

Economic Analysis of Law Review

The Relevance of Empirical Findings on Voting Patterns for the Analysis of Dworkin's Criticism of Legal Positivism

A relevância das descobertas empíricas sobre padrões de votação para a análise das críticas de Dworkin ao positivismo jurídico

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RESUMO

O artigo emprega a literatura relativa às descobertas empíricas sobre efeitos do painel e aversão ao dissenso a fim de criticar a concepção de Dworkin a respeito da interpretação do direito, bem como para apoiar a teoria de Kelsen da moldura normativa e sua afirmação de que a interpretação do direito consiste em um ato de conhecimento e em um ato de vontade. A perspectiva de Dworkin a respeito da discricção como algo que normalmente está ausente da prática da interpretação do direito é confrontada por meio da apresentação e análise das pesquisas sobre aversão ao dissenso e efeitos do painel, as quais indicam a influência generalizada de aspectos não-jurídicos nos padrões interpretativos exibidos pelos juízes dos tribunais recursais. Também são referidos os padrões interpretativos identificados a fim de apoiar a concepção de Kelsen sobre a interpretação, conforme a qual a interpretação envolve tanto a identificação da moldura normativa, quanto o ato de vontade subsequente que consiste na seleção de uma das opções disponíveis, a qual não é baseada em conhecimentos sobre estas opções.

Palavras-chave: Aversão ao dissenso. Dworkin. Efeitos do painel. Interpretação do direito. Kelsen.

JEL: K14, K42.

ABSTRACT

The article uses the literature on empirical findings on panel effects and dissent aversion in order to criticize Dworkin's conception of legal interpretation and to support Kelsen's theory of the legal frame and his assertion that legal interpretation consists of an act of cognition and an act of will. Dworkin's view of discretion as usually absent from the practice of legal interpretation is confronted through the presentation and analysis of research on dissent aversion and panel effects that indicate the pervasive influence of non-legal aspects in the interpretative patterns shown by circuit court judges. The identified interpretative patterns are also referred to in order to support Kelsen's conception of legal interpretation as involving both the identification of a legal frame and a subsequent act of will that consists of the selection that is not cognitively based of one of the available options.

Keywords: Discretion. Dissent aversion. Dworkin. Kelsen. Legal interpretation. Panel effects.

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1. Introdução

Two of the key elements of Dworkin's legal thought are his theory of the one-right-answer and his rejection of the positivist's account of the role of discretion in legal interpretation. Dworkin supported his views on legal interpretation by referring to legal decisions that would justify his assertion that the interpretative tasks judges need to face do not involve an act of discretion. This conception conflicts with the Kelsenian perspective, according to which legal interpretation involves an act of knowledge and an act of will, a discretionary (understood as not knowledge-based) act of choosing among possible interpretations of legal sources. Considered in these terms, the discussion could be seen as having no end: Dworkians would quote decisions in which judges decide with seeming confidence in favor of only one interpretative option, the one they present as the most adequate, while Kelsenians would claim that it may happen this way, but only because these judges are either concealing the act of will that took place during the reaching of their decisions or are unconscious of it.

The aim of this article is to deal with the debate about Dworkin's and Kelsen's conceptions of legal interpretation by employing a modified version of Dworkin's approach to the subject. A strong point in Dworkin's argumentation stems from the use of real cases, and empirical facts, in order to support a theoretical claim. Consequently, to justify the view that Kelsen's notion of interpretation includes a discretionary act is correct, and in order to present arguments against Dworkin's conception of legal interpretation, Dworkin's empirical findings and his interpretation of them need to be confronted. The main goal of this article is to present an interpretation of a set of empirical findings about dissent aversion and panel effects (these notions indicate that the large number of unanimous circuit court decisions in the United States is connected with the presence of a dissent aversion tendency, so panels of judges will be influenced by the votes of the other judges they are in the same panel with). It is also to demonstrate they provide the necessary reasons and empirical facts not only to criticize Dworkin's one-right-answer thesis and his assertions about discretion in legal decision, but also to support Kelsen's theory of the legal frame as well as his conception of legal interpretation as involving both an act of knowledge and an act of will.

The first section of this article offers a short presentation of the main elements of Kelsen's theory of legal interpretation and of its connection with the notion of discretion, as well as the key aspects of Dworkin's thesis of the one-right-answer and his criticism of the notion that discretion is pervasive in legal reasoning. The second section initially indicates empirical findings about panel effects and dissent aversion. After this, it connects them with the discussion on legal interpretation, discretion and the existence of a legal frame, while in the last section an interpretation of these findings is developed in order to relate them with Kelsen's theory of legal interpretation. It also explains why these results provide empirical reasons to reject Dworkin's one-right-answer thesis and his remarks on the role and weight of discretion in legal reasoning.

2. Legal Interpretation and Discretion according to Kelsen and Dworkin

Legal interpretation and discretion are two subjects that were analyzed by Kelsen and Dworkin. Indeed, one of the main differences in the legal theories of these authors lies in the way they deal with the points of contact between the two subjects. As will be presented in the sequence, Kelsen understands that discretion is inevitable in many circumstances of legal reasoning and because of this he describes the interpretative decisions taken by legal authorities as comprising an act of cognition and an act of will, the exercise of a kind of discretion. Dworkin, on the other hand, sees the legal reasoning practiced by legal authorities as involving the search for the best reading of legal sources. Based on what these authorities assert in their decisions, he

argues that legal sources do not offer space for discretion, since they can almost always be interpreted so that only one option presents itself as the correct legal interpretation, or as the correct answer. (According to him, only on “rare”² occasions is this not possible).

A. Kelsen’s Remarks on Legal Interpretation

Kelsen has not devoted many pages to the subject of legal interpretation.³ Still, his brief remarks may sound for many like a set of quite reasonable assertions about the subject. At the beginning of his Pure Theory of Law Kelsen announces that his theory would attempt “to answer the question of what and how the law is, not how it ought to be”⁴, and because the phenomenon of legal interpretation constitutes part of what the law is, Kelsen’s approach to legal interpretation focuses on the description of how it takes place, and one of the aspects he analyzes is the interpretation of the law by the authorities and organs that have the duty to apply the law. In other words, the aim of his theory is to offer a description of the set of legal phenomena in which legal application takes place by legal authorities that interpret the legal sources they need to observe. It is precisely in the context of describing this practice of interpretation that Kelsen mentions discretion as a property that accompanies legal interpretation: “The higher norm cannot bind in every direction the act by which it is applied. There must always be more or less room for discretion, so that the higher norm in relation to the lower one can only have the character of a frame to be filled by this act.”⁵

Kelsen will present the “indefiniteness” as one of the properties of the norms that need to be interpreted and applied by using the notion of a “frame”⁶, of a delimited space for manoeuvre that is available for legal authorities. On the nature of legal interpretation involving a legal frame and the identification of the limits of this frame he also writes the following:

If ‘interpretation’ is understood as cognitive ascertainment of the meaning of the object that is to be interpreted, then the result of a legal interpretation can only be the ascertainment of the frame which the law that is to be interpreted represents, and thereby the cognition of several possibilities within the frame. The interpretation of a statute, therefore, need not necessarily lead to a single decision as the only correct one, but possibly to several, which are all of equal value, though only one of them in the action of the law-applying organ (especially the court) becomes positive law. The fact that a judicial decision is based on a statute actually means only that it keeps inside the

² DWORKIN, Ronald. **A Matter of Principle**. Cambridge: Harvard University Press, 1985, p. 143.

