ARE EMPIRICISTS ASKING THE RIGHT QUESTIONS ABOUT JUDICIAL DECISIONMAKING?

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INTRODUCTION

This is a conference organized around the general topic of measuring judges and justice. The mandate for the conference raises a number of interesting and challenging questions, of both a positive and normative nature, about judicial decisionmaking. The main theme throughout the conference is how social scientists' empirical studies of the courts help to answer these questions. Regarding questions of "measuring judges," the relevant focus is on the ways social scientists conceptualize, operationalize, and then explain judicial decisionmaking. Regarding questions of "measuring justice," the relevant focus is on how these same studies might help to assess to what extent judges satisfy the normative requirements of their jobs.

This latter set of concerns may be seen as one important way of measuring the quality of judicial decisionmaking, that is, assessing how well judges do their jobs. At the outset, I think that it is important to note that underlying this conference is an assumption that I am quite comfortable making—that our positive explanations of judicial decisionmaking ought to significantly inform the normative assessments we make about the quality of this decisionmaking.

In early conversations with some of my new colleagues at Duke, I found a recurring theme that evidenced some skepticism about the ability of social scientific studies of the courts to adequately inform debates about what judges do and how well they do it. The crux of the

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skepticism seems to rest, in large part, on the question of whether empirical studies of the courts accurately capture the main concerns and primary activities of judges.

In *The Choices Justices Make*[1] Professor Lee Epstein and I specifically addressed the question of whether or not social science accounts of the courts accurately model and thus explain the primary elements of judicial decisionmaking.[2] There we set out an account of the Supreme Court as a group of nine judges who make strategic decisions that are motivated by a wide range of preferences, values, and commitments. Their strategic decisions are defended and justified by an array of normative and legal sources, and are proffered within a complex institutional context. We defended what has since become the widely held view (at least in the social sciences) that the Justices often make new law and, in fact, do so consciously and intentionally. We argued that the Justices are fundamentally concerned about influencing the substantive content of legal rules and standards.[3] One important implication of this argument is that the task of explicating the influential role of the Justices is a necessary feature of any adequate explanation of the evolution of the law in a democratic society like the United States.

Professor Epstein and I argued at the time that this conception of the role of the Court had important implications for how social scientists studied judicial decisionmaking. More specifically, we argued that empirical studies of judicial decisionmaking had focused too narrowly on the disposition of the case, on the final vote on the merits: "a lesson—if not the lesson—of this volume is that explorations of the Supreme Court should not begin and end with examinations of the vote, as they have for so many years. Rather, we must explore the range of choices that contribute to the development of law."[4] We recommended that the focus be on a more general examination of the various mechanisms by which the Justices affect the development of the law:

> What it suggests is that research building on *Choices* should attempt to explain discrete choices, but that we would be disappointed if that is all our work generated—studies designed to explain the decision to accommodate or bargain or to persuade or to vote in a particular

1. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998).
2. *Id.* at 184–86.
3. *Id.* at 11–12, 22–55.
4. *Id.* at 185.

> way and so on. We hope that future scholarship does not lose sight of the ultimate goal: to understand how these choices come together to explain the substantive content of law.[5]

And central to this more general examination would be a broader conception of the elements of judicial choice—dispositional votes, for sure, but also those aspects of the opinions accompanying the votes, the arguments in support of their votes that communicated what the Justices themselves intended the substantive implications of their decisions to be in the future. For, on the strategic account that we offered, these opinions are seen to have a significant effect on the evolution of the law.[6]

In this Article I use the recommendations that Professor Epstein and I set out in *The Choices Justices Make* as a starting point for a consideration of how well empirical studies of the courts address the issues of explanation and assessment raised by this conference. In doing so, I will propose ways in which future empirical research can be improved to better explain the dynamics of judicial decisionmaking. Specifically, I emphasize the central importance of judicial opinions for such explanations, a task that has been underappreciated and thus underdeveloped in the empirical literature. The task of crafting persuasive opinions plays a central role in two aspects of the decisionmaking process: the justification of the legitimacy of the decision and the establishment of new law.

First, I review the literature in the last ten years to see what questions social scientists are asking and to see what they take to be the important elements of judicial decisionmaking. Second, I offer a descriptive account of the practice of judicial decisionmaking. Third, I assess how well the present state of the literature captures this plausible conception of what judges actually do, a conception that is quite compatible with a strategic approach to judicial decisionmaking. Fourth, I reconsider our earlier recommendation by assessing the implications of the different ways of conceptualizing, operationalizing, measuring, and assessing judicial decisions.

This last task returns directly to the main themes of the conference. On the one hand, I assess the positive implications for social scientific explanations, focusing on the effects of different

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5. *Id.*

6. *See id.* at 95–107 (discussing examples of strategic opinion writing); *id.* at 167–77 (examining the use of precedent in published opinions).

conceptual and measurement choices on how well we can explain what judges actually do. On the other hand, I consider the normative implications for assessments of the quality of judicial decisionmaking and for recommendations for judicial reforms.

I. RECENT DEVELOPMENTS IN THE LITERATURE

Social scientists who study the courts employ an impressive array of statistical and mathematical approaches. This array has grown in variety and sophistication in the last decade. Although there are some scholars who employ the full range of approaches, most students of the courts focus primarily on one of two main approaches, employing either quantitative (statistical models with empirical data)[7] or formal theoretic (mathematical models) studies of judicial behavior.[8] One of the most striking features of this research is the way formal and empirical scholars have moved in different directions in terms of how they conceptualize judicial choice.

