

Schedule

June 15: Session One

8:00 Breakfast & Registration

8:30 Welcome

Dean Joseph D. Kearney, Marquette University Law School

8:35 **Panel One: Historical Perspectives**

Development of the Harmless Error Rule

Roger A. Fairfax, Associate Professor, George Washington University Law School

Stories of Crime, Trials, and Appeals in Civil War Era Missouri

Frank O. Bowman III, Floyd R. Gibson Missouri Endowed Professor, University of Missouri School of Law

A Vision of Criminal Appeals From the Great Society Era

Paul D. Carrington, Professor, Duke University School of Law

10:15 Break

10:30 **Panel Two: Institutional Roles**

The Impact of Government Appellate Strategies on the Development of Criminal Law

F. Andrew Hessick, Associate Professor, Arizona State University Sandra Day O'Connor College of Law

Death Penalty Appeals and Habeas Proceedings: The California Experience

Gerald F. Uelman, Professor of Law, Santa Clara University Law School

11:45 Lunch

June 15: Session Two

- 12:30 **Roundtable Discussion With Judges and Justices**
Chief Justice Shirley Abrahamson, Wisconsin Supreme Court
Justice James Duggan, New Hampshire Supreme Court
Chief Justice Karla Gray (Ret.), Montana Supreme Court
Judge Arlene Johnson, Oklahoma Court of Criminal Appeals
Chief Justice Randall Shepard, Indiana Supreme Court
Judge Diane Sykes, United States Court of Appeals for the Seventh Circuit (former Justice, Wisconsin Supreme Court)
Moderator: Chad M. Oldfather, Associate Professor, Marquette University Law School
- 2:00 **Break**
- 2:15 **Panel Three: Right to Effective Assistance of Counsel**
Taking Strickland Seriously
Stephen F. Smith, Professor of Law and John V. Ray Research Professor, University of Virginia; Professor of Law-Designate, University of Notre Dame
Strickland in the Circuit Courts
Gregory J. O'Meara, S.J., Assistant Professor, Marquette University Law School
- 3:20 **Break**
- 3:25 **Panel Four: Wrongful Conviction Issues**
Innocence Protection in the Appellate Process
Keith A. Findley, Clinical Professor and Co-Director of the Wisconsin Innocence Project, University of Wisconsin Law School
Blind Justice: How the Failure to Reform Eyewitness Identification Law Contributes to the "Processes of Injustice"
Sandra G. Thompson, Law Foundation Professor and Criminal Justice Institute Director, University of Houston Law Center

June 16: Session Three

8:15 Breakfast & Registration

8:45 **Panel Five: Sentencing Appeals**

Intermediate State Courts and Voluntary Guidelines in a Post-Booker World

John Pfaff, Associate Professor, Fordham University School of Law

Appellate Review of Sentencing Policy Decisions After *Kimbrough*

Carissa Byrne Hessick, Associate Professor, Arizona State University Sandra Day O'Connor College of Law

Appellate Review of Sentence Explanations: Learning From the Wisconsin and Federal Experiences

Michael M. O'Hear, Professor and Associate Dean for Research, Marquette University Law School

10:30 Break

10:45 **Panel Six: Quantitative Research**

Federal Criminal Appeals: A Brief Empirical Perspective

Michael Heise, Professor, Cornell University Law School

Context and Compliance: A Comparison of State Supreme Courts and the Circuits

Sara C. Benesh, Associate Professor, University of Wisconsin-Milwaukee Department of Political Science

Wendy L. Martinek, Associate Professor, SUNY-Binghamton Department of Political Science; Program Director, Law and Social Science Program, National Science Foundation

12:00 Lunch & Conclusion of Conference

PANEL ONE: HISTORICAL PERSPECTIVES

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Development of the Harmless Error Rule

Roger A. Fairfax, Associate Professor, George Washington University Law School

Abstract

The paper explores the history of the early-twentieth century struggle to implement the harmless error rule in American criminal appellate procedure. Although most accounts of the development of the harmless error rule observe that there was “agitation” for reform of formalistic criminal appellate practice at the turn of the century, few have offered a considered examination of the efforts which catalyzed the federal and state legislative embrace of the harmless error rule. The paper critically analyzes the rich history of the campaign for harmless error review and contextualizes it within the broader criminal procedural reform project of the early twentieth century.

Biography

Prior to joining the George Washington University Law School faculty, Professor Fairfax served as a federal prosecutor in the Public Integrity Section of the Criminal Division of the U.S. Department of Justice, where he represented the United States in a broad range of public corruption and other investigations and prosecutions. During his time in the Department of Justice Honors Program, he also served details as special assistant U.S. attorney in the Eastern District of Virginia and as special assistant to the assistant attorney general for the criminal division. Following his government service, he joined the Washington, D.C., office of O'Melveny & Myers, where his practice included white collar criminal and regulatory defense, internal investigations, complex civil litigation, and strategic counseling, as well as pro bono affirmative civil rights litigation, indigent criminal defense, and appellate litigation. Following law school, where he served as commentaries chair of the *Harvard Law Review*, Professor Fairfax clerked for Judge Patti Saris of the U.S. District Court for the District of Massachusetts and for Judge Judith W. Rogers of the U.S. Court of Appeals for the District of Columbia Circuit. He taught courses on the grand jury and criminal procedure as a visiting assistant professor at the William & Mary School of Law and for several years as an adjunct professor at Georgetown University Law Center. Professor Fairfax's research interests include criminal procedure, white collar crime, the grand jury, and federal criminal jurisdiction.

Stories of Crime, Trials, and Appeals in Civil War Era Missouri

Frank O. Bowman III, Floyd R. Gibson Missouri Endowed
Professor, University of Missouri School of Law

Abstract

This paper arises out of a larger undertaking, an ongoing research project, database, and website called “War & Reconciliation: The Mid-Missouri Civil War Project.” The homepage of the website describes the project this way:

The Civil War was fought across the American continent. It briefly scarred the fields where men fought and permanently transformed the country they fought over. The face of war in Missouri was unique. The war started early here, with violence along the Kansas-Missouri border in the 1850s. When secession came, Missourians formed armies and fought pitched battles over whether she would stay or go. Unionists won and Missouri became an anomaly -- a slave state that remained in the Union but was also claimed by the Confederacy. The marquee battles of the War were fought elsewhere, but guerrilla violence plagued Missouri until Appomattox and beyond. The last shot of Missouri's Civil War may not have been fired until 1882, when Governor Crittenden arranged the killing of guerrilla-turned-bandit Jesse James.

The Mid-Missouri Civil War Project is an effort to understand what happened in central Missouri by collecting, organizing, and interpreting the records, writings, and recollections of those who lived here. How did the communities we live in split in two? How did they experience a war in which their citizens killed each other in small, personal encounters? And how did they learn to live together again?

