

Lee Epstein*

HOW INSTITUTIONS STRUCTURE JUDICIAL
BEHAVIOUR: AN ANALYSIS OF ALARIE AND
GREEN'S *COMMITMENT AND COOPERATION*
ON HIGH COURTS: A CROSS-COUNTRY
EXAMINATION OF INSTITUTIONAL
CONSTRAINTS ON JUDGES[†]

No theory of judicial behaviour ignores institutions, but, all too often, their role in structuring the judges' choices goes assumed rather than directly evaluated. For this reason alone, we should applaud Benjamin Alarie and Andrew J. Green. Not only do they take institutions seriously; they attempt cross-national assessments of their effect on judging. This is their book's overarching contribution, but there are many others along the way – so many that Commitment and Cooperation on High Courts is bound to take its place among the classics in the ever-growing field of judicial behaviour. My aim is to bring Alarie and Green's contributions into relief by highlighting their key arguments and empirical results. Along the way, I integrate some of the existing literature if only to show where and how the authors advance our understanding of judging. All of this amounts to Parts I and II. But a simple summary of Commitment and Cooperation will not suffice because Alarie and Green invite the reader to think about extensions. In that spirit, Part III offers some suggestions for forward movement.

Keywords: agenda setting on courts, appointing judges, attitudinal model, dissent, institutions, judicial behaviour, judicial panels, labour market model, strategic accounts

I The backstory

Theories of judicial behaviour abound. There is the (in)famous attitudinal model, which holds that judges' votes reflect their ideological attitudes toward the facts raised in cases.¹ Strategic accounts also emphasize the judges' preferences.² But,

* Ethan AH Shepley Distinguished University Professor, Washington University, St Louis, United States

† Prepared for the *University of Toronto Law Journal*. Thanks to the John Simon Guggenheim Foundation, the National Science Foundation, and Washington University for supporting my research on judicial behaviour, some of which I discuss in the pages to follow. I also thank my long-time collaborator, Jack Knight. As the footnotes reveal, many of the insights to follow draw on our joint work. Finally, I am grateful to the editor and anonymous reviewer for their very thoughtful comments.

1 Best articulated in Jeffrey A Segal & Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge, UK: Cambridge University Press, 2002), especially ch 3, 8 [Segal & Spaeth, *Supreme Court*].

2 Though preferences play a key role in strategic accounts, the preferences need not (and perhaps should not) centre on ideology as they do in the attitudinal model. See Lee Epstein & Jack Knight, 'Reconsidering Judicial Preferences' (2013) 16 *Annual Review of Political Science* 11 at 11 (emphasizing that 'strategic accounts of judicial behavior can accommodate different or even multiple motivations' and urging scholars to consider the range of motivations following from work in economics, law, and psychology).

unlike the attitudinal model,³ they assume that when goal-oriented judges make decisions, they attend to the preferences and likely actions of other relevant actors, including their colleagues, elected officials, and the public.⁴

Bearing a familial resemblance to strategic accounts is the labour market model. Under this approach, judges, just as other workers, are motivated and constrained by costs and benefits both pecuniary and non-pecuniary, but mostly the latter: non-pecuniary costs such as effort, criticism, and workplace tensions and non-pecuniary benefits such as leisure, esteem, influence, self-expression, celebrity, and opportunities for appointment to a higher court.⁵ Then, of course, there is the traditional legal model, under which judges apply ‘law’ to the facts raised in cases – a task that involves no exercise of discretion.⁶

Despite their differences in emphasis, not to mention the distinct empirical implications they generate, these accounts overlap in one crucial respect: each emphasizes institutions – or rules that shape judicial choices.⁷ As Benjamin Alarie and Andrew J. Green note, the rules can be formal, such as constitutional provisions, or informal, such as norms and conventions.⁸ And they can be internal to the court – for example, the Supreme Court of Canada’s institution that allows the chief justice to set the size and composition of panels⁹ or the US Supreme Court’s norm governing opinion assignment, which holds that the chief justice assigns the opinion of the Court if he is in the majority. Institutions also can be external,

3 Lee Epstein & Jack Knight, *The Choices Justices Make* (Washington, DC: CQ Press, 1998) [Epstein & Knight, *Choices Justices Make*].

4 Under the attitudinal model, justices always behave in accord with their sincere preferences; under the strategic account, whether they behave sincerely or in a sophisticated fashion (that is, in a way that is not compatible with their most preferred position) will depend on the preferences of the other relevant actors and the actions they are likely to take.

5 Adapted from Lee Epstein, William M Landes & Richard A Posner, *The Behavior of Federal Judges* (Cambridge, MA: Harvard University Press, 2013) at 5 [Epstein, Landes & Posner, *Behavior of Federal Judges*].

6 This is the simplest form of the legal model. In more complex versions, judges use various methodologies (‘originalism,’ ‘textualism,’ ‘active liberty,’ and so on) to reach objective, impersonal, and politically neutral decisions.

7 This is the standard definition of institutions in the judicial behaviour literature – and one that Alarie and Green adopt. Benjamin Alarie & Andrew J Green, *Commitment and Cooperation on High Courts: A Cross-Country Examination of Institutional Constraints on Judges* (Oxford: Oxford University Press, 2017) at 43 [Alarie & Green, *Commitment and Cooperation*]. For other studies of judicial behaviour that use this definition of institutions, see e.g. Forrest Maltzman, James F Spriggs & Paul J Wahlbeck, *Crafting Law on the Supreme Court* (Cambridge, UK: Cambridge University Press, 2000) at 13 [Maltzman, Spriggs & Wahlbeck, *Crafting Law*]; Epstein & Knight, *Choices Justices Make*, supra note 3; Daniel M Brinks, ‘Informal Institutions and the Rule of Law: The Judicial Response to State Killings in Buenos Aires and São Paulo in the 1990s’ (2003) 36 *Comparative Politics* 1. More generally, see Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge, UK: Cambridge University Press, 1990, 3) [North, *Institutions*], defining institutions as the ‘rules of the game.’

8 Alarie & Green, *Commitment and Cooperation*, supra note 7 at 43. See generally Jack Knight, *Institutions and Social Conflict* (New York: Cambridge University Press, 1992) [Knight, *Institutions*].

9 Alarie & Green, *Commitment and Cooperation*, supra note 7 at 99.

governing relations between higher and lower courts (the ‘hierarchy of justice’¹⁰ between courts and other governmental actors (the ‘separation-of-powers’ system),¹¹ and with the public (norms of legitimacy).¹²

Whatever form the institutions take, no theory of judicial behaviour neglects them. For the legal model, this is obvious; formal constitutional provisions, laws, precedent, and the like serve as constraints on judges from acting on their personal preferences.¹³ Virtually all variants of strategic accounts also stress the role institutions play in structuring the judges’ interactions among themselves or with other relevant actors.¹⁴ As for the attitudinal model, even though it is often caricatured as ‘judges vote on the basis of their ideology,’ institutions are at its core. Judges only enjoy ‘enormous latitude to reach decisions based on their personal policy preferences’ when they can serve for life on a court of last resort and when that court has substantial control over the cases it will hear and decide.¹⁵ For judges operating under these rules, the labour market approach concurs on the importance of ideology.¹⁶

On occasion, scholars assess the assumed structuring effect of institutions. Coming to mind are empirical tests of how separation-of-powers systems shape relations between the government and judges. An important study by Jeffrey Segal, Chad Westerland, and Stephanie Lindquist, for example, demonstrates that when the US Congress threatens the US Supreme Court’s authority, the

10 The basic idea is that lower court judges alter their behaviour to avoid reversal by their hierarchical superiors. See e.g. Christina L Boyd, ‘The Hierarchical Influence of Courts of Appeals on District Courts’ (2015) 44 J Leg Stud 113; Frank B Cross & Emerson H Tiller, ‘Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals’ (1998) 107 Yale LJ 2155; Kirk A Randazzo, ‘Strategic Anticipation and the Hierarchy of Justice in the U.S. District Courts’ (2008) 36 American Politics Research 669.