Empirical social scientists have been at the forefront of the study of judicial decisionmaking from the earliest days of this line of research. They engaged in the initial, and perhaps field-defining, debate in the literature: what causes, and thus explains, the most basic element of judicial decisionmaking—the vote on the merits? This was the classic conflict between the legal and attitudinal models. Put simply, under the legal model, judges make decisions based on what precedent dictated, whereas under the attitudinal model, judges' decisions are based on their own ideology, preferences, or values. From the perspective of the social scientists, the research strategy was to demonstrate that judicial decisions (1) could not be explained by precedent (in the sense that they were inconsistent with the dictates of precedent) and (2) were therefore better explained by the judge's personal values or preferences (in the sense that the direction of the judicial decision was highly correlated with some measure of judicial ideology).[9] For the purposes of this analysis, the social scientists focused on the disposition of the case, the vote on the merits, as the

7. *See, e.g.*, Nancy Staudt, Barry Friedman & Lee Epstein, *On the Role of Ideological Homogeneity in Generating Consequential Constitutional Decisions*, 10 U. PA. J. CONST. L. 361, 378–84 (2008).

8. *See, e.g.*, Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the US Supreme Court*, 23 J.L. ECON. & ORG. 276, 280–92 (2007).

9. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 110–14 (2002).

relevant dependent variable. And for the purposes of assessing the attitudinal challenge to the legal model, the focus on votes was adequate to the task. It provided an important metric for measuring whether, and to what extent, judicial decisions were consistent with the legal model. Early research in the judicial politics field extended the analysis of the relative merits of the legal and attitudinal explanations of judicial decisions.[10]

The range of questions that form the basis of empirical studies of the courts dating back to the early debates is wide and impressive. Many studies have focused on other aspects of the judicial process. Topics such as agenda setting, the influence of amicus curiae briefs and oral argument, and the dynamics of collegial courts have received sustained attention by scholars.[11] Another important area of study has been the relationship between courts and other political actors. Some of the most interesting work has analyzed the influence of other actors on judicial choice, including both the other branches of government in the separation-of-powers framework and the public at large through the power of public opinion.[12] Many of these same topics remain on the agenda of empirical scholars.

Here it is important to note that, to the extent that judicial decisionmaking remains an important element of these various analyses, judicial choice is normally conceptualized as the dispositional vote. Thus, it is not surprising that considerable effort is still invested in measures and methods that seek to refine both measures of judicial ideology and case disposition. A 2006 analysis of

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10. *See, e.g.*, LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 5–7 (1992); *see also* Saul Brenner & Marc Stier, *Retesting Segal and Spaeth's Stare Decisis Model*, 40 AM J. POL. SCI. 1036, 1039 (1996) (criticizing the Segal and Spaeth model concerning precedent and the role of *stare decisis* in judicial decisionmaking); Donald R. Songer & Stefanie A. Lindquist, *Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making*, 40 AM J. POL. SCI. 1049, 1050 (1996) (same).

11. *See, e.g.*, Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1110 (1988); Paul M. Collins Jr., *Lobbyists Before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs*, 60 POL. RES. Q. 55, 55 (2007); Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs, II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99, 99 (2006).

12. *See, e.g.*, William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 617 (1991); Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 751 (1989); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1018 (2004).

tax law by Professors Epstein, Staudt and Wiedenbeck exemplifies the direction, as well as the sophistication, of this work.[13] In that article, the authors revisit the basic question of precedent versus preferences, but do so in the previously underanalyzed area of U.S. tax law. Most of the studies about the relative merits of the legal and attitudinal models were conducted using data sets drawn from the areas of constitutional law. One of the important contributions of the Epstein, Staudt and Wiedenbeck paper is that it moves the foundational debate to the area of economic activity, an area in which many have argued that judicial ideology will have a less important role to play in determining judicial choice.[14] In the course of their analysis, they demonstrate the complexity of the problem of discerning the effects of precedent and politics in this area of the law and propose some inventive methods for distinguishing the differing effects for different types of economic activities.[15] They conclude, contrary to common intuition, that ideology does play a role in explaining decisions (judgment for either the government or the taxpayer) in certain types of cases.[16]

This article is an exemplar of how a rich empirical analysis can continue to push the boundaries of our understanding of judicial decisionmaking while focusing on the dispositional vote. Compare this approach with the direction that formal theoretic research has gone in the last decade. Formal theorists who study the courts initially borrowed their analytical models from the research on legislative bodies. The models were standard spatial models that sought to analyze legislative votes as a function of the ideological distance between a legislator's ideal preference point and the utility point of the proposed piece of legislation under consideration. On this analysis, legislators voted for the alternatives that minimized the difference between their ideal preference points and the utility value of the alternatives. Early formal theoretic accounts of collegial courts basically imposed the spatial model framework on the U.S. Supreme Court and analyzed the dynamic of decisionmaking in terms of minimizing the policy differences between case outcomes and the

13. Nancy Staudt, Lee Epstein & Peter Wiedenbeck, *The Ideological Component of Judging in the Taxation Context*, 84 WASH. U. L. REV. 1797, 1815–20 (2006).

14. Neil M. Richards, *The Supreme Court Justice and "Boring" Cases*, 4 GREEN BAG 2D 401, 406 (2001); Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325, 351 (2001).

15. Staudt et al., *supra* note 13, at 1815–21.

16. *Id.* at 1821.

ideal points of the Justices.[17] In these early studies judicial choices were operationalized, not as dispositional votes, but rather as measures of the substantive policy consequences of the decisions. This approach is still employed in a significant number of game theoretic analyses of the courts.

Some studies by formal theorists have refined the spatial models they employ to better characterize what they take to be the distinctive nature of judicial decisionmaking. A line of research that best exemplifies these changes builds on the early work of Professor Kornhauser and others.[18] The authors of these studies employ what they call a "case-space" approach to judicial decisionmaking. Here is how Professors Lax and Cameron characterized the approach:

> Judicial decision making has unique characteristics that distinguish it from decision making in legislative settings. In particular, judges resolve legal disputes; that is, they decide cases, which present themselves as bundles of facts (fact patterns). Depending on the facts presented in the case, the judge determines the case's disposition (typically a dichotomous judgment) according to a rule. When appellate courts address judicial policy, they typically do so in opinions that modify existing legal rules or create new ones, perhaps to accommodate new factual situations. Thus, judge-created rules embody the content of judicial policy, and bargaining over judicial policy on collegial courts typically involves bargaining over the content of legal rules.[19]

They use this analytical framework to explain judicial decisions primarily as a function of the effect that their decision will have on the content of the rule that will be established and, secondarily as a function of the effect on the disposition of the case. In doing so, the

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17. For a review of this literature, see THOMAS H. HAMMOND, CHRIS W. BONNEAU & REGINALD S. SHEEHAN, STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME COURT 6 (2005).

