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The Puzzle of Judicial Behavior

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I owe the greatest debts to two people. Over the last several years, discussions with David Klein have sharpened my thinking about difficult issues in judicial behavior. Dave also gave me careful and insightful comments on two drafts of the book. Those discussions and comments have made a great deal of difference for the book.

Carol Mock offered very helpful comments on drafts of the book. More important, she did a great deal to help me recognize and think through theoretical and methodological issues that are discussed in the book. It would have been very difficult to take on this project without that help.

It is more important than usual to absolve all these people of responsibility for remaining limitations in the book. In addressing a subject of this broad scope, it is impossible to take all the relevant scholarship fully and properly into account or to address adequately all facets of the issues that are considered. Whatever may be the book's deficiencies, however, they are far more limited than they would have been without the extraordinary assistance that I have received. I am very grateful for that assistance.

CHAPTER 1

General Perspectives

Harold Baer, a federal district judge in New York City, ruled that the cocaine seized from a car was inadmissible as evidence against a criminal defendant. The decision and Baer himself were attacked by everyone from editorial writers to the president. Though he was protected by a life term, Baer retreated and reversed his decision (Goshko and Reckler 1996). James Heiple, a justice on the Illinois Supreme Court, wrote his court's opinion in a child custody dispute. The decision aroused strong opposition: a Chicago newspaper columnist attacked Heiple and the court in a number of columns, and the state legislature and governor tried to undo the decision. Potentially vulnerable to defeat in a retention election, Heiple nonetheless adhered to his position in the case after a rehearing and wrote an opinion lashing out at his critics (*Petition of Doe* 1994).

Felix Frankfurter and William O. Douglas were among the most brilliant people to sit on the Supreme Court, yet neither had great influence on his colleagues. Frankfurter expected to be a leader of the Court, but instead he alienated several other justices (Hirsch 1981). Douglas seemed to be ambivalent about trying to win support from his colleagues, and he ultimately occupied a peripheral position on the Court (J. Simon 1990). William Brennan did not have a reputation for brilliance, but he achieved an extraordinary degree of influence over the Court's collective choices (Eisler 1993).

Judges dislike reversal of their decisions by higher courts, and they often exert considerable effort to avoid reversal. But a federal district judge in Alabama virtually demanded reversal by declaring that the Supreme Court was wrong in its constitutional position on school religious observances (*Jaffree v. Board of School Commissioners* 1983). And over several years, the federal court of appeals for the Ninth Circuit on the West Coast suffered an unusual number of reversals because its judges adopted doctrinal positions that conflicted with the Supreme Court's conservative leanings (Maher 1985; Bishop 1992).

Political scientists who study courts examine the behavior of people in many roles. Among the subjects of their research are individuals who consider whether to file lawsuits and administrators who respond to court decisions. But the primary concern of their work is judges, and the issue that they study the most is explanation of judicial behavior.

In part, this intense interest in judicial behavior simply reflects the importance of judges. Another reason for this interest is that questions about judicial behavior are both difficult and intriguing; for instance, when do judges yield to outside pressures, what determines their influence within a court, under what conditions do they work hardest to avoid appellate reversal? Judicial behavior presents a complex puzzle, and generations of scholars have found it satisfying to work on that puzzle.

This book is an assessment of progress toward explanation of judicial behavior. I think this is a particularly good time for such an assessment. We are now in a period of great achievement in research on judicial behavior, one in which scholars are doing much to illuminate major issues. Both the findings that result from this new wave of research and its innovative approaches to the analysis of judicial behavior merit careful consideration.

At the outset, I should be explicit about the behavior to be explained. The book deals solely with judges in the United States. That restriction reflects the concentration of scholarship on the United States as well as a need to keep the book's scope manageable. In other respects its scope is broad, encompassing all judges who serve in the judicial branch and thus all courts.

The term *judicial behavior* refers to what judges do as judges, leaving aside other activities such as speech making and presidential advising. Antonin Scalia's off-the-bench statements about his religious views may provide insights on the sources of some of his doctrinal positions (Biskupic 1996), and Abe Fortas's consultation with President Johnson may have affected what he did on the Court (Kalman 1990), so both should be taken into account. But I am not concerned with explanation of these types of "nonjudicial" behavior in themselves.

The most consequential forms of judicial behavior typically consist of decisions or contributions to decisions. Decisional behavior can be defined broadly to include preliminary actions such as setting bail and determining whether to hold oral argument in a case. In final decisions it includes both the determination of outcomes for the litigants and the pronouncement of legal doctrine. Some kinds of behavior that might not be considered decision making, such as presiding over trials and interacting with colleagues, also constitute judicial behavior.

Four themes are central to the book. First, I begin with the premise that full explanation goes well beyond successful prediction, that it reaches fundamental sources of behavior. Thus I think that it is necessary to set a high standard for explanation of judicial behavior.

Second, I conclude that even by a more lenient standard, our progress toward explanation of judicial behavior has been limited: what we do not know stands out more than what we do know. Research has told us a good deal about the sources of judicial behavior, but the major issues in the field remain unresolved. That lack of resolution is obvious on issues that are the subject of active debate among scholars. It is less obvious but also true of issues on which there is a degree of consensus.

Third, I believe that this limited progress results only in small part from weaknesses of research in the field and that its primary source is inherent difficulties of explanation. Certainly there are theoretical and methodological shortcomings in the scholarship on judicial behavior, and those shortcomings have an impact on the state of knowledge. But that impact is overshadowed by the fundamental problems involved in explaining the behavior of any set of people, problems that bedevil scholars in every field.

