# Judicial Transparency in an Age of Prediction

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# JUDICIAL TRANSPARENCY IN AN AGE OF PREDICTION

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*The Empirical Legal Studies (ELS) movement is making strides toward understanding judicial behavior, and ELS models could become the foundation for more accurate prediction of judicial decisions. This essay raises two questions. First, what would an age of predictable judicial behavior look like? Second, would satisfying the informational needs of ELS prediction models also exhaust the demands for "judicial transparency"? The essay concludes that a state of predictable judicial behavior, if somehow stable, would leave almost no litigation to observe; and that a prediction-oriented information policy would nearly meet the demands of today's transparency advocates. One shortfall involves the intrinsic value of adjudication for intellectuals and others. A prediction-oriented policy would not meet that demand and could even thwart its satisfaction—which presents an unappreciated normative choice for information policy.*

*The object of our study, then, is prediction . . . .†*

*Publicity is justly commended as a remedy for social and industrial diseases.††*

*This is well within the parameters of responsible reporting of an important news event.†††*

## INTRODUCTION

TRANSPARENCY is a poor label for a rich subject. The truth is that no single observer will ever have complete information about even modestly complex institutions, and no institution is ever completely unknown. Instead, information tends to be dispersed among many different actors, and important aspects of an institution are always revealed to some set of

(829)

people.[1] Thus, whatever the appropriate political rhetoric might be, there is little analytic value in demands for government operations that are either totally transparent or totally secret. Neither will happen. Accordingly, the realistic goals for "transparency" advocates are often obscure, even though the slogan implicates crucial questions of information policy.[2]

As a practical matter, information policy is a series of intermediate choices along several dimensions. These dimensions include the content of information to be distributed; the manner of its distribution; the class of information insiders who should have access; the strategy, in law or elsewhere, for implementing these choices; and the resources appropriately devoted to the implementation strategy. Making sound choices on these dimensions is often difficult. The task may embed the decision-maker within conflicts that are without obvious solutions.[3] And a normative goal, or a reconciliation of competing goals, is required to make intelligent choices. Information policy lacks direction without a sense of value.

This essay is an attempt to better understand the plausible goals of information policy in one context: judicial operations. It is commonly felt that public access to information about the judiciary is desirable—or that competing interests are sometimes threatened—but these impressions will not resolve live disputes. At the least, the objective for information access ought to be more concrete.

Progress can be made by exploring the relationship between demands for judicial transparency and renewed scholarly efforts to explain judicial behavior. A new wave of Empirical Legal Studies (ELS) is assembling novel datasets and applying innovative statistical methods to test a variety of possible influences on judicial decisions—precedent, ideology, attorney quality, strategic considerations and others. As those models of judicial behavior become more convincing, the ability to predict future judicial decisions should also improve.

And predictability might exhaust the most persuasive claims for "judicial transparency." Perhaps the valid interests of transparency advocates

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1. *Cf.* KIM LANE SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 21 (1988) (describing shallow secrecy).

2. *See* Benjamin S. DuVal, Jr., *The Occasions of Secrecy*, 47 U. PITT. L. REV. 579, 583 (1986) ("[S]ociety is distinctly ambivalent about the benefits of increased knowledge."); Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 922–23 (2006) (noting feasibility and desirability issues regarding full information access); *see also* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 893–95 (2006).

3. *See, e.g.*, Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 98–99 (2d Cir. 2004) (addressing secret court dockets); Sunshine in the Courtroom Act of 2007, S. 352, 110th Cong. § 2(b)(2) (2007) (assuring much discretion over camera access to federal courtrooms, but prohibiting courts from televising jurors); Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. § 2 (2007) (proposing qualified journalist privilege); Judicial Transparency and Ethics Enhancement Act of 2007, H.R. 785, 110th Cong. § 2 (2007) (proposing Inspector General for lower federal courts).

would be entirely satisfied with an information policy designed to render judicial decisions predictable.[4] This angle of analysis thus suggests two inquiries: (1) what an age of predictable judicial behavior would look like, and (2) whether there are convincing arguments for judicial transparency beyond what is needed to predict judicial decisions.

After Part I briefly reviews ELS efforts to understand judicial behavior, Part II imagines a world of perfectly predictable judicial decisions. This environment, although unstable, would leave almost no litigation to scrutinize. Dramatically higher settlement rates occasioned by predictability would be at odds with actually observing the behavior in question. Part III returns to the real world and the question of judicial transparency's plausible goals. Those goals are clustered into instrumental and intrinsic arguments for information access. The instrumental arguments involve court monitoring, institutional reform, planning, and legitimacy in dispute resolution. The intrinsic arguments involve the consumption or entertainment value of information associated with certain legal proceedings.

Despite the diversity of these objectives, most would be served by orienting the judiciary's information policy toward the needs of prediction. A principal exception involves the intrinsic value of information access. The data necessary for accurate prediction almost certainly would not match academic or popular demands for visible legal proceedings; as Part II suggests, greater predictability need not advance—and might even thwart—an audience's opportunity to "consume" adjudication. For some, that is no shortcoming.[5] But how to treat the consumption value of public access is, I shall suggest, a contestable and unappreciated normative choice for information policy.

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4. In highlighting the potential of the PACER electronic docket, Lynn LoPucki suggested that the needs of reliable prediction models should drive the judiciary's information policy. *See* Lynn M. LoPucki, Court Transparency 3, 9, 71–72 (Mar. 2, 2008) (unpublished manuscript), *available at* http://ssrn.com/abstract=1104744 (urging researcher-friendly PDF file formats and abolition of PACER user fees). Some might think that access to such an extent is too costly or risky, and LoPucki attempted to address these concerns. *See, e.g., id.* at 3–5, 58 (distinguishing interest in avoiding data aggregation from "privacy in the traditional sense," yet recognizing that inconvenience effectively diminishes information access for scholars). My conclusions are usually compatible with LoPucki's. But I focus on whether a prediction-orientated information policy would omit anything valuable, whether or not countervailing interests recommend trimming back the prediction objective, and I might differ with him on the consequences of predictable judicial behavior. Our differences are not easily restated because we are asking somewhat different questions.

5. *See* Maria Bartiromo, *Justice Scalia Says "Not a Chance" to Cameras*, TODAY, Oct. 11, 2005, *available at* http://www.msnbc.msn.com/id/9649724/ (quoting Justice Scalia as stating, "I think there's something sick about making entertainment about real people's legal problems").

I. EMPIRICAL LEGAL STUDIES AND JUDICIAL BEHAVIOR

The growth and extension of ELS across disciplines has been remarkable. New data sets are being compiled.[6] Credentialed empiricists are collaborating with law professors at what seems like an increasing frequency.[7] ELS gained a peer-reviewed journal devoted to its findings in 2004, *The Journal of Empirical Legal Studies.* And ELS scholars began holding an annual conference in 2006,[8] which is one sign of a serious intellectual movement. There should be no surprise, then, that ELS now has a blog.[9]

Forms of ELS have existed for decades.[10] This is not the first wave of interest in quantitative analysis since Holmes claimed that prediction is the object of lawyers.[11] Perhaps this new wave is a fad. Perhaps the attraction of data collection, regression analysis, and other quantitative techniques soon will be discarded as a false hope of modernist rationalism in an uncertain and divided world—"a scientific enterprise that seems to return so little from so much," as Lon Fuller put it during an earlier surge of legal empiricism.[12] It seems equally likely, however, that ELS will grow into a sustained force within the modern law school and beyond.

For present purposes, the relevant division of ELS scrutinizes judicial behavior. Political scientists, economists and law professors are busy testing for variables that actually influence judge-by-judge voting, case out-

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6. One example is data on court of appeals voting made available by *The Chicago Judges Project* at http://www.law.uchicago.edu/academics/judges/data.html.

