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Gatekeeping: Documents, Legal Knowledge, and Judicial Authority in Contemporary Argentina

This article addresses the question of judicial authority by examining the mundane practices of legal knowledge-making that unfold within the Argentine Supreme Court of Justice. Building on a larger ethnographic study of the court in the aftermath of the country's 2001–2002 crisis, this article focuses on the particular forms and documentary practices Supreme Court justices use to review a few select cases and then discard the majority without explanation. Analyzing these practices sheds light on the tensions that exist among different imaginaries of judicial adjudication and the court's role in the native legal field. In this context, this article argues that exclusion operates not only as a tool of docket management and control but also as a way to shape judicial authority and legitimacy in contemporary Argentina. [gatekeeping, documents, legal knowledge, judicial authority, Argentina]

In civil law regimes, such as the one in Argentina, the workings of the courts have been traditionally portrayed as depoliticized activities vis-à-vis those of the executive and the legislative branches. Judges and legal bureaucrats are ordinarily referred to as "operators of the law" (Merryman 1985), furthering the image of the judiciary as a depersonalized professional bureaucracy. This is based on a formalist conception of law that builds its universality on the rational procurement and dissemination of legal knowledge (Weber 1968).

In recent decades, however, different political events in Argentina have led legal scholars to critique the alleged agnosticism of the law that has pervaded native legal institutions, including law schools, since the nineteenth century (Böhmer 2012). In addition, the political role of the Argentine Supreme Court and its authority and legitimacy as the final arbiter of disputes of national importance have been questioned (Gargarella 2004; Helmke 2005; Miller 1997; Onandia 2016; Oteiza 1994).

This article shares the scholarly interest in the court's authority and legitimacy in contemporary Argentina, although it seeks to shift the focus away from normative or sociological inquiries as well as abstract theories of law and power. Rather, it examines judicial authority by looking at the mundane acts of judicial practice, such as the creation and circulation of files and documents, the writing of memoranda, and the drafting of legal opinions. These are all instances of legal knowledge making that I documented over the course of my long-term ethnographic fieldwork conducted at the Argentine Supreme Court in the aftermath of the 2001–2002 crisis. My research extended for more than ten years, from August 2005 to June 2016. Fieldwork included interviews and informal conversations with legal experts inside and outside the tribunal (Supreme Court justices, lower court judges, law clerks, sociolegal scholars, and human rights activists), participant observation, and archival research.[1]

I pay specific attention to the forms and documentary practices the court uses to review only select cases while discarding the majority of the cases without explanation. Barbara Yngvesson calls this "gatekeeping" in another context. According to Yngvesson's formulation, exclusion and gatekeeping not only protect courts from matters that are

PoLAR: Political and Legal Anthropology Review, Vol. 41, Number 1, pp. 90–107. ISSN 1081-6976, electronic ISSN 1555-2934. ©2018 by the American Anthropological Association. All rights reserved. DOI: 10.1111/plar.12242.

regarded as “frivolous” but also helps shape their authority by allowing them to classify certain cases as “garbage” and others as worthy of attention, thus excluding certain kinds of relationships, people, and knowledge (Yngvesson 1998, 30). Following Yngvesson’s insight, I argue in this article that, in the postcrisis context in which my study of the Argentine Supreme Court’s practices took place, exclusion and gatekeeping could be interpreted as a means to rebuild authority and regain social prestige, in addition to being a technique of docket management and control.

In looking at the court’s gatekeeping practices, I set aside the law’s ends-oriented approach, which stresses legal decisions and their effects or draws attention to emphasize the behavior of judges. Instead, I focus on the *means,* that is to say, what lies before the law’s ends (Vismann 2008). In doing so, I draw on an important literature on the materiality of the law and its mediation capacity (Latour 2004; Richland 2013; Riles 2001, 2006; Vismann 2008), which emphasizes the law’s constitution and its constitutional force “in and through documents, records, files and other modes of bureaucratic language” (Richland 2013, 5). In other words, I take on the material dimension of legal knowledge such as practices, forms, documents, and proceedings as both a mode of knowledge construction and as instantiations of expertise and power relations.

Matthew Hull has shown in his study of an urban planning bureaucracy in Islamabad that attention to the production, circulation, revision, or annulment of documents, and the associations that emerge from these actions, help in understanding how “artifacts shape the discourses they mediate” and the relations that take place beyond bureacracy’s (physical) boundaries (Hull 2012, 21, 23). The court’s documentary practices on which I build my analysis of gatekeeping expose the construction of judicial discourse through the making, exchange, and cancellation of (both official and unofficial) documents: a process that can be seen as ordinary to bureaucratic action. However, in this article, I show that these instances are also artifacts that shed light on the court’s internal relations and its agents’ understanding of the role of the judiciary and of the court itself. This, in turn, impacts both materially and semiotically on the relationship between the institution and the outside. Indeed, as I discuss later, the practice of gatekeeping addressed here points toward the tensions between the Argentine Supreme Court’s self-proclaimed aim to become a highly specialized judicial body and its actual operation as a court that is called on to entertain different kinds of claims in a context of growing demands of access to justice and of compliance with the law.

The arguments I make in this article may, furthermore, resonate with what Justin Richland has called a new theory of “juris-diction,” as it advances the idea that “it is in the details of legal practice where governmental institutions, in their lawmaking, law-applying, and law-executing capacities, pose the question of their own authority to themselves, and to profound effect” (Richland 2013, 7).

