

# Doctrine, Data, and High Theory

Brian H. Bix\*

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## PREFACE

A famous man once described himself as being less a “pillar” of the Church of England than a “flying buttress,” in that he supported it from the outside.<sup>1</sup> That approximates how I feel about the New Legal Realism—indeed, about all of the legal realisms. (And I have dealt with more legal realisms than most—how many other American academics can claim not only to have read the Scandinavian legal realists, but even to have published multiple articles about them?<sup>2</sup>)

I consider myself an outsider to the realists, especially the New Legal Realists, because while I agree with most of what they have written,<sup>3</sup> I do not follow their

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\* Frederick W. Thomas Professor of Law and Philosophy, University of Minnesota. I am grateful for the comments and suggestions of William A. Edmundson, Michael Steven Green, David H. Helman, Ralf Poscher, and the participants of the New Legal Realism Conference at the University of California, Irvine School of Law.

1. I have seen the quotation attributed to both Lytton Strachey and Winston Churchill. *See, e.g.*, Eliza Filby, *God and Mrs Thatcher: The Battle for Britain’s Soul* xv (“The exception was Winston Churchill, who, when asked whether he was a ‘pillar of the church’ replied, ‘Madam, I’d rather describe myself as a flying buttress – I support the church from the outside.’” (footnote omitted)); *see also* Adam Sisman: *An Honourable Englishman: The Life of Hugh Trevor-Roper* 479 n.† (2010) (“a remark made by Winston Churchill, who once claimed that he supported the Church ‘like a flying buttress – helpfully, but outside.’”).

2. Brian H. Bix, *The American and Scandinavian Legal Realists on the Nature of Norms*, in UPPSALA-MINNESOTA COLLOQUIUM: LAW, CULTURE AND VALUES 85, 85–100 (Mattias Dahlberg ed., 2009); Brian H. Bix, *Ross and Olivercrona on Rights*, 34 *AUSTL. J. LEGAL PHIL.* 103, 103 (2009).

3. *See, e.g.*, Howard Erlanger, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse & David Wilkins, *Is It Time for a New Legal Realism?*, 2005 *WIS. L. REV.* 335, 335–64 (2005); Stewart Macaulay, *The New Versus the Old Legal Realism: “Things Ain’t What They Used To Be,”* 2005 *WIS. L. REV.* 365, 365–404 (2005); Mark C. Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 *ANN. REV. L. & SOC. SCI.* 555, 555–79 (2010).

program of doing empirical or experimental work.<sup>4</sup> It is not that I doubt in any way the value and importance of such work; it is simply not the kind of academic work that I ever thought that I would either enjoy or be good at. So I leave those tasks to others and confine myself to commenting appreciatively from the sidelines.

Assuming that I was not invited to contribute to this discussion of New Legal Realism based on some massive misunderstanding (I am not often confused with Stewart Macaulay or even Robert Scott), I trust that my function here is to give the perspective of the sympathetic outsider on New Legal Realism and its possible application to the topic of judicial decision making.

## INTRODUCTION

From the time of the original American legal realists, it has become common to question how judges come to their decisions; the question is not treated as either bizarre or inappropriate.<sup>5</sup> We no longer take at face value the notion, presented implicitly in many court decisions, even today, that the decision is a simple deduction from unquestioned premises.<sup>6</sup> Many contemporary commentators and social theorists even question whether judges themselves understand why they make their decisions.<sup>7</sup> As will be discussed in this Article, this questioning has come from (new and old) legal realists, law and economics scholars, and political theorists, as well as from both empirical investigators, and more theoretically inclined scholars.

Part I of this Article offers a brief overview of the skeptical rethinking of judicial decision making that began with the original legal realists and continues through the new legal realists. Part II considers what distinctive contributions legal theorists might offer to this generally empirical debate.

## PART I

As already noted, a questioning of the motives and causes of judicial decision making goes back at least to—and was given a strong impetus by—the original legal realists and those influenced by them. In the parallel topic of the true motives for

4. Cf. Victoria Nourse & Gregory Shaffer, *Empiricism, Experimentalism, and Conditional Theory*, 67 SMU L. REV. 141, 141–84 (2014) (offering an overview and critique of different strands within New Legal Realism).

