Law in Judicial Decision-Making

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Abstract and Keywords

Years of effort by many talented and creative scholars to gauge the influence of law on judicial decision-making have produced payoffs, but the payoffs do not seem commensurate with the work that has gone into producing them. After reviewing some of the most important approaches and findings, this chapter identifies key obstacles to progress and suggests a new strategy for making more headway against them. The strategy begins by recognizing that ultimately the questions driving empirical and theoretical inquiry into law's influence are often less about law itself than about the propriety of judicial decision-making. The chapter concludes with suggestions for empirical questions to complement more familiar ones about the role of law in judges' decisions.

Keywords: judicial decision-making, law, influence, evaluating judges, legal theory

DOES the law play a role in judges' decisions? Quite often, yes. The amount of intellectual effort that has gone into generating that answer to that question would likely stun and dismay most outsiders. After all, law is what judges do, isn't it? Would intelligent people spend thousands of hours trying to determine whether religion plays a role in clerics' actions or whether senators are influenced by politics? Perhaps not, but it would be a mistake to think that the scholars responsible for that tremendous effort undertook it mindlessly. Their actions can be explained by two important facts. First, the stakes involved in the question of law's influence are high. Second, the role of law turns out to be not nearly as straightforward nor as easily demonstrated as one might first think.

That said, it is hard to deny that there is something fundamentally unsatisfying about the state of our understanding, and there seems to be a widespread feeling in the law and courts community that we have reached a point of rapidly diminishing returns in our study of this issue. In the remainder of this chapter, I will review how we reached this point, consider reasons for dissatisfaction with the current state of things, and offer suggestions for moving forward.

Before proceeding, it is important to note that most examples in the chapter will reflect the fact that empirical research on the law's influence has focused overwhelmingly on U.S. courts. I do not mean to imply that the question is any less important in other countries or in the context of international law, and most of the ideas in the chapter should readily transfer to other settings.

Context and Motivations

Virtually all knowledgeable observers today would agree that judging is not simply a matter of applying readily ascertained legal rules to individual cases; in many cases (p. 237) judges must exercise independent judgment that is inevitably shaped by their personalities, experiences, and worldviews. In fact, this basic truth has been recognized by thoughtful lawyers and judges for many years (Tamanaha 2010). But widespread recognition of the truth does not entirely prevent lawyers and, especially, judges from pretending otherwise when it suits them.

The pretense that judicial decision-making can be accomplished purely through value-free analysis of legal materials often appears in judicial confirmation battles, where presidents and senators purport to care only about nominees' character and "judicial philosophy," not their ideology. Worse yet, the nominees typically join the charade. The most notorious recent example is John Roberts' opening-statement analogy: "Judges are like umpires. Umpires don't make the rules; they apply them."[1] Another example, Elena Kagan's statement that, "My politics would be, must be, have to be, completely separate from my judgment," (Burek 2010) and her reluctance to share her policy views with the Judiciary Committee, seemed especially egregious in light of her criticisms of Ruth Bader Ginsburg and Stephen Breyer for the same kind of behavior (Kagan 1995).

While most visible in confirmation hearings, self-serving statements about the degree to which judges are constrained by law abound in judicial opinions as well. This is very troubling, not only because it is unseemly for people entrusted with enormous responsibility to deceive those who entrust them with it, but because it allows judges to dodge responsibility for the policy decisions they make ("The law made me do it!").

The ascendance of the "attitudinal model" of judicial decision-making (and its cousin the "strategic model") among researchers in the second half of the twentieth century can be understood as a reaction against this kind of judicial prevarication. Researchers, many of them political scientists, seemed to feel that the best antidote to judicial attempts to fool the public was a mountain of rigorous evidence demonstrating that ideology plays a crucial role—or, to use the terms more commonly employed in legal circles, that politics trumps law—in judges' decisions, not only at the U.S. Supreme Court (e.g., Segal and Spaeth 1993, 2002), but in other courts in the United States and around the world.

The effort that has gone into locating evidence that law matters to judges' decisions must be understood in the context of this mountain of evidence pointing in the other direction. Many scholars, even some with considerable sympathy for the attitudinalists' project and

methods (e.g., Baum 1997; Posner 2008) have been concerned that the corrective has gone too far—that a picture of judging in which decisions are driven by little more than personal moral and policy views and in which the most important variable in determining a case outcome is the identity of the judge(s) deciding it, is distorted and misleading.

