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## The Curious Incident of The Falling Win Rate: Individual vs System-Level Justification and the Rule of Law

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# The Curious Incident of the Falling Win Rate: Individual vs System-Level Justification and the Rule of Law

Alexandra D. Lahav & Peter Siegelman\*

*For forty quarters starting in 1985, the plaintiff win rate in adjudicated civil cases in federal courts fell almost continuously, from 70% to 30%, where it remained — albeit with increased volatility — for the next twenty years. This Essay explores the reasons for this decline and the need for systemic explanations for the phenomenon. Approximately 60% of the fall could be attributable to the changing makeup of the federal docket, but that leaves 40% of the fall (that is, a win rate decline of 14 percentage points over a ten year period) unaccounted for. We show that the most obvious explanations for the remaining fall in the win rate and subsequent volatility do not fit the data and assumptions about rational behavior.*

*Changes in system-level “outputs” of the justice system require a justification that is consistent with rule of law values. The absence of such an explanation for the falling win rate should be a source of concern. Further empirical studies could help explain this mystery, but such studies require data only in the possession of the courts themselves, or that are not*

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*currently systematically collected. We conclude with an explanation for why systemic studies of the workings of the justice system are important.*

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## INTRODUCTION

Between 1985 and 1995, the plaintiff win rate in civil cases adjudicated in federal district courts fell dramatically and consistently. After 1995, win rates became substantially more volatile, with a much slower downward trend re-emerging after 2000. Figure 1 graphs the win rate, by calendar quarter of termination, from 1980 to 2017.<sup>1</sup> The magnitude of the win rate drop is astonishing: plaintiffs won almost 70% of the cases that were adjudicated to completion in the third quarter of 1985, but won only about 30% of those that were adjudicated in 2017. That is an approximately 40 percentage point (more than 50%) decrease.

Figure 1: Plaintiff Win Rate in Adjudicated Cases, By Quarter of Termination



<sup>1</sup> We use the Administrative Office of the U.S. Courts ("AO") Civil Terminations dataset. The data cover all federal district court civil cases that closed between January 1, 1980 and June 30, 2017. Here and throughout this Essay, the win rate is defined as the share of all adjudicated cases (those for which the AO's *Judgment for* variable codes a win by either the plaintiff or defendant) that are won by the plaintiff. As used here, "adjudication" is not the same as a trial; it refers to any decision rendered by a court that ends a case (as opposed to an ending by settlement). We note that recently-filed cases will not have been terminated by the end of the data compilation period. This censoring problem is of little concern for most of our purposes.

To get a sense of the significance of this drop, consider that if the win rate had remained at its highest level from the third quarter of 1985 through the second quarter of 2017 (and nothing else had changed), plaintiffs would have won roughly 570,000 more cases than they actually did. One need not pick 1985 as a baseline, however. If plaintiffs had won adjudicated cases between the second quarter of 1985 and the second quarter of 2017 at the 1995 rate, they would have had 218,000 *fewer* wins than they actually did. We do not take a position on the normative desirability of any particular win rate in this Essay. It is enough for present purposes to point out that the change in the win rate makes a difference both to individuals whose cases are affected and in the aggregate.

We were astonished to uncover this phenomenon, and equally surprised to find that almost nobody seems to have commented on it.<sup>2</sup> This Essay is a speculative effort to explain what is driving these changes. We find that perhaps 60% of the decline is attributable to changes in the makeup of the federal caseload: more suits from case types with lower win rates were filed during this ten year period. But that still leaves the remaining 40% of the decline unexplained.

From the outset, we acknowledge a key general theme that has emerged from the theory and empirical work on litigation over the last twenty years: data on case outcomes (win rates, adjudication rates) and litigation volumes cannot definitively identify the fundamental causes of win rate movements over time. For example, under some circumstances, observed plaintiff win rates can actually rise even if the “decision standard” (and therefore the fraction of all filed disputes that, if tried, would result in a plaintiff win) moves in favor of *defendants*.<sup>3</sup> And adjudication rates and win rates can move in the same direction, or in opposite directions, depending on unobservable background conditions.<sup>4</sup>

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<sup>2</sup> The phenomenon is mentioned in two articles by Clermont and Eisenberg, but without analysis of the longitudinal trend or explanations for it. See Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1125 (1996); Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11*, 4 J. EMP. LEGAL STUD. 441, 456 (2007) [hereinafter *Xenophilia or Xenophobia*].

<sup>3</sup> See Jonah B. Gelbach, *The Reduced Form of Litigation Models and the Plaintiff's Win Rate* 26-27 (Univ. Pa. Law Sch. Inst. for Law & Econ., Working Paper No. 16-22, 2016) for a persuasive general account of the problem.

<sup>4</sup> See Joel Waldfogel, *The Selection Hypothesis and the Relationship Between Trial and Plaintiff Victory*, 103 J. POL. ECON. 229, 235 (1995) (finding non-monotonic relationship between adjudication rate and plaintiff win rate in a more sophisticated version of the Priest-Klein model of the selection of disputes for litigation).

The limitations that we encounter as we explore different possible reasons for the fall in the win are largely due to the lack of data currently available to researchers. As we discuss in Part III, with more detailed data, we could make progress towards identifying the mechanism underlying the fall in the win rate — or at least do a better job of ruling out some possibilities. For now, what we can do is assemble such data as are available, assess the plausibility of some competing explanations, and lay out the “stylized facts” that any good theory must be able to explain.<sup>5</sup>

This Essay presents several empirical findings, but at bottom it makes a fundamentally normative claim: the justice system is obligated to explain suspicious developments in the administration of justice at the systemic level. The courts have largely ignored system-level changes such as the one we point to here. Yet the phenomenon of the falling win rate raises significant jurisprudential and policy concerns, issues a judicial system must confront because they go to the heart of the values it espouses, especially impartiality and predictability. It is widely recognized that a key component of the rule of law is that the justice system provide (or at least have) *reasons* for its decisions. That decisions be reasoned and reasonable is vital to legality.<sup>6</sup> Reasons demonstrate that decisions are not arbitrary and are impartial (that is, that they are the result of the application of relevant law to relevant facts). Reasons are also thought to produce consistent results across cases, another aspect of impartiality that enables

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<sup>5</sup> In economics, “stylized facts” are broadly-true generalizations about the world that a good theory needs to be able to explain. We note that even though it is very difficult to make causal inferences from selected data (such as win rates in litigated cases), there are still some basic features of causal reasoning that remain valid. For example, X is not a plausible cause of Y if X occurs later in time than Y. We can use this kind of reasoning to rule-out some possible explanations for the fall in win rates.

<sup>6</sup> See, e.g., Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365-72 (1978); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 723 (2012) (“That judicial tribunals must act in a reasoned manner is now deeply ingrained in our culture. On important matters, these reasons are expected to be made publically [sic] available, and in written form.”); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (stating that “reasoned response to reasoned argument is an essential aspect of” the judicial process and citing Lon Fuller and John Rawls for the proposition). For a more critical view, including a discussion of when judges have reasons not to give reasons, see Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 496-525 (2015); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 653 (1995) [hereinafter *Giving Reasons*] (describing the legal system’s tolerance for not giving reasons, such as in jury verdicts).

participants in the justice system to plan by giving them a basis on which they can predict the likely outcome of future cases.

Although individualized reason-giving may be necessary for a legitimate judicial system, we suggest that it is not sufficient. The unstated assumption of most theorists is that if each individual case is resolved with rectitude, the outputs of the system as a whole will reflect that fact.<sup>7</sup> But this assumption may be false. If individual cases are being resolved accurately,<sup>8</sup> parties (and their lawyers) are responding rationally to outcomes, and the system suffers no shocks, we would expect to see a stable win rate over the medium term, and perhaps a win rate with limited, random volatility over the short run. The fact that the win rate declined over many years, across so many different case types, and in a way that is not easily explained by either exogenous or endogenous developments using available data, suggests the need to undertake a systematic evaluation of federal adjudication.<sup>9</sup>

As an initial step, we focus on explaining the mystery of the dramatic fall in the plaintiff win rate from 1985 to 1995. In the first Part of this Essay we survey the theory of win rates, the existing empirical literature, and the relationship of our finding to this scholarship. In the second Part, we consider possible explanations for

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<sup>7</sup> The idea that the justice system ought to be consistent in its decisions is related to this discussion. Schauer argues that by deciding like cases alike, the courts privilege stability and consistency. Frederick Schauer, *The Generality of Law*, 107 W. VA. L. REV. 217, 234 (2004) [hereinafter *Generality of Law*]; see also Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 858 (1984) ("Procedural systems are supposed to treat like cases alike; consistency is the systematic analogue to the impartiality feature demanded of individual decisionmakers.").

<sup>8</sup> What constitutes an "accurate" resolution is a deeper epistemological problem than we can tackle here. We use the term to mean that the judge applies the law to the facts of the case in a reasonable manner to reach a conclusion that is within the acceptable range of outcomes. "An accurate result need not be a uniquely correct result . . . . As long as the set of reasonable outcomes is bounded — as it must be — any result within that set is accurate and any result outside it is inaccurate." Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1161 (2006).

<sup>9</sup> Although we recognize that it is very important, we set aside here the follow-up normative question of how precisely to evaluate what reasons would validate a fall in the win rate and what reasons would be red flags for the justice system. Reasonable minds can differ on this question and it depends on one's theory of the justice system more generally. For example, what if the fall in the win rate was caused by changing judicial appointments (such as more judges appointed by Republican Presidents) would this be more damning of the system than if the fall in the win rate was caused by changes in the substantive law that disfavored one side of the "v," or if the fall was caused by a decline in the quality of legal services available to plaintiffs? We cannot have this debate without first trying to figure out some possible reasons for the fall in the win rate, but it is an important debate to have.

the ten-year decline in the win rate from 1985 to 1995 and the subsequent volatility by assessing the theories against the data and predictions about rational lawyer and judicial behavior over time. In the third Part, we describe the additional data that would help to resolve the curious incident we have uncovered. We conclude by explaining the implications of our finding for the study of the justice system more generally.

## I. THEORETICAL AND EMPIRICAL BACKGROUND

In this Part we survey the literature on win rates in both theoretical law and economics and empirical legal studies. No extant theoretical model yields broadly generalizable results about what drives aggregate win rates. Nor have there been any empirical studies that attempt to explain longitudinal changes in aggregate win rates. We describe the significance of the scholarly literature that does exist below.

There is a substantial theoretical literature in law and economics on the determinants of win rates at “trial” (used loosely to mean all facets of adjudication).<sup>10</sup> The most famous contribution is probably the Priest-Klein hypothesis, which suggests that (under a set of restrictive assumptions) there should be a tendency towards a plaintiff win rate of 50%.<sup>11</sup> Whether the Priest-Klein hypothesis is valid as an empirical matter remains disputed.<sup>12</sup> But there is now widespread consensus that as a theoretical matter, plausible models of litigation can generate almost any outcome, depending on initial assumptions about which

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<sup>10</sup> See Abraham L. Wickelgren, *Law and Economics of Settlement*, in RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 330, 330-59 (Jennifer Arlen ed., 2013), for an excellent analytic synthesis. On what should count as a “trial” for purposes of the theory of adjudication/settlement, see 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. EMPIRICAL LEGAL STUD. 705, 707 (2004). We use the term adjudication to mean any case that ultimately reached a judgment (as opposed to a case that was voluntarily dismissed, for example) regardless of the procedural posture of the case at the time that judgment was reached.

<sup>11</sup> George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4-5 (1984). This model assumes many things that the authors themselves acknowledged are not true on the ground, such as, for example, that both the stakes and information are symmetric. See *id.* at 40.