5. See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in the Judicial Decision*, 14 CORNELL L.Q. 274 (1929); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950); Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. JOURNAL 357 (1925).

6. See, e.g., CARDOZO, *supra* note 5; Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605–23 (1908).

7. This is clear from the attitudinal model, discussed *infra*, in the text accompanying notes 31–40: theorists attributed decisions to judges' political biases, with the implied assumption that judges are not *consciously* seeking political outcomes. The judges reach essentially biased outcomes while believing that they are being neutral in their decision-making process. See also Hutcheson, *supra* note 5, at 275–76, 278, 287 (arguing that decisions are largely determined by hunches, which in turn are grounded on unconscious biases).

lawmakers, Charles Beard famously argued that we should understand the actions of the Constitution's framers in terms of their financial interests.<sup>8</sup> In Beard's work, one can see a familial resemblance with classical Marxist views, in which legal systems (as well as religion, conventional morality, and fashion) are merely epiphenomenal manifestations of class interests and the structures of production.<sup>9</sup> While Beard's analysis has not gained wide acceptance,<sup>10</sup> the parallel critique of judicial decision making—based on factors *other than* financial interests—has only grown stronger and obtained almost universal adoption.<sup>11</sup>

The original legal realists looked for the unspoken human motivations underneath formalism and mechanical jurisprudence, claiming that the true explanations of judicial decisions could be everything from social and political views, to prejudice, to individual psychological hang-ups.<sup>12</sup> There is a different but overlapping line of analysis, starting with the original legal realists and continuing to the present, involving the phenomenology of judging—how judicial decision making is experienced by judges. Joseph Hutcheson pointed out that decision making (judicial and otherwise) tended to begin with a “hunch” regarding the outcome.<sup>13</sup> Similar to observations made more recently by Daniel Kahneman and others,<sup>14</sup> this “hunch” could be an intuition that reflects years of experience and expertise, or it could be merely a prejudice (e.g., liberal judges might have a “hunch” that consumers or criminal defendants should win, while conservative judges’ hunches might go to favoring businesses and the prosecution).

In any event, the practical—and theoretical—significance of the hunch for judicial decision making depends a great deal on one's view of legal determinacy. It would not matter much what one's initial guess might be regarding the outcome of a legal dispute if, at the end of the day, only one outcome could be justified (and all competent judges acting in good faith would come to that conclusion). There seems

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8. See Richard Drake, *Charles Beard & The English Historians*, 29 CONST. CMT. 313, 313 (2014) (describing Beard in *An Economic Interpretation* as arguing that “the material interests of the founding fathers explained their key decisions at the constitutional convention of 1787”). See generally CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (Macmillan rev. ed. 1935).

9. *Id.* For Marx's views, see Jonathan Wolff, *Karl Marx*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, at §§ 2, 4 (Edward N. Zalta (ed.) (2015), <http://plato.stanford.edu/archives/win2015/entries/marx/> [https://perma.cc/SD2A-C38X] (last visited July 20, 2016).

10. For a summary of current views about Beard's thesis, see generally Mark A. Graber, *Beard & Uber-Beard*, 29 CONST. CMT. 293, 293–311 (2014).

11. See, e.g., Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1459 (2003) (identifying and evaluating “four primary theoretical models for [judicial] decisionmaking” in the U.S. Circuit Courts of Appeals).

12. See, e.g., JEROME FRANK, *LAW & THE MODERN MIND* (Transaction Publishers 2009) (1930) (offering a variety of explanations, including psychological and psychoanalytic, for judicial decisions).

13. Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L. Q. 274, 275 (1929).

14. See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* *passim* (2011). Some of the same ideas were published in popularized form in MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2007).

to be ample evidence, at least at the anecdotal level, that hunches need not be determinative. For myself, in many years of working for judges when I was younger, I frequently saw a judge start off with an initial inclination (whether this be a “hunch” or a policy preference) to come out one way in a case, only ultimately (and perhaps reluctantly) concluding that this initially chosen outcome “would not write,” therefore choosing, voting, and writing for the opposite outcome instead.