³ On Kelsen’s remarks regarding legal interpretation, see: WALTER, Robert. Das Auslegungsproblem im Lichte der Reinen Rechtslehre. In: KOHLMANN, Günter (Ed.). **Festschrift für Ulrich Klug zum 70. Geburtstag**. Band 1. Köln: Dr. Peter Deubner, 1983, p. 187-197; SCHWAIGHOFER, Christoph. Kelsen zum Problem der Rechtsauslegung. In: PAULSON, Stanley L.; WALTER, Robert (Eds.). **Untersuchungen zur Reinen Rechtslehre: Ergebnisse eines Wiener Rechtstheoretischen Seminars 1985/86**. Wien: Manz, 1986, p. 235-237; LIPPOLD, Rainer. **Reine Rechtslehre und Strafrechtsdoktrin**. Wien: Springer, 1989, p. 159-170; PAULSON, Stanley L. Kelsen on Legal Interpretation. **Legal Studies**, v. 10, 1990, p. 146-148; MAYER, Heinz. Die Interpretationstheorie der Reinen Rechtslehre. In: WALTER, Robert (Ed.). **Schwerpunkte der Reinen Rechtslehre**. Wien: Manz, 1992, p. 61-70; TELMAN, Jeremy. Law or Politics? Hans Kelsen and the Post-War International Order. **Constellations**, v. 18, 2011, p. 515-516; WIEDERIN, Ewald. Hans Kelsen als praktischer Verfassungsrechtler. In: ALIPRANTIS, Nikitas; OLECHOWSKI, Thomas (Hrsg.). **Hans Kelsen: Die Aktualität eines großen Rechtswissenschaftlers und Soziologen des 20. Jahrhunderts**. Wien: Manz, 2014, p. 114-118; SILVA, Matheus Pelegriño da. Merkl’s Beitrag zu Kelsens Theorie der Rechtsauslegung. Ein Vergleich beider Interpretationslehren. **Archiv für Rechts- und Sozialphilosophie**, v. 105, 2019, p. 359-375.

⁴ KELSEN, Hans. **Pure Theory of Law**. Translated by Max Knight. Berkeley: University of California Press, 1967, p. 1. On Kelsen’s goal with his theory of law, see: EBENSTEIN, William. **The Pure Theory of Law**. South Hackensack: Augustus M. Kelley, 1969, p. 205-206; DREIER, Horst. **Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen**. 2nd ed. Baden-Baden: Nomos, 1990, p. 154-155.

⁵ KELSEN, Hans. **Pure Theory of Law**. Translated by Max Knight. Berkeley: University of California Press, 1967, p. 349.

⁶ KELSEN, Hans. **Pure Theory of Law**. Translated by Max Knight. Berkeley: University of California Press, 1967, p. 350.

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frame represented by the statute; it does not mean that it is the individual norm, but only that it is one of those individual norms which may be created within the frame of the general norm.⁷

According to Kelsen, *as a rule* – he seems to admit that eventually only one option will result from the interpretation of a norm, since as quoted above he asserts that “[t]he interpretation of a statute need not necessarily lead to a single decision as the only correct one”⁸ – the product of the legal interpretation of legal sources is a plurality of alternatives. Kelsen will clearly reject the option according to which it is in any way possible to speak of “only one of several meanings of a norm [...] [as gaining] the distinction of being the only ‘correct’ one – provided, of course, that several possible interpretations are available”.⁹ It is because of this that he presents the interpretation practiced by legal authorities as the result of two different kinds of act, an act of cognition and an act of will: “In the application of law by a legal organ, the cognitive interpretation of the law to be applied is combined with an act of will by which the law-applying organ chooses between the possibilities shown by cognitive interpretation.”¹⁰

In Kelsen's theory the legal frame is the product of an act of cognition, the result of the “cognitive interpretation” of legal sources, and of the valid norms of a legal order. It is because as a rule this act of cognition does not lead to only one possible norm to be applied to the concrete situation that the authority needs to deal with, in order to decide the matter this authority needs to exercise discretion. It needs to practice the act of will that consists of choosing, without using legal standards¹¹ (since there are none available), which interpretative option will be adopted in order to reach a decision.

B. Dworkin's Remarks on Discretion in Legal Interpretation

One key aspect of Dworkin's rejection of the conception of legal interpretation as involving discretion consists of his one-right-answer thesis. According to this notion, when legal interpretation takes place it is almost always possible to find one interpretation of the legal

⁷ KELSEN, Hans. **Pure Theory of Law**. Translated by Max Knight. Berkeley: University of California Press, 1967, p. 350.

⁸ KELSEN, Hans. **Pure Theory of Law**. Translated by Max Knight. Berkeley: University of California Press, 1967, p. 351. On Kelsen's theory of the legal frame, see: WINKLER, Günther. **Rechtstheorie und Erkenntnislehre: Kritische Anmerkungen zum Dilemma von Sein und Sollen in der Reinen Rechtslehre aus geistesgeschichtlicher und erkenntnistheoretischer Sicht**. Wien: Springer, 1990, p. 224-225; JESTAEDT, Matthias, *Wie das Recht, so die Auslegung. Die Rolle der Rechtstheorie bei der Suche nach der juristischen Auslegungslehre*. **Zeitschrift für öffentliches Recht**, v. 55, 2000, p. 140.

⁹ KELSEN, Hans. **Pure Theory of Law**. Translated by Max Knight. Berkeley: University of California Press, 1967, p. 352.

¹⁰ KELSEN, Hans. **Pure Theory of Law**. Translated by Max Knight. Berkeley: University of California Press, 1967, p. 354. Regarding Kelsen's view of the interpretation practiced by legal authorities as involving an act of knowledge (or cognition) and an act of will, see: GRIMM, Dieter. *Zum Verhältnis von Interpretationslehre, Verfassungsgerichtbarkeit und Demokratieprinzip bei Kelsen*. In: KRAWIETZ, Werner; TOPITSCH, Ernst; KOLLER, Peter (Eds.). **Ideologiekritik und Demokratietheorie bei Hans Kelsen**. Berlin: Duncker & Humblot 1982, p. 151; HACK, Pierre. **La philosophie de Kelsen: Epistémologie de la Théorie pure du droit**. Bâle: Helbing & Lichtenhahn, 2003, p. 160.

¹¹ About that Kelsen asserts: “From a point of view directed at positive law, there is no criterion by which one possibility within the frame is preferable to another. There simply is no method (that can be characterized as a method of positive law), by which only one of several meanings of a norm may gain the distinction of being the only “correct” one – provided, of course, that several possible interpretations are available”. KELSEN, Hans. **Pure Theory of Law**. Translated by Max Knight. Berkeley: University of California Press, 1967, p. 352. On this subject, see also LIPPOLD, Rainer. **Reine Rechtslehre und Strafrechtsdoktrin**. Wien: Springer, 1989, p. 159-177; MERKL, Adolf Julius. *Das Recht im Lichte seiner Anwendung*. In: MAYER-MALY, Dorothea; SCHAMBECK, Herbert; GRUSSMANN, Wolf-Dietrich (Eds.). **Adolf Julius Merkl**. *Gesammelte Schriften*. 1. Band, 1. Teilband. Berlin: Duncker & Humblot, 1993, p. 87.

sources, one reasoning that seems to be more adequate than the others.¹² Dworkin asserts that in hard cases (“the case at hand is a hard case [...] when no settled rule dictates a decision either way”¹³), that in cases where the legal sources are not clear, principles may be employed in order to identify a right answer, an answer that seems to offer the better reading of legal sources, which include not only rules, but also explicit or implicit principles of the legal order.¹⁴ The assertion of the existence of “right answers”, Dworkin highlights, does not correspond to the assertion that there is only one right answer, but merely “to the claim [...] that one principle or another provides a better justification of some part of legal practice. Better in what way? Better interpretatively – better, that is, because it fits the legal practice better, and puts it in a better light”.¹⁵

Dworkin’s assertions about legal interpretation may count as reasonable and valid remarks about how legal authorities *should* proceed, even though he does not aim only at offering indications about the way legal sources should be interpreted, but also at criticizing the positivistic conception of legal interpretation. According to this, in reality authorities do not necessarily strive for the right answer, since they can see the available options as alternatives that may be discretionarily selected.

In *Taking Rights Seriously* the cases *Riggs v. Palmer*¹⁶ and *Henningsen v. Bloomfield Motors, Inc.* as well as elements of the votes in these cases are referred to by Dworkin in order to directly point out the use of principles in the justification of the votes¹⁷ and indirectly to back his criticism of legal interpretation, as conceived by positivism, and specifically of the defense, by this kind of legal theory, of the notion of discretion in legal interpretation.¹⁸ According to Dworkin’s

¹² Dworkin explains his thesis of the one-right-answer in the following way: “My thesis about right answers in hard cases is [...] a very weak and commonsensical legal claim. It is a claim made within legal practice rather than at some supposedly removed, external, philosophical level. I ask whether, in the ordinary sense in which lawyers might say this, it is ever sound or correct or accurate to say, about some hard case, that the law, properly interpreted, is for the plaintiff (or for the defendant). I answer that, yes, some statements of that kind are sound or correct or accurate about some hard cases [...] Legal theorists have an apparently irresistible impulse, however, to insist that the one-right-answer thesis must mean something more than is captured in the ordinary opinion that one side had the better argument in *Cruzan* [a case that Dworkin discusses]. They think I must be saying not just that there are right answers in some ordinary way, [...] but that there are *really* right answers, or *really real* right answers, or right answers *out there*”. DWORKIN, Ronald. **Justice in Robes**. Cambridge: Belknap Press, 2006, p. 41-42. See LEITER, Brian. Explaining Theoretical Disagreement. **University of Chicago Law Review**, v. 76, 2009, p. 1216.