11 See e.g. William N Eskridge, Jr, ‘Overriding Supreme Court Statutory Interpretation Decisions’ (1991) 101 Yale LJ 331 [Eskridge, ‘Overriding’]; John Ferejohn & Barry Weingast, ‘A Positive Theory of Statutory Interpretation’ (1992) 12 Intl Rev L & Econ 263; Rafael Gely & Pablo T Spiller, ‘A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases’ (1990) 6 JL Econ & Org 300.

12 E.g. Barry Friedman, *The Will of the People* (New York: Farrar, Straus and Giroux, 2009); Micheal W Giles, Bethany Blackstone & Richard L Vining, ‘The Supreme Court in American Democracy: Unraveling the Linkages between Public Opinion and Judicial Decision Making’ (2008) 70 Journal of Politics 293; Jack Knight & Lee Epstein, ‘The Norm of Stare Decisis’ (1996) 40 American Journal of Political Science 1018 [Knight & Epstein, ‘Norm of Stare Decisis’].

13 See e.g. Knight, *Institutions*, supra note 8; Eskridge, ‘Overriding,’ supra note 11; Knight & Epstein, ‘Norm of Stare Decisis,’ supra note 12.

14 Epstein & Knight, *Choices Justices Make*, supra note 3.

15 Segal & Spaeth, *Supreme Court*, supra note 1 at 92.

16 E.g., focusing specifically on US Supreme Court justices, Epstein, Landes & Posner, *Behavior of Federal Judges*, supra note 5 at 103, argue that justices are ‘likely to derive personal satisfaction, as well as reap prestige, exert power and influence, and achieve celebrity, from attempting to align the law with [their] ideological commitments; in contrast, caseload pressures, the threat of reversal or eventual overruling (and so of not having the last word), desire for promotion, a different case mix, and lower visibility combine to dampen the ideological ambitions of lower court judges.’

Court cowers, either exercising greater self-restraint or reaching decisions closer to the legislators' preferences.¹⁷ Then there is Gretchen Helmke's justifiably path-marking work on Argentina.¹⁸ She draws attention to the fact that in parts of the developing world governments have taken rather radical steps to tame their courts, with sanctions ranging from impeachment, removal, and court packing to criminal indictment, physical violence, and even death.¹⁹ Her studies, and others running along similar lines, show that judges respond to these potential threats by going on the defence: defecting against the old regime,²⁰ avoiding cases that may contribute to further escalation,²¹ going public,²² and passing up posts on apex courts altogether,²³ among others.²⁴

These studies are careful theoretical and empirical assessments of the effect of institutions governing relations between courts and the government. Other formal and informal rules too have been subjected to equally rigorous analysis,²⁵ though

- 17 Jeffrey A. Segal, Chad Westerland & Stephanie Lindquist, 'Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model' (2011) 55 *American Journal of Political Science* 89; see also Tom S Clark, 'The Separation of Powers, Court Curbing, and Judicial Legitimacy' (2009) 53 *American Journal of Political Science* 971 (demonstrating that congressional threats are not merely theoretical; between 1877 and 2008, members of Congress introduced more than 900 court-curbing proposals).
- 18 Gretchen Helmke, 'The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy' (2002) 96 *American Political Science Review* 291 [Helmke, 'Logic of Strategic Defection']; Gretchen Helmke, *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge, UK: Cambridge University Press, 2005) [Helmke, *Courts under Constraints*].
- 19 There are also many excellent studies of courts in developed democracies, notably Vanberg's work on the German Constitutional Court, perhaps the most influential national court in Europe. Vanberg takes on questions that now dominate commentary and scholarship not only about courts in Europe but also throughout the world, including whether 'the potential for evasion' of court decisions by the elected branches and the public 'shape[s] judicial deliberations and perhaps even decisions' and '[u]nder what circumstances [can courts] successfully constrain legislative majorities, and when will they not do so.' Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge, UK: Cambridge University Press, 2005)
- 20 Helmke, 'Logic of Strategic Defection,' supra note 18; Helmke, *Courts under Constraints*, supra note 18.
- 21 E.g. Lee Epstein, Jack Knight & Olga Shvetsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2002) 35 *Law & Soc'y Rev* 117.
- 22 E.g. Varun Gauri, Jeffrey K Staton & Jorge Vargas Cullerell, 'The Costa Rican Supreme Court's Compliance Monitoring System' (2015) 77 *Journal of Politics* 774; Jeffrey K Staton, *Judicial Power and Strategic Communication in Mexico* (Cambridge, UK: Cambridge University Press, 2010) [Staton, *Judicial Power*].
- 23 E.g. Santiago Basabe-Serrano, 'Judges without Robes and Judicial Voting in Contexts of Institutional Instability: The Case of Ecuador's Constitutional Court, 1999–2007' (2012) 44 *Journal of Latin American Studies* 127.
- 24 For a survey of these strategies, see Lee Epstein & Jack Knight, 'Efficacious Judging on Apex Courts' (2018) in Rosalind Dixon & Erin F Delaney, eds, *Comparative Judicial Review* (London: Edward Elgar, 2018), online: Washington University in St. Louis <<http://epstein.wustl.edu/research/EfficaciousJudging.html>>.
- 25 See e.g. the hierarchy-of-justice studies, discussed in note 10 above, which assess the role of institutions governing the relations between lower and upper courts.

I daresay that the effect of institutions on judicial behaviour mostly goes assumed rather than being directly assessed. Returning to the attitudinal model, only by comparing judges in societies where particular institutions do or do not exist (or where institutional change occurred) can we determine whether, and which, institutions give judges the freedom to act on their ideological preferences. But those comparisons are rarely made.²⁶ For this reason alone, we should applaud Alarie and Green. Not only do they take institutions seriously, but they also attempt direct cross-national assessments of how the rules may structure judicial choices. This is their book's overarching contribution, but there are many others along the way – so many that *Commitment and Cooperation on High Courts* is bound to take its place among the classics in the ever-growing field of judicial behaviour.

My aim is to bring Alarie and Green's contributions into relief by highlighting their key arguments and empirical results. Along the way, I integrate some of the existing literature if only to show where and how Alarie and Green advance our understanding of judging. (By the way, Alarie and Green also make great use of existing studies – yet another strength of their book.) All of this amounts to Parts I and II in what follows. But a simple summary of Alarie and Green's work will not suffice because they invite the reader to think about extensions. In that spirit, I devote Part III to some ideas for forward movement.

