
What Probate Courts Cite: Lessons from the New York County Surrogate's Court 2017-2018

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By knowing what a judge cites, one may better understand what the judge believes is important, how the judge understands her work will be used, and how the judge conceives of the judicial role. Empirical scholars have devoted serious attention to the citation practices and patterns of the Supreme Court of the United States, the United States Courts of Appeals, and multiple state supreme courts. Remarkably little is known about what probate courts cite. This Article makes three principal claims — one empirical, one interpretative, and one normative. This Article demonstrates through data, derived from a study of all decrees and orders issued by the New York County Surrogate's Court in the years 2017 and 2018, that the probate court located in the most densely populated county in the United States cites fewer authorities less often than almost any other court (of any level) for which data is available.

There are a variety of factors that may explain this low rate of citation by the New York County Surrogate's Court, including docket size, the size and composition of the court's staff, a judicial perception that the application of the law is a relatively mechanistic process, or a subjective

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determination that speed in processing the court's docket outweighs any public interest in citation-replete decrees and orders. Yet by increasing its engagement with a range of authorities, the New York County Surrogate's Court (and indeed any probate court) may increase public confidence in the judiciary while also enhancing understanding of trusts and estates as a complex and dynamic area of law.

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The law-review essay has felt beyond the common lot the repressive cruelty of prejudice. — Benjamin N. Cardozo¹

INTRODUCTION

Supreme Court Justice Benjamin Cardozo was an avid reader and citer of law review articles.² The man responsible for some of jurisprudence's most enduring (and poetic) phrases began citing law review articles in legal opinions he wrote as an associate justice of the New York Court of Appeals, where he served from 1914 until his elevation to the Supreme Court of the United States in 1932.³ Cardozo's frequent citations of law review articles continued throughout his career;⁴ Cardozo cited law reviews and other secondary sources more frequently than his judicial peers.⁵

Cardozo had a well-developed view of the judicial role: A judge should attempt to bridge the gap between the common person's understanding of justice and the current state of the law.⁶ When precedent did not serve the public interest, Cardozo believed, the judge was free to disregard the precedent.⁷ In making that determination, the

¹ Benjamin N. Cardozo, *Introduction to SELECTED READINGS ON THE LAW OF CONTRACTS FROM AMERICAN AND ENGLISH LEGAL PERIODICALS* vii (1931) (describing most judges' negative views of law review articles).

² See William H. Manz, *The Citation Practices of the New York Court of Appeals, 1850-1993*, 43 *BUFF. L. REV.* 121, 148 (1995) [hereinafter *The Citation Practices*] (calling Cardozo a "pioneer" in the practice of regularly citing law review articles in judicial opinions during his period as a judge on the New York Court of Appeals, the state's highest court); see also BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 14 (1924) (describing value of law reviews).

³ Most law students and lawyers will recognize, for example, Cardozo's famous formulation of fiduciary duty: "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive." *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (describing the mutual duties of co-venturers). Cardozo became Chief Judge of the New York Court of Appeals in 1926. See ANDREW L. KAUFMAN, *CARDOZO* 178-82 (1998) (detailing background to Cardozo's appointment as associate judge and then chief judge of the New York Court of Appeals).

⁴ See Manz, *supra* note 2, at 139 (marking the beginning of the citation of law review articles with Judge Cardozo's time on the New York Court of Appeals).

⁵ On Cardozo's fondness for citing law review articles, see William H. Manz, *The Citation Practices of the New York Court of Appeals: A Millennium Update*, 49 *BUFF. L. REV.* 1273, 1283 (2001) [hereinafter *The Citation Practices: A Millennium Update*] ("The regular citation of law reviews by the Court of Appeals was pioneered by Judge Cardozo, and continued at a modest rate in the decades after he left the court, before becoming commonplace during the later twentieth century.").

⁶ See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112, 161 (1921).

⁷ *Id.* at 112-13.

judge must “balance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and all the rest, and adding a little here and taking out a little there, [a judge] must determine, as wisely as he can, which weight shall tip the scales” toward justice.⁸ Perhaps because Cardozo sought to make plain all of the “ingredients” that went into his decision-making, Cardozo’s opinions explicitly referenced the works and ideas that contributed to his “sense of right.”⁹ If Cardozo is any guide, the sources a judge cites thus may reveal (at least in part) how the judge perceives his role in the legal system and the potential future use of the judge’s opinions.

Scholars have devoted considerable attention to the citation practices of the Supreme Court of the United States,¹⁰ the United States Courts of Appeals,¹¹ multiple state appellate courts,¹² and state supreme courts.¹³ There are studies of citation patterns in specific subject-matter decisions in business law, bankruptcy law, and intellectual property law.¹⁴ But to date, there is no empirical study of the citation practices of probate courts, the local courts across the United States with responsibility for the administration of decedents’ estates and related matters such as trusts.¹⁵

⁸ *Id.* at 162.

⁹ *See id.*

¹⁰ *See infra* Part II.A.

¹¹ *See infra* Part II.B.

¹² *See, e.g.,* A. Michael Beaird, *Citations to Authority by the Arkansas Appellate Courts, 1950-2000*, 25 U. ARK. LITTLE ROCK L. REV. 301, 302 (2003); Joseph A. Custer, *Citation Practices of the Kansas Supreme Court and Kansas Court of Appeal*, 7 KAN. J.L. & PUB. POL’Y 120 (1998).

¹³ *See infra* Part II.C; *see, e.g.,* William L. Reynolds II, *The Court of Appeals of Maryland: Roles, Work and Performance Part I*, 37 MD. L. REV. 1, 2 (1977) [hereinafter *Part I*]; William L. Reynolds II, *The Court of Appeals of Maryland: Roles, Work and Performance Part II: Craftsmanship and Decision-Making*, 38 MD. L. REV. 148, 148 (1978) [hereinafter *Part II*] (studying decisions from the 1975 term).

¹⁴ *See infra* Part II.D.

¹⁵ Depending on the jurisdiction, the court may be called the Surrogate’s Court, the Orphans’ Court, the Probate Division of the District Court, the Probate Division of the Chancery Court, or a similar name. ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS & ESTATES* 40 (10th ed. 2017) (describing various names for courts responsible for administration of estates). To give just one example of the other types of matters over which a probate court may have jurisdiction, Maine probate courts have jurisdiction over a wide variety of matters related to parental rights. *See* Deirdre M. Smith, *From Orphans to Families in Crisis, Parental Rights Matters in Maine Probate Courts*, 68 ME. L. REV. 45, 46-47 (2016) [hereinafter *From Orphans*] (describing jurisdiction of Maine probate courts over parental rights).

Over 2.8 million people die every year in the United States.¹⁶ A recent study suggests that approximately 35% of all Americans have a will.¹⁷ If someone dies with a will, the estate will be subject to probate. If someone dies without a will — and there are no reliable statistics on how many decedents die without a will each year¹⁸ — the decedent's estate nevertheless may be subject to administration by the probate court,¹⁹ even though Americans hold a majority of their wealth in non-probate form.²⁰ Probate courts thus administer hundreds of thousands of new estates each year.²¹ How do these local judges understand their role? How do they believe their opinions will be used? What, if anything, might the answers to these questions reveal about the field of trusts and estates generally? And, finally, why might the answers matter?

This Article reports the results of a study of over 1,300 recent decrees and orders of the New York County Surrogate's Court.²² In broad terms, the study measures the number and type of authorities the court cites in nine categories: cases, constitutions, statutes, legislative material, reference works, books, law review articles, other periodicals, and a catch-all classification for sources that otherwise do not fit one of these

¹⁶ According to estimates by the Centers for Disease Control and Prevention, 2,813,503 people died in the United States in 2017. SHERRY L. MURPHY ET AL., NAT'L CTR. FOR HEALTH STATISTICS, DATA BRIEF NO. 328, MORTALITY IN THE UNITED STATES 6 (2018), <https://www.cdc.gov/nchs/data/databriefs/db328-h.pdf> [<https://perma.cc/D372-SA5B>].

¹⁷ Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? Risks of Do-It-Yourself Estate Planning*, 38 EST. PLAN. 27, 27 (2011).

¹⁸ See Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 887 n.46 (2012) (noting lack of reliable data on number of people who die intestate each year).

¹⁹ See John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1118 (1984) (citing study of decedents in Cook County, Illinois, in the 1950s in which 15% of estates were subject to probate proceedings).

²⁰ See *id.* at 1108.

²¹ There is no readily available data on the number of estates subject to probate nationwide, but excellent recent empirical scholarship provides county-specific data. See, e.g., David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 626-28 (2015) (describing comprehensive methodology for analysis of estates of 668 decedents who died in 2007 and whose wills or estates were subject to court administration in one California county); Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341, 357-58 (2017) (describing methodology for analysis of estates of 493 decedents whose wills or estates were subject to court administration in 2013 in Alachua County or Escambia County, Florida).

²² See *infra* Parts I.A-B.

descriptors.²³ Based on a study of all decrees and orders issued over a two-year period by the probate court in New York County, the most densely populated county in the United States,²⁴ this Article makes three principal claims — one empirical, one interpretative, and one normative.

Part I of this Article begins with a description of the structural design of this empirical study of all decrees and orders issued by the New York County Surrogate's Court for a two-year period beginning January 1, 2017. It reports the results of over 56,000 observations (forty-one observations made with respect to 1,382 cases). The New York County Surrogate's Court regularly cites probate statutes, other state statutes (especially from the state's civil practice law and rules), its own decrees and orders, and decisions of other New York State courts.²⁵ The court rarely cites to law review articles or treatises.²⁶ It never cites to dictionaries or certain periodicals.²⁷

Part II of the Article locates this study's findings in the context of other empirical studies of the citation patterns of other courts. The New York County Surrogate's Court cites fewer secondary sources than any other federal or state court for which empirical studies are readily available.²⁸

Part III offers several possible explanations for the New York County Surrogate's Court's low rate of citations to secondary sources. Several factors may influence the Surrogate's Court citation practices: docket size, the nature of the matters under consideration, the lack of recent law school graduates acting as term clerks, a judicial perception that the applicable law is mostly mechanical, a judicial perception of the (lack of) usefulness of secondary literature, the professional background or future career goals of the deciding judges, the judges' understanding of constraints arising out of court's specialized jurisdiction, or the size of the court's docket.²⁹

²³ See *infra* Part I.D.

²⁴ See U.S. CENSUS BUREAU, POPULATION, HOUSING UNITS, AREA, AND DENSITY: 2010 - UNITED STATES - COUNTY BY STATE; AND FOR PUERTO RICO, 2010 CENSUS SUMMARY FILE 1 (2010), https://factfinder.census.gov/bkmk/table/1.0/en/DEC/10_SF1/GCTPH1.US05PR [<https://perma.cc/625E-W9YN>] (showing New York County has the highest population density per square mile of land area at 69,468.4).

²⁵ See *infra* Part I.D.

²⁶ See *infra* Part I.D.

²⁷ See *infra* Part I.D.

²⁸ See *infra* Part II.

²⁹ See *infra* Part III.A.

Part IV makes the normative claim that probate court judges should engage more robustly with legal literature. Whatever the reasons may be for the citation practices of the New York County Surrogate's Court, through its citations, this court and other similar courts can enhance understanding of trusts and estates as the complex and dynamic area of law that it is. Increased engagement with a range of authorities might correct the misperception that the field of trusts and estates is not as intricate or sophisticated as other areas of the law.³⁰ Toward that end, lawyers practicing before the Surrogate's Court can influence the citations in the court's decrees and orders. When representing clients in contested matters, attorneys should assist the court by citing secondary authorities in their briefs and papers. In turn, faculty members and practitioners who write law review articles and other publications can assist practitioners (and judges) by engaging with the practicing bar. State or national organizations might better train probate judges on applicable laws, authorities and perspectives.

Part V considers some of the questions unanswered by this study that might inspire further investigation, including how the citation practices of the New York County Surrogate's Court conform to or depart from the citation practices of other probate courts. Additional qualitative scholarship, in the form of surveys or interviews of judges or practitioners, might round out or complicate the results presented by this study. This limited empirical investigation is a modest first step in better understanding what probate courts cite, what those citation practices reveal, and why citations matter.

I. STRUCTURE AND DESIGN OF STUDY OF CITATION PRACTICES OF NEW YORK COUNTY SURROGATE'S COURT 2017-2018

A. *Selection of New York County*

I selected New York County for four reasons. First, it includes one of the zip codes in the United States with the highest average annual household income, which might correlate with a high degree of wealth and correspondingly complex estate issues that could give rise to

³⁰ See Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 UMKC L. REV. 293, 295-97 (2005) (reporting results of gender segregation in law teaching, with women disproportionately represented in certain areas such as "the less prestigious estates and trust courses," compared with men who are overrepresented in the teaching of constitutional law, for example).

lengthy (and citation-filled) decisions by the probate court.³¹ Second, because New York County has a large population (approximately 1.6 million people)³² and almost 10,000 deaths per year,³³ the Surrogate's Court supervises thousands of new estates each year and so the decision pool would be large.³⁴ Third, the New York Surrogate's Court is the one with which I am most familiar, having practiced law in New York County for several years. Fourth, I had the anecdotal (and incorrect) impression that the decrees and orders of the New York Court Surrogate's Court would be readily available. My intention was to read every court decree and order for the last two years and to classify each according to subject matter as well as the type, number and frequency of citations. I would then compare my results to studies of other courts.

