
ARTICLE

DO WE NEED AN EMPIRICAL RESEARCH AGENDA ON JUDICIAL INDEPENDENCE?

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Judicial independence is under attack. Unpopular judicial decisions meet with cries for resignation or impeachment. Legislative decisions limit judicial discretion. In many jurisdictions, judges must campaign for office, raising the specter of interest group influence on their selection.

This is a situation made for empirical research. If we identify the causes of the attacks on judicial independence, we can develop a better understanding of how to remedy the problem. If we identify the policies that best protect judicial independence, using sophisticated empirical analytic techniques, we can make the case for adopting these policies to legislators and the public.

But wait a minute. As Professor Stephen Burbank notes, judicial independence has been under attack since the birth of the republic.¹ Moreover, it is not clear that we are all in favor of judicial independence under all circumstances. As Professor Pamela Karlan reminds us, judicial independence, like Janus, has more than one face.²

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1. See Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 315 (1999).

2. See Pamela Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 536 (1999).

In fact, we do not even all agree on what judicial independence *is*. Professor Burbank says that, at its core, judicial independence is a particular set of outcomes that flow from certain structural features of American government, including separation of powers and “checks and balances.”³ Professor John Ferejohn defines judicial independence as an “aspect of judges’ moral character.”⁴ Professor Ronald Garet writes of prophets who “speak truth to power.”⁵ Dr. Frances Zemans says that judicial independence is the means of creating the “rule of law.”⁶ In their addresses at this symposium, Judge Robert Thomson focused on “craft”⁷ and Justice Anthony Kennedy focused on “neutrality.”⁸ Professor Richard Delgado’s friend Rodrigo thinks all this talk about judicial independence is diverting us from discussing more important issues.⁹ From an empirical perspective, we seem to have entered a measurement quagmire. If we are not clear on what “judicial independence” means—if we do not agree on why and when we want it—it is not obvious how or why we should construct an empirical research agenda.

In discussing definitional issues, symposium authors Professors Theodore Eisenberg and John Blume suggested we could rely on empiricists to keep us out of the quagmire,¹⁰ and Professor Erwin Chemerinsky suggested we need some guideposts to help us pick our way through the swamp without sinking.¹¹ Unlike Professor Eisenberg, I am not confident that the debate over judicial independence can be resolved by empirical analysis. And, unlike Professor Chemerinsky, I am not persuaded that the issue of judicial independence is worth a substantial investment of ana-

3. Burbank, *supra* note 1, at 318-20, 327. See also Robert S. Thompson, *Comment on Professors Karlan’s and Abrams’ Structural Threats to Judicial Independence*, 72 S. CAL. L. REV. 560-61 (1999); Anthony M. Kennedy, *The 1998 Justice Lester W. Roth Lecture at the Judicial Independence and Accountability Symposium at USC Law School*, Program & Webcast Archive (Nov. 20, 1998) <<http://www.usc.edu/dept/law/>>.

4. John Ferejohn, *The Dynamics of Judicial Independence: Independent Judges, Dependent Judiciary*, 72 S. CAL. L. REV. 353-54 (1999).

5. Ronald R. Garet, *Judges as Prophets: A Coverian Interpretation*, 72 S. CAL. L. REV. 387 (1999).

6. Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 630-31 (1999).

7. See Thompson, *supra* note 3, at 561-62.

8. See Kennedy, *supra* note 3.

9. See Richard Delgado, *Rodrigo’s Committee Assignment: A Skeptical Look at Judicial Independence*, 72 S. CAL. L. REV. 434-35 (1999); Erwin Chemerinsky, *Comments at the Judicial Independence and Accountability Symposium at USC Law School*, Program & Webcast Archive (Nov. 20, 1998) <<http://www.usc.edu/dept/law/>>.

10. See generally John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465 (1999); Chemerinsky, *supra* note 9.

11. See Chemerinsky, *supra* note 9.

lysts' time. For, like Professor Delgado's friend, I worry that the debate over judicial independence diverts us from more important questions about how to create a just society in the United States.