Largely because of this belief about the difficulty of explanation, the book is written as an assessment of the state of knowledge about judicial behavior rather than as a critique of the scholarly research on that behavior. Certainly such critiques are useful, but even research that met the highest standards would still confront the difficulty of explaining judges' choices. For that reason, it is less useful for my purposes to measure scholars' work against those standards than to consider more broadly what it does and does not establish.

Finally, I argue that progress toward greater knowledge will come most quickly if research is diverse—in theory, in method of inquiry, and in subject matter. Like other scholarly pursuits, the study of judicial behavior has always had participants who believe that all research should follow a particular mode. Such beliefs are understandable, but I think they are mistaken: the difficulties of explanation can be attacked most successfully by research that takes differing approaches and forms.

Consistent with this last theme, the book does not advocate a

particular theory of judicial behavior or a particular approach to its analysis. If there is a single best way of studying judicial behavior, I do not know what it is. Even if I thought I knew that way, I would hesitate to champion it, because I think that the field profits from a lack of consensus about what to study and how to study it. Thus I limit myself to suggesting some directions for research that I see as useful.

The five chapters of the book fall into three parts. First, this chapter addresses some introductory matters. I begin by discussing my perspective on explanation, taking up the book's first theme on the requisites of full explanation. The following section discusses the task of assessing the state of knowledge on a matter such as judicial behavior. The final section lays out a framework for consideration of the issues in the field, one centered on the goals that judges hold and seek to advance.

The next three chapters use this framework to consider three major issues in the explanation of judicial behavior. In these chapters I bring out the book's second theme, our limited progress in explanation. The issue for chapter 2 is the relative importance of judges' concern with the content of legal policy[1] and of other kinds of goals such as maintaining their positions or minimizing their work loads. Insofar as judges are concerned with the content of legal policy, the most contentious issue in the field has been the balance between their interest in good law and their interest in good policy. That issue is the subject of chapter 3. In chapter 4 I turn to the question of how judges seek to advance their goals, specifically to another issue that has become increasingly important: to what extent do policy-oriented judges act strategically[2] to achieve good policy?

Chapter 5 pulls together the implications of the analyses in chapters 2 through 4. I begin by summarizing what I see as the field's limited progress in explanation. I then turn to the third theme, the inherent difficulties of explaining political behavior. The remainder of the chapter focuses on the final theme, the one

1. As I use them, the terms *content of legal policy* and *legal policy* refer to the substance of a court's decisions and, in some contexts, the decisions that other institutions make on the same issues. As discussed later in the chapter, a judge who is motivated by an interest in legal policy cares about the substance of decisions for their own sake, whether as law or as public policy.

2. The meaning of strategic behavior is discussed in chapter 4. In general terms, following the definition used in that chapter, strategic judges do not simply take positions consistent with their preferences. Rather, in voting and other contexts they act in ways intended to bring about collective results that advance their preferred positions.

with the most direct implications for future research: the value of diversity in the study of judicial behavior.

A Perspective on Explanation

Richard Braithwaite (1953, 348–49) wrote that "an explanation . . . is an answer to a 'Why?' question which gives some intellectual satisfaction." I agree with that definition, one that allows for the whole range of scholarly approaches to explanation (E. Nagel 1961; C. Taylor 1964; Elster 1983a; Salmon 1990).

The book's first theme does indicate an important preference: I believe that full explanation goes beyond successful prediction to identify the fundamental sources of behavior. That belief is not universal. One important body of thought closely equates explanation and prediction (Hempel and Oppenheim 1948). That equation is widely accepted among economists and other social scientists whose scholarship reflects an economic perspective (M. Friedman 1953). In the study of courts, as in other fields of political science, it is common for scholars implicitly to treat predictive success as equivalent to good explanation. That position was made explicit in work by two leading students of judicial behavior (Schubert 1963b; Spaeth 1979, 140).

I disagree with the equation of explanation and prediction on two grounds (see Elster 1989, 8–10). First, I do not think that predictive accuracy is a requisite to good explanation. In Braithwaite's terms, not all satisfying answers to "why" questions take a form suitable for successful prediction. Stephen Jay Gould (1989) argued in his account of the evolution of species that even with a full comprehension of the laws that drive the world, we may not be able to predict the course of events in the long term. The source of the inability to predict, in his view, is contingencies in the operation of those laws.

I find Gould convincing on this point. To take an example of slightly lesser import than the existence of our species, scholars who fully understood the forces driving Supreme Court policy could not necessarily have predicted the emergence of the Warren Court (Baum 1992). Yet an understanding of those forces would provide the basis for a very good explanation of the Court's collective behavior.

Second, explanations that produce high predictive accuracy in the short term or in a limited sense are not always satisfying (Kavka 1991, 381). For one thing, such explanations may be

incomplete. In his book *Judicial Behavior* (1964a), as elsewhere, Glendon Schubert argued for the centrality of prediction to science (4). But he also pointed out that "even if we could complete a perfect description *and prediction* of judicial decision-making on the basis of individual judicial attitudes, we still would be left with the question: what explains judicial attitudes?" (446; emphasis in original). We would also be left with a second question: what accounts for the dominance of judicial attitudes as the basis for judicial behavior?

Another reason not to be fully satisfied with predictive accuracy is the theoretical ambiguity of behavior. One student of Congress (Ferejohn 1995, ix) noted that "[v]ery different theories of legislatures can have quite similar observational consequences in a wide range of settings." In doing so he pointed to a broader truth: patterns of behavior in a particular setting often are basically consistent with many different explanations. To accept an explanation on the basis of predictive success and thus to terminate the search for other explanations may be myopic.

