The Dream of a Social Science: Supreme Court Forecasting, Legal Culture, and the Public Sphere

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The first Monday in October marks a ritual that has become as sacred in the United States as circumcision is in Judaism or sainthood and sacrament in Catholicism, as hajj is for Islam or the singing of "God Save the Queen" in Britain. *First Monday in October* is also the title of a popular 1981 Hollywood film starring Jill Clayburgh and Walter Matthau, in which the first woman appointed to the Court, a staunch conservative, spars with the Court's reigning liberal. Through several vapid comedic encounters they develop affection and collegial respect for each other.

That the statutorily created date for the start of the Supreme Court's term is both sacred ritual and hackneyed entertainment is neither surprising nor worrisome for those who study popular legal culture. Americans have a romance with law. Our everyday lives are saturated with law. This is, after all, a nation governed by the longest lived democratic constitution in history. It is a nation of more lawyers and more litigation than any other. Our leisure and our commercial activities are suffused with law and legal representations: the books we read, the TV shows we watch, and the jokes we tell are frequently about law.

Each year, on the first Monday in October, as the Supreme Court term opens, we can observe the solemn embodiment of this complicated affair. The "Oyez, oyez, oyez" opening the Court's annual term announces the Court's historic descent. Before this court Americans bring all manner of human life and desire, from bankruptcy, copyrights, and pensions to capital punishment, reproduction, and sexuality. In our deference to the Court's judgments, we experience a kind of chivalrous love—remote, solemn, and unsullied.

More often than not, people experience a banal, profane law, whether in emotional disputes played out in lower courts or in the fine print on credit card statements. We acknowledge that too often "the 'haves' come out ahead"[1] and that law is just a game where position and money trump equity and justice. Yet, we regularly declaim that "there oughta be a law," while we smugly exchange jokes about overreaching lawyers.

The contradictory embrace of law by Americans is not a defect in the public culture. It is the source of law's durability and power. Because Americans understand the law to be both a game played by unruly lawyers and a solemn process that transcends the actions of individuals, they are willing to place their trust in the long run of the rule of law. Cynicism and idealism work hand in hand to construct a less brittle and more pragmatic, accessible legality. Thus Americans can revere the Supreme Court, be revolted by legal games, and enjoy court comedies without abandoning their commitment to the rule of law.

In this commentary, I argue that the law occupies a unique status in our technological and consumerist society: It is the space of shared public discourse and moral engagement. Whether one agrees with particular cultural practices or policies, the law provides the terrain upon which the disagreement is pursued. From this perspective, I want to understand how the Supreme Court Forecasting Project might advance or undermine the capacity of law to perform this communal, dialogic, and moral role in American life. How might computer prediction of Court decisions displace this complex, romantic, yet powerful engagement with law?

Social theorists early recognized the centrality of law to the cultures of modern societies. Emile Durkheim, for example, argued that law had become the embodiment of the collective conscience in an age of functional interdependence. In societies with an advanced division of labor, law displaced the traditional role of religion, providing the grounds for a new civic ethic. For Durkheim, law was the "visible symbol of all that is essentially social."[2] For Max Weber too, modern society is characterized by the dominance

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of formal legal rationality and a parallel decline of patriarchal as well as religious authority. However, the movement toward formal legal rationality brought with it a unique tension between the procedural formalism of legal rationality and the ever more strongly pressed demands for substantive justice. In these foundational social theories, the law is not simply the armed receptacle for values and priorities determined elsewhere, nor is it merely a limited instrument of the modern state. It is produced and woven throughout a culture—in the cinema, streets, and shops, as well as legislatures and judges' chambers.

The American legal realists and pragmatists shared this understanding of the cultural constitution of law. Oliver Wendell Holmes, for example, insisted that the law was a great anthropological document, embodying not only general norms but also compelling personal accounts of how citizens live and work. In *The Common Law,* he suggested what has subsequently become the canonical realist account: "The life of the law has not been logic but experience."[3] Like his younger admirer, John Dewey, Holmes used "experience" as a name for culture.[4] By pushing the focus of jurisprudence toward the exploration of culture, Holmes and Dewey sought to resolve enduring dilemmas concerning the legitimacy of law's coercion within an ethics of freedom and democracy, thus creating a specifically American version of the tensions Durkheim and Weber had identified.