<sup>12</sup> See Daniel Klerman & Yoon-Ho Alex Lee, *Inferences from Litigated Cases*, 43 J. LEGAL STUD. 209, 210-12 (2014) (showing that selection effects are “partial,” and thus that the plaintiff win rate in adjudicated cases generally will change when the legal standard changes, contra Priest and Klein’s original model); Yoon-Ho Alex Lee & Daniel Klerman, *The Priest-Klein Hypotheses: Proofs and Generality*, 48 INT’L REV. L. & ECON. 59, 70 (2016) (offering more rigorous proof of some of the Priest-Klein conclusions).



party (if either) has private information and on subtle details of how settlement bargaining is structured.<sup>13</sup> It is therefore difficult to justify a particular win rate or to evaluate the win rate as “too high” or “too low” without considering a large number of other factors, most of which are difficult or impossible to pin down empirically. For this reason, in this Essay we withhold judgment on the appropriateness of any particular win rate; we do not suggest, for example, that a win rate of 70% or 30% is normatively desirable. Rather, we focus on explaining the change in the win rate over time. Something (or things) caused the win rate to change, and those things should be identified because different potential causes implicate different concerns. If, for example, the falling win rate is caused by new, more restrictive laws or procedures enacted with the purpose of reducing plaintiff success, and they have that effect, then the law is being administered as intended by the legislators in an open and transparent manner. It may still be the case that the results of that system are substantively unfair, in which case the remedy is to change the laws or procedures that caused the change. If judges became more defendant-friendly and this caused a drop in the win rate despite existing laws, this raises a different kind of problem. Bias in favor of one type of litigant, unmoored from legal requirements, is inconsistent with the principles of judicial impartiality and consistency.<sup>14</sup>

The theoretical work also teaches that there is no necessary relationship between win rates and any other factor. For example, suppose that for some reason judges did suddenly become more defendant-friendly starting in 1985 and this continued for ten years. Even if this were true, it is entirely possible that the win rate in

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<sup>13</sup> The title of Steven Shavell's short article aptly summarizes his overall conclusion. Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 495-97 (1996) (showing that in models with asymmetric information favoring either plaintiffs or defendants the plaintiff win rate at trial can be anything between 0 and 1, and the probability of plaintiff victory in settled cases (if they were tried) can be either above or below the plaintiff win rate in tried cases). Or as Wickelgren puts it: “[U]nder general conditions, settlement models cannot tell us very much about empirical win rates in trials.” Wickelgren, *supra* note 10, at 344. For a definitive treatment of causal inference in litigation models, see Gelbach, *supra* note 3, at 13-16 (demonstrating that a “generalized Priest-Klein” model is capable of explaining essentially any set of observed results).

<sup>14</sup> We assume here that impartial administration of the law is a generally agreed upon rule-of-law principle, even if sufficiently vague so that it allows for disagreement in particular instances. See Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 8-9, 38-41 (1997) (summarizing leading modern accounts of the rule of law, and later in the article also disagreements in application).

adjudicated cases might not move in response. If all parties know that cases have become harder for plaintiffs to win, rational plaintiffs would bring fewer marginal cases (that is, cases with a low probability of victory) and/or settle the cases they do bring on less-favorable terms, leaving win rates in the cases that survive to an adjudication largely unchanged.<sup>15</sup> A pro-defendant movement in the “decision standard” might even lower the plaintiff win rate in some plausible circumstances.<sup>16</sup> Similarly, other possible influences on the win rate — increases in (relative) litigation costs, or changes in the informational advantage of one side or another, in (relative) costs of discovery, or in the sequencing of motions — could have some effect on the win rate, or none at all, depending on the details of the underlying settlement/bargaining process that picks out cases for litigation. This observation means that a good theory of why the win rate fell needs to be sufficiently robust to withstand the observation that rational lawyers and clients will change their behavior as they learn of changes to judicial decision-making.

Turning from theory to empirical work, there are several longitudinal studies of adjudication rates, but we have found no scholarship that has considered the evolution of win rates over time.<sup>17</sup> Marc Galanter’s important work on the “Vanishing Trial” analyzed adjudication rates from 1962 to 2002, but did not explore win rates.<sup>18</sup>

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<sup>15</sup> The extreme version of this kind of logic (that is, complete selection) was first expounded by Priest and Klein in *The Selection of Disputes for Litigation*. See Priest & Klein, *supra* note 11, at 5-6. For a more modern treatment that allows for incomplete selection, see Klerman & Lee, *supra* note 12, at 209-14.

<sup>16</sup> Gelbach, *supra* note 3, at 22-23 (showing that a pro-plaintiff change in the legal rules can, by altering the mix of cases that are litigated or settled, either raise or lower the win rate in litigated cases).

<sup>17</sup> A partial exception is found in Peter Siegelman & John J. Donohue III, *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis*, 24 J. LEGAL STUD. 427 (1995). They show that in the period from 1970 to 1989, plaintiffs brought more employment discrimination claims when the economy was in recession. *Id.* at 431. Their explanation is that a weak economy extended the average duration of unemployment spells, driving up the back-pay damages that plaintiffs could collect if they prevailed in their discrimination claims. In turn, this made plaintiffs willing to accept a smaller chance of winning (since the amount they would win if they did prevail was greater). These recession-induced cases were more likely to settle, but not all of them did. As a result, both the adjudication rate and the plaintiff win rate declined (but the latter only very slightly) when the economy weakened.

<sup>18</sup> Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459-60 (2004). For a careful analysis of what can be learned from the AO disposition data, see Hadfield, *supra* note 10, at 705 (arguing that after correcting for coding errors, trials have

More recent studies by Theodore Eisenberg and Kevin Clermont,<sup>19</sup> Jonah Gelbach,<sup>20</sup> and William H.J. Hubbard<sup>21</sup> have attempted to measure the effect on the adjudication rate of key Supreme Court decisions regarding the standard for summary judgment and motions to dismiss, but did not consider win rates. Finally, some studies of plaintiff win rates take a narrower and/or cross-sectional approach, and therefore do not uncover the changes we observe.<sup>22</sup>

Finding little prior scholarship that bears directly on our observation of a falling win rate in civil cases, we now consider some possible explanations.

## II. POSSIBLE EXPLANATIONS

There is no complete explanation for the win rate decline given the available data. In this Part, we show that a substantial share of the decline is attributable to changes in the makeup of the federal caseload. Cases in the subject-matter areas which plaintiffs tend to lose became more common over time, and certain categories of suits in which plaintiffs often prevailed were actually eliminated. These changes only account for part of the decline, however.<sup>23</sup> None of the

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actually been replaced by non-trial adjudications, not settlements).

<sup>19</sup> Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193, 194-99 (2014).

<sup>20</sup> Jonah B. Gelbach, *Material Facts in the Debate over Twombly and Iqbal*, 68 STAN. L. REV. 369, 372 (2016).

<sup>21</sup> William H. J. Hubbard, *Testing for Change in Procedural Standards*, with Application to *Bell Atlantic v. Twombly*, 42 J. LEGAL STUD. 35, 36-37 (2013).

<sup>22</sup> See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 947 (2002) (considering plaintiff win rates at the appellate level); Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1280 (2005) (studying win rates across different types of litigants). Hadfield found that individual plaintiffs are more likely to have their cases adjudicated than organizational plaintiffs. *Id.* at 1314. And Marc Galanter has found that individual plaintiffs suing organizational defendants were especially likely to lose. Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577, 593 (2001) [hereinafter *Contract in Court*]. For a theoretical take, see Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 95-97 (1974) [hereinafter *Why the "Haves" Come Out Ahead*].

<sup>23</sup> Note that these "explanations" are themselves subject to question: what underlying factors led Congress to eliminate certain kinds of lawsuits; what led to the growth of suits in areas where plaintiffs are unlikely to prevail? These are socio-political questions. On prisoner suits, for example, see Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV.

explanations for the remaining 40% of the decline fit our criteria for a good explanation of the phenomenon, which are that the explanation must: (1) fit the data and (2) be consistent with behavior we would expect from rational parties.

#### A. Changes in the Composition of Terminated Cases

A shift in the mix of adjudicated cases away from case types where plaintiffs usually do well (e.g., enforcing student loan obligations) towards those in which plaintiffs rarely prevail (e.g., prisoner or civil rights), would cause the aggregate win rate to decline. So, too, in principle, could a geographic shift in the case mix towards circuits where plaintiffs do less well. We would also expect to see a decline in the win rate if there are more *pro se* plaintiffs as a share of total cases, since *pro se* plaintiffs are assumed to fare less well than those who are represented by counsel.<sup>24</sup> We find that, indeed, the mix of cases can explain some, but not all, of the win rate decline.

We can begin to get a handle on these explanations using a regression equation in which we control for Nature of Suit,<sup>25</sup> Circuit, *pro se* status, and whether the plaintiff was proceeding *in forma pauperis*. That is, we can look at the win rate each year *after* taking account of any time-invariant effect of these factors, as well as a quadratic time trend. We do this using the set of all adjudicated cases (i.e., those case that are listed as “won” by one party or the other; we

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165, 212-15 (2013).

<sup>24</sup> Whether clients benefit from legal representation appears to be highly contextual. Compare Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423 (2006) (suggesting that in criminal trials, defendants who represent themselves do not experience higher conviction rates than defendants who have lawyers), and D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118 (2012) (finding that an offer of representation did not improve outcomes for plaintiffs in unemployment benefits cases), with D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 908 (2013) (finding that an offer of representation improved outcomes for defendants in eviction proceedings).

<sup>25</sup> The filing of a complaint in federal district court is accompanied by a civil cover sheet, filled out by the plaintiff's attorney. As part of the cover sheet, the attorney is required to select from one of roughly 100 Nature of Suit codes (the number has varied over the years). In a recent paper, Christina Boyd and David Hoffman have assessed the reliability of these self-reported codes, and concluded that they are reasonably accurate for some types of suits, but not for others. See Christina L. Boyd & David A. Hoffman, *The Use and Reliability of Federal Nature of Suit Codes*, 2017 MICH. ST. L. REV. 997, 997-98 (2018).

exclude cases that terminated without a win, which we can call “settled”), and a simple linear probability model in which the dependent variable is 1 if the case was won by the plaintiff (0 otherwise).

The exact specification, estimated by Ordinary Least Squares, is:

$$PWin_i = \alpha + \beta_{1j}Year_{ij} + \beta_{2c}Circuit_{ic} + \beta_{3l}Jurisdiction_{il} + \beta_{4n}NOS_{in} + \beta_{5i}Pro\ Se_i + \beta_{6i}IFP_i + \beta_{7i}Term-Quart_i + \beta_{7i}Term-Quart^2_i + \varepsilon_i,$$

where:

$PWin_i = 1$  if plaintiff wins (0 if defendant wins)

$Year_j = 1$  if year =  $j$  (1980-2016, omitting 1980), 0 otherwise

$Circuit_c = 1$  if Circuit =  $c$ .

$Jurisdiction_l = 1$  if basis of jurisdiction =  $l$  (U.S. Plaintiff, U.S. Defendant, Diversity, omitting Federal Question)

$NOS_n = 1$  if Nature of Suit =  $n$  (108 narrow Nature of Suit Categories)

$Pro\ Se = 1$  if plaintiff is *pro se*

$IFP = 1$  if Plaintiff is proceeding *in forma pauperis*

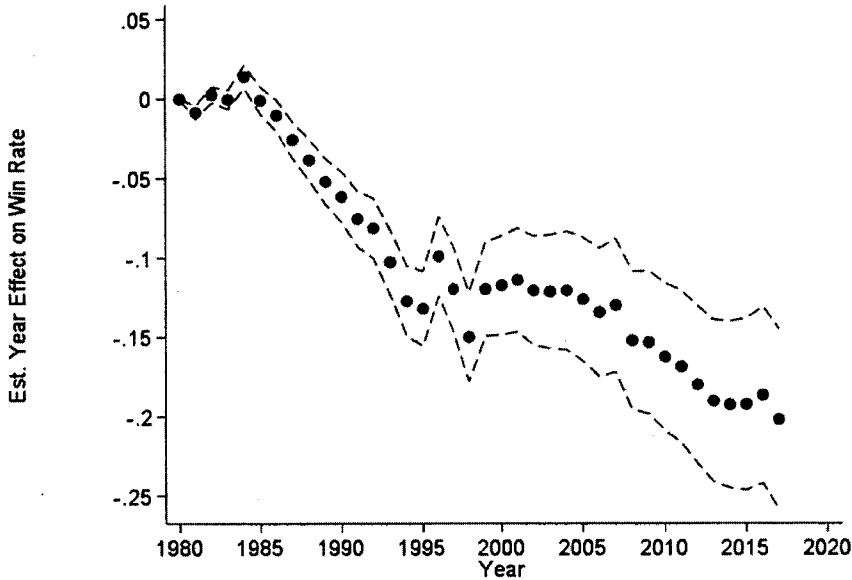
$Term-Quart =$  Elapsed Quarters since January 1, 1980

$Term-Quart^2 =$  (Elapsed Quarters since January 1, 1980)<sup>2</sup> and

$\varepsilon_i =$  random error term.

Figure 2 shows the estimated year coefficients ( $\widehat{\beta}_{1s}$ ) from this regression. Each point represents the effect of being in Year X (as opposed to 1980), controlling for the factors listed above. That is, each point plots our estimate of the “pure” effect of the passage of time since 1980, after removing any influence on the win rate attributable to time-invariant fixed-effects of Nature of Suit categories, Circuits, or *pro se* status and any linear or quadratic time trends. The dashed lines are upper and lower 95% confidence intervals.