7. *See generally* John Baldwin & Gwynn Davis, *Empirical Research in Law, in* THE OXFORD HANDBOOK OF LEGAL STUDIES 880, 882–83 (Peter Cane & Mark Tushnet eds., 2003) (noting cross-disciplinary collaboration and funding sources for ELS). Significant empirical studies of judicial behavior in the law literature include Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act,* 108 COLUM. L. REV. 1 (2008); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals,* 107 YALE L.J. 2155 (1998) [hereinafter Cross & Tiller, *Judicial Partisanship*]; Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence,* 73 S. CAL. L. REV. 741, 768 (2000); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication,* 60 STAN. L. REV. 295, 302–03, 361–72 (2007); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit,* 83 VA. L. REV. 1717, 1764 (1997).

8. For a description, see http://www.utexas.edu/law/news/2005/112805_black.html. As a point of comparison, Critical Legal Studies scholars began calling such conferences in the late 1970s and stopped in 1995. *See* Carrie Menkel-Meadow, *Taking Law and _____ Really Seriously: Before, During and After "The Law",* 60 VAND. L. REV. 555, 572 n.69 (2007).

9. *See* Empirical Legal Studies, http://www.elsblog.org/the_empirical_legal_studi/ (last visited Mar. 21, 2008).

10. *See, e.g.,* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,* 6 J. PUB. L. 279 (1957).

11. *See* Oliver Wendell Holmes, Jr., *The Path of the Law,* 10 HARV. L. REV. 457, 457 (1897).

12. Lon L. Fuller, *An Afterword: Science and the Judicial Process,* 79 HARV. L. REV. 1604, 1622 (1966).

comes, opinion drafting, and docket selection.[13] Empirical attention to
the Supreme Court is illustrative. Extensive work has been done to better
understand differences in voting behavior across Justices and across time.
A particularly bold claim is that a Justice's ideology influences voting be-
havior but precedent does not.[14] The more modest, general sense of the
research is that the policy preferences of the Justices are important to
their votes on the merits in many cases, even if these preferences cannot
account for all voting behavior.

Open questions remain, of course. The standard proxies for judicial
ideology are fairly crude. Options for such proxies include the political
party of the nominating president, newspaper editorials' characterization
of the Justice during the appointment process or coalitions of Justices
identified according to voting patterns on the bench.[15] It also seems that
ideology is somewhat unpredictable over long periods of time.[16] In addi-
tion, a judge who is willing to ignore conventional legal argument might
be strategic nonetheless.[17] He or she might consider what outcomes the
Court may realistically implement, whether other actors are likely to retali-
ate or how fellow Justices are behaving. ELS scholars are investigating
these rational choice theories as well.[18]

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13. For an extensive literature review accessible to lawyers, see Barry Fried-
man, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 272–329 (2005).

14. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE
ATTITUDINAL MODEL REVISITED 81, 111–12, 310–11 (2002); *id.* at 96 (stating that
model is limited to merits decisions in Supreme Court and is unlikely to fully ex-
plain certiorari voting); *cf.* Stefanie A. Lindquist & Frank B. Cross, *Empirically Test-
ing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV.
1156, 1206 (2005) (concluding that, "while our system of precedent creates some
path dependence in law, it is relatively weak").

15. *See* SEGAL & SPAETH, *supra* note 14, at 321 (editorials); Cross & Tiller, *Judi-
cial Partisanship*, *supra* note 7, at 2168 (nominating president); Lee Epstein, An-
drew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme
Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007) (vot-
ing coalitions); *see also* Robert Anderson IV & Alexander M. Tahk, *Institutions and
Equilibrium in the United States Supreme Court*, 101 AM. POL. SCI. REV. 811, 811–12
(2007) (noting common simplifying assumptions of one-dimensional policy space
and binary choices).

16. *See* Epstein et al., *supra* note 15, at 1504, 1520–26 (claiming that ideologi-
cal drift has been common for Justices serving ten or more years, and that such
drift is not always in same direction).

17. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE xiii–xiv
(1998); Lee Epstein, Jack Knight & Andrew D. Martin, *The Supreme Court as a Strate-
gic National Policymaker*, 50 EMORY L.J. 583, 591–92 (2001).

18. *Compare, e.g.*, Brian R. Sala & James F. Spriggs, II, *Designing Tests of the
Supreme Court and the Separation of Powers*, 57 POL. RES. Q. 197, 204 (2004) (finding
support for attitudinal model over certain strategic considerations), *with, e.g.*, Chris
W. Bonneau, Thomas H. Hammond, Forrest Maltzman & Paul J. Wahlbeck, *Agenda
Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court*, 51 AM. J.
POL. SCI. 891 (2007) (comparing influence of opinion authors and median jus-
tices), *and* Anna Harvey & Barry Friedman, Ducking Trouble: Congressionally-In-
duced Selection Bias in the Supreme Court's Agenda 3, 8–10, 34–35 (Dec. 1, 2007)
(unpublished manuscript on file with author) (finding that congressional prefer-

In any event, data on past judicial behavior can be used to build prediction models. Consider a recent effort to predict Supreme Court decisions. Using six variables, Andrew Martin and his colleagues designed a statistical model for predicting case outcomes and individual voting behavior.[19] The modelers generated classification trees to predict unanimous decisions and, for the remaining cases, the votes of each Justice based on their votes in past cases. Those past cases had been coded according to issue area, identity of petitioner and respondent, identity of the court below, liberal or conservative lower court decision, and whether the petitioner made a constitutional claim. Sometimes it turned out that one Justice's vote figured into the classification tree of another Justice.

Like every model, this one has weaknesses. For example, it cannot handle newly appointed Justices, does not say anything about the content of written opinions, and categorizes case outcomes as simply "affirm" or "reverse."[20] Nevertheless, the model performed fairly well within its constraints. For sixty-eight cases in October Term 2002, its overall accuracy rate for case outcomes was 75%—which was 16% better than the comparable predictions of a volunteer pool of eighty-three legal experts.[21]

There is room for improvement. No model predicts all case outcomes with 100% accuracy. Nor are scholars certain about the set, and relative force, of influences on the Justices. Leading proponents of the attitudinal model of judicial behavior confirm this. For civil liberties cases, Jeffrey Segal and Harold Spaeth claim that their ideology proxy correlated at 0.76 with the Justices' merits-voting behavior and their model actually explained less than 60% of the variance.[22]

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ences influenced probability of Supreme Court review of federal statutes enacted from 1987 to 2001, though perhaps due to litigant choices). For a study indicating strategic behavior at the agenda-setting stage in state supreme courts, depending partly on the salience to the other branches of the law to be reviewed, see LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY 123–33 (2002).

19. *See* Andrew D. Martin, Kevin M. Quinn, Theodore W. Ruger & Pauline T. Kim, *Competing Approaches to Predicting Supreme Court Decision Making*, 2 PERSPS. ON POL. 761, 761–63 (2004); Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1152, 1163–71 (2004).

20. *See* Ruger et al., *supra* note 19, at 1169–70 & n.67 (noting inability to code cases like *Virginia v. Black*, 538 U.S. 343 (2003)).

21. *See id.* at 1152, 1171. Interestingly, the experts did less well than the model in predicting the votes of Justices Kennedy and O'Connor—but they outperformed the model in predicting Justices' votes overall, and there were case categories where they outperformed the model on case outcomes as well. In addition, the twelve experts who were appellate attorneys predicted case outcomes at a remarkably high 92% accuracy rate. *See id.* at 1176–79 (cautioning, however, that study was not designed to test comparative accuracy of this subset of experts).