Ultimately, this work seeks to contribute to a growing field of sociolegal research that focuses on the central role that the artifacts of legal bureaucracy play in the constitution of law itself. It also takes the question of law’s materiality beyond legal thinking to inquire into its sociological effects.

Notes on Fieldwork and Methodology

In studying how rights have been shaped throughout Argentina’s history, Karen Faulk has pointed out that the native social field has tended to vacillate between individual and collective ideas of rights. The tension between one formulation and the other, she argues, “has historically been an essential feature in the way the nation has been imagined and experienced by its members” (Faulk 2013, 28). The contradiction and discontinuity of ideas, principles, and practices are two features that define Argentina’s contemporary political

history and legal field. During a period of political instability that extended from 1930 to 1983, democratic and military governments alternated in power, which had a dramatic impact on the country's legal system. Codes and statutes were frequently amended, and Supreme Court justices were removed after each new government came to power. Despite such a contentious political backdrop, the image of the judiciary as a nonpolitical organ persisted over decades (Böhmer 2012; Gabrielli 1986; Osiel 1995). It eventually provided illegitimate regimes with a lawful façade, and even allowed many judges to watch passively the systematic and massive human rights violations carried out by the last dictatorship (1976–1983) (Böhmer 2012).

The transition to democratic general elections in October 1983 was infused with a human rights ethics that grew out of the activism of the victims' families. It was epitomized in the claims of the Mothers of the Plaza de Mayo, civil rights lawyers, and human rights associations working either within the country or from exile (Vecchioli 2006). The derogation of the self-amnesty decree adopted by the dictatorship in December 1983 and the trial and sentencing of the military junta by the Federal Court of Appeals in 1985 are milestones of the restoration of democracy.

In 1994 an amendment to Argentina's National Constitution granted constitutional rank to international human rights treaties and incorporated collective rights, such as those related to the environment, consumers, and indigenous peoples; protection of personal data; and equal protection. In the judicial arena, the constitutional reform not only capitalized on the many years that social organizations had fought for human rights but also paved the way to new rights advocacy (Smulovitz 2010; Vecchioli 2006). Like other Latin American countries in the 1990s, Argentina also experienced a dramatic expansion of judicial power into policy domains that had formerly been in the executive and legislative branches (Couso 2010, 142).

The "bill of new rights" granted by the new constitution was enacted in the context of a ten-year, neoliberal, economic policy that ended with the country's financial breakdown in December 2001. This was followed by public discrediting of the political system and legal institutions, including the Supreme Court. The crisis spawned a negative perception of the court that was coupled with persistent criticism over its functioning. The 1990s was perhaps one of the most extreme in terms of the interventions of the executive branch over the court (Faulk 2013), represented by the latter's enlargement as promoted by President Carlos S. Menem (1989–1999).[2] It was not just the court but the system as a whole that raised concerns over the politicization and dependent character of judges. This negative perception has intensified over the last twenty years, and the judicialization of conflicts has dramatically increased (Smulovitz 2010), impacting the court's workload. According to Gretchen Helmke:

> Between 1974 and 1984 the average number of cases decided annually by the Argentine Supreme Court was between 4,000 and 5,000. Between 1984 and 1994, that figure rose slightly to an average of approximately 6,000. But since 1997 it has skyrocketed to over 36,000. (2005, 177)

The political unrest following the 2001–2002 crisis profoundly affected Argentina's political and legal institutions, and even led to the renovation of the Supreme Court between 2003 and 2005. During President Néstor Kirchner's administration (2003–2007), five out of the six appointees by Menem were either removed from office or resigned to avoid impeachment proceedings. The sixth Menem appointee had resigned in 2002 during the crisis.[3] Since then, the Supreme Court, or rather, the justices who were appointed after the crisis, have

been struggling to regain legitimacy and prestige through different actions and practices that advance ideas of transparency, accountability, open government, and juridical security (Bourdin 2014; Hauser 2016; Lorenzetti 2007). These are all buzzwords of a larger discourse of change and legal reform that gained momentum during the crisis (Barrera 2013).

The pursuit of legitimacy and prestige by the court's members prompted by the crisis not only enabled new court regulations but also provided a new background for revisiting old practices that, at the time of their adoption, were considered instruments conducive to similar ends (that is, for the court to build its authority). Among those practices were the court's management of its discretionary docket, as determined in Article 280 of the Federal Code of Civil and Commercial Procedure (or "the 280," in judicial jargon). According to Argentine legal scholar Gustavo Arballo, this rule, which entitles the court to refuse to hear a case without having to explain its decision, has become one of the most common techniques for how it decides which cases to review and which to discard (2015).[4]

I do not discuss in this article whether the Argentine Supreme Court has become more transparent, accountable, or efficient through the enactment of new regulations—or the adjustment of old ones—since the crisis. Rather, I approach the court's quest for legitimacy and prestige laterally (Maurer 2005; Riles 2006) through an ethnographic examination of the practice of "the 280", an operation to which legal actors continually referred when describing their routines and mundane workings within the court. The creation and circulation of files, the writing of memoranda, and the drafting of legal opinions became essential components to understand my subjects' perceptions of their roles. Indeed, the passage of files emerged in their accounts as both the driving force and the demise of their practices (Barrera 2008).

