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USING COURT RECORDS FOR RESEARCH, TEACHING, AND POLICYMAKING: THE CIVIL RIGHTS LITIGATION CLEARINGHOUSE

Margo Schlanger* and Denise Lieberman**

INTRODUCTION

The National Archives and Records Administration (NARA) is, wisely, planning the future of its enormous collection of relatively recent court records. The pertinent regulation, a “records disposition schedule” first issued in 1995 by the Judicial Conference of the United States in consultation with NARA, commits the Archives to keeping, permanently, all case files dated 1969 or earlier; all case files dated 1970 or later in which a trial was held, and “any civil case file which NARA has determined in consultation with court officials to have historical value.” Other files may be destroyed 20 years after they enter the federal repository.¹ The question before NARA, then, is whether to destroy nearly all of the records for cases terminated after 1969, keeping litigation files from those years only for those few cases in which adjudication was by trial (5% or less of the docket since 1984),² or whether to deem some or all non-trial cases as having “historical value” and preserve them for future research and use.

The regulation appears to embrace a view that historical court records are usually of only low or moderate value, insufficiently important to justify the resource allocation needed to preserve them all. In this brief article, we hope to demonstrate that this premise is incorrect. Court records have always been vital, and irreplaceable, sources for historical research. Made more accessible, as

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¹ The 1995 version was: *Schedule for the Disposition of the Records of United States District Courts, Territorial District Courts, Court of Claims, Court of International Trade, United States Claims Court, and the Special Court, Regional Rail Reorganization Act of 1973*, at 22, Information Resources Management Manual Chapter 17, XIII GUIDE TO JUDICIARY POLICIES AND PROCEDURES (Transmittal 3, Nov. 6, 1995). The current version, identical in pertinent respects, is ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Vol. I, THE GUIDE TO JUDICIARY POLICIES AND PROCEDURES, *Records Disposition Schedule 2*, Chapter 12, Part A, Section 15 (last modified Nov. 18, 2002). Both versions are on file with the authors and are posted in this article’s Appendix, see <http://schlanger.wustl.edu>, under “publications.”

² See, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMP. LEG. STUD. 459, 533-34 (tbl. A-2) (2004).

modern technology now allows, court records can become central sources for much broader use for legal researchers; for historians, political scientists, sociologists, and anthropologists; for students and teachers; and for advocates and policymakers. In Part I of this Article, we present a model for such use—the Civil Rights Litigation Clearinghouse, a new web-based resource built primarily around digitized court records, sponsored by Washington University in St. Louis.³ Accessible at <http://clearinghouse.wustl.edu>, the Clearinghouse collects, indexes, and makes publicly available for research and observation a growing universe of civil rights cases and the settlements and court orders those cases have produced, which regulate government and private entities in myriad important ways. We are working with NARA to include dockets and other court documents from the National Archives that might well be destroyed, someday, under the current document retention policy. The Civil Rights Litigation Clearinghouse illustrates the new opportunity to make court records, including NARA's court records, ever more useful to—and therefore used by—a broad array of people. It would be a great shame to pretermit such uses by ill-conceived archive destruction.

It is the absence of good alternatives that makes court records so important. In Part II, we explain why other types of records cannot substitute for litigation files, discussing the shortcomings of other sources of information about litigation. Part III concludes by arguing, very briefly, that trial status is an inappropriate proxy for the importance of a given piece of litigation. Trials are simply dispositions that turn on facts, as opposed to dispositions that turn on law (non-trial adjudication), or negotiation; trials are neither more nor less important than dismissals, summary judgments, settlements, and all the other methods of ending litigation. Moreover, trials are growing ever rarer, putting increasing pressure on the poor proxy.⁴ We therefore welcome NARA's invitation to comment on the best way for it to proceed and urge that that the current policy be changed altogether, or at least that the regulatory provision for keeping non-trial records for cases with historical value be applied extremely liberally, to entire case categories (e.g., civil rights of all kinds, including prison conditions; torts; environmental law; and many others).

I. THE CIVIL RIGHTS LITIGATION CLEARINGHOUSE: NEWLY ACCESSIBLE COURT RECORDS

A. The Importance of Civil Rights Injunctive Litigation

Civil rights injunctions have been of tremendous importance in this country since 1955, when the Supreme Court's second opinion in *Brown v. Board of*

³ The project is multidisciplinary and is supported by Washington University's Law School, the Law School's Center for Empirical Research in the Law and its Center for Interdisciplinary Studies, as well as by the Faculty of Arts and Sciences' American Culture Studies and Legal Studies programs.

⁴ See *infra* note 52 and accompanying text.

