Judicial Resistance and Legal Change

Matthew Tokson†

Conventional models of judicial behavior assume that, barring extraordinary circumstances, lower courts will comply with changes in governing law. The few studies that have examined judicial compliance with higher-court decisions have concluded that judges quickly adopt even controversial new doctrines.

This Article challenges these conventional accounts of judicial compliance. It presents several surprising examples of widespread and persistent judicial defiance of new doctrines. Judges often apply old, overturned laws instead of new laws—and they do so in observable and predictable ways. For instance, this phenomenon is especially common when a low-decision-cost regime is replaced with a high-decision-cost regime, as when a rule is changed to a standard.

This Article posits that judges are influenced by biases and incentives that can cause them to strongly prefer familiar laws to unfamiliar ones and simple laws to complex ones. These preferences shape judicial behavior and can engender overt noncompliance with new laws. This Article proposes a new model of judicial compliance and demonstrates how the model can successfully predict future judicial behavior. It then suggests ways of reducing judicial resistance to legal change. This Article's theoretical and empirical findings also shed light on current legal debates, including broader debates about the efficacy of court-driven social change.

† Assistant Professor, Salmon P. Chase College of Law, Northern Kentucky University. Thanks to Lisa Bernstein and the University of Chicago Legal Scholarship Workshop, Ryan Calo, Richard Epstein, Lee Fennell, the Honorable Ruth Bader Ginsburg, Todd Henderson, William Hubbard, Leah Litman, Jonathan Masur, Richard McAdams, the Honorable David H. Souter, and Lior Strahilevitz. And thanks to Prisca Kim and David Mindell for excellent research assistance.

INTRODUCTION

Changes in law, especially drastic or controversial ones, have at times met with strong political or cultural resistance. In the wake of *Brown v Board of Education of Topeka*,[1] for instance, state and local officials across the Jim Crow South led a decades-long campaign of opposition to the desegregation of schools and other public institutions.[2] Scholars have identified a number of impediments to courts' abilities to shape society, including institutional weakness,[3] political resistance,[4] and sticky

---

1 347 US 483 (1954).

2 See, for example, Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 78–88 (Chicago 2d ed 2008).

3 See, for example, Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 266–68 (Yale 2d ed 1986).

4 See generally, for example, Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (Oxford 2013). See also Rosenberg, *The Hollow Hope* at 57–58, 74, 367–68 (cited in note 2); J.W. Peltason, *Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation* 41–42, 93 (Harcourt, Brace & World 1961).

social norms.[5] Some have expressed skepticism about courts' abilities to effect progressive changes in society or to protect politically disadvantaged minorities from oppression by majorities or powerful interest groups.[6] The practical impact of legal change bears on fundamental questions of the role of the judicial branch and the importance of law as a discipline.

New legal doctrines are meant to influence citizens and institutions by shifting incentives or altering the legal standards that apply to certain types of activity. A crucial first step toward changing society through the legal system is changing the practices of the courts charged with applying new laws. This initial step is often taken for granted and generally receives little attention. Conventional studies and accounts of lower court behavior assume that courts nearly always comply with controlling doctrine, except perhaps in areas of profound political or cultural disagreement.

This Article challenges that assumption. Its findings suggest that the conventional model of judicial compliance is, in many ways, inaccurate and incomplete. Although the standard model considers political preferences, it largely fails to incorporate nonideological preferences, which can influence judicial behavior even more strongly. As this Article shows, judges are just as susceptible to many of the same unconscious biases, aversions to costs, and preferences for the familiar status quo as the rest of us.

Judges may be motivated to resist legal changes that increase their decision costs by increasing the time and effort necessary to address a legal issue or by increasing the cognitive difficulty of decisionmaking. They can also develop biases in favor of laws that they have repeatedly applied and justified in the past. And they may develop preferences for familiar doctrines and an aversion to any departure from a long-standing status quo.

Further, these preferences and biases can manifest as actual, widespread noncompliance with controlling doctrine. For example, judges may in practice refuse to follow new laws that would substantially increase their decision costs. Or, because judges can develop strong preferences for routinely applied doctrines, they may continue to apply those doctrines long after the doctrines have been expressly overturned by a higher court.

---

[5] See generally, for example, Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U Chi L Rev 607 (2000).

[6] See, for example, Rosenberg, *The Hollow Hope* at 15–21 (cited in note 2).

Judicial resistance to legal change can be observed in a wide variety of areas, including torts, securities, copyright, patent, and criminal law.[7] This Article discusses several examples of such resistance, taken from contexts where selection effects[8] are absent or unlikely, or where judicial defiance is overt and directly observable. Judicial resistance can virtually nullify the effects of doctrinal change in some contexts, and it can also be seen in situations in which judicial behavior changes substantially but still gravitates toward an old, defunct rule.[9]

This Article develops a new model of judicial compliance with legal change that accounts for the influence of costs, biases, and preferences for status quo doctrines. This model can be used to more accurately predict judicial behavior in a variety of contexts.[10] Moreover, understanding the nature of judicial resistance to legal change may allow legal actors to look for new ways to effectively change lower court behavior. Extrajudicial monitoring of lower court compliance, educating judges about basic statistical concepts relevant to new legal tests, and repeated, salient disavowals of old doctrines can all decrease the likelihood of judicial defiance. Finally, this Article's account of judges' responses to legal change suggests that scholars should consider lower court compliance before drawing conclusions about new doctrines. A multilevel approach may be necessary to accurately assess the true impact of a doctrinal change.

This Article proceeds in four parts. Part I reviews conventional accounts of judicial compliance with controlling law and summarizes the standard model of how courts respond to doctrinal change. Part II describes potential sources of judicial resistance to legal change. It examines judges' aversion to increased decision costs and the preferences that judges may develop over time for familiar doctrines. It then integrates this analysis with existing accounts of judicial behavior to develop a new model of judicial compliance with legal change. Part III

---

7 See Parts III, IV.A.

8 "Selection effects" refers to the tendency of the set of litigated cases to change when legal standards change, which can make it difficult to measure changes in plaintiff win rates in litigated cases. See text accompanying note 118. See also generally George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J Legal Stud 1 (1984).

9 See Part IV.A.

10 See, for example, Part III.E (showing in an empirical test that the model accurately predicts the behavior of courts applying the qualified immunity doctrine, and that the conventional model's prediction is incorrect).

presents evidence supporting this new model and surveys examples of resistance to legal change from a variety of legal areas. It also reports the results of an original study of courts' applications of qualified immunity doctrine, which demonstrates the persistent influence of overturned law. Part IV discusses the implications of this Article's account of judicial noncompliance with legal change. Specifically, it examines evidence that judicial resistance is ubiquitous and acts as a drag on legal change even when lower court behavior otherwise changes significantly. It describes how the new model of judicial compliance can be used to predict (and potentially shape) future judicial behavior. Finally, it discusses obstacles to practical legal change and offers some potential means of more effectively altering lower court practices.

I. CONVENTIONAL ACCOUNTS OF JUDICIAL COMPLIANCE

Few previous studies have examined judicial compliance with legal change, either generally or across a range of subjects. Several reports have, however, examined the extent to which lower courts follow controlling doctrine set out in a particular case or line of cases. Virtually all these studies have examined compliance after a major and controversial Supreme Court decision, because researchers have concluded that such decisions are most likely to produce noncompliance. Nonetheless, very few surveys of judicial behavior have found detectable noncompliance by lower courts, even in politically charged areas. This Part examines the literature on judicial compliance—paying special attention to studies of noncompliance—and summarizes the conventional model of how courts respond to doctrinal change.

A. Doctrinal Compliance

Scholars examining judicial responses to changes in doctrine have concluded that lower courts normally comply with higher courts' rulings. This conclusion may seem rather obvious to readers with law degrees. Lawyers take as a given that lower courts obey doctrinal commands, whether statutory or precedential. Thus, when the Supreme Court or Congress changes the law—say, by discarding an old rule and adopting a new one—lower courts will apply the new rule. Even the most pragmatic

scholars of judicial behavior assume that "the lower courts fall into line" with new decisions of higher courts.[11]

Political scientists generally take a more jaundiced view of judicial behavior, but they too conclude that judges virtually always comply with doctrinal imperatives. Although political scientists tend to examine judicial compliance in controversial or politically charged areas, in which noncompliance is expected to be highest, their studies have "found nearly universal compliance" with the new rulings of higher courts.[12]

Observers have suggested several potential reasons for this high level of compliance. Judges may be averse to having their noncompliant decisions reversed by a higher court.[13] A related incentive for compliance is bolstering one's reputation and prestige.[14] Finally, judges may have internalized norms of compliance through their professional training or may prize compliance because it is an essential part of their conception of their role as a judge.[15] For these reasons, outright defiance of higher-court

---

[11] Lee Epstein, William M. Landes, and Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* 41 (Harvard 2013).

[12] Donald R. Songer, Jeffrey A. Segal, and Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court–Circuit Court Interactions*, 38 Am J Polit Sci 673, 693 (1994). See also, for example, Jennifer K. Luse, et al, *"Such Inferior Courts . . .": Compliance by Circuits with Jurisprudential Regimes*, 37 Am Politics Rsrch 75, 92 (2009) (concluding that lower courts are entirely compliant with the test from *Lemon v Kurtzman*, 403 US 602 (1971)); Sara C. Benesh and Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J Politics 534, 536 (2002) (noting that scholars have found "little evidence of outright defiance" of Supreme Court precedent); Donald R. Songer and Reginald S. Sheehan, *Supreme Court Impact on Compliance and Outcomes:* Miranda *and* New York Times *in the United States Courts of Appeals*, 43 W Polit Q 297, 306–08 (1990) (finding that lower courts did not defy controversial Supreme Court decisions); Neil T. Romans, *The Role of State Supreme Courts in Judicial Policy Making:* Escobedo, Miranda *and the Use of Judicial Impact Analysis*, 27 W Polit Q 38, 56 (1974) (examining state court compliance and finding complete doctrinal compliance with a controversial Supreme Court decision despite differing degrees of expansion or restriction).

[13] See William M. Landes and Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J Legal Analysis 775, 780 (2009); Susan B. Haire, Stefanie A. Lindquist, and Donald R. Songer, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 L & Society Rev 143, 147 (2003). This effect is generally thought to be weak, however, while high levels of compliance are observed even in situations in which the possibility of reversal is effectively zero. See David E. Klein and Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 L & Society Rev 579, 583, 600–01 (2003); Haire, Lindquist, and Songer, 37 L & Society Rev at 146.

[14] See Landes and Posner, 1 J Legal Analysis at 780 (cited in note 13); Klein and Hume, 37 L & Society Rev at 581 (cited in note 13).

[15] See Haire, Lindquist, and Songer, 37 L & Society Rev at 147 (cited in note 13); Klein and Hume, 37 L & Society Rev at 581 (cited in note 13).

decisions is considered highly unlikely, and full compliance with doctrinal imperatives is the norm.

B. Indirect Noncompliance

Scholars have, however, recognized that courts may engage in a sort of indirect noncompliance—or at least imperfect compliance—without overtly defying doctrinal imperatives. Judges might, for instance, intentionally misinterpret the law (or the facts) in order to circumvent a doctrinal command and reach their preferred outcome. This is especially likely, legal observers agree, in the context of highly controversial laws.[16] One example that has received particular attention in the literature is the exclusionary rule. Under Supreme Court precedent, evidence gathered in violation of the Fourth Amendment is, in most cases, suppressed at trial.[17] This can have the unpalatable effect of setting known criminals free.[18] Judges are thought to be reluctant to apply the exclusionary rule, particularly in cases involving serious crimes.[19] They may therefore intentionally draw erroneous legal or factual conclusions that allow them to avoid applying the rule.[20]

The exclusionary rule does appear ripe for subversion by judges. However, evidence on judicial compliance with the Supreme Court's search-and-seizure case law suggests that if any noncompliance exists, it is limited. Lower courts closely follow the Court's doctrinal commands in search-and-seizure cases, and differences in case outcomes among courts are generally attributable to differences in facts rather than judicial policy preferences.[21]

---

16 See, for example, Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 Notre Dame L Rev 585, 657–58 (2011); Rosenberg, *The Hollow Hope* at 89–90 (cited in note 2). See also Peltason, *Fifty-Eight Lonely Men* at 93 (cited in note 4).

17 See generally *Mapp v Ohio*, 367 US 643 (1961).

18 See Jacobi, 87 Notre Dame L Rev at 629, 657 (cited in note 16).

19 See, for example, id at 657. Judges (as well as lawyers) have reported that they believe that some judges occasionally fail to suppress evidence that they know is illegal. See, for example, Myron W. Orfield Jr, *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U Colo L Rev 75, 115 (1992).

20 See David A. Harris, *How Accountability-Based Policing Can Reinforce—or Replace—the Fourth Amendment Exclusionary Rule*, 7 Ohio St J Crim L 149, 191 (2009); Orfield, 63 U Colo L Rev at 119 (cited in note 19).

21 See Songer, Segal, and Cameron, 38 Am J Polit Sci at 684–88 (cited in note 12); Sara C. Benesh and Wendy L. Martinek, *Context and Compliance: A Comparison of State Supreme Courts and the Circuits*, 93 Marq L Rev 795, 797–98 (2009). Indirect noncompliance may also be likely in areas in which a change in the law conflicts with strong and entrenched social norms. Professor Dan Kahan has suggested that judges may be particularly lenient in sentencing criminals in drunk driving and domestic violence cases

Legal scholars have focused a great deal of attention on the political inclinations of judges and how those inclinations may affect case outcomes. It is possible that judges deciding politically charged cases might go so far as to deliberately undermine doctrinal precedents with which they disagree in order to advance a political agenda. Alternatively, similar noncompliance might occur at an unconscious level, causing strongly biased judges to make mistakes of legal interpretation or factual assessment that seem obvious to unbiased observers.

Yet those legal scholars who have most closely examined the effects of political affiliation on case outcomes have suggested that actual doctrinal noncompliance or subversion is nonexistent or very limited. First, many areas and issues of law do not have an obvious political valence. The political world is ignorant of the vast majority of legal issues that courts address.[22] Second, in many areas of the law that seem relatively politicized or controversial, studies have shown no differences between Democratic- and Republican-appointed judges.[23] Finally, researchers have found that, even in highly politicized areas in which judges' votes diverge somewhat based on their political affiliations, judges appear to agree on the core doctrinal meaning of controversial Supreme Court decisions and obey these doctrinal commands regardless of their party affiliation.[24] Judges generally differ not on whether to follow Supreme Court decisions but on how broadly to apply them when faced with new sets of facts.[25] This is compatible with evidence that major, controversial rulings by the Supreme Court actually dampen rather than increase ideological divergence among judges, at least in the short term. Ideological divergence only increases as years go by and

---

because they are reluctant to fully enforce strict laws against once-tolerated activities. See Kahan, 67 U Chi L Rev at 628, 633 (cited in note 5). Judges may have also resisted new laws against sexual harassment by excessively limiting their scope. See id at 638. In general, when new laws challenge widely held social norms, some judges may attempt to defend those norms via indirect noncompliance. Such noncompliance, however, may be minimal in practice. Most of the evidence of norm stickiness in Kahan's article concerns the behavior of jurors and law-enforcement officers.

22 See Harry T. Edwards and Michael L. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 Duke L J 1895, 1924–27 (2009).

23 This includes areas such as criminal appeals and federalism. See Cass R. Sunstein, et al, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* 48–51 (Brookings 2006).

24 See, for example, id at 88, 106.

25 See id at 106.

new, related issues arise, requiring judges to decide whether these rulings should be extended or limited.[26]

Further, and even when using an expansive conception of noncompliance,[27] political scientists have generally found high levels of compliance in controversial and politically charged areas.[28] This is true even in the federal courts of appeals, which the Supreme Court cannot directly supervise in more than a small percentage of cases due to the Court's relatively small docket. Despite the low probability of review, the circuit courts "appear to be relatively faithful agents of their principal, the Supreme Court," in terms of both doctrine and policy outcomes.[29]

C. Direct Noncompliance

Observers have noted that, in very rare cases, courts may engage in overt noncompliance with the doctrinal imperatives of higher courts.[30] For instance, the Supreme Court's school-desegregation ruling in *Brown* fundamentally challenged the cultural and social structure of the American South. It resulted in enormous political and legal controversy, and it engendered a massive campaign of resistance at the state and local levels across the Deep South. It also reshaped the politics of these states, as racial moderates became unelectable and only politicians who vowed to fight the Court's mandate of desegregated schools remained viable.[31] In this highly charged environment, and facing incredible social pressure from the communities in which they and their families lived,[32] Southern judges sometimes engaged in direct noncompliance with the Supreme

---

[26] See id at 88–106.

[27] For a discussion of the very broad definition of noncompliance used by some political scientists, see Emery G. Lee III, *Precedent Direction and Compliance: Horizontal Stare Decisis on the U.S. Court of Appeals for the Sixth Circuit*, 1 Seton Hall Cir Rev 5, 8–9 (2005); Scott D. McClurg and Scott A. Comparato, *Rebellious or Just Misunderstood? Assessing Measures of Lower Court Compliance with U.S. Supreme Court Precedent* *30–31 (unpublished article, Southern Illinois University Carbondale, 2004), archived at http://perma.cc/V3VA-EBK2.

[28] See, for example, Songer and Sheehan, 43 W Polit Q at 306 (cited in note 12) (finding very high rates of compliance with *Miranda v Arizona*, 384 US 436 (1966)); Luse, et al, 37 Am Politics Rsrch at 92 (cited in note 12) (finding total compliance with *Lemon v Kurtzman*).

[29] Songer, Segal, and Cameron, 38 Am J Polit Sci at 690 (cited in note 12).

[30] Overt noncompliance with statutory commands, which is discussed in Part III.B.2, has not previously been reported in the judicial-compliance literature.

[31] See Rosenberg, *The Hollow Hope* at 78–79 (cited in note 2).

[32] See id at 90.

Court's ruling. This noncompliance took several forms. One federal judge attempted to reverse *Brown* on the basis that blacks were not intelligent enough to attend school with whites.[33] Another refused to require desegregation and criticized the Supreme Court for failing to understand the South.[34] Several judges upheld state laws designed to prevent compliance with *Brown*.[35] There were also countless examples of indirect noncompliance via delay, bad-faith legal interpretation, and the biased use of discretion.[36]

The ultimate impact of *Brown* in the Deep South is a matter of great controversy. What is clear is that judges' defiance substantially blunted the practical effect of *Brown*'s dramatic doctrinal change.[37] Judicial resistance to *Brown* "posed a serious obstacle to civil rights in the South."[38]

D. The Conventional Model of How Courts Respond to Legal Change

This Section will draw from the studies discussed above to elaborate the conventional account of judicial compliance with doctrinal change. That account runs approximately as follows: lower court judges are likely motivated to comply with new doctrines by aversion to reversal, concerns for their reputation, and their own conceptions of duty and the judicial role. Scholars have concluded that lower courts follow the doctrinal mandates of higher courts in virtually all cases. When applicable law changes, even drastically, lower courts will adopt and apply the changed law "immediately and overwhelmingly."[39] Very few studies have bothered to look for noncompliance in less controversial areas, and those few studies that have done so have not found any noncompliance.[40]

---

[33] See id at 89.

