Judicial Behavior and Legal Responsiveness

The judicial behavior movement in political science has made impressive progress over the past decade. This was dramatically evident at the Shambaugh Conference on Judicial Research, conducted in mid-October at the University of Iowa. The Conference assembled some twenty of the principal writers in the field, heard papers by half of them, and entertained cogent comments from all.

The Conference was opened by Herman Pritchett, the vigorous dean of the group, whose review of research on the behavior of judges ably summarized the record of achievement since his own field-creating book, *The Roosevelt Court.* At the same time, his background review helped to emphasize the scope and vitality of the research efforts reported on by the assembled scholars. Some have intensified their efforts at quantification of judicial prediction studies, utilizing discriminant function and simulation techniques in aid of earlier statistical procedures. Others have applied concepts and methods—developed in the U.S.—to Australia, Switzerland, Germany, and Japan. A few have turned from the effort to predict judicial behavior to an examination of its impact. The paper by Murphy and Tanenhaus, appearing in this issue of the *Review,* reports the results of a nationwide sequential survey aimed at ascertaining reactions to the decisions of the Supreme Court. A second paper, delivered at the conference by Herbert Jacob, reported preliminary results of a comparative study of reactions to court decisions by participants in bankruptcy and garnishment proceedings. Both of these papers, together with the others presented at the conference, are scheduled for publication by Wiley in a book edited by Joel Grossman and Joseph Tanenhaus, tentatively entitled *Frontiers of Judicial Research.*

The book will constitute an important event in the development of social science studies of the legal process. Without attempting a review of materials not yet generally available, I would like to share with the reader some of my reactions to the kind of work which has been done by the judicial behavior group. The presence of an article by Glendon Schubert, as well as the piece by Murphy and Tanenhaus, in the current issue of the *Review* makes this an appropriate time for these reflections.

The work of the judicial behavior school provides a striking example of the results that can be achieved by single-minded attention to a narrowly defined range of behavior. With very few exceptions, the

group has concentrated its attention on the judge's behavior as a dependent variable, i.e., as something to be explained. In doing so, it has shown that considerable success can be achieved in relating the decisions of judges to the blocs with which they are associated, their values prior to appointment, their ethnic background and political affiliation. While such studies reveal some of the correlates of judicial decision, they do not provide us with satisfactory guidance for the next major steps in judicial research. For one thing, while they explain some of the variance in judicial decision, they are unlikely to predict such decisions completely. Anecdotally, we know of enough major changes in orientation by judges once on the bench to be very doubtful that background analyses will carry us very far. The influences that operate toward uniformity, so suggestively described by Karl Llewellyn in *The Common Law Tradition,* very likely constitute a powerful counterweight to variations based on background.

More serious, judicial behavior studies have not—for the most part—asked questions concerning judicial behavior that would be most relevant for understanding the functioning of law in society. The kind of questions I have in mind were those posed by Cardozo more than forty years ago in *Nature of the Judicial Process.* It is striking to me that judicial behavior research has told us little about the likelihood that a particular judge in given circumstances will decide a case by the method of precedent, logical construction, custom, or functional considerations (Cardozo's "method of sociology").

Cardozo's questions are important for two main reasons. First, they may tap into the subjective world of the judge and thus provide us with a model that resembles more accurately the thought process of the judge as he reaches his conclusions. To the extent that they do, we may have a better basis for understanding judicial behavior. We might also find systematic variations among judges by position, mode of selection, style of training, and so forth. Trial judges, for instance, may address legal issues far more in terms of precedent than function, because of the constant problem of reversal. Appellate court judges may be far more oriented toward functional considerations, especially at the highest court level, although this may vary with the issue and judicial style of the time.

A second, more important, reason for stressing such questions arises from the role of the judiciary as an equilibrium maintaining mechanism in the society. This view of political institutions was clearly developed in the works of Dicey and Durkheim. Both felt that government served to enunciate norms which could bring unity to the society. Dicey thought

that this could be done as a reflection of public opinion, and that the emergence of an articulate public consensus was in the evolutionary cards. This led him to think that the problem of government would increasingly consist of making government more responsive to a relatively unified "public opinion." Durkheim's evolutionary analysis led him in the opposite direction. He projected an increasingly heterogeneous society in which it would become the task of government creatively to enunciate a normative consensus. These two models are represented in contemporary models of judicial systems. Dahl leans toward the Dicey view, stressing the extent to which the Supreme Court conforms to public opinion, as sifted and consolidated, to be sure, by Congress and the Administration. Dworkin and Bickel, on the other hand, stress the consensus *creating* function of the courts. Behind all these analyses lie the questions of how, whether, and to what extent the apparatus of law–government seems to provide for social order and adaptation while retaining the support of the society.

Research in judicial behavior should be able to tell us a good deal about this subject. Each of Cardozo's methods can contribute to the equilibrium maintaining functions of the judiciary. Precedent is endogenous in the judicial system and provides a basis for maintaining the predictability of that system. When change is needed, the legislature can become a major device through which the social consensus is hammered out and expressed. To interpret and refine statutes, Cardozo's method of logic may be most valuable. In certain spheres, both common law and statutory construction admit considerations of prevailing practice or belief, i.e., Cardozo's method of custom. Fully developed, this method could become a means whereby judicial decision draws directly on the sentiments of society. Finally, the judge may look forward to some consequences he wishes to achieve in the instant case or through policy innovation.

Each of these methods, then, seems to point toward a source capable of shaping judicial decision. The sources may vary with the judge, the problem, and the era. But if the differential use of these methods is highly related to source and if source affects content, then the analysis of judicial method should help us to understand the content that enters into judicial decision and how that content is transformed into decisions. Clearly many other elements will enter in the determination of decisions, but an analysis of the decision-making methods consciously employed by the judges themselves would seem a good focus for the next stage of judicial behavior research.

Ultimately, our goal should be to analyze not only the method of judicial decision, but also its impact. Considerable progress on this problem has been made by scholars working independently of those in judicial behavior. It is encouraging to see that the latter group is now turning to this topic. When each of these approaches has developed further, we may be able to put them together into one system of analysis that will tell us how decisions derived from various sources and interests in the society affect the society and how those effects in turn influence the sources and interests from which the decisions are derived. A crucial part of that analysis is certain to consist of a better understanding of judicial behavior. That can only be accomplished, however, if judicial behavior is studied in light of its place in the larger system. The Shambaugh Conference indicates the potential for a move in that direction.

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