Education created the conditions for the first modern such orders.⁵ It was *Brown II* that instructed district courts to “take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”⁶ The resulting long-term litigation-related oversight of errant institutions is the essence of modern injunctive practice. The settlements and court orders entered in civil rights cases over the past fifty years have transformed a huge number of governmental and private institutions including schools,⁷ voting districts,⁸ jails and prisons,⁹ housing authorities,¹⁰ child welfare systems,¹¹ employers,¹² restaurants and other public accommodations,¹³ and so on. This injunctive litigation model is prevalent in other types of cases as well: environmental litigation¹⁴ and some kinds of union reform,¹⁵ for example. In these and other arenas, injunctive civil rights cases have closed some institutions and opened others, dominated budget politics on occasion, become models for

⁵ *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955).

⁶ *Id.* at 301.

⁷ For a list of school desegregation cases, see, e.g., American Communities Project, Brown University, The State of Public School Integration: Desegregation Court Cases and School Demographic Data, <http://www.s4.brown.edu/schoolsegregation/desegregationdata.htm> (last visited July 16, 2006).

⁸ For a list of Voting Rights cases see, e.g., Voting Rights Initiative, Documenting Discrimination: Judicial Findings under Section 2 of the Voting Rights Act, available at: http://sitemaker.umich.edu/votingrights/final_report (last visited Sept. 9, 2006). By 2007, more comprehensive data will be available at <http://clearinghouse.wustl.edu>.

⁹ See Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, forthcoming 81 N.Y.U. L. REV. 550 (2006). For information about hundreds of jail and prison cases, see <http://clearinghouse.wustl.edu>.

¹⁰ See, e.g., Susan J. Popkin, George Galster, Kenneth Temkin, Carla Herbig, Diane K. Levy, & Elise Richer, *Baseline Assessment of Public Housing Desegregation Cases: Cross-site Report* (April 2000) available at <http://www.huduser.org/publications/pubasst/baseline.html> (listing cases) (last visited Sept. 9, 2006). See also <http://clearinghouse.wustl.edu>.

¹¹ See, e.g., National Center for Youth Law, Foster Care Reform Litigation Docket (2006), available at http://www.youthlaw.org/fileadmin/ncyl/youthlaw/publications/fcrl_docket06.pdf (last visited Sept. 9, 2006).

¹² The EEOC’s website includes descriptions and copies of many class action court orders. See, e.g., Joint Motion for Entry of Consent Decree, *EEOC v. Mitsubishi Motor Manufacturing of America*, 96-1192 (C.D. Ill. June 23, 1998), available at <http://www.eeoc.gov/policy/docs/mmma.html> (last visited Sept. 9, 2006). We hope that these cases will be available at the Clearinghouse in 2007, at <http://clearinghouse.wustl.edu>.

¹³ For example, for a list of the consent decrees and other settlements reached by the U.S. Department of Justice with various operators of public accommodations under the Americans with Disabilities Act, see U.S. Dep’t of Justice, ADA Settlements and Consent Agreements, available at <http://www.ada.gov/settlemt.htm> (last visited Sept. 9, 2006).

¹⁴ See, e.g., Peter A. Appel, *Intervention In Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215 (2000).

¹⁵ See James B. Jacobs, Eileen Cunningham & Kimberly Friday, *The RICO Trusteeships After Twenty Years: A Progress Report*, 19 LAB. LAW. 419 (2004) (describing cases); JAMES B. JACOBS, *MOBSTERS, UNIONS & FEDS: THE MAFIA AND THE AMERICAN LABOR MOVEMENT* (2005).

statutory interventions, and generally regulated governmental and private practices. Thousands of such cases have been filed over the past fifty years and new cases are filed all the time; hundreds, old and new, are ongoing and remain influential. Because relief in injunctive cases is directed at changing government or corporate policies, the impact of these cases extends far beyond the parties to the lawsuit.

But although these are extremely important cases, information about them has always been exceedingly hard to come by. Only a portion of the cases have ever been the subject of published judicial opinions. And even when judges have written opinions, and allowed those opinions to be published in print or on-line sources, such sources rarely tell the entire story of a litigation. For an example, consider *Brown v. Board of Education* itself. *Brown* was, of course, the litigation that produced perhaps the best known Supreme Court opinions of the 20th century. In the district court for the District of Kansas, *Brown* lasted nearly fifty years: It began in 1951, when lawyers for the NAACP Legal Defense Fund featured Oliver Brown's complaint on behalf of his daughter Linda in a class action complaint, and litigation continued until 1999. And, somewhat unusually, the *Brown* litigation was the subject of eleven reported opinions—seven in the district court,¹⁶ two in the court of appeals,¹⁷ and two in the Supreme Court.¹⁸ Yet those opinions merely begin to inform any one interested in the life of the litigation. They omit, for example, the actual desegregation plan entered on remand from the Supreme Court in 1955. Indeed, the district court's published discussion of that plan, that same year, states: "No useful purpose would be accomplished by setting out the plan in detail."¹⁹ Nor is there any published opinion detailing the district court's determination that the school district had by 1961 substantially complied with the 1955 plan.²⁰ The list of features of the *Brown* litigation invisible from the accessible opinions extends further, but the point is made: Even in this uniquely high profile and important case, those judicial opinions accessible via print or on-line publication do not capture close to the entirety of what interested observers would want to know about the

¹⁶ *Brown v. Bd. of Educ. of Topeka*, 98 F. Supp. 797 (D. Kan. 1951); 139 F. Supp. 468 (D. Kan. 1955); 84 F.R.D. 383 (D. Kan. 1979); 671 F. Supp. 1290 (D. Kan. 1987); No. 51-316-RDR, 1994 W.L. 114001 (D. Kan. March 30, 1994); *Brown v. Unified Sch. Dist. No. 501*, 878 F. Supp. 1430 (D. Kan. Feb 21, 1995); 56 F. Supp.2d 1212 (D. Kan. 1999).

