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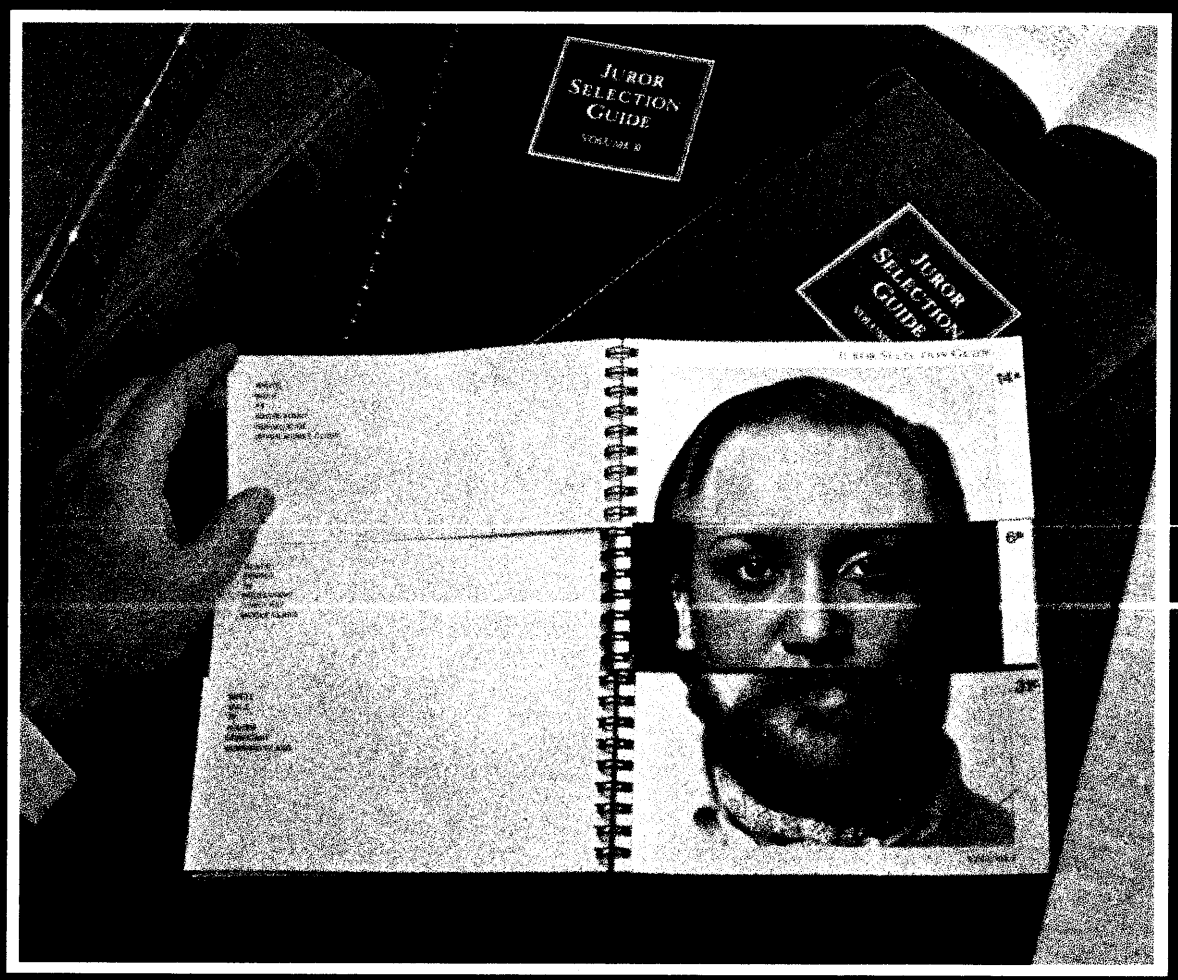

