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Multidimensional Analysis of Judicial Decision-Making: Reframing Judicial Activism as the Study of Judicial Discourse (or taking the judgment out of the Judgment)

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Abstract

This paper reviews the development of a multidimensional approach to the study of judicial activism as conceived by Cohn and Kremnitzer in 2005. The paper explores the meaning of judicial activism briefly before exploring the development of the Cohn/Kremnitzer model. The authors propose a methodological shift that repositions the activism analysis more broadly as an analysis of judicial discourse. The authors contend that this methodological shift would allow for more rigorous empiricism in the literature and for an analysis that would open up the activist project to all constitutional court cases, whether impugned legislation is under scrutiny or not. The authors conclude that the Cohn/Kremnitzer model provides the requisite indicia to inspire a new descriptive language in judicial activism studies, and to pave the way for empirical theorizing of justice in the context of judicial activism.

Introduction

In 2005, Margit Cohn and Mordechai Kremnitzer articulated a multidimensional model of judicial analysis that attempted to measure the decision-making of constitutional

courts by developing multiple indicia of measurement. The development of the model occurred in a controversial context because judicial activism (the focus of the Cohn/Kremnitzer model), though a popular topic of socio-legal scholarship[1], remains a highly contested term.

The definition of judicial activism is itself often the subject of debate in the literature. Russell (2009, 295) writes that the term is "vague", often used in a "pejorative" sense, and implies "abuse" on the part of the judiciary. Indeed, charges of judicial activism belie a description of judicial decision-making that occurs outside the "acceptable range" of the exercise of judicial competence. The range of decision-making is the matter most contested in the extant literature (Cohn and Kremnitzer 2005).

Certainly, even a relatively simplistic exploration of judicial activism yields confounding questions about the nature of this judicial range of conduct. For example, has the judiciary exceeded its bounds, and thus behaved as an activist court, when it reverses legislative edict? Is a court being activist when it protects the liberty interests of an accused in the face of legislative persecution? What about when legislative edict and constitutional values clash – which interest supersedes the other?

This confusing constellation of inquiries is often ignored in the political context in which charges of activism inure. For instance, those most invested in the notion of legislative fidelity might charge the court ascribes to a leftist activist project (as the court becomes a "political party" or a "court party") when it strikes legislation in favour of its own understandings of the constitution (Morton and Knopff 1990, 2000). Others might argue that what appears to be derogation of this fidelity is wholly justified in the context of a court that is protecting the constitutional rights of an accused (Kelly and Murphy 2001). Others still may argue that any time the court lacks the expertise necessary to adjudicate it behaves

1 Muttart (2011: 1) writes that the term originated in the 1950s and has resulted in over 350 peer-reviewed studies.

in an activist fashion (Manfredi 1993, 2004). In the activism debate, indeterminacy flows.

What unites these diverse approaches to inquiries of activism, including the Cohn/Kreminitzer multidimensional model, is a tendency to seek to judge the judges, and occasionally a tendency to cast aspersions on the judiciary. As a result, the study of judicial activism itself (and the development of salient models) has come under attack by some scholars as an inquiry beginning with a value-laden question in order to produce a value confirming answer (Jochelson 2009). For instance, asking whether the court exceeded its powers by overturning the legislature, especially when the researcher answers the question on the basis of her own judgment, may be something of a leading question.

Some critical scholars have problematized the "court party" assertion made by some activism scholars. Gotell writes that "court party" scholars argue that "organized special interests, most notably feminists and 'homosexual activists' have circumvented the democratic parliamentary process" but "this analysis tends to be overly focused on normative questions and lacking in systematic evidence" (Gotell 2005: 883; see also Smith 2002). This critique castigates an analysis of judicial activism as an inherently social conservative project destined to delight the political right.

In this short paper, we explore whether the Cohn/Kremnitzer analysis has the potential to depoliticize the judicial activism debate. The model developed by Cohn and Kremnitzer is more comprehensive than previously articulated models and allows for an examination of a "fuller spectrum of activism indicia" (Jochelson 2009: 231). However, the model is still "value laden" in that the researcher is still required to make a value judgment in each indicia about whether the court has behaved in an activist fashion. We argue that steps can be taken on a methodological level to reduce this value judgment to a judgment of coding by reorienting the analysis to an assessment of a court's discourse – what the court says about its own reasoning can be measured along the activ-

ist scale (instead of an investigator's belief about the activist orientations of a court). Here we imagine the creation of scales to determine the degree to which a Court speaks about its own activism along a series of activism dimensions.