¹⁷ *Brown v. Bd. of Educ. of Topeka*, 892 F.2d 851 (10th Cir. 1989); 978 F.2d 585 (10th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993).

¹⁸ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); 349 U.S. 294 (1955). In addition, in *Bd. of Educ. of Topeka v. Brown*, 503 U.S. 978 (1992), the Court vacated the 10th Circuit's 1989 opinion cited *supra*, in light of *Freeman v. Pitts*, 503 U.S. 467 (1992), and *Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237 (1991), and remanded for further consideration.

¹⁹ 139 F. Supp. at 469 ("There are a number of respects in which we feel that the plan does not constitute full compliance with the mandate of the Supreme Court, but that mandate implies that some time will be required to bring that about. The elements that we feel do not constitute full compliance are mostly of a minor nature but since this is not a final decree no useful purpose would be served by setting them out herein.").

²⁰ See 84 F.R.D. at 389 (mentioning 1961 finding of compliance).

litigation.²¹ This dearth of knowledge is even starker in most cases, and is nearly absolute for the many cases in which no judicial opinions have been published (usually either because the case's resolution occurred by settlement rather than adjudication or because the judge decided against publication). For most injunctive cases, then, even obtaining copies of injunctive orders that remain in effect can be a major challenge; getting hold of less central documents or of documentation in cases since dismissed can be nearly impossible for non-experts or the unfunded.

This information void has interfered with the development of public policy. As Congressman Roy Blunt recently explained in a forum discussing legislation he is sponsoring²² that would make it easier for state and local governmental defendants to terminate civil rights decrees, we need "some future sense of how many decrees there are even out there. There's no record, there's no clearinghouse, no way to look and see how many of these decrees are out there."²³ Informational scarcity makes good policymaking and advocacy more difficult, as officials, lawyers, and activists are forced to spend time finding out by word of mouth who has encountered issues similar to the ones they confront. And, similarly, ordinary citizens are unable to uncover the legal regime in which the governmental institutions that affect them are situated. The same problems undermine good scholarship, as well, when scholars are forced to study only unusual cases because the ordinary ones are so elusive.

B. The Civil Rights Litigation Clearinghouse: Introduction

The Civil Rights Litigation Clearinghouse addresses this knowledge deficit by posting information about many types of civil rights cases, along with documents from each case. The first phase of the Clearinghouse includes cases of several types: conditions of confinement cases involving jails, prisons, and juvenile detention and corrections facilities; and cases involving mental retardation and mental health facilities, and nursing homes. In addition, we have posted a few chosen cases even though we do not yet have the others in the category: *Brown* is there, for example,²⁴ as are a few recent cases, like *Lozano v. City of Hazleton*,²⁵ a litigation challenging a city ordinance that penalizes those

²¹ The district docket in *Brown* from the case's beginning until 1990 is available as document SD-KS-0001-9001 at <http://clearinghouse.wustl.edu>; the docket from 1993 to the case's close in 1999 is available via PACER, or as document SD-KS-0001-9000. Many other documents from the *Brown* file are also available at the Clearinghouse.

²² See Federal Consent Decree Fairness Act, S. 489, 109th Cong. (2005) (introduced March 1, 2005 by Senator Lamar Alexander (R-TN)); Federal Consent Decree Fairness Act, H.R. 1229, 109th Cong. (2005) (introduced March 1, 2005 by Representative Roy Blunt (R-MO)).

²³ For a transcript of the June 2005 event, entitled "Government by Consent Decree" and sponsored by the American Enterprise Institute, see <http://www.aei.org/events/filter.all,eventID.1078/transcript.asp> (last visited July 16, 2006).

²⁴ See SD-KS-0001 at <http://clearinghouse.wustl.edu>.

²⁵ See IM-PA-0001 at <http://clearinghouse.wustl.edu>.

who do business with illegal aliens. The Clearinghouse's cases currently available number over a thousand.

The first challenge for this phase was identifying the relevant cases. The difficulty of such identification is, we believe, one of the major reasons court records are so rarely used. In any event, our goal is that this part of the archive should include every litigation with injunctive relief or injunctive-like settlement in the relevant case categories, current and historical. To that end, in our search for cases to include we have supplemented traditional legal research by working with a number of advocacy and governmental organizations that maintain lists and brief banks. We believe that we have succeeded to the extent that the Clearinghouse collection reflects the most comprehensive documentation ever available of injunctive civil rights litigation. In addition, the Clearinghouse solicits its users to propose new case categories, cases, and documents for the collection, via the web.

