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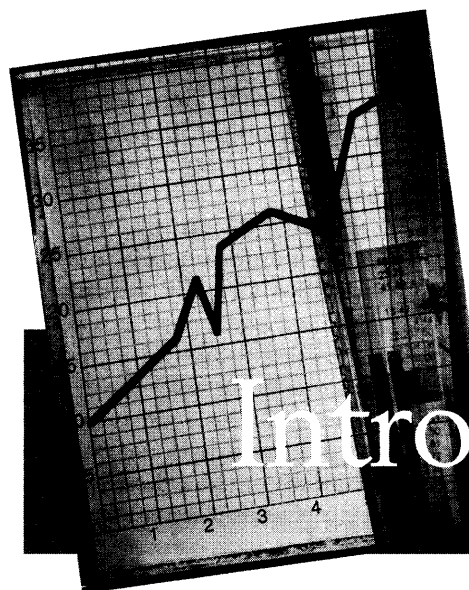
Judicature

MARCH-APRIL 2000 VOL 83 NO 5



Social Science, the Courts, and the Law

Using data to understand legal processes



Introduction

Social science, the courts, and the law

By LEE EPSTEIN, SYMPOSIUM ISSUE EDITOR

Social science and the law. To many scholars and practitioners alike that phrase conjures up images of the Brandeis brief—filed in *Muller v. Oregon* (1908) to defend the constitutionality of a maximum-hour work law for women and widely heralded as the first use of social science evidence in court;¹ or Clark's "doll study"²—made a part of the record in *Brown v. Board of Education* (1954) and cited by the Court as evidence of the negative effect of segregation on

Databases compiled by social scientists enable us to develop a fuller understanding of the courts

indeed, it is one that dominates various books on the subject of social science and the law, such as Loh's *Social Research in the Judicial Process* (1984), Monahan and Walker's *Social Science in Law* (1998), and Rosen's *The Supreme Court and Social Science* (1972); but it is not the sole interpretation. Not only do social scientists (and, increasingly, members of the legal academy) develop systematic evidence—sometimes at the request of attorneys, sometimes not—to advance particular claims, they also collect data to study numerous and diverse features of legal processes. And

it is this use of data that has come to dominate many scholarly contributions to social-scientific journals and university presses.

This "other" use is not new. Beginning in 1925, Professor Felix Frankfurter, with various collaborators, penned a series of *Harvard Law Review* articles that included a slew of data on the business and decisions of the U.S. Supreme Court. Twenty-four years later, the *Review* began what is now an annual tradition of supplying statistics on the Court's term. Political scientists too got into the act early on. C. Herman Pritchett, the founder of the modern-day study of law and courts, set the stage when, in 1941, he published an article chock-full of data on dissent patterns among the justices.⁵ Many scholars followed Pritchett's general lead. So many, in

fact, that today virtually no aspect of law and courts—from studies of the outputs of courts and judges to the views of the public over particular decisions to the success of various litigants—has remained immune from some type of data-analytic treatment.

Multi-user databases

What is new is a move toward "multi-user databases." The idea behind these is straightforward enough: Rather than collect data designed to answer particular research questions—*e.g.*, Is the Supreme Court more likely to reverse decisions from some circuit courts than from others? Does the U.S. government win its cases at unusually high rates?—we ought to

amass large databases so rich in content that multiple users, even those with distinct projects, could draw on them. This, at least, was Harold J. Spaeth's vision. Nearly two decades ago he asked the National Science Foundation (NSF) to fund a multi-user database

on the U.S. Supreme Court, one that would contain scores of attributes of Court decisions handed down since 1953.

With NSF support, along with guidance from a board of overseers, Spaeth collected and coded the data and, finally, assembled the database. In the late 1980s, he made it (and the documentation necessary to use it) publicly available; since then, he has updated the data annually. He also has backdated the data to cover the Vinson Court era (1946-1952 terms).

