jurisprudence : An Aretaic Theory of Law" (unpublished workshop paper available at : www.law.columbia.edu/center_program/legal_theory/papers/fall04).

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Consider the contribution that each of the following could make to a judicial selection panel, and then compare that contribution to that which would be brought by a person whose only (and here I do not mean to slander any person currently sitting on a judicial selection committee) qualification was that they were a member of a law society somewhere. In my view, most deserving of nomination to a judicial selection committee, or alternatively most deserving of being conscripted as non-public service members of a bureaucratized judicial selection committee would be people whose public contribution to the betterment of those with whom they interact is both quiet and personal—the sports or drama coach who recognizes in young players and actors a diversity of talents, a diversity of motivations and a diversity of anxieties and who responds to each child as an individual, the neighbour who gives up a night a week to serve as a Boy Scout or Girl Guide leader, and the music teacher who has taught generations of youngsters about life, beauty and self-discipline in the guise of weekly piano lessons.

I conclude that the qualities we seek in judges are the qualities we should seek in those who are responsible for selecting our judges. This suggests that those who ultimately select judges, however they themselves are selected, must attend to judicial virtue. For judges, the answer to the question "how do I achieve the goal of becoming who I aspire to become" is at once simple to state, and a terrifying challenge to live. Every day, every moment, in what they *say*, in what they *write*, in what they set out to *accomplish*, in how they *act* towards others—and most importantly—in what they *stand for*, they are making a public statement about who they are and about what they believe. For any person vested with responsibility for choosing judges—appointers, electors, recommenders—the challenge of virtue is no less imperative.

Conclusion: Is the Appointments Process all that Important?

Citizens, lawyers, politicians and judges themselves are rightly concerned about the processes by which judges are selected. After all, the courts are a fundamental political institution and, according to the dominant ideology of post-*Charter of Rights and Freedoms* Canada, they are indispensable guarantors of the rule of law. Even

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if the hyperbole now associated with the significance of the judicial function were toned down to a reasonable level, we would still have to conclude that, as governance actors in a liberal democracy, judges are equally as important as members of Parliament and provincial legislatures, ministers, the Governor-General and lieutenant-governors, the executive officers of Crown corporations, heads of key administrative agencies, police chiefs, and the senior public service. For this reason, the judicial selection process merits the same attention as the electoral process, and mechanisms for choosing, say, the Governor of the Bank of Canada, the Commissioner of the RCMP, and the Clerk of the Privy Council Office.

Many in the legal profession, of course, do not readily accept that the judicial selection process should be seen in the same light as these other selection processes. Their concern is that to do so would commit them to two other propositions that attract far from universal assent.

One such proposition that flows from imagining judicial selection as a process of governance is that the judicial function should not be imagined as some absolutely distinct endeavour that must, at all costs, be insulated from the "corrupting" political influence of other public governance institutions.[82] As a matter of constitutional law, the judiciary today may have a status grounded in the *Act of Settlement, 1701* and judges may, consequently, have structural guarantees of their independence and impartiality. But however distinctive the judicial function and however significant the institutional independence of the senior judiciary may be (would we not want the same institutional independence for the senior

[82] But see, for a contrary view, the decision in *MacBain* v. *Lederman* (1985) 1 F.C. 856 (C.A.). After this decision legislatures were required to separate out the adjudicative functions of agencies from their administrative, investigatory, educational functions, etc. The paradox is that at the same time that courts make a claim for a constitutionally protected status of the judicial function, in exercising judicial power they are themselves performing all manners of non-adjudicative governance functions—case management, judicial mediation, judge-led hearing processes, rule-making, and issuing managerial remedies that require ongoing supervision.