The key to Holmes and Dewey's pragmatic, experiential, democratic, and cultural orientations lay in the conception of life as an experiment. Social change is constant; social relations are forever open to revision. They argued that policies, or what they called social reconstruction, to be effective and sound, should be produced through open, participatory processes. The central epistemological insight, however, lay in the recognition that probabilistic reasoning could regularize the indeterminacy of individual human behavior; modernist rationalism could be reconciled with, indeed could enhance, the democratic participation and decision-making efficacy of what might sometimes seem like irrational masses. Holmes and Dewey, and their fellow pragmatists, adopted the insight of the biological and physical scientists: chance variation at the individual level produced patterns at the societal level. By expanding participation—increasing sample size—we would produce more inclusive representation and, as a consequence, more felicitous policies. Similarly, rather than understanding law as a series of particular disputes or a limited set of general rules, we could, and should, they claimed, understand law probabilistically as a cultural system. Together, the classical European social theorists and the American pragmatists and legal realists articulated the dream of a social science, and they put law at its center.

At first glance, the Supreme Court Forecasting Project looks like the fulfillment of that dream: a social science of law. On the one hand, it attempts to "make more transparent how decisions that impact all of our lives are made." From this perspective, to the degree that the project uses publicly available, nonexpert knowledge to explain how the Court makes its decisions, it can provide, as its authors claim, a tool for democratic law making—exactly what those who sought a social science of law had hoped for.[5] The research can "benefit . . . practicing attorneys and their clients," according to Martin and his colleagues, because "the everyday practice of law requires lawyers to predict court decisions in order to advise clients or determine litigation strategies."[6] On the other hand, the project might promote not the dream of more democratic legal practice, but rather Weber's nightmare of imprisonment by our own increasingly masterful rationality.

For the Court Forecasting Project, Martin and colleagues asked a unique set of subject matter experts from the world of practice and academia to predict the outcome of each case or cases within their area of expertise argued before the Court during the 2003–4 term. In addition, they predicted the outcomes using their decision tree mode of analysis, relying on models derived from statistical analyses of previous decisions. The model more correctly predicted case outcomes than did the experts (75 percent versus 59.1 percent of correct predictions) while the experts predicted marginally better on the individual justices votes (67.9 percent versus 66.7 percent).

I cannot help but be impressed by the imagination and commitment, no less the stunning results, of this project. However, I am also a bit worried that the statistical analysis of court decisions makes the law appear to be less of a collective moral accomplishment than it is,[7] contributing inadvertently to increasing juridification rather than the rule of law. Several concerns animate my worry. Martin and colleagues argue forcefully that their model relies on "observable case characteristics" rather than nonobservable, nonlegal, inputs of policy preferences, or expert intuitions. Nor does the forecasting project engage, the authors claim, the stylized debates between "attitudinalism" and "legalism" that have characterized court modeling research, but rather limits its analysis to variables that have been selected without "explicitly theoretical reasons." It is not clear to me how this is so. It is not possible to select variables without a theory, a "story," that suggests the relevance of those variables. Perhaps the authors mean that they have not produced a nuanced analysis of case details, and in that sense, their work is not explicitly theoretical. Or perhaps they mean that they have not produced a set of coordinated propositions linking their variables. Nonetheless, they surely have a reason for selecting the variables, for example, judicial circuits, as useful. They are hypothesizing some relationship between the Supreme Court and the various circuits; they simply do not tell us what that hypothesized relationship is. Similarly, what is the significance of the particular features they selected to describe the petitioners and respondents? There are many observable, nonintuitive features of petitioners and respondents that they did not use—for

example, age, first name, years of residence, organizational connections, frequency as a litigant, experience or status of legal counsel. Some of these have been shown to be important in predicting litigation outcomes; others may be nonsensical. There is an embedded story that makes some litigant features worth coding and modeling, and others not. Yet we are not told that story.

If the authors had been more systematic in their delineation and justification of "observable case characteristics," then they might prove not to be as removed from the stylized debates among court analysts as they claim.[8] Once their embedded assumptions are made explicit, might we not find that the authors have actually incorporated into their model many conventional elements of the attitudinalism and legalism debate? We might also find that they have incorporated, new, and perhaps important, considerations into their model, for example, from new institutionalist theories about the relationship between higher and lower courts. Thus despite claims to being relatively atheoretical, the forecasting project is thoroughly imbued with theory; it is just not explicitly articulated. If you want to make predictions, you need some sort of theory.

What the project seems to show however, by its inventive experimental design, is that there is nothing to recommend a theory emphasizing detailed features of litigation over a theory emphasizing gross structural or participant features. Interestingly, this conclusion confirms, as it reproduces, the most general conclusion of social scientific studies of law: structural features of the actors and organization of the process—rather than substantive or doctrinal particularities—explain much of what goes on in litigation and other parts of the legal system as well.[9] The project, however, also suggests variation in the predictive value of its model and legal experts. Certain kinds of cases do lend themselves to more fact and doctrinal analyses. Yet again, we are offered no explanation, or theory, as to which kinds of cases will be better predicted by the model or the experts, by party and case characteristics or by facts and doctrine. Who can make this distinction? Is it the ordinary citizen or the expert? Who knows the story that best allocates expert and ordinary knowledge about what kinds of predictors are most appropriate?