The subjects referred to in this article are mostly *secretarios letrados* (law clerks). They are civil servants who are lawyers. A law clerk may work as a staff attorney for a justice or for one of the eight court *secretarías judiciales* (judicial secretaries or desks), each of which is chaired by a *secretario de la Corte Suprema*, or just *secretario* (court clerk). However, there are law clerks in other Supreme Court offices that do not perform judicial tasks. They may work in the office of jurisprudence, management and control, communication and open government, or other administrative offices.

In the Argentine Supreme Court, law clerks hold the equivalent ranking of first-instance judges, and court clerks are comparable to appeals court judges. This comparison is manifested in court clerks' salaries and the treatment they receive that differentiates them from other court staff, including lawyers in lower positions. Court clerks are unanimously appointed by all court justices as the heads of the many desks (judicial or administrative) at the court. To clerk for a justice means status, authority, and respect among the court staff.

In addition to those with whom I interacted at the court, my analysis of the court's gatekeeping practices is informed by the accounts of law practitioners, representatives of nongovernmental organizations (NGOs), and legal scholars I met outside of the court.

Making the Court a Proper Place of Law

The Argentine Supreme Court's interventions are regulated through constitutional and statutory provisions according to the matter of the case involved[5]: jurisdiction can be original and exclusive, or appellate. Cases of appellate jurisdiction can be reviewed through two main mechanisms: *recurso ordinario* (ordinary appeals) and *recurso extraordinario* (extraordinary appeals). From that universe of cases, the practice of gatekeeping described in this article is concerned only with those cases that are filed to the court via extraordinary appeals or appeals filed for review of *recurso de queja por extraordinario denegado* (the

denial of extraordinary appeals), given that such appeals have exceeded the use of the ordinary appeal.

Two legal doctrines created decades ago by the Supreme Court itself are credited for the excessive growth of recurso extraordinario and recurso de queja. They are the issues of *arbitrariedad* or *sentencia arbitraria* (arbitrariness or arbitrary decision) and *gravedad institutional* (imperative institutional importance), respectively, which expanded the court's appellate jurisdiction beyond its legal regulation (Gil Domínguez 2003). These doctrines have allowed the court to hear cases that do not meet the requirements for extraordinary appeals, do not strictly involve federal questions when the underlying injustice of the case merits review, or the court cares about the issue at stake (Carrió 1989, 1143).

As a remedy for the dramatic enlargement of the court's docket (cf. Gelli 2004; Morello and González Cuello 2005; Supreme Court Bylaw No. 44, 1989), an amendment to the Federal Code of Civil and Commercial Procedure was made in 1990 (Law 23,774). It granted the court discretionary power to deny applications for extraordinary appeal when the alleged breach of federal law or federal matter does not suffice to hear the case or the issues involved are not substantial or not transcendent. That means that through this statutory provision, the court is entitled to refuse to hear a given extraordinary appeal without giving any reason for refusal to the parties. It is a matter of judicial discretion—the court's *sana discreción* (good judgement)—as provided by the statute.

In the Argentine judicial field, the 280 is understood to be modeled on the United States Supreme Court's *writ of certiorari* (Rules of the United States Supreme Court, 2007, Part III), one of the tools through which the US Supreme Court decides to take jurisdiction, that is, to hear a case (Argentine Court Bylaw No.44, 1989; Garay 1990; Palacio 2001, 26). Rather than emphasizing how the certiorari is actually performed in these two different jurisdictions, I want to highlight that my subjects described the Argentine certiorari as the reverse practice of the one that operates in the US Supreme Court, thus taking the difference between them for granted. The law clerks with whom I discussed the 280 viewed this practice of gatekeeping as a "negative" certiorari; that is, the reverse of what they interpreted as the "affirmative" or "positive" role it played in the US Supreme Court. They described what would operate as a "technique of exclusion" of cases in the Argentine Supreme Court as one that would work as inclusion in the United States.

In addition to this indigenous interpretation of the operation of the certiorari, there was a vast array of critiques of the 280 in the field. Legal scholars, for instance, believed either that the legislators misread the rules and mechanisms that they were "transplanting" from the United States (Garay 1990; Sabelli 2003) or were not aware of the native *mentalité* (mentality) in interaction with the imported legal idea. Either way, the so-called Argentine certiorari is believed to be the result of a failed "legal transplant" (Watson 1993) or a partial "translation" (Langer 2004) of a US legal practice. Central to the criticism of the 280 is that the court's discretionary dismissal of cases is at odds with a transparent reasoning requiring judges to explain their decisions, thus offering their reasons for denial. This criticism stems from a wider standpoint in which the refusal to disclose judicial votes is seen as a breach of the basic tenet of the rule of law, which requires government decisions to be made public (Lasser 2005). Some native scholars argue that the lack of argumentative transparency in the use of the 280 contributes to the undermining of judicial authority in Argentina (Gelli 2004; Gil Domínguez 2003; Hércules 1995; Olcese 1999; Sabelli 2003).