One of the intriguing features of the Civil War period experience in mid-Missouri (at least for a lawyer) is the prominence of lawyers – and sometimes of law – in the civil and military affairs of the area. This paper will tell some stories about several locally important lawyers, including their lives in the criminal law before, during, and after the War, and will try to draw some lessons about the place of a functioning appellate system in the legal regime of a troubled time.

Biography

Professor Bowman joined the University of Missouri School of Law faculty from the Indiana University School of Law-Indianapolis, where he served as the M. Dale Palmer Professor of Law. Following his graduation from Harvard Law School in 1979, Professor Bowman entered the U.S. Department of Justice as part of the Honor Graduate Program. He spent three years as a trial attorney in the Criminal Division in Washington, D.C. From 1983 until 1986, he was a deputy district attorney for Denver, Colo. He also spent three years in private practice in Colorado.

In 1989, Professor Bowman joined the U.S. Attorney's Office for the Southern District of Florida, where he was Deputy Chief of the Southern Criminal Division and specialized in complex white-collar crimes. In 1995 and 1996, he served as Special Counsel to the U.S. Sentencing Commission in Washington, D.C. From 1998 to 2001, he served as academic advisor to the Criminal Law Committee of the United States Judicial Conference.

A Vision of Criminal Appeals From the Great Society Era

Paul D. Carrington, Professor, Duke University School of Law

Abstract

Criminal Appeals was a hot topic in the 1970s, reflecting the politics of the Great Society and the development of the constitutional requirements of due process. There was then widespread agreement that the function of the criminal appeal was to assure that the appropriate judges were giving visible attention to all convictions to assure that they were justified. This paper will pose the question: what has become of that vision of a former generation?

Biography

Professor Carrington is a native of Dallas. His professional experience includes a brief stint in private practice, another in a military law office, and occasional consultations over fifty years, most of them pro bono publico. Since his teaching career began in 1957, he has taught in fifteen American law schools, as well as the University of Tokyo, Albert Ludwigs Universitat Freiburg, Bucerius Law School in Hamburg, and Doshisha University Law School in Kyoto. He has been at Duke since 1978, serving as dean from 1978 to 1988. He has been active in judicial law reform efforts, particularly with regard to the jurisdiction of appellate courts, the rules of civil litigation, and the selection and tenure of judges in state courts. From 1985 to 1992, he served as reporter to the committee of the Judicial Conference of the United States advising the Supreme Court on changes in the Federal Rules of Civil Procedure. He has since 1988 also studied the history of the legal profession in the United States. He teaches appeals, civil procedure, international civil litigation, and lawyers in American history. His recent works are *Stewards of Democracy: Law as a Public Profession* (1999), *Spreading America's Word: Stories of Its Lawyer-Missionaries* (2005); *Reforming the Court: Term Limits for Supreme Court Justices* (2006); and *Law and Class in America: Trends Since the End of the Cold War* (2006).

PANEL TWO: INSTITUTIONAL ROLES

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The Impact of Government Appellate Strategies on the Development of Criminal Law

F. Andrew Hessick, Associate Professor, Arizona State University
Sandra Day O'Connor College of Law

Abstract

Unlike for virtually all criminal defendants, the government's goal in a criminal appeal is not simply to win. Because it has the duty to protect the public, and because it is a repeat player in criminal cases, the government also has an interest in the legal doctrine created through an appeal. The government employs various strategies on appeal to encourage the development of legal doctrine favorable to it. For example, the government may incrementally push legal doctrine through a series of cases, deliberately force a court to address a new legal question when the case could have been easily resolved on preexisting grounds, or refrain from making a particular argument until an appeal that presents sympathetic facts. This Paper considers the effectiveness of these strategies and others, and it argues that, to the extent these strategies are effective, they may not be desirable because of the added influence they give the government over the criminal law.

Biography

Professor Hessick teaches Civil Procedure, Administrative Law, the Supreme Court in American Politics, and Judicial Remedies.

Professor Hessick, who joined the Arizona State University Sandra Day O'Connor College of Law faculty in 2008, served as a law clerk for Judge Raymond Randolph of the U.S. Court of Appeals for the D.C. Circuit and for Judge Reena Raggi of the U.S. Second Circuit Court of Appeals. He spent a year as a Bristow Fellow in the Office of the Solicitor General for the United States, working on a number of cases before the U.S. Supreme Court, and then worked as an associate in the Washington, D.C., law firm of Kellogg, Huber, Hansen, Todd, Evans & Figel. During the 2006-2007 academic year, Professor Hessick was a visiting assistant professor at Boston University School of Law. He was an editor on the *Yale Law Journal* and a semi-finalist in the Morris Tyler Moot Court of Appeals at Yale.

Death Penalty Appeals and Habeas Proceedings: The California Experience

Gerald F. Uelmen, Professor of Law, Santa Clara University School of Law

Abstract

The administration of the death penalty has become completely dysfunctional in California, to use the words of California Chief Justice Ronald M. George. The California Supreme Court is overwhelmed with a backlog of 80 fully briefed death appeals, and 100 fully briefed habeas petitions. California has the longest delays in the country, with 20-24 years elapsing between sentence and execution. With the longest death row in the country (680+), the chief cause of death on death row is death by natural causes, followed by suicide. California has had 13 executions since the death penalty was restored in 1978. The current estimate is that its dysfunctional death penalty law is costing California \$230 million per year more than it would cost to process death cases as Life Without Parole cases and confine the guilty for life. This presentation will analyze the causes and costs of these delays, as revealed by the California Commission on the Fair Administration of Justice, which Professor Uelmen served as Executive Director and Principal Reporter. This will include:

1. Standards for, and delays in, appointment of counsel.
2. Supreme Court backlogs, and proposals to reduce them by transferring cases to the lower courts.
3. Impact of federal habeas review and reasons for delays in federal court.
4. The growing cost of confinement on death row.
5. The lack of prospects for legislative reform.

Biography

As a Prettyman Fellow at Georgetown, Professor Uelmen did indigent criminal defense work while earning a LL.M. degree. He returned to California to serve in the U.S. Attorney's Office in Los Angeles, prosecuting organized crime cases. In 1970, he joined the faculty of Loyola Law School in Los Angeles, where he taught Criminal Law, Evidence, Trial Advocacy, Legal Ethics, and Counseling and Negotiation.

He also served as associate dean for two years and maintained an active part-time criminal defense practice, participating in the defense of Daniel Ellsberg in the *Pentagon Papers* trial and successfully challenging the murder conviction of Gordon Castillo Hall. He served as dean at Santa Clara from 1986 to 1994. In 1994-95, he served on the defense team for the trial of *People v. O.J. Simpson*.

He has served as president of California Attorneys for Criminal Justice, California Academy of Appellate Lawyers, and Santa Clara County Bar Association Law Foundation. In 1984, he won the ABA Ross Essay Prize. In 1996, he authored a one-actor play on the life of William Jennings Bryan, which has been produced in Omaha, Chicago, and Santa Clara.