A problem with “hunches” arises if there is some significant level of legal indeterminacy. (This would be true whether one ultimately agreed with either the quite modest conventional view associated with the legal theorist H.L.A. Hart,<sup>15</sup> in which law is indeterminate only in the hardest cases; the more significant indeterminacy asserted by the original legal realists; or the “radical” indeterminacy of the critical legal studies (CLS) movement.<sup>16</sup>) Simply put, if more than one outcome could be justified, then it matters a great deal where one’s starting position, inclination, or “hunch” is. If a case could be written legitimately for more than one outcome, then whichever outcome the judge’s hunch/inclination/preference stakes out is also the outcome the judge’ will likely ultimately select.

Duncan Kennedy’s work on the phenomenology of judging combined aspects of the original legal realist ideas on hunches and legal indeterminacy with a version of the CLS views on (radical) legal indeterminacy.<sup>17</sup> For Kennedy, judges, acting in good faith and within the rules, can frequently work through the legal materials to make a legal dispute, which at first seems to be an “easy case” for “the wrong outcome” (one the judge does not like for reasons of policy or principle), into a case that justifiably and defensibly comes out “the right way”—that is, the way consistent with the judge’s ideology or policy preferences.<sup>18</sup> Kennedy calls this process, by which the case is transformed, “ideologically oriented legal work.”<sup>19</sup> However, getting to the desired outcome is harder in some cases than in others; Kennedy thus writes of an “economics of legal work”<sup>20</sup> that takes into account the time available to the judge, the judge’s skill, and the current configuration of precedent, statutes, and other relevant legal materials. In some cases, judges will not be able to get to their desired outcomes, but the cause of that “failure” will not be self-evident and is not necessarily or simply attributable to “the law.”<sup>21</sup>

15. See H.L.A. HART, *THE CONCEPT OF LAW* 124–41 (3d ed. 2012); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–15 (1958).

16. For a (critical) overview of radical indeterminacy claims within CLS, see ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* 90–98 (1990).

17. See generally DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* [FIN DE SIÈCLE] (1997).

18. *Id.* at 166.

19. *Id.* at 157–79. In between the conceptual space of Hutcheson’s “hunch” and Kennedy’s “law work” is the idea of judges using “motivated cognition,” which leads them to reach legal outcomes consistent with their preferences. See Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543, 1560–61 (2015).

20. KENNEDY, *supra* note 17, at 166–68.

21. Kennedy writes:

Because of the “economic” dimension of legal work, the judge doesn’t know, when he or she “fails,” whether the failure was a product of time, knowledge, bias, skill, strategy, or the

Another CLS scholar, Mark Tushnet, contributed a different perspective on legal determinacy: that determinacy and indeterminacy are not merely relative to a particular point in time, but should also be evaluated over a longer period.<sup>22</sup> We should think not merely in terms of the days and weeks of a single judge deciding a case, but also in terms of the years of advocacy groups working—through litigation, scholarship, and media commentary—to make views that were once “beyond the pale”<sup>23</sup> seem acceptable, mainstream, and perhaps eventually “clearly correct.”<sup>24</sup> There seem to be examples of such purposive changes of acceptable arguments all around, including in the understanding of the Second Amendment,<sup>25</sup> the application of constitutional takings arguments to regulation,<sup>26</sup> the use of constitutional arguments for recognizing same-sex marriages,<sup>27</sup> and so forth. These examples all involve arguments that were once dismissed as clearly wrong and even silly, but have come to be taken seriously, in large part through the work of scholars and advocacy groups.

The original legal realists were primarily on the political left—progressives who challenged what they perceived to be the conservative judicial decision-making of their time.<sup>28</sup> Today, skeptical views about the true explanations—the true “causes”—of judicial outcomes are no longer confined to liberal law school critics of conservative judges.<sup>29</sup> While it is not clear that political valence is ultimately important here, it is interesting that those doubtful of judges’ surface explanations of case outcomes these days are as likely to come from right-of-center political

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“inherent properties” of the legal field. The report that he or she was “bound” can be accepted at face value. But it is not a report about inherent properties directly measured.

