[W-B: please insert page numbers on references to Bonjour, Conant, and Sonnnecken articles from this issue that appear in 38 *Law & Policy*.]

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Legal Mobilization and Juridification: Immigration as a Central Case

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I am ~~She is~~ grateful to Nancy Reichman for developing this symposium and for her thoughtful development of the project. ~~She is~~I am also grateful to Jesse Morse for his generous editing.

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The movement of desperate people gains public attention (see, e.g., Erlanger and Bennhold 2015). The rights of the desperate have not been faring well in the popular press, or in populist politics. Within established democracies, courts are charged with protecting rights, especially for the most disenfranchised. Courts have limited resources to do that work, even across different forms of organization and rights enforcement. ~~We've~~ We have long known that what courts can do for unpopular minorities depends on organizations that mobilize rights. Widespread concern about terrorist attacks and punishingly difficult economies make that support all the more important. From the attacks in Paris and the 2015 mass shooting in San Bernadino, California, many conclude that Western liberal democracies should not admit the foreign born, even though those guilty of the attacks were citizens of Europe and the United States. In September 2014, the deaths of people fleeing Egypt for Europe, whom traffickers drowned in the Mediterranean, brought the condemnation of the United Nations: trafficking people violates human rights.[1] Since then politicians have used those fleeing the disaster in Syria to find ways to shunt people to some

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other country; the process of asylum seeking and its attendant administrative and judicial processes await those who do make it across borders. Germany gained international recognition for its strikingly welcoming stance. Courts are part of the governance we imagine, even when courts are not evident in photographs of asylum seekers' boats or in political elites' speeches. As Dagmar Sonnnecken (2016) argues in this collection, elites often look for ways to keep cases out of their administrative system and general jurisdiction courts ~~(p. 2)~~, even in Germany with its constitutional right to asylum. Elites believed that the right to asylum and access to courts drove asylum seeking in Germany after the 1970s. The judicial enforcement of rights animates concerns about courts as countermajoritarian, particularly concerning given the argument that judicial governance is spreading.

We need to extend outward from the court to the political context and legal framework that produces claims and the institutions that respond. When we focus on the judges themselves, or the transnational activists who take complaints, we miss the broader maneuvering and the meanings courts generate, as Saskia Bonjour argues in this collection (2016). The studies in this special issue call for contextualizing claims. Case studies include the most recent contests over deportation and torture from the 1990s onward (Conant 2016), which in turn requires understanding why some political systems generate claims, and how claims connect to international politics after September 11. Broadening the institutions we consider in analyzing what courts do to include those that adapt to judicial decisions leads to studying the maneuvering to manage dockets to exclude cases (Soennecken), and to internal bureaucratic contention over family immigration and rights in 1970s Germany (Bonjour). Insights concerning policy regimes from the American context can inform how we interpret the judicialization of politics. Policies create new politics, as true in judicial governance as in the bureaucracies and legislatures more commonly the focus of policy regime analyses

(Mettler 2005; Pierson 2004). Drafters may never have imagined contests from the last forty years over deportation, family, and citizenship under the European Convention on Human Rights. Judicial review in Britain depended on a community of barristers, solicitors, and legal commentators to turn a few cases and traditional common law doctrines concerning administrative power into rights protection participants could claim fit with the European constitutionalism of the 1970s and 1980s (Sunkin 1997; Sterett 1994). New practices eventually became routines (Orren and Skowronek 1998~~, 694~~).

IMMIGRATION PRACTICE AND STRUCTURING ADMINISTRATIVE STATES

Judicial decisions are part of an iterative politics with political advocates, bureaucracies, and legislatures. Two of the articles in this symposium consider German policy after 1973, when Germany stopped recruiting laborers from abroad. The halt shifted migration demand to a claim for family resettlement (Bonjour) and a claim for refugee status (Soennecken). Bonjour demonstrates that the domestic courts' interpretations of rules of exclusion allowed advocates to argue for expansive bureaucratic interpretation of immigration rules in 1970s Germany. Similarly, Soennecken argues that docket control in the German administrative courts has been central to managing immigration case flows. After 1982, the administrative courts would get asylum cases dismissed as ~~"~~*manifestly unfounded*;~~"~~ people would then take their cases to the Constitutional Court. To keep cases out of the Constitutional Court, a federal office gained the power to dismiss cases as ~~"~~*unfounded*.~~"~~ Pushing on one part of the system led to the spread of cases in another.