¹³ DWORKIN, Ronald. **A Matter of Principle**. Cambridge: Harvard University Press, 1985, p. 84.

¹⁴ One aspect of Dworkin’s criticism of legal positivism concerns the positivistic tendency to assert that only formally posited rules should count as legal sources. This criticism was to a certain degree accepted by Hart, as can be observed in his remarks on the subject in the postscript of his *The Concept of Law*. See HART, Herbert Lionel Adolphus. **The Concept of Law**. 3rd ed. Oxford: Clarendon Press, 2012, p. 263-265.

¹⁵ DWORKIN, Ronald. **Justice in Robes**. Cambridge: Belknap Press, 2006, p. 52. See POSTEMA, Gerald J. **Legal Philosophy in the Twentieth Century: The Common Law World**. v. 11. Dordrecht: Springer, 2011, p. 432.

¹⁶ Criticisms about the kind of conclusion that Dworkin reaches by analyzing the case *Riggs v. Palmer* can be found in the following article by Schauer: SCHAUER, Frederick. The Limited Domain of the Law. **Virginia Law Review**, v. 90, 2004, p. 1937-1942. Leiter describes the behavior of the judges in this case as a possible example of “interpretative opportunism”. LEITER, Brian. Explaining Theoretical Disagreement. **University of Chicago Law Review**, v. 76, 2009, p. 1244.

¹⁷ See DWORKIN, Ronald. **Taking Rights Seriously**. Cambridge: Harvard University Press, 1978, p. 23-24 and p. 28-29. Regarding the distinction between rules and principles, see HEINOLD, Alexander. **Die Prinzipientheorie bei Ronald Dworkin und Robert Alexy**. Berlin: Duncker & Humblot, 2011, p. 70-172; POSTEMA, Gerald J. **Legal Philosophy in the Twentieth Century: The Common Law World**. v. 11. Dordrecht: Springer, 2011, p. 404-411.

¹⁸ DWORKIN, Ronald. **Taking Rights Seriously**. Cambridge: Harvard University Press, 1978, p. 30-31. Dworkin’s reconstruction of the positivist’s notion of discretion is a point that deserves criticism, mainly because he asserted that “[p]ositivists hold that when a case is not covered by a clear rule, a judge must exercise his discretion to decide that case by what amounts to a fresh piece of legislation.” (DWORKIN, Ronald. **Taking Rights Seriously**. Cambridge: Harvard University Press, 1978, p. 30-31). While it is true that Kelsen recognizes that it is possible for a

perspective it “is the judge’s duty” “to reach an understanding, controversial or not, of what [...] the rules require”, and this is the reason given by him to assert that the judge does not have any “discretion”¹⁹.

Not only is a duty to find a one-right-answer affirmed by Dworkin, but also the idea that in reality this duty is recognized and observed by judges. Dworkin will assert as a general conclusion (without giving names or numbers) that judges see the interpretations that they offer in judicial decisions as the best interpretative alternatives: “when judges finally decide one way or another they think their arguments better than, not merely different from, arguments the other way; though they may think this with humility, wishing their confidence were greater or their time for decision longer, this is nevertheless their belief.”²⁰

Actually, the closest Dworkin comes to offering factual evidence of general empirical validity for his theory of legal interpretation involving a constant search for the one-right-answers stems from the indication of a few cases. In a section named “the real world”²¹ Dworkin analyzes four cases (Elmer’s case, *McLoughlin*, the snail darter case and *Brown*) in which according to him there was a theoretical disagreement between the judges responsible for judging the cases.²² But even if it is granted that the judges in those cases meant every word and sentence that they said, and that they were looking at and expressing the one-right-answers as they perceived them²³, it is still a fact that by referring to four cases Dworkin is not justifying an assertion about the whole or

“law-applying organ” to decide a case outside of the legal frame, and to create a norm “which lies entirely outside the frame of the norm to be applied” (KELSEN, Hans. **Pure Theory of Law**. Translated by Max Knight. Berkeley: University of California Press, 1967, p. 354), the assertion of this possibility does not correspond in any way to the assertion that as a law-applying organ this organ received the power to do so in hard cases, but only to the description of the fact that in some cases authorities do not create norms that count as instances of the interpretation of the relevant legal sources. Kelsen has described a situation that takes place sometimes when legal interpretation takes place (or should take place). He has not asserted that in hard cases or in any cases authorities received from the legal order authorization to decide as they please. Nor does Kelsen present the act of choosing, the act of will, as an unlimited act, as implied by Dworkin. The use of the word “frame” should be enough to make it clear that the act of will that takes place in legal interpretation is a limited act of will, it is the act of choosing among a limited number of alternatives, definitely not corresponding to a situation in which the decision of a case “amounts to a fresh piece of legislation”.

¹⁹ DWORKIN, Ronald. **Taking Rights Seriously**. Cambridge: Harvard University Press, 1978, p. 36.

²⁰ DWORKIN, Ronald. **Law’s Empire**. Cambridge: Belknap Press, 1986, p. 10.

²¹ DWORKIN, Ronald. **Law’s Empire**. Cambridge: Belknap Press, 1986, p. 15. Uppercase omitted. In later works like *Justice in Robes* Dworkin distanced himself from assertions whose aim was to challenge legal positivism by showing how judges interpreted law and decided on cases, and focused on arguing about how “judges and others should” (DWORKIN, Ronald. **Justice in Robes**. Cambridge: Belknap Press, 2006, p. 2) do these things. In *Justice in Robes* Dworkin also declared that he did not want to focus on “a *sociological* concept of law” (DWORKIN, Ronald. Ob. cit., p. 3), but offered no explanation about why he was no longer interested in supporting his previous views about “the real world” and about how, according to him, “when judges finally decide one way or another they think their arguments better than, not merely different from, arguments the other way” (DWORKIN, Ronald. **Law’s Empire**. Cambridge: Belknap Press, 1986, p. 10). As already indicated, Dworkin originally intended to argue that legal positivism was wrong, because he believed it did not understand how legal interpretation takes place in the real world, and because it ignored the pervasive search for one-right-answers. Probably because he was not able to confirm this hypothesis (the empirical research referred to below supports this impossibility), Dworkin decided to silently abandon this criticism of legal positivism, to stop writing about what judges do and to focus on what they should do regarding legal interpretation.

²² See DWORKIN, Ronald. **Law’s Empire**. Cambridge: Belknap Press, 1986, p. 15-30. On the notion of theoretical disagreement in Dworkin, see LEITER, Brian. Explaining Theoretical Disagreement. **University of Chicago Law Review**, v. 76, 2009, p. 1216; PATTERSON, Dennis. Theoretical Disagreement, Legal Positivism, and Interpretation. **Ratio Juris**, v. 31, 2018, p. 261-267.

²³ About the notion of law as an interpretative concept, see: DWORKIN, Ronald. **Law’s Empire**. Cambridge: Belknap Press, 1986, p. 87; DWORKIN, Ronald. **Justice in Robes**. Cambridge: Belknap Press, 2006, p. 12; GREEN, Michael Steven. Dworkin’s Fallacy, or What the Philosophy of Language Can’t Teach Us About the Law. **Virginia Law Review**, v. 89, 2003, p. 1897; WALTJKINS-BIENZ, Renée M. **Die Hart-Dworkin Debatte**. Ein Beitrag zu den internationalen Kontroversen der Gegenwart. Berlin: Ducker & Humblot, 2004, p. 104-110.

about a significant part of the real world.²⁴ By referring to these four cases Dworkin may have proved that in four instances there was theoretical disagreement and there were assertions of one-right-answers regarding legal interpretation, but this is definitely not the same as to prove either that theoretical disagreement is a property of many or of most legal cases, or that judges usually or almost always see one of the interpretative options as better than all other options.

One aspect of theoretical disagreement that must be noticed is that it should be a property of cases that exist in “the real world”, but as will be indicated in the next section, the empirical data on disagreement show that in most cases judges do not actually express disagreement (they actively try to avoid disagreements) while deciding cases, even if they have reservations (as they do not express them, why should these secret disagreements even matter) about how the cases should be resolved.