[34] See Peltason, *Fifty-Eight Lonely Men* at 213 (cited in note 4).

[35] See Rosenberg, *The Hollow Hope* at 89 (cited in note 2).

[36] See id at 89, 320. See also Peltason, *Fifty-Eight Lonely Men* at 68, 70, 74, 115, 121 (cited in note 4).

[37] See Peltason, *Fifty-Eight Lonely Men* at 93 (cited in note 4).

[38] Rosenberg, *The Hollow Hope* at 91 (cited in note 2).

[39] John Gruhl, *The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Courts*, 33 W Polit Q 502, 518–19 (1980). See also Benesh and Reddick, 64 J Politics at 543, 547 (cited in note 12) (finding that courts of appeals adopt changed doctrines very quickly—generally, in the second decision in which they are applicable).

[40] See Gruhl, 33 W Polit Q at 504, 518 (cited in note 39).

However, in highly controversial and politically charged areas of law, courts may respond to legal change in a variety of ways. They may exhibit complete doctrinal and policy compliance, as usual, or they may engage in indirect noncompliance. In extremely rare situations, such as when a higher court attempts to impose transformative cultural and social changes via law, lower court judges might directly defy or disregard new legal mandates.

Further, in many cases involving politically charged topics, judges may exhibit a bias toward their preferred political outcome. But these judges appear to obey the core doctrines of new legal mandates—even very controversial ones—and to differ only as to how narrowly or broadly to apply new rulings. Evidence suggests that when the Supreme Court changes doctrine in politically charged areas, both liberal and conservative judges change their behavior in response, even as they continue to diverge in marginal cases.[41]

The conventional account of how courts react to legal change is plausible and intuitively appealing, and there is at least some empirical support for many of its premises. The next Part both expands on and challenges this account. It identifies substantial gaps and errors in current conceptions of how judges react to legal change. And it proposes a deeper theoretical account of the process of legal change in the lower courts.

II. SOURCES OF JUDICIAL RESISTANCE TO LEGAL CHANGE

The conventional model of judicial compliance with legal change represents a kind of judicial exceptionalism. Accustomed to considering the many ways in which judges behave differently from other legal or political actors, scholars of judicial behavior may have neglected the ways in which judges behave like everyone else. Studies of behavior from a variety of other fields suggest a markedly different model of judicial compliance. This Part begins to develop such a model, accounting for both general theories of human behavior and the unique context of judicial decisionmaking.

This model is based on three potential influences on judicial behavior that may cause judges to actively defy new laws. The

---

[41] See Songer, Segal, and Cameron, 38 Am J Polit Sci at 688 (cited in note 12); Benesh and Reddick, 64 J Politics at 546–47 (cited in note 12) (finding that the ideology of circuit court judges does not seem to affect doctrinal compliance).

first is judges' resistance to the greater time and effort costs that may be associated with new legal regimes. The second is judges' aversion to the increased cognitive difficulty of their decisions under complex new laws. And the third is judges' tendency to develop strong preferences for familiar, status quo doctrines. The ensuing sections describe these effects, all of which can influence judges to resist changes to current legal regimes.

A. Time and Effort Costs

As discussed above, the conventional model of judicial responses to legal change incorporates political and policy preferences. But it largely fails to address nonideological preferences, including preferences driven by the costs that judges face when deciding cases.

Let us start with the assumption that people seek to minimize costs and maximize benefits, at least if no other considerations apply. So, all else being equal, if driving to work on the traffic-heavy Beltway takes forty minutes, while driving on the wide-open George Washington Parkway takes twenty minutes, a busy and traffic-hating commuter will prefer the Parkway.

Certain changes in legal doctrine will increase (or decrease) costs for judges. For example, a higher court may replace a simple, bright-line rule with a standard that requires more time and effort to apply, or a basic standard with a more complicated one, or a clear-cut rule with one that involves a more difficult factual inquiry. These changes would increase the overall costs to judges of deciding cases and writing opinions. And they would do so in concrete ways: by increasing the amount of time that a judge spends preparing for trial, researching a legal question, or writing an opinion. They would likely also increase the length of opinions, the number (and length) of motions filed by parties, the time spent addressing motions and holding hearings, and the number of orders that judges must issue.

All else being equal, judges will prefer legal doctrines with lower implementation costs. They will tend to disfavor legal doctrines that impose higher decision costs in terms of time required for deciding cases and writing opinions. This may lead them to overtly defy these doctrines. Judicial aversion to increased costs may also operate partially at an unconscious level, subverting judges' good-faith efforts to properly apply the law.

Of course, cost and convenience are not judges' only considerations. The conventional model seems to implicitly assume

that judges' sense of duty in faithfully applying the law[42] will generally cause them to adopt doctrinal changes regardless of the cost. Or perhaps judges' aversion to reversal or concern for their own reputations will outweigh any additional costs in the vast majority of cases.[43] Or judges may simply pass off most of the additional costs onto their clerks, who may be less able or less willing to shirk them.[44]

Whatever the effect of these increased time and effort costs, their impact is likely greatest when they combine with other, more subtle decision costs. These less obvious costs are even more likely to influence judicial behavior at a subconscious level. The next Section addresses these costs.

B. Cognitive Decision Costs

As discussed above, changes in the law may increase decision costs for judges. But not all these higher costs will be reflected in longer opinions or a greater amount of time necessary to decide cases. Rather, new laws may increase another type of cost—the cognitive costs of decisionmaking. Essentially, more-complicated legal regimes will create harder decisions for judges. And judges, all else being equal, will tend to disfavor legal doctrines that make their decisions more difficult. This Section will examine this effect in greater detail, with the goal of better understanding and predicting how judges will react to higher cognitive decision costs.

Cognitive costs can be most easily understood as a measure of mental fatigue. Mental fatigue typically involves subjective feelings of tiredness or exhaustion, and it impairs cognitive performance and increases stress.[45] It can result from grappling with a difficult or complex decision.[46] People are averse to mental fatigue and high expenditures of mental energy.[47] Dealing

---

42 See text accompanying note 15.

43 See notes 13–14 and accompanying text.

44 For a discussion of law clerks' role in the judicial opinion-writing process, see Richard A. Posner, *Reflections on Judging* 238–55 (Harvard 2013).

45 See generally G. Robert J. Hockey, *Compensatory Control in the Regulation of Human Performance under Stress and High Workload: A Cognitive-Energetical Framework*, 45 Biological Psychology 73 (1997); Bruce S. McEwen and John C. Wingfield, *The Concept of Allostasis in Biology and Biomedicine*, 43 Hormones and Behav 2 (2003).

46 See generally Robert Langner, et al, *Energetic Effects of Stimulus Intensity on Prolonged Simple Reaction-Time Performance*, 74 Psychological Rsrch 499 (2010).

47 See generally Hockey, 45 Biological Psychology 73 (cited in note 45).

with complicated, multifactorial decisions can even activate the emotional regions of the brain, causing anxiety and frustration.[48]

The upshot is that people will tend to try to avoid difficult mental calculations and will prefer decisions that require less mental energy.[49] They will also seek to avoid high cognitive costs by choosing decision strategies that require low levels of effort.[50] The application of this framework to judges is relatively straightforward. All else being equal, judges will prefer decisionmaking regimes that require less mental energy and will disfavor regimes that involve complex, mentally fatiguing decisions.

The simple principle that people seek to avoid mental fatigue and high cognitive decision costs lies behind many of the interesting findings of behavioral psychology and behavioral economics. It drives our attraction to a variety of cognitive heuristics and shortcuts.[51] And it can motivate people to select a default option, whatever that may be, rather than facing a difficult choice.[52] This default effect can also contribute to the tendency to stick with a familiar status quo.[53]

Another behavioral phenomenon of particular relevance to legal decisionmaking is known as anchoring. People faced with a complex numerical task frequently start with a given number (the "anchor") and then adjust up or down. This allows them to avoid the demanding mental task of calculating a numerical answer from scratch. The problem is that these adjustments are typically insufficient, so final answers are biased in favor of the initial anchor.[54]

This anchoring effect is powerful and pervasive. Even when people are given numbers that they know to be arbitrary and randomly selected, they tend to use those numbers as anchors.

---

48 See generally Sharon Begley, *I Can't Think! The Twitterization of Our Culture Has Revolutionized Our Lives, but with an Unintended Consequence—Our Overloaded Brains Freeze When We Have to Make Decisions*, Newsweek 28 (Mar 7, 2011).

49 See Barry Schwartz, *The Paradox of Choice: Why More Is Less* 125–32 (HarperCollins 2004).

50 See Maarten A.S. Boksem, Theo F. Meijman, and Monicque M. Lorist, *Mental Fatigue, Motivation and Action Monitoring*, 72 Biological Psychology 123, 129 (2006).

51 See Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* 19–31 (Yale 2008).

52 See, for example, id at 83–84.

53 See Part II.C.3.

54 See Amos Tversky and Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 Science 1124, 1128 (1974); Thaler and Sunstein, *Nudge* at 23–24 (cited in note 51); Stephanos Bibas, *Plea Bargaining outside the Shadow of Trial*, 117 Harv L Rev 2463, 2515–16 (2004).

In one experiment, numbers selected by spinning a wheel acted as anchors for participants asked to guess the percentage of African countries in the United Nations.[55] The median estimate of participants who randomly spun the number *10* was 25 percent, while the median estimate from participants who randomly spun the number *65* was 45 percent.[56]

In legal decisions that require numerical answers, judges may anchor to given numbers, even if legal doctrine dictates that they generate numbers independently.[57] Further, anchors may be derived from past practices that were learned under an overturned legal regime. If a previous doctrine produced standard numerical outputs (such as months of imprisonment for a certain crime, or dollars of damages for a certain tort), a judge may anchor to these figures in producing numerical outputs under a new regime.[58] In this way, overturned laws may continue to have an influence even after their demise, in contravention of the doctrinal commands of higher courts.

Thus far, this Part has addressed two effects that might motivate judges to resist legal change: resistance to increased time and effort costs, and resistance to increased cognitive decision costs. Of course, the same costs may be present even in the absence of legal change. The current legal standard, for instance, might be particularly complex or difficult to apply compared to a potential alternative standard. And indeed, some noncompliance with long-standing, high-decision-cost laws is probable. But there are several reasons why resistance to high-cost legal regimes is likely to be most powerful in the context of legal change.

First, a change in the law is likely to make the existence of a feasible alternative more salient. Judges know that they could be applying a simpler rule or standard because, before the change, that is exactly what they were doing. Second, the fact

---

55 See Tversky and Kahneman, 185 Science at 1128 (cited in note 54).

56 Id. Payoffs for accuracy did not reduce the anchoring effect. See id.

57 See generally Jeffrey J. Rachlinski, Andrew J. Wistrich, and Chris Guthrie, *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 Ind L J 695 (2015) (finding, in studies using hypothetical cases, that judges are subject to substantial anchoring effects in awarding damages and in sentencing).

58 See William Samuelson and Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J Risk & Uncertainty 7, 22 (1988) (finding that later numerical decisions are anchored to earlier numerical decisions, even when circumstances have changed). See also Bibas, 117 Harv L Rev at 2515 (cited in note 54) (stating that legal actors may anchor to previous, analogous cases).

that a legal standard was used to determine case outcomes in the past may lend it a legitimacy or authority that an untested alternative doctrine lacks. Third, as mentioned above, the anchoring effect might cause judges to resist change in areas in which a previous legal regime produced concrete numerical outputs. Finally, there is another, powerful set of effects that can alter judges' preferences. These effects—discussed in the next Section—may cause judges to favor the legal status quo, independent of whether a new doctrine would increase or decrease decision costs.

C. Status Quo Preference Effects

Judges are regularly called on to apply, explain, and justify (in writing) a given legal doctrine. They become accustomed to working with the doctrine, and doing so becomes almost automatic over time. They come to identify the doctrine as the status quo and see any changes to it, however desirable, as departures. With each of these steps, judges become more and more likely to resist doctrinal changes and gravitate toward overturned, defunct laws—even in direct contravention of higher courts' doctrinal commands. This Section posits that biases in favor of familiar, status quo doctrines will shape judges' preferences and affect their behavior.

1. Justification bias.

One of a judge's most important duties is applying legal doctrines to real-world disputes. Millions, even billions, of dollars may be allocated to one party or the other on the basis of a judge's ruling. Judges sentence criminal defendants to imprisonment for decades or, in some jurisdictions, to death. In other words, a judge's decisions can have profound consequences for the lives of the men and women who appear before him.

Suppose that a judge is directed to apply a particular legal doctrine, Doctrine X, in certain criminal cases. Doctrine X typically leads to certain types of nonviolent criminals being sent to jail for twenty years, without the possibility of parole. Assume that this judge is initially somewhat skeptical about the desirability of Doctrine X. Nonetheless, he is doctrinally required to apply it, and he accepts it as binding precedent. He duly applies it in several cases, sentencing defendants to twenty years of imprisonment.

The judge is thus faced with something of an internal contradiction: he is skeptical of the normative foundations of Doctrine X, but he must nonetheless use it to drastically alter the life of a defendant, sentencing her to decades of confinement. It is well established that people generally try to reduce such inconsistencies between their actions and their beliefs, often by changing their beliefs.[59] They tend to ignore or suppress information that indicates that their past decisions are in error, particularly when being a good decisionmaker is an important part of their self-image.[60] It is very likely that judges conceive of themselves as good decisionmakers, and that this is an important part of their identities. Over time, judges may increasingly convince themselves of the normative correctness of the doctrines that they have previously applied. This effect may influence judges to prefer the doctrinal status quo.

In addition, judges are likely influenced by the human tendency to seek out information that confirms (rather than contradicts) a given hypothesis. When people are given a proposition or hypothesis, they tend to notice evidence that confirms rather than disproves it.[61] This applies even in cases when people have no material stake in the proposition's veracity.[62] A judge receiving a doctrinal mandate from a higher court is, to some degree, given a proposition ("Doctrine X is the best interpretation of the law") and told to act as though it is true. Under these circumstances, judges are more likely to seek out or notice evidence indicating that the doctrine is optimal rather than evidence suggesting that it is not. This may cause judges to believe that the doctrinal status quo is justified, even if a neutral review of the evidence would suggest otherwise.

There is an additional, unique reason why judges may be especially susceptible to a bias in favor of a doctrinal status quo. When people are asked to generate explanations for a proposition, they tend to express greater confidence in the truth of the

---

59 See Samuelson and Zeckhauser, 1 J Risk & Uncertainty at 39 & n 21 (cited in note 58); Derek J. Koehler, *Explanation, Imagination, and Confidence in Judgment*, 110 Psychological Bull 499, 508 (1991). See also generally Leon Festinger and James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J Abnormal & Soc Psychology 203 (1959).

60 See Samuelson and Zeckhauser, 1 J Risk & Uncertainty at 38–39 (cited in note 58).

61 See Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 Rev Gen Psychology 175, 176–78 (1998).

62 See id. Note that judges may have a stake in the correctness of the doctrine here—they wish to avoid applying an erroneous doctrine.

proposition.[63] This is true even if they are told that the proposition is totally fabricated.[64] It seems that the mere act of generating explanations reinforces a belief in the correctness of the thing explained.[65] And these explanations need not be causal stories or detailed accounts; any attempt to generate reasons to support a proposition is sufficient to produce the effect.[66]

Judges may be particularly vulnerable to this cognitive influence. Repeatedly explaining a doctrine, the history of its development, or the higher court's reasons for adopting it is likely to bias a judge in favor of that doctrine. These tasks are all but unavoidable for most Article III judges.[67]

Combining these related effects, we can identify a bias that I will refer to as "justification bias." Judges ordered to apply a doctrine will be biased in favor of believing that the doctrine is justified. The bias comes about because of the internal conflict that judges may feel if the doctrine is unjustified, a tendency to notice information that may justify the doctrine, and the requirement that judges explain and rationalize the doctrine to others. At a broader level, justification bias can affect any actor in a position to adversely affect the lives of others through the exercise of power, especially one who has strong motives to justify this harmful use of power to himself or others. Even if such an actor is initially skeptical about the normative foundations of the rules or norms that he enforces, he is likely, over time, to come to believe in their correctness.

Further, justification bias is likely to manifest as judicial hostility toward changes in law. Let us briefly return to our hypothetical judge. Imagine that, ten years later, a higher court overturns the case that established Doctrine X and develops

---

63 See Koehler, 110 Psychological Bull at 500 (cited in note 59).

64 See id at 501.

65 See id at 500.

66 See id.

67 Note that first drafts of many judicial opinions are written by judicial clerks, albeit often with substantial ex ante guidance from the judge. It is likely that a judge who relies heavily on his clerks to write opinions would not be as strongly influenced by any bias caused or amplified by repeatedly explaining a given doctrine. Nonetheless, even a very clerk-dependent judge may be influenced as he revises or reworks a drafted opinion, internalizing its language and reasoning and perhaps adding to it as well. These judges might also regularly apply and justify doctrines during the course of hearings or oral rulings, when they are less reliant on their clerks. Finally, judges sign their written opinions and send them out into the world as their own work. This likely motivates judges to believe that the doctrines on which their opinions rely are justified, even if much of the opinion's language was the work of a clerk.

Doctrine Y in its place.[68] Under Doctrine Y, criminals who previously were sent to jail for twenty years without the possibility of parole are now sent to jail for only five years, and with the possibility of parole. How is the judge likely to feel about Doctrine Y? If he had come to believe that Doctrine X was normatively desirable, he is more likely to believe that this new, different doctrine is undesirable. Otherwise, he has been sentencing defendants to extremely harsh sentences without normative justification. That would conflict with his image of himself as a good decisionmaker and a just person. It would contradict the words of numerous opinions and orders to which he has signed his name. And it would create an inconsistency that could generate substantial internal conflict.[69] He may therefore develop a strong preference for the old, overturned doctrine.

Empirically, once people reach a conclusion or form a belief, they are often very resistant to change, even in the face of strong evidence that the conclusion or belief is wrong.[70] Initial impressions tend to persist, even when the person is credibly told that the impressions are based on arbitrary, imaginary, or false information.[71] This resistance to change may occur at a subconscious level. Initial beliefs or conclusions exert an influence even when people try to ignore them while considering a new, alternative view.[72]

Moreover, people's tendency to persist in initial beliefs is significantly enhanced when they are told to write an explanation for those beliefs.[73] This implies that "the act of writing the explanation itself can enhance the perseverance of discredited beliefs."[74]

It is therefore likely that judges who come to favor an existing doctrine will be motivated to resist changes to that doctrine.

---

68 In this scenario, the higher court is presumably not as familiar with Doctrine X and has not applied it to numerous defendants. Rather, it apparently sees what the judge suspected at the start: Doctrine X is not normatively justified.

69 See Koehler, 110 Psychological Bull at 508 (cited in note 59); Samuelson and Zeckhauser, 1 J Risk & Uncertainty at 39 (cited in note 58).

