THE PSYCHOLOGY OF PERSUASIVE PRECEDENT

JEFFREY J. RACHLINSKI* & ANDREW J. WISTRICH**

I

INTRODUCTION

Adherence to precedent is a bedrock principle in a common law judicial system.[1] Public support for courts depends upon many factors, including the perception that they are stable institutions that follow their own rules.[2] Consider that, after it rendered the *Dobbs* decision,[3] public support for the U.S. Supreme Court dropped to its lowest level since anyone has been keeping track.[4] Courts that ignore precedent risk undermining the legitimacy of the judicial system.[5] Disregarding previous decisions promotes the view that the outcome of cases turns on who the judge is rather than what the law is.[6] That said, judges must also

Copyright © 2024 by Jeffrey J. Rachlinski & Andrew J. Wistrich.

This Article is also available online at http://lcp.law.duke.edu/.

*Henry Allen Mark Professor of Law, Cornell Law School.

**Magistrate Judge, United States District Court, Central District of California (ret.); Adjunct Professor of Law, Cornell Law School.

1. *See* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015) (describing stare decisis as "a foundation stone of the rule of law"); Goutam U. Jois, *Stare Decisis as Cognitive Error*, 75 BROOK. L. REV. 63, 67 (2009) ("The cornerstone of our legal system is reliance on prior decisions."); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 367 (1988) ("[R]eliance on precedent is one of the distinctive features of the American judicial system.").

2. As Justice Kagan put it: "[A] court is legitimate when it is acting like a court[.]" Nate Raymond & Andrew Chung, *U.S. Supreme Court Risks Its Legitimacy by Looking Political, Justice Kagan Says*, REUTERS (Sept. 14, 2022), https://www.reuters.com/legal/us-supreme-court-risks-its-legitimacy-by-looking-political-justice-kagan-says-2022-09-14/. She argued that, among other things, a court is acting like a court when it "abides by precedent, except in unusual circumstances." *United States Supreme Court Justice Elena Kagan Discusses Legitimacy of the Court in Visit to Law School* (Sept. 15, 2022), https://news.law.northwestern.edu/u-s-supreme-court-justice-elena-kagan-visits-law-school/ [https://perma.cc/PWG9-YNJ2].

3. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

4. *See* PEW RSCH. CTR., *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling* (Sept. 1, 2022), https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/ [https://perma.cc/2P2H-5E8W].

5. *See* Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 813 (2012) (suggesting that the failure to follow precedent confirms the view that courts do not follow their own rules); James R. Zink et al., *Courting the Public: The Influence of Decision Attributes on Individuals' Views of Court Opinions*, 71 J. POL. 909, 911 (2009) ("[T]he Court invokes precedent in part to demonstrate its use of fair and neutral decision-making procedures, whereby similar cases are consistently treated according to similar legal principles, thus bolstering the public's acceptance of judicial outcomes and its confidence in the Court itself.").

6. *See* NICHOLAS VON HOFFMAN, CITIZEN COHN: THE LIFE AND TIMES OF ROY COHN 380 (1988) (reporting that Roy Cohn, one of Donald Trump's longtime attorneys, commonly said "I don't care what the law is, tell me who the judge is."). *See also* Mead, *supra* note 5, at 813 ("When one judge refuses to

have the ability to make independent choices. This article presents an empirical study of the influence of non-binding, or persuasive, precedent on 952 sitting judges. We gave the judges one of four hypothetical cases, each of which contained configurations of persuasive precedent. We found that: (1) judges largely ignored a single non-binding precedent; (2) judges were more likely to make decisions that were consistent with three non-binding precedents; and (3) judges also tended to make decisions consistent with three non-binding precedents, even when they were accompanied by a fourth inconsistent non-binding precedent. Overall, the portrait of judicial reliance on non-binding precedent appears sensible, but less than optimal.

Different categories of precedent should affect judges differently. Lower courts must follow authoritative precedent of higher courts.[7] Failing to do so risks wasting time and resources by prompting appeals of decisions that are likely to be overturned. Perhaps more importantly, following authoritative precedent promotes the integrity and fairness of the court system.[8] Rulings by similarly situated courts, by contrast, produce only persuasive precedent: judges are not obligated to adhere to decisions made by peers who simply encountered the issue earlier.[9] Judges also need not follow precedents from other jurisdictions, although these often have the power to persuade.[10]

Even in the absence of binding authority, following the precedent of a similarly situated court in the same jurisdiction serves important institutional goals. Doing so promotes uniformity and legitimacy in the courts, just as following authoritative precedent does.[11] Like cases should be treated alike.[12]

follow the decision of another judge on the court, this view is confirmed.”).

7. *E.g.,* BRYAN A. GARNER ET AL., THE LAW OF PRECEDENT 27 (2016) (“Federal and state courts are absolutely bound by vertical precedents—those delivered by higher courts within the same jurisdiction.”).

8. *See* Hutto v. Davis, 454 U. S. 370, 375 (1982) (per curiam) (“[U]nless we wish anarchy to prevail the federal judicial system, a precedent of this Court must be followed by the lower Federal Courts no matter how misguided the judges of those courts may think it to be.”).

9. *E.g.*, GARNER, *supra* note 7, at 255 (“trial courts aren’t bound at all by other trial courts.”).

10. *See* Chad W. Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. Rev. 55, 59 (2009) (“There is no a priori reason why the interest in predictability and stability should stop at state borders.”).

11. *See* Deborah Beim & Kelley Rader, *Legal Uniformity in American Courts*, 16 J. EMPIRICAL LEGAL STUD. 448, 449 (2019) (“[L]egal uniformity has long been recognized as paramount for the administration of blind justice.”); J. Brandon Duck-Mayr, *Explaining Legal Inconsistency*, 34 J. THEORETICAL POL. 107, 108 (2022) (“[I]nconsistency in legal doctrine reduces judicial legitimacy.”). *See also* THE FEDERALIST NO. 80 (Alexander Hamilton) (referring to the “necessity of uniformity” in the interpretation of laws). *But see* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1639 (2008) (“Uniformity might generally be preferrable, and in a small percentage of cases essential, but it should not be among the judiciary’s first concerns.”).

12. *See* Karl N. Llewellyn, *Case Law*, *in* 3 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 249, 249 (Edwin R. A. Seligman & Alvin Johnson eds., 1930) (noting “that curious, almost universal sense of justice which urges that all men are properly to be treated alike in like circumstances” regardless of differences in time); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1090 (1975) (“The gravitational force of a precedent may be explained by an appeal . . . to the fairness of treating like cases alike.”); Arthur L. Goodhart, *Precedent in English and Continental Law*, 50 L.Q. REV. 40, 56–58 (1934) (describing the importance of treating like cases alike).

Openly disparate treatment makes the common law appear arbitrary[13] and risks allowing it to degenerate into chaos.[14] Splits in authority among the federal circuits are notorious for creating uneven justice in the federal courts,[15] and an analogous problem exists in the states.[16] Moreover, following precedent is simply an engrained feature of legal discourse, regardless of whether the precedent is binding.[17] Finally, following decisions made by other judges can reduce workload[18] and diminish stress.[19]

In many settings, relying on the choices that others have made is both common and reasonable.[20] If someone else is more capable or better situated to make a sound decision, deferring to their judgment makes sense. The fact that something was done before by someone else also provides a justification for doing it again[21]—after all, other people are frequently right and free-riding on their decisions is quick and easy.[22] Some psychologists refer to this phenomenon as the imitate-the-majority heuristic.[23] This heuristic is powerful and influences

---

13. *See* John E. Coons, *Consistency*, 75 CALIF. L. REV. 59, 60 (1987) ("[C]onsistency prescribes like treatment for successive cases governed by the same rule of law or morality.").

14. *See* Goodhart, *supra* note 12, at 53 ("It is obvious that if each new case were decided without any consideration of prior cases, the law might degenerate into a wilderness of single instances.").

15. *See* Jonathan M. Cohen & Daniel S. Cohen, *Ironing out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among the United States Courts of Appeals*, 108 CALIF. L. REV. 989, 1010 (2020) ("Circuit splits can undermine a legal principle that many believe is fundamental: courts should apply federal laws uniformly.").

16. *See* Kem Thompson Frost, *Predictability in the Law, Prized Yet Not Promoted: A Study in Judicial Priorities*, 67 BAYLOR L. REV. 48, 115–116 (2015) (reporting that, that when forced to choose between alignment with other judges of equal rank and the rule they believed correct, the judges usually preferred the latter). *See generally*, Mark DeForrest, *In the Groove or in a Rut: Resolving Conflicts Among the Washington State Court of Appeals at the Trial Court Level*, 48 GONZ. L. REV. 455 (2012).

17. *See* John Bell, *Comparing Precedent*, 82 CORNELL L. REV. 1243, 1266 (1997) ("The judge feels both less exposed when drawing on materials from the legal tradition, and the general obligation to ensure consistency and coherence requires judges to examine what is in place and the adjust their solutions accordingly."); Dworkin, *supra* note 12, at 1090 (explaining that a judge "will always try to connect the justifications he provides for an original decision with decisions that other judges or officials have taken in the past.").

18. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921) ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case . . . ."); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1177 (2006) ("[I]t saves time and trouble to rely on earlier decisions.").

19. *See* Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 179 (1993) ("To the extent that traditions represent judgments that others in other times have made, they can provide an attractive resource to those uncomfortable with making judgments of their own.").

20. *See* ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 100 (4th ed. 2001) ("We view a behavior as correct in a given situation to the degree that we see others performing it.").

21. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572 (1987) ("In countless instances, out of law as well as in, the fact that something was done before provides, by itself, a reason for doing it that way again."); ALGERNON CHARLES SWINBURNE, A WORD FROM THE PSALMIST, IN A MIDSUMMER HOLIDAY AND OTHER POEMS 176, 179 (3d ed. 1889) ("Is not Precedent indeed a king of men?").

22. *See* Robert H. Frank, *The Political Economy of Preference Falsification: Timur Kuram's Private Truths, Public Lie*s, 34 J. ECON. LIT. 115, 119 (1996) ("[O]ur cognitive capacities are limited, and without heavy reliance on social proof no one could manage event to get through the day.").

23. *See* Ralph Hertwig & Stefan M. Herzog, *Fast and Frugal Heuristics: Tools of Social Rationality*, 27 COGNITION 661, 684 tbl. 1 (2009). *See also* NICCOLO MACHIAVELLI, THE PRINCE 18 (1514) ("Men

people in many settings.[24]

Judges often sensibly imitate their predecessors.[25] If the previous judge is more experienced or enjoys more favorable circumstances, such as less time pressure, then the previous decision is apt to be more accurate. Furthermore, the decisions of multiple judges who have acted independently should be more persuasive than the decision of a single judge.[26] There is a wisdom in crowds.[27] Multiple judges who decide an ambiguous issue the same way arguably create a reasonable presumption that they have decided correctly.

Even crowds can be wrong, however. Decades ago, two well-known social psychologists, Muzafer Sherif and Solomon Asch, demonstrated the remarkable power of social influence. In his research, Sherif placed subjects in a darkened room with a small, stationary point of light and asked the subjects if it appeared to move.[28] Sherif showed that estimates of how far the light appeared to move invariably converged when groups of subjects were exposed to the illusion together. Even though the experimenter gave no indication that the group should achieve a consensus on how far the light appeared to move, they naturally settled on a norm.

Solomon Asch provided a more powerful demonstration that groups excessively influence individual judgment. In his most famous experiment, Asch recruited research subjects to assess which of three lines was most similar in length to a target line.[29] The task was conducted in groups of eight. Unknown to the one true research subject in each group, the other seven individuals were Asch's confederates. On several rounds, the confederates gave the wrong answer—even though the task was quite easy and the correct answer was obvious. Although the subjects knew that they were wrong, they went along with the group

---

nearly always follow the tracks made by others and proceed in their affairs by imitation."); THE FEDERALIST NO. 61 (Alexander Hamilton) ("There is a contagion in example which few men have sufficient force of mind to resist.").

24. *See* Christoph Engel, *How Little Does It Take to Trigger a Peer Effect? An Experiment on Crime as a Conditional Rule Violation*, 60 J. RSCH. CRIME & DELINQUENCY 455, 480 (2023) ("The experiment has a clear result: the more of their peers violate the rule in question, the more a randomly selected individual is likely to do so as well, and the more intensely she violates the rule."); Noah J. Goldstein et al., *A Room With a Viewpoint: Using Social Norms to Motivate Environmental Conservation in Hotels*, 1 J. CONSUMER RSCH. 472 (2008) (reporting that hotel guests were more likely to reuse their towels if they were informed that "the majority of guests in this room reuse their towels").

25. *See* Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 26 (1945) ("While . . . the power of the precedent is only 'the power of the beaten track,' still the mere fact that a path is a beaten one is a persuasive reason for following it.").

26. *See* GARNER, *supra* note 7, at 233 ("Another Court's approval of a decision can bolster its credibility and increase its value as precedent.").

27. *See* Ans Vercammen et al., *The Collective Intelligence of Small Crowds: A Partial Replication of Kosinski et al. (2012)*, 14 JUDGMENT & DECISION MAKING 91, 91 (2019) ("[H]uman groups, when properly managed, tend to outperform the average (and frequently the best) individual, both in terms of the quality and quantity of solutions in a wide range of tasks, including judgment and prediction, creative thinking, concept attainment, and brainstorming."). *See generally,* JAMES SUROWIECKI, THE WISDOM OF CROWDS (2004).

28. Muzafer Sherif, *An Experimental Approach to Attitudes*, 1 SOCIOMETRY 90, 97–98 (1937).

29. Solomon E. Asch, *Opinions and Social Pressure*, 193 SCI. AM. 2 (1955).

about one-third of the time after watching seven confederates give the wrong answer.[30] Nearly three-quarters of the research subjects conformed to the group response at least once during the experimental session.[31] If a group can induce people to choose an obviously wrong answer, it probably can persuade judges in an ambiguous task such as judicial decision making.

Subsequent research on the Asch conformity experiments sheds additional light on the nature of the group influence. First, Asch did not need seven confederates—three produced nearly the same effect.[32] Second, adding a single defector broke the power of the group. That is, research subjects faced with three confederates unanimously choosing the wrong answer frequently followed the group, but subjects faced with three confederates choosing the wrong answer—along with one defector who chose the right one—gave in to the power of the majority less often.[33] Researchers have replicated Asch's results many times over,[34] including the power of a single defector to eliminate the majority's influence.[35] One study even showed that adding a defector who chose a wrong answer that was different from the group still eliminated the group's power to promote conformity.[36] Groups exert a powerful influence over individuals, but a defector undermines that power.

In the judicial setting, following an earlier case without examination can create an undesirable path dependence.[37] A rational reliance on the decisions of others can devolve into irrationality, as subsequent individuals abandon any meaningful use of their private information or personal judgment and instead

---

30. *Id*. at 3 ("Whereas in ordinary circumstances individuals matching the lines will make mistakes less than 1 percent of the time, under group pressure the minority subjects swung to acceptance of the misleading majority's wrong judgments in 36.8 percent of the selections").

31. *Id*. at 4 (reporting only that "about one quarter of the subjects were completely independent and never agreed with the erroneous judgments of the majority.").

32. *Id*. at 5–6 ("Under the pressure of a majority of three, the subjects' errors jumped to 31.8 percent. But further increases in the size of the majority apparently did not increase the weight of pressure substantially.").

33. *Id*. at 5 ("The presence of a supporting partner depleted the majority of much of its power. Its pressure on the dissenting individual was reduced to one fourth.").

34. *See* Rod Bond & Peter Smith, *Culture and Conformity: A Meta-Analysis of Studies Using Asch's Line Judgment Task*, 119 PSYCH. BULL. 111, 116 (1996) (collecting and analyzing more than 130 replications of Asch's experiments).

35. *See* Paul A. Sloan et. al., *Group Influences on Self-Aggression: Conformity and Dissenter Effects*, 28 J. SOC. & CLINICAL PSYCH. 535, 546 (2009) ("These results are consistent with findings of previous studies demonstrating high rates of conformity in a unanimous group context and decreased rates of conformity in the presence of a dissenter.") (citation omitted).

36. William B. Morris & Robert S. Miller, *The Effects of Consensus-Breaking and Consensus Preempting Partners on Reduction of Conformity*, 11 J. EXPERIMENTAL SOC. PSYCH. 215, 215 (1975).

37. *See* Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 605 (2001) (arguing that courts' initial resolutions of legal issues can become locked-in and resistant to change); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 125 (2006) ("a doctrine of precedent . . . produces a form of path dependence: the content of law becomes highly sensitive to the order in which cases arise"). *But see* Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 909 (2005) (contending that the common law is only weakly path dependent).

rely entirely on what their predecessors have decided.[38] Judges who find that multiple judges have previously decided the issue the same way might fail to recognize that some of their predecessors were simply following the first precedent without question,[39] a phenomenon sometimes called an information cascade.[40] Uncritical reliance on precedent might produce irrational information cascades.[41] Because so few cases are appealed, and only a subset of those appeals that are filed are pursued to conclusion,[42] once a cascade begins, it might be difficult to stop. Following an earlier case promotes consistency, but as Ralph Waldo Emerson put it, "a foolish consistency is the hobgoblin of little minds."[43]

Existing research on and observation of judges provides little clarity as to how judges react to persuasive precedent. By definition, persuasive precedent from similarly situated courts is non-binding[44] or optional.[45] Yet, judges often follow, or at least cite, persuasive precedent.[46] The U.S. courts of appeals, for example, "have a tendency to herd: once one decides an issue, the next circuit to confront

38. *See* Erin P. Hennes & Layla Dang, *The Devil We Know: Legal Precedent and the Preservation of Injustice*, 8 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCI. 76, 78 (2021) ("[I]nformation . . . cascades can lead people to adopt a perspective simply because they assume (often incorrectly) that others have more information than they do. In the courtroom, information cascades are dangerous because authority is given to the first judge to try a particular matter, even though that judge was first generally only by chance.").

39. *See generally,* Benjamin Enke & Florian Zimmerman, *Correlation Neglect in Belief Formation*, 86 REV. ECON. STUD. 313 (2019) (describing how people fail to notice that others are acting on the same information, rather than deciding independently).

40. *See* Sushil Bikhchandani et al., *Information Cascades*, NEW PALGRAVE DICTIONARY ECON. 1, 1 (2d ed. 2008) (defining information cascade).

41. *See* Hennes & Dang, *supra* note 38, at 78 ("In the courtroom, information cascades are dangerous because authority is given to the first judge to try a particular matter, even though that judge was first generally only by chance."); Kai Spiekerman & Robert E. Goodin, *Courts of Many Minds*, 42 BRIT. J. POL. SCI. 555, 562 (2012) ("If judges are quite responsive to the opinions of their predecessors, they can quickly trigger cascades, compromising the capacity for many minds to enhance group confidence.").