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mandarinate?), at bottom, in a constitutional democracy the judiciary is an organ of political governance. John Willis's characterization of the judiciary simply as the "Ministry of Dispute Resolution" may be an exaggeration in one direction provoked by the excesses of the McRuer Commission; nonetheless it is no more an exaggeration than the immodest view of the judicial function that has been progressively articulated since the early 1980s by the Supreme Court—in particular through the *PEI Judges Remuneration Reference*.[83]

To imagine the judicial selection process as a process of governance[84] is to call forth a second, equally important, observation. Just as there is a great variety of judicial offices, a great variety of judicial tasks and functions, and a great variety of substantive areas with which judges must deal, there are a great variety of qualities and attributes that those called upon to serve as judges must possess. Not every office, function and substantive area requires the same abilities. Moreover, not every office, function or role requires them in the same balance. That is, the more we accept the need for differentiation not just in relation to role but also substantively, the more likely we are to pluralize our understanding of the characteristics and qualities we expect in judges. And the more we pluralize our understanding of the qualities we expect in our judges and the different relative balance we associate with different judicial tasks the likely we are to conclude that we must pluralize our processes of judicial selection. There is no reason to conclude that a one size fits all approach will optimize the chances of selecting the best judges for all courts and for all cases.

Finally, we should guard against expecting that all the political goals we seek to achieve—independence, impartiality, quality, timeliness—can be achieved by perfecting the judicial selection process. Many of the expectations about desirable outcome that

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83 (1997) 3 S.C.R. 3. See the discussion in LAW COMMISSION OF CANADA, *Setting Judicial Compensation : Multidisciplinary Perspectives*, *supra*, note 39.

84 L. SALAMON, *The Tools of Government* (New York : Oxford University Press, 2002).

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we visit upon the process may in fact be better achieved through other institutional arrangements. In the grand scheme of things, the selection process is only a small part of the way a liberal democracy manages the overall endeavour of public governance as it relates to the judiciary. Equally important are decisions involving court administration, the assignment, promotion, transfer, discipline, dismissal and retirement of judges, the financing and staffing of courts, the framework of civil and criminal procedure, and so on.[85] More than this, the selection process is not the only occasion where judgements about suitability and capacity should (and are) made. In some measure, the fact that judges enjoy tenure of office till age 75 diminishes the significance of these other moments as governance endeavours. But, not unlike the situation of tenured professors at universities, there are a number of post-appointment occasions when a review of the performance and suitability of a judge can be undertaken.

Altogether one can identify the following six moments of accountability: (1) the moment of recruitment (that is, the moment of establishing the pool of appointable candidates); (2) the moment of selection (that is, the moment the actual decision—to appoint, to elect, to draw lots, or to commence the auction, as the case may be—is taken); (3) the period during which one is in service (that is, the period prior to statutory retirement); (4) the moment a judge is promoted or transferred from one judicial body to another (for example, when a judge is promoted from a trial court to a court of appeal, or from an appeal court to the Supreme Court, or conceivably—but rarely—when an appellate judge seeks re-appointment to a trial court); (5) the moment a judge is selected as a Chief Justice or regional supervising judge, or named to some other judicial management function; and (6) the moment of "disrecruitment" (that is, the moment of normal retirement, transfer to supernumerary status, or removal for cause).[86]

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85 See C. BAAR, *Judicial Administration in Canada*, *supra*, note 51. See also, CANADIAN JUDICIAL COUNCIL, *Alternative Models of Court Administration*, *supra*, note 41.

86 These themes are taken from R.A. MACDONALD "The Acoustics of Accountability" in *Judicial Integrity*, *supra*, note 24.

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In this paper I have been most concerned with the first two of these moments. Consider now the third through the sixth of them. There is an assumption in common law jurisdictions (although not in civil law jurisdictions where the judicial function is conceived as a career) that, once appointed, judges are—or at least should be—free from any type of censure, performance review or other evaluation. While it may be true that the power to take measures to ensure high performance ought not to be vested exclusively in a Chief Justice, or manifest itself through discretionary "perks" like the assignment of offices, circuit responsibilities, service on motions court, etc., it remains the case that judges assume certain aspirational obligations of *phronesis* during their tenure and that they should be held to account for their failure to meet these obligations. To date, attempts to develop a set of principles of ethical conduct applicable to judges that would embrace positive obligations have been largely unsuccessful.[87] These might include the idea of an obligation to pursue professional training and continuing education, to maximize reading, experiences and study, to keep an open mind by varying one's experiences, and so on. Performance reviews and other mechanisms of bureaucratic management are central devices for ensuring the ongoing quality of judges.