In this Article, I briefly sketch some of the empirical research projects that are suggested by the debate on judicial independence. In the final section of the Article, I turn to the question of what other issues related to the courts merit serious scholarly and policy attention.

I. UNDERSTANDING THE ETIOLOGY OF ATTACKS ON JUDICIAL INDEPENDENCE

As a society we have a tendency to view social problems as new, however old their roots and our debates over their possible solutions may be. For example, concerns about the disintegration of the family and accompanying worries about juvenile misbehavior can be traced, at least, to the beginning of this century, but one would scarcely be aware of this from the recent "family values" debate.¹² Recent criticism of Rule 23(b)(3) class actions echoes the statements of earlier class action critics, but many involved in the current public debate seem unaware of the extent to which contemporary discourse mimics earlier controversy.¹³ Certain controversial issues, such as immigration, seem to rise and fall in public consciousness in relation to other phenomena, such as the state of the economy.

As the articles in this symposium indicate, attacks on judicial independence, variously defined, have a long history. Some of the symposium participants believe that these attacks have intensified in recent years, while others imply that they are episodic. Perhaps systematic analysis of attacks on judicial independence would give us a better understanding of what types of judicial decisions lead to attacks,¹⁴ and whether other social, economic, and political factors are linked to the attacks. If so, perhaps the information could help us design strategies to protect judicial independence.

12. STEVE SCHLOSSMAN, *LOVE AND THE AMERICAN DELINQUENT* (1977).

13. See DEBORAH R. HENSLER, BONNIE DOMBEY-MOORE, BETH GIDDENS, JENNIFER GROSS, ERIK K. MOLLER & NICHOLAS M. PACE, *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN* (forthcoming Nov. 1999).

14. Many commentators believe that criminal sentencing decisions, particularly in death penalty cases, stimulate attacks on judicial independence. See, e.g., Blume & Eisenberg, *supra* note 10, *passim*. To determine whether this is true, we need to study not those high-profile cases that are linked to such attacks, but rather, the *universe* of sentencing decisions, or death penalty cases, to determine the *rate* of such attacks. We also need to compare this rate to the rate of attacks on judicial independence relating to other types of decisions.

Assume for the moment that we take as indicators of such attacks judicial recall elections, impeachment, and public calls for judicial resignation, recall, or impeachment attendant on specific judicial decisions or lines of decisions. Systematic analysis of newspapers and news magazines could yield measures of the frequency of such attacks over time and their immediate circumstances, including the subjects of controversy (such as civil rights and criminal sentencing), jurisdiction and venue, and the judge's characteristics (such as gender, race and prior experience). This information could be combined with information about other contemporary phenomena—economic well-being, social changes, electoral outcomes—to examine the etiology of attacks on judicial independence.

A primary source of data for such a study would be the print media. All major national newspapers, as well as regional and local papers from forty-three states, are now available in electronic form through NEXIS[®]. But it is possible that the smaller local newspapers least likely to be included in NEXIS would be significant sources of relevant data and would have to be searched manually. Historical analysis also would require searching newspaper archives.

The researchers could utilize content analysis techniques for describing coverage of attacks on judicial independence and multivariate analytic techniques for investigating the relationship between coverage of the topic and other variables. As a result of their analyses, scholars and policymakers might better understand the factors associated with more and less frequent attacks on judicial independence, as defined above.

II. PUBLIC ATTITUDES TOWARD JUDGES, JUDICIAL DECISIONMAKING, AND JUDICIAL SELECTION

Although critics of judicial decisionmaking frequently look to the electorate for support for removing the targets of criticism, until recently we have known remarkably little about public understanding, beliefs, and attitudes toward judges. The best historical trend data pertain to public confidence in courts as institutions. These data, collected as part of an effort to monitor Americans' confidence in important political institutions and stakeholders, cover the period from 1973 through 1998.¹⁵ They show that confidence in the U.S. Supreme Court, as measured by the percentage of respondents who say they have "a great deal" or "quite a lot" of confi-

15. See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1997, 105 tbl. 2.14, 109 tbl. 2.19 (Kathleen Maguire & Ann L. Pastore eds., 1998) (reporting opinion poll data collected by the Gallup Organization, Inc.).