ROUNDTABLE DISCUSSION

Discussants

Chief Justice Shirley Abrahamson, Wisconsin Supreme Court

Chief Justice Shirley S. Abrahamson was appointed to the Supreme Court by Governor Patrick Lucey in 1976. She was then the only woman to serve on the court.

She won election to the court in 1979 and re-election in 1989, 1999, and 2009. Since August 1, 1996, she has been chief justice and, in that capacity, serves as the administrative leader of the Wisconsin court system.

Before joining the Supreme Court, Chief Justice Abrahamson was in private practice in Madison for 14 years and was a professor at the UW Law School. She is a past president of the National Conference of Chief Justices and past chair of the board of directors of the National Center for State Courts. She also has served as chair of the National Institute of Justice's National Commission on the Future of DNA Evidence. She is a member of the Council of the American Law Institute and the New York University School of Law Institute of Judicial Administration. She also has served on the State Bar of Wisconsin's Commission on the Delivery of Legal Services and the American Bar Association's Coalition for Justice and the National Academies' Science, Technology and Law panel.

Born and raised in New York City, Chief Justice Abrahamson received her bachelor's degrees from NYU in 1953, her law degree from Indiana University Law School in 1956, and a doctorate of law in American legal history in 1962 from the UW Law School. She is the recipient of 15 honorary doctor of laws degrees and the Distinguished Alumni Award of the UW-Madison. She is a fellow of the Wisconsin Academy of Arts and Sciences and the American Academy of Arts and Sciences and an elected member of the American Philosophical Society. In 2004, she received the American Judicature Society's Dwight D. Opperman Award for Judicial Excellence. In 2009 the National Center for State Courts awarded her the Harry L. Carrico Award for Judicial Innovation, for serving as a national leader in safeguarding judicial independence, improving inter-branch relations, and expanding outreach to the public.

Justice James Duggan, New Hampshire Supreme Court

Justice James E. Duggan taught at Franklin Pierce Law Center in Concord from 1977 until he came to the Supreme Court in January 2001, following his nomination by Governor Jeanne Shaheen. He had been director of the state's appellate defender program, which represents indigent clients in criminal cases that are heard by the Supreme Court.

A native of Laconia, New Hampshire, Justice Duggan is a graduate of Georgetown University and Georgetown Law Center, both in Washington D.C.

Chief Justice Karla Gray (Ret.), Montana Supreme Court

Chief Justice Karla Gray was born in Escanaba, Michigan, on May 10, 1947. She attended Western Michigan University in Kalamazoo, Michigan, from 1965-1970, receiving a B.A. and an M.A., the latter in African History. Chief Justice Gray worked as a clerk-matron in the Mountain View (California) Police Department prior to attending Hastings College of the Law in San Francisco, where she served as an articles editor of the *Hastings Law Review*. She received her J.D. degree in 1976 and moved to Butte, Montana, to serve as a law clerk for Senior U.S. District Court Judge W.D. Murray until 1977.

Chief Justice Gray continued to practice law in Butte in a number of different capacities, including in-house corporate legal staff and a solo practice. She also lobbied at the Montana Legislature during the 1980s for various entities, including the Montana Power Company and the Montana Trial Lawyers Association.

Chief Justice Gray was appointed to the Montana Supreme Court in 1991, and elected to her seat in 1992 and again in 1998. She ran successfully for Chief Justice in 2000. She is a member of the Board of Directors of the Conference of Chief Justices and the American Judicature Society, as well as a Fellow of the American Bar Foundation and a member of the National Association of Women Judges.

Judge Arlene Johnson, Oklahoma Court of Criminal Appeals

Appointed to the Court of Criminal Appeals, District 4, February 18, 2005. Received Bachelor of Arts degree in English from the University of Oklahoma and Juris Doctorate from the University of Oklahoma School of Law. After admission to Oklahoma Bar July 29, 1971, practiced law with the Oklahoma City law firm of Bulla and Horning, and subsequently served as judicial law clerk to the Court of Criminal Appeals. Worked as Oklahoma County Assistant District Attorney and as Assistant Oklahoma Attorney General. Served as Assistant United States Attorney for the Western District of Oklahoma for 21 years; received United States Attorney General's John Marshall Award for Outstanding Legal Achievement (1998), and FBI's Commendation for Exceptional Service in the Public Interest (1998). Admitted to practice before the United States Supreme Court, Tenth Circuit Court of Appeals and the United States District Court for the Western District. Former member of the Tenth Circuit Uniform Criminal Jury Instruction Committee, the Admissions and Grievance Committee for the Western District of Oklahoma, and of the United States Magistrate Merit Selection Panel for the Western District of Oklahoma. Also served as Adjunct Professor at the University of Oklahoma College of Law.

Chief Justice Randall Shepard, Indiana Supreme Court

Randall T. Shepard of Evansville was appointed to the Indiana Supreme Court by Governor Robert D. Orr in 1985 at the age of 38. He became Chief Justice of Indiana in March 1987.

A seventh generation Hoosier, Shepard graduated from Princeton University cum laude and from the Yale Law School. He earned a Master of Laws degree in the judicial process from the University of Virginia.

Shepard was Judge of the Vanderburgh Superior Court from 1980 until his appointment. He earlier served as executive assistant to Mayor Russell Lloyd of Evansville and as special assistant to the Under Secretary of the U.S. Department of Transportation.

Chief Justice Shepard was also Trustee of the National Trust for Historic Preservation. He served as chair of the ABA Appellate Judges Conference and of the Section of Legal Education and Admissions to the Bar. During 2005-06, Shepard served as President of the National Conference of Chief Justices. Chief Justice John Roberts recently appointed him to the U.S. Judicial Conference Advisory Committee on Civil Rules.

Judge Diane Sykes, United States Court of Appeals for the Seventh Circuit

Judge Sykes was nominated by President George W. Bush to the Seventh Circuit Court of Appeals. She was confirmed by the United States Senate on June 24, 2004, received her commission on July 1, and entered upon duty on July 4, 2004. Prior to her appointment to the federal bench, Judge Sykes served as a justice of the Wisconsin Supreme Court. She was appointed to the Supreme Court in 1999 by then-Governor Tommy G. Thompson and elected to a ten-year term in April 2000.

Born and raised in the Milwaukee area, Judge Sykes received a bachelor's degree from the Medill School of Journalism at Northwestern University in 1980 and a juris doctor degree from Marquette University Law School in 1984. Between college and law school, Judge Sykes worked as a reporter for *The Milwaukee Journal*.

Judge Sykes was elected to the bench in Milwaukee County in 1992 and served there in the misdemeanor, felony, and civil divisions until her appointment to the Wisconsin Supreme Court in September 1999. Prior to her election to the Milwaukee County Circuit Court, Judge Sykes practiced law with the Milwaukee law firm of Whyte & Hirschboeck, S.C., and served as law clerk to Federal Judge Terence T. Evans.

