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Newsletter  
of the  
Law & Courts  
Section  
of the  
American  
Political  
Science  
Association

Volume 26, Number 2  
Summer 2016

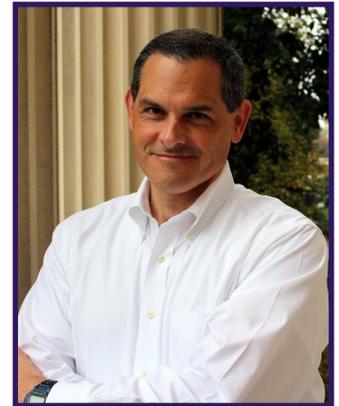
## From the Section Chair

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In a few short weeks, the Labor Day weekend will be upon us. For many, that represents the unofficial end of summer, but for us it marks the date of the annual meeting of the American Political Science Association. This year's meeting, in Philadelphia, has a particularly fine program that will be of interest to our section's members. Lisa Hilbink has assembled some impressive panels, addressing such topics as judicial behavior in the U.S. and abroad, transnational courts, judicial selection, and law and society. Likewise, thanks to the efforts of Liz Beaumont, there are panels that concern comparative constitutionalism, American constitutional development, and the First Amendment, among other things.



These are significant opportunities for our colleagues to share knowledge, often when it is in its early stages of development. Our attendance at (and active participation in) these sessions allow us not only to learn about where our field's research may be headed but to guide its direction, as well, by our interactions with panelists. Conversations that begin in this setting often transcend the meeting; shared discussions often turn into extended exchanges, research collaborations, and long-term professional bonds.

In my own case, I have benefitted enormously from meeting various judicial scholars at the APSA conference. Each of them has affected, in one way or another, my intellectual interests and the quality of my research. None has been more important, however, than this year's Lifetime Achievement recipient, Lee Epstein of Washington University in St. Louis. In 1991, as a new Ph.D., I confronted the doubt that faces many junior faculty: Would I be able to succeed on my own? With little scholarly achievement to recommend me, I approached Lee and asked if she would read my dissertation and assess its publication potential. She eagerly agreed and in very short order sent me a lengthy, single-spaced letter that provided corrections, suggestions, and questions. It was more extensive and penetrating than most students would expect to receive from members of their dissertation committee — and I wasn't even her student. She offered praise where it was warranted and constructive criticism where it was needed. Most important was her tacit message that I showed promise, and it came

### Inside this Issue

**Contributions from**  
Morgan Hazelton

Ethan Boldt &  
Christina Boyd

Stephen Wasby

Scott Harris

Claire Wofford

### Books to Watch For

*(Continued on page 4)*

## Table of Contents

<b>Message from the Chair</b>	<i>pages 1, 4</i>
<i>By Kevin McGuire</i>	
<b>Symposium: Research Related to Trial Courts</b>	
“The Politics of Pleadings and Plaintiffs: the Promise of Studying Trial Courts”	<i>pages 4—8</i>
<i>By Morgan L.W. Hazelton</i>	
“Federal Prosecutors as Strategic District Court Agenda Setters”	<i>pages 8 —10</i>
<i>By Ethan D. Boldt and Christina L. Boyd</i>	
“The Second Circuit: District Judges Reviewing Colleagues’ Cases”	<i>pages 10—12</i>
<i>By Stephen L. Wasby</i>	
“The Role and Importance of District Judges in Federal Sentencing ”	<i>pages 12—16</i>
<i>By Scott Harris</i>	
“Why Try?: Litigants and the Decision to Pursue Legal Action”	<i>pages 16 —19</i>
<i>By Claire B. Wofford</i>	
<b>Books to Watch For</b>	<i>pages 19 —22</i>

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**General Information**

**Law and Courts** publishes articles, notes, news items, announcements, commentaries, and features of interest to members of the Law and Courts Section of the APSA. **Law and Courts** publishes three editions a year (Fall, Summer, and Spring). Deadlines for submission of materials are: February 1 (Spring), June 1 (Summer), and October 1 (Fall). Contributions to **Law and Courts** should be sent to the Editor:

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Instructions to  
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**Articles, Notes, and Commentary**

We will be glad to consider articles and notes concerning matters of interest to readers of **Law and Courts**. Research findings, teaching innovations, release of original data, or commentary on developments in the field are encouraged.

Footnote and reference style should follow that of the *American Political Science Review*. Please submit your manuscript electronically in MS Word (.doc) or compatible software and provide a “head shot” photo. In addition to bibliography and notes, a listing of website addresses cited in the article with the accompanying page number should be included.

**Symposia**

Collections of related articles or notes are especially welcome. Please contact the Editor if you have ideas for symposia or if you are interested in editing a collection of common articles. Symposia submissions should follow the guidelines for other manuscripts.

**Announcements**

Announcements and section news will be included in **Law and Courts**, as well as information regarding upcoming conferences. Organizers of panels are encouraged to inform the Editor so that papers and participants may be reported. Developments in the field such as fellowships, grants, and awards will be announced when possible. Finally, authors should notify **BOOKS TO WATCH FOR EDITOR**, *Drew Lanier*, of publication of manuscripts or works that are soon to be completed.

from someone whose work I greatly admired and who had no vested interest in my success. Her generosity at that point in my career delivered a much-needed injection of confidence.

Not surprisingly, I am particularly gratified to see Lee Epstein honored this year for her contributions to our discipline. I hope that you'll be able to attend the session dedicated to her on Thursday, September 1, at 6:30pm.

Doubtless the story of my connection to Lee could be replicated among other scholars, old and young. Sooner or later, everyone who attends the APSA's conferences has some type of professional experience that ends up paying long-term dividends. For that reason alone, I think, it benefits us to attend the meeting and talk with one another, face to face.

One of the places to do that is the Law and Court's business meeting and reception. Please plan to attend the business meeting on Friday, September 2, at 6:30pm. As per usual, our reception will follow immediately thereafter.

As for the conference location, I need hardly remind anyone of the historical importance of Philadelphia, a city whose narrative continues to inform the research and teaching of many of us. For those who have not yet visited, the National Constitution Center is a wonderful institution that certainly merits a visit. Its programs and exhibits are first-rate; they are educational, thought-provoking, and fun.

Enjoy the rest of the summer. I look forward to seeing you soon.

### "The Politics of Pleadings and Plaintiffs: the Promise of Studying Trial Courts."

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Law and courts scholars are blessed and cursed with complex hierarchical judicial systems. They create both a wealth of opportunities for inquiry and myriad difficulties, such as selection bias and confounding influences. Broadening our scope beyond the Supreme Court is essential in taking advantages of the opportunities and avoiding the pitfalls they create.

Work being done about circuit, state, and foreign courts further our understanding of law and courts generally, as well as enhance what we know about the Supreme Court. Another area that deserves far more attention than it receives is trial courts (Boyd, 2012; Rowland & Carp, 1996). Political scientists have a lot to offer to the study of trial courts (see Martin & Hazelton, 2012), and knowledge of these courts has a lot to offer to scholars (Boyd, 2012; Rowland & Carp, 1996). Right now is an excellent time to study trial courts because of increases in recognition of their importance, data availability, and sophisticated tools.

#### *Why care about trial courts?*

Trial courts are inherently important and have an essential role in the judicial hierarchy (Rowland & Carp, 1996). As the first and often last court that litigants engage, they are significant (Boyd, 2009; Rowland & Carp, 1996): trial courts hear the vast majority of cases (Barnes, 2009). For example, the federal district courts handle over seven times the number of cases filed in

the courts of appeals and fifty times the number of cases brought to the Supreme Court (United States Courts, 2015).

Furthermore, what happens in trial courts is inherently political, because it is about who gets what, when, and how (see Barnes, 2009; Lasswell 1936; Peltason, 1955). The decisions made in and actions taken these courts result not only in trial outcomes, but also influence behavior in society at large, including policy (Barnes, 2009; Canes-Wrone, 2003; Mathers, 1998; Rowland & Carp, 1996), settlement (Boyd & Hoffman, 2013; Epstein, Landes, & Posner, 2013; Priest & Klein, 1984; Galanter, 2004), and filing (Gelbach 2012; Hubbard, 2013) decisions. For example, there is evidence that bureaucrats alter their behavior in anticipation of the political conditions in district courts (Canes-Wrone, 2003). Trial courts also provide a great vantage point from which to study the influence of institutions because procedural and substantive rules and standards play important roles in litigation (see Cox, Thomas, & Bai, 2008; Kessler, 1996; Kritzer, 2008; Yoon & Baker, 2006).