Strenghtening judicial authority was the main argument for the Argentine Congress to introduce the present version of Article 280, and for the court to uphold the constitutionality of the discretionary management of its docket. According to the court's case law:

> The main purpose of the amendment to the code of civil procedure in the form of Article 280 was to emphasize the *place* of the Court within the order of the governing institutions of the Nation, making possible—in a realistic way—for the Court to focus on matters related to the protection and defense of the Constitution's supremacy. Since its inception, the Court has acknowledged that, of all its functions, this is its most appropriate role. And the reform was aimed at reinforcing the special feature of the Court's jurisdiction allowing it to concentrate on serious constitutional and federal issues akin to its institutional nature.[6] (Emphasis added)

Judicial authority (or its pursuit) is also at the center of the criticism of the 280 that comes from inside the court, in particular from law clerks. For many of them, the 280 has not reduced the number of cases that are filed with the tribunal every day. This statement is debatable according to different actors I met outside the court.[7] Nonetheless, it speaks of a strong belief encountered within a circle of Supreme Court experts about the court as a place dominated by certain kinds of problems that "should be out of it." Jonathan, a law clerk in his mid-forties, who, at the time of our first meeting in late 2005, had been working for ten years at the same judicial secretaria, said, "Filing an appeal with the Court is relatively easy," even though the formal requirements to file one with the Supreme Court have increased over the last years. More than 30 percent of the appeals filed between 2012 and 2015 were granted full review; according to Arballo (2015), the admission of an appeal by the court is a likely event. Jonathan said that in his view, this was affecting his workload considerably. Similarly, Franklin and William, law clerks and coworkers for five years at another judicial secretaria, saw the court's appeal caseload as a deviation from its proper activities.

Interestingly, the workload that law clerks, especially the senior ones, pointed out to me seemed to be only one of their complaints about the demise of a social order of relationships that existed before the court's enlargement in 1990. The number of law clerks (including those who perform administrative tasks) has continually increased, from an estimated thirty law clerks in the 1980s to more than 150 by the mid-1990s (Helmke 2005, 179; Verbitsky 1993, 75), and again to approximately two hundred at the time of my fieldwork. At this time, these relationships influenced the law clerks' imaginaries of the court's role and of its relationship with society. This was true not only for the older clerks who had worked at the court before the enlargement but also for those who came afterward. Among these newer law clerks, however, were many who did not yearn for a lost social order; instead, they were critical of it. Their narratives succeeded in turning such an order into an imagined whole. The following account by Ellie, who was a junior law clerk in 2006, illustrates this point:

> They [older clerks] speak about the 'Court of 5' [the five-Justices, an elite Court, as the best Court ever, not because of its members' intellectual skills–actually they were better—but because of the Court's size; it was a small Court and they knew one another.
> Although *Menemismo*[8] dramatically changed many things in the court for the worse, it also made it a more accessible place (Barrera 2008, 9).[9]

The need to reassert and consolidate judicial power vis-à-vis other (state) powers was expressed through the palpable anxiety of court people (cf. Hauser 2016; Lorenzetti 2007; Onandia 2016). The clerks' insistence that the docket be reduced[10] usually was associated with claims for the court to assert its role "as a real state power" and to behave as a

"co-governance body and a real check of both Congress and the executive [branch]." These statements emerged forcefully as a demand for the court to regain the status it had enjoyed in the past when it controlled more of its docket. However, during my fieldwork, consolidation and restoration of judicial power had no single meaning, even within the small circle of Supreme Court justices (Barrera 2016).

Naming Law: Visible Ends and Invisible Means

In her study of the Massachusetts court system, Yngvesson builds on Michel de Certau to explain that the practice of gatekeeping becomes "*a way of using* imposed systems, a practice of the order constructed by others [that] redistributes its space," and creates "a certain play in that order, a space for maneuvers" (Yngvesson 1998, 30). In this light, the role of the court would lie within the dynamic tension between what courts *can* and *cannot* do. Consequently, the practice of naming crimes and revealing rights, that is, of naming law and excluding "garbage," become tools to make the law (and the legal institution) known.

Richland's work on juris-diction provides a similar insight. It points out that a legal institution decides it has jurisdiction to exercise its power over a dispute or a matter of policy even when it decides that it does not. Likewise, when the Argentine Supreme Court excludes from its juridisction a case on the basis of Article 280, such a resolution enacts the court as the legitimate authority to decide and name what matters for it. However, as I explain in the next sections, in the Argentine legal field, these denials work more semantically than materially.

In Yngvesson's work, hearings before clerks play a crucial role in the exclusion of garbage cases. These are the spaces in which law's power is limited and extended through a clerk ("the clerk is like a watchdog,") who connects by separation, classes, and discourses; however, the clerk's capacity for maneuver depends in part on who the clerk is (different institutions enable clerks differently) (Yngvesson 1998, 15, 30). At my field site, gatekeeping was both more diffused and completely inaccessible, as I explain below. It is instantiated in the exchanges and papering practices that develop around the files that circulate for review within the court. These practices demand that the court's agents (judges and clerks) engage in paperwork (for example, the writing of memoranda or the drafting of proposals for a judicial decision on a given case) as much as in thinking and reasoning (Barrera 2008).

Document making is not only the inscription of words on paper but also is an account of the actors' commitment to the file as a source of authority (Derrida 1997; Hull 2012). The file is a means, a "technology" (Vismann 2008) "for materially enacting an authoritative decision; for making a decision out of various utterances and actions" (Hull 2012, 127). File making, therefore, is truly an act of "naming" or of "instituting" law (Bourdieu 1987; Latour 2004; Yngvesson 1998). In a civil law culture such as the one in Argentina, which draws heavily on written judicial procedures, files set the limits of the judicial scope; hence, the truth is not separated from the files but achieved, contested, and negotiated within them. One particular Supreme Court decision supports this argument: in defining the character of the extraordinary appeal, the court ruled that an (extraordinary) appeal based on the alleged violation of the right to defense in trial cannot be admitted if the denial or substantial restriction of such right does not emerge from the judicial file or dossier.[11] Interestingly, through this double-negation, the decision reinforces the law's constitutive capacity and, vice versa, defines how law can be constituted in and through files.

