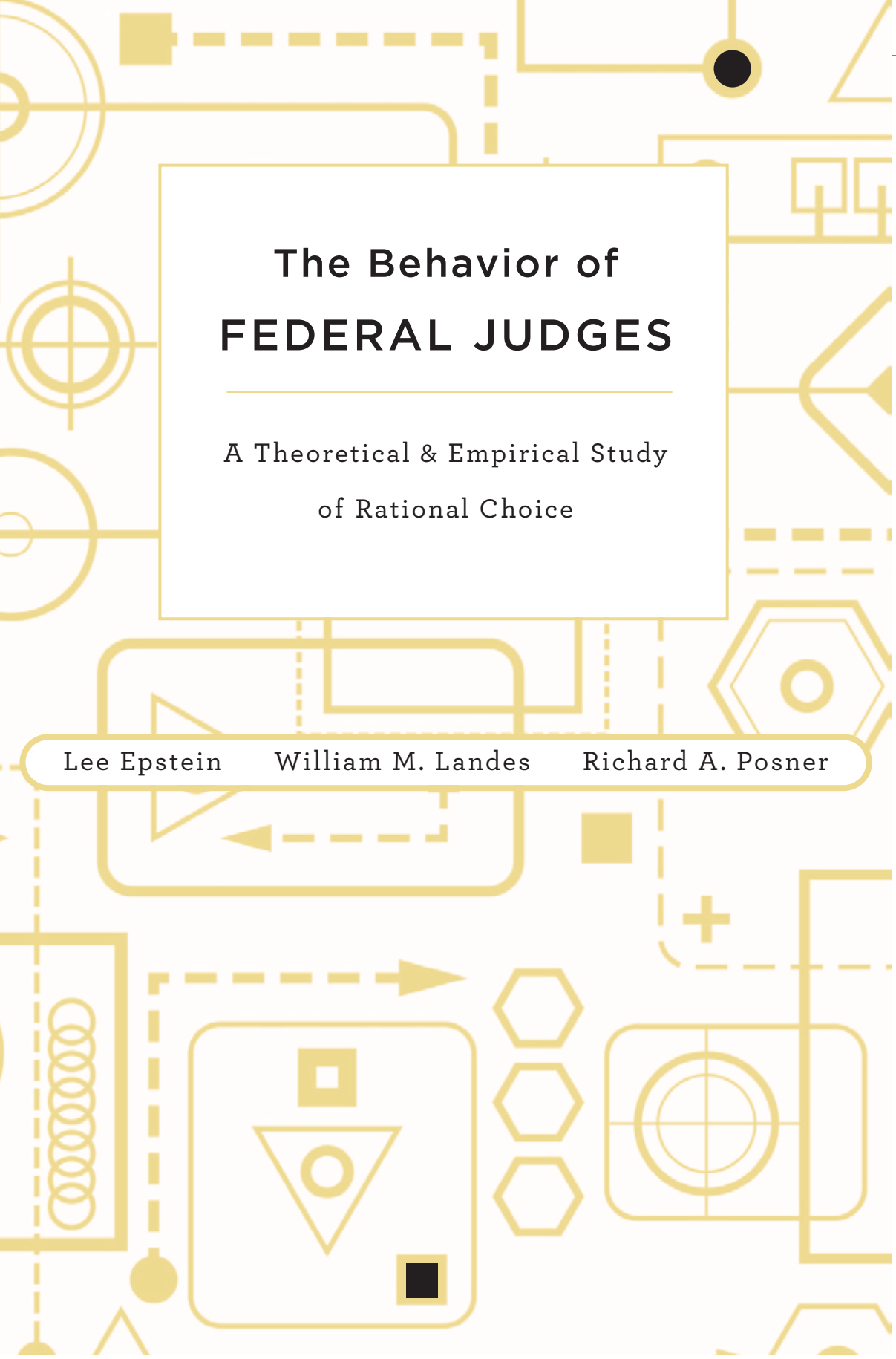

The Behavior of FEDERAL JUDGES

A Theoretical & Empirical Study of Rational Choice

Lee Epstein William M. Landes Richard A. Posner

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I often say that when you can measure what you are speaking about, and express it in numbers, you know something about it; but when you cannot measure it, when you cannot express it in numbers, your knowledge is of a meagre and unsatisfactory kind: it may be the beginning of knowledge, but you have scarcely, in your thoughts, advanced to the state of *science,* whatever the matter may be.

—Baron William Thomson Kelvin, "Electrical Units of Measurement" (May 3, 1883), in Kelvin, *Constitution of Matter* (vol. 1 of his *Popular Lectures and Addresses*), 73–74 (1889) (emphasis in original)

For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.