Studying what goes on in trial courts is also vital to understanding appellate courts. Trial courts are generally the courts of record where the factual record is set (Kornhauser, 1994). The facts and evidence that any appellate judges who review the case will consider is shaped by the trial courts (Rosenberg, 1970). Furthermore, the specter of selection bias always looms in our studies of courts (see Kestellec & Lax, 2008; Priest &

Klein, 1984). Information regarding when individuals engage trial courts, settle, proceed to trial, and appeal from trial courts decisions is all necessary to understanding the outcomes we see of the relatively rare cases that we see proceed through the judicial hierarchy (see, e.g., Clermont & Eisenberg, 2001). Finally, studying trial courts is essential to understanding the power of appellate courts, including the Supreme Court (Canon and Johnson, 1999; Peltason, 1955, 1961; see also Hall, 2010; Kritzer, 2008); if we want to understand the impact of legal doctrines announced by the Supreme Court and other appellate courts, we often must look to trial judges to understand implementation.

### *Data Accessibility*

Traditionally, data regarding trial courts was hard to come by. Few trial court decisions were available in legal reporters (Keele et al, 2009; Levin, 2008), and other types of litigation documents generally required costly trips to courthouses to deal with physical files (Keele, 2012). Collecting populations of cases was often infeasible due to their large sizes, and sampling was often complicated by the lack of readily accessible sampling frames.

Today, trial court data is far more accessible. First, there has been an increase in data sharing among scholars (see, e.g., Boyd, 2015; Carp & Manning, 2016; Nelson, 2011). For example, the Archival of the Carp-Manning U.S. District Court Database, which includes data regarding over 112,000 federal district court decisions reported in the *Federal Supplement*, is now available (Carp & Manning, 2016). Moreover, most courts in the federal and state courts have embraced electronic filing. These systems generally allow for access to all decisions, as opposed to only those relatively unusual opinions selected for publication (see Levin, 2008; Keele, et al. 2009; Keele, 2012). Furthermore, these systems, many of which are accessible via legal research services, provide access to dockets, motions, orders, and other filings, thereby greatly expanding the types of inquiries we can carry out, including considering cases that end in settlement (see Boyd & Hoffman, 2013; Keele, 2009; Kim et al., 2009).

Generally, these systems are publicly available. As a case in point, in the federal system, the Public Access to Court Electronic Records (PACER) system contains almost every recent filing in federal district courts (Keele, 2012). It is a fee-based service, but the chief district judges have discretion to grant fee exemptions to academics. Additionally, legal research services, including PacerPro, allow for enhanced searching of the records. Even where not directly available, electronic records regarding litigation are often accessible, through informal or open records requests (see, e.g., Nelson, 2014).

Advances in automatic text analysis has opened up many avenues of research in political science generally (Grimmer and Stewart, 2013; Monroe, Colaresi, & Quinn, 2008) and judicial politics specifically (see, e.g., Corley, Collins, and Calvin, 2011; Hinkle, 2015; Lauderdale & Clark, 2012; Owens and Wedeking, 2011; Rice, 2014). Within the study of trial courts, these tools offer many opportunities (see Boyd et al., 2013; Hazelton, 2015; Hinkle et al., 2012). For example, using a supervised classifier, I found that changes in the federal pleading standard announced by the Supreme Court in *Twombly* and *Iqbal* changed the ways in which complainants state their claims but only in cases where the defendant tends to have less private information (Hazelton, 2015). This research is part a larger in project in which I consider if the changes have hindered access to courts for certain litigants, such as civil rights claimants (Hazelton, 2014). Similarly, Boyd et al. (2013) took advantage of spectral topic analysis to consider the interrelationship among claims and how the change in pleading standards changed those relationships. Additionally, specialized tools are being developed with regards to studying law and courts: Rice and Zorn (2016) are developing methods to deal with the specialized vocabulary in court documents and decisions. Tools like these are important public goods that will enhance the study of trial courts by allowing for more refined analysis of the wealth of trial documents that are available.

### *Final Thoughts*

The greater accessibility of data regarding trial courts and the development of tools that allow us to more easily analysis this available puts us in an advantaged position to consider the politics of what occurs in trial courts. Trial courts are a necessary part of the puzzle in understanding what comes and both before and after trial, including decisions by high courts. Thus, we should do more to understand litigation and its implications.

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## "Federal Prosecutors as Strategic District Court Agenda Setters"

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Prosecutors are key players in the American criminal justice system. They are faced with a variety of essential tasks including charging, conducting grand jury proceedings, bail arguments, plea-bargaining, and recommending sentences. To complete

these tasks, they have been given broad discretionary powers. Among the most important discretionary decisions a prosecutor can make is whether to pursue charges against a suspected criminal. In this essay, we consider how federal prosecutors (U.S. Attorneys) are likely to make this decision strategically, selecting to prosecute cases that appeal to prospective district court judges' preferences.

U.S. Attorneys have the sole discretion to pursue or decline federal criminal matters referred by law enforcement agencies. Those matters that are pursued become cases and move further into the federal criminal justice system, leading almost invariably to convictions.<sup>1</sup> On the other hand, declined cases ("declinations") effectively disappear. U.S. Attorney declination discretion allows external factors to influence the prosecution decision. Prior research has found that several external considerations influence the decision-making of the U.S. Attorneys. O'Neill (2003; 2004) descriptively examined declinations, finding the impact of a variety of non-evidentiary concerns and measures of institutional capacity. Whitford and Yates (2003; 2009) and Whitford (2002) found that signaling from key political principals substantially increased drug and federal regulatory crime prosecutions.

Given the elite nature of the U.S. Attorneys, we assume that these professionals want to maximize their chances of success in prosecution to advance their careers. Prior literature has shown that career considerations shape the decisions of prosecutors (see e.g., Gordon and Huber 2002; Boylan and Long 2005). Many U.S. Attorneys later become federal judges, positions that are appoint-

ed by the president and Congress. Accordingly, we expect that U.S. Attorneys will engage in long-term reputation building to maintain future prospects as judges or other political appointees.

U.S. Attorneys concerned about maintaining high levels of prosecution success and conviction rates have strong incentives to appeal to the preferences of the prospective judges that will eventually make pivotal choices regarding evidentiary motions, the trial process, and sentencing in pursued criminal cases. Scholars within our law and courts community have long found evidence that judges' decisions are preference-based. While the evidence for district judges is less clear on this point than it is for appellate judges (see, Boyd forthcoming for a review), research on district judge ideology and criminal sentencing suggests that conservative and liberal district judges may have different priorities when it comes to interpreting and enforcing criminal law. Schanzenbach and Tiller (2007; 2008) found that Republican appointees are more punitive for street crimes such as narcotics and violent crime. Meanwhile, Democratic appointees were found to give longer sentences to "white collar" offenders. Similarly, Epstein, Landes, and Posner (2013) found modest differences between Republicans and Democrats in sentencing across a variety of offense types. If prosecutors want to be successful, choosing to pursue crime that a district's judges are especially aggressive in punishing could be an effective strategy.

To analyze the effect of ideology on the choice to prosecute, we rely on Department of Justice data released under the Freedom of Information Act that captures whether individual matters are pursued or declined for prosecution. Our sample consists of all criminal matters disposed of from 1996 to 2011. We rely on the median Judicial Common Space (JCS) scores for the district to capture the ideology of the judges (potentially) handling



these cases (Giles, Hettinger, and Peppers 2001; Epstein et al. 2007; Boyd 2015). In this preliminary examination, we study the impact of ideology on declinations in the ten most conservative districts versus the ten most liberal districts.<sup>2</sup> The number of pursued cases and declined cases are examined across six offense types: drug crimes, civil rights crimes, immigration crimes, terrorism, violent crimes, and white collar crimes. Consistent with research on ideology and sentencing, we anticipate that U.S. Attorneys will choose to prosecute proportionally more drug crimes, violent crimes, immigration crimes, and offenses related to terrorism in the most conservative districts. In the most liberal districts, we expect proportionally more prosecutions relating to criminal violations of civil rights and white collar crimes. Table 1 displays the descriptive results.

