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Judicial Behavior

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Summary

Once the sole province of U.S. scholars—and mostly political scientists at that—researchers throughout the world, drawing on history, economics, law, and psychology, are analyzing judicial behavior: why judges make the choices they do and what effect those choices have on society.

How the field moved from a modest, niche project of political scientists working in the mid-20th century to the powerhouse it has become makes for an interesting story, marked by several key developments along the way. One is certainly the influx of scholars and theories from other disciplines that have supplemented and challenged existing knowledge. Other developments include the growing interest in judging from a comparative perspective; the massive improvements in data acquisition through technological advancements; and, perhaps most importantly, the sheer number of topics that now fall under the rubric of "judicial behavior."

Although the field has advanced markedly, much work remains. Many of the canonical theories of judicial behavior rest on the assumption that judges are rational, goal-oriented, actors. But decades' worth of studies in social psychology, including experiments on judges, raise serious questions about the plausibility of this assumption. Should observational results converge with the experimental evidence, scholars must grapple with how to integrate insights from social psychology into the analysis of judicial behavior. On the empirical side, however notable the improvements in data infrastructure, most products ignore obvious objects of interest: the actual opinions produced by judges. Developing tools carefully calibrated to account for the unique ways judges develop and frame their work products presents yet another challenge. But it is one worth pursuing if only because of its potential to bring scholars closer to the goal of developing a fuller, more realistic conception of judicial behavior.

Keywords: judicial behavior, judicial preferences, judicial decision making, judicial politics, strategic analysis, rational choice, the attitudinal model

From Humble Origins to a Worldwide Enterprise

These are heady times for the analysis of judicial behavior. Once the sole province of U.S. scholars—and mostly political scientists at that—researchers throughout the world, drawing on history, economics, law, and psychology, are illuminating how and why judges make the choices they do and what effect those choices have on society. Many studies draw on data that would have been cumbersome, if not impossible, to amass without high-powered computers; and the tools for analyzing the data have grown ever more sophisticated and suited to the tasks at hand. Along the way, the number of topics falling under the rubric of judicial behavior has mushroomed.

This article traces the evolution of the field, from a small "counting project" launched by the political scientist C. Herman Pritchett in 1940s to a worldwide enterprise, with emphasis on key developments in theory, data, and the subjects under consideration. The conclusion highlights promising avenues for forward movement.

The Evolution of the Study of Judicial Behavior

When Socrates was on trial for his life, he refused to appeal to the "emotions" of judges out of a belief that the judge "has sworn that he will judge according to the laws and not according to this own good pleasure."[1] This theory of judging, in which careerism, ideology, emotions, and the like, play no role, is commonly called "legalism." In its simplest form, judges are said merely to apply law to the facts; their task is mechanical and involves no exercise of discretion.[2]

However dominant legalism was in the law world—and it was—the theory eventually faced challenges from within. Beginning in the 1880s and picking up force in the 1920s, some law professors and even judges were skeptical of "mechanical judging," claiming it to be mere rhetoric designed to conceal the political character of the judges' rulings. These "legal realists"—including U.S. Supreme Court justices Oliver Wendell Holmes and Benjamin Cardozo—sought to supplant legalistic accounts of judging with conceptions they believed were more realistic, chiefly by hypothesizing about the influence of the judges' political values (their ideology or partisanship[3]) on their votes.

C. Herman Pritchett, a political scientist just starting his career in 1940 at the University of Chicago, was undoubtedly aware of the realists' writings and likely influenced by them. But he was no traditional realist offering speculation, however reasoned, about the role of ideology on judging. To the contrary. Inspired by an inscription on a university building—"When you cannot measure, your knowledge is meager and unsatisfactory"—Pritchett decided to tally features of U.S. Supreme Court decisions: the number of dissenting votes, the extent to which the justices agreed with one another, the level of support for the federal government in tax cases, and so on. From these counts, Pritchett (1941, 1948) developed objective evidence to support the realist hypothesis: the justices often voted on the basis of their ideology.

By more modern standards, Pritchett's counting project seems small, even quaint. But with the hindsight of several decades, it is clear that his insights and efforts to test them against data helped launch the now worldwide field of judicial behavior. A detailed accounting of the field's evolution from the days of Pritchett would require a book, and a long one at that. For present purposes, it suffices to highlight four crucial developments: (1) the dramatic increase in studies of judicial behavior in Pritchett's own field, political science; (2) the influx of scholars from other disciplines; (3) the worldwide interest in judging; and (4) improvements in data. Discussion of what may be the most dramatic development of all—the increase in the number of substantive topics under analysis—receives its own section, "Substantive Areas of Interest."

Inside Political Science

Prior to Pritchett, political scientists studying law and courts were less legal realists than they were old-school legalists. Post-Pritchett and his new empirical approach, they were primed to differentiate themselves from legal academics. Rather than closely read judicial opinions, political scientists could now

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[1] Then again, in Gorgias Socrates predicted that his trial would be the equivalent of the trial of a doctor prosecuted by a cook before a jury of children.

