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Note from Section Chair

Renée Ann Cramer, Dickinson College

In my day job, I am the provost and dean of a small liberal arts college. Like most of the rest of the United States, people in positions like mine have had a discombobulating last couple of weeks, trying to interpret what various executive orders and actions will mean for our communities of learning.

Two days ago, I wrote a message to our students. Some of them are facing precarity in their family situations; some have seen their identities, and the teaching of their histories erased; many of them are concerned about the continued ability to receive Pell grants and student loans. In my message, I reminded them of the importance of the whole darn ball of wax—the entire endeavor of becoming an educated person. I told them that learning to focus and live through uncertainty was a skill that a broad education could provide them the opportunity to practice; I told them that the ability to take the perspective of others, the knowledge necessary to be nuanced and holistic thinkers, the habits they are learning to discern truth and fact, and evaluate sources—those are the skills they, and we, need.

Yesterday, I wrote remarks for tomorrow's faculty meeting. In those remarks, I will remind faculty of a whole bunch of deadlines, I will announce the winner of a new endowed chair, I'll propose that we have some additional community-wide conversations related to the way we will—as a college—approach artificial intelligence and generative technologies. I also intend to tell my faculty: as worried as you are about your grant-funded projects, please don't spend down your federal funding—we are reimbursed quarterly, and a "run" on your NSF account internally won't help us sustain your research later. I will tell them that our faculty personnel committee is alert to the ways that their research projects might change as a result of NIH and NEH money likely drying up, and as a result of the disappearance from government websites of their data, their maps, their sources. And I will remind them, as I reminded our students, of the importance of what we do.

So here it is, a Sunday evening, and I'm writing to you—the Law and Courts Section of the American Political Science Association.

I became a political scientist because I love the political. And I became a law and courts scholar because I love the tension between incremental change coming through established systems, and radical transformative change coming from without. I love the idea of challenges to—and growth from those challenges—existing legal regimes. In my case, the love of politics, and of law and courts, grows from a curiosity about the ways that social movements and legal movements can align to create space for progress in the United States.

In San Juan last month, Professor (and Vice Provost at JMU) Elizabeth Oldmixon gave a presidential address that used popular culture references (the Sopranos! The Office! Game of Thrones!) to explore how she views the truth of the present moment for our discipline as a whole—and for Americanists

within political science in particular. She argued that there are some things we might need to forget we ever knew as political scientists related to the stability of institutions and the durability of process. In essence she told us that she had realized, more fully lately, that the rules only matter when people are willing to follow them. And, she wondered what that will mean for the discipline: what will we focus on, study, argue, and come to know?

Members of our section have a diverse range of interests and methodologies—we engage in analyses of Supreme Court decision making, and oral arguments at that body; we examine methods of judicial selection and the implications of diversity for courts' operations and legitimacy; we research the judicial role in (and in challenging) democratic retrenchment around the world and close to home; and we write about the importance of the rule of law for the legitimation of governance.

The folks I am in closest scholarly conversation with—law and courts scholars who also hang in Law and Society circles—have come to a similar conclusion that Professor Oldmixon did about the contingency of processes and institutions. Law and Society/Law and Courts folks have known this to be true about law and rights for a while. Early scholars in our young discipline argued that the only rights anyone actually has are the ones that are enforced, which are often the ones that have been fought for; they argued that the idea of rule of law shifts in valence with the power and perspective of the courts that interpret it.

As a sub-field of the discipline I believe we are well-positioned to grapple with a fundamental set of ideas: that the rule of law, the good functioning of long-standing processes, the stability of democratic institutions, and the actualized presence of basic human rights are contingent and contested and not guaranteed. In doing so—in grappling with this—the most important thing to do, perhaps, is to look comparatively, broadly, and with curiosity; to avoid a sense of exceptionalism that might creep into our epistemologies; to welcome analyses of and by scholars who highlight underrepresented or marginalized perspectives on these issues; to learn from the past (we might get to chat more, with historians!); and to examine the ways that the discipline—even when we may disavow normative commitments—has been used to legitimate and further political discourses that may be being mobilized now. In short, I believe—with considerable good hope—that work of law and courts scholars is to become even more inclusive, even more incisive, even more willing to question underpinning assumptions related to law and legal institutions, and even more public in our discourses around norms, processes, and politics.

You may not share this view—likely, some Law and Courts scholars won't. I'm happy to still share a cup of coffee or a cocktail when we meet up at APSA or elsewhere; we can talk about our discipline, our students, our work.

Certainly, I'm aware that this isn't a typical Newsletter column—but these aren't typical times. As I wrap up this newsletter contribution, I do want to say thank you to all of the folks working on behalf of the section: on the executive committee, the program committee, on awards committees. And, I

want to remind you to please: nominate your colleagues and yourselves for the awards our section grants—and be alert to a new award that will appear on the www.apsanet.org website soon – a Law and Courts Best Journal Article award.

Note from Editor

Maureen Stobb, Georgia Southern University

I am grateful for the opportunity to serve as the editor of *Law & Courts Newsletter*. I appreciate the assistance of the outgoing section chair, Pamela Corely. I also thank the outgoing editor, Daniel Lempert, for his detailed guidance and help in making this a smooth transition. He has worked tirelessly for several years to provide our section with an engaging and substantively informative newletter. I aspire to meet the standard of excellence he has set. I am grateful to the board members—Nancy Arrington, Ryan Black, Onur Bakiner, Eileen Braman, Jeffrey Budziak, Martha Ginn, David Glick, Matt Hitt, Christopher Kromphardt, Pedro Magalhaes, Alyx Mark, Logan Strother, Udi Sommer, Sophia Wilson, Claire Wofford, Emily Zackin, Sarah Staszak, Lydia Tiede, Amanda Bryan, Cyril Ghosh, Sophia Wilson, Shenita Brazelton, and Ben Johnson—for their continued service and helpful advice. With the assistance of the editorial board, I plan to continue providing an outlet for scholarship that advances the discipline and speaks to the diversity of interests in the section. I welcome any feedback, as I am sure I have a great deal to learn. Please send me any suggestions, comments and questions at lcnapsa@gmail.com.

For my first action as editor, I am happy to present volume 35, Issue 1 of *Law & Courts Newsletter*. The issue features an article by Karen Orren of the University of California, Los Angeles. Orren's contribution explores a timely question in the wake of the 2024 election, one that will interest scholars across our section: are we experiencing a major turning point in American constitutional development? According to her theory, such events are preceded by criminal-law breakdowns, and the ongoing crisis in immigration enforcement may be such an episode. Her theory touches upon many areas of interest to law and courts scholars—including judicial behavior, constitutional interpretation and public opinion—and connects them to broad questions of American political development.

The Better Get To Know feature includes Ryan Black's interviews with Amanda Driscoll and Amna Salam. The Books to Watch For section introduces books across the subfield touching upon timely and important topics.

I would also like to note that, in the near future, I hope to publish a symposium on emerging scholarship on comparative courts. Please see the call for submissions below for more information.

Doing More Time: Trouble on the Border

Karen Orren,
University of California, Los Angeles[1]

Some years ago, I published an article, "Doing Time: A Theory of the Constitution" (2012). It argued that major turning points in American constitutional development were preceded by criminal-law breakdowns, episodes during which certain of the nation's criminal laws could not be enforced without spurring violence, institutional disarray, and overheated public opinion. "Doing Time" analyzed three such episodes. The first was Shays' Rebellion in 1786-7, an armed uprising of farmers in Massachusetts, seeking relief against a punishing system of debt enforcement, one that landed a large fraction of the population of New England either in prison or anticipating arrest. It presaged the constitutional convention in Philadelphia. The second episode consisted of numerous confrontations attending the enforcement of the Fugitive Slave Act in the 1850s. This augured the Civil War and the amendments to the Constitution that followed. The third was the struggle of courts and juries to navigate the pressure of mounting industrial conflict during the Great Depression. This signaled the victory of "the New Deal Order," culminating in the full authority of legislative forms over inherited common law. Each episode entailed the rechanneling of popular will through a realigned two-party system, a redefinition of citizenship, and the industrial enfranchisement of the working class.

Given the state of government and society since Donald Trump's first presidential campaign nearly a decade ago, a similar reordering seemed entirely possible. Two impeachments and near-ouster of a sitting President; historic levels of polarization in Congress, the Judiciary, and the electorate; unrest in the bureaucracy; urban violence and decay; cultural, racial, and medical warfare; three bitterly contested presidential elections ending, at this writing, in charges of fraud; a riot and forced entry into the Capitol; multiple indictments of the front-runner for the 2024 Republican nomination; the dislodgement of the presumptive Democratic nominee by party leaders and replacement by the sitting vice-president: these seemed the ingredients of serious change. Attentive to the ongoing crisis of law enforcement at the U.S. border with Mexico, I wondered whether the turbulence roiling immigration enforcement did not argue for extending the analysis. In "Doing Time," the events served as a platform for modeling the constitutional law-criminal law connection across time. Now, with a fourth episode added, the aim would be to probe further for internal features, common as end-of-regime-events. In the immigration case

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[1]The author extends sincere thanks to Bradley Mankoff and Anna Faubus for research assistance, Bruce Rothschild for help with calculations, and an anonymous referee for good suggestions.

this would be aided by readily accessible data on public opinion, surely an important dimension to a pattern that was striking but so far only descriptively depicted.