I suspect that voicing these worries, especially in this congenial forum, was what the editors had in mind by organizing this set of comments, encouraging a self-reflective and critical discussion about the uses and consequences of our social science. Of course, reflexivity is a paradoxical feature of the engirding iron cage of modern knowledge/risk societies.[10] My argument is simply that we live in a world that, for the most part, is governed behind our backs by expert systems. The law is an anomaly to the degree that despite its incomplete transparency, it is nonetheless set in motion and shaped by public participation and debate. To make my case, I will address three concerns: law and the social sciences, law and consumer culture, and trust in systems. I claim that because law provides this space of collective moral discourse, our social science ought to be mobilized to support rather than impede popular participation and critical engagement with law.

Law and the Social Sciences

Despite the centrality of law in social theory as well as in philosophical and legal pragmatism, understanding of its place in society became marginalized in twentieth-century American social science. Law was dislodged from a central role in the constitution of society to a peripheral position as a technical instrument of the modern state. What the law tells us *about* social relations and culture became less important than what law *does to* social relations. Law became defined primarily in terms of the processes of creating and enforcing formal rules—as machine rather than meaning. The study of law became a minor specialty for political scientists, sociologists, anthropologists and psychologists and, until the last 25 years, of almost no interest for economists.

The constricted view of law developed from within the social sciences themselves and almost directly out of efforts to operationalize and quantify Durkheim's and Weber's insights concerning its centrality to social life. For example, for law to fulfill the role Durkheim assigned it as the external symbol for the internal characteristics of social life, it was important that law "exist permanently . . . and constitute a fixed object, a constant standard which is always at hand for the observer, and which leaves no room for subjective impressions or personal observations."[11] Using law as an empirical indicator of social structure, or as a dependent outcome of social struggles, scholars operationalized it in very concrete, measurable, and instrumental terms. This conceptualization reduced law from an aspect of, and forum for, representation and moral engagement to a limited, functionalist tool of social policy. The marginalization was happily supported by the legal profession and academy, who continued to claim exclusive authority to speak about and for the law while relying on the technical expertise of social scientists to support professional legal projects. To this day, the "law" sections of the American social science associations are among the least prestigious, even if numerous, within their disciplines,[12] although the quality of research and theoretical sophistication is very high.

Nonetheless, continuing conversation about law among scholars from various disciplines has produced a set of perspectives that exemplifies some of the most important contemporary insights in many social science fields. Bridging the epistemological and theoretical paradigms that both fueled the knowledge production enterprise and created deep chasms within each discipline,[13] social scientific studies of law synthesize competing paradigms through research that uses scientific methods for public policy as in the realist tradition, develops general theories of law with testable hypotheses as part of a scientific enterprise, and includes

closely textured interpretations and understandings in analyses of culture. This symposium exemplifies the moral and epistemological grounds of the dream of *a* social science. Too much is at stake in the law, and the study of law, to allow occupational competitions to erode our collective commitment to critical engagement with the law. I suggest that this is especially important for social scientific studies of law because of the unique position it occupies in contemporary consumer culture.

Law and Consumer Culture

Law stands alone in modern society in both its claim and capacity to resist the fragmentation and commodification of consumer culture. Like most modern practices, law is a product for sale; witness the lively market in the sale of legal services, tax shelters, and jury selection consulting.[14] But law cannot be entirely commodified and still effectively regulate normative and functional diversity within a system that proclaims democratic and participatory values. Indeed, because of those democratic values inscribed at the heart of legal legitimacy, American law now makes provision for access to those who cannot fully participate in its commodification. More important than commodification, however, is the fragmentation at the heart of consumer culture and the resistance that law poses for fragmentation and individuation.

Douglas Goodman describes how consumer culture "involves much more than just the act of consuming":

> To say that we are a consumer culture means that our central shared values have to do with consumption. Accordingly, a consumer culture has effects far beyond actual consumption and its associated advertising. The shared concepts and values of a culture help people to relate their individual lives to larger themes. Because of this, a culture tends to change all other institutions into something compatible with its values.
>
> Historically, most cultures have been centered around a set of religious values and concepts. Alternatively, a few cultures have found their values and concepts in secular intellectual and aesthetic movements, usually called "high" culture. This is the type of culture that one refers to when speaking of the arts, manners or education. A consumer culture is distinct from either of these.[15]

Goodman explains that while religion and high culture have not disappeared from contemporary societies, "they have become instances of consumer culture. People still have religion, but increasingly, they 'shop around' for the right religion and choose one that fits their lifestyle." In traditional societies, religion was understood to be not a matter of choice or desire, but of necessity and compulsion—something beyond question. In contrast, consumer culture is all about choice, so much so that rational choice has become the dominant explanatory paradigm for social action, and satisfying human desire is the definition of both economic utility and political virtue. In a similar vein, Goodman suggests, high culture is no more normatively demanding or shared than is religion; "high culture has simply become a niche market in a consumer culture," rather than a set of independent and unifying social norms. In consumer culture, where everything is for sale, consumption is organized into "niches," and consumption niches, rather than social class, define ranks in the system of social stratification.