There are a number of reasons to think this even in light of all the evidence of ideology's effects. For one thing, the picture is a bad match for what lawyers and judges, even at their most self-aware and sincere, seem to think they are doing (Dworkin 1986; Gillman 2001). It is one thing to believe that they are willing to delude others (or even themselves) on occasion, another to imagine that they inhabit a fantasy world. Furthermore, correspondence between judges' ideologies and votes is not conclusive proof that their (p. 238) decisions are driven by ideology. It is at least conceivable that liberal and conservative judges gravitate toward different approaches to the law independently of the specific policies they prefer and that honest application of these approaches tends to produce decisions in line with their policy preferences. Perhaps most importantly, even if personal attitudes dominate judges' decisions in some cases, law still could have a controlling influence in others.

Empirical Studies of Law's Influence

These objections to purely attitudinal accounts of judging have struck many scholars as compelling. However, believing that law is important to judges' decisions is not the same as showing it, and demonstrating the influence of law has turned out to be quite difficult. Consider the most direct possible test: identify the legally best answer to a question in a case and see whether judges choose that answer even when it is inconsistent with their personal preferences. The first problem this approach runs into is the very one that has fueled so many doubts about law's influence over the years—that in many cases, especially the most interesting ones, there is no obviously best answer. Even when it is reasonable to think one answer is clearly better than another, the researcher must find a valid, reliable method of identifying it, most likely involving multiple expert and unbiased coders. Although this approach has been employed with some success (e.g., Gilbert 2011), the difficulties involved have kept it from playing a major role in the debate over law's influence.

Other approaches being less direct, their inferences are more open to question, and the evidence frequently points in more than one direction. For instance, a few scholars have undertaken the intensive coding needed to determine whether judges' choices of interpretive methods, such as originalism, are at all independent of their policy leanings (Phelps and Gates 1990; Gates and Phelps 1996; Howard and Segal 2002; Benesh and Czarnezki 2009). The studies, which have focused primarily on the U.S. Supreme Court (Benesh and Czarnezki 2009 is the exception), have yielded very little evidence that choice of method drives case outcomes rather than the other way around.

On the other hand, studies of precedent have uncovered substantial evidence of law's influence, especially, though not solely, in studies of trial and intermediate appellate courts. This proviso requires some elaboration before the overview can continue. The most famous exposition of the attitudinal model, in Segal and Spaeth (1993, 2002), was always directed foremost at the U.S. Supreme Court. Several special features of that court combine to attenuate the impact of law and enhance the impact of ideology. The justices, like other federal judges but few state court judges, serve for life (impeachment being extremely unlikely) and so can consult their own preferences in making decisions without fear of losing their jobs. They, like many state Supreme Court judges but unlike lower court judges, can choose which cases to hear, eliminating most of the cases that present straightforward legal questions where most lawyers would agree on the answer. (p. 239) And they, like state supreme court justices in some, but not all, cases, cannot have their decisions reversed by a higher court. Thus, there is reason to think that ideology will play an especially large role, and law an especially small one, at the Supreme Court.

Empirical evidence accords with logical expectations. For instance, Pinello (1999) in a large meta-analysis, found that ideology is a better predictor of votes at the U.S. Supreme Court than at state courts or lower federal courts. Zorn and Bowie (2010) demonstrated that case selection is not entirely responsible for this effect by tracing cases that made their way all the way through the federal judicial system to the Supreme Court. Even in this subset of cases, ideology was a stronger predictor of votes at the Supreme Court level than at district or circuit courts. Although neither study directly assesses the impact of law, it seems reasonable to assume that law fills at least some of the space left by ideology's diminished influence.

More direct evidence of law's impact on lower court decisions comes from studies of how lower courts respond to precedents from higher courts. Studies have consistently shown lower court movement in response to changes in higher court doctrines (e.g., Gruhl 1980; Johnson 1987; Songer and Haire 1992; Benesh and Reddick 2002). Larger-scale studies have revealed that lower court decisions typically track ideological trends in higher courts fairly well (e.g., Songer, Segal, and Cameron 1994; Rowland and Carp 1996) and that positive treatment of precedents by the Supreme Court increases the probability of positive treatment by lower courts even controlling for lower court ideology (Hansford and Spriggs 2006; Westerland et al. 2010).

Returning to the Supreme Court, the best known study of precedent there points in the other direction. Spaeth and Segal (1999) asked how justices treated opinions from which they had dissented when those opinions appeared before them later as relevant precedents. Would they put aside their objections and respect *stare decisis* or reject the ruling they disagreed with even though it was now the law? While it was not unheard of for justices to accept the force of an opinion they disliked, and some justices did it quite often, they far more often refused to accede.

