Texas Law Review
See Also
Volume 94

Response

Too Human?
Personal Relationships and Appellate Review

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We might all be legal realists.[1] But it doesn't always feel that way.[2] The starkness of deviations from legalist ideals of judges as disinterested geometers[3] or Herculean synthesizers[4] can still surprise. One recent study created a sensation[5] by finding that the probability of a pro-prisoner decision

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1. LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960 229 (1986) ("The statement ['We are all realists now'] has been made so frequently that it has become a truism to refer to it as a truism."); Brian Leiter, *American Legal Realism*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 249, 249 (Dennis Patterson ed., 2d ed. 2010) (explaining how, given "the legacy of realism in both the practice and teaching of law," "it is often said that 'we are all realists now'"); Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 467 (1988) (reviewing KALMAN, *supra*) ("All major current schools of thought are, in significant ways, products of legal realism.").

2. *Cf.* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 262 (1997) ("Few scholars accept Langdellian determinate formalism, but most accept that the law constrains decisions, by defining the reasons acceptable in adjudication and guiding the weight accorded the applicable reasons.").

3. *See* Ernest J. Weinrib, 77 IOWA L. REV. 403, 410 (1992) (describing Aristotle's comparison of a judge correcting injustice "to a geometer" who, when confronted with "a line divided into unequal segments," "re-establishes the midpoint of the line" to effect "quantitative equality").

4. RONALD DWORKIN, LAW'S EMPIRE 239–40 (1986) (explaining how a posited "Hercules," a "judge of superhuman intellectual power and patience," "must find, if he can, some coherent theory about legal rights . . . such that a single political official with that theory could have reached most of the results the precedents report").

5. *See, e.g.*, Kevin Lewis, *Judge Cranky, Presiding: Surprising Insights from the Social Sciences*, BOSTON GLOBE (Apr. 24, 2011), http://www.boston.com/bostonglobe/ideas/articles/2011/

by Israeli parole boards spiked immediately after the board members took a food break.[6] A straw man ascribed to realism by critics—the notion that "how a judge decides a case on a given day depends primarily on what he or she had for breakfast"[7]—suddenly seemed closer to reality than previously thought.[8] In *If You Can't Beat 'Em, Join 'Em? How Sitting by Designation Affects Judicial Behavior*,[9] Mark Lemley and Shawn Miller marshal evidence for another dramatic deviation from legalist ideals—namely, that the stringency of appellate review might be substantially affected by personal relationships between appellate and trial judges that form when district judges sit by designation on the appellate court.[10]

The appellate court studied by Lemley and Miller is the United States Court of Appeals for the Federal Circuit.[11] The category of legal question is patent claim construction,[12] the judicial process of determining a patent's literal scope that lies at the center of much patent litigation.[13] Many

04/24/judge_cranky_presiding/ [http://perma.cc/V5YJ-VQZG] ("Justice is supposed to be blind. However, a new study suggests that it is often tired and hungry instead."); Christopher Shea, *Week in Ideas: Beware of Hungry Judges*, WALL STREET J. (Apr. 16, 2011), http://www.wsj.com/articles/SB10001424052748703551304576260911338213064 [http://perma.cc/K84J-R4TC] ("A study of parole decisions in Israel indicates that if a judge hadn't taken a food break recently, the petitioner stood a greater chance of losing.").

6. Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. U.S. 6889, 6890, 6890 fig.1 (2011) ("We find that the likelihood of a favorable ruling is greater at the very beginning of the work day or after a food break than later in the sequence of cases.").

7. AMERICAN LEGAL REALISM, at xiv (William W. Fisher III et al. eds., 1993) (observing that "no Realist, in fact, took the position that a judge's diet is critical to his or her rulings"); *see, e.g.*, Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 993 (1993) (describing Legal Realism as a theory under which judges "decide who should win . . . on the basis of their digestion"). *See generally* Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 236 n.16 (1990) (suggesting that the "what the judge ate for breakfast" trope might trace to "a statement by [Roscoe] Pound in which he contrasts a system of law to the arbitrariness of 'cadi' justice").