Although "niche marketing" is often legitimated as an economic and imaginative response to "natural" human variation and desire, niches are anything but natural or morally neutral categories. They are the products of statistical analysis and manipulation; market niches are inventions of designers, advertisers, and actuaries. "Individuals, once understood as moral or rational actors, are increasingly understood as locations in actuarial tables of variations." These practices have consequences for the ways "we understand ourselves, our communities, and our capacity for moral judgment and political action."[16] Actuarial practices become the central mechanism for coordinated action and have direct consequences for individual life chances as well as group opportunities. "The statistical processing of information allows [messages and] power to be targeted quite precisely," for electoral campaigns, marketing prescription drugs directly to consumers, and generating specific desires in children.

For my response to the forecasting project, the key point is that actuarial niches not only create categories of persons appropriate for different kinds of regulation and control, they also disaggregate social groupings and impede the development of collective consciousness. "The kinds of groups whose formations are encouraged by actuarial practices are aggregates, conglomerations of people whose belonging together is unrelated to any significant traditions, discourses, or action. Actuarial practices define as groups assemblies of people that are singularly sterile in their capacity for political empowerment."[17]

In contrast to market niches, we are all subjects of law. In principle, there are no niches in which only some can hide. Of course, we know that to be more illusion than fact; the "haves" do come out ahead,[18] and tax shelters and capital gains regulations, for example, are effective or relevant for few citizens. Nonetheless, even if we are differentially situated legal subjects we nonetheless proclaim an aspiration that the law be otherwise and, importantly, that aspiration supports a good deal of legal compliance and legitimacy. Indeed, that ideal, and sometime reality, of equality before the law undergirds the power and durability of the rule of law.[19]

Trust in Systems

The rational technologies that have produced consumer culture also fuel much of our social science, engineering, medicine, and public policy processes. This is so on a global scale where, some authors argue, the power of the nation-state is challenged by multinational corporations and transnational social ties facilitated by technologically advanced

communications.[20] But on a local scale as well, our daily life is colonized by technological systems that not merely influence but determine modern selves and actions.[21] Jürgen Habermas's phrase "colonization of the life-world" refers to the proliferation of media-produced, marketed, and disseminated images that become the symbolic resources and values of ordinary people, although these signs and their meanings are independent of, and often at odds with, people's daily needs and experiences. There is an active struggle going on to hold on to locally produced and experienced physical, emotional, and cognitive transactions. What distinguishes this postmodern colonialism[22] from more traditional forms of colonialism and capitalism, however, is that production and distribution, as well as coordination and governance, is driven by and through systems that operate almost entirely behind the backs of most people, but that nonetheless demand enormous trust and command almost blind deference. We have transferred our trust, Anthony Giddens argues, from persons that we know or know of (e.g., fathers, priests, the king) to "disembedded" abstract systems—markets, airlines, electrical grids, water and sewer lines, banking, and so forth.[23] As much as we claim to value knowledge and transparency, and supposedly promote the expansion of democracy around the world, the material, technological infrastructure of social relations is less and less visible, participatory, or specifically democratic.

What has all of this to do with Supreme Court forecasting? Simply this: law stands alone in its ability to mediate between the everyday life of ordinary people and the technological systems that coordinate the activities of the life-world by its unique capacity as both moral accomplishment and coercive fact. Law is neither entirely of the life-world, nor entirely systematized juridification. It is a unique space through which trust in systems is publicly tested, negotiated, and regularly reinvented. To the degree that the Court forecasting project contributes to making transparent the processes of Supreme Court decision making, it can promote critical engagement with the law, which is necessary to resist the law's complete transformation into an abstract, expert system. To the extent, however, that the project itself buries its premises behind its own particular expertise, it fulfills not the dream of liberatory social science, nor produces a critical challenge to expert authority, but may promote further colonization of popular culture and the life-world. It may help undermine the people's capacity to engage the law.