Interpreting asylum seeking or immigration as a problem has influenced decisions to simplify and speed all administrative legal claims, not just immigration claims, as Soennecken shows regarding Germany. Immigration has been a foundation of sovereignty claims by states~~,~~ and foundational to

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human rights regimes as well in administrative states. However, seldom is immigration law put at the center of administrative law and governments' decisions to simplify administrative procedures. To take the point beyond this collection of articles, in the United States in the early twentieth century, Chinese and Chinese-Americans contested exclusion in federal court, particularly on the West Coast. The success of these cases at the district court level were central to the design of administrative state processes that limited the ability to contest administrative decisions in general jurisdiction courts (Salyer 1995). The political mandate to control immigration after demands for labor have diminished has been crucial to building administrative states in such different contexts; perhaps we need to turn our concern to regulating belonging to see when and how courts govern. Constitutional reform of the courts in Britain, one of the important developments of British politics after the Thatcher era, came in part from practitioners' interests in managing the growing number of immigration cases in the general jurisdiction courts (Sterett 1997). Immigration politics and the claims one could make in court allowed lawyers to take on the professional project of making the field of immigration law in both France and the United States (Kawar 2011, 2014).

Imagining rights and even judicialization as resting in courts or with the judges is particularly misguided in immigration. National states, with the participation of courts, have tried to keep cases out of court by allowing exclusion at airports, or putting some cases on a fast track to deportation, as Soennecken explains regarding the jurisdictional moves in Germany over the last forty years (moves that played out in other countries as well, partly through European harmonization).[2] Angst over courts as countermajoritarian institutions because they hold decision makers accountable to already enacted law, rather than to immediate political pressure, seems badly misplaced when the daily news demonstrates how marginal courts are to the mass of

individual immigration claims because people do ~~n't~~ not get to court. In answer to the wide-ranging scholarship that has converged on the argument that rights-based governance grounded in domestic and supranational courts has become dominant in Western national states, we see a hostility to rights for the most marginalized that looks completely disconnected from the expansive liberal rights that scholars have argued the courts have endorsed. Judges are generally selected to defer to dominant governing institutions. Domestic courts are widely regarded to be conservative, aligned with the central powers of the state (see, e.g., Kenney 2013).[3] General scholarship on courts has concluded that courts contribute to protecting rights only when organized advocacy groups support court claims and rights. However, the general scholarship on courts and rights has not taken immigration as a central case (Hirschl 2004; Epp 1998), though the issue has been central to administrative states. The three articles that comprise this symposium in *Law & Policy* illuminate the politics of courts as part of the politics of immigration, examining the politics of courts concerning immigration and deportation both inside and outside halls of justice in Europe. Judges answer the claims of civil society organizations and individuals. Civil society organizations amplify court decisions, and use their amplified claims to make claims on legislatures and executives. In difficult areas with little ability to enforce legal rights that a majority does not support, legislatures and executives respond by trying to keep claims out of court or by speeding up how the courts handle them. The judicialization scholars have argued is a hallmark of global governance must include the maneuvering national states have engaged in to try to make court cases disappear. Even when unsuccessful, as Soennecken argues they were in Germany, they reshape the work of claiming and deciding.

Migrants who were murdered or drowned or remain encamped at borders never landed in a