While the Spaeth and Segal study cast serious doubt on the influence of *stare decisis*, it nevertheless demonstrated that it exerts some force, even in those instances where it is

least likely to—that is, where a justice has directly considered and previously rejected a ruling. Studies coming at precedent from different angles have contributed additional evidence that precedent matters.

Hansford and Spriggs (2006), for example, found that the "vitality" of precedent, important to federal district and circuit judges, also counts with the justices themselves: they are more likely to accord positive treatment to precedents that have previously been treated positively by the Court. Bailey and Maltzman (2011), employing highly sophisticated measures of justices' ideologies and the ideological implications of the cases before them, tested whether justices were responsive to precedents in cases where those precedents were seriously contested. They found that the precedents exerted significant effects on the decisions of some, though not all, justices.

Other studies of precedent have begun by recognizing that precedent can operate subtly and indirectly, not so much directing judges to a particular answer as guiding them (p. 240) to think about problems in certain ways or to give more or less weight to certain considerations. Richards and Kritzer's (2002; Kritzer and Richards 2003) analyses of legal "regimes" centered on key cases that shifted doctrine in major areas of constitutional law. The authors found that the effects of various case factors on justices' votes changed in the ways suggested by those key cases, indicating that justices allowed precedent to shape the way they approached cases.

Even the subtle method of Richards and Kritzer requires a researcher to make judgments about the content of the law in order to determine whether judges are responding to it. Bartels (2009) largely avoided this difficulty in his study of First Amendment decision-making, though at the expense of requiring a greater inferential leap. He assessed the role of ideology in justices' decisions before and after a key decision establishing that "content-based" restrictions on speech, unlike "content-neutral" restrictions, should be subjected to strict scrutiny. Because strict scrutiny reduces judges' discretion, application of it should attenuate the influence of ideology. Bartels' finding that ideology did not predict voting as well in cases involving content-based restrictions suggests that justices take the law in this area seriously.

If willing to take an even less direct approach, one can look for evidence of law's effect in the influence of other actors on judges. For instance, consider the exceptional litigation success of the Solicitor General's office (Black and Owens 2012) and other highly experienced Supreme Court lawyers (McGuire 1993), success that cannot be explained entirely by the strategic (or lucky) choice of positions that the justices already favor. A highly plausible explanation of this success is that the justices take these lawyers' arguments more seriously than other lawyers', whether because greater experience and skill yields superior arguments or because they earn the justices respect and trust over time.

Recent studies in this spirit include Lindquist and Klein (2006) and Collins (2008). Lindquist and Klein, investigating legal issues that had divided lower courts, found that the Supreme Court was more likely to choose the position supported by a larger number of circuits and by more highly regarded circuit judges. Collins, analyzing all cases with

identifiable liberal and conservative positions, found that justices were more likely to vote in favor of the position supported by more amicus curiae briefs. These findings, like those on lawyer success rates, could conceivably be explained in attitudinal terms: the justices might find their arguments convincing on policy, rather than legal grounds. But this reading is implausible for precisely the reason policy attitudes play such an important role at the Supreme Court—because they are typically so strong and easily accessible in the cases the justices hear. Especially as all of these studies controlled for justices' ideology, among other things, it seems more reasonable to view the findings as evidence that the justices are moved by legal reasoning.[2]

A common theme running through recent studies of the Supreme Court is that the law is likely to have a greater influence in some cases than in others. This is especially apparent in studies comparing unanimous with non-unanimous decisions (Edelman, Klein, and Lindquist 2012; Epstein, Landes, and Posner 2012; Corley, Steigerwalt, and Ward 2013) and decisions following oral argument with summary decisions (Masood and Songer 2013). Orally argued cases that result in divided votes tend to get the most (p. 241) attention from scholars. These studies together suggest that we would see more of a balance of law and attitudes at the Supreme Court if we did not restrict our attention in this way. At the same time that they do not come close to showing that law's influence at the Supreme Court is constant or pervasive.

Obstacles to Further Progress

This modesty in claims is typical of scholarship on law's effects. I suspect that the authors of all the studies cited above would agree that there are many cases, especially but not solely at the Supreme Court, where the law plays little or no role in judges' decisions.