These descriptive results generally conform to our expectations. The most conservative districts have a greater proportion of pursued criminal matters for drugs, violent crime, and immigration offenses.

The largest difference is found with white collar crimes, where liberal districts pursue 8.91 percentage points more of these offenses. Terrorism matters have a substantial difference at 8.08 percentage points, but in the opposite direction as is expected with proportionally more prosecutions in liberal districts. Also contrary to expectations was civil rights offenses where the most conservative districts prosecuted 2.29 percentage points more of them. Additionally, these simple descriptive statistics reveal interesting similarities in prosecutions within offense types. Civil rights matters are rarely prosecuted. By contrast, immigration offenses, which are a large share of the U.S. Attorneys criminal matters, are the most frequently pursued crime category in terms of proportions.

This preliminary inquiry suggests that prospective district court judicial ideology may be an important factor in the decision of the U.S. Attorneys to pursue or decline matters for prosecution. Substantial differences on the basis of ideology are present between the most liberal and conservative districts. If, in fact, the U.S. Attorneys

Table 1: District Ideology and Declinations by U.S. Attorneys 1996-2011

Offense Type	Most Conservative Districts		Most Liberal Districts	
	Declined	Pursued	Declined	Pursued
Civil Rights	90.37% (1,051)	9.63% (112)	92.66% (1,880)	7.34% (149)
Drugs	22.2% (4,018)	77.8% (14,080)	29.19% (6,702)	70.81% (16,258)
Immigration	14.93% (840)	85.07% (4,785)	20.19% (1,561)	79.81% (6,172)
Terrorism	61.36% (751)	38.64% (473)	53.28% (1,333)	46.72% (1,169)
Violent Crime	29.87% (5,668)	70.13% (13,308)	36.08% (8,293)	63.92% (14,693)
White Collar	59.27% (11,020)	40.73% (7,574)	50.36% (13,778)	49.64% (13,580)
Total	36.66% (23,348)	63.34% (40,332)	39.21% (33,547)	60.79% (52,021)

Table displays the percentage and raw number, in parentheses, of matters pursued and declined in the ten most conservative and ten most liberal districts based upon the average of the districts' JCS medians from 1996-2011.

are filtering potential cases in this way, it has implications for the composition of federal courts' dockets, from district courts all the way up to the Supreme Court.

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## Notes

The authors thank the University of Georgia's Research Foundation for supporting this broader research project.

1 In 2015, only 5.8 percent of criminally charged defendants in federal district court had their cases dismissed (4,052) or were found not guilty (230). By contrast, 94.2 percent of defendants (69,561) were found guilty (U.S. Attorneys' Annual Statistical Report 2015)

2 The median JCS ideology scores for each district were averaged across the years 1996-2011 to identify the most ideologically disparate districts in the sample period. The ten most liberal districts were Minnesota, the District of Columbia, Western Missouri, Massachusetts, Vermont, Middle Tennessee, Eastern Missouri, Middle Pennsylvania, Southern New York, and Northern Ohio. The ten most conservative were Middle Alabama, North Dakota, Southern Alabama, Eastern North Carolina, Western North Carolina, New Jersey, Middle North Carolina, Western Louisiana, Northern West Virginia, and Western Michigan.

## "The Second Circuit: District Judges Reviewing Colleagues' Cases."

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Should judges sitting by designation on an appellate court review the work of home court colleagues? "No" might seem the instinctual answer, and most circuits agree that it is inappropriate for temporary appellate judges to review the work of their current district court colleagues. But it is "most," not "all," circuits, as there is a court of appeals in which district judges sitting there by designation, with some frequency, do sit on appeals from their own districts. As observers in the courts community feel that this is most definitely to be avoided, this little-known but important phenomenon in appellate court governance is addressed here.

### District Judges on the Courts of Appeals

In addition to their own active-duty and senior circuit judges, the U.S. courts of appeals, to assist with their caseload, make us of visitors from outside the circuit and district judges from within the circuit. Those district

judges, particularly when recent appointees, sit with the court of appeals to become socialized to its practices and expectations, and some return, depending on whether they "get out" their assigned opinions in a timely fashion and are thought to be well-prepared. Except for capital cases, there seem to be no limitations on the types of cases in which these judges might participate.

Yet whether district judges should participate in cases originating from their own districts remains a question. There is no statutory prohibition on such participation, but there appears to be a strong norm to the effect that it should definitely be avoided. It is certainly considered far from "best practice." A court administrator has observed that even if a court has no codified specific operating procedure on the practice, it remains a conflict. He observes that if a judge has to recuse herself if the judge's recent law clerk is appearing in a case, recusal should also be required when the trial judge in the case was a district court colleague, as that is a present relationship and thus is stronger than a former relationship with a law clerk or law firm. Among other concerns raised is that the district judge sitting as an appellate

judge will be “soft” on, that is, defer to, the judge’s own district court colleague and will hesitate to engage even in deserved criticism of the district court ruling under review. Another concern is that participating in reversal of the district court may lead to friction within that court, or at least to awkwardness, especially likely when a newly-appointed district judge sits in judgment on a ruling by a quite senior judge (or even chief judge) from his or her own court.

These concerns are a non-issue for those courts of appeals which make little use of in-circuit district judges or where a circuit contains no single large, perhaps dominant, district with a heavy caseload and many district judges. In the latter circumstance, the court of appeals’ use of district judges to help process caseload can create a logistical problem in avoiding assigning judges from that dominant district to the review of that district’s cases. Furthermore, there is

evidence of efforts to avoid the problem. The Seventh Circuit, which relatively recently resumed use of its own district judges to hear appeals, has been careful not to have Northern District of Illinois judges, although conveniently located in the same courthouse as the appellate court, sit on appeals from that district. The Ninth Circuit, which hears cases in several locations, with cases for a particular location drawn from nearby districts, goes further to harden the norm into policy, with in-circuit district judges assigned to appeals so as to avoid the situation; quite simply, they do not sit for argument near their own chambers. Thus Northern District of California judges will most likely not sit in Ninth Circuit cases argued at San Francisco, where appeals from their own district are heard, but they will sit with the appeals court at Pasadena, where cases from other districts, but *not* from Northern California, are heard.

### The Second Circuit

The problem, however, is not avoided in the Second Circuit, where it occurs with considerable frequency, particularly as to judges of the Southern and Eastern Districts of New York. The discovery in a recent study of 25 dozen instances of published opinions, which are circuit precedent, prompted a Lexis search of the *Federal Reporter Third Series*, from 1993 (1 F.3d) through mid-2015. The search revealed **515** instances involving Southern District judges plus **80** for Eastern District judges, not counting many more in non-precedential dispositions in *Federal Appendix*.

It is unclear what would warrant such frequent violation of best practices. An occasional instance could result from inadvertence by Clerk of Court staff to catch the mismatch of judge and source of appeal, but the many

instances argues against inadvertence. It is not apparent that it is a matter of policy. The mechanism by which panels and cases are matched for these particular cases is not known. The circuit’s chief judge, asked if there was an instruction to the Clerk’s office to avoid the situation, replied, “No, there isn’t.” It was, he said, “not a practice to assign” judges to cases from their own districts but it happened because of random assignment to panels.

The most likely reason, among several, is geography, especially district judges’ proximity to the court of appeals’ seat. This may be almost uniquely important in the Second Circuit. As another appeals court judge reported, the Second Circuit has “so many great SDNY judges that we use them a lot,” also true of use of judges from the Court of International Trade, “located across Foley Square from us.” The chief judge acknowledged that the district judges used were most likely to come from Southern and Eastern New York, and not from New York Northern and Western. When all district judges are asked annually whether they want to sit with the appeals court and for how many days, judges from the latter two districts find it inconvenient to sit for more than a couple of days. With the need to watch expenses, travel costs add to the mix, reinforcing use of nearby district judges. That the Southern and Eastern Districts generate many cases increases the risk that district judges might sit on appeals from their own district.