Inasmuch as Spaeth and Jeffrey A. Segal describe the contents of the database in their contribution to this symposium, suffice it to note here that Spaeth's vision has been realized. There is little doubt that today his U.S. Supreme Court Judicial Data Base is the greatest single resource of data on the Court; there are virtually no social-scientific projects on the Court that fail to draw on it.

What accounts for the database's success? One explanation centers on the comprehensive approach taken. Put succinctly, the database is a virtual compendium of "anything anyone would ever want to know about the Court"—or at least anything that is amenable to quantification. Ever curious about whether the Court tends to reverse particular circuits? Or whether the U.S. government wins its cases at unusually high rates? No longer is there a need to go out and collect data; Spaeth's product contains all the variables required to answer these and a host of other questions.

Another explanation implicates the care that Spaeth took in assembling the database. Over the years he has hired various assistants to replicate samples of the data, and the rates at which they agree with his codings are remarkable. The reason, I suspect, is that Spaeth provides exhaustive definitions of the variables and their values. This holds even for variables as seemingly plain and obvious as case citations, as this excerpt from his documentation attests:

Variables 1, 2, 3 case citations (US, SCT, LED)

The three variables in these fields provide the citation to each case from the official *United States Reports* (US) and the two major unofficial Reports, the *Lawyers' Edition of the United States Reports* (LED) and the *Supreme Court Reporter* (SCT). The volume number precedes the slash bar; the page number on which the case begins follows. When these citations appear in printed form, any zeros that precede any other cardinal number are dropped. Thus, the database LED citation, 086/0011, should be read as 86 L Ed 2d 11. Note that all LED citations are to the second series except for volumes 98, 99, and 100 which are cited without "2d." These three volumes cover the first three terms of the Warren Court (1953-1955). Note that the database does not distinguish between citations to volumes 98, 99, and 100 of the first series and volumes 98, 99, and 100 of the second series. The latter cover a portion of the 1987 term. This overlap should cause you no trouble unless you use LED citations to these volumes to create your own SPSS commands.

All US and LED citations were copied directly from the published volumes. SCT citations were derived from the conversion table to the *United States Reports* which is located in the front of the various volumes of the *Supreme Court Reporter*.

Citations to the *Lawyers' Edition* are current. Those to the other two Reporters are not.

Not every record is cited to each source. I do not find either *Olin Mathieson Chemical Corp. v. N.L.R.B.*, 352 U.S. 1020 (1957), or *United States v. Louisiana*, 409 U.S. 17 (1972), in the *Lawyers' Edition*. On the other hand, the *United States Reports* do not contain those cases in which a justice dissents from the granting of an attorney's request for admission to the Bar of the United States Supreme Court. *E.g.*, *In*

1. See Vose, *National Consumers' League and the Brandeis Brief*, 1 *MIDWEST J. OF POL. SCI.* 101-145 (1957) and his *CONSTITUTIONAL CHANGE* (Lexington, MA: Lexington Books, 1972).

2. Clark and Clark, *Racial Identification and Preference in Negro Children*, in Newcomb and Hartley, eds., *READINGS IN SOCIAL PSYCHOLOGY* (Holt, Rinehart, and Winston, 1947). The data in this paper were included in the Clark study cited by the Court. For an excerpt, see Monahan and Walker, *SOCIAL SCIENCE AND THE LAW*, 4th edition 183-184 (Westbury, NY: Foundation Press, 1998).

3. For information on these data, see Baldus, Woodruff and Pulaski, *EQUAL JUSTICE AND THE DEATH PENALTY* (Boston: Northeastern University Press, 1990).

4. See Frankfurter and Landis, Frankfurter & Hart, Frankfurter & Fisher, and Hart, *The Business of the Supreme Court*, *HARV. L. REV.*, 43:33,44:1, 45:271, 46:226, 47:245, 48:238, 49:68, 51:577, 53:579, (for the 1928-1938 terms.). See also Frankfurter and Landis, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* (New York: Macmillan, 1927).