Figure 2: Estimated Year Effect on Win Rate, With Controls: 1980–2016



The overall pattern in these data is strikingly similar to the unadjusted data in Figure 1: a rise between 1980 and 1985, a sharp decline for ten years, and little secular change (albeit with considerable volatility) between 1995 and 2016.<sup>26</sup>

The problem is that this regression only controls for the time-invariant effects of the independent variables, and we want to know how changes over time in the distribution of adjudicated cases across Nature of Suit types has affected the win rate. That is, did the aggregate win rate fall because of declines in the volume of adjudications in high win-rate suit types, or was there a drop in the win rate holding the distribution of suit types constant (or some combination of the two)?

The quantitatively-inclined reader will recognize that sorting out the relative importance of shifting litigation patterns versus changing win rates for each suit-type is a classic index number problem. The overall win rate in any period is just the weighted average of the win rate for each suit type, with the weights given by the number of suits in each

<sup>26</sup> The AO did not track *pro se* status until 1995, so the control for *pro se* status is only meaningful after that date.

category. Over time, however, both the win rates for each suit type and the *volume* of adjudications in each type can and do change. How, then, to decompose the change in the overall win rate between changes in weights (volume of cases adjudicated) and suit-type win rates? Unfortunately, as is well known, there is no perfect solution to this problem.<sup>27</sup> When both quantity weights and win rates are moving around substantially (as here), there is no unique formulation that best captures changes in the overall win rate over time.

One plausible solution is the Walsh Index, which we use here.<sup>28</sup> Define:

$W_t$  = value of win rate index in quarter  $t$ ,

$n_{it}$  = number of suits adjudicated in Nature of Suit category  $i$  in quarter  $t$ , and

$w_{it}$  = win rate in Nature of Suit category  $i$  in quarter  $t$ .

If we choose the third quarter of 1984 as our (arbitrary) base period, quarter 0, then  $W_0$  is automatically assigned a value of 1.0, and the value of  $W$  in quarter  $t$  is given by:

$$W_t = \frac{\sum (w_{it} \sqrt{n_{i0} n_{it}})}{\sum (w_{i0} \sqrt{n_{i0} n_{it}})} \quad 29$$

$W_t$  thus measures the win rate in period  $t$  *relative* to its baseline value,  $W_0$ . Using the data in the Appendix for the twenty-eight largest Nature of Suit categories (in 1985),<sup>30</sup> Figure 3 plots the value of the win rate index for each quarter between 1980:1 and 2017:2.

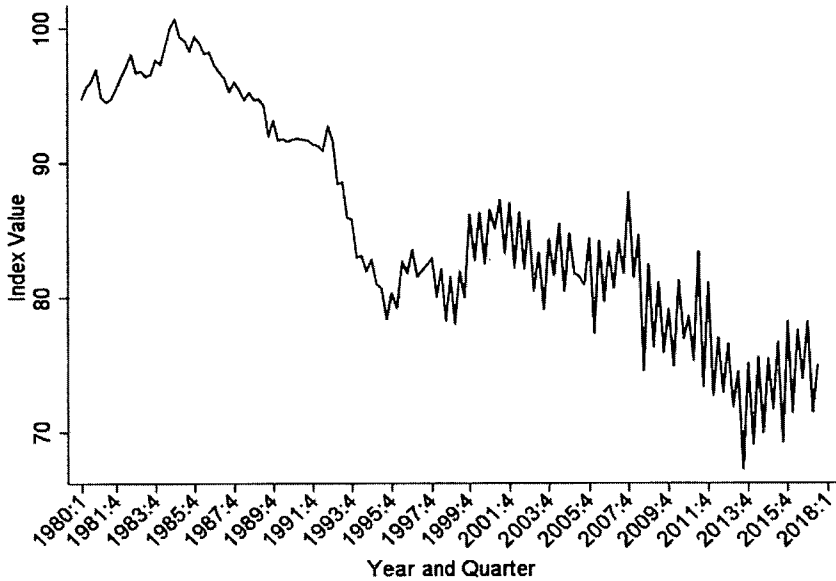
<sup>27</sup> See, e.g., INT'L MONETARY FUND, DEVELOPING A REVISED MANUAL FOR THE PPI 370-71 (2005), <https://www.imf.org/external/np/sta/teggppi/ch15.pdf> (discussing basic index number theory in chapter 15). In macroeconomics, the index number problem notably occurs in computing the rate of change of the overall price level ("inflation"). Here, Nature of Suit level win rates are analogous to "prices" and volume of suits adjudicated are analogous to "quantities of goods sold."

<sup>28</sup> See J.F. KENNEY & E.S. KEEPING, MATHEMATICS OF STATISTICS 66 (3d ed. 1962). The Walsh Index is one solution among many.

<sup>29</sup> The quantity weights used here are the geometric mean of the period-zero and period- $t$  quantities. The choice of base period is arbitrary, since the index value only measures win rates in quarter  $t$  *relative* to whatever base period is chosen.

<sup>30</sup> Together, these suit types accounted for 89,000 (92%) of the 97,000 adjudications in that year. Using the sixty largest Nature of Suit categories gives an identical result, since the remaining categories include too few litigated cases to make a difference in the overall calculation. See *infra* APPENDIX, for the raw quantities, win rates, and the abbreviation key.

Figure 3: Win Rate Index, 1980:1–2017:2



The win rate index looks very similar to the overall win rate in Figure 1. From its value of 100 in the fourth quarter of 1980, the index fell to just under eighty in the fourth quarter of 1995. Over the next twenty-two years, there was little or no trend in the index: although it was highly volatile, its average value remained at about eighty. That means that a plausible estimate of the “pure” win rate decline — apart from any reallocation of litigated cases across Nature of Suit types during the 1984–2016 period — is about  $(1 - 0.8) = 20\%$ . Starting from a win rate of 70%, the decrease is thus about 14 percentage points (or  $0.2 \times 0.7 = 0.14$ ). That is 40% ( $14/35^{\text{th}}$ ) of the *total* drop in the win rate between 1985 and 2016 of 35 percentage points, with the remaining 60% of the drop being explained by reallocation of cases across Nature of Suit categories.

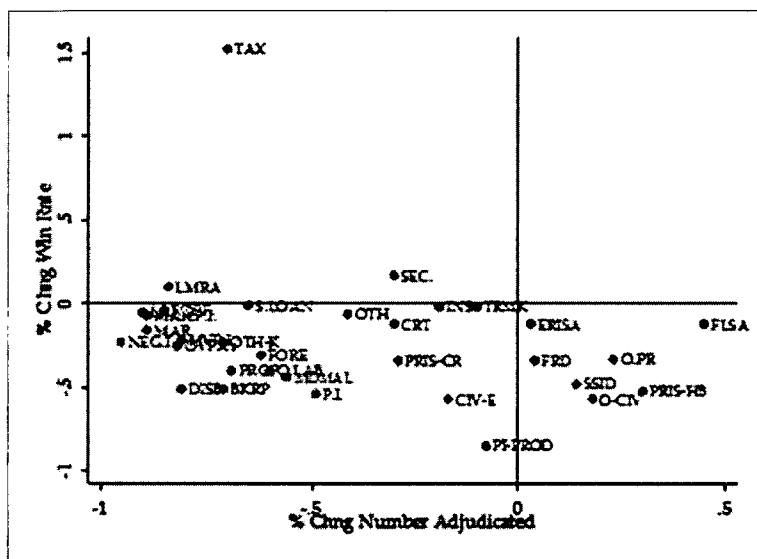
Figure 4 further disaggregates these results to clarify the underlying patterns. It plots the percentage change in the win rate against the percentage change in the volume of adjudications between 1985 and 2016 for each of the twenty-eight largest Nature of Suit categories in 1985.<sup>31</sup> The key conclusion is that both win rates and adjudication volumes fell across a wide range of cases: most of the observations are

<sup>31</sup> See *infra* APPENDIX, for the raw quantities, win rates, and the abbreviation key.



located in the southwest quadrant, where both win rates and adjudication volumes declined.

Figure 4: Percent Change in Plaintiff Win Rate vs Percent Change in Adjudication Volume 1985–2017: by Nature of Suit (for 28 Largest Nature of Suit Categories in 1985).



Only three of the twenty-eight Nature of Suit categories (11%) had a higher win rate in 2016 than in 1985.<sup>32</sup> Win rates declined for, among others, Copyright, Medical Malpractice, Motor Vehicle Personal Injury, Contract, Bankruptcy, and Insurance cases, as well as most Prisoner and Civil Rights cases. All of these cases moved in the same direction, albeit at different rates. The fact that these case types have virtually nothing in common suggests that some broader factor (or factors) must have been at work. The pattern cannot be explained with reference to doctrinal developments in any particular set of cases because it is consistent across all case types despite different doctrinal developments in the substantive law.

The period between 1985 and 1995 also saw a drop in adjudication volumes overall, and for several case types in particular. Only seven of

<sup>32</sup> There may be a doctrinal explanation for some of the positive change in tax cases, which is a change in the burden of proof in 1998. See Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 55-58 (2004) (discussing changes to the burden of proof in 1998).

the twenty-eight Nature of Suit categories experienced an increase in the volume of adjudications, and many categories experienced sharp declines. Chief among these was Overpayment of Veterans Benefits, which accounted for by far the largest number of adjudications in 1985, amounting by itself to more than 25% of the total. This category had essentially vanished by 1994.<sup>33</sup> Since the government won almost every Veterans Benefits Overpayment case it brought, that drop in litigation volume was highly consequential for the overall win rate.

In sum, the drop in the overall win rate is in part the result of a reallocation of adjudications in favor of those Nature of Suit types where plaintiffs do less well, and in part the result of a reallocation of work between the judicial and administrative branches. There was a substantial fall in the volume of adjudicated cases in some Nature of Suit categories with high win rates (e.g., Veterans Benefits Overpayments). To a much smaller degree, there was a rise in adjudications in categories with low win rates (e.g., Prisoner Habeas and Prisoner Vacate Sentence). On the other hand, win rates fell for many of the narrowly defined Nature of Suit classifications, and our calculations suggest a 20% drop in the “pure” win rate. We now turn to explanations for this drop that might fit the data and be consistent with rational lawyer behavior.

### *B. Selection Effects*

The 20 percentage point pure win rate drop might be explained by changes in the mix of cases being adjudicated over time. Suppose there are two kinds of cases, those likely to win (“good”) and those unlikely to win (“poor”). The declining win rate may be due to: (1) plaintiffs filing more “poor” cases, (2) plaintiffs litigating more “poor” cases, or (3) selective settlement of winning cases that would previously have been litigated.

Unfortunately, all of these possible explanations are more-or-less consistent with plausible models of litigation behavior, and are essentially indistinguishable given the data we have. Even worse, many paradoxical results are also possible under reasonable models of litigation and settlement: for example, under some circumstances, the

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<sup>33</sup> The explanation for this drop-off is that Congress passed a law in 1988 creating a new tribunal for veterans' appeals — after claims go through that tribunal, appeal is to the circuit courts rather than to district courts. See generally Veterans' Benefits Improvement Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105. At their peak in 1985, there were 46,321 suits contesting overpayment of veterans' benefits; that number fell to 634 in 1994 and fell into the single digits by 2004.

plaintiff win rate in adjudicated cases could fall even if the average "quality" of filed cases actually *rose*.<sup>34</sup> Nevertheless, we think it is worth looking at the raw data to see what patterns can be discerned. Even if we cannot identify the source or cause of the falling win rate, we can at least put on the table the basic facts that a compelling theory must be able to explain.

### 1. "Poorer" Cases Being Filed?

Perhaps the win rate drop reflects a fall in the "quality" of cases that are initially filed. Could it be that for ten years, starting in 1985, plaintiffs brought increasingly less-meritorious lawsuits, and the drop in the win rate is simply the result of worse cases being brought?

We find that story unconvincing, for several reasons. First, it is far from clear as a matter of theory that a fall in the average quality of filed cases would lead to a drop in the win rate: some or all of those new low-quality cases might settle out, leaving the ultimate win rate unchanged, or nearly so.<sup>35</sup> And it is even possible that a worsening (leftward shift) in the distribution of suit quality could raise plaintiff win rates.