70 See Nickerson, 2 Rev Gen Psychology at 187 (cited in note 61). People also tend to give information that is acquired first in time more weight in drawing conclusions than information that is acquired later. Id.

71 See id.

72 See id at 203.

73 See Koehler, 110 Psychological Bull at 501 (cited in note 59). Further, if asked to explain two things in sequence, people tend to persist in believing whatever they explain first. See id at 503.

74 Id at 501.

They may feel that the new doctrine is unjustified, or at least less justified than the familiar doctrine that they have applied so often. Judges might be unable to objectively consider a new doctrine without being influenced by their initial beliefs. And, having repeatedly explained and justified an existing doctrine, judges may be reluctant to stop applying it, even if told by a higher court that it was erroneous in the first place.

2. Routinization.

Even judges with a varied docket of cases encounter issues that eventually become routine, often to the point of boredom. Appellate judges may encounter a number of sentencing appeals, or workplace-discrimination claims, that are factually similar and decided in the same manner. Trial judges may deal with a certain type of case common to their district, like oil-rights disputes in Texas, corporate law cases in Delaware, or prisoner litigation and products liability cases anywhere. And specialized courts are especially likely to encounter identical or similar cases.

Even when the facts (and outcomes) of these cases vary, the legal doctrines that judges apply will often be the same, and familiar. A judge hearing her 500th slip-and-fall case is not taking a fresh look at her jurisdiction's slip-and-fall precedents, nor is she reaching new opinions about lingering controversies in that body of law. She is applying the same doctrine in much the same way that she has so often before.

Perhaps at first, a judge's application of a doctrine reflects conscious reasoning and deliberate decisions. But people do not go through a deliberate decisional process when they make the same decision over and over again.[75] Rather, the decision may become habitual and even automatic.[76] One's conscious attitudes and opinions become less important in dictating behavior, while habits and past behavior become more important.[77] This effect is powerful, and it is as likely to occur in important areas as in trivial ones.[78]

---

[75] See Henk Aarts, Bas Verplanken, and Ad van Knippenberg, *Habit and Information Use in Travel Mode Choices*, 96 Acta Psycholgica 1, 2 (1997).

[76] See id.

[77] See id.

[78] See Judith A. Ouellette and Wendy Wood, *Habit and Intention in Everyday Life: The Multiple Processes by Which Past Behavior Predicts Future Behavior*, 124 Psychological Bull

Intentions and opinions can themselves become habitual.[79] When the same situation arises repeatedly, people can become habituated to intending to perform an action and then performing it.[80] Habits may also subtly influence preferences, as people are likely to form favorable attitudes toward acts that they have frequently performed in the past.[81]

Thus, a judge applying a familiar doctrine for the 500th time is likely to do so in a habitual manner, without engaging in a fresh process of reasoning and deliberation about the doctrine. This is not to say that judges are applying doctrines unconsciously or absentmindedly, like they would brush their teeth. But forming an intent to apply a doctrine can become almost automatic,[82] and applying the doctrine can become a matter of routine—one that does not engage a judge's full attention in the way that a novel legal issue might.

Can the influence of routinization and habit cause judges to resist doctrinal changes imposed by a higher court or legislature? Aphorists and neuroscientists agree that old habits are hard to break,[83] although sufficiently strong intentions can override habitual behavior. Through consistent mental control of behavior, people can avoid familiar actions until new behaviors become ingrained.[84]

The assumption of the traditional model of legal change is that judges are able to break their old habit of applying an overturned law almost immediately.[85] It is certainly reasonable to assume that a judge will be made aware of any relevant higher-court cases overturning old precedents or otherwise changing the applicable doctrine. The judge herself may read about the case, or she may hear about it from her fellow judges, her law clerks, or the litigants. Once the legal change is brought to the

---

54, 54, 57 n 3 (1998) ("[F]requency of past behavior, a standard indicator of habit strength, is the best predictor of future behavior.") (citation omitted).

79 See id at 65.

80 See id at 55. See also generally Henk Aarts and Ap Dijksterhuis, *Habits as Knowledge Structures: Automaticity in Goal-Directed Behavior*, 78 J Personality & Soc Psychology 53 (2000).

81 See Ouellette and Wood, 124 Psychological Bull at 56 (cited in note 78).

82 See id at 65.

83 See generally, for example, Terra D. Barnes, et al, *Activity of Striatal Neurons Reflects Dynamic Encoding and Recoding of Procedural Memories*, 437 Nature 1158 (2005).

84 See Ouellette and Wood, 124 Psychological Bull at 57, 70 (cited in note 78).

85 See text accompanying note 39.

judge's attention, presumably the judge changes her behavior accordingly.

But such behavioral changes may not be as easy as the traditional model assumes. Although a judge may intend to implement a new doctrine, her behavior may be more influenced by the near-automatic habits that take over when she is faced with a familiar fact pattern.[86] Habits are difficult to break in part because they can change the structure of the brain itself.[87]

When faced with a familiar situation, these dormant brain structures can reassert themselves, automatically triggering the old habitual response.[88] The upshot is that even judges who are fully committed to obeying the new doctrine may be more prone to "mistakes" when they have habitually applied a prior doctrine. That is, they may apply the now-overturned doctrine without fully realizing that they are failing to follow a higher court's doctrinal command. This is especially likely to occur when judges are called on to make quick decisions during the course of a trial or during a pretrial hearing. But it might even occur in the context of written opinions.[89]

Such "mistakes" may also be more likely to occur when judges have formed favorable attitudes toward habitually applied doctrines. In order to comply with a higher court's opinion altering an applicable doctrine, not only must judges become aware of the new opinion, but they must also read and understand it. Because judges tend to favor the old, habitually applied doctrine,[90] they may be more prone to misinterpreting, minimizing, or even forgetting the opinion that overturned it.[91] This effect may be amplified by the other effects discussed in this Section, which can cause judges to prefer existing doctrine and disfavor doctrinal changes.

---

86 See Aarts, Verplanken, and van Knippenberg, 96 Acta Psycholgica at 2 (cited in note 75) (suggesting that conscious attitudes "may become irrelevant in guiding behavior when the behavior has been performed repeatedly, and has become habitual").

87 See generally Barnes, et al, 437 Nature at 1158 (cited in note 83).

88 See id; Michael Kanellos, *MIT Explains Why Bad Habits Are Hard to Break* (CNET News, Oct 19, 2005), archived at http://perma.cc/63A4-UKQN.

89 See Parts III, IV.A.

90 See text accompanying notes 81–82.

91 People's judgments are often strongly influenced by their preferences and hopes. See, for example, Leonard S. Newman, *Motivated Cognition and Self-Deception*, 10 Psychological Inquiry 59, 61–62 (1999).

3. Uncertainty and the status quo.

a) Uncertainty aversion. As judges learn about and apply a doctrine, it becomes more familiar to them. Over time, judges come to know a doctrine's origins, the way it operates, its effects on society, and its consequences for litigants. Changes in the law typically present judges with a new and unfamiliar doctrine, the practical effects of which are unknown and often difficult to predict. So alterations to the doctrinal status quo are likely, at least at first, to increase the uncertainty that judges face in resolving legal disputes.

Dealing with uncertain outcomes and ambiguous choices can be uncomfortable, even painful, for decisionmakers. People are more averse to uncertainty than a rational-choice model of behavior would predict.[92] That is, they will pay a substantial premium to avoid dealing with an ambiguous choice, even when doing so does not increase expected value.[93] Aversion to uncertainty manifests at the most basic levels of cognition and can be traced to specific neurological structures. Making decisions when there is ambiguity activates areas of the brain associated with disgust and pain and is correlated with lower activity in areas associated with reward.[94]

Uncertainty aversion is even stronger when people compare an unfamiliar situation to a more familiar one.[95] And aversion may be a particular problem when people are dealing with an issue that calls for expertise that they do not possess.[96] By contrast, people with expertise in a certain area are likely to be less averse to uncertainty within that area.[97]

Again, these findings may apply to judicial practices. All else being equal, judges are likely to be averse to a new doctrine whenever they are uncertain of how the doctrine will operate in practice, or unsure of its consequences for parties or its impact

---

92 See Craig R. Fox and Amos Tversky, *Ambiguity Aversion and Comparative Ignorance*, 110 Q J Econ 585, 585–86 (1995); Colin Camerer and Martin Weber, *Recent Developments in Modeling Preferences: Uncertainty and Ambiguity*, 5 J Risk & Uncertainty 325, 334 (1992).

93 See Camerer and Weber, 5 J Risk & Uncertainty at 333 (cited in note 92).

94 See Ming Hsu, *Ambiguity Aversion in the Brain* *20 (unpublished conference paper, June 2004), archived at http://perma.cc/XF5R-HA47. See also generally Ming Hsu, et al, *Neural Systems Responding to Degrees of Uncertainty in Human Decision-Making*, 310 Science 1680 (2005).

95 See Fox and Tversky, 110 Q J Econ at 588 (cited in note 92).

96 See id at 587.

97 See id.

on society. This aversion to uncertainty and concomitant preference for the familiar operates at the most fundamental cognitive level and may have a powerful effect on behavior.[98]

b) Status quo bias. A related effect that may motivate judges to resist doctrinal change is known as status quo bias. When making decisions, people tend to select the status quo option, even when doing so does not maximize welfare.[99] One reason for this bias is that people tend to experience more feelings of regret when they act and suffer bad consequences than when they do nothing and suffer the same consequences.[100] Another is that people facing challenging or complex decisions may have difficulty choosing between several alternatives according to their true preferences, so they just default to the status quo.[101] Accordingly, status quo bias tends to become stronger as the number of choices increases or as tradeoffs become more difficult.[102]

Of course, when people strongly prefer a particular new choice, the effect of status quo bias is diminished.[103] Judges might have uniformly strong preferences for compliance with new doctrines, and those preferences may allow them to minimize the effects of status quo bias. And there is another reason why we might not expect status quo bias to affect how judges react to legal change: once an old rule is replaced with a new one, the status quo itself should be changed. Judges might still think of the old rule as the status quo option at first, but, assuming that there are no substantial barriers to its adoption, the new rule may rapidly come to constitute a new status quo.

Status quo bias may, however, still exert a substantial influence when the prior status quo remains a valid option under the new law. For example, status quo bias is likely to influence judges when a bright-line rule is replaced with a standard that allows courts to reach the outcome produced by the old rule. In these situations, judges may view the old rule as the status quo

---

98 See Camerer and Weber, 5 J Risk & Uncertainty at 333 (cited in note 92).

99 See, for example, Samuelson and Zeckhauser, 1 J Risk & Uncertainty at 8 (cited in note 58); Daniel Kahneman, Jack L. Knetsch, and Richard H. Thaler, *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J Econ Persp 193, 198 (1991). See also Thaler and Sunstein, *Nudge* at 34 (cited in note 51).

100 See Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 Vand L Rev 1583, 1613–14 (1998).

101 See Samuelson and Zeckhauser, 1 J Risk & Uncertainty at 25–26 (cited in note 58).

102 See id at 8; Amos Tversky and Eldar Shafir, *Choice under Conflict: The Dynamics of Deferred Decision*, 3 Psychological Sci 358, 358, 361 (1992).

103 See Samuelson and Zeckhauser, 1 J Risk & Uncertainty at 8 (cited in note 58).

choice. They may use the old rule as a default, applying it whenever they have difficulty making an affirmative decision under the new standard.[104] Judges in such situations would likely reach the old-rule outcome much more frequently than a nonbiased judge would.

D. Toward a New Model of Judicial Compliance with Legal Change

The foregoing sections have described a variety of costs, preferences, and heuristics that may cause judges to disfavor changes to existing legal doctrine. Many of these influences are likely to operate on judges at a subconscious level. Nonetheless, it is possible that judges are able to overcome even powerful subconscious influences on their decisionmaking. Judges do typically have a strong sense of duty, an aversion to reversal, and a desire to protect their professional reputations,[105] all of which might cause them to be on guard against even subtle biases and effects.

This Article posits that judges actually will resist legal change, even, at times, in defiance of doctrinal imperatives. In other words, judges will engage in either indirect or direct noncompliance in response to the influences identified above. There are numerous grounds for this conclusion. Surveys of judges, using questions designed to test for common cognitive illusions, indicate that judges are susceptible to the same general mental biases as other decisionmakers (including jurors).[106] There is evidence that increases in workload can affect appellate judges' behavior, causing them to dissent less or to reverse fewer district court decisions.[107] Further, resistance to change has been observed in other professional contexts in which experts have been slow to adopt new practices despite apparently compelling

---

[104] See Tversky and Shafir, 3 Psychological Sci at 361 (cited in note 102). Default rules can have very powerful effects on behavior, including the behavior of legal actors. See generally Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 Cornell L Rev 608 (1998); Thaler and Sunstein, *Nudge* (cited in note 51).

[105] See text accompanying notes 13–15.

[106] See Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, *Inside the Judicial Mind*, 86 Cornell L Rev 777, 784, 829 (2001).

[107] See Epstein, Landes, and Posner, *The Behavior of Federal Judges* at 283, 293 (cited in note 11) (explaining that as their workload increases, appellate judges are less likely to dissent). See also generally Bert I. Huang, *Lightened Scrutiny*, 124 Harv L Rev 1109 (2011) (noting that increases in judicial workload affect circuit reversal rates).

reasons to do so.[108] And observations of judicial behavior in a variety of areas suggest that judges have been influenced to resist many types of legal change.[109]

This Section further develops a new model of how judges respond to doctrinal change and describes the situations in which resistance to change is most likely to occur.

1. The basic framework.

The effects of the costs, biases, and preferences described above will, this Article predicts, have a measurable impact on judicial compliance. This Section briefly summarizes these effects and sets out a basic framework for modeling judicial resistance.

The first type of effect is judicial aversion to increased time and effort costs. These are the costs of implementing a doctrine that show up in opinion length, or in the time spent reading briefs, researching a case, or carrying out some mandatory procedure. Judges will tend to prefer doctrines with lower implementation costs and will resist doctrines that impose higher costs. When the law changes from a low-cost regime to a high-cost one, the increase is likely to be especially salient to judges, and they will be motivated to resist the change.

The second type of effect is judicial aversion to increased cognitive decision costs. These are the internal costs of making difficult, complex, or multifactorial decisions. They may, but need not, show up in opinion length or time spent making a decision. They are in fact most likely to manifest as increased mental fatigue, confusion, or stress. Judges will tend to prefer doctrines that keep these costs low. When the law changes from a low-decision-cost to a high-decision-cost regime, judges will feel the increased costs, and they will be influenced (often subconsciously) to resist the change.

Finally, the third type of effect is judges' tendency to develop a preference for existing legal doctrines. This may be coupled with an aversion to unfamiliar doctrines and their uncertain

---

[108] For instance, doctors often fail to change their familiar practices in response to new data or medical guidelines, even when they recognize the benefits of doing so and even when failure to follow guidelines may expose them to tort liability. See generally, for example, Cynthia G. Ayres and Hurdis M. Griffith, *Perceived Barriers to and Facilitators of the Implementation of Priority Clinical Preventive Services Guidelines*, 13 Am J Managed Care 150 (2007); Timothy K. Mackey and Bryan A. Liang, *The Role of Practice Guidelines in Medical Malpractice Litigation*, 13 Virtual Mentor 36 (2011).

[109] See Part III.

consequences. Unlike the first two effects, this effect is present regardless of whether the new law increases or decreases decision and implementation costs. Judges will tend to prefer doctrines that they have applied and justified in the past, that are routine or familiar, or that they consider to be the status quo or default option. When the law changes, judges will, all else being equal, prefer existing law to the new law and will be motivated to resist the change.

2. Integration with existing models.

Of course, these are not the only variables that influence how judges comply with new laws. The conventional model identifies several important considerations that affect judicial compliance, including judges' dislike for being reversed, desire to uphold their reputations, and acceptance of compliance as part of the judicial role.[110] The strength of these factors should not be overstated,[111] but surely they play a substantial role in determining judicial behavior. And they will shape how the three effects described above influence judges and cause resistance to legal change.

The level of judicial resistance to legal change will be determined in part by the probability that judges' noncompliance will be detected and reproved. When judicial noncompliance is likely to be noticed, and especially when it is likely to generate some formal or informal penalty, it is less likely to occur. Thus, defiance of a popular higher-court decision that has received substantial media attention would be relatively improbable. Noncompliance is more likely to occur when it is difficult to detect or unlikely to be punished, as when a governing decision or statute has received little or no public attention. For example, if a judge purported to apply a new standard in an estate-law case but in fact ignored the new law and simply did the same thing that he has always done, the noncompliance might be difficult to detect, and even if it were detected, the legal community, media, and even higher courts might be less likely to reprimand him.[112] The probability of detection, and the likelihood and magnitude

---

[110] See text accompanying notes 13–15.

[111] See note 13.

[112] Higher courts with discretionary dockets would be especially unlikely to spend the time necessary to police this kind of indirect noncompliance.

of a penalty, are factors that help determine the incidence of judicial resistance to legal change.

The framework described above can also be integrated into existing accounts of judicial compliance that consider political or policy preferences. Essentially, judicial policy preferences act as another variable in the calculus of judicial compliance. These preferences may dampen or override the effects described above, especially the effects of biases in favor of familiar doctrines. For example, if judges have a strong political preference for a new doctrine, the effects of status quo bias will be diminished.[113] Of course, political preferences could just as easily amplify the effects described above, as when a judge has an ideological preference for an existing doctrine that is replaced with a complex and unfamiliar doctrine.

3. Generating predictions.

At this point, the model can be elaborated on and used to generate predictions about how judges will respond to different types of legal changes. When type 1 (time and effort costs), type 2 (cognitive decision costs), and type 3 (preference for familiar doctrines) resistance effects are present, when the probability of detection of resistance is low, and when judges' policy preferences do not strongly favor a new legal doctrine, judges are likely to actively resist doctrinal changes through either indirect or direct noncompliance. Whether noncompliance occurs in other situations will depend on the presence of the variables and their relative weight.

For instance, judges are likely to comply with doctrinal changes if the resistance effects are absent or weak and the probability of detection is high. On the other hand, if multiple resistance effects are present and fairly strong, judges may engage in noncompliance even when it is likely to be detected.

While the precise interactions of these variables may be difficult to predict, the model can generate several broad predictions about judicial noncompliance. One is that, contrary to the conventional model, noncompliance with legal change may occur not only when lower court judges are ideologically opposed to a higher-court ruling but also when they have no particular ideological preference. Another is that judicial noncompliance is most likely to be observed in areas where it is unlikely to result

[113] See text accompanying note 103.

in substantial penalties for the disobedient judge, perhaps in areas that receive less popular attention or where noncompliance is so common that it overwhelms the ability of appellate courts to address it.

Ironically, this suggests that scholars looking for noncompliance in controversial, highly publicized constitutional law cases have been looking in exactly the wrong place. Although controversy may indicate divergent political preferences, it also encourages media and public attention, which makes noncompliance less probable by increasing the chances of detection and reputational harm. Noncompliance is more likely to be found outside the glare of the media spotlight.