Of course this methodological move renders the multidimensional model of activism as something new and somewhat mutated because the Court's own voice is positioned as the main locus of analysis rather than the political judgment of the academic reading the decision. The posited methodological shift is the development of a multidimensional model of judicial discourse. The empirical results of such an investigation may provide interesting primary data for future theorizing, and thus reduce the lobbing of value judgments for another day. This is not a move that Cohn and Kremnitzer anticipated in their original study, but we endeavour to make a persuasive case for this alteration in the coming pages.

This paper is divided into three parts. Part I explores the development of the Cohn and Kremnitzer model and explores the literature that inspired their model. Part II reviews the model in more detail. Part III discusses the critiques of the model and our responses to these critiques, including the impetus for our modifications. Ultimately, we conclude that the adapted model may provide a new language of empirical exploration of legal decisions in Canada that moves the investigation beyond the usual concerns of precedential effects of decision-making. In other words, we argue that the study of judicial activism is value laden and therefore its empirical measurement could result in tautological responses to value-driven questions. In this paper we argue that a reorientation of the model could produce an empiricism for undertaking a "rich and textured discussion" of judicial analytics in a variety of issue specific and temporal contexts (Jochelson 2009: 233).

The initial orientation of the Cohn/Kremnitzer model was a more nuanced approach to a struggle that ultimately pitted political rivals in an academic contest to determine which

interpretive values ought be most important in a liberal democracy. Shifting the discussion to a discourse analysis instead asks us to elucidate what interpretive values the court sees as pivotal in its approach to adjudication. We may ultimately find ourselves, at the cessation of the empirical project, grappling with the same contest over interpretive values, but we would be doing so in response to a new set of data, instead of positing the values as the starting and ending point of analyses. Even if one were to fail in elucidating any empirical significance, the coding exercise we envision would at least provide a new language of description for constitutional decision-making beyond measuring success or failure rates of a court. The development of this new language would do justice to the long line of activism investigations that have emerged since the middle of the twentieth century, while simultaneously deferring the political discussion to a different point in the analysis. This might encourage something of an agnostic approach to the study of judicial activism (which we prefer to reframe as a study of judicial discourse). It would, at the least, reorient the starting point of inquiry in a less value driven direction.

Part I: The Development of the Model

In this section, we endeavour to review the activism literature that aided in the formulation of the Cohn/Kremnitzer model. A complete review of theory that underpins activist literature in general is beyond the scope of this paper. For our purposes, we merely seek to inform the reader of a brief history of the knowledges that informed the originators of the multidimensional model of analysis.

Certainly, a uniform definition of judicial activism is absent in the literature. Undoubtedly, the term has been marshaled on all sides of a particular argument in order to critique court jurisprudence, often in the constitutional realm. Regardless of who makes the activist claim against a court, the label of "activist" usually connotes a disapprobation of the decision made. Cohn writes:

> ''Judicial activism'' has received its share of bad press in all systems that allow judicial intervention in contested areas. In some cases, the object of the criticism is the content of the decision, rather than the loftier, theoretical question of the role assumed by the judiciary. The example of the United States reveals the flaws of this attitude. Its changed ideological climate in the 1990s, with the rise of ''conservative activism'', required both liberals, who had earlier applauded activism, and conservatives, who considered judicial activism as a threat to the integrity of American society, to reconsider their positions" (2007:115).