place where they could make rights claims. The judges are just one part of a long chain of advocacy and decision making. Courts, either domestic or supranational, do not decide most cases; border officials, unsafe seas, deserts, and traffickers exclude most people long before they can make claims in legal systems. Had people landed rather than drowned, they probably would have applied for asylum; had administrators denied them, administrative and eventually general jurisdiction courts might have decided their claims. Administrators, somewhat insulated from electoral politics, are charged with deciding immigration and asylum claims according to law (Hamlin 2014). National administrative decisions cumulate to enact national priorities; status is granted at varying rates that do not simply reflect the level of problems throughout the world (Avdan 2014) ~~n~~or the preferences of judges who have their work organized to manage caseloads. Yet both scholars and the citizens of Western industrialized countries argue the rights of members of disfavored groups have become judicialized via interest organizations (see, e.g., Santos 2007; Hirschl 2004). The cases before final courts of appeal that articulate rights echo through groups of lawyers, advocacy organizations, and government officials, leading to a conclusion about the judicialization of politics. Responsibility for that judicialization is often all ascribed to judges, although other officials have made decisions about how to manage claims (Kawar 2014)~~,~~ and even though interest organizations support claims (Epp 1998). Attributing decisions to the liberal democratic commitments of judges does not account for the routes cases take and the virtues that claimants who mean to delay deportation find in the process. In turn, groups advertise decisions, making them look bigger than the holdings in cases as the judges would have seen them. Further, judges are subject to immigration politics, too, and their careers seldom lead them to counter dominant politics. National states disperse the enforcement of immigration law through multiple institutions, and criminalization and bureaucratic decision making have answered hostile politics

(Longazel and van der Woude 2014).

Each scholar in this symposium argues that judges decide in an institutional context. The cases are very high stakes for individual clients who face deportation, sometimes to countries that torture, as Lisa Conant argues. However, the cases also have organizational effects beyond the instrumental outcome for a particular client. Despite the broad public hostility to inclusion and often low levels of success for those contesting deportation, domestic courts and European supranational courts decide cases concerning rights to settlement and against deportation. Victories in ~~upper~~ upper-level courts ripple through the news, both among advocacy groups and within administrative agencies. Historical configurations of institutions shape what courts can decide and how cases then work in other institutions, an insight from American public policy studies (see, e.g., May and Jochim 2013; Soennecken 2013).

CONSTITUTING JUDICIALIZATION IN COURT AND AMPLIFYING DECISIONS

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Why do people who flee persecution or try to reunite with family members and claim rights to settle ever win in court? Explanations from immigration scholars concerning how those who are fleeing persecution and trying to stay in countries to which they fled can win claims against states that wish to exclude them argue that judges and courts are countermajoritarian institutions committed to liberal legal norms. Therefore, the courts enforce rights against what national executive officials or the citizenry might want (see, e.g., Guiraudon and Joppke 2001). Judicial decisions, and the mobilization of judicial decisions in political executives and popular argument, allow us to evaluate the widely discussed importance of the judiciary in creating what Ran Hirschl has called a juristocracy (2004). Yet why would that happen, given that judges are part of the regime in which they work? How does that argument allow us to make sense of the variation in grants of rights claims by immigrants~~,~~ or variation in the use of arguments about

courts?

Lisa Conant considers cases before the Court of Justice of the European Union and European Court of Human Rights concerning the prohibition against torture. She argues that many of the cases come from countries that are more rights protective than those that generate few or no cases at all. The relationship between immigration, torture, and state of residence is stark: foreigners in established democracies contest deportation by claiming they will be tortured in the states to which they will be deported. In newer democracies, torture victims are nationals contesting criminal justice system practices. Losing therefore cannot be the simple result of rights violations; if it were, the states that have worse rankings on human rights indexes would lose more often in court, which they do not. We would also expect those countries to lose most often if decisions depended on the attitudes of judges, an explanation that has been consistently developed within analyses of the US judiciary.

Conant argues that the difference is the civil society that allows claims to emerge in long-standing democracies. Judges can only decide cases before them; advocacy groups have to take the cases to court. Without these advocacy groups, there are no cases. Although the courts follow liberal democratic commitments to individual rights, it is difficult to see them as very countermajoritarian when the cases are coming from the states most respectful of human rights, not the least. Remembering that the courts operate at the margins of a system that requires someone to initiate cases, where administrative officials decide most people's cases long before they can get to court, the cases look useful to the individual claimants but unlikely to transform a country from one that does not respect human rights to one that does.

