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CHAPTER 6

GATEKEEPING AND FILTERING IN TRIAL COURTS

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While not always the most popular courts of study, state and federal trial courts play a highly important role in the judicial system in the United States. Ninety-four federal trial courts (called district courts) geographically distributed across the country adjudicate over 350,000 cases per year (Administrative Office of the U.S. Courts 2013). The hundreds of state trial courts of general and limited jurisdiction adjudicate upwards of 300,000 criminal and civil cases each year (Court Statistics Project 2010). By contrast, the U.S. Supreme Court hears fewer than one hundred cases per year and the U.S. Courts of Appeals terminate fewer than 60,000 cases per year. It is thus no surprise that Henry Abraham famously referred to federal district judges as "the workhorses of the federal judiciary" (Lyles 1995b: 11), something he could have said just as easily about state trial judges. A similar point was made by Kenneth Dolbeare (1967: 3) when he noted that "for most practical purposes, the local trial court is both the Supreme Court and the state's court of last resort."

In addition to serving as the entry point for millions of cases, trial courts can also play an important policy-making role. These courts regularly make critical decisions in cases involving salient issues like abortion, voting rights, desegregation, religious liberty, and affirmative action (Lyles 1995), all of which, arguably, place them squarely at the center of local and national policy and political battles. This is particularly true when district courts are tasked with making decisions in cases of first impression—i.e., those without relevant precedent binding the outcome—but can hold for other trial court decisions as well. Trial courts can also bring otherwise overlooked issues to the public's attention. As Mather (1995) noted, media attention and public opinion resulting from trial level actions can raise the salience of issues and give the impression that the trial ruling or decision is very important.

Rather than always following the traditional definition of judicial policy-making through things like crafting new rules, standards, and binding precedents, trial courts often occupy this role through the subtle, cumulative impact of their decisions on
communities (Mather 1995). This often comes through the numerous decisions that trial judges make throughout the life of cases (from filing to termination), the choices that litigants make in deciding to file their case, crafting their lawsuits, and negotiating with each other, and the interaction that judges and litigants have with one another throughout this frequently lengthy process. It is not a coincidence that some factors that can lead to cumulative trial court policy-making are also at the heart of why trial courts are important gatekeeping and filtering institutions in the judiciary. The decisions that trial judges and case participants make throughout their trial court cases (and prior to their filings) affect what cases and claims remain within and progress through the judicial hierarchy.

In what follows, this chapter discusses the gatekeeping and filtering that takes places in trial courts. The chapter proceeds by first examining the selection of disputes and charges that take place by parties, prosecutors, and other lawyers prior to a case being filed in a trial court. Next, the chapter details the uniquely important decision-making of parties and lawyers within trial courts. Finally, the chapter tackles the roles and decisions of and constraints on trial court judges. 3

(Pre) Trial Court Filtering

As a rich literature details, cases are "selected into" trial courts. That is, those cases that enter the trial courts and judiciary are, generally speaking, not a random sample of all incidents, crimes, or grievances. For civil disputes, Miller and Sarat (1980–81) populated the pyramid of grievances, claims, and disputes that exist across different issue areas, with only a subset of those disputes turning into filed civil cases in trial courts. Potential litigants often choose not to communicate their grievance to the other party (especially in certain civil rights grievances), and, even when they do, conflict may not arise or the case may informally reach a compromise outcome before the necessity of filing a civil case in the trial court arises.

When it comes to the decision of whether to file a civil lawsuit in a trial court, Sloan and Hsieh (1995) found empirical evidence that, at least for medical malpractice claims following an adverse birth, injured parties will choose to file when the expected value of doing so exceeds zero. As discussed in further detail later in the chapter, this is very similar to the calculations that many litigants make after filing a trial court case—deciding whether to settle or proceed to trial to deciding whether to appeal or not. The filtering of potential cases into trial courts follows a similar pattern in the criminal context, albeit with different actors involved in the decision-making roles. Acting on behalf of the State, prosecutors decide whether to file criminal charges and what charges to bring. These prosecutorial decisions are driven by numerous factors such as the nature of the offense, availability and strength of evidence, politics and policy goals, the defendant’s prior record, and limited resources (O’Neill 2004; Mather 1979). Only when prosecutors or prospective plaintiffs choose to file their case in the court system do the trial courts begin their role in the system. For both criminal counts and civil claims, this filtering of cases into the trial courts is filled with strategic, non-random behavior that is itself important to understand and study as forms of gatekeeping and filtering. 3 As the above discussion reveals, prior to filing, the adversaries have likely already begun negotiating or posturing with one another over the underlying dispute and thus do not enter the trial court system unfettered by the previous interactions by the parties.

