

PROBING THE EFFECTS OF JUDICIAL SPECIALIZATION

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Americans typically think of judges as generalists. For some people, this quality is highly desirable or even inherent in the role of judge.¹ But in reality, the judiciary includes a good deal of specialization, and the extent of that specialization has increased over time. People within and outside the courts have given considerable attention to some aspects of that development, but they have not sufficiently considered the implications of the extent and growth of judicial specialization.

In their article, Jeffrey Rachlinski, Chris Guthrie, and Andrew Wistrich address one important implication—the impact of specialization on the behavior of judges.² Specifically, they consider how the specialization of most administrative law judges affects the ways they make choices. In this Response, I consider more broadly how specialization can affect judges' behavior as well as the task of ascertaining its effects. I argue that specialization can have powerful effects on judicial decisions through immersion of judges in specific fields of legal policy and judicial expertise and through the enhanced influence of political and legal interests in those fields. At present, understanding of those effects is limited. Because of the potential importance of those effects, more concerted efforts by scholars to identify them would have great value.

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1. See, e.g., MARTIN SHAPIRO, *THE SUPREME COURT AND ADMINISTRATIVE AGENCIES* 53 (1968) (“To the extent that [courts] specialize, they lose the one quality that clearly distinguishes them from administrative lawmakers.”).

2. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 *DUKE L.J.* 1477, 1479 (2009).

I. THE RACHLINSKI, GUTHRIE, AND WISTRICH STUDY

Rachlinski, Guthrie, and Wistrich (the authors) have carried out a series of well-designed experimental studies in which they analyze the cognitive processes of judges as decisionmakers.³ To oversimplify a theoretical formulation and set of findings that are both rich and complex, the authors have found that judges are susceptible to the same imperfections in reasoning as other people: essentially, they rely heavily on intuitive thinking (as distinguished from deliberative thinking). Intuitive thinking has some advantages for decisionmaking, but it tends to foster faulty judgments. To take one example, judges are susceptible to “anchoring.” One manifestation of anchoring is that simply informing judges of a high demand by the plaintiff causes them to award more money than they would without that information.⁴

In most of the authors’ research, the participating judges have been generalists, in that they deal with a wide array of cases in their work. But one of their past studies concerned bankruptcy judges,⁵ who are certainly specialists. In the parts of the bankruptcy study that were comparable with the authors’ research on generalist judges, they found similar reliance on intuitive thinking. In the parts of the study for which there were no directly comparable findings on generalist judges, however, the bankruptcy judges did well in disregarding considerations that would detract from the quality of decisionmaking. This result left open the possibility that the specialization of bankruptcy judges improves the processes by which they reach decisions. On the other hand, bankruptcy judges with more experience in the job did not differ substantially from less experienced judges. This finding suggests that time spent in the role

3. E.g., Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 29–42 (2007) [hereinafter Guthrie et al., *Blinking on the Bench*] (offering ways that the judicial system can encourage judges to think deliberatively); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 780–84 (2001) [hereinafter Guthrie et al., *Inside the Judicial Mind*] (exploring the impact of cognitive illusions on judicial decisions empirically); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information: The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1258–59 (2005) (discussing judges’ inability to ignore inadmissible information).

4. Guthrie et al., *Blinking on the Bench*, *supra* note 3, at 19–21.

5. Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge’s Mind*, 86 B.U. L. REV. 1227, 1230 (2006) (using bankruptcy judges as a case study to examine the impact of specialization on judicial decisions).

of a specialized judge does not affect the decisionmaking processes that the study analyzed.⁶

The authors' article for this Symposium examines another set of judges—administrative law judges. As they point out, these judges are quite important because of their large numbers and thus the volume of cases that they decide at the state and federal levels.⁷ Moreover, as controversies over the work of federal immigration judges suggest,⁸ their decisions help to shape policy on major issues.

Many, probably most, administrative law judges are specialists in the work of a single administrative agency,⁹ so a study of their decisionmaking provides another vantage point on judging by specialists. Further, as the authors point out, administrative law judges who work within a single agency are more accountable for their decisions than are judges within the judicial branch. As a consequence, they receive a relatively large volume of feedback on their performance.¹⁰ Thus, comparison of administrative law judges with generalist judges in the judicial branch provides a means to probe the impact of both accountability and specialization on judgment.

The authors' findings on administrative law judges are similar to the findings of their studies of generalist judges.¹¹ Although most of the judges in this study were specialists in a particular subject matter, for the most part they engaged in the same intuitive decisionmaking as the nonspecialists who participated in earlier studies. Thus this study provides evidence that specialization does not have a substantial effect on how judges think through their choices.

There is an unavoidable limitation to this study and the other studies that the authors have carried out. Like experimental research in general, their work maximizes internal validity, but with a potential

6. *See id.* at 1256–59 (“[T]he bankruptcy judges performed much like the generalist judges we have previously studied.”).