[2] In a more complex version, judges apply to cases a methodology, adopted on politically neutral grounds to generate objective decisions. These methods go by such names as "originalism," "textualism," and "the living Constitution," among others.

[3] The political science literature tends to treat political values and political, policy, ideological, and partisan goals as interchangeable terms because political scientists use partisan and ideological measures to assess empirically the judges' political values and goals.

use data to analyze the forces that gave rise to the opinions (Krewson & Owens, 2017). In short order, many created their own counting projects, and suddenly quantitative analysis became the dominant approach to studying judicial decision-making, much as it had in other disciplinary corners.

To up and coming political scientists, not only did Pritchett's methods make sense; his conclusions about the role of ideology also resonated. The idea that judges attempt to align the law with their political values was naturally appealing to scholars trained to view the world through a political lens (Epstein & Knight, 2013). Some even pushed Pritchett's approach harder than he did (Baum, 2003), claiming that ideology was the primary, if not exclusive, driver of judicial decisions. Harold J. Spaeth and his student, Jeffrey A. Segal, ultimately popularized this perspective in the "attitudinal model" of judging (Segal & Spaeth, 2002). On this account, judges 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 that court has substantial control over the cases it will hear and decide (Segal & Spaeth, 2002, p. 92).

Segal and Spaeth's extensive analysis of voting on the U.S. Supreme Court, along with earlier work by Schubert (1965) and Ulmer (1960), seemed to support the depiction of justices as "single-minded seekers of legal policy" (George & Epstein, 1992, p. 325). But some political scientists were not so sure. Of particular note was Murphy's (1964) Elements of Judicial Strategy. Relying on intuitions derived from the rational choice paradigm, Murphy sought to demonstrate that U.S. justices operate in a political context not wholly unlike elected officials. He painted a portrait of policy-minded justices, who make choices by paying some attention to the preferences of the other actors (e.g., their colleagues, Congress, the president) and the actions they expect them to take.

Despite Elements appearance on lists of truly path-marking studies of judicial behavior, few of Murphy's contemporaries adopted his vision of the way judges operate (exceptions include Howard, 1968; Rohde, 1972). Back then, political scientists mostly clung to the attitudinal model's view of justices as largely unconstrained decision-makers free to behave in accord with their own ideological preferences rather than the sophisticated actors Murphy made them out to be.

By the early 1990s, though, change was in the wind (Epstein & Knight, 2000). Law and business school professors began touting what they called "positive political theory," consisting of "non-normative, rational choice theories of political institutions," as an appropriate framework for the study of statutory interpretation (Farber & Frickey, 1992, p. 462; see also Eskridge, 1991; Spiller & Gely, 1992). In some sense, these professors were asking political scientists to take Murphy's intuitions seriously and to integrate them into their work.

Epstein and Knight's (1998) The Choices Justices Make attempted a response in the form of a clear alternative to the attitudinal model: a Murphy-like strategic account of judging. On this account: (1) judges' actions are directed toward the attainment of goals; (2) judges are strategic or interdependent decision-makers, meaning they realize that to achieve their goals, they must consider the preferences and likely actions of other relevant actors; and (3) institutions structure judges' interactions with these other actors. Note that under Epstein and Knight's approach, it is up to researchers to specify a priori the judges' goals; that is, they may select any motivation(s) they believe judges have. Nonetheless, Epstein and Knight adopted the (political science) party line and argued that maximizing policy is of paramount, even exclusive, concern.[4]

As political scientists turned the corner into the 21st century, a new generation eagerly fleshed out the strategic model. Their additions, detailed in "Substantive Areas of Interest,"[5] have generated more nuanced understandings of how judges relate to one another (Lax & Cameron, 2007; Lax & Rader, 2015;

[4] Epstein and Knight (2013) have subsequently pushed back from that position. See also the section "Beyond Political Science" in this article.

[5] See also Epstein and Knight (2018b) for a review of developments since *Choices*.

Spriggs, Maltzman, & Wahlbeck, 1999) and to relevant external actors (Black & Owens, 2012; Clark, 2011).

Beyond Political Science

Even from this brief recounting of the evolution of judicial behavior in political science, the influence of other disciplines is clear. Pritchett, Spaeth, Segal, and other developers of the field took inspiration from realists in the legal community; and Epstein, Knight, and other proponents of strategic analysis drew lessons from the positive political theorists in law and business.

Contributions from disciplines neighboring political science go even deeper, perhaps because they challenge assumptions at the core of judicial behavior. Three are worthy of mention. First, drawing on economic theory, scholars of judicial behavior are recasting the judge from a Segal/Spaeth (and even Epstein/Knight) "politician in a robe" to a worker in a labor market. Under this model, 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 job satisfaction, external satisfactions, leisure, promotion, and salary and income.

