The Chicago Judges Project finds that judges work in surprising ways

The Chicago Judges Project—a comprehensive survey of the voting patterns of federal judges—recently compiled an initial set of findings. The project is the first of a planned series of Chicago Policy Initiatives, research efforts led by Law School faculty, supported by student research assistants, and dedicated to finding practical solutions to difficult social problems. Three of the key players behind the Judges Project spoke recently about their work. Saul Levmore is Dean of the Law School and William B. Graham Professor of Law. Lisa Ellman, the project coordinator, is a law student in her third year of a joint J.D./M.P.P. program with the Harris School of Public Policy Studies. Cass Sunstein, the principal investigator in the Judges Project, is the Karl N. Llewellyn Distinguished Service Professor in the Law School. Their comments have been assembled into a loose conversation.

Saul Levinmore: The idea behind the Chicago Policy Initiatives is that we have assembled here in and around this one Law School a significant number of very smart people—students, faculty, and alumni. And while many are known for theoretical work, they actually have very practical ideas. The plan is to pick a project with social implications, about once a year, in such areas as health care, immigration, and child welfare. We will commit to developing a new approach or proposed solution in a two-year period. At the end of that time we will offer a plan, or a suggestion for experimentation. Chicago’s ideas will in this way be applied to important problems and broadcast to the nation and to relevant policymakers.

Lisa Ellman: I’m interested in making the law work better. Professor Sunstein’s research really works toward that, as he works at the intersection of law and policy. The Judges Project grew in part out of an article I wrote with him and Professor David Schkade at the University of Texas [who will be here next year teaching a mini-course in Statistics and Law]. Professor Sunstein had hired me as a research assistant. We studied judges and how they voted in environmental cases. The article that came out of our work reported on our findings, and it serves as a preliminary investigation for the Judges Project. Now we’ve got a larger group of students looking into relevant cases in a variety of areas of law in order to assess the voting patterns of judges.

Cass Sunstein: The project fits into my ongoing work on democracy and deliberation. Last year I published a book, Why Societies Need Dissent, that emphasizes the pressure to conform and the risk that like-minded people will go to unjustified extremes. The Judges Project grows out of that general topic.

Further information about the Chicago Judges Project, including downloadable versions of the papers the project has produced, can be found at http://www.law.uchicago.edu/policyjudges/index.html
Levmore: This is a great project, and I've enjoyed the way Cass Sunstein has inspired student interest—and shown all of us that there are surprising lessons to be extracted from the available data about judicial voting patterns. This is something one might not initially think of as a "social problem" but it is precisely that if only because our fellow citizens and our politicians talk a great deal about the perception that the judiciary is far more politicized than in days past. The first question is whether this is demonstrably true—in terms of actual judicial decisions or votes rather than pre-confirmation perceptions. The second question, as least as presently framed by Professor Sunstein, is whether this might be true in some areas of law and then not in others. A third question is about group effects; if panels of judges with mixed political backgrounds behave very differently from unmixed panels or individuals, then that is something we ought to know and perhaps something that the political and legal system can exploit to good effect. In terms of our Chicago Policy Initiatives, this stands as an example of a pressing issue that is ripe for inquiry by some of the best minds in the nation. I predict that Cass will come up with a terrific and provocative idea for improvement—even apart from the better understanding we will all have because of the work his group is engaged in.

Sunstein: We've analyzed about 16,000 judicial votes so far, focusing on areas such as affirmative action, disability, environmental regulation, campaign finance, abortion, capital punishment, property rights, gay rights, criminal appeals, and more. We have found a large difference between Republican appointees and Democratic appointees (the biggest on gay rights)—and also some surprising commonalities (we see no difference in results, for example, as between property rights cases and criminal appeals). We also find that judges are much influenced by whom they're sitting with. As a result, the political affiliation of the appointing president is a pretty good predictor of judicial votes, but the political affiliation of the other judges on the panel is an equally good predictor of judicial votes. There are big conformity effects. When a Republican appointee sits with two Democrats, the Republican gets pretty liberal.

Ellman: What we're really doing is observing human behavior. And you learn that all law is human. Last year, when I started working on the project, I got to read all these cases, go through all these votes—and received something of an education in the cognitive sciences. But I'm also seeing how we can make the law better, how we can make the system work. You're forced to come up with solutions. You look at the data you find, the empirical findings, and then you wonder where we go from here.