The book reflects my views about criteria for good explanation in two ways. First, I look for alternative explanations even when a particular explanation seems to account for a pattern of behavior fairly well. One result is that in chapters 2 through 4, I emphasize readings of empirical evidence that depart from the most widely accepted interpretations of that evidence. Second, I favor explanations that get as close as possible to the fundamental sources of behavior. If the policies of a particular court track trends in public opinion, does that relationship reflect judges' interest in following public opinion rather than some other mechanism? And if judges seek to follow public opinion, why?

Two other issues concerning explanation should be considered. One is the trade-off between comprehensiveness and coherence. The question is whether scholars should prefer explanations that account for more behavior at the cost of greater complexity.

My general preference is for coherence. Relatively simple models that account for a large share of the behavior in question have one of the qualities that make explanations satisfying, that give them "beauty" (Lave and March 1975, 61–64). Their beauty lies largely in their clarity.

Clarity is a hallmark of a widely accepted explanation of judicial behavior, the "attitudinal" model in which the behavior of Supreme Court justices in some contexts directly reflects their attitudes toward policy issues. The same quality characterizes the

increasingly prominent rational choice models of judging, models that posit strategic behavior by judges on behalf of their policy goals or other ends. Largely because of their coherence, both types of explanation have proved valuable in the understanding of judicial behavior.

Despite my preference for coherence, the book gives greater emphasis to comprehensiveness. If knowledge is to grow further, it is important to identify the gaps in existing explanations. One benefit of the clarity in attitudinal and rational choice models of judicial behavior is that it helps in identifying their limitations and thus assists in further development of explanations; I want to take advantage of that benefit. This aspect of my approach, like my interest in probing alternative and deeper explanations, exacts a cost from readers: the discussions of various issues will be more complicated than they might be. I think, however, that this cost is justified.

A final issue in explanation concerns the level of analysis. Judges make their choices within groups. Even trial judges, who usually decide cases as individuals, interact with attorneys and other people in courtroom "workgroups" (Eisenstein and Jacob 1977) or "courthouse communities" (Nardulli, Eisenstein, and Flemming 1988). Of course, appellate judges typically reach collective decisions within groups of three or more.

In such situations, analysis could focus either on the individual or on the group. Psychologists and economists typically prefer individual-level analysis, while sociologists give emphasis to groups as well as individuals (Alexander, Giesen, Münch, and Smelser 1987). Students of judicial behavior generally focus on individual judges, building explanations of collective choices from the individual level.

My own appraisal of issues in the field is primarily at the individual level. In part, this choice simply reflects the orientation of research in the field. It also stems from the relative ease of analyzing behavior at the individual level, though this advantage should not be exaggerated (Mock 1988).

But group elements of behavior cannot be ignored, because the choices of individual judges are affected by their membership in larger decision-making groups. Explanations of Supreme Court behavior that treat the justices basically as isolated individuals can be quite useful. But no complete explanation of the justices' behavior could leave aside their interactions with colleagues on the Court.

Also important is the aggregation of individual choices into group decisions. Scholars with an economic perspective have told us a good deal about this aggregation process in general (Sen 1970; T. Schwartz 1987) and, increasingly, about its impact on court decisions (Rogers 1990–91; Kornhauser and Sager 1993). Because my concern is with judges' behavior rather than with court decisions, the book considers these processes only to the extent that judges themselves take them into account. An example is the Supreme Court's requirement of four positive votes to accept a case for decision on the merits (see B. Palmer 1995). The "rule of four" helps determine which cases the Court accepts, and in itself that effect is beyond the scope of the book's concerns. However, a justice may take this effect into account in voting whether to hear a case, and *that* consequence of the rule must be considered.

Assessing What We Know

Scholars often undertake "reviews of the literature" with little explicit consideration of methods for weighing and aggregating empirical findings. But some scholars have thought systematically about how to assess the state of knowledge on an issue (Light and Pillemer 1984), and they have underlined the need to consider methods of assessment. Their work and other scholarship also point to characteristics of published research that complicate the task of assessment.

One relevant characteristic of research is obvious: it is imperfect. In quantitative analysis, models are underspecified, indicators measure variables only in part, and statistical methods do not fully match analytic tasks.[3] While the extent of these imperfections may differ from one field of research to another, the critical point is that no field is immune to them.

A second characteristic is the role of interpretation in the research process. Kritzer (1996) showed with particular clarity that interpretation is as integral to quantitative analysis as it is to qualitative research (see also Leamer 1978). Data do not announce their own implications; rather, what scholars infer from their data is based on their own management and reading of those data.

Readers of research reports may have great difficulty in discerning imperfections in research and ambiguities of interpretation. For one thing, the authors of studies often are unaware of them (see Mock and Weisberg 1992). Just as important, the requisites of publication reduce the likelihood that imperfections and ambiguities will be disclosed. Of course, authors prefer to highlight the strengths of their work and to minimize or even ignore its shortcomings; articles that dwell on the weakness of their methods or the fragility of their findings are not abundant. Similarly, to describe the complicated process of interpretation that preceded the analysis presented in a paper would detract from the crispness of presentation and might raise doubts about the robustness of findings. Further, the preference of editors and reviewers for statistically significant findings leads to the "file-drawer problem" in which nonsignificant results tend to remain in researchers' offices and the results actually reported in published studies of an issue are unrepresentative (R. Rosenthal 1979; M. Smith 1980; Dickersin et al. 1987).[4]

How should a reviewer take into account the imperfections and ambiguities of empirical research, particularly those that cannot readily be discerned? One possible stance is general suspicion of empirical research: "Hardly anyone takes data analyses seriously. Or perhaps more accurately, hardly anyone takes anyone else's data analyses seriously" (Leamer 1983, 37).[5] A variant is the position of skeptical Bayesians, who give little weight to findings that diverge from their prior expectations (see Bergmann 1987, 192). But blanket suspicion seems unjustified, and skeptical Bayesians may cling to their own prior beliefs more than is appropriate (Nisbett and Ross 1980).

