Judicial Biography and the Behavioral Persuasion

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The task of this paper is to appraise the relationship between judicial biography and research in judicial behavior. Interest in this subject suggests that fashions come and go in more places than hemlines. A generation ago, an APSA symposium on judicial biography debated the problems of the genre exclusively in terms of legal, historical, and literary analysis.\(^1\) No reference was made to the social sciences, nor was any defense thought necessary for their absence. Meantime, the rise of the behavioral persuasion has produced profound changes in the study of judicial processes,\(^2\) while significant judicial biographies have continued to be produced.\(^3\) A reassessment of judicial biography as a research technique is in order in light of these developments.\(^4\)

\(^1\) "The Writing of Judicial Biography—A Symposium," Indiana Law Journal, 24 (1948), 363–400. The stimulus for this paper was the 1969 APSA panel in honor of Alpheus T. Mason and Carl B. Swisher—pre-eminent judicial biographers among political scientists. I wish to acknowledge my debt to both and expressly to include my own work in the following criticism of biographies.


This appraisal of the relationship between judicial biography and judicial behavior research will proceed in two ways: (1) conceptually, by comparing the two as modes of inquiry; and (2) empirically, by making an inventory of the behavioral content of 15 leading judicial biographies. Although the accent is on biography, the central theme is that judicial biographies and judicial behavior research are complementary. Conceptually, they have important common premises and problems as well as major differences. Empirically, judicial biographies also offer considerable insight into judicial behavior. If closely read, they yield a substantial number of hypotheses worthy of empirical investigation and validation. When viewed as case studies in judicial politics, judicial biographies thus become closely related to behavioral inquiry. And their strengths and weaknesses fall into place as reflecting properties generally associated with case study as a mode of political analysis.

For clarity it is necessary to specify what is meant by the terms "judicial biography" and "behavioral research." So many studies of individual jurists have been written with such different purposes, credentials, and sources that I have narrowed the field for comparison.\(^5\) By "judicial biography" I mean a life-study of a judge written substantially as a case-history in the judicial process. While different balances may be struck between the classic biographical goals of portraying character and career, the prime object is to describe and relate the judge's personality, background, and belief sys-

tem to his conduct on the bench and impact on the law and politics of his time.6

Finding the common denominator of judicial "behavioral research" is more elusive. A search of the literature tempts one to invoke Plato via Mr. Justice Stewart: behavioralism like pornography is immanent; we cannot define it but know it when we see it.7 Given the youth and diversity of the movement, and in order not to restrict inquiry to the moods or methods of the moment, it seems preferable to deal with the "behavioral persuasion," an orientation to the empirical study of politics which may be identified by four attributes: (1) The unit of analysis is the behavior of persons (whether individuals, group, or system) rather than of institutions. (2) The search is for regularities in the determinants of political behavior. (3) The goal is systematic, explanatory theory rather than description of discrete or historically specific events. (4) Quantitative methods are preferred as more reliable, replicable, and valid expressions of empirical propositions about politics than other methods, assuming that all methods rest upon simplifying assumptions and manipulation of data.8

I. Judicial Biography and Behavioral Research Compared

Several similarities and differences emerge when judicial biography and behavioral research are compared as analytical approaches. The first similarity, seldom discussed, is that they both commonly rest on inarticulated epistemology. Although the problem is too intricate for elaborate discussion, unconscious assumptions about the nature of observation are treacherous pitfalls for the unwary. Is there an "objective" history which can be reconstructed as it happened, or is history merely a selective rendering of the past through the lens of the present? Is there an objective reality or immanent corpus of facts to be discovered, or is empirical validation merely the congruence of two conceptual frameworks—our common-sense perceptions of everyday reality and a set of hypotheses to be tested? What is the scope of intersubjective meaning among researchers and researched?

While one might expect behavioralists to be more rigorous about these matters than judicial biographers, only the most careful scholars of either persuasion emphasize the relativity of observation—a relativity which led to Voltaire's remark that history is the tricks the living play on the dead. Leaders, to be sure, are usually less guilty than their followers. Alpheus T. Mason, for example, while zestfully attacking Justice Sutherland for unawareness of personal biases, perennially shakes his seminar with the theorem: "facts never speak for themselves; facts are ordered by theory." Carl B. Swisher, in my opinion, was sensitive to observational dilemmas when he insisted that the general reveals itself through particular illustrations. Yet, for most of us, recognizing first premises is largely implicit, often for the other fellow, and seldom done with the candor of Cardozo, who conceded the "inescapable relation between the truth without us and the truth within."9 Actually, few students of judicial affairs deserve any medals for self-conscious grappling with the philosophy of history or science as it affects their subject.