42. *See* Theodore Eisenberg, *Appeal Rates and Outcomes in Tried Non-Tried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 664 tbl. 1 (2004) (reporting that of federal cases in which a definitive judgment was entered from 1987–1996, 21.0 percent were appealed, 11.4 percent of appeals were pursued to conclusion, and 2.5 percent were reversed).

43. Ralph Waldo Emerson, *Self-Reliance*, *in* ESSAYS AND ENGLISH TRAITS 63, 70 (C.W. Eliot ed., 1909).

44. *See* Flanders, *supra* note 10, at 62 ("[P]ersuasive authority is any authority which is not binding on courts").

45. *See* Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001) ("[I]n the absence of binding precedent . . . [a] court[] may forge a different path than suggested by prior authorities that have considered the issue."); Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1946 (2008) ("Judges are not required to seek it, read it, mention it, distinguish it, or follow it.").

46. *See* Flanders, *supra* note 10, at 78 ("There is a pull toward conformity with other courts, and court who drift from that pull are usually thought to have to explain why, or at least to acknowledge the disagreement."); Frost, *supra* note 11, at 1578 ("The Courts of Appeals are generally hesitant to depart from precedent set in other jurisdictions, despite being under no obligation to adhere to decisions by sister circuits."); Mark Cooney, *What Judges Cite: A Study of Three Appellate Courts*, 50 STETSON L. REV. 1, 17–19 (2020) (reporting that about 12 percent of U.S. Supreme Court citations were to persuasive authority and that the comparable figures for the Virginia Courts of Appeal and the Wisconsin Courts of Appeal were 9 percent and 13 percent, respectively).

the same question is more likely to agree."[47] The U.S. Supreme Court might also be vulnerable to herding. During the 2012 through 2015 Terms, when resolving unbalanced circuit splits, the Supreme Court sided with the position held by the larger number of circuits 68.1% of the time.[48] Of course, that might be because the majority position of the U.S. courts of appeals is usually right, but it also might mean that the Supreme Court tends to subconsciously follow the herd.[49]

In a series of experiments, Holger Spamann and his collaborators found that precedents do not have much influence over judges. In these studies, the researchers asked judges to review detailed case materials and then to render a decision. They varied the content of the materials, much as we do in our experiments, exposing them to precedents that ran in one of two directions. In the first study, the researchers varied the directions of weak precedent from a similarly situated court and also manipulated the characteristics of the litigants to make them more or less sympathetic.[50] They found that sympathy influenced judges' decisions more than the precedent.[51] In a similar study of judges from seven different countries, where the precedent was also from a similar court, but was more on point, the research team likewise found that precedent had little impact.[52] Finally, in a recent study, Daniel Klerman and Holger Spamann found that many judges ignored even authoritative precedent that dictated which state's law should apply to a lawsuit.[53] Overall, the series of studies suggests that

---

47. Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 739 (2018). *See also* Beim & Rader, *supra* note 11, at 450 (analyzing 137 circuit splits during 2005–2013) ("Though they are willing to depart from other circuits' decisions – after all circuit splits are a common phenomenon – qualitative and quantitative evidence suggest that most judges seriously consider sister circuits' positions before making their own decisions.") (citations omitted); Scott Baker & Anup Malani, *How Do Judges Learn from Precedent?* (unpublished manuscript, 2024) (finding that as each additional circuit reaches the same conclusion on a disputed legal issue the next circuit to confront it becomes increasingly likely to follow the herd).

48. We calculated this percentage from reports in a series of papers that describe how the Supreme Court has resolved circuit splits. Joshua Cumby, *Appellate Review VI: October Terms 2015*, 10 J. LAW 31 (2020); Joshua Cumby, *Appellate Review V: October Term 2014*, 9 J. LAW 54 (2019); Joshua Cumby, *Appellate Review IV: October Term 2013 – The Prodigal Sums Return*, 8 J. LAW 1, 65 (2018); Tom Cummins et al., *Appellate Review III: October Term 2012 and Counting*, 4 J. LAW 385, 397–98 (2014).

49. *See* Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 L. & SOC. REV. 135, 148 (2006) ("A justice is more likely to vote for the petitioner's position where . . . the circuits taking that position outnumbers those on the other side . . . ."). *See also* GARNER, *supra* note 7, at 235 ("Most courts respond to a strong convergence of opinion on a particular issue by following the majority rule, even when not obliged to do so.").

50. Holger Spamann & Lars Klöhn, *Justice is Less Blind, and Less Legalistic, Than We Thought: Evidence from an Experiment with Real Judges*, 45 J. LEGAL STUD. 255, 264–65 (2016) (describing the precedent as being related to the case before the judges, but not dispositive).

51. *Id*. at 270 (reporting that "the precedent made no detectable difference in our sample: the affirmance rates are almost identical").

52. Holger Spamann et al., *Judges in the Lab: No Precedent Effects, No Common/Civil Law Differences*, 13 J. LEGAL ANALYSIS 110, 121–22 (2021) (reporting that in their study "horizontal precedent does not affect judicial decisions").

53. Daniel M. Klerman & Holger Spamann, *Law Matters—Less Than We Thought*, 40 J. L. ECON., & ORG. 108, 122 (2024) (reporting that three out of 13 judges disregarded authoritative precedent).

precedent has little influence on judges.

These three studies provide valuable insights into how judges react to precedent, but they also have some limitations. The first two asked judges to render a decision in the context of an international criminal court. This setting was probably unfamiliar to the judges, who were domestic judges from various countries, including the United States, and they might not have had a clear understanding of the status of precedent in these intertwined courts. In fact, "international criminal courts and tribunals have consistently held that . . . [decisions of other tribunals] have no binding force, but may have persuasive value."[54] Furthermore, the third study had a limited sample size, reporting that three out of thirteen judges in the study ignored authoritative precedent.[55]

To expand upon the experimental research on the influence of precedent, we recruited 952 judges attending judicial education conferences to participate in our research. We drafted four different hypothetical cases, each of which requested a ruling in an uncertain area of law. In all cases, we indicated that no authoritative precedent existed, but that there was precedent from similar courts. We varied the direction of the precedent and randomly assigned the judges to review precedent in either one direction or the other. If the judges were more apt to side with the precedent, then we concluded that it had an influence. We also varied the strength of the precedent, simulating the group influences tested by Asch by using either unanimous or split precedent.

II

METHODS

To obtain the data, we used the same basic methodology in this study that we have used to assess the influence of other factors on judicial decision making for over two decades.[56] We collect the data during presentations we make at judicial education conferences. At the outset of our presentations, we ask the judges to respond to a written questionnaire containing multiple hypothetical cases or other tests. We deliberately use vague presentation titles, such as "Judicial Decision Making," so as not to reveal what our research involves before the judges respond to the questionnaire. Most of our presentations are made during plenary rather than parallel sessions so that the participating judges are not drawn to our presentation because they have a special interest in precedent or psychology.

We collected the data described in this article between 2006 and 2019 at ten separate presentations made by one or both of us at judicial education programs. All told, 952 judges participated in our research on precedent. At each of these

54. Zammit Borda, *The Direct and Indirect Approaches to Precedent in International Criminal Courts and Tribunals*, 14 MELB. J. INT'L LAW 1, 6 (2013).

55. *See* Klerman & Spamann, *supra* note 53.

56. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 816–18 (2001) (describing our methodology).

programs, we gave judges one of the scenarios listed in Table 1. We describe each scenario in detail as we present the results of individual experiments. The full scenarios are included in the appendices.[57] We also asked the participants to provide demographic information, such as gender, political affiliation, and years of judicial experience.

We used a between-subjects experimental design throughout.[58] That is, we created two—or more—versions of a hypothetical case in which the factors we studied varied from version to version. We randomly assigned each judge to only one condition. Differences between the aggregated decisions made by the individual judges comprising the two or more conditions can thus be attributed to the factor that we varied. We asked the judges not to identify themselves. We also informed the judges that participation was entirely voluntary and that they could complete the survey for purposes of participating in the training session but opt out of allowing us to use their questionnaire in any further research if they preferred. Nearly all of the judges who attended our presentations completed the voluntary survey and authorized us to use their results in the research described below.

Table 1: Summary of Presentations

Scenario	Judges (n)	% Female	Experience (Median Yrs.)	% Republican
Unemployment benefits	Florida State Trial Judges (155)†	24	13	57
	Federal Magistrate Judges (2010) (DC) (41)	35	n/a	21
Environmental Dispute	Ohio State Appellate Judges (54)	37	18	51
	Federal Magistrate Judges 2015 I (Seattle) (139)	38	8	20
	Federal Magistrate Judges 2015 II (Boston) (173)	30	8	32
DUI	Kansas Municipal Court Judges (133)	25	16	62
	Texas State Trial Judges (72)	32	8	63
Child Mobility	New York State, Family (69)	61	8	25
	New York State, New Trial Judges (72)	43	0	48
	Austin, Texas (44) ††	54	n/a	26

† 294 judges attended this conference. Only half reviewed this problem, while the other half reviewed a problem concerning a different issue

†† These judges were attending the National Council of Juvenile and Family Court Judges in 2015.

III
RESULTS

We provide a detailed description of each scenario followed by our results.

57. *See* Appendices A–D.

58. *See* JENNIFER K. ROBBENNOLT & THOMAS S. ULEN, EMPIRICAL METHODS IN LAW 104 (2010) (describing "between-subjects" experimental designs).

We then provide an aggregate analysis of the influence of persuasive precedent across all of our studies. Overall, the persuasive precedent mildly influenced judges' decisions, even though it was non-binding.