22. *See* SEGAL & SPAETH, *supra* note 14, at 323 (reporting $r^2$ of 0.57). Similarly, in search and seizure cases, their ideology proxy predicted 70% of the Justices' votes on the merits. *See id.* at 324–26 (not reporting $r^2$). Adding twelve stylized case facts, like "car" and "warrant," only slightly increased the model's accuracy

These results do not mean that constitutional text, precedent, public opinion, the Greenhouse Effect[23] or any other variable is influencing the Justices (or that such variables could be easily separated from the process by which policy preferences are constructed). Perhaps ideology likewise explains the remaining variance and we simply lack a better variable for it. ELS has yet to settle on the magnitude, circumstances and mechanism of influence on outcomes for other variables, such as the gender and race of participants in adjudication,[24] or the composition of multimember judicial panels.[25]

Nor are the imperfections in the statistical models likely to disappear.[26] Even if a model could be constructed that perfectly fit past Supreme Court outcomes, we could not be certain that the model's variables and their relationships would remain useful over time. In the first place, the Court's membership changes. In response, individual Justices might shift their preferences or decision protocols.[27] Likewise, it is possible that changes in the character of disputes available for Court resolution will undermine the predictive accuracy of the best models. And still more can be done to understand the behavior of lower federal courts and state courts. Indeed, those courts are designed differently and probably respond to a somewhat different set of influences.[28]

## II.  LIFE WITH THE ULTIMATE EQUATION

Set aside the aforementioned limitations for a moment and imagine that ELS achieves perfection. It yields the Ultimate Equation. That Equation accurately predicts every judicial decision, and it operates on some set

regarding Justices' votes, to 71%. *See id.* at 325. Yet these twelve facts *without* ideology were used to predict 77% of the case outcomes (as opposed to Justices' votes). *See id.* at 319.

23. *See* Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court,* 105 YALE L.J. 1537, 1555 (1996).

24. *See, e.g.,* Christina L. Boyd, Lee Epstein & Andrew D. Martin, Untangling the Causal Effects of Sex on Judging 2-3, 5-6, 12-15 (2007) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1001748 (departing from standard regression analysis and turning to non-parametric matching methods; stating that—in empiricist's sense—judge's sex cannot "cause" his or her vote); Cox & Miles, *supra* note 7 (studying Voting Rights Act cases).

25. *See, e.g.,* Miles & Sunstein, *supra* note 7, at 827.

26. *Cf.* Frederick Schauer, *Prediction and Particularity,* 78 B.U. L. REV. 773, 786 (1998) (raising questions about predictive power of observable variables).

27. *See, e.g.,* Scott R. Meinke & Kevin M. Scott, *Collegial Influence and Judicial Voting Change: The Effect of Membership Change on U.S. Supreme Court Justices,* 41 L. & SOC'Y REV. 909 (2007) (examining Justices' merits votes in post-*Mapp* search-and-seizure cases and post-*Miranda* confession cases).

28. *See* Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism,* 75 U. CHI. L. REV. (forthcoming 2008) (manuscript at 4, on file with author) (noting attention to lower federal courts). For a recent and insightful empirical study of state supreme court behavior, see LANGER, *supra* note 18, at 123-24 (finding evidence of attitudinal voting constrained by strategic considerations, which depend in part on type of law under challenge).

of observable variables involving the participating judge, the litigants, the quality of the lawyers involved, the claims and evidence at issue, and/or other factors. One needs only the model and the data on which it operates to predict judicial decisions with unsurpassable confidence.[29]

From one perspective, the Ultimate Equation brings us to the apex of court transparency. Foreseeing judicial decisions perfectly is akin to witnessing the decisions as they happen. Even better, the Equation's variables indicate what actually influences judicial conduct. Such a model might be more informative than, say, the most reliable prediction market.[30] These markets can be designed to both aggregate information about judicial behavior and point us toward the most likely outcome in particular cases. But it seems more difficult for prediction markets to explain themselves—that is, to provide observers with accurate reasons for one outcome over another. Statistical models can assist us with those answers. For reasons suggested in Part III, below, knowing the actual influences on judicial decisions might be important to judicial transparency advocates even apart from its contribution to accurate prediction.

It is true that the Equation might operate with mere proxies for these actual influences and yet generate accurate outcome predictions. Subjective and unconscious motives are notoriously difficult to unveil. As well, the specified variables could be the result of still other forces to which we should pay attention: a statistical model might gain accuracy by including the race, sex, age, and income of the parties, lawyers, and judges participating in a case without revealing precisely why or how those attributes influence decision-making. Useful variables will not necessarily map out decision dynamics.

Nevertheless, specification of the Ultimate Equation's variables would mark movement toward predicting and understanding judicial behavior. In this world, outsiders need not rely on their intuitions about judges; such intuitions can be clouded by expectations or normative commitments. Nor must outsiders depend upon explanations provided by judges. Cynics can disregard the public declarations of a judge as convenient window-dressing.[31] Furthermore, if judges are anything like ordinary human

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29. As described, this Equation would not predict jury decisions. I set this issue aside, without suggesting that empiricists will be forever mystified by juries even as they make progress on judges. An Ultimate Equation for juries seems equally (im)plausible. The judge/jury distinction is a reminder, however, that many of us have particular expectations for the judicial role, and that predictable judicial behavior might not permit these expectations to be satisfied. This question is taken up below.

30. *See* CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE ch. 4 (2006) (describing how prediction markets function).

31. *Cf.* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 272 (1997) (examining extreme view); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 52, 90 (2005) (dubbing *Roper v. Simmons* "naked political judgment" covered with "fig leaves").

beings, they are unable to accurately account for all of their behavior all of the time. Our imaginary Equation would flank those problems. It would model judicial behavior with mathematics and rely on hard data rather than human feel.[32]

The relationship between prediction and transparency is actually more complicated than this discussion suggests. The two objectives might not be fully interchangeable. Understanding why takes additional work. We can begin by considering what adjudication might look like under the condition of perfect prediction, and what might be required to perpetuate that condition.

### A.   *The End of Adjudication?*

One might suppose that perfect prediction of judicial behavior would leave us with nothing to see. Our court systems depend heavily on litigants to initiate the process, and an intelligible view of litigation is that it thrives on uncertain outcomes. Otherwise, parties can settle.[33] If party *A* wants something from party *B*, if each would suffer litigation costs by pursuing a lawsuit, if settlement can deliver the same result for the parties as adjudication, and if each party is confident that a court judgment would be enforced, then *A* and *B* are each better off knowing the judicial outcome in advance and settling the matter in light of that knowledge. Negotiating a settlement without judicial assistance must be comparatively less expensive for this logic to work, but often it is. In these situations settlement looks superior to litigation from the angle of narrow self-interest. Litigating would add no useful information about the likely outcome.

True, the predictability of adjudication might encourage more demands for redress. Perhaps injured parties with legally valid claims do not assert them today because they are not aware of judicial receptivity or because of litigation costs.[34] It is also possible that, in an environment of extreme legal certainty, recklessness allegations and punitive damages demands would rise as a proportion of all allegations, and that defenses akin to qualified immunity would fade.[35] But any increase in the number of

32. Its breadth also avoids some of the objections to more selective use of "actuarial" tools. *See* BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 2–6 (2007) (promoting randomization over statistical profiling in crime and punishment).

33. *See, e.g.,* George L. Priest, *Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes,* 14 J. LEGAL STUD. 215, 216–19 (1985) (suggesting settlement determinants).

34. *Cf.* LoPucki, *supra* note 4, at 32–33 (stating that litigation and cost reductions "would likely be modest" even if federal judicial decisions became more predictable).