But perhaps this concedes too much. Perhaps we would find more evidence of the law's influence if we knew better where and how to look. Scholars who incline toward this view might point out that even the more subtle approaches described above take a stunted view of law. Take a judge who, despite her reservations about the purpose of a particular statute, works hard to make the ruling that best serves that purpose. Or what of the judge who, despite his discomfort with a particular governmental practice, sustains it in light of a long tradition of acceptance by the community? Both judges would have excellent claims to be deciding according to the law, but how would this show up in the kinds of studies I have been describing?

When we reflect on the sources of law—texts, norms, even ideas—it is easy to see how empirical studies of readily observable behavior, like votes, could fail to capture some effects of law. Our best chances to see the full extent of law's influence on judges is through intensive examinations of the reasons judges offer and the considerations they point to in their opinions and comparisons of these with reasons and considerations found in legal sources at the time (e.g., Gillman 1993; Cushman 1998; Kahn 1999). Unfortunately, even such studies have only a limited capacity to change the larger picture. For one thing, they are so labor-intensive that even the most ambitious can cast light on only a small area of

judicial decision-making. More importantly, they run into two fundamental problems that bedevil all empirical research on judges' behavior.

The first of these is immediately apparent to anyone who ventures into the territory of legal theory: there is no consensus or even-near consensus as to what law is. Everyone can agree that the typical statute, constitution, or administrative rule counts as law. But do all enactments that occur through accepted procedures deserve to be called "law"? What about those passed by morally repugnant regimes like Nazi Germany? Or what about statutes that are inconsistent with a constitution or administrative rules that are inconsistent with statutes? On the other side, what else besides enactments should count as law? Presumably past decisions by courts often should, but what about community norms, principles of fairness, moral rules? Scholars have struggled mightily to answer these questions. Consider just the immense body of scholarship inspired by Hart's *The Concept of Law* (1961), itself by no means the first major attempt to define law. As hard (p. 242) as it can be to say definitively what the law requires in a given case, the task becomes impossible if we cannot even agree on what constitutes law.

The second inescapable problem is behavioral equivalence—the fact that individual actions and even whole patterns of judicial behavior can often be explained equally well in either attitudinal or legal terms, however one defines law. Take, for example, Justice's Brennan's insistence that the death penalty was unconstitutional in any circumstances. Is that stance better explained by his aversion to the death penalty or by a sincere belief, independent of his views on capital punishment, that the Constitution is centrally concerned with protecting human dignity? Reasonable people will disagree not only about the answer but about how to reach an answer. Note that this problem cuts in both directions: sometimes what we take to be ideological consistency might really be driven by legal reasons, and sometimes ostensibly legal considerations mask the attitudinal considerations that are really driving the decision. But the important point for this essay is that behavioral equivalence limits our ability to draw confident inferences about the importance of law even where claims of its importance are highly plausible.

This overview of research progress and prospects is not entirely discouraging. Although attitudinalism's corrective to self-serving judicial claims once threatened to leave us with a permanently distorted picture of decision-making, concerted efforts to gauge law's importance have brought greater balance, persuading even some skeptics (e.g., Epstein and Knight 2013) that in building models of decision-making we should take seriously judges' claims to care about doing right by the law. Moreover, we have deepened our understanding of how the effects of law and attitudes vary across courts and across types of cases.

Nevertheless, frustration is common among scholars working in or interested in this area. One reason for dissatisfaction is that the conclusions I just described seem to differ little from what people's intuitions would have told them in the first place. Of course, intuitions are faulty, as social scientists often feel compelled to point out, and they are not entitled to much respect unless backed up by rigorous evidence. Furthermore, as noted earlier, these intuitions have been challenged at times from two directions, by practitioners

claiming that judges can routinely disregard personal values entirely in reaching decisions and by scholars claiming that they almost never can (or at least almost never do). Still, it is hard to maintain that the payoff in terms of knowledge is sufficient reward for the immense effort that has gone into acquiring it.

But I suspect that there is an even more important reason for dissatisfaction, a reason that also explains why the question of law's influence has attracted such attention—namely, that we have made little progress on the tremendously consequential normative question underlying the main empirical (and theoretical) questions. Consider debates in legal theory over the status of moral principles. Why are Ronald Dworkin (1978, 1986) and his supporters not content simply to say that deciding cases sometimes requires judges to rely on broad moral principles; why insist that reliance on certain moral principles—when properly done—should be understood as a form of legal reasoning, the principles themselves being sources of law? Why has so much ink been spilled attacking, defending, or refining these claims?