18. *See, e.g.*, Jonathan P. Kastellec, *Panel Composition and Judicial Compliance on the US Courts of Appeals*, 23 J.L. ECON. & ORG. 421, 423 (2007) (considering the relationship between the rulings of circuit court panels and the Supreme Court in gauging compliance with legal rules); Lewis A. Kornhauser, *Modeling Collegial Courts II: Legal Doctrine*, 8 J.L. ECON. & ORG. 441, 467 (1992) (concluding that issue-by-issue adjudication, rather than case-by-case adjudication, requires judges to respect the doctrinal choice they made in prior cases); Lax & Cameron, *supra* note 8, at 277 (examining how judges' crafting of legal opinions relates to their policy and doctrinal goals); Pablo T. Spiller & Matthew L. Spitzer, *Where is the Sin in Sincere? Sophisticated Manipulation of Sincere Judicial Voters (With Applications to Other Voting Environments)*, 11 J.L. ECON. & ORG. 32, 34–35 (1995) (finding that judges write opinions partly anticipating the reactions of the other governmental branches).

19. Lax & Cameron, *supra* note 8, at 280 (footnote omitted).

formal theoretic scholars conceptualize the judicial choice as a decision about the substantive content of the opinion that accompanies, and justifies, the disposition of the case.

The difference in how the two approaches conceptualize the object of judicial decisionmaking is that empiricists emphasize disposition whereas formal theorists emphasize the substantive content of the rule that emerges from the opinion. Although I acknowledge that such stark distinctions are always open to the challenge of an exception, I think that this claim does a good job of capturing the general state of the literature. So, why the difference? This disagreement may have a number of sources. First, this may be a basic disagreement about what judges actually do. Second, this may be merely a disagreement about emphasis, about what is most important about what judges do. Third, it may be a disagreement about what social scientists can best explain about judicial decisionmaking.

The first two possible sources of difference should be amenable to comparison with a plausible account of the actual practice of judicial decisionmaking. I will take this up in Part II. Setting out this plausible account enables me to discuss the question of whether the difference in emphasis on votes or substantive opinions really matters and, if so, how much and for what kinds of questions and concerns.

The third potential source of disagreement cannot be resolved by reference to an account of judicial practice. Rather, it is a disagreement about what is in the realm of what social scientists can do and do well, and what is part of the comparative advantage of the social scientist. The formal theoretic emphasis on the substantive content of the rule seeks to capture an important aspect of what Professor Epstein and I recommended in *Choices*. But the attention to substantive content has remained almost completely at the level of theory. To my knowledge there have not been any serious efforts to translate the results of the case-space analyses into an empirically meaningful research agenda. I will return to this point when I consider what social scientists can do in this regard. It is equally important, however, that in the last few years the overwhelming majority of empiricists have not incorporated other elements of judicial reasoning and substantive argumentation into their analyses in a systematic way.

II. THE PRACTICE OF JUDICIAL DECISIONMAKING

What do judges actually do? What are the important elements of the process of making a decision in a case? And what are the resources that judges use in the process of making those decisions? These are very complicated questions that warrant a much longer and detailed discussion than I can offer here. But it would be helpful to have a general sketch of the practice of judicial decisionmaking as a comparative referent for answering questions about the quality of social scientific research on the courts. Such a referent would allow making some kind of informed assessment about how well the existing research conceptualizes judicial decisionmaking and how well it identifies the important elements of the decisionmaking process.

Judge Richard Posner[20] offers an account of judicial decisionmaking that is appropriate to my purposes here. This account is not uncontroversial for it challenges some of the common understandings offered by many other judges as to what motivates them and how they go about arriving at their decisions. And at the same time, it resists aligning too closely with any of the number of theoretical models in both the social sciences and jurisprudential literature that purport to set out *the* answer to the question of what determines judicial choice.

It offers, instead, a general framework for conceptualizing the task of judicial decisionmaking that I think is helpful for analyzing the practice of courts *even if* one rejects the more substantive claims that Judge Posner makes about the pragmatic nature of judicial choice. By this, I mean the following. The framework I present identifies categories of factors that one must account for when describing and explaining what judges do. Judge Posner's account identifies three categories that are especially relevant to the discussions at this conference: (1) the causal factors that influence the judge's decision, (2) the reasoning process by which the decision is made, and (3) the relevance of the judicial opinion.

Particular accounts of what judges do and thus particular explanations of judicial decisionmaking will offer different and often competing ways of thinking about the relevance of these factors. For example, proponents of the traditional legal model can define the substantive content of the framework in such a way as to develop an account of judges who are motivated by precedent and who craft

20. RICHARD A. POSNER, HOW JUDGES THINK (2008).

opinions that are grounded in past decisions. On the other hand, committed advocates of the attitudinal model can focus on judges who are motivated by ideological values and policy preferences and who pay less attention to the precedential value of their opinions. More importantly, for people who believe (as Judge Posner does and as I think most social scientists who study the courts really do) that the process of judicial decisionmaking is best characterized as a complicated mix of factors identified by several competing theories, the framework should allow the accommodation of this complexity and, perhaps, the distinguishing of the conditions under which different theories of decisionmaking apply.

A. The Causal Factors that Influence the Judge's Decision

Consider first the way in which Judge Posner conceptualizes the factors that might influence a judge's decision. On one dimension, this is a question of judicial motivation—what is the underlying basis of judges' decisions? This is the basic question that generates the debate over the relative importance of precedent and preferences. On another dimension, this is a more general question about the various sources that a judge may rely upon in arriving at a decision.