7. *See* Guthrie et al., *supra* note 2, at 1479.

8. *See, e.g.,* Jaya Ramji-Nogales, Andrew I. Schoenholtz & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 302 (2007); Nina Bernstein, *New York's Immigration Courts Lurch Under a Growing Burden*, N.Y. TIMES, Oct. 8, 2006, at A1; Pamela A. MacLean, *Immigration Bench Plagued by Flaws*, NAT'L L.J., Feb. 6, 2006, at 1.

9. *See* Guthrie et al., *supra* note 2, at 1478.

10. *See id.* at 1483–91.

11. *See id.* at 1480.

cost in external validity.¹² In other words, the experimental setting allows researchers to control or exclude influences on behavior other than those in which they are interested, but that setting differs from the situations in which the behavior that interests researchers actually occurs. More specifically, the authors asked judges to carry out decisionmaking tasks in a context different from the one in which they decide actual cases. For one thing, judges often have more time to reach decisions than the experimental setting provides. Another difference is that judges ordinarily make decisions after hearing from both sides, so that they get multiple and competing perspectives on the questions they resolve. Moreover, in the study of administrative law judges, the wide range of specialties for those judges made it impossible to give them decisionmaking tasks in the experiment that matched their fields of specialization. (The authors did match tasks to specialization in the bankruptcy study.)¹³ Thus, extrapolating from the study findings to judicial decisionmaking requires caution.

This caution, however, should not obscure the importance of the authors' findings in the study of administrative law judges and its predecessors. Those findings serve as a reminder that, despite their training and experience, judges are not immune from the imperfections in reasoning that are widespread in the general population. Even if judges make their actual decisions under conditions that reduce those imperfections, it is implausible that the imperfections disappear altogether when judges are on the bench. Moreover, some common attributes of decisionmaking in trial courts—the large number of decisions that are made quickly under considerable pressure—may actually foster reliance on intuitive processes.

The authors' findings also provide a valuable starting point for inquiry into the settings in which judicial decisionmaking takes place. One of the central findings of social psychology is that inherent characteristics of individuals have less impact on their behavior, and situations in which they find themselves have greater impact on behavior, than people generally think.¹⁴ Some structures and procedures for decisionmaking reduce imperfections in decision

12. See Leonie Huddy, *Crossing the Methodological and Disciplinary Divide: Political Stability, Political Change, and Research Method*, in *POLITICAL PSYCHOLOGY* 271, 273–74 (Kristen Renwick Monroe ed., 2002).

13. See Rachlinski et al., *supra* note 5, at 1260–65.

14. See LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 3–4 (1991).

processes more effectively than others.¹⁵ In the institutional design of courts, one goal should be to identify mechanisms that foster effective decisionmaking.

One mechanism that might improve judicial decisionmaking is specialization of judges. Indeed, many commentators have advocated specialization as a means to improve judicial decisionmaking.¹⁶ The findings of the authors' studies of bankruptcy judges and administrative law judges provide significant evidence, perhaps unsurprising, that the basic reasoning processes of generalist and specialist judges do not differ fundamentally. But those findings do not preclude the possibility that specialization produces other types of differences in decisionmaking. The extent of the specialization that exists in the American judiciary—an extent greater than is generally recognized—enhances the importance of any differences in decisionmaking that result from specialization.

II. THE MEANING OF JUDICIAL SPECIALIZATION

An inquiry into judicial specialization must begin by considering what that term means. Specialization in any area of human activity has multiple facets.¹⁷ For instance, restricting a court's jurisdiction to a particular geographical area represents one form of specialization. Even within the category that can be called functional specialization,¹⁸ all judges—or at least all those who serve full-time—are specialized simply by doing the job of a judge. When people refer to specialization in the judiciary, they usually mean another form of functional specialization, defined in terms of case type. Generalist judges hear a wide range of cases; specialists hear a narrow range.¹⁹

15. See Guthrie et al., *Blinking on the Bench*, *supra* note 3, at 29–43.

16. See sources cited *infra* note 32.

17. See HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS* 28–35 (2d ed. 1961).

18. I use the term functional specialization to refer to specialization on the basis of the type of work that people do. See *id.* at 21.

19. Subject matter specialization can be defined in terms of cases as well as judges. Specialization by judges, the more familiar dimension, concerns the extent to which judges focus on narrow sets of cases. The other dimension, which may be called concentration of cases, concerns the extent to which a particular type of case is decided by a narrow set of judges. See Lawrence Baum, *Judicial Specialization, Litigant Influence, and Substantive Policy: The Court of Customs and Patent Appeals*, 11 *LAW & SOC'Y REV.* 823, 826–27 (1977); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 *U. PENN. L. REV.* 1111, 1121–30 (1990). Concentration of cases can be consequential for judicial decisionmaking, but in this Response, I focus on specialization by judges.

