What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making

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HAROLD J. SPAETH AND JEFFREY A. SEGAL. *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court.* New York: Cambridge University Press, 1999. Pp. 359.

> [Behavioral research has] the potential to engender serious confusion over judicial decision making. Even worse, [it] may mislead the unsuspecting . . . into thinking that judges are lawless in their decision making, influenced more by personal ideology than legal principles. . . . I have no doubt that careful statistical analysis, cautiously interpreted, may conceivably shed some light on judicial decision making. But serious scholars seeking to analyze the work of the courts cannot simply ignore the internal experiences of judges as irrelevant or disingenuously expressed. (Edwards 1998, 1337–38)
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> [E]ven if Chief Judge Edwards is accurately reporting his perceptions, one must worry about whether those perceptions are in fact an accurate portrayal of the work of his court. . . . [W]hen leaders tell the public that their institutions function well and that the views of potential

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> critics should be disregarded, skepticism and empirical testing are appropriate. (Revesz 1999, 845)

Does law influence judicial decision making? Many scholars, in law schools and elsewhere, spend a great deal of time reviewing, categorizing, and engaging legal texts. They assume that by knowing various rules, principles, or structures of argument we will be in a better position to understand a wide range of social relations and political practices, including why judges decide cases as they do. Advocates and analysts know that there is a personal element to judging, and they realize that a case often turns on who is making the decision. But it is also widely believed that the personal element is either checked, constrained, or filtered through distinctive professional obligations and jurisprudential schools of thought. It would be considered malpractice if a lawyer who was preparing a case asked only about a judge's partisan affiliation and spent no time reading past opinions and researching the state of the law. Judges reinforce this judgment by requiring lawyers to talk about precedents and doctrines and by writing opinions filled with arguments about precedents and doctrines. The entire structure of legal education and the nature of the judicial process in the United States is premised on the assumption that, one way or the other, law matters.

But not everyone agrees—at least not when talking about the U.S. Supreme Court. In other corners of the university, and increasingly even within the ranks of the law professorate, it is widely considered a settled social scientific fact that law has almost no influence on the justices. Most of these scholars are positivist-empiricists who insist, not unreasonably, that the impressions of "jurisprudentially inclined scholars" (p. xv) and the testimony of judges should not be taken at face value. From their point of view, decades of social science research designed to test these impressions has demonstrated instead that ideological and political considerations drive decision making. This research has been so completely internalized by many political scientists that it is considered the common sense of the discipline that Supreme Court justices (and, in the minds of many, appellate judges in general) should be viewed as promoters of their personal policy preferences rather than as interpreters of law.[1]

The contemporary scholars most associated with this school of thought are Jeffrey A. Segal and Harold J. Spaeth. Spaeth has been involved in behavioralist research since the early 1960s (e.g., Spaeth 1961) and is also the principal investigator of the United States Supreme Court Database, a

1. This assumption is so prevalent that those in political science who believe there are interesting things to say about the role of law were recently told by the chair of the Law and Courts Section of the American Political Science Association that they are engaged in long-abandoned "trivial pursuits" and it is time to move on to more "genuinely interesting questions" (Epstein 1999, 3). Needless to say, many political scientists vigorously object to this view.

machine-readable collection of 247 variables covering the first term of the Warren Court and continuing through the last completed term of the current Court.[2] Segal, a former student of Spaeth, has written or co-written leading articles on Supreme Court decision making since the mid-1980s (e.g., Segal 1984), and is justly considered a leading figure in the study of judicial behavior. In 1993 they published *The Supreme Court and the Attitudinal Model*, a rigorous and systematic marshaling of the evidence in favor of the claim that the justices decided cases on the basis of their personal ideologies as conventional liberals or conservatives (the "attitudinal model") and not on the basis of any sense of fidelity to law or legal interpretation—a position characterized in political science as "the legal model."

Their new book, *Majority Rule or Minority Will*, is a worthy follow-up to that earlier work.[3] Spaeth and Segal note in their preface that while few "doubted that we had [previously] provided clear and convincing evidence of the influence the justices' attitudes had on their decisions" some critics did suggest that "our analysis of the legal model was far less systematic and relied almost exclusively on anecdotal evidence." At the time they wrote the previous book they were under the belief that arguments about the influence of law "were so vague that they could not be subject to falsifiable tests," since in most cases legal factors such as precedent could support any position that a justice might take, and "if one could not predict *a priori* how precedent might influence a decision, then precedent is completely meaningless as an explanation of the Court's decisions" (p. xv). They now claim that they have devised a falsifiable hypothesis test of one leading feature of the legal model—the claim that judges are influenced by precedent. After test-driving a preliminary version of their argument in a symposium sponsored by a leading journal of positivist political science (*American Journal of Political Science* in November 1996), they now present in book form a more mature and systematic version.

This book raises important questions that cut to the heart of work being done by judges and "jurisprudentially minded scholars." Political scientists have debated these issues for some time, but recently a number of law professors (who would not want to be confined by the label "behavioralists") have published very good behavioralist work in leading law reviews, and they are pressing the case that if the legal profession does not confront this "new legal realism" then conventional "legal research will appear increasingly irrelevant" and agenetic (Cross 1997, 255, and cites contained

2. Spaeth has generously made this data, and its supporting documentation, publicly available via the web at http://www.ssc.msu.edu/~pls/pljp. For more information on the database see Epstein (2000) and Spaeth and Segal (2000).

3. The book is already sufficiently well regarded to have received the C. Herman Pritchett Award, given by the American Political Science Association's Law and Courts section for "best book in the field of law and courts written by a political scientist" during the previous year.

therein; see also Cross and Tiller 1998; Revesz 1997 and 1999; Sisk, Heise, and Morriss 1998; Tiller and Cross 1999a and 1999b).[4] The time seems ripe for reflecting on the contributions made by behavioralists in resolving questions about law and judicial decision making.

I begin by reviewing the political science research on the so-called legal model leading up to Spaeth and Segal's latest efforts. Partly this is to clarify Spaeth and Segal's distinctive contributions. But it is also designed to highlight some distinctive features of the way behavioralists approach this topic—features that have consistently led legalists within political science to reject the findings of this research. Their most notable complaint has been that behavioralists are forced by the conventions of their positivist methodology to conceptualize legal interpretation in fairly formalistic terms (so that clear predictions about behavior can be tested), and this leads them to believe that behavioralists test only those versions of legalist arguments that are least persuasive and most easily falsified. Spaeth and Segal are mindful of this debate, and so it is important to assess whether their most recent effort is responsive in a way that will be more persuasive to legalists.

More important, though, their effort gives us a chance to identify some important differences in the ways that scholars and judges conceptualize "legal influence" for purposes of making claims about the determinants of judicial decision making. Greater attention to these essentially jurisprudential questions may help us better understand some of the differences separating behavioralists and their legalist critics. And because there are different versions of the "law matters" hypothesis, we must also consider whether different kinds of empirical methods are required if we are fully to explore the extremely important question of whether our judges should be seen as principled interpreters of law or as pursuers of personal political agendas.

JUDICIAL BEHAVIORALISM AND THE LAW

The law professorate may think of critical legal scholars as the more modern heirs of the legal realist tradition, but it may be more accurate to say that among contemporary scholars none is more self-identified with that school of thought than judicial behavioralists (e.g., Segal and Spaeth 1993, 65–69). More than any other scholars over the past few decades,behavioralists embody the efforts of the realists to demonstrate that law is vague, internally inconsistent, revisable, or otherwise not amenable to

4. One of the more interesting and useful consequences of law review behavioralism is that it has been read and responded to by prominent judges who have strenuously objected to the portrait of decision making implied by these models (see Edwards 1998; Wald 1999a, 1999b). This is something that political scientists are not used to, since the real world typically pays very little attention to what we say and do. Law professors have a slightly different relationship to the real world, and so not surprisingly the targets of this decades-old research are now starting to talk back.

a formal process of neutral application or logical deduction (Fisher, Horwitz, and Reed 1993, xiii, 164–231; Cardozo 1921, 173; Dewey 1924). They have taken to heart Holmes's famous aphorisms that "you can give any conclusion a logical form" but "behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds," and that "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court" (Holmes 1897, 458, 465). They exemplify Oliphant's (1928, 159) claim that "Not the judges' opinions, but which way they decide cases will be the dominant subject matter of any truly scientific study of law." They agree with Llewellyn that in order to achieve a "clearer visualization" of the nature of law it is important to move "toward ever-decreasing emphasis on words, and ever-increasing emphasis on observable behavior." Such an approach "turns accepted theory on its head" in that "the traditional approach . . . centers on words [and] has the utmost difficulty getting beyond words," whereas under this more "realistic" approach the "'real rules' . . . would by legal scientists be called the practices of the courts, and not 'rules' at all" (Llewellyn 1930, 443–45, 448, 464).

With rare exception, however,[5] these early efforts to draw attention to the personal elements of judicial decision making had almost no sustained impact on the research agendas of law professors, for whom doctrinal analysis remained a preferred activity over improving empirical predictions about observable judicial behavior (Kalman 1986; Cross 1997, 256–57; Schlegel 1979; Duxbury 1995; Schuck 1989). It also took a while before behavioralism had an influence within political science. Political scientists such as Thomas Reed Powell, Charles Grove Haines, Edward S. Corwin, and Robert E. Cushman (among others) felt themselves in league with the law professorate in the interpretive-political analysis of public law. Even as the behavioral revolution started to unfold, scholars such as Alpheus Mason, C. Herman Pritchett, Robert G. McCloskey, Walter Murphy, and Martin Shapiro paved the way for vast numbers of political scientists who, to this day,

5. There were some limited examples of jurisprudentially minded scholars toying with this approach to judicial decision making. When Thomas Reed Powell first wrote about "The Constitutional Issue in Minimum-Wage Legislation" he focused on a careful review of prevailing police powers jurisprudence and suggested that judicial decisions would follow the strongest arguments (Powell 1917). After the decision in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), he began writing instead about "The Judiciality of Minimum-Wage Legislation." Following in the footsteps of many opponents of court decisions, Powell complained that "literary interpretation of the Constitution has nothing whatever to do with it. . . . Arguments *pro* and arguments *contra* have no compelling inherent power. The issue was determined not by the arguments but by the arbiters" who were following their "personal views of desirable governmental policy" (Powell 1924; cf. Brown 1926, 910, who said Powell's position was "more clever than profound"). This came not long after Charles Grove Haines (1922) published some "General Observations on the Effects of Personal, Political, and Economic Influences on the Decisions of Judges" (see also Whittington 2000, 604).

adopt nonquantitative approaches to the study of law and courts (see also Gillman and Clayton 1999).