5. *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939-1941*, 35 *AM. POL. SCI. REV.* 890-898 (1941).

Table 1. Comparison of data from the *Harvard Law Review* and Spaeth's U.S. Supreme Court Judicial Data Base, 1994 Term

	Opinions written							
	Opinions of the Court		Concurrences		Dissents		Total	
	Harvard	Spaeth	Harvard	Spaeth	Harvard	Spaeth	Harvard	Spaeth
Rehnquist	11	11	1	1	4	4	16	16
Stevens	9	9	6	6	19	18	34	33
O'Connor	10	10	13	13	6	6	29	29
Scalia	8	7	9	8	7	7	24	22
Kennedy	10	10	4	4	1	1	15	15
Souter	9	9	3	3	6	6	18	18
Thomas	8	8	7	7	8	8	23	23
Ginsburg	9	9	5	5	7	7	21	21
Breyer	8	8	2	2	6	6	16	16
Per Curiam	4	4	—	—	—	—	4	4
Total	86	85	50	49	64	63	200	197

Sources: Harvard: 109 *Harvard Law Review* 340; Spaeth: U.S. Supreme Court Judicial Data Base.

the *Matter of Admission of Leda M.C. Hartwell, William Evans Benton, and Michael T. Rose*, 71 L Ed 2d 641, 859, and 862 (1982), respectively. Relative to the Court's formally decided cases, this sort of memorandum decision is trivial. Because citations to the *Supreme Court Reporter* are derived from a conversion table, as mentioned above, cases not cited in the *United States Reports* will have no parallel SCT citation, as will cases that the conversion table otherwise omits.

Pagination does not invariably proceed chronologically throughout the volumes. Hence, do not assume that because a given citation has a higher page number than that of another case it was decided on the same or a later date as the other case. The only accurate way to sequence the cases chronologically is by indexing or otherwise sequencing each case's date of decision (DEC) variable (variable 20).⁶

At first blush, this level of detail may seem unnecessary, even fussy. On deeper reflection, however, it is critical for all users and consumers of

data. That is so for several reasons, not the least of which is that the "fussy" details facilitate replication and reproduction.

Replication and reproduction

To see why this is so important consider Table 1. To construct it, I started with the table in the *Harvard Law Review* that I thought would be the easiest to replicate—Table I which lists the "actions of individual justices." (In fact, *Harvard* claims that "the construction" of this table "is accomplished primarily through tabulations as mechanical and simple as counting.") I then set out to reproduce it using the Spaeth data base but immediately ran into problems—two of which are worthy of mention.

First, I wondered about *Harvard's* unit of analysis, that is, whether the editors based their figures on docket numbers or case citations. This question arises because occasionally the Court will consolidate several cases (with different docket numbers) under one citation. It is thus possible for a justice to join, say, the majority with regard to one case but dissent in another even if the citation is the same. Unfortunately, *Harvard* does not specify whether it used citation

or docket number as the unit of analysis; it simply refers the reader to its reviews of the 1967 and 1969 Supreme Court terms for "a complete explanation of how the tables are compiled." These did, in fact, provide more detail, but neither contained information about the unit of analysis. It was only by going back to its review of the 1960 term that I thought I found an answer: "Table IV [the analog to Table 1 for the 1994 term] deal[s] with those full opinions of the Court that dispose of the cases on the merits. Since it is not unusual for one opinion to dispose of more than one docketed case, the total number of full opinions, 118, is fewer than the number of cases listed [in a table dealing with the final disposition of cases]." While far from clear, this statement suggested to me that those compiling the 1960 data used case citation as the unit of analysis; I simply had to assume that the 1994 term editors followed suit. Hence, in the Spaeth database, which conve-

6. Documentation to the United States Supreme Court Judicial Data Base, 1953-1998 Terms, 1-2. Available at: www.ssc.msu.edu/~pls/pljp/sctdata.html.

niently houses a variable titled "analu" or unit of analysis, I selected case citation rather than docket number.

