

Introduction

“ONLY CONNECT”: TOWARD A UNIFIED MEASUREMENT PROJECT

DAVID F. LEVI†

MITU GULATI††

In his early twentieth century novel, *Howard's End*, the English author E. M. Forster used the phrase “Only Connect” as an epigraph. Later one finds this passage: “Only connect! . . . Only connect the prose and the passion, and both will be exalted, and human love will be seen at its height. Live in fragments no longer.”¹ We do not advocate that academic scholars of the judiciary and judges should be joined in passion or exaltation, although love might not be entirely out of the question—particularly love of justice and a better system of adjudication. But we do suggest that they would do well to “live in fragments no longer.” Hence, the papers and comments which follow, the product of a conference of judges, political scientists, and law professors, convened at Duke University School of Law.

For many years, academics and judges have been thinking about the judiciary from their individual scholarly or practical perspectives. The scholars attempt to evaluate the structural, institutional, and behavioral factors that influence judicial decisions and the overall efficacy and impact of the legal system, while the judges study ways to become more efficient in the face of increasing caseloads while improving consistency and overall fairness. Both groups place a high value on empirical studies, and yet, for the most part, the scholars and the judges speak past one another, either strongly disagreeing or

Copyright © 2009 by David F. Levi and Mitu Gulati.

† Dean and Professor of Law, Duke University School of Law. Previously, Chief Judge of the United States District Court for the Eastern District of California.

†† Professor of Law, Duke University School of Law. The authors thank Jennifer Dominguez and Jonathan Williams for their assistance.

1. E.M. FORSTER, *HOWARD'S END* 214 (Alfred A. Knopf 1943) (1921).

simply unaware of what is most important to the other group. This is unfortunate because academics and the judges they study should have much to say to one another and much to gain from finding common ground. For example, take the recent research on the sentencing practices of federal trial judges. Academic scholars, seeking to examine patterns in sentencing practices, have been frustrated by the unavailability of judge-specific identifiers in the data.² The judiciary, however, is understandably reluctant to release judge-specific identifiers when the sole purpose of the scholarship appears designed to establish that, for example, Republican appointees hand out stiffer sentences than their Democratic colleagues, and when the release of such information could subject judges to external pressure, perhaps from the electorate or the legislature. The stalemate is regrettable not only because the topic of sentencing itself is important, nor only because the nature of decisionmaking in this area lends itself to empirical study, but also because judges want to know whether they are fair and consistent sentencers and how their sentences compare to other judges in the same justice systems. Surely there is a middle ground here, where both sides can benefit from cooperation and conversation.³

The general trend in recent years, however, has been away from the conversation and cooperation among judges and academics. As a general matter, the gap between academic writing and judicial reading has become more pronounced as legal scholarship has become increasingly technical and specialized, with an emphasis on theoretical and empirical approaches to law over analysis of particular cases and developments in legal doctrine.⁴ In our experience, most judges believe that the vast majority of academic writing, particularly academic writing focused on the judiciary, is of no practical use to them.⁵ They lament that law review articles

2. See, e.g., Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715, 717 (2008).

3. One easy partial solution might be to release individual judge information from larger courts without the names of the individual judges.

4. RICHARD A. POSNER, *HOW JUDGES THINK* 207–10 (2008) (describing the progression from a legal academy contributing pedagogical and practical-based scholarship to the current day reshaped “modern style of academic law” influenced largely by the social sciences and the critical legal studies movement).