35. *See, e.g.,* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (testing qualified official immunity by clearly established rights of which reasonable person would have known); Kelsay v. Motorola, Inc., 384 N.E.2d 353, 359 (Ill. 1978) (tying punitive damages to "wanton disregard of the rights of others"); MODEL PENAL CODE § 2.02(2)(c) (1985) (defining recklessness). One reason lawbreaking could continue in an age of perfect prediction about court behavior is that lawbreakers

complaining parties or the potency of their claims does not foretell actual case filings. If the Equation is available to all sides, the number of lawsuits might remain at zero. Additionally, a different class of legal arguments—such as the vagueness doctrine's attention to a law's fair notice—could disappear.[36]

Uncertainty about final judgments is not the only fuel for litigation, of course. Another hindrance to settlement might be that party *A* cannot evaluate the strength of her position without using the tools of court-supported discovery to extract information withheld by party *B*. But if the available model of judicial behavior is as perfect as we can imagine, even this uncertainty should not be a barrier to early settlement. The Equation ought to predict how a court would resolve any discovery dispute, thereby allowing the parties to know which information must be disclosed without filing suit.

*The Ultimate Equation seems to be at war with the existence of adjudication.*

Yet other considerations suggest that adjudication would persist. First of all, parties might find a measure of intrinsic or consumption value in litigation. Some parties derive pleasure or satisfaction from fighting their way through the litigation process. This remains true after accounting for those with a desire to harm their opponents with the pain of litigation regardless of the merits, along with those for whom a loss in court is a win somewhere else.[37]

Even apart from cases in which success on the merits is unimportant, a post-uncertainty age might still include litigation. The notion of an ethically pure vindication in court might not be a complete myth. Furthermore, there is a line of scholarship that supports participatory procedure. These studies contend that parties feel more satisfied with dispute resolution, perhaps regardless of the outcome, if they believe they have an adequate opportunity to voice their position to the decision-maker.[38] Although predictability and revelation of actual influences on judicial decisions could reduce such desire for voice and recognition, maybe the cold mathematics of an equation would not eliminate this demand.

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might not believe detection is certain, while remedies might not be optimally calibrated for deterrence.

36. *See* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (asking whether persons of "common intelligence . . . necessarily guess at [the law's] meaning").

37. For one possible example, see *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003) (ordering removal of Roy Moore's Ten Commandments display), *cert. denied*, 540 U.S. 1000 (2003), and *National Briefing: Roy Moore Announces Candidacy*, N.Y. TIMES, Oct. 4, 2005, at A17 (noting Commandments controversy and Moore's decision to run for governor).

38. *See, e.g.*, E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 66–83 (1988) (connecting perceived process "fairness" to satisfaction and compliance).

Obviously, these assertions are controversial. Feelings of vindication or acceptance can move someone only so far in the teeth of litigation burdens. There are, however, additional reasons for litigation to survive. For any statistical model to eliminate uncertainty in adjudication, that model would have to be radically available. Anyone contemplating a court fight would have to enjoy access to the model and the data on which it operates in order to ensure settlement through certainty. There is no guarantee that cutting-edge ELS modeling would be so available or user-friendly. We can assume away this access problem in a continuing spirit of fantasy. But, for those who labor in the academic field of transparency, practical availability of information is a persistent and understandable concern.

A final barrier to zero litigation cannot be evaded without extraordinary imagination. The difficulty is that the absence of adjudication is in tension with its accurate prediction. Any statistical model of behavior is likely to degrade without new observations. ELS models rest heavily on data about past behavior. Good models do rely on sound theories to make sense, but the raw material for a reliable prediction is evidence from the past. Modelers use what they can discover about the past to sketch a picture of causal influences that hopefully matches the dynamics of future situations. However much faith one places in this method of prognostication, its dependence on a matching past is inescapable.

If the relevant data set is frozen while decision dynamics and relevant case attributes are not, observers should begin to lose confidence in the model. Any number of changes can undermine reliability. An intuitive example is the appointment of new judges to the bench.[39] Other disrupting influences on the decision environment are more difficult to specify, but they certainly exist. Perhaps the operating Equation was built on the assumption of a particular mix of case types, but social, economic, political, or technological change alters that mix and produces novel disputes that the Equation cannot process.

Thus, it might be that a fantasy age of perfect prediction is self-immolating. The Ultimate Equation would eviscerate our reasons to litigate and, in so doing, undercut its own reliability. We might imagine an even better Equation that would not only predict behavior of sitting judges within their existing decision environment, but also predict retirements, deaths, new appointments, new case mixes, and everything else relevant to judicial decision. At this stage, however, the heuristic value of fantasy is rapidly declining.

Adding a little optimism (or rationalism) might change the conclusion. Informed observers will understand the extent to which our "modest" Equation has degraded. They will be able to calculate an increasing margin of error. Given that margin—which amounts to a degree of uncertainty about judicial behavior—some will be drawn back into the litigation

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39. Assuming a new judge's behavior on the bench cannot be predicted by pre-appointment behavior.

process. Some number of cases will be filed, fresh observations of judicial behavior will be made and the Equation will be updated. There is no assurance that such dynamics will be adequate; perhaps there will be an insufficient amount of litigation, or a suboptimal distribution of case types, such that the Equation will remain imperfect almost as soon as it is constructed. In that case, litigation might be subsidized or another fix might be implemented to push the model back toward perfection.

This is not to say that the Equation or the demise of adjudication has only advantages. One might prefer that the development and announcement of law take place in a public setting with judges presiding. Judicial policymaking is not always valued today, but there are stalwarts who consider the institutional features of courts conducive to a meritorious style of reasoning,[40] and others who portray judicial intervention as part of a healthy dialogue on values.[41] Settlement facilitated by statistical modeling might not satisfy this demand; in fact it would be Owen Fiss's nightmare.[42]

A related problem is the loss of learning from adjudication. Working through numerous disputes provides information to adjudicators about law and human affairs, and thus allows them to modify both their sense of good judgment and the optimal operation of the judicial system. "[I]f the Court has fallen into predictably routine patterns of decision," Fuller suggested, "it might be in the public interest for a good lawyer to step in and shake them loose from their bureaucratic rigidities."[43]

To be sure, this argument is easy to overstate. The salience of litigated cases can skew judicial perception of the world outside the courtroom.[44] Experience might lead to callousness that prevents a healthy assessment of real harms. Moreover, some evidence exists for the proposition that "experts" overestimate their own competence.[45] Nevertheless, we might sensibly conclude that experience with adjudication has net positive effects. Depressing the level of adjudication too far would threaten that learning effect.[46]

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40. *See generally* RONALD DWORKIN, JUSTICE IN ROBES 73–74, 138–39 (2006).

41. *See, e.g.*, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653–55 (1993); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 111 (2003) (discussing judicial authority on constitutional questions "as the consequence of a relationship of trust . . . with the nation").

42. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085, 1087 (1984).

43. Fuller, *supra* note 12, at 1622.

44. *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 894–99, 909–11 (2006) (discussing possible cognitive biases and selection effects).

45. *See* Colin F. Camerer & Eric J. Johnson, *The Process-Performance Paradox in Expert Judgment: How Can Experts Know So Much and Predict So Badly?*, *in* RESEARCH ON JUDGMENT AND DECISION MAKING: CURRENTS, CONNECTIONS, AND CONTROVERSIES 342, 347–49 (William M. Goldstein & Robin M. Hogarth eds., 1997) (distinguishing training from experience).

46. Two other complications are worth noting. First, current law permits ex parte proceedings under certain conditions where notifying an adverse party is counterproductive or infeasible. *See, e.g.*, FED. R. CIV. P. 65(b) (regarding tempo-

Understanding every aspect of life with an Ultimate Equation is plainly more trouble than it is worth. Every model will have a margin of error, a proxy, an omitted variable, and a collapse in the face of unanticipated shocks to previously stable systems. We are not going to achieve perfect prediction of judicial behavior any more than stock market prices will become totally foreseeable. Anyway, information policy is the present concern. But on that score, we have made progress. It seems that an age of prediction would witness far less litigation even if adjudication would never disappear. If so, predictability bears intriguing relationships to transparency and adjudication: predictability is allied with transparency, in that prediction offers an understanding of how and why judges act, yet predictability is inversely related to actual adjudication, which might be troubling depending on the preferred goals for "transparency."