8. Danziger et al., *supra* note 6, at 6892 ("[O]ur findings support the view that the law is indeterminate by showing that legally irrelevant situational determinants—in this case, merely taking a food break—may lead a judge to rule differently in cases with similar legal characteristics.").

9. Mark A. Lemley & Shawn P. Miller, *If You Can't Beat 'Em, Join 'Em? How Sitting by Designation Affects Judicial Behavior*, 94 TEXAS L. REV. 451 (2016).

10. *See id.* at 470 ("The data, then, strongly support the hypothesis that district judges who sit by designation on the Federal Circuit are thereafter significantly less likely to have their claim construction decisions reversed by that court."); *id.* at 453 (contending that the reduced reversal rate for judges who have sat by designation "is not a function of learning by the district judge but rather reflects a personal connection between the judge and the members of the reviewing court").

11. *Id.* at 458 ("In this study, we test whether judges who sit by designation on the Federal Circuit on at least one case in which claim construction is at issue are less likely to be reversed by the Federal Circuit thereafter.").

12. *Id.*

13. David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 MICH. L. REV. 223, 228 (2008) ("Claim construction is often the centerpiece of patent litigation."); *see also* John M. Golden, *Construing Patent Claims According to Their "Interpretive Community": A Call for an Attorney-Plus-Artisan Perspective*, 21

commentators point to high Federal Circuit reversal rates for district judges' claim constructions as evidence of severe problems in this legal area.[14] Before a 2005 en banc opinion on claim construction, *Phillips v. AWH Corp.*,[15] studies commonly found that the Federal Circuit reversed at least about one-third of district judges' challenged claim constructions.[16] A later study by Jonas Anderson and Peter Menell indicates that reversal rates dropped to 24.0% after *Phillips*.[17] But complaints of a lack of sufficient deference to district judges' claim constructions continued, and the U.S. Supreme Court ultimately intervened with a 2015 decision holding that the Federal Circuit must replace its previously purely de novo review of claim construction with a hybrid approach under which ultimate questions of claim construction are reviewed de novo but associated fact findings are reviewed only for clear error.[18]

Lemley and Miller add a new wrinkle to concerns with claim construction by suggesting that reversal rates for particular district judges depend strongly on whether the judges have previously sat with the Federal Circuit by designation.[19] More specifically, Lemley and Miller find that, from January 2002 to December 2014, the average reversal rate for a district judge who had not previously sat by designation with the Federal Circuit was 33.5% overall and 36.0% for district judges who later sat by designation,[20] whereas the average post-designation reversal rate for the 43 district judges who sat with the Federal Circuit was 15.2%.[21] Further, at least some evidence suggests that this discrepancy in reversal rates reflects the development of personal connections between appellate and trial judges, rather than any learning by district judges while sitting on appeals.[22] The Federal Circuit reversed a district court claim construction in only 1 of 27 appeals in which the Federal Circuit panel included an appellate judge who had sat on a prior panel with the district judge whose construction was under

HARV. J.L. & TECH. 321, 322 (2008) ("Determination of the scope of a patented invention is one of the most contentious and difficult tasks of modern patent law.").

14. *See* J. Jonas Anderson & Peter S. Menell, *Informal Deference: A Historical, Empirical, and Normative Analysis of Patent Claim Construction*, 108 NW. U. L. REV. 1, 4–5 (2014) ("Much of the criticism [of claim construction practice] originates from the high reversal rates of claim construction appeals—ranging from 35% to 44%.").

15. 415 F.3d 1303 (Fed. Cir. 2005) (en banc).

16. J. Jonas Anderson & Peter S. Menell, *Empirical Studies of Claim Construction*, *in* 2 RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY (Ben Depoorter, Peter S. Menell & David L. Schwartz eds., forthcoming) (manuscript at 6–10) (chapter on file with author) (reviewing empirical studies of claim construction reversal rates).

17. *Id.* (manuscript at 8) (finding that Federal Circuit claim construction reversal rates fell from 37.2% before *Phillips* to 24.0% after *Phillips*).