There is also another point about Dworkin’s conception of disagreement and discretion that must be highlighted: for Dworkin the instances of theoretical disagreements are authentic and they should be seen as a confirmation of the assertion that judges do not see the act of judging and the specific decisions they reach as discretionary decisions, or as including an act of cognition and an act of will, but only an act of cognition that may vary from one judge to the other due to the different one-right-answers that these judges find. Dworkin presents the situations of disagreement as including two alternative meanings. Either the disagreement is authentic and the judges are disagreeing because different judges interpret the same legal sources differently and see different right answers, or these judges “pretend” to disagree because they actually do not see the legal sources as offering one-right-answers, since they only selected one of the interpretative options as the one they would adopt arbitrarily or because of non-legal reasons.²⁵

In order to reject the alternative that recognizes the exercise of discretion as an element of legal interpretation *as perceived* by the judges, Dworkin’s argument involves resorting to an interpretation of the cases he mentions, the cases in which judges claimed that one specific interpretation of the legal sources is the correct one and all others are wrong. According to him, the claims made by these judges about what the correct interpretation of the legal sources is, if combined with the *supposition* that they are honest claims – specifically about the assertion that an interpretation is the “correct” one –, would prove that according to the way these judges perceived legal interpretation it did not involve discretion nor an act of will, a selection that does

²⁴The notions that the majority of the legally relevant issues do not involve disagreement, but agreement, and that many legally significant situations are not even the object of judicial debate, because their legal meaning is not disputed, was already indicated by some authors while discussing this property of law and legal phenomena. See PRIEST, George L.; KLEIN, Benjamin. **The Selection of Disputes for Litigation**. Santa Monica: Rand, 1984, p. 1-4; SCHAUER, Frederick. Easy Cases. **South California Law Review**, v. 58, 1985, p. 429-430; KRESS, Ken. Legal Indeterminacy. **California Law Review**, v. 77, 1989, p. 296-297; LEITER, Brian. Legal Indeterminacy. **Legal Theory**, v. 1, 1995, p. 488; LEITER, Brian. Explaining Theoretical Disagreement. **University of Chicago Law Review**, v. 76, 2009, p. 1227.

²⁵ This reading of disagreements can be identified in the following excerpt: “If positivism is right, then the appearance of theoretical disagreement about the grounds of law, in Elmer’s case and *McLoughlin* and the snail darter case and *Brown*, is in some way misleading. In these cases past legal institutions had not expressly decided the issues either way, so lawyers using the word ‘law’ properly according to positivism would have agreed there was no law to discover. Their disagreement must therefore have been disguised argument about what the law should be. But we can restate that inference as an argument against positivism. For why should lawyers and judges pretend to theoretical disagreement in cases like these? Some positivists have a quick answer: judges pretend to be disagreeing about what the law is because the public believes that there is always law and that judges should always follow it. On this view lawyers and judges systematically connive to keep the truth from the people so as not to disillusion them or arouse their ignorant anger.” DWORKIN, Ronald. **Law’s Empire**. Cambridge: Belknap Press, 1986, p. 37.

not result solely from the conception that each judge has of the matter and the case under discussion.

Still it may seem that Dworkin has the upper hand, since he has in his favor what is to be seen in the votes, the appearance that judges actually see legal sources as offering stronger reasons in order to support one interpretative option, or in other words one answer as the right answer. But the fact that judges do not assert that they are discretionarily choosing one interpretative option over the others is by itself no reason to claim that they are not doing so.

Dworkin's justification for the notion that legal interpretation does not involve a discretionary act may be refuted, even without having access to the mental states of the judges that decide cases, if it is proved that judges behave differently depending on the other judges that compose the panel in which they are and the party that appointed these judges. If the voting tendencies of other judges influence the voting behavior of a judge, then the behavior of this judge cannot be described as the product of a sole act of cognition, or in other words, of the one-right-answer that this judge supposedly found. If this external influence on the judge's voting behavior (as well as on the judge's interpretative behavior) is demonstrated, then there is a justified reason to assert the existence of a discretionary element in the practice of legal reasoning.

The following section is devoted to presenting the results of empirical research on panel effects and dissent aversion and by doing so, to indicate that the judge's voting behaviors are indeed influenced to a certain extent by non-legal aspects. Thus, legal interpretation cannot be seen as divorced from a non-cognitive and *in this sense discretionary act*.

3. Panel Effects, Dissent Aversion and their Relevance for Understanding Legal Interpretation

As indicated above, if Dworkin is right in his criticism of legal positivism, then the voting behavior of the judges will reflect their individual conceptions (the conceptions that they reach by themselves or by knowing about the decisions of other judges in a panel) about the answer to the legal cases they need to decide. They will decide based on their own conceptions about these cases and the pertinent legal sources, on what they perceive as the right answers. Therefore, their behavior will reflect in a manner of speaking individual constants and motivations that are the result of each judge's own understanding of legal sources (even if they change their minds after getting to know the votes of other judges, since the cause of the change would result from their decisions).

One of the consequences of the supposed existence of such individual constants and motivations would be that voting behaviors would not be affected by the presence in the panel of judges that express the same or a different perspective on the cases discussed only because they expressed these perspectives, that is, without taking into consideration the justifications provided. On the other hand, if the legal decision practiced by judges is influenced by the characteristics of the other judges they are empanelled with, then it is not possible to claim that discretion is not a property of the legal interpretation practiced by judges. Consequently, in order to assert that discretion has no place in the legal argumentation offered by judges in panels the interpretative decisions adopted by these judges must be shown to be unaffected by the voting patterns or characteristics of the other judges in a panel. In short, since a judge may be empanelled with different groups of other judges, so sometimes a judge is empanelled with judges that share his or her perspective and sometimes with judges that support a different perspective, if the decisions

of this judge are not discretionary (as already indicated, the judge would think his or her “arguments better than, not merely different from, arguments the other way”²⁶), then these different panel compositions should not affect the way the judge decides the cases.

This section is divided into two parts. The first one is devoted to explaining the notions of “panel effects” and “dissent aversion”, to indicate empirical findings about these subjects and to expose an argument that connects these findings with the conclusion that to a *significant extent* judges are influenced by the other judges they are empanelled with. Taking into account this conclusion it will be argued in the second part of this section that discretion in legal interpretation, understood as the variation in voting and interpretative behavior that is not caused by the available legal sources (by aspects related to legal cognition), is a phenomenon that constitutes a significant but not unlimited part of what counts as the legal interpretation practiced by judicial authorities.

A. Panel Effects, Dissent Aversion and Voting Patterns

In the last few decades a significant amount of empirical research on the voting behavior of the United States’ courts of appeal (also known as circuit courts) has been conducted.²⁷ One of the most interesting findings of this research regarded the large number of unanimous decisions reached by these courts of appeal if compared with the rate of unanimous decisions reached by the Supreme Court.²⁸ As observed in the literature, unanimity has become significantly rare in the Supreme Court²⁹, but this phenomenon has not influenced the voting behavior of the circuit courts. It is true that because circuit courts’ decisions are taken by panels of three judges, while the Supreme Court consists of nine justices, a higher rate of unanimous decisions could be expected, because it is easier to find unanimity when a case is judged by three judges than when it is judged by nine, but not such a difference in numbers, as the statistics referred to indicate.

This difference has been partially explained through the notion of “dissent aversion”.³⁰ According to this reading of the rates of unanimous decision, circuit courts show a much higher

²⁶ DWORKIN, Ronald. **Law’s Empire**. Cambridge: Belknap Press, 1986, p. 10.

²⁷ For a review of the literature on this subject, see EPSTEIN, Lee; LANDES, William M.; POSNER, Richard A. **The Behavior of Federal Judges**. A Theoretical and Empirical Study of Rational Choice. Cambridge: Harvard University Press, 2013, p. 65-99.