(p. 243) There are probably a number of reasons, but one of them undoubtedly is the same reason that judges so often are moved to insist that their decisions are driven by law: a belief that decisions based on the law are—and are seen as—more proper, more entitled to respect, more legitimate than decisions that are not.

For most people, whether or not they are academics and/or members of the legal community, law is special. Most believe that a command's status as law adds an additional moral reason to whatever other reasons one might have to obey it. If, as Fuller (1958) argued against Hart, Nazi statutes were not in fact laws, then the moral (though not the practical) calculus for citizens of Nazi regimes was much easier—they had no moral reasons to obey statutes or regulations that were even slightly unjust. But if those statutes or regulations did have a valid claim to the title of "law," then moral reasons for obeying the law in general would have to be weighed against the moral reasons for disobeying these specific laws.

Judges' professional obligations vis-à-vis their governments are not quite the same as their obligations as citizens. Still, law's status has obvious implications for their behavior. Thus, the Hart–Fuller debate about Nazi law repeatedly returns to the question of how a judge in a Nazi regime should act, and issues of judicial decision-making are frequently at or near the heart of writings in legal theory. More broadly, the role of "judge" is almost universally understood to entail some specific obligations with respect to law. Almost all of us would agree at least that judges are obligated to take law seriously and that judges who willfully disregard the law to reach decisions they prefer will often deserve our opprobrium.

Empirical scholars may shy away from addressing normative questions directly and may be committed to minimizing the influence their normative positions have on their analyses. But there is no reason to think that their personal criteria for evaluating judicial performance differ systematically from the criteria of other informed observers. Furthermore, it seems highly likely that what draws most empirical scholars to the study of judi-

cial decision-making in the first place is an intense interest in the quality and legitimacy of that decision-making. And so it is natural that they would think about how empirical evidence can be brought to bear in evaluating judicial decision-making and that in doing so they would focus on the role of law.

As we have seen, however, assessing the role of law is a maddeningly difficult enterprise. Here, then, is what I take to be the other major source of frustration at the state of our knowledge and the obstacles to further progress. If all we can say is that law is often important to judges' decisions, we are not in a position to make (or enable others to make) meaningful appraisals of their performance.

A New Direction

Closer inspection reveals some grounds for optimism. For it turns out that we have not always been careful to distinguish the motivating question—to what extent judges act (p. 244) appropriately in deciding cases—from the empirical question—to what extent judges base their decisions on law. This would not be a mistake if appropriateness depended entirely on adherence to the law. But despite vast efforts by many scholars to define law so that the set of "legal" grounds available for decision exactly coincides with the set of grounds on which judges can validly rest a decision, several decades of debate have not yielded anything approaching a consensus that they are right. Nor is it easy to imagine consensus emerging in the future, for the disagreement goes to the level of basic premises. One can agree that judges are obligated to respect the law when it speaks clearly, while denying—as it seems a great many scholars, lawyers, and judges do—that judges who bring in considerations from outside the law in hard cases are necessarily acting inappropriately.

Consider a judge in a difficult contract dispute who asks what fairness would seem to require, a judge who looks to considerations of justice in choosing a criminal sentence, or a judge deciding a novel intellectual property issue who asks which decision is likely to bring greater benefits to society in the long run. While anyone could imagine disagreeing with exactly how the judges worked through or weighted those considerations, only some people would rule the considerations strictly out of bounds. Many others would agree that there are at least some circumstances in which those judges could be seen as acting properly. Now, one could maintain that judges are acting properly in those circumstances precisely because the grounds relied on actually constitute law in those circumstances. But at least for purposes of evaluating judicial decisions, this seems unnecessary and confusing.[3]

In my view, renewed progress is most likely to come if scholars begin by recognizing a) that the fundamental normative concern motivating many empirical studies is whether judges are relying on appropriate considerations in making their decisions, and b) that the set of appropriate considerations is not exhausted by what are commonly understood as legal considerations. This approach would not entail putting the question of law's influence entirely to one side; it would simply treat that question as one among several. Nor

would it necessarily bring rapid advances in our understanding; interesting questions about judicial behavior just aren't easy to answer. But it holds considerably more promise of real gains than a continued focus on law does. How might this approach proceed?