Bifurcation of Judicial Discourse

File making, however, is not accessible to outsiders. If attention is focused on the aesthetics of the judicial dossier (Riles 2004), the operation of gatekeeping is perceptible through

nothing more than its visible end: a ruling to deny review on the basis of the 280. The court's judgment using the application of the rule of the 280[12] is presented through a laconic and formulaic decision that within the court is called the "template" or "formula 1" ("the template is the judgment," law clerk Jonathan said to me). Decisions based on the 280 are structured in a single-sentence customary format that reads as follows (see Figure 1):

> Buenos Aires, [date]
> Given [literally "Seen"]: [citation of the case]
> Whereas:
> The extraordinary appeals are inadmissible (Civil and Commercial Procedural Code of the Nation, Article 280).
> On this ground, the extraordinary appeals are declared inadmissible. It is hereby ordered that this resolution be duly notified and that these proceedings be returned to the relevant court.[13]

CSJ 564/2013 (49-D)/CS1
De la Rúa, Fernando s/ recurso de casación.

Corte Suprema de Justicia de la Nación

Buenos Aires, 12 de mayo de 2015.

Vistos los autos: "De la Rúa, Fernando s/ recurso de casación".

Considerando:

Que los recursos extraordinarios son inadmisibles (art. 280 del Código Procesal Civil y Comercial de la Nación).

Por ello, se declaran inadmisibles los recursos extraordinarios. Hágase saber y devuélvanse las actuaciones a la instancia de origen.

RICARDO LUIS LORENZETTI

ELENA I. HIGHTON de NOLASCO

JUAN CARLOS MAQUEDA

Figure 1: "The Template"; or a decision made on the basis of Article 280

In the Argentine Supreme Court, the construction of judicial discourse operates through a process of "bifurcation" that keeps all "argumentative arsenal concealed from view" (Lasser 2005, 200, 202). Multiple documentary practices advance argumentation: *proyectos de sentencia* (drafts of judicial decisions), memoranda, reports, and research documents are produced to build up a judgment on a given file, as is attaching previous documents written on similar cases or statutory provisions regulating the issues involved. The writing of a memorandum in preparation of *every* court decision epitomizes argumentation. The memos include the applications for review that the court rejects on the grounds of Article 280. To emphasize the role of the memo as a technology of knowledge construction, Ronald, a court clerk who had been in charge of a secretaria for more than a decade, explained, "The case must be studied, and the memo reflects such study." Meryl, a young lawyer who had clerked for two justices, went ever further by taking the memo as a proxy of internal deliberation: "Without the memo, nothing is convincing. . . . The memo is like a dialogue, as most of the time deliberation here in the court is written."

In contrast to the succinct structure of judgments based on Article 280 described above, the memo does not have a predetermined length. It can be as short or long as the author deems necessary to present arguments in support of the judicial decision that is being proposed. In general terms, the memo is structured in the following order.

On the top right is the complete heading of the file (file number, type of appeal, appellant's name, and type of the initial lawsuit). On the top left is the name of the office at which the author of the memo (usually a law clerk) works, that is either a justice's *vocalia* (a judge's chamber) or one of the seven judicial secretarías. If the latter, the memo is specifically called *nota de secretaría* (a secretary note) and is generally initialed by the author. In the left margin is the subject of the memo, the type of appeal under review (either an extraordinary appeal or an appeal seeking reversal of the appeal court's denial of extraordinary review), followed by the indication of the court of original jurisdiction (at which the action was initiated and first heard) and the lower instance courts (federal courts of appeal or provincial courts of last resort) that heard the case before it reached the Supreme Court. The main text is presented in chronological order, and includes:

- a statement of facts;
- a description of the decision of the court of appeals or court of last resort whose reversal the appellant seeks;
- a presentation of arguments exposed in the federal appeal submitted to the court; and
- the author's *consideraciones* (opinions) providing an understanding of the law that applies to the issues involved in the appeal and the proposed judicial decision; if the author's opinion is that the appeal should be rejected, the report usually concludes with the recommendation for the court to apply the current "formula 1" to the case (that is, Article 280).

The memo is often attached to a draft of the proposed judicial opinion it supports. If different judicial decisions leading to opposing results are drafted on the same case, all of them are "backed" by their respective memoranda explaining the reasons for such conclusions. These documents are enclosed in a yellow folder that is annexed to the file. They are circulated with the file even though they are not considered to be "officially" part of the file itself, at least in the sense that they are not physically integrated into the main file, and, unlike the main file, their content cannot be accessed by the parties. The memo is considered intellectually fundamental but at the same time is materially excluded from the official file. It is in this way, as mentioned earlier, that the gatekeeping is both diffused and inaccessible.

The memo is more than an informal and personal explanatory device and a means to convey one's (that is, the clerk's) legal opinion of the case that accompanies and supports a proposed judicial decision. It is as a mode of knowledge; it is a document that also elicits a moment of expansion in which knowledge is temporarily freed from the physical and political constraints of legal forms (for example, the application for review, the judgment, the file itself) that anticipate such knowledge or action. "All that is not written in the draft [of the judicial decision] is in the memo," asserted Marilyn, a lawyer with vast experience, having clerked for different justices and at judicial secretaria at the court.