Scientific jury selection: what social scientists know and do not know

"Hard" and "soft" data

Assuming that one could overcome the problems of validity already outlined and that researchers are neither intimidated nor restricted by their emotional or other attachments to the Court and its justices, there is an additional matter that requires attention—i.e., do private papers represent hard or soft data? Howard gives as one of his reasons for treading cautiously in using the Murphy papers, a wish not "to diminish the scant supply of hard data by tempting justices to destroy records."[17] Brenner and Palmer suggest that the justices' docket books and conference lists represent "hard data, as hard as the voting data we use from the published reports."[18] While there is certainly a distinction between the way Howard, Brenner and Palmer use the term "hard data," neither provide any definition for the term. This is unfortunate because how we view hard data has a substantial bearing on its use in social scientific study of the Supreme Court.

To me, hard data implies that the information to be used can be clearly identified and recorded and that such recording will not vary over time and across coders. It also means that the representations of events reported in printed or manuscript sources are in fact true representations of those events. The private papers of the justices certainly contain data that meets both these standards, but also much that does not. Moreover, the way in which documentary data are to be used influences its "hardness" and its "softness."

If we wish to use the words in a manuscript for formal content analysis, the words themselves certainly meet our requirement for hard data. But if we wish to use the same words to determine whether the writing is "liberal" or "conservative," or whether they are "pro civil rights," a certain, and sometimes fatal, softness creeps into the analysis. My conclusion is that we should not avoid the use of manuscript collections on the grounds that such collections represent soft data. We should, however, distinguish between both types of data found in the private papers of the justices and use each in an appropriate fashion. This means that in many cases we must eschew the use of statistical analysis and limit ourselves to descriptive and exploratory uses. This suggests that in many instances manuscript data are most important for purposes of "discovery"—the formulation of theories and hypotheses—and considerably less important for purposes of "verification"—determining the validity of one or more theories.

Finally, let it be noted that the concerns expressed in this essay reflect problems and potential problems encountered by the author and others who have worked in the papers of Supreme Court justices. These concerns are not equally shared by all scholars. Indeed, the handful of political scientists most closely identified with ploughing this furrow are apt to take a more sanguine view, less their work become suspect. This is particularly true as regards the frequency with which the problems are encountered, the duty of scholars to protect the reputations of the justices or the Court, and the probability that recent and future collections of papers will be equally tainted. But potential users of such sources can only profit from the reminder that the papers of the justices have presented and continue to present challenges for researchers that can only be overcome by assiduous attention to the deficiencies we have noted. □

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Interviewing U.S. Supreme Court justices and interest group attorneys

by Lee Epstein

The debate regarding "hard" and "soft" data in the judicial subfield is growing, is tumultuous and, ultimately, is very important to future research efforts. My aim is to describe the possible uses of one source of soft data—interviews—with an eye toward moving the debate from the abstract to the concrete.

An important question to address in this debate is often relegated by both sides to a lesser status: Why bother interviewing elites? More specifically, what are the possible uses of intensive interviews with judges or others involved in the judicial process? A general consensus emerges among methodologists that intensive, elite, unscheduled interviews have three general purposes: exploratory, main research instruments and supplementary.[19] These purposes have direct application to judicial research.

Exploratory uses

When scholars discuss "exploratory research," they generally refer to a study that "proceeds without hypotheses and/or involves looking at a smaller amount or a different kind of data than would be appropriate for research designed to test hypotheses."[20] Exploratory research, in short, is a legitimate way by which scholars develop hypotheses for future analysis.