Parties (and their Lawyers) in Trial Courts

More so than in any other court setting, the parties and their attorneys help shape the playing field for trial court litigation and prosecutions. Their decisions hold great potential to affect whether and where cases are filed, whether they settle, are dismissed through a non-trial adjudication, or go to trial, and, following the outcome, whether there is an appeal. Important and uniquely to the trial court setting, while justice “is sometimes sought by courtroom proceedings, but it is more often pursued in offices and corridors” (Jacob 1972: 164). Indeed, in both the civil and criminal realms in state and federal courts, cases rarely reach trial (Galanter 2004). Rather, settlement (civil) and plea bargaining (criminal) dominate as termination methods today. Both case resolutions involve case parties opting out of the legal system via compromise after first choosing, at least nominally, to resolve their dispute within the legal system.

While the literatures examining settlement and plea bargaining have evolved in very different ways across academic communities, the occurrence of both, along with the resulting models of litigant compromise and settlement behavior, share more similarities than differences. These compromise outcomes, and the litigant calculations that lead to them, are always important to discuss. However, given this chapter's focus on the gatekeeping role of trial courts, it is all the more necessary to account for these prevailing trial court termination methods. Of similar importance, the same types of calculations that affect litigant decisions to settle or plea bargain also affect the decision of the losing parties to appeal their outcomes to the supervising appellate courts.

Civil Cases

Settlements are the most frequent termination method in filed civil cases. While this number varies greatly by a case's issue area, it can be as high as 85 or 90 percent (Eisenberg and Landers 2009). The settlement of civil cases is argued to produce "greater disputant satisfaction with the decision" and to permit "compromise positions that are
unattainable through adjudication" (Galanter 1985). By choosing to settle a case, litigants are able to control their case's outcome and avoid the uncertainty and risk that comes from continuing a case toward trial and potential appeal. While settlements are very common, many cases conclude as a result of adversarial proceedings such as trials or summary judgment. The prevalence of settlement begs the question: with such clear benefits for all parties involved, why do only some cases settle while others continue on to contentious terminations via trials and non-trial judge-based decision-making?

A vast body of scholarship has developed on this very topic. Chief among this work are Priest and Klein's (1984) and Bebchuk's (1984) seminal articles. Priest and Klein (1984) theorized that civil litigants determine whether to settle or pursue litigation toward trial depending on the expected costs of favorable or adverse trial decisions, the information that the parties hold about their potential for success if the case goes to trial, and the direct costs of litigation and settlement. As a result of this selection, the cases remaining unsettled are likely to be close disputes, where both the defendant and the plaintiff reasonably believe that their chances of success at trial are good. The empirical implication of this "divergent expectations theory" and the selection of settling cases that takes place is that the likelihood of plaintiff success in those cases proceeding to trial should tend toward 50 percent.1

By contrast, Bebchuk (1984) offered an asymmetric information theory of litigation in which one party holds a monopoly on the case's likely outcome should it reach trial. This vast inequality of trial outcome information has enormous implications for the types of cases that will settle, with the informed party incentivized to settle only those cases in which its expected liabilities at trial are particularly high relative to its opponent. In a severe case of information asymmetry held by the defendant, Bebchuk predicted that plaintiff success rates for the very small and non-random set of cases advancing to trial will approach zero.

While Priest and Klein (1984) and Bebchuk (1984) vary in their predictions of when disputes will advance toward trial, both agree that strategic litigant decision-making because of the threat of court-adjudicated outcomes is at the heart of this litigation-settlement decision. To quote the famous line from Priest and Klein (1984), "disputes selected for litigation (as opposed to settlement) will constitute neither a random nor a representative sample of the set of all disputes." Rather, as Lawrence Baum argued, the cases advancing to trial "tend to involve conditions that make negotiated settlements difficult or unattractive to achieve" (Baum 2013: 243).

While the thirty years of formal and empirical literature stemming from Priest and Klein (1984) and Bebchuk (1984) is too expansive to cover here, this resulting work has led to major advancements (and continued debate) regarding our understanding of the choices that civil litigants make regarding settlement. Of particular note, Waldofgel (1998) provided empirical evidence that unifies the two models' expectations. His work indicates that settlements and pretrial adjudications like involuntary dismissal and summary judgment are largely due to asymmetric information (per Bebchuk). However, Waldofgel (1998) also indicated that for cases terminating later in litigation, when information asymmetries have been greatly reduced by discovery and other case proceedings, trial outcomes follow along the lines outlined in Priest and Klein and tend toward a 50 percent plaintiff win rate.

The push toward civil settlements in trial courts is often described as "bargaining in the shadow of the law" (Mnookin and Kornhauser 1979). The mere filing of the case raises the stakes in the negotiation of the dispute's resolution, sending the signal that the plaintiff is serious about the claim (Baum 2013). That filing may be enough for some defendants to approach the bargaining table in earnest, leading to a number of civil cases settling very quickly after filing. For other cases, however, compromise is not so quickly reached. To reflect these distinct stages of settlement, Spier (1992) modeled civil litigation bargaining in which a "U-shaped" pattern of settlement emerges: while many cases will settle very soon after filing, others will not settle until the threat of a looming trial nears—i.e., the "deadline effect." Between the two time periods, cases develop through things like motions practice and discovery, all of which, as Waldofgel (1998) argued, unveil greater detail about the case and reduce information asymmetries.

