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JUDICIAL FACTFINDING IN AN AGE OF RAPID CHANGE: CREATIVE REFORMS FROM ABROAD

Allison Orr Larsen

Very few judges have degrees in neuroscience, experience with complex financial transactions, or skill with deciphering statistical methodology. Yet questions involving complicated issues like these are increasingly landing on the desks of American judges. The U.S. Supreme Court, for example, has recently discussed at length the effect of video games on child brain development,¹ molecular biology and the patentability of genetic information,² and studies from sociologists claiming that affirmative action both does and does not stigmatize minority students.³ How is a generalist judge supposed to answer these complicated — and often unknowable — questions of fact?

Traditionally, of course, judges in the United States are educated about the issues they must decide through trial and expert witnesses. But times have changed. The internet provides a revolutionary new tool for members of the judiciary at all levels (trial courts and appellate courts) to address these so-called “legislative facts” on their own.⁴ Social science studies, raw statistics, and other data are now all just a Google search away. And increasingly *amicus curiae* (“friend of the court”) briefs offer factual information to judges beyond what the parties can provide.⁵ At bottom, the notion of expertise is changing — both within the legal system and in the world at large. Experts are now everywhere. And as the factual dimensions of controversies grow more complex and technology provides a tempting way to learn about them outside the record, judges now find themselves in a tough spot. On the one hand, turning to claims not tested by the adversarial process risks infecting judicial opinions with unsubstantiated claims;⁶ on

¹ See *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 800–01 (2011).

² See *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013).

³ See *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2213–14 (2016); *id.* at 2231–33 (Alito, J., dissenting).

⁴ A “legislative fact” — a phrase coined by Kenneth Culp Davis in 1942 — is a generalized fact about the world as opposed to a “whodunit” fact about what happened in any one case. Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 71 & n.57 (2013) (discussing Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942)).

⁵ See Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1760–62 (2014).

⁶ *Id.* at 1800–02; see also Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 NW. U. L. REV. 1137, 1139 (2014) (arguing “that the ease of accessing factual data now available on the Internet will allow judges and litigants to expand the

the other hand, ignoring available information even in the face of lopsided party resources could, in the words of Judge Posner, “heartless[ly] . . . make a fetish of [the] adversary procedure.”⁷ Neither option seems ideal.

These challenges are not just American challenges. And perhaps we should be looking globally to find creative solutions to them. In this Commentary I highlight two innovative ways to address the complex relationship between generalist judges and increasingly specialized and fact-heavy litigation. While no solution is perfect, the take-home point should be the need to think creatively about how to address the challenges that come with judging in the twenty-first century.

COORDINATED AMICI

Briefs from amici curiae — groups who are not parties to the litigation but are nonetheless interested in the result — are a growing tool for educating U.S. courts on questions of fact. The statistics at the Supreme Court are dramatic — amicus participation has increased over 800% from the 1950s and 95% from 1995.⁸ And although interest groups file briefs for any number of reasons, the most applauded reason is to address technical questions that the Justices are eager to learn about and the record is somehow inadequate to address.⁹ Conventional wisdom these days is that a successful venture at the Supreme Court requires assembling a slate of amici acting as factual experts.

However, as I have fretted about before, there are reasons to be skeptical of facts that come from amicus briefs: these claims are generally submitted at the eleventh hour, untested by the adversarial system, and motivated by those with a dog in the fight.¹⁰ Although some amici surely provide reliable expertise to the Supreme Court, that is not universally true, and the risk is that the Justices will turn to briefs that simply confirm what they already believe to be true. If courts rely too heavily on untested amicus experts, there is a risk of tainting the Court’s decisions with false facts and convenient science.

use of judicial notice in ways that raise significant concerns about admissibility, reliability, and fair process”).

⁷ *Rowe v. Gibson*, 798 F.3d 622, 630 (7th Cir. 2015). *But see id.* at 636 (Hamilton, J., concurring in part and dissenting in part) (disputing the court’s use of “internet research”).

⁸ Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1902 (2016) (citing Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 749 (2000)).

⁹ See, e.g., Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 987 (2009); James F. Spriggs II & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q. 365, 366–67 (1997).

¹⁰ Larsen, *supra* note 5.