The next challenge was to gather up information and documentation of the cases. At least for federal cases, court records are available but sometimes difficult to gather; they are usually in the relevant federal courthouse but for the older cases, in one of NARA's regional facilities. Copying documents from courthouses is prohibitively expensive, so we have not generally done that. Rather, we have obtained the documents from a wide array of alternative sources scattered across the country. Some are from the U.S. Department of Justice, others from the National Archives, still others from various advocacy organizations, as well as individual attorneys and litigators on cases. A great many are from the federal court system's web-based docketing system, known as PACER ("Public Access to Court Electronic Records"). For each case, we have tried to assemble key filings and orders if those documents are available—in particular, the complaints, the settlements and court orders, and, most crucially, the docket sheets that mark the progress of the litigation in trial court. Importantly, the Clearinghouse recognizes that the story of a litigation does not end with the issuance of a liability finding, or even a decree. Injunctive relief includes continued court jurisdiction and often a great deal of post-decree action, oversight, and/or litigation.²⁶ Our document-gathering efforts therefore extend through the entire course of proceedings, including any post-decretal period. In total, the Clearinghouse's first thousand cases will post over five thousand documents pulled from court records. The Clearinghouse thus makes web-accessible a rich and growing documentary archive of the progression of civil rights litigation in this country.

The archival work is supplemented with four other types of information. First, the Clearinghouse provides citations and links to several thousand additional opinions rendered in its cases and available on Westlaw or Lexis. Second, case summaries, mostly written by (supervised) law students, describe as much of the case's procedural history as we can discover; like the linked documents, the summaries cover post-decree as well as pre-decree proceedings.

²⁶ See, e.g., M. KAY HARRIS & DUDLEY P. SPILLER, JR., *AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS* (1977).

Third, case pages include citations to relevant case studies previously published. Finally, and perhaps most important, all the cases and documents are indexed, full-text searchable, and coded with searchable metadata. The available indices include: case name, case type, cause of action, source of relief (litigated or consent), case and institution location (city, county, state, district, circuit), various issues, federal or state court, name of judges and attorneys, name and type of subject institution, and various dates (filing, order entry, closing).

The Clearinghouse is scheduled to launch in October 2006, about the same time as this article will appear. By that time, we will be well underway in a second phase, as well. In the next year or so, we will add EEOC pattern or practice litigation and settlements; several thousand voting rights cases; and perhaps some portion of the large school desegregation category. In subsequent phases over the next months and years, we will work to add an easy-to-use quantitative component and new case categories (fair employment, deinstitutionalization litigation, disability public accommodations, school equity and finance, immigration class actions, police misconduct litigation, child welfare, public defender reform, and many more).

C. The Civil Rights Litigation Clearinghouse: New Possibilities for Research

The Clearinghouse thus makes two major contributions to the research infrastructure in the area of American civil rights. First, the Clearinghouse solves the basic problem in court record research that even for a particular case about which a researcher is aware, it can be extremely difficult simply to track down information. Ordinarily, to obtain relevant records using either PACER or the paper file in the federal courthouses or in NARA's regional archive requires knowledge either of the case name or the docket number—both often impossible to obtain except from the parties. The Clearinghouse instead allows users to browse (by case type or state), to search using any combination of several dozen fields (say, jail cases in Bowling Green, or cases in which Frank Johnson was a judge), or to search the full text of the included documents.

The second research problem is that obtaining documents requires often impracticable trips to their repositories and payment of a per-page fee. But for each included case, the Clearinghouse makes information more and more cheaply accessible. Once users find cases (and documents and summaries), the Clearinghouse allows them, without fee, to print or download any document, print or download a list of cases; and even save a search, case, or document in a personal briefcase. (Users can also register for updates of various sorts.)

The Clearinghouse thus not only makes it possible to find particular cases, but allows new kinds of research by users whose interests are legal, historical or political, whether their choice of analytic approach is qualitative or quantitative:

Policymakers interested in any of the substantive areas covered (corrections, education, housing policy, etc.) can use the Clearinghouse to access plans and reforms that have been implemented in other jurisdictions. Court decrees have long been a source of regulatory innovation—and even organizations and jurisdictions that have not been sued often want to know what

those decrees provide, to consider whether similar practices and procedures might be useful for them. But the decrees have not previously been available. The Clearinghouse will correct this situation. As Peter Martin, former Dean of Cornell Law School and one of the founders of Cornell's Legal Information Institute, has observed about digital information technology more generally, a broad searchable database can facilitate "less rigid, compartmentalized, and hierarchical government measures that also facilitate more richly informed discretion."²⁷

For both *plaintiffs' and defendants' attorneys*, as well as *judges*, the Clearinghouse can be an important tool for designing remedies. A lawyer or judge might use the Clearinghouse to pull up all the jail cases involving fire safety, for example, gaining insight into the variety of remedial avenues others have followed.