II *The basics*

As their book's title suggests, Alarie and Green are interested in two dimensions of judicial behaviour on high courts (also known as apex or peak courts): 'commitment' and 'cooperation.' Commitment, shown on the horizontal axis of Figure 1, implicates the extent to which judges are committed to making decisions based on their personal (political) views rather than on legal materials. Cooperation, on the vertical axis, focuses attention on collegiality: whether the judges work together (cooperatively) or independently. These two dimensions come together to create what Alarie and Green term the 'commitment–cooperation space' (CC space).

26 To be sure, there are many studies of effect of ideology (or partisanship) on judges working across the world, and virtually all find some relationship. My only point is that the studies rarely draw comparisons across countries. For studies finding an ideological effect, see e.g. Gunnar Grendstad, William R Shaffer & Eric Waltenburg, *Policy Making in an Independent Judiciary: The Norwegian Supreme Court* (Colchester, UK: ECPR Press, 2015) [Grendstad, Shaffer & Waltenburg, *Policy Making*] (demonstrating that Norwegian Supreme Court justices appointed by social democratic governments are significantly more likely to find for the litigant pursuing a 'public economic interest' than are their non-socialist counterparts); Christoph Hönnige, 'The Electoral Connection: How the Pivotal Judge Affects Oppositional Success at European Constitutional Courts' (2009) 32 *Western European Politics* 963 at 979–80 (finding that ideology helps predict the votes of judges serving on the French and German Supreme Courts); Nuno Garoupa, Fernando Gomez-Pomar & Veronica Grembi, 'Judging under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court' (2013) 29 *JL Econ & Org* 513 at 516 (rejecting 'the formalist approach taken by traditional constitutional law scholars in Spain' because the judges' personal ideology 'does matter').

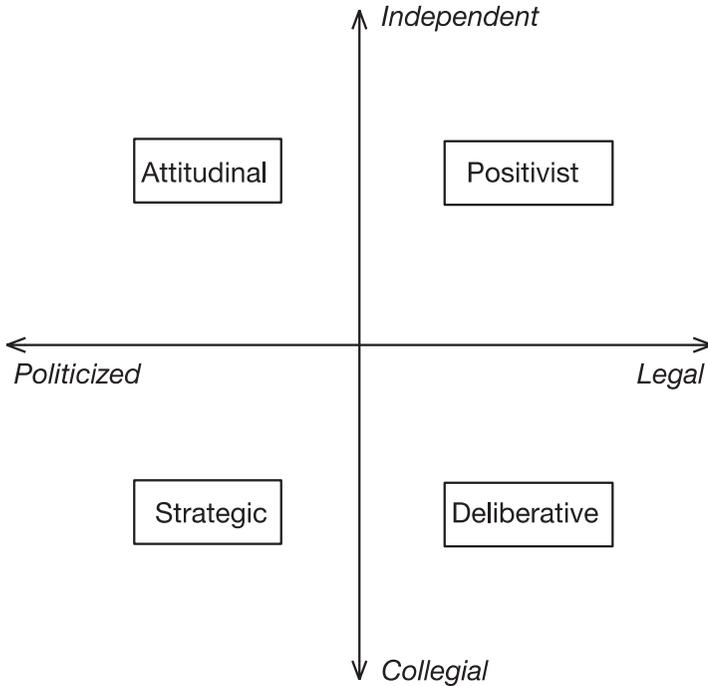


Figure 1: Alarie and Green’s commitment–cooperation space

Source: Redrawn from Benjamin Alarie & Andrew J. Green, *Commitment and Cooperation on High Courts: A Cross-Country Examination of Institutional Constraints on Judges* (Oxford: Oxford University Press, 2017) at 4.

Note: The horizontal axis represents the ‘commitment’ dimension: the extent to which judges are committed to deciding cases based on their personal (political) views rather than on what the ‘law’ might demand. The vertical axis is the ‘cooperation’ dimension: whether the judges work together (cooperatively) or independently. The ‘quadrants’ identify four different types of courts.

From the two dimensions, Alarie and Green identify four types of apex courts (see Figure 1). The attitudinal court is exactly what its name suggests: a court consisting of judges so committed to their personal-political views that they are not especially interested in cooperating with their colleagues. Moving clockwise, judges serving on a positivist (legalistic) court also do not especially value consensus, but they are far more driven to follow their sense of what the law demands rather than their personal values. Judges on deliberative courts also tend to be legalistic in orientation but emphasize collegiality in the hunt to find the ‘right’ answer. Strategic judges are motivated to etch their personal-political values into law but realize that their success depends on the preferences and likely actions of their colleagues, meaning that ‘cooperation’ (or at least interaction) is essential.

So far, so normal; aside from bringing together various approaches to judicial behaviour, there is nothing especially novel about the dimensions or the archetypes;

each is the subject of an extensive literature, as my introduction suggested. But laying out the CC space is not Alarie and Green's primary goal; it is rather asking the hard question of why: why do some peak courts find themselves in one quadrant or another? The answer, they posit, implicates the role played by institutions – the 'rules of the game' – in structuring judicial behaviour.²⁷ Under the labour market model, which Alarie and Green explicitly adopt, individual judges may be motivated and constrained by (mostly) non-pecuniary costs and benefits, but institutions – formal and informal, external and internal – help shape their choices.

Throughout their discussion, Alarie and Green explore many institutions related to the choices judges make, but they place special emphasis on those governing (a) the appointment of judges; (b) the size and composition of panels; (c) case selection; and (d) the decision to dissent. Their explorations combine the descriptive, theoretical, and empirical and are always cross-national focusing on the highest courts in five countries: Australia, Canada, India, the United Kingdom, and the United States (with the Israeli Supreme Court making cameo appearances).

Why these countries/courts? As Alarie and Green explain, the five have similar judicial structures and legal traditions but have developed sufficiently divergent institutions for analysis. Adding to their attraction is that each apex court is represented in the High Courts Judicial Database (HCJD).²⁸ Developed by Stacia L Haynie and her colleagues, the database consists of quantified information on decisions issued between 1969²⁹ and the early 2000s.³⁰ Alarie and Green make extensive use of the HCJD, along with hand-collected data on the individual justices serving on the courts and the political parties in power – a serious investment of time and resources but necessary to assess some of the hypothesis.

III *The institutions*

That is the overview. Onward to what we learn about how institutions relating to appointments, panel composition, case selection, and dissent structure judges' decisions.

A APPOINTING JUDGES

Societies have devised an impressive array of institutions to govern the retention of their judges, from life tenure, to a single non-renewable term, to periodic elections and re-election by the electorate.³¹ A substantial body of work considers the connection between these systems and judicial behaviour, especially the extent to

27 Alarie & Green, *Commitment and Cooperation*, supra note 7 at 43; North, *Institutions*, supra note 7 at 3.

28 High Courts Judicial Database (HCJD), available at the Judicial Research Initiative, online: University of South Carolina <<http://artsandsciences.sc.edu/poli/juri/highcts.htm>>.

29 1970 for the Indian Supreme Court and the UK Judicial Committee of the House of Lords.

30 For the US Supreme Court, data are available for the 1791–2017 terms from the Supreme Court Database, online: Washington University Law <<http://supremecourtdatabase.org>>.