*Id.* at 169.

22. Mark V. Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339, 341, 343 (1996) [hereinafter Tushnet, *Defending*].

23. On how legal education and general expectations within a legal community create the judgment of what is and is not “off the wall” or “beyond the pale” in legal arguments, see John Bell, *The Acceptability of Legal Arguments*, in *THE LEGAL MIND* 45 *passim* (Neil MacCormick & Peter Birks eds., 1986).

24. Tushnet, *Defending*, *supra* note 22, at 345.

25. See *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (modifying long-standing precedent to hold that the Second Amendment does not allow most forms of gun control legislation).

26. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (holding that any regulation that requires a permanent physical invasion of property is a *per se* taking). See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (arguing that a wide range of current rules and policies constitute “takings” for the purpose of creating a constitutional duty of governmental compensation).

27. See, e.g., *Baskin v. Bogan*, 766 F.3d 648, 671–72 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014) (holding that same-sex couples have a constitutional right to marry and to have states recognize their marriages from other jurisdictions).

28. See EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 74–94 (1973); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1986); Mark V. Tushnet, *Post-Realist Legal Scholarship*, 1980 WIS. L. REV. 1383, 1384, 1396 (1980) [hereinafter Tushnet, *Post-Realist*]; Note, *Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1670 (1982).

29. See Tushnet, *Post-Realist*, *supra* note 28, at 1384, 1396.

scientists, social choice theorists, and law and economics scholars as from liberal and radical law professors.<sup>30</sup>

Political scientists have developed the “attitudinal model”: very roughly speaking, the model states that how judges decide cases can be predicted from their ideologies (often “coded” in terms of the judges’ political affiliations, or the political affiliations of the presidents who selected them).<sup>31</sup> This is not Charles Beard’s focus on financial interests, or Jerome Frank’s focus on individual idiosyncratic psychological hang-ups.<sup>32</sup> This is a focus on politics, broadly understood.<sup>33</sup> The attitudinal model has been very influential, in part because it ties into a view widely held among both academics (and not just the most “worldly” or cynical ones) and the general public.<sup>34</sup> Numerous Supreme Court decisions in recent years—including, prominently, *Bush v. Gore*<sup>35</sup>—and the decisions on campaign finance,<sup>36</sup> gun control,<sup>37</sup> mandatory arbitration,<sup>38</sup> and similar topics seem to be clearly politically motivated and explained, with the “conservative” (and Republican-president-nominated) justices voting for “conservative” outcomes and the “liberal” (and Democratic-president-nominated) justices voting for “liberal” outcomes. Perhaps “we are all attitudinalists now.”<sup>39</sup> The attitudinal model also converges with empirical work done by law professors, which has shown that a judge’s ideology is significantly more important in explaining outcomes in statutory interpretation cases than is the interpretive approach or methodology the judge professes and purports to apply.<sup>40</sup>

However, there has also been significant scholarly pushback against the attitudinal model.<sup>41</sup> One response suggests that it is a mistake to focus exclusively

30. See *id.*; PURCELL, *supra* note 28, at 74-94; Posner, *supra* note 28, at 181.

31. E.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002). Sometimes, the explanatory factor is characterized not as “ideology,” but, slightly differently, as the judges’ “personal attitudes about social policy.” Michael J. Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733, 1733 (2003).

32. See BEARD, *supra* note 8; FRANK, *supra* note 12.

33. See SEGAL & SPAETH, *supra* note 31.

34. See MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* 4 (2011).

35. See *Bush v. Gore*, 531 U.S. 98, 111 (2000) (holding that Florida Supreme Court mandate to manually count certain votes in Florida without a set standard violated Equal Protection).

36. See *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1462 (2014) (holding that aggregate contribution limits First Amendment); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, (2010) (invalidating federal law that prohibited corporations and unions from using their general treasury funds to make independent expenditures for electioneering communications).