Recognition of geography as a major contributing factor does not, however, alter the prevalence of the problem. The chief judge, after the matter (including data) was brought to his attention, discussed it with court of appeals colleagues and some district judges who had sat with the court. He conceded that there might be “awkwardness” in passing judgment on one’s colleagues but reported that judges said that the situation “hasn’t affected” them. The district judges told him it isn’t personal and colleagues understand it is part of the process, and he said that newer district judges feel that the judges are all colleagues and that these cases come with the territory; even with some awkwardness, “at the end of the day” there aren’t problems. Yet it is of interest that he himself raised the possibility, going beyond external appearances and internal awkwardness, that judges’ like or dislike of each other would be part of the problem. Yet he also said that the situation was no different from court of appeals judges having long-standing professional and personal relations with district judges.

Such responses are unsatisfying. For one thing, the district judges spoken when asked by *their circuit’s chief judge* about an on-going practice, making it fair to surmise that their answers might have been different if given to someone not part of the court and not at least a

nominal “superior.” Most important, the responses seem protective of “we’ve always done it this way,” and, both surprising and more troubling, to reflect a lack of awareness of other circuits’ practices.

### A Closer Look

The situation might not be particularly critical if district judges sitting on cases from their own districts participated only in decisions unanimously affirming those cases, although this might show them to be overly deferential to their district court colleagues. Yet raising the question of their participation even in these cases is the significant subject-matter of some, e.g., post-9/11 litigation and New York City’s campaign finance rules.

Examination of the last ten years (October 2004 - May 2015), covering some 200 cases in which SDNY judges sat on Second Circuit panels hearing SDNY cases, reveals that panels more often affirmed in full (109, 54.5%) than reversed or vacated in whole or in part (83, 43.2%), with four appeals dismissed and four cases certified to the New York Court of Appeals. The presence of judges from the district whose ruling was being reviewed hardly precluded their overturning their colleagues.

Only a small number of rulings were not unanimous, consonant with low disagreement rates in the U.S. courts of appeals. In only 19 instances did any panel member not fully join the majority opinion. The panels were unanimous in 99 full-affirmance cases (plus the dismissals and certifications); the district judge dissented in only three affirmances and in only one wrote a separate concurring opinion, and only twice did a district judge dissent when the panel reversed or vacated. A by-designation district judge’s dissent is evidence that the judge has not deferred to the circuit judges, but it may say more. When the court of appeals majority affirms, a dissent by the panel’s district judge is a reversal of a district court colleague. Conversely, where the circuit judge majority votes to reverse or vacate in whole or in part, a district judge’s dissent upholds the work of that judge’s colleague.

District judges’ court of appeals participation is most stark when they provide the determinative or “casting” vote – when a district judge and a circuit judge form the majority over the other circuit judge’s dissent. Among the cases examined, there were 14 such cases – seven affirmances, seven reversals. The district judge’s vote on the opinion (if not the judgment) is also determinative either when one circuit judge concurs only in the result, as happened in five affirmances, or a circuit

judge assigned to the panel did not participate in the decision, because of recusal or departure (as when Judge Sotomayor went to the Supreme Court), leading to a two-judge decision, permissible as a quorum.

If one of the circuit judges writes the panel’s opinion, the district judge may go along out of deference to that judicial “superior.” However, when the district judge writes an opinion reversing, it brings into the open disagreement with a district court colleague. Such instances show that the circuit judges do not attempt to “protect” the district judge either by taking the assignment for themselves or by resorting to an unsigned *per curiam* disposition. Southern District judges authored 14 of the 103 signed opinions affirming their colleagues, but were more likely to write for panels *not* fully upholding the district judge’s colleagues: they wrote 25.7% of opinions reversing, but only 13.6% of cases unanimously affirming. In three cases in which they had the determinative vote, they wrote opinions reversing.

### Concluding Comments

A U.S. court of appeals’ use of district judges from within the circuit to assist with growing caseload creates the possibility that these judges will hear cases from the districts to which they were appointed, something considered to run counter to “best practice.” While the problem does not materialize in most circuits, either because they make minimal use of district judges or act to avoid the situation, in the Second Circuit it occurs frequently in the cases creating circuit precedent. While this state of affairs is partly a result of the proximity of New York’s large Southern and Eastern Districts to circuit headquarters, it is unclear how it came about. And, so far as can be determined, the Second Circuit “problem” is not so viewed by the judges involved. Yet it continues unabated and without internal question, despite the negative reaction of observers elsewhere and the potential awkwardness it creates. Thus, even if a one-circuit anomaly, this does remain a “problem” in judicial administration that warrants remedy.

### Notes

1 Thanks for the assistance of Jeffrey Budziak, who undertook key case searches, provided many useful ideas for analysis of the cases, and suggested an editorial restructuring.

2 A statement in which the court “observ[es] that court policy is for district judges not to participate in disposition of appeals from their own district” is noted by Jeffrey Brudney and Corey Ditslear, “Designated Diffidence: District Court Judges on the Court of Appeals,” 35 Law & Soc’y Rev 564, 572 n. 10 (2001).

3 In one case, the ruling in the Southern District of New York was by a judge from another district (William Young, of the District of Massa-

achusetts), so the district judge on the Second Circuit panel was not sitting in judgment on the ruling of a district court colleague.

There was one appeal from the Southern District's bankruptcy court, so the SDNY judge on the Second Circuit panel was not sitting directly in judgment on a district court colleague, but bankruptcy judges are selected by the Circuit Council, which contains district judges as well as judges from the court of appeals.

There are instances in which a panel as constructed included a judge from the Southern District of New York but by the time the opinion was filed, that judge, e.g., Denny Chin, had joined the Second Circuit. These are retained in the case count because the question is whether such judges were placed on panels then tasked with hearing cas-

es from their own districts. For the same reason, cases are retained in which a Southern District of New York judge was placed on a panel but recused before the case was decided, leaving the two circuit judges who remained, and who constituted a quorum, to decide the case.

4 Telephone conversation with Second Circuit Chief Judge Robert Katzmann, Sept. 22, 2015, on which the following draws.

5 Personal communication with a Second Circuit judge.

## "The Role and Importance of District Judges in Federal Sentencing"

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In the field of judicial politics, far too little is known regarding trial-judge decision making. Part of this research deficiency relates to certain inherent traits of trial courts. First, trial courts across the country vary greatly in both the types of cases heard and in their norms and institutional structure (Ulmer 1997;

Ashman, et. al. 1980). Second, unlike appellate judges who normally sit on multi-judge panels, trial judges must make decisions individually in each unique case (Wald 1992). These characteristics can make comparing the decisions of trial judges, especially across different courts, extremely difficult for researchers.

Despite these research difficulties, one area of inquiry that has the potential to improve the understanding of trial-judge behavior relates to criminal sentencing in federal courts. In the federal court system, federal district court judges are charged with the task of sentencing offenders convicted of federal crimes. Like all trial-judge decisions, no two sentencing decisions are exactly alike. However, the United States Sentencing Commission has developed a dataset documenting and coding a multitude of variables for the vast majority of federal offenders sentenced. This objectively-coded data can account for many conflating factors and overcome some of the empirical problems with studying trial-judge behavior. The data also provide extraordinary opportunities for both better understanding sentencing policy and for hypothesis testing of potential determinants of judicial behavior.

This opportunity has not been ignored by scholars, and two strands of research on federal sentencing have

emerged. First, scholars primarily from the disciplines of sociology and criminology have utilized the data to explain how individual characteristics of offenders and court-specific norms and practices help explain disparities in sentences for offenders convicted of similar offenses (Johnson et al. 2008; Kautt 2002; Lynch and Omori 2014; Wu and Spohn 2010). Second, political scientists and legal scholars have shown the effect of both judicial partisanship and legal policy change on district judges' sentencing behavior (Epstein et al. 2013; Fischman and Schanzenbach 2011; Schanzenbach and Tiller 2007; Yang 2014).

In this note, I argue that these two strands of research should be integrated and expanded. The research focusing on sentencing disparity is incredibly informative as to criminal-justice policy, but it provides less insight into explaining variation in sentencing behavior between judges. On the other hand, while the judicially-focused research demonstrates the import of partisan/ideological preferences and legal constraints on district judges' sentencing decisions, it deemphasizes potentially relevant contextual variables. Integration and expansion of these two strands can provide a more holistic understanding of how law, personal preferences, and institutions interact to drive sentencing outcomes.