But with the study of judicial behavior remaining unexplored in law schools an opportunity arose for some political scientists to distinguish their work from more jurisprudentially minded colleagues. Pritchett (1948) took the first step in his study of the judicial voting blocs on "the Roosevelt Court," but he considered this work a modest supplement to more orthodox analyses of legal doctrine, which he felt were still essential to an understanding of judicial decision making.[6] It was not until Glendon Schubert's work (1958, 1959, 1963) that some scholars in political science made the transformation (to borrow a title phrase from one of his essays) "From Public Law to Judicial Behavior."

As is suggested by this title, for a long time the focus on behavior meant that legal variables disappeared from the analysis. After all, the point of focusing on behavior was that one did not have to worry about the law. Some behavioralists claimed that this was actually a disciplinary advantage over traditional legal scholars, since legal reasoning was essentially "a low form of rational behavior," no more a science "than creative writing, necromancy, or finger painting" (Spaeth 1979, 64). Because (at that time) it was generally believed that legal variables were not amenable to statistical analysis, scholars started with variables that could be easily coded, such as a judges' party affiliation, background, or socialization (Schmidhauser 1959; Nagel 1961; Grossman 1966, 1967) and then increasingly turned their attention to the "attitudes," "values," or "personal policy preferences" of the judges (see Ulmer 1960; Spaeth 1961; to trace the development of some of this literature see Schubert 1959, 1963; Grossman and Tanenhaus 1969; Murphy and Pritchett 1974; George 1998; Rhode and Spaeth 1976).[7] In the

6. Later, Pritchett (1954, 189–91) noted some criticism of the "box score" approach to judicial politics. He acknowledged that "Considering the complicated character of the judicial decision making process, the value or meaning of such a box score may be disputed." He admitted that statistical analysis "cannot be used as a principal reliance in explaining the decisions of the Supreme Court. A box score is no substitute for the process of careful analysis of judicial writing by trained minds using all the established methods for coaxing meaning out of language. The results of such analysis can be presented only in more language, not in mathematical symbols. There is no method 'by which an IBM machine can be used as a substitute for scholarship.' But when all this is said, a place remains for a properly prepared box score used to highlight or summarize or put in shorthand form findings which support and give additional meaning to the results of more orthodox inquiry."

7. Just to clarify: Virtually everyone who studies law and courts agrees that to understand judicial decision making we should take into account the values, ideologies, or worldviews of judges. Because everyone knows that judges have different attitudes,many legal scholars believe it to be very important to pay close attention to the history, biography, and jurisprudence of various judges. What is distinctive about behavioralists is that they insist on treating judicial attitudes as quantifiable policy preferences that can be standardized and arranged mathematically along a conventional liberal to conservative spectrum. While most legal scholars would agree that the language of "liberal" or "conservative" is a useful shorthand for summarizing a judge's worldview, behavioralists have a tendency to treat these as the only appropriate labels, and on occasion this leads them to adopt characterizations that some juris-

early years, this community of scholars diplomatically suggested that they "do not eschew the traditional methods of research in public law" and they were willing to acknowledge that "there is no substitute for substantive competence and insight" (Schubert 1959; see also Spaeth 1961, 180). At the same time, they frequently delighted in demonstrating that these personal variables typically trumped the sort of legal norms that many jurisprudentially minded scholars spent much time analyzing, such as the norm of judicial restraint (Spaeth 1964).

What is particularly noteworthy about the long-standing behavioralist aversion to legal variables is that it was premised on a fairly controversial conception of law as a set of clear, determinate rules. It was the same sort of formalist conception that had been the object of realist ridicule, and to some extent it found renewed expression around the time of the birth of behavioralism in H. L. A. Hart's reformulation of legal positivism.[8] This conception of law allowed many behavioralists to discount the significance of legal influences whenever it could be demonstrated that different judges reached different decisions—and, since that could almost always be shown, it was an article of faith that no additional justification had to be given for focusing on other variables. George and Epstein (1992, 323–24) make the point that the behavioralist rejection of law is "grounded in positivist jurisprudence" or a conception of "mechanical jurisprudence," and their alternative explanations focus instead on "an array of sociological, psychological, and political factors having little to do with legal doctrine" (see also Epstein and Kobylka 1992, xiii–xiv). Behavioralists focus on nonlegal variables precisely "because the constraints under which the Justices decide their cases do not inhibit them from expressing their preferences insofar as voting on the cases before them is concerned" (Spaeth 1979, 109; see also Segal and

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prudentially minded scholars might find too reductionist (e.g., calling Frankfurter "a stalwart economic conservative" [Segal and Spaeth 1993, 318; Schubert 1965, 127–41; Spaeth 1964]). The major challenge for behavioralists has been to find actual measurements of judicial attitudes that are not based tautologically on the justices' votes (which for a long time led behavioralists to induce attitudes from votes and then use those attitudes as a basis for explaining votes) (see Epstein and Mershon 1996). The solution that was eventually arrived at is to do a quantifiable content analysis of the language used by editorial writers in describing Supreme Court nominees (Segal and Cover 1989). As an alternative, the party affiliation of an appointing president is sometimes substituted (Nagel 1961). For an overview of these developments see George 1998, 1646–55.

8. "If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognize as law could exist." These identifiable rules were assumed to possess a core meaning that brings to mind a "plain case" that is clearly governed by the commands of the rule (e.g., a rule that prohibits the use of vehicles in a park would obviously apply to automobiles). Hart recognized that judicial discretion or policymaking would exist when judges were asked to apply the rule outside the example of the plain case (that is, when the authority of clear rules had been exhausted). However, "the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do *not* require from them a fresh judgment from case to case" (Hart 1961, 120, 124–26, 132).

Cover 1989, 559; Scheb, Bowen, and Anderson 1991, 329; Baum 1993, 445, and 1994a, 755 n. 8; Danelski 1966). Similarly, Gibson argued that the fact of variation in voting means that judges "have enormous discretion when they make their decisions. The text of constitutions, statutes, and precedents does not *command* the votes of the judges. Since there is no 'true' or 'objective' meaning to constitutional phrases like 'due process of law,' judges *cannot* merely follow the law" (1991, 258, emphases in original). In this most extreme version of the realist position,[9] if law's influence was not determinate, if it allowed for any free play of discretion or judgment, then it was assumed that it had no influence at all.

Despite these long-standing assumptions about the irrelevance of legal variables, by the 1980s there were some scholars interested in constructing more direct empirical tests of law. These scholars also conceptualized law as determinate rules or norms that should (if working) lead judges to behave in similar ways; after all, if this was not assumed there would be no way to set up behavioralist hypothesis tests that are designed to examine whether certain predicted behaviors are more likely to occur given the presence of particular variables or conditions. This methodological requirement of behavioral predictability does not strictly rest on a notion of mechanical jurisprudence (since some legal influences may be discerned even when judges do not exhibit perfect compliance), but it clearly presumes that law-influenced behavior conforms to a predetermined course of conduct. There is nothing unreasonable about this presumption, but it should be noted that it reflects only one contested conception of law. Unfortunately, behavioralist researchers were not always explicit about how their studies focused on certain (controversial) propositions made within certain jurisprudential

9. Many legal scholars who were broadly sympathetic to the realist critique of mechanical jurisprudence believed that an overly dismissive attitude toward the importance of legal materials represented an exaggerated response to the exaggerated claims of the Langdellians. For example, in the course of making his argument that judicial decision making is not simply a matter of judges "discovering" law, John Chipman Gray (1909, 34) nevertheless acknowledged that judges "draw rules from precedents" and "decide cases otherwise than they would have decided them had the precedents not existed, and follow the precedents, although they may think that they ought not to have been made." At the same time that Felix Cohen railed against the "transcendental nonsense" of classical legal thought, he pointed out that "the 'hunch' theory of law [e.g., see Hutcheson 1929], by magnifying the personal and accidental factors in judicial behavior, implicitly denies the relevance of significant, predictable, social determinants that govern the course of judicial decision." Those social determinants include the fact that judges operate "within a system which provides for appeals, rehearings, impeachments, and legislation" and that they view themselves "as craftsmen, with aesthetic ideals, concerned with the aesthetic judgments that the bar and the law schools will pass upon their awkward or skillful, harmonious or unharmonious, anomalous or satisfying, actions and theories" (Cohen 1935, 223, 225). Roscoe Pound, who was certainly no friend of classical legal thought, nevertheless insisted that the realists were being unrealistic when they refused to recognize that "Received ideals, conceptions, the quest for certainty and uniformity, an authoritative technique of using legal materials, settled legal doctrines and modes of thought, and a traditional mode of legal reasoning are actual and everyday phenomena of the legal order" (Pound 1931, 61).

schools of thought; instead, their results were often summarized in more general terms, about the presence or absence of any legal effects, and this led researchers to offer misleading or at least incautious conclusions about the extent to which law influenced judicial decision making.[10] Still, this research did represent the first step toward constructing direct behavioralist tests of certain kinds of legalist claims.

In some cases behavioralists found that justices acted in ways that were consistent with the influence of fairly determinate rules. For example, almost 10 years before he joined Spaeth in expressing strong sentiments against the legal model, Segal (1984) attempted to determine the importance of search-and-seizure law on search-and-seizure case outcomes by isolating discrete elements of case law that may come into play when certain facts were present in a case.[11] He found that when he coded cases on the basis of the prior justification for the search (e.g., whether a warrant had been obtained), the nature of the intrusion (e.g., whether a home or car was searched), and some legally recognizable mitigating circumstances (e.g., whether the search was at a border), he could generate reliable predictions of a fair number of the Supreme Court's decisions about the reasonableness of a search. On the whole, once the "bedeviling" nuances of Fourth Amendment case law were given "a clear and logical form" the "legal model was quite satisfactory" as a basis for explaining case outcomes (Segal 1984, 899–900).[12] Other scholars followed this practice of evaluating the legal model in terms of predictable outcomes from clear rules, and in some studies some limited effects were identified.[13]

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10. This is important to keep in mind, because it leads behavioralists to assume that if judicial behavior does not bend toward determinate predictions then law is not exerting an influence. Legalists, who believe that law might influence behavior even when it does not require particular results, might complain that studies premised on more positivistic conceptions underestimate the extent of legal influence. See the discussion of postpositivist conceptions of law later in this essay.

11. This "case characteristic"" approach was attempted much less successfully at the dawn of the behavioralist revolution (Kort 1957), but it did not survive subsequent criticisms (Fisher 1958; Kort 1958; Segal 1984, 892). Segal's version avoids the problems of this earlier work.