Second, it is unclear why plaintiffs or their lawyers would start bringing worse cases in 1985, continue doing so for thirty of the next forty calendar quarters, and then rather abruptly stop. The steady fall and sudden leveling off in win rates seems incompatible with any larger socio-legal trend, and the length of the decline is hard to square with rational behavior. As poorer cases start to lose, one would imagine that attorneys would start vetting cases more carefully, pushing-back against the deterioration in quality by becoming more choosy in the cases they are willing to take. There may be some delay in lawyers figuring out the changing landscape, but it seems hard to believe that it would take ten years for a new equilibrium to be reached.<sup>36</sup>

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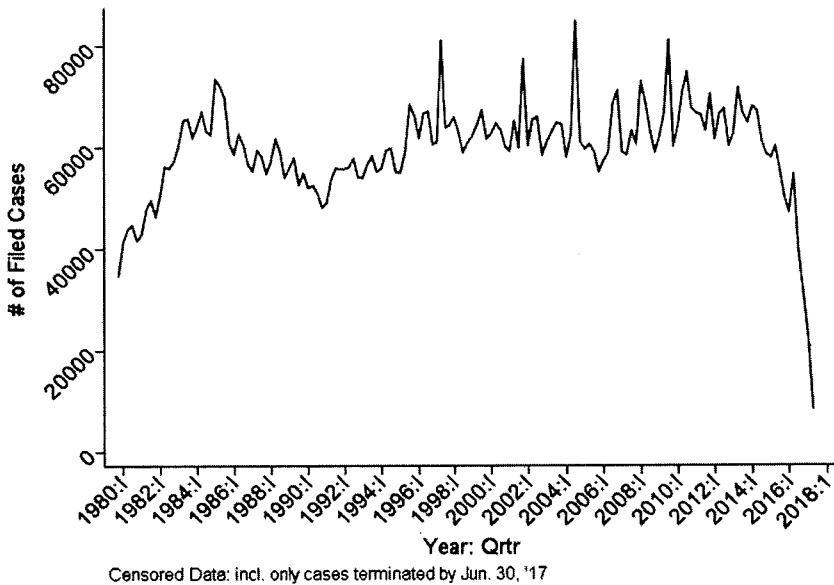
<sup>34</sup> For a fuller explanation, see Gelbach, *supra* note 3, at 22-23 (illustrating how a rise in the overall "quality" of suits filed could nevertheless be consistent with a fall in the plaintiff win rate in litigated cases).

<sup>35</sup> Selection would probably work to attenuate the effects of a decline in suit quality. *Cf.* Klerman & Lee, *supra* note 12; Siegelman & Donohue, *supra* note 17. It is even possible that a fall in (leftward shift in the distribution of) case quality could actually *raise* win rates in adjudicated cases under some circumstances. *See* Gelbach, *supra* note 3, at 23-25.

<sup>36</sup> Studies of contingency fee lawyers, for example, show that they diversify their portfolios of cases at different levels of risk. *See* HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES

Third, as Figure 5 illustrates, the total volume of filed cases was trending downward during the 1985 to 1995 period. If more “poor” cases were being brought at the same time that *total* filings fell, plaintiffs would have had to bring fewer “good” cases at the same time that they filed more “poor” ones, which seems implausible. Even if plaintiffs had a reason to bring more “poor” cases, it is very difficult to imagine why they would also simultaneously have had a reason to bring fewer “good” ones.

Figure 5: Volume of Cases, by Quarter of Filing: 1980–2016<sup>37</sup>



Still, it is possible that the ratio of “good” to “bad” cases has changed over time and that this partially explains the change in the win rate in conjunction with other factors. In Part III we consider possible causes for such a change and how they might be studied further.

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11-12 (2004). Given their business model, we predict they would be especially sensitive to changes in the win rate in their vetting and settlement practices. Yet we find a decline in the win rate of tort cases, which are most likely to be taken on a contingency fee.

<sup>37</sup> Note that because the data include terminated cases only, recent filings that did not have time to close before the data were compiled are excluded, making it appear as if the volume of filings dramatically decreased in the last year. Instead, what occurred was simply that the volume of *closed* filings declined.

2. “Poorer” Cases Being Litigated: More Aggressive Defendants or More Optimistic Plaintiffs?

Perhaps the falling win rate reflected a growing willingness by defendants to adjudicate “poor” cases that they had previously settled,<sup>38</sup> or a growing — but mistaken — optimism on the part of plaintiffs about their chances of success. Either story could conceivably explain why the group of cases that do not settle came to contain a larger fraction of plaintiff losses over time. Unfortunately, both seem at odds with expected behavior and the scant factual evidence.

For one thing, both scenarios are subject to the same question-begging problem as the filing story we discussed earlier. It is hard to know what could have caused defendants across substantive areas to begin altering their litigation strategy over a period of ten years starting in 1985. What change in the background rules or culture could explain such a new strategy? We are unaware of any changes in law, or in other factors such as litigation costs, that might predict such a large and consistent increase in defendants’ willingness to go to trial in cases they would previously have settled.<sup>39</sup> The same is true for plaintiffs — why would they have started to adjudicate more “poor” cases that they formerly would have agreed to settle in 1985, and then abruptly stop doing so in 1995?

Moreover, both accounts are in tension with the minimal evidence on adjudication rates. If defendants started playing tough (or plaintiffs became irrationally exuberant), the adjudication rate — the share of all terminated cases that are adjudicated (won by either party, as opposed to settling) — should have *risen*. Instead, as figure 6 illustrates, the opposite is true.

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<sup>38</sup> See, e.g., Benjamin Weiser, *To Curb Suits, City Now Opts to Fight Them*, N.Y. TIMES (Feb. 26, 2013), <https://www.nytimes.com/2013/02/26/nyregion/new-york-to-stem-civil-rights-suits-is-now-reluctant-to-settle.html> (documenting new litigation strategy under which New York City announced that it would start to defend what it deemed were non-meritorious lawsuits that it had previously settled because the suits cost more to defend than the amount at stake). This is only a single defendant, and it occurred very late in the period covered by our data. However, we have heard anecdotally that insurers developed more sophisticated settlement strategies around 1980. We discuss the possibility that more “good” cases were being selected out for settlement in the next section.

<sup>39</sup> Other scholars have noted, however, that there was a change in the makeup and general ethos of the judiciary during the 1970s. We discuss this below.

Figure 6: Adjudication Rate: 1980–2017



Measured either as the “raw” rate or after controlling for Nature of Suit, Circuit, and *pro se* and *in forma pauperis* status, the adjudication rate has *fallen* steadily since 1980.<sup>40</sup> To explain both a falling adjudication rate *and* an increased proportion of plaintiff losses, there would have to be both a rise in the volume of “poor” cases reaching adjudication, and a drop in the number of “good” cases as well.<sup>41</sup> This

<sup>40</sup> As with Figure 2, Figure 6 shows the “year effect” (here, on the adjudication rate), again controlling for Nature of Suit, Circuit, *pro se* and *in forma pauperis* status. The specification is exactly as for Figure 2, except that the dependent variable is one if the case is won by Plaintiff, Defendant, or “Both,” and the regression is estimated over all terminated cases (not just those won by Plaintiff or Defendant or Both).

<sup>41</sup> See Waldfogel, *supra* note 4, at 234–35 (deriving a relationship between the win rate and adjudication rate (across nature of suit types) in the Priest-Klein model). Unfortunately, the relationship depends on the (unobservable) location of the decision standard relative to the (unobservable) distribution of suit “quality” among all disputes. When the decision standard is *below* the mean of the suit quality distribution, an increasing adjudication rate *lowers* the plaintiff win rate. When the decision standard is *above* the mean of the suit quality distribution, a higher adjudication rate raises the win rate. Thus, one explanation for how the win rate and the adjudication rate could both fall over time is if the decision standard is high relative to the quality of the cases being brought and moves higher (in a direction more favorable to defendants) over time.

is possible if post-filing selection effects are very large. We now turn to our attempt to test the selection effect hypothesis.

### 3. Case Selection and Pretrial Dispositive Motions?

The decline in plaintiff win rates might be attributed, at least in part, to an increase in selective settlement. For example, suppose defendants became better at figuring out which cases plaintiffs were going to win. That would allow defendants to settle the cases most favorable to plaintiffs, leaving only the “poor” cases to proceed to an adjudication and lowering the win rate. In this view, the win rate fell because the best cases were taken out of the process in greater numbers than formerly, so more plaintiff “wins” were moved off-stage and did not show up among the cases terminating in a judicial decision.<sup>42</sup> Figure 6 shows that the adjudication rate was indeed falling over the period as a whole — a higher proportion of cases were settling rather than resolved by a judicial intervention — which is consistent with this story, at least in part. And the story is also consistent with developments in the court system, such as the 1983 revisions to Rule 16, which explicitly encouraged settlement as part of case management, and the passage of the 1990 Civil Justice Reform Act, which encouraged experimentation with Alternative Dispute Resolution (“ADR”) in the federal courts.<sup>43</sup>

This story is appealing, but the existing evidence does not adequately support it for three reasons. First, the case selection story does not fit the data. As we observed earlier, it is hard to see how the selection effect is reconcilable with the timing of the change in the win rate. Why would selective settlement suddenly begin in the mid-1980s, continue for ten years, and then shift to a more volatile but narrower range? And how is the trend in the adjudication rate — which drops more-or-less steadily from 1980 through 2016 — consistent with the quite different trend(s) in the win rate, which

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<sup>42</sup> Of course, it might be that plaintiffs are settling-out winning cases on less-favorable terms — net of trial costs — than they would have obtained if they had litigated the cases to an adjudicated outcome, but there is no way to know whether this is true.

<sup>43</sup> FED. R. CIV. P. 16; David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1984-87 (1989) (describing the 1983 amendment to Rule 16); DONNA J. STIENSTRA ET AL., FED. JUDICIAL CTR., A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990: REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT 1 (1997), <https://www.fjc.gov/content/study-five-demonstration-programs-established-under-civil-justice-reform-act-1990-report-0>.

declines dramatically only between 1985 and 1995? If worse cases were being selected for adjudication, we would expect to see a decline in the win rate that better tracked the decline in the adjudication rate. Finally, how does the selective settlement story fit with the increased volatility in the win rate we see in the period after 1995? We can think of no theory of rational attorney behavior that would explain this pattern. In other words, the selection story more or less fits the trend observed from 1985 to 1995, but not before or after.

Second, any change in settlement practice capable of explaining the win rate decline would have to be asymmetric in some dimension. If *both* sides became better at predicting adjudicated outcomes, we might expect fewer litigated cases, but no change in the success rate of the cases that make it to an adjudication.<sup>44</sup> It is not obvious why selective settlement — even if it occurred — should have favored defendants. So, for example, an increase in the availability of ADR techniques cannot explain the falling win rate unless it is coupled with a story about why ADR should disproportionately screen out the cases that plaintiffs would formerly have won.

One such explanation might be an increased use of pretrial motions that end the suit. It is reasonable to assume that defendants are the source of most of the dispositive pretrial motions.<sup>45</sup> That means that when the defendant prevails on his motion, the case ends in an adjudication. But the plaintiff can, at best, only “survive” such a motion. If the defendant *loses*, the result is that the case moves forward, although it may settle if the adjudication has provided

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<sup>44</sup> It might be the case that changes in parties' information were asymmetric *across* case types, rather than between plaintiffs and defendants for a *given* case type. For example, an improvement in information for case types in which plaintiffs had high win rates (but not for those in which plaintiffs had low win rates) might cause a fall in the overall win rate. Cf. Waldfogel, *supra* note 4. The problem for that explanation, however, is that win rates declined across a wide range of case types that had few if any structural similarities and included those with initially high and low plaintiff win rates. It is hard to see what forces could have led to a change in information structures consistent with these observations.

<sup>45</sup> This is certainly true of motions to dismiss. See FED. R. CIV. P. 12(b)(6). Voluntary dismissals are coded differently from adjudications on a motion to dismiss. In other work we have found that approximately 60% of summary judgment motions are brought by defendants. Miguel de Figueiredo et al., *Against Judicial Accountability: Evidence from the Six Month List 63* (Feb. 20, 2018) (unpublished manuscript) (on file with authors). Cecil et al. find that 72% of summary judgment motions were filed by defendants. See Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 886 (2007).



information that spurs settlement.<sup>46</sup> Over the span of cases, one would predict that an increase in dispositive pretrial motion practice (such as motions to dismiss or motions for summary judgment) would likely *decrease* the plaintiff win rate in the cases that are adjudicated. To see why, assume that some fraction of the cases in which plaintiffs survive a motion would otherwise have been plaintiff wins at trial. If these motions made cases more likely to settle because the process of bringing and deciding the motion revealed information helpful to the parties' negotiation (or increased costs, or both), then the plaintiff win rate would decline.<sup>47</sup>

At the same time, however, this theory also predicts an *increase* in the adjudication rate because some of the additional motions should resolve the dispute. But this prediction is not borne out by the data. Because both defendant wins in dispositive motions and all trials are counted as adjudications, introducing pretrial motions should raise the adjudication rate as *some* of these additional motions will be decided and end the lawsuit. To be sure, pretrial motions decrease the number of trials, but since trials were relatively rare to begin with and pretrial motions are more common, the volume of pretrial motions adjudicated to a defendant win will more than offset the decrease in trials, resulting in a higher adjudication rate overall.