In Canada's current constitutional order there is a further assumption that simply because a judge has been appointed, the requirements of competence and democratic accountability have been met for all time. But is it the case that the qualities one assumes in a trial judge are identical to those of an appellate judge? Or that all trial courts perform the same function? Still, the assumption is that decisions about promotion should be taken by the executive without invoking any process of an advisory committee. If independence is to be guaranteed by removing temptation, the holding out of the possibility of promotion should be revisited. Taking seriously the values that the selection process is meant to promote would suggest that the same type of process should be undertaken whenever a judge is nominated for transfer from one court to another.

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87 See CANADIAN JUDICIAL COUNCIL, *Ethical Principles for Judges* (Ottawa : Canadian Judicial Council, 1998).

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Presently, the Chief Justice and regional judges in every court have significant power. Yet they are appointed, without further formal consultative process, by the executive. Only where they are appointed from outside the judiciary is the assessment process engaged, and in these circumstances, only for the purpose of determining suitability for appointment as a judge, not for management possibility. If judicial selection is important, then some process for nominations of chief justices should also be undertaken. Some believe that the choice should be taken by a vote of members of the court—a possibility in an appellate court with a small number of members but certainly not a workable process for a 200 person trial court.[88] Nonetheless, one might imagine a process not unlike that by which deans are selected within universities—a selection committee comprising colleagues, users, administrators, alumni, members of other courts—that would make recommendations to the executive.

Finally, there is the moment of disrecruitment. While the Constitution currently provides for tenure of office until age 75, and therefore protects judges from external influences relating to job security, salary and benefits, it says very little about discipline. Discipline short of dismissal is managed through the Canadian Judicial Council according to processes that until recently probably would not have passed muster under any relevant Labour Standards Act. While the *Constitution Act, 1867* provides for a formal process of destitution of superior court judges, a process that the Supreme Court has extended to other judicial officers through application of section 11 of the *Charter of Rights and Freedoms*, there are many other ways to achieve a like result—constructive dismissal, induced resignations, or opting for supernumerary status—none of which are subject to bureaucratic control or regulation.

Perhaps the best way to conclude this attempt to situate the judicial selection process in its broader institutional context is to

88 For discussion see T. PETTYS, "Choosing a Chief Justice : Presidential Prerogative or a Job for the Court ?" (2006) 22 *Journal of Law and Politics* 231.

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recall and paraphrase what is often said about how to ensure quality in the administrative process. To achieve a virtuous judiciary and to enhance the likelihood that judges will show a deep respect for the constitutional values of a liberal democracy throughout their careers, it is not enough simply to choose them wisely. It is also necessary to: (1) celebrate their selection; (2) provide them with the information necessary to understand the tasks they will be expected to perform; (3) generate a commitment to the mission and the importance of the institution they are joining; (4) train them well; (5) provide them with meaningful feedback about their performance; (6) pay them decent salaries; (7) publicly value the job they are doing; (8) praise them for their successes; (9) provide them with the necessary help to do their job better; (10) furnish them with ongoing opportunities to learn and reflect about their role and responsibilities; (11) treat them properly and with respect; (12) give them a mandate that is within the capacity of a normal human being to accomplish; (13) avoid overburdening them with a case-load that is soul-destroying; and (14) defend them against ill-tempered and ill-considered critiques from those who have no clue about the nature of their job, the pressures they face, the pathologies and inconsistencies of the law they are meant to administer, and the sometimes perverse behaviour of those who appear before them.

These fourteen commandments speak, every bit as much as the processes we adopt for selecting judges, to the endeavour of ensuring an outstanding judiciary. They are the means by which we can ensure those optimal processes of judicial selection are not ultimately defeated by suboptimal processes of post-selection *encadrement*.

So I shall conclude as I began in the prologue to this essay: in the case of at least one public institution—the university—carefully-wrought processes of recruitment and *encadrement* have given us a living legacy of virtue. I speak, of course, of Andrée Lajoie.