—O. W. Holmes, "The Path of the Law," 10 *Harvard Law Review* 457, 469 (1897)

General Introduction

> In the continuing drama of American law the judge still holds the center of the stage, down in front of the footlights. . . . Much of our finest intelligence is engaged in studying what judges do and say and in guessing at their inmost sensations.
>
> —John P. Dawson[1]

Judges indeed play a central role in the American legal system—more so than in most others. But the behavior of American judges, and in particular the determinants of their decisions, are not well understood, including by lawyers, law professors, and even many judges (we'll explain that paradox in due course). In part this is because judges in our system are permitted to be, and most are, quite secretive.[2] Indirect methods must be employed to understand their behavior. Beginning more than half a century ago but accelerating in recent decades, social scientists—political scientists in particular, but also economists and psychologists, and, increasingly, academic lawyers knowledgeable about social science—have used ever more sophisticated theoretical concepts and quantitative tools to penetrate self-serving judicial rhetoric, go beyond judges' limited self-understanding, and place the study of judicial behavior on a scientific ba-

1. *The Oracles of the Law* xi (1968). Still true, almost half a century later.

2. With exceptions, of course. See, for example, William Domnarski, *Federal Judges Revealed* (2009), a study based on oral histories of a number of federal district and circuit judges. See also books based on the private papers of Supreme Court Justices, such as Lee Epstein and Jack Knight, *The Choices Justices Make* (1998); Forrest Malzman, James F. Spriggs II, and Paul J. Wahlbeck, *Crafting Law on the Supreme Court* (2000); and Walter F. Murphy, *Elements of Judicial Strategy* (1964).

sis. Yet this literature is not well known to the legal community,[3] apart from the small sliver that without pretension to doing social science research takes an interest, whether sympathetic or critical, in what social scientists might have to say about judges.[4] That separation is unfortunate, because many conventional legal scholars, abetted by judges, have promoted an unrealistic but influential theory of judicial behavior in which careerism and ideology play no role in judicial decisions, while some social scientists and some journalists have sponsored the opposite but also unrealistic conception of judges as merely politicians in robes.

The theory of judicial behavior in which careerism and ideology play no role in judicial decisions we call "legalism," though the more common term is "formalism."[5] In its simplest form, judges are said merely to apply law that is given to them to the facts; their task is mechanical, at best a form of engineering (but not "social engineering"), and involves no exercise of discretion. In a more complex version, judges (especially Supreme Court Justices) apply to cases an intellectual system—a methodology—adopted on politically neutral grounds to generate objective decisions. These systems are called by such names as "originalism," "textualism," "the Constitution in exile," "the Constitution as common law," "the living Constitution," "active liberty"—the list goes on and on.

Some academic lawyers have sponsored the opposite conception of judges—that their legalist pretensions are mere rhetoric, designed to conceal the political character of their rulings. About those systems these academic critics might say with Kierkegaard that "in relation to their systems most systematizers are like a man who has built a vast palace while he himself lives nearby in a barn; they themselves do not live in the vast systematic edifice."[6] The skeptical theory of judicial behavior was taken

3. Frank B. Cross, "Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance," 92 *Northwestern University Law Review* 251 (1997); Gerald Rosenberg, "Across the Great Divide (Between Law and Political Science)," 3 *Green Bag* (second series) 267 (2000).

4. For a recent, and very good, example, see Charles Gardner Geyh, "Can the Rules of Law Survive Judicial Politics?" 97 *Cornell Law Review* 191 (2012).

5. For an illuminating discussion of legalism (formalism), see Paul N. Cox, "An Interpretation and (Partial) Defense of Legal Formalism," 36 *Indiana Law Review* 57 (2003).

6. Søren Kierkegaard, *Papers and Journals: A Selection* 212 (Alastair Hannay trans. 1996).

to an extreme by such "realists" as Fred Rodell of Yale and by the votaries of "critical legal studies," a revival of Rodell-style extreme legal realism that flourished in the 1970s and is now defunct, although some of its avatars, such as feminist legal theory and critical race theory, continue to have a following among academic lawyers.

Properly understood, legal realism is an attempt to be realistic about judicial behavior, and an attempt with a distinguished pedigree (Jeremy Bentham, Oliver Wendell Holmes, Benjamin Cardozo, Learned Hand, moderate legal-realist scholars such as Karl Llewellyn, and other luminaries[7]). But the school of legal realism lacked both an articulated model of judicial behavior and the data and empirical methodology required to test such a model. These tools are now available and we build with them in this book, hoping to augment the existing social-scientific literature on judicial behavior.