The Clearinghouse allows *researchers or analysts* interested in civil rights, government operations, or any of the substantive areas covered to understand better the interplay of law and public policy. Instead of searching through reported opinions, knowing that such opinions are unrepresentative but unable to get access to the "law in action," researchers will be able to use the Clearinghouse to understand the settlement and/or post-decree activity in civil rights cases, to look at the course of the litigation involved, and to obtain records and do searches unavailable elsewhere.

For *law professors* in particular, the Clearinghouse will be a tool to teach about complex litigation with its multiple parties and phases, many decision points, and long life. It will also be useful in substantive law school classes, providing examples of complaints, briefs, opinions, and decrees on many topics.

For *students*, whether in high school, college, graduate school, or law school, the Clearinghouse will offer an entry point into important areas of civil rights injunctive practice, which might otherwise form an impenetrable thicket. By posting source documents along with summaries that explain their relevance, it creates ideal fodder for student inquiry.

In short, the Civil Rights Litigation Clearinghouse demonstrates two things: the usefulness of court records as sources, and the potential for broadening record access for many different types of users, by using modern digitizing, database, and Internet technology.

II. THE IMPORTANCE OF COURT RECORDS: HOW DO WE KNOW ABOUT LITIGATION?

We hope that part I has demonstrated that court records are extremely valuable, even though obstacles to their accessibility have prevented full use. But could other sources, more easily maintained and disseminated, substitute? After all, litigation creates voluminous and easily accessible records of other types. The answer is clear: Each of the other sources, though far more easily

²⁷ Peter W. Martin, *The Internet: "Full and Unfettered Access" to Law—Some Implications*, 26 N. KY. L. REV. 181, 199 (1999).

accessible than court records have been, suffer from major flaws that undermine its ability to substitute for court records, the gold standard for litigation research.

Consider the U.S. district courts, for example. Each year, the large page, small type Federal Supplement and Federal Rules Decisions case reporters print thousands of pages of “reported” judicial opinions; Westlaw and Lexis publish thousands more “unreported” opinions electronically.²⁸ Verdict and settlement reporters publish a description of the litigated or settled outcomes of thousands of cases. In addition, newspapers and other media outlets report on court proceedings. And finally, the Administrative Office of the United States Courts publishes annual statistical summaries,²⁹ and makes available the individual case data underlying those summaries.³⁰ All these are, unlike court records, sources that researchers and lawyers can find with relative ease; they are available in libraries and on-line, indexed, archived, often text-searchable. Yet closer examination demonstrates that this information is far from being either comprehensive or representative.

A. The inadequacies of reported opinions

Begin with lawyers’ favorite source of information, the judicial opinion. Judicial opinions may in some situations give their readers a great deal of information about a litigation, but that is not their purpose. An opinion’s purpose is to announce the reasoning underlying the judicial resolution of some issue in the case. Thus, even when a judge writes an opinion and makes it available, either by designating it for publication in the print and on-line versions of the relevant court reporters or allowing it to be included in the Westlaw and Lexis on-line databases, or (in the past several years) posting it on a court website, opinions do not tell the entire story of a litigation. Opinions are, rather, snapshots of the case at one particular point in time. That point may be a particularly crucial one, but it may not. Reported opinions can concern the especially important issue of liability, for example, but they can also be about more peripheral matters such as attorneys’ fees, discovery disputes, and the like. As discussed above in the *Brown v. Board of Education* litigation, extremely important matters may be totally omitted from reported decisions.

²⁸ As discussed below, a Westlaw search of all opinions in the “dct” database issued between October 1, 2003 and September 31, 2004, pulled up nearly 28,000 opinions, of which over 7,300 were officially reported. (In many districts, yet thousands more opinions—often labeled “orders” but including some limited legal discussion as well as the actual result—are apparently accessible only in case files or, more recently, via the electronic docketing system.)

²⁹ See, e.g., ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2004 (2005), available at <http://www.uscourts.gov/caseload2004/contents.html> (last visited Sept. 9, 2006).

³⁰ See, e.g., Federal Judicial Center, Federal Court Cases: Integrated Data Base, 2004 [Computer file], Inter-university Consortium for Political and Social Research Study No. 4348, available at <http://www.icpsr.umich.edu>.

