How Judges Work: Thinking about Social Science and Law

By Sally J. Kenney

Judge Patricia Wald identifies several impediments to judges' making greater use of social science: they lack time to find, read, and make sense of the research; the research is inaccessible to nonspecialists and fails to identify clearly the policy implications; too much exists, and only occasionally does one work stand out; and most research findings are qualified and ambiguous rather than certain. Just as the flukish order in which cases appear and the idiosyncrasies of their fact patterns shape precedent, the timing of research determines whether judges notice it. Judges are more likely to incorporate social science research into their opinions if it fulfills a pressing need and addresses an important shift in thinking. Judge Wald does not debate whether judges do or should make public policy, since she sees making policy choices as inescapable in appellate decision making.

Judge Wald further explains that judges are skittish because (1) they fear that higher courts will overturn them for going "beyond the law" and (2) procedural fairness necessitates that all parties be able to dispute the "facts" on which judges base their policy choices. A retreat to the myth of legal positivism would defy trends elsewhere. Despite the rhetoric of judicial restraint and states' rights dominant in the United States, from South Africa to Hungary and from the European Court of Justice to the newly established International Criminal Court, polities are granting more, not less, power to judges worldwide to decide contested matters of public policy.

I was surprised that Judge Wald gave so little weight to the value of amicus curiae briefs for synthesizing, digesting, and presenting social science data for judges. As one who studies other jurisdictions, particularly the United Kingdom and the European Union, I have argued that English courts' unwillingness to mirror the United States' expansive use of this practice excludes interest groups from helping judges to explore the wider policy implications of cases that may be of little interest to the parties. That unwillingness also misses an opportunity for mitigating the effects of the sheltered backgrounds of judges increasingly regarded as out of touch with society.[1] Do judges not have time to read the briefs? Or do they regard the arguments as compromised by advocacy rather than nearing the ideal of objectivity as does, Judge Wald suggests, the research of think tanks? Judge Wald laments the International Criminal Tribunal for the former Yugoslavia's rejection of a particular think tank's help, but provides another example of the utility of anthropological evidence in making the case for genocide. If, as she implies, judges tend to disregard even those most skilled at translating social science into policy-relevant material, we cannot merely assume a tidy division of labor and carry on with our version of basic science, leaving others to find the relevance of its application.

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We in policy schools often discuss how we can present research findings to policy makers, to bridge the chasm between the worlds of public policy research and public policy making.[2] Yet not all the blame lies with the research or its current presentation. Even the more certain of social scientific findings—for example, that the death penalty is not a deterrent to murder, that single women do not bear additional children to acquire more public assistance, or that tort awards are not skyrocketing—do little to dissuade politicians from espousing ideologically driven positions.

Judge Wald's remarks have implications for choices that political scientists make if we share her view that judicial decision making would be improved if judges were better able to use social scientific evidence. We could choose to more actively engage the world of policy making. Yet political science and women's studies seem less concerned than ever with that world. Rather than seen as enhancing one's scholarship, engagement with policy is too frequently perceived to be time taken away from the higher calling of the mind. I agree with Robert Putnam,[3] and the creators of this journal, that we as scholars must contribute more to public discourse, even if only for the cynical reason that, in times of funding crisis, those of us at public universities must justify why

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state money should go to us instead of institutions that offer greater access for state residents, K–12 education, or other worthy causes.

In addition to suggesting some ways that scholars can become more engaged, Judge Wald offers several insights for those who think institutionally and strategically about organizations and social change, be they scholars or activists or both (an increasingly rare hybrid). Her remarks reinforce what we already know: it matters who judges are, what they know, who works for them, and how they do their work. How do judges integrate social science into their decision making? First, they draw on their own life experiences and training. It is important that Judge Wald is a woman who has raised five children and championed the cause of children's rights at the Children's Defense Fund when it was even more unpopular than Hillary Clinton found it. It matters that she would have considered whether or not to take estrogen and that she helped in the legal rebuilding of Eastern European democracies. It matters that Justice Clarence Thomas can speak directly to what cross-burning means to those whom it terrorizes.[4] It matters that Justice Sandra Day O'Connor experienced employment discrimination and survived breast cancer. While I would not want to be too simplistic about the relationship between experience and judicial ideology, if legal decision making is not exclusively about applying rules and precedents but also about making policy choices, then what judges bring with them to the bench is relevant. A diverse bench is essential to justice, as well as to the appearance of justice.[5]

Who judges are, and what they know, is shaped partly by legal education—education that valorizes some social science (economics) and makes it difficult for students to learn about other social science fields. As one who has been affiliated with several different law faculties, I would say that law professors seem to be increasingly drawn from those trained in law and economics, members of the Federalist Society,[6] and politically active conservatives.[7] These faculty are molding not just the next generation of lawyers and law clerks, but future judges as well.