Moderator

Chad Oldfather, Associate Professor, Marquette University Law School

Professor Oldfather grew up in the thoroughly Wobegonian but unfortunately named Kiester, Minnesota (current population: 540). So far as he knows, he is the first in a line stretching back to Friedrich Altvater's arrival in Berlin, Pennsylvania in 1769 never to have been a farmer. He thinks, but of course can't be sure, that his ancestors would find his being a law professor to be a reasonably agreeable second-best as a career choice. At least so long as he doesn't go around putting on too many airs.

Prior to teaching, Oldfather was a lawyer in the Minneapolis office of Faegre & Benson LLP. There he practiced most recently in the appellate section of the firm's general litigation group, having previously spent four-and-a-half years in its real estate group. These phases of his career were sandwiched around an eighteen-month stint in the appellate office of the Minnesota State Public Defender. These legal peregrinations have resulted in a broad range of practice experience for a diverse array of clients, including environmental groups, multinational corporations, small businesses, churches, financial institutions, and convicted felons.

Oldfather has also previously taught at the Oklahoma City University School of Law, and as an Adjunct Professor at the William Mitchell College of Law in Saint Paul. Immediately following law school he served as a law clerk to Judge Jane R. Roth of the U.S. Court of Appeals for the Third Circuit. He graduated from Harvard College and the University of Virginia School of Law. While in law school he served as an Articles Editor of the *Virginia Law Review*.

Oldfather's primary area of scholarly interest is judging and the judicial process. His recent articles have appeared in the *Georgetown Law Journal*, *Florida Law Review*, *George Washington Law Review*, *Indiana Law Journal*, and *Vanderbilt Law Review*. In 2004 he was awarded the Howard B. Eisenberg Prize by the American Academy of Appellate Lawyers. He is currently a member of the National Advisory Council of the American Judicature Society, and has also served as Reporter for the American Bar Association's Study Group on Pre-Judicial Education, a project of the Standing Committee on Judicial Independence. In 2000 he was named a "Super Lawyer" by the *Minnesota Journal of Law & Politics*. His non-legal interests include all manner of books and music, baseball, wilderness canoeing, and good-natured japery.

PANEL THREE:
RIGHT TO EFFECTIVE ASSISTANCE
OF COUNSEL

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Taking Strickland Seriously

Stephen F. Smith, Professor of Law and John V. Ray Research Professor, University of Virginia; Professor of Law-Designate, University of Notre Dame

Abstract

Every criminal defendant is promised the right to the effective assistance of counsel. Whether at trial or on first appeal of right, due process is violated when attorney negligence undermines the fairness and reliability of the outcome in their cases. That, at least, is the black-letter law articulated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). In practice, however, the right to effective representation has meant surprisingly little over the last two decades. Due to several aspects of the *Strickland* standard, scores of defendants have received prison or death sentences despite serious, unprofessional errors committed by their attorneys.

This paper canvasses a line of recent cases that have breathed new life into *Strickland* as a meaningful guarantee of effective defense representation. These cases – all of which involved sentences of death – pointedly reject the understanding of *Strickland* that made it exceedingly difficult to prevail on claims of ineffective assistance. Although the new line of *Strickland* cases were undoubtedly motivated by concerns about the proper administration of the death penalty, it would be a mistake to limit the reinvigorated *Strickland* standard to capital cases. Whether the death penalty is at stake or not, appellate courts should be vigilant in policing the effectiveness of defense attorneys so that the determining factor in criminal proceedings will be the strength of the government's case, not the quality of defense counsel.

Biography

Professor Smith joined the University of Virginia Law School faculty in 2000. As a student at the Law School, he served as Articles Editor for the *Virginia Law Review* and was inducted into the Order of the Coif and the Raven Society. Upon graduation, he clerked for Judge David B. Sentelle of the U.S. Court of Appeals for the D.C. Circuit and for Justice Clarence Thomas of the Supreme Court of the United States.

Before returning to the Law School, Professor Smith served in the Supreme Court and appellate practice group of Sidley & Austin in Washington, D.C. He also served as Associate Majority Counsel to a 1996 House of Representatives select subcommittee investigating U.S. involvement in Iranian arms transfers to Bosnia and as an adjunct professor at George Mason University School of Law. He is actively involved in a number of community service organizations and civic projects. Smith's area of research is criminal law and criminal procedure. His courses include Criminal Law, Criminal Adjudication, and Federal Criminal Law.

Strickland in the Circuit Courts

Gregory J. O'Meara, S.J., Assistant Professor, Marquette University Law School

Abstract

Following the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which was designed to narrow access to federal courts, criminal defense attorneys have maintained that habeas actions based on claims of ineffective assistance of counsel will be unsuccessful because *Strickland v. Washington's* rule defining effective assistance was insufficiently robust. This conclusion rests in part on a particular understanding of how AEDPA restricts federal courts from reviewing state court convictions. Representative cases from Circuit Courts of Appeal may undermine this thesis and indicate that courts are more willing to entertain claims based on ineffective assistance than they were in the past. This paper maintains that when Congress passed AEDPA, it misperceived how courts interpret and apply precedent. This misunderstanding may eventually render AEDPA toothless.

Biography

Professor O'Meara re-joined the Marquette Law School faculty in the fall of 2002. He was a visiting faculty member from the fall of 1997 until the spring of 1999. In 1999 and 2005, Professor O'Meara was the recipient of the James D. Ghiardi Faculty Award for Teaching Excellence. During the interim between 1999 and 2002, Professor O'Meara completed his Master of Divinity degree from the Weston Jesuit School of Theology. Professor O'Meara's prior legal experience includes working as an Assistant District Attorney in Milwaukee County, serving as a staff attorney with the Legal Defense Project at the University of Wisconsin Law School, and teaching at Creighton University School of Law. He is a member of the Wisconsin Province of the Society of Jesus. He teaches Criminal Law, Evidence, Legal Theory, Legal Ethics, and Criminal Procedure.

PANEL FOUR: WRONGFUL CONVICTION ISSUES

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Innocence Protection in the Appellate Process

Keith A. Findley, Clinical Professor and Co-Director of the Wisconsin Innocence Project, University of Wisconsin Law School

Abstract

It is often said that truth – accurate sorting of the guilty from the innocent – is the primary objective of criminal trials. Among the important safeguards in our criminal justice system intended to ensure that the innocent are protected from wrongful conviction is the system of appeals and postconviction remedies. Recent empirical evidence based on DNA exoneration cases reveals, however, that the appellate process does not do a good job of recognizing or protecting innocence. Examination of known innocents – those proved innocent by postconviction DNA testing – shows that they have rarely obtained relief on appeal. Moreover, those individuals subsequently proved innocent by postconviction DNA testing do no better on appeal – and their innocence is no more regularly acknowledged – than otherwise similarly situated individuals who have not been exonerated by DNA. This paper examines the variety of reasons why the appellate system fails to effectively guard against wrongful conviction of the innocent, and considers possible reforms that might enhance the system's innocence-protecting functions.