Because others flesh out the details of the labor market model (Alarie & Green, 2017; Epstein, Landes, & Posner, 2013; Posner, 2008), suffice it to note here that this line of thinking introduces the importance of personal motivations for judicial choice (without necessarily downgrading the political scientists' emphasis on ideology or the law community's interest in legal motivations). The basic argument is as follows. Because there are only 24 hours in a day, judges must decide how to allocate their time among judicial activities (e.g., hearing and deciding cases, working with colleagues and staff), non-judicial work (e.g., writing books, participating in conferences, teaching), and leisure. Given these time constraints, judges seek to maximize their preferences over the set of personal factors (such as job satisfaction, leisure, and the like). Again, this is not to say that the judges' political preferences are irrelevant to judging; under the labor market model, they are not. It is only to suggest that the policy goal is hardly the only motivation; it may not even be dominant for many judges—a point more fully fleshed out in "The Judge: Motivations and Careers."

A second substantial challenge to existing political science studies comes from social psychologists. Although the attitudinal, strategic, and labor-market models assume that the judge as "a rational maximizer of his ends in life, his satisfactions . . . his 'self-interest'" (Posner, 2011, p. 3), decades' worth of studies in social psychology (and behavioral economics) raise serious questions about the plausibility of this assumption. They show that in many situations, people rely heavily on their intuitions to make fast decisions without much effort (Kahneman, 2011; Thaler, 2015). These responses are not always wrong or even unhelpful (Wistrich, Rachlinski, & Guthrie, 2015), but left unchecked by deliberative assessments, they can lead to mistakes and biased decisions.

Naturally enough, judges think they can "suppress or convert" their intuitions, prejudices, sympathies, and the like into rational decisions (Wistrich et al., 2015, p. 862). But it turns out that judges are human too (Guthrie, Rachlinkski, & Wistrich, 2001). Experiments conducted on thousands of judges demonstrate that they respond more favorably to litigants they like or with whom they sympathize (Wistrich et al., 2015), harbor implicit bias against black defendants (Rachlinski, Johnson, Wistrich, & Guthrie, 2009), fall prey to hindsight bias when assessing probable cause (Rachlinski, Guthrie, & Wistrich, 2011), and use anchoring and other simplifying heuristics in making numerical estimates (Sonnemans & van Dijk, 2012). Because these and other experimental findings (Simon & Scurich, 2013; Spamann & Klohn, 2016) coupled with convergent results from observational studies (Epstein, Parker, & Segal, 2018; Segal, Sood, & Woodson, 2018; Shayo & Zussman, 2011), are likely to play a central role in future studies of judicial behavior, we return to them in "Forward Movement."

Last but not least, legal historians have challenged the generally presentist posture of the field by demonstrating the value of insights drawn from carefully assembled historical data. Illustrative is Clark's (2019) analytic history of constitutional law. Clark begins by identifying the topics and dimensions of U.S. Supreme Court decisions. Then, using data that trace back to the Reconstruction era, he explores the ebb and flow of the dimensions. Another example is a study by Klerman and Mahoney (2005) on the relationship between judicial independence and economic prosperity. The hypothesis, in a nutshell, is that when courts are independent from the government, they are more willing to enforce contract and property rights, which, in turn, encourage economic investment and growth (North & Weingast, 1989). Whereas social scientists have validated this expectation against contemporaneous data (La Porta, López de Silanes, Pop-Eleches, & Schleifer, 2004), Klerman and Mahoney looked back to England in the 1700s, and show that laws providing greater job security to judges increased the value of financial assets. That the results from their study and analyses of more modern-day data coincide lends even greater confidence to the independence–prosperity hypothesis's plausibility.

Worldwide Interest

Many of the pioneering studies of judicial behavior focus on the United States, reflecting the role U.S. scholars studying U.S. courts played in building the field. But just as the field is no longer owned by political scientists, it is also no longer the sole province of Americanists. More to the point, the comparative analysis of judicial behavior is exploding, with researchers throughout the world drawing on history, economics, law, politics, and psychology to illuminate the behavior of judges and the effect of their choices on society.[6] Virtually no judicial system has escaped systematic and rigorous attention, from Argentina, Brazil, and Chile (Arguelhes & Hartmann, 2017; Muro, Chehtman, Méndez, & Durán, 2018; Tiede, 2016) up to Mexico (Staton, 2010) and Canada (Alarie & Green, 2017); and from China (Liu & Li, 2019) and Taiwan (Chen, Huang, & Lin, 2015) across the globe to India (Green & Yoon, 2017), Israel (Weinshall-Margel, 2016), and most of Europe (Coroado, Garoupa, & Magalha˜es, 2017; Grendstad, Shaffer, Sunde, & Waltenburg, 2020; Hanretty, 2020; Melcarne, 2017); and down to South Africa (Sill & Haynie, 2010) and Australia (Nielsen & Smyth, 2019). Analyses extend to long-standing democratic societies of course but also to developing democracies and authoritarian regimes (Moustafa, 2014). Likewise, judges serving on international and transnational courts, long of interest to scholars, are now more than ever the targets of sophisticated theoretical and empirical work (Cichowski, 2016; Frankenreiter, 2017; Gabel, Carrubba, Ainsley, & Beaudette, 2012; Lupu & Voeten, 2012; Voeten, 2020).

