The Role of Personal Attributes and Social Backgrounds on Judging

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Abstract and Keywords

Social background theory formalizes and tests the intuition that judges' attributes and experiences will affect their rulings. Attributes can include race, gender, sexual orientation, sexual identity, religion, and socioeconomic background. Experience can include education, occupation, and political activism. Social background theory is a positive theory rather than a normative one: it treats these factors as an explanation for a judge's actions. Social background theory has a history of intentional scholarly integration of ideas and methods in other fields. The theory can be seen as evolving through four stages tied to that integration: Legal Realism, behavioralism, new institutionalism, and computation. After briefly assessing the contributions and limitations of the theory, the chapter ends with a proposal for a relevancy threshold for social background research.

Keywords: social background theory, judicial politics, federal courts, U.S. Supreme Court, race, gender, Legal Realism, behavioralism, institutional economics, criminal justice

PRESIDENT Richard Nixon, frustrated after two failed Supreme Court nominations, sought the counsel of his new Chief Justice, Warren Burger.[1] Chief Justice Burger recommended his closest friend, Eighth Circuit Judge Harry Blackmun, for the seat (Greenhouse 2005: 46). Burger and Blackmun were best friends. They both grew up poor in a working-class, Catholic St. Paul neighborhood. And they both considered themselves modestly conservative and Republican. Burger naturally expected Blackmun to be an ally on the Court. As Linda Greenhouse wrote in her Blackmun biography, the relationship between Burger and Blackmun was "encrusted with a lifetime of shared experiences and mutual expectations" (Greenhouse 2005: 186). But, instead of becoming Court allies, the men became alienated, disagreeing in half of the Supreme Court's rulings by their last term together. We can think of other jurists who were surprising rivals, or unexpected supporters, on the bench. Our surprise arises from our belief—like that of Chief Justice Burger—that common backgrounds produce common judicial views and actions.

The social background theory of judges seeks to leverage the idea that we are a product of our identity and our experiences—nature and nurture—to create a theory of judicial decision-making. Social background theory, as defined here, includes research that hypothesizes and tests the influence of factors like personal attributes and experience on judicial behavior. Attributes can include race, gender, sexual orientation, sexual identity, religion, and socioeconomic background. Experience can include education, occupation, and political activism. Social background theory treats these factors as an explanation for a judge's actions. Political party affiliation or appointing president, by contrast, are generally used as proxies for a judge's unstated attitudes or policy preferences, and thus neither political party affiliation or appointing president is within the scope of social background theory as covered here. We can return to Burger and Blackmun to examine the characteristics which might be relevant under a social background approach.

(p. 287) In the beginning, the media called Chief Justice Burger and Justice Blackmun the "Minnesota Twins." Everyone focused on their commonalities, brushing aside their differences. Despite their personal similarities, their paths to the Supreme Court diverged in several respects. While Burger stayed in Minneapolis after high school to work and take pre-law undergraduate classes at night at the University of Minnesota, Blackmun won a scholarship which took him to Harvard University for college and then law school. Burger never finished college, but did secure a law degree from an unaccredited night law school (which later became William Mitchell College of Law). Burger practiced law and became active in both state and national Republican Party politics, which lead to jobs in Washington at the U.S. Department of Justice and later a seat on the U.S. Court of Appeals for the DC Circuit. After graduating from Harvard Law School, Blackmun returned to Minnesota to clerk for an Eighth Circuit judge and turned down an offer to work for the federal government in DC for posts first at a Minneapolis law firm and later as in-house counsel at the Mayo Clinic in Rochester, Minnesota. Like Burger, Blackmun did accept an appointment to the federal appellate bench—the Eighth Circuit—but his experiences on that collegial, Midwestern court were far different from Burger's on the highly politicized and contentious DC Circuit.

Social background theory allows us to hypothesize a relationship between the lives of judges like Justice Blackmun and Chief Justice Burger and their judicial rulings. We can determine whether and how the differences outweighed the similarities in their rulings as justices. In this chapter, we offer an overview of what we know about the influence of social background on judicial behavior. The first part explores the source and development of social background theory through four eras. The second part briefly assesses the contributions and limitations of the theory. The third part introduces our proposal for where social background theory should go from here.

This chapter focuses only on those studies that have taken a (principally) positive approach to the examination of how personal attributes and social backgrounds affect judging. Unlike normative inquiries that address how judges *ought* to engage in judicial decision-making, the positive studies examined in this chapter use various empirical tools to assess judicial outputs, ultimately offering a theory for how judges *do* engage in judicial

decision-making. That said, normative and positive theories intersected and influenced each other, making prescription sometimes relevant to understanding description. Therefore, we consider related normative theories when they inform our understanding of the positive theory.

The Source and Development of Social Background Theory

The idea that judicial decisions are the product of the person making the decision is not new. President George Washington considered a candidate's background when deciding whether to nominate him to a judicial opening. Then as now, presidents and other (p. 288) elected leaders wanted judges with whom they shared much in common in the belief that their peers were more likely to rule the *right* way. This focus has been most visible since the 1930s because of President Franklin Roosevelt's highly visible and strategic use of judicial nominations and because the federal courts themselves became more visible due to landmark legislation expanding and modernizing the federal judicial system. Studies of courts and judges became more sophisticated and complex in response to these two watershed developments, and the social background theory was one result.