12. In elaborating his point of view Segal (1986, 462) suggested that extralegal variables may account for variance among the justices, but the facts of the case may account for the variance in the decisions of a single judge. George and Epstein (1992, 326-27) point out that Segal's model fails strict behavioralist tests because he derives his understanding of the law from the Court's pronouncements rather than from some extrajudicial textual source, which means that it is not possible to know whether Segal's rules are merely a formalization of the justices' policy preferences or whether they reflect an external law to which the justices felt obligated.

13. In his analysis of whether lower courts follow Supreme Court opinions, Johnson (1987) took a more multidimensional approach to the challenge of coding the presence or absence of "legal factors." Still, his main interest was in capturing "leeways for interpretation," with the assumption being that law's influence diminished as law became less determinate (concluding that the lower court decision was more likely to follow the Supreme Court decision when the original decision was supported by a strong majority, when cases shared similar facts and litigants, and when the originating Supreme Court decision was complex)

But despite some positive results, behavioralists across the board consistently found it easier to correlate judicial voting behavior with measures of the political ideologies of judges than with measures of legal variables. By the early 1990s, Segal and Spaeth were sufficiently confident about the weight of the accumulated evidence that they were willing to assert that Supreme Court decision making reflected the personal policy preferences of the justices and almost nothing else. In their view, for law to be a factor it would mean that justices with different political ideologies would nevertheless decide cases the same by virtue of the constraint of determinate law. Since this obviously was not happening it was safe to conclude that "the legal model" was merely a "mythology" advanced by "the justices and their apologists." And once the myth has been exposed for what it is a more truly scientific explanation can take its place: "Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal" (Segal and Spaeth 1993, 62–65, 32–3).[14]

Most reviewers appropriately marveled at Segal and Spaeth's marshaling of evidence in support of the influence of personal ideology on case outcomes. However, many felt that the authors' discussion of legal influences was not as well conceptualized or supported. In a generally positive review in the *American Political Science Review*, a behavioralist nevertheless cautioned that the authors adopted "extreme" versions of competing

(see also Songer 1982 and Howard 1981). In George and Epstein's (1992) thorough and fair-minded effort to test "the legal model" against "the extralegal model" they operationalized the former so as to resemble "mechanical jurisprudence" by following Segal's efforts to code the influence of key elements of existing legal doctrine. For example, they assumed that the justices would be less likely to uphold an imposition of death in cases where the defendant was convicted of something less serious than intentional murder, where a claim was made that the state attempted to prevent the sentencer from examining the particular circumstances of the case, and where a claim was made that aggravating factors were vague. These authors ended up arguing for a more dynamic model that incorporates legal and extralegal findings (concluding that the legal model worked better during the early stages of an issue's life but that the extralegal factors more a greater impact as the issue develops). As part of their attempt to develop a multivariate model of obscenity decisions in the U.S. Courts of Appeal, Songer and Haire (1992, 967, 972, 978) characterized the "traditional legal approach" as suggesting that decisions might "flow directly from law and precedent when they are clear and on point." In order to measure the possible influence of law they compared Court of Appeal decisions on obscenity before and after *Miller v. California*, 413 U.S. 15 (1973), on the assumption that *Miller* represented a sharp break from the previous *Roth* (*Roth v. United States*, 354 U.S. 476) standard (concluding that judicial votes are the result "of the interplay of a wide variety of forces that include, at least, their ideological values, their perception of the clarity and relevance of precedent cited by opposing counsel, the nature of the arguments raised by counsel, the facts of the case, and their attitudes toward the litigants").

14. In chapter 6 the authors revisited Segal's (1984) work on search and seizure to demonstrate that ideological considerations were much more important than factual circumstances in influencing outcomes. They also noted that the effects of case-fact stimuli are consistent with both legal and attitudinal models, and so this evidence did not undermine their fundamental claims. And because others such as George and Epstein (1992) followed Segal's earlier methodology, the authors felt comfortable deemphasizing its significance and concluding that there was very little evidence to date supporting the legal model.

positions (viz., that decision making is either completely determined by law or is completely a matter of "raw policy preferences"), and since no one believes that law's influence is mechanical "they really do not set up any realistic competitor to their model of decision making" (Caldeira 1994, 485; see also Hall 1995, 254). Rosenberg (1994, 7) suggested that the authors' version of the legal model was a "straw man" and that if the legal model was properly understood it too would be consistent with variations in judicial votes, since "what they call 'subjective preferences' may be nothing more than honest attempts to apply consistent interpretive philosophy to the facts." Smith (1994, 8–9) repeated the "straw man" complaint and noted that "Segal and Spaeth do not cite a single scholar who now claims that courts actually behave largely in accordance with traditional 'mechanical jurisprudence.'" In a comment that the authors would take to heart in their new book, Smith added that they "fail utterly to address what is really their most appropriate 'legalist' target now: the sophisticated post-realist jurisprudence of legal scholars like Ronald Dworkin and Bruce Ackerman. These authors reject the old mechanical legal model and acknowledge the impact of judicial values on decisions. To preserve legal credibility, however, they still try to minimize the significance of judicial values in ways that may well be vulnerable to the Segal and Spaeth critique. But Segal and Spaeth fail to take on these potent current targets and instead tilt at long abandoned windmills."[15]

Behavioralists in general had not found it easy to take into account "sophisticated post-realist jurisprudence," since their methods demanded they be able to translate variables into measurable observations. Baum (1994b, 4) sympathetically noted that Segal and Spaeth were forced to rely on merely anecdotal evidence against the legal model because of "the difficulty of developing systematic tests for the impact of such considerations of law." Still, he pointed out that, given the lack of direct evidence against the legal model, their broad rejection of law's influence required "an intuitive leap" that is premised on the assumption that "the structure they find in justices' votes could have no basis other than the attitudes of justices about public policy." While he acknowledged that this is "a highly reasonable leap," he added that "it is not compelled by the evidence presented in the

15. Smith added that their "unofficial target" might be different. "They are vexed by the abundant scholarship in political science which accepts that Supreme Court justices vote in terms of their ideologies, but analyzes those ideologies interpretively, not quantitatively. Since my own work falls under this head, I may be unduly sensitive here. But their first paragraph says 'most' of what political scientists have written about the Court 'has been historical, anecdotal, legalistic, tendentious, or doctrinal.' They dismiss this 'stuff' as suited at best only to other disciplines, because none of it is 'science' though they do rely on such sources on occasion. . . . I believe they should instead recognize that interpretive studies of judicial ideologies can helpfully complement their own" (1994, 9). Segal and Spaeth (1994, 10) responded that "While we find much of merit in cited qualitative works, let us not be misunderstood: we still believe that evidence as to the factors that affect Supreme Court decisions must be systematically demonstrated" through falsifiable research.

book" since it is possible that variations in votes may be consistent with competing "readings of the law."

In a response to many of these complaints Segal and Spaeth (1994, 10–12) expressed some frustration about they considered to be the critics' purely speculative defenses of legal influences. They argued that if the legal model properly understood is consistent with a range of different judicial outcomes "then there is no decision that would be *in*consistent" with that theory and thus the claim was nonfalsifiable. More generally, any explanation that is too imprecise to generate clear predictions but sufficiently flexible to account for all sorts of behaviors after the fact "*necessarily explains nothing*," at least not from the point of view of the sort of positivist social science methodology that privileges the results of testable hypotheses. As for Baum's claim that their conclusions require a leap of faith about the influence of nonlegal versus legal attitudes, they respond that "the leap of faith is not made by those who accept that which has been empirically verified, but by those who believe in alternatives despite the absence of supporting evidence." As for the claim that their position implies that judges are purposefully deceitful about the nature of their practice, they claim that "we posit no Oliver Stone-like conspiracy in regards to the legal profession. . . . Legal socialization, to say nothing of self-preservation, keeps even self-aware judges from admitting their attitudinal biases." Moreover, asking judges whether their attitudes reflect policy preferences or opinions about the law would not be very useful. "Self-deception, social desirability effects, and flat-out lying would mar any such analysis. Judicial nominees who can state under oath before the entire nation that they had never thought about *Roe v. Wade* can hardly be fruitful candidates for traditional survey measures."[16]

Still, the authors also agreed that because the legal model had been poorly specified by its supporters they did not incorporate any direct tests of the model into their discussion. It would not take long before they were willing to proffer such a test.

TESTING ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT

Given that the elements of the legal model are a bit elusive Spaeth and Segal (1999) decided in their new work to just test one piece of it—the claim that judicial decision making is, at least in part, influenced or constrained by the autonomous force of precedent. They begin, appropriately

16. Many of these exchanges came from a symposium published by *Law and Courts*, the official newsletter of the Law and Courts Section of the American Political Science Association. This publication is not widely available. A pdf version of this publication can be found on the Law and Courts website at http://www.artsci.wustl.edu/~polisci/epstein/lawcourt.newsletter.html (click Spring 1994).

enough, by talking about *Planned Parenthood v. Casey* (505 U.S. 833 [1992]), a case in which the plurality emphasized the importance of adhering to precedent in its decision to not overrule *Roe v. Wade* (410 U.S. 113 [1973]). "Throughout the opinion, the commands of *stare decisis* ring, as if requiring the Court to reach a decision that it would not otherwise have reached on its own" (p. 2). This idea is central, since claims about the importance of precedent would have no weight unless judges felt some obligation to support previous rulings even if they disagreed with the decision (Alexander 1989; Monaghan 1979; Schauer 1987). However, Spaeth and Segal point out that it is possible that the plurality in *Casey* followed *Roe* primarily because they agreed with the substantive holding in that case and not in spite of their disagreement with it. This is not entirely implausible: O'Connor had supported abortion rights as a legislator and on the Court (even though she expressed doubts about the trimester format of *Roe*—which is precisely the part of *Roe* that she felt no obligation to abide by in *Casey*); Souter has proven himself fairly liberal on a range of constitutional issues; and as a court of appeals judge Kennedy had expressed support (albeit grudgingly) for rights to privacy. They acknowledge that "the strongest case for precedential impact can be made for Justice Kennedy," but their basic point is that judicial references to precedent do not alone prove that legal norms rather than personal preferences are influencing the justices' behavior.