## B.    *Toward the Equation*

Before investigating these relationships more carefully, it is worth underscoring some conditions under which advancement toward an Ultimate Equation is possible. Empirical models of judicial behavior will not operate reliably without maintenance and the right environment. One requirement was indicated above: some minimum level of actual adjudication. A second requirement is equally important and not limited to daydreams in which a leading worry is the disappearance of litigation. It involves data, and it is a concern for today's equations along with more sophisticated successors. All statistical models need data to be tested and to generate predictions. Their equations cannot produce any hypothesis about past judicial behavior, nor suggest anything about future behavior, without the information called for by their variables.

This point deserves to be emphasized because it is closely linked to one possible orientation for information policy. Those who value empirically grounded models of judicial behavior will prefer ongoing access to the data made relevant by those models. Even further, this class of "quants" will prefer access to a wider range of information in order to perfect and update their equations. Confidence in these models increases by testing alternatives that would disrupt conventional wisdom. To some extent, this means gathering data on factors we presently think irrelevant. A series of studies indicating, for instance, that precedent does not seri-

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rary restraining orders); Morrison v. Olson, 487 U.S. 654, 681 n.20 (1988) (regarding search warrants). To the extent prior court approval is required for a desired course of action, it is not clear how the system should adjust to the demanding party's ability to perfectly predict this approval. Second, the mix of cases filed as the Equation becomes less reliable might be very different from the mix of cases filed under today's condition of more serious uncertainty. We might expect those with the most at stake, not necessarily those with the strongest arguments, to begin filing suit at the first hint of the Equation's imperfection. The Equation would have to account for this skew, and observers would have to be careful not to be misled about the nature of law or legal disputes. Of course we already have this risk of misapprehension today.

ously influence Supreme Court outcomes would not lead every responsible ELS scholar to ignore data on precedent in all future efforts at modeling.

This is not only an issue of data being theoretically available. ELS supporters should want practical access to data for those with empirical skills, at a low cost. Functionally, there is no difference between data that is prohibitively costly to collect and data that is formally illegal to disseminate. Depending on the penalties and costs, the former might be more crippling to information needs than the latter.

Hence the information policy implications are relatively concrete once we commit to fueling ELS studies of judicial behavior. In fact, the entire information policy for the judiciary could be designed solely to maximize scholars' ability to explain and predict the decisions of judges. Perhaps the result would be too invasive or disruptive. It does seem unlikely that official policy will expose all information about the lifestyles of federal judges outside the courthouse, even if that data could greatly improve the predictive power of ELS models, or that Congress will mandate random case assignment across current jurisdictional boundaries in the service of ELS scholarship. And there remain privacy arguments to be addressed involving parties, witnesses, jurors, and even lawyers.

So we cannot know without much more debate whether a prediction-oriented information policy would expose too much. But can we at least deny that it would expose too little? Would the data requirements for progress toward predictability exhaust the normative claims to public information about the judiciary?

## III. PREDICTION AND TRANSPARENCY

In the real world, judicial behavior will never be perfectly predictable. Even if attention is narrowed to a particular slice of judicial decision-making, such as motions to dismiss after *Bell Atlantic Corporation v. Twombly*[47] or criminal sentencing after *United States v. Booker*,[48] prediction error will persist. The finest model will either incorrectly specify variables, or not quite understand their actual relationship, or depend on imperfect proxies for data that we want but cannot feasibly acquire, or fail to account for a meaningful change in the decision environment. Indeed, these imperfections could all be present in a statistical model that performs exceptionally well. The model might use ordinarily dependable proxies without explaining the underlying mechanisms of judicial decision. We will continue to live with uncertainty, and judges will still have a docket to clear.

The real world is also resource-constrained. Squeezing additional information out of institutions often entails substantial costs. Policymakers

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47. 127 S. Ct. 1955, 1968–69 (2007) (rejecting part of *Conley v. Gibson,* 355 U.S. 41 (1957)).

48. 543 U.S. 220, 244–46 (2005) (rendering federal Sentencing Guidelines effectively advisory).

ought to consider the marginal benefit of additional resources devoted to information access in view of alternative uses for those resources. To be clear, the trade-offs do not always run in these directions; in many situations, secrecy is the more costly option. It takes effort to keep doors closed, or to implement effective electronic security, or to hire "plumbers" to plug information leaks.[49] Plus, the cost of information access and dissemination has changed significantly. Internet communication and the popularity of digital files make radical public access easier. But attention should be directed to the challenging contexts in which access is not cost-free. An information policy worth arguing about will present controversial sacrifices.

On one side will be arguments for increasing the content of information lawfully available to interested parties, for making access to that information easy and cheap, and for the devotion of serious resources to ensure that this scope of access is guaranteed. On the other side will be understandable concerns for the projects crowded out by such commitments. There will be questions whether the costs associated with, for example, digitizing all case files in the federal courts is the best use of the required time and effort. This resistance to maximizing information access works apart from the risks of injury that can accompany information disclosure. The initial cost of information access must be added to the fear that disclosure will cause consequential harm such as privacy losses, poor deliberation, evasion of beneficial law enforcement efforts, and so on.[50]

Because unfortunate trade-offs are unavoidable, thoughtful information policy turns on a sense of priority. A first step is to get clear on whether there is a goal that is essential or most urgent. This is a normative question, bounded by feasibility considerations and guided by the context of judicial operations. One possibility is to orient the judiciary's information policy toward the needs of prediction. The following discussion evaluates that option against a range of potential objectives for transparency.

## A.  *Information Values*

With a little effort, typical justifications for information access can be identified, organized and briefly described. The list below is meant to be relatively uncontroversial and inclusive, and it draws upon a conventional distinction: instrumental and intrinsic values served by policy. That distinction is commonplace in the related field of free speech theory. Among the affirmative arguments for robust communication are empirical assertions that the consequence will be a working democracy or market-

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49. *See* Dan Eggen, *White House Trains Efforts on Media Leaks,* WASH. POST, Mar. 5, 2006, at A1 (referencing Nixon White House Plumbers and reporting on more recent efforts to reduce public disclosure of classified information).

50. *Cf.* Freedom of Information Act, 5 U.S.C. § 552(b) (listing exemptions).

tested truth or some other valued result,[51] in addition to deontological contentions that speech is an end in itself or uniquely constitutive of personal identity.[52] The same kind of division can be made for transparency demands. Both instrumental and intrinsic values are present in the most common justifications for greater, wider, and more convenient access to information about government operations.

On the instrumental side, consider the following claims:

• *Monitoring*—Prominent within transparency demands is the contention that bad conduct is more likely to take place when the relevant actors are able to shield themselves from others. Information access might facilitate monitoring by the right parties and deter misconduct[53] or otherwise result in desired behavioral change.[54] In this regard, a pro-access information policy is merely one tool for controlling behavior. It is not theoretically separable from other policy devices such as civil liability, criminal punishment, education and training, rewards for good behavior, and so forth. Thus, a focus on information policy can lead one to ignore superior methods for reaching the same objective. For present purposes, we will have to assume that information policy is the appropriate tool for positively influencing judicial behavior.