Scholars have unveiled a number of other interesting findings regarding settlement timing and litigant behavior in civil litigation. For example, Kessler (1996) found that case complexity influences the timing of settlements, with more serious motor vehicle claims taking longer to settle than less serious ones. Boyd and Hoffman (2013) provided evidence that just as the filing of a civil case can almost immediately propel certain cases toward settlement, so too can the filing of a dispositive motion. In other words, the threat that the judge could grant a motion to dismiss or a motion for summary judgment can be enough to encourage serious settlement efforts.

The litigation calculations that are made regarding settlement and litigation during a civil case are very similar to those made about the decision to appeal following the trial court disposition. Once again acting in the shadow of courts, litigants deciding whether to appeal their adverse trial court outcome evaluate their likelihood of success on appeal and what will be gained from an appellate victory against the costs of pursuing the case further (Priest and Klein 1984; Songer, Cameron, and Segal 1995). Just as with the settlement decision, this appeal decision leads to case filtering into the judicial hierarchy that is decidedly non-random in nature. For federal courts, Eisenberg (2004) reported that fewer than 20 percent of trial court cases are appealed.

Without question, the selection of trial court disputes for litigation or settlement or, later appeal, can be greatly affected by attorneys. For example, Johnston and Waldofgel (2002) revealed that the repeat interaction of opposing attorneys corresponds to swifter litigation compromises and fewer trials. Kritzer (1990) found that both plaintiffs and defendants in civil cases are more likely to view their litigation as a success, even in the case of settlement, when their lawyer engaged in strategic bargaining.

But not all civil cases, or their filing parties, are created equally. Rather, as Epstein, Landes, and Posner (2013) noted, "many cases are filed by pro se or emotional litigants and by litigants represented by inept or inexperienced lawyers" (p. 232). Most of these cases, as the authors argue, will be dismissed or abandoned rather than selected for litigation or settlement.
Attorney compensation structure is also important. For the contingency fee attorney engaging in litigation and possible settlement negotiation, there is an important need to manage a client's interests and expectations with an attorney's short- and long-term reputation and goals (Kritzer 1998). Despite these competing considerations, Helland and Tabarrok's (2005) analysis of medical malpractice cases revealed, compared to hourly attorneys, contingency-fee attorneys file fewer low-quality lawsuits and help yield faster settlement times.

Criminal Cases

Just like settlements in civil cases, plea bargaining is also the predominate way that criminal cases in trial courts terminate. While there is some variance across state and federal courts, as many as 90 to 95 percent of criminal trial court cases each year are resolved through plea bargains (Administrative Office of the U.S. Courts 2013a). As a reflection of this, Justice Kennedy's majority opinion in 2012's

Lafayette v. Cooper argued that "criminal justice today is for the most part a system of pleas, not a system of trials." Simply put, because of the way the criminal court system is designed and the time and money that it takes to advance most cases to trial, judges and counsel for both sides are incentivized to encourage plea bargains (Blumberg 1997).

As with civil cases and settlements, the defendant's decision to accept a plea bargain in a criminal case is theorized to be a strategic one, informed by the defendant's knowledge, information, and preferences along with those of his adversary, the prosecutor. After assuming that the prosecution and defendant maximize their utilities, Landes (1977) famously argued that the decision whether to plea bargain or go to trial is dependent on "the probability of conviction by trial, the severity of the crime, the availability and productivity of the prosecutor's and defendant's resources, trial versus settlement costs, and attitudes toward risk." (p. 61). In other words, the decision to accept a plea is made very much within the ominous "shadow of the trial" (Bushway and Redlich 2012) and, at least in some cases, does not begin in earnest until after a trial date has been set (Mather 1979).

Ultimately, a plea bargain can be reached only when the parties' expectations converge. Elder (1989) provided empirical evidence to support this, finding that as the parties' have increased agreement about the outcome at trial (via the evidence in the case), plea bargains are more likely. Many pleas are entered with "a tacit understanding of the likely sentence or with an informal indication by the judge as to the probable sentence." (Mather 1979: 55). For the most serious criminal cases, reaching a plea bargain can be very difficult, with the process involving "proposals and counterproposals in which the terms of the final agreement are clearly specified." (Mather 1979: 55). And, even after the bargaining is complete, the defense counsel must get the defendant to sign off on the plea agreement. With divergent estimations between the defense and prosecution, bargaining failure does occur, thereby leading cases toward trial. After all, rational defendants are only expected to accept plea deals when doing so will produce more of a benefit for them than going to trial would (Bushway and Redlich 2012).