What is the best way to determine whether a judge is voting on the basis of precedent or just citing precedent in support of personal preference? Spaeth and Segal's ingenuous (but strict and controversial) research design is to examine whether original dissenters from a precedent change their behavior so as to support the precedent in later "progeny" cases. In *Casey*, for example, we have no "hard evidence" as to how the plurality felt about *Roe* since all of them joined the Court after that case had been decided. We can also not examine the influence of precedent by focusing on the original supporters of the precedent because their later votes to uphold the precedent coincides with their earlier revealed preferences. "Rather, the best evidence for the influence of precedent must come from those who dissented from the majority opinion in the case under question, for we *know* that these justices disagree with the precedent. If the precedent established in the case influences them, that influence should be felt in that case's progeny, through their votes and opinion writing. Thus, determining the influence of precedent requires examining the extent to which justices who disagree with a precedent move toward that position in subsequent cases" (p. 5).

Obviously, it is possible to imagine other ways to operationalize the idea of precedent for purposes of hypothesis testing, but Spaeth and Segal argue that none of the alternatives would isolate so carefully the distinction

between precedential and preferential behavior, and so if one accepts that their design accurately captures claims about precedent made by legalists then the research should yield useful results. The authors spell out their procedures very carefully: they identified a group of over 100 "landmark" precedents with dissents (taken from Witt 1990, 883–929, and including both constitutional and statutory interpretation) and supplemented this list with a random sample of over 100 "ordinary" (run-of-the-mill) precedents with dissents, and then they searched out subsequent orally argued "progeny" decisions handed down during the time frame in which at least one of the original dissenters was still on the Court (using LEXIS and *Shepard's Citations* and then reviewing the relevance and similarity of cited cases). The dissenters' votes, and especially their arguments, in progeny decisions were then reviewed to determine what points of view (if any) they expressed about the precedent. The authors excluded cases in which the original dissenters go out of their way to justify their decision on the basis of some other precedent and express no opinion about the case considered precedential by their colleagues. They also exclude cases in which one might argue that the justice's position in a subsequent case amounts to a clear rejection of an earlier precedent but where the justice makes no mention of the precedent. They adopt this "excessively formalistic stance" because the "justice's failure to articulate the basis for that behavior precludes us from rendering an independent judgment" on whether the behavior is based on preference or precedent. "Hence, we sacrifice one level of objectivity in order to achieve another: that is, a systematically even-handed approach to the specification of precedent" (p. 32).

While in their earlier study (Segal and Spaeth 1996a) the authors coded the justices' positions as simply either precedent or preference, this time they expanded the categories so as to distinguish strong, moderate, or weak versions of each position. Strong versions are based on explicit statements of support or opposition to the precedent; weak versions involve simple votes in similar cases (in the appropriate direction). The authors provide sufficient illustrations to allow readers to make independent judgments about whether the authors correctly categorized the justices' attitudes about the precedent.

Significantly, part of their reason for building these more refined judgments into their analysis is that they wanted explicitly to avoid the traditional criticism of behavioralist approaches: namely, that they were based on unacceptably formalist conceptions of law and on overly stark specifications of alternative explanations. In a break from their past language, Spaeth and Segal refer to "mechanical jurisprudence" as "the least defensible" version of the legalist argument, and they acknowledge that it is "difficult to find modern legal scholars who believe that this is all judges do" (pp. 8–9). Instead, they claim that most defenders of the role of precedent "fall

into a category that can be called neolegalism," which recognizes "that a variety of factors might influence the decisions of judges and justices" but "still consider traditional legal factors, including adherence to precedent, to be important, if not primary" (p. 10). Taking their cue from Smith's critique of their earlier work, they review more carefully Ronald Dworkin's writings and argue that he best represents the neolegalist position since he claims that the judicial obligation to find the appropriate "fit" between a case and the gravitational forces of past decisions will (in Dworkin's words) "eliminate interpretations that some judges would otherwise prefer" even though "different judges will set this threshold differently" (p. 11). To further avoid the complaint that their understanding of neolegalism is a straw man, they randomly sampled articles in prominent law reviews and found that law professors overwhelmingly attempted to explain decisions with reference to previous cases.

The results of this research design are carefully laid out in a series of chapters that move forward historically from the pre-Marshall Court to the Rehnquist Court. Each chapter includes a statistical portrait of decision-making patterns along with a more detailed narrative of particular cases and justices. The authors' willingness to move beyond the statistics to offer more historical and interpretive accounts of this behavior is perhaps the most satisfying part of the presentation. The case discussions not only bring the data to life; they also help readers maintain some perspective on the aggregate results. For example, in discussing Justice Nelson's behavior on the issue of legal tender, these die-hard behavioralists end their analysis by acknowledging that "a subjectively more accurate [!] accounting suggests that only Nelson's two votes accede to precedent, but [because of our coding rules] we count all five" (p. 72).

Maybe not surprisingly, the data overall demonstrates that justices who dissent from a precedent-setting case generally maintain their opposition in related cases decided subsequently. Only 11.9% of all reviewed votes and opinions fall into one of their precedential categories. There were some periods where precedential behavior seemed more prominent; for example, in the 1860s and 1920s justices voted precedentially in a third of landmark cases and in around 45% of ordinary cases. Also, certain justices were somewhat inclined toward precedential voting in landmark cases: Taft voted that way in three out of four progeny, and Nathan Clifford did so three of seven cases; among justices who cast more than 10 votes, Lewis Powell supported precedent 34.8% of the time; Harold Burton 30.8% of the time. Mostly, though, between 80 and 100% of votes and opinions resisted precedent—some, quite vigorously.[17] To the extent that there was a minor precedent

17. The most antiprecedential justices in landmark cases: Brewer, Gray, Peckham, Douglas, and O'Connor, each of whom voted 100% against precedent; Black voted against precedent in 96.8% of progeny; Brennan, 98.6%; Marshall, 98.7%; and Rehnquist, 96.1%.

effect it seems somewhat related to salience, since the effect is slightly more pronounced in ordinary cases as compared to landmark cases, and in ordinary cases it is slightly more pronounced in statutory as compared to constitutional cases.

Still, the authors would not want the main point to be lost: "Though there may be some subset of justices or some types of issues or some periods within our sample where precedential behavior might be greater, we can state our overall conclusion straightforwardly: the justices are rarely influenced by *stare decisis*. . . . [T]he overall levels of precedential behavior are so low that only the preferential models . . . appear to be in the right ballpark" as explanations for the behavior. Even though Spaeth and Segal claim no direct evidence for the attitudinal model in this book, they do say that the justices appear so unconstrained that their decisions are characterized as essentially "free choices" of the sort depicted in the attitudinal model (p. 288). They acknowledge that their "conclusions are limited to the impact of precedent, and not to other forms of law oriented behavior" (p. 288), and they invite scholars to test other aspects of the legal model. But these appropriately cautious clarifications are offered in the context of their familiar claims about the apparent prominence of unconstrained preference and their additional claim to have constructed the first major direct test of the legal model.[18]

Before discussing whether this evidence amounts to a falsification of the legal model it is important to keep in mind how limited these findings are. The study does not attempt to address (although it does discuss) the use of precedent by lawyers in case briefs and by justices in conference discussions, where discussion of legal materials cannot be merely a matter of public relations (Knight and Epstein 1996; cf. Spaeth and Segal p. 43). It does

18. Segal has been involved in more recent (still unpublished) research that report findings which leave a slightly different impression. Segal and Howard (2000) studied cases between 1985 and 1994 where litigants asked the Supreme Court to overrule a precedent (67 out of 1,297 cases on the merits). Not surprisingly they note that, in general, liberal justices are more likely to vote to overrule "conservative" precedents and vice versa. But they also found that most of the justices voted most of the time to not overturn precedents, even when the precedents seemed to reflect political points of view different from those associated with the justices. For example, Brennan voted to *not overturn conservative precedents* 60% of the time (although this is based on only five cases), a higher percentage than Scalia (41.7%). Stevens voted to not overturn conservative precedents 53.8% of the time, Blackmun 45.5% of the time, Souter 55.6% of the time (more often than Kennedy). Marshall was on the low end, but even he voted to not overturn conservative precedents 33.3% of the time (a higher rate than Thomas's 28.6%!). On the other side, Rehnquist voted to not overturn liberal precedents 36.7% of the time (compared to 30% for Scalia and 18.2% for Thomas). So, with the exception of Thomas and Scalia, there is some more evidence of so-called precedential behavior in this data than in Spaeth and Segal. (Compare this footnote with the previous one: Brennan goes from someone who almost never supports a precedent with which he disagrees to someone who refuses to overrule such precedents 60% of the time.) Segal and Howard emphasize, though, that justices may choose to not overrule but also to not follow the direction of a previous precedent, and so just because a liberal justice does not overrule a conservative decision does not mean that the vote was in a conservative direction.

not test for the possible effects of precedent on the Court's agenda and litigation environment (Epp 1998; McCann 1994). It also cannot speak to the authority of unanimously decided precedents or to the lingering influence of precedents on justices other than the original dissenters (Pinello 1999, 4–5; Spaeth and Segal p. 8). The study does not attempt to undermine (and even acknowledges) other research that has found precedential effects on other courts, such as the U.S. Courts of Appeal (Gruhl 1980; Songer 1987; Songer, Segal and Cameron 1994; Pinello 1999). It also does not undermine other arguments in favor of legal influences that focus on certain judicial practices, such as writing concurring and dissenting opinions (forms of expressive behavior that are not about policymaking), inviting legislative overrides, and patterns of case selection during the cert-granting process (Cross 1997, 305–9, and research cited therein). Following the practice of judicial behavioralists in political science, the authors also do not even attempt to reconcile their findings with more interpretive social science research that claims to demonstrate how distinctive jurisprudential categories or doctrines have influenced voting and opinion writing on the Supreme Court (Brigham 1978; Bussiere 1997; Cushman 1998; Epstein and Kobylka 1992; Gillman 1997, 1996, 1993; Kahn 1994; O'Neill 1981; Perry 1991; Smith 1988). These limitations and omissions do not represent flaws in their study, since none of this other work contradicts the specific claims that the authors are making; but it is important to be mindful of this literature as we attempt to assess the significance of their findings against the larger body of work about law and judicial decision making.

On what basis, then, do Spaeth and Segal justify their conclusions against precedent and (by implication) in favor of a vision of unconstrained personal policymaking? A syllogism seems to be at work: "*Stare decisis* is the lifeblood of the legal model" (p. 314); if a justice is a follower of *stare decisis*, we should be able to observe that justice move toward precedents that she or he initially voted against; therefore, given that most justices maintain their initial opposition to disagreeable precedents, it is safe to conclude that precedent does not influence Supreme Court decision making.