I refer to “judges” rather than “courts” because the judge is the appropriate unit to consider. To the extent that specialization by case type affects what courts do, it is primarily because individual judges do work that has only a limited range in its subject matter. One implication of the distinction between courts and judges is that organization charts of court systems may be misleading about the extent and form of specialization. The state and federal court systems have a good many courts that are formally specialized.²⁰ But there is a good deal of specialization within state trial courts that statewide organization charts do not disclose.²¹ In large trial courts, judges are often assigned to hear specific types of cases rather than the full range of cases that fall within the court’s jurisdiction. The extent of that form of specialization has grown with the movement to establish entities that participants and commentators have called problem-solving courts, such as drug courts, mental health courts, and domestic violence courts.²² Largely because of this specialization

20. A partial list of existing and former specialized federal courts is at the website of the Federal Judicial Center. Fed. Judicial Ctr., Courts of the Federal Judiciary, <http://www.fjc.gov/public/home.nsf/hisc> (last visited Feb. 24, 2009). Organization charts of the state court systems are presented in COURT STATISTICS PROJECT, NAT’L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 2007, at 16–67 (2008), available at http://www.ncsconline.org/D_Research/csp/2007_files/Introduction%20to%20State%20Court%20Caseload%20Statistics.pdf.

21. For instance, the organization chart of the Illinois courts portrays a single trial court, the Circuit Court. COURT STATISTICS PROJECT, *supra* note 20, at 29. But the Circuit Court of Cook County is divided into divisions and departments that hear specific types of cases. STATE OF ILLINOIS, CIRCUIT COURT OF COOK COUNTY: AN INFORMATIONAL GUIDE 3–6 (rev. ed. 2009), available at <http://www.cookcountycourt.org/publications/pdf/Informational-Guide.pdf>. Both the Circuit Court of Cook County and its predecessors also have created some specialized courtrooms for specific types of criminal offenses or defendants, even prior to the development of problem-solving courts. See ALFRED R. LINDESMITH, THE ADDICT AND THE LAW 90–93 (1965) (drug court); MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 119–240 (2003) (domestic relations court, morals court, and boys’ court); Leslie Baldacci, *200 Defendants Come and Go Daily in Gun Court*, CHI. SUN-TIMES, Dec. 21, 1992, at 7 (gun court). There is a degree of unofficial specialization in the federal courts, primarily through case and opinion assignment. On opinion assignment, see Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 526 (2008).

22. Problem-solving courts have been defined in different ways. According to one scholar, “the essential ingredients are enhanced judicial oversight, lengthier case management (including post-sentencing supervision), and a general philosophy of restorative rather than retributive justice.” Jeffrey A. Butts, *Introduction: Problem-Solving Courts*, 23 L. & POL’Y 121, 121 (2001). A participant in the movement to establish problem-solving courts says of initiatives to establish problem-solving courts that “they all seek to use the authority of courts to address the underlying problems of individual litigants, the structural problems of the justice system, and the social problems of communities.” Greg Berman, “*What is a Traditional Judge Anyway?*” *Problem Solving in the State Courts*, 84 JUDICATURE 78, 78 (2000). On types of problem-solving

within courts, a substantial proportion of American judges each hear a relatively narrow subset of the cases that come to the courts.

Judicial specialization takes different forms, and I should make several distinctions. The first is between long-term and short-term specialization. Some judges have permanent assignments to particular types of cases, including, by definition, judges who serve on specialized courts. Bankruptcy judges hear only bankruptcy cases so long as they retain their positions. In contrast, within state courts, judges often are assigned to particular types of cases for specified or unspecified periods, moving from one subject matter to another over time.²³ The effects of specialization on judges' decisionmaking processes are probably greater when judges are permanently assigned to a particular class of cases. Among other things, judges' awareness that they will continue to hear the same types of cases for a long period can affect their thinking.

The second distinction is between full-time and part-time specialization. Judges who serve solely on specialized courts hear only cases within the jurisdiction of those courts, and judges who specialize within state trial courts usually focus on a single type of case for some period of time. In contrast, some judges move back and forth between a broad docket and a narrower one. This has been true of some of the specialized federal courts, such as the Foreign Intelligence Surveillance Court, whose judges are drawn from the district courts and courts of appeals as needed.²⁴ Similarly, some state trial judges devote only part of their time to the specialized dockets of problem-solving courts such as mental health courts and homeless courts because those dockets do not include enough business to occupy

courts, see GREG BERMAN & JOHN FEINBLATT, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* 8–9, 190–95 (2005); Pamela M. Casey & David B. Rottman, *Problem-Solving Courts: Models and Trends*, 26 *JUST. SYS. J.* 35, 36–49 (2005).

23. On assignment practices and rotation of assignments in the Circuit Court of Cook County (Illinois), see Herbert Jacob, *The Governance of Trial Judges*, 31 *LAW & SOC'Y REV.* 3, 10–15 (1997).