My hypothesis was multi-pronged. First, I anticipated that the New York County Surrogate's Court would most often cite state statutes and its own decrees and orders. Second, I hypothesized that in comparison with other courts, the New York County Surrogate's Court would cite fewer secondary sources, including law review articles, but that the authors of secondary sources that the New York County Surrogate's

³¹ See Shelly Hagan & Wei Lu, *This is America's Richest Zip Code*, BLOOMBERG (Apr. 10, 2018, 3:00 AM), <https://www.bloomberg.com/news/articles/2018-04-10/to-visit-america-s-richest-zip-code-first-you-ll-need-a-boat> [<https://perma.cc/42W9-H6UW>] (reporting that residents of zip code 10007, which includes the southern part of Tribeca, some of Battery Park, and arguably the northern part of the Financial District, have an average income of \$597,900, making it one of the "richest" zip codes in the country).

³² See U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR SELECTED AGE GROUPS BY SEX FOR THE UNITED STATES, STATES, COUNTIES, AND PUERTO RICO COMMONWEALTH AND MUNICIPIOS: APRIL 1, 2010 TO JULY 1, 2018, FACTFINDER (2018), <https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2018/PEPAGESEX/0500000US36061> [<https://perma.cc/J72D-BSVN>] (estimating the 2018 population of New York County as 1,628,701 people).

³³ See *Leading Causes of All Deaths for Total Population Selected Counties: New York*, N.Y. DEP'T HEALTH, https://apps.health.ny.gov/public/tabvis/PHIG_Public/lcd/reports/#county (last updated May 2018) [<https://perma.cc/GJ26-YTNT>].

³⁴ See N.Y. UNIFIED COURT SYS., 2018 ANNUAL REPORT 39, at tbl.4 (2018), https://www.nycourts.gov/legacypdfs/18_UCS-Annual_Report.pdf [<https://perma.cc/Z4K7-P6KL>] (showing the number of filings in Surrogate's Court in all New York State Surrogate's Courts, but the data is not broken out by county). In Alameda County, California, with a population of 1.5 million, Professor Horton identified 668 decedents (or 0.05% of the population) who died in 2007 and whose wills or estates were subject to court administration. See Horton, *supra* note 21, at 627. Professor Wright identified 293 decedents (or 0.12% of the population) in Alachua County, Florida (population of approximately 247,000) and 378 decedents (or 0.13% of the population) in Escambia County, Florida (population of approximately 298,000 people) with wills or estates filed in 2013. See Wright & Sterner, *supra* note 21 at 356-57. If 5% of the population of New York County had a will or estate subject to administration by the Surrogate's Court, that would mean the court handles approximately 80,000 new estates each year.

Court did cite would divide equally between two groups, reflecting the multiple contributions that estate planning professionals make to scholarly and professional publications.³⁵ Based on my own experience as a faculty member, and my prior experience as a practicing trusts and estates attorney, I hypothesized that the first group would be comprised of full-time faculty members at law schools writing in law reviews, and the second would be comprised of practitioners, judges, and other authors, writing in professional publications that are common in the field.³⁶

Having no prior experience with empirical scholarship, the task daunted, but I expected to engage in mostly a (large) counting exercise without making many qualitative judgments. I imagined that in a prior era, this would have been a project undertaken with a green visor³⁷ and an adding machine (preferably one with a tape roll). How wrong I was.

B. Locating Decrees and Orders

It is surprisingly difficult to determine with precision how many decrees and orders the New York County Surrogate's Court issues every year.³⁸ For most state and federal courts, a simple search of a commercially available database yields reliable results. The same is not true for the Surrogate's Court, however. According to the most recent Annual Report of the New York State Unified Court System, Surrogate's

³⁵ Consider, for example, Issues 1 through 3 of Volume 44 of the *ACTEC Law Journal* (all published in 2019). The *ACTEC Law Journal* is one of the leading publications for specialized trusts and estates scholarship. Of the twenty-two authors published in these volumes, six are full-time academics and sixteen are practitioners. See 44 *ACTEC L.J.* (2019) (additional information on file with the author).

³⁶ See *id.* (detailing mixed authorship of recent contributions to widely read trust and estate publication).

³⁷ See, e.g., U.S. Patent No. 1,834,415 (filed June 14, 1928) (patenting green eyeshade to reduce eye strain).

³⁸ The terms "decree" and "order" have slightly different technical meanings. A "decree" is the "determination of the rights of the parties to a special proceeding in the court." N.Y. Surr. Ct. Proc. Act Law § 601 (2020) (defining "decree"). An "order" is a "direction of the court made or entered in writing and not included in a decree." *Id.* (defining "order"). All proceedings in the Surrogate's Court are special proceedings. *Id.* § 203 ("All proceedings are special proceedings and are commenced by filing a petition."). In the New York Supreme Court (the state trial court), when a special proceeding results in the determination of rights of the parties, a "judgment" issues. N.Y. C.P.L.R. § 411 (2019). The practical difference between a decree and an order is that a decree is final (but appealable). See 1 WARREN'S HEATON ON SURROGATE'S COURT PRACTICE, § 10.02 (7th ed. 2020) [hereinafter WARREN'S HEATON] (stating that the "distinction between decrees and orders is one of finality").

Courts state-wide issued 117,988 decrees and orders.³⁹ Of those decrees and orders, 36,246 came collectively from New York County (Manhattan), Kings County (Brooklyn), Bronx County (The Bronx), Richmond County (Staten Island), and Queens County (Queens).⁴⁰ The Court System's Report does not break out data by county within New York City.⁴¹ With only a general sense of output of Surrogate's Courts in New York City as background, the first research task was to identify, with some degree of certainty, the pool of all decrees and orders issued by the New York County (Manhattan) Surrogate's Court.

Searches of the Westlaw databases⁴² and New York State's official Law Reporting Bureau⁴³ proved unfruitful. The search then turned to the Lexis commercial database that includes decrees and orders published in the *New York Law Journal*, a respected print (and digital) source for news stories and judicial orders, decrees, and judgments.⁴⁴ A search of the database "New York Lower Courts — Trial Orders" returned 4,393 results for the five-year period beginning January 1, 2014.⁴⁵ Narrowing the results for two specific years resulted in 722 returns (for 2017) and

³⁹ See N.Y. UNIFIED COURT SYS., *supra* note 34, at 44 tbl.7. The table does not break out by county the number of orders and decrees issued by the Surrogate's Courts in New York City. *See id.*

⁴⁰ *Id.*

⁴¹ *See id.*

⁴² A Westlaw search of the database "All New York State Cases" for the five-year period 2014 through 2018 inclusive retrieves just 223 results for the entire State of New York. *See* WESTLAW, <https://westlaw.com> (searching "ADV: DA(aft 12-31-2013 & bef 01-01-2019) & PR(surrogate)") (last visited Jan. 21, 2020).

⁴³ *See* N.Y. JUD. LAW § 430 (2020); *see also* NEW YORK STATE LAW REPORTING BUREAU, *New York Official Reports, About the Official Reports*, N.Y. COURTS, <https://www.nycourts.com/reporter/About.shtml> [<https://perma.cc/MG3K-FC5P>] (last visited Jan. 24, 2020). After the Surrogate delivers to the state reporter "a copy of every written opinion rendered," the State Reporter decides which decrees or orders of the Surrogate's Court are "worthy of being reported because of its usefulness as a precedent or its importance as a matter of public interest." N.Y. JUD. LAW §§ 431, 432 (2020). Those selected then appear in the New York Miscellaneous Reports. *See id.* § 431.

⁴⁴ *See New York Law Journal*, LAW, <https://www.law.com/newyorklawjournal/?slreturn=20190818225928> (last visited Jan. 24, 2020) [<https://perma.cc/5KQG-YRYB>]; *see also* Kyu Ho Youm, *Legal Methods in the History of Electronic Media*, in *METHODS OF HISTORICAL ANALYSIS IN ELECTRONIC MEDIA* 115-144, 127 (Donald G. Godfrey ed., 2006) (listing the *New York Law Journal* as among secondary sources that provide legal researchers with references to primary and secondary sources).

⁴⁵ *See* LEXIS ADVANCE, <https://advance.lexis.com/> (follow Explore Content >Cases >All Trial Court Orders >NY Lower Courts – Trial Orders from New York Law Journal (ALM) > Judges(Mella OR Anderson) > Search Within Results > (judges (Mella) OR judges (Anderson)) and (cite (NYLJ) and ("New York County")) > Timeline > 01/01/2014 to 12/31/2018 > Court > New York > N.Y. Sur. Ct.).

660 returns (for 2018).⁴⁶ Because the search is limited to decrees or orders by Judge Rita Mella or Judge Nora Anderson, the two Surrogates serving during this time period, the returns do not include estate-related cases that originate in or are transferred to the New York Supreme Court (the state trial court). The study includes decrees and orders of Surrogate's Court, not orders, decrees and judgments in all trust- or estate-related cases in all courts.⁴⁷

The pool of 1,382 decrees and orders for the two-year period beginning January 1, 2017 is overinclusive; a decree or order with the same substance may appear in the data sample twice.⁴⁸ A first glance, it may appear that these are two separate orders, when in fact they are two mentions of the same order in two separate places in the same publication (here, the *New York Law Journal*).⁴⁹ The pool of 1,382 decrees and orders also contains several false positives in the form of short documents with few, if any, citations.

C. Narrowing the Cases

Initial review of the 1,382 decrees and orders revealed that the majority of decrees and orders were comprised of short paragraphs, or just a handful of sentences, and contained few (or no) legal authorities.⁵⁰ Because of this abundance of results that likely would generate skewed figures, I manually segregated and marked as "excluded" those bare-bones decrees and orders that were unlike those one would find in a typical law school casebook. I then eliminated those entries that appeared to be substantively duplicative, even if they had

⁴⁶ See *id.* (following same search above, but narrowing original search to calendar year 2018 only and repeating narrowing of original search for calendar year 2017 only).

⁴⁷ The Surrogate's Court has concurrent jurisdiction over inter vivos trusts and decedents' estates, but the Supreme Court typically defers to the Surrogate's Court. See N.Y. SURR. CT. PROC. ACT LAW § 601 (2020); see, e.g., *Ahders v. Ahders*, 574 N.Y.S.2d 203, 204-05 (App. Div. 1991) (explaining how the Surrogate's Court should exercise jurisdiction over claims "premised on the imposition of a constructive trust"); *McGee-Ross v. Cook*, 755 N.Y.S.2d 559, 560 (Sup. Ct. 2002) (explaining that the Supreme Court's jurisdiction is general, whereas the Surrogate's Court's jurisdiction is specialized to handle matters involving a decedent's estate).

⁴⁸ Compare, e.g., *Estate of Patricia Goldstein*, 2017 N.Y.L.J. LEXIS 1704 (July 3, 2017) (containing order discontinuing for enforcement of settlement proceedings, published July 3, 2017), with *Estate of Patricia Goldstein*, 2017 NYLJ LEXIS 1686 (July 3, 2017) (containing name of case only).

⁴⁹ See *id.*

⁵⁰ See *infra* Table 1. It was not possible to do this sorting electronically using the LexisAdvance research tool; one cannot narrow the search to only those decrees and orders that exceed 250 words in length, for example.

different citations. Of the 722 returns for 2017, I excluded a total of 543. Of the 660 returns for 2018, I excluded a total 458.⁵¹ This study refers to the remaining decrees and order (179 for 2017 and 202 for 2018) as “Selected Decrees and Orders.” Table 1 shows the composition of the aggregate returns by year and type. The Selected Decrees and Orders form a smaller subset of all decrees and orders issued by the New York County Surrogate’s Court in the years 2017 to 2018 inclusive.

Table 1: Number of Decrees and Orders by Year and Type

	2017	2018	Total
	722	660	1382
Excluded (on the basis that decree/order is not of the type one would expect to see in a law school casebook or decree/order is substantively duplicative)	543	458	1001
Remaining (“Selected Decrees and Orders”)	179	202	381

D. Citation Practices of the New York County Surrogate’s Court

A team of law students assisted in manually coding all decrees and orders (not only Selected Decrees and Orders) for subject matter⁵² and then for then for types, number and frequency of citations.⁵³ Observations were made about whether (and how often) the court cited any one or more of forty-one sources in one of nine possible categories: cases;⁵⁴ constitutions;⁵⁵ statutes;⁵⁶ legislative material;⁵⁷ reference

⁵¹ See *infra* Table 1.

⁵² I categorized each case as concerning one of thirty-two possible subjects that track the substantive topics covered in a basic law school course in Trusts and Estates. See, e.g., SITKOFF & DUKEMINIER, *supra* note 15, at xii-xxvi (breaking up Trusts and Estates law into smaller subjects). This Article does not make use of those categories, however, and therefore does not report the results.

⁵³ The types of citations tracked loosely follow the categories of commonly used citation forms in Rules 10-13, 15-18 of a well-known guide to legal citation. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (20th ed. 2015). I also added sources specific to the practice of trusts and estates, chosen on the basis of my own research experience.

⁵⁴ See *infra* Appendix 1.

⁵⁵ See *infra* Appendix 1 and Table 3 (noting constitutions cited in fewer than 1% of all decrees and orders).