The making of the memorandum allows judges and judicial bureaucrats a certain margin of maneuver; that is to say, if not to escape from the material limits of the official dossier, at least to extend them, even when all the constellations of meaning that the memo elucidates are "backgrounded, held at bay" (Riles 2001, 86) for the court's authority to work out. As a technology of knowledge making, it is also possible to appreciate the memo's dual existence—both physical and virtual—as described in this section. One can think of the memo not only as a purely documentary practice or paperwork but also as a *hybrid* entity.[14] As such, the memo holds, on the one hand, documentary presence manifested as the end product (the final and official text of the decision) and, on the other hand, as the thinking and reasoning of the court, and thus as an intellectual activity with a nondocumentary existence.

Inside–Outside

After the court's judgment has been delivered and the parties have been notified, the file is sent to the court's general archive, where all the attached documents are compiled in a binder by the law clerk of the secretaría that supervised the circulation of the file. This binder, called *cartapacio de secretaría* (secretary folder), is kept for the record and can be accessed only by the court's legal bureaucrats as research material for future similar cases. I was able to access that registry thanks to Jonathan who, after an interview conducted in his office, presented a binder to me, calling it "the corpse." "You can find in it all the forensic evidence and the clues to interpret a court's decision in every case," he said, handing me a binder. "Everything is there," he asserted as I started perusing the binder. Indeed, the material I was given was a collection of memoranda, opinions, drafted decisions, statutory provisions, newspaper articles, and other "physical evidence" of the same sort that appeared to be key elements for the reconstruction of the judgment. He explained that he had had this particular binder in his office as he had borrowed it from the archive of another secretaría, because he needed to read the content of this particular binder for an appeal he was currently reviewing—a memo written for this latter case cited the case discussed in the binder. When asked why he did not simply read the cited ruling rather than examine all the data contained in the binder, he answered that that would *not suffice*; he wanted to know what had *really* happened.

In the process of making a decision, Jonathan located knowledge in the court's own act of making a decision, but his move transcended the pursuit of specific knowledge for the case under review. It speaks of a mode of knowledge making that "reflexively constitutes the legal act" (Riles 2003, 194; cf. Teubner 1984, 1993).The self-referential character of the law embedded in the court's denials discussed in this article is not only a discursive form (the decision literally states that the appeal is not admitted simply by invoking the norm of Article 280) but also is instantiated in how gatekeeping is performed by the court to the outside public, which I discuss below.

The effects of the bifurcation of judicial discourse are more likely to be experienced as disruptive in the appeals that the court rejects on the grounds of Article 280 than

in the cases in which it grants full review. In the latter cases, the arguments developed in the memorandum that explain the reasons for the legal opinion ultimately endorsed by the majority of the justices may be reproduced—even if heavily edited—and published in the judgment. In other words, the arguments discussed in the memorandum (or different memoranda) make up for the decision's *fundamentos* (rationale). In contrast to this, when an appeal is not admitted to the court on the basis of the 280, the reasons for such a decision remain in the court's internal circulation and are not available to the appellants' considerations.[15] This form of judicial discourse may trigger different reactions by the claimants, who are not given any reason for the court's refusal. Because of the thousands of cases that are dismissed by the court per term, it is impossible to give an account of all the subjects' experiences with Article 280. Nevertheless, I highlight the sense of frustration, inexorability, and uncertainty that some of my interlocutors expressed in reaction to the denials of their cases under the 280.

I held long discussions about the court's internal labor division with Harold, a constitutional scholar and attorney with experience in litigation before the court. He compared the reaction to the court's denials to the death of a relative: "You feel frustrated. . . . You always think that things could have happened differently; that something else might have been done to prolong their lives." I asked him why the reaction he was describing would be distinctive of a 280 case and not a common response to any negative decision one might get from any court. He replied that the first reaction—frustration—was indeed a response to the denial and to the impossibility of reversing this situation. However, when one realizes that no reason for denial has been given, the initial frustration becomes stronger; much more so if the appellant's counsel has no previous experience in arguing before the court.

Donald, a human rights lawyer from an NGO, and David, a public defender from the Buenos Aires City government, were more pragmatic. They insisted that lacking an understanding of the court's decision making prevented them from knowing how to proceed with similar cases in the future. Likewise, Henry, a human rights lawyer and law professor, told me that to avoid the court's dismissals, such as those based on Article 280, he frequently framed the issues of his cases at the outset in such a way that it would be hard for the court to reject them. Regardless of these actors' different experiences with the 280, their accounts suggest that denials—or, rather, how exclusion is performed—shape the appreciation of judicial practice as a form of enclosure of knowledge. There is nothing beyond judgment—hence, the analogy of judgment with death that Harold made. Nevertheless, denials do not necessarily mean closure.