dence in the Court, has held remarkably steady at about 50% throughout the last twenty-five years.¹⁶ Only the church and the military receive consistently more votes of confidence than the U.S. Supreme Court.¹⁷ The data for 1998 show that confidence in the Court was higher among whites, college graduates and individuals with household incomes of \$50,000 and over, than for people of color, the less well-educated and individuals from lower-income households.¹⁸

We do not have similar trend data for other measures of public attitudes toward the courts, which appear to have been largely unexplored until the late 1970s.¹⁹ But interest in public attitudes has burgeoned in the past decade, stimulated in part by the "Future Conferences" in the state courts, by the efforts of state and federal court task forces on bias, and, perhaps, by rising concern among legal professionals about negative attitudes toward the legal system. Opinion surveys have generally found that knowledge about the courts and legal processes is relatively poor, that many citizens do not understand how their judges are selected, and that a sizeable fraction of the population believes that people of color and low-income individuals fare worse in the courts than whites of European descent and middle- and upper-income individuals.

For example, a 1983 study found that three-quarters of Americans surveyed believed that every decision made by a state court "can be reviewed and reversed by the U.S. Supreme Court" (replicating the finding of a similar survey conducted in 1977).²⁰ Forty percent of the 1983 respondents said it was *not true* that federal judges are appointed for life terms, while another 16% said they did not know if that was true or false.²¹

16. *See id.* By comparison, confidence in Congress has declined from about 40% at the beginning of the period to about 28% at its end, though it had fallen as low as 18% for three years beginning in 1991. *See id.* at 105 tbl. 2.14.

17. *See id.* at 105 tbl. 2.14

18. *See id.* at 109 tbl. 2.19.

19. The earliest professionally conducted, nationwide poll of attitudes toward the court system that I have been able to locate was conducted by Yankelovich, Skelly, and White in 1977 for the National Center for State Courts. A similar survey, replicating some of the 1977 results, was conducted for the Hearst Corporation in 1983. The Hearst Report, *The American Public, the Media and the Judicial System: A National Survey on Public Awareness and Personal Experience*, is included in a compilation of survey data on public attitudes toward the legal system prepared by the American Bar Association Office of Justice Initiatives in February 1998 [hereinafter ABA Initiatives Project] (on file with author). According to Philip Dubois, political scientists did not turn their attention to researching judicial elections until the 1970s. *See* Philip L. Dubois, *Voting Cues in Nonpartisan Trial Court Elections: A Multivariate Assessment*, 18 L. & SOC'Y REV. 395, 396 (1984).

20. *See* The Hearst Report, *The American Public, the Media and the Judicial System: A National Survey on Public Awareness and Personal Experience* (Oct. 21, 1983) (conducted by Research & Forecasts, Inc.), in ABA Initiatives Project, *supra* note 19, § 1, at 13.

21. *See id.*

A 1995 survey of North Carolina citizens found that about 60% of respondents did not know that their state supreme court and intermediate appellate court justices were elected.²² A 1997 survey of New Mexico residents found that 96% of respondents could not name any state supreme court or intermediate appellate court justice, and that two-thirds could not name any of their local district court judges.²³

One of the remarkable features of these national and statewide opinion surveys is the consistency of perceptions of bias in the court process across different jurisdictions. A 1992 survey of California residents found that only 6% of blacks were “extremely” or “very” confident in the courts compared to 17% to 21% of other racial and ethnic groups. Californians generally had only somewhat more confidence in the U.S. Supreme Court—28% of those surveyed expressed high confidence—but considerably less confidence in the California state legislature, which was accorded high confidence by only 10%.²⁴ A 1996 survey of Florida residents found that only 39% of respondents agreed that “courts treat whites and minorities alike”—only 8% said they *strongly* agreed—and only 23% agreed that “courts treat poor and wealthy people alike”—a mere 4% *strongly* agreed with that proposition.²⁵ A 1997 survey of Arizona residents found that only 32% agreed with the statement “[c]ourts treat whites and minorities alike,” and only 17% agreed that “[c]ourts treat poor people and wealthy people alike.”²⁶ Taken together, these data suggest that large numbers of

22. See COMMISSION FOR THE FUTURE OF JUSTICE AND THE COURTS IN NORTH CAROLINA, NORTH CAROLINA COURT SYSTEM RESEARCH (1995) (conducted by Wilkerson & Associates), reprinted in ABA Initiatives Project, *supra* note 19, § 6, at 21. Perhaps not surprisingly, then, only half of the respondents who said they had voted in the previous general election reported voting for a judicial candidate. See *id.* at 22.