Sunstein: The most interesting finding, for me, is that judges get much more extreme when they're sitting with judges appointed by the president of the same political party. If you're challenging an affirmative action program, you're in great shape if the court consists of three Republican appointees—and in terrible shape if it's three Democratic appointees. This finding creates a real problem for the rule of law; it suggests that legal outcomes are much affected by personnel. Also, it's real-world evidence that like-minded people go to extremes.

Ellman: What we want to do is apply the findings to questions of politics and jurisprudence. We aim to see how judges apply the law in practice.

Sunstein: The United States debates many questions about judicial behavior, as we have seen in recent confirmation fights between Bush and the Senate Democrats. Those debates have been empirically uninformative. We think we can inform them. Also, there have been countless discussions about legal reasoning and whether and how it's "political." We think we can inform those discussions too. More broadly, there are discussions, in many fields of the humanities and social sciences, of social influences on human behavior. We can study these issues in a real-world setting and show what happens.

Ellman: We're coming up with a great data set. The senators I've spoken to—Carl Levin and Richard Durbin, who sits on the Senate Judiciary Committee—have been really excited about it. And our first paper was already cited in House Judiciary Committee hearings.

Sunstein: At a minimum, the data suggest that it's foolish to say that judges just follow the law. We have clear evidence
that this idea is unhelpful. Also, they suggest that the law imposes some discipline. Republican appointees often agree with Democratic ones. So the crudest picture of ideology—Republicans give conservative votes, Democrats liberal—is quite wrong. If you care about particular issues, we can show where political party matters. More ambitiously, I think that our data demonstrate the importance of having a range of views on the federal bench. If you have mostly Democrats, or mostly Republicans, unjustified movements in the law should be expected.

Ellman: We have all of this information about Republicans and Democrats—but what about the appointing presidents? How do they differ from each other? That’s our next step.

Sunstein: In time, we hope to have a far more complete picture of how judges have voted, in order to see, for example, the different behavior of Roosevelt nominees, Reagan nominees, Bush I nominees, Bush II nominees, Clinton nominees, Johnson nominees, and so forth. We should also be able to tell you which judges are conservative and liberal on particular issues—and which judges are most susceptible, and least susceptible, to other judges’ influences, and exactly when.

Levmore: I’d predict a practical result at the end of two years, perhaps in the form of an interesting idea about how judges ought to be nominated. It is after all our goal to produce not only great research but also concrete proposals.

Ellman: It’s one thing to sit in class and learn about law—though I admit to loving my classes. But it’s quite another thing to study law as it happens, so to speak, and to work on ways to change it—hopefully for the better.

Levmore: This Law School, perhaps more than any other, is associated with ideas. “One hundred years of ideas and action” is an accurate description. We are also associated, correctly I think, with critical thinking. For every decent Chicago idea, there are several good Chicago-trained lawyers who will puncture the idea. Critics might say “Oh, there are a lot of eggheads in Hyde Park, and what do they have to do with my world?” Others might ask why our small Law School is not even more evident in newspapers and in public discourse. The truth is that we are involved in public debates. I’ve never seen a faculty work so hard on so many interesting things. The Chicago Policy Initiatives—and the Judges Project—will help us show that we have important ideas that have legs of their own. We can develop ideas that lead to concrete suggestions. We will influence the design of legal institutions even as we continue our famous thinking (and criticizing). Our brilliant, hard-working faculty have ideas worth talking about and worth putting into action.—R.M.

WHERE IT ALL BEGAN:
The project before the Judges Project

The Law School has a tradition of conducting practical research that addresses social problems. In fact, the model for the Judges Project—and for the Chicago Policy Initiatives—is the groundbreaking Chicago Jury Project, begun in 1953 by Law School Professors Harry Kalven and Hans Zeisel.

“People thought that the jury was sacrosanct,” says Dean Levmore. Kalven and Zeisel treated it as a human institution, and they subjected it to rigorous scrutiny. “They asked: What does a jury do? What happens when it deliberates? Does the judge agree with its decision?” One result of their research, The American Jury, was a landmark effort to bridge the gap between social science and legal scholarship—and to bring academic research into public debate.

“It was a pathbreaking social science and law research project,” says Levmore. “Now we’re accustomed to that kind of thing. We regularly ask questions like why teenagers have guns, what causes crime spikes and declines, and what causes bankruptcies. And we use social science to answer these questions and then to understand and fashion legal rules.” Not so long ago, in the days of the Chicago Jury Project, this way of going about things was revolutionary.”

Levmore notes that graduates who studied here during the Jury Project still remember it—both as important work and as part of a great education. That is the model for the present initiatives; “work as a group on a specific problem that might lend itself to practical solutions and to yet better education.”—R.M.