⁵⁶ See *infra* Appendix 1.

⁵⁷ See *infra* Appendix 1 and Table 2 (reporting no results of search for citations for legislative material because of infrequency).

works;⁵⁸ books;⁵⁹ law review articles;⁶⁰ other periodicals;⁶¹ and a catch-all classification for sources that did not otherwise fit one of these descriptors.⁶² Over 99% of the decrees and orders were manually (blind) double-coded. To the extent that I detected possible coding errors, I reread and manually recoded the decrees and orders. I then used the Lexis database to confirm the manual results by conducting various word searches, where possible.⁶³ I was able to confirm through electronic searches results for cases (by searching for the name of the New York reporter in which Surrogate's Court cases typically are cited), constitutions (by searching for both the word "constitution" and its Bluebook citation form), New York Statutes (by searching the name of the statute and its Bluebook citation form), legislative material (by searching for the phrases "session laws," "committee report," and their Bluebook citation forms), reference works (by searching by title), law review articles (by searching for the Bluebook citation forms "L. Rev." or "L.J."), and newspapers (by searching for the names "New York Times," "Chicago Tribune," "Los Angeles Times," and their Bluebook citation forms). Generally speaking, in the event that any manual result varied from the electronic result by more than 2%, I recorded the electronically-generated result. The results for each year are shown in the Appendix 1 (for all decrees and orders) and Appendix 2 (Selected Decrees and Orders). This 2% guideline did not apply, however, for citations to case law or statutes from states other than New York, books (other than specific reference works or named treatises), newspapers (other than the *New York Times*, *Chicago Tribune*, and *Los Angeles Times*), other periodicals, book reviews, blog posts or other sources. That is because those electronic searches were too imprecise to yield reliable results. For those sources, the manual counts prevailed.

To summarize, for the period 2017 to 2018 inclusive, the sources most frequently cited by the New York County Surrogate's Court are shown in Table 2 below:

⁵⁸ See *infra* Appendix 1.

⁵⁹ See *infra* Appendix 1.

⁶⁰ See *infra* Appendix 1 and Table 3 (noting law review articles cited in fewer than 1% of all decrees and orders).

⁶¹ See *infra* Appendix 1.

⁶² See *infra* Appendix 1 (tracking the number and frequency of citations of book reviews, blog posts, and other sources).

⁶³ Searches included the abbreviations for names of laws (e.g., "EPTL," "SCPA," "CPLR"), commercial reporters (e.g., "N.Y.2d," "N.Y.S.2d"), law journals or law reviews (e.g., "L. Rev." or "L.J."), reference works (e.g., "A.L.R.," "C.J.S."), common newspapers (e.g., "N.Y. Times," "L.A. Times"), and names of the authors or editors of specific treatises (e.g., "Bogert," "Heaton").

Table 2. Percentage Decrees and Orders Citing Specified Source in More Than 1% All Decrees and Orders 2017-2018

	All Decrees and Orders N=1382	Selected Decrees and Orders ⁶⁴ N=381
Cases		
Cases from New York County Surrogate's	23.37%	35.17%
Cases from Other Surrogate's Courts in New York State (but Outside New York County)	17.80%	27.30%
Other New York State cases (not from a Surrogate's Court)	20.04%	47.51%
Statutes		
N.Y. Estates, Powers & Trusts Law	19.83%	36.48%
N.Y. Surr. Court Procedure Act	33.29%	53.02%
Other New York statute ⁶⁵	23.81%	35.43%
Statute of state other than New York	2.45%	2.45%
Reference Works		
Other specific treatise ⁶⁶	1.37%	2.36%
Some other source not listed above ⁶⁷	8.18%	1.31%

⁶⁴ See *supra* Table 1 (providing results for "Selected Decrees and Orders").

⁶⁵ After the Surrogate's Court Procedure Act and the Estates, Powers & Trusts Law, the Surrogate's Court most frequently cites to the New York Civil Practice Laws & Rules ("CPLR"). During the two-year period under consideration, the court also cited at least once to each of New York General Obligations Law, Judiciary Law, Mental Hygiene Law, and Tax Law.

⁶⁶ In the category of "other specific treatise" are Practice Commentaries, McKinney's Laws of New York Surrogate Court Procedure Act (2011) (cited in three decrees or orders), WARREN'S HEATON, *supra* note 38 (cited in ten decrees or orders), and DAVID D. SIEGEL, NEW YORK PRACTICE (5th ed. 2011) (cited in one decree or order).

⁶⁷ Authorities cited by the court and not otherwise listed include federal laws and regulations such as the Internal Revenue Code, 26 U.S.C. § 1-9834 (2020) (cited in four

This Table 2 is a subset of the sources listed in Appendix 1; it lists only those sources that the Surrogate's Court cites in more than 1% of all decrees and orders for the period 2017 through 2018 inclusive. Table 2 does not show citation counts for federal cases; constitutions; legislative material; most reference works, books, and law reviews, because the Surrogate's Court cites these in less than 1% of all decrees and orders. Table 2 also lists the citation rate of the same sources in Selected Decrees and Orders.⁶⁸

The appendices provide complete citation counts and rates for all decrees and orders (Appendix 1) and Selected Decrees and Orders (Appendix 2) by the New York County Surrogate's Court for the years 2017 and 2018.⁶⁹

II. EMPIRICAL STUDIES OF OTHER COURTS' CITATION PRACTICES

In order to evaluate the citation practices of the New York County Surrogate's Court, it is necessary to know what types of sources other courts cite (and how often). This Part reviews the key findings of empirical studies of the citation practices of the Supreme Court of the United States, federal appellate courts, state supreme courts, and selected other courts. The New York County Surrogate's Court cites fewer secondary sources than any other federal or state court for which empirical studies are readily available.

A. Supreme Court of the United States

The citation practices of the Supreme Court have garnered more scholarly attention than any other court's citations.⁷⁰ Empirical scholars

decrees or orders); N.Y. COURTS, GUIDELINES FOR THE OPERATIONS OF THE OFFICES OF THE PUBLIC ADMINISTRATORS OF NEW YORK STATE (2012), <https://www.nycourts.gov/ip/PA/PA-Guidelines.pdf> [<https://perma.cc/Y5DE-4S35>] (cited in two decrees or orders); N.Y. COURTS UNIF. RULES SURROGATE'S CT. (cited in two decrees or orders); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS (AM. LAW. INST. 2019) (cited in one decree or order); N.Y. COMP. CODES R. & REGS. (2020) (cited in six decrees or orders).

⁶⁸ See *supra* Table 2 (definition of "Selected Decrees and Orders").

⁶⁹ See *infra* Appendices 1 and 2.

⁷⁰ See, e.g., Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131, 131-32 (1986); Louis J. Sirico, Jr., *The Citing of Law Reviews by the Supreme Court: 1971-1999*, 75 IND. L.J. 1009, 1010 (2000); John Scurlock, *Scholarship and the Courts*, 32 UMKC L. REV. 228, 231 (1964) (studying citation practices by Supreme Court in criminal cases for years 1958 through 1962).

have examined the Court's use of social science research, for example,⁷¹ as well as dictionaries.⁷² The most frequent topic of study, however, is the Court's citation to law review articles.⁷³

For the five-year period beginning with the October 1939 term, the Court cited to law review articles in 17% of all opinions.⁷⁴ For the following ten-year period, the percentage fluctuated slightly between 26% and 28% on average.⁷⁵ In the 1970s and 1980s, the Court cited law reviews in approximately 50% of its opinions.⁷⁶ For the ten-year period beginning January 1, 2001, 294 opinions contained a citation to at least one law review article — the Court cited at least one law review article in approximately 37% of its opinions.⁷⁷ Researchers have documented that over a sixty-one-year period beginning in June 1949, the Court cited legal scholarship in approximately 32% of all of its opinions, marking the beginning of a decline in the 1970s.⁷⁸

⁷¹ See, e.g., John Monathan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 480-81 (1986).

⁷² See, e.g., John Calhoun, Note, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L.J. 484, 497 (2014) (reporting increase in percentage of Supreme Court decisions citing to dictionaries from 7% in the 1980s to approximately 22% in the 1990s and over 30% in the 2000s).

⁷³ See, e.g., Chester A. Newland, *Legal Periodicals and the United States Supreme Court*, 7 U. KAN. L. REV. 477, 481-82 (1959) (tracking citations to law review articles from 1924 through 1956).

⁷⁴ *Id.* at 478-79.

⁷⁵ *Id.* at 479.

⁷⁶ See Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399, 404 (2012) (calling the 1970s and 1980s the "apex" of the Court's citation practices, "when at least one Justice's opinion in approximately half of the Court's cases cited one or more law review articles"). In terms of frequency of citation, one study found the Court cited law review articles 963 times in the years 1981 to 1983; 767 times in the years 1991-1993; and 271 times in the years 1996-1998. Sirico, Jr., *supra* note 70, at 1011. The author reports that the citation counts derived only from memorandum opinions and excluded short citation forms. *Id.* at 1010 n.9. The Court cited law review articles 962 times in years 1971-1973 and 767 times in the years 1981-1983. Sirico, Jr. & Margulies, *supra* note 70, at 134.

⁷⁷ Newton, *supra* note 76, at 404 (reporting 37.1% rate of citation for years 2000 to 2010).

⁷⁸ Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court's Use of Legal Scholarship*, 106 NW. U. L. REV. 995, 998 (2012); see Sirico, Jr., *supra* note 70, at 1011 (reporting decline in frequency of Supreme Court citations to law review articles beginning in 1970s).

B. Federal Appellate Courts

Empirical scholars have called the federal circuit courts “the most policy-oriented tribunals and hence the most receptive to theory-oriented discussions,” after the Supreme Court of the United States and some state supreme courts.⁷⁹ Louis Sirico, Jr. and Beth Drew reviewed 100 opinions issued in 1989 by the United States Court of Appeals for the District of Columbia and each of the First through Eleventh Circuits, for a total of 1,200 opinions.⁸⁰ They found that approximately 18% of the opinions cited to law review articles, making these Appeals Courts less likely than the Supreme Court to cite this material.⁸¹ David Schwartz and Lee Petherbridge studied over 296,000 decisions from the Courts of Appeals from a fifty-nine-year period beginning in 1950.⁸² The authors found that the regional circuit courts cite law review articles in approximately 7.6% of all opinions on average,⁸³ ranging from 2.41% (the Eighth Circuit) to 14.34% (the Third Circuit).⁸⁴ Comparing the period 1950 to 1979 with the period 1980 to 2008, the authors found a greater rate of citation in the more recent opinions.⁸⁵ Schwartz and Petherbridge determined that “liberal” circuit courts were more likely than “conservative” courts to cite to law review articles,

⁷⁹ Some of the important studies of federal appellate courts include William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976); David L. Schwartz & Lee Petherbridge, *Legal Scholarship and the United States Court of Appeals for the Federal Circuit: An Empirical Study of a National Circuit*, 26 BERKELEY TECH. L.J. 1561 (2011) [hereinafter *Legal Scholarship and the United States Court of Appeals*]; David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345 (2011) [hereinafter *The Use of Legal Scholarship*]; Louis J. Sirico, Jr. & Beth A. Drew, *The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051 (1991).

⁸⁰ Sirico, Jr. & Drew, *supra* note 79, at 1052, 1052 n.4 (describing scope of study).

⁸¹ *Id.* at 1052-53 (“On average, 100 Supreme Court opinions will contain 138 citations [to legal periodicals], while 100 circuit court opinions will contain eighteen citations [to legal periodicals].”).

⁸² Schwartz & Petherbridge, *The Use of Legal Scholarship*, *supra* note 79, at 1351-52. It is not clear if the authors included the opinions of the Court of Appeals for the Federal Circuit in their data set.

⁸³ *Id.* at 1359.

⁸⁴ Schwartz & Petherbridge, *Legal Scholarship and the United States Court of Appeals*, *supra* note 79, at 1578 tbl.1 (showing each circuit’s rate of citation for the period 1990 to 2008 inclusive).

⁸⁵ Schwartz & Petherbridge, *The Use of Legal Scholarship*, *supra* note 79, at 1360, tbl.1 (reporting that 37% of all citations appeared in opinions issued in the years 1950 to 1979 and 63% all citations appeared in opinions issued in the years 1980-2008, suggesting an increase in the court’s citation to legal scholarship over time).

using Judicial Common Space scores to measure the courts' ideologies in any particular year.⁸⁶

In a separate study of the United States Court of Appeals for the Federal Circuit, Schwartz and Petherbridge report that the Federal Circuit cites to law review articles in approximately 5% of its opinions, well within the regional circuit courts' range of citation rates.⁸⁷ The percentage is higher in patent cases (approximately 6% of opinions cite to law review articles), but consistent with the regional circuit courts' overall range of citation rates.⁸⁸

Except for the study of law review citations, there has been minimal study of the types or frequency of other source citations by federal appellate courts. Schwartz and Petherbridge did not include citations to treatises and hornbooks in their studies, for example.⁸⁹ One study found citations to dictionaries in less than 10% of all opinions issued by the Courts of Appeals.⁹⁰

C. State Supreme Courts

After the United States Supreme Court, the courts that have received the most scholarly attention for their citation practices are state supreme courts. Researchers have measured the citations by the state's

⁸⁶ *Id.* at 1367-68. For a discussion of the Judicial Common Space Score variable, see Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 310 (2007) (explaining calculation).