Depending on the subjects' position vis-à-vis the judicial apparatus, the operation of gatekeeping through Article 280 enables two stable and competing understandings of judicial adjudication. On the one hand, litigants and their counsels (after years of pursuing litigation throughout the judicial system), who receive only a piece of paper with a one-sentence decision based on Article 280 as judgment, will likely perceive judicial adjudication as an "incomplete" or "failed" knowledge-making process; or a "failure of knowledge" (Riles 2004, 396). Here, the making of judicial discourse has been substituted by the plain text of the decision that is to be presented to the outsider as the result of a collective process. On the other hand, within the court, adjudication is seen as a "complete" and dialogic process that is actualized with the circulation of the file. Accordingly, for legal bureaucrats, judgment is achieved, contested, and negotiated through a work of "intertextuality" (Latour 2004, 105), and the social interactions that take place through the material aggregation of pages in the circulating file are taken, in a broad sense, as encompassing the main body and the annexed folder.

The production of judicial discourse enables judicial bureaucrats the possibility to create knowledge while realizing their personal capacities. However, the figures that the circulation of files activates vanish in the linguistic form of the judgement, which presents judicial discourse as the product of corporate agency. Elsewhere I discussed extensively the different forms of agency and the individuation effect that take place throughout the circuit completed by the files within the court (Barrera 2008). I will add here, following Hull's insight on Islamabad bureaucracies, that the "individualization and collectivization" of agency that files articulate are "simultaneous functions of the same bureaucratic processes" (Hull 2012, 130).

From an insider's point of view, both pragmatic and political considerations would justify the court's sheltered deliberations of 280 cases. The current court's workload would make it impossible to turn all the reasoning developed in the memo into a final ruling. However, preservation of the memo as a court's private document also has to do with a commonsensical effect associated with files and record-keeping practices: the possibility of checking, comparing, and assessing the reliability of files. In case of doubt, "the file testifies against the clerk" (Vismann 2008, 146). In this sense, Jonathan stressed that the memo would allow him and his colleagues "to write things that *cannot* be said in the final ruling." As he stated, "The court can get itself bound by its own words. . . . It [the court] has to be careful with what it says. The court is constrained by what it *has* to say in a given case and by the terms of the remedy it provides."

It is also important to remember that keeping the memorandum and deliberations *off the record* conceals the participation of different actors (other than the judges who sign the decision) from an external gaze and, in the process, gives the court a collective voice and—hence—authority. Hull maintans that the authority of a bureaucratic organization "depends in part on its representation as a collective agent." The bureaucratic (and impersonal and anonymous) discourse, grasped from an outsider's perspective through the analysis of public documents, advances the image of "bureaucracy as the epitome of a collective social organization" (Hull 2012, 127). As I indicated above, in the Argentine Supreme Court, judgement is presented to the outside world as a sole and collective product signed by the justices; disagreements are expressed in the form of minority opinions, but the judgement nonetheless is "reached" by the court as an *institution*. To emphasize the corporate authorship of the judicial decision, a Supreme Court justice explained to me, "It is the court, a state power, who speaks."

Knowledge Enclosure and Disclosure

In this article I have focused on judicial discourse by highlighting the pragmatic details of the law's documentary practices in the Argentine Supreme Court, with the assumption that legal actors also bring law and its force into existence through these mundane practices (Richland 2013, 10). I have argued that the exclusion of a case from the court's jurisdiction is perceptible in the form of a judgment to deny its review. When a brief sentence of that denial is released, it is accepted by the outside public as a proxy of judicial deliberation. Accordingly, adjudication is apprehended as a failure of legal knowledge. Conversely, from the perspective of court bureaucrats, the concealment of deliberation is experienced as the space in which knowledge achieves momentum through a sequence of argumentation and deliberation. This is instantiated through documentary practices that account for the making of judicial discourse as a complete process.

Accessing a memorandum, which, in the descriptions of judicial bureaucrats, appears as the embodiment of legal argumentation and thinking, is certainly important for understanding how judgment is articulated through a bifurcation of the legal discourse. Knowing that

this document is produced in the preparation of every court decision—that is, whether the court decides to grant review or to deny it—and that it is "backgrounded" in the laconic structure of the denial sheds light on how exclusion operates in the semantic field: it neither efficiently lessens the court's docket nor affects the bureaucrats' thinking. Their accounts of the court's workings reflect their perception of an endless intake of files. Gatekeeping, however, is performed to outside audiences as an exclusionary mechanism. As a result, along with being a technique (though unsuccessful) to avoid the enlargement of the court docket, gatekeeping becomes a semiotic technology for the construction of an authoritative institutional self: the court that legal texts and judicial actors envision.

It is in the dynamic tension between what the court *is* and what it *appears to be* that gatekeeping and exclusion of garbage cases through Article 280 makes sense as a particular mode of judicial authority construction in present-day Argentina. Gatekeeping reflects, on the one hand, the ambition of the Supreme Court to make itself a last instance and highly specialized court, as stated by the norm and strongly advocated from within. In this scheme, the matters that are deemed to interfere with or obstruct the fulfillment of its "authentic" role should be excluded from its jurisdiction. Exclusion, therefore, would work to instantiate the court's ethos that the present situation fails to fulfill. On the other hand, gatekeeping speaks of the need of the institution to regain prestige before the citizens whose demands for access to justice have flooded the judiciary and conditioned the limits of exclusion. In this context, the practices of production and circulation of judicial discourse make it possible to consider appeals decided by Article 280 as "garbage cases," and thus not worthy of the court's attention, whereas, in fact, those cases are reviewed like any other appeal filed with the court. The form used to make judicial decisions explicit to the outside world through an Article 280 judgement states exclusion of cases as a fait accompli while keeping legal knowledge concealed from view. In this light, knowledge enclosure may be seen as both the consequence and condition of its disclosure.