Maybe there is a systematic way to sort the “good” amici experts from the “bad” ones — a way to provide expertise when needed, but to ensure that such experts truly merit that label. Across the Atlantic, some clever legal thinkers have come up with one such strategy. P.R.I.M.E. Finance, established in 2012, is a Dutch nonprofit organization whose name stands for “Panel of Recognised International Market Experts in Finance.”¹¹ The goal of P.R.I.M.E. Finance is to “help resolve, and to assist judicial systems in the resolution of, disputes concerning complex financial transactions.”¹²

This innovative pilot program was born out of necessity. Following the 2008 financial crisis, financial litigation was increasing steadily, and lawsuits were being brought more globally — no longer just in New York or London. Courts around the world — facing what some called a “tsunami” of financial cases — were reaching different results with very similar facts.¹³ This led to “an immense black hole of legal uncertainty” and one with tremendous consequences in a global economy where rule stability is often the key to growth.¹⁴

Why the disarray? Jeffrey Golden, a leading arbitrator and frequent expert witness in global derivatives and one of the founders of P.R.I.M.E. Finance, explains it simply: “The stuff is complicated.”¹⁵ The new litigation, Golden explains, was asking judges to veer from issues and theories they were comfortable with (for example, contract formation and duty of care) and instead to deal with complex and “more technical issues, like flawed asset and anti-deprivation theories, mathematical modeling, formulaic calculations, and global insolvency-proofing techniques.”¹⁶ What is more, the cases often turned on questions of fact about the global market and trade usages that are both hard to understand and in constant flux. Of course the courts were muddled. And this confusion, in turn, led to industry instability; “[t]he markets worry all the time: wrong place, wrong party, judges and lawyers who would brief them who don’t get it.”¹⁷

¹¹ *About Us*, P.R.I.M.E. FIN., <http://primefinancedisputes.org/page/about-us> [<https://perma.cc/G8PG-KX9M>].

¹² Gerard J. Meijer & Camilla M.L. Perera – de Wit, *P.R.I.M.E. Finance: A New Dispute Resolution Facility for Conflicts Relating to Complex Financial Products*, 14 *BUS. L. INT’L* 153, 153 (2013); see also *About Us*, *supra* note 11.

¹³ Jeffrey Golden, *Judges and Systemic Risk in the Financial Markets*, 14 *FORDHAM J. CORP. & FIN. L.* 327, 330 (2013).

¹⁴ Meijer & Perera – de Wit, *supra* note 12, at 154 (quoting David Baragwanath, *How Should We Resolve Disputes in Complex International Financing Transactions?*, 7 *CAP. MKTS. L.J.* 204, 205 (2012)).

¹⁵ Golden, *supra* note 13, at 330.

¹⁶ *Id.* at 331 (footnote omitted).

¹⁷ *Id.* at 330.

So Golden and others came up with a solution. They wanted to ensure that judges dealing with complex financial litigation were turning to the right people to learn what they needed to know, and so they decided to create “one-stop access to the best collective knowledge of law and market practice regarding derivatives and other complex financial products.”¹⁸ With that, P.R.I.M.E. Finance was born. Golden explains the group’s motivation with a metaphor: If you think of market regulators as providing “preventive medicine,” then the goal of P.R.I.M.E. Finance is to educate the “hospitals” — the courts where financial market participants end up after a crash.¹⁹ P.R.I.M.E. Finance, he explains, seeks to ensure that the “‘hospitals’ . . . have enough qualified staff” to care for their patients.²⁰ Thus the organization, among other things, maintains a database of relevant publications and routinely provides technical training, support, and a ready pool of expert witnesses for the courts. They have, in other words, come up with a way to channel expertise outside of the adversarial system.

There is no reason this idea of one-stop shopping for judges hungry for specialized information must remain restricted to the field of finance. Part of the justification for P.R.I.M.E. Finance is that the adversary system is not equipped for these sorts of controversies, and judges have begun to admit what they do not know. The same, of course, can be said of judges in the United States facing hard questions on medicine, social science, or technological innovations. Digital access to information has supplanted or at least supplemented the old way of educating courts through witnesses at trial, and — as P.R.I.M.E. Finance exemplifies — we need to structure new systems for educating judges that do the job but somehow guard against unreliable information.

Reforms at home could take any number of shapes inspired by P.R.I.M.E. Finance. For one thing, amicus briefs could be coordinated by those with particular incentives to remain credible. I have previously suggested this role for members of the Supreme Court bar (repeat players to whom the Justices look for guidance and who carefully guard their reputations).²¹ Even beyond that Court, though, nonprofits could form as clearinghouses for this sort of factual information — perhaps monitored by groups (like professional associations) who also have incentives to be seen by judges and the Justices as credible. P.R.I.M.E. Finance is successful, in large part, because of its earned reputation for being objective and truthful. Similarly, institutional actors invested in a reputation market are less likely to overreach on fac-

¹⁸ Meijer & Perera – de Wit, *supra* note 12, at 157.

¹⁹ Golden, *supra* note 13, at 328.