18. Teva Pharms. v. Sandoz, Inc., 135 S. Ct. 831, 842 (2015).

19. Lemley & Miller, *supra* note 9, at 452.

20. *Id.* at 460 tbl.1, 461 (noting the average pre-designation claim-construction reversal rate for district judges who later sat by designation).

21. *Id.* at 460 tbl.1 (providing summary figures on claim construction reversals).

22. *Id.* at 477.

review.[23] In the 52 appeals for which the Federal Circuit panel did not include an appellate judge who had been a co-sitter with the district judge, the reversal rate was 21.2%, about equal to the general post-*Phillips* reversal rate observed by Anderson and Menell.[24] These results are remarkable given how limited an interaction sitting by designation generally entails: when district judges have sat with the Federal Circuit, they have typically done so for no more than two consecutive days[25]—although, of course, in association with those sittings, there were presumably months more of contacts through correspondence or otherwise.

The striking differences between district judges' post-designation and no-prior-designation reversal rates suggest a possible "post-designation deference" effect. In accordance with this effect, the claim construction reversal rate for a district judge will plummet after the judge sits by designation with the Federal Circuit—at least in those later appeals in which the Federal Circuit panel includes a judge who sat with the district judge on an appeal. If one cherishes an idealized view of judicial review under which appellate court decisions reflect only information that is of record or of an essentially indisputable nature,[26] a substantial post-designation deference effect is disturbing. Moreover, to the extent reversal rates are close to zero for appellate panels that include a judge who has relatively recently sat with the trial judge, there is cause to ask whether appellate co-sitters should recuse themselves from panels reviewing decisions of the relevant trial judge.[27] Finally, there is the question of any post-designation deference effect's generality. To what extent does it apply to issues beyond claim construction and to appellate courts beyond the Federal Circuit? According to government figures, about three hundred district judges are designated to sit on circuit courts annually,[28] and many of these assignments are intracircuit—

23. *Id.* at 472 tbl.5 (focusing on post-designation claim construction reversal rates).

24. *Id.*; *see supra* text accompanying note 17.

25. *See U.S. Court of Appeals for the Federal Circuit Visiting Judges,* U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, http://www.cafc.uscourts.gov/sites/default/files/judicial-reports/vjchartforwebsite2006-2015.pdf [http://perma.cc/3HXL-EXFG] [hereinafter "Federal Circuit Visiting Judges"] (listing district court and regional circuit judges who have sat by designation on the Federal Circuit since September 2006).

26. *Cf.* FED. R. EVID. 201(b) (providing that a "court may judicially notice a fact that is not subject to reasonable dispute").

27. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 877 (2009) (noting that recusal is required under "circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable'" (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975))); John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 243 (1987) ("[A] judge not shown to be biased must still decamp if 'his impartiality might reasonably be questioned.'" (quoting 28 U.S.C. § 455(a) (1982))).

28. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS tbl.V-2 (2014), http://www.uscourts.gov/statistics/table/v-2/judicial-business/2014/09/30 [http://perma.cc/VQR4-75KS] (reporting that 195 active district judges and 109 senior district judges participated in the disposition of 3,507 cases by courts of appeals from October 1, 2013, to September 30, 2014); ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS tbl.V-2 (2013), http://www.uscourts.gov/statistics/table/v-2/judicial-business/2013/09/30 [http://perma.cc/WZ5J-

i.e., involving assignment of a district judge to a panel of the regional court of appeals that generally reviews the district judge's opinions.[29] Hence, a post-designation effect could have widespread significance.