31 See Lee Epstein, Jack Knight & Olga Shvetsova, 'Comparing Judicial Selection Systems' (2001) 10 *Wm & Mary Bill Rts J* 7.

which they promote judicial independence (that is, the ability of judges to behave sincerely without fear of reprisal and with some confidence that political actors will enforce their decisions).³² The central insight from this literature is that forcing judges to face the electorate or the legislature for renewal, relative to providing them with life tenure, produces a more dependent judiciary; the opportunity costs for voting sincerely are higher. A life-tenured system, in contrast, leads to a more independent judiciary, with judges freer to vote as they desire.³³

Because all the judges in their study enjoy some form of life tenure,³⁴ Alarie and Green focus not on retention but, rather, on institutions governing the selection of judges. Relative to retention, selection is understudied perhaps because it poses more challenges. Looking at formal rules in constitutions or laws may be enough to understand retention systems,³⁵ but it is not sufficient for appointment mechanisms, as countries have devised numerous and often idiosyncratic norms to implement the formal rules. In some places, the rules of the game are so detailed that even scholars and lawyers working there have trouble describing them.

Finding the right balance between leaning too heavily on the constitutional rules and digging too deeply into the minutia is hard. But Alarie and Green get it just right by focusing on the institutions that plausibly connect to their interest in commitment and cooperation – mostly those that centre on politics, such as whether the appointers are politically accountable and the extent to which the process itself is politicized. From their (very interesting) rich descriptions, we learn that India, where the justices essentially select their colleagues,³⁶ anchors one end of the political-appointment spectrum and the United States anchors the other (no surprise to anyone familiar with the circus that has become the process of appointing US Supreme Court justices). In between are Australia and Canada, where executives dominate appointments, though the process is far less

32 Julio Ríos-Figueroa & Jeffrey K Staton, 'An Evaluation of Cross-National Measures of Judicial Independence' (2014) 30 *JL Econ & Org* 104. Lee Epstein & Jack Knight, 'The Economic Analysis of Judicial Behavior' in Lee Epstein & Stefanie A Lindquist, eds, *The Oxford Handbook of U.S. Judicial Behavior* (Oxford: Oxford University Press, 2017) 320 [Epstein & Knight, 'Economic Analysis'].

33 These conclusions follow from many empirical studies. See e.g. Carlos Berdejó & Noam M Yuchtman, 'Crime, Punishment and Politics: An Analysis of Political Cycles in Criminal Sentencing' (2013) 95 *Review of Economics and Statistics* 741; Brandice Canes-Wrone, Tom S Clark & Jee-Kwang Park, 'Judicial Independence and Retention Elections' (2012) 28 *JL Econ & Org* 211; Gregory A Huber & Sanford C Gordon, 'Accountability and Coercion: Is Justice Blind When It Runs for Office?' (2004) 48 *American Journal of Political Science* 247.

34 In the United States, US Supreme Court justices 'hold their offices during good behaviour' with no mandatory retirement age (US Constitution, art III, s 1). High court justices in Australia and the United Kingdom must retire at the age of seventy, Canadian justices at the age of seventy-five, and India justices at the age of sixty-five.

35 Then again, Helmke, *Courts under Constraints*, supra note 18, shows that the guarantee of life tenure in the Argentine Constitution meant tenure for the life of the ruling regime and not for the lives of the justices.

36 For the details on how this came about and why change might occur, see Alarie & Green, *Commitment and Cooperation*, supra note 7 at 61.

transparent and political than in the United States. Prior to 2005, the United Kingdom fell nearer to Australia and Canada on the political spectrum; now UK practice may come closer to India as an independent commission (which includes the president of the Supreme Court) selects the judges.

With these details in hand, Alarie and Green link the political appointment spectrum to the CC space in two central hypotheses: (a) the more political/politicized the process, the more committed the judges to etching their own political values into law – in other words, politics produces political judges – and (b) the more politically neutral the rules of the game, the more cooperative the judges. Ingenious empirical tests mostly confirm these links. To provide just a taste, Alarie and Green show that ideological polarization (the spread) in voting is quite high on the US Supreme Court and far lower among Canadian and Australian justices. They also demonstrate that ideology exerts predictably consistent effects across areas of the law in the United States but virtually unpredictable effects in India.

Considering their results, Alarie and Green's conclusion seems exactly right: institutions governing the appointment of justices, and not only their retention, matter. Rules that reduce the role of politics tend to create judiciaries that are higher on the cooperative dimension and lower on commitment – more deliberative-type courts – and vice versa for rules that emphasize politics and political actors. Whether one is preferable to the other remains a question open to debate, but, at the least, Alarie and Green have supplied ample empirical data to develop answers – a contribution no one should underestimate.

B SETTING PANEL SIZE AND COMPOSITION

Almost never do Americans see depictions of fewer than the nine US Supreme Court justices in their robes. When the justices are in full regalia, it is inevitably all nine. This makes sense. From decisions over which petitions to hear to votes on the merits of cases, the US high court operates as a collective; all nine justices participate. For this reason, members of the US socio-legal community might be surprised to learn that many, perhaps most, apex courts do not sit *en banc*. Like the US Courts of Appeals (the 'circuits'), they mostly make decisions in panels. But that is where the resemblance to the US circuits ends. As Alarie and Green tell it, judges on peak courts outside the United States are not always, or even usually, assigned to panels randomly (as they supposedly are on the circuits³⁷); and panel size on many peaks courts is not set at three (as it is on US circuit panels³⁸) or at any other number for that matter. In place of the 'no-discretion' rules operating in the United States, various institutions allow the court's leader to have a say over which and how many judges will sit on panels.³⁹

37 For an empirical challenge to the long-standing assumption of randomness, see Adam S Chilton & Marin K Levy, 'Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals' (2015) 101 Cornell L Rev 1.

38 Three is the usual number. On rare occasions, the circuits sit *en banc*. See e.g. Micheal Giles et al, 'The Etiology of the Occurrence of En Banc Review in the U.S. Courts of Appeals' (2007) 51 American Journal of Political Science 449.

39 Alarie & Green, *Commitment and Cooperation*, supra note 7, ch 4.

In some countries, including Canada, the chief justice has nearly unfettered discretion to set panel composition and size (five, seven, or *en banc* at nine). In the United Kingdom, the registrar composes the panels, but the president of the court can override the registrar's decisions. On the discretion scale, chief justices in India and Australia are somewhere between Canada and the United Kingdom. Though they have power to assign panels, various rules constrain their choices. For example, on the Indian Supreme Court, where thirty-one justices serve, panels cannot be smaller than two and must consist of at least five judges for important constitutional disputes.

After reading Alarie and Green's detailed descriptions of the various institutions governing panel assignment and size (an original contribution in and of itself), scores of research questions came to mind; the topics are that new and that ripe for analysis. Alarie and Green make real headway by asking how the rules structure chief justices' choices, specifically: do they use their power to maximize the court's resources and quality of its output (the 'managerial' approach) or to maximize the chances of getting their preferred outcome (the 'strategic' approach)? Put another way, are the chiefs cooperative, putting their court first, or are they more committed, prioritizing their own preferences?

Making clever use of the data, Alarie and Green show both are true. That chiefs occasionally use their discretion to assign 'experts' to panels suggests some interest in maintaining their court's reputation (assuming experts produce higher quality decisions). At the same time, discretionary rules can and do induce strategic behaviour. Alarie and Green demonstrate, first, that the potential for chiefs to 'game' panels is non-trivial, especially in India and the United Kingdom where the number of judges is relatively high and the size of panels relatively low.⁴⁰ Next, Alarie and Green show that chiefs do not always or even usually resist the opportunity to compose panels strategically.⁴¹ Their evidence takes different forms but especially interesting is the Canadian case, where left-of-centre chiefs tend to assign more liberal judges to panels hearing salient cases.