Social background theory formalizes and tests the intuition that jurists' attributes and experiences will affect their rulings. The origins and development of social background scholarship is closely tied to the broader evolution of legal scholarship and social scientific research. We examine the source and development of the theory by looking at its four stages or waves: Legal Realism, behavioralism, new institutionalism, and computation. We assign each stage to a specific time period, marking the beginning and key stage of growth for each specific approach. While all four approaches continue in some form today, formative development generally occurred in the initial twenty-year to thirty-year period. But, the ideas and scholarship discussed here continue to have an impact on social background scholarship.

Carrying out the Positive Agenda of Legal Realism: 1930s–1950s

Social background theory developed alongside and was influenced by the rise of Legal Realism. Legal Realists, beginning in the 1930s, adopted as a normative paradigm the observation that judges cannot make decisions without being strongly influenced by their personal perceptions—that judges cannot be wholly "impartial" (Frank 1930; Llewellyn 1930). This idea stood in sharp contrast to the classical understanding of judicial thought—that jurists, through thoughtful reasoning, could arrive at a certain and universal legal truth—that had previously dominated legal scholarship. Accordingly, the ideas and advocacy of Realists like Jerome Frank, Karl Llewellyn, and Thurman Arnold drastically altered the course of legal education and the development of legal scholarship (Kalman 1986). At the same time, social scientists sought to test positive hypotheses mirroring

what lawyers and judges were claiming should influence judicial decisions. Together these developments came to lay a foundation for modern social background theory.

During the early 1930s, economist Walton Hamilton, one of the leaders of Legal Realism at Yale Law School, helped to spur the growth of Legal Realism by offering an empirical account to match the movement's normative judicial philosophy. (Gordon 2004; Schlegel 1995: 19–20, 218). Although Hamilton is more commonly remembered today for bringing institutional economics to substantive law, he was invited to write the Judicial Process chapter in the 1932 edition of the *Encyclopedia of the Social Sciences*. In it, Hamilton defined "judicial process" as the "intellectual procedure by which judges decide cases" and entailed "all the ways of the mind, deliberate and subconscious, and all (p. 289) of the elements in personality, profession and environment which impel toward judgment" (Hamilton 1933: 450). Although his description is at a high level of abstraction, his characterization of judicial decisions as the product of "personality, profession and environment" is both a departure from contemporary thought and a precursor of social background theory.

Even before Hamilton's influential chapter appeared, political scientist Charles Grove Haines argued that judges necessarily evaluate cases through a lens formed by experience and training (Haines 1922). Haines's argument is principally normative, advocating for the recognition that judges and courts are political actors and thus the selection of judges should include a consideration of a judge's background and personality. But, he goes farther by offering a list of factors such as education, socio-economic class, and professional occupation which may impact how a judge rules.

In 1933, three legal scholars presented one of the first tests of Hamilton's and Haines's social background hypotheses. Struggling with many of the same questions facing the broader Legal Realist movement, the researchers juxtaposed the long-standing notion that "we have a government of laws, and not men," against the commonly held belief among prosecutors and criminal defense attorneys that criminal trial judges were either "tough" or "lenient" in sentencing. The authors looked at six judges' sentencing decisions during a nine-year period and found appreciable differences between judges in sentences handed down for nineteen commonly occurring crimes. After ruling out traditional explanations for these variations, the authors were left with the conclusion that "what determines whether a judge will be severe or lenient is to be found in the environment to which the judge has been subjected previous to his becoming an administrator of sentences" (Gaudet, Harris, and St. John 1933: 814). While the authors did not attempt to construct a general theory of judicial behavior, their research question and design augured a shift in how scholars looked at courts and judges.

Political scientist C. Herman Pritchett was the first to propose a general positive theory of judicial behavior. Pritchett, quoting Hamilton's observation that judicial process is a product of the individual judge as much as the law, aimed to empirically test jurisprudential theories that "take into account [the] personal element in the judicial interpretation and making of law" (Pritchett 1941: 890). He asserted that if U.S. Supreme Court justices dis-

agreed about the outcome in a case, then the division could be attributed to the justices' "conscious or unconscious preferences and prejudices." In an article and later a book, he mapped the justices' votes and found interesting patterns including voting blocs and revealed preferences as to public policy (Pritchett 1948). Pritchett did not link the justices' votes to specific background characteristics, but he provided a reason to try to do so and a way to do it.

Courts scholars quickly recognized Pritchett's work as a springboard for exciting new lines of inquiry. They understood, however, that any theory linking judicial decisions to judges' underlying preferences and prejudices would need to be rooted in the behavioral sciences, where psychologists had already sought to offer systematic explanations of human behavior. By intentionally connecting the study of legal phenomena to the work of social psychologists like Louis Thurstone, Clyde Coombs, and Louis Guttman, (p. 290) judicial process scholars began to fashion a behavioral approach to the study of judicial decision-making, ushering in a new era in the study of judicial process.

The Behavioral Agenda in the Social Sciences: 1950s–1970s

Glendon Schubert was one of the most influential pioneers in the application of behavioralism to the study of law and courts, creating a behavioral theory of judging while also documenting this new approach to the study of judging (see, e.g., Schubert 1963). Schubert saw behavioral theory in courts studies as a product of both an evolving and richer understanding of the legal process and a growing interest in scientific methods among academics studying courts (Schubert 1965). Together, these shifts fueled a move away from the previous focus on "prescriptive norms" to "a new approach" which he termed "behavioral jurisprudence" (Schubert 1968: 407). To appreciate the significance of this shift, consider how researchers would treat a disagreement between judges hearing the same case. A traditionalist would seek to *reconcile* the conflict to construct a coherent body of legal doctrine. Behavioralists would instead *exploit* the conflict to discover how differences between the judges might be affecting their votes.