Second, both judicial biographers and judicial behavioralists share common problems of value-laden selectivity regarding questions asked, choice and classification of variables from indeterminate numbers, criteria of relevance, and interpretation. Judicial biographers have been criticized by Peltason and others for indulging in personality cults, for choosing subjects and evidence according to subjective and nonverifiable assumptions of interest, importance, and personal empathy.10 The results, like other forms of case study, have been unrepresentative and unreplicable biographical coverage, along with tensions over standards of relevance best exemplified by lawyers' criticism of Mason's Brandeis for inadequate attention to

6 This conception of biography has the disadvantage of excluding several types of biographical works—encomia, philosophic studies, and character studies—which collectively comprise the lion's share of a voluminous literature, especially about Supreme Court justices. But it highlights the one common denominator of the leading biographies: each illuminates relationships among a personality (independent variable), his court or institution (intervening variable), and his policy (dependent variable). Younger students may be surprised to learn that lawyer John P. Frank, using different nomenclature, called these relationships the only justification for writing judicial biography back in 1948. "The Writing of Judicial Biography . . .," op. cit., pp. 374–75.


10 Peltason, op. cit., p. 219.
Erie v. Tompkins, political scientists' criticism of King's Fuller for ignoring such landmarks of judicial legislation as the Sugar Trust Case, and Fairman's criticism of nearly everybody for neglecting briefs.11

Much of this criticism is justified, but not the implication that the behavioral persuasion offers an escape from parallel problems of selectivity. One vexing example is the issue whether votes or opinions are superior measures of judicial power. Justice Jackson once asserted that Supreme Court opinions explaining decisions are more important than case results. Students of doctrinal development readily accept that proposition, though the reverse may be true of politicians and mass publics. The quantitative impetus, on the other hand, appears to have boxed some interpreters into the conclusion that all that counts are votes. Clearly both votes and opinions can be measures of influence, both may be expressed in quantitative or qualitative terms, and neither can precisely measure personal attitudes on collegial courts for the simple reason that both votes and opinions are subject to group influences.12

Similarly, the degree to which our inferences are biased by method is an issue infrequently faced. Strikingly diverse images of jurists emerge from the varying analytical frameworks used in judicial research.13 They range from the judges trapped in their logic and virtue of 19th-century memoirs to the judges seemingly trapped in their ideologies of 20th-century behavioral studies; from the rational poker-players of economic or gaming models to the hardy individualists of conventional biographies in which discrete personal and situational factors dominate choice. Which image is a closer fit to actual behavior? One must posit a conceptual framework of reality, also selected a priori and usually following some biological, economic, or theatrical metaphor before making measurements, quantitative or otherwise. Accordingly, both biographers and behavioralists usually presume rational models of the judicial process.

A third and critical common characteristic is the choice of single individuals as the focal point of analysis. Judicial behavior research is not limited to this focus, of course; but some judicial voting bloc and most attitudinal analysts use that focus as a starting point, and few scholars reject the assumption that individual jurists make value choices affecting public policy. While that assumption is surely plausible even at political-system levels, it is important to recognize some of the conceptual implications of the single-actor focus. For one thing, it goes against the grain of most contemporary social science. Collective rather than individual behavior so dominates the inquiry of modern historians and behavioral scientists that personality is either assumed away or forms residual categories. Champions of the "human element" and leadership study have made little headway in any social science. Not even psychology uses the individual focal point in the same fashion as judicial biography or jurimetrics. Psychologists are primarily concerned with the influence of external events on the whole personality rather than the influence of aspects of personality on political events—a difference which warns against uncritical borrowing from that quarter.14 Hence, by focusing on the causal chain of person → policy, both judicial biographers and attitudinal behavioralists occupy the same unpopular boat. Further, those who inject process into the equation (person → process → policy) are asking extremely ambitious questions requiring causal explanation at three levels—individual, group, system. Institutionalists, aggregationists, and systems analysts hold constant at least one of those. Psychologists cut their risks by controlling the collective behavior affecting individuals. For all their mutual complaints about the deficiencies of the other's causal inferences, the tension between judicial biographers and attitudinal behavioralists is not so much over frames of reference as over different degrees of formalization and methods of establishing causal links. Both conceptualize the source of decision as internal to individual actors.