37. See *District of Columbia v. Heller*, 554 U.S. 570 (2008) (modifying long-standing precedent to hold that the Second Amendment does not allow most forms of gun control legislation).

38. See *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333 (2011) (holding that federal law preempts state law prohibiting contracts from disallowing class-action arbitration).

39. A reference to the now-clichéd comment, “we are all realists now.”

40. See, e.g., William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008); Daniel A. Farber, Essay, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U. L. REV. 1409 (2000).

41. See, e.g., Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464, 2473 (2014) (reviewing LEE EPSTEIN, WILLIAM M. LANDES &

or primarily on the highest-profile Supreme Court decisions.<sup>42</sup> This response emphasizes, first, that the Supreme Court selects a relative handful of cases to decide from the thousands of cases that are appealed to it<sup>43</sup>—a selection process that is broadly understood to focus on various factors, including the importance of the issue(s) presented and whether there is a current split among the circuit courts on the issue(s).<sup>44</sup> Secondly, in general the cases that result in decisions at any level must be understood to be a very small fraction of the many millions of potential legal disputes, the vast majority of which are not brought to court at all, for the simple reason that the outcome would not be in doubt.<sup>45</sup> Thirdly, CLS and some legal realist scholars to the contrary, there *are* easy cases—cases where judges of all backgrounds and comprehensive belief systems would agree on the result.<sup>46</sup>

In general, any moderately careful analysis of actual and potential legal disputes, and judicial decisions (that extend beyond the Supreme Court and the most high-profile cases), does not support extreme versions of attitudinalism. As one commentator has argued, if judicial decisions were determined entirely by ideology, one would have expected the most liberal justices to have voted consistently for very liberal readings of constitutional provisions (e.g., that the Constitution requires full substantive economic equality), but that has never been the case.<sup>47</sup>

It is increasingly common to find theorists, in their empirical and descriptive work, combining attitudinal and legal/doctrinal explanations for case outcomes, arguing that one will never get a true explanation of judicial decision making unless one includes both.<sup>48</sup> And, like the original legal realists, contemporary legal scholars

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RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013)).

42. See David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 241 (2009).

43. *Id.* at 240–41 (noting that in the Supreme Court’s October Term 2005, 0.9% of certiorari petitions were granted—78 of 8,517; if *in forma pauperis* petitions are excluded, the percentage granted was still only 3.5%).

44. *Id.* at 240.

45. Of course, there are many reasons potential disputes are not brought to court *other than* because of the easiness of the answer: many otherwise meritorious (or at least tenable) claims are not brought because the plaintiffs cannot afford litigation, they misunderstand the law, they have been intimidated by (unenforceable) contractual terms, and so forth. Still, the number of cases *not* brought to court because the case is easy—and the ultimate result certain—must still cover a very large number of actual and potential conflicts.

46. See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985); CARDOZO, *supra* note 5; cf. Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645 (2003).

47. See, e.g., Solum, *supra* note 41, at 2474.

48. See, e.g., BAILEY & MALTZMAN, *supra* note 34; Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1945–46 (2009); Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 LAW & SOC. INQUIRY 89, 109 (2005); Howard Gillman, *What’s Law Got to Do With It? Judicial Behavioralists Test the “Legal Model” of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465 (2001) (book review); Solum, *supra*

are also finding explanatory factors that do not fit simply within either a legal/doctrinal or ideological category (e.g., the “panel effects” which arguably can be explained either as peer pressure, collegiality, log rolling, or a whistleblower effect).<sup>49</sup>

## PART II

The issue of the best explanation for judicial opinions is largely an empirical one—a debate in which new legal realists, positive political theorists, law and economics scholars, and many other academics can partake. There may also be a role, I believe, for non-empirical legal theorists.