Moreover, only a small percentage of cases have any library-accessible opinions at all;³¹ the precise number varies with case type, geography, and other factors.³² Indeed, even though Westlaw and Lexis have increased the accessibility of some “unreported” opinions, observers estimate that only five to ten percent of cases have any accessible opinion at all.³³ I conducted a study of 2004 dispositions in federal district courts that confirms this estimate more dispositively. I constructed a database of each opinion available from Westlaw for fiscal year 2004 (October 1, 2003 to October 1, 2004)³⁴; there were 27,890 such opinions.³⁵ I compared those opinions, by district, to the Administrative Office of the U.S. Courts’ reported number of civil and criminal cases “terminated”³⁶ in each district.³⁷ Because most (though by no means all) of the

³¹ For many years, “reported” and “published” meant simply that opinions appeared in the printed court reporter volumes—for district courts, the Federal Supplement and Federal Rules Decisions series. There were, however, numerous other sources of opinions. See Allan D. Vestal, *Reported Federal District Court Opinions: Fiscal 1962*, 4 HOUS. L. REV. 185, 186-87 (1966). As they have grown, the electronic research services have begun to publish, electronically, more and more opinions not designated for official “reporting.” Following ordinary usage, I call these “unreported” opinions. Different district judges have different practices with respect to both designating opinions for full, print, publication and allowing their inclusion in the Westlaw/Lexis databases. Telephone interview with Jim Woodward, Clerk of Court, U.S. District Court for the Eastern District of Missouri (Feb. 14, 2006).

³² See Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUST. SYS. J. 782, 790 (1992) (noting publication of just 37 of 697—6%—district court cases in chosen case categories in the District of Minnesota from July 1, 1982 through June 30, 1984); Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC’Y REV. 1133, 1140 (finding that only 6% of federal employment discrimination cases filed in 1974 had district court opinions accessible via Lexis; by 1986, the percentage had risen to 27%).

³³ Evan J. Ringquist & Craig E. Emmert, *Judicial Policymaking in Published and Unpublished Decisions, the Case of Environmental Civil Litigation*, 52 POL. RES. Q. 7, 9 (1999).

³⁴ The search was in the “dct” database, and included only date restrictions. For example, I ran the search “da(aft 12/31/2003) & da(bef 2/1/2004).” I searched month by month because Westlaw pulls up only the first 2000 results of each search.

³⁵ The database I constructed is available as part of this article’s online Appendix. See <http://schlanger.wustl.edu>, under “publications.” To derive the number in text, I took out cases from non-district courts that are (for whatever reason) included in the Westlaw’s dct database—for example, the Court of International Trade and the Court of Appeals for Veterans Claims.

³⁶ “Terminated” is a word used by the Administrative Office of the U.S. Courts to encompass all the various dispositions that take a case off of the district court’s active docket—not only adjudications, settlements, and defaults, but also remands, removals, transfers, and statistical closings. For details on each of these dispositions, see Tech. Training & Support Div., Admin. Off. of the U.S. Cts., *Civil Statistical Reporting Guide* (July 1999) (on file with authors and posted in this article’s Appendix, <http://schlanger.wustl.edu>, under “publications”).

³⁷ The Administrative Office of the U.S. Courts publishes terminations data each year, by fiscal year. For this project, I used the on-line publication of 2004 data, see ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *supra* note 29, tbls. C-4a & D-1. The data are also available in raw form as study no. 4348 at the Inter-university Consortium on Social and Policy Research, see *supra* note 30.

Westlaw-retrievable decisions are for the kinds of dispositions that the Administrative Office includes as “terminations,” this comparison produces a rough national estimate of the proportion of case terminations that leave a record in an accessible opinion. That proportion turns out to be a mere 8.7%, for 2004. The proportion of “published” opinions (published, that is, in F. Supp. or F.R.D.) to terminations is, as one might expect, far smaller—currently just 2.3%.

It would matter less that so few cases are observable from the judicial opinions if those cases fairly represented the entire docket. But they do not. Most importantly, opinions are limited to those cases with some judicial decisionmaking. But fewer than half of district court cases end by adjudication, even broadly defined; the others are either settled or withdrawn without definitive court action.³⁸ Second, even of those cases that are adjudicated, only a portion have a written opinion. Judgment as a matter of law, bench trials, and the like are the grist of the opinion mill. But many cases are instead resolved by jury trial, summarily, or with an orally announced rather than written judicial decision. Thus reported opinions offer little insight into these types of outcomes—each of which is very common. The two factors above mean that the world of the reported opinion exhibits a large skew towards *judicial* rather than jury or party decisionmaking. Third, of those cases with opinions, in only a portion does the judge in question submit that opinion to the court reporter publisher for publication. Finally, in some very small subset of the publication-designated cases, the publisher may decide against publication.³⁹

Moreover, even when judges are the decisionmakers, there is now voluminous evidence that they choose to devote the time to fully developed opinion writing in non-representative ways. Comparing published to unpublished outcomes, one study of Northern District of Illinois employment discrimination cases found many more plaintiffs’ victories among the published group than the unpublished.⁴⁰ Such outcome non-representativeness seems to be common. As Evan Ringquist and Craig Emmert summarized in 1999:

The most thorough comparison of political influences on published and unpublished district court decisions, that of Rowland and Carp (1996), reaches three general conclusions regarding this comparison. First, in almost all instances, court decisions in published cases were more “liberal” than in unpublished cases. . . . Second, more often than not, appointment effects were greater in published case decisions than in unpublished case decisions. . . . Finally, while Ducat and Dudley (1989) found that the published decisions of federal judges were much more likely to support the policy and legal

³⁸ See, e.g., Herbert Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161 (1986); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMP. LEG. STUD. 705, 720-22, figs. 5-7 (2004).

