

## **A RESPONSE TO PROFESSOR KNIGHT, ARE EMPIRICISTS ASKING THE RIGHT QUESTIONS ABOUT JUDICIAL DECISIONMAKING?**

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Although I was honored by the invitation to comment on Jack Knight's article, I was also a little puzzled. I do not do the sort of work to which this Symposium is devoted, nor do I even read very much of it. When I do dip into empirical studies of the courts, I often find them rather difficult or even alien, both in style and in focus. I also find them frustrating: the empiricists frequently appear to be battling a formalist straw man who believes that law can be done by following rules that do not allow for discretion in their interpretation or application. I do not know anyone who thinks that. Perhaps, I speculated, my role is meant to be like that of a Martian, invited to give the perspective from another planet.

Once I read Professor Knight's wonderful article, however, I had a very different sense. *Are Empiricists Asking the Right Questions About Judicial Decisionmaking?*<sup>1</sup> is not only written in clear and graceful English. Even more important, it is to me a reason for great hope that the astronomical distance between empirical work and the concerns of normative legal analysts—like me—is diminishing rapidly. I believe that empirical work along the lines that Professor Knight proposes will prove to be of great interest not only to other empiricists but also to judges, practicing lawyers, and scholars who write normatively about the courts.

Part of the reason for my hope is that Professor Knight's article is free of the assumption (sometimes evident in empirical studies of the law) that the normative concerns of others make them blind to the role of politics and policy in judicial decisionmaking. Normative

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1. Jack Knight, *Are Empiricists Asking the Right Questions About Judicial Decisionmaking?*, 58 DUKE L.J. 1531 (2009).

analysts have long known that judicial decisionmaking often involves, and cannot exclude the influence of, considerations that go beyond the proverbial black-letter law. Take the famous essay by Judge Joseph Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*.<sup>2</sup> Hutcheson was no foe of doctrinal analysis, but he argued vigorously that in practice the role of doctrine is not to exclude the personal convictions and inclinations of judges, but to provide them with the means of testing their intuitions about the best judgment against the concerns and results reached by other judges in other cases.<sup>3</sup> Hutcheson published the essay in 1929, but it sounds eerily like Judge Posner's description of judicial decisionmaking,<sup>4</sup> although Hutcheson could have benefitted from Professor Knight's more nuanced understanding.<sup>5</sup> To be sure, Hutcheson is often counted as a sort of legal realist, but his writing generally indicates that he was a perfectly orthodox lawyer of the generation that entered the profession about 1900. But if Hutcheson is not persuasive, consider a bigger and much older figure. This is Chief Justice John Marshall, writing in 1807: "The judgment is so essentially influenced by the wishes, the affections, and the general theories of those by whom any political proposition is decided, that a contrariety of opinion on . . . great constitutional question[s] might well have been expected."<sup>6</sup> So it is not news that one cannot describe judicial choices in drily formalistic terms, and Professor Knight does not think otherwise.<sup>7</sup>

Of course, if opinions are no longer thought to explain decisions the way a proof explains a proposition in Euclidean geometry, one

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2. Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929).

3. *Id.* at 285–88.

4. RICHARD A. POSNER, HOW JUDGES THINK 84–85 (2008).

5. See Knight, *supra* note 1, at 1539–54 (interpreting Judge Posner's work to derive three sets of factors in judicial decisionmaking that serve as a background for assessing the success of empiricism).

6. 5 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 297 (1807).

7. On a related point, Professor Knight understands that neither statistics nor game theory is necessary to understand that outcomes on collegial courts reflect the exigencies of multimember decisionmaking bodies. To cite Chief Justice Marshall once more, Professor G. Edward White's groundbreaking examination of the internal workings of Marshall's Court illustrates these points and Marshall's acute awareness of them. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835, at 1 (1988) (providing "a detailed description of the Court's internal deliberations, the first effort to survey the Court's nonconstitutional cases between 1815 and 1835, and the first detailed investigation of the intellectual legal culture in which the Court's decisions were grounded").

might wonder why anyone bothers doing doctrinal work (other than as a species of advocacy) or, for that matter, why the practice of writing opinions even persists. Yet judges *do* continue to write opinions, and scholars (well, academic lawyers at any rate) continue to study what those opinions say. Professor Knight's article is so excitingly full of promise because it grapples with this reality. He, as I read him, is proposing in part that social scientists turn their formidable tools on opinion writing not to exorcise once more the formalist bogeyman but to deepen our understanding of what opinions do and how they do it . . . and, ultimately, how we evaluate judges.<sup>8</sup>