A particular manifestation of focal-point kinship is the location of biographers in conflicts that have accompanied the behavioral emphasis in judicial research. One element of tension rises from group versus individual focus. Put crudely, advocates of the group-struggle approach, such as Peltason or Truman, are concerned with power flows and demands upon decision-makers (inputs) leading to public policy (outcomes) in continuing processes of con-


14 Eulau, Behavioral Persuasion, pp. 85 ff; Smelser, op. cit., pp. 39-41, 100 ff. For excellent discussion, see Fred I. Greenstein, Personality and Politics (Chicago: Markham Publishing Co., 1969).
Conflict resolution. Behavioralists such as Schubert plumb the attitudinal determinants of individual behavior in the conversion stage of systems analysis, leaving "in-depth" determinants to the undeveloped field of political psychology. Biographers, with their loose talk about "personal philosophy" and "social forces," have a foot in each camp. Sharing the attitudinalist's individual focus, they echo complaints that the group-struggle perspective subsumes individual variations of perception, cognition, and intensity to the point that group generalizations often commit reductionist and anthropomorphistic fallacies. Less explicitly, however, they also echo the criticism of attitudinalists for factoring out external political demands and results to the point that the most important questions at the interface of law and politics are never asked. More interested in describing complexity than in simplifying theory, biographers commonly complain that both group and attitudinal analysts neglect a host of intervening, institutional, and interpersonal factors within collegial courts to the point that the explanatory power of either combat or stimulus-response models is overstated. Thus they argue that the Supreme Court is not just another interest group or "black box," that different decisional processes in government institutions produce different outcomes, that attitude no more determines behavior than behavior confirms attitude. Contrary assumptions are dismissed all too often as over-reactions by methodologues against the excessive formalism of the past—a case of throwing law-court babies out with the bath—rather than what they commonly are: simplifying assumptions taken for data control and theoretical rigor.

Whatever one's view of these tensions, it is evident that part of the debate over behavioralism among students of judicial affairs are conflicts over levels of analysis. As such they are merely a judicial variant of a larger problem common to all social science explanation. The micro-macro issue is a recurring one, perhaps more difficult than the overdrawn institution-behavior dichotomy of earlier debates over behavioralism, because we cannot talk about everything at once and because observers, being human, tend to exaggerate the relevance of their subject and convert different focal-point choices into different wave lengths. The affliction, while normal, is not irremediable. The therapy is recognition that description and explanation must proceed at both individual and collective levels, that the relevance of personal, social, or cultural factors varies with the level of explanation sought, and that we are not dealing with a parochial problem but one which cuts across other social sciences, including history, on whose experience we can draw.15

So far we have argued that most biographers and behavioralists share common adversities of epistemology, selectivity, and units of analysis. A fourth similarity is a common bundle of legal realist premises that men instead of rules decide cases and that one determinant of judicial choice is personal values. The volitional aspect of judging has affected nearly every major school of American jurisprudence since Justice Holmes made these assumptions respectable. Without them neither judicial biography nor behavioralism makes much sense. Sometimes forgotten, however, are the subtle effects of realist assumptions on the concepts of law and policy-making. The definition of law as what judges do, as Schubert points out, changes law from an immanent to a behavioral concept.16 Law is judicial behavior. Further if we concentrate on how and why instead of what questions, the concept of law shifts from an output to a never-ending process. An astute reader of our literature recently remarked that he gathered the impression that judges were forever deciding but that nothing was ever decided. A behavioral concept of law virtually obliterates the distinction between what law is and how it is made.17 That is why biographies such as Mason's Stone were controversial even among legal realists, and for reasons other than the complaints about invasions of privacy which have accompanied life-histories since Plutarch. Modern judicial biographers concentrate increasingly on how and why questions and less on character, legal content, and ethical validation—the who, what, and for what questions which scholars past and lawyers present regard as legitimate parts of the biographical task.18

In blunter words, judicial biographies are basically case studies in judicial politics. Their authors are essentially empiricists, describing and

exploring the linkages between person, process, and policy by eclectic techniques of legal analysis, historical inference, and occasional descriptive statistics. In terms of the four attributes of the behavioral persuasion described above, judicial biography and behavioral research are united on the first criterion of analytical unit. Less explicitly, however, biographical description often includes group and institutional struggle, a shift of gears reconciled with the single-actor focus by rather vague explanations that judges internalize and thereby represent the outlooks of various interests and social groups. Group access, in other words, is indirect and personalized.