5. One such judge, Judge Harry Edwards, former Chief Judge of the United States Court of Appeals for the District of Columbia, and former professor at the University of Michigan Law School, contends that judges and others engaged in the practical application of the law

provide little help in understanding complex and developing areas of the law. They believe that there was a golden age when the best academics waited eagerly for the opinions of the appellate courts, poised to expound in treatises and in law reviews upon the brilliance and craft of the judicial authors. Judges tend to find interdisciplinary work irrelevant; and they resent what they see as the obsession of some empiricists with proving that judges determine case outcomes based on their judicial philosophies, which the political scientists insist on calling “political bias.” The scholars cry “gotcha” whenever a correlation between belief or experience or gender or the like can be made to case outcomes. To most judges, this literature seems misguided in part because it misses the vast majority of cases that are decided unanimously by judges of all shapes and sizes, in part because it states the obvious point that political selection processes for judges will select judges who sometimes decide cases differently in somewhat predictable ways, and in part because it misses the effort that conscientious judges make to overcome preconceptions by listening to and learning from the advocates and evidence in the case. Our adversary system and much of our procedure is based on the view that judges and jurors have preconceptions but that reasonable and fair outcomes are possible when the parties have extended opportunities to make their case and be heard.

If what we have described is the common view of judges, and if the criticism leveled at the academic literature has some force, it is also mistaken in many respects, as the papers submitted for this conference demonstrate. For example, Professors Brennan, Epstein, and Staudt’s paper, *Economic Trends and Judicial Outcomes: A Macrotheory of the Court*, is an interesting piece of empirical history and analysis.⁶ Moving away from the tendency in the empirical literature to focus on constitutional matters, these scholars turn their lens on the Supreme Court’s jurisprudence in the tax area.⁷ Looking to tax opinions during the periods 1912–1929 and 1930–1940, the

“have little use for” the scholarship generated by the academy. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992). He has described academic writing as unhelpful, overly impractical, and narrowly focused. See *id.* He has accused law schools of “abandon[ing] their proper place by emphasizing abstract theory at the expense of practical scholarship.” *Id.* at 34.

6. Thomas Brennan, Lee Epstein & Nancy Staudt, *Economic Trends and Judicial Outcomes: A Macrotheory of the Court*, 58 DUKE L.J. 1191 (2009).

7. *Id.* at 1195. This project builds on the prior work by Professors Staudt and Epstein in the tax-judging area. See Nancy Staudt, Lee Epstein & Peter Weidenbeck, *The Ideological Component of Judging in the Taxation Context*, 84 WASH. U. L. REV. 1797 (2007).

authors discover that the Justices may have been influenced by the economic condition of the country and that the Court began ruling more favorably to the government as the economy deteriorated in the 1930s.⁸ These scholars contend that in times of severe economic distress, as in a time of war, the Court appears to defer more to the government.⁹ By contrast, when the downturns are but short-term, the Court appears more willing to express its approval and disapproval.¹⁰ Whatever criticism might be made of the analysis, the attempt to describe the historical context of decisionmaking and to establish changing economic conditions as an important part of the context in which the Court then operated is of considerable interest to judges and scholars alike.

Using the tax data set that Professors Epstein and Staudt created, Professors Brudney and Ditslear look at how legislative history and canons of construction are used in tax law as compared with employment law decisions.¹¹ This article extends their prior empirical work on canons of construction.¹² They find that the use of canons of construction, legislative history, and deference to expert bodies are quite different in the tax and workplace law areas.¹³ Here is the golden age revived in empirical dress; these scholars are looking closely at doctrines and decisional methodology over a long period of time and over many cases.¹⁴ Most judges would welcome this scrutiny and might well learn something important from it.

Professor Shepherd turns her attention to an area often shunned by scholars, the state high courts, and measures the effect of institutional structure on decisionmaking.¹⁵ Her study finds that, in many cases, judges appointed by governors or state legislatures are less independent than judges who are elected, thereby questioning

8. Brennan et al., *supra* note 6, at 1196.

9. *Id.* at 1208.

10. *Id.* at 1195.

11. James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231 (2009).

12. See James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 44 (2005) (examining the Supreme Court's reliance on the canons of construction in workplace law).

13. Brudney & Ditslear, *supra* note 11, at 1235–37.

14. The authors rely on two Supreme Court datasets, consisting of nearly 160 tax cases and 600 cases involving federal workplace statutes accumulated over a thirty-nine-year period. See *id.* at 1235.

15. Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589 (2009).

conventional wisdom regarding judicial election versus appointment systems.¹⁶ This article is the third in a line of important articles by Professor Shepherd showing that judges in systems where retention or reappointment is an issue tend to shape their decisions, not as a function of their personal politics, but as a function of the politics of those who are deciding on whether the judge will continue in office.¹⁷ The implications of such a study for law reform are significant.

Professors Rachlinski and Guthrie, two of the leading scholars in the emerging field of behavioral law and economics, collaborate with Judge Wistrich to examine the behavior of administrative law judges.¹⁸ This type of collaborative study between judges and academics is precisely what we hope to encourage. We cannot take credit for bringing together this team because they have already put together an impressive body of experimental research on psychology and judging.¹⁹ In their project for this Symposium, they find that these specialized judges are no more deliberative decisionmakers than their generalist counterparts.²⁰ Professor Baum, one of the giants in the judicial studies field, responds by drawing insights from his current research on various types of judicial specialization.²¹

Professors Choi, Gulati, and Posner, building on two prior articles on state court judges,²² propose measures that can be used to rank the relative performances of courts and judges.²³ They ask whether, in the context of organizations like the U.S. Chamber of Commerce that issue annual rankings of the state courts based on

16. *Id.* at 1594.

17. See Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. (forthcoming 2009) (manuscript at 6), available at <http://ssrn.com/abstract=997491>; Joanna M. Shepherd, *Money, Politics and Impartial Justice*, 58 DUKE L.J. 623, 629 (2009).

18. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477 (2009).

19. See, e.g., Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001).

20. Rachlinski et al., *supra* note 18, at 1480.

21. Lawrence Baum, Response, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667 (2009).

22. Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Are Judges Overpaid?: A Skeptical Response to the Judicial Salary Debate*, 1 J. LEGAL ANALYSIS 47, 57 (2009); Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Professionals or Politicians?: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 3 J.L. ECON. & ORG. (forthcoming 2009) (manuscript at 2-4), available at <http://ssrn.com/id=1008989>.

23. Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L.J. 1313 (2009).

opaque measures (such as surveys of lawyers), there is utility in constructing countermeasures that use public information and transparent methodology.²⁴ To the extent that the public and transparent measures differ from those constructed using opaque (but supposedly superior) measures, this can potentially force those producing the opaque measures to reveal the reasons for the differences in rankings.²⁵

Professors Cross and Lindquist squarely address the topic of the conference—that of devising measures to evaluate judges and justice.²⁶ They take on the question of whether the measures employed by Professors Choi, Gulati, and Posner in the state court context can be improved upon, specifically within the context of the federal courts of appeals.²⁷ Cross and Lindquist suggest that significant improvements can be made, such as using information embedded in reversal rates.²⁸

Professors George and Guthrie, building on their prior work questioning the optimality of the U.S. Supreme Court's institutional design,²⁹ evaluate whether the Court should be restructured in the image of the courts of appeals—for example, in three-judge panels with the opportunity for en banc hearing.³⁰

Professor Knight steps back from the specifics of the various empirical projects to grapple with the big picture question of where empirical scholarship on the courts should now go.³¹ Drawing on his classic book with Professor Lee Epstein, *The Choices Justices Make*;³² Judge Posner's recent book, *How Judges Think*;³³ and the

24. *Id.* at 1317–18.

25. *Id.* at 1318.

26. Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383 (2009).

27. *Id.* at 1384–85.

28. *See id.* at 1405 (suggesting that the reversal rate is “an important metric . . . that may yield insight into the quality of circuit court judges”).

29. *See* Tracey E. George & Chris Guthrie, Essay, “*The Threes*”: *Re-Imagining Supreme Court Decisionmaking*, 61 VAND. L. REV. 1825, 1830 (2008). We thought it was delightful to see how the judges in the audience were far more willing to consider institutional reforms of the courts, even the high citadel, than the attending law professors.