Professor Knight is calling for an expansion of social science work in the first instance by moving beyond what has been a heavy emphasis on outcomes.<sup>9</sup> The form and content of the judicial opinion demand explicit analysis not for formalistic reasons but precisely because from a social scientist's perspective the work must be done if the scientist is to investigate the role of opinion writing as a justificatory practice, or the antecedent question of which factors actually affect decisions. Opinions are not epiphenomenal froth on a sea of political choices, but an essential part of the overall decisional process that deserves attention. Knight's exciting suggestion is that social scientists can advance this understanding of decisionmaking by developing "richer and more complex kinds of empirical evidence . . . sufficient to adequately characterize substantive content, and yet satisfy the requirements of explanation in the social sciences."<sup>10</sup> Lawyers whose orientation is doctrinal, conceptual, or historical can give us a "richly detailed"<sup>11</sup> account of the substance of law, but social science rests in part on what Knight calls "the desire for generalization,"<sup>12</sup> "the identification of causal mechanisms that apply generally to specific social situations,"<sup>13</sup> or, in the context of this Symposium, "the general causal framework in which judges change

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8. See Knight, *supra* note 1, at 1553 ("[T]he normative assessment of judicial quality is best served by an analysis of matters of judicial reasoning and justificatory practice and not by studies of judicial motivation.").

9. *Id.* (encouraging "empirical social scientists [to] take up . . . a broader research focus on substantive content").

10. *Id.* at 1554.

11. *Id.* at 1555.

12. *Id.* at 1554.

13. *Id.*

and justify the law.”<sup>14</sup> It is in their disciplined attention to this sort of explanation that Knight believes social scientists have a comparative advantage.<sup>15</sup> I think that he is right, and that research of the sort he proposes will be of great interest to those of us focused on normative issues—whether as judges, lawyers or scholars.

I do not have time to discuss Professor Knight’s fascinating suggestions about how to execute this research agenda.<sup>16</sup> I have two quick thoughts. First, I suspect that he and others working in this vein may well find themselves in conversation with figures from the legal past such as Karl Llewellyn and, before Llewellyn, John Chipman Gray. Llewellyn lacked Professor Knight’s far more sophisticated understanding of the problems of measurement, but his great book, *The Common Law Tradition*,<sup>17</sup> could be seen as a first and necessarily primitive effort to develop the tools for evaluating opinions that Knight is seeking. Llewellyn’s discussion of judicial styles has more in common with Knight’s concerns than with literary-critical approaches to law, and his resort to reading chronologically determined slices of particular courts’ decisions was a recognizable effort at sampling. Although Gray did not use the tools of a modern social scientist, his study of *The Nature and Sources of the Law*<sup>18</sup> is still worth reading as a learned reflection on how to characterize the substantive content of opinions and the decisions they justify in a thoroughly empirical spirit of inquiry.

Second, I believe that executive branch legal decisionmaking is an area that cries out for study along Professor Knight’s lines. The problem there, to be sure, is not that people are tempted to think of decisionmaking in overly formalistic ways (as with the courts) but that many assume that there is nothing at play but politics in the crudest sense. I am quite sure that assumption is overly simple, but at this point there is simply no framework for describing executive practice. The sort of investigation into judicial opinions that Knight proposes

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14. *Id.* at 1555.

15. *Id.*

16. *See id.* at 1554, 1555 (“Any adequate analysis of the crafting of judicial opinions would require at least two kinds of measurement: (1) a measure of the substantive content of the law and (2) measures of the sources of justification and, thus, of new law . . . [as measured by factors like] precedents, constitutional provisions, statutes, administrative regulations, legislative history, generally accepted social practices (e.g., in the commercial law area), social norms and basic values on which there is a social consensus in the community.”).

17. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

18. JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* (1909).

would be invaluable in understanding an area that—as the controversies over the Justice Department’s role in the War on Terrorism have shown—is of great practical significance.

I am more confident than I was before reading this article that the future of social science research into the activity of judging bears exciting promise, not only for those engaged in it, but for others as well. For that hope, and for an extraordinarily clear introduction to the issues, we are greatly indebted to Professor Knight.