24. Past examples include the Emergency Court of Appeals (which heard cases involving price controls during and after World War II), the Temporary Emergency Court of Appeals (which heard cases involving price controls and other economic regulations in the 1970s and 1980s), the Special Court, Regional Rail Reorganization Act (which heard cases growing out of the reorganization of freight railroads in the Northeast), and the Special Counsel Panel (which chose special counsel to investigate criminal matters in the executive branch). These courts are discussed in Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 *U. PA. J. CONST. L.* 341, 359–67 (2004). On the establishment of the special court under the Regional Rail Reorganization Act of 1973, see *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 102–03 (1974).

judges full time. Even if a judge focuses on a particular subject matter for only one court session a month,²⁵ that focus can shape how a judge approaches cases. But a full-time specialization has greater potential to influence that approach.

The third distinction concerns the breadth of the cases that a specialized court or a subunit of that court hears. Specialization by judges is not a dichotomy. Rather, it falls along a continuum. There is room for disagreement about the relative breadth of different sets of cases, but clearly some specialized judges hear a wider array of cases than others. The public law jurisdiction of the Pennsylvania Commonwealth Court²⁶ and the “hodge-podge”²⁷ jurisdiction of the Court of Appeals for the Federal Circuit are considerably broader than the jurisdiction of the United States Tax Court. A judge who hears a full range of criminal cases and no civil cases is a specialist, but not to the same degree as a judge who hears only cases in which defendants are charged with domestic violence. The extent of any effects of specialization should vary with the breadth of a judge’s specialized field.

A final distinction concerns specialization within criminal law. Subject matter specialization in that field can be similar to specialization in other fields in that it is based on case type. But in criminal law, some courts specialize by defendant type.²⁸ The most widespread examples of specialization by defendant type are juvenile courts. Other defendant-defined courts include homeless courts,²⁹ mental health courts,³⁰ and drug courts that deal with an array of offenses allegedly committed by people who are addicted to drugs

25. At least for several years, the San Diego Homeless Court met once a month. Charlie LeDuff, *Lifting Hurdles as the Homeless Rebound*, N.Y. TIMES, Dec. 29, 2004, at A14.

26. See David W. Craig, *The Court for Appeals—and Trials—of Public Issues: The First 25 Years of Pennsylvania’s Commonwealth Court*, 4 WIDENER J. PUB. L. 321, 323 (1995).

27. Diane P. Wood, Judge, U.S. Court of Appeals for the Seventh Circuit, Generalist Judges in a Specialized World, Speech at the Eighth Annual Judge Irving L. Goldberg Lecture Series (Feb. 11, 1997), in 50 SMU L. REV. 1755, 1765 (1997).

28. The Court of Federal Claims may also be considered a specialist by (civil) defendant type because it hears only cases brought against the federal government.

29. The prototype for homeless courts is the San Diego Homeless Court, established in 1989 primarily to serve the needs of homeless military veterans. See Tony Perry, *Homeless Court Offers New Hope for the Down and Out*, L.A. TIMES, May 1, 2000, at A3.

30. The first mental health court was established in Broward County (Fort Lauderdale), Florida, in 1997. See GINGER LERNER-WREN, NAT’L CTR. STATE COURTS, BROWARD’S MENTAL HEALTH COURT: AN INNOVATIVE APPROACH TO THE MENTALLY DISABLED IN THE CRIMINAL JUSTICE SYSTEM 2 (2000), available at http://www.ncsconline.org/WC/Publications/KIS_ProSol_Trends99-00_FlaMentalPub.pdf.

(rather than with drug offenses).³¹ It is not clear how specialization by subject matter and by defendant type might differ in their effects, but there is a potential for substantial differences.

In a relatively brief analysis of the potential effects of judicial specialization, it is impossible to take these distinctions fully into account. But it is important to keep these distinctions in mind, because any generalizations about the effects of specialization apply more accurately to some forms of specialization than to others.

III. THE POTENTIAL EFFECTS OF SPECIALIZATION

Advocates of judicial specialization regularly cite what they see as the benefits of specialization for courts' work,³² benefits that they usually label as efficiency, expertise, and uniformity. Uniformity refers to minimizing conflicts in interpretations of the law. To the extent that specialization brings uniformity, that effect results from reducing the number of judges who decide cases in a field of law rather than from reducing the range of cases that particular judges hear.³³ In contrast, commentators who associate efficiency and expertise with specialization expect it to result from judges' focus on relatively narrow sets of cases, the dimension of specialization on which this Response focuses. Of course, perceptions of those benefits are largely responsible for the general movement toward specialization in government and society.³⁴

31. The first drug court of this type was established in Miami in 1989. See Michael Isikoff & William Booth, *Miami "Drug Court" Demonstrates Reno's Unorthodox Approach*, WASH. POST, Feb. 20, 1993, at A1; Ronald Smothers, *Miami Tries Treatment, Not Jail, in Drug Cases*, N.Y. TIMES, Feb. 19, 1993, at A6.