23. See STATE BAR OF NEW MEXICO & ADMIN. OFFICE OF THE COURTS, COMMUNITY SURVEY OF LAWYERS AND THE LEGAL SYSTEM (1997) (conducted by Research & Polling, Inc.), reprinted in ABA Initiatives Project, *supra* note 19, § 16, at 32-34 [hereinafter LAWYERS AND THE LEGAL SYSTEM].

24. See 2020 VISION COMM’N ON THE FUTURE OF THE COURTS, SURVEYING THE FUTURE: CALIFORNIANS’ ATTITUDES ON THE COURTS SYSTEM (1992) (conducted by Yankelovich, Skelly and White), reprinted in ABA Initiatives Project, *supra* note 19, § 3, at 21-22.

25. JUDICIAL MANAGEMENT COUNCIL COMM. ON COMMUNICATION AND PUB. INFO., FLORIDA STATEWIDE PUBLIC OPINION SURVEY—EXECUTIVE SUMMARY (1996) (conducted by Oppenheim Research), reprinted in ABA Initiatives Project, *supra* note 19, § 10, at 12-13.

26. Arizona Supreme Court, Arizona State Court Citizen Survey: “The Public Perspective” (June 11, 1997) (conducted by O’Neil Associates, Inc.), in ABA Initiatives Project, *supra* note 19, § 14, at 11 [hereinafter Public Perspective]. Three-quarters of these same respondents said they had “some” or “a great deal” of confidence in their state supreme court and their “State Courts in general,” but only 47% chose the courts as the branch of state government that they “most trust to do what is right for the people of Arizona”—illustrating the need for care in interpreting survey statistics. *Id.* § 14, at 8-9.

Americans do *not* believe the law keeps the promise of neutrality, which Justice Kennedy spoke so eloquently about at this symposium.²⁷

Most of these surveys do not touch directly on the issue of judicial independence, although the results pertaining to perceived bias certainly indicate that a large segment of the public does not believe that legal decisions are based solely on the merits. The recent survey of New Mexico residents asked respondents to agree or disagree with the statement: "Politics do not influence court decisions in New Mexico." A rousing 61% of the respondents said they *disagreed*, another 15% said they neither agreed nor disagreed, and 8% said they did not know.²⁸ Ninety percent of the Arizona survey respondents said that judges should be selected on "the basis of merit and qualifications rather than political popularity," but an equivalent number said that judges are also "accountable to the public for their job performance."²⁹ Most people said that judges should not accept campaign contributions from "persons and corporations who may later be litigants in court."³⁰ Two-thirds of the respondents thought "judges should have the freedom to make legal decisions without fear of retaliation from any other branch of government," but about one-fifth disagreed with that statement.³¹

The latter surveys begin to explore the public beliefs and attitudes that those concerned about judicial independence should consider. But, as these sometimes conflicting findings illustrate, untangling public beliefs about the actual and desired behaviors of judges is a very difficult task. Like the participants in this symposium, many citizens may have conflicting beliefs about judicial independence, and they have less knowledge and ability to articulate the tensions among their beliefs. Moreover, survey responses are highly sensitive to context. As a result, we should expect that individuals' responses to general questions about proper judicial behavior and appropriate relationships among the branches of government, and between judges and the public, will not necessarily predict their responses to particular situations—particularly to highly publicized accounts of judicial decisionmaking.