I say this to preface what is a more wide-ranging view than usual in research notes. One thing that emerged early in this effort, carried out mainly on either side of the 2020 election, was how disturbance in immigration enforcement was experienced not only in separate government institutions and public locales but systemically.[2] Was this the case with the other episodes as well? Shays' Rebellion, fugitive slave arrests, pre-New Deal labor actions—each began as state criminal law violations and took on federal constitutional significance as events unfolded. Immigration, principally a "civil" jurisdiction, has always depended heavily on criminal law for its enforcement. Pursuing the border metaphor: features associated with crime—violence, danger, spectacle, disorder, dominance—are by nature "atmospheric," permeating government and society without regard to boundaries, whether occupational or personal.

Perhaps this line-crossing itself, its intensification, reflects regime failure, suggesting in turn a deeper, structural, connection between criminal law and constitutional politics than currently appreciated. In that sense, criminal law breakdown might be categorized with external shocks like war, technological upheaval, and so on, already recognized as causes of disequilibrium in political systems. But the challenge remained of finding concepts closer than these to action on the ground but still indicative of the broad political transition underway. What follows is exploratory to that end. Everything discussed needs more interrogation, more evidence, more analysis. Still, I think it is worth setting out in hopes of promoting further thought.

A roadmap to what follows may be helpful. Section I narrates the centrality of immigration in candidate Trump's campaign and the turmoil it caused across his administration; this, among other things, establishes the basis for including this criminal-law breakdown among the other three. Section II turns to a brief consideration of immigration's position in public opinion and its association with the vitriol the 2016 campaign invoked. This move is important theoretically; the public opinion setting enables the refinement of "turmoil" into "cognitive dissonance" as it passes through the institutional-behavioral barrier and forms the basis for the retroactive review that follows. Here, I build on a study of antebellum judges offered by the law professor, Robert Cover (1974). Section III reads back this approach into an abbreviated version of earlier episodes, highlighting the judiciary. Finally, Section IV speculates on the meaning of all four episodes within the recurring chronology of American political development.

One caveat: no claims will be made about the specifics of political reordering, how long it requires for a new state of constitutional affairs to solidify, or whether a given shift successfully addresses what had been a major pre-

[2]Criminal law identifies acts deemed immoral or harmful to society and punishes their performance, usually by fine and/or imprisonment; constitutional law allocates personal rights between and among government officers and citizens.

cipitating issue. In each of the three earlier episodes studied, presumably causal elements in political-governmental rearrangements were unpredictable. Looking only at the single question of party realignment, these would include, respectively, a controversial foreign treaty, an assassin's bullet, and a prolonged depression. The same must be said now about President Trump's reelection. Whether the breakdown surrounding immigration enforcement will be successfully ended, and followed by more "popular sovereignty," a draining of the "swamp," or even stable party realignment, cannot, at this writing, be known. One might safely go this far: what presently appears a seismic political event cannot as yet be considered disconfirming.

I.

The closest thing on offer to an "insider account" of the 2016 Trump For President campaign is provided by Joel Pollack, a member of the press pool for pro-Trump *Breitbart News* (and now its editor), and Pollack's co-author, Larry Schweikart. They "pinpoint the moment when Trump took control of the race":

> On July 10, 2015, Trump was three-and-a-half weeks into his campaign, and stuck in sixth place, with just 6.5 percent support among Republican primary voters in the RealClearPolitics average. Former Florida governor Jeb Bush, with whom Trump earlier provoked a dispute about the immigration-charged word "anchor baby," was in first place, with 16.3 percent. But that day, Trump met with the families of Americans who had been killed by illegal aliens. The families had reached out to other politicians, to no avail: few were interested in their bereavement. By July 19, just nine days later, Trump had surged to first place, and barely looked back (Pollack and Schweikart 2017, 31-2).

A month later, in August, pollsters asked prospective voters to name a "big problem facing the nation." The division was striking. Trump supporters named immigration more frequently than any other issue; Clinton supporters named it last. In no previous election had that issue figured so prominently or been so polarizing (Doherty 2016). Nor does the word division adequately convey the feelings of acrimony immigration provoked in the media's reporting, the proceedings of both national conventions, and the televised debates. Following Trump's upset victory in November, dejected university students, concerned for Hispanic friends and family they believed were now endangered, marched in campus streets. Throughout the country, Americans reported shortened Thanksgiving dinners and lifetime friendships dissolved (Chokshi 2018).

On January 18, 2018, almost exactly half-way through President Trump's term, Congressman Al Green, Democrat of Texas, announced he would force a

vote in the House of Representatives to impeach President Trump. Green said his decision was based on reports that the President, at an official meeting in the White House, had referred to Haiti, El Salvador, and certain African nations as "sh**hole countries," the result of which, said Green, was to sabotage negotiations on a bipartisan bill of immigration reform (Kwong 2018).[3] The bill in question would have limited family-based migration and provided funds to build a wall on the border with Mexico. It would also have overridden federal court decisions making it illegal for persons brought to the U.S. as children to remain under Deferred Action for Childhood Arrivals (DACA), a hard-fought policy of the Obama administration (U.S. Department of Homeland Security and Napolitano 2012).

These vignettes will serve to place the issue of immigration at the center of political events. In addition, the topic encapsulated multiple themes that divided President Trump's supporters from his opponents, first in the electorate and subsequently within government. Start with the theme of political repudiation. Repudiation is routine in a democracy where parties rotate in power, but even by the heightened standard of difference between the two parties' policies since the 1980s, 2016 was exceptional. Trump vowed to "drain the swamp" that in his eyes infested past administrations of both parties and was epitomized by his Democratic opponent; his crowds chanted "lock her up." Immigration also held a top place on the agenda of Trump's predecessor, just after health care. President Obama sought full citizenship for people "living in the shadows" (State of the Union address 2016); having been thwarted by Republican control of both houses, he instituted DACA and a second program, Deferred Action for Parents of Americans, by executive order. Trump's plan was to keep "illegal aliens" behind a border wall with Mexico and he promised to reverse Obama's actions.

A second theme was law and order. Violence at the border; importation of illegal drugs; rising crime and addiction rates; fear of terrorism, including by Muslims able to exploit immigration loopholes. Still another was globalism. Devised by and benefitting a bi-coastal elite who "hate their country," globalism was seen to suction out manufacturing jobs, leaving American workers to compete with immigrants for lower paying employment. Globalism in turn dovetailed with the much-vaunted aim of diversity, opening doors to education and employment for non-white and otherwise excluded people, some of them only recently arrived. In these ways immigration chimed with the USA-Mother-Theme of race. Hispanics, the largest group of border crossers, were the largest non-white segment of the electorate, comprising roughly 13%, actively courted by both parties. Nor was it irrelevant that the outgoing president was a Black American whose eligibility for office the Republican candidate had questioned because of his alleged foreign birth. Immigration contained it all. Thus, its explosive political charge, its power to enrage.

Several other campaign issues drew sparks. The Republican candidate's en-

[3]Green's motion garnered only 66 votes, but it foreshadowed impeachment articles eleven months later.

emies called him out for what they regarded as unforgivable remarks against ethnic groups, women, and the mainstream media. But none was more mobilizing of his base or of the media that would televise and write about him than immigration. Within two minutes of gliding down the escalator to announce his candidacy, he threw down the gauntlet. Mexican immigrants were "bringing drugs, bringing crime, they're rapists. . . ." (C-SPAN 2015; 9:39). Watch a video of an early campaign rally and you will see a wiry, thirty-something warm-up man named Stephen Miller. Miller had been an outspoken immigration critic since high school in Santa Monica, California. After college, he joined the staff of Senator Jeff Sessions of Alabama, one of Trump's earliest supporters and Chair of the Subcommittee on Border Security and Immigration. Miller wrote Sessions' speeches against Obama's failed immigration bills. Having risen to become senior policy advisor on the campaign, in the White House he took up the job of directing immigration policy (ABC15 Arizona 2016).[4]

Off to a roaring start in January 2017, with a presidential proclamation banning travel and immigration for residents of seven Muslim countries, immigration policy would from then on continue to sow disorder in every government branch.[5] The White House's fevered relations with Congress, from the start the branch understood to enjoy primary constitutional jurisdiction over the subject, would be stoked by a continual stream of activity.[6] A study of President Trump's issuance of executive orders, an inherently contentious form, shows his overall numbers roughly in line with presidents going back to Truman, but the percentage of those he issued on immigration, 8%, was six and seven times more than his predecessors with the single exception of President Obama, whose proportion of 6.5% still lagged President Trump's record by 23% (Waslin 2020, Table 3).

The administration's legislative proposals encompassed changes in border enforcement, political asylum, refugee resettlement, visa actions, internal arrests, executive orders, and courtroom procedures (Pierce and Bolter 2020). The White House sponsored no less than four bills to cut off aid to sanctuary cities—local-national relations was another area thrown askew; repeatedly proffered measures for so-called merit entry alternated with efforts to rescind or delay DACA. General budget resolutions foundered on attempts to fund the border wall; in 2019 Democratic opposition to the President's pet construction project caused the longest government shutdown in American history. Meanwhile, every motion and maneuver was monitored by the growing immigration lobby, the immigration bar, a (mostly) pro-immigration mainstream media, and an irritable public, who relentlessly aired their views on the internet and

[4]In 2020 Miller would be added to the Southern Poverty Law Center's "List of Extremists" for his "draconian immigration policies" (Walker 2020).

[5]The same order closed refugee admissions for 4 months; banned Syrian refugee admissions indefinitely; and gave priority to religious refugees who were in the minority in their country of nationality. See Mashaw and Berke (2018, 568-76).

[6]That congressional authority has been largely putative in an operational sense for at least a century is the thesis in Cox and Rodriguez (2015).

(mostly) anti-immigration radio stations. Every Trump-side proposal failed, both before and after the Democrats took the House in the midterm elections.