Judge Posner adopts a broad conception of these factors in his discussion of what might appropriately be characterized as the "law" on which judges base their decisions:

> The true middle ground, as long ago explained by Roscoe Pound, is a tripartite conception of law as legal doctrines (rules and standards), techniques for deriving and applying doctrines (techniques such as *stare decisis*—decision according to precedent—which often means distinguishing or overruling a precedent), and social and ethical (in a word, policy) views.[21]

He elaborates on this point:

> "Law" in a judicial setting is simply the material, in the broadest sense, out of which judges fashion their decisions. Because the materials of legalist decision making fail to generate acceptable answers to all the legal questions that American judges are required to decide, judges perforce have occasional—indeed rather frequent—recourse to other sources of judgment, including their own political opinions or policy judgments, even their idiosyncrasies.

21. *Id.* at 43.

> As a result, law is shot through with politics and with much else besides that does not fit the legalist model of decision making.[22]

This highlights one important set of factors that should enter into a social scientific study of courts: the causal factors, including motivation, that influence the judge's choice.

B. The Reasoning Process by which the Decision Is Made

Second, consider Judge Posner's conception of the process of judicial reasoning through which the various causal factors are weighed to produce the decision. Judge Posner begins by rejecting a strict adherence to the legalist model: "It might seem that judges would legislate only after they had tried and failed to decide a case by reference to the orthodox materials of legislative text and precedent. Some judges do proceed in that way. But others reverse the sequence."[23] Judge Posner argues that some are motivated primarily by policy concerns:

> They start by making the legislative judgment, that is, by asking themselves what outcome—not just who wins and who loses, but what rule or standard or principle enunciated in their judicial opinion—would have the best consequences. Only then do they consider whether that outcome is blocked by the orthodox materials of legal decision-making, or, more precisely, whether the benefits of that outcome are offset by the costs that it would impose in impairing legalist values such as legal stability.[24]

He acknowledges that others are, in fact, motivated by the pursuit of precedent:

> An equally pragmatic judge might start the other way around, by asking himself whether the issue in the case was ruled by statutory language, precedent, or some other orthodox source of law that it would be a mistake to disregard. The lawyers in the case would have hurled at him general statements, drawn from cases and statutes, that covered the case as a matter of semantics. But he would want to determine whether the authors of those statements had been referring to the kind of issue confronting him in this case. If not, he would have to make a legislative judgment.[25]

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22. *Id.* at 9.
23. *Id.* at 84.
24. *Id.*
25. *Id.*

Nonetheless, Judge Posner argues that circumstances beyond the control of any particular judge (the inevitable uncertainty and ambiguity in the existing law and the necessity, in most cases, of having to render a decision) forces judges, in the end, to balance a variety of factors in the course of their reasoning:

> Most judges blend the two inquiries, the legalist and the legislative, rather than addressing them in sequence. Their response to a case is generated by legal doctrine, institutional constraints, policy preferences, strategic considerations, and the equities of the case, all mixed together and all mediated by temperament, experience, ambition, and other personal factors. A judge does not reach a point in a difficult case at which he says, "The law has run out and now I must do some legislating." He knows that he has to decide and that whatever he does decide will (within the broadest of limits) be law; for the judge as occasional legislator is still a judge.[26]

This highlights a second set of factors that should reasonably enter into a social scientific study of courts: the ways in which judges balance the various causal factors and, if possible, the conditions under which one or another set of factors might control.

C. The Relevance of the Judicial Opinion

Third, Judge Posner emphasizes that the practice of judicial decisionmaking, as defined by the institutional structure of most legal systems, dictates that judges subsequently explain and justify their decisions through some kind of publicly articulated opinion.[27] There are a number of important points introduced by the requirement of an opinion, relevant to my present discussion, that need to be highlighted. First, the judge's opinion may be unrelated to the actual factors that were influential in deciding the case. Judge Posner discusses this in terms of the unconscious nature of many decisions, but his point is equally relevant to the other types of factors (for example, the intentional priority of policy over precedent) that may weigh heavily in a judge's actual decision:

> The role of the unconscious in judicial decision making is obscured by the convention that requires a judge to explain his decision in an opinion. The judicial opinion can best be understood as an attempt to explain how the decision, even if (as is most likely) arrived at on

26. *Id.* at 84–85.

27. *Id.* at 110–11.

> the basis of intuition, could have been arrived at on the basis of logical, step-by-step reasoning. That is a check on the errors to which intuitive reasoning is prone because of its compressed, inarticulate character . . . .[28]

Second, the opinion is commonly produced after a decision on the vote on the merits:

> It is an imperfect check, however, because the vote on how the case shall be decided precedes the opinion; and though it might be otherwise, most judges do not treat a vote, though nominally tentative, as a hypothesis to be tested by the further research conducted at the opinion-writing stage. That research is mainly a search for supporting arguments and evidence.[29]

Third, Judge Posner emphasizes the important way in which the opinion itself affects the substantive content of the law:

> The first decision in a line of cases may be the product of inarticulable emotion or hunch. But once it is given articulate form, that form will take on a life of its own—a valuable life that may include binding the author and the other judges of his court (along with lower-court judges) and thus imparting needed stability to law through the doctrine of precedent, though a death grip if judges ignore changed circumstances that make a decision no longer a sound guide. Opinions create, extend, and fine-tune rules; they are supplements to constitutional and other legislative rules.[30]

Fourth, the offering of the opinion has an important justificatory function. Through the practice of offering an opinion, judges seek to enhance the legitimacy of the decision in particular and the judicial system in general. Judge Posner puts this last point in terms of the extent to which the judge's decision on the merits and the accompanying opinion conforms to what is commonly accepted in the community as the "law": "But since it is a public document, it can be scrutinized for conformity to the norms of the judicial process, and in particular for the degree to which it gives legalism its due."[31] This last claim, however, should not be taken as an acceptance on Judge Posner's part of the commonly held view that judicial legitimacy is a function of narrow conformity to legal precedent. To the contrary, he