One central question in the debate about judicial decision making, a question that is partly conceptual and partly empirical, is: How do we know when a judge is deciding a case based on “law” rather than ideology, interest, what the judge had for breakfast, or whether the judge has daughters?<sup>50</sup> Some empirical work on judicial decisions takes as evidence that a case was decided on the basis of “law” that judges of different (apparent or perceived) ideology agree on an outcome.<sup>51</sup> As an original legal realist<sup>52</sup> or CLS theorist would point out, the fact that a Republican(-appointed) and a Democratic(-appointed) judge agree on an outcome *may* indicate that the decision in question does not reflect ideology, but that conclusion is by no means *necessary*. Broad agreement, even unanimity, may mean only that the *ideology* that underlies the decision is one that is shared by both the Republican and Democratic judges in question. One can recall Mark Tushnet, in an early work, noting how

note 41; Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1 (2011).

49. See e.g., CASS R. SUNSTEIN, ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006) (describing panel effects); see also Guy Grossman, et al., *Descriptive Representation and Judicial Outcomes in Multiethnic Societies*, 60 AM. J. POL. SCI. 44 (2016) (discussing how punishment for Arab defendants is significantly lower when the judicial panel had at least one Arab judge); cf. Frank B. Cross & Emerson H. Tiller, Essay, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2156 (1998) (speculating that “panel effects” may be due to ability of dissenter to show manipulations in case). In LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013), the authors display an ambivalent view of the attitudinal model (seemingly rejecting it or discounting it at some points, while pointing out ideological effects on judicial decisions at other points), while at times promoting a labor economics model that never seems especially helpful or persuasive. See Solum, *supra* note 41, at 2482–83. More promising has been the application of positive political theory to the courts. See, e.g., McNollgast [Mathew McCubbins, Roger Noll & Barry Weingast], *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995); cf. KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* (1998) (discussing positive political theory regarding the politicians or judges who serve as powerful “pivots” giving one side the majority—or super-majority—needed to prevail).

50. See e.g., Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37 (2015) (empirical study finding that judges with daughters consistently vote in a more “feminist” fashion on gender issues).

51. *Id.*

52. Or whatever is the best adjective for the American legal realists who came before the *New* Legal Realists. See Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY* 50 (Martin P. Golding & William A. Edmundson eds., 2003).

reading the U.S. Constitution to require socialism is an intellectually defensible interpretation, but not one observers would expect *any* U.S. judge, Democrat or Republican, to endorse.<sup>53</sup> Recall also the analyses by both Mark Tushnet and John Bell,<sup>54</sup> that certain arguments may simply seem unacceptable—“out of bounds” or “beyond the pale”—at a certain time (even though the boundary line for what is “out of bounds” might shift over time, perhaps through the “ideological work” of advocacy groups). That is, what is acceptable and unacceptable is relative to the understandings and conventions of the legal profession at a particular time, and that these understandings and conventions can be changed over time by scholarship and advocacy.

To be sure, when we start to speak of legal arguments that are “out of bounds” because of shared political ideology or because of shared legal education and socialization, it is no longer obvious which side of the line we are on—is it “*legal* explanation of judicial decisions” or “*other* explanations of legal decisions”? As H.L.A. Hart nicely put the matter, statutes do not declare what instances fall under them.<sup>55</sup> The correct interpretation of a legal text is a function of many background factors that usually go undiscussed, including general usage of the terms that appear in the text, special usages of those terms in legal contexts, social norms about reasonable actions and purposes for individuals, social norms about reasonable actions and purposes for government, views about the proper roles of judges, and so on. The social context of legal interpretation contains a spectrum of factors, from specific rules that are more in the foreground and may vary from jurisdiction to jurisdiction, or even from judge to judge (e.g., regarding whether and when judges should refer to legislative history, foreign court judgments, or dictionaries), to more general social norms so taken for granted that they are rarely noticed. Along that spectrum, what counts as a legal or doctrinal reason for an outcome, and what instead should be seen as ideological or cultural?

Let us take a step back. When we say that “law” or “doctrine” explains an outcome, sometimes this refers to there being only one correct or acceptable understanding or application of a legal text (whether constitutional provision, statute, administrative regulation, contract, will, or trust), and sometimes this refers to judges being constrained by prior judicial decisions (precedent). My claim is that there is a need for a clearer articulation of what is meant by “legal or doctrinal explanation,” and that this cannot be done through increasingly sophisticated empirical investigations. This is an area where legal theory may be helpful.