Of course, one should be wary of running ahead of the data. Even with respect to the Federal Circuit, there is cause for caution. First, there is the moderate size of Lemley and Miller's core sample, one of Federal Circuit opinions that review claim constructions by district judges who have at some point sat by designation on the circuit. For some purposes, Lemley and Miller make the relevant sample even smaller by restricting their attention to reviews of decisions by district judges who, while sitting by designation, have participated in an appellate decision on claim construction.[30] Lemley and Miller count 43 district judges who have sat by designation on the Federal Circuit and had a claim construction "reviewed by the Federal Circuit during the period of [their] study."[31] Only 33 of these participated in an appellate decision on claim construction, and only 23 of the 33 made a later trial-level claim construction decision that the Federal Circuit reviewed.[32] Likewise, although Lemley and Miller examine a total of 1,151 Federal Circuit opinions,[33] only 190 of these opinions "reviewed claim construction decisions rendered by [district court] judges who sat with the Federal Circuit by designation on at least one claim construction appeal. . . ."[34] Further, only 79 of the 190 issued after the relevant judges sat by designation.[35] A final point is that a significant driver of the overall

GFL6] (reporting that 192 active district judges and 103 senior district judges participated in the disposition of 3,966 cases by courts of appeals from October 1, 2012, to September 30, 2013).

29. Only the "Chief Justice of the United States may designate and assign temporarily a district judge of one circuit for service in another circuit," 28 U.S.C. § 292(d) (2012), and the Chief Justice has recently approved intercircuit assignments of district *and* circuit judges at a rate of only about 200 per year. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE FEDERAL BENCH IN 2014 – ANNUAL REPORT (2014), http://www.uscourts.gov/statistics-reports/federal-bench-2014-annual-report-2014 [http://perma.cc/KJ6C-FJF8] (reporting that, from October 2013 through September 2014, "the Chief Justice approved 215 intercircuit assignments of 125 Article III judges"); ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDGES AND COURT STAFF – ANNUAL REPORT (2013), http://www.uscourts.gov/statistics-reports/judges-and-court-staff-annual-report-2013 [http://perma.cc/8BWW-X2SL] (reporting that, from October 2012 through September 2013, "the Chief Justice approved[] 198 intercircuit assignments"). Thus, even if all recent intercircuit assignments involved district judges, that would mean that each year about one hundred district judges sit by designation on intracircuit appellate panels.

30. Lemley & Miller, *supra* note 9, at 468 (describing a "restricted data set composed only of decisions by district judges who ever sat by designation on a claim construction appeal").

31. *Id.* at 458 & n.40 (noting the 43 district judges in their study and explaining the discrepancy from a total of "47 different district court judges [who] sat by designation" on the Federal Circuit during the relevant time period).

32. Lemley & Miller, *supra* note 9, at 468 n.56 ("Of the 33 judges who sat by designation on a claim construction appeal, 23 made claim construction decisions as district judges after that experience which were subsequently reviewed by the Federal Circuit.").

33. *Id.* at 458.

34. *Id.* at 459.

35. *Id*. An additional 75 of the 1,151 Federal Circuit opinions reviewed claim construction decisions by district judges who sat with the Federal Circuit but were not involved in a claim

results might be an even smaller subset of 27 opinions issued by panels that included a circuit judge who had previously sat on a panel with the specific district judge whose trial-level decision was under review.[36] In short, Lemley and Miller's core sample appears decently sized for providing their main descriptive results but unsurprisingly shows strain when Lemley and Miller try to tell a specific causal story.

A major hurdle to attributing reduced reversal rates to a post-designation deference effect is the Federal Circuit's 2005 opinion in *Phillips*, which appears to be an independent cause of reduced reversal rates and which issued during Lemley and Miller's 2002 to 2014 study period.[37] In part because the Federal Circuit's use of district judges appears to have peaked in the years immediately following *Phillips*,[38] the periods in which we can expect to see a post-*Phillips* effect and a post-designation deference effect substantially overlap. Thus, the posited effects are difficult to disentangle. Nonetheless, Lemley and Miller provide some assurance: in regressions on their overall 1,151-opinion dataset, inclusion of a variable for whether the decision occurred after *Phillips* does not wash out the statistical significance of sitting by designation.[39]

But Lemley and Miller themselves note that there are selection-effect concerns with respect to their regressions: the small group of judges selected to sit by designation might differ in relevant ways from the larger sample of judges not selected.[40] An initial response to this concern is that the average pre-designation claim construction reversal rate for district judges who sat by designation on the Federal Circuit was 36.0%, somewhat higher than the average reversal rate of 33.2% for "judges who never sat by designation."[41] This fact suggests that, before sitting by designation, judges who sat by designation were at least as likely to have their claim constructions reversed on appeal as judges who never sat by designation. Thus, inherent aptitude would seem not to explain the relatively low post-designation reversal rates for judges who sat by designation.