There is too much at stake to allow Court decisions to become a statistical game played behind the backs of its audience. Moreover, would we really want to understand the Court's decisions as yes/no outcomes? We know that the opinions often provide not only the substance of the engagement with law, but also the grounds for future decisions. Often, details of the opinion are more significant than the outcome (e.g., 2003 decisions that approved one procedure for creating affirmative action but challenged the second). While the project may be successful on its own terms, as it gets disseminated and discussed, its utility risks being reduced to simple dichotomies, especially if it does not reveal its theoretical framework. Rather than better and worse craft, justices will be assessed only by those who are for or against some position. If the decisions become understood only as wins and losses, we feed the politicization and gaming of judicial appointments that have become ever more systematic in an effort to predict, and control, the decisions of appointees. Interest in, and study of, judging as a craft, as a way of engaging the community together in dialogue, may diminish. From the perspective of citizen participation, each of these rationalizing moves is another facet in the iron cage of modernity.

But might empirical research such as the Supreme Court Forecasting Project connect to the questions at the heart of legal scholarship? I think so. The project can serve useful didactic classroom purposes, like all good social science, liberating us from the view of judges as wise elders to whom we should automatically defer. But here we are on very delicate ground and must work against the usual trajectory of professional projects.[24] Is it possible to explicate the theories and hypotheses of legal scholarship through labor-intensive data collection and analysis without turning that enterprise into an occupation (careers, cleavages, a field unto itself), a profession that forgets its critical mission and becomes a source of status, authority, and the concomitant restricted entrance (e.g., PhD)? How can the forecasting project sustain the connection to the human events that are the substance of debate and deliberation, while exploring fundamental questions about legal authority and democracy?

I recently read an example of the place we don't want to go with Court modeling, and offer it as a caution. It appeared in the *Proceedings of the National Academy of Sciences* and was sent to me by a physical scientist. He was amused, but also worried, by it. "A Pattern Analysis of the Second Rehnquist U.S. Supreme Court"[25] purports to show that little interaction or discussion among the nine justices is necessary to produce the Rehnquist court decisions; the analysis shows that the votes of Justices O'Connor and Kennedy are "the likeliest to determine the majority opinion" and thus the votes of just two justices are sufficient to predict case outcomes. Additional analyses of the two Warren courts suggest that perhaps four to five justices (here called information dimensions) might better capture the range of variation in decisions. But, the author notes, while the model suggests the utility of more than one dimension (decision maker), nine are not necessary (inefficient) to produce patterned, predictable, historically comparable outcomes. What function does this paper serve in advancing our understanding of legal disputes or judicial craft? What anthropological insight, in Holmes's sense, does this analysis provide of the way Americans live, or want to live? How does this paper engage our public debates about justice, freedom, human dignity, the limits of authority, and the grounds of security?

Happily, the Supreme Court Forecasting Project does not fall into this trap. But how do we prevent the trap from springing when there is so much reward for increasing complexity and predictability?

It would be wrong to conclude by suggesting that we can proceed without expert knowledge; it is too late for that. Moreover, it would be wrong to conclude that we can live without trust in systems, or that those systems can be made entirely transparent to us. How to understand and manage that trust is the key issue, whether it be trust in law, electric power, or the continuity of everyday life as we come to know and experience it.

Notes

1 Galanter 1974.
2 Hunt 1978, 65.
3 Holmes 1881.
4 Menand 2001.
5 I use law-making here in the social constructivist sense, that as participants in the legal system, we contribute to its constitution.
6 Martin et al. 2004, 761.
7 By moral accomplishment, I refer simply to the accomplishment of intersubjective communication that accumulates over time into norms and collectively recognized ways of acting. See Habermas 1998.
8 Martin et al. 2004, 761.
9 See Friedman 1977; Friedman, 1984; Cotterrell 1992; Abel 1995; Sutton 2001; Kritzer and Silbey 2003.
10 Giddens 1990; Beck, 1991.
11 Durkheim 1964, 82.
12 The membership numbers are available on the Web; among other operationalizations, prestige could be measured by officers of associations doing research on law.
13 Stewart 2003.
14 I can imagine, and I assume the authors already have, a new start-up company, Court Forecasting, Inc., available online for a fee for citizens and attorneys alike. See Black 1989, who proposes from a very different perspective similar use of sociological jurisprudence.
15 Goodman 2003.
16 Simon 1988, 772.
17 Ibid., 789.
18 Importantly, the "haves" who come out ahead in legal processes are not coterminous with standard socioeconomic indicators. They are repeat players in the legal system and may, thus, include professional criminals as well as corporations and wealthy individuals. See Kritzer and Silbey 2003 for a full review of this literature.
19 Ewick and Silbey 2003; more generally, Ewick and Silbey 1998.
20 Levitt 2002; Quinn 1992; Smith 1990.
21 Habermas 1984; Habermas 1987; Habermas 1998; Giddens 1990; Goodman and Silbey 2004.
22 Silbey 1997.
23 Giddens 1990.
24 Freidson 2001.
25 Sirovich 2003.