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28. *Id.* at 110 (footnote omitted).
29. *Id.* at 110–11.
30. *Id.* at 111.
31. *Id.*

casts the net of judicial legitimacy more broadly than it is often depicted:

> when we say that a judge's decisions are in conformity with "the law," we do not mean that we can put his decisions next to something called "law" and see whether they are the same. We mean that the determinants of the decisions were things that it is lawful for judges to take into account consciously or unconsciously. A judge is not acting lawlessly unless there is no authorized method by which he could deny some claim that a litigant was urging on him, yet he denied it nevertheless.[32]

In emphasizing the importance of opinion writing as a justificatory practice and thus a potentially necessary element of explanations of judicial decisionmaking, one need not address the question of what makes any particular determinant of a judicial decision lawful or legitimate. For my purposes here it is enough to acknowledge that there are, as Judge Posner suggests, social processes that give various factors, various sources of law, legitimacy in the eyes of the relevant community and thus make them lawful for purposes of judicial decisionmaking. The most straightforward example is judicial precedent and the legitimate ways in which it can be established. Another category would be constitutional and statutory enactments. Focusing on informal norms and social values, instead of the more traditional factors, will cause more controversy about their legitimacy. In principle, however, the controversy should be subject to resolution through factual investigation, that is, does a legal community accept a particular norm or value as legitimate for these purposes? If so, then the factor has a certain normative legitimacy for the purpose of judicial decisionmaking. If not, then the influence of the factor on judicial choice will be deemed illegitimate and, in Judge Posner's words, unlawful. Questions such as these are relevant for normative assessments of the quality of judicial decisionmaking, a topic I discuss in Part III.

This discussion highlights a third set of factors that should enter into a social scientific study of courts: the reasons, arguments, and justifications judges offer in their opinions. These factors determine both the substantive content of the law and the normative legitimacy of their decisions.

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32. *Id.* at 44.

III. HOW WELL ARE EMPIRICISTS DOING?

Of the three sets of factors that are highlighted by this sketch of judicial decisionmaking, empirical social scientists have focused their attention on the first two: the causal factors that determine choice and the underlying reasoning of those decisions. The classic debate between the legal and the attitudinal models is at the center of the ongoing debate about the determinants of judicial choice. That is primarily a debate about the basic motivations of judges. To assess the relative importance of various factors that might affect judges who are motivated by ideology, empirical social scientists have engaged in detailed analyses of judicial reasoning, detailed at least to the extent that the analyses involves a balancing of factors that might affect the choice calculus. Empiricists have primarily conducted these analyses by focusing on the disposition of the case, the vote on the merits.[33] In doing so, they have developed several ways of characterizing the vote (including measures of the ideological direction of the vote). Here it is interesting that those law professors who have adopted social scientific approaches to study judicial decisionmaking have also adopted the vote on the merits as their primary dependent variable.

Empirical research can be contrasted with the work of formal theoretic scholars who have focused primarily on the issues of judicial reasoning (especially on collegial courts) and on the creation of judicial opinions (most recently through the case-space framework). Formal theorists have primarily dealt with the central issue of judicial motivation by assumption, relying on the work of empirical scholars finding that judges are motivated by policy concerns. They have employed models that emphasize the substantive content of the opinions rather than the dispositional vote. Although they have contended that their work has important implications for empirical studies of the courts,[34] they have offered few, if any, insights as to exactly how the formal results would translate into empirical research on issues such as the crafting of opinions.

Upon reflection, there has been little uptake from empirical scholars of the specific recommendation that Epstein and I made to expand the focus of their analysis to those causal mechanisms that influence the substantive content of the law. Other scholars have

33. *E.g.*, SEGAL & SPAETH, *supra* note 9, at 255–60.

34. *E.g.*, Lax & Cameron, *supra* note 8, at 296–97.

noted a similar disregard of the importance of judicial opinions.[35] And some empiricists have begun to push research in the direction of taking the substance of judicial opinion seriously.[36] But these efforts, although significant and important, are few in number and they do not begin to constitute a systematic move in the direction of a new focus in the study of judicial decisionmaking.

So, to what extent does this really matter? To what extent does it matter that empirical social scientists have generally focused on the votes on the merits and not on the task of crafting of judicial opinions? In addressing this question, I want to distinguish three separate tasks that are relevant to the concerns of this conference. First, to what extent does it matter for the task of description, for offering a realistic descriptive account of what judges do? Second, to what extent does it matter for the task of explanation, for offering a persuasive explanation of what judges do? And, third, to what extent does it matter for the normative task of assessing the quality of judicial decisionmaking, for assessing how well judges do their jobs?

Let me take these up in turn. Regarding the task of *description*, I can be brief. Attention to the crafting of opinions is a very important element of an adequate description of the practice of judicial decisionmaking. But this is not really a problem for social scientists, even those who are exclusively empirical scholars, because descriptive accuracy is not a criterion by which social scientific research will, or should, be judged. The only concerns there would be about the descriptive accuracy of a social scientific account of judicial decisionmaking would be the possible implications of that accuracy for the tasks of explanation and normative assessment.

In regard to the task of *explanation*, the implications of focusing on votes and not opinions are a function of the specific question being answered. For example, the question "does *X* affect judicial decisionmaking?" is a basic question about causal effect. The classic

35. Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261, 262 (2006); Anna Harvey, What Makes a Judgment "Liberal"? Coding Bias in the United States Supreme Court Judicial Database 27–28 (June 15, 2008) (unpublished manuscript, on file with the *Duke Law Journal*).