There is an important difference between traditional legal realism and the concept of realism that shapes our analysis. The traditional realism was, like legalism, a jurisprudential theory—a theory about the legitimacy and character of particular judicial outcomes. It was not a theory of how judicial behavior is shaped by incentives and constraints. Legal realists, notably Jerome Frank, offered conjectures about judicial psychology, but realist analysis was largely limited to the influence of a judge's ideology, or, what was believed to be correlated with it, social class, on judicial votes. There is more influencing a judge than class and ideology, and the "more" includes, but importantly is not exhausted in, legalist reasoning. This is brought out in a striking passage by Llewellyn, the foremost academic legal realist:

> Those phases of human make-up which build habit in the individual and institutions in the group . . . [are] laziness as to the reworking of a problem once solved; the time and energy saved by routine, especially under any pressure of business; the values of routine as a curb on arbitrariness and as a prop of weakness, inexperience and instability; the social values of predictability; the power of whatever exists to produce expectations and the power of expectations to become norma-

7. Such as Ambrose Bierce, who in *The Devil's Dictionary* (1911) defined "lawful" as "compatible with the will of a judge having jurisdiction."

> tive. The force of precedent in the law is heightened by an additional factor: that curious, almost universal sense of justice which urges that all men are properly to be treated alike in like circumstances. As the social system varies we meet infinite variations as to what men or treatments or circumstances are to be classed as "like"; but the pressure to accept the views of the time and place remains.[8]

These are shrewd observations. They are paralleled from outside the legal profession by remarks to us (which we have edited slightly) by the economist Andrei Shleifer, in correspondence:

> Consider common law judges who face few prospects of promotion, are not so high in the judicial hierarchy that they are making law, and cannot be fired or voted out. These judges face almost no incentives. They need to move cases through, and they need to be not so utterly random that they get overturned very much. But these are not enormously strict constraints. So what consequences follow? I think that in this context just about any external or internal motivation can prove decisive. Of course, one motivation might be to try to figure out what the law is and to apply it, but this is only one of them. Judicial politics is one that the legal literature focuses on; abuse of lawyers to humor oneself is another. But one needs to take a much broader view: that just about anything can move these judges when incentives are so weak.
>
> Right/left politics is only one source of judicial bias. Other sources might be much more important. Judges can be pro-dog or anti-dog. More importantly, judges can be pro-government or anti-government. If many judges are former prosecutors or believe that "prosecutors don't get names out of a phone book," this might be a more significant bias than right/left politics. Judges may have their own philosophies on all kinds of matters, in other words. There may be a very important interaction between the judicial branch and the media. If judges are really not particularly constrained, presumably they will try to get at-

8. K. N. Llewellyn, "Case Law," in *Encyclopedia of the Social Sciences,* vol. 3, p. 249 (E. R. A. Seligman ed. 1930).

> tention, be liked, be popular. Since media intermediates a lot of information, they might choose to do what the media want.

Building on such insights, we aim in this book to present a realistic model of judicial behavior that is sufficiently simple and definite to be testable empirically, and then to test it.

Chapter 1 presents the model. Using concepts from labor economics, it models the judge as a participant in a labor market—the judicial labor market—and defends the model against legalist objections. We explain that a judge conceived of as a participant in a labor market can be understood as being motivated and constrained, as other workers are, by costs and benefits both pecuniary and nonpecuniary, but mainly the latter: nonpecuniary costs such as effort, criticism, and workplace tensions, nonpecuniary benefits such as leisure, esteem, influence, self-expression, celebrity (that is, being a public figure), and opportunities for appointment to a higher court; and constrained also by professional and institutional rules and expectations and by a "production function"—the tools and methods that the worker uses in his job and how he uses them. We rebut the formidable challenge that Judge Harry Edwards of the U.S. Court of Appeals for the District of Columbia Circuit has mounted to the realist approach to judicial behavior.

We call ours "the" realist approach, but other such approaches are possible and are found in the scholarly literature, approaches that emphasize the influence on judging of personal characteristics, such as race and sex, religious upbringing, temperament, cognitive limitations, education—even law-school grades.[9] Those approaches are fruitful, but in order to make our analysis manageable we employ a simpler model, though we do from time to time touch on personal-identity characteristics, which influence ideology and through ideology judicial outcomes.

Ours is strictly a positive analysis. We do not ask how judges should decide cases but how they do decide them—more broadly, how they do

9. These approaches are discussed in Richard A. Posner, *How Judges Think,* ch. 1 (2008). See also Lawrence Baum, *The Puzzle of Judicial Behavior* (1997); Eileen Braman, *Law, Politics, and Perception* (2009); Frank B. Cross, *Decision Making in the U.S. Courts of Appeals* (2007).