Prosecutors are quintessential repeat players in their local trial courts, with some even arguing that it is the prosecutor, rather than the judge or defense attorney, who is key to administering criminal justice (Jacob 1972). "The prosecutor's power stems in large part from her role as gatekeeper in the criminal justice system. Juries convict, judges sentence, and wardens incarcerate, but it is the prosecutor who at the outset of a criminal case selects those individuals who will enter the system" (Gordon and Huber 2002:349).

Following Galanter's (1974) logic, prosecutors will primarily favor long-term goals, policy, reputation, and voters' preferences rather than single, one-shot victories in cases. This is likely to affect decisions that prosecutors make prior to filing (e.g., whether to decline prosecution and what charges to bring) and will also invariably influence post-filing bargaining over whether to offer a plea bargain, the terms of plea deal, the strategy to pursue at trial, and the severity of the sentence to recommend to the judge (Mather 1979; Gordon and Huber 2002).

While criminal defense lawyers are also often repeat players in their local trial courts (Blumberg 1967), their associated list of strengths emerging from that is likely to be far less lengthy, with issues like low pay, high caseloads, lack of ability to filter cases in the way that prosecutors do, and limited control over clientele having the greatest negative effect. Stuntz (1997) detailed the assembly-line nature of most criminal defense work, noting that "the law operates from the premise that effective representation [by defense attorneys] can be minimal." (p. 20). Blumberg (1967) further described criminal defense attorneys as "double agents" where they are first placed in a difficult position to get their client to trust them and then convince him to plea out.

Critics of plea-bargaining dominance in the criminal court system exist on both sides and continues to rage today, with some concerned about the leniency that it promotes in criminal outcomes, "allowing guilty defendants to obtain unwarranted reductions in charges and/or sentences by threatening an overworked system with requiring a time-consuming and pointless trial" (Kritzer 1990: 16). Others worry about the potentially coercive nature of the system, with the vast inequalities that many defendants face when forced to decide whether to accept a plea deal (Bibas 2004). This argument generally rests on the strength and repeat-player status of the prosecutor, often bolstered by the judge's incentives to encourage pleas (Alschuler 1968), combined with limited bargaining power for many defendants oppressed by poverty and focused on short-term goals of getting out of jail as quickly and cheaply as is possible (Bowers 2008).

**Trial Court Judges as Gatekeepers**

While judges serving on appellate courts receive a great deal of attention in political science scholarship, most judicial decision-making takes place in trial courts. Indeed, for most litigants involved in legal disputes, trial judges are the only judicial actors they will ever encounter. The decisions that these important trial judges make throughout a case have important gatekeeping implications, influencing how a case develops, whether it
settles or not, the degree of satisfaction that the parties and lawyers have with the outcome, whether it will be appealed, and, if appealed, whether it will be reversed.

The job of judging varies greatly depending on a judge's position in the judicial hierarchy, with this being particularly true when comparing trial court judges to those serving on multi-member appellate courts. Unlike appellate court judges, trial judges' workloads are dominated by the complexities and multi-staged proceedings inherent in trial court litigation (Boyd and Hoffman 2013; Kim et al. 2009). This litigation process means that trial judges have numerous decision-making opportunities in each case over which they preside, with the potential to be a mediator and settlement encourager, a fact-finder, a law-applier, and a law-creator with enormous discretion in how a case develops and is resolved. This level of judging is also likely to present unique pressures on and considerations for trial court judges that simply do not exist for appellate court judges, including, as discussed in detail above, the predominance of settlement and the particularly important role of attorneys. Other unique pressures for trial judges are the real possibility for judicial elevation and the credible risk of decision appeal and reversal from judicial superiors.

**TRIAL JUDGE DECISION-MAKING**

How do trial court judges make decisions? Are they ideologically driven decision-makers? Or, instead, do other considerations such as the law and precedent, their place in the judicial hierarchy, or their other characteristics dominate their behavior? Trial court scholars have pondered these questions for many years, but to date, they remain far from being resolved.

There is little debate regarding the significant role that law and precedent have in trial courts, particularly compared to appellate courts. From their time as law students and practicing lawyers to their time within the judicial profession, judges are indoctrinated on the merits of judicial restraint and following precedent. The nature of trial court cases further reinforces this, with a great many cases being weak, routine, or ordinary in nature, thereby making legalistic, non-discretionary judicial decision-making viable (Epstein, Landes, and Posner 2013). However, various duties within the job of a trial judge have no clear legal answer and, therefore, provide room for the trial judge to exercise considerable discretion (Levin 2008). This discretion can exist in numerous judicial decisions throughout a case (e.g., how to rule on dispositive motions, whether to actively encourage settlement, and whether to write opinions) and opens the door for trial judges to make decisions based on things other than the law—whether those other things be ideological preferences, personal background characteristics, experience, or hierarchical constraints.

