Judges and the Deregulation of the Lawyers' Monopoly

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Online Appendix[2]

A. Overview of our approach to data collection and analysis

Our methodological approach is informed by the pragmatic tradition of sociolegal scholarship, which recognizes that studying complex social phenomena first requires researchers to describe and understand the conditions that underlie the phenomena they wish to study.[3] To engage in this type of research process, we must diverge from conventional ways of studying judicial behavior in legal scholarship, which tend to focus on case outcomes and written opinions.[4] While these existing studies provide valuable contributions to the scholarly understanding of how appellate judges decide cases, this methodological approach is not appropriate for studying trial judges and their courts, where written decisions are nearly non-existent.[5]

Even if written decisions were widely available, our interest does not lie solely in predicting or explaining case outcomes, but instead in the myriad within-case decisions judges make that largely go unrecorded. Civil trial courts lack lawyers to mediate and influence judge behavior, thus judges' within-case decisions become as important as case outcome decisions. Understanding judicial behavior in civil trials requires data on judges' live, in-person interactions with litigants. By collecting these data, we can explore a full range of judicial behavior in those interactions, including what choices judges make, why judges make the choices they do, how those choices affect litigants, and the implications for court legitimacy and the rule of law.

Given that our research questions focus on examining judicial behavior and motivations for that behavior, we collected observational data from hearings and interview data from conversations with judges. Our study sample—of eleven judges observed across three jurisdictions that vary in their level of guidance and support for active judging tactics–- facilitates comparisons of our behaviors of interest at the judge and jurisdiction level.[6] The jurisdictions include Centerville, a large, prosperous, coastal urban center; Townville, a small, economically depressed coastal city; and Plainville, mid-size city in the Midwest (to protect the confidentiality of our study sites and research

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[2] Adapted from *Judges in Lawyerless Courts*, working paper on file with authors.

[3] NAOMI CREUTZFELDT, MARC MASON, AND KIRSTEN MCCONNACHIE, EDS. ROUTLEDGE HANDBOOK OF SOCIO-LEGAL THEORY AND METHODS (ROUTLEDGE, 2019).

[4] *See* Katerina Linos & Melissa Carlson, *Qualitative Methods for Law Review Writing*, 84 U. CHI. L. REV. 213 (2017).

[5] Theodore Eisenberg, *The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns,* 2011 U. ILL. L. REV. 1713, 1734; Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 835 n.17 (2008).

[6] For a discussion of this approach, purposive sampling, see JOHN GERRING, CASE SELECTION FOR CASE-STUDY ANALYSIS: QUALITATIVE AND QUANTITATIVE TECHNIQUES, IN THE OXFORD HANDBOOK OF POLITICAL METHODOLOGY (JANET BOX-STEFFENSMEIER, HENRY E. BRADY, AND DAVID COLLIER, EDS., NEW YORK: OXFORD UNIVERSITY PRESS) 645 (2008); Jason Seawright and John Gerring, *Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options*, 61 POLITICAL RESEARCH QUARTERLY 294, (2008).

subjects, this series of articles reports no identifying information). To focus our comparative efforts, we sought to minimize the influence of factors that would interfere with our ability to discuss judges' approaches across jurisdictions. As such, we chose an area of law that varies relatively little from state to state, protective orders. Further, in this area of law, most parties are unrepresented and the cases require in-person testimony. Therefore, we were able to efficiently gather data on judges' in-person interactions with pro se parties in an area of law that affords similar opportunities for judges to utilize active judging tactics. We discuss our study site and case selection methods in more detail below.

B. Study sites

The three jurisdictions in our study vary in economic, demographic, and political terms. Centerville is a relatively wealthy, politically liberal, and diverse urban center. Townville is also urban, politically liberal, and diverse, with a very high poverty rate and a history of economic stagnation. Plainville is majority white, politically moderate, and sits in a fiscally and socially conservative state where social and government services of all kinds are under-funded, including the courts. As illustrated in Table 1, the jurisdictions also vary in their institutional commitments to, and history of, civil access to justice reform, including court funding, ethics rules, and training for judges. We conducted an independent review of each jurisdiction's access to justice reform history and civil justice context, including reviewing primary documents and aggregating sources.[7] One of the aggregating sources, the Justice Index, regularly surveys and ranks U.S. states based on the strength of their access to justice reform efforts.[8]

Table 1. Jurisdiction-level variation in judges' environments

Jurisdictions	Justice Index[9]	Judicial Training	Guidance for Judges	Court Governance
Centerville	Upper quartile (top 25%)	Yes	Allows accommodations, provides detailed guidance	Centralized
Townville	Second quartile (25-50%)	Yes	Allows accommodations, provides guidance	Somewhat centralized
Plainville	Lower quartile (bottom 25%)	No	Allows accommodations, no other guidance	Local control

[7] To preserve anonymity, we have omitted identifying details, which sometimes requires us to speak at a level of abstraction about certain issues and prevents us from quoting or citing law or primary documents directly.
[8] *See* JUSTICE INDEX, *supra* note 8.
[9] *See* JUSTICE INDEX, *supra* note 8.

