

Legal Research and Practical Experience

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I have a motto, taken from Tennyson's poem "Ulysses":

Match'd with an aged wife, I mete and dole
Unequal laws unto a savage race,
That hoard, and sleep, and feed, and know not me.¹

The aged wife, in my appropriation of Tennyson, is not the mother of my children but the federal judiciary, much in need of improvement, and the subject of this Essay is what academic research of a particular type can do to help improve the federal judiciary.

The judiciary could use quite a number of improvements, from top (the Supreme Court) to bottom (the immigration courts and the Social Security disability offices). Interdisciplinary legal fields such as law and psychology and law and economics have a major role to play in the design and evaluation of plans for improvement, but in this Essay I emphasize research methods that do not involve the kind of technical knowledge found in the natural and social sciences and can therefore be used by academic lawyers who are not interdisciplinary. I'm troubled by the fact that the faculties of the leading law schools are increasingly populated by refugees from the humanities or the social sciences.² Practical experience is vital to understanding and improving law, and suggests a need for law professors who base research on practical experience rather than on the social or natural sciences.

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¹ Alfred, Lord Tennyson, *Ulysses*, in Robert W. Hill Jr, ed, *Tennyson's Poetry* 82, 82 (Norton 1999).

² See Justin McCrary, Joy Milligan, and James Phillips, *The Ph.D. Rises in American Law Schools, 1960-2011: What Does It Mean for Legal Education?*, 65 J Legal Educ 543, 545–46 (2016) (noting a rise in the proportion of law school faculty members holding PhD degrees in fields such as "[e]conomics, political science, history, and philosophy").

I've been a judge for thirty-five years and over that period my interest in legal research has narrowed to research that illuminates, and by doing so can alter, judicial behavior. Legal research, in areas such as antitrust and regulation, that is based on economics and statistics has had profound effects on how judges interpret and apply the statutes and common-law principles that govern, or at least are supposed to govern, those fields. Legal research into the punishment and possible rehabilitation of child molesters and other compulsive sex offenders is making some, though very slow, progress toward the reform of the law's treatment of such offenders.³ The role of psychology in this research is fundamental, and psychology has also contributed importantly to destroying the myth of the "demeanor cues"—the belief that the truthfulness of a witness can be inferred from observing his appearance and manner on the witness stand. In fact it can be inferred better from reading a transcript of the witness's testimony, because the "demeanor cues" are not clues but distractions.⁴

I would particularly emphasize statistical research, which has illuminated numerous facets of judicial behavior, ranging from the role of law clerks in writing their judges' opinions,⁵ to the effect on the behavior of lower court judges of aspiring for promotion, for example to the US Supreme Court,⁶ to variation across circuits in reversal rates in politically sensitive types of cases,⁷ to regional variance in sentencing,⁸ and to much else besides. Political science has contributed significantly to understanding the role of politics, of political ideology more broadly,⁹

³ See generally Christina Mancini and Daniel P. Mears, *U.S. Supreme Court Decisions and Sex Offender Legislation: Evidence of Evidence-Based Policy?*, 103 J Crim L & Crimin 1115 (2013).

⁴ See Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 Cardozo L Rev 2557, 2559–66 (2008).

⁵ See generally Todd C. Peppers, Micheal W. Giles, and Bridget Tainer-Parkins, *Surgeons or Scribes? The Role of United States Court of Appeals Law Clerks in "Appellate Triage"*, 98 Marq L Rev 313 (2014).

⁶ See Lee Epstein, William M. Landes, and Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* 337–79 (Harvard 2013).

⁷ See generally Kevin M. Scott, *Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges*, 40 L & Society Rev 163 (2006).

⁸ See generally Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker*, 89 NYU L Rev 1268 (2014).

⁹ See generally Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va L Rev 301 (2004).

and of religion,¹⁰ sex,¹¹ race,¹² and other influences similarly remote from “the law” (legal doctrine) on judicial voting. Political science and psychology combine to illuminate facets of judicial psychology such as the authoritarian personality that some judges have and its influences on criminal sentencing.¹³

But in this Essay I emphasize forms of research into judicial behavior that do not depend on the social sciences. And even within that narrowed field I’m leaving out a lot, such as judicial biographies, which are valuable sources of knowledge of the judiciary and which require no extralegal training to compose. But there are plenty of other examples of promising research that does not involve extralegal training, such as interviews of federal judges. In a study by Professor Mitu Gulati and me of the management by federal court of appeals judges of their tiny staffs,¹⁴ a study based on phone interviews of 75 such judges selected more or less at random, we found that only 3½ (4.7 percent) tell their law clerks to call them (the judges, that is) by their first names, the ½ being a judge who allows her clerks to call her by her first name only outside the courthouse, as she believes that her colleagues would be angry with her if they discovered that she was allowing her clerks such liberties of address.¹⁵

What is odd about such judicial formality is that modern businesses tend to require *all* their professional employees to be on a first-name basis with each other, even to the point at which the company’s CEO is addressed by his underlings by his first name.¹⁶ This is done not out of affection but to create an atmosphere, believed to elicit greater loyalty, commitment, and effort among junior professional employees, in which the juniors feel

¹⁰ See Gregory C. Sisk, Michael Heise, and Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 Ohio St L J 491, 501–03, 576–84 (2004).