Intensive interviews often provide an excellent method by which to collect exploratory or preliminary data. That is, often interviewees will suggest, perhaps "accidentally," new ideas for research that scholars can then translate into hypotheses for future testing. As Kerlinger notes, an interview "can be an exploratory device to help identify variables and relations, and to guide other phases of the research".[21]

This is not a unique or strange occurrence. Quite often during the course of interviews, elites make statements that they hold to be "fact," but which scholars have not considered in any serious way. Consider this example: While interviewing five Supreme Court justices about the quality of group representation before the Court, several mentioned state attorneys. These justices noted that some states had clear advantages (or disadvantages) in litigation because the quality of their representation was so varied, ranging from superb to intolerable. Although the justices provided different and mostly vague explanations for the existence of such variation, their comments in and of themselves led to several interesting research questions: do states, in fact, have varied success rates before the Court and if variation does exist, can we systematically explain it?[22]

Clearly, elite interviewing can be used for exploratory work and elites often provide excellent suggestions for innovative research hypotheses. Equally as clearly, however, the researcher must act cautiously because elites are often sources of tremendous bias. As Manheim and Rich have indicated, the utility of intensive interviewing as an exploratory device may be negated if respondents: "have so narrow a view of the events in question...; have inaccurate information...; or intentionally lie in order to protect themselves or others" and so forth.[23]

Statements made by elites may be suggestive, may even seem "on their face" to be valid, yet are often tainted by perspective. Consider this illustration: One week after a pro-life group, Americans United for Life, argued a 1983 case involving the constitutionality of local restrictions on abortion procedures,[24] we interviewed AUL attorneys. In passing, they mentioned that the organization may not win the case, but that they were sure that they had Justice Steven's vote. Why? Because he seemed sympathetic in his lengthy questioning during oral argument. While looking over my notes on the interview, I thought that such an observation about oral argument could be transformed into a testable hypothesis. I gave up the idea several weeks later when the Court produced a strongly worded majority opinion upholding the principles enunciated in *Roe v. Wade* (1973) on to which the "sympathetic" Justice Stevens signed.[25]

In sum, respondents' answers during intensive interviews provide a unique and often valuable source of preliminary data, but caution is advised since perspectives often alter asserted facts. Separating insights from misperceptions requires systematic investigation by the researcher of data beyond that provided by the original source.

A main research tool

The vast majority of scholars examining judicial voting behavior rely heavily on Supreme Court opinions as "the" data source, but there are other sources of information. For those scholars studying interest group litigation, most research has followed the pioneering works of Clement E. Vose—to "understand" a group, scholars must go out and interview organizational representatives and staff attorneys.[26] What other sources could most accurately answer questions including, how did the group form, why did it turn to litigation, what strategies does it use and what impact does it believe it has? When scholars of the group process use interviews in this way, "the products of interviews, respondents' answers to carefully contrived questions, can be translated into measures of variables...[and] are then to be considered as items in a measurement instrument, rather than as mere information-gathering techniques".[27] Fenno, too, agrees, noting that interactive observation "has benefits." "It brings you especially close to your data. You watch it being generated and you collect it at the source."[28]

I have used interviews as primary measurement instruments to study one of the most interesting conservative public interest law firms—the Mountain States Legal Foundation (MSLF). From interviews with those involved in the conservative movement, I discovered that MSLF was funded by the Coors Foundation whose first president, James Watt, went on to serve as secretary of the interior. But many questions relevant to my study remained unanswered: the specific circumstances surrounding the founding of MSLF, how Watt and Coors got involved, etc. As far as I could tell, only two sources could answer such questions, Coors—which refused to grant me an interview and James Watt—who did. Watt, while serving as secretary of the interior, in fact gave generously of his time, fully addressing my queries.