These and other results once again make a strong case for the role of institutions in structuring judicial behaviour – here, the chief justice's choice of panel members and size. Of course, by necessity, much of the analysis excludes the United States because the US Supreme Court always sits *en banc*. But it is easy to imagine research deploying Alarie and Green's ideas about panel assignment to

40 Specifically, they devise a gaming prospect ratio, which is the number of decisions that theoretically could be decided differently by a different panel divided by the total number of cases (ibid at 110–11). E.g., if the Supreme Court of Canada (nine total justices) issues a decision by a seven-to-zero or nine-to-zero vote, no other combination of justices could have changed the outcome. But a six-to-three decision could have been different if the three dissenters had served on a panel of five with any two in the majority.

41 Here they develop the gaming resistance ratio; conceptually, the number of cases that could have been decided by a smaller panel but were heard by a larger panel. On this measure, in only about a third of the cases do chiefs resist the opportunity to influence the outcome. Alarie & Green, *Commitment and Cooperation*, supra note 7 at 113–14.

study how chiefs (or members of a panel) assign the opinion of the Court – a power US chiefs do enjoy when they are in the majority.⁴²

C DECIDING TO DECIDE⁴³

Scores of papers and books address a single question: why do US Supreme Court justices decide to hear some cases and reject others?⁴⁴ Answering it is a bit like looking for needles in haystacks because relevant institutions give the Court a great deal of discretion over its plenary docket. During the 2016–17 term, for example, the Court received 6,305 petitions but agreed to hear ('grant cert' to) only seventy-one (or 1 per cent).⁴⁵ Still, the search for answers goes on because the subject is important – and not just to scholars but also to the lawyers whose careers and reputations rest on convincing the Court to hear their cases.⁴⁶

As you might expect, the studies show that no one factor predicts the justices' decisions; rather a set of 'cues' increases the probability of the Court ~~hearing a case~~ (for example, divisions among the circuits and the quality of the attorneys).⁴⁷ There is also the strongly held and now empirically verified belief that strategic considerations occasionally come into play.⁴⁸ On this account, US justices are far more likely to vote to hear a case when they think 'a majority of judges [will] line up in favor of [their] preferred outcome.'⁴⁹ In other words, the

42 Though opinion assignment on the US Supreme Court has been the subject of several studies, research on other countries' procedures is harder to come by and cross-national analysis, virtually non-existent. On the US Supreme Court, see e.g. Richard J Lazarus, 'Back to "Business" at the Supreme Court: The "Administrative Side" of Chief Justice Roberts' (2015) 129 *Harvard L Rev Forum* 33; Maltzman, Spriggs & Wahlbeck, *Crafting Law*, supra note 7; Kaitlyn L Sill, Joseph Daniel Ura & Stacia L Haynie, 'Strategic Passing and Opinion Assignment on the Burger Court' (2010) 31 *Justice System Journal* 164.

43 From HW Perry, Jr's classic book, *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge, MA: Harvard University Press, 1991) [Perry, *Deciding to Decide*].

44 In addition to Perry, *Deciding to Decide*, supra note 43, important studies include Gregory A Caldeira & John R Wright, 'Organized Interests and Agenda Setting in the U.S. Supreme Court' (1988) 82 *American Political Science Review* 1109; Gregory A Caldeira, John R Wright & Christopher JW Zorn, 'Sophisticated Voting and Gate-Keeping in the Supreme Court' (1999) 15 *JL Econ & Org* 549 [Caldeira, Wright & Zorn, 'Sophisticated Voting']; Ryan J Owens, 'The Separation of Powers and Supreme Court Agenda Setting' (2010) 54 *American Journal of Political Science* 412; Joseph Tannenhaus, Marvin Schick & David Rosen, 'The Supreme Court's Certiorari Jurisdiction: Cue Theory' in Glendon A Schubert, ed, *Judicial Decision-Making* (New York: Free Press, 1963) 111.

45 *Chief Justice's 2017 Year-End Report on the Federal Judiciary*, 31 December 2017, online: Supreme Court of the United States <<https://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf>>.

46 See e.g. Richard J Lazarus, 'Advocacy Matters before and within the Supreme Court: Transforming the Court by Transforming the Bar' (2008) 96 *Geo LJ* 1487 [Lazarus, 'Advocacy'].

47 See the studies listed in note 44 above; Lazarus, 'Advocacy,' supra note 46.

48 E.g. Caldeira, Wright & Zorn, 'Sophisticated Voting,' supra note 44; Ryan C Black & Ryan J Owens, 'Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence' (2009) 71 *Journal of Politics* 1062; Robert L Boucher & Jeffrey A Segal, 'Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials' (1995) 57 *Journal of Politics* 824.

49 Alarie & Green, *Commitment and Cooperation*, supra note 7 at 181.

justices try to predict the outcome of the case on its merits before they decide whether to hear it.

That is a plausible story and one, as I suggest, the data support. But it is not a story that makes much sense outside the United States.⁵⁰ Why? Different institutions. Because all nine US justices participate in all of the cases, it is not much of a stretch to believe they can predict how their colleagues will ultimately vote on the merits, especially in politically charged disputes. But consider the task in Canada. The three justices on the panel deciding whether to grant leave must predict (a) the chief justice's choice of the size and composition of the panel should they decide to grant and (b) the votes of the justices selected by the chief – which is not so easy when Canada's appointment process produces justices less committed to their personal views than in the United States. In short, it is just a lot harder 'to game the system' on the Canadian Court,⁵¹ and Alarie and Green's data suggest that the justices do not bother. This is not to say that the Court's leave decisions are entirely random. To provide one example, Alarie and Green show that the justices are far more likely to hear cases brought by the federal government (a finding that holds in other countries, including the United States).

Still a clear takeaway of Alarie and Green's analysis is that hypotheses and findings on the US Supreme Court cannot and should not be adopted willy-nilly to other countries; the institutional context matters and matters a lot. This is a lesson that bears emphasizing and repeating. Because so much of the literature on judicial behaviour – and screening cases, in particular – has used the US Supreme Court as its testing ground, it is tempting to turn results from that court into expectations for others. We should resist and instead adapt research to local conditions for exactly the reasons Alarie and Green give.

D CHOOSING TO DISSENT

Even on courts that allow dissents, the range in their use is wide. At the high end is the US Supreme Court with dissents filed in about six of every ten cases (60 per cent dissent rate); the Australian High Court is up there too (40 per cent).⁵² At the very low end are the Indian (less than 5 per cent)⁵³ and Israeli Supreme Court (less than 3 per cent).⁵⁴ Apex courts in Brazil, Canada, and Norway are somewhere in between at 20 per cent.⁵⁵ Why the variation? Scholars have

50 See also Roy B Flemming, *Tournament of Appeals: Granting Judicial Review in Canada* (Vancouver: UBC Press, 2004).

51 Alarie & Green, *Commitment and Cooperation*, supra note 7 at 185.

52 Ibid at 15.

53 Ibid at 15.

54 Theodore Eisenberg, Talia Fisher & Issachar Rosen-Zvi, 'Case Selection and Dissent in Courts of Last Resort: An Empirical Study of the Israel Supreme Court' in Yun-chien Chang, ed, *Empirical Legal Analysis: Assessing the Performance of Legal Institutions* (London: Routledge, 2013) 181.