The behavioral approach is marked by the construction (sometimes explicit, sometimes implied) of a "stimulus-response" model to explain judicial rulings. A case is a set of stimuli. The judge's decision is the response. Behavioralists focused on the step between stimulus and response. That transition, unlike the stimulus or the response, cannot be directly observed; thus, a theory had to be constructed to explain it. The flexibility of the stimulus-response model allowed for different lines of scholarly inquiry. Some scholars chose to consider a specific set of general demographic variables and how they played out across a wide range of cases. Others focused instead on a specific set of cases, allowing them to explore background variables which were more closely connected to the issue.

Taking a subject-matter focused approach, a behavioralist could use the stimulus-response model to answer the riddle which troubled those three scholars back in 1933: Why were some judges sentencing harshly and others leniently in response to the same case facts. The criminal violation would be the stimulus and the judge's sentence the response.

Beverly Blair Cook, for example, looked at federal trial judges' sentencing of draft dodgers during 1972—a time of intense debate regarding the legitimacy of military conscription and the Vietnam War (Cook 1973). She found significant disparities in sentences and, like the 1933 study, a distribution of judges from more to less severe. She hypothesized that numerous independent variables including, significantly for social background theory, the characteristics of the judge accounted for the variance. She specifically looked at whether the judge's life made him more or less sympathetic to the draft dodger. She found that judges with substantial military service were, contrary to her initial expectations, less punitive than judges with no prior military service while judges with draft-age sons were more severe. Stuart Nagel also looked at criminal cases but focused on appellate judges' rulings on defense claims (Nagel 1962a). His dependent (p. 291) variable was the percentage of criminal appeals in which a judge voted for the defense. Among other findings, he discovered that former prosecutors were significantly less likely to favor the criminally accused over the state while Catholics were more sympathetic than Protestants to the accused.

Cook was not the only scholar who sought to explain court decisions on hotly contested issues of the period. Recognizing the courtroom as a key battlefield of the civil rights movement, Kenneth Vines asked what factors made judges more likely to support the civil rights claims of African Americans. He examined 250 race segregation and discrimination cases decided in federal trial courts in twenty-eight Southern judicial districts from 1954 to 1962 (Vines 1964). Vines categorized each judge based on the relative frequency with which the judge ruled in favor of an African American party. Having ordered the judges from most to least likely to support civil rights claims, Vines observed commonalities within each category and differences between categories. He found that judges who attended law school and/or practiced in the South were more likely to oppose civil rights claims than those who did not. While the results were not statistically significant because of the limited number of southern trial judges who had left the south for training or work, the distribution was sufficiently stark to prompt Vines to observe that southern judges' votes could be seen as a product, in part, of the fact that their "legal development … has taken place within the framework of the Southern political system and very largely within the state containing the district of their appointment" (Vines 1964: 352).

Michael W. Giles and Thomas G. Walker looked at the most momentous set of civil rights rulings of the twentieth century: racial desegregation of public schools (Giles and Walker 1975). Examining 151 school districts under active court supervision, the authors hypothesized that the data would indicate higher rates of ongoing segregation in the schools actively monitored by the judges with southern backgrounds. While the data mostly failed to support the authors' predictions, the study did show that *where* a judge was educated mattered. Consistent with Vines's earlier work on all civil rights cases, Giles and Walker discovered that the average level of segregation allowed by judges who attended Southern universities for both college and law school was significantly higher than the level allowed by those judges that were educated outside the South.

Where many scholars used the new behavioral lens to analyze highly politicized issues in courts (see, e.g., Ulmer 1973), others set out to examine a broader range of cases. These models often lost some explanatory value by using broader demographic categories. But the general models gained explanatory power and statistical strength by looking at more cases and judges. Sheldon Goldman, for example, focused on the U.S. Courts of Appeals, which he viewed as a troublingly understudied part of the federal judiciary. Goldman evaluated the relationship between an array of background variables and individual judges' votes in a subset of cases where a relationship could theoretically exist (Goldman 1969). In his initial study of non-unanimous cases and unanimous reversals from 1961–4 and, again later, in a second set drawn from 1965–71, Goldman found that for certain characteristics and certain sets of issues, social background appeared to explain appellate judge's votes (Goldman 1966, 1975). For example, he found that Catholics were more (p. 292) likely than non-Catholics to favor the underdog but discerned no difference between elite-educated and non-elite-educated judges or between judges with or without prior judicial or prosecutorial experience.

A person's race and gender obviously impacts her experiences and views of the world; thus, a judge's race and gender would seem likely to affect how a judge processes case stimuli to reach a result. Behavioralists tested this hypothesis by looking at the small but growing number of women and minorities serving as judges in the 1960s and 1970s. But, they were able to find little if any effect. Herbert Kritzer and Thomas Uhlman looked at criminal sentences imposed by male and female judges for violent crimes, predicting that female judges would impose relatively longer sentences on rapists than did their male colleagues (Kritzer and Uhlman 1977). But, they uncovered no difference between women and men. Uhlman in a separate study looked at criminal sentencing and race. He found no difference between white judges and black judges, but he did find that both groups imposed harsher sentences on black defendants than on white ones (Uhlman 1979).

While these studies only offer a glimpse into the development of behavioral legal scholarship, they are representative of the larger body of work developing during this period in several respects. First, these studies lent empirical support to the idea that judicial determinations by trial and appellate judges were influenced by a judge's attitudes and experiences. Second, and just as importantly, not every attribute or experience was found to influence judicial decisions. In fact, the relationships between observed attributes and judicial decisions were subtler than most behavioralists initially hypothesized. Finally, when a relationship was found, these studies showed that the relationship between the personal attribute or experience and the judge's ruling was stronger when the background factor was salient to a contested issue (Nagel 1962b, 1969; Tate 1981).