It is impossible to test for this kind of selection directly, especially with the limited information available in the AO dataset.<sup>48</sup> But we can at least look at whether the degree of selection is related to the plaintiff win rate among the cases that survive settlement. If the selective settlement story is correct, as more cases are selected out for settlement, the win rate should drop. Likewise, in the group of cases where the adjudication rate is higher (meaning fewer cases are selected out for settlement), the win rate should rise.

To test this explanation, we first compute the share of all cases filed in quarter  $t$  and case-type  $n$  that ultimately reach an adjudicated outcome. That is, we define a quarter-and-case-type-specific adjudication rate,  $ADJ_{in}$ , and then plot this variable against probability

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<sup>46</sup> For example, Boyd & Hoffman find that motion outcomes affect speed of settlement, but they study only a narrow set of cases in the federal courts. Christina L. Boyd & David A. Hoffman, *Litigating Toward Settlement*, 29 J.L. ECON. & ORG. 898, 900 (2012).

<sup>47</sup> The win rate analysis follows that of Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 110-11, 113-14 (1990).

<sup>48</sup> See Clermont & Eisenberg, *Xenophilia or Xenophobia*, *supra* note 2, at 452-53 (describing the AO dataset).

that plaintiffs will win the cases from this group that are ultimately adjudicated.<sup>49</sup>

To see how this might work, consider a hypothetical group of cases of Nature of Suit type  $n$  filed in quarter  $t$ . For example, suppose we find 100 Employment Civil Rights cases filed in the third quarter of 1984. Of these, eighty are settled and twenty are adjudicated:  $ADJ_{tn} = 20\%$ . Plaintiffs ultimately win eight of the twenty cases that are adjudicated, for a win rate of 40%. In the fourth quarter of 1990, ninety Employment Civil Rights cases are filed. Sixty-eight of these settle and twenty-two are adjudicated (24.4%). Plaintiffs win twelve of the litigated cases, for a win rate of 54.5%. In this canned example, the less selection there is from among the filed cases, the higher the plaintiff win rate for those cases that are adjudicated. This negative relationship between adjudication rate and win rate is what the Issacharoff and Loewenstein theory predicts (although unfortunately, more complex theories of adjudication are also consistent with the opposite result under some circumstances).<sup>50</sup>

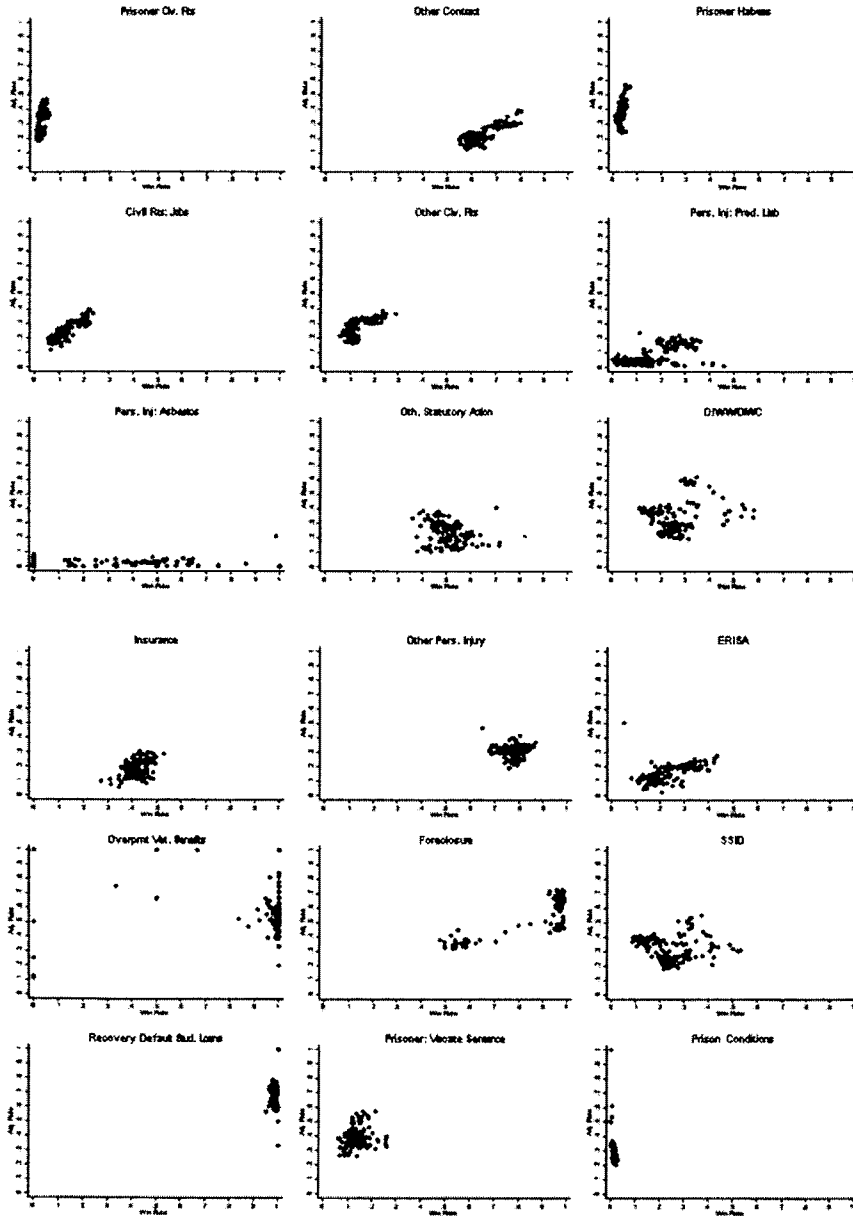
Figure 7 plots the quarterly adjudication rate against the plaintiff win rate for each of the twenty-seven largest Nature of Suit categories. (Each observation is the adjudication rate and win rate for cases in case type  $t$  filed in quarter  $n$ .)

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<sup>49</sup> The  $t$  subscript indexes the quarter in which the case was filed, while the  $n$  subscript indexes the Nature of Suit code for that case. Note that we sort cases by *filing* date, rather than termination date as in the rest of this Essay.

<sup>50</sup> See Waldfogel, *supra* note 4.

Figure 7: Quarterly Adjudication Rates vs Win Rates by Filing Quarter, for 27 Largest Nature of Suit Categories: 1980:I—2015:IV



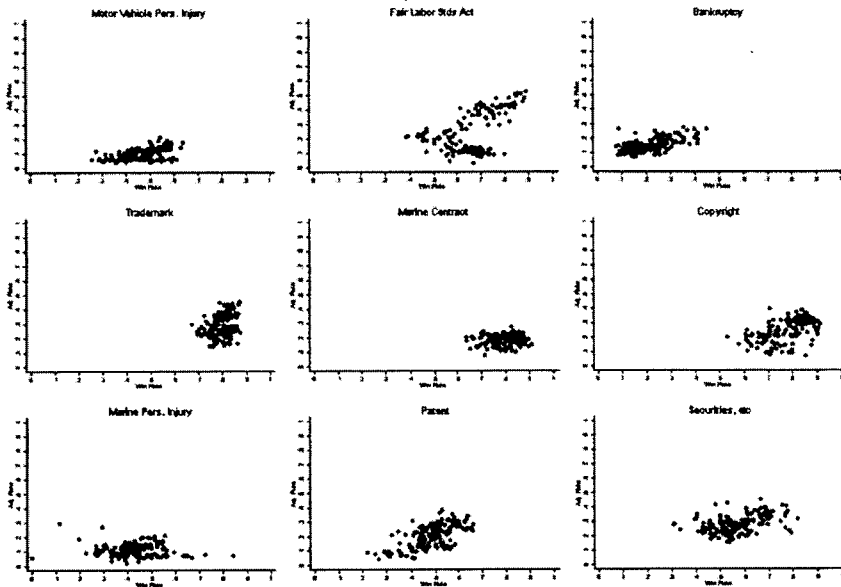


Figure 7 reveals two interesting facts. First, for virtually all case types, the adjudication rate and plaintiff win rate are *positively* related: in quarters where the adjudication rate is higher, the plaintiff win rate for those cases that survive to reach an adjudicated outcome also tends to be higher. While there are a few case types (Social Security/SSID; Disability; Other Personal Injury: Asbestos) for which there is no apparent relationship between adjudication rates and win rates, there are no clear examples of the hypothesized *negative* relationship between these two variables. This is consistent with, but does not prove, the selection hypothesis.

Second, it is also apparent that for most case types, win rates are considerably more variable than are adjudication rates, as is the case, for example, with Motor Vehicle Personal Injuries.<sup>51</sup> That is surprising, since any theory in the Priest-Klein tradition would generate the conclusion that “outliers” (clear wins for plaintiffs or defendants) would be the cases most likely to settle, leaving the win rate *less* volatile than the adjudication rate by virtue of this “sieving”

<sup>51</sup> There are a few clear exceptions in which win rates are virtually constant and it is instead adjudication rates that are quite variable. Student Loans, Veterans Benefits, Prisoner Civil Rights, and Prisoner Habeas all have essentially constant plaintiff win rates (in the first two cases, almost 100%, in the second two, almost zero), but highly variable adjudication rates.

process. In the limit, the Priest-Klein model predicts a *constant* win rate of 50%; Klerman and Lee's model of partial selection attenuates the 50% prediction but still suggests that win rates should be insulated from changes in the quality of filed cases via selective settlement.

We are not entirely sure what to make of this evidence. On the one hand, it is consistent with a selection effect in some categories of cases. On the other, in some case types we most expected to have a strong positive relationship between the adjudication rate and the win rate (that is, a strong selection effect) such as "other personal injury," we do not find any relationship between the adjudication rate and the win rate.

### C. Changes in Litigant Identity

It is possible that litigant identity changed over time, putting plaintiffs at a disadvantage which in turn lowered their win rate. "Plaintiff" and "defendant" are legal categories, not sociological ones. A plaintiff can be an individual or an institution, rich or poor. Perhaps sociological changes in who was bringing suit in the years we study explains the change in the win rate. As two prominent theorists have noted: "The skilled strategist knows that one can no more predict the outcome of a case from the facts and the law than one can predict the outcome of a game of chess from the positions of the pieces and the rules of the game. In either case, one needs to know who is playing."<sup>52</sup> (That includes what resources they have, what constraints they face, and what they believe about how the system works.)

The dynamic of litigation is likely different when individuals sue institutions than when adversaries are more equal. For example, it has been suggested that individuals are likely to have fewer resources and therefore may be more likely to lose lawsuits than institutions because they are unable to invest sufficient resources in prosecuting their case. Information asymmetries may play a larger role as well. And the stakes in litigation are almost certainly different between repeat players and one-shot litigants.<sup>53</sup> In sum, litigation may be more of an "uphill battle" for individuals than for institutions, even in meritorious cases, affecting the win rate.<sup>54</sup>

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<sup>52</sup> Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1472 (2000).

<sup>53</sup> Priest & Klein, *supra* note 11, at 28-29. See generally Galanter, *Why the "Haves" Come Out Ahead*, *supra* note 22.

<sup>54</sup> See generally Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 BUFF. L. REV. 1369, 1387-98 (2006). For specific evidence, see Galanter, *Contract in Court*, *supra* note 22, at 599-601.

Unfortunately, existing data do not track litigant type so we cannot falsify this theory.<sup>55</sup> We do find some evidence supporting it, however. For example, the falling success rate for cases brought against the U.S. Government is part of what drove the drop in overall win rates, as illustrated in Figures 8 and 9 below. That segment of cases is too small to explain the entirety of the win rate decline, even in combination with the changes in case type. Still, the U.S. Government is a powerful institution and increasing losses in cases against it, as compared to other jurisdictional categories, leads us to suspect that changes in litigant identities may be driving the “pure” win rate decline, at least in part. We also find limited support in the fact that there was no decline in the win rate in cases brought by the U.S. Government. Perhaps being a powerful institution explains its consistent win rate, although it is equally plausible that this success was due to case selection.

We also find that plaintiffs tend to lose earlier in litigation than formerly, and when they do win, plaintiffs wait longer to succeed, as illustrated in figures 10 and 11 below. Together, these changes are consistent with a story that plaintiffs were increasingly more likely to be individuals who faced an uphill battle in winning against institutional adversaries. Changes to the procedural law, discussed in Section F, combined with an increased number of individual plaintiffs may also have contributed to the decline in plaintiff success.