55 For Brazil, see Evan Rosear, Ivar Alberto Hartmann & Diego Werneck Arguelhes, 'Disagreement on the Brazilian Supreme Court' (31 October 2015), online: Elsevier <https://papers.ssrn.com/abstract_id=2629329>. For Norway, see Henrik Litreré Bentsen, 'Court Leadership, Agenda Transformation, and Judicial Dissent' (2018) 6 *Journal of Law and Courts* 1 [Bentsen, 'Court Leadership'].

been trying to solve this puzzle for decades, and Alarie and Green make some real advances. First, they show that modern-day baseline dissent rates on the five courts are relatively impervious to change. Take the UK Court. The percentage of cases with dissent is quite low and, as Alarie and Green demonstrate, it has not increased even in the face of ideological heterogeneity among its members or, for that matter, decreased during periods of ideological homogeneity. Likewise, dissent on the US Supreme Court, which is comparatively quite high, is also insensitive to ideological diversity; the justices are only slightly less willing to dissent when the other justices are ideologically similar to them. Canada is an exception. There, the probability of dissent increases as ideological distance grows.⁵⁶

The suggestion from these and related analyses is that institutions – in the form of norms of consensus – play a crucial role in shaping the decision to dissent. In the United States, the norm is that it is okay to dissent, and, in the United Kingdom, it is not okay. Or, as Alarie and Green more eloquently put it,

for the United States a strong norm of disagreement may allow justices to overcome at least some of the negative consequences of dissenting (such as reputation effects with her fellow justices⁵⁷), and for the [United Kingdom] a strong norm of agreement may mean that it is difficult to dissent even in the face of a large difference in voting tendencies of the justice and other panelists.⁵⁸

That makes sense, but it evades the questions of how the norms start and whether they can change. Alarie and Green acknowledge as much and take the second step of exploring the chief justice's role in prompting or suppressing dissents.

The idea that leaders play a crucial role in norms structuring dissent comes from research on the US Supreme Court,⁵⁹ and here the US studies do seem to transport to other societies. Depending on the empirical strategy, Alarie and Green find that dissent rates fluctuate by chief justice in Australia,⁶⁰ Canada, and even the United Kingdom.⁶¹ These findings do not mean that chiefs are the sole explanation for dissent, as Alarie and Green point out. But generalizability across

56 Australian justices too, though to a far lesser extent.

57 William M Landes, Richard A Posner & Lee Epstein review some of these in William M Landes, Richard A Posner & Lee Epstein, 'Why (and When) Judges Dissent' (2011) 3 *Journal of Legal Analysis* 101.

58 Alarie & Green, *Commitment and Cooperation*, supra note 7 at 227.

59 E.g. Thomas G Walker, Lee Epstein & William J Dixon, 'On the Mysterious Demise of Consensual Norms in the United States Supreme Court' (1988) 50 *Journal of Politics* 361; Frank H Easterbrook, 'Agreement among the Justices: An Empirical Note' (1984) 1984 *Sup Ct Rev* 389.

60 This finding seems consistent with Russell Smyth, 'The Role of Attitudinal, Institutional and Environmental Factors in Explaining Variations in the Dissent Rate on the High Court of Australia' (2005) 12 *Australian Journal of Political Science* 519, but not with Paresch Kumar Narayan, 'What Explains Dissent on the High Court of Australia? An Empirical Assessment Using a Cointegration and Error Correction Approach' (2007) 4 *J Empirical Leg Stud* 401.

61 Bentsen, 'Court Leadership,' supra note 55, reports the same for the Norwegian Supreme Court, as do Yen-tu Su & Han-wei Ho for the Taiwan Constitutional Court. Yen-tu Su & Han-wei Ho, 'The Causes of Rising Opinion Dissensus on Taiwan's Constitutional Court' (28 July 2016), online: Elsevier <<https://ssrn.com/abstract=2815752>>. Both papers other factors also affect dissent rates.

countries suggests that leadership is a plausible point of departure for studies exploring why and when judges dissent.

III *Forward movement*

I have tried to highlight Alarie and Green's key findings, but I lack the space to accomplish even that. *Commitment and Cooperation on High Courts* is a book that must be read. It is that important and makes that weighty a contribution. But there is more; *Commitment and Cooperation* shores up all of the work that remains to be done. However wide and deep the existing scholarship and however wide and deep their contribution, Alarie and Green prompt us to think about all of the gaps and the many possibilities for filling them. Picking up on just some of their suggestions, I look at the potential (read: need) for forward movement in the areas of description, theory, and data.

A DESCRIPTION

As you may have gathered, Alarie and Green provide a rich (some might say thick) description for each institution they analyse. By this, I mean descriptions that are not rote listings of the formal constitutional rules but, rather, that relay what is happening on the ground – the informal institutions. Why this is such a crucial contribution of *Commitment and Cooperation* is pretty obvious. Over two centuries ago, James Madison expressed scepticism about bills of rights, believing they are little more than 'parchment barriers' – mere words on paper that have little bearing to actual practice.⁶² Many scholars not only concur but also have provided data to support the view that law as specified in constitutions provides only a partial explanation of practices on the ground.⁶³

Aside from the imperative of providing institutional details in a book on institutions, Alarie and Green's descriptions speak to scholars of judicial behaviour because we are starved for exactly this kind of information. Jeffrey Staton put it this way, '[w]ithout good description it is hard to imagine how we are going to

62 See e.g. James Madison to Thomas Jefferson, 17 October 1788, Founders' Constitution, online: University of Chicago <<http://press.pubs.uchicago.edu/founders/documents/v1ch14s47.html>>; '[E]xperience proves the inefficacy of a bill of rights on those occasions when its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State.' Still, Madison became a supporter of (and even drafted) the US Bill of Rights. See Jack N Rakove, 'James Madison and the Bill of Rights' (1985), online: American Political Science Association <http://www.apsanet.org/content_8300.cfm>.

63 E.g. Helmke, *Courts under Constraints*, supra note 18; Erik S Herrona & Kirk A Randazzo, 'The Relationship between Independence and Judicial Review in Post-Communist Courts' (2003) 65 *Journal of Politics* 422; Linda Camp Keith, 'Constitutional Provisions for Individual Human Rights (1977–1996): Are They More Than Mere "Window Dressing"?' (2002) 55 *Political Research Quarterly* 111. But see Clifford J Carrubba et al, 'When Parchment Barriers Matter' (14 October 2015), online: Gretchen Helmke <<http://www.gretchenhelmke.com/uploads/7/0/3/2/70329843/parchment.pdf>> [Carrubba et al, 'When Parchment'].

meaningfully advance theory or even identify good opportunities' for research.⁶⁴ And yet we find ourselves exactly in this 'without' world. There are simply too few studies devoted to the task of mapping crucial features of whatever judicial system(s) is under analysis. Many reasons for this void probably exist, but Staton thinks the lack of incentives is key.⁶⁵ I agree. Social science journals do not seem interested in thick description nor do funding agencies.