While survey research is the appropriate tool for measuring the distribution of public opinion on various issues, focus-group interviewing, which permits more contextualized inquiry, might provide more enlight-

27. See Kennedy, *supra* note 3.

28. LAWYERS AND THE LEGAL SYSTEM, *supra* note 23, § 16, at xi.

29. Public Perspective, *supra* note 26, § 14, at 10.

30. *Id.*

31. *Id.* § 14, at 12.

enment on what the public believes judges do, and should do, under different circumstances.³² Focus-group interviewing might also suggest how these views vary with individuals' social and political characteristics. Such information, collected away from the heat, confusion, and misinformation that often characterize controversy over a particular judge's decision, might provide a more accurate picture of the public's views on judicial independence.

III. EXECUTIVE AND LEGISLATIVE ATTITUDES TOWARD JUDGES, JUDICIAL DECISIONMAKING, AND JUDICIAL SELECTION

In the stories we tell about attacks on judicial independence, the executive and legislative branches are the protagonists, and public opinion—real or imagined—often provides their ammunition. But public officials' statements about judicial independence or accountability in a particular context may reflect transitory desires for political gain or risk avoidance. It would be interesting to know what state and federal public officials know and believe about judicial selection and judicial decisionmaking. What role do *they* believe political allegiance, ideological orientation, and merit should play in judicial selection? How do *they* believe judges should balance sometimes competing incentives to adhere strictly to legal principles, conform to prevailing public opinion, and satisfy their own sense of justice?³³ What do *they* believe is the relationship among public perceptions of judges, judicial decisionmaking, and judicial selection; public perceptions of the fairness of the legal system; and public assessment of system legitimacy?

Uncovering public officials' actual views—sometimes contrary to their public expressions of support for or condemnation of individual judicial candidates and specific judicial decisions—may be impossible. It would require qualitative interviews with a small number of legislators selected to represent diverse political backgrounds and perspectives. If re-

32. Using a focus-group approach, the researcher assembles a small number of individuals to engage in a wide-ranging conversation about a specific topic. The group leader has a protocol for guiding the conversation, but the participants themselves may take the conversation in directions not anticipated by the researcher and may offer detailed examples to support their statements that suggest still other areas of questioning. Typically, focus-group interviews last for a couple of hours. See DAVID W. STEWART & PREM N. SHAMDASANI, *FOCUS GROUPS: THEORY AND PRACTICE* (1990).

33. For commentary on the tension between the desires to be "responsive to the pure law" and "responsive to societal realities," see *What Is Judicial Independence? Views from the Public, the Press, the Profession, and the Politicians*, 80 *JUDICATURE* 73, 82 (1996) [hereinafter *What is Judicial Independence?*].

searchers were able to create a safe space for legislators to discuss their views, it might shed some light on the likely path of evolution of the arrangements among the branches of government and with the public—that is, on judicial independence defined as a particular set of institutional arrangements.

IV. MEASURING THE CONSEQUENCES OF ALTERNATIVE JUDICIAL SELECTION SYSTEMS

As several of the symposium articles note, it has long been asserted that certain judicial selection mechanisms—in particular, “merit selection”³⁴—promote judicial independence. But there is little empirical evidence to support this proposition. As Professor Burbank notes, variations in implementing the wide variety of formal selection mechanisms that have been adopted yield such a plethora of judicial selection practices that it is difficult to describe judicial selection in the state courts accurately.³⁵ The extensive empirical research attempting to link these mechanisms to various outcomes, including patterns of decisionmaking, has not yielded firm conclusions.³⁶

To analyze the consequences of alternative approaches to judicial selection, one needs to construct a taxonomy of practices that reflect both formal rules and informal understandings. Such a taxonomy should include entries indicating:

- (1) the roles of various persons and entities (including the chief executive officer, legislators, political party representatives, specially appointed commissions, and the electorate) in the initial selection and in later stages of the selection process (endorsing or rejecting the original choice, or renewing the tenure of a previously selected judge);

34. Merit selection is a process for selecting state judges in which a commission comprising lawyers and nonlawyers (and sometimes judges) identifies a list of candidates for judicial appointment from which the governor selects one. Under the Missouri Plan, appointed judges stand for retention in uncontested elections; if they lose, a new judge is appointed by the governor. First adopted by Missouri in 1940, merit selection had spread to 34 states and the District of Columbia by 1994. However, in some of these states the process is not used for all judicial appointments. “Nominating commissions” have also been established by some U.S. senators to advise them on federal judicial appointments. See Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1 (1994).