It is difficult to separate individual litigants from the quality of legal representation they are able to obtain and the effect of legal representation on outcomes. Individuals who have fewer resources are likely to have access to a different segment of the market for legal services than institutions do. This, in turn, may impact plaintiff win rates. For example, suppose an individual hires a lawyer whose business is based on volume. Such a lawyer may abandon or fail to zealously pursue her relatively low value case if she cannot get a settlement quickly, even if the case has merit. It has been documented that “settlement mill” firms do a poor job of distinguishing between meritorious and non-meritorious cases.<sup>56</sup> The result may be a

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<sup>55</sup> A valiant effort to determine what proportion of cases are brought by individuals as opposed to institutional litigants can be found in Hadfield, *supra* note 22, at 1294-1305. The study is not longitudinal. Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991*, 21 L. & SOC. INQUIRY 497, 497 (1996) focuses only on the largest firms.

<sup>56</sup> See Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1536-37 (2009). As the name implies, however, such firms settle cases for the most part rather than adjudicating them.

dismissal for want of prosecution or a loss on a dispositive motion that the plaintiff might have won if the lawyer was willing to invest more in the case or was just a better lawyer.<sup>57</sup>

Our analysis so far has assumed that rational lawyers have a financial incentive to vet cases before filing and therefore that they would react to a fall in the win rate by improving their vetting process. But if the market for legal services encouraged a growth in the number of lawyers who do not vet cases or are unable to do so effectively, then we might expect to see a decrease in the win rate.<sup>58</sup> The “settlement mill” firm may file many more cases that are likely to lose if they invest very little in them and can settle enough cases for a going rate that large numbers of losses do not affect their behavior.<sup>59</sup> In other words, if there is a business model for lawyers which rewards reduced investment in vetting cases, and there is a rise of filings from this type of law-firm or a shift of cases from one type of legal practice to another, this could cause a rise in “poor” (or poorly litigated) suits and a fall in the plaintiff win rate. Whether this theory is plausible depends on the transformation of legal services market between 1980 and 2017. A rise in individual litigants and in representation by lower quality lawyers or lawyers with a high volume legal practice between 1985 and 1995, combined with some market stabilization thereafter, could conceivably have led to the changes we see in the win rate.

There are two significant problems with the litigant identity account, however. First, individual plaintiffs tend to bring certain types of cases (such as employment or personal injury), but the decline in the plaintiff win rate appears across a wide range of case types. For example, “commercial” cases, which are more likely to be brought by institutions and a sophisticated bar, show a declining win rate over time. Second, this theory appears to require a different model of lawyer behavior than the one we have assumed so far. As the win rate declined, one would expect lawyers to stop bringing cases that they could not prosecute or select these cases out for settlement early in litigation. But if lawyers are uninformed, irrational, or responding

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<sup>57</sup> See Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs’ Briefs, Its Impact on the Law, and the Market Failure It Reflects*, 63 EMORY L.J. 59, 63 (2013).

<sup>58</sup> Moss’s work provides some qualitative evidence for this theory in the employment discrimination context. *Id.* at 97-98. Again, we note that this conclusion depends on the underlying model of settlement behavior and does not generalize to all reasonable models of the selection of disputes for litigation.

<sup>59</sup> See Engstrom, *supra* note 56, at 1492-1503.

to other incentives, then perhaps a win rate decline could continue for ten years without reaching equilibrium.<sup>60</sup>

#### 1. U.S. Government Defendants

A clue to the potential for litigant identity to affect win rates comes from data concerning adjudications involving the U.S. Government, shown in Figures 8 and 9. The sharpest decline in the win rate occurred for plaintiffs suing the U.S. Government, particularly in social security cases. Although social security cases do not explain the phenomenon, since they constitute such a small share of all adjudications, they hint that there may be something about individuals suing powerful institutions that may be driving the decline in the win rate.

Appendix Table 2 shows basis of jurisdiction among the adjudicated cases that are the relevant population for our win rate analysis. Federal question jurisdiction accounts for nearly half of all adjudicated cases; another 25% consists of cases brought by the U.S. Government; and diversity and cases in which the U.S. Government is a defendant make up the remaining 25% to 30%.

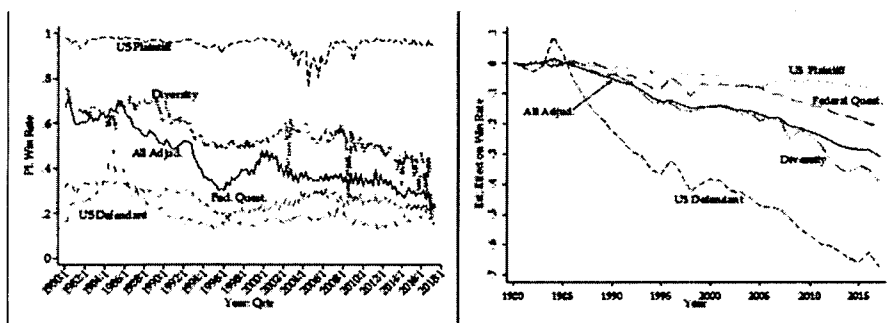
Cases brought against the U.S. Government exhibited the most substantial downward trend during the 1985–1995 period. By contrast, the raw win rate for cases brought by the U.S. Government did not change much over time — these cases seem unaffected by the overall trend. Diversity and Federal Question plaintiffs experienced milder declines in success rate than those suing the U.S. Government. Figure 8 illustrates the changes.

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<sup>60</sup> There is some evidence of this being true of new entrants to the employment discrimination bar and perhaps this was also the case in other areas of the law. See Moss, *supra* note 57, at 96–104.



Figure 8: Win Rates, by Jurisdictional Basis, 1980–2016

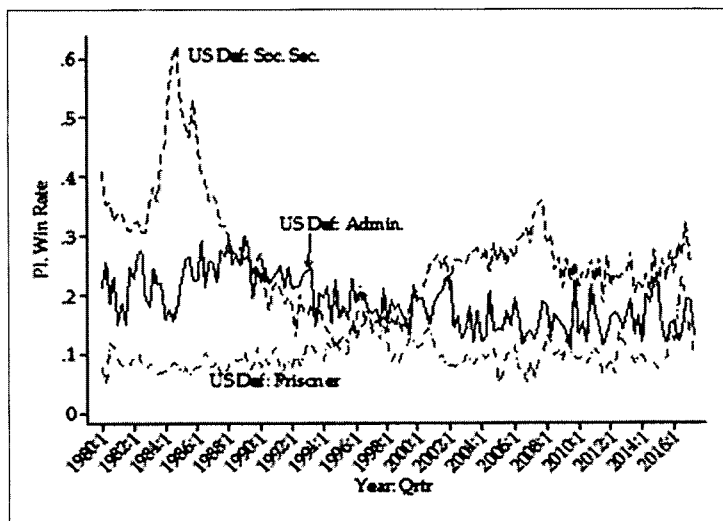


A. Raw Win Rate

B. Est. Year Effect, with Controls

Only three U.S. Government defendant case types have significant numbers of adjudicated outcomes: Social Security, “Administrative,” and Prisoner cases. Together, these account for almost 84% of all U.S. Government defendant adjudications. These case types are not sufficiently numerous to drive the decline in the pure win rate we observed in Figures 1 and 2, however. U.S. defendant cases taken together are only 16% of all adjudicated cases; Social Security cases are only about 7%, and Prisoner cases amount to only 4.5% of total adjudications. But they do provide an example of how litigant type is correlated with different win rate patterns. Figure 9 shows the win rate decline for each of these case types.

Figure 9: Plaintiff Win Rate in Adjudicated Cases, by Quarter of Termination: 1980–2016 (selected U.S. Government Defendant case types)



The most dramatic pattern is the declining win rate for Social Security cases, from 63% in 1984 to only about 10% by 1996; after that point, however, Social Security win rates trend back up to about 35%. Win rates for “Administrative” cases trended slightly downwards in the 1985–1995 period. Prisoner cases actually became increasingly successful, although they have consistently been much less successful than other types of cases, as illustrated in Figure 9.

Overall, litigants against the U.S. Government suffered a significant decline in win rates over the relevant period. This decline does not drive the overall win rate because of the relatively small numbers, but could constitute a partial explanation for the “pure” win rate decline in changing litigant identity. An explanation is still needed, however, as to why rational lawyers continued to bring losing cases over the ten year period, especially when (as in Social Security cases) the win rate at its nadir was so very low.

## 2. Individuals Versus Institutions

The finding that the U.S. Government fares better than other litigants leads us to consider whether the win rate decline can be partially attributed to a change in the type of plaintiffs (individuals or institutions) bringing cases over time more generally. Some types of cases such as torts or civil rights tend to consist largely of individual

plaintiffs suing institutional defendants. These cases also tend to be the types of cases that plaintiffs lose more often. Theorists have long argued that individual plaintiffs face more of an uphill battle in litigation when facing institutions than when the parties are evenly matched.<sup>61</sup> Perhaps the composition of the plaintiff population shifted towards individuals rather than institutions over this time period in case types not usually associated with individual litigants.

Although the data currently available does not differentiate by type of plaintiff and defendant, data about the timing of resolution and level of judicial involvement indicates this theory is worthy of further study. We find that win rates declined most for cases in which there was no judicial action at all before dismissal (as compared with those cases in which there was an adjudicated motion, for example). This suggests that some of the reason why plaintiffs may be losing more cases is that they are not prosecuting them as vigorously as they once did. Anecdotally, cases brought by individuals are considered more likely to fall into the category of lax prosecution than those brought by institutions.<sup>62</sup>

This theory differs from the earlier discussion of “poor” cases displacing “good cases.” A dismissal for lack of prosecution does not necessarily mean that the case is meritless. Other factors, including economic considerations, poor lawyering, or the economics of legal practice may cause plaintiffs to fail to zealously pursue their cases. In cases in which there was no defendant response, we can assume that the case is not resolved because the plaintiff received information from the other side that it did not have at the commencement of litigation about the quality of her case (although the plaintiff may have learned new information from her own investigation). We find that win rates decline both in cases that do not involve court action and those cases which do, suggesting that even when plaintiffs prosecuted their cases over this period they tended to lose more frequently over time.

We show the decline of win rates at different points in the litigation using the AO’s tracking of procedural progress at termination. The AO’s “Procedural Progress” codes are roughly allocated into two categories — before and after “the issue is joined.” The category “before issue is joined” means that the defendant has filed no answer or other motion. Roughly half of all adjudicated cases are resolved before the issue is joined. Plaintiff win rates in cases decided before

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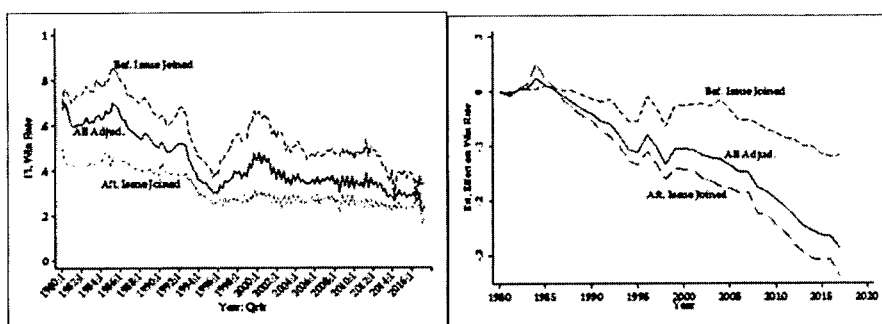
<sup>61</sup> Marc Galanter found that individual plaintiffs suing organizational defendants were especially likely to lose. *Contract in Court*, *supra* note 22, at 593, 599; *Why the “Haves” Come Out Ahead*, *supra* note 22, at 119-22.

<sup>62</sup> Interview with Jane Doe, District Court Judge, (July 21, 2017).

the issue was joined (either with or without controls) track the overall results quite closely.

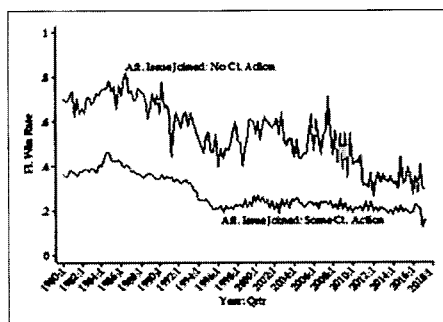
Figures 10.A and 10.B use the same methods we adopted earlier. Figure 10.A plots the raw (unadjusted) win rate by quarter for cases that terminated before and after the issue was joined. Figure 10.B shows the estimated year effects on the win rate in adjudicated cases, with the same set of controls as earlier. Both parts of Figure 9 tell a story that is consistent with the overall pattern we have observed.