A. Unemployment Benefits: Materials and Results

Our first test of the influence of persuasive precedent concerned an error in a statute dealing with unemployment benefits. Our materials described a statute authorizing an appeal from an agency denial of an unemployment benefits claim.[59] The statute stated that the appeal may be filed "not less than" seven days after the entry of the agency order. The materials indicated that the unemployment agency denied the applicant's request for unemployment insurance and that he filed a notice of appeal forty-three days after entry of the order. Although that comports with the wording of the statute, it arguably makes little sense. If read exactly the way it is written, the statute places no restrictions on the timing of appeals other than to delay them. The defendant employer claimed that the statute contained a scrivener's error and that the statute should have said "not *more* than 7 days," rather than "not *less* than 7 days" (emphasis added) and moved to have the appeal dismissed as untimely.

We provided no facts concerning the merits of the unemployment claim, thereby focusing the judges' attention solely on the interpretation of the statute. The employee simply argued that the plain meaning of the statute would allow the appeal. The employer argued that,

> [T]he plain meaning of the statute makes no sense because there is no reason to require a party aggrieved by an order to wait 7 days before filing notice of appeal, and yet allow that party to file a notice of appeal at any time in the future after the 7 day period has elapsed.

The materials also stated that the "[t]he legislative history is unhelpful, suggesting only that the statute was intended to regulate the timing of appeals from the agency's orders." They went on to note, however, that there is "a general legislative policy of expediting the resolution of applications for unemployment insurance benefits."

To manipulate the precedent, the materials stated that "[j]ust one other court, in a different part of the state, has considered this issue." This court had issued "an unpublished decision" in which either the "trial judge found the plaintiff's [employee's] arguments more persuasive and denied the motion to dismiss" or the "trial judge found the defendant's [employer's] arguments more persuasive and granted the motion to dismiss."

Judges who agreed that the statute should be re-interpreted as the employer suggested should have granted the employer's motion, thereby affirming the denial of unemployment benefits. At the bottom of the page, the materials asked the following: "How would you rule on the defendant's motion to dismiss the appeal?" Two options followed:

59. *See* Appendix A. All quotations in this section are from the original materials.

"_____ I would **grant** the defendant's motion to dismiss the plaintiff's appeal", and

"_____ I would **deny** the defendant's motion to dismiss the plaintiff's appeal"

We presented almost identical materials to federal magistrate judges with a few exceptions. First, we described the employee as a federal worker and the statute as federal. Second, the judge providing the precedent was a U.S. district judge, rather than a fellow federal magistrate judge.

Precedent had no overall effect on the 155 Florida judges. Among the judges who read that precedent favored granting the motion to dismiss—which favored the employer—23.1% (eighteen out of seventy-eight) granted the motion, as compared to 28.9% (twenty-two out of seventy-six) who had read that the prior court had denied the motion. One judge assigned to the deny condition did not respond. The judges were thus somewhat more likely to grant the motion when they had read that another judge had denied it, although the difference was not significant.[60]

We found an unexpected effect of political orientation. Judges who self-identified as Democrats were more apt to follow the precedent, while self-identified Republicans did the opposite. Specifically, among the Democrats, 30.8% (eight out of twenty-six) of those who read that the precedent favored granting the motion to dismiss granted the motion, while only 14.3% (four out of twenty-eight) of those who read that the precedent favored denying the motion granted the motion. In contrast, these percentages were 17.9% (seven out of thirty-nine) and 31.3% (ten out of thirty-two) respectively, among self-identified Republicans. In effect, it appears that the Democrats followed the precedent, while the precedent affected the Republicans in the opposite way. Using an ordered logistic regression, the interaction between political party and condition was marginally statistically significant.[61] Gender and experience did not interact significantly with precedent.

The non-binding precedent influenced the decisions of the federal magistrate judges. Among judges who had read that a U.S. district judge had granted the motion to dismiss, 27.8% (five out of eighteen) granted the motion, compared to 4.3% (one out of twenty-three) among judges who had read that a U.S. district judge had denied the motion. This difference was only marginally significant, perhaps owing to the small sample size.[62] Also due to the small sample size, we did not assess demographic variables.

The difference between Florida judges' reaction to the materials and that of the federal magistrate judges could be attributable to many factors. Federal judges might react differently to the concept of a scrivener's error than would state judges. Also, most of the federal judges in the study were Democrats, and like the Florida Democratic judges, they followed the precedent. Maybe more

60. Fisher's Exact Test, $p = 0.46$.

61. $z = 1.92$, $p = 0.054$.

62. Fisher's Exact Test, $p = 0.07$.

significantly, however, the precedent was not from another judge of similar rank. Federal magistrate judges do not have to follow the rulings of U.S. district judges from other districts or even in their own districts in other cases, but they might have found such a ruling to be more compelling than if the precedent had come from another federal magistrate judge.

Overall, the first problem provided only weak support for the influence of non-binding precedent. Looking at the data differently, only 50.8% of the judges (ninety-nine out of 195) combining both the Florida judges and federal magistrate judges, made decisions that were consistent with the precedent that they read.

B. Environmental Problem

To test the influence of precedent in a different context, and to test the influence of multiple precedential decisions, we drafted a hypothetical case involving an environmental statute.[63] This case also involved an alleged mistake in statutory drafting. The problem took advantage of a provision in the Resource Conservation and Recovery Act.[64] The statute heavily regulates waste disposal facilities that accept hazardous waste, but only lightly regulates disposal facilities that accept only non-hazardous waste. Because the volume of household waste is so large, the statute exempts it from regulation as hazardous, even though household waste contains modest levels of hazardous substances. In amending the statute in 1984, Congress attempted to clarify the household waste exemption by allowing facilities that accept only household waste to also accept non-hazardous commercial wastes without being subject to the exacting regulations required that apply to hazardous waste disposal facilities. Unfortunately, Congress codified this exemption as follows:

> A facility shall not be deemed to be a "hazardous waste disposal facility" if such facility receives only:
>
> a) household waste; and
>
> b) solid waste from commercial and industrial sources that does not contain hazardous waste.[65]

The use of "and" suggests that facilities must accept both household waste and commercial non-hazardous waste to qualify. Rather than providing clarity, this amendment created confusion.

We drafted two versions of a problem based on this statute: one version for federal magistrate judges and one for Ohio state judges. In the materials we gave to federal magistrate judges, we described a waste-disposal facility called REcycle, which accepted only household waste. The materials indicated that the Environmental Protection Agency (EPA) nevertheless insisted that the facility shut down because it was not also accepting commercial non-hazardous waste. As with the unemployment problem, one party—the EPA—argued that the plain

63. *See* Appendix B.
64. 42 U.S.C. §§ 6901-6992k.
65. 42. U.S.C. §6921(i).

meaning should prevail, while the other—REcycle—argued the statue should be read reasonably. There was no assertion of a scrivener's error in this case, just an assertion that the statute was poorly drafted.

The materials indicated there was precedent from other courts, as noted below, but that "[n]o appellate court has decided this issue." To ensure that the judges did not simply defer to the EPA, the materials stated that "[b]ecause the EPA has used informal procedures (rather than a rulemaking procedure) to issue the order, it is not entitled to deference and you review the issue de novo." The materials stated that the EPA wanted to shut down the facility. It then asked the judges, "[h]ow would you decide the case?" and then gave them two options: "[f]or REcycle[,] and allow it to operate without a permit" and "[f]or the EPA, and force the company to close or obtain a permit."

For the Ohio state appellate judges who reviewed this problem, the materials also described the federal statute, but referred to the state environmental protection agency, which is the Ohio EPA. The materials also indicated that they were reviewing a decision of the Ohio EPA, which was also reviewed by "the Environmental Review Board, pursuant to Chapter 3745 of the Ohio Revised Code (governing appeals from OEPA orders)." The materials note that the review board had denied the appeal and that the company had filed an appeal directly to the Ohio appellate courts. Consistent with the materials for federal magistrate judges, the materials noted that that the standard of review was de novo. The materials were otherwise the same.

We wanted to boost the influence of precedent in this case relative to the employment scenario, and also to test the effect of divided precedent. Among the Ohio judges and the first group of federal magistrate judges, we indicated that "the same issue has been addressed by three federal district courts[66] in other circuits—all in opinions written by U.S. Magistrate Judges." For half of the judges, the precedent favored the company, and for the other half, it favored the EPA. Among the second group of federal magistrate judges, we provided a split version of the precedent. We stated either that "[t]hree courts concluded that the language in the statute exempts facilities that accept only household waste; one concluded that the language in the statute does not exempt facilities that accept only household waste" or that the precedent was similarly split but favored the EPA.

The Ohio judges showed no meaningful variation. Virtually all decided in favor of the Ohio EPA. When precedent favored the position of the Ohio EPA, 96.8%, (thirty out of thirty-one) decided in favor of the Ohio EPA; when it favored the company, 100% of the twenty-three judges still decided in favor of the Ohio EPA. We do not know why these judges were so deferential to the Ohio EPA. The lack of variation precluded further analysis.

The federal magistrate judges, however, were influenced by precedent.

66. In Ohio, we indicated that the precedent was from federal appellate courts from circuits other than the Sixth Circuit, in which Ohio is located.