35. See Burbank, *supra* note 1, at 317-18.

36. See Victor Eugene Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make? Selection Procedures in State Courts of Last Resort*, 5 JUST. SYS. J. 25 (1979).

(2) the degree of influence of political parties and interest groups on nominating commissions;³⁷

(3) the degree of party involvement in any electoral process, distinguishing candidates who run as party choices, formally nonpartisan candidates who are widely known to be affiliated with particular parties, and candidates who have little or no public identification of political party connections;

(4) the frequency of contested elections; and

(5) the length of judicial terms.

Sorting regimes along these multiple dimensions requires far more than a scan of the formal rules for judicial selection. For example, in recent years almost half of Illinois state court judges, who are required to stand for retention in *uncontested* elections, mounted significant campaigns for office.³⁸

Even if the researcher is able to construct a set of variables that measure the key features of judicial selection regimes, she is likely to falter when it comes to measuring the consequences of different modes of selection. At first blush, examining the consequences of judicial selection at the appellate level would seem doable. One might construct a variety of measures of decisions, such as whether they are “pro-state” or “pro-defendant” in criminal cases, or in favor of the “haves” or “have nots” in civil cases, and examine patterns of decisions across judges selected under different regimes. But there are myriad factors that influence appellate decisionmaking with regard to specific cases,³⁹ and it is difficult to build a multivariate model to account for such factors and to tease out the independent contribution of judicial selection regime to decisionmaking.⁴⁰

37. On political influences on nominating commissions, see Goldschmidt, *supra* note 34, at 49-56.

38. See Larry T. Aspin & William K. Hall, *Campaigning for Retention in Illinois*, 80 JUDICATURE 84, 85 (1996). On differences among seemingly similar nonpartisan judicial elections, see Dubois, *supra* note 19, at 401-11.

39. There is rich empirical political science literature examining factors that affect judicial decisionmaking. See, e.g., DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISIONMAKING (1976); GLENDON SCHUBERT, THE JUDICIAL MIND REVISITED (1974); David W. Allen & Diane E. Wall, *The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders?*, 12 JUST. SYS. J. 232 (1987); James L. Gibson, *Judges' Role Orientations, Attitudes and Decisions: An Interactive Model*, 72 AM. POL. SCI. REV. 911 (1978).

40. Any such multivariate analysis would also confront significant multicollinearity problems, since judicial selection regimes are not distributed randomly across the country, but rather are clustered in regions with distinctive demographic and economic features, and sociopolitical histories. See Goldschmidt, *supra* note 34, at 5 n.10, 12 n.46. Multicollinearity (strong inter-correlation of independent variables in a regression model) violates the assumptions of ordinary least squares regression;

Moreover, even if one were able to perform this analysis reliably—and previous attempts do not provide grounds for optimism—without a definition of what we mean by judicial independence, it is not clear how we would interpret the results.⁴¹

The research problem would become even murkier if we turned our attention to trial judges, whose adjudicative decisions are decreasing in number⁴² and whose dispositive pretrial decisions are generally undocumented. At the trial court level, only the grossest forms of judicial *non*-independence, such as trading decisions for bribes, are likely to be detectable.⁴³ Moreover, there is a dizzying variation in judicial selection practices at the trial court level, even within a single state.⁴⁴

V. FINANCIAL DISINCENTIVES FOR INDEPENDENCE

One reason for thinking that elected judges may be less independent than appointed judges is that the former must raise money for seeking (or retaining) office. Political science research on financing judicial elections in the 1980s did not find much ground for alarm, arguing that sources of campaign financing are diverse and average contributions modest enough to mitigate concerns of undue influence.⁴⁵ But as the frequency of contested judicial elections increases⁴⁶ and campaign costs escalate, it might be useful to revisit this question. Professor Kathryn Abrams' article in

statisticians use various techniques to correct the problem. *See, e.g.*, CARTER R. HILL, WILLIAM E. GRIFFITHS & GEORGE G. JUDGE, UNDERGRADUATE ECONOMETRICS 150-178. (1997).