Biography

Professor Findley teaches in the clinical programs at the University of Wisconsin Law School's Frank J. Remington Center, where he has served as co-director of the Criminal Appeals Project and where he co-directs the Wisconsin Innocence Project (which he co-founded with Professor John Pray). He currently serves as the president of the Innocence Network, an affiliation of 52 innocence projects in the United States, Canada, the United Kingdom, Australia, and New Zealand. Through the Wisconsin Innocence Project, students investigate and litigate claims of actual innocence based upon newly discovered evidence on behalf of wrongly convicted prisoners. Through the Criminal Appeals Project, students work under public defender and court appointments representing state and federal defendants appealing their criminal convictions and sentences.

Professor Findley's primary areas of expertise are in criminal defense work and appellate advocacy. He has previously worked as an Assistant State Public Defender in Wisconsin, both in the Appellate and Trial Divisions. He has litigated hundreds of postconviction and appellate cases, at all levels of state and federal courts, including the United States Supreme Court. At the Law School, he has taught criminal procedure, and regularly teaches courses on appellate advocacy and wrongful convictions. He also lectures and teaches nationally on appellate advocacy and wrongful convictions.

Blind Justice: How the Failure to Reform Eyewitness Identification Law Contributes to the "Processes of Injustice"

Sandra G. Thompson, Law Foundation Professor and Criminal Justice Institute Director, University of Houston Law Center

Abstract

This paper will report on a one-year empirical study of state appellate court cases in which eyewitness identification evidence has been challenged. The paper will detail the types of cases in which identifications are contested and show that the recommended protocols are almost never followed in these cases. The paper will also discuss the fact that the courts do not exclude identification testimony, even though social science would suggest that the resulting identifications are quite dubious. The paper considers the nature of the judicial role: what makes a judge apply a law that she knows is not consistent with the scientific findings and that might lead to a false conviction?

Biography

Professor Thompson is a graduate of Yale University, where she earned a B.A. in Economics in 1985 and a J.D. from the Yale Law School in 1988. She served as an Assistant District Attorney in the New York County (Manhattan) District Attorney's Office, where she practiced both trial and appellate criminal law from 1988-1990. She joined the faculty of the University of Houston Law Center in 1990. She teaches Criminal Law, Federal Criminal Law, Evidence, Criminal Procedure, Sentencing, and Prisoners' Rights and Prison Reform. She received the University of Houston Teaching Excellence Award in 2003 and the Ethel Baker Faculty Award in 2000. She is a former Director of the Mexican Legal Studies Program, and she taught a course for that program called "Criminal Law Issues in U.S.-Mexico Relations." Professor Thompson has authored numerous articles on criminal law issues, on such topics as wrongful conviction, immigration crimes, jury discrimination, police interrogations, federal sentencing, and asset forfeiture. She has co-authored a treatise entitled *The Law of Asset Forfeiture* (with Gurule and O'Hear), now in its second edition. Professor Thompson's service activities have included serving as the co-principal investigator for the University of Houston Law Center Keck Professionalism Initiative, serving as Associate Dean for Academic Affairs, and as a member of the search committee for the University President and Chancellor's position. She is an elected member of the American Law Institute and was appointed to the Board of Advisors for the American Law Institute's project entitled "Model Penal Code: Sentencing." She is a former Chair of the Criminal Justice Section of the Association of American Law Schools. She has served on the planning committee for the Houston Bar Association's Criminal Bench-Bar Conference and she is a member of the Houston Bar Foundation. She served for 15 years as a member of the Board of Directors of the Hispanic Bar Association and continues to serve as a liaison with that group and the University of Houston. Professor Thompson is a frequent media commentator, both locally and nationally.

PANEL FIVE: SENTENCING APPEALS

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Intermediate State Courts and Voluntary Guidelines in a Post-Booker World

John Pfaff, Associate Professor, Fordham University School of Law

Abstract

This paper examines the role of appellate courts in state criminal sentencing. Though much of the attention directed at *Blakely* has focused on its effect on state sentencing guidelines, it is worth noting that it has significant implications for appellate courts as well. In short, outside of a narrow category of cases, *Blakely* effectively gutted the possibility of meaningful appellate review. Yet *Booker*, which purports to follow *Blakely*, explicitly if awkwardly crafts a role of appellate courts exactly where *Blakely* banned it. What role, then, can appellate courts in fact play?

I have two goals here. The first is broader and more theoretical. I simply want to sketch out the narrow space where appellate review remains unambiguously acceptable, and then discuss the viability of the *Booker* semi-presumptive option. Though *Blakely* seems to be viewed as upending presumptive guidelines, what it does is change the fact-finder. Before *Blakely*, presumptive guidelines required judges to make certain factual findings before setting certain sentences, and appellate courts were free to review how well the judge made the findings and balanced various competing interests. *Blakely* held that any fact-finding required for the imposition of a sentence had to be made by the jury. The judge remains free to balance the facts found, and appellate courts remain free to evaluate how well the judge engages in the balancing.

Booker attempted to carve out another role for appellate courts. Several justices were concerned that the federal sentencing guidelines (the guidelines under review in that case) did not lend themselves to jury fact-finding. So to preserve judicial fact-finding without overturning *Blakely*, a majority in *Booker* converted the presumptive federal guidelines into voluntary guidelines but instructed appellate courts to review these (semi) discretionary sentences for “reasonableness.” Unfortunately, as Justice Scalia points out in his *Booker* dissent, this can create a paradox. Rigorous appellate review will eventually create a set of facts that trial judges must find before imposing a sentence. At this point, *Blakely* charges back into the scene, forcing such fact-finding back onto a jury or requiring that the common-law rules developed by the appellate court be abrogated.

The second goal is narrower and more applied. Though a *Booker* fix may ultimately lead to a paradox, four states have nonetheless adopted this approach. I want to examine what appellate review looks like in these states, whether their approaches run the risk of triggering the paradox, and what light (if any) their experiences shed on how to handle the paradox in the future. In general, appellate review in these states is procedural, not substantive, despite suggestions from the state supreme courts that more aggressive review could be permissible. In other words, appellate courts generally make sure that trial judges have explained their reasoning (but do not evaluate the quality of it), have not relied on any factors wholly unsupported by

the record, and have not failed to acknowledge any relevant factors (though cursory acknowledgment and dismissal is acceptable). As a result, these states are unlikely to trigger the *Booker* paradox, but not without cost. Judges appear to follow voluntary guidelines less closely than presumptive, so the more these semi-presumptive guidelines operate like truly voluntary guidelines, the less control states will have over sentencing outcomes.