In the most recent Justice Index report, Centerville sits toward the top of the rankings. The city is a recognized national leader in access to justice reform, including reform of the judicial role. Centerville's effort to shape the active judge role include changes to the judicial canons, official guidance, and regular judge training. Centerville's canons not only permit "reasonable accommodations," and clarify that such accommodations do not violate impartiality, but also offer a list of possible active judge tactics judges may use, such as modifying procedures or explaining processes. Only a handful of other states have similarly robust ethics rules.[10] Centerville's court administration has issued additional formal guidance encouraging judges to take an active role in assisting pro se litigants. The guidance instructs judges to ensure litigants have an opportunity to be heard, understand court processes, decisions, and orders, and are treated with respect. Judges receive regular training on handling pro se cases. Centerville is a jurisdiction with a strong court administrative body that exercises significant control over court processes and logistics, including judicial training.

According to the Justice Index, Townville falls in the middle of national access to justice reform rankings. Its judicial ethics rules include the authorization for judges to make "reasonable accommodations" and state court administrators have issued additional guidance urging judges to explain procedures and court orders and make necessary referrals. Judges receive regular training on handling pro se cases. Townville's court administration is strong, but it does not exercise the same level of heavily centralized control over trial courts that we see in Centerville.

Our final jurisdiction, Plainville, sits in the very bottom of the Justice Index rankings, having made almost no effort to reform its civil justice system, or the judicial role in that system, in response to self-represented litigants. Its court administration has stayed mostly silent on the topic of self-represented parties' needs beyond authorizing "reasonable accommodations" in ethics rules. There is no statewide guidance and judges do not receive any training on handling pro se cases. In contrast to the other two jurisdictions, Plainville's court administration is among the weakest in the country in terms of its power to influence trial court management. Trial courts are almost totally controlled at the local level by judges who are functionally not accountable to state court administration and do not rely on the state for funding. Judicial power at the state level is limited to the supreme court's role in deciding cases and establishing court rules.

As such, we selected these jurisdictions based on our expectations of finding significant cross-jurisdictional variation driven in how judges implemented the active role. In Centerville and Townville, where judges receive regular training and strong court administrative bodies have signaled their support for active judging, we expected to find judges would behave more consistently with guidance and generally do a better job of helping litigants in the courtroom. We thought Centerville judges might be the best examples of active judges in our sample, given the jurisdiction's long history of access to justice reform, widespread support for judicial assistance to pro se parties, and robust ethical rules. Our expectations were much different for Plainville, where ethics rules include only the "reasonable accommodations" language, there is no statewide guidance on how to implement the active judge role, and judges are not trained on working with pro se litigants. We expected its judges to be more passive and less helpful to pro se litigants than either of the other

[10] To preserve anonymity, we are not offering the exact language of any state's rules.

jurisdictions.[11]

C. Ensuring consistency of case law and case type across study sites

We chose to study protective order dockets because the law is relatively straightforward and consistent across jurisdictions. Protective order statutes first originated in the 1970's and were originally designed as a remedy to protect victims of intimate partner violence.[12] These laws were a direct response to advocacy by advocates for women, who initially criticized the police response to domestic violence and sought to have it treated like any other crime. Later, advocates grew skeptical of the state's ability to help victims, and successfully advocated for the creation of a civil law remedy that would protect victims from abuse, empower them to leave dangerous relationships, and most importantly, give them a measure of autonomy.[13] Protective orders represent an area of civil court operations that has seen particularly robust access to justice reform over the past few decades, and petitioners are the primary focus of these efforts. For example, in all the jurisdictions we studied, at least one domestic violence agency works collaboratively with the court to offer a broad menu of social and legal services, both inside and outside the courthouse. In fact, in all jurisdictions, staff from these domestic violence agencies sit in the courtroom during dockets and assist petitioners.

In addition, these cases almost always involve two unrepresented parties. Protective orders are a form of injunctive relief, paired with discretionary court fees and monetary awards, and the potential for criminal enforcement.[14] They offer fairly robust relief provisions ranging from "no contact" or "stay away" provisions, property possession, and child custody.[15] In each jurisdiction, the court has developed and made available a set of court forms including petitions, draft orders, and returns of service. And in all jurisdictions, the domestic violence agencies offer their services to essentially all petitioners. These agencies help people decide whether to pursue a protective order, offer legal advice and information, and help people complete and file all necessary forms. Notably, protective orders are an area of law with robust services for petitioners and essentially no services for defendants. In all three jurisdictions, petitioners file form pleadings with the court, but defendants do not. Instead, in these summary proceedings, a defendant's only opportunity to respond happens live, in-court, during a hearing on the merits.