In addition, noncompliance with legal change is more likely to occur when judges are called on to implement new laws in an area in which they are familiar with the prior doctrine but lack technical expertise.[114] These nonexpert judges are likely to face sharply increased time and effort costs as they try to teach themselves unfamiliar science or mathematics relevant to the new doctrine. Also, novices in a given area tend to be more averse to uncertainty than experts making decisions in the same area.[115] Combined, these effects likely make nonexpert judges especially hesitant to depart from familiar doctrines.

Judicial noncompliance is probably most likely when a higher court replaces an existing bright-line rule with a legal standard, especially a complex or ambiguous one. This type of legal change would implicate all three types of resistance effects. A complicated standard would cost more in terms of time and effort (more research, longer opinions, and so forth). The cognitive decision costs of applying such a standard would be much higher. The application of the standard and the resulting outcomes would be uncertain, in contrast to the familiar operation of the old rule. And the old rule might be used as a sort of default choice under the new standard, a workable status quo option that judges can select when applying the standard itself would be difficult.[116]

By contrast, very high rates of compliance with doctrinal changes would be likely when the three types of resistance

---

[114] At least, this is the case holding all else equal. Experts might be more likely than novices to hold strong ideological preferences for certain outcomes within their areas of expertise.

[115] See text accompanying notes 96–97.

[116] See note 104 and accompanying text.

effects are absent. A new doctrine may not increase effort or decision costs, for instance. Type 3 effects (preference for familiar doctrines) may be minimized when a higher court's opinion is very clear, the previous doctrine was in place for only a short time, or doctrinal change is frequent or expected (for example, in a still-evolving, common-law context). For example, the frequent changes in libel law as it evolved throughout the 1960s and 1970s were associated with very high rates of compliance.[117]

III. EVIDENCE OF JUDICIAL RESISTANCE TO LEGAL CHANGE

This Part does not purport to offer definitive proof of the model described above. Rather, it offers several observations that support the model and suggest that its theoretical underpinnings are sound. Future research will be required to establish a conclusive empirical account of judicial compliance with legal change. And finding clear empirical evidence about any kind of legal change can be difficult for a variety of reasons, including confounding variables, unavailability of relevant data, and selection effects.

Selection effects refer to the tendency of the set of cases filed and litigated to change when legal standards change, a phenomenon that can result in a lack of measurable change in plaintiff win rates in litigated cases. Thus, the behavior of parties and judges may change in response to a legal change, but the rate of plaintiff victories at trial may remain the same.[118] For this Article, I have taken examples from areas where selection effects are likely to be absent or minimal (as in criminal sentencing), or where judicial resistance is explicit and can be directly observed. In other areas, I have examined practitioner behavior in addition to judicial behavior in order to determine whether parties might be changing their litigation practices in response to new laws, and I have excluded examples where selection effects appear to play a significant role in the apparent absence of legal change.

Evidence of the resistance effects described above may be hard to obtain for another reason: judicial noncompliance is most likely to occur in situations in which it is difficult to

---

[117] See, for example, Gruhl, 33 W Polit Q at 511 (cited in note 39) (describing high levels of compliance with *New York Times v Sullivan*, 376 US 254 (1964)).

[118] See, for example, Priest and Klein, 13 J Legal Stud at 4–5 (cited in note 8) (discussing how utility-maximizing decisions tend toward 50 percent win rates for each side, regardless of the applicable legal rules).

detect.[119] If a new law allows for a variety of outcomes, for instance, judges may engage only in indirect noncompliance with it in order to lower the risk of detection. Their noncompliance with the new doctrine can be difficult to distinguish from a mistake in interpretation or an overly narrow application of binding law.[120] Thus, in order to observe judicial noncompliance, it may be necessary to look for either overt defiance or indirect noncompliance that is subtle at the individual case level but apparent in the aggregate.

This Part gathers evidence from several areas of law in which judges have engaged in direct noncompliance or detectable indirect noncompliance. It also presents the results of an original study of the influence of prior, abrogated law on the judicial application of the qualified immunity doctrine. These examples illustrate how the resistance effects identified in Part II operate in real-world settings.

A. *Campbell v Acuff-Rose Music* and the *Sony* Presumption

As discussed above, judicial disobedience is most likely to occur when a bright-line rule is replaced with a more ambiguous or multifactorial standard. The Supreme Court made such a change to copyright law in 1994, and substantial noncompliance followed.

When someone owns a copyright in a creative work (such as a television show), others generally cannot reproduce it, perform it, or display it.[121] However, other people can make "fair use" of a copyrighted work without infringing an owner's copyright.[122] The fair use doctrine is reflected in § 107 of the Copyright Act of 1976,[123] which states that, when deciding whether a use is fair, courts should consider:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

---

119 See Part II.D.2.

120 See Part I.B.

121 See 17 USC § 106.

122 Examples of fair use include criticism, reviews, news reporting, teaching, and scholarship. See 17 USC § 107.

123 Pub L No 94-553, 90 Stat 2541, codified as amended at 17 USC § 101 et seq.

> (4) the effect of the use upon the potential market for or value of the copyrighted work.[124]

In the seminal 1984 fair use case *Sony Corp of America v Universal City Studios, Inc*,[125] the Supreme Court applied these factors to the then-new technology of the Sony Betamax video recorder, establishing the Court's modern approach to the fair use doctrine. The majority opinion set forth a presumption: under prong one of the fair use test, use of copyrighted material for a "commercial or profit-making purpose" was presumptively unfair.[126] Likewise, under prong four of the fair use test, if the use was commercial, a likelihood of future harm to the copyright holder was presumed.[127] This "*Sony* presumption," though technically dicta,[128] was applied by numerous lower courts deciding fair use cases.[129]

The controversial presumption remained legally viable until 1994, when the Court directly struck it down in *Campbell v Acuff-Rose Music, Inc*.[130] The Sixth Circuit had applied the presumption to defendant Campbell's fair use claim for a parody version of Roy Orbison's *Oh, Pretty Woman*. Finding that Campbell had sold the parody commercially, the Sixth Circuit declared the use unfair.[131] The Supreme Court reversed, declaring that courts must not use the presumption and emphasizing that the proper fair use test requires consideration of all circumstances, to which no presumptions or per se rules should be applied.[132]

Campbell "explicitly . . . repudiated the [*Sony*] presumption and should have buried it once and for all."[133] The case made it clear that commerciality was just one factor among many for courts to consider.[134] As Pierre Leval, a prominent Second Circuit judge and author of an influential paper on fair use,[135]

---

124 17 USC § 107.

125 464 US 417 (1984).

126 Id at 449, 451.

127 See id at 451.

128 The Court determined that the use of the Betamax by Sony customers was noncommercial. Id at 449.

129 See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U Pa L Rev 549, 601, 619 (2008).

130 510 US 569 (1994).

131 Id at 573–74.

132 See id at 577, 583–85, 591.

133 Beebe, 156 U Pa L Rev at 601 (cited in note 129).

134 See id at 571–72.

135 See generally Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv L Rev 1105 (1990).

wrote: *Campbell* "fixed the rudder and restored the compass bearing. It has dispelled . . . the pernicious 'commercial use' presumption."[136]

The possibility of direct judicial resistance to *Campbell* was not considered. Under the conventional model, copyright was unlikely to be sufficiently politically charged for lower courts to defy a clear declaration from the Supreme Court. And even if it was, such resistance would manifest itself as a biased interpretation of the amorphous fair use standard, not direct defiance of *Campbell*'s commands.

Yet many judges continued to use the *Sony* presumption long after *Campbell*, despite the Supreme Court's clear command. Specifically, 7.4 percent of all federal fair use opinions after *Campbell* (through 2005) continued to apply the defunct *Sony* presumption to commercial use under the first prong of the fair use test.[137] This compares to 41.7 percent of all federal fair use opinions that applied the presumption in the first prong prior to *Campbell*.[138] *Campbell* had an even less powerful impact on lower court behavior under the fourth prong of the fair use test—a difficult factor that requires judges without expertise in marketing or product development to assess the effect of the defendant's use on the potential market for a copyrighted work. Prior to *Campbell*, 30.5 percent of federal fair use opinions applied the *Sony* presumption under prong four. After *Campbell*, 15.4 percent of federal fair use opinions continued to apply the presumption under the fourth prong.[139] Thus, the application of the *Sony* presumption under prong four decreased after *Campbell* by only 49.5 percent, rather than the 99–100 percent that conventional models would predict.

Campbell had a major effect on lower court behavior, as one would expect from a binding Supreme Court opinion. But a substantial percentage of federal judges essentially ignored *Campbell* and continued to apply a defunct, overruled, bright-line rule rather than a new, more complex standard. This cannot be adequately explained by conventional models of judicial compliance. But it does comport with the model described in Part II.

---

136 Pierre N. Leval, Campbell v. Acuff-Rose*: Justice Souter's Rescue of Fair Use*, 13 Cardozo Arts & Enter L J 19, 22 (1994).

137 Beebe, 156 U Pa L Rev at 602 (cited in note 129). Unsurprisingly, most of these cases resulted in a denial of the fair use claim.

138 Id at 601. Recall that the presumption is not applied to noncommercial uses.

139 Id at 619. Again, most of these cases resulted in denial of the fair use claim.

Striking down the *Sony* presumption and commanding courts to apply an ambiguous, multifactorial standard implicates all three types of effects described above. A "case-by-case" analysis that is "not to be simplified with bright-line rules"[140] will tend to increase time and effort costs for judges and make their decisions more cognitively taxing. Courts also may have become familiar with and come to prefer the *Sony* presumption during the decade between *Sony* and *Campbell*. The Supreme Court directed judges to "explore[ ]" and weigh all four factors (and any other relevant factors) against each other "in light of the purposes of copyright."[141] Faced with such a challenging and ambiguous task, judges may be tempted to use an old, familiar, bright-line rule as a default choice.

This Article's model of judicial compliance would thus predict some significant level of resistance to *Campbell*'s commands. It would also predict that resistance to *Campbell* would be greater when judges face a more difficult analysis, or an analysis that calls for particular expertise.[142] This is consistent with the finding that judicial noncompliance with *Campbell* was greater under the more complex prong four (the effect of use on the potential future market for a copyrighted work) than under the simpler prong one (the general purpose and character of the use).

B. Rules that Increase Time and Effort Costs

Judges are likely to resist new legal rules that would substantially increase time and effort costs.[143] Resistance to heightened costs can be exacerbated by the effect of habit and routinization, as judges often form strong preferences in favor of their existing modes of conduct.[144] We are thus likely to observe noncompliance with new, high-cost rules governing judicial behavior.

---

140 *Campbell*, 510 US at 577.

141 Id at 578. According to Leval, judges must engage in a "multifaceted assessment" of the "dynamic interrelationship" of the fair use factors in order to properly apply the fair use test. Leval, 13 Cardozo Arts & Enter L J at 22 (cited in note 136). Note also that the fourth factor requires nonexpert judges to predict how infringement will affect future markets for copyrighted items.

142 See note 114 and accompanying text.

143 See Part II.A.

144 See Part II.C.2.

1. Jury-improvement rules.

Over the past twenty years, numerous states and federal districts have established commissions to examine and improve the functioning of jury service. These commissions have proposed several new rules intended to enhance juror participation, comprehension, and accuracy. They have endorsed practices like allowing jurors to take notes and submit questions during trials, encouraging jurors to discuss evidence before deliberations, instructing jurors on law and practice throughout the trial, and providing jurors with written jury instructions for use during deliberation. Many of these practices have been formally mandated in statutes, higher-court opinions, or court rules, or promoted informally through judicial-education programs.[145]

Even when binding, the implementation of these rules has been dependent on individual courts and judges and has rarely arisen at the appellate level.[146] Application of the rules was, in other words, almost invisible to higher courts and the broader legal community. In fact, little was known about their implementation until a 2007 survey that asked judges, lawyers, and court officials about the jury practices used in their most recent trials.[147]

The author of the study was surprised to find "judicial noncompliance in jurisdictions that either mandated or expressly prohibited certain practices."[148] This defiance of binding laws or rules occurred for every type of jury-improvement rule. For instance, in jurisdictions that mandated that jurors be instructed before closing arguments, that law was disregarded in 30 percent of civil trials. Where courts were required to give all jurors written copies of the final jury instructions, the rule was not followed in 52.8 percent of civil trials. In jurisdictions where juror note taking was prohibited, it was nonetheless allowed in 41.7 percent of civil trials. And in jurisdictions that mandated instructing jurors on substantive law before trial begins, that law was disregarded in a whopping 69.7 percent of trials.[149]

To the survey author, this noncompliance amounted to "judicial nullification" of the jury-improvement rules.[150] It is certainly

---

145 See Paula L. Hannaford-Agor, *Judicial Nullification? Judicial Compliance and Non-compliance with Jury Improvement Efforts*, 28 NIU L Rev 407, 408–12 (2008).

146 See id at 409, 413–14.

147 See id at 410–11.

148 Id at 409.

149 Hannaford-Agor, 28 NIU L Rev at 418–19 (cited in note 145).

150 Id at 421–23.

a clear—and illustrative—example of judicial noncompliance. As this Article's model would predict, noncompliance with mandatory jury-improvement rules was at its highest in areas in which compliance with the rules would require additional time, effort, or diligence. Many judges declined to take the time to instruct jurors on substantive law at various points in the trial or failed to provide written instructions for all jurors. On the other hand, judicial noncompliance was observed for every kind of jury-improvement rule, and often in both directions—some judges failed to implement practices when they were mandatory, while other judges used the same practices when they were prohibited.[151] This suggests a substantial role for habit and routinization of practices among judges, and a tendency among judges to develop preferences in favor of existing practices. It also indicates that these effects can sometimes be strong enough to cause judges to resist adopting new legal rules even when doing so would lower their time and effort costs.[152]

2. The Private Securities Litigation Reform Act.

Class action lawsuits accusing officers of publicly held companies of securities fraud are both lucrative and particularly prone to abuse. Defendant corporations have strong incentives (like preventing further declines in stock prices) to settle such cases, even relatively meritless ones. As a result, unscrupulous attorneys may bring questionable lawsuits in order to obtain hefty settlements, even when doing so is not in the best interests of most investors.[153]

In response to this problem, Congress passed the Private Securities Litigation Reform Act of 1995[154] (PSLRA), which established several procedural hurdles meant to deter frivolous securities lawsuits in federal court. It imposed heightened pleading standards, regulated which parties could be named as lead plaintiffs in class action suits, and required courts to conduct a

---

[151] See id at 419.

[152] For instance, in jurisdictions where instructing jurors on substantive law before a trial was prohibited, judges did so anyway in 6.7 percent of cases. And where giving written copies of jury instructions to jurors was forbidden, judges persisted in doing so in 18.3 percent of civil trials. Id.

[153] See *Private Securities Litigation Reform Act of 1995, Report of the Committee on Banking, Housing, and Urban Affairs*, S Rep No 104-98, 104th Cong, 1st Sess 6 (1995); Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U Ill L Rev 913, 920.

[154] Pub L No 104-67, 109 Stat 737, codified in various sections of Title 15.

review of whether attorneys had violated FRCP 11, which provides for sanctions against attorneys who bring frivolous or unwarranted legal or factual claims.[155] This last procedural change is the focus of this Section.

Section 21D(c) of the PSLRA provides that upon final adjudication of any private securities action, "the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion."[156] Courts must make findings as to whether the attorneys' pleadings and motions have been filed for an improper purpose, whether their legal claims are warranted by existing law, and whether their factual claims have evidentiary support.

This requirement is unambiguous and purely procedural. Even in the unlikely event that a judge were averse to imposing sanctions on a party filing frivolous lawsuits or making false claims,[157] he could simply find that the party's claims were incorrect, but not entirely unwarranted. Failure to comply with § 21D's direct statutory command would be visible to reviewing courts and would likely be very embarrassing to district court judges if pointed out. Under the conventional model of judicial compliance, one would expect total, or virtually total, compliance with this statute. In fact, when President Bill Clinton vetoed the PSLRA, he cited its new sanctions-review requirement, arguing that it treated plaintiffs too harshly and would convert securities litigation into a "loser pays" system.[158] Congress overrode Clinton's veto, and § 21D went into effect on December 22, 1995.

Although § 21D is clear, it sharply increases time and effort costs to judges, requiring them to assess compliance by *every* party and *every* attorney with each of the four requirements of Rule 11(b), for *every* pleading or dispositive motion that parties

---

155 FRCP 11(b)–(c). For a brief summary and history of the PSLRA, see Neil Pandey-Jorrin, *A Case for Amending the Private Securities Litigation Reform Act: Why Increasing Shareholders' Rights to Sue Will Help Prevent the Next Financial Crisis and Better Inform the Investing Public*, Bus L Brief 15, 15–17 (Spring 2009).

156 15 USC § 78u-4(c)(1). There is identical language in § 27 of the Act, codified at 15 USC § 77z-1(c)(1). Hereinafter, for clarity, references to "§ 21D" encompass this section as well.

157 If a judge finds a violation of Rule 11(b), he is required to impose sanctions under 15 USC § 78u-4(c)(2).

158 See *Private Securities Litigation Reform Act of 1995, Veto Message from the President of the United States*, HR 1058, 104th Cong, 1st Sess, in 141 Cong Rec H 15214 (daily ed Dec 20, 1995).

file. It may also increase cognitive decision costs for judges, requiring them to assess the purpose of every filing and consider whether novel legal claims are warranted under existing law.[159] And it commands judges to change from conducting Rule 11 inquiries in rare cases and only on motion from the parties or their own initiative,[160] as they had done their entire judicial careers, to conducting numerous Rule 11 inquiries for every pleading or motion filed in every securities case.

The few existing studies of the frequency with which judges conduct Rule 11 inquiries under § 21D indicate that compliance with § 21D is far from total—in fact, it is quite rare. One study of § 21D's effects examined a set of 1,039 final orders in securities cases and found that only 140, or 13.5 percent, actually complied with § 21D.[161] Moreover, the vast majority (125 out of 140) of "compliant" orders were approvals of settlement agreements that contained boilerplate statements that no Rule 11 violations had occurred.[162] Another study of the effects of the PSLRA found that only 50 cases (out of hundreds filed) had addressed Rule 11 sanctions under the PSLRA in the first nine years after its enactment.[163] The authors concluded that "[d]espite the recurring use of adjectives like 'mandatory,' 'specific,' and 'each'" in the statute, "the sanction provision has been little used as a weapon against possibly abusive class actions."[164]

Examining a large set of PSLRA cases on Westlaw points to a similar conclusion. As of August 1, 2011, 1,493 federal opinions mentioned the PSLRA along with an entry of judgment or dismissal with prejudice.[165] Of these, only 93 mentioned Rule 11 sanctions under the PSLRA, a rate of 6.2 percent.[166] This is not

---

159 See FRCP 11(b).

160 See FRCP 11(c).

161 M. Todd Henderson and William H.J. Hubbard, *Do Judges Follow the Law? An Empirical Test of Congressional Control over Judicial Behavior* *13 (Coase-Sandor Institute for Law and Economics Working Paper and Public Law and Legal Theory Working Paper, Jan 2014), archived at http://perma.cc/N8GF-WB5M.