One state, however, does engage in aggressive review, but in an interesting way. Appellate courts in Indiana engage in a two-step review of sentencing outcomes. First, they undertake a procedural and rather perfunctory “reasonableness” review, as instructed by Indiana’s analog to *Booker*. Second, pursuant not to reasonableness review but a separate appellate rule for reviewing sentences, they closely analyze the acceptability of the sentencing outcome. In undertaking this second review the courts make no mention of *Blakely* or *Booker*, despite the fact that this review is no less problematic and no less likely (in theory) to trigger the paradox. Yet it may be possible for this review to survive. The Supreme Court’s recent opinion in *Oregon v Ice* indicates that the Court may limit the *Blakely* line of cases solely to sentencing guidelines, suggesting a possible end-run that states can employ to preserve meaningful appellate review.

Biography

Professor Pfaff teaches Criminal Law, Sentencing Law, and Law and Economics. Before coming to Fordham, he was the John M. Olin Fellow at the Northwestern University School of Law and clerked for Judge Stephen F. Williams on the U.S. Court of Appeals for the D.C. Circuit.

Professor Pfaff’s research focuses on empirical questions related to criminal law and sentencing and, more generally, on the application of social science techniques to criminal law and policy. He is currently focusing on two empirical questions. The first explores the forces which have driven the explosive growth of the U.S. prison population over the past thirty years. And the second looks at how to incorporate evidence based practices into the judicial review of scientific and empirical evidence. For his work on the latter issue, Professor Pfaff recently received a two-year grant from the John Templeton Foundation and the University of Chicago’s Arete Initiative for the study of wisdom.

Appellate Review of Sentencing Policy Decisions After Kimbrough
Carissa Byrne Hessick, Associate Professor, Arizona State
University Sandra Day O'Connor College of Law

Abstract

In *Kimbrough v. United States* the Supreme Court addressed a question left open in *United States v. Booker*: whether to permit district courts to make sentencing decisions based on a policy disagreement with the Federal Sentencing Guidelines. The *Booker* Court, in order to avoid a Sixth Amendment jury right problem inherent in mandatory sentencing regimes, had held that the Guidelines were purely “advisory” and that district courts had discretion to sentence outside the ranges prescribed by the Guidelines. Ultimately, the *Kimbrough* Court held that district courts could sentence outside the advisory Guideline range based solely on a policy disagreement with the Guidelines, as opposed to limiting judicial discretion to case-specific criteria. At the same time, however, the *Kimbrough* opinion contained language suggesting that sentences based on policy disagreements with those Guidelines that are the product of the U.S. Sentencing Commission’s expertise may be subject to “closer” appellate review. This paper explores the differing approaches regarding sentencing policy decisions taken by U.S. Courts of Appeals since the *Kimbrough* decision. It notes that the varying degrees of appellate scrutiny are largely attributable to (a) the circuits’ disagreement regarding *Kimbrough*’s effect on previous circuit precedent and (b) some courts electing not to follow the dicta in *Kimbrough* for when “closer review” may be warranted. The paper also suggests how to promote sentencing uniformity among district courts without running afoul of the Sixth Amendment.

Biography

Professor Hessick teaches Criminal Procedure, Criminal Law, and a seminar on sentencing law and policy. Her research focuses on aggravation and mitigation in criminal sentencing, relative crime severity, and other political and doctrinal issues associated with sentencing. She recently published an article in the *Boston University Law Review* on aggravating and mitigating sentencing factors, as well as an article in the *Alabama Law Review* on appellate standards of review for federal sentencing decisions.

Professor Hessick joined the Arizona State University Sandra Day O'Connor College of Law faculty in 2007, after spending two years teaching at Harvard Law School as a Climenko Fellow. She served as a law clerk for Judge A. Raymond Randolph on the U.S. Court of Appeals for the D.C. Circuit and for Judge Barbara S. Jones on the U.S. District Court for the Southern District of New York. Professor Hessick also worked as a litigation associate at Wachtell, Lipton, Rosen & Katz. In law school, she was an editor on the *Yale Law Journal*, and won the Potter Stewart Prize for best team performance in the Yale Law School moot court competition.

Appellate Review of Sentence Explanations: Learning From the Wisconsin and Federal Experiences

Michael M. O'Hear, Professor and Associate Dean for Research,
Marquette University Law School

Abstract

Appellate courts in the United States have struggled for decades with the challenge of establishing a meaningful role for themselves in the sentencing process, particularly in jurisdictions that lack mandatory sentencing guidelines. One promising role for the appellate courts to perform would be to review the adequacy of the explanations offered by trial-court judges for their sentences. Structured as a form of procedural review, this role would avoid the Sixth Amendment problems raised by substantive review of sentences, but would still have the capacity to nudge trial-court judges towards more principled, consistent outcomes. In order to have such positive effects, however, "explanation review" must have clear and rigorous standards.

Recent experiences with explanation review in Wisconsin and the federal system illustrate important pitfalls. The Wisconsin Supreme Court adopted a helpful set of standards in its 2004 decision in *State v. Gallion*, but might have had an even greater effect had it insisted more forcefully that sentence explanations make reference to objective benchmarks, such as advisory sentencing guidelines or sentences imposed in similar cases. The court then missed an opportunity to correct this misstep in its 2007 decision in *State v. Grady*, which held that sentencing judges need not even calculate the sentencing range recommended by an applicable sentencing guideline.

Meanwhile, in the wake of the conversion of the federal sentencing guidelines from mandatory to advisory in 2005, the federal courts have also emphasized the importance of explanation, but have sometimes required nothing explicit beyond the calculation of the guidelines range, even when the defendant has offered nonfrivolous arguments for a sentence below the range. The United States Supreme Court's 2007 decision in *Rita v. United States* seemingly approved such nonresponsive explanations in most, if not all, cases.

Evaluating the recent Wisconsin and federal cases, this paper develops a proposed set of principles to guide explanation review in jurisdictions without mandatory sentencing guidelines. These principles largely track the *Gallion* framework, but with two important additions. First, appellate courts should insist that sentence explanations make reference to objective benchmarks, including (where available) advisory sentencing guidelines. Second, appellate courts should demand more than *Rita* by way of responsiveness: when a defendant offers a nonfrivolous argument for lenience, the sentencing court should be required to address the argument explicitly.