The legal theorist could evaluate whether a particular legal question is in fact indeterminate or not—that is, whether legal doctrine and precedent are a sufficient

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53. See generally Mark V. Tushnet, *DLA-TRIBE*, 78 MICH. L. REV. 694 (1980) (reviewing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978)).

54. See Tushnet, *Defending*, *supra* note 22, at 341, 343; see also Bell, *supra* note 23, *passim*.

55. HART, *supra* note 15, at 126. (“Particular fact-situations do not await us already marked off from each other, and labeled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances.”).

explanation for a particular outcome. In response, a concern might be raised that even if the legal theorist concludes that the legal materials are *indeterminate*, or that precedent does *not* in fact constrain, the judge in a case might *perceive* her situation differently. Whatever her ideology, she might *think* that a statute *requires* a certain outcome (and it may be one that she in fact does not prefer), or that precedent *allows* only one possible decision. However, here the judge would be no different from the judges, acting in good faith, who believe that they are open-minded, but end up—consistently and predictably—deciding as the political scientists predict, given those judges' political ideology.<sup>56</sup> That is, if we focus on a judge's subjective perceptions, we should give equal credence to her subjective perception that she is open minded (despite the evidence that her decisions follow a predictable, ideological path) as we give to her perception that she is bound (despite reasonable doctrinal or philosophical argument that she is not).

These reflections on subjective perception may indicate a need for a different sort of careful elaboration in the debates about judicial decision making. What role should or must subjective perception play in explanations of judicial decision making? As a matter of due respect for the human beings involved, do we not need to note that even the judges whose decisions may be most predictable on ideological grounds perceive themselves to be making choices based on what the law requires? In discussing their decisions, it seems to me that we need a more subtle discussion of the differences between reasons and causes in judicial actions.

Of course, there is a sense in which *high* theory is not needed for the task outlined above. One does not need to be an expert in Hart, Dworkin, Llewellyn, Unger, or MacKinnon to help determine whether or not particular legal questions have determinate answers. Putting aside claims of universal and radical indeterminacy—most of which have been, in due course, discredited<sup>57</sup>—arguments about determinacy tend to be retail, not wholesale, and involve the sort of doctrinal analysis that has been standard among legal scholars (both in their writing and their teaching) for a very long time.<sup>58</sup>

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56. See SEGAL & SPAETH, *supra* note 31.

57. See, e.g., Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

58. See Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 883 (2003).

## CONCLUSION

It is likely that most judges act in good faith when deciding cases; they likely see themselves as open-minded in deciding the legal disputes before them and devoted to trying to find out what the law requires. Yet legal and political science observers (and others) notice patterns seemingly more related to ideology than doctrine.<sup>59</sup> The idea that judicial decision making is “political,” and that in court decisions we are being governed as much by the people as by law,<sup>60</sup> is now a commonplace.<sup>61</sup> However, the underlying reality of judicial decision making remains complicated, with much work still to be done by empirical research.

As I have argued in this Article, I think that there remains a role in this debate for (non-empirical) legal theorists to investigate and clarify what is meant by “legally determined outcomes,” and to help ascertain which issues are in fact legally determined, and when even predictable outcomes might be explained by factors other than legal doctrine, such as the judges’ political biases and self-interest and advocacy by interest groups.

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59. Notice that this situation is structurally analogous to the more general phenomenon where people generally see themselves as free in their choices, while their friends and other observers see those same choices as predictable and seemingly predetermined.

60. This is of course a reference to John Adams’s phrase, “a government of law and not of men.” MASS. CONST. art. XXX, pt. I. (1780). Adams himself credits a similar phrase to James Harrington’s *The Commonwealth of Oceana*. JAMES HARRINGTON, *THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS* 35 (J.G.A. Pocock ed., Cambridge Univ. Press 1992) (1771).

61. See, e.g., SEGAL & SPAETH, *supra* note 31; Solum, *supra* note 41.