These studies have had many salutary effects on the study of judicial behavior, not the least of which is to highlight the role institutions play in structuring the judges' choices and interactions. To be sure, no theory of judicial behavior ignores institutions, but in many studies their effect is assumed rather than directly assessed. Return to the attitudinal model. It is one thing to claim that life tenure and other rules give judges the freedom to act on their ideological preferences, but quite another to test that assertion. Only by comparing judges in societies where particular institutions, such as life tenure, do or do not exist (or where institutional change occurred) is it possible to determine whether and which institutions matter. If only for this reason (and, of course, there are many others), the growing worldwide interest in judicial behavior is a true milestone in the field's evolution.

Obviously cataloguing all the many studies on all the many courts is far beyond the scope of this article but a few examples suffice to underscore the value of work on courts outside the United States. Helmke's (2002, 2005) research on Argentina is a great starting point because it opened the door for

[6] This is not to stay that the comparative analysis of courts is entirely new. In the 1960s and 1970s, some of the U.S. "pioneers" of judicial behavior began to study courts outside the United States (Becker, 1970; Schubert & Danelski, 1969; Tate, 1971). See also important books by Stone Sweet (1992) and Epp (1998).

many other analyses of judging in Latin America (and indeed throughout the world). What Helmke shows is that although the Argentine and U.S. constitutions allow judges to "hold their office during good behavior," in Argentina, this is a parchment guarantee: "good behavior" does not mean life tenure as it is understood in the United States; it means tenure for the life of the appointing regime. As Helmke (2002, p. 292) writes, "incoming governments in Argentina routinely get rid of their predecessors' judges despite constitutional guarantees." Out of fear for their jobs or even their lives, Helmke theorized and empirically demonstrated that Argentine judges would rationally anticipate the threat and begin "strategic[ally] defecting," that is, ruling against the existing regime once it began to lose power (p. 291). Helmke's work was just the beginning; such an explosion of work on Latin America followed that annual review articles struggle to keep up (Kapiszewski & Taylor, 2008).

Studies on European judges also abound, especially those on serving on apex courts. Of these the German Constitutional Court has been the object of many analyses, with several important projects focused on interactions between the court and the elected branches (Krehbiel, 2016; Vanberg, 2005)—specifically on how the justices exploit various institutions to thwart potential noncompliance with their decisions. Krehbiel (2016), for example, explores the court's use of public oral hearings to generate public support for its decisions. Along similar lines, Carrubba, Gabel, and Hankla (2008, p. 444) demonstrate that the European Court of Justice relies on "observations" (briefs filed by EU institutions and member state governments) to make assessments of the "balance of member-state preferences regarding the legal issue." The more observations for one side, the higher the chances of that side winning, which makes good sense: if the member states favor one side and the court rules the other way, the states could form a coalition to override the decision, thereby rendering the latter ineffective.

Strides also been made in the study of judicial behavior in Asia, especially in India and Japan. The Indian Supreme Court is of natural interest because of "its central role in Indian political life," massive docket, the sheer number of judges, and the physical presence of its courtrooms throughout the country (Chandrachud, 2011). Robinson's (2013) interesting article, for example, shows that the court disproportionately draws its cases from wealthy states. Likewise, Ramseyer's studies have shed considerable light on the Japanese Supreme Court. Among the many findings that may transport to other societies is that frequently reversed lower court judges are systematically assigned less prestigious responsibilities (Ramseyer & Rasmussen, 2001).

In the Middle East, Israel has received the lion's share of attention. As in many other country studies, researchers have tended to focus on the country's apex court, the Israeli Supreme Court (e.g., Dotan, 2013; Gliksberg, 2014; Sommer, 2009; Weinshall-Margel, 2011). But lower courts have not been ignored. Among the most striking examples is Shayo and Zussman's (2011) analysis of the decisions of small claims courts, which shows that Jewish judges systematically favor Jewish litigants and Arab judges favor Arab litigants. Then there is Danziger et al.'s (2011) study of the effect of food breaks on the decisions of judges serving on Israeli parole boards. Their finding that judges are more lenient at the beginning of the work day and after a food break received worldwide attention (though Weinshall-Margel and Shapard (2011) subsequently questioned that finding).

Data

The explosion of work in multiple disciplines and across the world should not be taken to mean that scholars in the field have followed a single, uniform path. As is probably obvious, their substantive questions and theories differ, as do the targets of inquiry. Some work focuses on a single court, drawing comparisons over time; at the other extreme are cross-national studies of many courts operating during similar eras. The researchers' motivations are equally diverse, from describing features of judging to offering measures of crucial concepts (e.g., judicial independence); and from making causal inferences to developing implications for law and public policy.