As Sidney Ulmer explained, however, a constraint awaited behavioralists who narrowed their inquiry too greatly in the hopes of highlighting points of greatest saliency (Ulmer 1986). He specifically challenged behavioral works that were defined entirely by the time period under study. While such studies offered insights into time sensitive relationships between social background factors and judicial decisions, they did little for the theoretical development of social background theory and were more akin to descriptive pieces on

"particular courts at particular points in time" (Ulmer 1986: 958). For example, Vines's exploration of the influence of personal attributes and experiences on the decision-making of Southern district court judges seems defined by the times. Just as racial attitudes changed across the country, so did the attitudes prevailing in colleges and law schools. The composition of Southern law schools' faculties and student bodies changed too. While nearly all law professors in the 1950s and 1960s were from the region where their law school was located, they were increasingly educated at elite law schools by the 1970s and certainly by the 1980s. Southern students too were more aware of and engaged with the national debate over civil rights as a result of the dramatic expansion in television and telecommunications. Vines's attribution of anti-civil rights decisions to "unsophisticated" southerners would be unpersuasive as a theoretical account today.

(p. 293) In highlighting the limitations of discrete individualized studies, scholars like Ulmer anticipated a shift in the explication and application of social background theory. This next wave of scholarship deliberately builds upon earlier behavioral advances. Behavioral jurisprudence allowed scholars to study judicial decision-making scientifically. That is, they could propose a falsifiable hypothesis and test it against the evidence, typically judges' rulings. Knowledge would be built systematically based on proof rather than intuition. The next generation of scholarship sought to build on this important foundation through the construction of a much more complex theory of judicial behavior which took into account ideas developing in economics and political science under a broad label of organizational or institutional theory.

Institutional Economics: 1970s–1990s

Behavioral jurisprudence greatly expanded our understanding of how an individual judge's rulings may be a direct product of the judge's background and attributes. But its focus on the individual judge was both a strength and a weakness. The focus on judges rather than courts was a strength because it revealed the role of the personal in the judicial process. But it was a weakness because judges, of course, make their decisions in a rich and varied context that includes other actors, the institutional setting, and judges' personal goals. This broader context may affect how a judge's social background translates to judicial actions. Stated differently, judicial behavior is the product of the interaction between the judge's characteristics and the setting in which she is working. The next wave of social background research drew on institutional economics to construct a more fully developed theory of how individual judges make decisions in a complex setting.

An institutional economic account of judicial behavior is grounded upon two distinct observations. First, that the nature of the judicial process may alter how background and attributes influence a judge, producing an indirect or otherwise subtle, yet significant, effect. Second, that a judge's personal characteristics may affect a range of actions beyond votes in cases. These two important insights prompt the following questions: How does the setting in which decisions are made affect the influence of background and attributes upon judicial actions? Does social background theory predict different effects for differ-

ent types of decisions such that some attributes only impact certain categories of actions? We consider in turn how judicial process scholars answered each question.

Judicial decisions are subject to three major constraining forces: superiors, colleagues, and law. We begin by considering the effect of superiors. American judges operate in a hierarchy where superior courts can reverse lower courts. Trial judges can be reversed by appellate judges, intermediate appellate judges by supreme court judges. Judges are aware of the risk of reversal. Sincere (or naïve) judges will simply vote their preferences without regard to the possibility of reversal, but strategic judges will take the risk into account when making decisions.

(p. 294) Behavioralists assumed that judges were sincere, and therefore they expected that any hypothetical relationship between a judge's personal characteristics and a case stimulus would be direct and readily observable in the judge's response. Many behavioralists, for example, studied criminal sentences to see whether specific judicial characteristics such as race, prior prosecutorial experience, and gender impacted the sentences judges imposed, but most studies failed to find any relationship. Institutional theorists looked not only at direct effects—do female judges impose harsher sentences than male judges on rapists or do African American judges impose lighter sentences than white judges on African American defendants––but also looked for indirect effects that may be the product of strategic judging.

For example, the federal sentencing guidelines provide a sentence range for each offense of conviction. In a given case, a lenient trial judge may initially be inclined to grant a defendant's request for a downward departure to produce a penalty that the judge believes is merited. Although such departures are allowed under the law, it may be the case that the reviewing appellate court is controlled by conservative judges who routinely reverse downward departures. Thus, the strategic judge will choose another method, one aimed at producing a sentence which is close to the downward-departed sentence, while remaining near enough to the guideline range so as to avoid reversal. The judge may do this, for example, by dismissing a more serious charge (or ruling inadmissible evidence to support it), leaving a lesser count. Even though the lesser count carries a harsher guidelines penalty than the initial downward-departed sentence she was inclined to impose on the serious charge, the judge recognizes that this outcome is a better result than the guidelines' sentence for the more serious charge, which would potentially be handed down should she be reversed. Ultimately, if a study only looked at the judge's sentence, it would not appear lenient because it is the standard sentence for the crime of conviction. But, if alternative methods of achieving a lighter sentence were taken into account, then the study would reveal that the attribute does have the hypothesized effect (see, e.g., Schanzenbach and Tiller 2007).