²⁸ On analyzing 10,786 opinions (individual votes) given by judges of the U. S. courts of appeal Hettinger, Lindquist and Martinek found that in 92.1 per cent of these there was a joint majority, while in 2.7 per cent of the opinions there was the occurrence of concurrence voting and only 5.2 per cent of the opinions were dissent opinions. See HETTINGER, Virginia A.; LINDQUIST, Stefanie A.; MARTINEK, Wendy L. Separate Opinion Writing on the United States Courts of Appeals. **American Politics Research**, v. 31, 2003, p. 231. A similar proportion of dissenting opinions was found in research conducted by Epstein, Landes and Posner: “in only 80 of our random sample of 1025 published decisions in the courts of appeals are there dissenting opinions (a shade under 8 percent)”. EPSTEIN, Lee; LANDES, William M.; POSNER, Richard A. Why (and when) Judges Dissent: A Theoretical and Empirical Analysis. **Journal of Legal Analysis**, v. 3, 2001, p. 116.

²⁹ “Most studies of the US Supreme Court conclude that the 1930s or early 1940s is the period during which a consensual norm on that Court declined. These statistical approaches are consistent with M. Todd Henderson’s less technical summary of the dissent data over time. He traces the variation in dissent rates in the US Supreme Court and reports that dissent rates were low for about 150 years after the Court was established. For the 35 years of John Marshall’s service, 4 per cent of opinions had dissents. For the next seven chief justices, through Chief Justice Hughes’ tenure ending in 1940, the dissent rate remained less than 10 percent. It increased to 27 percent during Chief Justice Vinson’s tenure, peaked at 59 percent during Chief Justice Burger’s service and was at 47 percent for the period 2005 to 2007 under Chief Justice Roberts.” EISENBERG, Theodore; FISCHER, Talia; ROSEN-ZVI, Issachar. Case Selection and Dissent in Courts of Last Resort. An Empirical Study of the Israel Supreme Court. In: CHANG, Y. (ed). **Empirical Legal Analysis**. Assessing the Performance of Legal Institutions. London and New York: Routledge, 2014, p. 185. For circuit courts statistics, see note 28 above.

³⁰ About this kind of aversion Posner remarks: “Dissent aversion reflects the simultaneous difficulty and importance of collegiality. Appellate judging is a cooperative enterprise. It does not work well when the judges’ relations with

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rate of unanimous decisions than the Supreme Court due to a combination of factors. Among these lies predominantly the fact that the judges of the Supreme Court only decide a small fraction of the petitions of certiorari, while circuit court judges have the duty to judge all appeals.³¹ The small workload in the Supreme Court compared with circuit courts as well as factors like collegiality costs and lack of benefits from dissenting are also indicated by Posner as causes for the high percentage of unanimous decisions in circuit courts.³²

But the phenomenon of dissent aversion cannot fully explain the voting patterns that are found when the behavior of circuit court judges regarding legal interpretation and legal decision is observed. Circuit court judges are nominated by the President and confirmed by the United States Senate, and as a result they tend to show, to a certain and variable extent, voting patterns that follow the democrat and republican ideas about the issues. They tend to exhibit “ideological voting”, so “a judge’s ideological tendency can be predicted by the party of the appointing president”.³³ But differently from Justices of the Supreme Court, who will frequently dissent in order to voice the principles of the party of the president that nominated them, the behavior of the judges of circuit courts shows as a rule³⁴ different tendencies, which are related to the characteristics of the other judges that are in the panel and that constitute what will be called panel effects.

Initially it is important to point out that the high rate of unanimous decisions in these appellate courts could not be explained if the judges of the circuit courts were constantly loyal to the party conceptions and always offered ideological voting. Since panels are randomly constituted and a significant number of panels are not composed by three judges of the same party³⁵, the high rate of unanimous decisions requires another explanation.³⁶

one another become tinged with animosity”. POSNER, Richard A. **How Judges Think**. Cambridge: Harvard University Press, 2010, p. 33.

³¹ About that Eisenberg, Fischer and Rosen-zvi comment: “the US Supreme Court, with almost wholly discretionary jurisdiction, reverses about 70 percent of the cases it agrees to hear, whereas US federal Courts of Appeal, with largely mandatory jurisdiction, reverse about 20 to 30 percent of the cases they review”. EISENBERG, Theodore; FISCHER, Talia; ROSEN-ZVI, Issachar. Case Selection and Dissent in Courts of Last Resort. An Empirical Study of the Israel Supreme Court. In: CHANG, Y. (ed). **Empirical Legal Analysis**. Assessing the Performance of Legal Institutions. London and New York: Routledge, 2014, p. 181.

³² See EPSTEIN, Lee; LANDES, William M.; POSNER, Richard A. **The Behavior of Federal Judges**. A Theoretical and Empirical Study of Rational Choice. Cambridge: Harvard University Press, 2013; TAHA, Ahmed E. Publish or Paris? Evidence of How Judges Allocate Their Time. **American Law and Economics Review**, v. 6, 2004, p. 1-27.

³³ SUNSTEIN, Cass et al. **Are Judges Political?** An Empirical Analysis of the Federal Judiciary. Washington, D. C.: Brookings Institution Press, 2006, p. 8. In this book Sunstein et al. analyze decisions of circuit courts on twenty-five different issues. They considered 19,224 votes in 6,408 decisions taken by panels of three judges. See SUNSTEIN, Cass et al. Op. cit., p. 17-18.

³⁴ Sunstein et al. indicates that exceptionally, in some areas that they researched (involving abortion and capital punishment), judges in panels show entrenched views, that is, the fact that they are empanelled with one or two judges of the other party does not affect their voting behavior and they continue to show an ideological (party oriented) voting pattern. See SUNSTEIN, Cass et al. **Are Judges Political?** An Empirical Analysis of the Federal Judiciary. Washington, D. C.: Brookings Institution Press, 2006, p. 54-57 and p. 62-63. Also non ideological voting was identified to a significant extent, since in five researched areas “no significant difference between the votes of Republican appointees and those of Democratic appointees” was found. See SUNSTEIN, Cass et al. Op. cit., p. 48-54.

³⁵ A judge of party X can sit in panels with three different compositions, XXX, XXY and XYY. Even though there is a variation in the proportion of judges of one party in comparison with the judges of the other one, these variations are not extreme. Considering a relatively even distribution of judgeships between both parties (as of November, 30th, 2020 this is of 53 per cent judges appointed by Republican presidents and 45 per cent appointed by Democratic presidents. See at “Judicial Appointment History for United States Federal Courts” <https://en.wikipedia.org/wiki/Judicial_appointment_history_for_United_States_federal_courts> accessed 10

This explanation is offered by the notion of “panel effects”. According to this conception, to a certain extent judges tend to vote following the ideological conception of the party of the appointing president, showing an ideological voting pattern. However, they also behave in different ways depending on the arrangement of the panel, so the concept of the ideological party conception will not always orient their decisions.³⁷

These voting patterns are classified by Sunstein et al. as the result of two effects, ideological amplification and ideological dampening.³⁸ According to the notion of ideological amplification (the notion that “like-minded people tend to go to extremes”³⁹), if the panel consists of three judges of the same party, these judges will normally reach decisions that are aligned with that party view to a higher rate than any other panel configurations. This is one of the effects of the panel, to result in positions that would not usually be taken in other panel configurations, when one or two of the judges were from the other party. This amplification of the intensity of support for certain views can be seen either when the panel consists solely of democrats, or when it consists solely of republicans, so that “strong amplification effects” are found, indicating that “judges show far more ideological voting patterns when they are sitting with two judges appointed by a president of the same political party”.⁴⁰

Ideological dampening, the other effect of panel configuration, shows the opposite effect. When a panel includes one judge of the other party, the two judges in the majority tend to moderate their views. Thus, the presence of a judge from the other party can be seen to influence the voting behavior of the other judges.⁴¹

It can be observed that these two voting patterns are involved in the high rate of unanimous decisions and they seem to confirm the hypothesis that dissent aversion is a

December 2020), there is a considerable chance that a judge of the party X will be empanelled with at least one judge of the other party.

³⁶ In general terms and without dividing the cases judges by subject, the difference in the dissent rate of uniform panels in comparison with mixed panels is very low, as can be seen in the following comment offered by Posner: “We expect more dissents, the more ideological division in a panel. This suggests that the dissent rate in mixed, rather than in all, court of appeals panels provides the proper comparison to the Supreme Court dissent rate. And indeed if we divide our court of appeals sample of 1025 published opinions into cases decided by mixed and by uniform panels, we find a higher dissent rate in the former. The dissent rate for mixed panels is 8.6 percent (54 dissents out of 626 published opinions) and 6.5 percent for uniform ones (26 dissents out of 399 published opinions).” EPSTEIN, Lee; LANDES, William M.; POSNER, Richard A. Why (and when) Judges Dissent: A Theoretical and Empirical Analysis. *Journal of Legal Analysis*, v. 3, 2001, p. 119.