Among theorists who agree with Dworkin and like-minded scholars that judicial decision-making cannot be confined to sources that are uncontroversially legal in nature but balk at their attempts to stretch the definition of law to include considerations of moral or political theory, two responses are most common. One, associated with Hart and his followers, is to distinguish sharply between cases where ordinary legal materials provide significant guidance and cases where they do not, with judges having broad discretion to act as they see fit in the latter. The disadvantage of this approach for our purposes is obvious: it provides little help in evaluating judges' decisions in difficult cases. The other response is to go Dworkin one better and deny that there is such a thing as distinctively "legal" reasoning (e.g., Alexander and Sherwin 2008). This approach does not deny that traditional legal materials do and should often play an important role in (p. 245) judge's decisions, but it does not assign them any special status. Legal decision-making is simply a form of practical reason, employing the same techniques and materials that one finds in other forms of practical reason.

It would be a mistake to think that proponents of this view must throw up their hands and treat all judicial decisions as equally sound. In fact, they often take great pains to point out that some reasons and some lines of argument will be much stronger than others even under this approach (e.g., Posner 2003, 2013). Nevertheless, I think the approach ultimately does risk sacrificing something important. To see why, consider Posner's criticism of Justice Scalia's decisions in *McDonald v. City of Chicago*[4] and *Arizona v. United States*[5] (Posner 2013: 217–19).

Both cases involved the subordination of states to the federal government. In *Arizona*, Scalia argued against the preemption of state laws directed at illegal immigrants, supporting his position with, in Posner's characterization, a "passionate paean to states' rights" (p. 219). Yet in *McDonald*, Scalia joined the majority in extending the reach of the Second Amendment to state laws, seriously restricting their power to regulate handguns. Posner concludes the discussion this way: "I don't understand how Scalia's votes in these two cases can be reconciled on any grounds other than his personal values—a liking for guns … and an intense dislike of illegal immigrants" (p. 219).

This last line does not read as mere disagreement with Scalia's reasoning; one gets the impression that Posner is taking Scalia to task for failing to perform his job properly. Even if Posner did not intend this, readers who accept his interpretation are likely to feel that way. The dominant response elicited by the discussion is not that Scalia reasoned poorly, but that he acted badly—that while his arguments might or might not deserve criticism, he as a judge does.

Imagine instead that Scalia had decided both cases for the state and local governments and had done so on the grounds that democracy is better served by maintaining strong state and local governments, which tend to be more responsive to constituents and less

dangerous than the federal government. Doubtless many people would consider this an inadequate reason for decision, and some might go so far as to call it inappropriate. But few would be inclined to react as strongly as if they believed his decisions were based on animus toward a particular group.

The first key intuition here is that some reasons strike us, not only as weaker than others, but as less proper. Of course, this can hold true for decision-making in many spheres. A legislator or even an ordinary citizen would probably be open to greater criticism for basing a position on animus than on a principled distinction between levels of government. But it is not hard to think of examples where judges are held to a different standard. Consider taking a position because it is favored by one's political party or by many of one's neighbors. For a legislator to act on either of those reasons would hardly raise an eyebrow. A judge who did so would invite harsh censure. The second key intuition, then, is that the appropriateness of different considerations is bound up with the role of judge.

It may well be that the judging-as-practical-reason approach can accommodate these intuitions. But in any case it seems wise for empirical researchers wishing to speak as (p. 246) effectively as possible to normative concerns to respect the widely held assumption that legal reasoning should be special in at least some way.

At this point, it might feel like we have come full circle, realizing now that we were too hasty in rejecting the sharp distinction between law and not-law. But that is not the case. In fact, we can now see an additional reason for eschewing that approach when attempting to evaluate judging. Categorizing considerations as law or not-law encourages us to think of reasons as either in or out, appropriate or not. This fails to reflect the nuance of our actual thinking, in which we tend to recognize degrees of appropriateness.

Let us return to Scalia's actual and hypothetical decisions in *McDonald*. Imagine a truly neutral observer who had no feelings one way or the other about gun control but was able to observe Scalia's other decisions. Almost certainly the hypothetical decision would reflect better on Scalia in the observer's eyes than the actual decision. But this would be true even if the observer considered both grounds to be extralegal and dubious. Slightly altering the hypothetical might clarify the point. Again imagine that Scalia voted in support of Chicago, though now because he felt that state and local governments were more trustworthy when it came to making gun control policy. This reason would have little claim to be law-based, but it would still likely strike most people as a more acceptable reason than distaste for Chicago's gun control policy would be. Or consider again Posner's take on Scalia's motivations in *McDonald* and *Arizona*—an affinity for guns and an aversion to illegal immigrants. Surely neither motivation could be regarded as law-based under any respectable theory. But that does not mean we would evaluate them the same. Deciding a case on the basis of how comfortable one is with guns is inappropriate; deciding based on how one feels about a group is apt to be regarded as reprehensible.