Collegiality, like hierarchy, is a hallmark of the American judicial system. Appellate judges work on panels. Thus, a judge's vote is a product not only of her background but also the influences of her peers and the necessity of reaching a collective decision. This fact has numerous implications for social background theory in terms of both constructing an ex-

planation for why there would be an effect and measuring the hypothesized effect. For example, the impact of one's background may be mitigated by a need to compromise such that a judge's personal characteristics may be less significant when the judge faces the choice of accommodating the majority in order to remain part of it (and thereby have some impact on the ruling) or instead dissenting (Maltzman, Spriggs, and Wahlbeck 2000). Alternatively, the impact of background may not be visible if measured by comparing judges. In a collegial court, a judge's salient personal attribute may affect the votes of colleagues who lack that attribute, such that male judges on a panel with a female judge may be more sensitive to women's claims when facing sex-salient questions (Boyd, Epstein, and Martin 2010).

(p. 295) The most fundamental constraint on judicial behavior is the law itself (George and Epstein 1992; Ashenfelter, Eisenberg, and Schwab 1995: 281). Strategic theorists hypothesize that when the law grants discretion to the judge—either explicitly through the relevant standard or implicitly through the lack of precedent—the judge has greater freedom to act and thus is more likely to be affected by personal attributes. While behavioralists often used broad measures of outcomes that were unresponsive to nuances in legal doctrine or to the way in which a legal question was presented to the court, institutional scholars refined how judicial actions were measured to recognize that the law itself frames the questions presented to the court and thus the impact of professional and personal backgrounds on judges' actions. Goldman's research on the courts of appeals, for example, categorized labor law rulings as either pro-union or anti-union. He failed to find a strong relationship between social background and labor law rulings (Goldman 1966). James Brudney, Sara Schiavoni, and Deborah Merritt, writing more than thirty years later, refined the outcome measure by dividing labor law cases based on the specific statutory provision under consideration on the theory that the influence of a background variable depends upon the nature and stance of the union's position (Brudney, Schiavoni, and Merritt 1999). By doing so, they revealed that certain characteristics—like religion and college selectivity (which was viewed as a proxy for socio-economic status)—were strongly associated with pro-union votes on certain claims but not others. Thus, the refinement revealed that the hypothesized relationship did exist when specific questions were presented to the court. Likewise, Andrew Morriss, Michael Heise, and Gregory Sisk found that race did not explain whether federal trial judges ruled that the Sentencing Guidelines were unconstitutional but did explain the reason given to support the ruling with black judges more likely to rely on due process principles and white judges more likely to cite separation of powers (Morriss, Heise, and Sisk 2005; Sisk, Heise, and Morriss 1998).

New Institutionalists recognized that judges make many decisions beyond the ultimate ruling in a case and began examining the full range of actions taken by judges. For example, judges have discretion about writing and publishing opinions to explain their rulings. Appellate judges choose whether to join an opinion written by a co-panelist or instead to write a separate opinion. Judges who had jobs or education which involved substantial individual writing would seem more likely to opt to write separately as would judges who routinely operated independently rather than on a team. Virginia Hettinger, Stefanie Lindquist, and Wendy Martinek found that federal courts of appeals judges with prior ap-

pellate court experience were more likely than other judges to write a concurrence rather than join the majority, but that federal appellate judges with prior trial experience did not appear less likely than other judges to go along with a colleague's majority (Hettinger, Lindquist, and Martinek 2006). One of the authors of the current chapter found that academics who have significant writing experience and are unaccustomed to accommodating other's views were likely to continue to issue solo-authored written work—now judicial opinions—when they became appellate judges (George 2001). Similarly, Merritt and Brudney found that courts of appeals judges who went to elite law schools were more likely than non-elite graduates to publish their own opinions (p. 296) (Merritt and Brudney 2001). Christina Boyd, however, failed to find that elite education or law professor experience produce a higher publication rate for federal *trial* judges who can resolve disputes without issuing written opinions (Boyd 2015).

Judges also take significant actions outside a specific dispute. The most fundamental decision is whether to continue to serve as a judge. Albert Yoon has conducted extensive studies of federal judicial tenure. He found that women and black judges served much shorter terms than their male and non-black colleagues on both district and appellate courts (Yoon 2003). (While gender and race affected how long a judge served, the judge's prior wealth appeared to have little effect across the sample.) But, women and black judges who served as chief judge were much more likely than male and white judges to complete their leadership term (George and Yoon 2008). Thus, Yoon has found that race and gender effects that have been observed in the labor market generally also are manifest in the judicial labor market.

Institutional theory brought greater richness to the theoretical account of how social background and personal attributes impact judge's behavior. The examples outlined here highlight the variety of research questions and hypotheses which courts scholars have examined. By 2000, the institutional account was a well-accepted understanding of how social background variables could influence the work of judges and courts. Around the same time, the capacity and speed of computers and the availability of new computational methods grew dramatically, bringing tremendous changes to the way scholars study courts.

Sophisticated Methods and New Technologies: 1990s to present

The sophistication and complexity of the federal judicial appointment process has increased with the growing power and prestige of the federal bench and the expanding diversification of potential nominees. Likewise, tools and methods for studying federal judges have become more complex and sophisticated with expanded computer power, evolving statistical models, and growth in multi-user databases. Scholars have been able to test for the effects of social background factors in ever more refined and creative ways by leveraging these new tools. The development of social background *theory* often took a backseat to methods and data during the most recent stage of development.