¹¹ See generally Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 Yale L J 1759 (2005).

¹² See generally Pat K. Chew and Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 Wash U L Rev 1117 (2009).

¹³ See Richard A. Posner, *How Judges Think* 98–103 (Harvard 2008) (offering a sketch of the authoritarian tendency in judicial psychology).

¹⁴ See generally Mitu Gulati and Richard A. Posner, *The Management of Staff by Federal Court of Appeals Judges*, 69 Vand L Rev 479 (2016).

¹⁵ Although my information about law clerks’ being or not being on a first-name basis with their judges derives from my study with Gulati, it is not discussed in the article, but rather in my book *Divergent Paths: The Academy and the Judiciary* 372–73 (Harvard 2016).

¹⁶ See *id.*, citing Jodi Glickman, *What’s in a (First) Name* (Harvard Business Review, Nov 1, 2011), archived at <http://perma.cc/U4AE-Q933>.

that their views are valued. Fifty years ago, probably twenty years ago, such informality would have been unthinkable by businessmen as well as by judges. The former have changed; why not the latter? Because the legal profession, including its judicial branch, is stodgy, backward-looking, timorous, and insecure, as I illustrate throughout this Essay.

Professor Abbe Gluck and I have been interviewing federal court of appeals judges with respect to their beliefs and practices regarding statutory interpretation. The interviewees have tended to divide into roughly four groups. One we call the “sourpusses” because they are merciless with respect to the numerous imperfections in the legislative process. To take an extreme example, imagine that an ordinance states: “No vehicles in the park.” A visitor to the park falls into a pond, an onlooker calls 911, an ambulance roars into the park to rescue the flailing visitor—and a police officer gives the ambulance driver a ticket for violating the ordinance. Most judges would consider the officer to have erred, because surely the enactors of the ordinance did not intend “no vehicles” to mean “no vehicles, even emergency vehicles.” But the sourpusses would say: an ambulance is a vehicle, therefore the ordinance includes ambulances, and though the result is silly, it was the enactors who screwed up, and we should let them clean up their mess.

Judges whom we interviewed who had had firsthand experience with legislators, as either legislators themselves, members of legislative staffs, or members of agencies such as the Office of Legal Counsel in the Justice Department that work with legislatures, were confident of their ability to interpret statutes, feeling that they knew what kinds of legislative history provide reliable guidance to the legislators’ intentions and what kinds do not. These “legislators” tend to be eclectic in their use of various aids to statutory interpretation.

Judges in the third group tend to be even more eclectic. They rely on such interpretive aids as dictionaries, all types of legislative history, both linguistic and policy canons of construction, precedents, literal meanings of statutory terms (what lawyers and judges like to call “plain meaning”), implicit statutory purpose, and the meaning of related statutes.

Finally, a few judges rely on common sense, and a few of those few are skeptical about statutory interpretation altogether, noting that issues that arise in litigation relating to the meaning or application of statutes often were not foreseen by the

legislature that enacted the statutes. In such cases, there is no intended meaning to be recovered, leaving the judges to play in effect a legislative role. Judges on this view are not only common-law legislators but also interstitial statute-makers.

A final point is the utility of having a judge be part of the interview team in every case in which a judge is being interviewed. There is a certain clubbiness among federal judges, which tends to make judges more comfortable if their interviewers include judges.

I want now to emphasize a source of understanding of judges that is not research based at all. And that source is common sense, aided or not by experience and intelligence. It shouldn't require study or science to demonstrate that jurors should be allowed to ask questions because otherwise there's a risk they'll be forced to decide the case without knowing enough to decide it sensibly; or that jurors should be permitted to discuss the case (though not decide what their verdict will be) whenever they're in recess in the jury room, as otherwise when it comes time to deliberate they may have forgotten critical evidence; or that jurors should not be given pattern jury instructions because such instructions are legalistic.