We should not overlook the intentional and planned dissemination of the law and economics paradigm by a community of scholars and well-resourced activists. Funding training for judges; fostering an intellectual community by sponsoring scholarly research and conferences, donating to law schools, and endowing chairs; bringing people together; networking; and seeking to place their people in positions of power—these are all identifiable strategies of a successful social movement. Such efforts are hardly new. The Progressive Party, as just one example, sought to bring to the bench judges who would weigh new social science evidence more heavily than liberty of contract precedent. Given the importance of courts in the U.S. system, it is hardly surprising that groups seek to influence how they approach their work. The endeavor is not intrinsically sinister.

Of course, what judges know is also determined in part by judicial training. Judge Wald recommends that the exemplary training on energy science and technology policy she received be extended to other modes of reasoning and subjects. Feminists, for instance, have had positive experiences educating judges about gender bias and the law.[8] While I agree that such specialist training is indispensable, it is vulnerable in states experiencing budget deficits. And other jurisdictions, such as England, are still debating whether such training for judges is desirable at all.

Cut, too, at the state level is law clerk staffing, another key mechanism for bringing relevant social scientific evidence to bear on legal policy making.[9] Judge Wald mentions that she chooses her clerks partly based on such expertise. We know that this happens at other courts, such as the European Court of Justice.[10] Clerks may not have the power that Edward Lazarus attributes to them,[11] but who they are and what they know matters. They are among the few people with whom judges can freely discuss cases.[12] They help bring to judges the latest thinking from their academic institutions. Their absence in England, I would argue, is a reason that English judges are out of touch. Conversely, their greater longevity in European courts, while providing much needed continuity, is a cause for concern. The more judges rely on longtime clerks for substantive expertise, the more their independence diminishes. Judge Wald's remarks encourage us to see courts as organizations, like executive agencies or legislators, which helps us think how we might accomplish institutional change.

Of course, engagement with the legal system has its downside too. Doctrines constrain and shape arguments. To secure equality under the 14th Amendment and avoid being disadvantaged in the workplace, for example, women have had to claim that they are like men.[13] In order to advance their legal status, gays and lesbians seek to prove that they are just like monogamous heterosexual couples and that sexual orientation is immutable. Furthermore, as Judge Wald points out, judges deciding particular disputes want clear factual answers: Do we want to sacrifice the complexity that Kim Scheppele describes in her comments for the sake of possibly securing the kind of influence economics has had in legal decision making? Offering up our knowledge in useable nuggets to judges poses risks akin to those novelists face when they sell their work to Hollywood—we have little control over outcomes. Martha Chamallas illustrates the pitfalls of expert testimony, describing the difficulty that Judge Gerhard A. Gesell had following the arguments of a sociologist testifying about stereotyping and tokenism in the case of *Price Waterhouse v. Hopkins*.[14] Sociologist Susan Fiske's arguments about gender roles in organizations were opaque to Judge Gesell, who employed a legal framework looking for individuals acting intentionally from prejudice. Alas, the alternative—disengagement and leaving the terrain to other disciplines and ideologies—poses even more serious risks.

Judge Wald's essay reveals two opportunities for political scientists. As scholars reflecting about our own work products and priorities, we can choose to be more accessible, enter relevant debates as public intellectuals, and interact with judges. Moreover, we can exercise our abilities for institutional analysis (especially comparative analysis) to trace the implications of how to structure judicial selection, judicial training, legal education, and the staffing and organization of legal institutions to ensure the best possible legal decision making, informed by the best social science. Thanks to Judge Wald for contributing to that conversation.

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References

Anasagasti, Miriam, and Nathalie Wuiame. 1999. *Women and Decision-Making in the Judiciary in the European Union.* Luxembourg: Office for Official Publications of the European Communities.

Chamallas, Martha. 1990. Listening to Dr. Fiske: The easy case of *Price Waterhouse v. Hopkins. Vermont Law Review* 15:1, 89–124.