• *Reform*—In a related vein, transparency demands might be an effort to secure information for institutional reform. Exposing information about judicial operations is the groundwork for intelligent judgment about the proper design of the court system.[55] Unlike the typical monitoring arguments, the reform justification does not necessarily presuppose a path for change. The reform justification might come with serious uncertainty about the correct purposes and design for the institution under scrutiny. In those cases, information is a transitional instrument. It can facilitate deliberation about institutional design, choices about institu-

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51. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970) (hoping for peaceful conflict resolution, among other results); JOHN STUART MILL, ON LIBERTY 17–18 (David Spitz ed., 1975) (1859) (hoping to generate reliable ideas); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 253–57 (hoping to produce responsible democratic electorate); *see also* AMARTYA SEN, DEVELOPMENT AS FREEDOM 51–52, 178–88 (1999) (hoping to prevent famine).

52. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 3–5, 47–51, 69 (1989); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 785 (2d ed. 1988).

53. *See* Louis D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Frederick A. Stokes Co. new ed., 8th prtg. 1932) (1914) ("Publicity is justly commended as a remedy for social and industrial diseases.").

54. *See, e.g.*, BERNARD GUERIN, SOCIAL FACILITATION ch. 8 (1993) (reviewing human experiments); Joshua M. Feinberg & John R. Aiello, *Social Facilitation: A Test of Competing Theories*, 36 J. APPLIED SOC. PSYCHOL. 1087, 1102 (2006) (distinguishing complex from simple tasks, and finding that physical presence was not necessary to yield effects on performance).

55. *See* LoPucki, *supra* note 4, at 34–36.

tional objectives, or a series of decisions aimed at continuous improvement.[56]

• *Planning*—For the next two transparency justifications, the interests of litigants and potential litigants become central. One argument is that information about judicial operations provides clarity for third-party planning. This planning function of information access can be important regardless of whether monitoring or institutional reform is needed. Potential litigants will appreciate the ability to adjust their conduct in light of the judiciary's standard operating procedure, even if that procedure is corrupt, unjust, and impossible to reform. Legal advice becomes more reliable with more information about judicial procedures and decisions, all else equal, allowing society the comfort of planning around that knowledge.

• *Settlement or Legitimacy*—Finally, certain categories of information might legitimize judicial operations. The concept of legitimacy includes moral judgments about when the influence of law is justified,[57] but a thinner, sociological version of legitimacy is also useful.[58] A judiciary's dispute resolution function is undercut when participants do not respect court decisions. One might then believe that delivering an explanation to affected parties will help them accept or endorse the outcome.[59] This disclosure can be paired with an opportunity to prevent decision-maker error through evidence and argument. It is difficult for parties to add valuable insights to a decision process when it is largely a mystery to them.

On the intrinsic value side, there are fewer arguments to review. These transparency justifications depend on the value of a given type of information standing apart from (other) consequences, and any number of normative frameworks might yield such value. As for data about the judiciary, two arguments might be separated out.

• *Academic Knowledge*—The first argument turns on the good associated with discovery, even when that knowledge has no use value. Professional scholars and others can experience a deeply rewarding satisfaction or euphoria from understanding how systems operate, or simply the sense that they are pursuing a foundational good.[60] There is no reason this experience does not extend to knowledge about court systems. Recognizing the phenomenon and the importance of "eureka moments" is not to argue for a hedonic trump over other considerations, of course. The thrills of knowledge could be registered as a justification for information access without granting them lexical priority over every other good. It seems

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56. *See* Samaha, *supra* note 2, at 921–22.

57. *See generally* LESLIE GREEN, THE AUTHORITY OF THE STATE 234–40 (1990).

58. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795–99 (2005).

59. *See generally* LIND & TYLER, *supra* note 38, at 66–83.

60. *Cf.* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 64–70 (1980) (arguing that knowledge is self-evident, intrinsic good that is desirable for that reason alone).

awkward, on the other hand, to defend a policy analysis that disregards the joy of knowledge.

• *Popular Entertainment*—Closely related is the entertainment value of litigation, both civil and criminal. As with academic knowledge, the focus here is on the potential audience for information beyond the participants in litigation. The difference is that the consumption value comes from viewing human drama instead of gathering knowledge about institutional function. Although *Court TV* did not endure forever as a network brand name,[61] there is a significant paying audience for information and images regarding a small number of conflicts that play out in the judiciary. Policy-makers might want to privilege the first kind of intrinsic argument for transparency over the second, but we should recognize this choice as contestable. Free speech theorists, no less than utilitarians, have struggled over whether to erect a hierarchy of consumption values.[62] No simple reason presents itself for insulating the broader category of information policy from the controversy.

This list of justifications is likely incomplete, and a defensible information policy is certainly sensitive to factors in addition to the benefits of access. The list does, however, capture the rationales underlying most demands for judicial transparency. Now, the question is whether the reliable prediction of judicial behavior accords with these values—that is, whether or not prediction fits the conventional notion of transparency.

## B. *Prediction and Priorities*

As it happens, achieving reliable prediction of judicial behavior serves the listed values quite well. It should be emphasized that this conclusion partly depends on precisely what data ELS models will demand: the less raw data these models need, the less likely it is that every transparency advocate will be content with a prediction-oriented policy. Nevertheless, the plausible goals of transparency would be powerfully served by a reliable prediction model, even if the model's data were never disclosed to the public. Prediction alone delivers on many dimensions of transparency, and it could be the polestar for information policy in the courts.

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61. *Court TV* is now *TruTV*. *See* David Bauder, *Court TV Exits, TruTV Appears,* Associated Press, Dec. 30, 2007, *available at* http://www.usatoday.com/life/television/news/2007-12-30-truTV_N.htm (discussing channel's change in name and programming).

62. *Compare, e.g.,* John C. Harsanyi, *Morality and the Theory of Rational Behaviour, in* Utilitarianism and Beyond 39, 56 (Amartya Sen & Bernard Williams eds., 1982) (laundering out preferences for sadism, envy and malice), *and* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) ("[E]xpression on public issues has always rested on the highest rung of the hierarchy of First Amendment values.") (citation and internal quotation marks omitted), *with, e.g.,* Edenfield v. Fane, 507 U.S. 761, 767 (1993) ("[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented."), *and* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected . . . .").

1. *Judicial Transparency's Instrumental Value*

First, empirical models of judicial behavior help solve monitoring problems. These equations allow users to not only predict judicial decisions, but also to explain them. Observers can then assess whether these explanations are normatively acceptable. If, for example, the model indicates that judges' policy preferences are driving case outcomes contrary to conventional legal argument (somehow defined), then we can evaluate whether this situation is tolerable. And if an observer already has specific conceptions about what amounts to judicial misconduct or mistake, the model becomes a monitoring tool.

It is certainly true that available equations do not fully inform us about judicial behavior. A statistical model's ability to predict outcomes at fairly high accuracy rates does not mean that it will reveal actual judicial motives in particular cases. Furthermore, today's empirical surge regarding judicial behavior rarely concentrates on efficiency. Although judicial efficiency has not been ignored,[63] academic attention is often on variables influencing outcomes, rather than the time or resources expended to reach those outcomes. Careful monitors of the judiciary should want more. Nevertheless, each advance in our ability to predict simultaneously provides the kind of insight usually demanded by monitoring arguments. Even monitoring for efficiency is partly served by existing empirical research, and it could be better served with an adjustment in focus. If cost-justified, therefore, information policy can follow the needs of ELS scholars without excessive worry that core demands of monitoring will be left unmet.

A prediction-oriented policy, moreover, would not necessarily reduce public access to the details of court operations below what is available today. In fact, the result could be greater disclosure, or only a slightly different mix of content disclosed. Empirical scholars are not the only ones with an understandable claim to data, even if solely to predict judicial behavior. Lawyers might be imperfect prognosticators but many can improve their odds of giving accurate forecasts to their clients if they have better information about the court system. Forecasting is a skill for which lawyers are prized. Non-lawyers might say the same.