At the risk of belaboring the point, let us consider some other comparisons. Which is worse, deciding in a way that promotes what you (though not necessarily others) view as the proper balance of power between the executive and legislative branch or deciding ac-

cording to the wishes of most people in your political party? Virtually everyone would say that the latter is worse; in fact, it seems terrible in comparison. But now compare deciding according to the wishes of your political party with deciding in the way that provides you with the greatest financial benefit or that does the greatest harm to a litigant you dislike. Suddenly partisan voting doesn't seem all that bad. The point is that we do not naturally tend toward absolute judgments in this area. Reasons are not simply acceptable or unacceptable; they are more or less acceptable. And note again that our ability to discriminate does not depend on categorizing some reasons as legal and others as extralegal. We have no trouble discriminating between reasons that are all obviously extralegal.

Here, then, is another argument for moving away from questions about whether judicial decisions are based on law and asking instead how appropriate or inappropriate the grounds judges rely on in their decisions are. Not only does the latter question speak more directly to the underlying normative issue, but it better captures the nuances of our thinking about it.

(p. 247) One possible objection to this move is that it calls for empirical scholars to make normative judgments. As damaging as this objection might be in other contexts, it is not particularly compelling in this one. "Law" is a normatively loaded and fiercely contested concept. As soon as empirical researchers choose a conception of it, they necessarily take sides, perhaps unwittingly and surely with limited awareness of the broader implications of their position. At least when we ask directly about appropriateness we can be more sure of what we are doing. And so even research that simply relied on our intuitions would begin from at least as strong a foundation as empirical work on law.

However, we need not rest on our own intuitions. For one thing, we can consult the intuitions of the general public. Studies like those of Scheb and Lyons (2001) and Gibson and Caldeira (2011) can provide revealing insights into what ordinary people think should go into judges' decisions. For instance, while large majorities of Scheb and Lyons' respondents said that partisanship and ideology should have no impact, they were far more accepting of decisions based on the "judges' views of what's best for the public" (p. 125). True, there is no particular reason to think that ordinary citizens' intuitions are necessarily superior to empirical researchers'. On the other hand, it is not safe to assume that empirical researchers are representative of the general population, and—this is the important point—the law judges make is binding on everyone in society, not just those who study courts closely. It seems eminently reasonable to consult the views of those subject to the law when assessing the legitimacy of judges' behavior.

We can also look again to legal theory. Even if legal theorists are unable to agree on what law is, there is considerable agreement regarding the key challenges faced by legal systems and some fundamental things citizens should expect from a legal system. Beginning from those, it should not be difficult to generate at least some non-controversial evaluative statements about judicial decision-making. There is not space in this chapter for a proper analysis, but even a cursory one should be sufficient to demonstrate the possibilities.

Let us begin with four fairly self-evident statements about courts. 1) Their decisions are typically made in the context of concrete cases involving litigants with major stakes in the outcome. 2) In a non-trivial proportion of cases, the best answer is not easy to discern, whether because the law is ambiguous or undeveloped or because it is unclear how best to apply the law to the issues raised by the case. 3) The answers given by courts can change the law of their jurisdictions. 4) That law is binding on all people in that jurisdiction, regardless of whether they had any connection to the case, and will continue to be binding on them until changed by some governmental authority.

Focusing on the last two statements first, we can immediately see the force of Wechsler's (1959) admonition that legal reasoning "must be genuinely principled, resting with respect to every step which is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved" (p. 15) The more a decision deviates from this standard, relying on reasons that work for this case only, the less likely it is that the resulting law will serve the population at large well moving forward and thus the less appropriate the decision is.

(p. 248) The first and fourth statements point toward the necessity for stability and predictability in the law. This is vitally important for the parties to a case. As Dworkin (1978: 84) points out, "if a judge makes new law and applies it retroactively in the case before him, then the losing party will be punished, not because he violated some duty he had, but rather a new duty created after the event." Decisions applying new law retroactively also undercut the ability of individuals (Scalia 1989) and societies (Shapiro 2011) to engage in effective planning. Presumably no one would argue that judges should always refrain from making new law or that all decisions should apply prospectively only. But most would agree that weighing fairness and reliance considerations is essential to good judicial decision-making.