If there was a single moment of greatest combustion, it was in summer 2018, when agents for the Department of Homeland Security (DHS) were nightly on the evening news, shown in the act of separating parents from minor-age children, some infants, and housing them in wire enclosures. Congress' angry response was further highlighted by tours of several Democratic members to various border-crossings. A House hearing, "Kids in Cages: Inhumane Treatment at the Border," before the House Oversight and Government Reform Subcommittee on Civil Rights and Civil Liberties, saw the Secretary of Homeland Security asked by a member to explain how the children's enclosures differed from dog kennels (Rupar 2019). President Trump, for his part, defended family separations as a deterrent to illegal entry (Shepardson 2018).

As for the immigration bureaucracy: it was poetic justice that "Anonymous," the "senior official" who disparaged the President's managerial style in *The New York Times*, was later unmasked as the ex-staff director to the third-named Secretary of the DHS (in the end there were five, three of them acting) (Tapper and Herb 2020). Low morale meant poor repute: the department would experience simultaneous vacancies in the positions of deputy secretary, undersecretary for science and technology, director of Immigration and Customs Enforcement (ICE), and ICE Ombudsman.[7] The Federal Emergency Management Agency, U.S. Citizenship and Immigration Services, and Office of the General Counsel were all led by acting appointees. Constant turnover of personnel, a controversial mission, unclear jurisdictional lines, bad relations with Congress: all preceded the Trump administration; however, the substitution of a border policy of "zero-tolerance" for Obama's "catch-and-release" (President Trump's name for it) meant more children to be housed, worse morale, more churning of staff, and more oppositional coverage in the press.

As with the three earlier episodes of breakdown, federal courts stood at the eye of the storm. Judicial processing of immigrants and their appeals had been in a state of managed chaos for some time. At the lowest level, in the immigration courts, operations had been near dysfunction for years, with case backlogs numbering in the hundreds of thousands; when President Trump's administration ended it would be over one million (U.S. Government Accountability Office 2023). In the district courts, efforts by multiple diverse plaintiffs to block the administration's changes through executive orders meant a wide scattering of filings, exacerbating conflict among the Circuit Courts of Appeal. This turmoil was harmful in ways beyond simple inefficiency. Cacophonous rough-and-tumble may sometimes be tolerable, even productive, inside and between legislative and executive agencies. It does not go down well when accompanied by a constant barrage of new business, involving people's physical detention, within a system whose adherence to established rules was already widely questioned.

[7] A somewhat heated account of these years is Ngai (2022).

Nor did the wrangling evade the Supreme Court. The President's first appointment, Justice Neil Gorsuch in 2017, felt constrained to apologize to the Senate for having used the term "undocumented alien" during his nomination hearings (Giaritelli 2017). The next year, the President himself was given a rare public rebuke by Chief Justice Roberts for chastising as an "Obama judge" a member of the Ninth Circuit who blocked his plan to deny asylum to anyone crossing the border illegally (Williams 2018). A climax of sorts was reached in 2020 when, in a dissenting opinion in *Wolf v. Cook County* (2020, 684), Justice Sonia Sotomayor complained that a recent line of immigration decisions had benefitted "one litigant over all others," by whom she meant the sitting President. The President publicly fired back, saying she, along with Justice Ruth Bader Ginsberg, who during the campaign had called him a "faker" on national TV, ought to recuse themselves in all future litigation involving the White House (Okun 2020; Supreme Court Justice Ginsburg bashes Trump: "He's a faker" 2016).

The occasion for Justice Sotomayor's words was the Court's decision to stay an injunction against Illinois' implementation of its "public charge" rule, requiring prospective immigrants to provide proof they could support themselves without public benefits, another round in a continuous game of tug of war between state and federal officeholders.

II.

During the 2020 presidential debate of October 22, in response to President Trump's repeated taunts of "Who built the cages, Joe?" Joseph Biden said this about plans for his first 100 days in office:

> I'm going to send to the United States Congress a pathway to citizenship for over 11 million undocumented people. And all those so-called Dreamers [sic], those DACA kids, they're going to be legally certified again, to be able to stay in this country, and put on a path to citizenship.[8]

The political logic of the colloquy is self-evident. The connection between enforcement shortcomings at the southern border and the overall acrimony of the campaign—the debate moderator was given a "mute button" in anticipation of excessively aggressive back-and-forth—requires more searching inquiry. That a connection exists is plausible enough, but are the two linked in a politically meaningful way? Can it be argued, for instance, that hostility in the debate or the disruption that tarnished election day two weeks later was "caused" by feelings about immigration in the sense that one could not give an

[8] "Debate Transcript: Trump, Biden Final Presidential Debate Moderated by Kristen Welker" (2020). For the discussion of immigration see just before 58:48 and for Biden's statements, see just before 1:01:51.

equally convincing account of events without putting immigration enforcement in the mix?

I would argue yes, though with the qualification that none of the episodes in question could pass a strict sine-qua-non test of causation concerning, say, their impact on a specific policy proposal or future behavior at the polls. Our interest lies elsewhere, in the configuration of elements common to all four episodes. These include the highly publicized and problematic task of law enforcement, the different institutions that endorse and change constitutional authority, joined in real time by a comprehensive partisan strain, in both public and private arenas, the last observable through public opinion research. Less as critique than as counterpoise to my own argument, it will be useful to briefly discuss a recently published *APSR* article, "Activating Animus: The Uniquely Social Roots of Trump Support," which directly addresses the hostile tone of the 2016 campaign and can be extended to embrace Trump administration appointees as well as members of the public (Mason, Wronski, and Kane 2021, 1508-1516).

The article begins with the idea that Americans increasingly self-sort politically into Republicans and Democrats, based on their desire to associate with people and organizations like themselves, that is, of the same race, religion, gender, and other aspects of their social identity. Political leaders and leaders of organizations do the same, with the overall result of "group polarization," two party formations, opposed to one another, each taking and promoting attitudes and opinions they purportedly share with "people like me," rejecting attitudes and opinions they believe are shared by those "unlike me." This conception reverses the more conventional understanding of partisanship, in which people align themselves politically *because* they hold the attitudes and opinions they do.[9]

Further elaboration of this idea explains the role of political acrimony and anger on display. Over time, each side comes to feel anger toward certain groups they see affiliated with the other party. In "Activating Animus," the authors identify groups affiliated with the Democratic party as African Americans, Hispanics, Muslims, and Gays and Lesbians; on the other side, groups affiliated with the Republican party are identified as Christians and whites. The authors then look at data showing respondents' feelings about different groups and find, among other things, that those who express greater animosity toward the Democratic affiliates also gave greater support to President Trump and to the Republican party, had a more favorable opinion of President Trump compared to other politicians of both parties, and a higher opinion of how the President was performing his job as of 2018. On the other hand, no parallel effects were observed in respondents who expressed animosity to Christians and whites; indeed, the less hostility respondents expressed toward these Republican-affiliated groups, the more likely they were to support Hillary Clinton.[10]

[9]For a statement of the "group polarization" idea, see Iyengar and Westwood (2014).

[10]The finding on Clinton (Mason, Wronski, and Kane 2021, 1512-15) is perhaps not

It is entirely possible that group-polarization theory could, based on more impressionistic data, be used to analyze the animus demonstrated in the earlier episodes of "Doing Time." But thinking of the group of four together argues against it. That each (including, prospectively, the immigration case) precedes system-wide realignment of governing authority suggests an association between a straddling of the criminal-constitutional divide and the condition of governance brought under pressure. From a group polarization perspective, the explanatory role of these factors would be secondary or indirect, filtered through the array of groups. This observation returns these remarks to the categories of constitutional and criminal law with which they began, and the fact that each animus-filled episode has at its center the enforcement of a criminal law increasingly challenged as unconstitutional and unjust.

The public opinion data shows that in 2016 Immigration assumed a prominence unusual in electoral history (Gimpel 2017). Another poll in mid-summer showed both candidates' supporters naming Immigration third most often as "very important" to their vote, after the Economy and Terrorism, both of which I have argued were closely tied up with a voter's position on immigration (Pew Research Center 2016). In order to capture this interplay between this data and the political system within which it is expressed, I take my cue from Robert Cover in a book he wrote four decades ago on the behavior of judges adjudicating lawsuits over slavery prior to the Civil War.

Cover described two potentially inconsistent prescriptive systems: law and (antislavery) morality. "Neither system had a wholly satisfactory accommodation mechanism for the potentially inconsistent principles or rules of the other... [I]nsofar as the judge's personal world was populated by some people who valued the formal obligations very highly, and by others who were more strongly concerned with libertarian morality, whatever action he took would inevitably disappoint the hopes and expectations of one group. Such situations were uncomfortable ones" (Cover 1974, 226).

Cover's analysis, based on the social-psychological theory of cognitive dissonance, is that judges, to relieve their discomfort about who they "were," in their own and others' eyes, wrote their judicial opinions following one of three ameliorative strategies. The first was to reorder the relative appeal of the two choices; the second, to take refuge in a mechanical formalism; and the third, to attribute the responsibility of deciding to some agency outside of the courts (1974, 229-38). That judges are made uncomfortable socially by what others will think, is, in that limited sense, akin to the argument of group-polarization theory, but that the primary problem presented the judge in each iteration of decision making involves specifically law, the enforcement of slavery by the state, makes it distinctive.

surprising, given that she is both Christian and white. These "negative" categories were not chosen by the authors. They are from surveys conducted in 2018 by the Democracy Fund's Voter Study Group in partnership with the Cooperative Campaign Analysis Project (CCAP) and YouGov. For a good discussion bearing on the Mason, Wronski, and Kane paper, see Marble, Grimmer, and Tanigawa-Lau (2022).