Thus, it could be that orienting information policy toward prediction will not seriously shrink the class of people with colorable access claims. In addition, much information presently available is relied upon by our leading statistical models. And, as indicated above, data now thought irrelevant to decisions might have to remain available in order to maintain confidence in existing models.

Finally, it seems worth noting that judicial openness can be an appropriate response to errors or misconduct uncovered by ELS models. Should a statistical model identify troubling judicial outcomes without de-

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63. *See infra* notes 74-76 and accompanying text.

pending on, say, media access to courtroom proceedings, perhaps the best way to prevent the misconduct will be to guarantee such access. The "Hawthorne Effect" of in-person observation on behavior is not a simple rule for all contexts.[64] So we should not rule out the possibility that certain traditional forms of live information access will influence judicial behavior differently—and in ways more desirable—than widely available statistical modeling.

It is true that what counts as desirable judicial behavior depends on an additional evaluation. One needs a normative vision for the court system, along with an understanding of observation's consequences, to choose an appropriate information policy (or an alternative method for regulating judicial behavior). But that additional step does not differentiate a prediction-oriented information policy from any other information policy. Although a prediction orientation would not certainly entail public access to courtrooms, such outcomes might be a consequence of statistical insight into the foundations of judicial conduct.

Next consider the argument that transparency facilitates institutional reform. The analysis just given speaks to this value as well. The ability to predict behavior gives would-be reformers a realistic picture of judicial outcomes. Furthermore, a reliable model of behavior helps diagnose the causes of any outcomes singled out for reform. The caveats above also apply: statistical models drawing on past behavior—that is, all statistical models—cannot predict future behavior with perfect accuracy, nor can they identify every causal factor with precision. But the important point is that institutional reform efforts are served by focusing on the needs of prediction models.

This conclusion holds for third-party planning as well. Insofar as a statistical model presents an accurate prediction of judicial outcomes, the model allows outsiders to understand the institution and to plan around it. Specifying causal factors serves this planning desire more strongly, but the function is served either way. Although a prediction model has to be practically available before any third party can use it for planning, this is a reason to ensure wide availability and user-friendliness of ELS models. It does not add reasons to extract information from court systems beyond what is necessary to generate reliable models.

One could pause here and question whether it is best to grant private parties and others the opportunity to predict judicial outcomes. Perhaps these actors would use the information to bend the courts to an injurious political will, or to "game the system" and achieve what might be called

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64. Behavioral effects of observation are sometimes referred to as the "Hawthorne Effect," one of many loose uses of the term. *See* F.J. ROETHLISBERGER & WILLIAM J. DICKSON, MANAGEMENT AND THE WORKER 154–56, 179–84 (1939) (attempting to assess supervision effects on workers at electric plant); *see also supra* note 54 (citing social facilitation studies).

unfair advantage over the law.[65] These are not irrational concerns. Yet however troubling, these risks suggest a possible constraint on the degree to which information policy ought to serve prediction—a constraint that might be satisfied by reformulating substantive law to avoid gaming and improper democratic influence, rather than avoiding a world in which everyone understands how law operates in the courts. The project in this essay is the less ambitious task of isolating positive values for transparency. In any event, the risk that information will be used to do harm is a feature of all information policies and a reason for caution. It does not seem to cut harder against a prediction-oriented policy.

The fourth goal for transparency, settlement through party accept-ance, is probably more challenging to achieve with prediction. Recall that the settlement argument supposes that parties to a dispute will more likely accept the outcome if they have a sense of adequate participation. This might include an explanation from the decision-maker and an opportu-nity to make arguments that get heard. These objectives are served by a particular kind of information policy, one that involves individual party access to judicial explanations and argument. But a prediction-oriented policy would not clearly satisfy these demands.

True, a sophisticated prediction model may help reveal actual reasons for judicial behavior, and this could be a partial substitute for the settle-ment objective. Human psychology might not respond favorably to this method of explanation, however. The problem is not that statistical mod-els would reveal morally troubling factors that influence judicial decisions. A party can have this adverse reaction from reading a judicial opinion and without any hope of enhancing prediction. Rather, the difficulty is that the settlement function might require a personal interaction that statistics cannot provide. It is not apparent how often a prediction-oriented infor-mation policy would fall short on this score. Reliable statistical models might depend on the kind of judicial opinion that also fulfills the psycho-logical need for personal explanation. But there could well be a mismatch between prediction and party acceptance.

### 2. *Judicial Transparency's Intrinsic Value*

As for the intrinsic side of transparency arguments, the conclusion is less favorable. A prediction-oriented policy is a quite limited answer to those who value information about courts for its own sake. Roughly speak-ing, a prediction orientation partly satisfies cravings for academic knowl-edge but might do very little for popular entertainment.

The analysis is straightforward. Prediction-orientation plainly delivers on intellectual knowledge for one class of the curious. If the information policy for the judiciary were designed to meet the needs of those attempt-

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65. *Cf.* Richard J. Pierce, Jr., *Completing the Process of Restructuring the Electricity Market*, 40 WAKE FOREST L. REV. 451, 472–73 (2005) (discussing Enron's gambits in western electricity markets).

ing to reliably predict judicial behavior, large numbers of ELS scholars would be excited. This follows from the lasting and growing interest in quantitative measures of judicial behavior. Trained empiricists and many others have shown their commitment to understanding how courts operate in reality, and we can assume that part of this commitment comes from the value of knowing. It is not entirely clear that the elimination of this knowledge could be adequately or easily replaced by other goods.

Intrinsic value is surely not the whole story for scholars. Much of the academic's joy must be attributed to additional consequences of knowledge. Uncommon knowledge allows a person to teach or influence others, to build a certain type of reputation, to obtain employment, and so forth. Remember that the eureka moment for Archimedes happened in the service of Hiero.[66] Nor is accounting for judicial decisions the only intrinsic intellectual interest one might have in the courts. For example, the overall cost of running the court system, the speed with which cases are decided, the division of labor within the judiciary, and other topics can generate serious curiosity without a necessary link to improving predictions on case outcomes. Nevertheless, it is fair to say that a prediction-oriented information policy would serve an important niche of academic curiosity about courts.

A prediction orientation performs still worse for popular entertainment. Much of the data that is useful for building reliable statistical models seems to have a rather low consumption value when it comes to human drama. Variables such as a judge's voting record or the experience level of the lawyers are fairly disconnected from trial-related dramas. Indeed, the very existence of a reliable prediction model can undermine the entertainment value of litigation. A predictable final act is a recipe for bad drama. And as we have already discussed, predictability in litigation can lead to no litigation at all. A rough test for how an observer values litigation-as-entertainment, then, is to ask whether the observer feels a tinge of dismay at the thought of adjudication becoming predictable and then disappearing. For some, the source of this discomfort is the loss of another public arena for the confrontation of irreconcilable differences.

The point should not be overplayed. A prediction orientation might meet a substantial amount of the entertainment demand for transparency. It is common for popular interest in court proceedings to spike upward based on the identity of the litigants. Celebrity involvement in legal disputes appears to be no less attractive to mass audiences than any other celebrity conduct, and occasionally the popular interest is intense. During these episodes, a large proportion of the court's docket and proceedings

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66. This is the story, anyway. *See* VITRUVIUS: THE TEN BOOKS ON ARCHITECTURE 253–54 (Morris H. Morgan trans., 1914) (describing Archimedes' effort to determine whether Hiero's crown was pure gold).

will be valued by substantial numbers of the public,[67] perhaps regardless of consequential benefits associated with water cooler chats. To the extent that ELS models of judicial behavior operate on similar raw material, a prediction-oriented access policy would incidentally serve the demand of a wider audience.