References

Abel, Richard L., ed. 1995. *The law and society reader.* New York: NYU Press.

Abu-Ali Abdur'Rahman v. Ricky Bell. 537 U.S. 968 (2002).

American Insurance Association v. Garamendi, 539 U.S. 396 (2003).

Atkins v. Virginia. 536 U.S. 304 (2002).

Beck, Ulrich, 1991. *Risk society: Towards a new modernity.* Newbury Park, CA: Sage Publications.

Berg, Joyce, Robert Forsythe, Forrest Nelson, and Thomas Rietz. 2000. Results for a dozen years of election futures markets research. College of Business, University of Iowa.

Black, Donald. 1989. *Sociological justice.* New York: Oxford University Press.

Borden Ranch Partnership v. U.S. Army Corps of Engineers. 537 U.S. 99 (2002).

Bowers v. Hardwick. 478 U.S. 186 (1986).

Brown v. Legal Foundation of Washington. 538 U.S. 216 (2003).

Breiman, Leo, Jerome H. Friedman, Richard A. Olshen, and Charles J. Stone. 1984. *Classification and regression trees.* Belmont, CA: Wadsworth.

Breuer v. Jim's Concrete. 538 U.S. 691 (2003).

Chavez v. Martinez. 537 U.S. 1027 (2002).

Connecticut Department of Public Safety v. Doe. 538 U.S. 1 (2003).

Cook County v. United States ex rel. Chandler. 538 U.S. 119 (2003).

Cotterrell, Roger. 1992. *The sociology of law: An introduction.* 2nd ed. London: Butterworth.

Demore v. Kim. 538 U.S. 510 (2003).

Dow Chemical v. Stephenson. 539 U.S. 111 (2003).

Durkheim, Emile. 1964. *The rules of sociological method.* New York: Free Press.

Eldred v. Ashcroft. 537 U.S. 186 (2003).

Epstein, Lee, and Jack Knight. 1998. *The choices justices make.* Washington, DC: CQ Press.

Epstein, Lee, Jack Knight, and Andrew D. Martin. 2003. Childress Symposium: The political (science) context of judging. *Saint Louis University Law Journal* 47 (3): 783–817.

Eskridge, William N., Jr. 1995. The one senator, one vote clause. *Constitutional Commentary* 12 (2): 159–62.

Ewick, Patricia, and Susan S. Silbey. 1998. *The common place of law: Stories from everyday life.* Chicago: University of Chicago Press.

———. 2003. Common knowledge and ideological critique: The significance of knowing that the "haves" come out ahead. In *In Litigation: Do the "Haves" Still Come Out Ahead?* ed. Herbert Kritzer and Susan S. Silbey, 273–89. Stanford, CA: Stanford University Press.

Ewing v. California. 538 U.S. 11 (2003).

Farber, Daniel A., and Suzanna Sherry. 2002. *Desperately seeking certainty: The misguided quest for constitutional foundations.* Chicago: University of Chicago Press.

Federal Communications Commission v. NextWave Communications. 537 U.S. 293 (2003).

Federal Election Commission v. Beaumont. 539 U.S. 146 (2003).

Fisher, R. A. 1935. The logic of inductive inference. *Journal of the Royal Statistical Society* 98 (1): 39–54.

Ford Motor Co. v. McCauley. 537 U.S. 1 (2002).

Forsythe, Robert, Forrest Nelson, George R. Neumann, and Jack Wright. 1992. Anatomy of an experimental political stock market. *American Economic Review* 82 (5): 1142–61.

Freidson, Eliot. 2001. *Professionalism, The third logic.* Cambridge, UK: Polity Press.

Friedman, Lawrence. 1977. *Law and society: An introduction.* Englewood, NJ: Prentice Hall.

———. 1984. *American law.* New York: W. W. Norton.

Galanter, Marc. 1974. Why the "haves" come out ahead: Speculations on the limits of legal change. *Law and Society Review* 9 (1): 95–160.

Giddens, Anthony. 1990. *The consequences of modernity.* Stanford: Stanford University Press.

Goodman, Douglas. 2003. Consumption as a social problem. In *The handbook of social problems,* ed. G. Ritzer, 236–45. Thousand Oaks, CA: Sage, 2003.

Goodman, Douglas, and Susan S. Silbey. 2004. Defending the liberal arts against law. In *Law in the liberal arts,* ed. Austin Sarat, 17–40. Ithaca: Cornell University Press.