The primary differences of approach among biographers and behavioralists thus lie with the other three attributes of the behavioral persuasion—regularities, theory, and method. Generally speaking, biographers do not search for regularities in judicial behavior. They often assume the most important uniformities, sometimes with awkward results. For example, leading biographers are ambivalent about whether judicial decisions are a composite of personal values. Their general propositions to that effect are soon qualified by assertions that some intervening variable, e.g., bargaining or "self-restraint" by their judge, mediated between policy values and action. Biographers, individual and collectively, have not really decided whether attitudes and behavior are proximate. The difference between their general and particular propositions neatly illustrates what happens to personal variations when explanation shifts from individual to collective behavior. Biographers, too, make simplifying assumptions about individuals in order to discuss groups.

The third attribute— theoretical impulse—points to the key distinction. Despite judicial biography's heuristic potential, its animus is description, not theory. No judicial biography rests upon an explicit, much less uniform theoretical framework. Rarely do biographers exploit their studies by way of suggesting theoretical refinements and implications. Seldom do they even compare their own findings with other biographers. This difference between describing how and explaining why, in my view, is far more important than current conflicts over the fourth count of method. While theory and method are closely entwined, it misplaces emphasis to make the dividing line means rather than ends. Since political science lacks a unique methodology, there is nothing inherently wrong with case studies or with borrowing from historians as opposed to other disciplines. The real questions are the purposes of the borrowing and the explanatory yield. Just as few biographers have utilized descriptive statistics, so David J. Danelski and Walter F. Murphy have demonstrated the behavioral possibilities of historical data. It bears repetition that behavioralism and quantification are not co-extensive. Choice of method turns on relative reliability and costs for the data and purposes at hand.

The central differences between judicial biography and behavioral research thus boil down to this difference of emphasis: biographers are interested mainly in empirical description, behavioralists in prediction and systematic explanation. Even this difference, however, is often one of degree. The best biographers have always attempted to explain as well as describe—sometimes too much. The best behavioralists have always relied on trained intuition to avoid the trap of politically naive research.

In any event, no problem of principle exists between theory and description. The two obviously must go together. Since both biographers and behavioralists ask how and why questions, they share similar research problems. Both study the same universe of behavior as reflected in votes and opinions, and therefore select the same phenomena as dependent variables to be explained. Both tend to treat the same phenomena as distinctive causes and therefore tend to specify from an indeterminate number the same causal or independent variables. Both share realist assumptions as well as focal point and engage in the humbling procedure of making inferences from manifest collegial behavior about individual judicial minds. Both are commonly denied the tools of survey sampling and controlled experiment, which support a technological revolution in the social sciences, and must therefore improvise as best they can. While no one should minimize their methodological differences, or the agonies of their separate aspirations to art and science, it is plain that their differences are primarily the degree of theoretical explicitness, the weight given to certain intervening variables, and the means of


collecting, measuring, and processing data.

In time, at least the latter differences may appear less distinctive than what unites them. When perspectives clear over methodological issues we may find that individual-oriented behavioral research has more in common with judicial biography than with aggregative forms of social science inquiry now seemingly united by similarities of method. Perhaps that was C. Herman Pritchett's meaning when he concluded that Carl Swisher, however he might have disliked the thought, "was one of the first . . . 'judicial behavioralists,'"22 Behavioralism, of course, involves more than unit of analysis. But, conceptually, judicial biography and judicial behavior research have never been antithetical. By virtue of common subject matter and realist outlook, the one was a step to the other and a far greater departure from what had gone before than now appears. Indeed, when the empirical content of judicial biographies is examined from a behavioral perspective, biography and behavioral research relate not merely as historical continuities but also as complementary techniques.

II. A Behavioral Inventory of Judicial Biography

Complementary relations, like shotgun weddings, may please neither side of this affair. But in order to assess the behavioral potential of judicial biography, I have made a crude inventory of behavioral propositions—or assertions easily translatable into them—contained in fifteen leading judicial biographies. This procedure is not meant to suggest that a propositional inventory can substitute for theory. An inventory, however, does make it possible to judge the empirical yield of judicial biographies from a common frame. The biographies chosen, though not exhaustive, are leading works picked mainly on grounds of availability. The behavioral propositions contained in them have been grouped into eight summary categories of behavioral research. Table 1 summarizes this inventory. The entries are the number of propositions in each category found in each biography. Totals and averages are also reported, including total number of propositions per 100 pages.23

To clarify interpretation, it should be


24 For example, Fairman's Miller includes a disagreement matrix prepared by Justice Blatchford (p. 387), and King's Fuller has a rudimentary intensity scale of the Income Tax Case in which votes are correlated with per capita wealth of the Justice's home states (p. 214, p. 217).