Notes

For constructive feedback to earlier versions of this piece, I am grateful to Gustavo Arballo, Marie-Andrée Jacob, Máximo Langer, Matias Novoa Haidar, Valentin Thury Cornejo, Noa Vaisman, and four PoLAR anonymous reviewers.

1. All names are pseudonyms. Unless otherwise noted, all translations are mine.
2. As a result of Menem's court-packing plan in 1990, Congress passed a law enlarging the tribunal from five to nine members. Menem's appointees were pejoratively called the "automatic majority," because they often favored the position of the executive branch in every institutionally relevant case (e.g., the privatization of state-run corporations and pension funds).
3. In 2006 Congress passed a new law to make the number of Supreme Court justices five again. Because there were seven justices at that time, it was statutorily established that the court would be composed provisionally of seven members. In 2014 two justices died, and a third retired when he turned 75. In September 2015 a fourth judge resigned and left office on December 11, leaving the court with only three members. On December 15, 2015, the recently inaugurated President Mauricio Macri issued a decree appointing two new court justices to cover the vacancies. There were no prior confirmations by the Senate, as called for in the Constitution, and his action was highly criticized. Macri was finally able to appoint his two nominees to the court in June 2016, after the Senate had confirmed them. They took office in June and August

2016, respectively. Some controversial decisions on cases involving Human Rights issues were taken by the court after the two Macri's apointees joined it. However, the analysis of such rulings and the social and scholarly reactions that they triggered are beyond the scope of this piece.

4. For instance, the number of judicial cases decided by the court per term (including those declared inadmissible) totaled 9,526 in 2012; 9,458 in 2013; and 10,125 in 2014 (Supreme Court of the Nation, n.d.). Of the total number of the decisions reached by the court within this three-year period, 67.80 percent were rejected cases. Of those rejections, 91.31 percent were decided on a discretionary basis, and more than half were made on the grounds of the 280 (see Arballo 2015).
5. Articles 116 and 177 of Argentina's Constitution establish the issues that fall under the jurisdiction of federal courts, including the Supreme Court. The latter can hold either original and exclusive jurisdiction or appellate jurisdiction according to constitutional and statutory regulations. In addition, the judicial review doctrine that grants Argentine courts the authority to declare the unconstitutionality of laws has been acknowledged in the Supreme Court's jurisprudence as "implicit" in the text of the constitution, mimicking the development and tradition of judicial review in the United States (cf. Miller 1997).
6. *El Ministerio Fiscal c. Don Benjamín Calvete por atentado contra la inmunidad de un senador* 1 *Fallos* 340 (1864); *Ekmekdjian, Miguel Angel c/ Sofovich, Gerardo y otros* 315 *Fallos* 1492 (1992) (opinion of the minority); *Fernando Horacio Serra y Otros v. Municipalidad de la Ciudad Buenos Aires* 314 *Fallos* 2454 (1993).
7. E-mail communication with the author, February 28, 2015, and September 5, 2015. Interviews with the author, September 28, 2015, and November 10, 2015.
8. Here, "Menemismo" refers to the encroachment of the judicial power by President Menem in the 1990s that began with the packing of the court.
9. Some anthropologists (e.g., Sarrabayrouse Oliveira 2004) have argued for kinship— either rooted in biology or made up by social practices— as a native category of the Argentine judiciary to explain appointments and promotions within the judicial hierarchy. The metaphor of the "judicial family" extends beyond the academy and reflects a popular understanding of judicial power pervaded by kinship relationships among its members. The law clerks' words suggest that it might have been changes in the modality of appointments at the court after the 1990 enlargement. However, there is no empirical analysis to support such an argument, other than that the number of clerks has increased .
10. From 2002 to 2006, the court received more than twenty-five thousand appeals per year (Muro et al. 2016). The number began to drop after that period, which might be explained by the passing of Law 26025 by Congress in 2005, which abrogated a statutory provision from 1995 that established that decisions of the National Social Security court of appeals had to be appealed directly to the Supreme Court. In December 2006, in the *Massa* case, the court decided the issue concerning the large number of appeals that arose from the 2001 crisis, thus clearing the way to solve thousands of similar cases. See *Massa, Juan Agustín c/ Poder Ejecutivo Nacional - dto. 1570/01 y otro s/ amparo ley 16.986*.
11. CSJN, *Corporación de Transportes de la Ciudad de Buenos Aires v. Compañía de ómnibus "Ciudad de Buenos Aires,"* Fallos at 194, 220, 221 (1942).

12. An additional prescribed formula used by the court as a basis for discretionary denial is that the appeal lacks autonomous reasoning. A new cause for dismissal of cases based on formal errors was introduced by the court in 2007 (Bylaw 4/2007) to make adjudication more efficient. The findings of the empirical analysis conducted by Muro et al. (2016) on this subset of the court's discretionary docket show that this goal has not yet been achieved.
13. I thank Griselda Perrota for the translation of this sentence.
14. I am indebted to Marie-Andrée Jacob for this observation.
15. An important exception to this practice was *Tejerina,* a very controversial criminal law case in which two of the four justices who comprised the majority opinion decided to disclose their respective arguments in reaching a decision based on Article 280. The two minority opinions were also made public. See *Recurso de hecho, Tejerina, Romina Anahí s/ homicidio calificado-causa 29/05* T. 228, XLIII (2008).

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