An alternative approach is simply to accept the validity of empirical findings, on the assumption that they are more accurate than inaccurate and with the hope that one study of an issue will correct for the weaknesses of another. This is a common approach in practice, but it underestimates the impact of the imperfections and ambiguities I have discussed. Further, it probably assumes a greater degree of self-correction in scholarly fields than actually

3. In this section I focus on quantitative research, but analogous processes and problems exist in qualitative research (Kirk and Miller 1986; G. King, Keohane, and Verba 1994).

4. On this preference, see Greenwald 1975 and Coursol and Wagner 1986. One scholar (Feige 1975) actually estimated the monetary payoff in lifetime salary of producing statistically significant results in a journal submission. On the impact of this preference on research, see Selvin and Stuart 1966; Mayer 1975; David Freedman 1983; and Mock and Weisberg 1992.

5. This quotation is from an article entitled "Let's Take the Con out of Econometrics." The article is part of a small body of provocative literature on problems in the research and publication processes. Other titles in this literature include "Data Mining" (Lovell 1983), "Are All Economic Hypotheses False?" (De Long and Lang 1992), and "Econometrics—Alchemy or Science?" (Hendry 1980) (see also Leamer 1974; Bergmann 1987). As the titles indicate, economists have contributed heavily and enthusiastically to this literature.

exists—at least in fields such as judicial politics, where research is scattered across a large domain.

The difficulty of the reviewer's task is compounded by the need to aggregate the findings of different studies. How should contradictory findings be reconciled, and how should one's varying degrees of confidence in differing studies be taken into account? Scholars have developed techniques for combining and analyzing findings on an issue under the rubric of *meta-analysis* (Hedges and Olkin 1985; R. Rosenthal 1991). In the process, judgments about the differential quality of studies can be taken into account. It is even possible to take into account the bias favoring statistical significance, allowing the reviewer to estimate the magnitude of the file-drawer problem and to correct for its impact (Iyengar and Greenhouse 1988).

I can describe my own stance in light of this background. I think there is good reason for a degree of skepticism in reading the findings of published studies. But this hardly means that empirical findings should be dismissed altogether. Nor does it mean that all studies should be given equal weight. If it is impossible to assess any study with complete confidence, there is often good reason to accord more weight to one than to another.

The more studies of an issue, the better. No single study, no matter how skillfully it is carried out, should be regarded as the definitive treatment of a question. Similar findings from multiple studies can be accorded more confidence. However, studies based on the same theoretical orientations, types of data, and analytic strategies tend to share the same limitations. Where studies differ in these respects, they are far more likely to compensate for each other's limitations.

In considering the empirical evidence on various issues, I do not use the formal techniques of meta-analysis. One reason is that in the explanation of judicial behavior, there usually is too small a body of findings on a particular question to make those techniques applicable. Further, findings often are presented in forms that are not amenable to meta-analysis.

More important, my primary concern is not with empirical findings in themselves but with their broader theoretical implications, a quite different matter that is beyond the scope of meta-analysis (R. Rosenthal 1991, 13).[6] Of course, this is an enterprise

6. Like any other reviewer, of course, I need to consider the findings of single and multiple studies in their own terms. In this task, the insights of scholars concerned with reviewing research, including those who undertake meta-analysis, are helpful.

that necessarily involves a good deal of subjectivity. I am confident that readers will bring to my assessments the skepticism that is appropriate for anyone with the temerity to assess the results of a large body of scholarly research.[7]

A Framework for Analysis

Assessment of a body of knowledge is facilitated by an explicit framework of analysis. The framework that I use in this book is built around the concept of goals, the ends that people seek to realize (Pervin 1983, 10).[8]

I chose a goal-based framework for two reasons. First, it encompasses rather well the major issues in the scholarship on judicial behavior. Research on judicial behavior most often is framed as an effort to identify the determinants of judges' choices (see Gibson 1983). But underlying the specific determinants that scholars consider are questions—usually implicit—about what judges seek to achieve and how they go about trying to achieve it. If caseload pressures affect actions by trial judges, if the Supreme Court responds favorably to the federal government as a litigant, that behavior can be traced back to judges' goals. Moreover, some of the most significant research on judicial behavior has begun with explicit premises about the identity of judges' goals and then examined the relationship between goals and decisional behavior (W. Murphy 1964; Rohde and Spaeth 1976; Segal and Spaeth 1993). Indeed, the link between goals and action is central to rational choice analysis of judicial behavior.

The second reason for use of a goal-based framework is its analytic value. Such a framework requires systematic consideration of what people are trying to accomplish and directs attention to the processes that determine their goal orientations. Further, it leads to examination of the ways that goals are put into action and

7. In any case, readers have available to them other assessments of the state of knowledge about judicial behavior. Gibson 1983 provided an extensive and insightful analysis of the judicial behavior research. More recently, Jacob 1991 and Gibson 1991 analyzed the research on judicial behavior in trial and appellate courts, respectively. For broader analyses of scholarship on judicial politics, see Pritchett 1968, 1969; Grossman and Tanenhaus 1969; Murphy and Tanenhaus 1972; Sheldon 1974; Baum 1983; Gibson 1986; Slotnick 1991; Gates and Johnson 1991; Shapiro 1993; and Hensley and Kuersten 1995.