32. See, e.g., STEPHEN H. LEGOMSKY, *SPECIALIZED JUSTICE: COURTS, ADMINISTRATIVE TRIBUNALS, AND A CROSS-NATIONAL THEORY OF SPECIALIZATION* 7–19 (1990); Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 330–31 (1991); David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 63–68 (1975); Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377, 377–78; Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745, 747–48 (1981); Daniel J. Meador, *An Appellate Court Dilemma and a Solution Through Subject Matter Organization*, 16 U. MICH. J.L. REFORM 471, 481–82 (1983); Sarang Vijay Damle, Note, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 VA. L. REV. 1267, 1275–79 (2005).

33. For a discussion regarding the distinction between these two dimensions of specialization, see *supra* note 19.

34. For descriptions of these perceived benefits, see, for example, SIMON, *supra* note 17, at 10, 20; ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 1–60 (R.H. Campbell et al. eds., Oxford Univ. Press 1976) (1776).

Efficiency is fairly straightforward. Repeating similar tasks may enhance efficiency by allowing people to develop routines and giving them greater familiarity with their tasks. Thus it seems reasonable to assume that judges who hear only cases involving international trade law process those cases more quickly than judges who hear only occasional international trade cases. Specialization in the judiciary might create certain inefficiencies, because parties would need to litigate jurisdictional boundaries and specialized courts might have too few cases to fully utilize their judges' time. But these inefficiencies have nothing to do with the effects of specialization on judges' thinking, so they can be left aside.

Expertise is not so straightforward. Efficiency is a result; in contrast, expertise is an attribute that might produce certain results. For one thing, any gains in efficiency that result from specialization are partly the product of judges' gaining expertise through concentration on a particular subject matter. What commentators generally mean when they talk about expertise seems to be the possibility that expertise will enhance the quality of court decisions: more expert judges, who know more about the field in which they are deciding cases, are more likely to get decisions right. Commentators make that argument most fervently about fields of law in which they think that judges who lack special expertise have difficulty understanding the issues, especially taxes and patents.³⁵

Getting decisions right might mean multiple things. In most discussions of expertise and specialization, it implicitly refers to applying the law to the facts properly. Alternatively, it might mean making the decision that best reflects a judge's conception of good public policy. Different as those two meanings are, they share the premise that expertise improves judges' capacities to reach decisions that are consistent with what they are trying to accomplish.

Judges might be chosen to serve on specialized courts on the basis of preexisting expertise. This is the regular practice for the federal Tax Court, staffed by people who specialized in tax law as practitioners.³⁶ Some judges on other specialized courts come to those

35. *See, e.g.*, HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 155–59 (1973).

36. For the biographies of sitting and senior Tax Court judges, see U.S. Tax Court, Judges, <http://www.ustaxcourt.gov/judges.htm> (last visited Feb. 24, 2009).

courts with relevant backgrounds.³⁷ If judges lack expertise when they join a court, the expectation is that they will gain it through immersion in the court's work.

It is likely that specialization has some of the positive effects on the quality of decisionmaking that its advocates cite. On the other hand, specialization might have negative effects on quality as well.³⁸ Both the potential positive and negative effects of judicial specialization should be put in a broader framework—a framework that encompasses the variety of ways that specialization in a particular subject matter can affect how judges make decisions and, ultimately, the substance of their decisions. These effects fall into two categories: first, effects relating to judges' immersion in a particular field and judicial expertise, and second, effects relating to the influence of interest groups in the specialized field.

The possible positive impact of specialization on efficiency and on the quality of decisionmaking falls in the first category. Three other possible effects of immersion and expertise, actual and self-perceived, are assertiveness, insularity, and stereotyping.

Assertiveness grows out of the self-perception of expertise. Specialized judges who come to a court with experience in the subject matter of their court's work or who develop that experience as judges can be expected to feel greater confidence in their judgment than their generalist counterparts. Because of this confidence, they are likely to be more assertive than generalists in their policymaking. One possibility is that they will be more willing to overturn administrative decisions.³⁹ Another is that they will be more inclined to make sweeping decisions that change policy substantially.

In his classic book on bureaucracy, Anthony Downs cites insularity as another effect of immersion in a narrow field.⁴⁰ People come to see the decisions they make from the perspective of the field in which they work and give little weight to other perspectives. This

37. See Ralph R. Mabey, *The Evolving Bankruptcy Bench: How Are the "Units" Faring?*, 47 B.C. L. REV. 105, 107, 123 (2005) (bankruptcy judges).

38. E.g., Currie & Goodman, *supra* note 32, at 68–74; Jordan, *supra* note 32, at 748; Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 783–88 (1983); Revesz, *supra* note 19, at 155–65; Damle, *supra* note 32, at 1281–86.