Two solutions come to mind. One is for scholars working in this field to recognize, and not dismiss, the value of descriptive work when they review articles, books, and grant proposals. The other is for researchers to follow Alarie and Green's lead and integrate description into their theoretical and data work. Along these lines, *Commitment and Cooperation on High Courts* is a model, as is Gunnar Grendstad, William R Shaffer, and Eric Waltenburg's *Policy Making in an Independent Judiciary*.⁶⁶ In what is likely the first comprehensive, rigorous, and dispassionate treatment of the Norwegian Supreme Court Grendstad and colleagues bring data to bear on all aspects of the Court's decision making. But they never neglect the institutional details that animate the data and allow readers to assess the analysis.

Were authors to follow the leads of Grendstad and colleagues and Alarie and Green, they too would better serve their audiences – and themselves. *Policy Making in an Independent Judiciary* has brought a great deal of attention to the Norwegian Supreme Court outside of Norway, with follow-up studies now making their way into disciplinary journals.⁶⁷

B THEORY

In addition to their emphasis on institutions, the major accounts of judicial behaviour operate under the assumption that judges are 'rational maximizers of their ends in life, their satisfactions – . . . their "self-interest."⁶⁸ Under the labour market model, which, recall, Alarie and Green adopt, the individual judge acts parametrically to maximize her preferences.⁶⁹ If the judge desires to make more money, she might write a novel assuming she has weighed her own costs (for example, time away from her judicial work) and benefits; in other words, she is the variable and all others, the constants.⁷⁰ Strategic accounts are non-parametric

64 Jeffrey K Staton, 'Building Research Communities via a Collective Investment in Data Infrastructure' in Diana Kapiszewski & Matthew C Ingram, ed, *Concepts, Data, and Methods in Comparative Law and Politics* (Cambridge University Press, forthcoming) [Staton, 'Building Research'].

65 Staton, 'Building Research,' supra note 64.

66 Grendstad, Shaffer & Waltenburg, *Policy Making*, supra note 26.

67 See e.g. Bentsen, 'Court Leadership,' supra note 55; Jon Kåre Skiple et al, 'Supreme Court Justices' Economic Behaviour: A Multilevel Model Analysis' (2016) 38 *Scandinavian Political Studies* 73.

68 Richard A Posner, *Economic Analysis of Law*, 9th ed (New York: Wolters Kluwer, 2014) at 3.

69 I adapt some of the material in this and the next few paragraphs from Epstein & Knight, 'Economic Analysis,' supra note 32; Lee Epstein, Christopher M Parker & Jeffrey A Segal, 'Do Justices Defend the Speech They Hate? An Analysis of In-Group Bias on the U.S. Supreme Court' (2018) 6 *Journal of Law and Courts* 237, online: Washington University in St. Louis <<http://epstein.wustl.edu/research/InGroupBias.html>> [Epstein, Parker & Segal, 'Do Justices Defend'].

70 See Jon Elster, *Explaining Technical Change* (Cambridge, UK: Cambridge University Press, 1983).

rational choice models, as they assume that goal-directed judges operate in a strategic or interdependent decision-making context, regardless of the judges' specific motivation. Though its origins lie in psychology,⁷¹ even the attitudinal model is now framed in economic terms; when certain institutions exist (for example, life tenure), judges can 'engage in rationally sincere behaviour' – meaning they can decide cases in line with their ideology.⁷²

No doubt, the assumption that judges are rational actors is reasonable or at least gets us pretty far in understanding their choices. But equally without doubt, it will not get us all of the way there. It is just too late in the day to question the decades' worth of studies showing that, in many situations, people rely on intuitions, emotions, and heuristics to make fast decisions without much effort. Social psychologists tell us that these responses are not always wrong or even unhelpful. But they also say that, unchecked by deliberative assessments, 'thinking fast' can lead to mistakes and biased decisions.⁷³

Although judges may believe they can 'suppress or convert' their intuitions, prejudices, and sympathies into rational decisions, this is not so.⁷⁴ Experiments conducted on thousands of judges show that they – no less than other humans – favour insiders and disfavour outgroups,⁷⁵ harbour implicit racial bias,⁷⁶ rely on the affect heuristic to respond more favourably to litigants with whom they sympathize,⁷⁷ succumb to belief perseverance in their consideration of evidence,⁷⁸ fall prey to hindsight bias when assessing probable cause,⁷⁹ and use anchoring and other simplifying heuristics in making numerical estimates.⁸⁰ Alarie and Green are aware of this literature, pointing out that 'judges, like all individuals, may not make decisions that are fully rational in all cases, such as where they rely on shortcuts (or heuristics) in decision making.'⁸¹ But their (three-paragraph) discussion of non-rational factors amounts to little more than hand waving, and I am guilty of much the same in my work.

71 See Segal & Spaeth, *Supreme Court*, supra note 1 at 89–91.

72 Ibid at 93.

73 Including the Nobel Prize winners Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011); Richard H Thaler, *Misbehaving: The Making of Behavior Economics* (New York: Norton, 2015).

74 Andrew J Wistrich, Jeffrey J Rachlinski & Chris Guthrie, 'Heart versus Head: Do Judges Follow the Law or Follow Their Feelings?' (2015) 93 Texas L Rev 855 at 862 [Wistrich, Rachlinski & Guthrie, 'Heart versus Head'].

75 E.g. *ibid*.

76 E.g. Jeffrey J Rachlinski et al, 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) 84 Notre Dame L Rev 1195.

77 E.g. Wistrich, Rachlinski & Guthrie, 'Heart versus Head,' supra note 74.

78 E.g. Andrew J Wistrich, Chris Guthrie & Jeffrey J Rachlinski, 'Can Judges Ignore Inadmissible Information: The Difficulty of Deliberately Disregarding' (2005) 153 U Penn L Rev 251 [Wistrich, Guthrie & Rachlinski, 'Can Judges Ignore'].

79 E.g. Jeffrey J Rachlinski, Andrew J Wistrich & Chris Guthrie, 'Probability, Probable Cause, and the Hindsight Bias' (2011) 8 J Empirical Leg Stud 72.

80 E.g., Joep Sonnemans & Frans van Dijk, 'Errors in Judicial Decisions: Experimental Results' (2012) 28 JL Econ & Org 687.

81 Alarie & Green, *Commitment and Cooperation*, supra note 7 at 42.

We can and should do better. We must own up to the very real possibility that the experiments have it right, that judges are influenced by their emotions, intuitions, prejudices, and the like – all of which complicate their ability to make rational decisions and so complicate our efforts to explain their behaviour. There is no getting around the fact that these very human features can distort purely rational or strategic decision making. The interesting research questions relate to how much they alter what we would expect to observe if we assume that judges act rationally.