Cover's presentation points up the similarity between the enforcement of slavery and the enforcement of immigration, indeed the similarity of all four episodes of legal breakdown (See Lasch 2013 and Rierson 2020). Each consists in a confrontation between the enforcement arm of the state and a targeted set of lawbreakers—debtors, runaway slaves, industrial workers, aspiring migrants—whose criminality is mitigated for some significant part of the public by sympathy for the offence and for the difficult situation of the offenders. Confrontations in each case were played out dramatically, in person, reported and magnified by media, recited and reenacted in courtrooms. Tension was heightened by an arresting unity of tactics and goals: shut down the courts; escape to freedom; break the contract; cross the border.

I propose, following Cover, that the dissonance troubling anti-slavery judges was present in a significant part of the American public, in and outside government, as they watched and attempted to control the progress of illegal border crossings. My hypothesis is that the dissonance and resulting discomfort they experienced was expressed in the form of feelings of anger.[11] The first "potentially inconsistent" principle is obedience to law. This principle is embraced as a leading democratic ideal by the majority (67%) of Americans (Gramlich 2019). The second principle, in possible conflict with the first, is the beneficial effect of immigration on American society. During this same period, a majority polled endorsed both these statements: "The growing number of newcomers strengthens American society" (57%); and "America's openness to people from all over the world is essential to who we are as a nation" (67%) (Pew Research Center 2019).

With all disclaimers about empirical finality in the "ON" position, I will make a bare-bones case for my hypothesis, drawing initially on public opinion surveys done at three data points. One survey was shortly before the 2016 election, another during the second half of President Trump's term, and a third just after the election of 2020.[12] For each, I focus on two questions intended to draw on beliefs which I argue were potentially in conflict in the border enforcement setting: one expressing a favorable or unfavorable view of police and the other a favorable or unfavorable view of the policy of deporting all undocumented residents. Finally, I control for whether respondents describe themselves as either "strong" or "leaning" Democrats, collapsing these into one category, and conversely, either "strong" or "leaning" Republicans. This yielded four possible groups of respondents: pro-police/pro-deportation, pro-police/anti-deportation, anti-police/pro-deportation, anti-police/anti-deportation.[13]

The first thing apparent in the data is that a significant portion of the

[11] Anger is a feeling routinely attributed to cognitive dissonance by researchers, along with regret, shame, fear, anxiety, poor self-esteem, etc. (arguably more often than demonstrated). See Kashyap (2004).

[12] See notes at bottom of Table 1 for sources. Decimal points in the Table and Figures represent percentages. ANES and CCES data were used in 2016 because there were no Nationscape surveys then. The numbers were substantially similar.

[13] I am unaware of an independent measurement of anger "out there" in the public at given times.

public held views I claim were productive of cognitive dissonance. They were in two groups, the first being respondents who held a favorable view of police while disfavoring the deportation of immigrants; the majority of these respondents were Democrats. The second group was respondents holding an unfavorable view of police while favoring the deportation of immigrants; the majority of these were Republicans. Among Republicans, the pro-police/pro-deportation—in our terms a cognitively *consistent* position—prevailed decisively in each of the three surveys.

Party	Party & Police (0-1)	Deport (0-1)	Cognitive Dissonance*
2016			
Republican	0.84	0.72	NA
Democrat	0.70	0.21	NA
Difference	0.14	0.51	NA
2019-07-18			
Republican	0.85	0.75	0.19
Democrat	0.63	0.23	0.44
Difference	0.22	0.52	-0.25
2020-11-12			
Republican	0.82	0.65	0.26
Democrat	0.60	0.30	0.35
Difference	0.22	0.35	-0.09

Table 1. Attitudes Toward Police and Deportation of Undocumented Immigrants Over Time, By Party. *Respondents hold a dissonant attitude if they have a favorable attitude toward police but do not want to deport all undocumented immigrants. 2016 data regarding police comes from ANES. 2016 data regarding deportation comes from CCES. All other data comes from Nationscape.

In contrast, the majority of Democrats on every survey expressed both a favorable view of police and an unfavorable view of deporting undocumented residents, with the second position more widely held than the former. Of these, the anti-police, anti-deport view is, as in the case of Republicans, consistent, leaving as the group potentially experiencing dissonance Democrats who hold a favorable view of law enforcement but also oppose deporting persons living in the country in violation of law. At no point did the proportion of Democrats with that combination of attitudes dip below 27%. Republicans experiencing dissonance ranged between 19 and 26%.

Importantly, the data indicate the potential for dissonance existing at the level of *individual* Democrats and Republicans, not only Democrats and Republicans as groups. For purposes of concision, the 2019 survey listed will be taken as representative of all three. Sixty-three percent of Democratic respondents indicated a favorable view of police and 77% disapproved of deporting undocumented residents; by calculation, 44% of all Democratic respondents would have fallen into this category. For Republicans, 85% responded pro-police and 75% pro-deportation; the calculated percent dissonance is 18.7%. It hardly needs saying, in no real world could immigration enforcement have been the sole cause of anger in the public, but only a significant one. Nonethe-

less, information on feelings shortly before the 2020 election bears out this distribution. Pollsters offered registered voters a menu of choices of how they were likely to feel if the candidate they were not supporting won; these were "excited," "relieved," "disappointed," or "angry." Among Biden supporters, 54% said they were likely to feel angry. Among Trump supporters saying they were likely to feel angry the figure was 31%. As this is a reasonable proxy for Democrats and Republicans, respectively, the figures roughly track the dissonance attributed to the two groups.[14]

To probe further, I introduce another potential stressor into the situation, the death of George Floyd, which occurred on May 25, 2020, or between the second and third surveys on Table 1. George Floyd was a Black American man in Minneapolis who died when a police officer pressed his knee on Floyd's neck for eight-plus minutes. Figure 1 shows that in the days soon after Floyd's death, Democrats adjusted their favorability toward police sharply downward, the largest adjustment for many months; at the same time, in a less dramatic move, they decreased their support for deporting undocumented residents. This corresponds to Cover's finding that one strategy adopted by antebellum judges to ease their feelings of discomfort was to readjust the relative strength of the two principles.

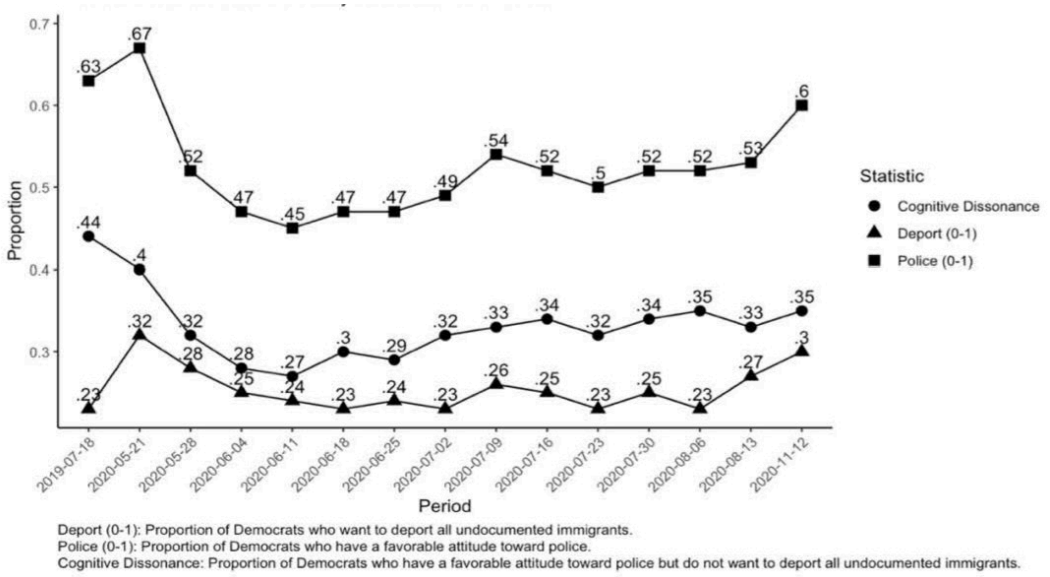

Figure 1. Proportion of Democrats for Each Statistic
Note: First/last weeks are not immediately before/after other weeks

Figure 2, showing cognitive dissonance over the same time span, indicates that indeed, cognitive dissonance in individual Democrats was eased; it was also eased, but less, for Republicans, who, remember, experienced less dissonance as a group. Over the space of the rest of the year, Democrats' downward trend in approval for police continues for several weeks, then gradually returns to 60%, near where it began before Floyd's death. Virtually the same pattern

[14]Pew Research Center (2020). For an update, see Barrow and Sanders (2024).

is seen in opposition to deportation, with the recovery by the end of 2020 slightly less complete.