Despite these differences, contemporary scholars can take advantage of the enormous advances in data. (Mostly) gone are the days of Pritchett when scholars sat in law libraries thumbing through volumes of court decisions and marking down characteristics of interest. Many countries' legal documents are available online through companies (e.g., Westlaw and LexisNexis in the United States) or on public websites. Because these sources make for more efficient data coding (e.g., via scraping), the rapid rise of public, multiuser datasets has followed.[7]

This is an extremely important development because it suggests that worldwide scholars are acknowledging the importance of high-quality data infrastructure for advancing knowledge and driving innovation, discovery, and invention for the analysis of judicial behavior. No doubt this trend will only accelerate as scholars begin to exploit methods for building even stronger and larger-scale datasets, for example, by automating content analysis: not simply scraping facts (e.g., case names) but developing algorithms for organizing the texts—court decisions and other legal documents—into categories of interest (i.e., classification) (for a nontechnical introduction, see Grimmer & Stewart, 2013). Also a possibility is crowd-sourced coding by non-experts. Social scientists have now shown beyond any reasonable doubt the feasibility of assigning the task of coding even very technical data to (large numbers of) non-expert online workers (Carlson & Montgomery, 2017). Benoit, Conwy, Lauderdale, and Laver (2016) is particularly relevant because the authors succeeded at the Herculean task of reproducing the Manifesto Project's encoded data using crowd workers across the globe.

These are just the sort of tools required to bring into reality what is now only a dream of scholars in the field: high-quality case-, judge-, and institutional-based infrastructure covering (at the least) all apex courts worldwide—in other words, a "common resource" that all researchers and their students would use and ultimately adapt for their own purposes.

Substantive Areas of Interest

By now the message is clear: as a result of new scholars, fresh ideas, and higher-quality data, the field of judicial behavior has evolved markedly since Pritchett's day. Even so, perhaps the most notable development is the explosion of the substantive topics under study, including relations among judges and between courts and external actors. These move to the fore in the section "Additional Topics." What immediately follows is a perennial and conventional topic—"The Judge"—that is now being reimagined in new and hardly conventional ways.

The Judge: Motivations and Careers

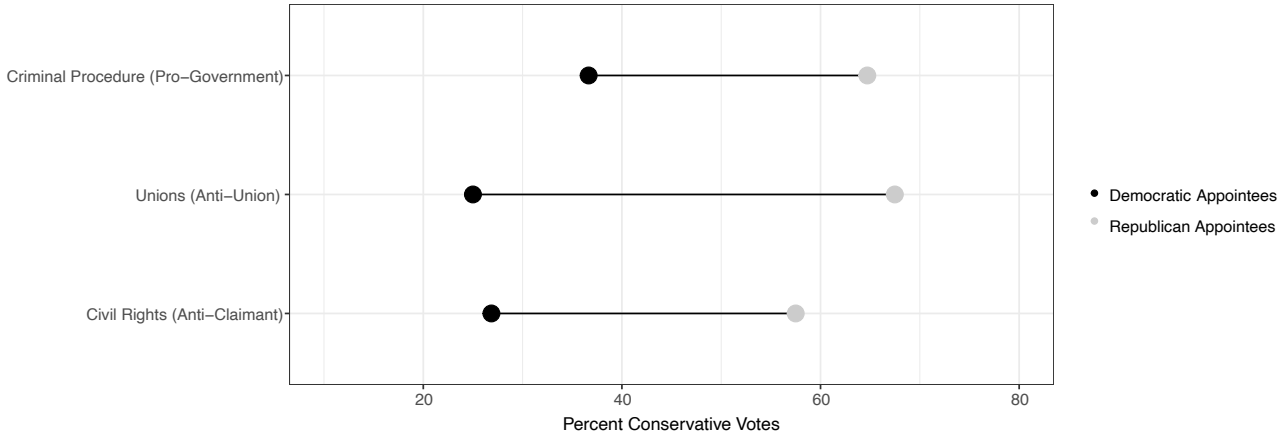
Many pioneers of judicial behavior followed Pritchett's lead and emphasized political preferences as a key determinant of the individual justices' votes. That emphasis continues today because ideology and partisanship, no matter how measured, remain drivers of judicial decisions.

To see the point, consider Figure 1, which shows the U.S. justices' votes, since 2005, in favor of the government (in criminal cases), against unions, and in opposition to the civil rights claimant—in other words, the percentage of conservative decisions.[8] Note that the justices are sorted by the partisan affiliation of their appointing president. The dark circles represent Democratic appointees and the lighter circles, Republican appointees.

[7] For a list of existing multiuser datasets, see Weinshall and Epstein (2020).

[8] Data calculated from the U.S. Supreme Court Database.

Figure 1. Justices' Votes in U.S. Supreme Court Cases during the Roberts Court (2005–2018 Terms), by the Party of the Justices' Appointing President.



The takeaway is obvious: in each of the three areas, the Republican appointees are significantly more conservative than the Democrats. The gap between the two ranges from 28 percentage points in criminal procedure to 43 in union litigation.

Not only do these same basic patterns hold in the U.S. Supreme Court across nearly every legal area going back to 1937 (Epstein et al., 2013), they also hold in courts throughout the world. In virtually all studies that measure it, partisanship or ideology affects judging, whether on the British Appellate Committee (Iaryczower & Katz, 2016), the Chilean Constitutional Tribunal (Carroll & Tiede, 2012), the French Constitutional Council (Hönnige, 2009), the Norwegian Supreme Court (Grendstad, Shaffer, & Waltenburg, 2015), or the Spanish Constitutional Court (Garoupa et al., 2013), among many others.