Outline

- I. The Case for Explanation Review
 - A. Procedural Justice
 - 1. Neutrality
 - 2. Consideration
 - B. Substantive Justice: Addressing Cognitive Bias
 - C. Systemic Benefits of Information-Forcing
- II. Wisconsin's Explanation Requirement
 - A. *McCleary*, 182 N.W.2d 512 (Wis. 1971)
 - B. *Gallion*, 678 N.W.2d 197 (Wis. 2004)
 - C. *Grady*, 734 N.W.2d 364 (Wis. 2007)
- III. The Federal Explanation Requirement (*Rita*, 127 S. Ct. 2456 (2007))
- IV. Proposed Principles to Guide Explanation Review
 - A. A sentence that has not been adequately and expressly explained on the record constitutes an abuse of discretion, and is subject to reversal on that ground.
 - B. The sentencing court must specify the principal purpose or purposes of each component of the sentence.
 - C. In explaining how a purpose is advanced by a particular component of the sentence, the court must identify the case-specific facts on which it relies and indicate how they relate to the purpose.
 - D. For prison sentences, the explanation should make clear both why a sentence of probation was rejected and why a materially shorter sentence would not have adequately accomplished the relevant purposes of sentencing.
 - E. If there is an applicable advisory sentencing guideline, the court must determine what range is recommended by the guideline, unless the court expressly finds that the benefits of calculating the guidelines range do not warrant the costs.
 - F. If the sentence is outside an applicable advisory guidelines range, the court must explain why the sentence chosen is believed to advance the relevant purposes of sentencing better than the guidelines sentence.
 - G. If the sentence is inside (or above) the applicable advisory guidelines range, the court must expressly address any nonfrivolous arguments made by the defendant for a sentence below (or within) the range and explain why the arguments were rejected.
 - H. The court must specifically identify what benchmark or benchmarks were used in setting the sentence and why they were believed to be relevant.

- I. If the defendant offers a benchmark that the court rejects, the court must explain why the benchmark was determined not to be appropriate.
- J. If the defendant makes any nonfrivolous arguments for lenience, the court must identify which arguments were found to have merit, what role those arguments played in the selection of the sentence, and why the remaining arguments (if any) were found not to have merit.

Biography

Dean O'Hear teaches Criminal Law, Criminal Procedure, and related courses. He is an editor of the Federal Sentencing Reporter and the author of more than thirty scholarly articles on sentencing and criminal procedure. His publications have appeared in such journals as the *Yale Law Journal*, *Duke Law Journal*, *Northwestern University Law Review*, *Iowa Law Review*, and *Vanderbilt Law Review*. He is also the coauthor of a treatise on asset forfeiture.

Dean O'Hear is a graduate of Yale College and Yale Law School, where he was editor-in-chief of the *Yale Journal of Law & the Humanities* and an editor of the *Yale Law Journal*. Following law school, he clerked for United States District Court Judge Janet Bond Arterton in New Haven, Connecticut. He then practiced civil and criminal litigation for three years at Sonnenschein Nath & Rosenthal in Chicago. He joined the Marquette Law School faculty in 2000, and was appointed the Law School's first Associate Dean for Research in 2008. He also serves as a Managing Editor of the Law School's Faculty Blog, where he regularly posts on new Seventh Circuit decisions in criminal cases.

Dean O'Hear has chaired the Federal Nominating Commission to Appoint the United States Attorney in the Eastern District of Wisconsin. He also serves as a member of the Wisconsin Criminal Justice Study Commission, the Seventh Circuit Advisory Committee on Circuit Rules, and the Programs and Interventions Committee of the Milwaukee County Community Justice Council. In 2009, he was awarded the Robert W. Warren Public Service Award by the Eastern District of Wisconsin Bar Association.

PANEL SIX: QUANTITATIVE RESEARCH

Please do not cite or quote any of the following material without the author's permission. The papers presented at this Conference are expected to be published in the Winter 2009 issue of the *Marquette Law Review*. Authors may also post prepublication drafts of their papers at <http://www.ssrn.com>.

Federal Criminal Appeals: A Brief Empirical Perspective

Michael Heise, Professor, Cornell University Law School

Abstract

Although few dispute the appellate process's centrality to our system of justice, especially in the criminal context, debates over rationales supporting the appellate process's vaunted status in adjudication systems persist. Clearly, it is difficult to overestimate error correction as a justification for an appellate system. Of course, other rationales, such as a desire for lawmaking and legitimacy, also support the inclusion of a mechanism for appellate review in an adjudication system.

Appellate courts are ubiquitous in our legal landscape: appellate review exists in state and federal systems, and for criminal and civil trials. Despite general agreement and widespread understanding that access to appellate review is a critical component of a comprehensive judicial system, the outcomes of appellate courts and, equally important, how to interpret the outcomes, are comparatively less well understood and developed in the research literature. Specifically, the distribution of appeals outcomes as well as what to make of the distribution warrant far more scholarly attention than they have received.

To address this scholarly gap, this paper focuses on federal criminal appeals and approaches the topic from an empirical perspective. Modest in ambition and scope, this paper seeks to only to map the broad empirical contours of federal criminal appellate activity in the United States. As it relates to the initial research question – what are the most basic of results incident to appellate review of federal criminal trials – existing data, while far short of thorough and definitive, provide some helpful guidelines and trends. The second part of the research question – what one can plausibly infer or imply from the results – is far more complicated and illusive and, therefore, limited. Contributing to the question's complications and illusiveness are severe limitations to existing data as well as the influence of selection effects. Thus, while existing data sketch out the general contours of what our federal appellate courts are doing in the criminal setting, how to interpret these data remains far from clear.

Biography

Professor Heise's research focuses on bridging empirical methodologies and legal theory. He earned an A.B. from Stanford University, a J.D. from the University of Chicago, and a Ph.D. from Northwestern University, and was admitted to the Illinois Bar in 1987. Professor Heise served as Senior Legal Counsel to the Assistant Secretary for Civil Rights in the U.S. Department of Education and later as Deputy Chief of Staff to the U.S. Secretary of Education. He entered academia in 1994 as a Visiting Assistant Professor at Indiana University School of Law, becoming Assistant Professor in 1995, and Associate Professor in 1999, before moving to Case Western Reserve University as Professor of Law. His research and teaching areas include torts, law and education policy, insurance, constitutional law, and empirical methods. Professor Heise has co-edited the *Journal of Empirical Legal Studies* since 2005.

Context and Compliance: A Comparison of State Supreme Courts and the Circuits

Sara C. Benesh, Associate Professor, University of Wisconsin-Milwaukee Department of Political Science

Wendy L. Martinek, Associate Professor, SUNY-Binghamton Department of Political Science; Program Director, Law and Social Science Program, National Science Foundation

Abstract

The U.S. Supreme Court has effect only when those charged with implementing its decisions faithfully comply with its precedents. Stories about compliance with and defiance of Court prescriptions are plentiful, but systematic, empirical analyses of the influence of Supreme Court precedent on lower-court decision-making are not as prevalent. In this article, we consider the Supreme Court's *Miranda* jurisprudence to determine whether different lower courts treat High Court precedent differently. We expect that the U.S. Courts of Appeals will be more compliant with Supreme Court precedent than the state courts of last resort given the circuit courts' position in the federal hierarchy, their constitutional position with respect to the Supreme Court, and the stronger likelihood that aberrant decisions might be reversed by a watchful Supreme Court. Judges on the state courts of last resort, on the other hand, have their own constitutions to apply, are less visible to the Supreme Court, have increased control over their dockets, and have need to concern themselves with retaining their position. Hence, we employ a contextual analysis to ascertain the extent to which the differential situations of these two lower courts affect their propensity to use Supreme Court precedent in the area of confessions of crime. Using samples of decisions from 1970-1981, we seek to compare models of decision making for the circuit courts and for the state supreme courts with respect to the influence of Supreme Court precedent. These court systems are both subservient in matters of federal law; which, however, is more compliant?