³⁷ SUNSTEIN, Cass et al. *Are Judges Political? An Empirical Analysis of the Federal Judiciary*. Washington, D. C.: Brookings Institution Press, 2006, p. 8-9. Sunstein et al. report the following numbers: “In the cases we analyze, a panel composed of three Democratic appointees issues a liberal ruling 62 percent of the time, whereas a panel composed of three Republican appointees issues a liberal ruling only 36 percent of the time. The difference of 26 percent is strikingly large. Not surprisingly, mixed panels show intermediate figures. A panel composed of two Republican appointees and one Democrat issues a liberal ruling 41 percent of the time; a panel composed of two Democratic appointees and one Republican does so 52 percent of the time.” SUNSTEIN, Cass et al. *Op. cit.*, p. 11-12.

³⁸ See SUNSTEIN, Cass et al. *Are Judges Political? An Empirical Analysis of the Federal Judiciary*. Washington, D. C.: Brookings Institution Press, 2006, p. 8-9; KIM, Pauline T. Deliberation and Strategy on the United States Courts of Appeals: an empirical exploration of panel effects. *University of Pennsylvania Law Review*, v. 157, 2009, p. 1330-1331.

³⁹ See SUNSTEIN, Cass et al. *Are Judges Political? An Empirical Analysis of the Federal Judiciary*. Washington, D. C.: Brookings Institution Press, 2006, p. 15.

⁴⁰ See SUNSTEIN, Cass et al. *Are Judges Political? An Empirical Analysis of the Federal Judiciary*. Washington, D. C.: Brookings Institution Press, 2006, p. 10.

⁴¹ See SUNSTEIN, Cass et al. *Are Judges Political? An Empirical Analysis of the Federal Judiciary*. Washington, D. C.: Brookings Institution Press, 2006, p. 8-9.

significant factor in judicial decisions.⁴² Thus, the party conceptions of individual judges will in many circumstances lose weight in order to avoid dissent and to reach unanimity. Just as one of the judges in a panel with three judges of the same party tends to flexibilize his or her moderate conception in comparison with the conception of the other judges to preserve unanimity, two judges in a panel with a judge of the other party seem to be willing to moderate their conceptions in order to prevent a dissent opinion.

This latter pattern is usually seen as the result of, and response to, the denominated whistleblower effect. The expression “whistleblower effect” indicates a situation in which “the presence of a judge whose policy preferences differ from the majority’s and who will expose the majority’s manipulation or disregard of the applicable legal doctrine [...] is a significant determinant of whether judges will perform their designated role as principled legal decisionmakers.”⁴³ According to this notion, a decision that is not unanimous tends to attract attention to itself, since one of the judges in the panel stated that he or she viewed the law or the facts differently from the others, which may put the validity of this decision in question. Unanimous decisions, on the other hand, tend to be perceived as reasonable and uncontroversial, basically due to the reasoning that if three experienced jurists understood the case in a certain way, in principle there should be no reason to cast doubt on their decision.⁴⁴

Considering the above indicated set of phenomena and data it is possible to assert that there is empirical confirmation of Sunstein et al.’s hypothesis that “an individual judge’s likely vote is in fact influenced by the composition of the panel”.⁴⁵ Thus, both ideological voting as well as panel effects (ideological amplification, ideological dampening and whistleblower effect) can be seen as factors that actually influence the voting patterns of circuit court judges.

B. Legal Frame and Limited Interpretative Variation

The research of Sunstein et al. not only indicates situations in which factors influence the voting behavior of judges, but also the subjects and degree to which these variations can be observed, as well as the subjects in which no significant variation was found. These results can be understood as an important indication of the appropriateness of Kelsen’s notion of legal

⁴² “In many of the domains we have examined, both ideological dampening and ideological amplification are substantial. When Democratic appointees sit with two Republican appointees, they often show fairly conservative patterns. When Republican appointees sit with two Democratic appointees, they often show fairly liberal voting patterns”. SUNSTEIN, Cass et al. **Are Judges Political?** An Empirical Analysis of the Federal Judiciary. Washington, D. C.: Brookings Institution Press, 2006, p. 45.

⁴³ CROSS, Frank B.; TILLER, Emerson H. Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals. **The Yale Law Journal**, v. 107, 1998, p. 2156.

⁴⁴ The presence of a whistleblower effect cannot be overestimated as the sole reason for the judging behaviors of the judges, since only a small number of decisions of these courts will be revised by the Supreme Court or the circuit court *en banc* but there are also indications that to a certain extent this effect exists. After analyzing the votes and decisions of 787 cases involving allegations of sex discrimination in employment, Kim reached the following conclusion about the whistleblower effect: “The analysis conducted here does not support the theory that panel effects are caused by strategic behavior aimed at inducing or avoiding Supreme Court review. On the other hand, the findings strongly suggest that panel effects are influenced by circuit preferences. Both minority and majority judges on ideologically mixed panels differ in their willingness to vote counter-ideologically, depending upon how the circuit as a whole is aligned relative to the panel members. These results are consistent with the theory that circuit judges behave strategically with an eye to circuit *en banc* in review. It is also possible, however, that court of appeals judges are responding to their circuit environment more generally, or to circuit doctrine more specifically, rather than acting directly out of fear of an *en banc* reversal.” KIM, Pauline T. Deliberation and Strategy on the United States Courts of Appeals: an empirical exploration of panel effects. **University of Pennsylvania Law Review**, v. 157, 2009, p. 1375.

⁴⁵ See SUNSTEIN, Cass et al. **Are Judges Political?** An Empirical Analysis of the Federal Judiciary. Washington, D. C.: Brookings Institution Press, 2006, p. 41.

interpretation as consisting of the identification and application of a legal frame, of a limited space in which one (among a restricted number of) interpretative option will be adopted by the judges.

In order to discuss this matter, initially the cases of no significant interpretative variation need to be considered. Sunstein et al. refer to situations in which there is “non ideological voting”, that is, situations where even though Republicans and Democrats disagree on the matter, the judging patterns do not reflect this disagreement and no ideological (party) effect can be identified, and also situations in which there is no disagreement between the parties.⁴⁶ Two different causes are presented as the motive for the absence of significant interpretative variation. These are either the relatively clear nature of the legal sources that needed to be interpreted or the existence of a consensus on the matter between both parties. This means that even though the legal sources could receive different interpretations, both parties agree on one interpretative alternative. The outcome in situations of “binding law” or “*bipartisan consensus*”⁴⁷ is a significant uniformity regarding the voting patterns of circuit court judges, and a lack of disagreement, including, as highlighted by Sunstein et al., in the kinds of cases in which the political parties tend to disagree.⁴⁸

Also most of the areas in which significant interpretative variation was identified can be seen as usually confirming and not as questioning the idea of a legal frame, of a limited space for legal interpretation. Speaking in general terms and considering all cases analysed, Sunstein et al. observe that there is variation in the voting patterns of judges, depending on the other judges they are sitting with, but this variation is in some configurations almost nonexistent and in many others not extreme.⁴⁹ Considering all kinds of cases together the variation observed in mixed panels is small, 46 per cent of liberal votes from a Republican appointee in a panel with two Democratic appointees and 44 per cent of liberal votes from a Democratic appointee in a panel with two Republican appointees. On the other hand the variation in uniform panels is significant, but not extreme: on average, judges in panels consisting only of Republican appointees will cast a liberal vote 31 per cent of the time, while judges in panels constituted only by Democratic appointees will cast a liberal vote 64 per cent of the time.

⁴⁶ SUNSTEIN, Cass et al. **Are Judges Political?** An Empirical Analysis of the Federal Judiciary. Washington, D. C.: Brookings Institution Press, 2006, p. 59-60. Sunstein et al. refer to five areas (out of the twenty-five investigated) in which there was no significant interpretative variation.

⁴⁷ SUNSTEIN, Cass et al. **Are Judges Political?** An Empirical Analysis of the Federal Judiciary. Washington, D. C.: Brookings Institution Press, 2006, p. 60.

⁴⁸ “our investigation finds that party is irrelevant in several areas where such effects might be anticipated and indeed in which we ourselves anticipated them. By informal lore, Republican appointees and Democratic appointees do disagree in criminal appeals and in cases involving takings, punitive damages, standing to sue, and federalism. But informal lore turns out to be wrong.” SUNSTEIN, Cass et al. **Are Judges Political?** An Empirical Analysis of the Federal Judiciary. Washington, D. C.: Brookings Institution Press, 2006, p. 60.