⁸⁷ Schwartz & Petherbridge, *Legal Scholarship and the United States Court of Appeals*, *supra* note 79, at 1578 (noting that the Federal Circuit "uses legal scholarship in its opinions more frequently than the Eighth and Eleventh Circuits and less frequently than the Fifth Circuit").

⁸⁸ *See id.* at 1588. The reasons for the slight increase in the court's citation rates in patent cases are unclear, though.

⁸⁹ *See* Schwartz & Petherbridge, *The Use of Legal Scholarship*, *supra* note 79, at 1357-59.

⁹⁰ Calhoun, *supra* note 72, at 502 fig.3 (showing that federal appellate courts' use of dictionaries increased modestly from 2% of all cases in 1950 to 7% of all cases in 2010).

highest court in Arkansas,⁹¹ California,⁹² Kansas,⁹³ Maryland,⁹⁴ Montana,⁹⁵ Nebraska,⁹⁶ New York,⁹⁷ North Carolina,⁹⁸ and Ohio,⁹⁹ as well as the practices of several state appellate courts.¹⁰⁰ There have been at least two other studies that have compared state supreme court decisions across jurisdictions.¹⁰¹ For purposes of locating the study of probate courts in the context of prior scholarship, a discussion of the two comparative state supreme court projects and the study of New York's highest court are sufficiently instructive.

In 1981, historian Lawrence Friedman and his colleagues published the results of their study of the citation practices of state supreme courts

⁹¹ See, e.g., George Rose Smith, *The Current Opinions of the Supreme Court of Arkansas: A Study in Craftsmanship*, 1 ARK. L. REV. 89, 91 (1947) [hereinafter *Current Opinions*] (reporting 616 citations to Corpus Juris, Corpus Juris Secundum, Ruling Case Law and the American Jurisprudence legal encyclopedias for period 1943 to 1946). Based on the number of reported decisions in Volumes 206 through 209 of the Arkansas Reports, the Arkansas Supreme Court cited to an encyclopedia at a rate greater than once per opinion. See 206 Ark. (1943–44), 207 Ark. (1944–45), 208 Ark. (1945), and 209 Ark. (1945–46). By way of contrast, the United States Supreme Court made no citations to these encyclopedias during the same time period. See Smith, *Current Opinions*, *supra* note 91.

⁹² See, e.g., John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613, 613 (1954); John Henry Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381, 381 (1978).

⁹³ E.g., Custer, *supra* note 12, at 136.

⁹⁴ See, e.g., Reynolds, *Part II*, *supra* note 13, at 152–59.

⁹⁵ E.g., Fritz Snyder, *The Citation Practices of the Montana Supreme Court*, 57 MONT. L. REV. 453, 453 (1996).

⁹⁶ E.g., Richard G. Kopf, *Do Judges Read the Review? A Citation-Counting Study of the Nebraska Law Review and the Nebraska Supreme Court, 1972–1996*, 76 NEB. L. REV. 708, 708 (1997).

⁹⁷ E.g., Manz, *The Citation Practices*, *supra* note 2, at 121; Manz, *The Citation Practices: A Millennium Update*, *supra* note 5, at 1273.

⁹⁸ E.g., Richard A. Mann, *The North Carolina Supreme Court 1977: A Statistical Analysis*, 15 WAKE FOREST L. REV. 39, 43–45 (1979).

⁹⁹ E.g., Robert D. Archibald, *Stare Decisis and the Ohio Supreme Court*, 9 W. RESERVE L. REV. 23, 23 (1957) (studying opinions from years 1951 through 1954); James Leonard, *An Analysis of Citations to Authority in Ohio Appellate Decisions Published in 1990*, 86 LAW. LIBR. J. 129, 129 (1994).

¹⁰⁰ See *supra* note 13.

¹⁰¹ See Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 792–817 (1981) (studying citation practices for the period 1870–1970 of state supreme courts in Alabama, California, Idaho, Illinois, Kansas, Maine, Michigan, Minnesota, Nevada, New Jersey, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and West Virginia); Robert A. Kagan et al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 991–93 (1978) (studying citation practices by courts in sixteen states from 1940–1970).

of sixteen states over the hundred-year period 1870 to 1970.¹⁰² They reported that of all state supreme court opinions citing at least one case, the rate of citation of case law rose from 75.6% in the period 1870 to 1880 to 91.1% in the period 1960 to 1970.¹⁰³ Since 1900, state supreme courts have cited to in-state cases (at an average rate of 7.42 cases per opinion) more often than out-of-state cases (at an average rate of 3.2 cases per opinion), and more often than federal cases (at an average rate of 1.06 cases per opinion).¹⁰⁴

For the period 1940 to 1970, state supreme courts cited statutes in 67.2% of all opinions, and administrative regulations in 2.5% of all opinions.¹⁰⁵ For the period 1960 to 1970, the courts cited law review articles in 11.9% of opinions; and treatises, encyclopedias, restatements and similar sources in 39.2% of opinions.¹⁰⁶ This represents a substantial increase over law review citation rates in the period 1870 to 1880 (0.5% of cases cited law review articles) or 1930 to 1940 (2.3% of cases cited law review articles), to refer to just two comparative time periods.¹⁰⁷ The percentage of cases citing treatises, encyclopedias, restatements, and similar sources fluctuated less: 32.7% in the period 1870 to 1880; 42.2% in the period 1930 to 1940; and 39.2% in the period 1960 to 1970.¹⁰⁸

William Manz, a librarian at St. John's University School of Law, examined the citation practices of the New York Court of Appeals, that state's highest court, for the period 1850 to 1993.¹⁰⁹ He then updated that work with a similar study of that court for the two-year period beginning in 1999.¹¹⁰ His study excluded citations to constitutions, statutes and regulations, on the grounds these citations are "not an exercise of judicial discretion."¹¹¹ Manz focused on four categories of citations: (1) case law, both in-state and out-of-state; (2) treatises (including books, law dictionaries and digests); (3) "legal periodicals," meaning law reviews and bar journals; and (4) a miscellaneous category

¹⁰² See Friedman et al., *supra* note 101, at 797 (studying citations to law review articles by sixteen state supreme courts for period 1959 to 1962).

¹⁰³ *Id.* at 796.

¹⁰⁴ See *id.* at 797 (using data from 1900 to 1970 only).

¹⁰⁵ *Id.* at 798.

¹⁰⁶ Friedman et al., *supra* note 101, at 811.

¹⁰⁷ See *id.*

¹⁰⁸ *Id.*

¹⁰⁹ See Manz, *The Citation Practices*, *supra* note 2.

¹¹⁰ Manz, *The Citation Practices: A Millennium Update*, *supra* note 5.

¹¹¹ Manz, *The Citation Practices*, *supra* note 2, at 123.

comprised of legislative materials, newspapers, jury instructions, judicial ethics canons and non-legal sources.¹¹²

New York's highest court tends to cite its own opinions more often than the opinions of lower New York courts, and at a rate comparable to that found by Lawrence Friedman and colleagues in their study of sixteen state supreme courts.¹¹³ The rate of citation to opinions from other states has remained constant and relatively low.¹¹⁴ For the periods 1970 to 1993 and 1999 to 2000 inclusive, New York's highest court cited federal opinions in approximately 22% of all cases, a factor that Manz attributes to the increase in opinions issued in criminal cases.¹¹⁵

Consistent with the study by Friedman and his coauthors, Manz found no meaningful change in the court's rate of citation to legal treatises: "The 1993 rate of .58 citations per majority opinion is almost identical to the rate for the 1880 through 1900 sample years."¹¹⁶ Manz attributes a distinct rise in citations to legal periodicals, in contrast, to Judge Cardozo's presence on the bench, with the law review citation rate dipping after Cardozo's appointment to the Supreme Court of the United States and not recovering to Cardozo-era level of citations until 1970, reaching a per opinion high of 0.82 in 1980, dropping to 0.58 in 1993, 0.47 in 1999, and 0.39 in 2000.¹¹⁷

Additional noteworthy data from Manz's study include a relatively consistent number of citations to legal encyclopedias for the period 1890 to 1993 (a mean of 0.5 citations per opinion) and for 1999 and 2000 (0.1 mean citations per opinion).¹¹⁸ Citations to Restatements, American Law Reports, and McKinney's Practice Commentaries were

¹¹² *Id.* at 123-24. Manz used the same methodology for his study of opinions issued in 1999 and 2000. See Manz, *The Citation Practices: A Millennium Update*, *supra* note 5, at 1275.

¹¹³ Manz, *The Citation Practices*, *supra* note 2, at 127-28, 128 n.34 (reporting that majority of court's in-site citations have been to its own decisions in every year other than 1920, and comparing New York's in-state citation rates to those found by Professor Friedman); see also Manz, *The Citation Practices: A Millennium Update*, *supra* note 5, at 1301 tbls.4 & 5 (listing total case citations and total case citation percentages).

¹¹⁴ Manz, *The Citation Practices*, *supra* note 2, at 130-31.

¹¹⁵ *Id.* at 128-29, 154 tbl.9 (showing increase in criminal cases from 7.6% in 1940 to 38.4% in 1970 and then 32.1% in 1993); Manz, *The Citation Practices: A Millennium Update*, *supra* note 5, at 1301 tbls.4 & 5.

¹¹⁶ Manz, *The Citation Practices*, *supra* note 2, at 137.

¹¹⁷ *Id.* at 140, 158 tbl.15 (Citations to Secondary Authorities Per Majority Opinion); Manz, *The Citation Practices: A Millennium Update*, *supra* note 5, at 1306 tbl.13. (Citations to Secondary Authorities Per Majority Opinion).

¹¹⁸ Manz, *The Citation Practices*, *supra* note 2, at 158 tbl.15 (Citations to Secondary Authorities Per Majority Opinion); Manz, *The Citation Practices: A Millennium Update*, *supra* note 5, at 1306 tbl.13 (Citations to Secondary Authorities Per Majority Opinion).

de minimis as well (fewer than 0.1 citations per opinion on average for reported years).¹¹⁹ Sources in Manz's "miscellaneous" category — legislative materials, newspapers, jury instructions, judicial ethics canons and non-legal sources — were not cited at all in 1900 and at an average rate of 1.13 per opinion in 1990.¹²⁰ For the period 1850 through 1993, the average number of "miscellaneous" citations per opinion was 0.21.¹²¹ The average number of "miscellaneous" citations were 1.24 in 1999 and 0.87 in 2000.¹²²

D. Specialized Courts or Cases

A limited number of empirical studies focus on courts' citation patterns in decisions relating to business law,¹²³ bankruptcy law,¹²⁴ and intellectual property law.¹²⁵ These investigations are relevant to the study of probate courts insofar as they explore how, if at all, a court's citation practices may differ depending on the subject matter.

Researchers Michelle Harner and Jason Cantone randomly selected 200 business law opinions issued by Delaware state courts during the period from 1997 through 2007.¹²⁶ They coded the cases for their use of nine possible sources of citations: (1) general subject-matter law reviews or law journals affiliated with a university;¹²⁷ (2) specialized law reviews or journals affiliated with a university;¹²⁸ (3) legal periodicals

¹¹⁹ Manz, *The Citation Practices*, *supra* note 2, at 158 tbl.15 (Citations to Secondary Authorities Per Majority Opinion); Manz, *The Citation Practices: A Millennium Update*, *supra* note 5, at 1306 tbl.13 (Citations to Secondary Authorities Per Majority Opinion).

¹²⁰ Manz, *The Citation Practices*, *supra* note 2, at 158 tbl.15 (Citations to Secondary Authorities Per Majority Opinion).

¹²¹ *Id.*

¹²² Manz, *The Citation Practice: A Millennium Update*, *supra* note 5, at 1306 tbl.13.

¹²³ See, e.g., Michelle M. Harner & Jason A. Cantone, *Is Legal Scholarship Out of Touch? An Empirical Analysis of the Use of Scholarship in Business Law Cases*, 19 U. MIAMI BUS. L. REV. 1, 3 (2011).

¹²⁴ See, e.g., Robert M. Lawless & Ira David, *The General Role Played by Specialty Law Journals: Empirical Evidence from Bankruptcy Scholarship*, 80 AM. BANKR. L.J. 523, 523 (2006).

¹²⁵ See, e.g., Craig Allen Nard, *Toward a Cautious Approach to Obeisance: The Role of Scholarship in Federal Circuit Patent Law Jurisprudence*, 39 HOUS. L. REV. 667, 668 (2002); Lee Petherbridge & David L. Schwartz, *The End of an Epithet? An Exploration of the Use of Legal Scholarship in Intellectual Property Decisions*, 50 HOUS. L. REV. 523, 524 (2012) [hereinafter *Epithet*]; Derek Simpson & Lee Petherbridge, *An Empirical Study of the Use of Legal Scholarship in Supreme Court Trademark Jurisprudence*, 35 CARDOZO L. REV. 93, 931 (2014).

¹²⁶ Harner & Cantone, *supra* note 123, at 5.

¹²⁷ *Id.* at 12, 39-43.