Among the judges who read about a uniform three-to-zero precedent that favored the EPA, 56.7% (thirty-eight out of sixty-seven) ruled in favor of the EPA, as compared to 27.8% (twenty out of seventy-two) who read about precedent that favored the company. This difference—a shift of 28.9 percentage points—was statistically significant.[67]

The three-to-one split precedent had much less influence on the federal magistrate judges. Among those who read that the split majority precedent favored the EPA, 51.2% (forty-four out of eighty-six) also found in favor of the EPA, as compared to 41.7% (thirty-five out of eighty-four) among judges who read that the split precedent favored the company. This difference—a shift of 9.5 percentage points—was not significant.[68] As compared to the 28.9% shift that we observed among judges who reacted to a unanimous precedent, the effect of the split precedent was marginally statistically significantly smaller.[69]

Unlike the employment case, we observed no significant interaction between the judges' political orientation and the influence of precedent. Table 2, below, reports these results by condition. Neither group reacted negatively to precedent, as the Republican judges in Florida had done. And precedent appeared to have had more influence on Republican judges than Democratic judges. The interaction between political party and the influence of precedent was not significant among either group of federal magistrate judges, however.[70] As with the employment case, the analysis of gender and experience of judges revealed no significant interactions with the direction of the precedent.

67. Fisher's Exact Test, $p = 0.0006$.

68. Fisher's Exact Test, $p = 0.22$.

69. The analysis was conducted using logistic regression of the decision on the direction of precedent and the unanimity of precedent, and the interaction between the two. The interaction term tests whether the three-to-zero conditions produced a different effect on the judges than the three-to-one conditions. It was marginally significant. $z = 1.77$, $p = .08$.

70. For the judges who reviewed the unanimous precedent, $z = 1.33$, $p = 0.18$. For the judges who reviewed the split precedent, $z = 0.10$, $p = 0.92$.

Table 2: Percent of Judges Ruling for EPA Among Federal Magistrate Judges by Condition and Party (and sample size)

Unanimity Condition	Party of the Judge	Precedent Favors the EPA (n)	Precedent Favors the Company (n)	Effect of Precedent†
Unanimous (3-0) Precedent	Democrats	52.2 (46)	30.2 (53)	20.0
	Republicans	57.1 (14)	9.1 (11)	48.0
Split (3-1) Precedent	Democrats	51.0 (51)	44.0 (50)	7.0
	Republicans	36.8 (19)	32.1 (28)	4.7

† This column reports the difference between the percentage of judges who found in favor of the EPA when the precedent favored the EPA and the percentage of judges who found in favor of the EPA when the precedent favored the company (that is, disfavored the EPA).

These results showed that the unanimous precedent of three similar courts, though not binding, influenced judges. The federal magistrate judges expressed a thirty-percentage-point shift in favor of the precedent. That shift shrunk to only ten percentage points when the precedent was split. The results suggest that the influence of non-binding precedent is greater when it is unanimous.

That said, the results were less than perfectly clear. The interaction term testing whether the split precedent was less effective than the unanimous precedent was only marginally significant. Furthermore, although the materials were identical in both the split and unanimous versions, and were presented to the same category of judges, the data were collected at different sessions at different times of the year. We doubt that difference explains the different trend, but we cannot rule it out.

C. Driving Under the Influence

To assess the differential effect of unanimous and split precedent more clearly, we crafted a problem concerning self-driving—autonomous—cars and drunk-driving laws.[71] We presented the materials to two groups of judges and used four different conditions. The judges read that precedent favored one position or the other and either that it was three-to-zero unanimous or three-to-one split. This problem presents a clean test of the influence of split versus unanimous precedent.

The materials asked the judges to "[i]magine that in the near future self-driving cars have become widely available" and that "self-driving cars and person-driven cars have similar accident rates." The materials stated that the defendant, Ned Sales, was charged with driving under the influence (DUI). Police pulled him over and administered a field sobriety test. A breathalyzer revealed that he had not consumed alcohol. Sales, however, "admitted that he had taken pain medication he had been prescribed for a recent injury." The medication, which was not to be taken while driving, had left him feeling "quite woozy."

71. *See* Appendix C.

The materials recited the relevant statutory language prohibiting driving under the influence in Kansas or Texas, depending on the group of judges. The materials stated that "Sales contends that his use of a self-driving car should be considered as a relevant factor for assessing whether he was" driving while intoxicated. The materials also stated that Sales "admits that he would probably not have been able to drive a conventional vehicle safely, but he noted that he had programmed his vehicle to take him home from the bar before he took the pills." The prosecutor argued that the use of autonomous technology is irrelevant because "sometimes drivers must override autonomous controls in self-driving cars to address unexpected hazards and hence must remain fully capable to operate their vehicles." The prosecutor noted that Sales actually "had to override the system to pull over his vehicle when the arresting officer flashed his lights."

To manipulate the precedent, for half of the judges, the materials stated that:

> similar situations have been addressed by 3 other trial courts in Kansas [or Texas] within the past few years. All 3 courts have decided that the use of a self-driving car is [or is not] a relevant factor to be considered when assessing whether a driver was DUI under § 8-1567(a)(4) [or § 49.04].

For the other half, the materials stated instead that four other trial courts had decided the matter, with three favoring one outcome and one favoring the other. The materials thus created a two-by-two design, varying whether the precedent favored a ruling of relevance or no relevance and whether the precedent was three-to-zero unanimous or three-to-one split.

Finally, we asked the judges, "How would you rule on this issue?" We provided two options. Judges could rule that "[u]sing a self-driving car is relevant to the determination of whether a driver is DUI." Alternatively, they could rule that "[u]sing a self-driving car is not relevant to the determination of whether a driver is DUI."

Table 3 presents the results. Overall, precedent had a slight influence on the judges: 33.3% (thirty-one out of ninety-three) determined that using an autonomous car was relevant when the weight of precedent favored that outcome, as compared to 22.7% (twenty-five out of 110) when the weight of precedent favored the conclusion that this fact was not relevant. This difference was not statistically significant.[72] Nor did unanimity matter. In both the unanimous precedent versions and the split precedent versions, the judges slightly favored following precedent.

72. Fisher's Exact Test, $p = 0.12$.

Table 3: Percentage of Judges Ruling That the Use of an Autonomous Vehicle (AV) is Relevant to the DUI Charge (and sample size)

Unanimity Condition	Precedent: AV Is Relevant	Precedent: AV Is Not Relevant	Effect of Precedent†
Unanimous (3-0)	34.8 (46)	24.5 (53)	10.3
Split (3-1)	31.9 (47)	21.1 (57)	10.8
Combined	33.3 (93)	22.7 (110)	10.6

† This column reports the difference between the percentage of judges who found that the use of an autonomous vehicle was relevant when the precedent favored concluding that the use of an autonomous vehicle was relevant and the percentage of judges who found that the use of an autonomous vehicle was relevant when the precedent favored concluding that the use of an autonomous vehicle was not relevant.

In this problem, across both types of precedent, political party did not interact significantly with the direction of the precedent.[73] Gender did, however.[74] Among the male judges 31.3% (twenty out of sixty-four) ruled that the use of an autonomous car was relevant when the precedent favored that conclusion as compared to 28.2% (twenty-two out of seventy-eight) when the precedent did not favor that conclusion. Among the female judges, however, 38.5% (ten out of twenty-six) ruled that it was relevant when precedent favored that conclusion, as opposed to 7.1% (two out of twenty-eight) when it did not.

Judges who reviewed this problem expressed only weak evidence for the effect of precedent. The trend was similar to the environmental problem, but much smaller. Furthermore, we found no evidence that unanimous precedent had more influence than split precedent.

D. Child Mobility

Given the mixed results, we tested another scenario using the same two-by-two design that manipulated the direction of precedent and unanimity that we used in the DUI problem. For this problem, we used a scenario we have used before to test the influence of litigants' gender on judgment.[75] The materials asked the judges to "[i]magine that you are presiding over a family court case involving a six-year-old girl and her four-year-old brother whose parents divorced two years ago."[76] The materials indicated that the parent with primary custody—the mother—had requested permission to move with the children from the city where they currently resided to a city located at the other end of the state. The noncustodial parent—the father—opposed the relocation of the children.

The materials then provided a rough description of the relevant case law. The materials asked judges to assume that the law in their jurisdiction allowed them

73. $z = 0.13, p = 0.90$.

74. $z = 2.13, p = 0.03$.

75. Jeffrey J. Rachlinski & Andrew J. Wistrich, *Benevolent Sexism in Judges*, 58 SAN DIEGO L. REV. 101, 122-23 (2021) (describing a similar version of these materials).

76. *See* Appendix D.

"to grant the request provided you determine that the move is consistent with the best interests of the children." We used a somewhat generic format because the judges came from different jurisdictions.

The materials noted that the custody decree provided that the noncustodial parent "hosts the children three out of every four weekends, sees them occasionally during the week, and pays child support." The materials also indicated that the parents are single and currently live near each other. The materials stated that "[n]one of the grandparents or other close relatives live" near either the city in which the parents were residing or the proposed relocation city.

The materials stated that the mother wanted to move because she had gotten engaged. Her fiancé owned a successful restaurant in the distant city to which she wanted to move. The mother argued that moving would save her money that she could use to send the children to a prestigious private school. The materials indicated that the noncustodial parent "works for a large law firm in [City A], doing highly specialized work for investment banks." The noncustodial parent contended that the relocation would "uproot the children" and "force him to give up his career because he is unwilling to live so far apart from them." The materials ultimately asked, "Would you grant the [custodial parent's] request to move with the children to the small town?"

As with the DUI problem, we created four versions of the vignette. In two of them, the materials indicated that similar situations have been addressed by three other trial courts in the same jurisdiction within the past few years. All three courts decided that the children [may or may not] be moved under these circumstances. In the other two versions, the materials indicated that four courts had decided similar issues, and that the precedent was three to one, either in favor of or against, allowing the children to move.