Executives and legislatures respond to the claims that civil society groups and individual claimants generate by shunting some cases out of court. Managing jurisdiction allows executives

and legislatures to manage caseloads. Sonnecken argues that while the German Federal Constitutional Court has had what observers called an "overwhelming" workload, a rapidly increasing number of asylum cases accounted for the expansion in case submissions. While caseloads grew and spread across the country as people were resettled in the 1980s, rates of granting refugee status declined. Cases triggered a 1992 decision to restrict the right to asylum (Soennecken 2016**[Au: do you mean 2016 or 2013 here?]**

Even when institutions do not welcome or expand rights claims, advocates also amplify decisions to make points about courts and immigration, to shape public opinion and legislative or bureaucratic action. Saskia Bonjour demonstrates how the broadening of immigration claims happens outside the courts, but with reference to court cases and principles courts articulate. Bonjour argues that proponents of family migration rights in Germany took up decisions from the courts and amplified them to make rights claims. Advocates used the court decisions before the executive to argue that the institution must broaden its interpretation of rights. Bonjour, like Soennecken, argues for the importance of administrative courts; family reunification did not come before the Constitutional Court until years after advocates for families began to make claims.

Conversely, opponents of immigration have also amplified claims. In Britain, individual decisions have been used to stand in for the work of both the executive and the courts in immigration. Opponents use one decision to imply the courts are admitting everyone applying for refugee status or resettlement rights, though cases often end with what the executive decides, and administrators turn down many claims. Permission to resettle varies by country of origin (Hamlin 2014a). Amplification is particular to a country. In Britain, hostility to immigration decisions is intertwined with hostility to constitutional and judicial change, often called the

biggest change in postwar British politics. Britain's Human Rights Act allows the British courts to apply the European Convention on Human Rights directly, an initiative in British politics that both recognized the deployment of rights via supranational courts, while allowing the Labour Party to distinguish itself from the Thatcher government. Immigration decisions embody rights as foreign incursions~~,~~ and lead opponents to conclude that Britain needs a homegrown rights framework (Hamlin 2014b). That in itself is a shift in the popular press toward some acceptance of human rights; opposition to a Bill of Rights in Britain once explained all rights as foreign. In postwar elite legal discussions about Bills of Rights, those borrowed from the United States would be excessively individualist, while European legal accountabilities would be too statist (Sterett 1997).

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Taken together, the studies lead us to refine the argument that we see a worldwide expansion in the exercise of judicial power (see, e.g., Hirschl 2004). First, court cases do not simply reflect an underlying level of complaint. The cases have to be mobilized (Zemans 1983). Matching court decisions with rankings of human rights indirectly highlights the central place of mobilization. Second, court cases do not have one meaning that is consistent from the time an advocate argues, a judge decides, the press announces, and advocates make new claims. Advocacy groups amplify decisions, both positively and negatively. Finally, we need to intertwine institution and substance: these cases are not about courts conceived abstractly. They are about immigration~~,~~ and resolving the particular problems the cases pose before the courts. In recognizing the importance of a field to understanding the judiciary, the study of law and courts can contribute to an understanding of politics recently argued for by Jacob Hacker and Paul Pierson (2014): policy is key to understanding political institutions. That insight illuminates comparative studies of

judicialization, which have traced policies rather than courts and thereby integrated general jurisdiction courts with administrative courts and decision making (Kenney 1992).

CONCLUSION: INSTITUTIONS AND IMMIGRATION

Immigration control is central to rights, administrative states, and judicial institutions. Courts and court-like administrative bodies participate in governing the flow of immigrants and asylum seekers around the world. Immigration can illustrate questions about how courts operate as institutions. However, immigration is more than a field of law. Controlling who enters and who does not is a mark of what it means to be a state; treating a field of law as constitutive of constitutionalism and the courts as constitutionalist actors counters theorizing courts or judges as freestanding institutions. Legal mobilization of rights claims in and out of court, and the institutional rules that structure how people make claims, are both central to understanding the significance of courts in governing asylum claims and claims against deportation.

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NOTES

[1] [1] http://www.unhcr.org/57178bcf6.html The UNHCR has recommended strategies to limit trafficking that would invoke domestic administrative and judicial processes, including greater granting of humanitarian status as well as family reunification and student visas.

[2] Strategies converged across national states, even without formal agreement. On strategies in the United Kingdom, see Sterett (1997).

[3] The extensive training that judges receive in becoming part of a long—established institution can account for Melton and Ginsburg and Melton's (2014) finding that de jure forms of judicial independence do not make a difference to de facto judicial independence in established democracies.

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