30. Tracey George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1465 (2009).

31. Jack Knight, *Are Empiricists Asking the Right Questions About Judicial Decision-making?*, 58 DUKE L.J. 1531 (2009).

32. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

33. RICHARD POSNER, *supra* note 4.

jurisprudence of H.L.A. Hart,³⁴ Professor Knight wrestles with the ultimate question of whether empirical studies of the courts adequately measure the correct components of judicial decisionmaking.³⁵ He advocates for a movement beyond a simple review of a case's disposition to explain judicial choice, and toward the development of more nuanced measures of judicial opinions—based upon the reasons given in the decision.³⁶

Finally, Professor Ramseyer's study of the Japanese Supreme Court from 1990–2000 examines how that Court might have been affected by the loss of power by the Liberal Democratic Party in the mid-1990s.³⁷ Professor Ramseyer uses this opportunity to meditate upon the connection between an independent judiciary and the consequent freedom a judge has to apply political preferences: “Were courts not independent . . . judges could not costlessly indulge their political biases. And if they could not indulge them at low cost, they would not indulge them often. That they act politically in political cases simply reflects their essential independence from incumbent politicians.”³⁸

Professor Ramseyer's study of judicial independence, which builds upon his large body of prior research on the Japanese judiciary and specifically on judicial independence,³⁹ should be of great interest to judges. Indeed, there is probably no topic of greater importance and interest to judges in the United States than judicial independence. The Chief Justice of the United States Supreme Court annually speaks to the connection between the conditions of judges' employment, specifically their pay, and judicial independence.⁴⁰ Justices and judges testify and write op-ed pieces on the importance

34. H.L.A. HART, *THE CONCEPT OF LAW* (1961).

35. Knight, *supra* note 31, at 1532–33.

36. *Id.* at 1548 (arguing for “a more nuanced measure of the substantive content of the law produced by the case”).

37. J. Mark Ramseyer, *Predicting Court Outcomes Through Political Preferences: The Japanese Supreme Court and the Chaos of 1993*, 58 *DUKE L.J.* 1557 (2009).

38. *Id.* at 1559.

39. *E.g.*, J. Mark Ramseyer & Eric B. Rasmusen, *The Case for Managed Judges: Learning from Japan After the Political Upheaval of 1993*, 154 *U. PA. L. REV.* 1879 (2006); J. Mark Ramseyer & Eric B. Rasmusen, *Political Uncertainty's Effect on Judicial Recruitment and Retention: Japan in the 1990s*, 35 *J. COMP. ECON.* 329 (2007); J. Mark Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, 95 *AM. POL. SCI. REV.* 331 (2001).

40. *E.g.*, JOHN G. ROBERTS, JR., 2008 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2009), available at <http://www.supremecourtus.gov/publicinfo/year-end/2008year-endreport.pdf>.

of judicial independence. Judicial conferences are devoted to this topic. A joint conference of the American Law Institute and The Sandra Day O'Connor Project on the State of the Judiciary at Georgetown University Law Center⁴¹ enabled many eminent lawyers and judges, including Justices O'Connor and Breyer, to take a thorough look at judicial independence.⁴²

Perhaps as an indication of the unnecessary division between academic work on the judiciary and the very judges who might benefit from such work, none of the published materials reference the substantial academic literature on the importance of the independent judge in the common law tradition to economic development, political stability, and democratic values. In the past decade, one of the areas of academic debate in the fields of finance and development has been the relationship between law and finance. This is an age-old question—whether a robust rule of law can lead to increased economic growth.⁴³ But what has been noteworthy about the modern version of this debate has been its focus on empirical evidence, specifically, whether common law courts result in greater economic growth because of the independence that judges are given within that system. Although one can quarrel with the precise causal mechanisms (and many do), most seem to agree that this is an interesting question and that common law systems come out on top under a variety of tests. The premise that the independence granted to judges under the common law system is key to producing the kind of justice system that induces growth should be of great interest to judges particularly because in some of the studies job security and protection of judicial salaries are deemed important to creating the conditions for this growth. Yet, we believe that most judges are unaware of this substantial body of academic work even though it is well known to policymakers and institutions like the World Bank.⁴⁴ In sum, whatever

41. This was the first in a series of conferences organized by Georgetown's Sandra Day O'Connor Project to examine judicial independence.