However, this syllogism may not be as persuasive as the authors would hope. For Spaeth and Segal to persuade legalists, they must get them to agree that, if law matters, then justices who dissent in precedent-setting cases should be willing (at some level) to support the precedent in later related cases. They are not suggesting that the force of precedent is mechanical—just that it should generate some gravitational force on the initial dissenters. But it is unlikely that they can get most legalists to agree with this claim, at least as applied to Supreme Court justices. Most legal scholars would agree with this statement as applied to lower courts by virtue of their inferior status within a hierarchical structure (although see Caminker 1994), and researchers have identified this kind of "principal-agent" effect

on lower courts (Songer, Segal and Cameron 1994; Pinello 1999; cf. Hellman 1999). But the same obligation imposed by law on lower-court judges to obey (or gravitate toward) a majority of the Supreme Court does not extend to the dissenters on the Supreme Court; they are not considered politically subordinate to their colleagues and thus are under no obligation to gravitate toward the disputed position of their colleagues. In other words, with respect to the Supreme Court, the *law* allows for both "majority rule" and "minority will."

This is not to say that *stare decisis* does not apply to the Supreme Court, only that if it applies it does so ways that may not be completely captured by this research design. This is because there is not a consensus among legalists that, as a general matter, the norm of *stare decisis* obligates justices to defer to precedents against which they have written dissents. Spaeth and Segal may reasonably complain that legalists are sometimes frustratingly elusive about when the obligation to follow a precedent should be recognized; even Supreme Court justices disagree about when a precedent is sufficiently established as to command the obedience of justices who might otherwise have resisted it (Kelso and Kelso 1996; Lee 1999).[19] Moreover, to their credit, Spaeth and Segal (p. 304) try to anticipate those who might argue that more long-established precedents exert a stronger gravitational pull; their data shows instead that the dissenters' rate of resistance generally stays the same whether the precedent is 1 year old or more than 20 years old.

Still, it would not surprise many legalists that deference to *stare decisis* is not expected of Supreme Court justices when they are the ones who have played an active role in resisting the establishment of the precedent. After all, if it was an accurate characterization of the legal model to expect all justices to defer to a Court majority then the very fact of original dissent would itself be evidence against the legal model. Spaeth and Segal do not assume this (the original dissent in a precedent-setting case is not coded as "preferential" behavior), but their interpretation of their progeny data amounts to precisely the same mistake. It is a shame to point this out after

19. Note, for example, *Dickerson v. United States*, 120 S. Ct. 2326 (2000), upholding *Miranda* in an opinion by Chief Justice Rehnquist, who wrote "Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now." In dissent Justice Scalia responded: "Far from believing that *stare decisis* compels this result, I believe we cannot allow to remain on the books even a celebrated decision—*especially* a celebrated decision—that has come to stand for the proposition that the Supreme Court has power to impose extraconstitutional constraints upon Congress and the States. This is not the system that was established by the Framers, or that would be established by any sane supporter of government by the people. I dissent from today's decision, and, until §3501 is repealed, will continue to apply it in all cases where there has been a sustainable finding that the defendant's confession was voluntary." Whatever the disagreement, there does seem to be some consensus that "the first essential element of a lasting precedent is that the court or the majority that promulgates it be fully committed to its principle" (Jackson 1944, 335), and this means that recently announced nonunanimous precedents have the least claim on a justice's allegiance (Banks 1999).

such an extraordinary effort, but because the principle of *stare decisis* is not normally understood to mean that dissenting justices gravitate toward the position held by the majority of their colleagues, very few legalists would consider this research an appropriate test of either precedent or legal influences.[20] We are left, then, with more than 300 pages of interesting descriptive data, but for most of the scholars whom Spaeth and Segal hope to enlighten it will not be seen as particularly illuminating on the central theoretical question that is at the heart of this research agenda.

Because Spaeth and Segal treat persistent dissent as evidence against some aspects of the legal model, some legalists may complain that their research design is biased against the model; after all, the same behavior they consider a falsification of legalist claims is considered by most legalists to be consistent with legal influence. Legalists may also complain that the researchers have rhetorically stacked the deck against the legal model by using the label "preferential" when describing votes against a precedent by the original dissenting justices. A close reading of the text suggests that the label is intended to stand for a justice's "revealed preference" (in contrast to the way they may feel obligated to vote if they followed precedent). But in light of the elaborate discussion early in the book about how "preferential" models assume that judges are motivated by their personal policy preferences, it would be natural for a reader to assume that Spaeth and Segal are suggesting that a vote against a precedent reflects personal rather than legal considerations.

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20. The authors end the book by making reference to some exchanges they had on an e-mail discussion list, and so for what it's worth: I asked subscribers of the Discussion List for Constitutional Law Professors ("conlawprof") whether they considered this research design a test of whether the justices were basing their decisions on personal versus legal considerations. None of the 15 professors who responded (on 7/18/00) felt that this test captured that distinction. Most argued that the obligation to follow a precedent set by a majority on the Supreme Court existed for lower court judges but not for Supreme Court justices. Some typical comments: "At the level of the highest court in the system, continuing to dissent from following precedent to which a justice initially dissented is consistent with any sensible formulation of the legal model"; "If I am convinced on Monday that the Constitution and laws require X, and five justices issue a wholly unconvincing opinion announcing not X, then it is not clear why my adherence to X is just a personal preference—it is also my best understanding of the law"; "if 8 get it wrong and one gets it right, the one is following law (not merely 'attitude') if s/he continues to maintain this position"; "why should a judge who is fully persuaded that a precedent decision constitutes an incorrect interpretation of the Constitution *ever* deliberately adhere to what he or she is convinced is an incorrect exposition of 'the law' and decide a case wrongly"; "one cannot argue that a precedent-conforming justice is more legalistic than a precedent-defying judge whose arguments are couched in 'fidelity-to-the-Constitution language'"; "their reliance on how a judge reacts to precedent as a test of whether or not the judge is behaving legally is conceptually flawed." I am not claiming that this is a representative sample of all law professors. It is possible that some legalists hold the view that the law requires dissenters to defer to a Court majority (although I am not familiar with anyone who holds this view), and it is also possible that some justices have expressed the view that they consider it their obligation to give up the fight after a while and defer to precedents they initially contested. Still, it is telling that not one of these law professors thought that this research design was an appropriate test of legal influences, and I think it illustrates the sort of resistance that Spaeth and Segal may encounter from jurisprudentially minded scholars.

However, this assumption would be wrong. As the authors note in passing (p. 5), they offer no evidence about what is actually motivating these revealed preferences. This means that the votes labeled "preferential" could reflect legal considerations rather than personal ones. The only evidence that these votes and opinions reflect a lack of concern with law is that they are not supportive of the contested precedent; but unless one assumes that the contested precedent is the only lawful position, it is also possible that these votes and opinions, along with the original dissent, are motivated by a sincere belief that the majority has the law wrong and they have the law right (which is precisely the claim made by dissenters). This is why either *antiprecedential* or the arguably more neutral *persistently dissenting* might have been better labels for this behavior than the misleading *preferential*. The main point, though, is that those who believe that the behavior of persistent dissenters may be influenced by law are in a position to point out that this data is not especially useful in testing the legal model. After all, while all of Spaeth and Segal's evidence of precedential behavior is consistent with the legal model, the evidence now labeled *preferentialist* is best understood as consistent with either legal or nonlegal influences—which means that, ironically, this data can be used only to verify, not falsify, claims about law's influence.

If legalists reject their findings by arguing that both the majority and dissent could be acting on the basis of legal influences, then one might expect Spaeth and Segal to reiterate their earlier complaint that this position makes it virtually impossible for behavioralists to test claims about law's influence (p. xv; Segal and Spaeth 1993, 33; see also Griffin 1996, 133). But behavioralists need to recognize that there is a symmetry of frustration at work: if legalists accept the behavioralist's methodological demand for a conception of law that lends itself to determinate predictions about law-influenced behavior then they are being trapped into accepting a conception of law that they consider inaccurate and that they know is easily falsified.

We are left, then, with something of a paradox. Behavioralists want to force legalists into offering testable hypotheses, so that beliefs about law's influence can be verified by a kind of scientific knowledge that behavioralists consider more authoritative; however, legalists believe that doing such tests has the effect of changing the concept of legal influence so that it no longer represents what they believe. Behavioralists may continue to worry that the legalist's refusal is an overly convenient way of evading scientific verification for their potentially delusional beliefs; legalists may continue to complain that behavioralist conceptions of influence or causality are too inflexible to capture a phenomenon like legal obligation. One side may think that if the claim is not scientifically verified there is no good basis for believing it; the other side may think that just because something cannot be

seen by behavioralists does not mean that it does not exist. One can see why behavioralists would want legalists to be more cooperative, but it should be equally clear why legalists would feel no sense of obligation to play by behavioralist rules.

IS LAW AN EXTERNAL CONSTRAINT OR A STATE OF MIND WITHIN A PRACTICE?

Whatever else might be said about it, behavioralist work is at least fairly systematic about specifying how key concepts are defined and identifying what counts as evidence for and against certain contested claims. If legalists often disagree with these definitions and with behavioralist inferences about evidence, it is because behavioralists give them a basis for engaging their claims. Legalists who continue to dismiss this research would do well to follow the example of Spaeth and Segal and explain more clearly how they conceptualize legal versus personal influences and what evidence they think will help us distinguish between these alternatives.

To facilitate these clarifications it may be useful to distinguish two different kinds of claims made about the nature of legal influence. As we have seen, the legal positivist claim views law as an external constraint on judges, and this means that legal influence should result in at least a certain amount of judicial conformity to an identifiable rule or norm (see Eskridge 1990; Scalia 1989; Schauer 1988, 1991). This is the basis upon which it has been said that "the fundamental premise in the idea of impartial judges and rules of law is that certain kinds of decision-making, for example, by judges, can by institutional arrangements and role discipline be made to show less variance and less correlation to personal factors than other kinds of decision-making" (Kalven 1973, 594). This is also the version of the argument that we associate with legalist claims about how, on many multimember courts, the vast majority of cases are decided unanimously[21] and with attitudinalist claims that when rules are less clear we should expect judges to base decisions on personal or extralegal factors (Carp and Stidham 1996, 378). Spaeth and Segal (pp. 18–19) also have this understanding in mind when

21. Edwards reports that during the three-year period from 1995 through 1997 the dissent rate on the D.C. Circuit in all dispositions "has been between 2% and 3%. In cases where the court published an opinion, the dissent rate was between 11% and 13%. Of those dissents, between one-third and two-thirds involved cases in which the dissenter and the two judges in the majority were appointed by Presidents of different parties. In aggregate, only 47 out of 94 dissents over the last three years followed presumed 'party' lines. Thus, even where there was dissent, the dissent only occurred along presumed 'party' lines around half of the time. This is, in my view, extremely strong prima facie evidence of consensus among judges about the correct judgment in a given case" (1998, 1359–60; see also Edwards 1985, 630). For a different interpretation of this data, and of the general phenomenon of dissent, see Revesz 1999, 836–38, and Hensley and Johnson 1998. For an overview of research on so-called easy cases, see Cross 1997, 285–87.

they explain that their attitudinal model is designed to apply specifically to the Supreme Court, precisely because the modern justices do not typically address cases considered routine or frivolous.