### Table 1. A Behavioral Inventory of Judicial Biography

<table>
<thead>
<tr>
<th>Categories of Propositions</th>
<th>Personality</th>
<th>Socialization</th>
<th>Recruitment</th>
<th>Input</th>
<th>Conversion</th>
<th>Intra-Court</th>
<th>Legal Output</th>
<th>Pol. Output</th>
<th>Total</th>
<th>Rank</th>
<th>Mean</th>
<th>Prop. per 100 pages</th>
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<td>14</td>
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<td>118</td>
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<td>25.9</td>
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<td>11</td>
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<td>14</td>
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<td>30</td>
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H = historian; J = journalist; L = lawyer; P = political scientist; Personality = effects on political style or behavior; Socialization = background characteristics affecting political attitudes or behavior; Recruitment = political and judicial; Input = external demands and supports; Conversion = attitudes or values affecting judicial behavior, including "role of court" attitudes; Intra-Court = intra-court relations, leadership, bargaining, strategy, etc.; Legal Output = impacts on legal subsystem; Pol. Output = impacts on political system.

The inventory also contains propositions about nonjudicial political behavior, which inflates the input-output columns of Beveridge's Marshall, Mason's Brandeis, and Pusey's Hughes to more than half nonjudicial in character. Cause-effect propositions are included, moreover, regardless of how contradictory or empirically unverified they may seem. "Propositions" do not mean validated ones.

Counterbalancing such generous standards is lack of repetition. Swisher in 1930 unequivocally stated the core of "political jurisprudence": the Supreme Court is merely one among many power centers. The message did not change with repetition.

Given the selectivity of the inventory, I do not pretend that it is anything more than one man's slicing of the cake. But taken for what it is, the inventory tends to support rather than refute Pritchett's contention of behavioral stirrings in biography. The argument is that judicial biographers were early or proto-behavioral-
ists in the sense of the behavior they studied and their attempted explanations. This argument is buttressed when a raw count in fifteen judicial biographies produces a total of 2,232 behavioral-like propositions (for an average of 149 per biography). Though a parallel proposition-count in behavioral literature would presumably produce much smaller quantities, it is illuminating that biographers attempt causal explanations to the extent that Beveridge's *Marshall* (1916) contains 237 behavioral-like propositions, Swisher's *Taney* (1935) contains 151, and Mason's *Stone* (1956) contains the most of all, 340. Even the most "legalistic" work, Paschal's brief life of Justice Sutherland, has 81. Qualifiers also may take comfort in the association, at least at the top end, between proposition production and consensus about quality. Mason, Beveridge, Pusey, and Swisher lead the pack. Is not explanatory insight rather than literary style the primary reason for their prestige? 257

Since counting propositions tells little about their content, the more important question is: what kinds of information do judicial biographies produce? A detailed content analysis of propositions in fifteen biographies is beyond the scope of one paper, and the shaky empirical foundations of many propositions make yield assessments risky. But a preliminary appraisal leads to the conclusion that the accumulated empirical findings of judicial biographies relate to behavioral inquiry—positively, by generating hypotheses worthy of empirical validation; negatively, by making the search for regularities, theory, and rigorous methods indispensable. In support of that conclusion I shall summarize briefly the highlights of propositional content within each category of the inventory by describing: (1) how biographies handle such information, (2) some illustrations of the propositions that appear in biographies, and (3) some suggested hypotheses that merit empirical exploration.

**Personality.** The strongest impression in this category is biographical neglect of the personality roots of judicial behavior. Not only does personality generate a relatively small number of propositions, but they are overwhelmingly superficial rather than in-depth observations.