41. One survey of judges who must stand for retention in uncontested elections found that they themselves believe this requirement affects judicial behavior. Substantial fractions of those surveyed said that the election requirement makes judges "more sensitive to public opinion," "more accommodating to lawyers, jurors, etc.," and more likely to "avoid controversial cases and rulings"—as well as "more motivated to do a good job." Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 312-13 tbl.4 (1994).

42. *See, e.g.*, TERENCE DUNGWORTH & NICHOLAS M. PACE, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS 28-32 (1990).

43. On the notion that corruption is a leading indicator of the lack of judicial independence at the state trial court level, see John Q. Barrett, *Introduction: The Voices and Groups That Will Preserve (What We Can Preserve of) Judicial Independence*, 12 ST. JOHN'S J. LEGAL COMMENT. 1, 18 n.47 (1996).

44. *See* Goldschmidt, *supra* note 34, at 13.

45. *See, e.g.*, Philip L. Dubois, *Financing Trial Court Elections: Who Contributes to California Judicial Campaigns?*, 70 JUDICATURE 8 (1986).

46. Some states report increases in competitive elections. *See, e.g.*, L. Douglas Kiel, Carole Funk & Anthony Champagne, *Two Party Competition and Trial Court Elections in Texas*, 77 JUDICATURE 290 (1994).

particular presents some provocative data and lays out some of the relevant issues.⁴⁷

Collecting detailed data on the sources and amounts of contributions is becoming easier as states have created centralized reporting systems and made data available on the Internet. But empirical analyses measuring the effects of contributions, if any, on decisionmaking will be bedeviled by the same sorts of problems identified above: infrequency of adjudicative decisions and difficulty of obtaining reports of pretrial decisions at the trial court level, difficulty of specifying multivariate models for explaining decisionmaking, and the lack of a clear standard for interpreting results.

Another possible avenue for considering the effects of financial disincentives on judicial independence would be to examine Congressional and state legislative decisionmaking regarding judicial salaries. Although judges' salaries cannot be withheld or reduced by legislators, the latter can delay adjusting salaries to reflect inflation, which results over time in a de facto salary reduction. Of course, legislators also appropriate resources for court facilities and staff, which affect the quality of judicial work life. As Professor Martin Redish notes, the Constitution does not protect Article III judges against retaliatory resource decisions.⁴⁸

It would be interesting to conduct case studies of legislative deliberations over judicial salary increases and appropriations for the judiciary, to assess the contribution of legislative displeasure with judicial behavior to decisions to withhold increases and other court resources, and to determine whether the character of judicial decisionmaking changes in periods of legislative resistance to judicial salary increases and appropriations.⁴⁹

VI. JUDICIAL INDEPENDENCE AND DISPUTE RESOLUTION

The rich, and perhaps ultimately disappointing, political science literature on judicial independence focuses on patterns of *decisionmaking*. This ignores some of the most significant developments in the legal system over the past several decades: the decline of public adjudication, the cele-

47. See generally Kathryn Abrams, *Some Realism About Electoralism: Rethinking Judicial Campaign Financing*, 72 S. CAL. L. REV. 505 (1999).

48. See Martin H. Redish, *Judicial Discipline, Judicial Independence and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 701-04 (1999).

49. Another avenue for research would be to explore the influence on trial court decisionmaking of judges' desires for appellate appointment. Some have commented that judges' ambitions for higher-court appointment help shape their behavior at lower-court levels. See, e.g., *What Is Judicial Independence?*, *supra* note 33, at 81 (including an audience member identified as a federal judge commenting on effects of judicial ambitions on actions of young judges).

bration of settlement, and the rise of “private courts.”⁵⁰ Alternative dispute resolution generally, and settlement in particular, are lauded variously as tools for managing court caseloads, saving parties’ legal expense, and producing more mutually satisfying outcomes of civil disputes.⁵¹ But as Owen Fiss and Judith Resnik remind us,⁵² to choose settlement is to reject a whole bundle of values associated with public adjudication. Settlement within the court system can also be understood as disempowering judges (and juries). Dispute resolution outside the courts can be understood as restricting the scope of judicial power.