### Federal Sentencing Background

Since November 1, 1987, offenders in the federal court system are sentenced within the framework of the U.S. Sentencing Guidelines. The Guidelines, promulgated by the U.S. Sentencing Commission, set forth relatively tight ranges of sentences (e.g., 21–27 months) for criminal defendants. These ranges are based primarily upon two variables: the seriousness of the offense committed and the offender's criminal history. In 2005, after years marked by some uncertainty as to how strictly

district judges were required to apply the Guidelines, the U.S. Supreme Court held in *U.S. v. Booker*, 543 U.S. 220 (2005) that the Guidelines were merely “advisory.” Since *Booker*, the cases of *U.S. v. Gall*, 552 U.S. 38 (2007) and *U.S. v. Kimbrough*, 552 U.S. 85 (2007) further clarified and expanded the discretion of district judges in federal sentencing matters.

Many commentators and politicians interested in criminal-justice reform have focused on the appropriateness of “mandatory minimum” penalties.<sup>1</sup> For these offenses, *Booker* is not applicable, and district judges have no unilateral authority to issue sentences shorter than the minimums set by statute. However, it is worth noting that mandatory minimum cases make up only approximately one-third of federal sentencing cases (USSC 1995-2015). Accordingly, both scholars interested in federal criminal-justice policy and advocates interested in sentencing reform would be well served to obtain a better understanding of the determinants of sentencing outcomes in the majority of cases where mandatory minimums are not applicable.

### Federal Sentencing Research

There has indeed been a great deal of recent research on the subject of federal sentencing. Many of these works have focused on how demographic offender characteristics affect ultimate sentences. Specifically, there is evidence that African American and Hispanic offenders receive more punitive sentences than White offenders, while female offenders receive less punitive sentences than male offenders (Johnson 2003; Mustard 2001; Ulmer et al. 2011).

Other researchers have attempted to determine why sentences seem to vary so much across the 90 federal districts.<sup>2</sup> Kautt (2002) attributed much of the inter-district variation in sentencing practice to local legal culture. Similarly, Ulmer (2005) examined variation in sentencing practices and found that differing interpretations of Guideline terms and parlance can lead to disparate outcomes. Both Lynch and Omori (2014) and Wu and Spohn (2010) found that the charging practices and sentencing recommendations of different U.S. Attorney’s offices contribute to sentencing disparity between districts.

While this research has been incredibly illuminating, it has largely skirted the issue of why different judges might have different sentencing preferences throughout the country. Yet an independent focus on judges is important. Regardless of any district-specific differences in prosecutorial practices, there is still marked district variation in how often district judges themselves choose to issue sentences below the Guideline range (USSC 1995–2015).<sup>3</sup>

Fortunately, differences in the sentencing preferences of district judges have not gone unstudied. Fischman and Schanzenbach (2011) found that district judges appointed by Democratic presidents tend to issue more lenient sentences, and that this partisan effect is greater in the post-*Booker* era of greater judicial discretion. Epstein et al. (2013) found that higher proportions of Republican circuit judges on the court of appeals sitting above the sentencing district court were associated with lower probabilities of Guideline departures by district judges. Epstein et al. (2013) interpreted this finding as strategic behavior by district judges, who bear in mind the likelihood that their sentencing decisions will be overturned on appeal.

Recently, Yang (2014) provided the most comprehensive study of differences in the sentencing behavior of district judges and found strong evidence that these differences have increased post-*Booker*. Consistent with Fischman and Schanzenbach (2011), Yang (2014) also found that, although the effects are relatively small,<sup>4</sup> Democratic-appointee judges within the same district both issue shorter sentences and are more likely to issue below-Guideline sentences. Finally, and quite interestingly, Yang (2014) also found that judges appointed post-*Booker* are less likely to adhere to Guideline-level sentences.

To summarize, these more judge-focused works address several of the limitations of the research focusing solely on sentencing outcomes by explaining sources of differences in judicial sentencing behavior. However, these works have their own set of limitations. First, the studies tend to limit their focus to partisanship and levels of discretion. Yet there are doubtless many other factors affecting judges’ different sentencing practices. As Yang (2014, 1320) rightly noted, it is problematic to make inferences about judges in different districts based upon different sentencing outcomes because these differences may be attributed to different case types in different parts of the country. However, researchers should not completely sidestep this problem. Since regional differences in sentencing outcomes are stark and district judges play an important role in shaping these outcomes, it is unlikely that district differences are wholly independent of judicial preferences (Tiede 2009).

To illustrate this point, in fiscal year (FY) 2015, 42.9% of offenders in the Eastern District of Wisconsin received a judge-initiated below-Guideline sentence, compared to just 18% of offenders in the District of South Carolina (USSC 1995–2015). This disparity is even more striking when we consider that the Eastern District of Wisconsin has a lower proportion of judges appointed by Democratic presidents.<sup>5</sup> To be sure, part of this disparity may be explained by

different crime compositions and prosecutorial practices in the two districts. Nonetheless, it is also highly plausible that judges who live and work in South Carolina simply have different sentencing preferences than judges who live and work in Wisconsin.

To be sure, disentangling potential “cultural effects” from caseloads or other contributing factors is a difficult task. Still, it should not be ignored. Understanding differences in district judges throughout the country is critical for resolving normative questions pertaining to federal sentencing. Specifically, is it just for offenders convicted of similar crimes in different parts of the country to be sentenced differently based on more local, cultural attitudes? More tangibly, is it better to have a discretionary sentencing regime that allows for potential judicial biases or a more rigid regime that forces judges to apply the Guidelines strictly? These questions and others cannot be squarely addressed without a better understanding of the role that contextual factors play in shaping judges’ sentencing decisions throughout the country.

### **The Way Forward: Toward a More Comprehensive Understanding of Judicial Sentencing Decisions.**

As set forth above, recent research efforts have greatly improved the understanding of federal sentencing. We now have evidence that offender characteristics, prosecutorial practices, district-specific norms, levels of judicial discretion, judges’ partisan affiliation, and years of experience on the bench all likely affect sentencing outcomes to some extent. Yet, more can be done to integrate these alternative perspectives and measure their relative weight. Furthermore, additional work can be done to incorporate previously deemphasized contextual or sociopolitical variables that may explain why district judges appear to sentence differently across time and space. Specifically, I make three recommendations for future avenues of research.

First, there is a need for more broad-based studies, such as Yang’s (2004), that assess multiple determinants of sentencing outcomes across several years and several districts. Much of the extant literature on federal sentencing focuses solely on one offense type (Lynch and Omori 2014), one short-term period (Johnson et al. 2008), or a selected number of districts (Wu and Spohn 2010). Moreover, many of these narrower federal sentencing studies focus on a subset of variables to the exclusion of other potentially important determinants. These works are valuable in that they can isolate how certain factors may be important in shaping sentencing outcomes in specific scenarios. Yet the more limited studies make it difficult to determine which determinants are most important. Furthermore,

broader questions of theoretical interest, such as how district judges arrive at decisions, are best addressed through more comprehensive analyses.

Second, future research should move beyond questions of the effects of judicial partisanship and policy change and include tests for the effect of contextual and sociopolitical variables that likely play a role in shaping sentencing decisions. These potentially important variables include local culture, public punitive preferences, elite punitive preferences, crime rates, and incarceration rates. In addition to the regional variation discussed above, these and other contextual factors may also help explain changes in judicial sentencing behavior over time. For example, since 2008, there have been no major changes in the amount of discretion granted to district judges in sentencing matters. However, the proportion of offenders receiving judge-initiated below-Guideline sentences has increased markedly over this period from 13.4% to 21.3% (USSC 1995–2015). Granted, a portion of this increase may be attributed to either an increase in proportion of Democrats on the federal bench (Epstein et al. 2013) or the appointment of new judges unaccustomed to the pre-Booker era of stricter Guideline application (Yang 2014). Nonetheless, changes in the political environment regarding the problem of incarceration might also play some role. Public support for harsher sentencing seems to have waned in recent years (Pew 2014<sup>6</sup>), and there are now bipartisan efforts at sentencing reform.<sup>7</sup> There is also some evidence from past decades suggesting district judges’ sentencing behavior can change in the face of a changing political environment (Cook 1973, 1977; Kritzer 1978).<sup>8</sup> Thus, it is a worthwhile endeavor to test whether and to what extent, modern judges’ sentencing preferences are shaped by their political environment.