162 Id at *17–18.

163 Stephen J. Choi and Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes during the First Decade after the PSLRA*, 106 Colum L Rev 1489, 1508 (2006).

164 Id.

165 I searched Westlaw's ALLFEDS database for "pslra & (ent! /3 judgment) 'final judgment' (dismis! /s 'with prejudice')."

166 For the set of 1,493 cases, I used the same methodology as Professors Stephen Choi and Robert Thompson to search for cases that mention sanctions. See Choi and Thompson, 106 Colum L Rev at 1508 n 117 (cited in note 163) (reporting the results of a search for "sanctions & PSLRA & 'Rule 11'"). A slightly different methodology of examining

conclusive, but it suggests that judges are not conducting the statute's mandatory sanctions inquiries in the vast majority of cases decided under the PSLRA. Judges appear to be defying the direct statutory requirement of § 21D en masse.

More-concrete evidence can be obtained by examining the few appellate cases that actually address the sanctions provision of § 21D. I located only twenty-nine of these cases decided before August 1, 2011.[167] In twelve of these twenty-nine, the appeals court admonished the district court for failing to comply with the statute and remanded so that the court could make the required Rule 11 findings.[168] In another twelve, district courts made findings as to sanctions following a final judgment, but only after a party moved for sanctions—something that would not have been necessary had the courts complied with the statute by addressing sanctions sua sponte. In only five of the twenty-nine cases did the lower court conduct a sanctions inquiry, as contemplated by the statute.

Even in the set of district court cases addressing § 21D, there is evidence of direct noncompliance with the statute's commands. I randomly selected fifty district court cases that dealt with § 21D. Nineteen of the fifty cases addressed sanctions only on the motion of a party after a final adjudication.[169] In these cases, the courts failed to comply with the statute because they dismissed the case or entered judgment without conducting any sanctions inquiry. A party later pointed out this failure and reminded the court to conduct the required inquiry.[170]

---

securities cases on Westlaw yielded a rate of 3.2 percent compliance with § 21D. See Henderson and Hubbard, *Do Judges Follow the Law?* at *29 n 46 (cited in note 161).

[167] I searched Westlaw's ALLFEDS database for "sanctions & pslra & 'rule 11' & da(bef 8/1/2011)" and "78u-4(c) or 77z-1(c) & da(bef 8/1/2011)." This yielded forty-one appellate cases, twenty-nine of which actually address § 21D.

[168] See, for example, *Rombach v Chang*, 355 F3d 164, 178 (2d Cir 2004) ("Neither the district court's Memorandum and Order nor its judgment made the required Rule 11 findings. . . . [W]e remand to the district court for compliance with the PSLRA."); *Cohen v USEC, Inc*, 70 Fed Appx 679, 689 (4th Cir 2003) ("[T]he district court . . . fail[ed] to make Rule 11(b) findings expressly required by the [PSLRA]. . . . Because the statute commands that such findings be made, we remand this case for that purpose."); *Gurary v Winehouse*, 190 F3d 37, 47 (2d Cir 1999) ("[T]he district court made no findings regarding compliance with Rule 11(b). As the statute required the district court to make findings, we have no choice but to remand in order to permit it to do so.").

[169] In another six cases, a party moved for judgment and sanctions at the same time.

[170] See, for example, *In re Initial Public Offering Securities Litigation*, 399 F Supp 2d 369, 370 (SDNY 2005); *Furlong v Appiant Technologies, Inc*, 2005 WL 1463490, *1 (ED Mo); *Gorman v Coogan*, 324 F Supp 2d 171, 172 (D Me 2004).

This Section does not purport to calculate an exact percentage of cases adjudicated under the PSLRA in which judges do not comply with the clear command of § 21D. But the percentage is not zero or near zero, as conventional models would predict. In fact, judges appear to defy § 21D in a very high proportion of PSLRA cases. Such extensive defiance of a controlling statute is initially quite surprising, even shocking. However, for the reasons discussed earlier,[171] this result comports with this Article's model of judicial compliance.

C. *eBay v MercExchange* and Indirect Noncompliance

The above sections address situations in which courts are faced with clear doctrinal imperatives and failure to comply is easy to observe. In these contexts, the conventional model would predict total or near-total compliance by courts. As such, the examples of noncompliance discussed above provide direct evidence supporting this Article's model of judicial resistance. The following sections discuss situations in which noncompliance is more widespread but also less overt and more difficult to detect. In these circumstances, evidence for the new model may take more-subtle forms, such as the persistent influence of an overturned law, and the concomitant failure of a new law to substantially change lower court behavior. Such examples may indicate that judges are resisting a legal change and gravitating toward a familiar, defunct doctrine.

The aftermath of the Supreme Court's 2006 patent case *eBay Inc v MercExchange, LLC*[172] offers an interesting example of indirect resistance to a major doctrinal change. Prior to *eBay*, the Federal Circuit had established a rule that, absent exceptional circumstances, a patent holder who proves that another party has infringed her patent should be granted a permanent injunction against the infringer.[173] Denials of permanent injunctions were accordingly rare. No rigorous empirical studies have

---

171 See text accompanying notes 159–60.

172 547 US 388 (2006).

173 See *MercExchange, LLC v eBay, Inc*, 401 F3d 1323, 1339 (Fed Cir 2005). See also *Richardson v Suzuki Motor Co*, 868 F2d 1226, 1247 (Fed Cir 1989). Exceptional circumstances in this context refer to situations in which a permanent injunction would cause significant harm to the public interest, as in patent cases involving medical technologies not otherwise available.

been completed, but estimates of the pre-*eBay* rate of approval of preliminary injunctions range from 84 to 95 percent.[174]

In *eBay*, the Supreme Court unanimously rejected the Federal Circuit's bright-line rule for granting injunctions. Instead, the Court held that permanent injunctions could issue only after a court had applied the traditional four-factor equitable test for permanent injunctions. The test requires a court to consider four factors and balance competing interests. To obtain an injunction, a plaintiff must demonstrate:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law . . . are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[175]

The Court also expressly warned against taking shortcuts to avoid a thorough, painstaking application of the test. Although the district court had applied the appropriate four-factor test,[176] the Supreme Court noted that its application of the test was erroneous, because it had essentially formulated a "categorical rule" that a patent holder's failure to market its patented product means that it has suffered no irreparable harm from infringement.[177] Such a shortcut was forbidden, the Court ruled, because "traditional equitable principles do not permit such broad classifications."[178]

The Supreme Court's unequivocal command that lower courts comprehensively apply the four-factor injunction test in patent cases was perceived as a major change in patent law—one with the potential to diminish the value of patents by billions of dollars. Patent observers predicted a "sea change"[179] in patent practice, a legal shift "of great consequence to both patent

---

[174] See, for example, Lily Lim and Sarah E. Craven, *Injunctions Enjoined; Remedies Restructured*, 25 Santa Clara Computer & High Tech L J 787, 798 & n 74 (2009); Robert M. Isackson, *After* 'eBay,' *Injunctions Decrease*, Natl L J S1, S1 (Dec 3, 2007).

[175] *eBay*, 547 US at 391.

[176] See *MercExchange, LLC v eBay, Inc*, 275 F Supp 2d 695, 711 (ED Va 2003).

[177] *eBay*, 547 US at 393.

[178] Id.

[179] Jeremy Mulder, *The Aftermath of* eBay*: Predicting When District Courts Will Grant Permanent Injunctions in Patent Cases*, 22 Berkeley Tech L J 67, 67 (2007).

owners and the infringers they confront."[180] Some commentators worried that it could jeopardize the entire patent system by eroding incentives to seek patents or litigate against infringers.[181]

The reality of *eBay*'s impact has been much different. Faced with a command to apply a complex, four-factor equitable standard, courts instead appear to use the exact "categorical rule" shortcut that the Supreme Court expressly forbade in its opinion.[182] That is, courts deciding whether to award permanent injunctions have relied heavily on whether patent holders marketed their inventions.[183] An injunction was virtually inevitable in cases in which patent holders practiced their patents, but courts nearly always denied injunctive relief to patent holders whom the courts found were inactive in the relevant market.[184] Although *eBay* rejected "broad classifications" based on practicing patents, district courts appear to be using a "binary inquiry"—market participation or no market participation—rather than the four-factor test.[185] Meanwhile, factors such as the type of patent, the overall complexity of the product, the likelihood of future patent infringement, and even willfulness (which typically weighs heavily in the decision to grant an injunction) have played little or no role in determining whether an injunction will issue.[186]

The widespread use of this "categorical rule" shortcut also appears to have dampened *eBay*'s impact on the rate of permanent injunction awards. Studies of patent infringement cases decided in the years following *eBay* found little change in the

---

[180] C.J. Alice Chen and Darren E. Donnelly, eBay v. MercExchange*: Supreme Court to Reconsider Injunction Remedy in Patent Cases* *1 (Fenwick & West LLP, 2006), archived at http://perma.cc/C9Z6-A378.

[181] See Stacy Streur, *The* eBay *Effect: Tougher Standards but Courts Return to the Prior Practice of Granting Injunctions for Patent Infringement*, 8 Nw J Tech & Intell Prop 67, 67 (2009) (citing several commentators).

[182] *eBay*, 547 US at 393.

[183] See Streur, 8 Nw J Tech & Intell Prop at 72–79 (cited in note 181).

[184] See Benjamin H. Diessel, Note, *Trolling for Trolls: The Pitfalls of the Emerging Market Competition Requirement for Permanent Injunctions in Patent Cases Post*-eBay, 106 Mich L Rev 305, 318–21 (2007); Benjamin Petersen, Note, *Injunctive Relief in the Post*-eBay *World*, 23 Berkeley Tech L J 193, 197–99 (2008) (noting that the court issued an injunction in thirteen out of sixteen district court cases in which there was competition in the same marketplace).

[185] See *eBay*, 547 US at 393; Diessel, Note, 106 Mich L Rev at 309, 315 (cited in note 184).

[186] See Andrew Beckerman-Rodau, *The Aftermath of* Ebay v MercExchange*, 126 S. Ct. 1837 (2006): A Review of Subsequent Judicial Decisions*, 89 J Patent & Trademark Office Society 631, 655–57 (2007); Diessel, Note, 106 Mich L Rev at 316–18 (cited in note 184).

rate of permanent injunctions granted to patent holders, while practitioners and commentators noted the absence of a significant impact on patent practice and the tendency of many district courts to grant permanent injunctions as a matter of course in most cases, just as they had done before *eBay*.[187] One study calculated that the rate of permanent injunctions granted in 175 post-*eBay* cases finding patent infringement through April 2011 remained high, at over 75 percent;[188] other studies have found similar results.[189] Although the doctrine had changed substantially, there "has not been a corresponding shift in the outcome of [patent injunction] decisions."[190]

Practitioners and scholars, following the conventional model of judicial compliance, expected that *eBay* would cause lower court judges to apply the traditional four-factor test for injunctions and to issue injunctions at a substantially lower rate. Instead, lower courts appear to have adopted a binary approach, granting injunctions as a matter of course to patent holders found to be active in the marketplace and denying injunctions to entities found not to have practiced their inventions—an approach specifically rejected by *eBay*.

The advent of this judicial shortcut was by no means inevitable or easily predictable. But this Article's model may offer an

---

[187] See, for example, Andrei Iancu and W. Joss Nichols, *Balancing the Four Factors in Permanent Injunction Decisions: A Review of Post*-eBay *Case Law*, 89 J Patent & Trademark Office Society 395, 403 (2007); Isackson, *After 'eBay,' Injunctions Decrease*, Natl L J at S1 (cited in note 174).

[188] See Ronald J. Schutz and Patrick M. Arenz, *Non-practicing Entities and Permanent Injunctions Post*-eBay, 12 Sedona Conference J 203, 205 (2011).

[189] See Streur, 8 Nw J Tech & Intell Prop at 73–74, 79–80 (cited in note 181) (finding an injunction grant rate of 75 percent from May 2006 through April 2009); Douglas Ellis, et al, *The Economic Implications (and Uncertainties) of Obtaining Permanent Injunctive Relief after* eBay v. MercExchange, 17 Fed Cir Bar J 437, 441–42 & nn 35–36 (2008) (finding that permanent injunctions were granted in about 78 percent of patent infringement cases from May 2006 through July 2008).

[190] Streur, 8 Nw J Tech & Intell Prop at 67 (cited in note 181). Note that the absence of substantial change in the rates of permanent injunctions granted cannot be explained by selection effects. There is no indication from practitioners' commentary on *eBay* that they have changed their filing or litigation behavior; indeed, the conventional wisdom seems to be that judicial behavior has remained unchanged and *eBay* has had little practical impact. See text accompanying note 187. There has been no detectable effect on the number of patent applications filed or the number of patent suits initiated, both of which increased (consistent with the general trend) in the years after *eBay*. See Patent Technology Monitoring Team, *U.S. Patent Statistics Chart Calendar Years 1963–2011* (US Patent and Trademark Office, July 24, 2014), archived at http://perma.cc/Z6M6-HJRC; Interuniversity Consortium for Political and Social Research, *Federal Court Cases: Integrated Data Base, 2009* (University of Michigan, 2009), archived at http://perma.cc/XV7B-VF4B.

explanation for this strange form of noncompliance with controlling Supreme Court precedent. Lower courts attempting to apply *eBay* are confronted with a complex equitable inquiry, involving difficult-to-analyze factors such as the feasibility of potential damages and projected future damages over the life of the patent, the specific product or product component patented, the technological area involved, the complexity of the invention, and the willfulness of the infringement. It is, no doubt, powerfully tempting to short-circuit this process and engage in an analysis with dramatically lower decision costs and time and effort costs: Is the patent holder marketing this invention? Courts appear to be using this heuristic regularly instead of applying the required four-factor test.

D. *United States v Booker* and Anchoring

For most of American history, federal judges have had broad discretion to sentence criminal offenders.[191] Federal criminal statutes have typically specified only a maximum term of imprisonment and a maximum fine, entrusting the judge to impose an individualized sentence for each offender.[192] But eventually judges' unfettered discretion, and the uncertainty and disparities in sentences that it produced, led many to call for a more consistent and uniform sentencing regime.[193] The issue reached the halls of Congress when Senator Edward Kennedy introduced what would become the Sentencing Reform Act of 1984.[194] The Senate Judiciary Committee cited numerous studies indicating that judges varied greatly in terms of their sentencing goals, their attitudes about punishment and retribution, and the lengths of sentences that they imposed.[195] One study conducted by the US Attorney's Office for the Southern District of New York gave twenty case files drawn from actual cases to fifty federal judges in the Second Circuit and asked them to sentence each defendant. These identical cases yielded remarkably wide sentencing ranges—from 3 years of imprisonment to 20 years (extortion), 1 year to 10 years (sale of heroin), and probation to

---

191 See Kate Stith and Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L Rev 223, 225 (1993).

192 See id.

193 See id at 226–30.

194 Pub L No 98-473, 98 Stat 1987, codified as amended at 18 USC § 1351 et seq.

195 See *Comprehensive Crime Control Act of 1983, Report of the Committee on the Judiciary*, S Rep No 98-225, 98th Cong, 1st Sess 41 (1983).

7.5 years (theft and possession of stolen goods)—with a great deal of variation in between.[196] A similar, broader study for the DOJ presented 16 cases of bank fraud or robbery to 208 active federal judges. Variations were even greater, ranging from probation to 27 years of imprisonment for fraud, and probation to 25 years of imprisonment for bank robbery, with standard deviations of up to 7.9 years.[197] Judges' sentencing preferences appeared to vary widely; some judges were found to sentence particular offenses more harshly than the norm, while others were especially punitive when a defendant had a prior criminal record.[198]

The Sentencing Reform Act addressed these issues primarily through the creation of the US Sentencing Commission, which was tasked with producing Sentencing Guidelines that would "ensure that similar offenders, committing similar offenses, would be sentenced in a similar fashion."[199] Congress made the Guidelines mandatory, although judges could depart from the guidelines range if they could identify an aggravating or mitigating circumstance not contemplated by the Guidelines.[200] The Act also stipulated (with a few exceptions) that the maximum sentence in a range could be at most 25 percent greater than the minimum sentence.[201] The Sentencing Commission promulgated the first set of binding Guidelines in 1987.

Judges were not pleased. Most had opposed the Act in the first place.[202] Many felt that the Guidelines were too rigid and undermined the art of judging.[203] This antipathy toward the Guidelines may have influenced the approximately 200 district court judges who initially declared the Guidelines unconstitutional (compared to about 120 judges who upheld them);[204] the

---

196 See id at 42–43.

197 See id at 44–45.

198 See id at 44.

199 Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 Wake Forest L Rev 185, 189 (1993).

200 See 18 USC § 3553(b).

201 28 USC § 994(b). Exceptions to the 25 percent rule were made for maximum sentences no more than six months greater than minimum sentences, and for maximum sentences of life imprisonment.

202 See, for example, Stith and Koh, 28 Wake Forest L Rev at 257, 275 (cited in note 191).

203 See Robert Weisberg, *How Sentencing Commissions Turned Out to Be a Good Idea*, 12 Berkeley J Crim L 179, 186–87 (2007).

204 Terence Dunworth and Charles D. Weisselberg, *Felony Cases and the Federal Courts: The Guidelines Experience*, 66 S Cal L Rev 99, 113 n 56 (1992).

Guidelines were, however, ultimately upheld by the Supreme Court.[205]

Under the Guidelines, sentences greatly increased in severity. The percentage of federal defendants receiving probation decreased from nearly 50 percent to less than 15 percent.[206] The average sentence length for all crimes went from twenty-eight months before the Guidelines to fifty months afterward, and actual time served increased from an average of thirteen months to forty-three months.[207] Sentence disparity was significantly reduced, reflecting the Guidelines' profound reduction in judicial discretion.[208]

The Guidelines had been in force for the better part of two decades when the Supreme Court issued a decision that called their validity into question. In *Blakely v Washington*,[209] the Court concluded that a state's mandatory sentencing guidelines violated the Sixth Amendment's jury trial guarantee because they allowed judges to increase a defendant's sentence based solely on judge-found facts.[210] Less than one year later, the Court held the federal Guidelines unconstitutional on the same reasoning in *United States v Booker*.[211] But the Court did not strike down the entire federal sentencing scheme. Rather, it fashioned a unique remedy, striking only the provision that made the Guidelines mandatory and a related provision for strict appellate review of sentences outside the Guidelines range,[212] and ruling that all sentences (whether inside or outside the range) would be reviewed for unreasonableness. It also left in place the law requiring judges to calculate a Guidelines range, although that range was made merely advisory.[213]

Booker was widely considered to be a paradigm shift in federal sentencing, a return to the pre-Guidelines era of broad judicial discretion and dramatically lower federal sentences. The Guidelines would "cease to restrain the discretion of federal

---

205 See generally *Mistretta v United States*, 488 US 361 (1989).

206 Kate Stith and José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 62 (Chicago 1998).

207 Id at 63.

208 See generally, for example, James M. Anderson, Jeffrey R. Kling, and Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and after the Federal Sentencing Guidelines*, 42 J L & Econ 271 (1999).