³⁹ See Olson, *supra* note 32, at 784.

⁴⁰ Siegelman & Donohue, *supra* note 32.

positions of the presidents who appointed them, Rowland and Carp (1996) find no such cohort effect for unpublished decisions. . . .⁴¹

Besides outcome skews, it is plausible that opinions are about different kinds of cases than are typical on the docket—I would hypothesize that they are more likely to concern complex than simple cases, more likely to be issued in large stakes than small stakes cases, and so on.⁴² On the other hand, it does not appear to be true that only unimportant cases are decided without opinion. In one recent study, 81% of reported appellate opinions were from district court decisions without reported opinions.⁴³ Perhaps more telling yet, *half* the Supreme Court's docket of cases that originated in federal district courts during the study period consisted of cases whose district court decisions were originally unpublished.⁴⁴

And finally, reported opinions exhibit a huge geographic skew of an unstudied nature. The figure below demonstrates, presenting a histogram of the 94 district courts, grouped by the relationship between the number of opinions that appear in Westlaw and the number of terminations reported by the Administrative Office. It shows that while over half the districts (58 of the 94) produced opinions at a rate of 5% or less of terminations, the others were more diverse, ranging from 6-10% to 40-45% and even (for two outliers) 60-80%. Because some of the more opinion-prone districts are quite large, the resulting skew is severe: The twelve districts with the highest opinion-writing rate produced *over half* of the opinions available on Westlaw, although they account for only 12% of total terminations.⁴⁵ Most notably, the Northern District of Illinois, the Southern District of New York, and the Northern District of Texas between them terminated 9.2% of all federal district cases in 2004, but produced 33.4% of all opinions.

⁴¹ Ringquist & Emmert, *supra* note 33, at 15-16 (discussing C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* (1996), and Craig R. Ducat & Robert L. Dudley, *Federal District Judges and Presidential Power During the Postwar Era*, 51 J. POL. 98 (1989)).

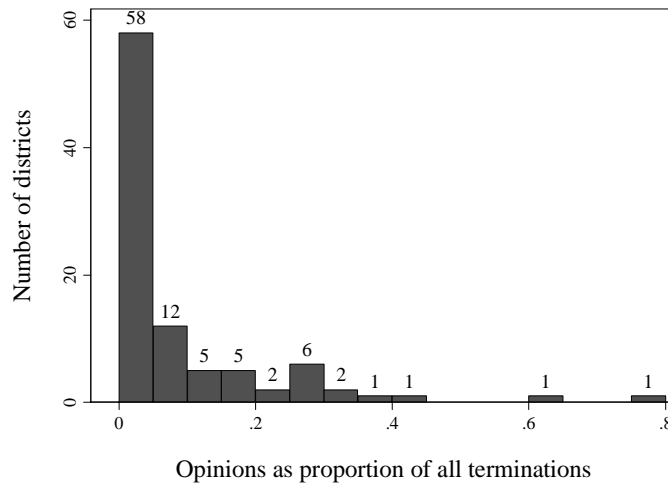
⁴² Donald Songer & Reginald Sheehan, *Who Wins on Appeals? Upperdogs and Underdogs in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 235 (1992); Donald Songer, Danna Smith & Reginald Sheehan, *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963 (1989). Even of cases reversed on appeal—a very small proportion—only a small fraction were appeals from published opinions in the district court.

⁴³ Donald R. Songer, *Nonpublication in the United States District Courts: Official Criteria Versus Inferences from Appellate Review*, 50 J. POL. 206, 213 (1988).

⁴⁴ *Id.* at 208.

⁴⁵ These twelve districts are (in ascending order by publication rate): the Northern District of Illinois, the District of Oregon, the District of Connecticut, the District of the Virgin Islands, the Eastern District of Louisiana, the Western District of New York, the District of Kansas, the Southern District of New York, the District of Delaware, the Northern District of Texas, the District of Maine, and the Western District of Wisconsin.

**FIGURE: OPINIONS AS PROPORTION OF TERMINATIONS
FEDERAL DISTRICT COURTS, FISCAL YEAR 2004 (N = 94)**



Source: Administrative Office of the U.S. Courts and all opinions in Westlaw's dct database; see *supra* text accompanying notes 34-37.

In short, federal district court litigation as it appears in accessible opinions is likely unrepresentative of the entire docket with respect to type of disposition, subject matter, outcome, and location. As Alan Vestal noted in 1966:

There seems to be an overemphasis in certain areas, while other areas are under reported. Some judges do not participate; others apparently are not at all selective in their contributions to the reported law. Reporting is left to the author of the writing or to the publisher of the series of reports. Neither acts unbiasedly in the process.⁴⁶

B. The Inadequacies of Other Sources

There are two other readily available sources of information about federal litigation—settlement and verdict reporters, and the Administrative Office of the U.S. Courts terminations databases. Like judicial opinions, each is inadequate because it is either unrepresentative of the full district court docket or insufficiently informative or both.