¹²⁸ *Id.*

or journals not affiliated with a university;¹²⁹ (4) business journals or periodicals not affiliated with a university;¹³⁰ (5) treatises;¹³¹ (6) textbooks;¹³² (7) educational materials such as continuing legal education course materials;¹³³ (8) working papers posted on SSRN with no forthcoming publication information;¹³⁴ and (9) restatements.¹³⁵ They found that 46% of the opinions cited at least one source pulled from any of these nine categories.¹³⁶ Thirteen percent of opinions cited to law review articles, whether from a general law review or a specialty law review, with no apparent change in citation patters over the ten-year period.¹³⁷

Of all the publications cited in the sample pool, 20% were from general subject-matter law reviews or law journals affiliated with a university;¹³⁸ 7% were from specialized law reviews or journals affiliated with a university;¹³⁹ 1% from legal periodicals or journals not affiliated with a university;¹⁴⁰ 42% from treatises;¹⁴¹ 10% from textbooks;¹⁴² 7% from educational materials such as continuing legal education course materials;¹⁴³ 0.5% from working papers on SSRN;¹⁴⁴ and 13% from a Restatement.¹⁴⁵

In contrast to the study of business law opinions, the study of the use of scholarship in bankruptcy opinions proceeds from “bottom up” —

¹²⁹ *Id.*

¹³⁰ *Id.* at 12.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* See generally *What is the SSRN? Frequently Asked Questions*, SSRN, https://www.ssrn.com/index.cfm/en/ssrn-faq/#what_is (“SSRN is an open-access online preprint community providing valuable services to leading academic schools and government institutions.”).

¹³⁵ Harner & Cantone, *supra* note 123, at 12.

¹³⁶ *Id.* at 15.

¹³⁷ *Id.* at 18. Neither the identity of the issuing court nor the identity of the parties had any impact on citation practices. *Id.* at 18-19. Length of the opinion and authorship by specific judges did impact citation practices. *Id.* at 19 (finding more frequent citations to scholarship in opinions that were long opinions and opinions written by Vice Chancellor Leo Strine).

¹³⁸ *Id.* at 26.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

the identity of source being cited — not “top down” — the court doing the citing.¹⁴⁶ Robert Lawless and Ira David found that opinions in bankruptcy cases generated citations to 1,177 different articles (other than student notes) that were published in years 1980 through 2000 inclusive.¹⁴⁷ Approximately 34% of the cited articles came from general law reviews; 66% came from specialty journals.¹⁴⁸ The authors argue that this data suggests that specialty journals “play a different role than do the general law reviews, perhaps filling some of the lamented disjunction between the academy and the practicing legal community, including judges.”¹⁴⁹

In 2002, Craig Nard published the results of his study of the use of legal scholarship in patent, trademark, and copyright opinions, finding that in trademark and copyright decisions, the Second and Ninth Circuit “cite scholarship roughly four times as often” as the Federal Circuit in patent cases.¹⁵⁰ Nard suggested that this might be explained by the fact that the Second and Ninth Circuit judges were more likely than Federal Circuit judges “to come from a culture [i.e., the academy] that is more receptive to academic legal scholarship.”¹⁵¹ But he also acknowledged that the Federal Circuit may be more comfortable with patent cases than the generalist regional circuit courts are with copyright and trademark cases.¹⁵² Lee Petherbridge and David Schwartz followed with an examination of how Nard’s article had been used to further an inaccurate stereotype that the Federal Circuit is somehow insular or uninterested in policy matters.¹⁵³

To provide a comparative benchmark, Simpson and Petherbridge examined the opinions of the Supreme Court, the only court that hears cases in all three substantive legal areas: patent, copyright, and trademark.¹⁵⁴ In their study of the Supreme Court’s use of legal scholarship from 1949 to 2011, Simpson and Petherbridge found that the Court cites legal scholarship in 58.82% of trademark cases

¹⁴⁶ See Lawless & David, *supra* note 124, at 523-24 (examining frequency of citation to general law reviews or journals versus specialized law reviews or journals, in the context of bankruptcy decisions).

¹⁴⁷ See *id.* at 530-31.

¹⁴⁸ See *id.*

¹⁴⁹ *Id.* at 524.

¹⁵⁰ Nard, *supra* note 125, at 682-83.

¹⁵¹ *Id.* at 682-83.

¹⁵² *Id.* at 683.

¹⁵³ Petherbridge & Schwartz, *Epithet*, *supra* note 125, at 526-30.

¹⁵⁴ *Id.* at 534.

(compared with 32.25% of cases other than trademark cases).¹⁵⁵ They hypothesize that the higher rate of citation may be attributable to the “esoteric” nature of trademark law, or the particular usefulness of trademark scholarship, or both.¹⁵⁶

Existing studies of courts’ citation practices reveal great variation in time periods and types of citations studied, sample sizes and methodologies. For that reason, it is difficult to make conclusive comparisons. Yet even allowing for the differences among the studies, it is possible to identify key ways that the citation practices of the New York County Surrogate’s Court appear to depart from those other courts. The next Part attempts to identify the most salient differences.

III. LOW CITATION RATES BY THE NEW YORK COUNTY SURROGATE’S COURT: CONTEXT, CAUSES AND CONSEQUENCES

A. Context

Placing the results of the study of the citation practices of the New York County Surrogate’s Court in the context of prior studies of other courts, one overarching pattern emerges. The New York County Surrogate’s Court cites less frequently than any other court to every studied source.¹⁵⁷ Although the years and categories of citations tracked in the various empirical studies of courts do not match precisely, it appears that the New York County Surrogate’s Court cites fewer sources and cites them less frequently than any other court for which data is available. Table 3 provides a quick comparison of the various courts’ citation practices.

¹⁵⁵ Simpson & Petherbridge, *supra* note 125, at 950.

¹⁵⁶ *See id.* at 976.

¹⁵⁷ This data might be more valuable if it were possible to account for the length of opinions across courts studied. No effort was made in this case to gather data about the length of the decrees and orders of the Surrogate’s Court. Search engine limitations mean that it is not possible to electronically retrieve information about page length or word count. *See supra* Part I.C (discussing structural limitations on electronic search).

Table 3. Comparison of Empirical Studies of Court Citation Practices: Average Percentage of Opinions Citing Specified Source

	Supreme Court of the United States	Federal Circuit Courts	State Supreme Courts	NY Court of Appeals	Other Specialty Courts	New York County Surrogate's Court 2017-2018 ¹⁵⁸
Cases	no data	no data	75.6% to 91.1% ¹⁵⁹	"Comparable" to state supreme courts ¹⁶⁰	no data	<36%
Constitutions	no data	no data	no data	no data	no data	<1%
Statutes	no data	no data	67.2% ¹⁶¹	no data	no data	<53%
Dictionaries	5% to >30% ¹⁶²	2 to 7% ¹⁶³	no data	no data	no data	0
Treatises, ALR, CJS, encyclopedias	0 ¹⁶⁴	no data	Up to 47.2% ¹⁶⁵	0.58 per opinion ¹⁶⁶	no data	< 2%

¹⁵⁸ See *infra* Appendices 1 and 2; *supra* Table 2.

¹⁵⁹ More precisely, the range is from 75.6% (for cases in years 1870-1880) to 91.1% (for cases in the years 1960-1970). See *supra* note 103 and accompanying text (providing rate of citation by state supreme courts to case law).

¹⁶⁰ See *supra* notes 112-113 and accompanying text (providing rate of citation by New York Court of Appeals to case law).

¹⁶¹ The figure is for years 1940 to 1970. See *supra* note 104 and accompanying text.

¹⁶² More precisely, the range is from 5% (in 1950s) to greater than 30% (in 1980s). See Calhoun, *supra* note 72, at 497 fig.1 (providing rate of citation by Supreme Court to dictionaries).

¹⁶³ The range is from 2% (low) in 1950 to 7% (high) in 2010. *Id.* at 502 fig.3 (reporting rate of citation by Circuit Court to dictionaries).

¹⁶⁴ See Smith, *Current Opinions*, *supra* note 91, at 91 (reporting no citations by Supreme Court to encyclopedias for years 1943 to 1946).

¹⁶⁵ Friedman et al., *supra* note 101, at 811 (reporting rates of citation by state supreme courts in representative period from 1870 through 1970).

¹⁶⁶ The rate of citation per opinion was approximately 0.58 in period 1880-1900 and was also at that level in 1993. See *supra* note 116 and accompanying text (providing the rate of citation for New York Court of Appeals to legal treatises). Manz has a separate category for Restatements, the American Law Reports and McKinney's Practice Commentaries. See Manz, *The Citation Practices*, *supra* note 2, at 142-43; Manz, *The Citation Practices: A Millennium Update*, *supra* note 5, at 1287.

	Supreme Court of the United States	Federal Circuit Courts	State Supreme Courts	NY Court of Appeals	Other Specialty Courts	New York County Surrogate's Court 2017-2018 ¹⁵⁸
Law Review Articles	17% to 37.1% ¹⁶⁷	7.6% to 18% ¹⁶⁸	11.9% ¹⁶⁹	0.82-0.39 per opinion ¹⁷⁰	13.0% to 58.2% ¹⁷¹	<1%

B. Causes

Judges of the New York Surrogate's Court cite fewer sources less often than other courts with studied citation practices.¹⁷² Possible explanations cluster in three major areas: factors endogenous to the workings of the probate court system;¹⁷³ factors exogenous to the Surrogate's Court, but related to the legal profession;¹⁷⁴ or potential subjective perceptions of the judges.¹⁷⁵

1. Endogenous Factors

Endogenous influences on the court's paucity of citations include the large size of the court's docket. The sheer quantity of reported decrees

¹⁶⁷ See *supra* note 76 and accompanying text (reporting the results of study of Supreme Court's citation of law review articles for ten-year period beginning 2001); *supra* note 73 and accompanying text (providing the rate of citation by Supreme Court to law review articles for five-year period beginning October 1939).

¹⁶⁸ See *supra* notes 81–82 and accompanying text (reporting results of study of courts of appeals for fifty-nine-year period beginning in 1950); *supra* note 81 and accompanying text (providing the rate of citation by the United States Court of Appeals for the District Columbia and the enumerated regional circuits in opinions issued in 1989).

¹⁶⁹ The figure is for years 1960-1970. See *supra* note 106 and accompanying text (providing rate of citation by state supreme courts to law review articles).

¹⁷⁰ See *supra* note 117 and accompanying text (providing the rate of citation for New York Court of Appeals to law review articles).

¹⁷¹ The figure of 13.0% is for Delaware business-law opinions for years 1997-2007. See *supra* note 137 and accompanying text (providing rate of citation by Delaware business-law opinions to law review articles for years 1998 to 2007). The figure of 58.82% is for the Supreme Court in trademark cases for years 1949-2011. See *supra* note 135 and accompanying text (providing rate of citation by Supreme Court patent opinions to law review articles for years 1949 to 2011).

¹⁷² See *supra* Part III.A.

¹⁷³ See *infra* Part III.B.1.

¹⁷⁴ See *infra* Part III.B.2.

¹⁷⁵ See *infra* Part III.B.3. Because I made no attempt to interview the judges, all statements about judicial perceptions are speculative.

and opinions issued by the New York County Surrogate's Court — over 1380 in the two-year period 2017 to 2018 inclusive¹⁷⁶ — means that judges likely do not have the luxury of issuing a fully-cited explanation of each decision they make.¹⁷⁷ At the same time, however, there is no reason that a probate judge cannot make use of well-developed templates, replete with citations, that can serve as the basis of substantive decisions, even in so-called “simple” cases.

Note, also, that staffing limitations may impact the amount of time that a judge can devote to each decree or order. In the New York County Surrogate's Court, for example, there is a Chief Clerk and a Deputy Chief Clerk.¹⁷⁸ Each of the two Surrogates also has a law secretary who may (or may not) hold a law degree.¹⁷⁹ The clerks and law secretaries do not necessarily have experience with trusts and estates matters.¹⁸⁰

¹⁷⁶ See *supra* note 48 and accompanying text.

¹⁷⁷ By way of comparison, consider that during the same time period, the probate court in Albany County, New York, issued twenty-eight reported decrees and opinions. See *Search Results from Albany County's Probate Court*, LEXIS ADVANCE, <https://advance.lexis.com/firsttime?crd=0f22b4cd-6ab2-44e9-9bf7-8685f8d6d031> (last visited Jan. 30, 2020) [<https://perma.cc/LXC6-F5U9>] (expand “Explore Content” tab; select “Cases” hyperlink; select “All Trial Court Orders” hyperlink; select “NY Lower Courts – Trial Orders” hyperlink; enter in search field “cite(NYLJ) and (Albany County)”; filter results by “Timeline” and enter “01/01/2017 – 12/31/2018”; filter results by “Courts” and select “N.Y. Sur. Ct.”). Albany County is the fourteenth most populous of New York State's sixty-one counties. See *Annual Population Estimates for New York State and Counties: Beginning 1970*, NEW YORK STATE, <https://data.ny.gov/Government-Finance/Annual-Population-Estimates-for-New-York-State-and/krt9-ym2k> (last visited April 18, 2020). Because there is no academic study of the citation practices of the Albany County Surrogate's Court or any other probate court, it is not possible to say with certainty that a less burdened docket leads to more frequent citations in decrees and opinions.

¹⁷⁸ See *Surrogate's Court, New York County: Overview*, N.Y. CTS., <http://ww2.nycourts.gov/courts/ljd/surrogates/index.shtml> (last visited Jan. 27, 2020) [<https://perma.cc/KEF6-RNAC>] (listing staff of Surrogate's Court, New York County).