The discussion so far points to some questions researchers might consider asking instead of "Are judges following the law or their attitudes?" How broadly applicable are the principles on which judges rest their decisions? How consistently do they follow those principles in other cases? How carefully do they weigh the possibility of disruptive effects on society and unfairness to litigants in deciding whether to adhere to precedent? Other possibilities include:

- How well do judges understand the empirical conditions relevant to the issues they are deciding? How much effort do they put into understanding those conditions? These questions build on an insight from Posner (2013: 83): "The perception of the [Supreme] Court as a political court in most constitutional cases and many nonconstitutional ones derives from the fact that the Justices form confident views without any empirical basis for them." One of the things that can make a judicial decision difficult is uncertainty about the effect it will have on people's situations in a complex world. The good judge will work hard to acquire reliable information about current conditions and possible effects, drawing on the expertise of others where appropriate, rather than rest on facile assumptions.

- To what extent do a judge's decisions reflect positive or negative attitudes toward a group to which a litigant belongs? Deciding on the basis of attitudes toward groups violates judges' duty of fairness toward both the individuals involved in the case and citizens in society at large.
- To what extent and how frequently do the moral and policy views a judge brings to bear in making a decision deviate from those of the general population? In keeping with the spirit of this entire chapter, this question begins with the realist assumption that moral and policy views will inevitably enter into judicial decisions but rejects the inference that therefore "anything goes." Moral and policy questions are often very difficult, and it can be especially tricky to discern the best answer in the unique circumstances of one particular case (Schauer 1991, 2006). For this reason, one crucial function of law is to decide key questions in advance, taking them out of the hands of individual decision-makers in unique circumstances (Shapiro 2011). Recognizing this, good judges will require exceptionally strong reasons before deciding on the basis of views that most others do not share.

(p. 249) • How thoroughly does a judge consider the reasons for and against a given position? Few norms are more fundamental to the legal process than evenhandedness in the evaluation of cases. This norm begins in recognition of the stakes for the parties, regardless of how far-reaching the implications of the case; fairness to the parties requires that their arguments be heard and taken seriously. It also reflects the understanding that cases that make it to court, especially to the appellate level, are rarely entirely one-sided. Even when one party clearly has the more credible argument, there are typically some non-trivial considerations favoring the other party. Even observers who differ greatly as to the merits of the different legal positions will still often be able to agree whether a judge has respectfully weighed the reasons on both sides and therefore whether the judge's opinion is itself worthy of respect.[6]

It would be foolish to pretend that questions of this sort can be easily answered. But I submit that they are no harder to answer than ones empirical researchers currently struggle with. In fact, progress is already underway in some areas, for instance in research on judicial independence around the world that asks to what extent judges kowtow to those who control their job prospects and in studies of state courts in the United States that ask whether campaign contributions for judicial elections influence judges' votes.

Most importantly, questions like these would get more directly at the underlying concern motivating much research into law's role in judicial decision-making—to what extent judges are performing their jobs properly and their decisions are entitled to our respect. Ultimately, our best hope for advancing the project of understanding law's influence might be to come at it from new angles.

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Notes:

(1.) http://www.nytimes.com/2005/09/13/politics/politicsspecial1/13ctext.html?pagewanted=all. The widespread mockery of Roberts might be unfair. Assuming there ex-

ists a baseball league where umpires are authorized to decide which pitches they will call and which they will ignore, to amend the definition of balls and strikes at will, and to announce the definition after the pitch has been called—and where the teams have a large and not necessarily equal say in who the umpires will be—then the analogy may well be apt.

(2.) Collins' finding that the predictive value of ideology weakens as the number of amicus briefs grows gives us additional reason to think that amicus briefs' effects occur through legal persuasion. Additional evidence of this, from in-depth analyses of group arguments and justices' responses in two areas of law can be found in Epstein and Kobylka (1992).

(3.) More than that, it can be pernicious, providing a rhetorical device for judges to hide behind when they disagree with each other (Geyh 2012). Rather than do the hard work of demonstrating that my argument is sounder than yours, I accuse you of acting outside the law. Your reasons, being illegitimate, are entitled to no respect, so I win. Of course, this would be a reasonable enough argument if your reasons clearly were illegitimate. But as typically employed by judges, the argument serves only to obfuscate.

(4.) 130 S. Ct. 3020 (2010).

(5.) 132 S. Ct. 2492 (2012).

(6.) Like other questions discussed in this chapter, this one presents considerable methodological challenges. Here efforts by political psychologists at coding "integrative complexity" (e.g. Conway et al. 2014) might point a way toward overcoming them.

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