

# Michigan Law Review

---

Volume 69 | Issue 1

---

1970

## Nagel: The Legal Process from a Behavioral Perspective

G. Theodore Mitau

*Minnesota State College System*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Legal Writing and Research Commons](#)

---

### Recommended Citation

G. T. Mitau, *Nagel: The Legal Process from a Behavioral Perspective*, 69 MICH. L. REV. 156 (1970).

Available at: <https://repository.law.umich.edu/mlr/vol69/iss1/7>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE. By *Stuart S. Nagel*. Homewood, Ill.: Dorsey Press. 1969. Pp. xv, 399. \$8.50.

Because Stuart Nagel's *The Legal Process from a Behavioral Perspective* uses the tools of one discipline to analyze the operation of another, it should prove highly valuable to scholars in both fields. Lawyers can gain from this text a more sophisticated appreciation for the developing behavioral science of law and for the application of current social-science methodologies to legal research. Social scientists, on the other hand, can derive a better comprehension of the policy capabilities of this country's legal "delivery system."

Professor Nagel, a member of the Illinois Bar, belongs to a group of highly productive and gifted political scientists whose scholarship has given significant new directions to the study of public law. He and his fellow scholars—Jack Peltason,<sup>1</sup> C. H. Pritchett,<sup>2</sup> Sid Ulmer,<sup>3</sup> Glendon Schubert,<sup>4</sup> Fred Kort,<sup>5</sup> and Joe Tanenhaus<sup>6</sup> are but a few of the leading names—insist that, since judges function as actors in our political system, the role of the judiciary in the making of law constitutes a form of political decision-making. Therefore, they believe that the actions of judges should be viewed, methodologically, in behavioral-political rather than traditionally legal terms, even though such actions may differ in style and process from those of legislatures or executives.

To many members of the legal profession, however, the concept of a political jurisprudence—a joining of politics and law—conjurs up connotations that are far from appealing. "Law is a prestigious symbol, whereas politics tends to be a dirty word," acknowledges C. H. Pritchett, one of the founding fathers of the behavioral approach to judicial research. "Law is stability; politics is chaos. Law is impersonal; politics is personal. Law is given; politics is free choice. Law is reason; politics is prejudice and self-interest. Law is justice; politics is who gets there first with the most. The motto over

---

1. J. PELTASON, *FEDERAL COURTS IN THE POLITICAL PROCESS* (1955); J. PELTASON, *FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION* (1961).

2. C. PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947* (1948); C. PRITCHETT, *CIVIL LIBERTIES AND THE VINSON COURT* (1954).

3. *INTRODUCTORY READINGS IN POLITICAL BEHAVIOR* (S. Ulmer ed. 1969).

4. G. SCHUBERT, *QUANTITATIVE ANALYSIS OF POLITICAL BEHAVIOR* (1960); G. SCHUBERT, *JUDICIAL POLICY-MAKING: THE POLITICAL ROLE OF THE COURTS* (1965); G. SCHUBERT, *THE JUDICIAL MIND* (1965); *JUDICIAL DECISION-MAKING* (G. Schubert ed. 1963); *JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH* (G. Schubert ed. 1964); G. SCHUBERT & D. DANIELSKI, *COMPARATIVE JUDICIAL BEHAVIOR* (1969).

5. Kort, *Simultaneous Equation and Boolean Algebra*, in *JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH* 477 (G. Schubert ed. 1964).

6. *FRONTIERS OF JUDICIAL RESEARCH* (J. Grossman & J. Tanenhaus ed. 1969).

the portals of the Supreme Court building is, 'Equal Justice Under Law,' not 'Equal Justice Under Politics.'"<sup>7</sup>

The behaviorists nevertheless maintain that law is not so totally divorced from politics. They view judges as participants in the making of public policy, and therefore as part of the political process. This behavioral perspective on public law, which has strongly developed since World War II, represents a reaction to what has been somewhat pejoratively termed the "slot machine jurisprudence" approach to constitutional law. Thus, Nagel and his colleagues see that judges do not merely discover law; they make law. Judges do not merely follow mechanical precedents; they select those precedents most appropriate to the ends that they believe reflect just and socially desirable policy.

But this is not to say that contemporary behaviorists are merely ideological descendants of the school of judicial realism—as first propounded by Cardozo, Jerome Frank, Brandeis, and Pound. Because behaviorists also are strongly influenced by studies in sociology, psychology, psychoanalysis, and the application of mathematics to the social sciences, they seek a political jurisprudence which employs empirical and quantitative studies in order to build testable theories within a behaviorally oriented science of politics. To achieve this goal, the behaviorists emphasize methodologies which point up the interdisciplinary nature of contemporary public-law research, the need for greater precision in the quantification of data, and the employment of increasingly sophisticated statistical tools. Their specific aim is to elucidate scientific relationships between the backgrounds and attitudes of judges and judicial decision-making, and thus to develop general models or theories for predicting decisional outcomes within a "stimulus-response" conceptual context.