²⁰ *Id.*

²¹ Larsen & Devins, *supra* note 8, at 145–46.

tual assertions for the sake of advocacy. To be sure, there are downsides to endowing certain groups with the power to educate courts; steps would need to be taken to ensure that those with the judges' ear are careful and prove trustworthy. But the point for now is that the insight behind P.R.I.M.E. Finance can be generalized: if judges are hungry for factual information beyond what the adversarial system is providing, we should make sure they are going to the right people to find it.

A TURN TO QUASI-SPECIALIZED COURTS

If one solution to the challenges of modern judicial factfinding is to provide specialized knowledge to generalist judges, then another move could be the reverse: to channel cases that require such expertise to judges who have it already. This is not a novel suggestion. In the United States, some areas of federal law are already funneled through specialized courts: tax courts and bankruptcy courts (although not Article III courts) are specialized by subject matter, and the Federal Circuit hears all patent appeals. Still other areas of the law — business disputes, social security benefit adjudications, and health law — have all been the subject of calls for specialized courts.²² And of course states have experimented with a range of different types of specialized courts — drug, juvenile, and family courts.²³

Yet the call for specialized courts is not without controversy. In a lecture on the issue, Chief Judge Diane Wood explained the critique: “Generalist judges cannot become technocrats; they cannot hide behind specialized vocabulary and ‘insider’ concerns. The need to explain even the most complex area to the generalist judge (and often to a jury as well) forces the bar to demystify legal doctrine and to make the law comprehensible.”²⁴ This is a powerful warning against the temptation to specialize and an important reminder about the value of the generalist judge.

Perhaps there is a way to have it both ways — to preserve the hallmark of generalist judges but to promote specialized knowledge within those courts. In 2015, the United Kingdom came up with just

²² LAWRENCE BAUM, *SPECIALIZING THE COURTS* 228 (2011); see also Ad Hoc Comm. on Bus. Courts, Am. Bar Ass'n, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. L. 947 (1997); Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631, 1633–35 (2015).

²³ Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1591 (2012); Tamar M. Meekins, “Specialized Justice”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 3 & n.7 (2006).

²⁴ Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1767 (1997).

such a hybrid solution: the government created a “financial list” of judges who had handled “financial claims of £50 million or more, or cases that raise issues concerning the domestic and international financial markets.”²⁵ The goal of creating such a list was to “ensure that cases which would benefit from being managed and heard by a Judge with particular expertise and experience in the law relating to the financial markets, or which raise issues of general importance to the financial markets, are dealt with by Judges with suitable expertise and experience.”²⁶ Twelve such judges were named to the initial list.²⁷ These judges have since been educated regularly on the ins and outs of issues important to financial markets. The parties to a dispute are expected to ask together if they want their case heard by a judge on the financial list.²⁸ If they do, one will be appointed to their case by the Chancellor of the High Court and the Judge in Charge of the Commercial Court (who are in turn accountable to the Lord Chief Justice).²⁹ The normal appellate process applies.

The financial list is the United Kingdom’s response to a call for specialized financial courts, but it stops short of creating courts that hear only one type of case — perhaps avoiding the pitfalls highlighted by Chief Judge Wood. Could the U.S. judiciary set up such a list even outside the context of financial disputes? Certainly there must be some judges who have had repeat exposure to, for example, complicated immigration law questions, or the psychological development of minors, or pharmacology lessons in connection with challenges to lethal injection. Once a judge gets up to speed on complex technical issues like these, it seems a shame to just let that knowledge go to waste. Creating content-based specialized lists of judges would create quasi-specialized courts — capturing the upsides of specialization while preserving the virtues of the generalist. Particularly if party control is preserved (meaning it remains up to the parties in a case whether to request a judge from such a list), this reform could prove a healthy way to modify the educating function of the adversary system without abandoning it altogether.

* * *

We can surely debate the merits or feasibility of both of these reforms, but the most important point is that we need to actually have

²⁵ *History*, CTS. & TRIBUNALS JUDICIARY, <https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/high-court/financial-list/history/> [https://perma.cc/CUR2-PWLE].

²⁶ *Financial List: FAQ*, CTS. & TRIBUNALS JUDICIARY (Oct. 29, 2015), <https://www.judiciary.gov.uk/publications/financial-list-faq/> [https://perma.cc/L9BJ-VP8Q].

²⁷ *Id.*

²⁸ *See id.*

²⁹ *Id.*

that conversation. Technology has changed so much about the way we live, and it has completely transformed the way we consume facts about the world. It is a mistake to ignore these changes in the judicial context. The challenges to judging in the information age are global challenges, and we should not be shy about looking abroad when searching for creative solutions.