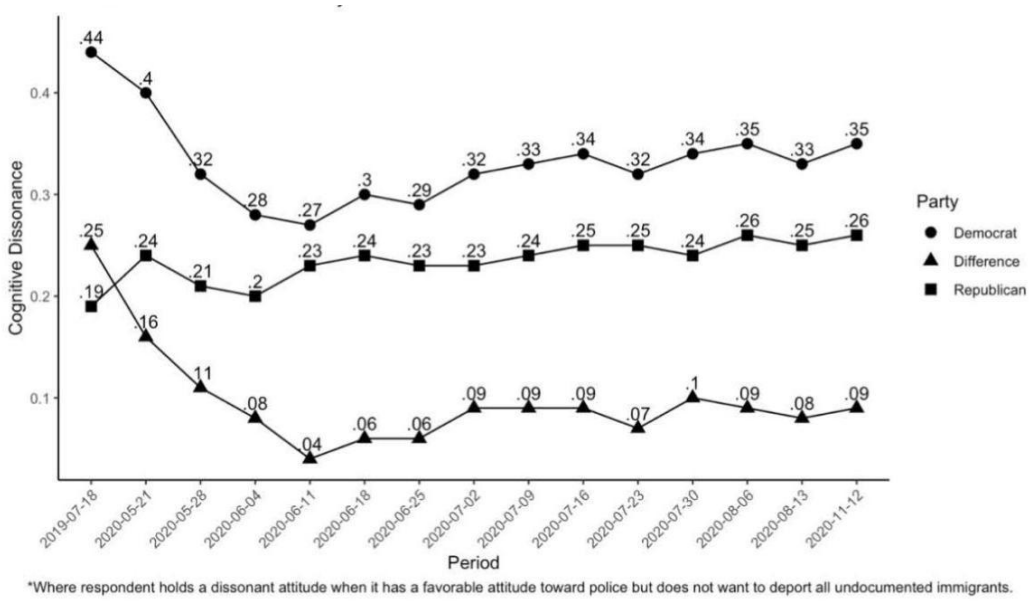

Figure 2. Proportion of Respondents Who Hold Dissonant Attitudes*
Note: First/last weeks are not immediately before/after other weeks

If volatility is measured as the average percent change between weeks, support for the police is the more stable, registering less than half the movement seen on deportation. This can be seen for Republicans as well (see Figure 3), though the change is less pronounced; changes in Republican views are overall smoother, but again, support for the police is less moveable.

A further question arises whether this relief came from increasing individual Democrats' opposition to deportation of undocumented immigrants or from their increasing hostility to police. That Democrats increased their opposition to deportation is itself interesting. Floyd was not an immigrant. Perhaps this suggests a common affinity ascribed in the circumstances to victims; alternatively, it could signal a stronger pull by Democratic Party ideology. In any case, Figure 1 indicates that it was their opinion of police that was the significant change, with opposition to deportation remaining more even over the sequence of surveys. This is understandable, given that the first would seem more inducive of hostility, fear-and-loathing, and the rest, with deportation being the less immediate event. As a matter of speculation, these results are consistent with the idea that the public's everyday dependency on police for protection creates, at the same time, short range volatility in attitudes and a longer-run stability or a social-psychological outer limit of police disapproval tolerable for a legal system to remain robust without significant change.[15]

[15]For an overview of changing public views on police, see Ekins (2016) and Lowery et al. (2020).

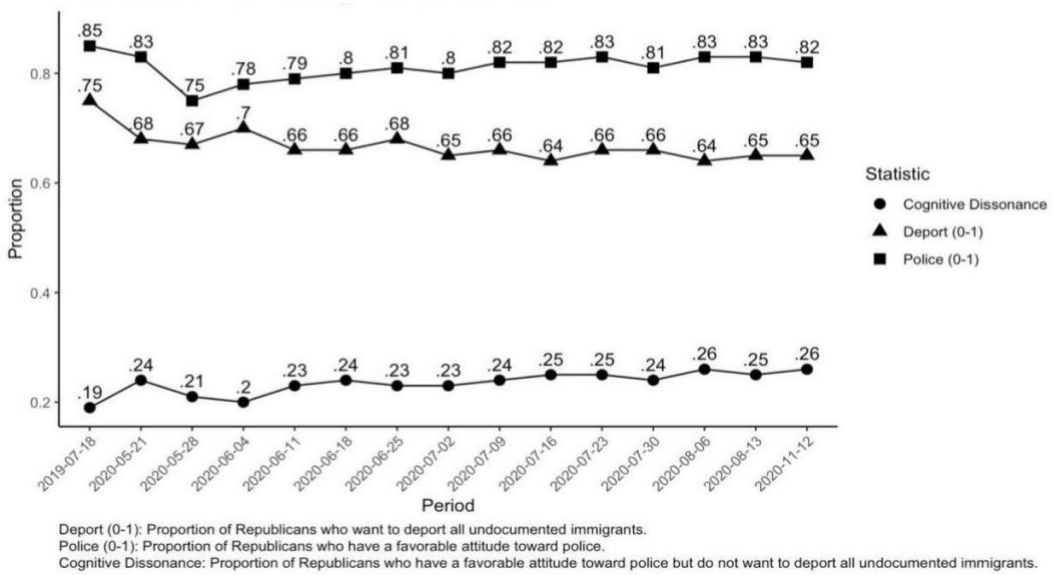

Figure 3. Proportion of Republicans for Each Statistic
Note: First/last weeks are not immediately before/after other weeks

III.

As already acknowledged, there is no public opinion data for the other three episodes to align with what is available for immigration, nor is it feasible here to survey contemporaneous letters and memoirs for a parallel showing. However, an approach through the idea of conflicting principles can be rerouted to individual government officers as shown in the record of their decision making. This was, after all, the sphere of Cover's own inspiration, and the conflicting normative and social pressures he saw at work in the antislavery episode can now be seen active in the others as well. This should be especially so when, as in each case, jurisdictional lines relied upon to decide procedures and penalties in situations of lawbreaking are unclear. In each of the four episodes, constitutionally prescribed routines normally entailed in criminal arrest and confinement were routinely skirted. In both Shays' Rebellion and fugitive slavery, jailing of the accused was on "mesne" process, that is, on only the affidavit of the complaining party; striking and boycotting workers were often convicted of "civil" contempt of a judge's injunction, with no participation of a jury but with punishment characteristic of criminal offenses.

So great a proclivity has immigration enforcement shown for crossing these lines that "crimmigration" has become a term of art.[16] The situation is especially vexed in decisions concerning deportation, itself a severe sanction, also accomplished with periods of arrest before, during, and sometimes after the administrative court's (juryless) decision. So palpable has been the discomfort—the cognitive dissonance—among federal judges that many have

[16]The first appearance in scholarship seems to be in Stumpf (2006). Stumpf credits Priest (2005).

resolved the tension through the so-called "canon of avoidance."[17] Torn between an awareness of Congress' undisputed right to write immigration law and a legal culture that boasts procedural protections for accused and convicted criminals, these officeholders avoid declaring what they regard as an offensive statute unconstitutional, interpreting it instead as consistent with the literal words of Congress but adding on what they as judges consider necessary to provide a modicum of fairness to complainants. A leading immigration scholar has dubbed the results "phantom constitutional norms" (Motomura 1990).

This resolution of conflicting principles can be observed in an important Supreme Court decision during the Trump administration, *Jennings v. Rodriguez* (2018). This was a class action by immigrants who had been held in custody for longer than 6 months under the Immigration and Nationality Act (INA) while waiting for admission to, or removal from, the country, having finished serving sentences for committing specified crimes. Alejandro Rodriguez, class representative, was a permanent resident who, after being in custody for three years, filed a habeas corpus petition appealing an order for his removal. Rodriguez claimed that prolonged detention without a bond hearing, at which the Government must prove by clear and convincing evidence that continuing custody was justified, violated the due process clause of the Fifth Amendment.

The district court judge heard Rodriguez' suit and agreed with him. Finding upon thorough inspection no provision in the INA that pertained to class members, he proceeded to issue a permanent injunction requiring bond hearings automatically every six months for such persons detained; this order was affirmed by the Court of Appeals, in an opinion referencing the canon of avoidance as justification (*Rodriguez v. Holder* 2013, *Rodriguez v. Robbins* 2015). The Supreme Court, in a fragmented 5-3 decision, reversed, finding the lower courts had misconstrued the INA, the precedents relied upon, and the canon of avoidance.[18] This was the first high court reversal in a string of similar cases over several years (*United States v. Witkovich* 1957, *Zadvydas v. Davis* 2001, *Clark v. Martinez* 2005).

The Court's language in *Jennings* is as interesting as its holding. "Doing Time" illustrated how Supreme Court opinions tend to track the line dividing criminal and constitutional law with a rhetoric voicing their respective historical features. One side, dubbed "officism," speaks to privileges and constraints pertaining to officers, expected to regularly, in the course of duty, deprive citizens of property and personal liberty, but with pre-established legal protection against punishment; the other side, dubbed "citizenism," manifests

[17]The canon of avoidance directs federal courts to avoid ruling on constitutional issues when they can decide the same cases on other grounds. See the discussion and accompanying notes in Vermeule (1997, 1945-6 and passim).

[18]Justice Alito delivered the opinion of the Court. Chief Justice Roberts and Justice Kennedy joined that opinion in full; Justices Thomas and Gorsuch joined as to all but Part II; and Justice Sotomayor joined as to Part III–C. Justice Thomas filed an opinion concurring in part and concurring in the judgment, in which Justice Gorsuch joined except for footnote 6. Justice Breyer filed a dissenting opinion, in which Justices Ginsberg and Sotomayor joined. Justice Kagan took no part in the decision of the case.

the "confident, thrusting, citizen-regarding orientation" of constitutionalism (Orren 2012, 76-77). These categories align with Cover's antebellum judges who assuage their dissonance either by a mechanical formalism or by an orientation he calls "moralism" (1974, 226). What is interesting in *Jennings* is that the decision can be read to show participating justices on both sides employing this resort, which is what would be expected if they were moved to their positions in reaction to an arrangement they alike saw out of sync, but for different reasons.

