

What do judges do?

1 Chief Justice Roberts

“Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.”

2 Associate Justice Sotomayor

Confirmation hearing

“Judges can’t rely on what’s in their heart. ... It’s not the heart that compels conclusions in cases; it’s the law.”

“In the past month, many senators have asked me about my judicial philosophy. It is simple: fidelity to the law.”

“I’m a judge who believes the facts drive the law. By drive the law, I mean, determines how the law will apply in that individual case.”

pre-nomination

“I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.” (2001)

A “court of appeals is where policy is made. ... And I know — I know this is on tape, and I should never say that because we don’t make law. I know. O.K. I know. I’m not promoting it. I’m not advocating it. I’m — you know.” (2005)

3 Denying the distinction

1. The law is often indeterminate prior to a judge's decision.
2. The law is what judges decide it is.
3. Judges have to decide indeterminate cases according to how the law ought to be.
4. Therefore, there is a connection between how the law is and how it ought to be.

4 A snippet from Hart

drastically restated. The point must be not merely that a judicial decision to be rational must be made in the light of some conception of what ought to be, but that the aims, the social policies and purposes to which judges should appeal if their decisions are to be rational, are themselves to be considered as part of the law in some suitably wide sense of "law" which is held to be more illuminating than that used by the Utilitarians. This restatement of the point would have the following consequence: instead of saying that the recurrence of penumbral questions shows us that legal rules are essentially incomplete, and that, when they fail to determine decisions, judges must legislate and so exercise a creative choice between alternatives, we shall say that the social policies which guide the judges' choice are in a sense there for them to discover; the judges are only "drawing out" of the rule what, if it is properly understood, is "latent" within it. To call this judicial legislation is to obscure some essential continuity between the clear cases of the rule's application and the penumbral decisions. I shall question later whether this way of talking is

Figure 1 Hart, "Separation of Law and Morals", p. 612