How to answer these questions is a matter of some debate.⁸² More relevant here is whether there is a role for institutional design in accounts that acknowledge the limits of rationality. The answer must be yes or else the entire field of behavioural economics probably would not amount to much. A major enterprise in this field, sure, is to notice how non-rational factors may lead to biased or otherwise deficient decisions, but a major contribution is to offer up solutions. Often these require altering institutions, such as changing the default rule on retirement savings plans from one that forces individuals to enrol to one that automatically enrolls them.⁸³

And so it goes with judging. Because the researchers conducting experiments on judges are mostly lawyers/legal academics,⁸⁴ you **would** not be surprised to learn that they offer fixes for the biases they observe. Some solutions place the burden on judges, asking them to become aware of how their emotions and so on affect their decisions.⁸⁵ Others, though, focus on altering institutions to help mitigate bias. Based on experiments showing that judges respond more favourably to litigants with whom they sympathize, Andrew Wistrich, Jeffrey Rachlinski, and Chris Guthrie recommend separating ‘case management and admissibility functions from case resolution functions by assigning two judges to each case. This

82 I take the experimental evidence quite seriously. But some members of the legal community (especially judges) do not; they complain that the experiments are artificial and do not capture the real courtroom environment. This counsels for observational studies – that is, studies making use of data that the world, not the researchers, created. These are not easy to do, but neither are they impossible, as Shayo and Zussman’s study of Israeli small claims courts demonstrates. Moses Shayo & Asaf Zussman, ‘Judicial Ingroup Bias in the Shadow of Terrorism’ (2011) 126 *Quarterly Journal of Economics* 1447. More to the point, they are crucial; should the experimental and the observational converge, we can be far more confident in our conclusions. For work moving in this direction, see Epstein, Parker & Segal, ‘Do Justices Defend,’ supra note 69; Avani Mehta Sood, Jeffrey A Segal & Benjamin Woodson, ‘Does Crime Severity Influence Judges in Search-and-Seizure Cases? An Empirical Triangulation of Motivated Admissibility Decisions,’ *Virginia Law Review* (forthcoming).

83 See e.g. Shlomo Benartzi & Richard H Thaler, ‘Behavioral Economics and the Retirement Savings Crisis’ (2013) 339 *Science* 1152.

84 As the citations above indicate, the main players are Chris Guthrie (law professor at Vanderbilt Law School), Jeffrey J Rachlinski (law professor at Cornell Law School), and Andrew J Wistrich (federal magistrate judge in the Central District of California). All have law degrees; Rachlinski also has a doctoral degree in psychology.

85 Wistrich, Rachlinski & Guthrie, ‘Heart versus Head,’ supra note 74 at 909: ‘First, judges should be cognizant of their susceptibility to affect. Most people fail to recognize its hidden influence. Awareness is not sufficient to ensure that judges keep emotional responses in check, but it is a necessary first step.’

might shield the judge deciding the case from exposure to emotionally laden suppressed evidence.⁸⁶ Another answer comes from Holger Spamann and Lars Klöhn, whose experiments also show that (legally extraneous) defendants' characteristics affect judicial decisions. They propose 'blinding judges to many details of the facts, for example, sanitizing the record before it is sent up to an appeals court.'⁸⁷ These are just a few examples. The larger point is that in considering the role that non-rational factors play in judicial decision making, we need not neglect matters of institutional design. To the contrary, they should move the fore in any study designed to spot problems and offer solutions.

C DATA

As I mentioned, Alarie and Green draw almost all of their data from the High Courts Judicial Database (HCJD). This database has the benefit of being explicitly comparative when most case- or judge-based datasets target a particular court. But the HCJD also has its share of drawbacks, as Alarie and Green acknowledge.⁸⁸ The courts represented all write their opinions in English and are mostly embedded in common law systems, and the data themselves are now nearly two decades old.⁸⁹

That Alarie and Green used the HCJD anyway is understandable. That it remains the only game in town is not. The absence of comparative multi-user databases is suggestive of a community of scholars working not as a community but, rather, in isolation building one-off datasets for specific projects. No doubt this approach has its benefits, but it also has substantial costs, including massive duplication of effort, inefficiencies, and dated (if not downright unreliable) measures – all of which ultimately impede the drive to discovery.⁹⁰ Alarie and Green are among the growing number of scholars calling for change.⁹¹ I count

86 Wistrich, Rachlinski & Guthrie, 'Heart versus Head,' supra note 74 at 909–10. See also Wistrich, Guthrie & Rachlinski, 'Can Judges Ignore,' supra note 78 at 1325–6.

87 Holger Spamann & Lars Klöhn, 'Justice Is Less Blind, and Less Legalistic Than We Thought: Evidence from an Experiment with Real Judges' (2016) 45 J Leg Stud 255 at 277.

88 Alarie & Green, *Commitment and Cooperation*, supra note 7 at 252.

89 Lee Epstein, James L Gibson & Andrew D Martin, 'Using Databases to Study Constitutional Law' in David Law, ed, *Handbook of Research Methods in Constitutional Law* (Edward Elgar Publishing, forthcoming), online: Washington University in St. Louis <<http://epstein.wustl.edu/research/DatabasesConLaw.html>>; see also Carrubba et al, 'When Parchment,' supra note 63.

90 See e.g. Staton, *Judicial Power*, supra note 22.

91 Alarie & Green, *Commitment and Cooperation*, supra note 7 at 252–3, offer some specific suggestions. For example, they call for ways to overcome the HCJD's simple outcome/ideological measures, which 'do not capture important aspects of how judges see cases' (at 253). I would only add that a single policy dimension does not always capture voting, as political scientists have long demonstrated for parliaments. See e.g. Simon Hix, Abdul Noury & Gérard Roland, 'Dimensions of Politics in the European Parliament' (2006) 50 *American Journal of Political Science* 494 at 509 (finding a dominant classic left-right dimension in the European Parliament as well as 'the gradual stabilization of a second dimension around pro-/anti-Europe positions, orthogonal to left-right dimension'); Howard Rosenthal & Erik Voeten, 'Analyzing Roll Calls with Perfect Spatial Voting: France 1946–1958' (2004), 48 *American Journal of Political Science* 620 at 624 (demonstrating 'that a stable two-dimensional spatial configuration [left-right and pro-anti regime] explains deputies' vote choices').

myself in this group and, to that end, have proposed the development of two large-scale sustainable databases: one focused on the institutional features of courts throughout the world and the other on case-level data. Because I have recounted the details elsewhere, I will not bother to rehearse them here.⁹² Suffice it to say that technological advances in automating data collection and content analysis provide room for optimism about the development of new data infrastructure.⁹³

IV *Concluding remarks*

Alarie and Green have done us a great service. Rather than assuming that institutions matter, they have demonstrated that they do, and they have demonstrated that they do cross-nationally. It now falls on us to build on their work. Those efforts could take many forms, but, at bottom, the community must band together to move forward. No longer should we turn up our noses at descriptive work nor ignore the reality that our theories may not be up to the task of developing full and realistic conceptions of judging. And paying heed to Alarie and Green's call to develop better infrastructure sooner rather than later will do much to promote their rallying cry: "The way forward is comparative."⁹⁴

92 Lee Epstein, 'Forward Movement in the Development of Data Infrastructure for the Comparative Analysis of Law and Legal Institutions' in Diana Kapiszewski & Matthew C Ingram, ed, *Concepts, Data, and Methods in Comparative Law and Politics* (Cambridge University Press, forthcoming), online: Washington University in St. Louis <<http://epstein.wustl.edu/research/InfrastructureCompJudBeh.html>>.

93 See *ibid.* Briefly, by 'automating data collection,' I mean writing scripts to scrape information (for example, case names, citations, year, parties, judges, and disposition) from court decisions and dockets. By 'automating content analysis,' I mean algorithms to help organize the texts – here, court decisions – into categories of interest (that is, classification). For a non-technical introduction, see Justice Grimmer & Brandon M Stewart, 'Text as Data: The Promise and Pitfalls of Automatic Content Analysis Methods for Political Texts' (2013) 21 *Political Analysis* 267.

94 Alarie & Green, *Commitment and Cooperation*, *supra* note 7 at 254.