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[11] We also note that, while we are principally seeking to explore the relationship between jurisdiction-level commitments to civil justice reform and the utilization of active judging tactics, we do not foreclose the possibility that intra-jurisdictional differences may also inform judges' behavior. Future studies would do well to consider how these differences may manifest across a sample of judges that allow for such subset analyses.

[12] In protective order cases, the core question is typically whether the defendant engaged in a particular behavior, targeted toward the petitioner, that either harmed the petitioner directly or threatened harm. In most jurisdictions, there is some sort of relationship test, usually looking at whether the parties are related through a dating relationship, marriage, or blood. But protective orders are also available for victims of stalking.

[13] *See* Deborah Epstein, *Redefining the State's Response to Domestic Violence: Past Victories and Future Challenges*, 1 GEORGETOWN JOURNAL OF GENDER AND THE LAW 127, 127-8 (1999); Stoever, *supra* note 14, at 194; Leigh Goodmark, *Law Is the Answer-Do We Know That for Sure: Questioning the Efficacy of Legal Interventions for Battered Women,* 23 ST. LOUIS U. PUB. L. REV. 7, 18 (2004).

[14] Jane Stoever, *Mirandizing Family Justice* 39 HARVARD JOURNAL OF GENDER AND THE LAW 189, 199 (2016).

[15] *Id.*

D. Data collection and analysis

We sat in on approximately 200 hours of court time across the three sites, encompassing 357 protective order hearings involving at least one person without counsel. While in court, we took verbatim notes on everything judges and litigants said.[16] Wherever possible, we made notes about the court environment and recorded exchanges we heard and things we saw around the courtroom, including interactions involving litigants in the audience, court clerks, domestic violence advocates, law students, and bailiffs, to name a few. We also conducted semi-structured interviews with the judges in Centerville and Plainville, which tapped the justifications and processes underlying the behavior we were observing in the courtroom, and included questions about the role of a judge and how that role has evolved over time and adapted to accommodate a majority pro se docket.

After we completed data collection, we converted our raw observation and interview notes to text files and used a qualitative coding platform, ATLAS.ti, for our thematic analyses. Based on our categorization of active judging tactics, we then followed a theoretically informed qualitative coding protocol and analysis process.[17] All researchers reviewed the raw data files across study sites and identified a range of potential codes and broader themes. The researchers shared their initial codes and themes and refined them through an iterative process. Next, the full dataset was coded by one researcher for evidence of the utilization of the active judging tactics and the emergent nuances therein, beginning with our court observation field notes, followed by the interview data. In this process, we coded for both judicial behaviors that appeared in hearing transcripts and for the explanations judges gave about their approach through the interview.[18] Through this process, we also recognized the importance of capturing missed opportunities for judges to utilize active judging tactics, as well as of identifying mismatches between a judge's expressed interests and her courtroom behaviors. For example, while the interviewed judges identified fairness as a principle guiding their work, we identified opportunities for judges to advance that principle that were missed through their refusal to answer basic questions from litigants and their use of jargon, as two examples. We contend that these missed, or even overtly rejected opportunities, have important consequences for substantive and procedural justice.

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[16] We sought and received Institutional Review Board approval to conduct this study (Protocol 17-28), which was found to be exempt. Throughout our data collection and analysis process, including drafting this article, we seek to preserve the confidentiality of our study sites. We sought permission to conduct court observations and interviews and were able to observe all judges working in each jurisdiction at time of data collection, including five judges in Centerville, four in Townville, and two in Plainville. Of these, two judges in Centerville and two in Plainville consented to be interviewed. Unfortunately, none of the judges in Townville consented to an interview. Judge and court resistance to our research existed in different ways as we conducted our research. In Secondville, though individual judges directly expressed varied willingness to be interviewed and some spoke "unofficially" to researchers, the administrative judge of the court instructed all of the observed judges that they may not be officially interviewed. In addition, a fourth jurisdiction was originally intended to be a site of research and while an individual judge welcomed observation and interview, the administrative judge of the relevant docket refused to allow either. Despite clear law in the jurisdiction that the court could not prohibit observation, we decided not to pursue data collection in that jurisdiction. In any situation where a case was called and at least one party was present and had an interaction with a judge, we counted it as a hearing.

[17] *See* Jennifer Fereday and Eimear Muir-Cochrane, *Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development*, 5 INTERNATIONAL JOURNAL OF QUALITATIVE METHODS 1, 4 (2006).

[18] *Id.*