First, consider Justice Breyer's *Jennings* dissent, arms around the avoidance canon, offering a spacious tour through the "constitutional language, purposes, history, traditions, context, and case law," in order to demonstrate how the majority's contrary reading would "at the very least. . . raise 'grave doubts' about the statute's constitutionality" (861). By contrast, the majority and concurring opinions in *Jennings* are technical, devoted to parsing the statute, with citations to precedent and an accent on jurisdiction. That said, they also do not avoid the avoidance canon. Rather they read it differently, as applicable only in circumstances where a statute allows for multiple interpretations, in which case judges may properly "shun" readings that raise constitutional doubt and adopt an alternative that avoids those problems.[19] Indeed, as an add-on lesson in the benefits of adhering to established rules, the majority instructs the circuit court how on remand it might avoid the constitutional question on the ground that it was inappropriately certified as a class action.[20]

Remarkably enough, a search for the sources of the avoidance doctrine leads directly to the next-most recent episode of our criminal-law breakdowns, in labor relations (Vermeule 1997). One source is a Supreme Court opinion written by Justice Hughes on the eve of the New Deal, when, deciding an appeal of an award under the Longshoremen's and Harbor Workers' Compensation Act, the majority held a statute could constitutionally designate certain facts for determination soley by an administrative agency and not by an Article III court as normally required, as long as the designation is itself subject to judicial review.[21] Another is Justice Hughes' majority opinion in *NLRB v. Jones and Laughlin Steel Corp.* upholding the Wagner Act, declaring that the "cardinal principle of statutory construction is to save and not to destroy;" this, said Hughes, was true "even if a serious doubt of constitutionality is raised"(29-30 1937). This must be considered a major linkage, in that the Wagner Act was arguably the backbone of the New Deal political order going forward. Yet a lesser bit of evidence for the connection between the immigration and labor episodes: the avoidance canon is given blunt expression in Chief Jus-

[19] Ibid., 836.

[20] "'[D]ue process is flexible,' we have stressed repeatedly, and it 'calls for such procedural protections as the particular situation demands.'"'(*Jennings v. Rodriguez*, 851-2).

[21] *Crowell v. Benson* (1932). We focus here on the "statute saving" form of avoidance. For Justice Brandeis' compendium of the diverse varieties of the genre see his concurring opinion in *Ashwander v. Tennessee Valley Authority* (1936, 347).

tice Warren's later rejection of an employer's argument that the Harbor and Longshoremen's Compensation Act contained a technical notice requirement not obeyed: "This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results" (*Voris v. Eichel* 1953, 333; Frickey 2005, 410).

The question arises if and how cognitive dissonance might figure in these connections. If one approaches the question in a heuristic posture, it becomes significant that first example referred to in the previous paragraph, *Crowell v. Benson*, on the longshoreman's claim, is today regarded as an important gateway to the administrative state that would itself take a quantum leap with the Wagner Act and with its creature, the National Labor Relations Board. Yet at the time, *Crowell* was severely criticized by fellow progressives on and off the Court for being a half-hearted endorsement of this change.[22] To be sure, Justice Hughes is remembered today as a "centrist" justice, and he was burdened as he wrote with being chief of a Court very much in transition. To say that the industrial conflict plaguing government and society at large in the 1930s likely affected minds on the Court would be an understatement, and it is not implausible that Hughes' opinion reflected internal clamor between constitutional principles.[23]

If the analytic register be switched from heuristic to speculative, the chain of doctrinal disorder in our episodes can be followed further backward. The enforcement of fugitive slavery preceded the period when striking a statute for being unconstitutional became normal judicial practice. That said, antebellum judges sometimes followed a kind of "avoidance canon" in reverse. Rather than add phantom protections to existing laws, they engaged in what court observers call "underenforcement," endorsing a statute's constitutionality while finding persuasive reasons for not following through on the remedy.[24] A case in point is *Kentucky v. Dennison* (1861), in which the governor of Kentucky asked the governor of Ohio to hand over a free man of color for having aided the escape of a Kentucky slave girl. For a unanimous court, Chief Justice Taney gives a painstaking exposition of the extradition sections and constitutionality of the 1793 Fugitive Slave Act, complete with an affirmation of the challenged writ of mandamus and of a state governor's non-discretionary duty to obey, only to conclude that with no specific modalities of obedience being provided in the statute, the Ohio governor's duty was "moral," and therefore beyond compulsion by a federal court.[25]

[22]For example, see Dickinson (1932).

[23]Hughes' opinion for the majority was politically split: hearing the case on habeas, much decried by strong Progressives, but not requiring a reconsideration of the agency's finding of facts, which was very important to the flourishing of regulation in the long run.

[24]For underenforcement generally see Natapoff (2006). As it pertains to federalism, see Pursley (2012).

[25]*Kentucky v. Dennison* (1861, 107): "The demand being thus made, the act of Congress declares that 'it shall be the duty of the Executive authority of the State' to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding State. The words, 'it shall be the duty,' in ordinary legislation, imply the assertion of the power to

Little space need be spent chronicling the public's contradictory emotions when *Kentucky v. Dennison* was decided. This quarrel between governors transpired in the shadow of John Brown's raid at Harper's Ferry and his execution; it was announced on the last day of the Court's term, just weeks before Bull Run. Taney's foremost exegete concedes there was "an element of unrealism" generally about the federal judiciary successfully binding the states, some of which had already seceded (Swisher 1974, 688). Still, it was a noticeably odd decision from a justice not famous for holding back. Years before in an earlier case, Taney was prepared to forcibly prevent a governor from turning a prisoner wanted for murder over to Canada, despite the same practice previously by other governors.[26]

Showing analogous dislocations in doctrine before the Constitution existed might push comparisons too far. That said, the episode of Shays' Rebellion might be tentatively understood in terms of "overenforcement," or better, "enforcement creep" (Grano 1985). Under the Articles of Confederation, Americans were imprisoned under debtor laws imported from England. These presented a mixed picture. For many centuries it had been a boast of the common law that only property could be seized for debt and not persons (Fox 1923). At the same time, beginning in the seventeenth century, the English king and Parliament competed in arranging for ex parte ("mesne") arrest and imprisonment of disfavored debtors under such "fictions" as their having committed violent trespass; bankruptcy protection was available, but only to traders, not farmers. Whether judges under the Confederation were following these recent anti-debtor decisions is unknown, but the number of Americans in debtors' prison suggests many were. Perhaps the awkwardness of imposing a highly unpopular law on a manifestly excitable public promoted, in Cover's terms, a mechanical formalism.

What does seem plain is that the circumstances of Shays' Rebellion offered enough ambiguity to provoke felt dissonance on all sides (Szatmary 1980). It seems likely that neither judges, nor legislators, nor militiamen, nor the rebels themselves could escape the mixed feelings and inevitably two-edged remedies that arose from so many being creditors and debtors in the same person. For the time being, it appears that dissonance accompanying the conflict between popular government and popular imprisonment would find the beginnings of resolution in the Philadelphia convention of 1787 (Rossiter 1966, 56-67).

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command and to coerce obedience. But looking to the subject matter of this law, and the relations which the United States and the several States bear to each other, the court is of opinion the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created when Congress had not provided the mode of carrying it into execution."

[26] *Holmes v. Jennison* (1840). Taney could not carry the day, however, as one vacancy on the Court meant that only three other justices voting with him were insufficient to override the decision below.

IV.

I will anchor my concluding remarks with the question: what, precisely, are these four episodes a case *of*? Put differently, are the four episodes more specifically related than generically, that is, as so many breakdowns in criminal law enforcement that coincide with the end of American constitutional regimes? The tracking just above of the avoidance doctrine to judicial decisions in earlier episodes suggests following up with other parallels, perhaps other conflicting principles, with the systemwide effect of unsettling what had previously seemed stable ground. Without a larger political-historical mise-en-scene, however, against which these episodes recur, it is not clear that the result would amount to more than a psychologically-infused narrative of the ups and downs of democratic government. To paraphrase a joke President Reagan liked to tell about the optimistic boy hoping for a pony on Christmas morning but finding only a pile of **** [evidence]: he was sure "there must be a theory around here someplace" (Morales 2003).

Available theories that sound promising, for example, "critical junctures theory" and "analytic narratives," are arguably less attuned to the historical details of setting and sequence that was our starting point (Collier et al. 2017, Bates et al. 1998). Perhaps more on target is one I have proposed elsewhere, motivated by the successive dismantling of centuries-old common-law hierarchies and their attendant personal and governmental upheavals (Orren 1991 and Orren 2006.) But whereas relations of commerce, servitude, and industrial labor, the subjects that correspond to our first three episodes, readily fit this scheme, the immigration case was unexpected. Instead, because in essentials unchanged for centuries and not yet having followed the "breakdown" pattern of the others, this should have been the traditional family.

This anomalous turn of events can be interpreted in two ways. The first is to decide that immigration is not as far off course as it appears. Several themes of the recent southern border breakdown concern the separation of families, the exploitation of women and children, the contrast of gangs and drugs with parental discipline. More indirectly, as was said at the outset, the issue of immigration and its enforcement crystallizes several varieties of "otherness" (including race) which public opinion research may show associated with "family values." The second interpretation hones in on the social relations between natives and outsiders that, while not enjoying a position among Blackstone's rights of persons, has played a part in common law and in English history more broadly since before the Norman conquest.[27] Closer to home, it would have figured in the period of Shays, and then again in the 1850s when the nativist Know-Nothing Party served as waystation to the Republicans. A similar immigration-heavy analysis could be made of the trade-union lead-in to the New Deal. This would arguably qualify immigration as "existential" to

[27]The subject of immigrants has frequently been subordinated in English history to the subject of criminal punishment. For the perspective of the American constitutional framers, see Natelson (2022, 209-236).

national politics and contribute another "primacy-of" thesis to the historical-constitutional chronology.[28]

Finally, a last theoretical reading might draw on the specifically criminal-constitutional law aspect of the four breakdowns, seeing it in a new way. Without insisting on the uniqueness of this signal, its placement at the end of constitutional "orders" draws attention to the not-well-understood (or perhaps taken-for-granted) zone where public policies must meet the tarmac of public implementation. Such settlements include, as a matter of course, both serious sanctions and their normative justification. In the case of all four episodes, high personal stakes demonstrably existed for both law breakers and enforcing officers, a circumstance of potentially corrosive institutional contradictions, with measurable and cumulative effects on the public's disposition as well.