Because Watt's responses to my questions became my primary measures of important concepts, they needed to be reliable and valid. To ensure "reliable and valid" responses, I developed some rather straightforward rules. First, even though these are largely "unscheduled" interviews, they need not be conducted in a haphazard fashion. Indeed, I followed many of the "techniques of elite interviewing" offered by Manheim and Rich: use a "reflective and conversational tone," "plan initial questions carefully" and ask questions that could be subject to "multiple interpretations," bearing in mind that a primary goal is "to learn how respondents see the situation..."[29] Second, I minimized interviewer bias by avoiding any verbal "communication" or nonverbal "cues" that would relay my personal views.[30] Third, I knew the subject. That is, it is very important to understand the perspective from which the respondent is coming. Doing so will help to nullify often-voiced complaints of elite interviewing such as "researchers do not know enough about their subjects to recognize 'incorrect statements' or to analyze perceptively 'responses for possible sources of invalidity.'"[31]

Perhaps the most important lesson I learned about using respondents' answers as measures, however, is that researchers should not rely on a single respondent. Just as those who use "hard" data sources, as we now know, should not depend exclusively on a single court era to evaluate the utility of certain theories[32] or on one term to "measure" a justice's attitude[33] intensive interviewers must get as much information as they can from as many sources as possible. In the case of James Watt and MSLF, I talked to several

17. Howard, *supra* n. 9, at ix.
18. Brenner and Palmer, "Working with Supreme Court Docket Books," Paper prepared for delivery at the Annual Meeting of the Southern Political Science Association, Hyatt Regency Hotel, Atlanta, Georgia, November 6-8, 1986.
19. Kerlinger, FOUNDATIONS OF BEHAVIORAL RESEARCH (New York: Holt, Rinehart and Winston, 1973). All interviews mentioned in this note were conducted with Karen O'Connor.
20. Bernstein and Dyer, AN INTRODUCTION TO POLITICAL SCIENCE METHODS (Englewood Cliffs, NJ: Prentice-Hall, 1984).
21. Kerlinger, *supra* n. 19, at 480.
22. Both of these questions can be answered affirmatively. We found tremendous variation in state success rates before the Court, ranging from .25 to 1.00. We were able to explain such variation through three sets of factors: litigant characteristics, legal expertise, and appeal rates, Epstein and O'Connor, *States and the Supreme Court: An Examination of Litigation Outcomes*, 68 SOC. SCI. Q. 660 (1988).
23. Manheim and Rich, EMPIRICAL POLITICAL ANALYSIS 133 (New York: Longman, 1986).
24. Akron v. Akron Center for Reproductive Health, 462 U.S. 416.
25. Research by Wasby et al. has indicated that the attorneys most-questioned by the justices may win their cases, although they may well leave the courtroom believing they have lost.
26. Vose, CAUCASIANS ONLY (Berkeley, CA: University of California Press, 1959) and Vose, CONSTITUTIONAL CHANGE (Lexington, MA: Lexington Books, 1972).
27. Kerlinger, *supra* n. 19, at 480.
28. Fenno, *supra* n. 2, at 3.
29. Manheim and Rich, *supra* n. 23, at 135-137.
30. Nachmias and Nachmias, RESEARCH METHODS IN THE SOCIAL SCIENCES 241 (New York: St. Martin's Press, third edition, 1987).
31. Manheim and Rich, *supra* n. 23.
32. Ulmer, *Are Social Background Models Time-Bound?*, 80 AM. POL. SCI. REV. 957 (1986).
33. Ulmer, *Parabolic Support of Civil Liberties Claims: The Case of William O. Douglas*, 41 J. OF POL. 634 (1979).

other individuals who had some knowledge, however tangential, of MSLF's role in the conservative legal movement. Happily, their comments well-supported those made by Watt.

Supplementary uses

Although I have used interview data in an exploratory fashion and as a main research instrument, its use as a supplementary or confirmatory device is most compelling. When scholars refer to the supplementary utility of intensive interviewing, they do not necessarily mean that interviews provide "additional" information. Rather, interviews can supply important tools for "validating" one's measures. In fact, I have found that intensive interviews provide one of the best ways to evaluate, via construct validations,[34] the measurement quality of operational definitions. As Kerlinger has noted, "the interview can supplement other methods: follow up unexpected results [and] validate other methods..."[35] What this strongly implies is that whenever possible, we should test quantitative and unobtrusive results against the views of elites, recognizing that, of course, in some instances they will be complementary and, in others, that emergent countervailing biases of the two will prevent convergence.