36. *See, e.g.*, James J. Brudney & Cory Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. (forthcoming 2009) (manuscript at 3–4, on file with the *Duke Law Journal*); Kevin T. McGuire et al., *Measuring Policy Content on the U.S. Supreme Court*, J. POL. (forthcoming) (manuscript at 3, on file with the *Duke Law Journal*); Tom S. Clark & Benjamin Lauderdale, Locating Supreme Court Opinions in Doctrine Space 1 (Sept. 15, 2008) (unpublished manuscript, on file with the *Duke Law Journal*).

example of this is the question of whether judges' ideologies or policy preferences affect their decisions. Similar studies have analyzed the causal effect of a variety of additional factors (for example, amicus curiae briefs, oral argument, other governmental actors, and public opinion).[37] These are the types of effects that are important to know about when making a prediction about the outcomes of future cases. For these types of questions, causal effect is primarily a yes or no issue and the dispositional vote is an adequate measure of judicial choice. The value of this measure has been demonstrated repeatedly in the debate between legalists and realists, as the overly simplistic conception of the causal role of precedent endorsed by the legalist model has been consistently undermined.[38]

Conversely, the question "which factor, *X* or *Y*, has a more significant effect on judicial decisionmaking?" is about the relative importance of the factors that might affect judicial choice. This is the type of question to ask when attempting to explain the balancing of factors that is entailed by the sketch of judicial reasoning. Here again are basic questions of causal effect. And again the dispositional vote is a reasonably good measure for purposes of answering these kinds of questions.[39]

On the other hand, answering the question "*how* does *X* affect judicial decisionmaking?" is a task of identifying and specifying causal mechanisms. Consider, for example, the question of how past precedent affects judicial decisionmaking. One approach to this question follows from the traditional legal model: assume that judges are motivated to answer legal questions according to precedent and then analyze the way past precedent determines their choices in particular cases. An alternative approach comes out of the strategic model of judicial decisionmaking.[40] From my perspective it offers a

37. *See* sources cited *supra* note 11.

38. *See, e.g.*, Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1154–55 (2004).

39. There is one problem, however, with relying on the dispositional vote in such cases. It is the problem of behavioral equivalence. This occurs when both variables under consideration would predict the same decision on the merits. In such situations it is impossible to discern which factor, if either, is exerting causal influence. The lack of a more finely grained measure of the judicial decision tends to result in the underestimation of the causal force of one of the variables. To the extent that this is a problem, it will offer further support for my argument that empiricists should focus greater attention on the substantive content of judicial opinions.

40. For an extended discussion of the strategic approach, see EPSTEIN & KNIGHT, *supra* note 1, at 1–21.

much more plausible account of the way in which precedent affects the choices judges make.

This approach can be formulated in a number of different ways, depending on what the primary motivation of judges is assumed to be. In the limiting case judges are motivated totally by ideology; moving away from the limiting case, judges are motivated by some mix of factors, including ideology and concern about precedent. On the strategic account, the primary focus of the analysis would be on the ways in which precedent can affect the choices of policy-motivated judges. In *Choices*, Professor Epstein and I argued that past precedent could serve as a causal constraint on the decisions of such judges.[41] The logic of the constraint follows from the fact that judges are required to give a public justification, through opinion, of their decision. To the extent that past precedent is one of the factors that judges might invoke to lend legitimacy to their decisions, it can serve as a constraint on their discretion. The same causal logic can hold for any of the other factors that judges might employ in crafting their opinions.

An appropriate measure of judicial choice is necessary to test this argument, and thus to see if the "precedent as constraint" mechanism offers a satisfactory answer to the "how" question. For this type of question, the disposition of the case is an inadequate measure of the judicial decision. A more nuanced measure of the range of alternatives in the feasible choice set of a judge—that is, a measure of the substantive content of the law produced by the case—is necessary to adequately explain how causal mechanisms work. To see why this is the case, consider the following characterization of the judge's choice calculus. Analytically, it is possible to conceptualize the judge's decision problem in the spatial terms commonly employed by formal theorists. The spatial conception captures the more intuitive idea that the task of judges is to render justifiable decisions that produce outcomes as close as possible to the judge's ideal decision. In an unconstrained environment, the judge would render decisions that produce the judge's most preferred outcomes. In most circumstances, however, the judge's choice will be constrained by the requirements of justification. Therefore, there should be some distance between the judge's unconstrained, preferred choice and the choice that the judge actually makes in the case. That difference is an indicator of the causal effect induced by the requirements of justification.

41. *Id.* at 40–45, 163–65.

To ascertain the effect of precedent it is necessary to identify some distance between what the outcome produced by the unconstrained choice would have been and the outcome produced by the publicly justifiable decision. If there is some significant distance between the two, and if the judges justify their decisions in terms of past precedent, then it is reasonable to conclude that the precedent had a constraining effect on judicial choice. Setting the particulars aside, the basic point here is that the analysis of how factors actually affect decisions will require in most cases a more refined measure of the feasible set of alternatives available to a judge than will be provided by the vote on the merits. Some measure of the substantive content of the law would satisfy this requirement. The one exception to this conclusion would be when there are very few alternatives in the judge's choice set. In such an instance, the vote on the merits might be an adequate proxy for the substantive outcome of the case. For the social scientist, the problem is that the analyst is unlikely to know about the dearth of alternatives in the feasible set without conducting a more detailed analysis of the available alternatives.

And finally, answering questions about the effects of *X* on either the substantive content of the law or on the justification of the decision involves an explicit analysis of the form and content of the judicial opinion. A narrow focus on disposition will not provide the data necessary for an adequate explanation of these issues.

In regard to the *normative* task of assessing the quality of judicial decisionmaking, the implications of an exclusive focus on the dispositional vote will depend on the criterion of assessment. If the relevant normative criterion were one of strict prohibition, "*X* is not a legitimate determinant of judicial decisionmaking," then the basic causal explanations derived from analyses of the first two kinds of questions would be sufficient for judicial assessment. Thus, focusing on the vote on the merits would be appropriate. The types of behavior covered by such prohibitions, such as explicit prohibitions of judicial corruption, however, likely constitute a very small percentage of the types of judicial activity we will want to cover in our assessments.