39. E.g., ISAAC UNAH, *THE COURTS OF INTERNATIONAL TRADE: JUDICIAL SPECIALIZATION, EXPERTISE, AND BUREAUCRATIC POLICY MAKING* 131–70 (1998); Bruff, *supra* note 32, at 332; Currie & Goodman, *supra* note 32, at 71.

40. ANTHONY DOWNS, *INSIDE BUREAUCRACY* 103–07 (1967).

tendency can develop in the judiciary as well.⁴¹ One possible manifestation of insularity concerns the authority of higher officials. Within organizations, highly specialized subordinates tend to accord less authority to their superiors than do generalists because they see generalist superiors as less knowledgeable than themselves.⁴² Specialized judges might respond in this way to higher courts staffed by generalists. Indeed, this effect appears to have occurred in the relationship between the Supreme Court and the Court of Customs and Patent Appeals (which was folded into the Court of Appeals for the Federal Circuit in 1982).⁴³

Stereotypes are another possible effect of judges' immersion in a particular type of case. If judges hear a succession of similar cases, they may ascribe the attributes of past cases to current cases. The work of the Foreign Intelligence Surveillance Court is a possible example. Although the surveillance court constitutes part-time duty for the federal judges who sit on it, each of those judges typically hears several dozen requests a year for warrants to conduct electronic surveillance. The surveillance court almost never denies these requests, largely because of the lenient statutory requirements for approval,⁴⁴ so judges may develop a strong expectation that any given warrant request is justified. If all district judges randomly heard warrant requests, that expectation might not be nearly as strong—though even if this were the case, the outcomes might not be much different because of the statutory rules.⁴⁵

In a second category of potential effects, specialization by judges can change the relative success of the political and legal interests that are concerned with the subject matter of court decisions by enhancing the influence of certain interests. Enhanced influence may arise in the selection of judges and in the operation of courts.

41. *E.g.*, Jordan, *supra* note 32, at 748; Damle, *supra* note 32, at 1281–83.

42. JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 91–101 (1989).

43. *See* Lawrence Baum, *Specialization and Authority Acceptance: The Supreme Court and Lower Federal Courts*, 47 *POL. RES. Q.* 693, 693 (1994).

44. *See* James E. Meason, *The Foreign Intelligence Surveillance Act: Time for Reappraisal*, 24 *INT'L LAW.* 1043, 1057 (1990).

45. On the other hand, during the George W. Bush administration the judges on the Foreign Intelligence Surveillance Court demonstrated some independence, and arguably their familiarity with the field helped to foster that independence—or, in the term I have used in this Part, their assertiveness. *See* ERIC LICHTBLAU, *BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE* 164–66 (2008).

In the selection of judges, interest groups that care about case outcomes in a policy area gain a better opportunity to influence the selection process when a court concentrates its efforts on that field.⁴⁶ If a court hears only tax cases, then groups that care about tax policy need not compete with their counterparts in other fields when they try to exert influence over the selection of judges for a particular court. Further, their specialization in a court's field of work enhances their legitimacy as participants in the selection process⁴⁷: who knows more than tax lawyers about the qualifications of prospective judges to decide tax cases?

Other mechanisms operate within courts themselves. Interest groups gain a better opportunity to influence judges who hear only a narrow set of cases.⁴⁸ The lawyers who come before any court shape the attitudes of judges toward the issues they confront in a field of legal policy. For judges who hear cases only in one field, the specialized bar in that field interacts more frequently with the judges than it would with judges who are generalists. In turn, this interaction allows more chances to help shape judges' thinking. And to the extent that judges benefit from the cooperation of lawyers and litigants or care about their approval, specialized judges are dependent on a narrow set of court participants.

This enhanced opportunity for influence may have little effect if the competing interests balance out. But in some areas of law, one side holds a permanent advantage, often because it is more concentrated and thus better organized than its competitor. When government constitutes one side, as it does in courts that review administrative decisions, it often holds the special advantage of selecting judges itself. The president and Senate choose judges for such courts as the Tax Court and the Court of International Trade. Professor Lynn LoPucki has described another basis for advantage in a specific context. As he sees it, because debtor corporations can

46. NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 145 (1994) ("Courts become more attractive targets for special interest groups as their jurisdiction is narrowed."); Revesz, *supra* note 19, at 1147-53. *But see* Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 *BROOK. L. REV.* 67, 97-105 (1995) ("Prevailing theory on specialized courts posits that they frequently are targeted by interest group activity and are more likely than are generalist courts to be 'captured' by powerful interest groups and become indirectly politicized." (footnote omitted)).

47. Bruff, *supra* note 32, at 331-32; Currie & Goodman, *supra* note 32, at 70-71; Dreyfuss, *supra* note 32, at 379-80.