Multi-user databases are data sets which are designed to facilitate and encourage analysts other than just the creators to use them. When behavioralists or institutionalists sought to test the research questions which they posed, they typically would collect data by identifying and coding cases and also assembling relevant details in judicial biographies. They only recorded the information which they needed for the research project on which they were working. This research-question-centered approach to the construction of data sets is not efficient: the marginal cost of collecting all usable information from each case and biography is lower than the marginal benefit to the scholarly community interested in the same cases or judges but asking different questions. (p. 297) As Lee Epstein has observed, "we ought to amass large databases so rich in content that multiple users, even those with distinct projects, can draw on them" (Epstein 2000: 225). The problem, of course, is that the marginal costs of creating the data set would be borne by the original researcher and the marginal benefits would accrue to everyone.

Harold Spaeth saw the solution to this collective action problem in the creation of a multi-user database on the U.S. Supreme Court which would be funded by the National Science Foundation (Spaeth and Segal 2000). The data set first became available in the late 1980s, and has been expanded and improved over time. The widespread use of the U.S. Supreme Court Data Base as well as the creation of other databases picked up speed in the 1990s and 2000s. The internet's growth has had a profound impact on the role of multi-user databases in judicial research. Scholars can easily share, locate, and download databases. Digital dockets and archives accessible through web portals have decreased the costs of accessing information to include in data sets. Multi-user databases have played an important role in the development of social background theory. For example, prior research found little relationship between the race of a judge and her decisions. Adam Cox and Thomas Miles, however, uncovered a sizable effect in voting rights cases—where minority judges were more than twice as likely to side with minority plaintiffs—by using Ellen Katz's voting rights database which included the universe of such disputes (Cox and Miles 2008).

The dramatic expansion in computer memory capacity and processor speed has inspired scholars to develop models and methods which capitalize on these technological improvements. One such example is textual statistical analysis. Appellate judges offer written explanations for their decisions. Scholars in the past who wanted to examine opinions for patterns which could reveal something about the judge's thinking and possibly be attributed to personal characteristics of the judge would have to read and hand code each opinion. This time-consuming process necessarily limited the number of cases which could be included in any study. Today, software makes it possible to consistently gather information across large numbers of opinions. The text analysis program scans the opinion's text for common patterns, allowing the researcher to find salient factors much more quickly, efficiently, and reliably than collecting information by hand (Williams and George 2014: 441–2). This and other automated coding techniques can be used to capture basic variables of interest from large caches of information (Sen 2015). Maya Sen exploited this method to collect judicial reversal data from Westlaw for over one thousand judges, finding that black district judges were more likely than white judges to be reversed by courts

of appeals judges (who sit in panels which are almost always majority-white) even controlling for non-race-based reasons for reversal.

An exciting and impressive array of new methodologies and data sources have been developed since 1990. Network analysis, which visualizes and analyzes connections between judges through their actions, has revealed, among other things, peer effects within the courts which could serve as the basis for testing whether pre-judicial experiences dictate a judge's influence on others (Katz and Stafford 2010). Markov chain Monte Carlo (MCMC) methods allow scholars to run repeated simulations on data to better (p. 298) measure judicial preferences (Martin and Quinn 2002). Social background variables are regularly included in scholarship utilizing these innovative approaches.

The Strengths and Weaknesses of the Theory

It is difficult to imagine a world in which legal scholars neglected to study the notion that judges, like all other men and women, are influenced by their attributes and previous experiences. But while its most basic premise is intuitive, social background theory rests on years of preceding developments in legal, sociological, and psychological scholarship. In fact, it is social background theory's history of intentional scholarly integration that presents it with unique opportunities going forward.

Contemporary social background scholarship, however, routinely suffers from two significant weaknesses. First, while the empirical methods have become more sophisticated and the data sets richer, the theoretical models have become thinner. Theory feels post hoc (and even ad hoc) and less coherent. Arguments are elliptical, failing to explicate important steps in the logical reasoning to get from what we know about people and courts separately to a persuasive hypothesized relationship between them. Facts without theory do not add to our understanding of law or legal systems (see, e.g., Gibson 1983). Second, the sophisticated statistical models often overemphasize measurable and sortable attributes at the expense of other ineffable ones that might be more useful or relevant. Both of these weaknesses reflect a greater, but tractable, problem: Judicial process scholars regularly fail to offer a narrative to support their hypotheses. Herman Pritchett, Glendon Schubert, and Beverly Blair Cook were storytellers: Each told a story about how and why judges' decisions were influenced by their earlier experiences, political allegiances, and colleagues on the bench. That story provided the link between the evidence offered, how it proved a fact, and how that fact was material to the research question.

Theories of Relevance

The first principle of evidence law, which governs the admission of evidence at trial, is relevancy. Evidence must be relevant in order to be admissible. Relevance is necessary, but not sufficient. The question of whether evidence is relevant serves as the preliminary and often decisive inquiry in litigation.

The fundamental relevancy principle applies with equal force to evidence offered in academic research. That is, scholarly evidence should be relevant in order to be (p. 299) admissible to the world of ideas and the body of scholarship. Academic publication of irrelevant evidence wastes time and other scarce resources. And, it may undermine the development of valid theories by misleading or distracting other scholars. The rigorous enforcement of a relevancy requirement would strengthen and improve social background scholarship.

The test of relevance in academic scholarship is in essence the same as the test of relevance in law. “Evidence is relevant if it has any tendency to make more or less probable the existence of a fact that is of consequence in determining the action” (Federal Rule of Evidence 401). Relevance therefore requires both probativeness (“any tendency to make more or less probable the existence of a fact”) and materiality (“a fact that is of consequence in determining the action”). Evidence is relevant if (1) it proves a fact and (2) that fact is material to the legal action. In law, the two requirements are known as “logical” relevance and “legal” relevance, respectively. In scholarship, they could be described as logical relevance and scholarly relevance.

