

Judicial politics research tends to focus on the final outcome of the case, and while there are substantive reasons for this, an important methodological constraint is that final decisions are easy to obtain. But particularly for analysts who study trial-court processes, final outcomes are only part of the story. We're beginning to see the development of docket-oriented datasets that allow scholars to ask questions about the entire life cycle of the case. In particular, the EEOC Litigation Project, the Civil Rights Litigation Clearinghouse, and the SCALES project at Northwestern provide new, exciting datasets for judicial politics scholars. Understanding *how* cases develop from filing to judgment is just as important as understanding *why* they reach the outcomes that they do. In particular, descriptive work on phases of the litigation process that are relatively rare, such as jury instructions, can give us a new perspective on the ways that litigants and courts communicate with one another and evaluate their own ability to win.

Some of the most important questions for political scientists interested in trial courts are non-causal and ask about issues related to events prior to a final decision. Many of them turn on questions related to the court's rhetoric in decision-making (Boyd and Hoffman 2012). While regression or more sophisticated causal analyses may be able to identify patterns in litigant behavior and derive causal claims related to who wins and who loses, discerning the tools judges use *within* their decisions to influence litigant behavior is much harder to accomplish (Hinkle and Hazelton 2022). Ultimately, descriptive and qualitative work is the only tool judicial politics scholars have to answer Wallace Mendelson's 1967 criticism that

we've collapsed the entire judiciary into the things we can measure and then act surprised when our measurements predict outcomes (Mendelson 1967).

The heirs to judicial behaviorists have offered us some really exciting tools in creating new datasets to apply to trial-court decision-making. This movement began with the development of litigation document clearinghouses, with Stanford Law School founding the Stanford Intellectual Property Litigation Clearinghouse (now paywalled by Lexis under the name Lex Machina) and the Stanford Securities Class Action Clearinghouse. Finally, Margo Schlanger created the Civil Rights Litigation Clearinghouse, currently housed by the University of Michigan.

Clearinghouses began to evolve into datasets. While I would be remiss not to mention Bert Kritzer's Civil Litigation Research Project from the mid-1980s as a first effort to develop a trial-court dataset, it was not maintained after its initial funding lapsed and is currently out of date. After that, major public trial-court datasets tended to be focused on particular areas of law (such as the EEOC Litigation Project) or on particular phases of the litigation cycle (such as the DaubertTracker focused on motion practice surrounding expert witnesses). Other datasets were painstakingly compiled by individual researchers, frequently with little to no support, for dissertation research (Dumas 2012) or for particular projects and then abandoned (Smith 2006).

More recently, a team of researchers have obtained funding to prepare a dataset that plans to encompass the entirety of the federal docket during a given time period. The Systematic Content Analysis of Litigation Events Open Knowledge

Network (SCALES-OKN), housed at Northwestern University School of Law, offers the potential for extensive datasets that capture docket behavior across a broad swathe of the federal judiciary. Unfortunately, as the SCALES-OKN Consortium itself notes, “docket entries go on to list all the noteworthy episodes in the lifetime of the case (motions, orders, status hearings, trial proceedings), but regrettably, they don't describe *what happened* in those episodes” (SCALES-OKN 2022). Thus, in order to understand the reasons that judges and litigants give for their decisions, researchers “have to find the docket entry . . . , and retrieve the link to the PDF document attached to that docket entry” (SCALES-OKN 2022). Thus, most researchers studying judicial politics focus on questions that can be answered using datasets, such as what case, litigant, or judge characteristics lead to a particular outcome.

Analyses that require the close reading of cases we tend to leave to law professors, and frequently we dismiss their insistence that the text of judicial decisions matter as naïve (Clark 2019). Small-n, descriptive work on courts, when it occurs at all, tends to focus on comparative courts (Brett 2022). I recently reviewed 20 recent law and courts publications for a venue dataset that I've compiled for the APSA Law and Courts section (Krell forthcoming), and *one* of these articles used qualitative methods (*two* were non-empirical). Thus, I worry that the law and courts subfield, particularly among Americanists, is in danger of disappearing down the same methodological rabbit hole that Congressional studies has lost itself in. In addition, the closure of *Justice System Journal* means that law and courts scholars

are chasing a decreasing number of publishing opportunities. Broader incentives in the discipline push scholarship toward increasing statistical sophistication and causal claims. Scholars who lack the opportunity to obtain large grants rely on datasets compiled by other scholars who can.

But datasets cannot answer questions their compilers did not envision. For example, the EEOC Litigation Project, one of the few datasets that include information on the amounts plaintiffs receive in settlements, contains no information about the initial pleading defendants file. To the extent that these documents (called “answers” or “responsive pleadings”) play a role in litigation outcomes, the dataset cannot answer those questions.

When I collected information on responsive pleadings to extend this dataset, I made several interesting findings, among them being a simple descriptive finding that cases that settle are more likely to do so after an answer has been filed than before. Further analysis provided a causal theory: answers that signaled competent defense were more likely to settle than answers that suggested the defense team was in over their head. But without the initial descriptive finding I would not have developed that theoretical addition to our understanding of trial court processes – and the data simply didn’t exist until I decided this was worth exploring.

Other events are so rare that it is difficult to measure their impact at all. For example, jury instructions are the last opportunity that litigants have to gain insight into how the judge views the strength of their case prior to trial. They’re also the last opportunity that litigants have to shape how the decision-makers see their

case. One would expect that jury instructions would therefore be a vital component to how law and courts scholars approach these questions. One would be wrong. And the reason is almost entirely due to the paucity of the data.

Among 300 pseudo-random¹ employment discrimination cases filed in the federal courts from 1996-2006 for whom data was collected, *thirty* cases have *any* jury-instructions documents at all. Of these thirty cases, only *thirteen* have a court order adopting jury instructions. And of those thirteen, only *seven* proceeded to a final judgment. Thus, for scholars interested in *outcomes*, only 2.5% of cases give you any information on jury instructions anyway. And that 2.5% has to be found through intensive search of the docketing system, they don't just turn up easily.

But there's clearly something going on here; after presenting their competing requests for jury instructions, over half of the cases reviewed settled, even without the court taking any action. Similarly, almost half the cases settled *after* the court issued a jury-instructions order, suggesting that what courts *do* in these orders matters. Without taking the time to do a deep dive into these documents, scholars risk ignoring a clearly-influential piece of the process.

I wish I had a more concrete solution beyond "let's spend a lot of resources reviewing documents," but I think we've just about hit the limits of existing datasets. New projects have great promise but are still coming online. We should be working to make those new projects as expansive as possible and afford scholars as many opportunities to ask questions as we can.

¹ The selection process wasn't determined by me, but there were external forces such that I can't call it random. I'm happy to discuss them in more detail if folks are so inclined.