Because public controversy over judicial independence appears to implicate criminal law and constitutional law more than the private civil law, we are not accustomed to considering the implications of the dispute resolution movement for judicial independence. Professor Karlan’s discussion of the California Supreme Court’s decision in *Neary v. Regents of the University of California*,⁵³ and the controversy over Judge Anthony Kline’s refusal to apply the *Neary* court’s ruling in a subsequent case,⁵⁴ draws our attention to this relationship.⁵⁵

To what extent is some parties’ search for dispute resolution within and outside of the public court system driven by a desire to escape the power of the judiciary, rather than (or in addition to) a desire for economy or for more textured case outcomes? Procedural justice and legal anthropological research suggest that ordinary citizens turn *toward* adjudication and public courts for resolution of disputes.⁵⁶ We know less about what motivates the more powerful actors who are designing and choosing pri-

50. On the decline of public adjudication, see, e.g., Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986). On private dispute resolution, see ELIZABETH ROLPH, ERIK MOLLER & LAURA PETERSON, *ESCAPING THE COURTHOUSE: PRIVATE ALTERNATIVE DISPUTE RESOLUTION IN LOS ANGELES* (1994).

51. On the different strands of the alternative dispute resolution movement, see Deborah R. Hensler, *A Glass Half Full? A Glass Half Empty? The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1589-92 (1995).

52. See Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984); Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 403 (1987).

53. 834 P.2d 119 (Cal. 1992).

54. In *Neary*, the California Supreme Court approved the practice of some settling parties of stipulating to reverse a trial court’s judgment as part of a settlement agreement. See *id.* In *Morrow v. Hood Communications, Inc.*, 69 Cal. Rptr. 2d 489 (1997), appellate court Judge Anthony Kline declined to follow the supreme court’s decision by refusing to enter a reversal of judgment agreed to by settling parties. In his dissent, he characterized the court’s decision in *Neary* as “destructive of judicial institutions.” *Id.* at 491.

55. See Karlan, *supra* note 2, at 549-54.

56. See, e.g., E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990).

vate alternatives to the court system. This issue might be explored by interviewing parties about their dispute resolution choices.

We also do not know how the public embrace of settlement and dispute resolution by the judiciary may affect public views of the role of the courts and judicial independence. There is currently considerable variation among jurisdictions with regard to the use of alternative dispute resolution. By surveying citizens in different jurisdictions, we could examine whether and how the involvement of courts and judges in mediation and other nonadjudicative dispute resolution processes affects public beliefs and attitudes about the role of courts and judges.

VII. DO WE NEED EMPIRICAL RESEARCH?

The debate over judicial independence suggests avenues for empirical research, some of which I have sketched above. But until we know and can agree on what we mean by judicial independence, and why and when we want it, it will be difficult to outline an empirical research agenda on the subject that will propel us in a useful direction.

Like Professor Delgado's friend Ricardo, however, I am not convinced that this is the effort that most deserves our attention. Scholarly and policy discourse on judicial independence directs our attention to judges and views the public—uninformed, uninterested, and susceptible to manipulation—as a threat to judicial power and perquisites. I would argue instead that *we should turn our attention to the public*—to understanding their beliefs and attitudes about the courts and judges as shaped by their own experiences in the legal system, the experiences within their peer groups, and the experiences of others, as described by the media.

We should be distressed to discover that a significant fraction of citizens in many different jurisdictions believe that courts are not equally open and do not grant equal attention to people of different racial and ethnic groups, and different income and social status. We need to know why so many believe this and how we can remedy this perception. The issue is not how to educate the public to better understand judges' roles, although this is a laudable endeavor, but rather what changes are necessary within the courts to assure the public that the legal system does indeed provide "equal justice for all."

We also need to engage in more research and debate about how current trends in the courts—in particular, the transformation of judges from adjudicators to settlers and the transformation of courts from public decisionmaking fora to doorways toward private dispute resolution—are af-

fecting public beliefs about and confidence in the courts. For whatever we mean by judicial independence, we can probably all agree that our judiciary will indeed be in trouble if it loses the public's confidence.