And yet few 21st-century scholars of judicial behavior begin and end their studies with political preferences. Ideology and partisanship, it turns out, may be necessary to complete explanations of judging, but they are not sufficient. Once again, return to Figure 1, and note that the association between partisanship and voting is hardly perfect. Even in unions cases, far short of 100% of the votes cast by Democratic appointees were in favor of unions; and far short of 100% of the Republican votes were against unions; associations between political preferences and votes are even lower in non-peak courts, such as U.S. trial courts. In short, too much unexplained variation exists to be content with the conventional political science approach to judging.

In the hunt to develop more comprehensive conceptions of the individual judges' decisions, scholars have taken different routes. One is to explore the relations between the choices judges make and their biographies, asking, for example, whether former prosecutors are tougher on defendants (George & Williams, 2014). Interest too has increased in the effect of race (Cox & Miles, 2008; Kastellec, 2013; Sen, 2015), gender (Boyd, Epstein, & Martin, 2010; Haire & Moyer, 2015), and religion (Shayo & Zussman, 2011; Sisk, Heise, & Morriss, 2004) on judging, with work drawing on a range of theories in the social sciences and law to produce interesting conclusions. Sen (2015) finds that black trial court judges are reversed on appeal more often than their white counterparts, a finding consistent with implicit bias; Haire and Moyer (2015) show that female judges tend to vote differently than male judges but only on issues on which the women possess unique expertise or experience (e.g., gender discrimination), a result in line with informational accounts; and recall that Shayo and Zussman (2011) show in-group bias among Jewish and Arab judges serving on small claim courts.

Another route to the study of individual judges follows from economic theory and focuses attention, as noted in the section "Beyond Political Science," on motivations other than ideology—especially personal motivations, such as job satisfaction, leisure, and promotion. Although much work remains, there are some promising findings. Consider promotion, which would seem to be an important factor influencing the personal utility that judges gain from their work. To explore the possible effects of this motivation, Epstein et al. (2013) compare U.S. judges with some realistic possibility of promotion with those without much hope of advancement to determine whether the former "audition" for their next job. The researchers hypothesize and find that the auditioners impose harsher sentences on criminal defendants to avoid being tagged as soft on crime. Along similar lines, Black and Owens (2016) demonstrate that auditioners (they call them "contenders") are more likely to vote in line with the president's preferences.

These studies focus on the judicial vote, a traditional dependent variable. But scholars have now expanded the outcomes of interest, constituting yet another contemporary route for the study of the individual judge. Among the many choices receiving attention are decisions to recuse (Hume, 2014), to encourage settlement (Boyd, 2013), and to depart from the bench (Perez-Linan & Araya, 2017); and approaches to opinion-writing (and assignment) (Black & Spriggs, 2013; Lax & Rader, 2015) and enhancing reputation and legacy (Garoupa & Ginsburg, 2015; Posner, 1990).

This is just a small sample; there are nearly countless innovative studies on the individual judge. But the larger point should not be missed: the infusion of theories from an array of disciplines, working in diverse contexts, has advanced this aspect of judicial behavior light years since Pritchett's time.

Additional Topics

As work on the individual judge continues, many other topics have moved to the fore, including judges' relations with their colleagues ("The Collegial Court"), with their superiors and subordinates in the judiciary ("The Hierarchy of Justice"), and with political officials ("Relations with Elected Actors"). Each is interesting in its own right, though they are not necessarily mutually exclusive. Some work that considers relations among judges—the collegial court literature—also implicates relations between higher and lower courts—the hierarchy of justice studies (e.g., Cross & Tiller, 1998). Likewise, these topics are not exhaustive. Space considerations led to the exclusion of many, such as attorneys, parties, and interest groups (Abrams & Yoon, 2007; Box-Steffensmeier, Christenson, & Hitt, 2013); clerks and other staff (Grendstad et al., 2020); judicial independence (La Porta et al., 2004); judicial selection and retention (Tiede, 2020); opinions and precedent (Staton & Vanberg, 2008); and public opinion (Casillas, Enns, & Wohlfarth, 2011). For this reason, the material that follows amounts to a mere introduction to some but hardly all topics under study.

The Collegial Court

Judges decide cases under one of three arrangements: alone (a single judge), in panels of three or five judges (or some other subset of the court), or en banc (all the judges serving on the court). Much of the work falling under the collegial court asks whether a case's outcome or a judge's vote would have been different had a single judge, and not a panel or full court, decided the case (so-called "peer" or "panel" effects). Cross and Tiller (1998, p. 2156), for example, demonstrate that the presence of a "whistleblower" on a panel—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" to a higher court—can constrain his or her colleagues from behaving in accord with their own sincere preferences.