209 542 US 296 (2004).

210 Id at 303, 305.

211 543 US 220 (2005).

212 See 18 USC § 3742(e).

213 See *Booker*, 543 US at 259–60.

judges,"[214] who would "sentence defendants however they saw fit."[215] The decision "almost inevitably [would] reintroduce the unjust sentencing disparities that plagued pre-Guidelines sentencing."[216] And overall, the "result [was] certain to be a return" to the pre–Sentencing Reform Act era.[217] The principles of *Booker* and *Blakely* were described as legal "earthquakes,"[218] "bombshell[s],"[219] and among the most important doctrinal changes in the history of criminal law.[220] They represented an "enormous sea change for sentencing policy, perhaps even a revolution."[221]

But *Booker*'s impact on judicial behavior has been dramatically less than predicted. Judges, who had once been strongly opposed to the Guidelines and the loss of discretion that they represented, did not return to the days of lower sentences, probation-only sentences, or widely varied punishments. Practitioners and observers noted the "surprisingly limited"[222] and "strikingly modest"[223] differences in sentencing practices following *Booker*, concluding that "little has changed."[224] The "Guidelines continue to be applied as the default benchmark for sentencing" in nearly every criminal case,[225] and "average and median

---

214 Id at 285 (Stevens dissenting).

215 D. Michael Fisher, *Striking a Balance: The Need to Temper Judicial Discretion against a Background of Legislative Interest in Federal Sentencing*, 46 Duquesne L Rev 65, 78 (2007).

216 Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J Crim L & Crimin 643, 725 (2006).

217 *Booker*, 543 US at 300 (Stevens dissenting).

218 Shannon P. Duffy, Blakely *Makes* Apprendi *a Mere Tremor; But Pa. Guidelines Not Likely in Jeopardy*, 231 Legal Intelligencer 3, 3 (July 1, 2004).

219 Tefft W. Smith, James H. Mutchnik, and Scott M. Abeles, *Harder to Prosecute? A Recent Supreme Court Decision Could Nullify Enhanced Antitrust Penalties*, 27 Legal Times 1, 1 (July 12, 2004).

220 See Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 Colum L Rev 1082, 1086 (2005).

221 Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 Stan L Rev 1721, 1736 (2005). See also Graham C. Mullen and J.P. Davis, *Mandatory Guidelines: The Oxymoronic State of Sentencing after* United States v. Booker, 41 U Richmond L Rev 625, 625 (2007).

222 William H. Sloane and Kenneth S. Levine, *'*Booker*' after a Year: New Highs for Sentences, Guidelines Followed; Outside Counsel*, NY L J 1, 1 (Mar 6, 2006).

223 Frank O. Bowman III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System after* Booker, 43 Houston L Rev 279, 319 (2006).

224 Mullen and Davis, 41 U Richmond L Rev at 625 (cited in note 221).

225 James R. Dillon, *Doubting* Demaree*: The Application of Ex Post Facto Principles to the United States Sentencing Guidelines after* United States v. Booker, 110 W Va L Rev 1033, 1089 (2008).

sentences nationwide are at historic highs, the exact opposite of what was expected."[226]

Although many anticipated a flood of below-Guidelines sentences following *Booker*, reflecting a return to the far-lower average sentences that prevailed before the Guidelines took effect, it has not materialized. The Sentencing Commission calculated that the rate of below-range sentencing increased from 8.6 percent of all sentences in the pre-*Booker* era to 12.5 percent in the first year after *Booker*.[227] This was certainly a noticeable increase, but hardly a revolution, especially in absolute terms. (Neither was the increase in above-range sentences, from roughly 0.8 percent to 1.6 percent.)[228]

The rate of downward departures then decreased slightly in 2006 and 2007, to 12.0 percent, before increasing gradually in the years since (13.4 percent in 2008, 15.9 percent in 2009, 17.8 percent in 2010, and 17.4 percent in 2011).[229] For every year since *Booker*, the vast majority of sentences have continued to fall within the Guidelines range.[230]

But even these numbers likely overstate the extent to which federal judges changed their sentencing practices post-*Booker*. First, although judges are departing from the Guidelines

---

[226] Sloane and Levine, NY L J at 1 (cited in note 222).

[227] The Commission intentionally used data predating the passage of the PROTECT Act of 2003, Pub L No 108-21, 117 Stat 650, which limited district courts' ability to depart downward from the Guidelines and mandated de novo review for sentences outside the range. The PROTECT Act's effects are difficult to quantify, and the Act was quickly made irrelevant by *Blakely* and *Booker*. See *Final Report on the Impact of* United States v. Booker *on Federal Sentencing* *77 (US Sentencing Commission, Mar 2006) ("USSC Final Report 2006"), archived at http://perma.cc/C8PD-XG9J.

[228] USSC Final Report 2006 at *58 (cited in note 227).

[229] See, for example, *U.S. Sentencing Commission Final Quarterly Data Report: Fiscal Year 2011* *1 (US Sentencing Commission, Mar 27, 2012) ("USSC Report Fiscal Year 2011"), archived at http://perma.cc/75CH-DD72. The corresponding numbers for above-Guidelines sentences are: 1.6 percent in 2006, 1.5 percent in 2007 and 2008, 2.0 percent in 2009, and 1.8 percent in 2010 and 2011. *U.S. Sentencing Commission Final Quarterly Data Report: Fiscal Year 2010* *1 (US Sentencing Commission, Apr 18, 2011), archived at http://perma.cc/6P9A-YXNX; *U.S. Sentencing Commission Final Quarterly Data Report: Fiscal Year 2009* *1 (US Sentencing Commission, Mar 11, 2010), archived at http://perma.cc/9EUD-V9F9; *U.S. Sentencing Commission Final Quarterly Data Report: Fiscal Year 2008* *1 (US Sentencing Commission, 2009); *U.S. Sentencing Commission Final Quarterly Data Report: Fiscal Year 2007* *1 (US Sentencing Commission, Mar 19, 2008), archived at http://perma.cc/W6EG-SVNM; *U.S. Sentencing Commission Final Quarterly Data Report: Fiscal Year 2006* *1 (US Sentencing Commission, Mar 16, 2007) ("USSC Report Fiscal Year 2006"), archived at http://perma.cc/Y6VK-KAKM.

[230] See, for example, USSC Report Fiscal Year 2011 at *1 (cited in note 229). This is the case whether or not government-initiated downward departures for substantial assistance or other reasons are included.

somewhat more often, their departures have been smaller (per departure, on average) than pre-*Booker* departures.[231] Two-thirds of downward departures between *Booker* and 2006 were less than 40 percent below the Guidelines minimum sentence, suggesting that even departing judges were heavily influenced by the Guidelines.[232] And a return to pre-Guidelines probation practices appears to be a pipe dream; rates of probation actually *decreased* following *Booker*.[233] The upshot of all this is that the average sentence imposed post-*Booker* has very closely tracked the average Guidelines minimum sentence, just as it did before *Booker*.[234] In fact, the average sentence slightly *increased* after *Booker*, as the average Guidelines recommendation slightly increased.[235] This is, indeed, the "exact opposite of what was expected."[236]

Second, the evidence suggests that judges continue to rely heavily on the precise numbers generated by the Guidelines when calculating sentences. Before *Booker*, judges set roughly 59 percent of all within-range sentences at the exact bottom of the Guidelines range, and 10 percent at the exact top of the range. After *Booker*, this behavior continued virtually unchanged—judges set 58 percent of all within-range sentences at the exact bottom of the range, and 10 percent at the exact top.[237] In a great proportion of cases decided post-*Booker*, judges appear to be simply adopting one of the Guidelines' numbers as their "presumptive sentence."[238]

Why do the Guidelines retain so much force now that they are advisory only? And why are they followed so often, despite judges' traditional opposition to rigid sentencing regimes and prior preference for far lower sentences? There are surely several reasons, but the evidence points to a prominent role for type 2 (cognitive decision cost) and type 3 (status quo favoring) effects. Judges appear to be using the now-advisory Guidelines as anchors[239] when they make their sentencing decisions. This allows

---

231 See USSC Final Report 2006 at *47, 63–64, 66 (cited in note 227).

232 See id at *47.

233 See id at *63.

234 See id at *70; USSC Report Fiscal Year 2011 at *32 (cited in note 229) (showing the average sentence moving in virtual lockstep with the average Guidelines minimum).

235 See, for example, USSC Final Report 2006 at *69–73 (cited in note 227).

236 Sloane and Levine, Booker *after a Year*, NY L J at 1 (cited in note 222).

237 USSC Final Report 2006 at *72 (cited in note 227).

238 Id at *73.

239 See text accompanying notes 54–58.

them to avoid the difficult task of coming up with a sentence from scratch, but it has the effect of tying them tightly to the Guidelines.[240] The anchoring effect is most obvious in the cases in which judges simply set a sentence identical to the numbers at the top or bottom of the Guidelines range. But it is also apparent in the smallness of the departures from the Guidelines—even when judges depart, they appear to mentally begin with the Guidelines range and then adjust slightly upward or downward from there.[241]

Type 3 effects likely play a major role in judges' tolerant attitude toward the Guidelines, which they or their predecessors once vehemently opposed. Between the Sentencing Reform Act and *Booker*, Guidelines sentences became the status quo, and judges applied and justified them repeatedly. This likely contributes to judges' continued acceptance of drastically higher average terms of imprisonment (and lower rates of probation) compared to the pre-Guidelines era. Further, the delayed and very gradual increase in below-range sentences is consistent with the slowly decreasing force of type 3 effects over time.

The behavior of individual judges following *Booker* also suggests a prominent role for type 3 effects. A recent study has found that judges appointed during the pre-*Booker* era were significantly less likely to depart from the Guidelines after *Booker* than judges appointed in the post-*Booker* era.[242] Judges appointed before *Booker* routinely followed the then-mandatory Guidelines, and those judges persisted in following the Guidelines even after they were no longer mandatory. These findings are consistent with the theory that type 3 effects are causing judges to gravitate toward older practices with which they are familiar—such as closely following sentencing Guidelines—even after the legal regime governing their behavior has changed substantially.[243]

Another reason for the continuing influence of the Guidelines may be that appeals courts have signaled that they will affirm nearly all sentences that fall within a Guidelines range. For

---

[240] See Nancy Gertner, *What Yogi Berra Teaches about Post*-Booker *Sentencing*, 115 Yale L J Pocket Part (2006), archived at http://perma.cc/2BYP-9QFL.

[241] See text accompanying notes 58, 231–35.

[242] See Crystal S. Yang, *Have Inter-judge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from* Booker, 89 NYU L Rev 1268, 1318–19 (2014) (noting that judges appointed before *Booker* are less likely to depart downward or upward than judges appointed after *Booker*, and that this difference is statistically significant for both types of departure).

[243] See Part II.C.

most of the period prior to *Booker*, neither defendants nor the government could appeal sentences within a range.[244] Sentences outside a range were reviewed for abuse of discretion.[245] *Booker* allowed for appeals of within-range sentences and made clear that all sentences were henceforth to be reviewed for "unreasonable[ness]."[246] This particular change not only altered the long-standing and familiar practice of reviewing only outside-Guidelines sentences but also commanded courts to take the time to perform a reasonableness review—a complex inquiry based on the bevy of esoteric factors listed in 18 USC § 3553(a)—on a vast swath of within-range sentences challenged by defendants. As this Article's model would predict, appellate courts appeared to resist this doctrinal shift. Most circuit courts quickly created a "presumption of reasonableness" for any sentence falling within a Guidelines range.[247] This presumption was almost never rebutted; the fact that a sentence was within the Guidelines practically ended the matter.[248] And even in those circuits that did not adopt the presumption, virtually every within-Guidelines sentence was upheld on appeal.[249] As a result, district court judges may be motivated to sentence within the Guidelines to avoid any risk of reversal.

However, it is unlikely that fear of vacatur by an appellate court is the primary reason for the Guidelines' continued influence. The likelihood of a district court's outside-Guidelines sentence being vacated as substantively unreasonable is extremely low. Take 2006, for example, when there were 8,507 below-Guidelines sentences, and 1,129 above-Guidelines sentences.[250] A comprehensive study of all sentencing appeals from January 1, 2006, to November 16, 2006, found that only 60 below-range

---

244 See 18 USC § 3742(a)–(b).

245 See *Koon v United States*, 508 US 81, 99–100 (1996).

246 *Booker*, 543 US at 261.

247 The Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and DC Circuits adopted the presumption, while the First, Second, Third, and Eleventh Circuits rejected it. See *Rita v United States*, 551 US 338, 346 (2007) (listing cases). The Supreme Court eventually ruled that appeals courts (though not district courts) could adopt the presumption without violating the Sixth Amendment. Id at 351–54.

248 See Brief of New York Council of Defense Lawyers as Amicus Curiae in Support of Petitioner, *Rita v United States*, No 06-5754, *5 (US filed Dec 18, 2006) (available on Westlaw at 2006 WL 3742254) ("NYCDL Brief") ("Only one sentence out of 1,152 within-guidelines sentences challenged on appeal for reasonableness has been found to be substantively unreasonable."). All 138 below-Guidelines sentences challenged by defendants were affirmed. Id at *6 n 6.

249 See id at *5.

250 USSC Report Fiscal Year 2006 at *16 (cited in note 229).

sentences (and only 7 above-range sentences) were vacated as unreasonable.[251] Adjusting the 2006 numbers to the 10.5-month period of the study, and assuming an even distribution over those months,[252] the rate of vacatur of below-range sentences was 0.8 percent, and the rate of vacatur of above-range sentences was 0.7 percent. Such a low risk of vacatur is unlikely to keep district court judges up at night. Moreover, in surveys and empirical studies, fear of reversal has not been shown to be a major determinant of judicial behavior.[253] Finally, several states in which state sentences are essentially unreviewable on appeal report high rates of conformity with voluntary state sentencing guidelines.[254] Voluntary guidelines were especially influential in states where judges were required to calculate the advisory range before sentencing.[255] This suggests that anchoring to given numbers, rather than fear of reversal on appeal, is the primary driver of advisory-guideline compliance.

E. *Pearson v Callahan*: Old Habits Die Hard

When type 3 (status quo favoring) effects are strong enough, judges may resist a change to a familiar doctrine even when the change would *lower* decision costs. This may occur, for instance, when judges have routinely applied and justified a prior doctrine over a number of years. A recent Supreme Court decision on qualified immunity offers an opportunity to examine this kind of resistance. Indeed, the volatile history of qualified immunity law reveals a great deal about how judges respond to different types of legal change.

---

[251] NYCDL Brief at *1a–2a (cited in note 248).

[252] Assuming a roughly consistent distribution of cases, there were approximately 7,444 below-range sentences and 988 above-range sentences in the 10.5-month study period.

[253] See note 13. See also, for example, Richard A. Posner, *How Judges Think* 71 (Harvard 2008) ("[R]eversal aversion is rarely a very powerful motivator since a reversal usually imposes only a small cost on the judge who is reversed."); William I. Kitchin, *Federal District Judges: An Analysis of Judicial Perceptions* 90–92 (Collage 1978) (discussing judicial risk perceptions and attitudes toward reversal).

[254] See USSC Final Report 2006 at *C-13 to -15 (cited in note 227). See also generally John F. Pfaff, *The Continued Vitality of Structured Sentencing Following* Blakely*: The Effectiveness of Voluntary Guidelines*, 54 UCLA L Rev 235 (2006).

[255] See USSC Final Report 2006 at *C-15 (cited in note 227).

1. *Saucier* and judicial defiance.

Government officials who have been sued for conduct within the scope of their authority are entitled to qualified immunity. That is, even if they have violated a plaintiff's constitutional (or statutory) right, they are immune from suit unless the right was clearly established at the time of the violation.[256] Initially, the Supreme Court did not specify exactly how courts should assess qualified immunity: Should they always determine if there was a violation of a right before examining whether the right was clearly established? Or could they avoid the often-difficult violation inquiry by simply concluding that the right was not clearly established and therefore immunity applies? In the absence of a clear command, lower courts frequently took the shortcut, declaring that immunity applied without determining whether a constitutional violation had actually occurred.[257]

Then, in 1991, the Court in *Siegert v Gilley*[258] admonished a court of appeals for reaching a related qualified immunity question—whether malicious intent by an officer was sufficiently pleaded—before first resolving the "preliminary" issue whether there had been a constitutional violation.[259] The Court stated that a "necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all."[260] The Court then affirmed on the ground that the plaintiff had in fact failed to allege a violation of a constitutional right.

The Court's opinion was not entirely clear because the case involved malice pleading, the lower court was affirmed, and the opinion did not expressly state that finding constitutional violations before addressing qualified immunity defenses was mandatory. Still, panels in almost every circuit interpreted *Siegert* to mean that the violation question must always be answered first.[261] But later panels often ignored these decisions, and, as a

---

256 See *Harlow v Fitzgerald*, 457 US 800, 818 (1982).

257 See, for example, Greg Sobolski and Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 Stan L Rev 523, 529, 554 (2010) (collecting empirical studies).

258 500 US 226 (1991).

259 Id at 232.

260 Id.

261 See Sobolski and Steinberg, Note, 62 Stan L Rev at 556 & n 116 (cited in note 257) (collecting cases).

whole, appellate courts took the qualified immunity shortcut only moderately less often than they had before *Siegert*—down from approximately 38 percent of the time before the decision to about 28 percent after.[262]

This reluctance to aggressively apply *Siegert* is not especially surprising—the opinion directed courts to take an approach that would require substantially more time and effort and force courts to confront thorny constitutional issues, and it had done so in an oblique and halfhearted manner.

In 2001, however, the Court handed down *Saucier v Katz*,[263] ruling that "the requisites of a qualified immunity defense must be considered in proper sequence," which means that, "the first inquiry must be whether a constitutional right [was] violated."[264] It repeated this command several times in the opinion[265] and justified it by pointing out the necessity of clarifying the law for future cases.[266] The process for analyzing qualified immunity was now unmistakable.

Several empirical studies were conducted after *Saucier*, and each found something unexpected: numerous courts defied *Saucier* and continued to dismiss cases on qualified immunity grounds without addressing whether a constitutional violation had occurred. Remarkably, many of these courts would cite *Saucier* but then appear to forget or ignore it just a few pages later.[267] The most comprehensive studies calculated that this defiance occurred in 5.9 percent of all appellate and 5.1 percent of all district court cases involving qualified immunity.[268]

The authors were understandably puzzled by the "continued appearance of these outcomes even after the Court's *Saucier* pronouncement" and reported that "our data do not shed light on why lower courts would ignore the *Saucier* regime; there are no discernable similarities among these claims (for example circuit,

---

[262] See id at 554.

[263] 533 US 194 (2001).

[264] Id at 200.

[265] See, for example, id at 201 ("This must be the initial inquiry.").

[266] Id.

[267] See generally, for example, *Caldarola v Calabrese*, 298 F3d 156 (2d Cir 2002); *Franklin v Fox*, 312 F3d 423 (9th Cir 2002); *Gomez v Atkins*, 296 F3d 253 (4th Cir 2002).