¹⁷⁹ See, e.g., *New York State Surrogate's Court — Richmond*, GREEN BOOK ONLINE, <http://a856-gbol.nyc.gov/GBOLWebsite/GreenBook/Details?orgId=342> (last visited Jan. 20, 2020) [<https://perma.cc/ZDF2-8B59>] (listing Eva-Marie Cusack as Law Secretary to Surrogate Mathew J. Titone); Eva-Marie Cusack, LAWYERS, <https://www.lawyers.com/staten-island/new-york/eva-marie-cusack-2056778-a/> (last visited Jan. 27, 2020) [<https://perma.cc/33GU-R3FL>] (listing Ms. Cusack as a 2000 graduate of New York Law School); see also *Secretary to Judge (Part-Time) Job Postings in Careers*, N.Y. CTS., <http://www.nycourts.gov/legacyPDFs/careers/statewide/23001.pdf> (last visited Jan. 27, 2020) [<https://perma.cc/L7PM-P6QW>] (listing as minimum qualifications typing skills and a high school diploma or two years of experience).

¹⁸⁰ See, e.g., *Profile of Diana Sanabria, Chief Clerk at New York County Surrogate's Court*, LINKEDIN, <https://www.linkedin.com/in/diana-sanabria-2076b742/> (last visited Jan. 27, 2020) [<https://perma.cc/C35D-TZZ7>] (showing variety of prior professional experience outside the field of trusts and estates); *Profile of Jana Cohn, Deputy Chief*

They may (or may not) continue their employment in the New York County Surrogate's Court once the Surrogate's fourteen-year term concludes.¹⁸¹ In other words, the clerks and law secretaries are not necessarily career trusts and estates specialists. In any event, recent law school graduates do not typically hold positions as clerks in the Surrogate's Court, as they might in a federal judge's chambers or the chambers of a state supreme court judge. Given the clerks' potential lack of experience with trusts and estates matters and lack of recent day-to-day exposure to faculty members doing legal scholarship, it may be that the clerks are not aware of the most recent work in the field and do not bring it to the attention of the judge.

Finally, the Surrogates themselves may or may not have a deep background in the field of trusts and estates. Judge Mella, for example, worked as a "judicial assistant" in the Surrogate's Court of King's County, but prior to her appointment in 2012 as the New York County Surrogate, Judge Mella spent the majority of her career focused on other areas of the law.¹⁸² Judge Nora Anderson worked as a Deputy Clerk and Chief Clerk for the New York County Surrogate's Court, and then for nine years in private practice in the trusts and estates field, before being elected to the New York County Surrogate's Court in 2009.¹⁸³ Neither Judge Mella nor Judge Anderson comes from an academic background

Clerk at New York County Surrogate's Court, LINKEDIN, <https://www.linkedin.com/in/jana-cohn-892a7552/> (showing three years of experience as a "Private Accounts Representative" but no other prior trusts and estates-related experience).

¹⁸¹ See, e.g., *Profile of Joseph M. Accetta, Court Attorney/Referee at Supreme Court — Westchester County*, LINKEDIN, <https://www.linkedin.com/in/joseph-m-accetta-b48a10b/> (last visited Jan. 27, 2020) [<https://perma.cc/53FJ-82G3>] (showing former Chief Law Clerk for Westchester (N.Y.) Surrogate's Court having taken a new position in New York State Court System); Email from Joseph M. Accetta, former Chief Clerk of the Surrogate's Court, Westchester County, to author (Feb. 21, 2020, 02:20 AM) (on file with author).

¹⁸² Judge Mella was a court attorney or law clerk in various roles before being appointed as a Criminal Court Judge in 2006. She also served as a law clerk for Hon. Margarita Torres, King's County Surrogate's Court, for a short period. See Profile, *Hon. Rita Mella* in *Judicial Directory*, N.Y. CTS., <https://tinyurl.com/yyetzbuu> (last visited Jan. 27, 2020) [<https://perma.cc/AVN4-XR6D>]; *Rita Mella* in *CUNY Dominican Studies Institute*, CITY C. N.Y., <https://www.cuny.edu/dsi/dominican-blue-book-rita-mella> (last visited Jan. 27, 2020) [<https://perma.cc/8LVW-YK4E>] (profiling Judge Rita Mella and providing career details). Judge Mella's term ends in 2027. *Id.*

¹⁸³ Judge Anderson was an attorney with the Legal Aid Society for four years, served as a law clerk to Justice Albert P. Williams of the New York State Supreme Court (the trial court), and worked at a private firm for three years. Judge Anderson's term expires in 2023. See *Hon. Nora Anderson*, in *Judicial Directory*, N.Y. CTS., <https://tinyurl.com/yxq4jmka> (last visited Jan. 27, 2020) [<https://perma.cc/978N-VELL>] (profiling the education and career of Judge Anderson).

as a faculty member. Whether any Surrogate's background has any impact on citation practices is far from obvious based on this study.¹⁸⁴

2. Exogenous Factors

Factors exogenous to the Surrogate's Court that may impact citation type and frequency include the citation practices of lawyers and the quantity of legal scholarship, broadly defined, that is available to the court. Consider first that if lawyers do not cite to authorities in briefs or other papers submitted to the court, then it is far less likely that a judge will cite the authority in a decree or order.¹⁸⁵ It may also be relevant that the entire body of trusts and estates scholarship — defined in the broadest way possible to include any source other than constitutions, statutes or cases — is smaller than in fields like criminal law or property, for example.¹⁸⁶ This might explain why a probate court might cite scholarship less frequently than, for example, a court dealing with criminal law issues. But it cannot fully explain the Surrogate Court's failure to cite law review articles (including student notes) in less than a fraction of 1% of all 1,382 decrees and orders issued over a two-year period.

¹⁸⁴ For the two-year period covered by this study, the number of Selected Decrees and Orders issued by Judge Mella (n=249) exceeded the number issued by Judge Anderson (n=132), but no investigation was made into whether the judges cited statutes and cases with approximately the same frequency. See *supra* Table 1. Declining to pursue this investigation rests in part on the subjective nature of the determination of what constitute "Selected Decrees and Orders." See *supra* Table 1 (definition of "Selected Decrees and Orders").

¹⁸⁵ See Dolores K. Sloviter, *In Praise of Law Reviews*, 75 TEMP. L. REV. 7, 9-10 (2002) ("Another reason for the lack of frequent citation of articles in appellate opinions is the fact that they are rarely cited by the lawyers who write appellate briefs."). Although Judge Sloviter was speaking from her position as a circuit judge of the United States Court of Appeals for the Third Circuit, lawyers practicing before the Surrogate's Court or any probate court may be called upon to submit memoranda of law or briefs (albeit with different frequency), so the explanation should apply to attorneys in probate courts as well. See *id.*

¹⁸⁶ Compare *Wills, Trusts & Estates eJournal, Legal Scholarship Network Subject Matter eJournals*, SSRN, <https://www.ssrn.com/link/wills-trusts-estates.html> (last visited Oct. 1, 2019) [<https://perma.cc/T96A-63JJ>] (listing 2,458 papers dated from September 2, 1998 in repository as of October 1, 2019), with *Criminal Law eJournal*, SSRN, <https://www.ssrn.com/link/criminal-law.html> (last visited Oct. 1, 2019) [<https://perma.cc/2BV4-8QDF>] (listing 6,443 papers dated September 26, 1996 to October 1, 2019), with *Property, Land Use & Real Estate Law eJournal*, SSRN, <https://www.ssrn.com/link/property-real-estate-law.html> (last visited Oct. 1, 2019) [<https://perma.cc/AP3R-8V6V>] (listing 8,343 papers dated from April 2014 to October 1, 2019).

3. Subjective Judicial Perceptions

The standard explanation for the failure by any judge to cite legal scholarship is lack of relevance.¹⁸⁷ In the case of Judge Mella and Judge Anderson, however, there is no evidence that either has made public statements to that effect in speeches or published writings, based on a review of legal news sources. Also, full-time academics and practitioners alike regularly contribute scholarship in the trusts and estates area.¹⁸⁸ Even if one were to dismiss (unfairly) academic articles as out-of-touch, the written work of practicing attorneys likely does address issues relevant to contemporary practice and thus to judges, then.¹⁸⁹

Another possible explanation for the failure to cite many (or any) sources is that probate judges might perceive themselves as engaging in a mechanical application of a static field of law to routine legal problems.¹⁹⁰ In other words, the judges do not engage in the “prestige” practice of citation that one associates with the Supreme Court, federal circuit courts or even state supreme courts, because they do not perceive themselves to be deciding “prestige” cases. Probate judges may not think of themselves as building a body of precedent on which future decisions may rest. They may believe that detailed decrees or orders are not in the public interest, because it would slow progress through the docket. These are merely speculations, however. To better understand how probate judges understand their roles, qualitative research is necessary.

C. Consequences

As Lawrence Friedman and his coauthors have explained, judges typically cite to legal authorities in order to establish their legitimacy in

¹⁸⁷ See Sloviter, *supra* note 185, at 9 (claiming that law review articles do not focus on relevant issues).

¹⁸⁸ See, e.g., *supra* note 36 (describing the ACTEC Law Journal).

¹⁸⁹ See, e.g., Nichole M. Paschoal, *The Problem of Replacement Property in the Law of Ademption*, 44 ACTEC L.J. 183, 184-85 (2019) (article written by practicing attorney about practical problems when decedent no longer owns property specifically bequeathed in his will).

¹⁹⁰ Franklin Delano Roosevelt apparently found his firm’s trusts and estates practice to be “boring.” See Joseph C. Sweeney, *Franklin Delano Roosevelt as Lord of the Admiralty 1913-1920*, J. MAR. L. & COM. 403, 410 (2017). At least some law professors perceive that law students approach the Trusts & Estates course with low (or no) knowledge of the complexity of the course. See Jerome Borison et al., *Contemporary Trusts and Estates — An Experimental Approach*, 58 ST. LOUIS U. L.J. 727, 729 (2014) (“Students often expect that trusts and estates classes will involve boring cases detailing the formalities attendant to will execution on behalf of wealthy, entirely uninteresting, dead people.”).

a democratic society.¹⁹¹ That is, unless judges act in a principled manner and justify their decisions by reference to law, their authority necessarily rests on a precarious foundation.¹⁹² Although the New York County Surrogate's Court decrees and orders are not entirely devoid of legal authority, the fact that the judges cite the Estates, Powers & Trusts Law in less than 20% of all decrees and orders, the Surrogate's Court Procedure Act in less than 34% of all decrees and orders, and its own case law in less than 24% of all decrees and orders should give rise to concern if the low number of citations negatively impacts the perceived authority of the court.¹⁹³ It is not clear, for example, what impact, if any, the citation pattern has on the parties themselves or their attorneys. Indeed, some parties, attorneys, or even judges may consider trusts and estates practice to be routine or even mechanical, and so the lack of citations might seem efficient rather than negative.

Consider, however, a broader perspective on the function that citations serve in a legal option. According to former U.S. Solicitor General Archibald Cox, citations express the court's legitimacy: "the legitimacy of judicial decrees depends . . . in considerable part on public confidence that the judges are predominantly engaged not in making personal political judgments but in applying a body of law."¹⁹⁴ Citations thus also signal an adherence to the principle of stare decisis as a matter of fulfilling the judicial role and establishing authority: According to Richard Posner and William Landes, a judge "is likely to follow precedent to some extent, for if he did not the practice of decision according to precedent . . . would be undermined and the precedential significance of his own decisions thereby reduced."¹⁹⁵

¹⁹¹ See Friedman et al., *supra* note 101, at 793-94 (taking a broad approach to what "law" is, including the state and federal constitutions, statutes, administrative regulations, case law, customary practices, and national interest).

¹⁹² *Id.* at 793-94 (describing the function of legal citations in judicial opinions).

¹⁹³ See *infra* Appendix 1. In terms of Selected Decrees and Orders, see *supra* Table 1, the percentage of decrees and orders citing the Estates, Powers & Trusts Law is less than 37%; the Surrogate's Court Procedure Act is less than 28%; the decrees and orders of the New York County Surrogate's Court itself is less than 36%. See *infra* Appendix 2; see also Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 491 (describing citations by the Supreme Court as "operate as an important influence and constraint on Court decisions, because of a need for protecting the Court's political legitimacy or simply concern for the principles of stare decisis").

¹⁹⁴ ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 362 (1987).

¹⁹⁵ William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 273 (1976); see also Sophie Harnay & Alain Marciano, *Judicial Conformity Versus Dissidence: An Economic Analysis of Judicial*

Even if many probate cases are not complicated legally, and even if the parties and their attorneys are not troubled by the absence of citations, the Surrogate's Court's failure to engage in a robust citation practice is noteworthy. When the court does not cite to the reasons for its decision, the court denies the parties an explanation for the decision reached. Through the absence of citations, the court might be viewed by some as implying that probate proceedings are not important, and that the cases do not raise questions of justice and fairness. To be sure, contested estates and trusts involve family members and money — two elements that, when combined, are not always conducive to rational thinking by the parties to the proceedings. An amply cited judicial decree or order could bring orderliness and reason to emotionally charged legal matters. Similarly, the Surrogate's Court conveys respect for the parties through its citation practices. The New York County Surrogate's Court issues hundreds of decrees and orders every year in cases involving celebrities¹⁹⁶ as well as everyday working people. Regardless of the fame or wealth (or lack of either), decedents leave behind family members and other loved ones who deserve to have their matters handled fairly.¹⁹⁷ Failure of the Surrogate's Court to cite, at a minimum, to statutes and cases may diminish public perception of fairness (and possibly confidence in the judiciary). Citation to authorities is the ultimate signal that “judges follow precedent because of their beliefs about its value in ensuring societal stability and legitimacy for the judicial branch.”¹⁹⁸ As a matter of maintaining authority and legitimacy, probate judges should cite to more authorities more often than the New York County Surrogate's Court does. The decisions of a probate judge, no less than any other judge, should be backed by authority that the judge reveals to the public.