Table 4 presents the results. Among the judges who read that the precedent favored moving, 31.9% (thirty out of ninety-four) also allowed the move, as compared to 21.4% (eighteen out of eighty-four) who read that other judges did not allow the move. This difference was not significant.[77] As Table 4 also shows, the unanimous precedent had a similar effect on the judges' decisions as the split precedent. Gender and political party did not interact significantly with the direction of the precedent.

77. Fisher's Exact Test, $p = 0.13$.

Table 4: Percentage of Judges Who Allowed the Parent to Move (and sample size)

Unanimity Condition	Precedent Favors Allowing Move	Precedent Disfavors Allowing Move	Effect of Precedent†
Unanimous (3-0)	37.1 (35)	24.3 (37)	12.8
Split (3-1)	28.8 (59)	19.1 (47)	9.7
Combined	31.9 (94)	21.4 (84)	10.5

† This column reports the difference between the percentage of judges who allowed the parent to move when the precedent favored that conclusion and the percentage of judges who allowed the parent to move when the precedent disfavored allowing the move.

As with the DUI problem, judges showed a trend towards following precedent, but it was only a trend. And surprisingly, once again, the strength of the precedent had no effect. The influence of three judges who had decided a case the same way was not diluted by the presence of a fourth judge who disagreed.

This problem was somewhat different from the previous ones. The previous three problems posed questions of law. This one presented factual issues. Judges likely recognized that, even if there is precedent on point, the previous cases likely involved different facts. Judges should perhaps have felt freer to disregard the precedent here than in the other three scenarios, although of course all of the precedent we presented was non-binding. Nevertheless, this case produced similar results to the DUI problem.

E. Aggregate Results

To get a better sense of the influence of persuasive precedent, we aggregated our results. To facilitate the aggregation, we re-scored the data to assess whether the judges ruled in a manner that is consistent with the precedent provided or inconsistent with the precedent provided. If precedent had no effect, then the number of judges who decided consistently with the precedent would have equaled the number who decided inconsistently with the precedent. After excluding the fifty-seven Ohio judges who virtually all decided the case the same way and the judges who did not report a result, we combined the responses of the remaining 885 judges who participated in the four studies. The results show that 493 judges, or 55.7%, ruled in a way that was consistent with the precedent, as compared to 392 who ruled against it. Using a sign test, this result showed that precedent had a significant effect.[78]

We used a similar procedure to measure the influence of unanimous versus split precedent in the three studies in which we assessed that influence. Among the 310 judges who confronted unanimous precedent, 187, or 60.3%, made rulings consistent with that precedent, as compared to 123 judges who ruled

78. Sign Test, $p = .0008$.

against it. This result showed that precedent had a significant effect.[79] Among the 380 judges who confronted split precedent, 208, or 54.7%, made rulings consistent with the majority of that precedent, as compared to 172 judges who ruled against it. This effect was only marginally significant.[80] Even aggregated across all three studies, the unanimous precedent was not significantly more influential than the split precedent.[81]

IV

DISCUSSION

Overall, our results suggested that persuasive precedent has a modest influence on judges. Our data showed that trial court judges deferred to persuasive precedent 55.7% of the time. They deferred to a three-to-zero unanimous precedent 60.3% of the time, deferred to a three-to-one split precedent about 54.7% of the time, and deferred to precedent from a single judge only 50.8% of the time. In addition, when considered independently, only one of our six three-to-zero or three-to-one split conditions produced a strong statistically significant result. The other five conditions produced differences of approximately ten percentage points, which constituted a trend, but were only marginally statistically significant.

Although our experiments show that, like most people, judges rely on the imitation heuristic, the heuristic had much less influence on our judges than one might have supposed. If anything, precedent should have had more influence. Unlike the task in the Asch experiment, the questions in our experiments had no clear right or wrong answers. Furthermore, the precedents were authored by peers who presumably made their decisions under comparable conditions. Other judges should be persuasive because they share a common background and professional role with our subjects. Thus, the two factors that make imitation most likely—uncertainty and similarity—are present.[82]

On the other hand, the judges in our study were not confronted in person by relevant peers, as the students in Asch's experiment were or as a judge on a multimember appellate panel who is contemplating a dissent might be. Moreover, judges recognize the importance of their rulings and take their decision making seriously. They also are experts who are overconfidence, as we discuss below. American judges typically have a great deal of life and legal experience, unlike the college students in the Asch experiment. Furthermore, the task we assigned them was a simulation of a judging task that likely stimulated the mindset and norms developed during their years on the bench. These factors

79. Sign Test, $p = 0.0003$.

80. Fisher's Exact Test, $p = 0.07$.

81. Proportion Test, $z = 1.48$, $p = 0.14$.

82. *See* CIALDINI, *supra* note 20, at 140 ("Social proof is most influential under two conditions. The first is uncertainty . . . . The second . . . is similarity: People are more inclined to follow the lead of similar others.").

would tend to lessen reliance on the decisions of others.[83] Therefore, the greater independence they displayed relative to what Asch found in students is unsurprising.

Do judges defer to persuasive precedent too much, too little, or exactly the right amount? The answer is complicated. The pattern of the results we obtained seems intuitively reasonable. Judges essentially ignored the decision of a single peer, but they followed the three-to-zero precedent 60% of the time and were somewhat persuaded by the three-to-one precedent.[84] The addition of a dissenter in our study did not eliminate the group's influence, as it did in the Asch experiment. Instead, it simply diluted it.

Starting with French mathematician Marquis de Condorcet in the late eighteenth century, probability theorists have tried to measure the superiority of group decision making relative to individual decision making.[85] The Condorcet Jury Theorem is an attempt to estimate the wisdom of crowds mathematically. In its simplest version, the theorem holds that, under certain assumptions, the independence of the decision makers being key, if each decision maker is more than 50% likely to select the correct answer in a binary choice, then the choice made by the majority vote of a group will be more accurate than that of an individual acting alone. Furthermore, as the number of individuals comprising the group increases, the group is more likely to be accurate.

Declining to defer to the decision of a single judge is sometimes sensible.[86] Deferring to a more expert or experienced judge would be wise, but our scenarios did not provide the judges with any information about the prior judges' expertise or rationale. Under such circumstances, a second judge who recognizes that they disagree with the first would have no basis for deferring, even if both judges are more likely than not to be correct. In such a case, the second judge would essentially have a sample of two judges—themself and the judge who previously decided a similar case. If they disagree, then the sample is split evenly between the options. With both judges being equally likely to be correct, each choice is just as likely to be the correct one.[87]

Judges faced with a three-to-zero split, however, displayed too little deference in our study. If judges facing a unanimous set of three persuasive precedents agree with these decisions, then they should go along with the consensus. Even

83. *See id*. at 137 ("[W]e don't always want to trust the actions of others to direct our conduct—especially in a situation . . . in which we are experts.").

84. As noted above, the effect of split precedent was only marginally significant. *See infra* note 81 and accompanying text.

85. *See* MARQUIS DE CONDORCET, ESSAI SUR L'APPLICATION DE L'ANALYSE A LA PROHABILITE DES DECISIONS RENDUES A LA PLURALITE DES VOIX (1785) (Essay on the Application of the Analysis of Probabilities to Decisions Rendered by a Plurality of Votes).

86. Others have also considered the application of the Condorcet Jury Theorem to judges. *E.g.*, Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts*, 123 YALE L.J. 1629, 1714 (2014).

87. *See* Thomas Kelly, *The Epistemic Significance of Disagreement*, *in* 1 OXFORD STUDIES IN EPISTEMOLOGY 167 (John Hawthorne & Tamar Gendler eds., 2005).

under the modest assumption that the judges are accurate 60% of the time[88] and all three judges are equally likely to be accurate, then three judges who agree are 93% likely to be correct.[89] If the judges do not agree with the unanimous precedent, however, then these judges know that they are the only one of four judges to hold a dissenting view and that the majority is more apt to be correct.[90] In our study, the participating judges had no reason to believe that they were more likely to be correct than the unnamed judges who had decided the issue already and, hence, should have deferred to the majority. Judges facing a three-to-one split would have still found themselves in the minority if they disagreed with the decision made by three judges and should likely have deferred.[91]

Importantly, the Condorcet Jury Theorem assumes that the decision makers act independently. Judges might recognize that some of their predecessors could have been relying on decisions of those judges who decided even earlier. Hence, the three-to-zero precedent might be the product of an information cascade and thus not as persuasive as if all of the judges had decided in ignorance of each other. Ironically, however, the three-to-one precedent also could be more persuasive, since it shows that at least some of the judges were making independent judgments, rather than just deferring to the first judge to decide the matter.

We also think that judges tend to be overconfident about their judgment, even relative to their peers. Most people rate themselves as above average on desirable skills and traits."[92] Studies show that, relative to others, adults believe that they are healthier; drivers believe that they are safer and more skilled; professors believe that they are superior teachers and researchers; couples believe that they have better and more durable marriages; college students believe that they are better leaders, athletes, and friends; and so on.[93] This better-than-average effect is ubiquitous and powerful.[94]

88. This is a cautious estimate of judicial accuracy. Reversal rates vary by jurisdiction but seldom exceed 20–30 percent. The average reversal rate in federal courts is roughly 10 percent. *See* Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights Into the "Affirmance Effect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 359–63 (2005). The assumed level of accuracy does not matter much, in fact. A unanimous group is more likely to be accurate than a single individual so long as each member is more likely than not to be correct.

89. The formula specifically is $(1 – 0.6)^3$. *See* Saul Levmore, *Appellate Panels and Second Opinions*, 127 PENN. ST. L. REV. 811, 829 n. 23 (2023) (stating that a group three judges who each have a .4 likelihood of being wrong and split three-to-zero will have a 93.6 percent probability of reaching the correct decision.).