Figure 10: Win Rates in Adjudicated Cases, by Procedural Progress at Termination, 1980–2017



A. Raw Win Rate

B. Est. Year Effects, with Controls



C. Raw Win Rate, by Procedural Progress

Figure 10.C illustrates the win rate for cases in which defendants *did* respond to the complaint, distinguishing those that close with no subsequent court action at all (code 3) from those that required some intervention before closing (codes 4 and 5).<sup>63</sup> This disaggregation

<sup>63</sup> Code 3 refers to cases decided after the issue was joined but without court intervention. Code 4 refers to cases decided after the issue was joined by judgment on a motion. Code 5 refers to cases decided after the issue was joined and a pretrial

reveals that win rates declined most for cases in which there was no judicial action at all, suggesting that changing plaintiff identity and investment in their lawsuits may be a fruitful area for further study.

The decline in plaintiff resources to prosecute cases offers at best a partial explanation for the 20% decline in the win rate, however, because the declines are evident across all of the procedural progress codes. The decline is also driven by cases which plaintiffs prosecuted and lost. A viable explanation for the decline must therefore explain the decline in both cases in which plaintiffs invested and those in which they (apparently) did not.

Importantly, there is good reason for econometric skepticism with respect to all analysis that depends on procedural progress. Unlike fixed-in-advance variables such as Nature of Suit or Jurisdictional Basis, a case's procedural progress at termination is endogenous with respect to its outcome. That is, the same factors that cause a case to end "before the issue is joined," rather than after, could plausibly be correlated with the case's ultimate outcome. These results should be understood as a way of summarizing the evidence, rather than as a statement about causal influence. The same is true for the findings in the next section, documenting changes in the length of case disposition.

### 3. Uphill Versus Downhill Battles

The data offer some, albeit limited, evidence that plaintiffs with "good" cases may have faced more "uphill" battles, and litigated them longer and with more procedural hurdles, in the period of long decline (1985 to 1995) than previously. This evidence is consistent with the individual plaintiff thesis explained above and the theoretical literature, which posits that individuals are more likely to have a difficult time prosecuting their cases than institutions.

Figures 11 and 12 plot the median duration of adjudicated cases by the quarter in which the case terminated.<sup>64</sup> It is apparent from Figure 11 that adjudicated cases won by plaintiffs are closed in considerably less time than those won by defendants. The median plaintiff win takes only about half as long as the median defendant win. Moreover,

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conference held.

<sup>64</sup> Cases with durations of more than 2000 days are extreme outliers and are dropped in both figures. The same caveat about endogeneity that we raised with our analysis of procedural progress applies here as well. A case's duration and the party who prevails are clearly determined by some of the same factors, so the relationship between prevailing party and duration should not be given a causal interpretation.

both plaintiff and defendant wins have gotten longer over the past thirty years, by roughly fifty days.

Figure 11: Median Duration (days) of Cases Won by Plaintiff and Defendant, by Quarter of Closure

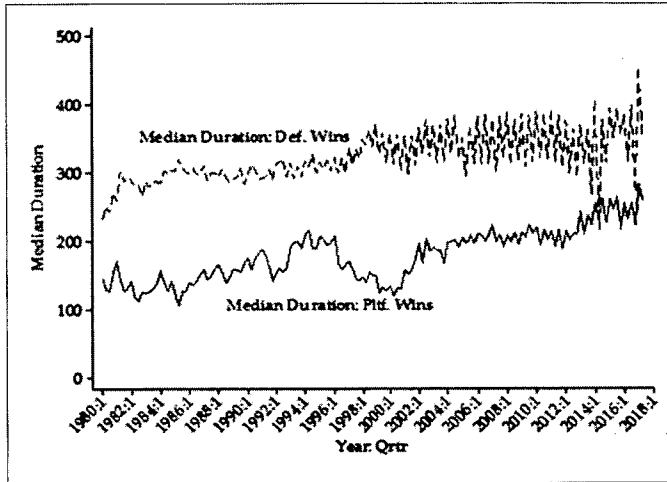


Figure 12: Ratio of Median Duration of Plaintiff and Defendant Wins, by Quarter of Closure

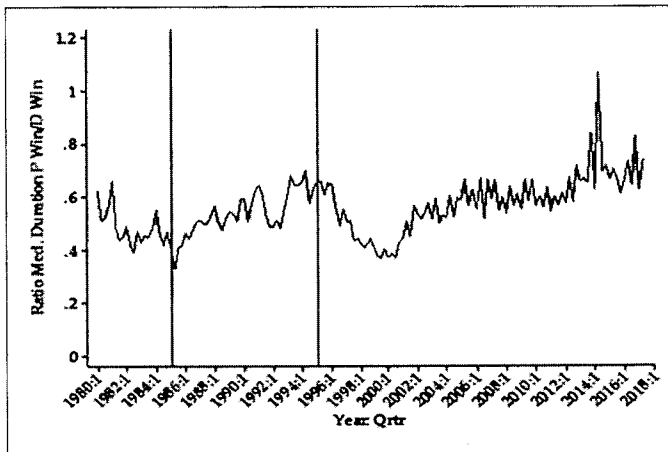


Figure 12 shows that cases won by plaintiffs started getting longer relative to those won by defendants around the end of 1984, and this trend continued through 1995, as indicated by the vertical red lines. This is precisely the period during which plaintiff win rates declined.

It is possible that the two trends are related.<sup>65</sup> Figures 11 and 12, and the data on the procedural progress of cases from Figure 10, suggest that plaintiffs with winning cases may have faced more “uphill” battles, and litigated them longer and with more procedural hurdles, in the period of long decline (1985 to 1995) than previously.<sup>66</sup>

These changes do not in themselves provide an explanation for either the long decline in plaintiff win rates from 1985 to 1995 or the stabilization and volatility that emerged after ten years. However, they do indicate an avenue for further research into the changing nature of adjudication, of party make-up, or a combination of both, over this period. With further research, such changes, taken together, might explain the win rate decline.

#### *D. Changing Judicial Attitudes Toward Plaintiffs, or Procedural Retrenchment?*

A final possible explanation for the falling win rate is that judicial attitudes towards plaintiffs changed during the 1985–1995 period, making judges more skeptical of plaintiff claims. This is similar to the idea that procedural retrenchment (which is sometimes also attributed to an anti-plaintiff bias) caused the decline in win rates. These theories can also be related to changes in plaintiff identity, as many of the procedural changes over the past forty years increased the costs of litigation, which one would anticipate would have a greater effect on individuals suing institutions than other types of litigants. On their own, however, the judicial attitudes and procedural retrenchment theories do not fit the data very well.

The available data do not allow us to trace changes in decision patterns of individual judges to compare them over time.<sup>67</sup>

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<sup>65</sup> The increased length of plaintiff wins relative to defendant wins could, by itself, have had a temporary “algebraic” effect on the win rate. As an analogy, think of what happens to the share of women in all year-*i* deaths, as female life expectancy starts to lengthen relative to that of men. As successive cohorts of women start living relatively longer, they account for a smaller fraction of all annual deaths until at some point the life expectancy of new cohorts stops increasing. During that time, women make up a smaller fraction of all deaths in any given year than their share of all births (roughly one-half) in the year they were born. Similarly, if plaintiff-won cases are taking longer to adjudicate relative to defendant-won cases, that fact by itself will depress the plaintiff win rate for a period of time.

<sup>66</sup> See, e.g., Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 301 (2002) (describing changes in attitude towards litigants, especially plaintiffs).

<sup>67</sup> The Administrative Office of the U.S. Courts does not release data with individual judge identifiers.

Accordingly, the judicial attitudes thesis is difficult to either prove or disprove directly. Still, there is some evidence that the federal courts began to disfavor litigation in general beginning in the late 1970s. For example, Andrew Siegel has persuasively argued that the most reasonable explanation for the Rehnquist Court's jurisprudence is its hostility to litigation.<sup>68</sup> Stephen Burbank and Sean Farhang have shown that the probability that the Supreme Court ruled in a way that allowed a plaintiff to bring a private enforcement action fell from around 68% in 1970 to 18% in 2013.<sup>69</sup>

A variant on this hypothesis is that the makeup of the federal judiciary changed during the period between 1985 and 1995, so that judges who were more sympathetic to plaintiffs were gradually replaced by ones who were less so. If such a change in personnel stabilized in 1995, that could have given rise to a pattern like the one we observe.<sup>70</sup> That is, as more plaintiff-friendly judges were displaced, the win rate might slowly decline, and when judicial personnel stabilized, the win rate would reach a new (lower) equilibrium.

It is not possible to test this hypothesis with existing data. However, we can look at the share of all sitting district court judges appointed by Democratic presidents as a crude first step. The data are graphed in Figure 13.<sup>71</sup> If one assumes that Democratic-appointed judges are more plaintiff-friendly than Republican appointees and ignores selection effects, the picture seems broadly consistent with the evolution of the win rate as depicted in Figure 1. The share of Democratic appointees peaks in 1981, but allowing for lags in filing and deciding cases, it roughly matches the drop in plaintiff win rates beginning in the mid 1980s. And similarly, the share of Democratic appointees began to rise again in 1992, which — again allowing for

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<sup>68</sup> See Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1117-18 (2006).

<sup>69</sup> Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1574 (2014).

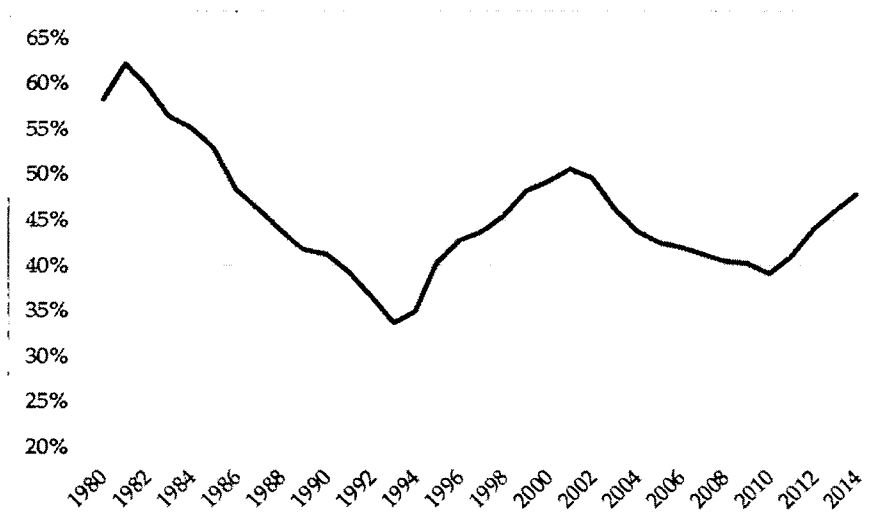
<sup>70</sup> We are hedging here because if all parties know about the shift in judicial attitudes, a Priest-Klein style analysis would predict offsetting changes in settlement behavior, meaning that the win rate would not move (significantly) in response to a more defendant-friendly judiciary. Instead, parties would simply settle marginal cases that would formerly have been plaintiff wins.

<sup>71</sup> The data come from <https://www.fjc.gov/history/judges>, and include both senior and regular judges. As suggested by Bert Kritzer, one could weight senior judges as counting for only half of an ordinary judge, but doing so makes no difference. We are grateful to Professors Christina Boyd and Bert Kritzer for obtaining the data for us and suggesting how to use it.



lags — could line up with the stabilization in the win rate in the mid-1990s.

Figure 13: Share of Sitting District Court Judges Appointed by Democratic Presidents, Calendar years 1980–2014



Although it is tempting to read Figure 13 as confirming the judicial politics explanation for the falling win rate, we remain skeptical for several reasons. First, as we have stressed before, there is no necessary relationship between win rates in litigated cases and judicial ideology or a judge's personal decision standard once selective settlement practices have been taken into consideration.<sup>72</sup> A more defendant-friendly judiciary could in principle actually cause in a *higher* win rate in the selected sample of cases that are litigated.

Second, even if one believes that Democratic appointees were more "pro-plaintiff" than Republican appointees, it is hard to see how judicial attitudes could explain declining win rates in case types where most plaintiffs are institutions or business. "Plaintiff" and "Defendant" are procedural categories, not ideological ones. So pro-business Republicans should logically prefer *plaintiffs* in areas such as copyright where business are suing individuals.<sup>73</sup> But win rates fell across almost

<sup>72</sup> See Jonah Gelbach, *Rethinking Summary Judgment Empirics: The Life of the Parties*, 162 U. PA. L. REV. 1663, 1673-75 (2014); Priest & Klein, *supra* note 11, at 3-4; Waldfogel, *supra* note 4, at 245-48.