Precedent, 23 INT'L REV. L. & ECON. 405, 408-9 (2003) (illustrating that adherence to stare decisis is way for judge to preserve or increase standing with other judges).

¹⁹⁶ See, e.g., David Cay Johnston, *Mrs. Onassis's Estate Worth Less Than Estimated*, N.Y. TIMES (Dec. 21, 1996) <https://www.nytimes.com/1996/12/21/nyregion/mrs-onassis-s-estate-worth-less-than-estimated.html> [<https://perma.cc/J55D-SNN6>] (reporting on will of Jacqueline Kennedy Onassis, probated in New York County Surrogate's Court); Matthew Purdy, *Money Doris Duke Meant for Charity is Making a Lot of Other People Rich*, N.Y. TIMES (Jan. 24, 1997), <https://www.nytimes.com/1997/01/24/nyregion/money-doris-duke-meant-for-charity-is-making-a-lot-of-other-people-rich.html> [<https://perma.cc/4ZVA-HWSD>] (detailing litigation in New York County Surrogate's Court over Miss Duke's \$1.2 billion estate).

¹⁹⁷ See *supra* notes 39–41 and accompanying text (providing aggregate number of cases handled each year by Surrogate's Courts in New York City).

¹⁹⁸ Madeline Fleisher, *Judicial Decision Making Under the Microscope: Moving Beyond Politics Versus Precedent*, 60 RUTGERS L. REV. 919, 955 (2008).

Lawrence Friedman has framed the style (including the citations) of a judicial opinion “as good an indicator as we have of what counts as sound legal reasoning for any given area.”¹⁹⁹ To be sure, in any area of the law, a bare-bones decision, decree, or order is not necessarily unsound, but without citation to applicable legal authority, it has limited future utility. In other words, “[c]itation patterns . . . set forth the authority on which a case rests.”²⁰⁰ For a decree or order to be useful beyond the case to which it pertains, it must cite applicable authorities and explain its reasoning. As William Manz explains, “[t]he application of an opinion to a legal issue establishes its precedential value and, therefore, its influence on future decisions. Citation of a treatise or an article, in turn, enhances its persuasiveness and increases the possibility that it will find future favor in the courts. Utilization of a novel source of authority may legitimize its use in future opinions and appellate briefs.”²⁰¹ A decree or order that is replete with citations, then, will be more useful to the court in the future — and that is true regardless of whether the court is the New York County Surrogate’s Court or the Supreme Court of the United States. For a probate judge to cite authority sparingly may negatively impact not only public perception of the judicial system, but also the future work of the court itself.

Consider further that through the citation of different sources, including social science or material other than caselaw and statutes, a judge can help shift public thinking about the value of these non-legal authorities in understanding legal issues.²⁰² When probate judges largely ignore these sources, as reflected in this study of decrees and orders of the New York County Surrogate’s Court in the years 2017 and 2018, a perception might arise that the judges do not wish to engage with larger legal questions, the possibility of establishing reliable

¹⁹⁹ Friedman et al., *supra* note 101, at 773.

²⁰⁰ *Id.* at 794.

²⁰¹ Manz, *The Citation Practices*, *supra* note 2, at 121.

²⁰² For one clear example of a decision influenced by a non-traditional legal source, see Mary Louise Fellows, *Rewritten Opinion in Welch v. Helvering*, in *FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS 103-120* (Bridget J. Crawford & Anthony C. Infanti eds., 2017) (citing Mary Shelley’s gothic novel *Frankenstein* as a resource in helping understand the difference between the private and public spheres, and in turn, the distinction between non-deductible personal expenditures and tax-deductible business expenses). Although the feminist judgments are “shadow opinions” and not actual court opinions, there is no reason that a court could not cite to literature to make its point. See Bridget J. Crawford & Anthony Infanti, *Introduction to the FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS Project*, in *FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS 3-21*, at 6-10 (explaining goals methodology and definition of a “feminist judgment”).

precedent, or broadening the scope of what “counts” as authority in a judicial opinion.

In tracking what a judge cites, one seeks to understand how the judge thinks about the judicial role.²⁰³ For a probate judge to cite to few (or no) legal authorities may convey the (unintended) impression of lack of engagement, leading to suspicions that the judge is “biding time” before being appointed to a higher court, or perfunctorily processing cases through the system, or both.²⁰⁴ Or, the judge may conceive of her primary job as processing cases, even if doing so means the judge will cite no authorities at all. If a probate judge believes her position to be so limited, perhaps by the specialized jurisdiction of the court, the judge may not appreciate the complexity of the judicial role or the substantive law of trusts and estates.

The language of law is always imperfect. Thus a judge who must interpret and apply the law necessarily engages with a particular methodology and perspective, even if neither is apparent.²⁰⁵ When a probate judge does not reveal “all his ingredients,” as Justice Cardozo described judicial influences,²⁰⁶ or at least a significant number of them, the judge risks conveying a disinterest in achieving justice in property matters and lack of engagement that negatively impacts public respect for the judiciary. Whether that risk is outweighed by judicial economy in citation practices is not clear.

IV. HOW PROBATE COURTS CAN INCREASE CITATIONS

There is a strong argument that all courts, including probate courts, should cite to applicable authority frequently and broadly as a matter of furthering the best interests of a democratic society and emphasizing

²⁰³ Friedman et al., *supra* note 101, at 794 (explaining that a judge’s citation patterns “reflect conceptions of role. Changes in these patterns may be barometers of changes in the way judges think about their roles and about the sources and limits of their power. These patterns may be clues, too, to the role of courts in society”).

²⁰⁴ In New York City, Surrogate’s Court judges are elected for a fourteen-year term. N.Y. CONST. art. 6, § 12(c). In most other counties, they are elected for a ten-year term. *Id.*

²⁰⁵ Consider, for example, the case of *In re Martin B*, 841 N.Y.S.2d 207 (Sur. Ct. 2007). In that case, then-New York County Surrogate Renee R. Roth held that descendants of the grantor of an inter vivos trust who were posthumously conceived after the death of the grantor and of their father — a son of the grantor — would be treated as “descendants” and “issue” for purposes of distributions of trust property. *See id.* at 211-12. It is difficult to think of a case that involves a more current policy issue than the rights of children conceived through reproductive technology.

²⁰⁶ *See supra* note 8 and accompanying text (quoting Justice Cardozo on his conception of the judicial role).

the role of the legal profession within it.²⁰⁷ By failing to cite to many (or any) authorities, probate judges act akin to the way a community criminal court judge would when processing a large volume of “quality of life” offenses or even the way a traffic court judge would resolve speeding tickets — in these courts judges typically dispose of cases by making an oral, recorded statement of the “verdict” with citations to the applicable law.²⁰⁸ Most trusts and estates matters are more complicated than a traffic ticket. Judges can enhance the reputation of the field by engaging in the practice of frequent written citation to a range of authorities.

Attorneys who practice before probate judges have a role to play in assisting the court. Attorneys should cite a range of sources in any submitted papers. Producers of legal scholarship — both full-time academics and practitioners — must engage the bench and bar in their work, too. It is not enough for a professor to publish an article and hope the ideas find their way into the field. By maintaining active membership in local, state, or national bar associations, participating in law improvement projects, and even interacting personally with judges, the producers of legal scholarship (broadly defined as all sources other than statutes, cases and constitutions) can help elevate the quality of decision-making.

Judges, lawyers, policymakers, and academics in the trusts and estates field might borrow from the example of the Annual Tax Court Judicial Conference, an event that brings together judges with representatives of federal agencies, directors of community or law-school based legal clinics, academics, lawmakers and private practitioners.²⁰⁹ There is a National College of Probate Judges that meets semi-annually, but this is not an organization that is well-known outside the group of attending judges. It does not regularly engage with the academy.²¹⁰ The American

²⁰⁷ See generally Fleisher, *supra* note 198 (discussing role of courts in democratic society).

²⁰⁸ See, e.g., Traffic Violations Bureau, *What to Do if You Receive a Traffic Ticket*, N.Y. DEP’T MOTOR VEHICLES, <https://dmv.ny.gov/brochure/traffic-violations-bureau> (last visited Mar. 24, 2020) [<https://perma.cc/3S7H-ETQM>] (describing the operation of a hearing by a Department of Motor Vehicles Administrative Law Judge including an immediate decision).

²⁰⁹ See *U.S. Tax Court Conference*, DUKE U. SCH. L., <https://law.duke.edu/events/us-tax-court-conference/> (last visited Jan. 29, 2020) [<https://perma.cc/CD72-3K32>] (describing conference held one year on campus of Duke University in connection with the Duke Law Center for Judicial Studies).

²¹⁰ See, e.g., *2019 Fall Conference*, NAT’L C. PROB. JUDGES, <https://ncpj.org/conferences-2/upcoming-conferences/2019-fall-conference> (last visited Mar. 24, 2020)

College of Trust and Estate Counsel, an organization whose membership is based on peer election,²¹¹ might be an ideal place for probate judges to interact with leading academics and practitioners, but of ACTEC's more than 2,500 members, only fifteen are full-time judges and sixty-two are academics.²¹² Because the organization's members are overwhelmingly practitioners, its considerable programming has tended to reflect those interests.

State judicial training programs might renew focus on judges to develop fully-cited templates for even routine decrees and orders. The New York State Judicial Institute, for example, could lead the way in training county Surrogates.²¹³ It might be possible either to create a new forum for sustained engagement among the judges, practitioners, policy makers and academics or to use existing national or state organizations to create opportunities for sustained and balanced engagement that would redound to the benefit of the entire field of trusts and estates.

V. NEXT DIRECTIONS FOR RESEARCH

Motivating this study of two years of decrees and orders issued by the Surrogate's Court of New York County is an effort to understand what probate courts cite and what the patterns of citation might reveal. This investigation covers only a two-year period and only one court (on which the same two judges sat during the entire sample period). It is impossible to generalize about the practices of these judges, this court, or probate courts generally based on this study alone. There were no significant changes to New York's probate law during the studied time period, so the two-year snapshot may (or may not) be representative. Although there does not appear to be anything unusual in the professional backgrounds of the New York County Surrogates covered in this study, it would be necessary to do a larger study in order to know, even if this two-year snapshot is representative of these judges' citation practices, whether those practices diverge from or conform to the practices of their predecessors.

[<https://perma.cc/VE2C-CVC6>] (announcing an invitation to the 2019 Fall Conference as a follow up to the 2019 Spring Conference).

²¹¹ *About the College*, AM. C. TR. & EST. COUNS., <https://www.actec.org> (last visited Mar. 24, 2020) [<https://perma.cc/86LS-P4H7>].

²¹² ACTEC, The American College of Trust and Estate Counsel Membership Roster 2019-2020 (on file with the author).

²¹³ See *New York State Judicial Institute*, N.Y. CTS., <https://www.nycourts.gov/ip/judicialinstitute> (last visited Mar. 24, 2020) [<https://perma.cc/NWA3-QZ6F>] (describing institute as "a forum for judicial scholarship that includes continuing education seminars and conferences").

A longer-term study could reveal any changes in the court, whether due to workload, types of cases on the docket, or some other factor. As William Manz has explained, longitudinal studies are important because:

changes in citation patterns can reflect a court's conception of its role in society. They also may indicate the effect of changes in judicial workload or the nature of claims a court is called upon to adjudicate. Finally, a long-term study can reveal how quickly and the extent to which a court has adopted a new or novel type of authority.²¹⁴

None of those results can be achieved by studying one court's decrees and orders in a two-year period.

Similar studies from other probate courts — in other parts of the state or the country — would enable comparison across regions and jurisdictions. It is not clear, for example, whether the paucity of citations by the New York County Surrogate's Court is at all representative of what other probate courts do. There may be substantial variation depending on the professional norms of the jurisdiction in which the probate court sits.

To the extent that there are differences among probate courts in different states in both citation practices and subject-matter jurisdictions, additional studies might reveal whether the substance of a court's docket might impact its citation practices.²¹⁵ Citation patterns may vary based on the size of the court's docket, too. The process by which a particular probate judge comes to sit on the bench — by appointment or by election — might matter to the judge's citation practices. The educational background, professional training, or political affiliation of the judge might matter. These topics are ripe for further investigation.

Note, also, that the recommendation that the Surrogate's Court should engage in the practice of more regular (and widespread) citations arises out of the empirical evidence that the Surrogate's Court cites dramatically fewer sources (and less often) than any other court for which studies exist.²¹⁶ To be sure, the Supreme Court of the United States, federal circuit courts of appeal and state supreme courts have different purposes, operations and norms than the Surrogate's Court does. For purposes of evaluation the Surrogate's Court citation

²¹⁴ Manz, *The Citation Practices*, *supra* note 2, at 122.