Turning first to ideological preferences, the theoretical and empirical findings on trial court judges is unquestionably mixed. Lyles (1995) argued that we have every reason to believe that trial judges will behave in a political way. "The frequency and salience of district court policymaking, their gatekeeping role in the federal judiciary, the characteristics and attitudes of the individual judges appointed to these courts, as well as the dynamics of the appointment process itself, suggest a political nature and function" (Lyles 1995: 2). District judges themselves also often seem to believe that their preferences enter into their decision-making. When asked whether their "personal attitudes and values affect their discretionary judgments," 58 percent of the district judges responded "often" or "sometimes"; when asked the same question about other district judges' judgments, however, that number skyrocketed to 75 percent (Lyles 1995: 25).

Empirical work supports the role of ideology. Rowland, Carp, and Stitham (1984) found that federal trial court judges appointed by Democratic presidents are often more likely to support criminal defendants than those judges appointed by Republican presidents. Relatedly, Schanzenbach and Tiller (2006) found evidence that federal district courts with higher percentages of Republican-appointed judges impose longer sentences for criminal sentences, with Epstein, Landes, and Posner (2013) confirming modest sentencing-partisanship effect for data coded at the individual district judge level. Work by Rowland and Carp (1996) extended these findings to include differences among judges in civil rights, civil liberties, economics, and labor-related cases, with Democrat-appointed trial judges ruling more liberally in each area. Rowland and Todd (1992) also indicated that federal trial judges can use procedural rulings, such as those regarding whether a plaintiff has standing, to exert their policy preferences.

These findings stand in sharp contrast to scholarship indicating that ideology and partisanship is generally not a strong predictor of trial judge decision-making. Zorn and Bowie (2010) found that judicial preferences and ideology predict conservative voting in the federal appellate courts, but when it comes to district judges, "ideological and policy-related influences... are but two of several competing considerations, and in many instances not the most important ones" (p. 1123). This mirrors an earlier finding by Ashenfelter, Eisenberg, and Schwab (1995), who noted that "the political aspects of that judicial selection process may not filter down to the mass of litigation" (p. 281). Similarly, Keel et al.'s (2009) study of federal U.S. Forest Service litigation revealed that for district judges, there was no evidence of ideological decisions in either published or unpublished opinions. Other notable work failing to find evidence that federal district judges systematically decide cases based on ideological or partisan considerations includes Howard (2002) (taxpayer suits against the IRS), Walker (1972) (civil liberty decisions), Yarnold (1997) (religious freedom cases), Baum (1980) (patent cases), King (1998) (fair housing cases), and Perino (2006) (securities fraud actions)."
found: attitudes are good predictors of trial judge sentencing behavior when the judge has a "broad" role orientation that permits attitudes to affect his decisions.

Beyond ideology and attitudes, scholars have found that other trial judge characteristics can be, at times, meaningful predictors of their behavior. For example, Giles and Walker (1975) found that Southern federal district judges' degree of connection to their community affected the way that they made decisions in school desegregation cases following Brown v. Board of Education. Their results indicate that these federal district judges were more vigilant in enforcing desegregation in remote, rural areas where the enforcing judge had little-to-no community linkage to the school. In a similar way, Baum (2006) argued that state trial judges can be influenced by those working in local government with them: "Judges who serve a city or county are likely to have personal ties with other local officials through schooling, politics, and community activities. They often work in close proximity to people in the other branches and interact with them outside of work" (p. 170). Other studies of trial judge behavior have found some evidence that these judges' decisions are, at least in certain circumstances, also affected by the judge's sex (Steffensmeier and Herbert 1999; Walker and Barrow 1986) and race (Sisk, Heise, and Morris 1998), among other factors.

**Trial Judges, the Hierarchy, and the Public**

Many argue that trial judges are uniquely constrained by non-personal considerations such as their institutional position at the bottom of the judicial hierarchy. When a trial court case is proceeding, the judge and the parties cannot predict with certainty whether the dispute will ultimately end up before the appellate courts. While such an appeal is not assured, losing parties generally have a right to appeal. This looming possibility of review, and with it, reversal, means that appellate courts are an ever-present influence in case dispositions. Indeed, trial court judges are controlled and sanctioned by their supervising judges through reversals, since such an outcome overturns a district judge's decision, holds the potential to add additional work to the judge, and can affect a trial judge's reputation (Hettenger, Lindquist, and Martinez 2006; Scott 2006).