Chinoy, Ira, and Robert G. Kaiser. Decades of contributions to conservatism. *Washington Post,* 2 May 1999, A25.

Cook, Beverly B. 1981. Will women judges make a difference in women's legal rights? A prediction from attitudes and simulated behaviour. In *Women, Power, and Political Systems,* ed. Margherita Rendel, with Georgina Ashworth. New York: St. Martin's Press, 216–39.

Davis, Sue. 1992–1993. Do women judges speak "in a different voice"? Carol Gilligan, feminist legal theory, and the Ninth Circuit. *Wisconsin Women's Law Journal* 8, 143–72.

Draper, Electa. 2003. Clerks' day off, judges' day on: Jurists will fill in during furloughs. *Denver Post,* 10 February, B1.

Hale, Brenda. 2001. Equality and the judiciary: Why should we want more women judges? *Public Law* (Autumn), 489–504.

Kay, Herma Hill, and Geraldine Sparrow. 2001. Workshop on judging: Does gender make a difference? *Wisconsin Women's Law Journal* 16:1, 1–123.

Kenney, Sally J. 1992. *For Whose Protection? Reproductive Hazards and Exclusionary Policies in the United States and Britain.* Ann Arbor: University of Michigan Press.

———. 2000a. Beyond principals and agents: Seeing courts as organizations by comparing *référendaires* at the European Court of Justice and law clerks at the U.S. Supreme Court. *Comparative Political Studies* 33:5, 593–625.

———. 2000b. Puppeteers or agents? What Lazarus's *Closed Chambers* adds to our understanding of law clerks at the U.S. Supreme Court. *Law and Social Inquiry* 25:1, 185–226.

———. 2002. Breaking the silence: Gender mainstreaming and the European judiciary. *Feminist Legal Studies* 10:3, 257–70.

Landay, Jerry. 2000. The Federalist Society: The conservative cabal that's transforming American law. *Washington Monthly,* 1 March, 19.

Lazarus, Edward. 1998. *Closed Chambers: The First Eyewitness Account of the Epic Struggles inside the Supreme Court.* New York: Times Books.

Love, Norma. 2003. Too much work, too few clerks: Courts struggle to provide services. *Concord Monitor,* 28 February. Available at www.cmonitor.com/stories/news/local2003/0228%5Fcourt%5Fbudgets%5F2003.shtml. Accessed 21 March 2003.

Martin, Elaine. 1993. Women on the bench: A different voice? *Judicature* 77:3, 126–8.

Putnam, Robert D. 2003. APSA presidential address: The public role of political science. Delivered at annual meeting of the American Political Science Association, August 2002, in Boston, Massachusetts. *Perspectives on Politics* 1:2, 3–9.

Rehnquist, William H. 1987. *The Supreme Court: How It Was, How It Is.* New York: Morrow.

Resnik, Judith. 1996. Asking about gender in courts. *Signs* 21:4, 952–90.

Top court budget cuts decried. 2002. *The Arizona Republic,* 21 November, 4B.

Virginia v. Black 01–1107 (2003).

Notes

1 Kenney 1992.

2 Certain segments of the social science community have started to think about this issue. Sociologists for Women and Society, for example, recently dedicated their annual meeting to making their work accessible to nonspecialist communities. See newmedia.colorado.edu/~socwomen/.

3 Putnam 2003.

4 See his oral questioning in *Virginia v. Black.*

5 Kenney 2002; Kay and Sparrow 2001; Hale 2001; Anasagasti and Wuiame 1999; Martin 1993; Davis 1992–1993; Cook 1981.

6 Landay 2000, 19, describes the Federalist Society as "the best-organized, best-funded, and most effective legal network operating in this country. . . . By providing grants to fund visiting professorships in law and economics, it opens doors to academics who are likely to be sympathetic to the Society's agenda."

7 This claim, of course, is difficult to substantiate empirically, although the Federalist Society itself agrees. See www.fed-soc.org/whatpeoplearesaying.htm.

8 Resnik 1996.

9 Top court budget cuts decried 2002; Love 2003; Draper 2003.

10 Kenney 2000a.

11 Lazarus 1998; Kenney 2000b.

12 See, for example, Chief Justice William Rehnquist's account of his interaction with his clerks, in Rehnquist 1987.

13 Kenney 1992.

14 Chamallas 1990.

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