At this point, the reader will remember the author's adherence to the avoidance canon against prognostication. In that spirit I will end by quoting an interview of Alejandro Mayorkas, the seventh Secretary of Homeland Security in as many years, on the television show, "60 Minutes." Mayorkas, a middle-aged man with an elfish grin, once an infant refugee from Cuba, avoided any suggestion that the troubles under his supervision constituted a crisis, preferring the designation of "challenge" (60 Minutes 2023, 2:30-3). If he suffered from cognitive dissonance, then his resort seems to have been Cover's third choice, attribute the authority at issue to some other agency.

The following exchange ensued concerning a woman from Venezuela who, with her family, had braved dangerous forests to finally cross and gain temporary entry and now had plans to leave for Chicago.

> Interviewer: "We know only years from now will a judge figure out if they actually qualify for asylum in the US. How is that arrangement good for them? How is that arrangement good for the country?"
> Mayorkas: "I would ask them—after they enjoyed their first pizza [in the U.S.] How do they feel as compared to what they fled? You mention that their asylum claim may not be judged, may not be adjudicated, for years. Our asylum system is broken. We need Congress to fix it" (60 Minutes 2023, 7:30-9:00).

In January 2024, the House Committee on Homeland Security opened proceedings to impeach Secretary Mayorkas, the first such subjection of a cabinet officer in 148 years.[29] This effort resulted in a measure that narrowly passed the House but was dismissed by the Senate without trial.

[28] Aspects of such an argument can be seen in Rogers Smith (1999; 2003) and Christopher Tomlins (2010).

[29] The last was Secretary of War William Belknap in 1876.

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Better Get to Know: Amanda Driscoll

Interview by: Ryan Black, Michigan State

Amanda Driscoll (website) is Associate Professor of Political Science at Florida State University. She earned her PhD in Political Science from Washington University in St. Louis in 2012.

Tell me a little about your background and how you got to where you are today.

I spent most of my childhood in Saudi Arabia and then my family moved to Spokane, Washington, at the start of the Persian Gulf War when I was about 10. I studied abroad in Spain my senior year of high school and then majored in Spanish and Latin American Studies. I minored in Business, and I had only taken one political science course as an undergrad. I had no idea what I was doing when I started my PhD. Everything I've learned about political science I learned in graduate school (and thereafter).

If you weren't a political scientist, what would you be instead?

If I were to do something that is career adjacent, I would work for YouGov or consult. If I had not gone to graduate school, I would have gone into the private sector and worked in international business, or in the foreign service.

What are you working on now?

Mike Nelson and I have a book in the works (still!) on public support for courts in separation of powers systems throughout North and South America, and we consider whether the public is ever willing to punish incumbents who infringe on judicial independence. We recently started a new project on the Mexican judicial elections, a follow-up to previous work on judicial elections in Bolivia and the U.S. An unrelated line of work centers on *Bolsa Familia*, a conditional cash transfer program in Brazil; we are getting ready to explore the effects this program has on political participation.

Best book on your office shelves people may be surprised by?

La Respuesta (Sor Juana) and *Love in the Time of Cholera*.

What's some good work other than your own that you've read recently and would recommend?

I think the work of Rebecca Reid and Todd Curry on indigenous law and its implications for state sovereignty is super interesting. Logan Strother, Michael Dichio, and Ryan Williams have an extensive project on the Court of Claims that I think is well-positioned to inform us about the development of judicial power and independence. It's exciting to see work on US courts beyond SCOTUS that relates directly to questions that have generally been the purview of comparative politics. The books of Whitney Taylor and Sandra Botero (both published in 2023) are excellent works on legal mobilization and judicial power and impact that I highly recommend.

What's your workspace setup like?

I usually work at school. I'm a Mac user. I like my standing desk. I have pencils and post-it notes for my to-do lists and a well-loved whiteboard. I collect old maps and science posters; I have a giant map of South America and the anatomy of an apple on my office wall. I have piles of things everywhere so it looks a little like chaos, but I know where everything is.

What apps, software, or tools can't you live without?

I use both Word/Office and LaTeX, base R and Stata, Google and Dropbox. Version control has saved me more times I can count, Overleaf and Google Docs are helpful for collaboration. I have relied on SubethaEdit as a plain text editor markup tool for a long time; it is niche, but I use it all the time.

More important to my work life are my coauthors, and the support provided from good administrative professionals. Quality collaborators and admins are worth more than their weight in gold.

What do you listen to while you work?

Nothing, but I use earplugs even if I am alone and it is quiet.

Favorite research and teaching hacks?

I used to block off the mornings for writing, but long periods of unstructured time are now a rare luxury. I've gotten better at compartmentalizing and writing in small segments of prose and time. I use pomodoros to get myself going. Once I start I always focus longer than 25 minutes. I am an iterative writer, nothing I write is precious. Bad first drafts are the gateway to slightly less bad second drafts. When I am anxious about something relating to work it is always worse in my head than it is if I just face it. I use this fact to get unstuck.

How do you recharge? What do you do when you want to forget about work?

I travel, preferably internationally, which I like to do with my daughter. I like to walk, watch soccer, garden, and workout. I also like to work on house projects with my husband. Our current project is keeping bees. We've got 5 hives, which is around 100-150k bees. My husband and daughter are incredibly grounding.

What's in your "culture queue" that you'd like to recommend to our readers?

Wicked (the movie) exceeded my expectations. My daughter has a hand in most of what we listen to and watch; at the moment *Hamilton* is heavy in rotation. I've been watching the FSU women's soccer team, they were (until this past December) the reigning national champions. We are fortunate that the ACC is home to 6 of the top 10 NCAA women's soccer teams, which is awesome because we get to see a ton of fantastic football.

What everyday thing are you better at than everyone else? What's your secret?

I wear a hat and sunscreen most of the time. I am surprised by my own consistency with this. But it has gotten to the point that being without my

hat is on par with leaving home without my keys or phone.

What's your biggest struggle in being a faculty member? How do you try to address it?

I am a true introvert and being the center of attention is not my favorite space. The fact that public speaking is so integral to our work (hundreds of students! Talks and conferences!) is something I've had to genuinely work on; I will still avoid it if given the choice. I've gotten better with practice, but this still requires intention and active effort

What's the best advice you ever received?

This was really hard to pick one, but here's something I repeat often. John Barry Ryan told me before my first job talk "everyone wants to see you succeed." It was such a kind thing to say! And once you've sat through a few not so good talks you can appreciate how true it is.

What's the greatest idea you've had that you don't want to do yourself?

I thought for a moment in 2019 I would start a project on prosecutors. Thankfully many others have started (and some have finished!) that work far better than I ever could. Outside of judicial politics, I think the politics of food regulation and scarcity is fascinating. I also am getting very interested in zoning, local politics, and urban planning. Those aren't really ideas (yet), but I would love to know more.

Which junior and senior persons would you like to see answer these same questions?

Christopher Krewson and Sivaram Cheruvu; Ryan Owens, Christina Boyd, and Andrew Martin.

Better Get to Know: Amna Salam

Interview by: Ryan Black, Michigan State

Amna Salam (website) is Assistant Professor of Political Science at the University of California-San Diego. She earned her PhD in Political Science from the University of Rochester in 2023.

Tell me a little about your background and how you got to where you are today.

I was raised in New Jersey and studied History and Economics at Rutgers. I knew I was interested in something in their intersection and that I really enjoyed my game theory classes in undergrad. I did a master's at Columbia in their quantitative methods in social sciences program. This was especially useful to me because it was my first real exposure to political science. I decided to apply for PhD programs that would allow me to study applied game theory. Luckily, I got into Rochester, and the rest is history.

If you weren't a political scientist, what would you be instead?

Probably something in the hard sciences, I think a physician if I'd cut it.

What are you working on now?

I'm working on a couple of projects. First, I'm working on a model of presidential appointments to the Supreme Court with Larry Rothenberg where a nomination to the Court changes the rules that are made as well as the docket that is decided on. Second is a model of jury selection in which potential jurors vary in the accuracy of the information they receive during trial and their bias towards wrongful conviction or acquittal.

Best book on your office shelves people may be surprised by?

I was a history major in undergrad and began grad school thinking I wanted to studying IR, so I have a fair amount of books about world history and conflict. My favorite among these is probably *The Long Partition and the Making of Modern South Asia* by Vazira Zamindar.

What's some good work other than your own that you've read recently and would recommend?

This past fall I taught a class on the criminal justice system, and we read some really exciting work there. Some that come to mind that might be of interest to a law and courts audience are Sandy Gordon and Sidak Yntiso's paper on judicial recall elections, Andrew Little and Hannah Simpson's paper on pleas, and Allison Harris's recent paper on racial diversity among judges and sentencing.

What's your workspace setup like?

I'm just getting set up in my new office. I got this desk that is convertible sitting to standing. I generally try to keep the top of my desk pretty clear, but usually have my laptop or iPad out, a notebook, my desk lamp and a coffee.

What apps, software, or tools can't you live without?

I use my iPad a lot, it's like a portable whiteboard and I can annotate papers super easily. It is also is very useful for drawing figures while I'm teaching and adding them to the slides. I feel like the Notability app makes my life significantly easier.

What do you listen to while you work?

Nothing too interesting, unfortunately. Usually *The Daily* in the morning on my way into the office, and then "White Noise Black Screen" on YouTube while I'm working.

Favorite research and teaching hacks?