8. Goals are related to motives and incentives (Loomis 1994, 343–44). I think that the concept of goals is particularly useful for purposes of the book, but that is not a strong preference, and I sometimes use the terms *motives* and *motivations* as synonyms for goals.

thus of the processes through which people make choices. Because of these virtues, explanations of behavior based on the goals of legislators have proved quite useful (Fenno 1973; Mayhew 1974; J. Hansen 1991; Parker 1992; see Rieselbach 1992; Loomis 1994; Shepsle and Weingast 1995). The same is true of goal-based analyses of judges (W. Murphy 1964; Rohde and Spaeth 1976; Toma 1991; Mark Cohen 1992; Ferejohn and Weingast 1992b; Segal and Spaeth 1993).

A framework that begins with individual goals represents a particular approach to explanation (see E. Nagel 1961; Boden 1972). Explanations built on goals carry with them the assumption that the behavior in question is goal-oriented to at least a significant degree. Some scholars have expressed doubts about the centrality of goals to human behavior, either in certain contexts or more generally (Michael Cohen, March, and Olsen, 1972; Eckstein 1991; Johnston 1991; see Rowland and Carp 1996, 158).

The doubts that these scholars express are quite important. But it should be underlined how little a goal-based framework requires in assumptions about human behavior. Such a framework can be used so long as we assume that people do have goals and that they make efforts to advance those goals.[9] Those assumptions would be accepted by at least some scholars who question the centrality of goals to behavior. Their concerns are largely about people's capacities to act in ways that advance their goals, questions that can be addressed within a goal-based framework. Thus most psychologists doubt that individuals can consistently identify the actions that would maximize achievement of their goals, but psychologists often treat goals as important or even central to behavior (Graham, Argyle, and Furnham 1980; Ajzen 1985; Frese and Sabini 1985; Pervin 1989; Fiske 1993). Indeed, psychologists have contributed much to an understanding of the complexities of goal-based behavior (e.g., Pervin 1983).

9. There is disagreement about whether goal-directed behavior must be conscious or intentional (G. Becker 1976, 7; Posner 1986, 3–4; Lewis 1990; Bargh 1990; Bohman 1992, 216–17). I think it makes sense to treat as goal-directed not only those actions that are quite consciously aimed at particular goals but also actions taken "semiconsciously" in furtherance of such goals. Much of what judges do to enhance their standing with people who are important to them can be considered semiconscious. Judges may do various things to win the favor of legal scholars, for instance, without fully recognizing that this is what they are trying to accomplish. The same might be said of judges' efforts to advance their policy goals. It is likely that some judges act on their policy preferences without fully recognizing that basis for their choices; this is one implication of the theory of motivated reasoning, discussed in chapter 3 (see Rowland and Carp 1996, 164–69). It would be unduly restrictive, I think, not to treat such behavior as goal-directed.

In any case, I do not argue that goals are the only lens through which judicial behavior can be analyzed effectively. Such an argument would run contrary to both my view that behavior can be explained in many ways and my emphasis on the value of diversity in research. And the goal-based framework used in this book is sufficiently open that readers who prefer different frameworks or perspectives should find it easy to put the book's discussions of judicial behavior research in those other terms.

One other proviso is appropriate. Although most research on judicial behavior fits comfortably within the book's framework, by no means is all that research directly concerned with identification of judges' goals and their impact on judicial behavior. It would be pointless to evaluate a body of scholarship on the basis of what it tells us about judges' goals when much of that scholarship has a quite different purpose. Rather, the task is to assess the state of knowledge on judicial behavior from the vantage point of goals.

The Framework

Figure 1.1 depicts the book's general framework. The first column reflects the truism that individuals have sets of goals that they would like to achieve, what may be called *inherent* goals. Different people have different inherent goal orientations: sets of goals and priorities among them. In turn, these orientations reflect all the influences that shape individuals.[10]

Recruitment processes bring a sample of the general population to courts and smaller samples to specific levels and types of courts. Thus the set of judges who serve on all courts and those subsets who sit on particular courts have their own mixes of goal orientations. While those orientations might be representative of the population as a whole, recruitment processes almost certainly are selective in this respect (as they are in others). Judges as a single group are unrepresentative of the general population, and subsets of judges may differ from each other. We would not necessarily

10. Scholars disagree about the need to investigate the sources of people's goals and the processes that determine them (H. Simon 1983, 14; Schwarz and Thompson 1990, 49–51; Bohman 1991, 69). I think that a full comprehension of people's behavior requires an understanding of these sources and processes. However, I address this set of issues only in some limited ways. One reason is theoretical: if there is a wide range of goal orientations in the general population, the determinants of this range of orientations are less important than the processes that bring one mix of orientations to the courts rather than another. The other reason is that this is a matter that the scholarship on judicial behavior barely touches.

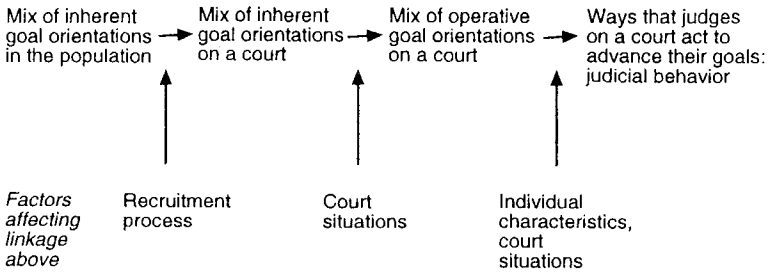

Fig. 1.1. A framework for analysis of judicial behavior. (Terminology is explained in the text.)

expect those judges who sit on municipal courts and those on federal courts of appeals to have the same mixes of goal orientations.

Of the various inherent goals that individual judges hold, some may be irrelevant to their work as judges. Further, the relative importance of those that are relevant may differ between the judicial arena and a judge's life as a whole. The sets of goals that actually affect the judicial behavior of judges can be termed *operative,* and judges' operative goal orientations are based on that set of goals and their relative importance to judges in the judicial arena.