In the North American context we have seen arguments making the claim that a court has essentially derogated from the will of the legislature, thereby flouting the constitutional balance of governance powers established by constitutions (Morton and Knopff 2000: 34-53; Schubert 1972: 17, Posner 2006: 314, 318). At a more microscopic level, such claims often take aim at the mechanics of judicial decision-making and charge that a court has departed in its decision from the original intent of the legislature, a matter evidenced by the written legislation or constitutional text (Manfredi 1993: 46). Yet even such minutiae are often contested. For instance, some argue that original intent is a fiction, and that any such contention is plagued by indeterminacy (Kelly and Murphy 2001: 8). Others merely argue that such apparent incongruities can be met by appealing to so-called "natural" delineations of constitutional text; these arguments are often apprised by "moral" readings of a constitution that situate the values of a constitutional democracy as being founded on universal values (Kelly and Murphy 2001: 10-11; Morton and Knopff 1990: 545-6).

This conception of values is subject to its own indeterminacy and thus other attempts to describe activism have emerged. Hence, scholars began to scrutinize the concepts of judicial discretion, and a court could be described as activist under such accounts where it has exceeded the scope of its author-

ity. Here, a court is affixed with possessing particular "expertise" and is activist when it supersedes the margins of this expertise (Manfredi and Kelly 2004: 744). Often, these critiques chastise a court for its activism when it relies on non-traditional, weak and limited, or under-theorized social science evidence (Manfredi and Kelly 2004: 744).

To answer such concerns, scholars problematize the notion that a court is a final site of debate in these areas of contested social science evidence. Some scholars posit that a court is only a first site in a dialogue about constitutional issues between legislatures and courts (Hogg and Bushell 1997:75; Manfredi 2004: 122-29; Schneiderman, 2002: 633). The dialogue here is apprised of players with different constitutional roles – legislatures wish to efficiently legislate, and courts are charged with guarding constitutional liberties. Each may thus have important contributions to the dialogue and the constitutional outcome of a particular constitutional issue (Waluchow 2007; Kavanagh 2003: 55; Sager 1990: 893). Of this agonistic relationship is borne the notion that rather than dialogue between institutional adversaries, the relationship between legislatures and courts is more akin to partnership, or even less simplistically, as one partnership in a network of complex institutional relationships involving numerous other government agencies, political partisans and society (Cohn and Kremnitzer 2005: 340).

The notion of dialogue is further seated in conceptions of the court as guardians or custodians of constitutional values. Perhaps when a court issues a decision emboldening constitutional values, it is behaving less activist and simply as a capable constitutional custodian (Cohn and Kremnitzer 2005: 339; Roach 2001). Others would argue that constitutional fastidiousness in the context of such values would be more appropriate where the decision aligns with populist sentiment (Tushnet 1999: 11-14). Yet others argue that a court must be placed so as to guard constitutional values especially when constitutional fastidiousness means that vulnerable groups are being protected from majoritarian tyranny (Mc-

Lachlin 2001: 117). Under such constructions, guardianship of the constitution must hold fast, even in the face of accusations of deviation from the legislative agenda.

In the development of the multidimensional model of analysis Cohn and Kremnitzer recognized the importance of the above arguments. Cohn argues for her composite model of activism:

> The judiciary's role is multi-faceted; the effect and impact of any one decision are contingent on extraneous conditions just as much as they can be extrapolated from the decision itself. The model thus supports a composite view of judicial decision-making, which draws together the variety of ways that judges can impact on society. Once judicial involvement is considered as potentially balanced by other powers, its contribution can be considered against the potential threat of over-intervention and under-representation. On balance, the potential benefits of a participating judiciary have sustained and reinforced constitutionalist frameworks (Cohn 2007: 115).

Cohn and Kremnitzer used Canon's model of activism to elaborate upon their approach. Canon had articulated six indicia of activism, which recognized that the import of a decision was more than its disposition – that other political stories are being told in a particular decision (Canon 1982).[2] Cohn and Kremnitzer argued that while the Canon factors were useful indicia of analysis, other factors which speak to socio-legal reactions to decision making and explorations of constitutional values would further elucidate a court's activist leanings. Cohn makes clear that she is arguing for a "justificatory" theory of judicial decision-making – she

2 At 386, Canon developed six species of activism: majoritarianism (the usurpation of the legislative role by courts), interpretive stability (deviation from earlier doctrine), interpretive fidelity (degree of deviation from original intent), substance-democratic process distinction (substantive policy making rather than democratic preservation), specificity of policy (the making of policy at the expense of the discretion of other institutions), and alternate policy makers (the availability of other institutions to properly exercise the requisite discretion).

defines judicial activism as "as action that extends beyond the role or function of the courts in liberal constitutional polities" (Cohn 2007: 96). Thus Cohn makes clear that she is less concerned with accounts of constitutional courts as inappropriate actors, but rather in the analytics of courts as agents of liberal political theory. Hence Cohn and Kremnitzer develop an account apprised of three dimensions of analysis, some of which move beyond a textual analysis of decision-making.