Even though the sample of authors is too small for meaningful correlation, students of biography may be interested that the inventory (1) suggests no rise in the quantity of behavioral-like output through time, (2) offers little support for tempting distinctions between biographical schools—e.g., a political jurisprudence school à la Swisher or an attitudinal school à la Mason, and (3) shows no large variances by profession of author.

drawn from psychological models. Reid, for example, distinguishes the judicial styles of Holmes and Doe in terms of contrasting needs for public approval. 26 The personalities of Waite, Taft, Hughes, and Stone are described as well suited to judicial roles. 29 Yet the underlying elements of such propositions are seldom articulated or related via personality theory. Most biographies, it is true, exploit the medium's strong suit—human interest. What table or scale can match in appeal the portrayals of Field's cussedness, Hughes' imperiousness, or Doe's eccentricities? So long as people yearn for vicarious experience—the personal triumphs and tragedies of eminent men—biography needs no further justification. From a scientific viewpoint, human interest actually may be biography's worst enemy. Surface description is so easy. Another hazard presents itself if justices like Frankfurter and Murphy, heeding Clio's claim, write memos for future biographers. 30 Then we may have to reverse Voltaire: history becomes the tricks the dead play on the living.

These problems are normal hazards of historical method. More serious is the limited yield of descriptive biography concerning the personality determinants of judicial behavior. No Freudian inferences, adolescent identity crises, or psychosomatic illnesses jar these pages, though such concepts are central in psychological analyses of other political leaders, and we know that judges underwent similar experiences. 31 Can Justice Miller's intense abolitionist commitment be traced to a childhood trauma of watching his Mammy being flogged? Can Chief Justice Fuller's skill as a presiding officer be attributed to ingratiating traits developed as a result of his parents' 1833 divorce? 32 Individually, biographers suggest several scraps and clues but make little of them.

The cumulative product is hardly more substantial. The only regularity found in these fifteen studies concerns leadership. All judges ex-
cept Johnson allegedly possessed “ability to handle men.” From that uniformity it might be inferred that judges are homo politicus in robes, politicians without difference. On the other hand, if these biographers are correct in asserting that each chief justice on the list (Marshall, Taney, Fuller, Waite, Taft, Hughes, Stone, Shaw, Doe) developed a distaste for political office before appointment, then collectively they offer the germ of an important hypothesis about selective socialization. This hypothesis relates to basic theoretical issues of political leadership, uniformity versus uniqueness, and a long-neglected question posed by Lasswell—the interplay of office and personality.33

Even so, the least satisfactory state of biographical knowledge concerns the relation of personality to judicial behavior. That is ironic in view of the premises of the medium. Yet judicial biographers as a class lack “the tools and the daring” to plumb the psychological roots of judicial behavior.34 Attitudinal analysts, unfortunately, come off no better with in-depth analysis, and aggregationists seldom try. Personally, I have reservations about psychobiography as a solution, but if psychological models would help overcome the general discomfort of political scientists about personality analysis or the particular discomfort of biographers about generalization, then resources invested in both single-actor and aggregative studies would be worthwhile.35 A mine of information awaits psychologically-trained observers so inclined.

Socialization and Recruitment. With the exception of Mason’s Taft, all the biographies surveyed relate political attitudes and behavior to social and party background characteristics. Perhaps the clearest causal connection between class origins and judicial behavior are Swisher’s explanations of Taney’s conduct in Dred Scott and of Justice Story’s predilections generally.36 Beyond describing the effects of background on value systems, biographers also assert more particular socialization propositions, such as paternal influence on political ideology and party identification (Marshall, Johnson, Waite) or family influence on choice of legal careers (Marshall, Waite).37 Beveridge is unusually specific in relating events, e.g., Marshall’s military career or tenure in Paris, to subsequent attitudes.38

The recent revisionism of Bowen, Grossman, and others suggests that both early biographers and early behavioralists may have exaggerated the causal significance of social background characteristics.39 On the other hand, these biographies indicate at least two regularities that remain unexplored. One is professional socialization. How did all these successful lawyers, as alleged, escape the “corporation lawyer” taint? The other is the noninfluence of religion. Why did the intense religious partisanship of the times escape most of these jurists—or their biographers?

The political party basis of recruitment to high appellate courts is so uniformly proposed in these biographies as to pass for conventional wisdom. On closer examination, however, the strength of the party variable in judicial selection appears to decline when mixed with other criteria such as age, section, or professional prestige. The strength of the party variable also declines as a decisional determinant when mixed with other intervening variables. While several biographies assert a sectional or party basis of voting behavior in particular decisions, there is little support for the pervasive behavioral generalization that party is the strongest background-behavior correlation. The main reason is that biographical description is overwhelmingly discrete. Hence, for both socialization and recruitment we may conclude that (1) biographies yield familiar information long since absorbed into behavioral hypotheses, and (2) the task nonetheless remains unfinished.