²¹⁵ See Smith, *From Orphans*, *supra* note 15 (describing jurisdiction of Maine probate courts).

²¹⁶ See *supra* Part II.

practices, the better comparator might be a jurisdiction's family courts or similar trial-level court. Those studies remain to be done, however; there is no data about the citation practices of courts that may be more comparable to probate courts. Nevertheless, because citations bolster judicial authority, regardless of the level of the court, probate judges should increase their frequency and range of citations.²¹⁷

Methodologically, this study makes no distinction between reported and unreported decrees and orders; this may skew the results.²¹⁸ Not all decrees and orders of any Surrogate's Court in New York State are officially reported, and a judge reasonably may write with fewer citations in an unreported decree or order than in a reported one. However, it is not the Surrogate who decides to publish a particular decree or order; that is a decision for the State Reporter.²¹⁹ Thus while a judge might believe that a particular decree or order will (or will not) be reported, the judge cannot be certain *ex ante*.

Another methodological shortcoming of this study is that the electronic search of decrees and orders of the Surrogate's Court could not be narrowed by length of source document, thus making it likely that the reported results are over-inclusive (i.e., Appendix 1 includes citations that appear in all 1,382 decrees and orders, including those classified for the purposes of Table 1 as "Selected Decrees and Orders," or those of the type one would typically find in a law school casebook, before elimination of duplicates). Yet even allowing for the inclusion of false positives from perfunctory decrees and orders or duplicates, the raw numbers of citations to statutes and cases (as well as other materials) are startlingly low.²²⁰

Finally, consider the possibility that the absence of citations in decrees and orders of the probate court does not mean that the judges are not influenced by treatises, dictionaries, books, law review articles or other sources. Citations may be the coin of the realm for academics, but courts may be "more likely to use citations as rhetorical devices, employed only when the citation itself adds persuasive authority to the court's opinion. In other words, scholars may cite works they have barely read, while courts may be influenced by articles they do not

²¹⁷ See *supra* Part III.C.

²¹⁸ See, e.g., Schwartz & Petherbridge, *The Use of Legal Scholarship*, *supra* note 79, at 1353-54 nn. 30-31 ("Formal evidence of decisional law historically does not include unreported (or nonprecedential) opinions. . . . [J]udges should only rarely use legal scholarship in unreported opinions since they are not intended to add to the law.").

²¹⁹ See *supra* note 43 (explaining process by which some decrees and orders are selected for publication).

²²⁰ See *infra* Appendices 1 and 2.

cite.”²²¹ In order to better understand how probate judges make their decisions, conceive of their opinions and understand the judicial role, further qualitative research such as surveys of judges or in-person interviews would yield important information.

CONCLUSION

The citation practices of probate courts are mostly unknown to scholars. There have been studies of citation practices by a range of other (to some, perhaps more “important”) courts.²²² But what probate courts cite has not been the subject of empirical investigation. The inattention may be due to a perceived lack of prestige of the probate courts (or the practice of trusts and estates generally),²²³ the fact that it is not possible to make ready comparisons across jurisdictions, the fact that probate court decrees and orders are not easy to locate, or once found, they are not easy to search electronically, even if an electronic database exists. Until relatively recently (and still in many probate courts), empirical research requires combing through dusty files and original documents. In a few jurisdictions, contemporary records are searchable, sometime for a fee, on the court’s website by case name only; it is not possible to access all probate decrees and orders issued for an entire time period or by a particular judge.²²⁴ Some jurisdictions have digitized older probate files — likely to facilitate historical or genealogical research — but still the researcher must examine each file one by one.²²⁵ Other jurisdictions may lack funding to do so, or even

²²¹ Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHL.-KENT L. REV. 871, 878 (1996) (citations omitted).

²²² See *supra* Part II.

²²³ See *supra* note 30 and accompanying text (for discussion of low-prestige areas of law).

²²⁴ See, e.g., *Instructions and Search Tips for Xchange*, UTAH CTS., <https://www.utcourts.gov/xchange/> (last visited Mar. 24, 2020) [<https://perma.cc/22EK-Y9XC>] (providing for searches of cases by name, jurisdiction and other segments, but not by probate-related decisions).

²²⁵ See, e.g., *Missouri’s Judicial Records*, MO. DIGITAL HERITAGE, <http://sos.mo.gov/records/archives/archivesdb/judicialrecords> (last visited Mar. 24, 2020) [<https://perma.cc/NE4U-73BY>] (providing a database of Missouri’s historic court records, which allows for only one document to be viewed at a time). Missouri’s records are searchable by year and by type of case, making it relatively easy to locate all probate files for a particular period. See *id.* The material in the Missouri Judicial Records Historical Database archives formed the basis for Professor Knaplund’s study of wills from St. Louis in 1900. Kristine S. Knaplund, *Women and Wills: An Empirical Analysis of the Married Women’s Property Act and Its Remarkable Resonance Today*, 45 RUTGERS U. L. REV. 216, 216-17 (2017-2018) (describing scope of study).

where funding is available, decide to keep probate records out of easily searchable public databases, motivated by the concern that probate files, although technically public records like voter registration rolls, should not be too accessible to the public.

The transmission of property at death is an ancient practice.²²⁶ But just because humans have been engaged in the practice of succession for millennia does not mean that it is a straightforward matter. The law of trusts and estates is full of complexity and nuance. The public should perceive institutions charged with the supervision of property dispositions as engaged in careful and principled decision-making. For that reason, decisions of probate judges should explain the judge's basis for the decision and be grounded in legal authorities that are made known to the parties and to the public. Probate judges are more than mere functionaries. They are guardians of public confidence in the law of succession.

²²⁶ In Genesis, for example, Abraham gives "all that he had" to Isaac, his son. *Genesis* 24:2-36, 25:5-6.

APPENDIX 1: NUMBER (PERCENTAGE) OF ALL DECREES AND ORDERS OF
NEW YORK COUNTY SURROGATE'S COURT 2017 AND 2018 CONTAINING
AT LEAST ONE CITATION TO SOURCE²²⁷

	2017 N=722	2018 N=660	2017 + 2018 N=1382
Cases			
Cases from New York County Surrogate's Court	111 (15.37%)	212 (32.12%)	323 (23.37%)
Cases from Other Surrogate's Courts in New York State (but Outside New York County)	93 (12.88%)	153 (23.18%)	246 (17.80%)
Other New York State cases (not from a Surrogate's Court)	164 (22.71%)	113 (17.12%)	277 (20.04%)
Federal cases – District Court level	3 (0.42%)	6 (0.91%)	9 (0.65%)
Federal cases – Circuit Court level	0	2 (0.30%)	2 (0.14%)
Federal cases – Supreme Court of the United States	2 (0.28%)	1 (0.15%)	3 (0.22%)
Constitutions			
United States Constitution	2 (0.28%)	0	2 (0.14%)
New York State Constitution	2 (0.28%)	3 (0.45%)	5 (0.36%)
Constitution of another state in U.S.	1 (0.14%)	2 (0.30%)	3 (0.22%)

²²⁷ All percentages were rounded to nearest one-hundredth of one percent and so figures may not total 100.

	2017 N=722	2018 N=660	2017 + 2018 N=1382
Statutes			
N.Y. Estates, Powers & Trusts Law	131 (18.14%)	143 (21.67%)	274 (19.83%)
N.Y. Surr. Court Procedure Act	220 (30.47%)	240 (36.36%)	460 (33.29%)
Other New York statute ²²⁸	191 (26.45%)	138 (20.91%)	329 (23.81%)
Statute of state other than New York	20 (2.77%)	14 (2.12%)	34 (2.45%)
Legislative Material			
Session laws (from any state)	2 (0.28%)	0	2 (0.14%)
Unenacted bill	0	0	0
Legislative hearing	0	1 (0.15%)	1 (0.07%)
Legislative report/legislative committee report	2 (0.28%)	1 (0.15%)	3 (0.22%)
Reference Works			
Black's Law Dictionary	0	0	0
Other Dictionary	0	0	0

²²⁸ After the Surrogate's Court Procedure Act (220 citing decrees or orders) and the Estates, Powers & Trusts Law (191 citing decrees or orders), the Surrogate's Court most frequently cites to the New York Civil Practice Laws & Rules (CPLR). See *supra* Table 2. During the two-year period under consideration, the court also cited at least once to each of New York General Obligations Law, Judiciary Law, Mental Hygiene Law, and Tax Law. See *supra* Part I.D.

	2017 N=722	2018 N=660	2017 + 2018 N=1382
American Law Reports (A.L.R.)	1 (0.14%)	0	1 (0.07%)
Corpus Juris Secundum (C.J.S.)	0 (0%)	0	0 (0%)
Bogert & Bogert on Trusts (or Hess, Bogert & Bogert) (treatise)	1 (0.14%)	1 (0.15%)	2 (0.15%)
Raymond P. Radigan & Margaret V. Turano New York Estate Administration	2 (0.28%)	0	2 (0.14%)
William McGovern et al., Wills, Trusts and Estates: Including Taxation and Future Interests	0	0	0
Ascher on Trusts (or Scott and Ascher on Trusts)	0	0	0
Other specific treatise ²²⁹	14 (1.94%)	5 (0.76%)	19 (1.37%)
Books			
Books (other than treatise)	1 (0.14%)	1 (0.15%)	2 (0.14%)
Works in collection (other than treatise)	1 (0.14%)	0	1 (0.07%)

²²⁹ In the category of “other specific treatise” are MARGARET VALENTINE TURANO, MCKINNEY’S LAWS OF NEW YORK, SURROGATE’S COURT PROCEDURE ACT (2011 ed.) (cited in three decrees or orders); WARREN’S HEATON, *supra* note 38 (cited in ten decrees or orders), and SIEGEL, *supra* note 66 (cited in one decree or order).

	2017 N=722	2018 N=660	2017 + 2018 N=1382
Law Review Articles			
Law review article in journal associated with ABA-approved law school – first author is full-time law professor	1 (0.14%)	1 (0.15%)	2 (0.15%)
Law review article in journal associated with ABA-approved law school– first author is full-time practicing attorney	0	1 (0.15%)	1 (0.07%)
Student-authored law review note or comment	0	1 (0.15%)	1 (0.07%)
Periodicals			
<i>Trusts & Estates</i> magazine	0	0	0
<i>Journal of Taxation</i>	0	0	0
<i>ACTEC Law Journal</i>	0	0	0
<i>Taxes</i> magazine	0	0	0
<i>Tax Notes</i>	0	0	0
Newspaper article	1 (0.14%)	0	1 (0.07%)
Other Sources			
Book review	0	0	0
Blog post	0	0	0
Some other source not listed above ²³⁰	73 (10.11%)	40 (6.06%)	114 (8.18%)

²³⁰ Authorities cited by the court and not otherwise listed include federal laws and regulations. E.g., I.R.C. §§ 1-9834 (cited in four decrees or orders); RESTATEMENT

APPENDIX 2: NUMBER (PERCENTAGE) OF SELECTED DECREES AND ORDERS OF NEW YORK COUNTY SURROGATE'S COURT 2017 AND 2018, BY CITATION TYPE AND PERCENTAGE²³¹

	2017 N=179	2018 N=202	2017 + 2018 N=381
Cases			
Cases from New York County Surrogate's Court	63 (35.20%)	71 (35.15%)	134 (35.17%)
Cases from Other Surrogate's Courts in New York State (but Outside New York County)	57 (31.84%)	47 (23.27%)	104 (27.30%)
Other New York State cases (not from a Surrogate's Court)	104 (58.10%)	77 (38.12%)	181 (47.51%)
Statutes			
N.Y. Estates, Powers & Trusts Law	59 (32.96%)	80 (39.60%)	139 (36.48%)
N.Y. Surr. Court Procedure Act	94 (52.51%)	108 (53.47%)	202 (53.02%)
Other New York statute	78 (43.58%)	57 28.22%	135 (35.43%)
Statute of state other than New York	12 (6.70%)	3 (2.12%)	15 (2.45%)
Bogert & Bogert on Trusts (or Hess, Bogert & Bogert) (treatise)	0	1 (0.50%)	[0] (0.26%)

(THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS (AM. LAW INST. 1999) (cited in one decree or order); OFFICIAL COMPILATION OF CODES, RULES & REGULATIONS OF THE STATE OF NEW YORK (cited in six decrees or orders); UNIF. RULES OF THE SURR. CT. (cited in two decrees or orders); *Guidelines for the Operations of the Offices of the Public Administrators of New York State*, N.Y. CTS., <https://www.nycourts.gov/ip/pa/PA-Guidelines.pdf> (last visited Mar. 24, 2020) [<https://perma.cc/CPH4-ST58>] (cited in two decrees or orders).

²³¹ See *supra* Table 1 (providing the definition of "Selected Decrees and Orders").

	2017 N=179	2018 N=202	2017 + 2018 N=381
Raymond P. Radigan & Margaret V. Turano New York Estate Administration	1 (0.56%)	0	2 (0.26%)
Other specific treatise ²³²	4 (2.23%)	5 (2.48%)	9 (2.36%)
Law Review Articles			
Law review article in journal associated with ABA-approved law school — first author is full-time law professor	0	0	0

²³² See *supra* note 229.