[268] See Sobolski and Steinberg, Note, 62 Stan L Rev at 544 (cited in note 257) (tracking appellate courts' defiance of *Saucier*); Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 Pepperdine L Rev 667, 711 (2009) (tracking district courts' defiance of *Saucier* from 2006 to 2007). See also Thomas Healey, *The Rise of Unnecessary Constitutional Rulings*, 83 NC L Rev 847, 937–47 (2005) (finding *Saucier* defiance in 7 percent of appellate cases from 2001 to 2003).

judge, or type of constitutional question.)."[269] This "intriguing"[270] noncompliance, however, fits well with this Article's model of judicial behavior, which would predict that courts are likely to resist a new doctrine that substantially increases time and effort costs and departs from long-standing practice.

2. Status quo bias and resistance to legal change.

Eight years after *Saucier*, the Court made another major change to qualified immunity law. In *Pearson v Callahan*,[271] the Court expressly overruled *Saucier*, recognizing that its rigid sequencing requirement had resulted in a "substantial expenditure of scarce judicial resources on difficult questions."[272] Henceforth, it would be left to lower courts to "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first."[273]

Pearson was, in a sense, a total victory for lower courts, which could now avoid the hassle of the *Saucier* regime and exercise unfettered discretion over how to resolve constitutional claims in qualified immunity cases. Not since the period before *Siegert* had lower courts had such freedom to avoid difficult constitutional questions in qualified immunity cases.

A conventional account of judicial behavior would anticipate that, after *Pearson*, judges would resume dismissing constitutional claims solely on immunity grounds at roughly the same rate as they did before *Siegert*.[274] But this Article's model suggests a more complicated picture. Because *Pearson* allows courts to decrease their time and effort costs and avoid making difficult decisions about constitutional liability, we might expect courts to enthusiastically discard *Saucier* sequencing. But a type 3 resistance effect (status quo favoring) is likely to play a role here, making courts more likely to stick with the old, familiar *Saucier* sequence, even though it is no longer required.

Saucier sequencing was in place for eight years, and qualified immunity issues arise frequently in the federal courts.[275] As

---

269 Sobolski and Steinberg, Note, 62 Stan L Rev at 546 (cited in note 257).

270 Id.

271 555 US 223 (2009).

272 Id at 224. See also id at 236–37 (collecting examples).

273 Id at 236.

274 See Sobolski and Steinberg, Note, 62 Stan L Rev at 555–56 (cited in note 257).

275 *Saucier* was cited in over 6,800 federal cases before *Pearson* was issued, including in over 1,500 federal appeals.

judges applied *Saucier* in case after case, the application of the sequence may have become habitual, and therefore more likely to persist.[276] Judges also may have altered their preferences in favor of *Saucier* sequencing, a result of the natural tendency to develop favorable attitudes about past actions.[277] In addition, judges applying *Saucier* typically explained the case and often justified its mandatory sequencing as necessary to "provid[e] a clear standard against which officers can measure the legality of future conduct."[278] Having validated the doctrine, judges are more likely to come to truly believe in it, or at least to prefer it more than they otherwise would.[279] Finally, *Saucier* sequencing may operate as a sort of default choice for judges who do not have strong preferences about sequencing in a given case. In the absence of a compelling reason to deviate from past practice, these judges may simply opt for the status quo.[280]

This Article's model would therefore predict that judges would not revert to pre-*Siegert* rates of taking the qualified immunity shortcut. Judicial behavior is likely to change, but the prior legal regime of mandatory sequencing is likely to continue to influence judges via type 3 effects. In other words, the model predicts that judges would dismiss cases on immunity grounds at a higher rate than during the *Saucier* era but substantially less than during the previous (pre-*Siegert*) era of unfettered discretion.

To test this prediction, I compared the rate of immunity-only dismissals in court of appeals cases decided after *Pearson* with the rates observed pre-*Pearson*. In the two years following *Pearson*, roughly 490 court of appeals cases cited the opinion. Two hundred of these cases were randomly selected for this study.[281] Because some cases involved multiple claims, these 200 cases produced 224 distinct rulings on qualified immunity.

---

[276] See Part II.C.2.

[277] See text accompanying note 81.

[278] *Loria v Gorman*, 306 F3d 1271, 1281 (2d Cir 2002). See also, for example, *Wilson v City of Boston*, 421 F3d 45, 53 (1st Cir 2005) ("[C]ourts must address the constitutional merits question first in order to facilitate the development of the law."); *Doe v Heck*, 327 F3d 492, 509 (7th Cir 2003) ("We proceed in this fashion because this analytical framework promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public.") (quotation marks omitted).

[279] See Part II.C.1.

[280] See Part II.C.3.b.

[281] A random-number generator was used. Cases that did not involve a qualified immunity determination were later excluded.

Using the same methodology as prior studies,[282] these cases were coded by outcome. The results are reported in the bottom rows of Tables 1 and 2.

TABLE 1. QUALIFIED IMMUNITY CASE OUTCOMES IN COURTS OF APPEALS

	Before *Siegert*	After *Siegert*, before *Saucier*	After *Saucier*, before *Pearson*	After *Pearson*
Court Finds No Constitutional Violation	26.5%	37.7%	43.6%	51.8%
Court Finds a Constitutional Violation and No Qualified Immunity	31.9%	28.6%	36.5%	30.0%
Court Finds a Constitutional Violation but Still Grants Qualified Immunity	3.6%	5.5%	13.9%	4.5%
Court Dismisses the Case on Qualified Immunity Grounds Alone	38.0%	28.1%	5.9%	13.8%

Note: All pre-*Pearson* numbers are from Sobolski and Steinberg, Note, 62 Stan L Rev at 546, 552 (cited in note 257).

TABLE 2. THE QUALIFIED IMMUNITY SHORTCUT, OVER TIME, IN COURTS OF APPEALS

	Percent Dismissed on Qualified Immunity Alone
Before *Siegert*	38.0%
After *Siegert*, before *Saucier*	28.1%
After *Saucier*, before *Pearson*	5.9%
After *Pearson* (Conventional Model Prediction)	38.0%
After *Pearson* (Actual)	13.8%

Courts took the qualified immunity shortcut at a markedly higher rate than they did under the mandatory *Saucier*-sequencing regime—an increase from 5.9 percent to 13.8 percent.[283] But as this Article's model would predict, 13.8 percent is

[282] See Sobolski and Steinberg, Note, 62 Stan L Rev at 540–43 (cited in note 257).

[283] Another study of post-*Pearson* outcomes produced a similar rate, 19.5 percent. See Ted Sampsell-Jones and Jenna Yauch, *Measuring* Pearson *in the Circuits*, 80 Fordham L Rev 623, 628 (2011). However, that study's coding method did not account for multiple rulings in a single case, and it therefore cannot be directly compared to the comprehensive pre-*Pearson* studies.

much lower than the 38.0 percent observed during the previous era of unfettered discretion.[284] Courts' behavior under the new discretionary regime appears to be substantially affected by the prior, now-defunct legal doctrine. Even an unambiguously overturned legal doctrine like *Saucier* sequencing can have a major influence on judicial behavior, because of type 3 effects.

The same phenomenon can be observed in district court cases. Using the same methodology as a prior study of district courts,[285] 200 qualified immunity cases decided between March 1, 2012, and March 1, 2013, were randomly selected and coded by outcome.[286] Because some cases involved multiple claims, these 200 cases produced 272 distinct rulings on qualified immunity. The results of the coding are reported in the bottom rows of Tables 3 and 4.

---

[284] The difference is statistically significant at the 1 percent level.

[285] See Leong, 36 Pepperdine L Rev at 684–88 (cited in note 268). This was essentially the same methodology used in Sobolski and Steinberg, Note, 62 Stan L Rev at 540–43 (cited in note 257).

[286] A random-number generator was used. Cases that did not involve a qualified immunity determination were later excluded.

TABLE 3. QUALIFIED IMMUNITY CASE OUTCOMES IN DISTRICT COURTS

	Before *Siegert*	After *Siegert*, before *Saucier*	After *Saucier*, before *Pearson*	After *Pearson*
Court Finds No Constitutional Violation	42.2%	46.0%	61.4%	64.3%
Court Finds a Constitutional Violation and No Qualified Immunity	32.3%	32.7%	14.4%	25.7%
Court Finds a Constitutional Violation but Still Grants Qualified Immunity	3.7%	4.9%	3.6%	1.5%
Court Dismisses the Case on Qualified Immunity Grounds Alone	18.6%	13.3%	5.1%	8.5%

Note: All pre-*Pearson* numbers are from Leong, 36 Pepperdine L Rev at 711 (cited in note 268). Professor Nancy Leong also coded a number of cases as "other," including cases in which the court found a constitutional violation but did not address qualified immunity (no such cases were encountered in this Article's sample) and in which the court noted a clearly established right but found no constitutional violation (such cases were coded for this Article as "court finds no constitutional violation"). See id at 687–88.

TABLE 4. THE QUALIFIED IMMUNITY SHORTCUT, OVER TIME, IN DISTRICT COURTS

	Percent Dismissed on Qualified Immunity Alone
Before *Siegert*	18.6%
After *Siegert*, before *Saucier*	13.3%
After *Saucier*, before *Pearson*	5.1%
After *Pearson* (Conventional Model Prediction)	18.6%
After *Pearson* (Actual)	8.5%

Courts took the qualified immunity shortcut at a somewhat higher rate than they did under the mandatory *Saucier* sequencing regime, an increase from 5.1 percent to 8.5 percent. But as this Article's model would predict, the 8.5 percent rate is far lower than the 18.6 percent rate observed the last time judges had complete discretion to use the shortcut.[287] Again, courts' behavior under a new legal regime appears to be greatly influenced by an old, overturned law.

[287] The difference is statistically significant at the 1 percent level.

The data collection for district court outcomes allows for an additional test of this Article's predictions. This Article's model implies that judges appointed to the bench after a doctrinal change will be more inclined to adopt the new doctrine than judges who served while the prior doctrine was in force.[288] New judges should not be as susceptible to type 3 effects—including justification bias, routinization, or status quo bias—as judges who have regularly applied the old doctrine.

To test this prediction using the district court sample, I compared the decisions of judges appointed to the federal bench before *Pearson* with the decisions of those appointed after *Pearson*.[289] Of the 272 coded rulings on qualified immunity, 225 were made by judges appointed before *Pearson* and 47 by judges appointed afterward.[290] The outcomes are reported in Table 5.

TABLE 5. THE QUALIFIED IMMUNITY SHORTCUT IN DISTRICT COURT CASES DECIDED 3/1/2012 TO 3/1/2013, BY ERA OF JUDICIAL APPOINTMENT

	Percent Dismissed on Qualified Immunity Alone
Conventional Model Prediction	18.6%
All Judges	8.5%
Judges Appointed before *Pearson*	6.7%
Judges Appointed after *Pearson*	17.0%

As discussed above, judges took the qualified immunity shortcut at a far lower rate than the conventional model would predict, using it in only 8.5 percent of cases. This effect appears to be almost entirely driven by judges who served on the bench during the *Saucier* era. Only 6.7 percent of these judges' rulings on qualified immunity used the qualified immunity shortcut. For the other 93.3 percent, these judges declined to take the shortcut and instead followed the no-longer-mandatory, but familiar, *Saucier* sequence.

---

288 This phenomenon can also be observed in a recent study of criminal-sentencing practices following *Booker*. See generally Yang, 89 NYU L Rev 1268 (cited in note 242).

289 Judges appointed as federal magistrate judges and then later promoted to be district court judges were assigned the date of their first federal appointment—that is, their magistrate appointment. This coding decision had no notable effect on the results.

290 Three claims were decided by judges appointed as state court judges prior to *Pearson* and as federal judges afterward. These claims were excluded from the study. Their inclusion would not notably affect the results.

By contrast, judges appointed after *Pearson* overruled *Saucier* took the qualified immunity shortcut in 17.0 percent of rulings, roughly the same as the 18.6 percent rate of judges in the previous era of unfettered discretion. This was more than double the rate of judges appointed before *Pearson*.[291]

These observations are consistent with the theory that type 3 effects cause judges to gravitate toward an overturned legal doctrine. Judges who served during the *Saucier* era have not substantially changed their behavior following *Pearson*. They may be habituated to the use of *Saucier* sequencing, or they may have come to see it as the status quo, to be departed from only in extraordinary circumstances. Judges appointed after *Pearson* are not as susceptible to these influences, and their behavior does not appear to be affected by the prior legal regime.[292]

The example of qualified immunity sequencing demonstrates that this Article's model can successfully predict future judicial behavior. It also offers further evidence[293] that type 3 effects can have a substantial impact on judicial behavior, even when considerations of time, effort, and difficulty of decisionmaking point in the other direction.

IV. A NEW UNDERSTANDING OF LEGAL CHANGE

What does it mean that a law has "changed"? Formally, of course, it means that a new doctrine has replaced an old one and now governs legal disputes within its domain. But practically, as a determinant of case outcomes, legal change may not be so clear-cut. The actual governing law may be a mixture of the new doctrine and the previous one—a mixture determined by judges' experiences, habits, and aversions to costs.

The conventional account of judicial systems as efficient hierarchies in which lower courts faithfully adopt new higher-

---

[291] Despite a fairly small sample size of decisions by judges appointed after *Pearson*, this difference is statistically significant at the 10 percent level.

[292] Note that other explanations for the disparity among these judges cannot be ruled out. For instance, *Pearson* was decided the day after President Barack Obama's first inauguration, and thus all post-*Pearson* judges in the sample were nominated by Obama. It is possible that political preferences are influencing judges' use of the qualified immunity shortcut. However, a previous study of the shortcut in the district courts found no link between use of the shortcut and the political party of the president who appointed the judge. See Leong, 36 Pepperdine L Rev at 697–700 (cited in note 268).

[293] See note 152 and accompanying text. See also Yang, 89 NYU L Rev at 1318–19 (cited in note 242) (finding that judges appointed before *Booker* were significantly less likely to depart from the Guidelines than judges appointed after *Booker*).

court decisions fails to capture a great deal of actual judicial conduct. Changes in doctrine do not always result in changes in lower court behavior. Practical legal change is not always abrupt or comprehensive; it can be gradual or partial, and sensitive to costs and status quo preferences. In some situations, a legal change may not be complete until a new generation of judges replaces the generation familiar with the prior law.[294]

Accordingly, creating a new doctrine is sometimes only the first step in effecting legal change. Moreover, legal change cannot be evaluated solely by examining a new statute or Supreme Court case. The greater body of case law may not necessarily follow these authorities. Scholars should consider lower court behavior before making claims about a new law and its likely effects.

Observers attempting to predict judicial behavior should also broaden the scope of their inquiry into judicial preferences. Scholars already account for judges' ideological preferences when modeling judicial behavior. They should do the same for judicial preferences for a familiar status quo and lower decision costs, or they risk overlooking powerful influences on judges' behavior.

The sections below discuss some additional implications of this Article's model of judicial resistance to legal change. The first Section examines the scope of resistance to legal change. The second identifies some of its practical consequences. The third describes how this Article's findings can shed light on debates about judicial behavior and help lawmakers to design more-efficient regimes for judicial decisionmaking. The fourth discusses potential responses to the problems that resistance to legal change may cause.

A. *Daubert* and the Ubiquity of Resistance to Legal Change

When a higher court or Congress changes the law, lower courts may actively resist adopting the new doctrine, resulting in either direct or indirect noncompliance. This is most likely to occur when several of the resistance effects identified above are present, as in transitions from rules to standards. But the potential for resistance is present whenever there is a substantial change in the law. Judges cannot help being at least somewhat uncertain as to how a new law will operate and what its consequences

---

[294] See Part III.E. In such cases, the adoption of new legal doctrines can resemble the halting advance of new scientific paradigms. See, for example, Thomas S. Kuhn, *The Structure of Scientific Revolutions* 148–52 (Chicago 2d ed 1970).

will be. Uncertainty can lead to aversion, while familiarity may cause judges to strongly prefer the prior doctrine.[295]

This Article's model thus suggests that judicial noncompliance with doctrinal change may go far beyond the examples given above. Indeed, resistance effects likely operate as a drag on legal change even when new doctrines do substantially and pervasively alter judicial practices. These effects might limit the magnitude of change by working at the margins to push judges in the direction of the prior, overturned legal regime. Judicial resistance may operate to some degree in almost all legal transitions, causing actual judicial behavior to diverge (in varying degrees) from governing doctrine.

The aftermath of *Daubert v Merrell Dow Pharmaceuticals, Inc*,[296] a major Supreme Court case on expert witness testimony, provides one example of the persistent influence of overturned law even in the midst of an otherwise-extensive change in lower court practice. A multitude of tort cases—including personal injury, medical malpractice, and product liability cases—involve scientific evidence presented by expert witnesses. For most of the twentieth century, such expert testimony was considered admissible only if it had "gained general acceptance in the particular field in which it belongs."[297] This "*Frye* standard," named after the 1923 DC Circuit case from which it derived, was supplanted (in federal courts) by a new test created by the Supreme Court in 1993. In *Daubert*, the Court held that trial judges must assess whether scientific evidence will be reliable and relevant to the task at hand before admitting it.[298] In determining whether scientific evidence is reliable, the Court stated, judges should consider a nonexhaustive list of factors: (1) whether the scientific theory or technique has been tested or can be tested, (2) whether it has been peer-reviewed and published, (3) what its rate of error is, and (4) whether it has been generally accepted in its field.[299]

Daubert had a major impact on the practice of tort law and the behavior of trial judges. After *Daubert*, studies showed, parties "challenged the admissibility of [scientific] evidence more frequently, and judges scrutinized evidence more carefully,

---

295 See Part II.C.3.

296 509 US 579 (1993).

297 *Frye v United States*, 293 F 1013, 1014 (DC Cir 1923).

298 *Daubert*, 509 US at 592–93.

299 Id at 593–94.

excluding a greater proportion of it."[300] In contrast to their responses to *eBay* and *Booker*,[301] practitioners and judges noticed a substantial change in their practices following *Daubert*.[302] Judges and attorneys paid more attention to the reliability of potential expert witnesses, judges increasingly held pretrial hearings on expert testimony, and attorneys made more objections and filed more motions in limine to exclude experts.[303] Judges reported employing the four *Daubert* factors when determining whether to admit scientific evidence.[304]

Yet even in the midst of this major change, there is evidence of substantial resistance to the new regime and the strong influence of prior doctrine. Although judges have given scientific evidence more scrutiny following *Daubert*, they often do so by applying essentially the same test as they did before the decision—whether a scientific theory or claim has gained general acceptance in its field. That is, many courts applying *Daubert* "in practice perform what is essentially a *Frye* analysis."[305] Studies indicate that general acceptance continues to play a pivotal role in *Daubert* admissibility determinations,[306] while unfamiliar and complex new factors such as error rate and susceptibility to testing have generally had little impact.[307] Although judicial behavior changed substantially and pervasively after *Daubert*, the influence of *Frye* has remained strong.