Still, the reality television aspect of litigation is often not covered by a prediction-oriented information policy. There is no guarantee that a policy carefully designed to facilitate predictive models of judicial behavior would deliver video cameras in the courtroom. It is true that video images might help to explain judicial behavior by revealing information that the cold record cannot. It is also true that when judges are aware that their behavior is being videotaped, their behavior could well be different from non-videotaped situations.[68] Yet a prediction-oriented information policy seems to be at a loss on this issue. It cannot point toward or away from cameras in the courtroom. Yes, modelers should want to know the effect of videotaped observation compared to other environments, but their needs are unable to drive those observation policy choices.

In other words, an empiricist bent on prediction will be curious about how video cameras influence judicial behavior given a diversity of camera-access practices or the possibility of a change in practice. If, however, the choice is made to exclude the cameras and never turn back, then an empiricist cannot muster arguments for reversing that policy. The empiricist interested in predicting judicial behavior needs to understand the relevant decision environment, not change it per se. He or she should be indifferent to which environment is selected, as long as policymakers ensure access to data needed for prediction in the chosen environment.

Contrast those who enjoy witnessing real-life courtroom dramas. Video images are central to this form of popular entertainment. There is striking anecdotal evidence of this. During criminal proceedings against Michael Jackson, cameras were not allowed inside the courtroom but transcripts were released to the public. The *E! Entertainment* network and *British Sky Broadcasting* televised professional actors performing segments of the transcripts on the day after each was released.[69] The audience for these reenactments cannot be indifferent to courtroom camera policies.

Assuming a gap between popular entertainment demands and the information policy delivered by a prediction orientation, the question is how

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67. *See* The Smoking Gun: About, http://www.thesmokinggun.com/about.html (last visited Feb. 12, 2008) (explaining that website posts material obtained from court files nationwide).

68. This feared Hawthorne Effect is a leading objection to cameras in the Supreme Court's courtroom. *See, e.g., Judicial Security and Independence: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 13 (2007) (testimony of Justice Kennedy) ("[W]e have come to the conclusion that it will alter the way in which we hear our cases, the way in which we talk to each other, the way in which we use that precious hour . . . .").

69. *See* Lisa de Moraes, *E!'s Thriller: Floating a Jackson Trial Balloon*, WASH. POST, Jan. 12, 2005, at C7.

we should judge it. Is it a failing? In the setting of a symposium hosted by a respected academic institution, the gap is not likely to be of much concern. Instead, this feature of prediction orientation might assist scholars, judges, and others to specify which goals they are after when they invoke the idea of transparency. Most likely, this set of values will gravitate toward justifications involving monitoring in a democracy, the possibility of institutional reform, fair warning to potential litigants about how the system operates, a sense of legitimacy among participants in the judicial system, and perhaps the intrinsic benefits of academic inquiry. My guess is that popular entertainment will receive little or no weight.[70] Regardless of your value set, there are lively entertainment alternatives and reality television is not likely to disappear in the near future. Celebrity activity might be intriguing to mass audiences whether it happens on the red carpet or the courthouse steps.

In this space, I will not take a position on whether an instrumental and academic value set should be exclusive for the purpose of information policymaking. I will suggest, however, that many traditional transparency claims are motivated by entertainment values. This helps explain why the controversies over courtroom cameras and access to high-profile criminal proceedings are perennial issues.

Consider the well-known line of free speech doctrine addressing mass media demands for access to court proceedings and records. In many of these cases, both sides in the dispute and the trial judge preferred confidentiality to public exposure.[71] The interveners argued for constitutionally required openness, which would serve their audiences (also known as consumers). This is not to disregard the possibility that such access would shape judicial behavior in beneficial ways. Perhaps scrutiny by members of the general public would bring to bear popular norms on adjudication, and perhaps this influence deserves to be increased.[72] This type of monitoring claim is controversial but not irrational. Even so, the consumption value delivered by media access is undeniable. And fully sating this demand with a prediction-oriented information policy seems impossible.

Compare information on other aspects of judicial operations, data that are not popularly demanded. While debate over courtroom cameras never stops, outsiders do not seem to know or care exactly how hard fed-

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70. *See* Bartiromo, *supra* note 5 (quoting Justice Scalia); *cf.* L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 40–41 (1999) (holding that for-profit publishing company could not assert facial challenge to state law that demanded promise of noncommercial use before disclosing arrestee addresses).

71. *See, e.g.*, Press-Enter. Co. v. Superior Court, 464 U.S. 501, 503–04 (1984) (arising from defense-and-prosecution-supported motions to close most of voir dire and seal transcript thereof); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality opinion) (arising from defendant's motion to close his criminal trial, which was unopposed by prosecution).

72. Some believe that a good monitoring argument can be made out for media access to the "special interest" deportation proceedings that took place after 9/11. *See* Detroit Free Press v. Ashcroft, 303 F.3d 681, 711 (6th Cir. 2002).

eral judges work—whether they are working close to capacity, or whether they might be made to work harder without sacrificing quality or qualified applicants. We tolerate this ignorance even though judges are tax-paid agents of the state who are employed to perform a public service. Of course a rudimentary measure of effort is available: case filings per judge.[73] But more informative measures of effort and productivity are not recorded as a matter of policy.[74] There does not appear to be readily available data on orders or opinions per judge, nor are federal judges required to keep timesheets.[75]

In a related vein, we do not know the extent to which judges rely on their law clerks. Common knowledge does not isolate the number or identities of judges who rely on law clerk drafting, nor the extent to which each judge retains control over opinion content, nor law clerks' actual influence over case outcomes as opposed to the details of opinion content.[76] The quiet persistence of these gaps in our knowledge is telling.

CONCLUSION

This suggests two final thoughts. The first is that a prediction-oriented information policy will not cover every version of "transparency." There is fair doubt that this orientation can deliver on the instrumental value of legitimizing court outcomes, additional concern about whether efficiency monitoring will be accomplished, and very little chance that it can satisfy popular entertainment demands. The second thought is that a rational observer might not care. Shaping information policy to maximize reliable predictions about judicial behavior performs well in serving several other transparency values. The remaining shortfalls are troubling only according to certain normative perspectives. This is a fitting place to close, then. By examining the possibilities of an information policy that

73. *See, e.g.*, RICHARD A. POSNER, THE FEDERAL COURTS 130–31 & fig.5.2 (1996) (asserting that federal judges worked shorter hours thirty-five years earlier).

74. For a recent study on the productivity of state supreme court justices, and the possible influence of judicial selection schemes, see Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary (2007), *available at* http://papers. ssrn.com/sol3/papers.cfm?abstract_id=1008989. On judicial performance measures, see, for example, Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23 (2004), and Daniel A. Farber, *Supreme Court Selection and Measures of Past Judicial Performance*, 32 FLA. ST. U. L. REV. 1175 (2005).

75. Court administrators have, at points in the past, collected timesheets for research purposes. *See* Gordon Bermant, Patricia A. Lombard & Elizabeth C. Wiggins, *A Day in the Life: The Federal Judicial Center's 1988-1989 Bankruptcy Court Time Study*, 65 AM. BANKR. L.J. 491, 501 (1991).

76. *Cf.* Todd C. Peppers & Christopher Zorn, Law Clerk Influence on Supreme Court Decision Making 10–11, 23–29 (June 14, 2007) (unpublished manuscript), *available at* http://ssrn.com/abstract=925705 (collecting data on law clerk ideology by survey and finding modest influence on Justices' merits votes). Two television series involving Supreme Court law clerks were trotted out in the past few years and then quickly canceled. *See id.* at 1.

caters to empirical models of judicial behavior, the plausible justifications for judicial transparency have been better specified and an important normative choice has been exposed.