Part II: The Cohn/Kremnitzer Model

Cohn and Kremintzer identify seventeen indicia of activism in their model. The indicia are divided into three dimensions of analysis: *traditional visions* of activism, *socio-legal deviation* activism and *core value* activism (Cohn and Kremnitzer 2005: 341,343, 346, 347, 352). Each dimension of activism represents a different paradigm for envisioning the activism of a particular court.

Traditional visions of activism are a measure of judicial output as compared to previous legal norms or rules. The deviation from such norms is what establishes these dimensions as activist. This dimension consists of twelve indicia. *Judicial stability* measures whether a court deviates from its past decisions, or decisions of lower courts. *Interpretation* analyzes whether a court interprets legal text in light of the original meaning (often held to be the intent of the drafters of the document) of the constitutional text. *Majoritarianism and autonomy* asks whether a court "interferes with policies set by democratic legislation" (Cohn and Kremnitzer 2005: paras. 26-7). *Judicial reasoning* explores whether a court expresses fidelity to legal procedures or whether the court uses reasonableness-based calculi to explain the reach of its decision. *Threshold activism* asks whether a court jumps threshold hoops in order to hear the substance of a case in spite of legal barriers to its jurisdiction. *Judicial remit* explores whether a decision expands the court's jurisdiction beyond previous understandings. *Rhetoric* seeks to explore the court's allegiance to broader positions of values beyond

those required to solve a legal problem. *Obiter dicta* asks how far a court is willing to expand its arguments beyond the legal issues raised in a given case. *Comparative source reliance* examines the extent to which a court will use extra-jurisdictional sources to reach a decision. *Judicial voices* situates activism as a function of the amount of dissenting opinions in the decision. *Extent of decision* asks about the implications of a decision in a particular area, with decisions of broad scope being more activist than narrowly tailored decision making. Finally, *legal background* asks whether clear legal tests precede the case and suggests that when courts need to use creative reasoning in the face of vague rules, activism is higher (Cohn and Kremnitzer 2005: paras. 26-7). Each of these indicia represents well-worn political theory of judicial activism and asks whether the court has exceeded the traditional limits of its authority.

Socio-legal deviation activism, the second dimension of analysis is based on post-decision dynamics, and is inspired by the dialogue model discussed in the previous section. Here the court's output is measured against subsequent responses, rejections or acceptance by the *legislature*, *administrative apparati,* other *courts* and the *public*. Cohn and Kremnitzer explain that "social and political response in the wake of a decision can reflect the degree of deviance of the court from the emerging consensus or equilibrium, and thus bears, ipso facto, on the nature of judicial output… the lowest level of activism pertains to a court that follows and reinforces existing law, with no contrary post-decision response" (Cohn and Kremnitzer 2005: para. 40).

The last dimension of analysis, *core value* activism*,* posits that where courts align with core values of the constitution they are behaving in a less activist fashion. The only factor developed by Cohn and Kremnitzer under this dimension is *intervention and value content*. Here Cohn and Kremnitzer make their most controversial claim – that "highly subjective content disputes, involving important rights based dilemmas, that are resolved by reference to 'thin' core values" are not

activist (Jochelson 2009: 244). Cohn and Kremnitzer explain that:

> Our third vision of activism considers the protection of core values as a relatively non-activist exercise, as it is a constitutional role of the judiciary. We join those who accept that judicial output is inherently value-based, and normatively argue that in a constitutionalist climate, the judiciary is an active participant in a broad social effort to promote and maintain 'core' or 'thin' constitutional principles. The utilities of this participation outweigh the potential dangers - dangers that are essentially tempered, in constitutional democratic frameworks, by an effective power of the legislature over the judiciary and other societal restraining mechanisms embedded in the constitutional network. We thus adhere to the argument that purely value free judicial decision-making is not only impossible, but also untenable.