Cross and Tiller draw attention (yet again) to policy motivations. But an interesting piece by Fischman (2011) finds evidence that relying solely on these motivations is an oversimplification of

collegial decision-making. Fischman theorizes that U.S. appellate judges are less apt to follow their own ideological preferences than the norm of consensus out of fear of paying reputational costs associated with writing a dissent. Sure enough, in an empirical analysis of the Ninth Circuit Court of Appeals, Fischman (2011) finds that the "consensus model" is significantly better at explaining the judges' votes than the "policy model."

Other work focuses on panel effects relating to gender and race. In these studies, scholars ask whether traditional judges (usually defined as white and/or male) vote differently when they are on a panel with, say a female or a black judge. The answer is that they do, though the effect seems limited to the set of characteristic-relevant cases. Kastellec (2013, p. 168), for example, finds that "randomly assigning a black counterjudge—a black judge sitting with two nonblack judges—nearly ensures that the panel will vote in favor of an affirmative action program." Along similar lines, Boyd et al. (2010) analyzed the effect of male judges sitting with a female judge in 15 areas of the law. Only in cases of sex discrimination in employment do the researchers find a significant "panel" effect: the males are more likely to vote in favor of the party alleging discrimination when a female is on the panel.

Yet another line of research turns its attention away from the votes of judges to the choices made by the court's leader. Judges on many courts are not always or even usually assigned to panels randomly (as they supposedly are in the U.S. circuits); and panel size on many is not set at three (as it is for U.S. circuit panels) 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—which raises the question of whether chiefs use their power to maximize the court's resources and the quality of its output (a "managerial" approach) or to maximize the chances of getting their preferred outcome (a "strategic" approach). Making clever use of the data from apex courts in Canada, the United Kingdom, India, and Australia, Alarie and Green (2017) show both occur. 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 behavior. Alarie and Green's evidence takes different forms but especially interesting are data from the Canadian Supreme Court, revealing that left-of-center chiefs tend to assign more liberal judges to panels hearing salient cases.

Collegial effects also show up in the U.S. Supreme Court, which sits not in panels but en banc. The theoretical ramifications of this unique context are reviewed in Cameron and Kornhauser (2013; see also the article "Theorizing the U.S. Supreme Court"). A key result is the majority-opinion author may have an initial advantage in setting the policy position of the court's ruling, but in salient cases strenuous collegial bargaining drives the ruling toward the median justice in the majority. Providing another example is Caldeira, Wright, and Zorn's (1999) justifiably famous analysis of case selection. The authors demonstrate that U.S. justices are less likely to vote to grant certiorari (agree to hear a case) when they think they will be on the losing side if certiorari is granted (sometimes called a "defensive denial"). Caldeira et al. also supply evidence of "aggressive grants": voting to hear a case when the justice agrees with the lower court's decision because he or she believes that the majority of the other justices do too. Other studies demonstrate that in the United States, just as in Canada, collegial effects play a role in the chief justice's assignment of the majority opinion. Lax and Cameron (2007, p. 293), for example, establish that the chief justice favors justices "who are more extreme ideologically" than himself in part because "more extreme writers must invest more heavily in judicial craftsmanship, in order to hold the majority."

The Hierarchy of Justice

Research on the judicial hierarchy explores the interactions between judges on higher and lower courts. Although there are several possible approaches to study these interactions, many studies proceed from principal-agent theory, which, in this literature, assumes heterogeneous ideological preferences

between higher and lower court judges and emphasizes how a higher court can extract conformity from a lower court with different preferences (Westerland, Segal, Epstein, Cameron, & Comparato, 2010). More concretely, the typical starting point in these studies is that lower court judges no less than higher court judges are interested in etching their values into law. But lower court judges face a substantial constraint in their quest to do so—the possibility of sanctioning from a higher court. To the extent that many higher courts cannot fire, promote, demote, financially reward, or penalize members of trial or intermediate courts, scholars have identified various mechanisms for keeping the lower courts in line, including strategic auditing (Cameron, Segal, & Songer, 2000), implicit tournaments among lower courts (McNollgast, 1995), en banc review (Clark, 2009), and, of course, whistleblowing (Cross & Tiller, 1998).

Although this line of research is nearly canonical, it is not without detractors. Kim (2011, p. 538), for example, claims that the principal-agent framework "distorts the role that law plays in judicial decision making." On her account, the relationship between higher and lower courts is less an adversarial game centered on ideological preferences than a mixed-coordination interaction in which judges attempt to create coherent legal doctrines. Coherent doctrines, she argues, make for a smoother decisional process and enhance institutional legitimacy.

Kim is not alone in thinking about hierarchical relationships in terms other than ideology. Recall Sen's (2015) finding that U.S. Courts of Appeals panels are more likely to overturn the decisions of black district court judges than those of similar white judges. Equally interesting is Blanes i Vidal and Leaver's (2015, p. 464) study of English courts, which shows that the judges' "collegial culture" artificially lowers the reversal rate as they "actively avoid public contradiction of their peers." These results are akin to findings in the United States indicating that justices tend to affirm cases coming from the appellate court on which they served (Epstein, Martin, Quinn, & Segal, 2009).