The translation of inherent into operative goal orientations is a product of the court situations in which judges work. By *situation* I mean both the institutional arrangements emphasized by rational choice theorists (e.g., Shepsle 1979; Krehbiel 1987) and any other characteristics of courts in general, or of particular courts, that affect the relevance of judges' goals.[11] Richard Epstein (1990) argued that characteristics of the judiciary as a whole render a wide range of self-interested motives irrelevant to the decision process. In contrast,

> Whenever judges appear at conferences, serve on committees, teach in law schools, or sit on boards, they act pretty much the way the rest of us do, because they no longer labor under the distinctive set of incentives that apply to their case work. (R. Epstein 1990, 844)

11. This usage of the term *situation* is common in psychological research (e.g., L. Ross and Nisbett 1991; Fiske and Taylor 1991, 5). For the most part judges' situations are exogenous, beyond their control, but judges sometimes can shape their own situations. One example is the Supreme Court's successful lobbying over time for increased control over its jurisdiction, control that transformed the Court as an institution.

Whether or not one agrees with Epstein's conclusion, it underlines the distinction between inherent and operative goals. Characteristics of courts such as length of tenure in office, extent of review by higher courts, and control over the agenda influence how inherent goal orientations translate into operative orientations.

The final linkage is from operative goals to judicial behavior. How judges act on their goals and how well their actions serve those goals depend in part on their characteristics as individuals. For instance, the effort that judges devote to persuasion of colleagues reflects their level of comfort with that kind of personal interaction, and the success of such efforts depends in part on judges' ability to identify and carry out effective means of persuasion.

Characteristics of court situations also affect this linkage. Supreme Court chief justice John Marshall (1801–35) had an excellent opportunity to use his persuasive skills on colleagues with whom he lived during court sittings (Beveridge 1919, 86–88), and this opportunity undoubtedly encouraged him to employ those skills on behalf of his policy goals. He would have been in a far weaker position as chief judge of a court whose members come together occasionally and in constantly shifting panels, like some current federal courts of appeals. Other characteristics of a court such as the volume and composition of its agenda may also affect the ways that judges act on their goals.

A judge's goals and means of carrying them out might change over time. While some scholars argue that individual goals are highly stable (Stigler and Becker 1977), others emphasize the possibility of change (von Weizsäcker 1971; R. Frank 1987; R. Smith 1988). Even change in the specific content of judges' goals, such as their policy preferences, may have considerable effect on their choices (see S. Ulmer 1973a; Segal 1985; L. Epstein et al. 1995). A judge's experience in the job or modification of a judge's situation may bring about change of a more fundamental sort, in the relative importance of different goals (see Alpert, Atkins, and Ziller 1979). A trial judge who struggles with a flood of cases may come to care less about interpreting the law well and more about coping with the work load.[12] Similarly, judges might change the ways in which they put their goals in practice. Learning from colleagues, an appellate judge may become increasingly strategic in acting on a set of policy goals. Even if stability of goals and means is the general rule, change cannot be ignored.

12. Dodd's (1986) discussion of congressional careers suggests the possibility that judges' goal orientations might evolve in a systematic way during their careers on the bench.

The Goals

But what are the goals that judges might hold and act on? Goals may be conceptualized at different levels of abstraction and proximity to judges' choices. We might conceive of goals in terms of the fundamental needs and motives identified by psychologists and other scholars (Murray 1938; J. Atkinson 1958; Maslow 1970; Winter 1973). Some typologies of such needs and motives have been applied in useful ways to public officials (Barber 1965; Payne and Woshinsky 1972; Payne et al. 1984; Hermann 1988), including judges (Caldeira 1977; Sarat 1977; Aliotta 1988). In contrast, scholars often identify quite concrete goals for public officials, goals that are fairly proximate to the specific choices they face (W. Murphy 1964; Mayhew 1974; Niskanen 1994).

For analysis of behavior within a goal-based framework, it is useful to focus primarily on goals that are at least moderately concrete and proximate.[13] Table 1.1 presents a typology of such goals that might be operative in judges' behavior as judges. The typology is neither comprehensive nor theoretically coherent. Rather, it is intended to set out a broad range of goals to consider in thinking about judicial behavior. The labels for specific goals and categories of goals in the table generally are used in the chapters that follow.

The various goals listed in the table are not entirely distinct from each other. For judges, as for other people, different goals often are linked as ends and means (see Boden 1972, 158–89). For instance, a judge may seek popularity in the community as a means to maximize the chances of re-election. In turn, interest in re-election may stem from an interest in maintaining the income of a judgeship. It would not be difficult to construct a variety of similar chains among goals listed in the table. These chains may extend to very distal and nonconcrete goals such as self-esteem (see Beach 1985, 124). (I use the term *distal* to mean nonproximate.)

The existence of these chains complicates analysis of judges' goal orientations. Most students of judicial behavior have minimized these complications by focusing on the goals that are most directly connected with judges' behavior and ignoring those that underlie these proximate goals. This approach is a reasonable one, because the most proximate goals often provide a quite sufficient

13. As discussed later in this section, however, more abstract and distal goals sometimes should be taken into account. The role of such goals in law- and policy-oriented behavior is considered in chapters 3 and 4.

TABLE 1.1. A Partial Typology of Possible Goals for Judges

I.	*Content of Legal Policy*
	Accurate interpretation of the law ("legal accuracy")
	Clear and consistent interpretation of the law ("legal clarity")
	Good policy as gauged by the judge's policy preferences ("good policy")
II.	*Personal Standing with Court Audiences*
	Popularity and respect in the legal community
	Popularity and respect in the community as a whole
	Power outside the court
III.	*Career*
	Continued tenure in the current judicial position
	Promotion to a higher court
	Securing attractive nonjudicial positions
IV.	*Life on the Court*
	Good relations with other judges and with participants in the courts who have other positions
	Power within the court
	Limited work loads
	Court resources
V.	*Standard of Living*
	Personal income
	Personal comfort

basis for analysis.[14] We may learn what we want to know about a trial judge by determining that the judge's highest priority is popularity in the community without identifying the deeper motivational bases for this priority.