There remains, however, the tricky business of fully disentangling any post-designation and post-*Phillips* effects while at the same time controlling for potential differences between judges. Toward this end, Lemley and

construction decision while doing so, and 10 of these 75 opinions issued post-designation. *Id.* at 473 tbl.6 (reporting observations for district judges who did not participate in a claim-construction decision at the Federal Circuit).

36. *Id.* at 472 & tbl.5 (reporting a reversal rate of less than 4% when the Federal Circuit panel included a judge who had previously sat with the district judge).

37. *See supra* text accompanying notes 14–16.

38. *See* Federal Circuit Visiting Judges, *supra* note 25 (listing 50 instances of 47 different district judges sitting by designation from September 2006 through March 2015, with 70% of these instances occurring between September 2006 and December 2008).

39. Lemley & Miller, *supra* note 9, at 470 (describing results for regressions controlling for the time of the Federal Circuit decision).

40. *Id.* at 467 (discussing "the potential problem of selection bias").

41. *Id.*

Miller try regressions on the "restricted data set" of 190 opinions reviewing claim constructions by district judges who at some time sat by designation.[42] Here, inclusion of a post-*Phillips* variable washes out the statistical significance of sitting by designation as a predictor of subsequent reversal rates.[43] Lemley and Miller nonetheless assert that *Phillips* "cannot explain" away all of the apparent post-designation effect by pointing to a sizable and statistically significant difference between post-*Phillips* reversal rates for "judges who had already sat by designation" and those "who would, but had not yet" sat by designation.[44] With this data, however, there could still be confounding variables, such as distinctions between judges or case types, that help account for the observed difference. Further, analysis based on strict pre-*Phillips* and post-*Phillips* distinctions is complicated by the fact that decisive reduction in reversal rates after *Phillips* apparently did not occur immediately but instead only after several months.[45] Failure to account for this apparent lag in the onset of a *Phillips* effect could quite generally result in understatement of the effect of *Phillips* and overstatement of the effect of sitting by designation. In short, Lemley and Miller ultimately make a substantial but not watertight case for a post-designation deference effect.

Regardless, Lemley and Miller do enough to stoke questions about the potential generality and normative significance of a post-designation deference effect. Assuming there is such an effect, one might wonder whether the effect is specific to claim construction. Likewise, one might wonder how such an effect interacts with standards of review. By contending that their study gives "insight into how an informal deference regime might operate,"[46] Lemley and Miller suggest that, if an issue were subject to a more formal deference regime such as clear-error review,[47] appellate decisions might not evidence as much sensitivity to personal ties between judges.[48] On the other hand, one could imagine that informal deference survives and supplements formal deference. The extent to which informal deference and formal deference are substitutes or complements is a question for future study.

A further question is whether Lemley and Miller's results are Federal-Circuit-specific. They might be. Compared to regional circuit judges and the district judges within their circuits, Federal Circuit judges are uniquely

42. *Id.* at 468 ("To further eliminate the possibility of selection bias, we constructed a second, more restricted data set . . . .").

43. *See supra* note 35.

44. Lemley & Miller, *supra* note 9, at 470.

45. Anderson and Menell's data suggest that, in fact, claim-construction reversal rates spiked upward in the relatively immediate aftermath of the Federal Circuit's *Phillips* decision and only later fell decisively to a substantially lower characteristic level than tended to prevail before *Phillips*. *See* Anderson & Menell, *supra* note 16, at 41–42 figs.2 & 3 (showing rises in per-claim-term and per-case claim construction reversal rates immediately after *Phillips*).

46. Lemley & Miller, *supra* note 9, at 478.

47. *See supra* text accompanying note 18.