Third, large sample quantitative analyses should be supplemented with case-studies and interview research. Ulmer (2005) has already demonstrated the value of interviews in the context of federal sentencing by finding that different court communities interpret and apply the exact same legal terminology in very different ways. These are the types of insight that can be missed by pure quantitative analyses. Additionally, interviews with district judges, former judges, attorneys, and other legal actors can potentially provide corroboration for the results of quantitative studies. Finally, while the data provided by the Sentencing Commission is fairly robust, it cannot account for other potentially important factors that shape sentencing outcomes, such as attorney quality or local norms.

### **Sentencing Research and District Judge Behavior**

In closing, it is worth emphasizing that understanding

district judges' sentencing behavior has broader implications for fundamental questions pertaining to trial judges. For example, how much of a role do judges' personal preferences play in their decisions? Are these preferences fairly static and tied to party, or do they change in response to changing conditions? How effective are top-down legal rules in bringing uniformity to a judicial system containing several sub-units with their own norms? Breaking down the boundaries between disciplines, paying more heed to contextual and environmental influence, and utilizing mixed-method approaches will improve the understanding not only of federal sentencing behavior but also of how district judges make decisions in general.

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### Notes

1 See e.g., Tonry (2009) for a critique of mandatory minimum penalties. See H.R. 3713 (2015-2016) and S. 2123 (2015-2016) for examples of recent efforts by Congress to limit the number of cases in which mandatory minimum penalties are applicable.

2 This count excludes the federal districts in the U.S. territories of Puerto Rico, Guam, the U.S. Virgin Islands, and the North Mariana Islands.

3 For example, in FY 2013, at the 25<sup>th</sup> percentile district, or a typically Guideline-adherent district, offenders received a judge-initiated below-Guideline sentence in approximately 15% of cases (USSC 1995-2015). At the 75<sup>th</sup> percentile district, or a typically Guideline-resistant district, offenders received such a below-Guideline sentence 27% of the time. Thus, offenders are almost twice as likely to receive a judge-initiated below-Guideline sentence at the 75<sup>th</sup> percentile dis-

trict than at the 25<sup>th</sup> percentile district (USSC 1995–2015). If we truly want to understand these dramatic regional differences in Guideline application, a deeper inquiry into the decision-making process of judges is warranted.

4 Yang (2014) finds that an offender sentenced by a Democratic judge is 2.7% more likely to receive a downward departure below the Guideline-recommended sentence than an offender sentenced by a Republican judge in the same district.

5 The partisan composition in FY 2015 was 50% Democratic appointees for the Eastern District of Wisconsin and 63% Democratic appointees for the District of South Carolina.

6 A 2014 Pew Poll finds that 63% of the public now oppose mandatory minimum sentences for non-violent drug offenders, up from 47% in 2001.

7 See e.g., H.R. 3713 (2015–2016); S. 2123 (2015–2016).

8 Specifically, Cook (1973, 1977) and Kritzer (1978) found that lower levels of support for the Vietnam War among both elites and the general public were associated with less harsh sentences from district judges for “draft dodgers.” In fact, Kritzer (1978) found that these environmental variables explained a larger portion of sentencing behavior than judge-based characteristics or case-specific facts.

## “Why Try?: Litigants and the Decision to Pursue Legal Action”

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I welcome and am delighted to contribute to the newsletter and add some thoughts about research concerning trial courts. Though trials themselves have almost “vanish[ed]” (Galanter 2004), the number of legal actions is growing, the majority of which are handled primarily by trial courts. As Americans continue to seek (or be required to

seek) redress through the legal system, we should continue our study of these “workhorses” of the judiciary.

Trial courts traditionally have not drawn a great deal of attention from political scientists. We have instead focused primarily on appellate courts and the decisions made by appellate jurists. The emphasis is understandable, since the rulings of trial court judges do not easily lend themselves to sweeping claims of judicial policymaking and the centrality of courts. It was, until quite recently, also difficult to obtain good quantitative data.<sup>1</sup>

Yet our concentration on appellate court decision-making may have distracted us from other key actors in the judicial system, particularly at the trial court level. I suggest here that we have yet to fully recognize the importance of litigants to civil trial courts and, more specifically, their decision to commence litigation.<sup>2</sup>

To put it bluntly, litigants are the *sine qua non* of the civil legal system. Unlike the legislative or executive branches, the judiciary is a fundamentally passive institution: it must rely on others to bring cases to it. Only when an individual begins legal action does the potential for judicial decision- and policy-making appear. In other words, it is the choices of litigants that generate the “raw material” with which judges at all levels work. Studies of litigant behavior, particularly about starting litigation, can complement our understanding of both trial and upper-level courts.

Many scholars have recognized that litigants matter. There is a substantial literature on certain high-profile or high-status litigants, including interest groups (Baird 2008; Collins 2008; Epstein 1995; Caldeira and Wright 1988), the federal government (Black and Owens 2012; Bailey et. al. 2005; Zorn 2002), and “cause lawyers” (Barclay and Chomsky 2014; Marshall and Crocker 2014; Sarat and Scheingold 2006). We now have a reasonably good understanding of why these entities litigate, why they appeal, and what factors affect their likelihood of success on the merits.

There has been less attention paid to “ordinary” litigants, particularly in the civil trial courts. Studies of litigants that do exist focus primarily on the behavior of prosecutors and criminal defendants (Gordon and Huber 2009; Fleming 1986; Landes 1971), private attorneys (Kritzer 2004; Kritzer 1990; McGuire 1995), and the impact of civil litigants on judicial behavior and case outcomes (Best et. al. 2011; Yates and Coggins 2009; Baird 2008; Cross 2003; Songer, Cameron and

Segal 1995). New works have studied the decision to appeal or settle a case and the content of litigants' legal filings in district courts (Boyd 2015; Hazelton 2015; Boyd et. al. 2013; Boyd and Hoffman 2013). There remains, however, relatively little empirical work on why "average" litigants decide to litigate at all (see Yates et. al. 2013; Morrill et. al. 2010; Morgan 2009 for important exceptions).<sup>3</sup>

Much of the dearth of study is likely due to data challenges, as it is quite difficult to identify cases that could have been filed, but were not. The problem is compounded because a good study requires identification of both potential litigants and conflicts that could give rise to a legal claim. While all citizens retain, at least in theory, the right to sue, not every dispute they experience or injury they suffer is legally actionable. A rigorous study needs to ensure that those who decide not to initiate legal action could have made the alternative choice.

Despite this difficulty, we do have some viable methodological approaches already in our toolkit. In a forthcoming article, for example, I use a web-based survey with hypothetical vignettes to explore whether men and women make different choices about taking formal legal action. Scholars also might find interviews of potential litigants (see e.g. Morgan 1999) or experiments to be useful avenues.<sup>4</sup> Case studies have generated good insights (see e.g. Stern 2008; Harr 1996; Hicks 1994), but could benefit from the methodological sophistication political scientists can bring.

There is also a large range of research questions about the decision to file a lawsuit that await further study. The choice to sue, as in later stages of the legal process, may be strategic. Considerations of the financial costs and benefits, the likelihood of a favorable outcome, or the advice of the lawyer are all potentially explanatory. Psychological factors are relevant to judicial decision-making (Braman and Nelson 2007; Braman 2006) and might explain litigant choices as well. As I and others have demonstrated, factors about the litigants – their gender, race, socio-economic status, familiarity with the legal system, ideology etc. – can affect their behavior. Lastly, certain categories of disputes (such as those involving contracts, torts, or civil rights) could provoke more or less litigation.

As is often true with newer areas of study, empirical challenges must be confronted. At the same time, however, the topic offers a richness that can generate valuable scholarship. If we better understood why litigants employ the legal system, we would have a better grasp of the operation of the judiciary and the products of judicial decision-making. I found, for instance, that women were less likely to file lawsuits than men unless

the case involves pay discrimination, when they become more likely than men to sue. This suggests that who is using the legal system and what types of cases courts handle can be shaped by characteristics of the litigants. If we confine our study to judicial outputs, without attending to why and how those cases arrived there, we have presumed a neutrality to judicial behavior that does not exist and short-circuited our understanding of the legal system.