In *The Legal Process from a Behavioral Perspective*, Professor Nagel brings together more than twenty of his studies that utilize this approach, most of which were published previously in various legal and social-science journals. The book includes a number of chapters illustrating the application of the behavioral approach to research. Among the topics explored are the exercise of discretion by various federal administrative tribunals in rule-making proceedings, decisional influences of state and federal courts upon each other as revealed in *Shepard's Citations*, the influence of cultural patterns upon the adjudicative processes, the extent of favorable and unfavorable treatment received by identifiable groups of litigants—classified by sex, race, age, and education—in the various stages of criminal proceedings, and the relationships between "attorney characteristics" and courtroom results. Three chapters are devoted to the

---

7. Pritchett, *The Development of Judicial Research*, in *id.*, at 31.

use of correlation-analysis methods, demonstrating how they can be used to predict the decisional outcomes of cases involving criminal confessions, reapportionment, and civil liberties.

Discussions of judicial "decisional propensities" include studies relating judicial backgrounds—ethnicity, religion, education, and ideology—to outcomes in criminal cases; methods of judicial recruitment—election or appointment—to party loyalty; and background variables—including political party, region of country, and ideology of appointing authority—to "conservative or liberal decisional directions" of seven federal regulatory commissions. A number of attitudinal surveys are reported which seem to point to a tendency for judges with conservative responses "to decide for the prosecution in criminal cases, for the business firm in business regulation cases, for the party sued in auto accident cases, and for the employer in workmen's compensation cases" (p. 218).

In addition to these studies of reactions of the legal system to various phenomena, the author has included several studies which examine political reactions to judicial decisions. One such study quantitatively measures congressional reaction to judicial review by isolating and analyzing factors and issues that exhibit positive correlation with court-curbing bills. Another analyzes major editorial reaction to "church and state" cases in order to discern variables that might help to account for differences in response patterns. Methodological problems encountered in systematically testing legal effects are further illustrated in a study which examines the effects and impact of the exclusionary rule established by the Supreme Court in *Mapp v. Ohio*<sup>8</sup> on police, judicial, and criminal behavior.

The material presented in the last two chapters is less directly related to the author's central discussion of the applications of behaviorally oriented research methods to the judicial process. Chapter 24 contains a computer program for use by legislatures engaged in redistricting. This program is designed to reconcile reapportionment policy considerations—such as district compactness, contiguity, and maximization of political interests—with the one man-one vote imperative. Professor Nagel's last chapter, "Optimizing Legal Policy," attempts to employ "estimated correlation coefficients to determine the relation of policies to goals and paired comparisons to weight goals, and to determine the likelihood that a policy will be adopted" (p. 360). Quantifying the "ideal" strategy options in the legislative process in order to determine which set of policies has the greatest chance of overcoming opposition forces represents an important and practical research objective for social scientists. Nagel presents a scheme for optimizing the probability that socially useful legisla-

---

8. 367 U.S. 643 (1961).

tion will be adopted, which he recommends "wherever it can be applied in part or in whole" (p. 373) for use not only when the variables may be ascertained with quantitative certainty, but also when they can only be estimated. The method is thus designed more as a stimulus for further analysis of legislative problems than as a fixed formula for deriving proven solutions.

Whether assessed from the perspective of the "newer" political science or from that of the "newer" public law, Nagel's concept of law-making and adjudication "as both effects or outputs and as causes or inputs" reflects quite accurately the thrust toward a unified social science of law, that dominates contemporary behaviorist research and writing. One of the major merits of this closely reasoned book is the author's success in combining his own numerous investigations and the research of others into one logically and systematically integrated work. This integration was especially important because Nagel chose to include some of his earlier and possibly somewhat dated studies. The book's shortcomings, on the other hand, are relatively minor. Broader comparative system-type approaches to the legal process received only limited attention.<sup>9</sup> Moreover, the book's readability might have been enhanced had the conceptual discussions been more clearly separated from the methodological detail.

Despite these insignificant problems, *The Legal Process from a Behavioral Perspective* offers a significant contribution to the discipline of behavioral analysis of the legal system. It constitutes a most scholarly and articulate plea for the construction of more scientifically precise and empirically verifiable principles of judicial decision-making. There are, of course, legal scholars who continue to express serious reservations about the adequacy of the behavioral approach as a method of providing a meaningful guide to the subjective world of judges. For example, Professor Schwartz<sup>10</sup> has urged that a series of important questions, posed by Cardozo more than a generation ago, should continue to challenge the building of reliable predictive models, especially as the questions relate to a judge's perception of his judicial role under particular sets of circumstances and conditions:

What is it I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency,

---

9. In this connection see G. SCHUBERT & D. DANIELSKI, *supra* note 4.

10. Schwartz, *A Proposed Focus for Research on Judicial Behavior*, in J. Grossman & J. Tanenhaus, *supra* note 6, at 490.

the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?<sup>11</sup>

It is doubtful that Professor Nagel would quarrel with the relevancy of these questions, but he clearly believes that their seemingly subjective nature will not render behavioral analysis unproductive. Rather, Nagel—more than traditionally inclined members of the bar and bench—is confident that, as data bases grow and quantitative research techniques become more sophisticated, he and his fellow behaviorists will derive verifiable generalizations concerning the legal process.

*G. Theodore Mitau,*  
*Chancellor,*  
*Minnesota State College System,*  
*and*  
*Adjunct Professor of Political Science,*  
*Macalester College*

---

11. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10 (1921), quoted in Schwartz, *A Proposed Focus for Research on Judicial Behavior*, in J. Grossman & J. Tanenhaus, *supra* note 6, at 490 n.4.