The second problem I encountered involved per curiam opinions. The *Harvard Law Review* states that it includes in its counts only those containing "legal reasoning substantial enough to be considered full opinions." Almost needless to write, such a "criterion" does not meet any accepted or acceptable standards of scientific work with which I am aware: What "substantial" legal reasoning means to the editors of the *Harvard Law Review* may be quite different from what it means to you or me. Accordingly, we might select distinct per curiams to incorporate into the analysis.

Perhaps out of recognition of this problem, *Harvard* provides a list of the per curiams it includes. But, frankly, this does not help matters much because we would be unable to replicate its list for earlier or later years; "substantial" legal reasoning is simply too squishy of a phrase to admit replication. I am thus much more comfortable with the Spaeth data base, in which I—as the researcher—could develop my own replicable criterion (e.g., all per curiam opinions more than two pages long) or invoke one of Spaeth's (e.g., all orally argued per curiams).

Still, to construct the Spaeth columns in Table 1, I included the per curiams listed in *Harvard's*; after all, my task was to replicate its data. And, yet, despite my best efforts I could not do so; I could not obtain the same totals for *Harvard* and Spaeth. To be sure, the differences appear small (e.g., 200 versus 197 total opinions). But imagine how large they would grow if we looked at career opinion-writing records rather than those for a single term. Moreover, recall that I purposefully selected a table that I thought would be a snap to replicate, the one that the *Harvard* editors themselves called "mechanical" and "simple." What if I had attempted to reproduce one of the

more complicated tables? My guess: the differences would have been enormous.

So the results of my replication effort failed, but where does this leave us? The question, I think becomes one of trust: Which results should we trust more? *Harvard's* or Spaeth's? To me there is no contest: Spaeth provides precise definitions of all the variables included in my analysis; *Harvard* provides at most only the barest of clues and at minimum subjective criteria. Based on Spaeth's definitions you or I could easily reproduce his data and the results they yield; based on *Harvard's*, we could not.

Just the beginning

I could continue this rave review of the Spaeth database, but let me stop and simply note: Whatever the explanation for its success, the U.S. Su-

Whatever the explanation for its success, the U.S. Supreme Court Judicial Data Base was just the beginning

preme Court Judicial Data Base was just the beginning. Since its appearance (and expansion) the NSF agreed to support a number of multi-user projects. This symposium covers two, along with the Spaeth project, in detail: the United States Courts of Appeals Data Base and the State Supreme Court Data Project. For each, the authors provide some background on the database and an overview of its contents. They also furnish illustrations of the data's use—illustrations that members of legal and social-scientific communities alike will find intriguing.

So, for example, Spaeth and his co-author, Jeffrey A. Segal, demonstrate how users can employ the U.S. Supreme Court data to assess "conventional wisdom" about the Court, including whether the justices typically choose to hear cases that they wish to

reverse and whether chief justices assign opinions to associates who share their political values.

Likewise, Tracey E. George and Reginald S. Sheehan, authors of the essay on the U.S. courts of appeals data, set out a series of interesting questions that the database can help to address, e.g., whether the creation of two-judge panels to handle certain "easy" cases would help reduce workload pressures on federal appellate courts and whether particular federal agencies "fall out of favor" with one or more circuits.

Finally, Paul Brace and Melinda Gann Hall, who amassed the State Supreme Court Data Project, describe how their data could answer critical questions pertaining to judicial selection, such as whether campaign contributions affect the success of donors who litigate before courts and whether justices with an "electoral connection" vote differently from their appointed counterparts.

Following each database discussion are comments from specialists outside the social sciences—a business school professor, a member of the legal academy, and a state supreme court justice. Their responses perform a real service, I think, in delimiting both the benefits of multi-user projects and some of their drawbacks. Either way, I have no doubt that readers will come away with a fuller understanding of the relationship between social science and the law as well as a keener appreciation of the rich resources available to study questions emerging from that relationship. ☞