48. *See* Lemley & Miller, *supra* note 9, at 478.

isolated from the district judges whose patent-case decisions they review. The Federal Circuit's national jurisdiction over patent appeals means that the circuit reviews the work of district courts dispersed across the country.[49] There are no district judges with whom Federal Circuit judges have naturally close relations. No district judges hear trials in the Federal Circuit's courthouse in Washington, D.C. The only judicial co-occupants of this courthouse are the Article I judges of the Court of Federal Claims,[50] who, not having been appointed under Article III of the U.S. Constitution, may not sit by designation on the courts of appeals.[51]

Compared to Federal Circuit judges, regional circuit judges might have many more opportunities to interact with the district judges whose opinions they regularly review. As Lemley and Miller note, regional circuit judges "see the mill run of appeals from district judges within their circuit" and "have regular conferences that include district judges."[52] Thus, a district judge likely has less need to sit by designation to establish a personal contact with a regional circuit judge that could generate informal deference, a likelihood that perhaps helps prevent any strong post-designation deference effect when district judges sit by designation in their regional circuits.[53] Alternatively, in some circuits, the practice of having district judges sit by designation might reach a critical mass at which all district judges benefit from a common collegial glow.[54] More frequent elevation of district judges

49. John M. Golden, *The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 664 (2009) ("Since October of 1982, a single United States court of appeals, the Court of Appeals for the Federal Circuit, has had jurisdiction over all appeals from district courts in cases 'arising under an Act of Congress relating to patents.'" (quoting 28 U.S.C. § 1338(a) (2000))).

50. *See* GEORGE E. HUTCHINSON, THE HISTORY OF MADISON PLACE: LAFAYETTE SQUARE, WASHINGTON, DC 1 (2d ed. 2012) ("Today, the Howard T. Markey National Courts Building and two houses . . . are part of the federal courts campus of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Federal Claims."); John B. Pegram, *Should the U.S. Court of International Trade Be Given Patent Jurisdiction Concurrent with That of the District Courts?*, 32 HOUS. L. REV. 67, 94 (1995) ("The Court of Federal Claims' principal office and its judges' official duty station is in Washington, D.C., where it shares a courthouse with the Federal Circuit.").

51. Nguyen v. United States, 539 U.S. 69, 72, 74–76 (2003) (holding that a judge from "an Article IV territorial court" was not authorized to sit by designation on a U.S. Court of Appeal); *see also* DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 33.5 (6th ed. 2015) ("Only Article III judges may sit by designation."); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 762 (2004) (noting the Supreme "Court's consistent assumption that Article I judges may not serve alongside Article III judges in constitutional courts").

52. Lemley & Miller, *supra* note 9, at 479.

53. *Id.* at 480 ("[R]egional circuit judges may already have the information they need to engage in informal deference from their other interactions."); *see also* Stephen Easton, *Losing Your Appeal*, 42 FED. LAW. 24, 31 (1995) (contending that appellate judges "are not fond of upsetting" intracircuit district judges by reversing them because "[a]ppellate judges attend conferences with the trial judges from their jurisdictions, socialize with them, and call upon them for assistance").

54. *Cf.* James J. Brudney & Corey Ditslear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 LAW & SOC'Y REV. 565, 572 & tbl.2 (2001) (observing that, from 1987 to

to the regional circuits could operate similarly.[55] In short, in the regional circuits, various other circumstances might displace or swamp a judge-specific post-designation deference effect.

Whatever the breadth and reality of any post-designation deference effect, there is an ultimate normative question. To what extent is such an effect problematic? As noted above, Lemley and Miller provide evidence suggesting that the observed discrepancy between pre-designation and post-designation reversal rates is not well explained by any learning that district judges attain while sitting by designation.[56] But Lemley and Miller posit that there might be learning on the part of the circuit judges, learning that could provide an at least arguably benign explanation for a post-designation deference effect.[57] Working with a district judge on appellate cases might provide Federal Circuit judges with specific information about the soundness of the district judge's judgment, thereby providing understandable grounds for greater than average confidence in the district judge's decisions. Particularly if one believes that Federal Circuit reversal rates are suspiciously high,[58] informal deference to district judges who have sat by designation might seem a partial, albeit haphazard, corrective to distrust that results from the Federal Circuit's atypical isolation from trial courts.[59] Continuing in this vein, one might compare a post-designation deference effect to the effect of public reputations developed by some judges through their opinions, expertise, or scholarly writing—reputations that can cause their judicial rulings or reasoning to carry greater than normal weight with other judges.[60] Finally, one could contend that, as long as there is no substantive or party-oriented bias associated with a post-designation deference effect, it is not a matter of great concern from a social-welfare perspective. Without bias, the argument could go, the effect would not alter average *ex ante* expectations