90. This is even the case at three-to-one. The majority will be correct 85 percent of the time if each member (even the dissenter) is 60 percent likely to be accurate. The formula is $1 – 4(.4)^3(.6)$.

91. A majority of three out of five will be correct 68 percent of the time if all are 60 percent likely to be correct.

92. Linda Koppel et al., *We Are All Less Risky and More Skillful than Our Fellow Drivers: Successful Replication and Extension of Svenson (1981)*, 7 META-PSYCH. 1, 1 (2023).

93. *Id*.

94. *Id*. (replicating a prior study and confirming that the better than average effect is common and influential); Ignazio Ziano et al., *Replication and Extension of Alicke (1985) Better-Than-Average Effect for Desirable and Controllable Traits*, 12 SOC. PSYCH. & PERSONALITY SCI. 1005 (2021) (same); Ethan

We have found that judges also suffer from an illusory belief in self-superiority. In one study, we asked about one-third of then-serving federal magistrate judges to rank themselves relative to their peers on their ability to avoid being overturned on appeal.[95] We asked the judges to place themselves into one of four quartiles: the top 25%, the next best 25%, the second to worst 25%, or the bottom 25%. The vast majority of the judges, specifically 87.7%, placed themselves in the top 50%—that is, the least often reversed—of their peers, indicating that nearly 90% of the judges believed that they were better than average.[96] In a second study, we asked a group of administrative law judges (ALJs) to compare "their ability to assess the credibility of a witness, their ability to avoid bias, and their ability to facilitate settlements."[97] They, too, provided self-serving evaluations of their skills. With regard to assessing the credibility of witnesses, 83.3% of the ALJs placed themselves in the top half.[98] Similarly confident in their ability to facilitate settlements, 86.2% of the ALJs placed themselves in the top half of that category as well. Even more ALJs—97.2%—believed they were in the top half with regard to their capacity for avoiding racial bias in judging. In sum, over 80% of the judges we tested rated themselves as belonging in the top 50% of judges in four important skills, thereby offering an impossibly optimistic assessment of their abilities relative to the abilities of their peers. Other researchers have reported similar results.[99] In the experiments we reported in this paper, overconfident judges might have mistakenly discounted the value of their predecessors' decisions.

Judges who resisted following persuasive precedent might have been unwittingly promoting the sound and efficient evolution of the common law. Discounting the value of persuasive precedent can prevent the formation of information cascades, thereby increasing group competence in the long run.[100] The more judges decide for themselves rather than following the emerging majority, the richer and more diverse is the pool of information upon which subsequent judges can draw in reaching their decisions.[101] Although the rule on

Zell et al., *The Better-Than-Average Effect in Comparative Self-Evaluation: A Comprehensive Review and Meta-Analysis*, 146 PSYCH. BULL. 118, 134 (2020) ("Our work supports the view that the BTAE is a highly robust and replicable phenomenon.").

95. Guthrie et al., *supra* note 56, at 813–14.

96. *Id*. at 814.

97. Chris Guthrie et al., *The Hidden Judiciary, An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1519 (2009).

98. *Id*.

99. Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J.F. 391, 397 (2017) (reporting that 87 percent of active federal district judges and 92 percent of senior federal district judges reported that they were in the top 25 percent of their colleagues in "their ability to make decisions free of racial bias").

100. *See* Spiekermann & Goodin, *supra* note 41, at 562 ("Judges who are very self-confident about the quality of their own signal will persist in revealing their own signal and avoid cascades for longer."); Eric Talley, *Precedential Cascades: A Critical Appraisal*, 73 S. CAL. L. REV. 87, 91 (1999) ("If common law precedent is in fact a type of cascade, it would represent the strongest refutation yet of the common law efficiency hypotheses.").

101. *See* Mir Adnan Mahmood & Jason Paulo Tayawa, *To Follow the Herd or Break Away?*

which judges ultimately converge might be better, the downside is that such convergence might be delayed.

An important implication of our data is that, although the sequence in which cases arrive can determine the direction in which the common law develops, the danger is perhaps not as great as sometimes suggested. Our data indicate that a single judge heading down one path or the other will exert little influence on the second judge to face the same issue. It is only if at least three prior judges unanimously—or with a single defector—choose the same path that later judges become likely to follow. This does not eliminate the path dependence of the common law, but it suggests that the common law is less path dependent than some have assumed.[102] An information cascade—at least in the judicial context—is unlikely to begin until after at least a third judge has ruled the same way.

Like any empirical study of judicial decision making, ours has limitations. Controlled experiments or simulations possess both strengths and weaknesses relative to other methodologies. We have previously analyzed the limitations of our methodology in detail elsewhere.[103] Suffice it to say that the usual caveats apply to this study as well. Although simulations are unavoidably somewhat artificial, judges responding to a hypothetical case do not act like ordinary people.[104] Rather, they bring their professional training, experience, and mindset to bear, at least to some degree.

One limitation specific to this study is the paucity of the information we provided the judges about the persuasive precedent. The judges in our experiments received only limited information. They received only the text of the problem, the number of judges who had previously decided the issue, and the direction of the precedent. We did not reveal information that judges sometimes possess that could have influenced the impact of the precedents, such as the judge's expertise,[105] their political party,[106] or the location of the court.[107]

Overconfidence and Social Learning 28–29 (Nov. 20, 2022) (working paper) (suggesting that individuals who are overconfident or susceptible to the BTAE can break away from herds more often, even when those herds are correct).

102. *See* Hathaway, *supra* note 37, at 605 (observing that applying path dependency theory to stare decisis suggests that courts become more resistant to change); VERMEULE, *supra* note 37, at 125.

103. Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings*, 93 TEX. L. REV. 855, 900–04 (2015).

104. Holger Spamann & Lars Klöhn, *Can Law Students Replace Judges in Experiments of Judicial Decision Making?*, 1 J.L. & EMPIRICAL ANALYSIS (2024), available at https://doi.org/10.1177/2755323X231210467.

105. *See* GARNER, *supra* note 7, at 243 ("Great deference is paid to those courts possessing an acknowledged reputation for learning and ability or a special and intimate familiarity with the branch of the law to which the decision in question relations."); Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1203 (2006) (arguing that a "judge . . . may well have her own degree of persuasiveness as a result of her reputation").

106. *See* Anthony Niblett & Albert H. Yoon, *Friendly Precedent*, 47 WM. & MARY L. REV. 1789, 1811 (2016) ("We find that judges consistently gravitate toward precedent that is friendly in terms of political alignment.").

107. *See* Yun-Chien Chang & Geoffrey Miller, *Regional Common Law*, 45 J. LEGAL PROF. 151 (2021) (finding that state supreme courts are more likely to cite opinions of nearby courts).

Although this arguably undercuts the realism of our experiments, judges often learn little about the author or rationale of persuasive precedent. Moreover, by testing the impact of persuasive precedent on judges in the abstract, we were able to isolate and measure the information content of the sheer existence and number of non-binding precedents. Because we stripped away all of the criteria by which the judges could assess the quality of the persuasive precedent, it is surprising that it had an impact at all. Thus, our experiments measure the residual value a persuasive precedent possesses simply by virtue of its existence.

Sometimes the persuasive precedents of other courts are accompanied by a rationale whose soundness judges can assess. We deprived our subjects of this safeguard,[108] which might have left them unusually susceptible to the imitation heuristic. If we had provided the judges with this additional information regarding each precedent, our results might have been different.

Another limitation of our study is that there is a distinction between private conformity, which is a change of belief, and public conformity, which is a change of overt behavior without a corresponding change of belief. We cannot distinguish between the two. Were the judges convinced that the other judges were right? We cannot say. It does not matter, however, because what counts is how they decided. Here, the judges did not necessarily change their minds. Some may have intended to vote the way they did irrespective of the precedent. Nevertheless, the precedent nudged them in one direction rather than another overall.

V

CONCLUSION

Our results indicate that judges are influenced by the decisions of other judges, but only to a modest degree. The ruling of one other judge correctly counts for almost nothing. A three-to-one split exerts some influence, but only a three-to-zero split exerts a clear influence. Thus, the authority of persuasive precedent does not depend entirely upon the expertise of its author, the cogency of its reasoning, or other indicia of quality. Rather, it apparently depends in part simply on how many other persuasive precedents agree with it and whether they do so unanimously. Judges are more lone wolves than sheep, even in circumstances in which they might be better off following the herd.

What are the implications of our results for public confidence in the judiciary? A revelation that judges mindlessly follow each other would undermine public confidence.[109] Presumably, people expect judges to exercise independent

108. *See* GARNER, *supra* note 7, at 23 ("Lacking the coercive authority of binding precedent, it draws its power mainly from its coherence and logical force.").

109. It can be perilous to behave as a sheep. *See The Odd Truth: July 8, 2005*, CBS (July 11, 2005) https://www.cbsnews.com/news/the-odd-truth-july-8-2005/ [https://perma.cc/Z2WM-AYNK] (reporting that "[f]irst one sheep jumped to its death. Then stunned Turkish shepherds, who had left the herd to graze while they had breakfast, watched as nearly 1,500 others followed, each leaping off the same cliff, Turkish media reported").

judgment in the unique setting of each case. On the other hand, if judges were found to pursue their own idiosyncratic paths heedlessly rather than maximizing accuracy and inter-judge consistency, that would also undermine public confidence. Such behavior would suggest that judges ignore probabilities and that the law lacks an objective basis. How the public might balance these competing interests is unclear. Nevertheless, it seems more likely that the confidence of a fully-informed public in the legitimacy of the judiciary would be enhanced if judges followed non-binding precedents more frequently than our experiments suggest that they do.