Adequate measures of judicial behavior are needed to extend these assessments to more general questions of judicial quality. And, from a normative perspective, this raises the basic question: measures of what? The account of judicial decisionmaking that I draw out of Judge Posner's work has a very important answer to this question, an answer that ties assessments of judicial quality to basic questions of

judicial legitimacy. And this account has the added benefit of shedding considerable light on the contribution that social scientists might be able to make to such an assessment.

On this account, the publicly articulated nature of the judicial opinion is the key element to determining the legitimacy of judicial decisionmaking. The extent to which the judges can justify their decisions in terms of reasons deemed legitimate by the relevant community, the more legitimate both the decision and the accompanying change in the subsequent content of the law will be. And, furthermore, the central importance of the opinion for the public justification of the decision is, in principle, independent of any motivations or other factors that influenced the initial decision itself. This last point is at the very least implied by Judge Posner's account. It is made explicit in a compatible account offered by Professor H.L.A. Hart in *The Concept of Law*.[42]

On my reading of their work, although they differ in many ways, Judge Posner and Professor Hart share an understanding of the institutional nature of the practice of judicial decisionmaking. Both envision the task of decisionmaking as one that involves discretion constrained by the rules and conventions of the legal system. Professor Hart, in his emphasis on the central role of rules of recognition, grounds the very legitimacy of judicial decisionmaking in the institutional dictates of the system itself.[43] Although he adopts a more narrow conception of the dictates of the system, of the factors rendered legitimate for judicial decisionmaking, than the one I sketch here, the basic point about the significant role of a justificatory opinion is apropos. On his account, the definition of the role of the courts, as well as the standards of legitimacy and effectiveness, are derived from what Professor Hart calls the rules of recognition, the set of secondary rules that dictate how the primary rules, the laws, are to be implemented, administered, and changed.[44] The rules of recognition distribute authority over the different tasks involved in maintaining the legal system among various legal and political institutions. Within this distribution, the courts are primarily responsible for adjudicating controversies over how the law is to be applied in particular cases. Central to Professor Hart's understanding of these rules of recognition is that they are effective as long as they

42. H.L.A. HART, THE CONCEPT OF LAW 112 (1961).

43. *Id.* at 111–13, 132.

44. *Id.* at 91–92.

garner the voluntary acceptance of the members of the community.[45] In this way, Professor Hart ties effective institutional performance to shared views about the legitimacy of the various institutions.

For Professor Hart, the court, more often than not in the form of unelected judges, derives its legitimacy from the particular nature of its most common form of decisionmaking, the application of primary rules to new fact situations. While acknowledging that there is always room for discretion in the application of rules, Professor Hart insists on the importance of rules even in such cases: "these activities . . . must not disguise the fact that both the framework within which they take place and their chief end-product is one of general rules. These are rules the application of which individuals can see for themselves in case after case, without further recourse to official direction or discretion."[46]

It is important to note that Professor Hart emphasizes the "framework" in which judges' make their decisions, highlighting the importance of institutional procedures as a precondition for the legitimacy of judicial decisionmaking. Professor Hart's justification of the court as an institution rests on the idea that judges make their decisions in an impartial way.[47] The criteria of impartiality, when applied, serve to restrict the types of arguments that parties can effectively employ as well as the ways in which judges can justify their decisions. According to Professor Hart, in an ideal situation, an impartial judge will justify a decision in terms of predetermined rules.[48] In response to the criticism that precedent citation is merely rhetoric to justify decisions made on other grounds, Professor Hart insists that

> [s]ome judicial decisions may be like this, but it is surely evident that for the most part decisions, like the chess-player's moves, are reached either by genuine effort to conform to rules consciously taken as guiding standards of decision or, if intuitively reached, are justified by rules which the judge was antecedently disposed to observe and whose relevance to the case in hand would generally be acknowledged.[49]

45. *Id.* at 111–13.
46. *Id.* at 132–33.
47. *Id.* at 202–04.
48. *Id.* at 139–40.
49. *Id.* at 137.

Professor Hart's institutional approach to legal legitimacy, as I understand it, reinforces the importance of the publicly articulated opinion to developing an understanding of what judges do. Part of the task of judges is to make their decisions as legitimate in the eyes of the relevant community as they can. On the account I set out here, it is not a task that requires them to adhere to any particular set of factors in the process of reasoning to their decision. And this task does not place any ex ante constraints (except the usual constraints on corrupt behavior) on the factors that influence their vote on the merits. Rather, it is a task that requires judges to give an ex post justification of their decision that is consistent with the criteria of legitimacy in their community. That is, judges can use whatever means and reasons they want to arrive at their decision, but they are compelled by the dictates of legitimacy to justify that decision with reasons generally accepted by the members of the community. This is an important insight, significantly relevant for assessing the quality of judicial decisionmaking. And it is not merely an artifact of Judge Posner's broad, pragmatic conception of what judges do. This insight is an important feature of Professor Hart's positivist account that is more closely aligned with the traditional legalist conception of judicial decisionmaking.

The judicial opinion, on this account, becomes the primary focus of assessments of judicial quality. How well do judges justify their votes and their attempts to substantively alter the existing content of law? Although it may be desirable to assess the effective performance of judges on other dimensions (for example, efficiency in handling case load), the basic dimension of judicial legitimacy surely holds a certain pride of place. In a sense, it suggests a certain lexicographic ordering of dimensions of assessment: only if the criteria of legitimacy were normally satisfied would it be necessary to move on to other criteria of quality.

This argument about justification and legitimacy provides theoretical support for using measures like citation indices and reversal rates to study how well judges do their jobs. Citations may be a measure of a good decision that offers a legitimate justification for future changes in the substantive content of law; a reversal may be seen as a judgment that the justification was not legitimate. The justification for using these measures does not rest on a legalist claim that citations and reversals are indicators of the "correctness" of the decision. Rather the use is justified as a measure of the ability of

judges to offer for their decisions legitimate reasons for which there is a social consensus in the legal community.