1993, "the Sixth and Tenth Circuits made use of [district judges] in more than 30% of panel decisions").

55. *Cf.* Elisha Carol Savchak et al., *Taking It to the Next Level: The Elevation of District Court Judges to the U.S. Courts of Appeals*, 50 AM. J. POL. SCI. 478, 479 (2006) ("43.6% of the appeals court judges serving from 1946 to 1995 were elevated from the district courts."); *cf. also* John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 GEO. WASH. L. REV. 553, 573 (2010) (noting that "appointment of four D.C. Circuit judges to the Supreme Court" might help explain "cessation of the D.C. Circuit's time of high reversal" in the 1970s and 1980s).

56. *See supra* note 10 and accompanying text.

57. Lemley & Miller, *supra* note 9, at 478 (contending that appellate judges' "giv[ing] more credence to people and decisions they believe are smart and trustworthy . . . might not be a bad thing").

58. *See supra* text accompanying notes 14–18.

59. *Cf.* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 CASE W. L. REV. 769, 796 (2004) (contending that increased use of visitors on Federal Circuit panels could help "acquain[t] the court with practices elsewhere").

60. *See* Akhil Reed Amar, Heller*,* HLR*, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 149 (2008) ("Inferior court rulings are in general merely persuasive authorities, entitled to interpretive weight depending on factors such as . . . the legal reputations of their authors . . . .").

about litigation outcomes and therefore, under certain rational-actor models, would not significantly distort the out-of-court behavior that the law fundamentally seeks to regulate.[61]

Such arguments might suffice to show that a post-designation deference effect is unlikely to be the legal system's greatest concern. On the other hand, they fail to show that the effect is problem free. First, the analogy to the posited influence of judges' positive public reputations is imperfect because judges' public reputations are likely more transparent in their effects and subject to readier adversarial checks. An attorney knows how to marshal counter-authority and counter-argument to weigh against the reasoning of a Learned Hand or Henry Friendly (however formidable the task[62]), but the same attorney might wonder how to counterbalance more amorphous, perhaps more unconsciously operative impressions created by an appellate judge's personal and largely private contacts with the trial judge. Second, even if a post-designation deference effect is not strong enough to require an appellate judge's recusal, its haphazard reduction of the prospects for certain individual appeals could harm dignitary or other process-centered values that rights to appeal are meant to serve.[63] Third, widely varying degrees of informal deference for district judges could exacerbate forum shopping by complainants who anticipate having less interest in pursuing appeals. Finally, the proposition that a post-designation deference effect does not generate substantive or party-oriented bias could be wrong. Generally speaking, chief judges' discretion to appoint district judges, particularly intracircuit judges, does not appear to be very tightly regulated.[64] Further, at least one empirical study has suggested that certain chief judges have used

61. *Cf.* John M. Golden, *Principles for Patent Remedies*, 88 TEXAS L. REV. 505, 580 (2010) (noting "classic arguments that . . . average correctness [of court-awarded damages] suffices to provide proper incentives").

62. *See* John Minor Wisdom, *Views of a Friendly Observer*, 133 U. PA. L. REV. 63, 63–64 (1984) ("Within my lifetime, except for the giants (Holmes, Brandeis, and Cardozo) and possibly Learned Hand, no federal appellate judge has commanded more respect for his opinions and his writings than Henry Friendly.").