48. Bruff, *supra* note 32, at 332; Dreyfuss, *supra* note 32, at 380.

choose among federal districts when they file for bankruptcy, they can steer cases to districts in which bankruptcy judges are favorable to debtor corporations and their attorneys. And because bankruptcy judges find large corporate bankruptcy cases attractive, they have a strong incentive to adopt those favorable policies.⁴⁹ Whether or not one side has an advantage in its influence over a court, the two sides that appear in litigation may share a point of view and thus jointly shape judges' perceptions. Arguably, this is the case with the preference of the patent bar for a relatively lenient standard of patentability.⁵⁰

This list of potential effects may suggest that the negative effects of judicial specialization outweigh the positive consequences. That conclusion would be premature for several reasons. First, if specialization does increase efficiency and if the expertise that it fosters enhances the quality of decisionmaking, those benefits may outweigh any undesirable effects of specialization.

Second, some potential effects of specialization that seem negative on their face are not necessarily so. Judicial assertiveness sounds negative, but at least under some circumstances it might improve public policy. If specialization strengthens the influence of certain interests over a court's work, sometimes that enhanced influence too might bring about improvement in the quality of policy.

The most important reason to be cautious in reaching conclusions about the desirability of judicial specialization is the limited information that exists on its impact. The existing scholarship provides only a fragmentary understanding of the extent to which the potential effects of judicial specialization—positive, negative, or mixed—actually occur.⁵¹ The dearth of information about the impact of specialization merits consideration.

49. LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 19–24 (2005). For a different view, see Melissa B. Jacoby, *Fast, Cheap, and Creditor-Controlled: Is Corporate Reorganization Failing?*, 54 *BUFF. L. REV.* 401, 403 (2006).

50. Baum, *supra* note 19, at 835.

51. In this respect, judicial specialization is hardly unique among issues concerning the quality of judging and of court performance. In large part, the fragmentary understanding of such issues that scholarship provides reflects formidable methodological challenges, of which measuring quality is perhaps the most serious. On the task of measurement, see David F. Levi & Mitu Gulati, *Judging Measures*, 77 *UMKC L. REV.* 1, 2 (2008) (“In order to achieve a more reliable and useful measurement, judges must be involved in the process of arriving at the right characteristics to measure and the right ways to measure them.”).

IV. ASCERTAINING THE EFFECTS OF SPECIALIZATION

The possibilities that I described in the preceding Part suggest that specialization of judges might have significant effects on their work. Debates over specific proposals for specialized courts and the general movement toward greater specialization in the courts reflect a belief that such effects exist. The empirical evidence on the impact of specialization, however, is limited. A considerable volume of scholarship discusses the performance of a few specialized courts, such as the Court of Appeals for the Federal Circuit,⁵² and types of courts, especially juvenile courts in the states.⁵³ But there are many other courts on whose work scholars have done little research, with the exception (in some instances) of analyses that focus on specific decisions or clusters of decisions.

Even for courts on which there is substantial scholarship, that scholarship typically provides little systematic evidence about how specialization affects the work of courts. Detailed studies of the behavior of specialized courts offer hints, sometimes very good hints, about the impact of specialization. One example is Professor Jonathan Lurie's study of the Court of Appeals for the Armed Forces, a study that examined the court's work in detail over its first three decades and thereby provided a good sense of its role in the military justice system.⁵⁴ But direct comparisons between generalist and specialized courts provide the best evidence about the effects of giving jurisdiction to specialized judges, and only a limited number of such studies exist.

To a degree, the dearth of comparative studies reflects the difficulty of comparing generalist and specialist judges. Sometimes, a good point of reference for comparison does not exist. To return to the example of the Foreign Intelligence Surveillance Court, nobody can really know how specialization has affected the court's review of warrants for surveillance because nonspecialized district judges never

52. See, e.g., John R. Allison & Mark A. Lemley, *How Federal Circuit Judges Vote in Patent Validity Cases*, 27 FLA. ST. U. L. REV. 745, 765–66 (2000); Timothy J. O'Hearn, *Patent Law Reform via the Federal Courts Improvement Act of 1982: The Transformation of Patentability Jurisprudence*, 17 AKRON L. REV. 453, 471–72 (1984).

53. See, e.g., BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 109–65 (1999); ELLEN RYERSON, *THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT* 78–98 (1978); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1187–88 (1970).

54. See JONATHAN LURIE, *PURSuing MILITARY JUSTICE: THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951–1980*, at 71–106 (1998).

carried out this review. A similar difficulty arises for some other specialized courts such as the Court of Appeals for the Armed Forces and the Court of Veterans Appeals.

Even when generalist and specialized courts decide the same types of cases, efforts to compare them can run into measurement problems. The federal district courts and the Tax Court both hear challenges to tax assessments by the Internal Revenue Service at the trial level. For this reason, comparison of the two is attractive. But differences between the two in jurisdiction and procedure complicate the task of comparison.⁵⁵ Because of these differences, intercourt comparisons of the proportions of decisions favoring the Internal Revenue Service and taxpayers are likely to be misleading. Scholars have done useful research comparing the Tax Court and district courts,⁵⁶ but they have not yet provided a clear picture of the impact of specialization on these courts' policies.