---

[300] A. Leah Vickers, Daubert*, Critique and Interpretation: What Empirical Studies Tell Us about the Application of* Daubert, 40 USF L Rev 109, 110 (2005).

[301] See, for example, Jeffery T. Ulmer and Michael T. Light, *The Stability of Case Processing and Sentencing Post*-Booker, 14 J Gender, Race & Just 143, 173–74 (2010).

[302] See Carol Krafka, et al, *Judge and Attorney Experiences, Practices, and Concerns regarding Expert Testimony in Federal Civil Trials*, 8 Psychology, Pub Pol & L 309, 322–23, 329–30 (2002).

[303] See id.

[304] See Sophia I. Gatowski, et al, *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post*-Daubert *World*, 25 L & Human Behav 433, 444–48 (2001).

[305] Edward K. Cheng and Albert H. Yoon, *Does* Frye *or* Daubert *Matter? A Study of Scientific Admissibility Standards*, 91 Va L Rev 471, 478 (2005).

[306] See, for example, id; Lloyd Dixon and Brian Gill, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases since the* Daubert *Decision*, 8 Psychology, Pub Pol & L 251, 286–87 (2002) (finding that general acceptance was sufficient for admission pre-*Daubert* and, while no longer sufficient on its own, tends to result in admission post-*Daubert*); Nicole L. Waters and Jessica P. Hodge, *The Effects of the* Daubert *Trilogy in Delaware Superior Court* *22 (National Center for State Courts, 2005), archived at http://perma.cc/8LKP-2H7U (noting that attorneys citing *Daubert* often use general acceptance in their arguments).

[307] See, for example, Cheng and Yoon, 91 Va L Rev at 478 (cited in note 305); Gatowski, et al, 25 L & Human Behav at 444–48 (cited in note 302).

The *Daubert* example suggests that overturned regimes may exert some influence in virtually all legal transitions, by offering a fallback position for judges faced with applying an unfamiliar new test, or by influencing judges to prefer the prior status quo even as they attempt in good faith to implement a new doctrine. Given the near ubiquity of the effects discussed in Part II, some resistance to legal change is likely to be the rule rather than the exception.

B. Zombie Doctrines and Predicting Judicial Resistance

The phenomenon of judicial resistance to legal change can be uncanny. Defunct doctrines, abolished and replaced by new laws, appear to rise from their graves and walk the earth again, influencing judges much as they did before being overturned. These zombie-like doctrines present both problems and opportunities for legal actors trying to predict and shape judicial behavior.

As described above,[308] this Article's model can be used to predict judges' behavior in a variety of contexts. It can identify new doctrines that are unlikely to command full compliance[309] and situations that are likely to cause judges to gravitate toward familiar practices.[310] For instance, the model correctly predicted that judicial behavior would change substantially less than anticipated after *Pearson*, because of judges' habits and acquired preferences for the former status quo.[311] It was also able to predict which judges were most likely to follow a prior legal regime and which were most likely to rapidly adopt the new doctrine.[312] By generating such predictions, the model can inform debates about the meaning and impact of new Supreme Court or appellate court decisions. And it can allow practitioners and observers to better forecast judicial behavior and case outcomes.

This Article's model can also help to clarify ongoing controversies about the effects of doctrinal change. For example, scholars have recently warned of a "revolution" in equitable remedies, as higher courts have extended *eBay*'s holding to other areas of

---

308 See Part II.D.3.

309 One example is a new test involving a tricky assessment of commercial harm. See Parts III.A, III.C.

310 These situations may arise, for example, when inexpert judges are called on to deal with difficult technical or empirical issues. See Parts II.A, II.C.3.a, II.D.3, III.A, III.C.

311 See Part III.E.

312 See Part III.E.

law, replacing the presumption that courts should issue an injunction with a complex, four-factor equitable test.[313] Scholars have also expressed concern about the "unfettered discretion" that courts will possess in the absence of the "meaningful guidance" offered by the presumptions.[314]

This Article's model predicts that the practical impact of these recent rulings will be limited. Higher courts are commanding judges to abandon presumptions that many of them have applied frequently over the years and adopt a new standard that is both conceptually complex and a chore to apply. Most likely, lower courts applying these new laws will continue to be influenced by the overturned presumptions. They will likely continue to grant injunctions at a high rate and employ cost-lowering doctrinal shortcuts when possible.

As in the equity context, the influence of zombie doctrines can present serious practical problems for political or legal actors attempting to alter outcomes in legal disputes. Although the Supreme Court likely intended its *Campbell* opinion to reduce grants of summary judgment in fair use disputes, grants actually increased, in part because lower courts continued to cite and apply an abrogated fair use presumption.[315] Despite Congress's passage of the PSLRA, neither the number of securities class actions filed nor the value of such settlements has decreased at all, and courts' failure to implement a major provision of the statute (requiring Rule 11 review of all filings) has no doubt contributed to this limited impact.[316] Scholars recommending legislative solutions to various legal or social problems should note these difficulties and consider whether, even if their proposed legislation is enacted, judges will actually implement it.

In general, judicial resistance to doctrinal change may present another obstacle to the pursuit of meaningful social change via the courts. Scholars have lamented the failure of many progressive judicial opinions to substantially influence public policy or social practices.[317] This Article suggests that the difficulty of

---

[313] See Mark P. Gergen, John M. Golden, and Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 Colum L Rev 203, 204, 216–19 (2012) (pointing to appellate cases that reversed long-standing equitable presumptions involving copyright infringement, administrative law, and the Federal Arbitration Act).

[314] Id at 242–43.

[315] See Beebe, 156 U Pa L Rev at 572 (cited in note 129).

[316] See Perino, 2003 U Ill L Rev at 929–35, 938, 939–42 (cited in note 153).

[317] See, for example, Rosenberg, *The Hollow Hope* at 15–21, 71–72 (cited in note 2).

changing behavior extends even to the lower court level. Not only do plaintiffs seeking social change through the courts face political, cultural, and economic constraints, but they must also contend with widespread judicial resistance to any change to the legal status quo.

C. Shaping Judicial Decisionmaking

This Article's findings can contribute to theoretical debates over judicial preferences and behavior. For instance, several scholars have argued that lower court judges favor standards over rules because standards maximize their discretion, and discretion allows them to reach their preferred outcome in a greater number of cases.[318] Others have suggested that this analysis may be oversimplified but have not directly challenged it on theoretical or empirical grounds.[319] This Article's model indicates that lower court judges may disfavor standards for several reasons, including increased time and effort costs, increased decision costs, and cognitive aversion toward the uncertainty that discretion may entail. And the empirical evidence discussed above suggests that judges often decline to use newly granted discretionary power and instead gravitate toward more-restrictive, bright-line rules. Rather than always favoring discretionary standards, lower court judges' preferences likely vary based on factors such as the difficulty of deciding cases using a standard, the intensity of their policy views, and their habits and prior practices.

The evidence discussed in this Article may also point the way toward new legal regimes that guide judicial decisionmaking while still allowing judges flexibility to accommodate unusual cases. When the law is changed from a bright-line rule to a broader standard, judges appear to be significantly influenced

---

[318] See, for example, Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 Georgetown L J 1863, 1906–07 (2008) (discussing judges' preferences for maximizing discretion in order to maximize their power); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J Legal Stud 627, 631 (1994) (finding that judges are likely to "maximize their ability to make discretionary decisions" in order to "reach legal results that maximize their own view of the good"); Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" about the Sentencing Commission?*, 7 J L, Econ & Org 183, 186–87, 189 (1991) (modeling judges' preferences for increased judicial discretion).

[319] See, for example, Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 Duke L J 669, 723 (2010). See also generally Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J Legal Stud 647 (1994).

by the prior rule, which often operates as a default from which judges only rarely depart.[320] This unintended outcome may actually have many advantages, especially in complex or technical areas of the law. For judges lacking expertise in a given area, it could have the benefits of a rule, allowing for quick, low-cost decisionmaking and rendering judicial outcomes more predictable. But expert or highly motivated judges would retain the freedom to depart from the default rule in appropriate cases. This default-rule regime would, in some situations, perform better than either a rule or a standard in producing optimal judicial decisions while holding down decision costs.[321]

Because default rules appear to influence judges as much as they influence other decisionmakers, legislators and higher courts could intentionally set up legal rules as defaults when appropriate. They might, for instance, establish a baseline rule (for example, "piloting an aircraft within one mile of a nuclear power plant is unlawful") but allow judges to depart from it if they give a detailed explanation of their reasons for doing so. Lawmakers could even require the discussion of specific factors in the explanation (for example, weather, air traffic, structure of the plant, and pilot experience). This would likely have the effect of driving inexpert or time-constrained judges toward the default rule, while still allowing expert or motivated judges to reach the best outcome in outlier cases.

Further, the powerful influence on judges of numerical anchors[322] suggests that there is room for voluntary guidelines to play a much larger role in shaping judicial behavior. Lawmakers, higher courts, or special commissions might promulgate voluntary guidelines for judges in areas in which outcomes are unpredictable and inconsistent, as they often were in pre-Guidelines criminal sentencing. For example, there tend to be very few standards for alimony and child support awards, and judges are expected to apply a multifactorial test in order to produce a numerical outcome, making the results difficult to predict. Likewise, punitive damages and pain and suffering awards tend to be highly variable, and the amounts awarded often have little correlation

---

[320] See note 104 and accompanying text.

[321] See generally Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 Duke L J 557 (1992) (discussing the relative costs and benefits of rules and standards).

[322] See Parts II.B, III.D.

with jurors' judgments about culpability.[323] Voluntary guidelines could promote uniformity and reduce decision costs by providing consistent numbers for judges but while still allowing judges to depart from the numbers in unusual cases.

D. Effective Legal Change

As discussed above, formal, doctrinal changes alone may prove ineffective in altering the behavior of lower court judges or the outcomes of legal disputes. This Section describes how, by better understanding judicial resistance to new doctrines, appellate judges and legal reformers might more effectively change lower court practices.[324]

Let us start with the least-drastic measure. Higher courts might reduce resistance to their new rulings simply by enhancing (through conscious, dogged effort) the clarity of their written opinions. Language that is at all vague, subtle, or debatable is unlikely to produce significant practical changes in lower court behavior—especially when more than one of the resistance effects are implicated.

Vague language and an excess of subtlety likely account for several new doctrines' failures to influence judicial behavior. *Phillips v AWH Corp*,[325] an en banc Federal Circuit decision encouraging consideration of the entirety of a patent application in interpreting patent claim language (and discouraging the use of

---

[323] See, for example, Cass R. Sunstein, Daniel Kahneman, and David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L J 2071, 2074 (1998).

[324] The normative implications of reducing judicial noncompliance with new doctrines are mostly beyond the scope of this Article, and I will offer only a few preliminary thoughts. The extent to which increased compliance with new doctrines is desirable will, of course, largely be a function of the value of those doctrines. Beyond that, it is possible that widespread, mostly indirect noncompliance with new doctrines allows judges to allocate their energy most efficiently, hedge against misguided legal changes, or lower transition costs imposed by sudden doctrinal shifts. I think that it is more likely that the benefits of effective legal change will outweigh any advantages of noncompliance. Greater compliance would bring lower court behavior closer to formally controlling doctrine. As a result, parties would be better able to predict how judges will resolve legal disputes, and new laws could be evaluated more cleanly on the basis of the outcomes that they would produce, without the noise created by judges still following abrogated doctrines. I would also cautiously posit that doctrinal changes have more often than not been for the good, and that over time the law will likely continue to improve, becoming more just, efficient, and equitable. If so, then the normative value of ensuring that doctrinal changes actually change lower court behavior may be substantial.

[325] 415 F3d 1303 (Fed Cir 2005) (en banc).

dictionaries),[326] has had little effect on subsequent Federal Circuit or district court cases.[327] The likely culprit is the court's well-intentioned refusal to "provide a rigid algorithm for claim construction" and its decision to instead "simply attempt[ ] to explain why, in general, certain types of evidence are more valuable than others."[328]

Likewise, the Supreme Court's recent alteration of the civil-pleading standard from notice pleading to a requirement that plaintiffs plead "enough facts to state a claim to relief that is plausible on its face"[329] has had no significant effect on pleading dismissals.[330] Judges were already likely to disfavor this kind of change given that the old, familiar standard was clear and easy to apply, while the new standard arguably calls for substantially greater scrutiny of pleadings. But another major obstacle is the *Twombly* opinion's inconsistency and lack of clarity, and the uncertain magnitude of its departure from previous standards.[331] Lower courts are unlikely to make difficult and often-unwanted changes to their prior routines if they have not received a clear signal to do so. Accordingly, a common practice of some appellate courts—writing opinions with the expectation that every subtle doctrinal point and policy rationale will be taken as gospel by lower courts—appears to be seriously misguided. Simple and emphatic explanations of how lower courts should act might be less likely to produce elegant opinions but are more likely to yield effective legal change.

---

[326] See id at 1314, 1320–21.

[327] See generally R. Polk Wagner and Lee Petherbridge, *Did* Phillips *Change Anything? Empirical Analysis of the Federal Circuit's Claim Construction Jurisprudence*, in Shyamkrishna Balganesh, ed, *Intellectual Property and the Common Law* 123 (Cambridge 2013). See also Michael Saunders, Note, *A Survey of Post-*Phillips *Claim Construction Cases*, 22 Berkeley Tech L J 215, 236 (2007) (finding little change in results post-*Phillips*, aside from possible superficial changes in methodology).

[328] *Phillips*, 415 F3d at 1324. See also Wagner and Petherbridge, *Did* Phillips *Change Anything?* at 30 (cited in note 327) (attributing *Phillips*'s lack of impact in part to the "open-ended nature of the *Phillips* language," notwithstanding the opinion's otherwise "clear choice in favor of a more holistic approach" to claim construction).

[329] *Bell Atlantic Corp v Twombly*, 550 US 544, 570 (2007).

[330] See William H.J. Hubbard, *Testing for Change in Procedural Standards, with Application to* Bell Atlantic v. Twombly, 42 J Legal Stud 35, 57 (2013) (finding that, even in cases filed before *Twombly* and thus not influenced by selection effects, neither the rate of dismissal on motion nor the rate of dismissal as a fraction of all filed cases changed significantly after *Twombly*).

[331] See Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 94 Iowa L Rev 873, 881–82 (2009).

That said, even clear opinions frequently encounter resistance among lower court judges. To defeat especially persistent zombie rules, higher courts may have to engage in overkill. That is, higher courts can respond to strong judicial resistance by repeatedly issuing opinions that vigorously admonish lower courts for following old rules. For example, after the Supreme Court issues an opinion establishing a new doctrine, the Court could examine lower court decisions for signs that the old, defunct law is continuing to influence judicial behavior. It could then grant certiorari in a case that appears influenced by the old law, reverse it, prominently criticize the lower court or courts, and again emphatically state that the old rule must be abandoned and the new way adopted. Although repetitive opinions might raise efficiency concerns, any harm to efficiency is likely outweighed by an increase in efficacy. By sending an unusually strong signal that the status quo has changed and that the Court is monitoring the issue, repetitive opinions can provoke judges to pay particular attention to the application of a new doctrine, making them more likely to avoid or overcome unconscious biases.[332]

Something like this appears to have happened in the qualified immunity context. Following *Siegert*, which admonished judges to resolve whether a constitutional right had been violated before addressing qualified immunity, courts continued to take the immunity shortcut at a high rate.[333] After the *Saucier* Court repeated *Siegert*'s command and clearly and emphatically scolded courts to address violations first, lower courts sharply curtailed their use of the shortcut.[334] In fact, somewhat increased compliance was observed even before *Saucier*, following the 1999 cases *Conn v Gabbert*[335] and *Wilson v Layne, Deputy United States Marshal*,[336] which cited *Siegert* for the proposition that a court must address an alleged constitutional violation before considering immunity.[337] Repeated declarations of the new rule sent a powerful message to lower courts, and effective legal change resulted.

---

[332] It may also increase the perceived risk of reversal or reputational harm and thereby deter intentional resisters as well.

[333] See text accompanying note 259.

[334] See Sobolski and Steinberg, Note, 62 Stan L Rev at 553, 555 (cited in note 257).

[335] 526 US 286 (1999).

[336] 526 US 603 (1999).

[337] See *Conn*, 526 US at 290; *Wilson*, 526 US at 609.

Nonjudicial actors can also play an important role in successfully modifying lower court practices. By studying the influence of overturned doctrines in lower courts' rulings under a new legal regime, legal scholars can alert appellate courts to problems of indirect or direct noncompliance and warn trial courts of the possibility of unconsciously reverting to prior methods of decisionmaking. Simply by recognizing their tendencies to gravitate toward defunct but familiar legal rules, judges may be better able to avoid doing so.[338] A lack of awareness of the potential for resistance, exacerbated by the conventional assumption that compliance with controlling doctrine is universal, is currently a substantial obstacle to effective legal change in the lower courts.

Reformers may also encourage compliance with new doctrines by focusing on the nonlegal aspects of judicial decisionmaking. Familiarizing judges with technological, scientific, or statistical concepts relevant to the application of new legal tests may significantly reduce judicial opposition to change.[339] Advocacy for doctrinal reforms should go hand in hand with the development of judicial-education programs to inform judges about new laws and the contexts in which those laws operate. Providing reference manuals or voluntary guidelines designed to aid judges making decisions in technical or complex areas of law can also promote compliance.[340] These approaches may make the application of novel tests quicker and easier, allow judges to become familiar with new doctrines, and give judges a sense of certainty about how the doctrines should be applied and what the results will be. By doing so, these approaches can minimize the effects that lead to resistance to legal change.

CONCLUSION

Conventional models of judicial compliance have focused on judges' institutional roles and political preferences, and these models have largely assumed high levels of conformity with new laws. These accounts have overlooked perhaps the most important sources of noncompliance: judicial resistance to higher decision costs and judicial preferences for familiar, status quo

---

338 See Guthrie, Rachlinski, and Wistrich, 86 Cornell L Rev at 821–24 (cited in note 106) (noting that awareness of cognitive biases may allow judges to reduce their impact).

339 See Cheng and Yoon, 91 Va L Rev at 504 (cited in note 305).

340 See id; Federal Judicial Center 2000, *Reference Manual on Scientific Evidence* 2–8 (Lexis 2d ed 2000).

doctrines. This Article has developed a detailed account of these effects and integrated it with existing models of judicial behavior. The resulting new model is better able to predict judicial behavior in a variety of situations.

The evidence of widespread judicial noncompliance with new doctrines described above suggests the need for a better understanding of legal change itself. Changing the law that actually resolves legal disputes is not as simple, or as immediate, as it appears. Legal change can be gradual or incomplete; some lower courts might reject it outright, while others might adopt some but not all components of a new doctrine. Defunct laws may be influencing judges and determining outcomes from beyond the grave.

This new understanding of legal change poses challenges for judges, practitioners, and scholars as they try to predict and shape legal outcomes. Legal actors should not assume that they can fully understand a new law and its consequences simply by analyzing the latest controlling opinion on the matter, or even by surveying judges' political preferences. The behavior of lower courts is ultimately governed by a much broader set of factors.