Being unscientific and unsystematic, common sense, conceived of as a basis for critique of legal conventions (some going back centuries, illustrating the stodginess that is among the unattractive features of our legal culture), is likely to be derided by law professors, judges, and lawyers alike. For the legal profession likes to think of itself as a guild of learned experts, masters of esoteric doctrines cloaked in esoteric language. Most lawyers, judges, professors, and law clerks would feel naked without their jargon-captioned rules and doctrines: "actual innocence," "clear and convincing," "arbitrary and capricious," "*eiusdem generis*," "suspect class," "rational basis," "strict," "heightened," and "intermediate" scrutiny, "narrow tailoring," "*contra proferentem*," "*de minimis non curat lex*," and so on ad infinitum. (Wikipedia lists about four hundred Latin terms used in US law.)¹⁷ All these terms, and many others, are dispensable.

Another type of badly needed research on the federal judiciary is research on trials, both criminal and civil. Interviews with district judges (and also bankruptcy and magistrate judges) are a largely unexplored research technique. Other techniques

¹⁷ *List of Latin Legal Terms* (Wikipedia), archived at <http://perma.cc/MHC9-598L>.

include simple observation of trials, study of court records, mock trials, and use of trial formats, utilizing the highly realistic trial folders of the National Institute for Trial Advocacy, to structure law school evidence courses (my approach when some years ago I taught evidence at The University of Chicago Law School).

I am particularly interested in what I call “district court research” because ever since my appointment to the Court of Appeals for the Seventh Circuit I have tried cases as a volunteer in the district courts of the circuit. Until recently I had tried just civil cases, conducting jury and bench trials and also supervising discovery, settlement negotiations, and other pretrial phases of civil cases. Lately I have begun trying criminal jury cases.

I’ve learned a lot about the trial process from my forays into the district court. One thing I’ve learned is that *all* appellate judges who like me had not been a trial judge or a trial lawyer before becoming a judge should conduct trials, for I have learned from my trial experience that the conduct of a trial and the appellate review of the trial court’s judgment are radically different experiences. But like real trial judges, much of what I do in a trial is a result of hunch, guesswork, or speculation rather than solid judgment.

I need finally to mention the Supreme Court, a troubled institution. The Court is not well managed, though that is nothing new. Forget the spittoons (a spittoon is “a metal or earthenware pot typically having a funnel-shaped top, used for spitting into”¹⁸) next to each justice’s seat in the courtroom; that is sheer antiquarian silliness. Think rather of the five-year interval between the rendering of a decision and its publication in the *US Reports*; of the refusal of the Court to disclose the vote (not the voters) in cases in which certiorari is denied (disclosure that would signal the importance of the issue sought to be resolved by the Court, and therefore encourage or discourage future efforts to persuade the Court to hear a case presenting the issue); of the refusal of justices, when they recuse themselves from hearing a case, to give the reason for their recusal (or for refusing to recuse themselves, if a responsible recusal motion is filed); of the bunching of opinions at the end of June, rather than making September the deadline, so that cases argued late in the term (April) would receive due consideration rather than being rushed out in time for the summer break; of the inordinate

¹⁸ *Define: Spittoon* (Google), archived at <http://perma.cc/NH84-DQ4D>.

length of opinions; of the unmemorability of the dissenting opinions; of the warring footnotes and occasional lapses into incivility; of the excessive reliance on law clerks. These things could be changed by an aggressive chief justice. What cannot be changed is the justices' pretense that they do not make law but merely apply it.¹⁹

I also think that the Court is diminished from the 1960s, the heyday of the "Warren Court."²⁰ When I think back to the 1960s, when I was a clerk to a Supreme Court justice for one year (the 1962 term) and later an assistant to the solicitor general (1965–1967), I am struck by the poverty of the Court's resources then compared to what they are now—yet by a sense that its much greater resources at present have not improved it. Each justice now has four law clerks; in the 1962 term each had just two (except the chief justice, who had a third law clerk to process the pro se petitions for certiorari). And rarely these days is a clerk hired who has not clerked for a federal court of appeals judge—whereas until the late 1960s it was the unwritten law of the Court not to hire as a law clerk anyone who had been a law clerk to another judge. The clerks were good—some excellent—but the average quality was inferior to what it is today; the job was less coveted, there was no signing bonus, and the justices tended to be more casual about the appointments process, often delegating the appointment to a law professor, a personal friend, or a professional acquaintance, without interviewing the clerk candidate or even receiving an application from him (no "her"—all clerks were male in those days). There was of course no electronic research back then. There also was no cert pool; no organized Supreme Court bar; and, dramatically unlike today, the justices asked few questions at the oral arguments—and this despite the fact that the standard amount of time allotted for argument to each side was forty-five minutes rather than the current thirty minutes. And yet, despite everything, the Court heard twice as many cases as it does now. Probably the justices also worked harder in those days, since the celebrity culture had not yet embraced them. Indeed, with the exception of Justice William O. Douglas, they were wallflowers. (Justice Hugo Black, like Douglas, had charisma, but he did not cut a public figure.)