The power of a simple relevancy test can be seen through its application to Christina Boyd, Lee Epstein, and Andrew Martin’s influential 2010 study, “Untangling the Causal Effects of Sex on Judging.” Their article uses sophisticated methods to test a question which has animated social background research since at least the 1970s: Are women judges different from men? They sought to test whether female judges decided sex discrimination cases differently from male judges (“individual effects”) and whether male judges behaved differently in such cases when a co-panelist was female (“panel effects”). If we apply the relevancy requirement, we see two theories of relevance undergird their study. A judge’s sex (evidence) makes it more (or less) likely than it would be without the evidence that the judge has experienced sex discrimination (fact) which means that the judge will be more (or less) receptive to sex discrimination claims (research question). If the judge is a woman, she is more likely to have experienced sex discrimination and will be more receptive to such claims. If a judge is male, he is less likely to have experienced sex discrimination and will be less receptive to such claims. The authors also hypothesize that a female judge sitting on a panel with a male judge (evidence) makes it more likely than it would be if the panel were all male that the male judge will hear arguments from another judge in support of a sex discrimination claim (fact) which makes it more likely the male judge will vote in favor of the plaintiff (research question). Focusing on their theory of relevancy allows us to test its persuasiveness and coherency. Are we persuaded that experiencing sex discrimination affects a person’s receptivity to such claims? That a person who has likely experienced sex discrimination is more likely than someone who has not to make an argument to her colleagues during conference in support of a claim? That a judge is more persuaded by arguments made by a colleague than made by parties? More importantly, because their hypotheses are supported by a compelling theory of relevancy, their results succeed in demonstrating that the sex of a judge matters in sex dis-

crimination cases. And, it serves as a model for how scholars should begin their social background research.

(p. 300) Conclusion

When he was nominated to the Court, Justice Harry Blackmun's mother warned him that his appointment would change his relationship with his best friend, Chief Justice Warren Burger. Blackmun recalled responding " 'Mother, it just can't. We've been friends for a long time.' 'Well, you wait and see,' his mother replied" (Greenhouse 2005: 51). During his confirmation hearing, Justice Blackmun testified that he and Burger expected that at times they would disagree (Greenhouse 2005: 51). But, Blackmun did not expect the conflict that would grow between them. They not only took different substantive positions, they also carried out their work in markedly different ways.

Social background theory helps us to understand why the two justices could share so many experiences and attributes yet behave so differently on the Court. Chief Justice Burger lacked the elite credentials of his colleagues on the DC Circuit and the Supreme Court, but he brought the ideological perspective and strategic outlook of a party activist, which were only strengthened by his bruising experience on the DC Circuit. Justice Blackmun had the Harvard degrees, circuit clerkship, and elite practice background, but no prior political experience. His erudite approach was only strengthened by his service on the collegial Eighth Circuit. Court observers at the time knew about these differences, but were inattentive to them. Today, however, their effects seem almost as inevitable to us as they did to Theo Blackmun on the eve of her son's appointment.

References

Ashenfelter, O., Eisenberg, T., and Schwab, S. 1995. "Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes." *Journal of Legal Studies* 24(2): 257–81.

Boyd, C. L. 2015. "Opinion Writing in the Federal District Courts." *Justice System Journal* 36(3): 254–73.

Boyd, C. L., Epstein, L., and Martin, A. D. 2010. "Untangling the Causal Effects of Sex on Judging." *American Journal of Political Science* 54(2): 389–411.

Brudney, J. J., Schiavoni, S., and Merritt, D. J. 1999. "Judicial Hostility toward Labor Unions? Applying the Social Background Model to a Celebrated Concern." *Ohio State Law Journal* 60(5): 1675–771.

Cook, B. B. 1973. "Sentencing Behavior of Federal Judges: Draft Cases—1972." *University of Cincinnati Law Review* 42: 597–633.

(p. 301) Cox, A. B., and Miles, T. J. 2008. "Judging the Voting Rights Act." *Columbia Law Review* 108(1): 1–54.

Epstein, L. 2000. “Social Science, the Courts, and the Law.” *Judicature* 83(5): 224–27.

Federal Rules of Evidence, 28 U.S.C. Appendix (as amended 2014).

Frank, J. 1930. *Law and the Modern Mind*. Gloucester, MA: Peter Smith.

Gaudet, F. J., Harris, G. S., and St. John, C. W. 1933. “Individual Differences in the Sentencing Tendencies of Judges.” 23: 811–18.

George, T. E. 2001. “Court Fixing.” *Arizona Law Review* 43(1): 9–62.

George, T. E., and Epstein, L. 1992. “On the Nature of Supreme Court Decision Making.” *American Political Science Review* 86(2): 323–37.

George, T. E., and Yoon, A. H. 2008. “Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging.” *Vanderbilt Law Review* 61(1): 1–61.

Gibson, J. L. 1983. “From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior.” *Political Behavior* 5(1): 4–49.

Giles, M. W., and Walker, T. G. 1975. “Judicial Policy-Making and Southern School Segregation.” *The Journal of Politics* 37(4): 917–36.

Goldman, S. 1966. “Voting Behavior on the United States Courts of Appeals, 1961–1964.” *American Political Science Review* 60(2): 374–83.

Goldman, S. 1969. “Backgrounds, Attitudes, and the Voting Behavior of Judges: A Comment on Joel Grossman’s Social Backgrounds and Judicial Decisions.” *Southern Political Science Association* 31: 214–22.