Yet more distal goals may be critical to judges' behavior. The judge who seeks popularity in order to win re-election and ultimately to maintain a good income may behave in a way that is most consistent with the last goal. If a four-year term is converted into a life term, the judge's decisions might no longer reflect public opinion. If the judge perceives a good opportunity to achieve a higher-paying position in corporate law, the judge's decisions might now be aimed at pleasing the business community rather than the general public. In such circumstances, analysis that focused only on the interest in community approval would be incomplete. To take a different kind of example, whether judges act on their policy goals sincerely or strategically may depend on

14. Focusing on proximate goals also avoids the prospect of what Riker (1995, 40) called "infinite regress."

the more fundamental motivations that underlie the policy goals. For that reason, analysis of goal-oriented behavior sometimes must extend to such motivations.

Links between goals can go in multiple directions. If judges care solely about good policy, and if they act strategically to achieve it, other goals that may appear to be proximate to judges' choices (such as popularity in the community and good relations with colleagues) are actually means to advance policy goals (see W. Murphy 1964). This example also highlights the difficulty of identifying judicial motivations through empirical analysis: what one observer perceives as an interest in harmony with fellow judges for its own sake looks to another like a means to advance a policy agenda.

The list of goals in table 1.1 underlines a distinction between the framework sketched in this section and some other goal-based formulations. Gibson (1983, 9) suggested that "judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do." Knight and Epstein (1996a, 1021) viewed precedent "as a constraint on justices acting on their policy preferences." These formulations make a distinction between goals and constraints.[15] Further, they explicitly or implicitly treat as constraints a large share of the goals in the table, such as legal coherence and respect in the community.

These formulations provide useful ways of thinking about judicial behavior. But it is more useful for the purposes of this book to analyze all the forces on judges' behavior in terms of goals. After all, constraints would not be constraints if they did not have a basis in judges' goals. Judges who take public opinion into account when they decide cases do so either because they care about public approval for its own sake or because attention to public opinion assists them in achieving another goal. Thinking about the various elements in a judge's calculus in terms of their goals helps in understanding how those elements interrelate in shaping judges' behavior.

Moreover, the Gibson and Knight–Epstein formulations assume the primacy of policy goals: judges would simply follow their vision of good policy if they were not faced with constraints.

15. Gibson (1983, 17) refers to role conceptions ("what they think they ought to do") as institutional constraints.

That assumption may be accurate, but what we know about judicial behavior is most effectively assessed if judges' goal orientations are treated as an open question. Until evidence establishes otherwise, we should not dismiss the possibility that judges seek legal coherence for its own sake or that respect in the legal community outweighs policy goals for some judges.

Identifying Goals

Central to the analytic scheme in figure 1.1, and important for the understanding of judicial behavior from most perspectives, is the content of judges' operative goal orientations. Two general methods have been used to identify the goals of judges and other public officials. The first is to draw data from expressions by those officials. Caldeira (1977) and Sarat (1977) used interviews to gather information about the incentives of trial judges, and many other scholars have interviewed or surveyed judges to help understand their behavior (e.g., Glick 1971; Ryan et al. 1980; Howard 1981; Perry 1991). Psychologists who study political leaders often seek to identify their motivations by analyzing expressions in the public record (e.g., Winter and Carlson 1988). Aliotta (1988) took this approach, employing the testimony of Supreme Court nominees before the Senate Judiciary Committee.

Of course, it is quite common to utilize judges' nonpublic writing, such as diaries and correspondence, as a source of information about the reasons for their behavior. This is standard procedure in biographies (e.g., Hirsch 1981; Yarbrough 1992). Such writing was also an important data source for Walter Murphy's (1964) pioneering analysis of policy goals as foundations of Supreme Court behavior.

Judges' expressions can tell us a great deal (see Rowland and Carp 1996, 146–47), but they need to be interpreted with care (see Marvell 1978, 9–13, 106–16). Judges usually speak and write with audiences in mind, and they ordinarily present themselves in a way that they think will be received favorably. Further, they do not always understand their goals fully, and they may mislead themselves as well as their audiences. For both reasons, to take one important example, scholars have been appropriately skeptical about statements by Supreme Court justices that their only goal is to interpret the law accurately (Spaeth 1995, 305). This problem is reduced in psychological research that focuses on underlying

themes in judges' expressions, themes that may not be affected very much by judges' concern with audiences or by their self-knowledge. But such themes are likely to reflect judges' inherent priorities rather than their operative goals as judges.

The preponderance of research on judicial behavior uses a different source of data, inferring goals and motives from judicial behavior rather than expressions.[16] At most court levels, scholars study primarily the behavior recorded in votes and opinions. In studies of state trial courts, many scholars use direct observation of judges' behavior on the bench. At least implicitly, much of this research involves a search for revealed preferences, "preferences manifested in the pattern of the agent's choices" (Bohman 1991, 69).

Two kinds of difficulties can arise in inferring judges' operative goals from their behavior. The first lies in the theoretical ambiguity of behavior: patterns of behavior often are consistent with multiple goal orientations. As discussed earlier, this ambiguity raises questions about equating good explanation with successful prediction. Empirical analysis may seem to support a particular conception of judges' goals when it would provide as much support for another conception.