¹⁹ Richard A. Posner, *What Is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable: Part II*, 19 Green Bag 2d 257, 266 (2016).

²⁰ The next several paragraphs draw heavily on my book *Divergent Paths* (cited in note 15).

The members of the Court back then, in order of appointment, were Justices Black, Douglas, Tom Clark, Earl Warren, John Marshall Harlan II, William Brennan, Potter Stewart, Byron White, and Arthur Goldberg. There were some dim bulbs, but Black, Douglas, and White were extremely smart (though Douglas was irresponsible), and Harlan, Stewart, and Brennan were perhaps a little less smart but thoroughly competent. The professional backgrounds of the justices were far more diverse than those of any of the current justices. Black had been a successful trial lawyer and influential senator; Douglas a prominent “realist” law professor at Yale and head of the Securities and Exchange Commission; Warren a three-term governor of California, his first term being during World War II. Clark had been US attorney general in the Truman administration; Brennan had had a distinguished career as a private practitioner, as a military administrator during World War II, and as a state trial judge and state supreme court justice in New Jersey at a time when the New Jersey judiciary, under the leadership of Chief Justice Arthur Vanderbilt, was outstanding; Goldberg had been secretary of labor in the Kennedy administration, and White had been deputy attorney general in that administration. There was greater educational diversity as well. Two justices had graduated from Yale, one from Harvard, one from Columbia, and the rest from the University of Texas, the University of Alabama, Northwestern, New York Law School, and Berkeley. In contrast, all the present justices attended law school at either Harvard or Yale, though Justice Ruth Bader Ginsburg spent a year at (and graduated from) Columbia. None has significant political experience (none has ever run for political office). Only Justice Sonia Sotomayor has substantial trial experience; she is also the only justice who was once a trial judge.

The 1962 term was the term in which Justices Charles Whittaker and Felix Frankfurter were replaced by White and Goldberg, consolidating the Warren Court, which persisted with only two changes in membership (the replacements of Goldberg by Justice Abe Fortas in 1965 and of Clark by Justice Thurgood Marshall in 1967, which were not significant ideological changes) until Warren’s retirement in 1969 and his replacement by Chief Justice Warren Burger. The Warren Court went overboard in a number of areas, but most of its landmark decisions, dealing with such issues as reapportionment, the right to counsel, the application of the Fourth Amendment to the states, the *Miranda*

warnings, and sexual rights, have survived to this day. It seems unlikely that the current Court will have a comparable legacy, despite what might appear to be its vastly greater resources and vastly superior working conditions.

I believe that the average quality of the justices back then was higher than that of the current justices and that the current justices are overstaffed, talk too much at oral argument, and devote an excessive amount of their time to extrajudicial activities, but also that what made the earlier Court better despite its meager resources by current standards was mainly the diversity in the justices' professional backgrounds. Today, judged by educational and professional backgrounds, and despite pronounced ideological differences, the justices are peas in a pod.²¹ (I do not consider race, sex, or ethnicity forms of diversity relevant to the Supreme Court.)

Among useful reforms to the Court, I would emphasize fewer law clerks, none with prior clerkships; more cases heard; more time allotted to oral argument; no amicus curiae briefs without considered permission of the Court; career diversity among justices; prompt publication of the *US Reports*; no footnotes in opinions; limits on opinion length; appointing as chief justice only a person with proven high-level managerial skills and a national reputation (examples of such chief justices being William Howard Taft, Charles Evans Hughes, and Earl Warren); televising oral arguments; eliminating the June deadline for issuing opinions and the summer recess; giving the opinions to the press a day in advance of issuance to enable them to publish a responsible article on the day of issuance; not requiring that justices reside or work in Washington; dropping the pretense that the Court "interprets" the eighteenth-century Constitution rather than makes up constitutional law as it goes along. And for heaven's sake throw out the spittoons!

Of course, none of these reforms will be implemented in the foreseeable future, if ever. But I'm not concerned, in this short Essay, with achievable reform; I'm interested in showing the reader that legal reform need not depend on, and therefore need not await, social-scientific, other scientific, or rigorously academic study. Most of what is wrong with American law in general, and the federal judiciary, which is the American legal institution that I know best (indeed the only one I know well), is either obvious,

²¹ Posner, *Divergent Paths* at 249–51 (cited in note 15).

or discernible with practical experience and insight not requiring scientific study (such as the absurdity of the *Bluebook* and of the dread of the italicized period), or requires *more* such study, such as the manifold deficiencies of the jury trial as currently administered.