Hence, Cohn and Kremnitzer develop an understanding of activism in the third dimension that justifies the role of the judiciary as custodians of constitutions. The development of this third category places its authors as subscribing to the prudence of constitutional stewardship.

The development of the multidimensional model was an important moment in activism scholarship. Its benefits are derived from its nuance. It provides more variables than previous accounts. It also represents an interest in post-decision dynamics as an empirical endeavour. It equips us with a vision of activism that allows for guardianship of the constitution to militate against activism charges in the *traditional visions* of activism. Thus the dimensions provide multivalent political descriptions of a court's action in a given case. Perhaps most importantly, the model provides a lens for critique of constitutional decision-making and for the development of empirical lenses to code for, or measure (qualitatively and/or quantitatively), this decision-making. Despite these possibilities, neither Cohn nor Kremnitzer has attempted to

operationalize an empirical version of the model, and indeed, Cohn in her recent work has only utilized the model as a qualitative critique of a particular legal case (Cohn 2007; see also Khosla 2009).

Part III: Towards Operationalizing the Model

Despite the apparent benefits of the Cohn/Kremnitzer model, few academics have taken up the clarion calls of its authors to use the "analytical framework for the study of the judiciary that expands from the legal to the social and political spheres" (Cohn and Kremnitzer 2005: 354). Certainly there have been attempts to empiricize activism indicia in Canada (for recent examples see Muttart 2011, 2007; Ostber and Wetstein 2007).

The literature reveals a willingness to interrogate the criteria qualitatively in singular case contexts but a reluctance to apply the model more broadly (Muttart 2011; Khosla 2009). The reluctance to operationalize the model appears to stem from methodological concerns including the "relative weight of each parameter", the suggestion that the second dimension may be controversial because it suggests that "that the judiciary has a participatory role in society", the contested notion that the judiciary ought to have a guardianship "duty to preserve certain constitutional goals" (Khosla 2009: 59), the unwieldiness of the amount of indicia posited, the difficulty in coding the "unwieldy" quantum of indicia, and the overly wide reach of the indicia beyond more narrow expositions of activism (Muttart 2011: 13).

The issue of "unwieldiness" is one that can be largely dismissed by various strategies of empirical analysis. That the first dimension of analysis contains the lion's share of indicia may be solved by relatively mundane statistical practices such as weighting and ought not prevent the development of a Cohn/Kremnitzer analysis. The critiques relating to the dimensions countenancing controversial and contested judicial functions, or as distraction from more commonly understood narrow expositions of activism are potentially more damn-

ing critiques. Cohn and Kremnitzer's model is, by their own admission, justificatory, and hence, is subject to the critique that some of the indicia developed attempt to provide legitimacy to the court functioning, where none (on some readings) may exist. Hence, the model as developed by Cohn and Kremnitzer may be criticized as a reimagining of democratic court function in a manner which disrupts the *traditional visions*. This reimagining also has methodological implications in an empirical analysis because a researcher is implored by the model to make a "judgment call" about the degree of a court's activism under the second dimension (*socio-legal* deviation) and the third dimension (*core value* activism). This degree of latitude would undoubtedly trouble those who have a more traditional understanding of judicial activism scholarship. Yet, the "judgment call" critique would also apply to the first dimension of analysis: for instance who would determine whether a court is subscribing to the legislature's initial intent? Would one use the judgment of the researcher, a notable constitutional scholar, or some other luminary?

We contend that these more critical concerns about the model can be rectified by employing a discourse-based analysis of court decision-making. A researcher, rather than measuring the activism of a court along each indicia by virtue of a judgment call can attempt to surmise what the court appears to be deciding based on its own account. The voice of the court then provides its own account of how it has made the decision along each indicia and the researcher is tasked with coding these accounts and measuring them in order to yield data. Utilizing the court as the empirical source of primary research would require that the second dimension of activism be set aside for different socio-legal projects since societal and institutional reaction would largely require measurement outside of the "in their own words" methodology. Once the data is identified and subsequently coded, one can attempt to interpret the data yielded.