We are indebted to Harold J. Spaeth for his insights on this and related work. Wendy L. Martinek also gratefully acknowledges the support of the National Science Foundation.

Table 4
Circuits and States and Supreme Court Precedent
(Robust Standard Errors)

U.S. Circuit Courts of Appeals

Variables	Coefficients	Significance Levels (two-tailed)
Supreme Court Precedent		
Coercion	1.3299	0.001
Characteristics of the Accused	1.5084	0.000
Procedural Issues	0.5180	0.000
Precedent Change	0.0821	0.813
Ideology		
U.S. Supreme Court Mean Segal/Cover	-4.5046	0.097
Percent Democrat on Panel	0.7770	0.350
Controls		
Lower Court Excluded Confession	2.2655	0.000
Case Involved Murder or Manslaughter	-0.6621	0.337
Constant	-1.9295	0.049

Pseudo R2 = 0.5835; Percent Correctly Classified = 91.59%; Reduction in Error = 49%

State Courts of Last Resort

Variables	Coefficients	Significance Levels (two-tailed)
Supreme Court Precedent		
Coercion	1.5687	0.000
Characteristics of the Accused	0.6825	0.000
Procedural Issues	0.2655	0.000
Precedent Change	0.0142	0.964
Ideology		
U.S. Supreme Court Mean Segal/Cover	-0.8384	0.691
Mean PAJID Score of Majority	0.0279	0.007
Controls		
Lower Court Excluded Confession	0.1330	0.854
Case Involved Murder or Manslaughter	-0.4001	0.185
Constant	-1.3703	0.098

Pseudo R² = 0.3431; Percent Correctly Classified = 86.28%; Reduction in Error = 31%

As shown here, the most important influences on the decision over a confession in the circuit courts are those measuring Supreme Court precedent, as well as a control for the decision made by the district court on the matter. For the states, Supreme Court precedent is also highly significant, but their second influence is the mean ideology score of those judges in the majority coalition.

Table 5
Putting State Court Decision Making in Context

Variables	Coefficients	Significance Levels (two-tailed)
Supreme Court Precedent		
Coercion	1.6543	0.000
Characteristics of the Accused	0.6230	0.002
Procedural Issues	0.2505	0.001
Precedent Change	0.1065	0.735
Ideology		
U.S. Supreme Court Mean Segal/Cover	-0.5721	0.783
Mean PAJID of Majority	0.0138	0.266
Context		
Grounds for Decision	0.1894	0.370
Constitution Protective	-0.0403	0.840
Grounds * Constitution	0.1429	0.640
Jurisdiction	0.4628	0.077
Intermediate Appellate Court	0.1867	0.592
State Ideology	0.0200	0.061
Controls		
Lower Court Excluded Confession	0.3080	0.693
Case Involved Murder or Manslaughter	-0.5266	0.085
Constant	-2.6643	0.008

Pseudo R2 = 0.3620; Percent Correctly Classified = 86.89%; Reduction in Error = 34%

Once controls are entered for the context in which state supreme courts make decisions, the ideology of the judges no longer matters, but the ideology of those responsible for the retention of the judges does. U.S. Supreme Court precedent, however, remains strongly influential.

Table 6
The Influence of Supreme Court Precedent

	Probability Y = 1 Confession Excluded (Confidence Interval in Parentheses)	Change from Mean
U.S. Courts of Appeals		
All variables at mean	0.044 (0.017, 0.092)	
Three more coercive than noncoercive facts	0.783 (0.334, 0.978)	+ 0.739
Three fewer coercive than noncoercive facts	0.004 (0.000, 0.026)	- 0.040
Three more sympathetic accused characteristics	0.756 (0.403, 0.952)	+ 0.712
Three fewer sympathetic accused characteristics	0.001 (0.000, 0.005)	- 0.043
Three more procedural problems than procedural protections	0.393 (0.199, 0.613)	+ 0.349
Three fewer procedural problems than procedural protections	0.031 (0.010, 0.069)	- 0.013

State Supreme Courts

All variables at mean	0.087 (0.057, 0.124)	
Three more coercive than noncoercive facts	0.962 (0.894, 0.992)	+ 0.875
Three fewer coercive than noncoercive facts	0.003 (0.001, 0.010)	- 0.084
Three more sympathetic accused characteristics	0.419 (0.182, 0.693)	+ 0.332
Three fewer sympathetic accused characteristics	0.014 (0.003, 0.041)	- 0.079
Three more procedural problems than procedural protections	0.300 (0.156, 0.494)	+ 0.213
Three fewer procedural problems than procedural protections	0.077 (0.049, 0.112)	- 0.010

The influence of Supreme Court precedent on decision making on both the circuit court and the state supreme court is substantial, but as shown here, Supreme Court precedent exerts more overall influence on the probability that a given confession will be excluded from evidence for the circuit courts than for the state courts of last resort.

Biographies

Professor Benesh has been a member of the political science department at the University of Wisconsin-Milwaukee since 2001. She teaches undergraduate and graduate courses in civil rights and civil liberties, judicial behavior, and political methodology. She received her Ph.D. from Michigan State University in 1999. She taught at the University of New Orleans from 1999-2001.

Professor Martinek specializes in the study of judicial politics, with a particular interest in the judicial selection politics at the federal level and decision-making in both the United States Courts of Appeals and state courts of last resort. Her current research program includes a project examining amicus curiae in the United States Courts of Appeals. In addition to her focus on judicial politics, Professor Martinek has complementary interests in American political institutions, interest groups, state politics, and political methodology. Her research has been published in the *American Journal of Political Science*, *Journal of Politics*, *Social Science Quarterly*, *American Politics Review*, *Party Politics*, and *Justice System Journal*. Her book, *Judging on a Collegial Court: Influences on Federal Appellate Decision Making*, with Virginia A. Hettinger and Stefanie A. Lindquist, is forthcoming with the University of Virginia Press.

Professor Martinek teaches classes on Constitutional Law, Civil Rights and Liberties, Judicial Politics and Behavior, and American Political Institutions. With a Master's from the University of Wisconsin-Milwaukee and a Ph.D. from Michigan State University, Professor Martinek joined the Binghamton faculty in 2000.