APPENDIX A: UNEMPLOYMENT BENEFITS PROBLEM

Assume that your state has recently adopted a new statute governing unemployment insurance. This statute created a new agency called the State Unemployment Insurance Benefits Agency. The Agency makes preliminary determinations of benefits, to be paid by the employer.

You are presiding over an appeal from a decision of the Agency. The plaintiff, Michael Smith, contends that the Agency improperly denied his application for unemployment insurance benefits.

The defendant employer has filed a motion to dismiss the action. It contends that the plaintiff's appeal was not filed in a timely manner. The provision of this statute governing appeals (which go directly to trial courts) from decisions of the Agency provides as follows:

"A trial court may accept an appeal from an order of the Agency if a notice of appeal is filed not less than 7 days after entry of the order."

The plaintiff filed his notice of appeal 43 days after entry of the Agency's order.

In support of its motion to dismiss, the defendant argues that the statute contains a scrivener's error, and that the Legislature really meant to say, "not more than 7 days" rather than "not less than 7 days." According to the defendant, the plain meaning of the statute makes no sense because there is no reason to require a party aggrieved by an order to wait 7 days before filing notice of appeal, and yet allow that party to file a notice of appeal at any time in the future after the 7 day period has elapsed.

In opposing the motion to dismiss, the plaintiff argues that his appeal is timely because according to the plain language of the statute, a notice of appeal need only be filed more than 7 days after entry of the Agency's order. The plaintiff further contends that granting a motion to dismiss would mean striking from the statute a word chosen by the Legislature and approved by the Governor ("less") and replacing it with a word of the exact opposite meaning ("more").

The legislative history is unhelpful, suggesting only that the statute was intended to regulate the timing of appeals from the agency's orders. There is, however, a general legislative policy of expediting the resolution of applications for unemployment insurance benefits.

Just one other court, in a different part of the state, has considered this issue. In an unpublished decision, a trial judge found the [plaintiff's / defendant's] arguments more persuasive, and [denied / granted] the motion to dismiss.

How would you rule on the defendant's motion to dismiss the appeal?

_____ I would **grant** the defendant's motion to dismiss the plaintiff's appeal

_____ I would **deny** the defendant's motion to dismiss the plaintiff's appeal

APPENDIX B: ENVIRONMENTAL DISPUTE (VERSION FOR FEDERAL MAGISTRATE JUDGES)

You are presiding over an appeal from an order issued by the Environmental Protection Agency ("EPA") against REcycle, Inc. REcycle collects old electronics (principally computers) from homes for recycling. The company refurbishes the equipment or extracts valuable materials from unusable components at a processing facility.

Under 42 U.S.C. §6901 et seq., any facility that accepts solid hazardous waste must obtain a permit to operate as a "Hazardous Waste Disposal Facility" and must operate according to the strict environmental quality regulations governing such facilities. REcycle operates a small and reasonably clean facility, but it lacks this permit. After the company refused to obtain such a permit, the EPA ordered it to close. REcycle then filed an appeal from the EPA order (which goes directly to a federal district court).

REcycle contends that it qualifies for an exemption under 42 U.S.C. §6921(i) for "household waste." REcycle cites the following provision:

"A facility shall not be deemed to be a 'hazardous waste disposal facility' if such facility receives only:

a) household waste; and

b) solid waste from commercial and industrial sources that does not contain hazardous waste."

Both the EPA and REcycle agree that §6921(i) is intended to exempt the disposal of household waste (including home electronics, such as computers) from permitting requirements, even if this waste contains hazardous materials. Many of the electronics REcycle obtains contain hazardous materials, but all would be considered "household waste."

The EPA asserts that this exemption applies only to facilities that accept *both* kinds of waste streams—household *and* non-hazardous commercial waste—which is generally how municipal waste dumps operate. They note that the statute uses the word "and" between "household waste" and "solid waste from commercial and industrial sources."

REcycle asserts that this reading of the exemption is literally correct, but nonsensical. It claims that the part ("b" of the exemption was meant to ensure that municipal dumps would not lose the household waste exemption merely because they also accept non-hazardous commercial waste. It argues that the provision should be read as exempting facilities that accept household waste, and that might or might not also accept non-hazardous commercial waste.

No appellate court has decided this issue. Because the EPA has used informal procedures (rather than a rulemaking procedure) to issue the order, it is not entitled to deference and you review the issue de novo. The same issue has been addressed by three federal district courts in other circuits—all in opinions written by U.S. Magistrate Judges.

Unanimous: All three courts have concluded that the language in the statute [does not exempt / exempts] facilities that accept only household waste.

OR

Split: Three courts concluded that the language in the statute [does not exempt / exempts] facilities that accept only household waste; one concluded that the language in the statute [exempts / does not exempt] facilities that accept only household waste.

How would you decide the case?

____ For REcycle and allow it to operate without a permit

____ For the EPA, and force the company to close or obtain a permit

APPENDIX C: DRIVING UNDER THE INFLUENCE?

Imagine that in the near future self-driving cars have become widely available. Self-driving cars are fully autonomous and navigate without any human input. Extensive research and experience indicate that self-driving cars and person-driven cars have similar accident rates.

In this new environment, you are presiding over a DUI case against Ned Sales. Sales was pulled over on a Friday night after an officer observed him acting strangely in a parking lot outside a bar. The officer stated that Sales appeared to open a bottle of pills, ingested something, fiddled with some controls inside his car, and then eventually drove off in his car. The arresting officer noted that Sales seemed "out of it" and administered a field sobriety test. Sales failed this test, but a breathalyzer test indicated he had not consumed any alcohol. Sales admitted that he had taken pain medication he had been prescribed for a recent injury. He stated to the officer that he was feeling "quite woozy" as a result of the medication (which is not supposed to be taken before driving). Sales was driving a fully autonomous, self-driving vehicle at the time.

[Kansas Version:

Under 8 Kan. Stat. § 8-1567(a)(4), "Driving under the influence" as "operating or attempting to operate any vehicle within this state while . . . under the influence of any drug or combination of drugs to a degree that renders the person incapable of safely driving a vehicle."

Texas Version:

Under Tex. Pen. Code § 49.01(2) a person is intoxicated if they lack "the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body." Tex. Pen. Code § 49.04 prohibits being "intoxicated while operating a motor vehicle in a public place."]

Sales contends that his use of a self-driving car should be considered as a relevant factor for assessing whether he was "incapable of safely driving a vehicle." He admits that he would probably not have been able to drive a conventional vehicle safely, but he noted that he had programmed his vehicle to take him home from the bar before he took the pills. He asserted that he had avoided alcohol because he knew he might need the pain medication, and left when the pain from his injury became intolerable.

The prosecutor asserts that it is irrelevant whether Sales was operating a self-driving car. The prosecutor argues that sometimes drivers must override autonomous controls in self-driving cars to address unexpected hazards and hence must remain fully capable to operate their vehicles. In fact, Sales had to override the system to pull over his vehicle when the arresting officer flashed his lights (although Sales noted that this was a simple maneuver that he was able to perform safely.)

Unanimous: Similar situations have been addressed by 3 other trial courts in Kansas [Texas] within the past few years. All 3 courts have decided that the use

of a self-driving car [is / is not] a relevant factor to be considered when assessing whether a driver was DUI under § 8-1567(a)(4) [§ 49.01(2)].

Split: Similar situations have been addressed by 4 other trial courts in Kansas [Texas] within the past few years. Three of these courts have decided that the use of a self-driving [is / is not] a relevant factor to be considered in assessing whether a driver was DUI under § 8-1567(a)(4) [§ 49.01(2)] and one court has decided that it is [irrelevant / relevant].

How would you rule on this issue?

____ Using a self-driving car is relevant to the determination of whether a driver is DUI.

____ Using a self-driving car is not relevant to the determination of whether a driver is DUI.

APPENDIX D: CHILD MOBILITY

Imagine that you are presiding over a family court case involving a six-year-old girl and her four-year-old brother whose parents divorced two years ago. The mother has requested that you authorize her to move with the children from the large city where they currently reside to a small town that is located at the other end of the state (too far to commute daily). The father contests the relocation.

Assume that in your jurisdiction the law allows you to grant the request provided that you determine that the move is consistent with the best interests of the children.

Pursuant to the custody decree, the mother has primary custody, although the father hosts the children three out of every four weekends, sees them occasionally during the week, and pays child support. The parents, who have thus far remained single, live only a mile apart in the city. None of the grandparents or other close relatives lives near either the city or the small town.

The mother has requested the move because she has gotten engaged. Her fiancé runs his own business (a local restaurant) and is very successful. They plan to be married one month from now and she would like to move herself and her children to live in the small town with her future husband after the wedding. By all accounts, the fiancé cares deeply for the children and gets along well with them. The mother argues that the children would benefit from the move. In particular, she argues that moving into her future husband's house will save her money, thereby enabling her to pay for the children to attend a prestigious private school.

The father opposes the relocation. He works for a large law firm in the city, doing highly specialized work for investment banks. He argues that the move would force him to give up his career because he is unwilling to live so far apart from his children.

Unanimous: Similar situations have been addressed by 3 other trial courts in your jurisdiction within the past few years. All 3 courts decided that the children may [not] be moved under these circumstances.

Split: Similar situations have been addressed by 4 other trial courts in your jurisdiction within the past few years. In these cases, 3 courts decided that the children may [not] be moved under these circumstances and 1 decided that the children may [not] be moved.

Would you grant the mother's request to move with the children to the small town?