This approach to measurement is certainly subject to the familiar critique that the analysis would lose the core meas-

urements of activism. Rather than prognosticating about the proper role of the court, this proposed methodological shift would instead create an account of judicial decision-making, largely apprised of the court's own justifications and analytical building blocks. How could one then argue that a court has been activist or restrained? Indeed the question begs the answer (that discourse analysis is less politically charged endeavor than desperately seeking activism), but we will elaborate on this point further. The Cohn/Kremnitzer model is ideally situated to provide a means of analyzing judicial discourse rather than seeking to justify judicial decision making as activist or restrained. This reorientation of the model would also satisfy Cohn and Kremnitzer's closing salvo that:

> The model proposed … contributes to this constantly evolving but always pressing debate, by questioning and expanding the discourse… It could thus serve as basis for further analyses, theoretical and socio-legal alike (2005: 356).

Indeed, even those who have dismissed the Cohn/Kremnitzer model as losing sight of the core of activism scholarship attempt to expound the virtues of robust quantitative analysis. Muttart argues that quantitative analysis "due to their [Cohn and Kremnitzer's] requirement of large sample sizes", stimulates "comprehensive and systematic study", promotes "comparison between types of cases and between temporal and administrative eras" and uncovers "interesting, but previously overlooked phenomena" (Muttart 2011: 66). Muttart describes an appeal to a quantitative analysis of activism as the missing "leg" of judicial analytics:

> The employment of qualitative methodologies to the exclusion of quantitative ones is comparable to attempting to describe how humans walk by focusing on their right legs and, except to acknowledge their existence, ignoring their left legs. It is now time to expand the analysis of the Court's activism and restraint to encompass both legs. (2011: 66)

If indeed these virtues are worthwhile, it surely is also worthwhile to sublimate the necessity to protect the core of activist research until the cessation of primary research analysis. This militates robust discourse analysis as a first step prior to engaging in qualitative discussions of the legitimacy or illegitimacy of judicial decision making. We imagine the development of scales to measure the Cohn/Kremnitzer indicia of activism as a first step in creating empirical data for such an analysis. Following this primary research phase the groundwork will be laid for critical discourse analysis. The primary research will represent the analysis of written text (i.e case law) which can then be analyzed in the context of the distribution and consumption of legal knowledges with an eye to extrapolating discursive events in socio-legal practice.

Reorienting the Cohn/ Kremnitzer model towards discourse also reveals other advantages. Most judicial activism research occurs in response to judicial consideration of the constitutionality of legislation. However, many court decisions involving constitutional principles occur in the absence of legislation save for the constitution itself. For example, improper police conduct in Canada is analysed in many circumstances quite apart from legislation. This is in part because wide-ranging police powers legislation has not been enacted in Canada (Jochelson 2009; 2008; 2007). Thus, in such cases, a court may be left analyzing the constitutional propriety of police misconduct against constitutional law alone. For example, a warrantless search may be analyzed solely against the constitutional standard of protections against unreasonable searches. In these situations, traditional activist researchers might be unwilling to interrogate the analysis as no impugned legislation is implicated.

However, *traditional visions* of analysis, such as determining the original intention of legislation may still be relevant in this stark constitutional context. For example, a court may claim to interrogate the meaning of the term "reasonable" in the constitutional context of unreasonable search and seizure and in doing so would create an empirically measurable

statistic under *traditional visions* of activism. This reoriented lens of discourse analysis (as opposed to activism analysis) would open up all court cases to empirical rigour. In particular, decisions relating to the criminal justice system, or the discretion of administrative or other governmental apparati could thus be subject to measurement. Further, this would then allow for analytical discourse comparisons between and within areas of law. In the criminal justice context one could cross compare the discourse measures of cases across different constitutional protections: search and seizure discourse could be cross compared to developments in the law of arrest; criminal procedure discourse could be cross compared to administrative law discourse; the court's discourse in assessing legislation could be cross compared to its discourse in the analysis of the exercise of discretion of governmental players and so on. In short, a reorientation of the Cohn/Kremnitzer model as a measure of discourse expands the empirical measure of judicial decision-making across legal areas, legal participants and beyond precedent.