Not surprisingly, it is this positivist version of the legalist argument that positivist social scientists have considered the most amenable to behavioralist verification, and as noted earlier there has been some limited success in testing certain elements of these claims. Given the nature of contemporary legal positivism and formalism, it is unclear whether this version of legalism is sufficiently reductionist to accommodate behavioralist methods. (This is best worked out between the positivists and the behavioralists.) But if some contemporary positivists are willing to make empirical claims about the determinate influence of rules, then it is not unreasonable for scholars such as Spaeth and Segal to ask them to formulate those claims in ways that allow for hypothesis testing.[22]

However, this is not the only way that legalists talk about legal influence. In the version of the argument that might be called "postpositivist" legalists make claims, not about the predictable behavior of judges, but about their state of mind—whether they are basing their decisions on honest judgments about the meaning of law. What is postpositivist about this version is the assumption that a legal state of mind does not necessarily mean obedience to conspicuous rules; instead, it means a sense of obligation to make the best decision possible in light of one's general training and sense of professional obligation. On this view, decisions are considered legally motivated if they represent a judge's sincere belief that their decision represents their best understanding of what the law requires. Burton (1992, xi–xii, 44) has persuasively argued that this notion of "judging in good faith" is all we can expect of judges once we give up on the "determinacy condition" at the heart of legal positivism and formalism (and with it the assumption that the absence of clear rules implies that decision making must be extralegal—what he calls the "anything goes" alternative). The focus of this approach is what Baum (1993, 445) seems to have in mind when

22. If legal positivists and positivist social scientists arrive at an understanding of how law-abiding judges should act in certain cases, it should still be kept in mind that the ability to predict judicial behavior does not necessarily mean that law's influence is externally imposed rather than a result of interpretation. As Fish put it in his postpositivist (pragmatist) analysis of Hart's positivism: "A plain case is a case that was once *argued*; that is, its configurations were once in dispute; at a certain point one characterization of its meaning and significance—of its *rule*—was found to be more persuasive than its rivals; and at *that* point the case became settled, became perspicuous, became undoubted, became plain. Plainness, in short, is not a property of the case itself—there is no case itself—but of an interpretive history in the course of which one interpretive agenda—complete with stipulative definitions, assumed distinctions, canons of evidence, etc.—has subdued another. That history is then closed, but it can always be reopened. . . . So that while there will always be paradigmatically plain cases—Hart is absolutely right to put them in at the center of the adjudicative process—far from providing a stay against the force of interpretation, they will be precisely the result of interpretation's force; for they will have been written and rewritten by interpretive efforts" (1989, 512–13).

he distinguishes judges who are motivated to achieve an "accurate interpretation of the law" from judges who are self-conscious about their discretion and are "willing to take advantage of this power and leeway to further particular policy aims." It is also at the heart of those who complain that behavioralist inferences about the influence of personal policy preferences do not correspond to the experiences of judges and lawyers and thus they are "dubious as descriptions of real-world decision making" (Cross 1997, 299; see also Baum 1993, 456, 1994a, 762; Epstein and Kobylka 1992; Edwards 1998, 1338, 1364, 1366; Tamanaha 1996). These scholars do not reject behavioralist descriptions of decision-making patterns, but they insist that behavioralists should not infer that these patterns mean an absence of legal motivations unless they have additional independent evidence that judges are basing decisions on considerations that are not warranted by law.

This understanding takes its cue from Dworkin's classic critiques of Hart's positivist conception of law. In that early work Dworkin referred to those who consider the law a myth or a lie as "nominalists" and he pointed out that when these folks criticize the idea of "law" they have in mind

> a set of timeless rules stocked in some conceptual warehouse awaiting discovery by judges, and that when we speak of legal obligation we mean the invisible chains these mysterious rules somehow drape around us. The theory that there are such rules and chains they call "mechanical jurisprudence," and they are right in ridiculing its practitioners. Their difficulty, however, lies in finding practitioners to ridicule . . . [since] most lawyers have nothing like this in mind when they speak of the law and of legal obligation.

An improved understanding of legal obligation would seem to be an important step before we casually conclude (with realists and behavioralist-attitudinalists) "that our practices are stupid or superstitious" (Dworkin 1978, 15–16).

Among the features of positivism that Dworkin criticized was the belief that law is made up only of a set of legal rules

> so that if someone's case is not clearly covered by such a rule (because there is none that seems appropriate, or those that seem appropriate are vague, or for some other reason) then that case cannot be decided by "applying the law." It must be decided by some official, like a judge, "exercising his discretion," which means reaching beyond the law for some other sort of standard to guide him in manufacturing a fresh legal rule or supplementing an old one. (1978, 17)

Dworkin's major complaint about this feature of positivism is that legal practitioners routinely experience a sense of obligation to features of the law that do not take the form of determinate and discrete rules, such as the pull

of legal principles and other legal standards that "state[ ] a reason that argues in one direction, but do[ ] not necessitate a particular decision" (1978, 26).

To illustrate this nonformalistic sense of obligation-influence, Dworkin suggested that we consider the different ways one might conceptualize the notion of discretion. Behavioralists argue that when judges realize that existing rules are indeterminate they exercise discretion in the sense that they are free to proceed in accordance with their idiosyncratic preferences without any sense of obligation to conform their behavior to a set of authoritative legal standards. Dworkin characterized this notion of discretion as "strong discretion" and likened it to a situation where a sergeant is told by a commanding officer to choose any five men he wants for an unspecified assignment, which is an instruction that empowers the sergeant to choose individuals without worrying about whether the choices conform to a decision-rule promulgated by the commanding officer. However, Dworkin suggested that we sometimes use the concept of discretion in a weaker sense to mean simply that "the standards an official must apply cannot be applied mechanically but demand the use of judgment," as would be the case, for example, if the commanding officer told the sergeant to select the five men who were most experienced to carry out a specified assignment (1978, 31–33).

If we have reason to believe that the sergeant in the second case would act differently from the sergeant in the first case or would act on the basis of different motives or attitudes, then it becomes possible to imagine how decision makers might be influenced by a sense of obligation to a set of authoritative standards even when those standards do not strictly govern their behavior and even if different decision makers can be seen making different choices about how best to proceed in accordance with these standards. If Dworkin is correct that the experience of weak discretion is real but nevertheless different from either the experience of strong discretion or no discretion, then we can begin to see how legal norms can matter even if they cannot be mechanically applied—that is, how law can motivate and even shape a decision without determining the result.[23]

23. Dworkin's argument about "right answers" to "hard cases" is another way of capturing the postpositivist emphasis on good faith judging (Dworkin 1978, 81–130, 279–90, 331–38; 1985, 119–45). In response to those who see this position as a form of positivism (Burton 1992, 185–91), Dworkin has insisted that the "right answer" thesis refers to the proper state of mind of judges and lawyers rather than to a property of positive law: "It is a claim made *within legal practice* rather than at some supposedly removed, external, philosophical level. I ask whether, in the ordinary sense in which lawyers might say this, it is ever sound or correct or accurate to say, about some hard case, that the law, properly interpreted, is for the plaintiff (or for the defendant). I answer that, yes, some statements of that kind are sound or correct or accurate about some hard cases. . . . Now it's your turn. Have you yourself found any ordinary legal argument on balance the soundest, in any kind of hard case? Then you, too, have rejected the no-right-answer thesis I take to be the target of my own claim" (Dworkin 1991, 365, emphasis added). He went on: "Legal theorists have an apparently irresistible

The rejection of the idea of strong discretion means that postpositivists disagree that legal influences diminish when we move from easier to harder cases. The easy-hard distinction may be a useful way of conveying that certain decisions appear easier to predict, but as long as judges (or sergeants) are acting in good faith they are influenced by law both when the standard resembles "pick the tallest" and when it resembles "pick the most experienced." Moreover, these scholars are also happy to acknowledge that different judges will decide cases differently and that these differences will often coincide with political ideology.[24] This is why judges who defend their commitment to law might also declare "ho-hum" when someone points out that "judges' personal philosophies enter into their decision making" (Wald 1999a, 236). To the extent that judges are able to reconcile their ideologies, strategic inclinations, experiences, and personalities with the accepted practices of judging, then these attitudes have been transformed to the point that they become internal to the practice. Differences among practitioners are then properly seen as disagreements that fall equally within the practice (as with a decision to dissent from a precedent-setting case) rather than as behaviors that expose the fraudulent nature of the practice.[25] Thus, so long as judges draw on beliefs about public values, because they believe the law recognizes this as an inevitable part of interpretation (in some circumstances), but also (for example) refuse to base decisions on partisan

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impulse, however, to insist that the one-right-answer thesis must mean something more than is captured in the ordinary opinion that one side had the better argument in [a case]. They think I must be saying not just that there are right answers in some ordinary way, as an unselfconscious lawyer might say that, but that there are *really* right answers, or *really real* right answers, or right answers *out there*, or something else up the ladder of verbal inflation."

24. As Dworkin (1996, 37) put it, "It is no surprise, or occasion for ridicule or suspicion, that a constitutional theory [and interpretive judgments made from it] reflect[ ] a moral stance. It would be an occasion for surprise—and ridicule—if it did not. Only an unbelievably crude form of legal positivism—a form disowned by the foremost positivist of this century, Herbert Hart—could produce that kind of insulation."