Still, meaningful comparisons are possible. In those instances in which jurisdiction is transferred from generalist to specialized courts, scholars can use records of both case outcomes and doctrinal positions to estimate the effects of the jurisdictional change, so long as they take into account possible changes in the composition of the cases that go to court. The transfer of patent infringement litigation from the federal courts of appeals to the Court of Appeals for the Federal Circuit is one instance in which there is enough evidence to make clear how the jurisdictional change affected judicial policy.⁵⁷

55. See David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 24–29. The most important difference is that the Tax Court hears cases brought by people before they have paid their taxes, while the district courts hear lawsuits to recover money that people have already paid. This difference in itself ensures that the samples of cases heard by the Tax Court and the district courts are not entirely comparable.

56. See, e.g., Robert M. Howard, *Comparing the Decision Making of Specialized Courts and General Courts: An Exploration of Tax Decisions*, 26 JUST. SYS. J. 135, 136–41 (2005); Daniel M. Schneider, *Assessing and Predicting Who Wins Federal Tax Trial Decisions*, 37 WAKE FOREST L. REV. 473, 474–75 (2002); Scott Hendrickson, *Examining Judicial Independence: Article I v. Article III Courts* 94–145 (Aug. 2006) (unpublished Ph.D. dissertation, Washington University) (on file with the *Duke Law Journal*). For another comparative study of review of administrative decisions by generalist and specialized federal courts, see UNAH, *supra* note 39, at 131–70.

57. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 337–38 (2003) (discussing the shift to the Court of Appeals for the Federal Circuit and the resulting policy changes); Matthew D. Henry & John L. Turner, *The Court of Appeals for the Federal Circuit's Impact on Patent Litigation*, 35 J. LEGAL STUD. 85, 85–91 (2006) (same); Glynn S. Lunney, Jr., *Patent Law, the Federal Circuit, and the Supreme Court: A Quiet Revolution*, 11 SUPREME CT. ECON. REV. 1, 1–7 (2003) (same); Gerald Sobel, *The Court*

Further, with appropriate controls for relevant differences, scholars can systematically compare generalist and specialized courts that hear the same kinds of cases. If comparisons of case outcomes between the district courts and the Tax Court are misleading, analysis of the legal doctrines they have adopted would produce more meaningful information with which to compare their policy positions.

The states provide abundant opportunities for analysis of both changes that occur when jurisdiction over a field is transferred from generalist to specialized courts and differences between generalist and specialized courts that hear similar cases. Studies can compare the processes and outputs of specialized courts with those of the generalist judges who formerly handled the same type of case in the same jurisdiction. Further, because each type of problem-solving court exists in only a limited number of jurisdictions, their work can be compared with the work of generalist courts in similar jurisdictions. One set of scholars took advantage of that opportunity in their study of the Midtown Community Court in New York City, comparing its actions with those of a generalist court in the same borough.⁵⁸ Similar studies could be done of an array of other specialized courts that exist in some states and localities but not in others.

Because this is an important issue, scholars could make a valuable contribution by adding to the body of empirical research on the impact of judicial specialization. Because of the difficulties involved in analyzing this impact and the limited scholarly attention that is given to this task, however, any growth in this body of research is likely to be slow.

In the meantime, the limited knowledge about the impact of specialization suggests the need for both scholars and participants in the policymaking process to be careful when making judgments about that impact. In debates over proposals for specialized courts, arguments about good or bad consequences of specialization are common even in the absence of much evidence about those

of Appeals for the Federal Circuit: A Fifth Anniversary Look at Its Impact on Patent Law and Litigation, 37 AM. U. L. REV. 1087, 1092–105 (1988) (same).

58. MICHELE SVIRIDOFF ET AL., DISPENSING JUSTICE LOCALLY: THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT 109–38 (2000). The court was established to hear cases involving criminal offenses such as prostitution and disorderly conduct that advocates of the court perceived as damaging to the community and inadequately handled by the courts. *Id.* at 1–2.

consequences.⁵⁹ In particular, people who discuss the merits of proposals for specialized courts tend to conclude from anecdotal evidence or no direct evidence at all that certain forms of specialization improve courts' work. That tendency is reflected in the speed with which some types of specialization, such as juvenile courts and drug courts, have diffused from place to place.⁶⁰ Both policymakers and scholarly commentators should be slow to reach conclusions about the desirability of judicial specialization in its various forms until scholars add substantially to the current body of knowledge about the effects of specialization on the behavior of judges.

59. See, e.g., FRIENDLY, *supra* note 35, at 154.

60. In the opinion of one judge, "Perhaps the most startling thing about the drug court phenomenon is that drug courts have so quickly become fixtures of our jurisprudence in the absence of satisfying empirical evidence that they actually work." Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1479-80 (2000).