Second, working backward from behavior to goals is most straightforward when behavior is consistent with the best means to achieve one or more goals. When the link between behavior and goals is weaker or more complex, inferences from one to the other can be inaccurate (see Boden 1972, 31; Marini 1992, 29). Given sufficient ineptitude, a judge whose aim is to win support from colleagues for a set of policy goals may look like a judge who seeks to alienate those colleagues.[17]

These difficulties certainly do not preclude the use of judges' behavior as a source of information about judges' goals and motives. Research that takes this approach has taught us a great deal and will continue to do so. But scholars who infer goals and motives from judges' behavior should be sensitive to complexities and open to alternative interpretations. The same is true of those who assess research that is based on this inference.

16. On data sources in judicial behavior research, see Tate 1983 and Johnson 1990.

17. I am alluding to the case of Justice Felix Frankfurter, mentioned at the beginning of the chapter. This issue is discussed more extensively in chapter 4.

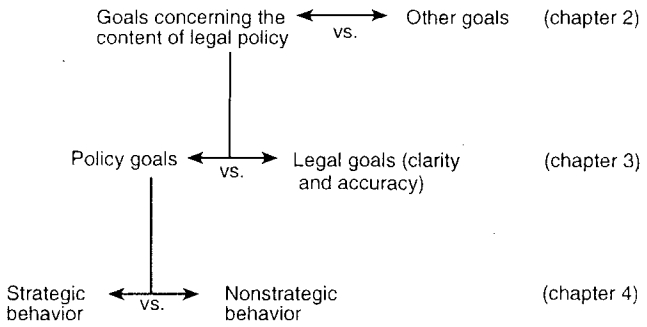

Fig. 1.2. Issues to be analyzed in chapters 2 through 4

Format of Analysis

Within the broad framework presented in figure 1.1, the next three chapters examine three major issues in the explanation of judicial behavior. As shown in figure 1.2, these issues are nested hierarchically.

Chapters 2 and 3 deal with the identities of judges' operative goal orientations and with the recruitment processes and court situations that determine them. The central issue in chapter 2 is the extent to which judges act on the basis of goals related to the content of legal policy rather than the array of other possible goals. Scholars have depicted state trial judges as people who hold and act on a wide range of goals and who differ among themselves in their goal orientations. In contrast, Supreme Court justices usually are depicted as people concerned only with legal policy. This difference in portrayals suggests the metaphor of a pyramid, in which operative goal orientations become narrower and more homogeneous at higher levels in the judiciary. Chapter 2 considers how accurately that metaphor captures reality, particularly the reality of the Supreme Court.

In part because of their concentration on the Supreme Court, scholars emphasize the content of legal policy as a motivation for judges. But those who share this emphasis disagree sharply about the mix of content-related goals. Some argue that in practice judges act almost solely on the basis of policy goals, while others believe that legal accuracy and clarity also are important to judges. Chapter 3 addresses those differing points of view.

The final issue concerns the links between goals and behavior. Because of the emphasis on judges' policy goals, students of judicial behavior have concerned themselves primarily with one specific link: the extent to which judges act strategically on behalf of their policy goals. Chapter 4 examines strategic behavior by policy-oriented judges.

On each of these three issues, one point of view occupies something of a favored position. That is especially true of the belief that Supreme Court justices are concerned solely with the content of legal policy. In contrast, the relative importance of law and policy for judges is a matter of considerable dispute. But in scholarship on the Supreme Court—the primary focus of judicial behavior research—the view that policy considerations are dominant over legal considerations has been taken by the most prominent work. The conception that judges act strategically has been strongly disputed, but it has already become quite influential, and the strong position of the rational choice approach in political science guarantees that its influence on analysis of judicial behavior will grow further.

In my analyses of these three issues, I take something of a skeptical stance toward the point of view that has the favored position. In chapter 3, for instance, I emphasize ways in which the empirical evidence on Supreme Court decision making may be consistent with law-oriented behavior. I do so not because I necessarily disagree with the favored positions—indeed, I think there is considerable basis for each of those positions—but because a skeptical stance assists in thinking carefully about theoretical issues and empirical evidence. Moreover, progress toward a better understanding of these and other issues is facilitated by a full recognition of the uncertainties in our current understanding.

CHAPTER 2

Legal Policy and Other Goals

According to James March (1956, 534), "it is probably true to say that judges correspond with, more than they differ from, people."[1] If so, most judges want a great many things, from high income to popularity to short working hours. But people give higher priorities to some goals than to others, and they differ in their priorities. Further, the relevance of people's goals to their choices depends on the situations in which they act, and situations vary a good deal. Thus the goals on which judges act depend on both their inherent goal orientations and the situations that translate them into operative goal orientations—those configurations of goals that actually affect judicial behavior.

This chapter considers the breadth of judges' operative goal orientations. Its central issue is the balance between two types of goals: those related to the content of legal policy—legal and policy goals—and the diverse array of goals that fall into other categories.

Students of judicial behavior seldom compare the goal orientations of judges who sit on different courts. But their separate depictions of various courts suggest the metaphor of a pyramid: at increasingly higher levels of the judiciary, the range of operative goals narrows and variation among judges diminishes. At the lowest levels, in this metaphor, interest in the content of legal policy is one of many motivations for judges' behavior, motivations whose importance differs from judge to judge. At the highest level, in the Supreme Court, only an interest in the content of legal policy influences the behavior of any justice.

In the first section of the chapter, I describe the pyramid metaphor as it emerges from scholarly work on judicial behavior. The second section considers differences among courts in theoretical terms. The final section focuses on the Supreme Court, surveying empirical evidence to assess the conception that only legal and policy goals motivate the justices.

1. This observation was quoted in Schubert 1965, 37. Thomas Jefferson expressed a similar view (quoted in Haar 1996, 156).