Measures of citation and reversal are, in an important sense, indirect indicators of judges' ability to justify their decisions. They are a long-term assessment of how other judges think that they have performed the primary task of their job. And citation counts will only pertain to a portion of the cases in any judge's workload. What can be made of the significant number of cases that, for various reasons, are neither cited nor reversed? If the concern is assessing judicial quality in this way, then it would be ideal to have some direct measures of the quality of judicial justification.

And this goes back to the role that empirical scholars might play in the assessment of judicial quality. The overlap between what empirical scholars study and what empirical scholars would need for an adequate assessment of judicial quality on this account is small at best. Social scientists have made their most significant contributions to the study of courts up to this point by focusing primarily on the causal factors that determine the disposition of the case. But the normative assessment of judicial quality is best served by an analysis of matters of judicial reasoning and justificatory practice and not by studies of judicial motivation.

Nonetheless, there is, in principle, a good reason to believe that the overlap between the interests of social scientists and those who want to assess judicial decisionmaking could be much broader. This is because there should be a significant overlap between explanations of how judges affect the substantive content of the law and normative assessments of how judges justify their decisions. The data is primarily the same in both cases: the arguments and reasons that they employ in their decisions are factors that affect both substantive content and judgments of legitimacy.[50] So, the argument for having empirical social scientists take up the recommendations that Professor Epstein and I made about a broader research focus on substantive content is reinforced by the requirements of normative assessment. But perhaps this is harder to do than we thought.

50. *See, e.g.*, Dimitri Landa & Jeffrey R. Lax, *Disagreements on Collegial Courts: A Case-Space Approach*, 10 U. PA. J. CONST. L. 305, 306 (2008).

IV. IMPLICATIONS FOR FUTURE RESEARCH

Any adequate analysis of the crafting of judicial opinions would require at least two kinds of measurement: (1) a measure of the substantive content of the law and (2) measures of the sources of justification and, thus, of new law (the reasons and arguments that judges employ in their opinions). These are richer and more complex kinds of empirical evidence than commonly found in the data sets used in the study of courts. Is it reasonable to think that empirical scholars can produce measures sufficient to adequately characterize substantive content, and yet satisfy the requirements of explanation in the social sciences?

In the end the answer to this question turns on what the goal of the social sciences is, a topic much too vast to undertake here. But one common feature of most accounts of social science explanation is enough to understand what is at stake. That feature is the criterion of generalization. Social scientists seek to identify generalizations in social behavior. One of the common requirements for an adequate social explanation is the identification of causal mechanisms that apply generally to specific social situations. Generalization is a necessary, but perhaps not sufficient (this depends on having more details about the particular theory of social explanation), condition of an adequate explanation in the social sciences. How, therefore, can the desire for generalization be reconciled with what appears to be the richly detailed nature of the substance of law and legal sources? This is the basic conceptual and methodological question that needs to be answered if empirical social scientists are to extend their focus to the justificatory practices of judges. And I can only offer some speculation about this question in the remaining space here.

Regarding a potential measure of the substantive content of law, there must be a way to array, preferably on a couple of dimensions, the set of rules and principles that could be the substantive basis for a particular area of the law. This is a formidable task. Potential sources for such a measure, however, can be found in the existing social science literature. One might look to the case-space framework recently employed by formal theorists to begin to conceptualize ways of developing this measure. This approach has real analytical promise, but claims that the framework has important methodological implications for empirical studies have yet to be supported.

Another potential source might be the impressive efforts to enhance measures of judicial ideology. For example, Professors

Epstein, Martin, Segal and Westerland recently used the Martin-Quinn approach to judicial ideology to analyze the trends of individual Justices' votes over time.[51] One way to develop a measure of the feasible set of alternatives in a particular substantive area of the law might be to adopt a similar methodological strategy. Various judges' decisions could be collected in a common legal area over time and reinterpreted as plausible alternatives in the feasible set of substantive positions on that legal question.

Regarding the measures I have been calling the sources of law, the task is to find a way to develop indicators of these various sources. These factors form the basis for the reasons and justifications that judges apply in their opinions. A partial sample of the available theories of judicial interpretation can help to develop a substantial list of possibilities. They may include, but are not limited to, precedents, constitutional provisions, statutes, administrative regulations, legislative history, generally accepted social practices (for example, in the commercial law area), social norms, and basic values on which there is a social consensus in the community.

Focusing on how this wide variety of sources can be converted into data that might lead to the identification of general causal mechanisms allows them to be translated into a workable social scientific analysis. Here, I propose that the best way to do this would be to establish a set of categories of different types of sources and then seek to establish generalizable claims about the conditions under which judges are more or less likely to invoke a particular category. So, the focus would not be on the particular details of a specific argument, but rather on how the argument fits into a general framework of source categories. The primary interest of the social scientist will be how different categories of factors affect the evolution of the law or how the different categories affect the acceptance of the claims of legitimacy.

This focus on categories and conditions highlights the comparative advantage of empirical social scientists. For explanations of the substantive content of law, social scientists are better equipped to establish and document the general causal framework in which judges change and justify the law. Their comparative advantage is not the detailed analysis of the substantive path of the law in particular areas. But in pursuing their comparative advantage, empirical social

51. Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 309–21 (2007).

scientists have a significant contribution to make to these more detailed analyses.

I will end with this last point on how social science research can support and enhance the efforts of legal scholars both to understand and to normatively assess the behavior of judges. Most studies of the development of law in particular substantive areas make important assumptions, often implicit and unstated, about the causal structure of law. Similarly, they commonly invoke, without substantiation, various causal mechanisms to further their explanatory narrative. There is nothing, in principle, wrong with this. In fact, reliance on some kind of general causal framework is a necessary feature of these accounts. And this is when social scientific research enters the picture. To the extent that the social scientific framework is found persuasive by the intellectual community at large, it will serve as both a guide and a constraint for how other scholars make these assumptions and employ these causal mechanisms. In particular, these scholars will be under some obligation to reconcile their accounts with the best understanding of how these general mechanisms actually work. In this way, the social scientific study of courts can have a significant influence on the scholarly understanding of what judges do and the assessment of how well they do it.