Gratz v. Bollinger. 539 U.S. 244 (2003).

Greenhouse, Linda. 2002a. Justices to reconsider ruling against sex between gays. *New York Times,* December 3.

———. 2002b. Supreme Court seems skeptical of F.C.C. position on Next Wave. *New York Times,* October 9.

———. 2002c. Justices hear arguments on extension of copyrights. *New York Times,* October 10.

———. 2002d. Court revisits question of jury selection bias. *New York Times,* October 17.

———. 2002e. California's 3-strikes law tested again. *New York Times,* November 6.

———. 2002f. Asbestos appeal centers on fear of cancer. *New York Times,* November 7.

———. 2002g. Method of legal services financing is challenged before Supreme Court. *New York Times,* December 10.

———. 2002h. An intense attack by Justice Thomas on cross-burning. *New York Times,* December 12.

———. 2002i. Court ponders limits of punitive damages. *New York Times,* December 12.

———. 2003a. Nike, fighting trade suit, asks justices for free-speech protection. *New York Times,* April 24.

———. 2003b. Medical leave act is debated in major federalism case. *New York Times,* January 16.

———. 2003c. Justices seem to lean to charity telemarketer. *New York Times,* March 4.
———. 2003d. Justices hear arguments on campaign finance. *New York Times,* March 26.
———. 2003e. Court appears ready to reverse a sodomy law. *New York Times,* March 27.
———. 2003f. Affirmative reaction: Can the justices buck what the establishment backs? *New York Times,* March 30.
———. 2003g. Justices look for nuance in race-preference case. *New York Times,* April 2.
———. 2003h. Justices show their doubts on state law on Holocaust. *New York Times,* April 24.
———. 2003i. First Amendment argument is made in a trespass case. *New York Times,* May 1.
———. 2003j. In a momentous term, justices remake the law, and the Court. *New York Times,* July 1.
———. 1984. *The theory of communicative action.* Vol. 1, *Reason and the rationalization of society.* Boston: Beacon Press.
———. 1987. *The theory of communicative action.* Vol. 2, *Lifeworld and system.* Boston: Beacon Press.
———. 1998. *Between facts and norms: Contributions to a discourse theory of law and democracy.* Cambridge: MIT Press.
Green Tree Financial Corp. v. Bazzle. 539 U.S. 444 (2003).
Grutter v. Bollinger. 539 U.S. 982 (2003).
Habermas, Jürgen. 1984. *The theory of communicative action.* Vol. 1, *Reason and the rationalization of society.* Boston: Beacon Press.
———. 1987. *The theory of communicative action.* Vol. 2, *Lifeworld and system.* Boston: Beacon Press.
———. 1998. *Between facts and norms: Contributions to a discourse theory of law and democracy.* Cambridge: MIT Press.
Hillside Dairy Inc. v. Lyons. 539 U.S. 59 (2003).
Holmes, Oliver Wendell. 1881. *The common law.* Boston: Little, Brown.
Hunt, Alan 1978. *The sociological movement in law.* London: Macmillan.
Illinois ex rel. Madigan, Attorney General of Illinois v. Telemarketing Associates. 538 U.S. 600 (2003).
Jacobellis v. Ohio. 378 U.S. 184 (1964).
Johnson, Timothy R. 2004. *Oral arguments and decision making on the United States Supreme Court.* New York: SUNY Press.
King, Gary, Robert O. Keohane, and Sidney Verba. 1994. *Designing social inquiry: Scientific inference in qualitative inference.* Princeton: Princeton University Press.
Kritzer, Herbert, and Susan S. Silbey, eds. 2003. *In litigation: Do the haves still come out ahead.* Stanford: Stanford University Press.
Lane, Charles. 2003 Civil liberties were term's big winner. *Washington Post,* June 29.
Lawrence v. Texas. 539 U.S. 558 (2003).
Levitt, Peggy. 2002. *Transnational villagers.* Berkeley: University of California Press.
Lewis-Beck, Michael S., and Tom W. Rice. 1992. *Forecasting elections.* Washington, DC: CQ Press.
Martin, Andrew D., and Kevin M. Quinn. 2002. Dynamic ideal point estimation via Markov chain Monte Carlo for the U.S. Supreme Court, 1953–1999. *Political Analysis* 10 (2): 134–53.
Martin, Andrew D., Kevin M. Quinn, Theodore W. Ruger, and Pauline T. Kim. 2004. Competing approaches to predicting Supreme Court decision making. *Perspectives on Politics* 2 (4): 761–767.
McGuire, Kevin, and Barbara Palmer. 1995. Issue fluidity on the U.S. Supreme Court. *American Political Science Review* 89 (3): 691–702.
Meehl, Paul. 1954. *Clinical vs. statistical prediction.* Minneapolis: University of Minnesota Press.
Meirowitz, Adam, and Joshua A. Tucker. 2004. Learning from terrorism markets. *Perspectives on Politics* 2 (2): 331–36.
Menand, Louis. 2001. *The metaphysical club.* New York: Farrar Straus Giroux.
Merrill, Thomas W. 2003. Childress Symposium: The making of the second Rehnquist Court: A preliminary analysis. *Saint Louis University Law Journal* 47 (3): 569–658.
Miller-El v. Cockrell. 537 U.S. 322 (2003).
Moseley v. V Secret Catalogue. 537 U.S. 418 (2003).
National Park Hospitality Assn. v. Dept. of Interior. 538 U.S. 803 (2003).
Nevada Department of Human Resources v. Hibbs. 538 U.S. 721 (2003).
Nguyen v. United States. 539 U.S. 69 (2003).
Nike, Inc. v. Kasky. 539 U.S. 654 (2003).
Nisbett, Richard, and Lee Ross. 1980. *Human inference: Strategies and shortcomings of social judgment.* Englewood Cliffs, NJ: Prentice-Hall.
Norfolk & Western Railway Co. v. Ayers. 538 U.S. 135 (2003).
O'Connor, Sandra Day. 2003. *The majesty of the law: Reflections of a Supreme Court justice.* New York: Random House.
Penry v. Lynaugh. 492 U.S. 302 (1989).
Pharmaceutical Research and Manufacturers of America v. Walsh. 538 U.S. 644 (2003).
Pierce County v. Guillen. 537 U.S. 129 (2003).
Poole, Keith T., and Howard Rosenthal. 1991. Patterns of congressional voting. *American Journal of Political Science* 35 (1): 228–78.
———. 1997. *Congress: A political-economic history of roll call voting.* New York: Oxford University Press.
Quinn, James B. 1992. *Intelligent enterprise: A knowledge and service based paradigm for industry.* New York: Free Press.
Romer v. Evans. 517 U.S. 620 (1996).