Inputs. The notion that judicial biographers consider courts in splendid isolation from the political environment is not supported by these studies. External demands and supports constitute the largest quantity of propositions (more than 3/5) about the way judges behave. Biographical description also ranges over a

35 Swisher, Taney, pp. 100, 442, 495, 503ff.
36 On ideology, see, e.g., Beveridge, op. cit., I, p. 9; Morgan, op. cit., pp. 22–23; Magrath, op. cit., p. 72. On legal careers, see, e.g., Beveridge, op. cit., I, p. 56; Magrath, op. cit., p. 31.
37 The Life of John Marshall, I, pp. 79, 126, 145, 314; IV, p. 3.
broad political spectrum, from the determinants of mass ideology to the unique effects of wives and female spectators in courtrooms.40 A large number of propositions in this category concern extra-curial political activity by judges, including the dysfunctional effects of presidential ambitions among Justices McLean, Davis, Chase, and Field.41 Other common propositions include the sensitivity of judges to diverse reference groups (e.g., Stone to academics and Taft to the organized bar);42 the influence of counsel or clerks on particular cases; and the decisional consequences of personnel turnover, workload, docket control, age, illness, and senility. Verification, of course, is something else again.

Although biographers seldom test their own propositions, they are suggestive at several levels of explanation. At cultural levels, for instance, they identify clusters of environmental variables, such as economic and social conditions, which are germane to theories of legal change and political development. At lower levels of generalization, so many biographers talk about the party pressures and interest configurations confronting adjudicators that it is odd that none overtly subscribes to an interest-group theory of judicial politics. In addition, biographies collectively provide our richest source regarding observance of judicial propensities.43 Several of these biographies also confirm a favorite proposition of leadership study—situational ambiguity increases scope for individuality.44 Some biographies tacitly accept de Tocqueville’s proposition that judicial power is ultimately the power of public opinion. Other biographies assert that judicial policy-making is inherently incremental and that certain conflicts are not amenable to judicial resolution. Surely these assertions bear so closely on questions of uniformity and uniqueness, not to mention normative debates and institutional designs, that recommendations for empirical validation need no elaboration.

With inputs we come to the most developed subject, the area of greatest professional overlap among political scientists and with other disciplines. This overlap is important, because it suggests that the basic analytical problem is not the range of political phenomena thought relevant as external influences on judicial decisions. The basic problem is how to establish the links.

Conversion and Intra-Court Relations. The above observation also applies to the process of converting personal values and other inputs into decisions. Although behavioral decision-making models are more explicit, there is little substantive difference in what biographers and behaviorists regard as relevant to conversion and the intra-court relations which operate, hypothetically, as intervening variables between attitudes and behavior. Biographies are filled with analysis of personal values—e.g., Taft’s commitment to stare decisis or Waite’s to the Union—and evaluations of their influence in such decisions as the Child Labor and Civil Rights Cases.45 Many propositions in this category concern individual “role of the Court” conceptions, which usually convert into role perceptions that in given cases either constrained or rationalized a judge’s policy predictions. Even more than behaviorists, biographers also describe a mass of interpersonal factors that mediate between personal attitudes and collegial action. Leadership styles, strategies, freshman socialization, bargaining, internal organization—all these and more complicate the mix. The first serious scholarship regarding intra-court interaction was undoubtedly biographical, and Peltason with reason regards the findings as biography’s major contribution.46

The difficulty is that biographical description of “inner workings” suffers the same defects of imprecision, discreteness, and nonverification, noted earlier, which gave rise to the behavioral persuasion. No biography compares in precision or alertive power to the explicit, behaviorally-influenced model used in Murphy’s Elements of Judicial Strategy (except possibly Mason’s Stone, which draws partially on the same data). On the other hand, biographies supply untapped raw materials for generating and refining hypotheses about decision making.47