25. "While practices are based on a shared set of organizing rules and standards, they are nonetheless internally heterogeneous. Some practices are more internally coherent than others, but all practices contain norms that potentially conflict or lean in differing directions. . . . To believe in [perfect internal] unity and coherence is an analytical imposition on an otherwise unruly reality, in much the same way anthropologists in the past projected tightly knit, unchanging sameness onto primitive societies" (Tamanaha 1996, 179). As Fish (1994, 22) put it, "What makes a field a field . . . is not an impossible purity, but a steadfastness of purpose, a core sense of the enterprise. . . . The core sense of disciplinary purpose is not destroyed by the presence in the field of bits and pieces and sometimes whole cloths from other fields because when those bits and pieces enter, they do so in a form demanded by the definitions, distinctions, convention, problematics, and urgencies already in place." In other words, disciplinary autonomy "is not a matter of refraining from commerce" with other practices "but of stamping whatever is imported or appropriated with a proprietary imprint. While it is true that disciplines do not originate much of what appears in their operations, it is not the materials they traffic in that makes for their distinctiveness, but the underlying purpose or point in the context of which those materials acquire a disciplinary intelligibility" (1994, 22; see more generally his essay "The Law Wishes to Have a Formal Existence," in Fish 1994, 141–79).

favoritism, because that kind of political consideration is considered out of bounds, then the influence of legality is at work.[26]

Behavioralists may respond that the difference between talking about "policy preferences" and "ideology-influenced legal considerations" is merely semantic. At times they are even willing to admit that judges "may actually believe they resolve disputes by legal analysis" (although they add that judges are subject to "fallible reasoning processes" designed "to convince oneself of the propriety of what one prefers to believe") (pp. 43–44). For postpositivist legalists these dismissive responses underestimate the extent to which judges (again like Dworkin's sergeant) behave differently than they would if they had the kind of strong discretion behavioralists imagine them to have. When we set aside the unrealistic premise that legalistic behavior must look like formalistic decision making, then it has been fairly easy for empirical social scientists to find legal influences, even at the level of the Supreme Court in so-called hard cases.

For example, we have research that shows that the particular patterns of Supreme Court decisions in due process and commerce clause cases from the late nineteenth century to the New Deal can only be explained with reference to (politically charged but autonomous) concepts within the prevailing jurisprudence of the period (Gillman 1993, 1996; Cushman 1998). Others have referred to legal influences to explain why Warren Court liberals did not simply follow their presumed policy preferences in favor of the welfare state and constitutionalize the notion of rights to welfare (Bussiere 1997, 1994; see also Dworkin 1996, 36). Graber (1991) has demonstrated that the development of modern free speech jurisprudence was shaped by the need to reconcile a vision of progressive politics with what were considered to be the available jurisprudential alternatives. In their study of developments in the Supreme Court's abortion and death penalty jurisprudence, Epstein and Kobylka (1992) conclude that doctrinal change was driven largely by the way litigants framed legal arguments. They noted that some of the justices can be observed to respond to arguments that were framed in

26. Note Justice Breyer's comments: "Politics in our decision-making process does not exist. By politics, I mean Republicans versus Democrats, is this a popular action or not, will it help certain individuals be elected? . . . Personal ideology or philosophy is a different matter. . . . Judges have had different life experiences and different kinds of training, and they come from different backgrounds. Judges appointed by different presidents of different political parties may have different views about the interpretation of the law and its relation to the world. Those kinds of differences of view are relevant to the legal questions before us and have an effect. One cannot escape one's own training or background. . . . Those differences of legal philosophy do matter. I think the Constitution foresees such differences, and results that reflect such differences are perfectly proper" (Breyer 1998, 4). He may overstate the case when he reports that "politics in our decision-making process does not exist" (see the discussion of nonlegal decision making later in the text), but his effort to distinguish ideology-influenced legal behavior from politically motivated behavior is consistent with this postpositivist conception. This is why *Bush v. Gore* (121 S.Ct. 525 [2000]) is properly viewed as a rare example of purely partisan decision making (see Gillman 2000).

light of principles or distinctions that they had articulated in prior decisions, and thus it is reasonable to infer that they were influenced by the logic of prior holdings rather than public sentiment or policy preferences.[27] Others have attempted to show how the distinct nature of midcentury constitutional theory shaped Warren and Burger Court decision making in a variety of areas (Kahn 1994). Perry's (1991) work on agenda setting established that during the cert process decision makers were overwhelmingly engaged in careful legal analysis and this mitigated against the advancement of mere preferential or strategic considerations. We have less research on the role of law in cases where one might expect no attitudinal inclinations whatsoever, but the studies just mentioned on more salient issues suggests that the distinctive behavior of judges would be even more conspicuous if we looked into these areas as well.[28]

Spaeth and Segal (1993, 363) have suggested in the past that any post hoc interpretation of law's influence amounts to mere "normative rationalization" that "masks the reality of choice based on the individual justices' personal policy preferences." But none of the studies referred to above were written by judges or law professors with an interest in disguising the actual motivation of judges. All were written by scholars who were mindful of the debates in the literature about legal versus personal influences on decision making, and all attempted to show how the judges' expressed beliefs *and* patterns of behavior could only be explained with reference to distinctive legal norms. Some may call into question some of the authors' evidence or inferences, but it is not obvious why the careful judgments of these scholars should be considered any more or less normative than Spaeth and Segal's

27. In some respects these authors do not go far enough. For example, they do not explain why they conclude that judges who changed their votes in response to legal arguments exhibited a commitment to law while those who voted consistently for or against abortion or the death penalty exhibited a commitment to extralegal political ideology. Such a position inappropriately assumes that legal norms would prevent a judge from expressing a consistent point of view across a line of cases, which would lead to the strange conclusion that only moderates can love the law. Before reaching that point, it would have been appropriate to marshal stronger evidence in support of the claim that Brennan and Marshall (with respect to the death penalty) or Rehnquist, White, and Scalia (on abortion) voted as they did even though they knew that there was no valid legal basis for their position. This led one reviewer to ask: "why can't it be that [Brennan and Marshall] were convinced on legal grounds? Particularly when legal grounds include evidence of racial discrimination and a commitment to 'evolving standards of decency' [which is an established feature of due process jurisprudence]. If one wishes to argue that legal argument is a significant factor in decision making, there is no reason to say it only matters for swing justices such as O'Connor. . . . [L]ike Rehnquist, Scalia has been committed to federalism and has a perspective on constitutional construction that is skeptical of fundamental rights. . . . An account of judicial decision making that takes legal argumentation seriously needs to do so for all justices rather than invoking it as a residual category. Differences can be accounted for within the confines of legal argument" (Sterett 1993, 75–76).

28. "A large portion of our cases (particularly administrative law cases) have no apparent ideology to support or reject at all. . . . For my part, I cannot even imagine having personal feelings about the appropriate regulatory standards for 'retrofitted cell-burners' as opposed to 'wall-fired electric utility boilers'" (Wald 1999a, 237).

interpretive characterizations of the justices' attitudes from reading the justices' opinions. If anything, the major difference seems to be that Spaeth and Segal create what some legalists would consider a fairly artificial standard for what should count as a legal frame of mind (gravitate toward precedents from which you dissented) while these other scholars made it a focused object of their research to understand and reconstruct the actual legal standards under which these judges were operating.

Still, the claims made by these legalists should not be exaggerated. While these scholars found legal influences, none of them would argue that knowledge of law alone is sufficient for understanding the nature of judicial decision making (since none view legal influences as mechanical); in fact, virtually all of them would agree that in many circumstances judges set aside purely legal considerations to pursue other goals, and they would also agree that legal considerations are themselves a by-product of evolving political contexts and social forces. They are also aware that judges often swing between alternative "modalities of constitutional argument" in reaching their decisions (Bobbitt 1991, 12–22), although most would reject the extreme claim that such evidence alone demonstrates "the myth of jurisprudence" (Phelps and Gates 1991). In general, these scholars, while aware of the nonmechanical nature (and political significance) of decision making, nevertheless have found persuasive evidence in support of the view that the institutional setting within which judges operate shape their behavior in ways that require attention to the "relative autonomy" of legal norms, categories, or rhetorics of justification (Thompson 1975).

In light of all this, under what circumstances would postpositivists be willing to say that judicial behavior was not motivated by law? Burton (1992, 45) explains that good faith means that judges are acting nonlegally when they "decide on the basis of personal or political preferences or interests, or felt identification with the parties" or other reasons not warranted by law. The easiest examples would be about judges who are accused of corruption or self-conscious bias, but more commonplace are judges who self-consciously depart from their best understanding of law in order to take into account certain political or institutional considerations. Some of these considerations are inherent to the internal dynamics of multimember courts, such as the bargaining and compromise that is sometimes associated with securing a majority (Epstein and Knight 1998; Clayton and Gillman 1999; Maltzman, Spriggs, and Wahlbeck 2000; Murphy 1964). When Justice Stanley Reed decided against filing the dissent he was writing in *Brown v. Board of Education* (1954) he was most likely responding to Chief Justice Earl Warren's lobbying and to his concern about the impact a dissent would have on the Court as an institution rather than to his understanding of the best interpretation of the Fourteenth Amendment (Schwartz 1983, 87–100). Other circumstances may arise as part of the general process by

which power holders contemplate the consequences of their behavior on their institutions or their communities (see Mason 1956). For example, Graber (1995) has offered a persuasive argument that Marshall knowingly misinterpreted a congressional act in *Cohens v. Virginia* (6 Wheat. 264 [1821]) in order to avoid a conflict with the Virginia Supreme Court.

Between clear cases of good faith legality and self-conscious politicking are more contested practices. Some judges or scholars claim that certain extralegal considerations are inevitable when is not precisely on point or when clear law may have unexpectedly bad consequences in a particular case (Hart 1983, 16; Posner 1990, 232). Whether or not these behaviors should be characterized as legal or extralegal depends in part on whether one conceptualizes these considerations as completely external to law or as operating within (and bounded by) legal considerations (in the sense that judges do not feel as though "anything goes" when considering arguments of policy or political morality).[29] In these cases claims about legal influences can still be saved if one agrees with Burton (1992, 49) that "the idea of a legal reason includes both reasons that are created by the law and independent reasons the law warrants as grounds for judicial action." (See also Dworkin 1986 on how "anything goes" prospective-pragmatic policymaking is not consistent with good faith judging.) Otherwise, scholars may either disagree about proper labeling or may make simply acknowledge the contested status of the grounds for a decision.

It should be clear that if one accepts postpositivist conceptions of legal practice, then empirical studies that rely on interpretivist, ethnographic, and historical methodologies may be uniquely well-suited to distinguishing between legal and extralegal behaviors and frames of mind. Mostly this is because "taking an internal view of the practice means viewing the activity in consideration of the understandings of the participants involved (interpretivism); taking an external view means ignoring these understandings and instead focusing on the patterns reflected in the activity (positivism)" (Tamanaha 1996, 183; see also Geertz 1973; Taylor 1985; Hiley, Bohman, and Shusterman 1991; Bohman 1991). Such studies may not be able to claim the putative advantages of counting and correlating, but those aspects of behavioral work are only virtues if one is asking the right kinds of questions, and given the different ways that legalists make claims about legal influence it is likely that interpretive-empiricism has compensating advantages as a method of investigating this topic. Foremost among these advantages would be an enriched understanding of the structure of legal argumentation associated with particular conflicts at particular times, as

29. "A judge might seem to be so permitted if the law runs out of guidance without prohibiting two or more actions in a case. But our common dispositions with respect to judicial duty deny that judges are permitted to act for such reasons. . . . The judicial duty to uphold the law, in particular, has exclusionary force in that some kinds of reasons are barred from judicial deliberations" (Burton 1992, 45–46).

well as a better perspective on the institutional considerations that shape a judge's understanding of her or his professional obligations.