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## Notes

1 Scholars can now locate data through various excellent sources, including Carp and Manning (2016), the Administrative Office of the Courts, and PACER. Boyd (2015) has also created a dataset of ideology scores for district court judges.

2 Defendants in criminal court also play a fundamental role in the judiciary. As my focus here is on why litigants chose to employ the legal system, I confine my comments to the civil arena.

3 There is a solid body of theoretical work based in law and economics (see generally Sanchirico 2012), which uses Priests and Klein's (1984) "selection hypothesis" to determine why litigants pursue legal action or decide to settle a case (Hylton 2002; Wald-fogel 1998; Watts 1994; Wittman 1988; Donahue 1988; Bebchuk 1984). A few have also empirically tested these models in certain substantive areas of the law, such as telecommunications contracts, and employment discrimination (de Figueiredo 2005; Drahozal and Hylton 2003; Siegelman and Donahue 1995).

4 For an excellent analysis of the use of experiments in political science, see the Law & Courts Newsletter Spring 2014.

## Books to Watch For – Summer 2016

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**Wayne Batchis** (University of Delaware) has published *The Right's First Amendment The Politics of Free Speech & the Return of Conservative Libertarianism* (Stanford University Press, ISBN 978-0-80479-606-4). "Not so long ago, being aggressively 'pro-free speech' was as closely associated with American political liberalism as being pro-choice, pro-affirmative action, or pro-gun control. With little notice, this political dynamic has been shaken to the core. *The Right's First Amendment* examines how conservatives came to adopt and co-opt constitutional free speech rights. In the 1960s, free speech on college campuses was seen as a guarantee for social agitators, hippies, and peaceniks. Today, for many conservatives, it represents instead a crucial shield that protects traditionalists from a perceived scourge of political correctness and liberal oversensitivity. Over a similar period, free market conservatives have risen up to embrace a once unknown, but now cherished, liberty: freedom of commercial expression. What do these changes mean for the future of First Amendment interpretation? Batchis offers a fresh entry point into these issues by grounding his study in both political and legal scholarship. Surveying six decades of writings from the preeminent conservative publication *National Review* alongside the evolving constitutional law and ideological predispositions of Supreme Court justices deciding these issues, the author asks the conservative political movement to answer to its judicial logic, revealing how this keystone of our civic American beliefs now carries a much more complex and nuanced political identity."

**Keith Bybee** (Syracuse University) has written *How Civility Works* (Stanford University Press, ISBN 978-1-50360-

154-3). "Is civility dead? Americans ask this question every election season, but their concern is hardly limited to political campaigns. Doubts about civility regularly arise in just about every aspect of American public life. Rudeness runs rampant. Our news media is saturated with aggressive bluster and vitriol. Our digital platforms teem with expressions of disrespect and trolls. Reflecting these conditions, surveys show that a significant majority of Americans believe we are living in an age of unusual anger and discord. Everywhere we look, there seems to be conflict and hostility, with shared respect and consideration nowhere to be found. In a country that encourages thick skins and speaking one's mind, is civility even possible, let alone desirable? In the book, Bybee elegantly explores the "crisis" in civility, looking closely at how civility intertwines with our long history of boorish behavior and the ongoing quest for pleasant company. He argues that the very features that make civility ineffective and undesirable also point to civility's power and appeal. Can we all get along? If we live by the contradictions on which civility depends, then yes, we can, and yes, we should."

**Charles S. Bullock III** (University of Georgia), **Ronald Keith Gaddie** (University of Oklahoma), and **Justin J. Wert** (University of Oklahoma) have co-written *The Rise and Fall of the Voting Rights Act* (University of Oklahoma Press, ISBN 978-0-80615-200-4). "On June 25, 2013, the U.S. Supreme Court handed down its decision in *Shelby County v. Holder*, invalidating a key provision of voting rights law. The decision—the culmination of an eight-year battle over the power of Congress to regulate state conduct of elections—marked the closing of a chapter in American politics. That chapter had opened a

century earlier in *Guinn v. United States*, which ushered in national efforts to knock down racial barriers to the ballot. A detailed and timely history, *The Rise and Fall of the Voting Rights Act* analyzes changing legislation and the future of voting rights in the United States. In tracing the development of the Voting Rights Act from its inception, Bullock, Gaddie, and Wert begin by exploring the political and legal aspects of the Jim Crow electoral regime. Detailing both the subsequent struggle to enact the law and its impact, they explain why the Voting Rights Act was necessary. The authors draw on court cases and election data to bring their discussion to the present with an examination of the 2006 revision and renewal of the act, and its role in shaping the southern political environment in the 2008 and 2012 presidential elections, when Barack Obama was chosen. They go on to closely evaluate the 2013 *Shelby County* decision, describing how the ideological makeup of the Supreme Court created an appellate environment that made the act ripe for a challenge. Rigorous in its scholarship and thoroughly readable, this book goes beyond history and analysis to provide compelling and much-needed insight into the ways voting rights legislation has shaped the United States. The work illuminates the historical roots—and the human consequences—of a critical chapter in U.S. legal history.”

**Michael C. Gizzi** (Illinois State University) and **R. Craig Curtis** (Bradley University) have co-authored *The Fourth Amendment in Flux: The Roberts Court, Crime Control, and Digital Privacy* (University Press of Kansas, ISBN 978-0-70062-256-6). “When the Founders penned the Fourth Amendment to the Constitution, it was not difficult to identify the “persons, houses, papers, and effects” they meant to protect; nor was it hard to understand what “unreasonable searches and seizures” were. The Fourth Amendment was intended to stop the use of general warrants and writs of assistance and applied primarily to protect the home. Flash forward to a time of digital devices, automobiles, the war on drugs, and a Supreme Court dominated by several decades of the jurisprudence of crime control, and the legal meaning of everything from “effects” to “seizures” has dramatically changed. Gizzi and Curtis make sense of these changes in *The Fourth Amendment in Flux*. The book traces the development and application of search and seizure law and jurisprudence over time, with particular emphasis on decisions of the Roberts Court. Cell phones, GPS tracking devices, drones, wiretaps, the Patriot Act, constantly changing technology, and a political culture that emphasizes crime control create new challenges for Fourth Amendment interpretation and jurisprudence. This work exposes the tensions caused by attempts to apply pre-technological legal doctrine to modern problems of digital privacy. In their analysis of the Roberts Court’s relevant decisions, Gizzi and Curtis document the different approaches to the law that have been ap-

plied by the justices since the Obama nominees took their seats on the court. Their account, combining law, political science, and history, provides insight into the courts small group dynamics, and traces changes regarding search and seizure law in the opinions of one of its longest serving members, Justice Antonin Scalia. At a time when issues of privacy are increasingly complicated by technological advances, this overview and analysis of Fourth Amendment law is especially welcome—an invaluable resource as we address the enduring question of how to balance freedom against security in the context of the challenges of the twenty-first century.”

**Susan Hunter** (West Virginia University) and **Richard A. Brisbin, Jr.** (West Virginia University) have co-published *Pet Politics: The Political and Legal Lives of Cats, Dogs, and Horses in Canada and the United States* (Purdue University Press, ISBN 9781557537324). *Pet Politics* presents the first study of the development and implementation of companion animal or pet law and policy in Canada and the United States by political scientists. The authors examine how people and governments classify three species of pets or companion animals—cats, dogs, and horses—for various degrees of legal protection. The book our argues is that the animal welfare and animal legal rights movements have engaged in a protracted and often frustrating political struggle to expand policies and laws beneficial for the lives of cats, dogs, and horses. Why have these movements not succeeded in the political struggle? The first chapters of this book critically examine how individuals frame the social identity of companion animals, define cruelty, and express their expectations about the extent of legal accountability that people bear toward pets. Using data from multinational public opinion and elite surveys and an analysis of narratives about animals found in a range of legislative and judicial documents, the authors discern how people assign conflicting of social and legal identities, cruelty norms, and legal categories to companion animals. Next they evaluate how interest groups sharpen and politicize this range of identities and values. Then, using original quantitative data and case studies of a series of political struggles about the adoption of laws that affect the lives of cats, dogs, and horses they examine the political conflicts and political resistance that influences the formulation of companion animal law by legislators, administrators, and judges. The political and legal conflicts examined include the passage of anti-cruelty laws, kennel licensing legislation, horse slaughter regulation, laws governing roaming and feral cats, and canine breed bans. A subsequent chapter examines the factors that affect the implementation of the law and that result in the limited enforcement of laws and policies designed to protect cats, dogs, and horses. In conclusion the authors summarize findings that show that most legislative and judicial changes in pet policy

only incrementally modify the treatment of cats, dogs, and horses, that unified animal welfare and animal rights movements do not exist, and that resistance exists against the further development of laws and policies that protect the welfare of pets or grant them a greater degree of legal protection or autonomy. Also they consider whether new laws and policies signaling greater concern for animal welfare and protection can grant legitimacy to different ways of perceiving and treating cats, dogs, and horses and serve as a catalyst to mobilize citizens and groups in efforts to extend laws and policies to protect pets and curtail the violence and casual or passive cruelty that they often suffer.