Ruger, Theodore W., Pauline T. Kim, Andrew D. Martin, and Kevin M. Quinn. 2004. The Supreme Court Forecasting Project: Legal and political science approaches to predicting Supreme Court decisionmaking. *Columbia Law Review* 104 (4): 1150–1209.

Scheidler v. National Organization for Women. 537 U.S. 393 (2003).

Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the attitudinal model revisited.* New York: Cambridge.

Sell v. United States. 539 U.S. 166 (2003).

Sherry, Suzanna. 1986. Civic virtue and the feminine voice in constitutional adjudication. *Virginia Law Review* 72 (April): 543–616.

———. 2003. The unmaking of a precedent. *Supreme Court Review* 2003:231–67.

Silbey, Susan S. 1997. Let them eat cake: Globalization, postmodern colonialism and the possibilities of justice. *Law & Society Review* 31 (2): 207–35.

Simon, Jonathan. 1988. Ideological effects of actuarial practices. *Law & Society Review* 22 (4): 771–800.

Sirovich, Lawrence. 2003. A pattern analysis of the second Rehnquist U.S. Supreme Court. Proceedings of the National Academy of Sciences. http://www.pnas.org/cgi/10.1073/pnas.1132164100.

Smith, A. D. 1990. Toward a global culture? *Theory, culture and society* 7 (2–3): 171–91.

Smith v. Doe. 538 U.S. 84 (2003).

Spaeth, Harold J. 2003. *The original United States Supreme Court judicial database, 1953–2002 terms.* Program for Law and Judicial Politics, Michigan State University.

State Farm v. Campbell. 538 U.S. 408 (2003).

Stewart, Sharla. 2003. Revolution from within. *University of Chicago Magazine* 95 (2): 33–37.

Stogner v. California. 539 U.S. 607 (2003).

Sutton, John. 2001. *Law/society: Origins, interactions, and change.* Boston Thousand Oaks, CA: Pine Forge Press.

United States v. American Library Association. 539 U.S. 194 (2003).

United States v. Bean. 537 U.S. 71 (2002).

Virginia v. Black. U.S.538 U.S. 343 (2003).

Virginia v. Hicks. 539 U.S. 113 (2003).

Wasby, Stephen, Anthony D'Amato, and Rosemary Metrailer. 1976. The functions of oral argument in the U.S. Supreme Court. *Quarterly Journal of Speech* 62 (4): 410–22.

Washington Legal Foundation v. Legal Foundation of Washington. See *Brown v. Legal Foundation of Washington.*

Wiggins v. Smith. 539 U.S. 510 (2003).

Zadvydas v. Davis. 533 U.S. 678 (2001).