⁴⁹ “we are taking, as the baseline, cases in which a judge is sitting with one Democrat and one Republican, and we are examining how voting patterns shift when a judge is sitting instead with two Democratic appointees or two Republican appointees. We can readily see that a Democrat, in the baseline condition, casts a liberal vote 52 percent of the time, whereas a Republican does so 37 percent of the time. Sitting with two Democratic appointees, Democratic appointees cast liberal votes 64 percent of the time (an increase of 12 percent over baseline), whereas Republican appointees do so 46 percent of the time (an increase of 9 percent over baseline). Sitting with two Republican appointees, Democratic appointees cast liberal votes 44 percent of the time (a decrease of 8 percent), whereas Republican appointees do so only 31 percent of the time (a decrease of 6 percent). Thus, Republican appointees sitting with two Democratic appointees show the same basic pattern of votes (46 percent liberal votes) as do Democratic appointees sitting with two Republican appointees (44 percent liberal votes).” SUNSTEIN, Cass et al. **Are Judges Political?** An Empirical Analysis of the Federal Judiciary. Washington, D. C.: Brookings Institution Press, 2006, p. 23-24.

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If we consider one by one the statistics of the different kinds of cases analyzed by Sunstein et al., the fifteen kinds of cases in which they found confirmation for the three hypotheses researched (ideological voting, ideological dampening and ideological amplification)⁵⁰, it is possible to observe that also in the panel configurations that are most favorable to extreme interpretations, uniform panels with only appointees of one party, the variation in the voting pattern is usually not extreme, even though the selection of kinds of cases focused precisely on “controversial issues that seem especially likely to reveal divisions between Republican and Democratic appointees.”⁵¹ In order of disparity of voting pattern the following differences in the percentage of liberal votes cast in uniform Republican or Democratic panels were reported: 52 (that is, 52 per cent more liberal votes in a panel with three Democratic appointees as in a panel with three Republican appointees), 51, 47, 47, 46, 39, 33, 33, 31, 26, 26, 24, 15, 15 and 4 per cent.⁵²

Summarizing, only in six of the kinds of cases analyzed was the percentage of the disparity of voting pattern above one third, and this even though the research focused precisely on the subjects that usually cause disagreement. These numbers indicate that as a rule the voting behavior of judges does follow certain limits, even in highly disputed matters. They also show that it is not true that Democrat appointees always decide for the defendant in cases of capital punishment, while Republican appointees always decide against the defendant⁵³, just as it is not true that Republican appointees always cast votes against abortion rights and Democrat appointees always cast pro-choice votes.⁵⁴ Judicial decisions and interpretative choices are neither random nor always the expression of party conceptions, and in the words of Sunstein et al. this is so because “[o]ften the law is clear, and judges must follow it whatever their convictions”.⁵⁵ The clarity of law will not eliminate interpretative divergences that are either based on ideological views or on the use, in legal sources, of terms and expressions that allow more than one

⁵⁰ SUNSTEIN, Cass et al. **Are Judges Political?** An Empirical Analysis of the Federal Judiciary. Washington, D. C.: Brookings Institution Press, 2006, p. 24-27.

⁵¹ SUNSTEIN, Cass et al. **Are Judges Political?** An Empirical Analysis of the Federal Judiciary. Washington, D. C.: Brookings Institution Press, 2006, p. 8.

⁵² SUNSTEIN, Cass et al. **Are Judges Political?** An Empirical Analysis of the Federal Judiciary. Washington, D. C.: Brookings Institution Press, 2006, p. 26-27. It is also important to refer to the differences in the percentage of liberal votes cast in uniform Republican or Democratic panels in two other kinds of cases, the cases of abortion and capital punishment (cases that have exhibited neither ideological dampening nor ideological amplification), respectively 13 per cent and 21 per cent. SUNSTEIN, Cass et al. Op. cit., p. 55-57.

⁵³ “Republican appointees vote for defendants 15 percent of the time on all-Republican panels, 24 percent of the time on majority Republican panels, and 24 percent of the time on majority Democratic panels. Democratic appointees vote for defendants 36 percent of the time on in all-Democratic panels, 49 percent of the time on majority Democratic panels, and 42 percent of the time on majority Republican panels.” SUNSTEIN, Cass et al. **Are Judges Political?** An Empirical Analysis of the Federal Judiciary. Washington, D. C.: Brookings Institution Press, 2006, p. 56.

⁵⁴ “In abortion cases since 1971, Democratic appointees have cast pro-choice votes 67 percent of the time, compared to 51 percent for Republican appointees. [...] Sitting with two Democratic appointees, Republican appointees vote in favor of abortion rights 55 percent of the time—a figure that is not appreciably different from the 51 percent rate when sitting with one or more Republican appointees or from the 56 percent pro-choice rate in all-Republican panels. Similarly, sitting with two Republican appointees, Democratic appointees vote in favor of abortion rights 65 percent of the time—not much less than the 68 percent and 69 percent rates when sitting with one or two other Democratic appointees, respectively.” SUNSTEIN, Cass et al. **Are Judges Political?** An Empirical Analysis of the Federal Judiciary. Washington, D. C.: Brookings Institution Press, 2006, p. 55-56.

⁵⁵ SUNSTEIN, Cass et al. **Are Judges Political?** An Empirical Analysis of the Federal Judiciary. Washington, D. C.: Brookings Institution Press, 2006, p. 56. In the same sense it is also asserted: “Undoubtedly, the large measure of agreement is partly a product of the constraints of law itself. In some areas, those constraints will increase agreement between Republican and Democratic appointees. In other areas, they will permit disagreement, but they will discipline its magnitude. And when the law is genuinely binding, judges will be disciplined, whatever the party of the appointing president.” SUNSTEIN, Cass et al. Op. cit., p. 96.

interpretation, but the empirical data indeed confirms the assertion that relative clarity is frequently a property of the legal sources, as the judicial authorities see them.

4. The Non-Cognitive Aspect of Interpretation and the Presence of Discretion

The empirical research on voting patterns presented above indicates that consensus is a pervasive aspect of the legal decision that takes place in circuit courts. Also the identification of the existence of panel effects is an important factor while observing the practice of legal interpretation. The high rate of unanimous decisions does not prove that as a rule legal interpretation is a simple matter, since a significant part of those unanimous decisions does not result from a unanimous conception regarding the appropriate legal interpretation of the relevant sources for a case, but actually in many kinds of cases from behaviors that reflect dissent aversion or the presence of a whistleblower effect. Some judges will agree to adopt an interpretative option in order to avoid dissent. This can happen either when the majority change their perspective in order to go in the direction of the third judge, who would otherwise dissent and call attention to the decision (the dampening effect), or when the minority in a uniform panel agrees to follow an interpretation that it thinks is extreme in order to avoid dissent (the amplification effect). In both cases the interpretation adopted is not the pure sum of the interpretation and decision of each judge individually considered. It is also the result of the interaction between judges that have certain characteristics.

One of the conclusions that can be obtained from these situations is that the legal interpretation practiced by a judicial authority does not consist solely of a cognitive element. It is not only the result of what one judge thinks about the legal sources, just as the panel decisions of circuit courts are not only the outcome of three independent votes. There is not only the fact that the vote and remarks of one judge may convince the other judges and lead to their adopting a different interpretation. This is not the only kind⁵⁶ of “cognitive” influence on the outcome. Party ideologies also count and their influence can be seen when the voting patterns of uniform and mixed panels are compared. If the mere presence of three judges were the only factor responsible for the interpretative decisions, then there should be no significant difference regarding voting patterns between uniform and mixed panels, since both have the same number of judges. If it is true that judges in mixed panels behave differently from judges in uniform panels and uniform panels usually mirror the party conceptions regarding the matters discussed, then a non-legal aspect is in play during legal decision. Therefore, it is more than reasonable to assert that an interpretation that not only reflects general legal standards, but also, to a certain extent, non-legal standards, is an interpretation that does not consist only of an act of cognition, but also of another kind of act.