**Matthew C. Ingram** (SUNY Albany) has published *Crafting Courts in New Democracies The Politics of Subnational Judicial Reform in Brazil and Mexico* (Cambridge University Press, ISBN 978-1-10711-732-7). “The role of Latin American courts in facilitating democracy and economic liberalization is considerable. But while national ‘high courts’ have been closely studied, the form, function, and empowerment of local courts are still not well understood. In *Crafting Courts in New Democracies*, Ingram fills this gap by examining the varying strength of local judicial institutions in Brazil and Mexico since the 1980s. Combining statistical analysis and in-depth qualitative research, Ingram offers a rich account of the politics that shape subnational court reform in the region’s two largest democracies. In contrast to previous studies, theoretical emphasis is given to the influence of political ideas over the traditional focus on objective, material incentives. Exhaustively researched and rigorously presented, the work will appeal to scholars and policymakers interested in the judiciary, institutional change, Latin America, the causal role of ideas, justice reform, and the rule of law.”

**David Klein** (Eastern Michigan University) and **Greg Mitchell** (University of Virginia) have co-published *American Courts Explained: A Detailed Introduction to the Legal Process Using Real Cases* (West Academic Publishing, 978-1-63459-879-8). “This is an unconventional textbook, premised on the assumption that students can better understand and address big empirical and normative questions about the legal system if they start with a thorough understanding of how American courts work. While brief, the book packs in a great deal of information about all stages of litigation. To hold readers’ interest and bring abstract concepts to life, the book follows two cases, one civil and one criminal, from initiation through final appeals. Numerous documents—discovery materials, motions for summary judgment, habeas corpus petitions, appellate opinions, etc.—are excerpted in the book and presented in full on the book’s website ([amcourtsbook.com](http://amcourtsbook.com)).”

**Joseph Mello** (DePaul University) has written *The Courts,*

*the Ballot Box, and Gay Rights: How Our Governing Institutions Shape the Same-Sex Marriage Debate* (University Press of Kansas, ISBN 978-0-70062-291-7). “If the same-sex marriage debate tells us one thing, it’s that rights do not exist in a vacuum. What works for one side at the ballot box often fails in the courtroom. Conservative opponents of same-sex marriage used appeals to religious liberty and parental rights to win ballot measure campaigns, but could not duplicate this success in court. Looking at the same-sex marriage debate at the ballot box and in the courts, this timely book offers unique insights into one of the most fluid social and legal issues of our day—and into the role of institutional context in how rights are used. Why, Mello asks, did conservative opponents of same-sex marriage enjoy such an advantage when debating this issue in the popular arena of a ballot measure campaign? And why were they less successful at mobilizing the language of rights in the courts? His analysis shows us that rights don’t just entitle us to resources; they also shape the way we see ourselves and are perceived by others. Thus, by using the language of rights to frame their cause, conservative opponents of same-sex marriage were able to construe themselves as victims of oppression, their religious and moral beliefs under threat. The same language, however, proved less useful, or even counterproductive, in courtrooms, Mello concludes, because the court’s norms and constraints force arguments to undergo more searching scrutiny—and rights-based arguments against same-sex marriage contain discriminatory stereotypes that cannot be supported with evidence. In its analysis of the same-sex marriage issue, the work provides insights that illuminate some of the most salient rights-based issues of our time—including affirmative action, abortion, immigration, and drug policy. The book offers a new way of understanding how such issues are decided, and how important context can be in determining the outcome.”

**Lisa Miller** (Rutgers University) has published *The Myth of Mob Rule: Violent Crime and Democratic Politics* (Oxford University Press, ISBN 978-0-19022-870-5). “Scholars and lay persons alike routinely express concern about the capacity of democratic publics to respond rationally to emotionally charged issues such as crime, particularly when race and class biases are invoked. This is especially true in the United States, which has the highest imprisonment rate in the developed world, the result, many argue, of too many opportunities for elected officials to be highly responsive to public opinion. Limiting the power of democratic publics, in this view, is an essential component of modern governance precisely because of the risk that broad democratic participation can encourage impulsive, irrational and even murderous demands. These claims about panic-prone mass publics—about the dangers of ‘mob rule’—are widespread and are the central focus of Miller’s work. Are

democratic majorities easily drawn to crime as a political issue, even when risk of violence is low? Do they support 'rational alternatives' to wholly repressive practices, or are they essentially the *bellua multorum capitum* (the 'many-headed beast') winnowing problems of crime and violence down to inexorably harsh retributive justice? Drawing on a comparative case study of three countries—the U.S., the U.K. and the Netherlands—the book explores when and with what consequences crime becomes a politically salient issue. Using extensive data from multiple sources, the analyses reverses many of the accepted causal claims in the literature and finds that: serious violence is an important underlying condition for sustained public and political attention to crime; the United States has high levels of both crime and punishment in part because it has failed, in racially stratified ways, to produce fundamental collective goods that insulate modern democratic citizens from risk of violence, a consequence of a democratic deficit, not a democratic surplus; and finally, countries with multi-party parliamentary systems are more responsive to mass publics than the U.S. on crime and that such responsiveness promotes protection from a range of social risks, including from excessive violence and state repression.”

**William Phelan** (Trinity College Dublin) has published *In Place of Inter-State Retaliation: The European Union's Rejection of WTO-style Trade Sanctions and Trade Remedies* (Oxford University Press, ISBN 978-0-19871-279-4). “Unlike many other trade regimes, the European Union forbids the use of inter-state retaliation to enforce its obligations, and rules out the use of common 'escape' mechanisms such as anti-dumping between the EU member states. How does the EU do without these mechanisms that appear so vital to the political viability of other international trade regimes, including the World Trade Organization? How, therefore, is the European legal order, with the European Court of Justice at its center, able to be so much more binding and intrusive than the legal obligations of many other trade regimes? This book argues first that the EU member states have allowed the enforcement of EU obligations by domestic courts in order to avoid the problems associated with enforcing trade obligations by constant threats of trade retaliation. It argues second that the EU member states have been able to accept such a binding form of dispute settlement and treaty obligation because the policy ad-

justments required by the European legal order were politically acceptable. High levels of intra-industry trade reduced the severity of the economic adjustments required by the expansion of the European market, and inclusive and authoritative democratic institutions in the member states allowed policy-makers to prioritize a general interest in reliable trading relationships even when policy changes affected significant domestic lobbies. Furthermore, generous national social security arrangements protected national constituents against any adverse consequences arising from the expansion of European law and the intensification of the European market. The European legal order should therefore be understood as a legalized dispute resolution institution well suited to an international trade and integration regime made up of highly interdependent parliamentary welfare states.”

**Daniel R. Pinello** (CUNY) has published *America's War on Same-Sex Couples and their Families And How the Courts Rescued Them* (Cambridge University Press, ISBN 978-1-10755-900-4). “[This work] is a legal, political, and social history of constitutional amendments in twenty American states (with 43 percent of the nation's population) that prohibited government recognition of all forms of relationship rights (marriage, civil unions, and domestic partnerships) for same-sex couples. Based on 175 interviews with gay and lesbian pairs in Georgia, Michigan, North Carolina, Ohio, Texas, and Wisconsin, the volume has great human-interest value and chronicles how same-sex couples and their children coped within harsh legal environments. The work ends with a lively explanation of how the federal judiciary rescued these families from their own governments. In addition, the book provides a model of the grassroots circumstances under which harassed minority groups migrate out of oppressive state regimes, together with an estimate of the economic and other costs (to the refugees and their governments) of the flight from persecution.”