Institutional constraints on trial judging may help explain why many scholars, as detailed above, have struggled to find consistent evidence of ideological decision-making among trial judges. Rather than acting as unconstrained pursuers of their personal preferences, the hierarchical system in which they serve demands responsiveness to superiors. Baum (1997) suggested:

Lower-court judges want judicial doctrine to match their policy preferences as closely as possible. But judges cannot simply set doctrine at their ideal points. Rather, because of the threat of reversal by the reviewing court, they must balance their preferences against the preferences of that court; they sometimes take positions that diverge from their own preferences in order to avoid reversal that would move policy even further from those preferences. This, of course, is a form of strategic voting. (p. 153)

A number of recent studies have found empirical evidence of this hierarchical influence on trial judge behavior. Studying cases from 1925 to 1996, Randazzo (2008) found that district court judges anticipate the preferences of their courts of appeals superiors in civil liberties and economics cases but not in criminal cases. In securities fraud action cases, Perino (2006) found that district judges moderate their behavior in anticipation of an ideologically dissimilar circuit court. Epstein, Landes, and Posner (2013) provided evidence that federal district judges are less likely to sentence defendants below the sentencing guidelines range when they sit in a Republican-judge-dominated circuit. Choi, Gulati, and Posner (2012) revealed strategic publication rates (fewer published opinions) as district judges' ideologies move farther way from those of their reviewing circuit. Baum (1980) found that "courts of appeals exert real influence over the decisions" of their district court subordinates in patent cases, a result that is not dependent on the judges' ideologies and that indicates a "degree of hierarchical control in the judicial system" (p. 223). Finally, studies from Schanzenbach and Tiller (2006) and Buchanan (2007) indicated that trial court judges strategically use deferential standards of review to help protect their sentencing and evidential decisions from reversal.

Interestingly, scholarship indicates that district judges are not just influenced by the judicial hierarchy, but that they also are influential themselves, especially when they play the role of gatekeeper. First, research indicates that a number of actions taken by trial judges greatly decrease the likelihood of the case being appealed. Encouraging settlement is certainly one such action, a topic discussed in greater detail later in this chapter. In non-settling cases, rational litigants will undoubtedly assess their chances of success on appeal (Posner 1986). However, if the trial judge's decision was guided by consideration of preferences of judges on the appeals court, this should affect the litigants' calculations and, correspondingly, decrease the chance of appeals. Scholarship also tells us that unpublished district court decisions are less likely to be appealed than those that are published (Siegelman and Donohue 1990). Similarly, when litigant satisfaction with the process in their trial court case is high, despite their loss, they may also be less likely to appeal (Barclay 1999).

Second, in cases that are appealed, trial judges may influence not only the outcome of the case (i.e., the likelihood of reversal) and the substantive legal standard that is applied by the appeals court but also the content of the law that results. On this latter point, recent research by Corley, Collins, and Calvin (2011) found that the U.S. Supreme Court's opinions regularly repeat the exact language present in the lower court judges' opinions from the case.

Finally, trial courts are well positioned to influence the decisions of their judicial superiors through the implementation of remand orders. When appellate courts remand decisions to the trial courts, the remand decrees regularly require the trial court to implement the higher court decision, a scenario famously played out in the federal courts in the context of local school district desegregation. As in Brown v. Board of Education, remands for trial court implementation place trial judges in an important policy-making role while simultaneously granting these judges considerable discretion. That discretion is not without its own constraints—remanded trial court decisions...
can be re-appealed—but, as Murphy (1959) argued, trial courts on remand are well positioned to construe or criticize appellate court precedent in their preferred way. At its extreme, this can even lead to trial judges evading the remanding decision altogether. The result of this is that remanding courts like the U.S. Supreme Court must take into consideration the anticipated reaction of the lower court judges when returning cases (Rosenberg 1991).

In addition to (or perhaps instead of) considerations about appellate review, some trial judges may be influenced by public opinion. This is especially true in areas of salience to voters for the many state judges who are elected. Many U.S. states select or retain their trial judges through some form of election, and this selection mechanism is likely to affect decision-making. Kuklinski and Stanga (1979) found that California trial court judges alter their sentencing behavior for marijuana-related crimes based on their county's level of support for a state initiative proposing to decriminalize personal marijuana use. Similarly, Huber and Gordon (2004) found that the criminal sentencing behavior of elected Pennsylvania trial court judges is very much affected by election proximity and voters' desires to see punitive justice on the bench. As predicted by their theory, Huber and Gordon's analysis finds a unilateral convergence toward punitive sentencing the closer the judge gets to reelection.

**Trial Judges as Settlement Judges?**

When ruling on potentially case-ending motions or presiding over a bench trial, trial judges serve in publicly salient posts. Even with jury trials, trial judges have a great deal of responsibility and visibility, including managing jury selection, ruling on important dispositive and evidentiary motions during, before, and after trial, and crafting jury instructions. Beyond these salient duties, trial judges can also serve as case managers and facilitators of settlements and plea bargains. Indeed, given the ongoing pressures related to rising caseloads, understaffing, budget cuts, and lingering judicial vacancies, many argue that trial judges are increasingly in these roles (Resnik 1982; Kritzer 1986; Baum 2013). “There is more to ‘it’ than trials. Judicial actions can play an important role in the processing of civil cases, even in the vast majority of cases that never come to trial” (Kritzer 1986: 165). Given the above-noted dominance of these compromise outcomes in trial courts today, this role thus places these judges in the middle of many decisions to filter cases out of the court system.