In large order, the tendencies of empirical activism scholars have fetishized precedent, by giving exclusive primacy to the results of cases and their legal effect on future jurisprudence.. Since the Charter came into force, there has been a "surge of interest in quantifying activism" (Jochelson 2009: 246) . These studies have attempted to label "a series of cases or jurisprudence, a period of the court's time, or a type of constitutional analysis as highly activist, modestly activist or restrained, or they otherwise attempt to quantify the activism of the court" (Jochelson 2009: 246; see for examples Muttart 2011, 2007; Manfredi and Kelly 2004; Choudhry and Hunter 2003; Monahan 2000). Why have the bulk of empirical analyses focused on the precedential aspects of court cases in Canada? Largely, the answer lies in the contested lability of the meaning of judicial activism itself. Carver (2008 para. 26) provides an excellent summation of empirical studies of judicial activism:

> Debates about judicial activism often frustrate because

> those who argue that judges are 'activist' or 'too activist' do so without describing what they mean by the term. It is, of course, easy to say that any judicial decision that does not accord with one's personal view of what the law should be is "activist" because it represents an unwarranted departure from the law. In that way, many criticisms of judicial activism are mere synonyms for saying "I disagree with that decision." To be more meaningful than this, 'activism' must be able to be described as a type of legal reasoning or outcome or institutional understanding that is 'out of bounds' for a court acting appropriately.

These critiques provide the impetus for reorienting the activist analysis towards a measurement of discourse. Others have attempted to empiricise judicial activism by focusing instead on indicia such judicial attitudes, and using factors such as a judge's pre-appointment political party affiliation as predictive of attitudes on the bench (Ostberg and Wetstein 2008). We do not dismiss the validity of such research but rather suggest that a study of judicial discourse, along the lines of an adapted Cohn/Kremnitzer model, may add to an empirical understanding of judicial reasoning and provide further data for theorizing judicial decision-making. An adapted Cohn/Kreminitzer discourse scale would remove its "justificatory" predilections, take the court's "own words" more seriously, and provide rich possibilities in assessing judicial analytics apart from measuring precedential effects.

Conclusion

Cohn and Kremnitzer's multidimensional analysis draws on a rich array of socio-legal jurisprudential philosophy that interrogates the decision-making of high courts in liberal democracies. Their model proposes the largest and most diverse array of parameters in describing judicial decision-making to be proposed in the literature. Cohn and Kremnitzer never operationalized the model, and suggested that the parameters were a starting point for analysis. Few activism studies

have evoked such a broad sweep of parameters; further, the broad array of parameters mined by Cohn and Kremnitzer, at the least, provides for an interesting way to describe judicial decision-making in a more textured and nuanced sense.

Furthermore, in describing judicial activism, most Canadian scholars have attempted to describe the conduct of a Court across numerous broad legal classifications and subject matters – for example, little academic work on specific issues in criminal justice as they relate to activism has been undertaken (for example, the court's activism in criminal law has been examined, but not on an issue by issue basis – such as an exploration of search and seizure law). We believe that the nuance of the Cohn/Kremnitzer model combined with an analysis of Supreme Court decisions since the advent of a Charter, provides an interesting experimental zone in which to further develop the model and to enrich our understanding of the way the Court has adjudicated.

Empirical analysis of jurisprudence, in general, is a poorly mined terrain. We wish to cautiously navigate this terrain while remaining apprised of the context and discretionary pitfalls that might inure in reducing jurisprudence to dimensions of analysis. This is a new language that we are excited to explore, although we maintain some agnostic distance from the promise of providing a purely empirical answer to questions of the appropriate intermingling of legal adjudication and social policy-making. The ultimate result of the project will help determine whether judicial activism is a useful phrase in an increasingly late modern era. Modestly, we believe the new dimensions may at least amount to a description of judicial analytics which will inform not only legal practice, but socio-political knowledge more broadly. The results will allow a study of the judiciary to expand from the legal to other disciplines and open up new language by which to mobilize knowledge of an area that has traditionally been inaccessible to non-legal scholars and policy analysts.

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