Relations with Elected Actors

Many analyses of the relationship between courts and elected actors bear a family resemblance to the hierarchy of justice studies in that they too use a strategic framework to explore their interactions. The basic hypothesis is that judges must attend to the preferences and likely actions of the government if they are to achieve their goals (Eskridge, 1991; Ferejohn & Weingast, 1992; Sala & Spriggs, 2004; Spiller & Gely, 1992). If the judges do not, they run the risk of retaliation from elected actors, making it difficult for them to establish enduring policy, maintain legitimacy, or whatever else their objectives may be.

Although early empirical work assessing this claim focused on cases of statutory interpretation (Eskridge, 1991; Spiller & Gely, 1992), constitutional interpretation also has come under the fold, reflecting speculation that courts must be equally if not more vigilant in adhering to the preferences of elected actors in constitutional cases (Epstein, Knight, & Martin, 2001). Subsequent work has shown this to be a promising hypothesis. Clark (2011) and Segal, Westerland, and Lindquist (2011) demonstrate that when Congress threatens the U.S. Supreme Court's authority, the court cowers, either exercising greater judicial self-restraint or reaching decisions closer to congressional preferences.

These studies focus on the United States. Helmke's (2002, 2005) work on Argentina draws attention to the fact that in many parts of the world governments have called for (and taken) even more radical steps to tame their courts, with sanctions ranging from impeachment, removal, court-packing, and non-compliance to criminal indictment and physical violence. To respond to these and other potential threats, researchers have established that judges follow an array of strategies, such as defecting against the old regime (Helmke, 2002, 2005), avoiding cases that may contribute to further escalation (Epstein, Knight, & Shvetsova, 2002; Goelzhauser, 2011), writing vague opinions (Staton & Vanberg, 2008), going public (Gauri, Staton, & Cullell, 2015; Staton, 2010), and passing up posts on apex courts altogether (Basabe-

Serrano, 2012).[9] A next step for scholars would be to specify formally, or otherwise, the circumstances under which one strategy might be more effective than others.

Yet another related research program might consider threats to courts from politicians who have taken to social media to express their anger with court decisions or even threaten particular judges (Krewson, Lassen, & Owens, 2018; Okun, 2020). The rise of populism also presents research opportunities to explore backlash against both international and domestic courts (Voeten, 2020).

Forward Movement

The goal of this article was to describe several key developments in the study of judicial behavior ever since Pritchett started counting votes in the 1940s. Certainly the field has advanced markedly in the intervening decades but much work remains. Two quick suggestions, one theoretical and one empirical, for forward movement suffice to make the point.

Beginning with theory, many studies continue to treat judges as rational decision-makers intent on achieving their goals whether ideological, personal, or legal. No doubt the assumption that judges act rationally has generated many breakthroughs in the study of judicial behavior. But also without doubt, the rationality assumption, just as the policy-maximization assumption, is insufficient for the development of a full conception of judicial behavior. It is too late in the day to question the mounds of social psychological studies (referenced in "Beyond Political Science") showing that in many situations, people—including judges—rely on mental shortcuts derived from their own emotional and intuitive thoughts when making decisions.

To the extent that judges are influenced by their emotions, intuitions, and the like, these will complicate their ability to make (strategically) rational decisions. And, in turn, will complicate efforts to explain their behavior. There is no getting around the fact that these very human features can distort purely rational decision making (Epstein & Knight, 2018a).

The question of how to integrate the insights from social psychology into the analysis of judicial behavior is tricky. The vast majority of evidence of "fast judging" comes from experiments (Spamann & Klohn, 2016; Wistrich et al., 2015). Many scholars (the present authors included) take this 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 critique, which implicates external validity, counsels for observational studies—studies making use of data that the world, not the researchers, have created. These are not easy to do, but neither are they impossible, as Shayo and Zussman's (2011) analysis of Israeli small claims courts demonstrates (see also Abrams, Betrand, & Mullainathan, 2012; Epstein et al., 2018; Segal et al., 2018). More to the point, they are crucial: the greater the convergence between experimental and observational results, the more confidence the community can have in the conclusions reached (see generally Ho & Rubin, 2011).

Turning to empirics, improvements in data infrastructure are many in number. Especially notable is the growth of datasets that quantify important features of judicial decisions. Nonetheless, as useful as these datasets are, they ignore obvious objects of interest: the actual texts produced by judges—opinions—and by lawyers—briefs. Some scholars have tried to tackle the problem using software developed for the analysis of non-legal texts (Black, Owens, Wedeking, & Wohlfarth, 2016) Although the resulting work bristles with insights, a new generation of studies might consider developing tools more carefully calibrated to account for the unique ways judges and lawyers develop and frame their work products (see generally Rice & Zorn, 2020).

[9] For a review of these and other strategies for efficacious judging, see Epstein and Knight (2018a).

These suggestions represent but a few opportunities to enhance the study of judicial behavior in the years to come. To be sure, 21st-century scholars come from more disciplines and more societies than at any time in the field's history. But if the dramatic developments since Pritchett's counting project have taught us anything, it is that the possibilities for growth are seemingly limitless.

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