42 Mason, Stone, pp. 323, 381; Taft, p. 275.
43 For a remarkable parallel to the Fortas-Wolfson affair, see Mason, Taft, p. 274.
44 Greenstein, op. cit., p. 50.
46 Peltason, op. cit., p. 233.
47 For example, cross-reference suggests one theoretical refinement. Social and task leadership perhaps should be differentiated as between conference and the remainder of group activity. While Taft permitted VanDevanter task leadership in conference, Taft maintained task leadership in administration and opinion output. VanDevanter and “pen paralyzis.” Hughes dominated conferences to the point of torpor, but dissent rates suggest that Hughes hardly dominated the policy output of his court in the sense of Marshall, Shaw, or Doe. If a chief justice’s effectiveness as task leader is measured by dissent rate, Taft comes off as more effective than Hughes. Cf. Danelski, op. cit.
They highlight personal behavior and relate it to interpersonal behavior, one of the most difficult and therefore neglected linkages in empirical analysis. And they retain historical perspective, which permits attention to attitude change. In much jurimetric research, by contrast, attitudes are perforce static, and group processes are subsumed under personal attitudes in order to achieve operational definitions.\(^{46}\) Apart from serving as data sources, biographies thus complement behavioral research by providing partial correctives for necessary shortcuts.

**Outputs.** Generally speaking, what characterizes inputs holds also for legal and political outputs. Most of these biographies do attempt to assess the political impact of judicial decisions, though usually in formal, institutional terms and by a case approach which eschews broadly functional generalizations. Many of the propositions merely report public opinion responses to particular judges and decisions—e.g., Marshall's unpopularity after the Burr trial or his popularity after Gibbons.\(^{49}\) The accuracy of the measurement also leaves much to be desired. While Beveridge, Mason, and Pusey used newspapers to illustrate public reactions and Fairman occasionally Shepardized cases, biographies are simply outclassed by modern impact analysis.\(^{50}\) Still, the cumulative message is unmistakable: judges make public policy.

Functionally, this proposition is probably overdone. That judges make policy is the beginning, not the end, of sophistication. Sophistication begins with differentiation of policy roles according to time, subject-matter, and institution.\(^{51}\) Biographies generally offer only spasmodic attention to issues of uniformity and uniqueness at this level. Yet on revisiting the literature, this reader was struck by the freshness of a few. Their works go beyond case description by offering functionally relevant ideas, such as not-so-new roles in system maintenance, conflict resolution, legitimation, and public education.\(^{52}\) For example, Beveridge implies and Swisher says that pre-Civil War justices consolidated their own power as architects of a legal order favoring business elites and capitalist development.\(^{53}\) Fairman implies and Magrath says that post-Civil War justices reconsolidated their power by helping to re-establish a racist legal order favored by white middle classes.\(^{54}\) Compare how closely these conclusions match Dahl's concerning the relations of justices to dominant, law-making coalitions. Fairman actually anticipates Dahl's argument that political recruitment is the mechanism of harmonizing the two.\(^{55}\)

Who-said-it-first is not the name of this game. The point is merely to reaffirm the relevance of judicial biographies to understanding the systemic effect of judges' lives, however imprecise the measurements and imperfect the linkage between single actors and larger systems.

**III. Summation**

While accenting biography, we have considered the relationship between judicial biography and judicial behavior research in two ways. Conceptually, we compared them as modes of inquiry and concluded that: (a) they are related by common questions, assumptions, and research problems, and (b) they are distinguishable mainly by relative concern with description and systematic explanation. Empirically, we made an inventory of behavioral-like propositions and concluded that: (a) judging by proposition production, judicial biographers may be considered early or proto-behavioral; and (b) judging by proposition content, judicial biographies relate to behavioral inquiry—positively by offering rich description and explanatory insight about determinants of judicial decisions, conversion processes, and judicial policy roles; negatively by stimulating demands for closer attention to regularities, theory, and more reliable measurements which underlie the behavioral persuasion. Together, these conclusions resolve into a theme that began as inarticulate major premise. As a mode of analysis, judicial biographies are complementary to behav-


\(^{49}\) Beveridge, op. cit., III, pp. 357, 528, 595; IV, pp. 396, 454, 517.


\(^{52}\) See, e.g., Beveridge, op. cit., IV, p. 279; Swisher, Field, p. 203 and Taney, pp. 415, 419; Mason, Brandeis, pp. 518, 560, and Stone, pp. 302, 426, 443, 533, 591, 605, 645.


ioral research. When conceived as case studies in judicial politics, they become related to, if not part of, the scientific enterprise. And their strengths and weaknesses fall into place as specialized versions of case-study characteristics.

Each mode has its place—and its drudgeries—in a scheme of self-conscious division of labor.\textsuperscript{56} Before options are chosen, two final reminders are in order. (1) Aggregate analysis is ultimately essential if explanation is the goal. Accumulated biographical information will amount to little, in short, without coherent theory. (2) By the same token, biography helps to reclaim human beings from abstraction, a function the more to be prized the greater is our success in aggregation.