An example of interviews supporting construct validity stems from a research effort on employment discrimination litigation. We were interested in whether interest groups would be more successful than non-organized parties. Operationally, we defined success as the ratio of wins to number of appearances. And, indeed, we found that groups were more successful than their counterparts. But, contrary to our expectations, the NAACP Legal Defense fund was not the most successful organization—the AFL-CIO won 89 per cent of its cases.[36]

Given this puzzling finding, we began to question the validity of our measure—was the proportion of victories actually measuring organizational success? One way to validate this measure, we decided, was to ask Supreme Court justices about "success"—were certain groups "better" than others and, if so, why? Although we felt it inappropriate to discuss specific organizations with the justices, at least two volunteered such information. And, much to our surprise, in the course of their discussions both mentioned the AFL-CIO as one of, if not the best litigator before the Court. Our operationalization received support as being a valid indicator of success.

Interviews can serve as vehicles to expand our knowledge of political processes.

But interviews can provide contrary information. Once again, consider the question of group success. Another way we tried to validate our empirical definition was to talk to group attorneys including representatives from the NAACP LDF. During the course of my interview, I took out a list of the employment cases the group had lost and won. The attorney and I started to discuss each of these, but in doing so, I found that we diverged on the meaning of success. For every "apparently" lost suit (i.e. the LDF asked the Court to reverse and it affirmed), this attorney found a redeeming point—a small win on principle, the collection of attorneys' fees, etc. To make matters worse, I have found that almost every organization approaches their Court losses in much the same way as the LDF attorney: they claim small victories within mountains of losses. How does the researcher deal with this? That is, how should scholars proceed when interview data seem to "invalidate" empirical/operational definitions?

For those who use interview data which produce contradictions, it becomes particularly important to "go back to the source of the data." Consider my experience with the LDF attorney; it does not require any extraordinary acumen to understand why he wanted me to view the organization as a success story. As Manheim and Rich have noted, in these sorts of instances the respondent's "knowledge" is colored by perspective. But must we then necessarily cast off the interviewee as an "invalid" source of information?

The answer, I think, is no. In the instance of group success, for example, I tried to incorporate a groups' perspective in some of the following ways. First, when operationally defining group success, I am now careful to specify precisely what such a definition entails—be it the group's or the Court's. Second, and more typically, I present "success" as a concept with multiple operational definitions. In *Conservatives in Court*,[37] for example, I measure success via three operations: the group's work as a whole, the percentage of cases in which the group supported the victorious part and the group's assessment of its activities. In some instances, these measures all pointed in the same direction; in others, I had to evaluate fully differing "signals" before I could reach any definitive conclusions. In any event, I would never have considered a multiple indicator approach to success had I not had that telling conversation with the LDF attorney!

Conclusion

Although scholars have criticized the use of intensive interviewing as an unreliable, non-generalizable method by which to collect data, "elite" responses can play an important role in the research process. In the final analysis, the answer to Fenno's query of "Should we, as a discipline, encourage more [personal observation]?" must be answered affirmatively. Certainly observation or intensive interviewing "has its costs," but when scholars take appropriate precautions, intensive interviews can serve as vehicles by which to expand our knowledge of political processes. □

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34. *See especially*, Carmines and Zeller, RELIABILITY AND VALIDITY ASSESSMENT (Beverly Hills & London: Sage Publications, 1979) and Babbie, THE PRACTICE OF SOCIAL RESEARCH (Belmont, CA.: Wadsworth, 1986).

35. Kerlinger, *supra* n. 19, at 480.

36. O'Connor and Epstein, *The Importance of Interest Group Involvement in Employment Discrimination Litigation*, 25 How. L. Rev. 711 (1982).

37. Epstein, CONSERVATIVES IN COURT (Knoxville: University of Tennessee Press, 1985).