Goldman, S. 1975. “Voting Behavior on the United States Courts of Appeals: Revisited.” *American Political Science Review* 69: 491–506.

Gordon, R. W. 2004. “Professors and Policy-Makers: Yale Law School Faculty in the New Deal—and after.” In *History of Yale Law School: The Tercentennial Lectures*, edited by A. T. Kronman. New Haven, CT: Yale University Press.

Greenhouse, L. 2005. *Becoming Justice Blackmun: Harry Blackmun’s Supreme Court Journey*. New York: Times Books (Henry Holt and Company).

Haines, C. G. 1922. “General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges.” *Illinois Law Review* 17: 96–116.

Hamilton, W. H. 1933. “Judicial Process.” In *Encyclopaedia of the Social Sciences*, Vol. 8, edited by E. R. A. Seligman and A. Johnson. New York, NY: Macmillan, 450–7.

Hettinger, V. A., Lindquist, S. A., and Martinek, W. L. 2006. *Judging on a Collegial Court: Influences on Federal Appellate Decision Making*. Charlottesville, VA: University of Virginia Press.

Kalman, L. 1986. *Legal Realism at Yale, 1927–1960.* Chapel Hill, NC: University of North Carolina Press.

Katz, D. M., and Stafford, D. K. 2010. "Hustle and Flow: A Social Network Analysis of the American Federal Judiciary." *Ohio State Law Journal* 71(3): 457–509.

Kritzer, H. M., and Uhlman, T. M. 1977. "Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition." *The Social Science Journal* 14(2): 77–88.

Llewellyn, K. N. 1930. "A Realistic Jurisprudence: The Next Step." *Columbia Law Review* 30: 431–65.

Maltzman, F., Spriggs, J. F., II, and Wahlbeck, P. J. 2000. *Crafting Law on the Supreme Court: The Collegial Game*. New York, NY: Cambridge University Press.

Martin, A. D., and Quinn, K. M. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999." *Political Analysis* 10(2): 134–53.

(p. 302) Merritt, D. J., and Brudney, J. J. 2001. "Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals?" *Vanderbilt Law Review* 54(1): 71–121.

Morriss, A. P., Heise, M., and Sisk, G. C. 2005. "Signaling and Precedent in Federal District Court Opinions." *Supreme Court Economic Review* 13: 63–97.

Nagel, S. S. 1962a. "Judicial Backgrounds and Criminal Cases." *The Journal of Criminal Law, Criminology, and Police Science* 53: 333–9.

Nagel, S. S. 1962b. "Testing Relations between Judicial Characteristics and Judicial Decision-Making." *The Western Political Quarterly* 15: 425–37.

Nagel, S. S. 1969. *The Legal Process from a Behavioral Perspective*. Homewood, IL: Dorsey Press.

Pritchett, H. C. 1941. "Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939–1941." *American Political Science Review* 35: 890–8.

Pritchett, H. C. 1948. *The Roosevelt Court: A Study in Judicial Politics and Values, 1937–1947*. New York, NY: Macmillan.

Schanzenbach, M. M., and Tiller, E. H. 2007. "Strategic Judging under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence." *Journal of Law, Economics & Organization* 23: 23–56.

Schlegel, J. H. 1995. *American Legal Realism and Empirical Social Science.* Chapel Hill, NC: University of North Carolina Press.

Schubert, G. 1963. "Behavioral Research in Public Law." *American Political Science Review* 57: 433–45.

Schubert, G. 1965. *The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices, 1946–1963*. Evanston, IL: Northwestern University Press.

Schubert, G. 1968. “Behavioral Jurisprudence.” *Law & Society Review* 2: 407–28.

Sen, M. 2015. “Is Justice Really Blind? Race and Reversal in US Courts.” *Journal of Legal Studies* 44: S187–S228.

Sisk, G. C., Heise, M., and Morriss, A. P. 1998. “Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning.” *NYU Law Review* 73: 1377–498.

Spaeth, H. J., and Segal, J. A. 2000. “The U.S. Supreme Court Judicial Data Base: Providing New Insights into the Court.” *Judicature* 83(5): 228–35.

Tate, C. N. 1981. “Personal Attribute Models of Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978.” *American Political Science Review* 75: 355–67.

Uhlman, T. 1979. *Racial Justice: Black Judges and Defendants in an Urban Trial Court*. Lexington, MA: Lexington Books.

Ulmer, S. S. 1973. “Social Background as an Indicator of the Votes of Supreme Court Justices in Criminal Cases: 1947–1956 Terms.” *American Journal of Political Science* 17: 622–30.

Ulmer, S. S. 1986. “Are Social Background Models Time-Bound?” *The American Political Science Review* 80: 957–68.

Vines, K. N. 1964. “Federal District Judges and Race Relations Cases in the South.” *The Journal of Politics* 26(2): 337–57.

Williams, M. S., and George, T. E. 2013. “Who Will Manage Complex Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation.” *Journal of Empirical Legal Studies* 10(3): 424–61.

Yoon, A. H. 2003. “Love’s Labor’s Lost? Judicial Tenure among Federal Court Judges: 1945–2000.” *California Law Review* 91(4): 1029–60.

Notes:

(1.) Nixon’s first appointment to the Court was Burger, who was confirmed as Chief Justice on June 9, 1969. Two months later, Nixon had an opportunity to name an Associate Justice, but his first two attempts—Fourth Circuit Judge Clement Haynsworth Jr. and Fifth Circuit Judge G. Harrold Carswell—were each rejected by the Senate.

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