In fact, it has recently been suggested that, within the social sciences, those who adopt "interpretive institutionalist" or postbehavioralist approaches are in a good position to cope with the practice of legal interpretation and, perhaps more importantly, to "explore the ways various legal actors are concerned with strategy *and* principle, law *and* politics" (Whittington 2000, 632). It may be that this can be part of the process by which we "will hopefully avoid continued debate over whether judicial behavior is determined by 'law' or 'politics'" and instead focus on the "interpenetration of law and politics and the difficulty of regarding them as either separate spheres or trying to collapse one category into another" (Ibid, 629–31). Nevertheless, as long as scholars are still framing empirical questions around claims about distinctive judicial motivations—as is the case with all contemporary scholars who consider themselves attached either to legalist accounts, attitudinal models, or strategic conceptions of decision making—then interpretivist methods that focus specifically on whether judges view themselves as legal interpreters, freewheeling politicians, or interactive game players will be an essential part of any comprehensive research agenda (Gillman 1999).

This is not to discount the continued relevance of behavioralist research into these questions. Just as careful attention to the states of mind of practitioners can be a useful check on behavioralist conceptualizations and inferences, so too can careful behavioral work provide an ongoing check against becoming too attached to an insider's perspective. Behavioralists also provide extremely useful descriptive data for anyone interested in patterns of decisional outcomes, and this is essential for analyzing the political implications of having different sorts of judges on the bench. In the real world, knowing whether certain kinds of judges always vote in favor of (or against) abortion rights is extremely important even if this data alone does not resolve more academic disputes about whether those votes are best understood as legal or extralegal. In addition, some claims by some legal positivists may be formulated in a way that could be interrogated by behavioralists. This is what Cross (1997, 326) has in mind when he uses the metaphor of law as like "ropes binding a judicial Houdini" and notes: "The ropes may be tight or loose, possibly knotted with skill and redundancy. These ropes will strive to bind thousands of judges, each of whom possess different levels of escape skills. If we try to constrain judges with law, it is imperative to understand which brand of rope and which type of knot are most effective and inescapable." But as Spaeth and Segal's latest book shows, behavioralists are on less certain grounds when they attempt to offer explanatory or causal claims about the presence or absence of legal influences without taking into account postpositivist conceptions of law and the

distinct but potentially unpredictable patters of decision making that may be generated by a sense of legal fidelity. On this topic, behavioralists should be willing to make clear what conceptions of law their studies do not address as well as what conceptions they believe to be amenable to behavioralist falsification; they should not simply persist in defining law in ways that they find methodologically convenient but that are deeply contested by many legalists.

Similarly, interpretivists who make postpositivist claims about legal influences should be more self-conscious about whether those claims are based on a careful scrutiny of the evidence or are just habitual disciplinary assumptions. They should also be especially mindful not to accept uncritically a participant's internal view of their practice (see Perry 1991 as an exemplar). This means that these legalists should be as clear as possible about the theoretical and evidentiary basis for claims about law's influence. Postpositivists know that legal and political attitudes are often impossible to untangle, and some of their most interesting work can focus on showing the ways in which politics constitutes legal doctrine and vice versa; but when they believe that the practice of judging shapes judicial decision making in distinctive ways, then these legalists should explicitly articulate the basis for that judgment. More research by interpretivist social scientists along these lines would be particularly helpful in establishing a more robust empirical record for law's relative autonomy. And finally, rather than assume that judges are acting as faithful interpreters, legalists should be willing to identify the circumstances under which they would acknowledge the existence of extralegal influences.

Even if interpretivists start acting less defensively against behavioralist depictions and became more self-consciously analytic about their own claims, there may still be some behavioralists who will continue to treat this work as inherently less authoritative then research that adopts more positivist methodologies. In particular, they may complain that interpretive assessments about whether the grounds of a decision are legal or nonlegal renders the analysis too subjective or generates results that are merely descriptive (rather than truly explanatory). For a long time behavioralists have condescended to interpretivist research with claims such as these (Gibson 1986, 142). But by now it should be clear that behavioral research that is premised on disputed definitions of key concepts offers lots of description but very little by way of satisfactory explanation. Behavioral research is essential to the exploration of many important issues, but if one is investigating claims about the state of mind of decision makers then persuasive explanations are inevitably interpretive. Moreover, if legalists are making claims about real but nonformalistic legal influences on judicial behavior, then methods must be used that are capable of investigating those sorts of claims, and as behavioralists admit, hypothesis testing is not well suited to examining such

arguments. As for the challenge about the allegedly subjective nature of interpretive judgment, it is also important to reemphasize that behavioralists necessarily make precisely the same kinds of inferences when they make decisions about whether a vote is coded as (for example) precedential or preferential. Translating these judgments into quantitative data does not make them any more objective or trustworthy; in fact, as noted earlier, even Spaeth and Segal are willing to admit that a close reading of the text may produce "more accurate" understandings than formalistic coding schemes (p. 72).[30] In light of this admission greater efforts to reconcile these judgments with the perspectives of practitioners may make all such studies more persuasive to greater numbers of interested scholars.

CONCLUSION: WHAT'S AT STAKE?

In responding to behavioralist investigations of the legal model, many legalists today find themselves making arguments that are reminiscent of those made by Roscoe Pound, when he criticized realists' attempt to equate the failures of the model of mechanical jurisprudence with the less careful conclusion that law was insignificant:

> Radical neo-realism seems to deny that there are rules or principles or conceptions or doctrines at all, because all judicial action, or at times much judicial action, can not be referred to them; because there is no definite determination whereby we may be absolutely assured that judicial action will proceed on the basis of one rather than another of two competing principles. . . . Such a view is not without its use as a protest against the assumption that law is nothing but a simple aggregate of rules. But nothing would be more unreal—in the sense of at variance with what is significant for a highly specialized form of social control through politically organized society—than to conceive of the administration of justice, or the legal adjustment of relations, or, for that matter, the working out of devices for the more efficient

30. While this remark appears to acknowledge the legitimacy of judgments based on interpretive methods, some readers will also set it alongside Segal and Spaeth's earlier practice of dichotomizing scholarly views of judicial decision as based either on myth or behavioralist science (1993, xv). Some scholars viewed these earlier remarks as too harsh and dismissive, suggesting that first-rate interpretive, historical, or ethnographic research which explored the issue of legal influence was essentially no better than making up fables. For those who were put off by the tone of Segal and Spaeth (1993) (see Rosenberg 1994; Smith 1994), I should report that the language in their current work is much more tempered, perhaps because so much of this book is historical and interpretive in its presentation. One can hope that, by identifying the different ways in which the "law matters" argument can be made, behavioralists in general may follow the lead of the new Spaeth and Segal and develop a deeper appreciation for why their useful tools may not always be well-suited to an exploration of the topic, and for why scholars who believe the topic (nevertheless) worth investigating may want to explore the advantages of alternative methods and approaches.

> functioning of business in a legally ordered society, as a mere aggregate of single determinations. (Pound 1931, 65)[31]

Many legalists press these points because they believe that there is potentially a lot at stake in this academic debate. Some have argued that if we took seriously the behavioralists' findings that decision making is "a reflection of the justices' values" rather than a faithful "rendering of constitutional or statutory language" then "the inherent contradiction between policy making by nonelected, life-term justices and representative government is heightened" (Adamany 1991, 12). We might hope with Dworkin (1978, 16) that behavioralist claims that law does not matter are "mostly bluff" since legalist assumptions "are too deeply cemented into the structure of our political practices," but there is also every reason to think that unrefuted claims about law's irrelevance could lead to reforms of these practices.

For example, two law professors have recently used behavioralist findings as a basis for proposing that at least one Democratic or Republican be assigned to all three-judge panels of the U.S. Courts of Appeal (Tiller and Cross 1999a). The researchers have evidence that when a panel is made up of judges from one political party there are a higher proportion of ideological decisions than when the panels have one member from another party. They argue that, from a behavioralist point of view, there is reason to think that more legalistic (transpartisan) outcomes will be produced with this structural change. This proposal provoked a strong response from Judge Patricia Wald. She acknowledged the behavioral differences (although also thought they were overstated), but more important she worried that this proposal would institutionalize an antilegalist sentiment on the court and would thus corrupt the legalist state of mind that the current structure is designed to nurture. "Most people, including judges, have a tendency to mold themselves into their assigned roles. Emphasize to a judge that she must act independently, and she will likely try to do that; tell her she is two-thirds or one-third of a bipartisan panel and has been selected to fill that role, it is far likelier that politics will bleed into her decision making" (Wald 1999b, 270).

This exchange not only further illustrates the difference between thinking of law as behavioral uniformity and thinking of it as good faith deliberation; it also captures some of the potential real world consequences of this debate, especially as it moves beyond the insulated borders of political science. We have perhaps reached a point where we need to be especially careful of what we mean by legal and political decision making, especially when faced with the possibility that reforms designed to promote

31. For a response to Pound and a defense of the realists' "distrust of traditional rules" and "tentative adoption of the theory of rationalization for the study of opinions," see Llewellyn (1931).

one conception (e.g., greater panel uniformity) might undermine a competing conception (a good faith effort to avoid partisan decision making). To apply this point to Spaeth and Segal's new effort, we might reflect on whether we really think that principles of legality would be better promoted if, somehow, we discouraged dissenting justices from resisting disagreeable precedents.

Like many legalists, Dworkin has suggested for quite some time that the picture of law advanced by positivists "has exercised a tenacious hold on our imagination, perhaps through its very simplicity," and he has expressed hope that "[i]f we shake ourselves loose from this model of rules, we may be able to build a model truer to the complexity and sophistication of our own practices" (Dworkin 1978, 45). All researchers, behavioralists and interpretivists, attitudinalists and legalists, claim an interest in devising accurate portrayals. If scholars continue to view this debate as nontrivial then all sides should appreciate how progress on this question may have as much to do with the quality of our jurisprudence as with the rigor of our empirical methods.

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