No hacks, let me know if you find some!!

How do you recharge? What do you do when you want to forget about work?

I watch reality TV, draw, or go on a run. I am, for better or worse, very distractible (see answer to what I listen to while working).

What's in your "culture queue" that you'd like to recommend to our readers?

I'm reading Sally Rooney's *Intermezzo* now, which is good but probably not for everyone. Next I'm planning to read *James* by Percival Everitt which I'm super excited to read and have heard really good things about. Last year I read *I Who Have Never Known Men*, by Jaqueline Harpman, which was excellent. I would (and do) recommend it to everyone, but I think I feel like it's especially resonant for academics. I was visiting family in NJ and Connecticut during Thanksgiving, and during the drives I listened to the *Good Whale* podcast, which I really liked. I also just watched this season of *Love is Blind* in DC, which is my favorite reality TV show these days.

What everyday thing are you better at than everyone else? What's your secret?

I am really good at folding laundry. Not in terms of efficiency but in technique. My secret is love for the game.

What's your biggest struggle in being a faculty member? How do you try to address it?

I just started two months ago, so my biggest struggle has been trying to find time to get research done while teaching. I am hoping that the time I take on prepping well now will pay dividends as I teach these classes in the future, which will hopefully mean more time for future research.

What's the best advice you ever received?

I have been especially lucky when it comes to mentorship and advising, I'm having a hard time narrowing it down. But probably the best advice I have gotten has been from my mom—she taught me that everything else becomes more manageable when you take care of yourself. I still have a hard time internalizing this, but I find I'm most productive and happy when I am working out regularly and maintaining hobbies outside of work.

What's the greatest idea you've had that you don't want to do yourself?

This just came up in my class the other day (inspired by the paper by Allison Harris that I mentioned above). It would be interesting to see whether the appointment of a Black appellate court judge changes the behavior of the district court judges in that circuit.

Which junior and senior persons would you like to see answer these same questions?

Sidak Yntiso and Tom Clark.

Books to Watch For

Michael P. Fix and Matthew D. Montgomery **Research Handbook on Judicial Politics.** Edward Elgar Publishing, September 2024. (website).

This timely Research Handbook offers a comprehensive examination of judicial politics, both in the US and across the globe. Taking a broad view of the judiciary in all levels of the court, it examines the present state of the field and raises new questions for future scholarly exploration. Expert authors critically analyze what the current literature tells us about important phenomena related to judicial politics, while simultaneously expanding the scope of that knowledge through original empirical research. Chapters cover the process of judicial decision-making in different types of courts, before discussing the electoral dimensions of judicial appointments, as well as vertical and horizontal constraints on judicial behavior. They also address extrajudicial communications, public opinion and legitimacy, before concluding with an examination of methodological issues in judicial politics research. Accessibly written, the *Research Handbook on Judicial Politics* is a vital resource for graduate and undergraduate students of law, political science and public policy. It is also beneficial to practitioners in law and law-related fields who are interested in gaining insight into the processes and structure of the judiciary.

Kálmán Pócza. **Constitutional Review in Central and Eastern Europe: Judicial-Legislative Relations in Comparative Perspective.** Routledge, February 2024. (website).

Recent confrontations between constitutional courts and parliamentary majorities in several European countries have attracted international interest in the relationship between the judiciary and the legislature. Some political actors have argued that courts have assumed too much power and politics has been extremely judicialized. This volume accurately and systematically examines the extent to which this aggregation of power may have constrained the dominant political actors' room for manoeuvre. To explore the diversity and measure the strength of judicial decisions, the contributors to this work have elaborated a methodology to give a more nuanced picture of the practice of constitutional adjudication in Central and Eastern Europe between 1990 and 2020. The work opens with an assessment of the existing literature on empirical analysis of judicial decisions with a special focus on the Central and Eastern European region, and a short summary of the methodology of the project. This is followed by ten country studies and a concluding chapter providing a comprehensive comparative analysis of the results. A further nine countries are explored in the counterpart volume to this book: *Constitutional Review in Western Europe: Judicial-Legislative Relations in Comparative Perspective*. The collection will be an invaluable resource for those working in the areas of empirical legal research and comparative constitutional law, as well as political scientists interested in judicial politics.

Donald Grier Stephenson, Jr. and Alpheus Thomas Mason **American Constitutional Law: Introductory Essays and Selected Cases, 19th Edition.** Routledge, October 2024. (website).

This single-volume introduction to American constitutional law covers both the structure and operation of government as well as the people's rights and liberties. By integrating the Supreme Court's decisions and electoral politics, this text provides students with current perspectives on constitutional developments, including an account of the appointment of all justices since the late 1960s.

James L. Gibson **Democracy's Destruction? Changing Perceptions of the Supreme Court, the Presidency, and the Senate after the 2020 Election.** Russell Sage, October 2024. (website).

Did Trump and his MAGAites inflict damage on American political institutions via election denialism and the assault on the U.S. Capitol? While most pundits and many scholars find this a question easy to answer in the affirmative, to date, little rigorous evidence has been adduced on Trump's institutional consequences. Based on surveys of representative samples of the American people in July 2020, December 2020, March 2021, and June 2021, Gibson's analysis examines in great detail whether American political institutions lost legitimacy over the period from before the presidential election to well after it, and whether any such loss is associated with acceptance of the "Big Lie" about the election and its aftermath. With one exception, Gibson's highly contrarian conclusion is simple: try as they might (and did), Trump and his Republicans did not in fact succeed in undermining American national political institutions. The empirical evidence indicates that institutions seem to be more resilient than many have imagined, just as Legitimacy Theory would predict. The exception, however, is of utmost importance for American politics: Among African Americans, support for democratic institutions and values waned considerably, largely as a consequence of factors such as the insurrection and experience, vicarious and personal, with unfair treatment by legal authorities.

Judicial politics scholars will likely find this book interesting because it presents a sustained analysis of change in institutional support for the U.S. Supreme Court, including analysis of the effects of the Barrett nomination/confirmation on the Court's legitimacy, as well as an extension of legitimacy theory to the U.S. Senate and the presidency. Race and ethnic politics scholars may also find the book interesting because it presents extensive analysis of inter-racial differences in institutional support, based on strong representative samples of African Americans, as well as analyses of intra-racial variation in support and institutional alienation.

Call for Submissions

Special Call for Symposium Submissions. The members of the Editorial Board and I would like to invite submissions to the upcoming symposium, "Reflections on Dahl's Decision-Making in Democracy: The Supreme Court as a National Policy-maker." The symposium is tentatively planned for Fall 2025. Contributors may reflect on the legacy, implications, and influence of Dahl's article, and/or discuss connections between their own work and the classic piece. Submissions may examine Dahl's influence on the study of American courts and/or on comparative judicial politics. In the latter case, contributors may consider how and to what extent high courts play a role in setting policy, the relationship between the policies high courts set and the preferences of both lawmaking and public majorities, and explanations for that relationship within and across jurisdictions.

Law and Courts Newsletter publishes articles, research notes, features, commentaries, and announcements of interest to members of APSA's Law and Courts Section. The various substantive topics falling under the umbrella of "law & courts" are welcome, as are methodological approaches from across the discipline of political science. I am particularly interested in receiving the following types of submissions:

Descriptions of Datasets. Creators of publicly-available datasets potentially useful for Section members' research or teaching may submit descriptions of their datasets. Although the datasets should be relatively new, it is acceptable for the data to have been used and described in previously published research. Submissions should describe (and link to) the dataset, give practical advice about viewing and analyzing the data, and explain how the data might be used in Section members' research or teaching (including for undergraduate student research). Submissions describing relevant software or other tools are also encouraged.

Research Notes. These submissions should be approximately 2,000 words in length (a target, not a limit), and may be theory-focused or empirics-focused. The former should present theoretical arguments relevant to law & courts literature, but need not involve concurrent empirical testing. The latter should present empirical results—including adequately powered "null results"—with only the most necessary literature review and theoretical discussion included directly. Replications and extensions are also welcome. I hope that these notes will inspire research ideas for readers, spur collaboration among Section members on projects greater in scope, and prevent duplication of effort caused by the file drawer problem (i.e., the systematic non-publication of null results).

Reviews of Recent Developments in the Literature. These submissions should be literature reviews of approximately 4,000 words focused on recent developments in active areas of law & courts research. A review should

summarize and analyze recent developments in a line of research, and suggest open questions and opportunities for further research. Authors should aim their reviews at readers who research and teach in law & courts, but are not necessarily specialists in the area of research discussed. I seek such submissions particularly from graduate students, whose prospectuses, dissertation chapters, etc., may form the basis for such reviews. I hope that these reviews will provide Section members with a convenient means of keeping up with the literature across the law & courts field.

In addition, the *Newsletter* solicits research articles (including research about the Section), commentaries about the profession, proposals for symposia, and announcements (including of newly-published books) that are of interest to Section members.

Instructions for Authors

Submissions are accepted on a rolling basis. Scholarly submissions will typically be reviewed by the editor and one editorial board member. Submissions and questions about possible submissions should be emailed to lcnapsa@gmail.com. Initial submissions should be sent in PDF format and may be written in Word (LibreOffice, etc.) or TeX. Authors should follow *APSR* formatting, as described in the *APSA Style Manual*. Submissions need not be blinded. Please avoid footnotes and endnotes unless absolutely necessary, and aim for concision. Appendices are encouraged for information that is relevant but not of primary importance. Upon publication, I ask that authors consider posting replication data and code for articles involving statistical analysis.

Section members who have written books they would like to see featured should email basic information about the book, including a 1-2 paragraph description, to lcnapsa@gmail.com.

–Maureen Stobb, Editor

Newsletter and Section Information