63. *See* Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 119–20 (1978) (discussing due process interests in "human dignity" that uphold the importance of "the individual" against interests in "expediency, convenience and ease of administration"). *But see* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1213–14, 1218 (expressing skepticism about the interest of "most individuals" in "most procedural issues" and contending that procedures championed as "fair" commonly "serv[e] an obvious instrumental purpose"); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 482 (1986) (concluding that most allegedly non-instrumental values associated with due process "are inherently tied to the instrumental justification").

64. Brudney & Ditslear, *supra* note 54, at 572 (observing that neither statutory language nor circuit rules provide much in the way of "standards for determining when [district judge] service is appropriate or how district judges are to be selected"); Todd C. Peppers et al., *Random Chance or Loaded Dice: The Politics of Judicial Designation*, 10 U. N.H. L. REV. 69, 75 (2012) (noting the absence of general rules requiring random assignment of visiting judges to appellate panels).

their appointment power in ideologically biased ways.[65] At least in principle, if there is a real post-designation deference effect, a chief judge could use temporary appointments of judges to sit by designation as a means not only to stack appellate panels but also to generate more deferential appellate treatment of the decisions of trial judges whose decision making the chief judge tends to favor. Likewise, if a chief judge is viewed as more likely to invite jurisprudential favorites to sit by designation, a trial judge seeking such an appointment might have incentive to shape holdings and reasoning accordingly.

These concerns with the potential procedural and outcome-oriented consequences of a post-designation deference effect suggest the possible desirability of considering closer regulation or, at least, scrutiny of both the designation of visiting judges and the later assignment of appellate panels that review the decisions of such a judge. Alternatively, one might try to counter concerns about post-designation deference by instituting a more formal deference regime or by strictly insisting on a regime of no deference, formal or informal. In this respect, one might wonder whether formal deference regimes that have developed in administrative law—for example, arbitrary-or-capricious review or *Chevron* deference—partly serve to correct for the relative foreignness of such agencies to the federal judiciary, a foreignness that could otherwise foster excessively stringent judicial review or arbitrary oscillations in informal deference.[66] On the other hand, without additional regulation, mere attention to the possibility of a post-designation deference effect could largely dissolve the concerns it raises.[67] Circuit judges might react to the recognition of this potential effect by consciously working to override any unconscious bias or other concerns associated with it.

In sum, Lemley and Miller's study provides striking descriptive data and intriguing support for a post-designation deference effect on appellate judging. At the very least, Lemley and Miller's evidence for appellate decision making's responsiveness to personal contacts reminds us that judges

65. Peppers et. al., *supra* note 64, at 90 (concluding that empirical study of over three thousand appellate cases from 1925 to 1988 provides "clear and consistent evidence that chief judges, in making designation decisions, tend to choose individuals with similar ideologies"); *cf.* Brudney & Ditslear, *supra* note 50, at 567 (noting that, in the cases studied, "district judges participating on appellate courts . . . were significantly more likely . . . to have been appointed by Democratic presidents" than "their appellate colleagues").

66. *Cf.* Steve R. Johnson, *The Phoenix and the Perils of Second Best: Why Heightened Appellate Deference to Tax Court Decisions Is Undesirable*, 77 OR. L. REV. 235, 274 (1998) (concluding that "at least some appellate judges are likely to feel uncomfortable according more deference to Tax Court decisions than to district court decisions" because "federal district court and appellate court judges are fellow Article III judges" and "have more points of contact . . . than Tax Court judges" and federal appellate judges).

67. *Cf.* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 38 (2007) ("Training could help judges understand the extent of their reliance on intuition and identify when such reliance is risky—the necessary first steps at self-correction.").

are human.[68] Whether judges are "too human" in relevant respects and how to respond to their humanity are questions with which society will continue to grapple.

68. *Cf.* Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 326 (2002) (discussing a statement by Judge Leon Higginbotham, Jr., that a judge "must have neighbors, friends and acquaintances" and that the "ordinary results of such associations and the impressions they create . . . are not the 'personal bias or prejudice' to which the [judicial disqualification] statute refers" (internal quotation marks omitted)); Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17, 23 (1931) (stressing "the immense importance, the inescapable operation, of the personal element in court justice").