⁴⁶ Vestal, *supra* note 31, at 220.

Settlement and verdict reporters. The settlement and verdict reporters⁴⁷ are even worse as a source of unbiased information about the mass of cases. Because they are mostly passive recipients of information given them by lawyers, their sample is highly skewed towards the kinds of cases lawyers wish to brag about.⁴⁸

The Administrative Office of the U.S. Courts databases. When a federal district court case ends, personnel in the court clerk's office fill out a computerized form that assembles information about it—its name, filing date, district, docket number, the nature of the claim (using about a hundred “nature of suit” codes), how the case was disposed of (by default, settlement, or various kinds of adjudication), which party won, at what stage of the litigation, and so on. The Administrative Office of the U.S. Courts assembles these observations into a database and uses it to produce its published statistics. It also releases the raw data to the Inter-university Consortium on Social and Political Research, which in turn makes the database available on the web. The data include information about every case filed in federal district court, since 1970.⁴⁹ There are two problems with the AO terminations data, which make it far less useful than court records, at least for detailed inquiry about the content of litigation. First, the data are extremely summary in nature.⁵⁰ Second, they have significant error rates in some fields.⁵¹

* * *

In short, for anyone who hopes to understand litigation—one specific litigation or an entire field of litigation—there is no substitute for court records. Historians, sociologists, anthropologists, political scientists, legal researchers, and policymakers all need court records if they are going to understand either a type of case or a particular litigation, whether it is individually important or studied as an exemplar. There is simply no other source of information about the substantive or legal issues, the conduct of the disputes, or their resolutions. We are left, then, with an unmet need for access to court records—a need that the National Archives can and should meet, for those records within its purview.

⁴⁷ The Federal Jury Verdict Reporter premiered in October 2005, but federal verdicts and settlements were previously available in state-by-state reporters.

⁴⁸ See, e.g., Herbert M. Kritzer, *Advocacy And Rhetoric vs. Scholarship And Evidence In The Debate Over Contingency Fees: A Reply To Professor Brickman*, 82 WASH. U. L.Q. 477, 499-502 (2004).

⁴⁹ The database is maintained non-longitudinally, as ICPSR Study Nos. 8429 (1970-2000); 3415 (2001); 4059 (2002); 4026 (2003); and 4348 (2004), available at <http://www.icpsr.umich.edu/>.

⁵⁰ For information on the available information, see the codebooks for the ICPSR studies cited *supra*, and Admin. Off. of the U.S. Cts., Civil Statistical Reporting Guide, *supra* note 36.

⁵¹ See Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455 (2003); Hadfield, *supra* note 38.

III. CONCLUSION

As described in the introduction, NARA is committed to retaining all trial records for cases after 1969. It is only the non-trial cases that are at risk of elimination from the National Archives. A great deal of recent work reminds us just how rare trials are: In 1970, only ten percent of civil cases in federal district court were terminated during or after trial, and the proportion has shrunk in recent years to two percent.⁵² More important is that it is simply not true that all (or even most) important cases see trials. Indeed, purely legal issues—which surely can rank high in importance—are typically adjudicated without trial. Settlements, too, can be extraordinarily important. We therefore welcome NARA's invitation to comment on the best way for it to proceed and urge that the regulatory provision for keeping non-trial records for cases with historical value be applied extremely liberally, to entire case categories. Only if the records for entire case categories are preserved can future research understand any given litigation context.

There are numerous case categories whose historical and political importance is obvious—not only civil rights of all types (including prisoner cases) but torts, environmental law, antitrust, securities law, and many others. For any area of law in which the law is of public concern—which is to say, nearly any area of law—it would be terrible to deprive future generations of the opportunity to understand the way litigation works, from filing to disposition, whether that disposition occurs by trial, on consent, or by non-trial adjudication.

In addition, we urge the Archives to continue collaborating with other entities to increase access to, and use of, court records. For the vast body of information currently hidden in district court records to be socially useful, it cannot merely be warehoused. We have offered the Civil Rights Litigation Clearinghouse as an anti-warehouse model. Because information in the Clearinghouse is easily and quickly accessible, fully indexed and searchable, and because the documents can be downloaded or copied, we are hopeful that it will transform the use of the included records. Digitized information, that is, is more usable information. This kind of access is not only a technocratic success, but a democratic one as well.

⁵² See, e.g., Galanter, *supra* note 2, at 533-34 (tbl. A-2); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years of War*, 57 STAN. L. REV. 1255 (2005). For a literature review of this topic, see Margo Schlanger, *What We Know and What We Should Know about American Trial Trends*, 2006 J. DISP. RESOL. 35.