42. The proceedings of the conferences were later published in the Fall 2008 issue of *Dædalus*, titled "On Judicial Independence." See *DÆDALUS*, Fall 2008.

43. See, e.g., DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 8 (1990); see also Mancur Olson, *Big Bills Left on the Sidewalk: Why Some Nations are Rich, and Others Poor*, 10 J. ECON. PERSP. 3, 20 (1996) (observing the connection between high rates of growth and the quality of economic policies and institutions).

44. See Daniel Klerman & Paul J. Mahoney, *The Value of Judicial Independence: Evidence from 18th Century England*, 7 AM. L. & ECON. REV. 1, 2 (2005) ("There is a growing body of evidence that differences in the quality of legal systems can explain . . . variation in financial

its shortcomings, there exists a body of academic literature discussing judicial decisionmaking, judicial independence, and the institutional design of judiciaries that judges do not know about, even though there is much in this scholarship that would be of great value to them.

On the other side, academics would benefit from more judicial comment upon their work. As Judge Edwards puts it, understanding how judges think “requires considering the way those who perform the activity understand it.”⁴⁵ Similarly, judges have a unique understanding of how courts are organized and operate, and how cases are decided and managed, that could be quite useful to scholars interested in institutional design. Finally, judges might be helpful in moving scholarship toward questions of great practical importance and away from the somewhat tired search for correlations between judges’ so-called politics—a potentially misleading term—and the decisions they reach. Judge Posner offers his own recommendations for future research in an interview in this Issue.⁴⁶ The potential for the judge-subjects and academic-evaluators to have a mutually beneficial relationship just needs an opportunity to be fully realized.

The *Duke Law Journal* Conference on Measuring Judges and Justice, the conference that precipitated the articles in this Issue, was an attempt to provide that opportunity. The conference was an outgrowth of discussion in a seminar class we taught on the study of judicial behavior. Our students believed that it would be useful for judges and those doing research on judicial behavior to come together to discuss and debate judicial measurement and institutional design; and we were willing to put their theory to the test. Our academic guests at the conference were all preeminent scholars whose work sits at the intersection of traditional law and the modern empirical inquiry into judicial behavior. Our judicial guests were all distinguished members of the judiciary from both the federal and state courts at both the trial and appellate levels. To us, the results were exceptional.

development and economic growth . . .”); Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 507 (2001).

45. Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1365 (1998); see also Stephen Breyer, *Serving America’s Best Interests*, DÆDALUS, Fall 2008, at 139, 140 (“Ultimately, only the judge, not third parties, can understand his or her own thought processes.”); David F. Levi & Mitu Gulati, *Judging Measures*, 77 UMKC L. REV. (forthcoming 2009) (manuscript at 22, on file with the *Duke Law Journal*) (advocating for judicial involvement in the measurement project as a means to determine the appropriate characteristics to measure and the best ways to measure them).

46. Interview, *A Conversation with Judge Richard A. Posner*, 58 DUKE L.J. 1807, 1819–23 (2009).

The papers generated thoughtful and illuminating panel discussions among the authors, their judge-subjects, and other academics. Though their approaches differed, the participants generally agreed that despite the law's emphasis on rules as constraints, discretion and judgment permeate the judicial process. Their discussions centered not on whether one could measure exercises of discretion quantitatively, but on how one might best capture the complexity of legal decisions and help improve decisionmaking through measurement. Moreover, as the responses in this Issue suggest, the ideas and discussions were anything but exhausted by the end of the Symposium. This Symposium and this Issue are just the beginning of an ongoing discussion and debate begun in the hope that we will "live in fragments no longer."