What can and do trial judges do to facilitate these compromises? As the above litigant discussion notes, there are many cases that settle or plea out almost immediately upon filing. These cases need no assistance from a judge; the mere filing raises the negotiation stakes and propels the parties to the bargaining table. However, in many other cases, the settlement negotiations are often “encouraged, brokered, or actively mediated by the judge” (Galanter 1985). Within a case’s proceedings, judges can “meet with parties in chambers to encourage settlement of disputes and to supervise case preparation” (Resnik 1982). And, indeed, Federal Rule of Civil Procedure Rule 16 lists “facilitating settlement” as one of the express purposes of a case’s pretrial conference (Provine 1986).

In the criminal trial court context, Mather (1979) described how judges and attorneys develop informal norms as to their interactions, behavior, information sharing, and strategies. One such common norm among many trial judges is their willingness to “chamberize” (Mather 1979), where the attorneys and the judge meet to discuss the possibility of a plea bargain, with the judge often weighing in on what sentence he would likely impose. This judicial participation is undoubtedly critical in many cases in reducing information uncertainty that exists between the prosecution and defense, thereby further increasing the odds of a bargain being struck and the defendant agreeing to the deal. As one California prosecutor put it, with judicial involvement in bargaining, “you get more guilty pleas [than if the judge were not involved]” (McCoy 1993: 150).

Trial judges also often take two common institutionalized steps to encourage civil case compromise: referring the case to a type of Alternative Dispute Resolution (ADR), such as mediation, and requiring the parties to participate in a settlement conference. The occurrence of ADR or settlement conferences forces parties to formally come together and attempt to settle. Generally with the help of a neutral evaluator, parties are often able to better understand their chances of success and the expectations of their opponent. Since initiating settlement talks can be perceived as a sign of case weakness (Provine 1986), the judge’s role in facilitating settlement discussions serves not only to breathe realism into the case but also to alleviate the pressure from the attorneys to force the issue themselves. Spurr (1997) found empirical evidence that this judicial strategy is successful, with personal injury litigation cases settling more quickly when they have been referred to a settlement specialist during litigation.

Ultimately, how actively a trial judge manages his cases and affirmatively presses the parties to settle when they may not otherwise do so is often at his discretion. As such, as with much about judging, the identity of a trial judge and specific trial court on which he sits can affect the type of case manager that a trial judge becomes and how this affects processing of cases. Boyd (2013) found that female federal trial judges, predicted by theory to be more collaborative and compromise-seeking case managers, have their cases settle more often and more quickly than their male counterparts’ cases. Kritzer (1990) argued that there is more judge-centeredness in civil justice in federal courts than in state courts, while Plapinger and Stienstra (1996) documented how, even among federal trial courts, there are vast differences as to how much pressure is placed on the judges to actively encourage settlement.

It is worth noting that settlement and plea bargains dominate case outcomes in trial courts not only because judges promote settlement and because litigants are often incentivized to pursue compromise outcomes. Indeed, other institutional and political factors influence judicial system efficiency via legislation like the Civil Justice Reform Act (1990) and criminal laws that permit harsher penalties for those advancing their cases toward trial, the growth district level mandated ADR, and the increased reliance on magistrate judges and other non-permanent judges are all geared toward encouraging compromise solutions in federal case filings.
CONCLUSION

Without question, trial courts and their actors play critical gatekeeping and filtering roles within the judicial hierarchy. As the trial court literature discussed above reveals, the decisions made by litigants and judges in the millions of criminal and civil trial court cases in the United States each year affect things like what cases get filed in trial courts, how cases develop, what cases settle and when, whether losing litigants will appeal, and, if they do, how the appellate courts will respond. Each of these, in turn, acts to shape the contents of the judicial hierarchy, while also presenting the actors involved opportunities to strategically manipulate their outcomes. What results, of course, is a set of disputes advancing through the appellate courts that is very much a non-random representation of disputes and filed trial court cases.

While undeniably important, studying trial courts presents a unique set of challenges to scholars. The heavy involvement of the parties, attorneys, and judges throughout the life of trial court cases and the very real potential for opting out of the system through compromise presents empirical and theoretical complications. When it comes to trial court judges, the construct of the single-judge environment is also difficult to properly capture: “In a collegial court situation, a group of judges responds to exactly the same cases after examining identical briefs and considering the same oral arguments. When disagreement occurs it is relatively easy to measure the differences among the jurists. Students of the trial courts are not afforded this convenience. Each district judge individually hears cases arising out of his or her own judicial district ... We simply cannot know how the judges would have ruled had they traded docket” (Walker and Barrow 1986).

