TRIAL AND APPELLATE JUDGING IN THE MEASURE OF JUDICIAL RESPONSIVENESS

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In Triangulating Judicial Responsiveness: Automated Content Analysis, Judicial Opinions, and the Methodology of Legal Scholarship, Chad Oldfather, Joseph Bockhorst, and Brian Dimmer initiate a provocative dialogue about measuring judicial responsiveness by providing innovative tools for assessing how closely judicial opinions hew to the arguments and information provided by litigants. The authors’ primary objective is to assess the effectiveness of using computational methods of textual analysis to measure judicial responsiveness to the arguments and authorities presented by litigants. Drawing upon the cases decided by the First Circuit in 2004, the authors identified cases for which the court issued opinions and briefs from both parties were electronically available. The authors used a sample of thirty cases from this population to test the validity of responsiveness measures. After manually coding the opinions as either “strongly responsive,” “weakly responsive,” or “non-responsive,” the authors tested two methods of automated content analysis. One method estimated textual similarity between briefs and opinions using a cosine similarity measure that measured the similarity of terms used in the briefs and those in the opinions. A second method measured responsiveness by identifying citation patterns between the briefs and opinions.

Although the authors’ aim is to evaluate the relative merits of the empirical methodologies they propose, a good portion of the article is devoted to justifying an inquiry into the phenomenon of judicial responsiveness in the first place. Such an effort is to be commended. In the abstract, judicial responsiveness to litigants is an appealing idea, particularly in an adversarial system. The authors are, perhaps, too enthusiastic about the inherent value of judicial responsiveness, and gloss over the downsides of this phenomenon, especially when it drifts away from the province of responsiveness and into the territory of judicial plagiarism. The line between a lack of “independent analysis”

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1. 64 FLA. L. REV. 1189 (2012).

2. "Terms" refers to “stemmed non-stop words.” Id. at 1226. A “stop word” is “any stemmed word present in at least one brief or opinion of all thirty cases.” Id. at 1226.

3. The U.S. Supreme Court has declined to find that wholesale adoption of litigants’ briefs is reversible error, but does require that the opinions reflect independent analysis by the judge. United States v. El Paso Natural Gas Co., 376 U.S. 651, 656 (1964); id. at 662 (Harlan, J., concurring in part and dissenting in part). Nonetheless, appellate courts have remonstrated trial judges for adopting or copying large swaths of litigants’ briefs, “even when the judge adds some
by the judge and attentiveness to the structure and content of counsels’ argument is undoubtedly murky as both a normative and an empirical matter. The authors thus have framed their project carefully so that they investigate both whether responsiveness can be quantified using computational analysis, as well as which dimensions of responsiveness can and should be measured.

While the authors state that their project is designed to measure judicial responsiveness to litigants’ factual and legal arguments, there are some significant limitations on this scope. First, a more accurate characterization of the authors’ project is that they are quantifying appellate judicial responsiveness. Second, the authors could consider a broader measure of judicial responsiveness even within the appellate realm to account for materials outside of briefs.

The authors do not hide the fact that their analysis is limited to appellate judges, but it is worth exploring why appellate judicial responsiveness is a different phenomenon from trial court judicial responsiveness. The automated content analysis tested by the authors is well-suited to the work of an appellate judge whose job it is to read, synthesize, and evaluate written submissions from counsel within a confined period of time.

Unlike their appellate counterparts, trial judges engage in repeated interactions with the judge over a period of months or even years. These include both written and oral exchanges, many of which do not find their way into the written materials submitted as briefs for a dispositive motion. The discussions that take place among the lawyers and a judge during formative stages of litigations such as the Rule 16 pre-trial conference in federal court or a hearing over discovery matters might exert a good deal of influence on how a judge perceives the facts and law of a given claim or case. Moreover, the trial judge is far more likely to encounter the litigants themselves rather than just their lawyers, particularly if the litigant is a criminal defendant who has the right to appear at all proceedings. Thus, simply looking at responsiveness to trial court briefs might produce an incomplete picture of judicial responsiveness. Judges might be responsive to the arguments and facts to which they were exposed but do not appear directly in the parties’ submissions, or responding to how the factual record unfolded in front of them over the course of litigation. While this aspect of trial court judging would make automated content analysis more difficult, it is not impossible. Researchers using the authors’ methods could utilize transcripts of hearings, status conferences, and copies of letter rulings

words of his own.” DiLeo v. Ernst & Young, 901 F.2d 624, 626 (7th Cir. 1990); see also Cabrioleit Porsche Audi, Inc. v. Am. Honda Motor Co., 773 F.2d 1193, 1198 n.2 (11th Cir. 1985); Orthopaedics of Jackson Hole, P.C. v. Ford, 250 P.3d 1092, 1100–01 (Wyo. 2011); NevadaCare, Inc. v. Dep’t of Human Servs., 783 N.W.2d 459, 465–66 (Iowa 2010).
which appear in the full record of a case. Although these do not capture the ineffable qualities of demeanor and interpersonal relationships that shape judicial thought, they would provide a more complete picture of the judicial responsiveness of trial court judges.

Within the realm of appellate courts, restricting the measure of responsiveness only to parties’ briefs and judges’ opinions might also be inadequate. This method does not account for the role of oral argument, the text of which is available in transcript form. Moreover, it implies that the parties’ briefs can or even should be the relevant documents to which judges are responding. While this might be fairly accurate as to propositions of law which can be measured with citation patterns, it is less convincing when it comes to propositions of fact. The parties’ briefs reflect the narrative they have constructed about the factual record below. The litigants supply the appeals court with the relevant portions of the record below as an appendix to their briefs.4 The appeals court retains the ability to hear an appeal based on the entire record rather than the party-supplied appendix.5 Given the availability of portions of the record in appellate briefs, it might be interesting to discern whether judges are more responsive to lawyers’ narrative arguments about the facts, or to the record as provided to the court of appeals. Furthermore, one can ask normative questions about whether judges should be more responsive to the record developed below, or whether the structure of our adversarial system demands responsiveness primarily to litigants and their arguments.

The authors have not claimed to answer any of these questions, and are quite clear that their methodology measures the relationship between litigants’ briefs and judicial opinions. Although it might be logistically difficult to obtain the extra materials I have suggested in this response, a study that incorporated such documents might provide a more complete picture of judicial responsiveness. Moreover, it might also show the normative and descriptive differences between the responsiveness of trial judges and appellate judges. These avenues for future research show the value of the tools that the authors have developed and the careful work they have done to verify their reliability lays a solid foundation for important and relevant future work.

4. FED. R. APP. P. 30. The appellant bears the formal obligation of developing the appendix, FED. R. APP. P. 30(a), but the rule encourages the parties to agree on a joint appendix with the relevant portions of the record. FED. R. APP. P. 30(b)(1)

5. FED. R. APP. P. 30(f).