Do Democrat or Republican appointees intentionally adopt interpretative decisions that are in harmony with their party views? Does the judge appointed by one party and with a more

⁵⁶ Regarding this kind of function of dissent opinions, Ruth Ginsburgs remarks: “What do separate opinions contribute to the improvement or progress of the law? Most immediately, when drafted and circulated among the judges, they may provoke clarifications, refinements, modifications in the court's opinion. They provide, as Chief Justice Stone said, ‘some assurance to counsel and to the public that decision has not been perfunctory, which is one of the most important objects of opinion-writing.’ [...] Separate opinions in intermediate appellate courts serve an alert function. If appeal from the court's judgment is a matter of right, the separate opinion may assist the court of next resort by charting alternate grounds of decision. If further review is discretionary, as in the U.S. Supreme Court, a separate opinion may signal to the Court that the case is troubling and perhaps worthy of a place on its calendar.” GINSBURG, Ruth B. Remarks on Writing Separately. *Washington Law Review*, v. 65, 1990, p. 143-144.

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moderate view on a matter follow the position of the other two judges appointed by the same party consciously or not? Usually these questions are not responded to by the literature on panel effects and dissent aversion and are not the main problem that they intend to deal with.⁵⁷ It can be argued that the data do not provide information to answer these questions, even though these same data confirm the existence of panel effects and dissent aversion, since to prove that these interpretative decisions are taken freely would involve the necessity of proving the existence of free will. But even if there is no conclusive positive or negative proof of such a notion some questions about legal interpretation can still be answered.

The research referred to in this article confirm the hypothesis that legal interpretation does not consist only of a cognitive activity. It also confirms that party ideology plays a role in the decisions of judicial issues in many kinds of cases. These two results can be seen as confirming at least one possible interpretation of what was meant by Kelsen when he asserted that as a rule the legal interpretation practiced by judicial authorities consists of an act of cognition and an act of will. As long as “act of will” is not understood as necessarily meaning “act of free will”, but merely as an expression that gives a name to an act that is not an act of cognition, it is more than reasonable to claim that the empirical research referred to confirms Kelsen’s conception of legal interpretation.

This same research will also present strong reasons to reject Dworkin’s one-right-answer theory and his claims about the exceptional character discretion in the interpretative practices of judicial authorities. As seen above, from Dworkin’s perspective a decision reached by a judge can be classified as discretionary if it does not reflect the one-right-answer that this judge found or if this judge has not even tried to find an answer that he or she would consider the right one. Dworkin claims that even though discretion is not absent from the legal interpretation practiced by legal authorities, is is not a pervasive quality of this activity, and that positivists fail to describe “the real world” when they present a description of legal argumentation in which judges are not described as asserting (and intending to assert) the one-right-answers as they see them.

The empirical research that confirms the hypotheses of dissent aversion and panel effects present the activity of legal decision practiced by legal authorities as the outcomes of certain elements, some of them related to the legal peculiarities of the cases (the elements that reflect the legal frame), and some of them related to the different panel configurations. Because different panel configurations indeed lead to empirically verified decision patterns, Dworkin’s claim that judges should be seen as usually (or as a rule) looking for one-right-answers⁵⁸ needs to be rejected, since empirical data not only have not confirmed an autonomous acting pattern, but have indicated that in many cases the judge’s decisions are influenced by non-legal elements, such as dissent aversion tendency as well as by panel effects.

The presence of dissent aversion and panel effects also confirms that discretion is to a certain extent (there are always limits, there is always a frame) a pervasive element of legal

⁵⁷ Pauline Kim presents two key alternatives of explanation for questions as the above indicated: “By deliberative explanations, I mean to identify those theories that emphasize the internal exchanges that occur among panel members and the potential for these exchanges to influence a judge’s vote. For purposes of the empirical test undertaken here, the exact mechanism by which judges influence one another is not critical. It may be the case that they come to persuade one another through the exchange of information and the power of reasoned argument. Alternatively, psychological mechanisms – such as conformity pressures or group polarization – may be operative, leading judges to change their minds when confronted with the opinions of their colleagues.” KIM, Pauline T. *Deliberation and Strategy on the United States Courts of Appeals: an empirical exploration of panel effects.* **University of Pennsylvania Law Review**, v. 157, 2009, p. 1325.

⁵⁸ “when judges finally decide one way or another they think their arguments better than, not merely different from, arguments the other way”. DWORKIN, Ronald. **Law’s Empire**. Cambridge: Belknap Press, 1986, p. 10.

interpretation. Ideological dampening and ideological amplification only occur because judges change their voting conceptions and tendencies in order to avoid dissent and whistleblowing. Since avoiding dissent or whistleblowing is not a legal goal asserted by the legal order, the judicial decisions that are influenced by these factors reflect a non-judicial aspect, the random compositions of the panels.

Because dissent aversion and panel effects indeed influence judicial decisions to a significant extent, the idea that “theoretical disagreement” is a property of an important part of legal cases must also be either rejected or reformulated. It may be the case that judges would disagree with each other if they cast their votes without knowing how the other judges intended to vote – dissent aversion and panel effects do not indicate that judges usually see the answer for the cases in the same way. They indicate that judges vote as *if they* do so –, but the fact is that they do not act that way. It can be claimed that theoretical disagreements exist, but there is an empirical reason (the more than 90 per cent of unanimous decisions) to reject the assertion that theoretical disagreements are a pervasive property of the majority of the cases judged by circuit courts.⁵⁹

5. Conclusion

As already indicated, according to Dworkin it “is the judge’s duty” “to reach an understanding, controversial or not, of what [...] the rules require”⁶⁰, and “when judges finally decide one way or another they think their arguments better than, not merely different from, arguments the other way”.⁶¹ Dworkin presents the judges’ voting behavior as not being influenced by what surrounds them. For him judges indeed follow the duty that he asserts, the duty to look for the one-right-answers, and because of this conception he asserts that these judges usually vote in a non-discretionary way, as presented above. Empirical research shows that panel effects exist and that they influence judicial decisions in two different ways, by causing either ideological amplification or ideological dampening. Both situations indicate that in many cases judges do not “think their arguments better than, not merely different from, arguments the other way”. What these judges do is adjust their votes in order to prevent dissent and whistleblowing. The particular cases that reflect these patterns, the adoption of these goals, can be seen as instances of legal discretion.

But legal discretion is not demonstrated everywhere and in all possible shapes and forms. Legal decisions tend to observe certain boundaries, and some limits. Not all decisions taken by Democratic appointees are liberal, just as not all decisions taken by Republican appointees are

⁵⁹ Even though in the last few decades the U. S. Supreme Court has exhibited a high rate of non-unanimous decisions, the key fact about the discussion on disagreement in legal interpretation is that the number of cases decided by the Supreme Court is extremely low if compared with the number of cases decided by circuit courts. Epstein, Landes and Posner remark about the year 2008 that “[o]n average a Supreme Court Justice writes only 8 to 10 majority opinions a year, compared to a mean of 54 for a court of appeals judge.” EPSTEIN, Lee; LANDES, William M.; POSNER, Richard A. *Why (and when) Judges Dissent: A Theoretical and Empirical Analysis*. **Journal of Legal Analysis**, v. 3, 2001, p. 104. If the basic reference point to reflect about the nature of legal interpretation consists of the majority of cases and not of the hand-picked selection of the unusual cases that confirm a theory, then there is much more to learn about legal interpretation by observing the way it takes place in most cases, and these cases will be found in the decisions of the tens of thousands of annual decisions reached by the circuit courts (“the mean number of cases terminated on the merits per active judge has increased from an average of 155.4 in the 1990–1992 period to 205.1 in the 2005–2007 period.” EPSTEIN, Lee; LANDES, William M.; POSNER, Richard A. *Op. cit.*, p. 130), not in the very few hundred cases decided by the Supreme Court

⁶⁰ DWORKIN, Ronald. **Taking Rights Seriously**. Cambridge: Harvard University Press, 1978, p. 36.

⁶¹ DWORKIN, Ronald. **Law’s Empire**. Cambridge: Belknap Press, 1986, p. 10.

conservative. Even uniform panels tend to show a limited variation in the application of legal sources, thus confirming Kelsen's assertion that legal interpretation usually consists of the adoption of one alternative among a limited number of possibilities. This limited variability confirms the assertion of the existence of a legal frame, while the fact that the specific choices are taken at least in part due to one of some combinations of factors (the possible panel formations) justifies Kelsen's assertion that the legal interpretation practiced by judicial authorities consists of an act of cognition (the identification of the legal frame) and of an act of will (the variable factors that lead to the adoption of one of the interpretative options).

6. References

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