Probably more than anything, the absence of large scale, reliable data on trial courts has impeded systematic research in this area. Unlike with appellate court research, many trial court studies cannot be properly designed using only those data drawn from published, publicly available trial court opinions (something Siegelman and Donohue 1990 refer to as “studing the iceberg from its tip”). Rather, we must also rely on sources such as unpublished oral decisions from the trial judges, courtroom and deposition transcripts, docket sheets, complaints, and motions (Kim et al. 2009). With electronic docketing an increasing commonplace in trial courts, the sources of these data for recent years are more easily accessible than in the past.

Nonetheless, trial court data collection huddles are still numerous. For example, great variation exists among state trial courts regarding the electronic availability of case documents and docketed information. At the present time, privacy concerns for trial judges and case participants have caused the federal judiciary to refuse to release the complete data (containing judge, case, and party identifiers) that they collect on every filed criminal and civil case. This therefore makes it very difficult to use these data for projects necessitating any judge-specific or litigant-specific variables. To further complicate data matters, in 2011, the Administrative Office of the U.S. Courts announced that, to save storage costs, they would begin destroying all case files from 1970 to 1995 that either did not have a trial or were not deemed to be “historically significant” (Administrative Office of the U.S. Courts 2011).

Moving beyond data and research design challenges, it is interesting to note how the study of civil and criminal trial court decisions and trends have generally developed separately from one another. While this makes sense in many respects, there may well be areas where better understanding their influences on each other could be informative on the courts and the gatekeeping that takes place within them. For example, it may be worth further examining whether the long-term but still growing dominance of plea bargaining in federal criminal case dispositions has influenced the well-documented gradual growth in settlement frequency in federally filed civil cases. The influence that these two important activities have on each other is not well known or understood, but the reasons to expect a connection between plea-bargaining trends and settlement trends are plentiful. One possibility is that the involvement of the same district court judges, magistrate judges, staff, clerks, and other personnel for both criminal and civil cases makes the cross-implementation of bargain-seeking solutions more seamless. In addition, both criminal and civil cases give rise to pressures on the overall trial court system, including caseload and vacancy pressures on judges, the scarce availability of other limited court resources, the overall push for efficiency, etc. If this latter possibility is supported by the data, it could well provide evidence that high levels of plea bargaining and civil settlements were caused by similar factors rather than the former causing a growth in the latter.

NOTES

1. The study of trial courts is inherently interdisciplinary, finding its home in fields such as political science, law and society, law and economics, and criminology, just to name a few. While space constraints within this chapter make it impossible to fully review all of the pertinent work from each of these disciplines, the hope is that the literature cited herein reflects the breadth and diversity of scholarship on the subject.

2. While scholars have frequently referred to trial judges and their courts as gatekeepers (see, e.g., Lyles 1995), I am not the first to also suggest that other actors within trial courts, like lawyers, play an important filtering and gatekeeping role. For example, Krizer (1997) argued that “Lawyers ... are gatekeepers who control the flow of civil cases into the courts” (p. 22), and Gershman (1992) averred that “the prosecutor functions almost literally as a gatekeeper of justice with the obligation to prevent an injustice” (p. 521).

3. The basic rationale for the Priest and Klein’s 50 percent hypothesis is that both the plaintiff and the defendant are involved in selecting cases that move toward trial — with the plaintiff only selecting those where he estimates that the defendant’s liability is in a range that favors the plaintiff and the only defendant selecting those where he estimates his liability to be outside of that range. The resulting intersecting set of close disputes should thus lead to a probability of victory at trial of about 0.5.

4. There is almost certainly a selection effect built into these results. All other things equal, while attorneys paid hourly fees can pursue less meritorious claims should their clients wish
them to contingency fee attorneys must carefully consider their likelihood of success (and getting paid) when deciding to accept representation and whether to pursue rapid settlement for a particularly case.

5. This is particularly true for elected state prosecutors (Cole, Smith, and DeJong 2013).

6. A further review of empirical political science work examining trial court ideology through the 1990s can be found at Pinello (1999).

7. In 1954’s Brown v. Board of Education, the Supreme Court famously announced that segregation is a denial of the equal protection of the laws. Following additional arguments the next year, the Court announced the remedy Brown II: federal district courts should “take such proceedings and enter such orders and decrees” to “admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.” As history has revealed, the high degree of discretion in this remand order led to very uneven implementation of the Brown decision across the country.

8. While the connection between elected state trial judges and public opinion is clear, there are also a number of empirical findings that suggest that non-elected trial judges are also responsive to public opinion at times. For example, Rosenberg (1991) and Giles and Walker (1971) found that federal trial court judges were affected by local public opinion in their school desegregation rulings.

References


Cases Cited