<sup>73</sup> See, e.g., Peter Siegelman & Joel Waldfogel, *Toward a Taxonomy of Disputes: New Evidence Through the Prism of the Priest/Klein Model*, 28 J. LEGAL STUD. 101, 109-

all case types, even for copyright and other business-plaintiff case types.

The procedural retrenchment theory similarly fails to fit the data. One problem is timing: scholars have pointed out a series of procedural limitations that were predicted to affect plaintiffs negatively, starting in the early 1980s in response to the so-called “litigation explosion.”<sup>74</sup> But the increasingly hostile view of litigation, as well as greater emphasis on settlement in the federal courts, began to be seen in judicial decisions in the late 1970s.<sup>75</sup> For example, then Chief Justice Warren E. Burger convened the Pound Conference decrying the increase in federal litigation in 1976.<sup>76</sup> More popular accounts expressed concern about a rising tide of frivolous litigation, notably *after* the decline in win rates was well underway or near its end.<sup>77</sup> It is true that Rule 16 was amended in 1983 to empower judges to manage cases and to close meritless cases more easily.<sup>78</sup> In 1986 the Supreme Court decided the summary judgment trilogy, which made it easier for defendants to bring summary judgment motions.<sup>79</sup> But studies show that summary judgment motions were already increasing in the lower federal courts prior to these decisions.<sup>80</sup> Similarly, the

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11 (1999) (demonstrating that most copyright plaintiffs are firms, at least in the Southern District of New York).

<sup>74</sup> The book by that name was published in 1991. WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 2 (1991). Cf. A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 360 (2010) (describing various changes in procedural doctrine that make it harder for plaintiffs to bring and maintain lawsuits).

<sup>75</sup> See Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1861 (2014).

<sup>76</sup> The proceedings were published in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* (A. Leo Levin & Russell R. Wheeler eds., 1979). See Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1157 (1993) (discussing the proceedings of the Pound Conference, hostility towards litigation and concerns over the growing federal docket).

<sup>77</sup> See generally OLSON, *supra* note 74.

<sup>78</sup> FED. R. CIV. P. 16(c)(2) (2018) (“[T]he court may consider and take appropriate action on the following matters: (A) formulating and simplifying the issues, and eliminating frivolous claims or defenses . . .”). We note — again — that pro-defendant procedural innovations might lead to a rise in measured plaintiff win rates (since judges can eliminate “weaker” plaintiff cases), or to no change at all (if the cases so eliminated are still recorded as adjudicated outcomes favoring defendants).

<sup>79</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-54 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986).

<sup>80</sup> See Joe S. Cecil et al., *A Quarter Century of Summary Judgment Practice in Six Federal District Courts 18-20* (Dec. 1, 2007) (unpublished manuscript),

Supreme Court tightened pleading standards in 2007,<sup>81</sup> but it appears that pleading standards were already more restrictive than mere “notice pleading” in the lower federal courts long before those decisions.<sup>82</sup> The abrupt change around 1995 is also inconsistent with the Burbank-Farhang study, which shows a consistent decline in pro-plaintiff sentiment over the entire period from 1970 to 2013.<sup>83</sup> None of these developments fit the trends we observe in the data, which would require there to have been significant judicial decisions affecting win rates across the board between 1985 and 1995, and no such decisions thereafter.

In sum, doctrinal trends noted by procedural scholars began before the decline in win rates and continued long after the win rate stabilized at a new, lower, and more volatile norm. Therefore, these changes cannot explain the long term win rate pattern.

### III. WHAT NEXT?

Given that the usual suspects such as changes in selection effects or in the makeup of the caseload offer insufficient explanations for the fall in the plaintiff win rate, we turn to the question of where else to look for an adequate explanation. We think four types of data would assist in determining why the win rate shows the pattern that it does

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[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=914147](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=914147) [hereinafter Quarter Century].

<sup>81</sup> See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009).

<sup>82</sup> See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003). In a series of cases, the lower courts attempted to increase pleading standards in civil rights cases only to be struck down by the Supreme Court, demonstrating that the lower courts were making pleading more difficult in civil rights cases for years prior to *Twombly* and *Iqbal*. See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (striking down heightened pleading standards for employment discrimination cases); *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (striking down heightened pleading standards for civil rights cases against the government).

<sup>83</sup> All of these scholars were looking at Supreme Court decisions, which may have less to do with developments at the district court level than many commentators assume. How much Supreme Court procedural decisions actually affect lower court outcomes is hotly debated. For example, many predicted that changes in pleading doctrine would increase dismissals for failure to state a claim. Yet scholars studying the effect of changes to pleading doctrine on outcomes at the trial court level have reached disparate conclusions. Compare Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2121 (2015) (finding an effect on dismissal rates), with William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 700 (2016) (finding no effect on dismissal rates).

over the last thirty years: judge identifiers, data on litigant type, data on lawyer type, and granular process detail (such as timing and resolution of motions and, to be really ambitious, settlement data). Such data are either embargoed (in the case of judge identifiers and motion data) or are not systematically collected at all (in the case of lawyer, litigant, and settlement information).

#### A. Judge Identifiers

The current data provided by the federal courts do not include judicial identifiers.<sup>84</sup> If such identifiers were made available, we could then assess how much of the win rate fall occurred because of the replacement of one set of judges with another, and how much was due to declining win rates *within* each judge's docket (that is, whether a particular judge's win rate at time  $t+1$  was lower than her win rate at time  $t$ ). With a database that also included individual judges' names, we could test whether win rates depend on the party affiliation of the President who appointed that judge, for example, and whether the fall in win rate was attributable to judicial appointments by political party.

Although we are skeptical of the theory that judicial identity drove the decline in the win rate and subsequent volatility, we cannot rule this theory out without access to data that would allow us to test it. We have been told that the AO does not release data with judicial identifiers in order to protect the system from allegations of bias at the individual judge level. This is not an unfounded worry. Even if the AO only provided anonymized judge identification, it would be easy for researchers to use publicly available data to "reverse engineer" every judge's identity from his or her district and date of appointment.<sup>85</sup> That would allow for precisely the singling-out of individual judges that the AO is keen to avoid. For these reasons, we think it unlikely that the AO will provide this data to researchers in the foreseeable future.

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<sup>84</sup> We note the distinction between judge identifiers and judge's names. The former require only that each judge in the dataset be given a unique code so that all of his or her cases could be identified as having been decided by the same judge. The latter would allow incorporation of background characteristics for each judge.

<sup>85</sup> It is important to realize that the name of the judge associated with every decision is *already* part of the public record. Thus, the *aggregate* results (across all cases) for every judge could in theory be obtained by hand-coding the judge's name associated with each case. Until recently, that would have been an overwhelming task. However, advances in web-scraping and big data techniques will soon open up this possibility, if indeed they have not done so already.

We appreciate that there are good reasons not to release data with judge identifiers or names. But there is a tension between protecting individual judges and protecting the legitimacy of the system overall. We think that releasing the data to scholars with anonymized judge IDs, and a requirement not to reveal names or link to external data sources, could satisfy both concerns.<sup>86</sup> Scholars have obtained access to sensitive personal income tax data under similar restrictions, and have generated highly significant research without exposing any confidential information.<sup>87</sup> These agreements are a model for the kind of data access we would like to see.

*B. Granular Process Data (Settlement and Motion Outcomes)*

Granular process data, such as settlement and motion outcomes, could help better test for selection effects. An increasing settlement rate, combined with an evaluation of settlement outcomes, would illuminate the role of selective settlement in explaining the win rate decline. For example, if one could demonstrate that win rates declined at the same time that settlement outcomes improved for plaintiffs, this might assuage worries that the system is treating plaintiffs inequitably. Documentation of settlement outcomes would therefore help in developing a normative evaluation of the falling win rate. (We note that to our knowledge, no federal district court carefully tracks settlement outcomes, although at least one state court does so.<sup>88</sup>)

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<sup>86</sup> There are still systemic legitimacy concerns that might arise, of course, similar to the systemic legitimacy concerns raised by the win rate decline. While we suspect that if researchers discovered that the decline in win rates was in fact attributable to replacement of pro-plaintiff with anti-plaintiff judges, many would find this shocking, debunking this hypothesis would increase legitimacy.

<sup>87</sup> See, e.g., Jeffrey Mervis, *How Two Economists Got Direct Access to IRS Tax Records*, SCI. MAG. (May 22, 2014, 2:00 PM), <http://www.sciencemag.org/news/2014/05/how-two-economists-got-direct-access-irs-tax-records> (explaining the procedures for ensuring confidentiality and the conclusions of the path-breaking research). Even without such elaborate measures, there is a rigorous procedure under which bona fide scholars can get access to tax data, under limited conditions for specific purposes. The IRS has long used “secure data centers” to give access to its data to researchers who qualify, but only for those who travel to a physical location. See Jeffrey Mervis, *It’s Already on File: How Administrative Records Can Help Assess Mobility*, SCI. MAG. (May 22, 2014, 2:00 PM), <http://www.sciencemag.org/news/2014/05/its-already-file-how-administrative-records-can-help-assess-mobility>. Some data are now made available in slightly less restricted forms.

<sup>88</sup> See Eric Helland et al., *Contingent Fee Litigation in New York City*, 70 VAND. L. REV. 1971, 1972 (2017) (describing confidential dataset that contains settlement amounts and offers).

A recent study by Helland et al. showed that settlements in contingency fee litigation in New York State Court tracked trial outcomes closely.<sup>89</sup> If settlements tracked adjudication outcomes closely in the federal courts as well, this would be further evidence against a selection effect. If, on the other hand, plaintiffs experienced an increase in positive settlement outcomes over the period when they experienced a decrease in the win rate, this would be evidence of a selection effect. Settlement information is not available for our data set, as the federal courts have not requested information on settlement outcomes from litigants.<sup>90</sup>

Combining settlement data with granular motions data would also help test for selection effects. Suppose that in the past more plaintiffs prevailed in summary judgment motions and that this led to nuisance value settlements in which defendants settled primarily to avoid trial. In that case, the falling win rate would be a reflection of plaintiffs losing in a way that became more evident over time, a change in what might be called the *visibility* of the win rate. Combining motion outcomes with settlement data would allow us to determine whether the falling win rate is a reflection of the court system surfacing information that used to be hidden rather than a true fall in the plaintiff win rate.

### C. *Litigant and Lawyer Characteristics*

As noted earlier, if litigant characteristics changed over time, with individuals replacing institutions as plaintiffs, this could have had an effect on the win rate. The same is true with changes to the political economy of legal practice.

To investigate these hypotheses, we would need data that included litigant type, lawyer type, and granular information about the resolution of motions. We could then examine the relationship between litigants, the market for legal services, and the win rate both across the board, for different types of suits, and at different stages of the litigation. We can use the nature of suit codes as a proxy for some types of litigants and lawyers — for example, it is widely believed that personal injury suits tend to be brought by individuals against

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<sup>89</sup> *Id.* at 1982-88 (finding a settlement rate of 76% and that mean recoveries in settled and adjudicated cases were nearly identical).

<sup>90</sup> It is possible, however, that liability insurers retain such data. See Tom Baker, *Transparency Through Insurance: Mandates Dominate Discretion*, in CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 184, 184-200 (Joseph W. Doherty et al. eds., 2012).

institutions and by attorneys working on a contingency fee. But how many of these litigants are represented by firms willing or able to invest fewer resources over time? We do not have data on which lawyers were bringing personal injury cases during this period; some may have been settlement mills, others may have invested more in vetting cases. Furthermore, since our data show a declining win rate across a wide range of case types, case type information is not a useful proxy for explaining the change in the identity of participants in the justice system that could have driven the win rate decline.

Data on litigant and lawyer types would help us understand whether changes in participants in the legal system are the reason for the win rate decline, and data on how cases are lost or won (at the motion level) would allow us to understand the mechanisms by which the win rate is created and their relationship to the economic drivers of legal practice. Of course, this is not the kind of data that federal district courts currently collect, and doing so would entail a significant expansion of their record-keeping activities. Instead of requiring this information for all litigants, therefore, it would make sense to randomly sample some fraction of all cases.

#### IV. WHY ASK FOR A SYSTEMIC EXPLANATION?

Plaintiff success rates in adjudicated cases are a matter of considerable policy importance. Almost seven million civil cases were filed in the federal courts between 1980 and 2017. Depending on the time period, one-quarter to one-third of these ended in some kind of adjudication.<sup>91</sup> Unlike Las Vegas, however, what happens in court does not stay in court: adjudicated outcomes inform settlements, and the underlying behavior by all parties that gives rise to litigation.<sup>92</sup> Decisions about how much care to take to prevent an accident, whether to breach a contract, or how to administer government programs, are all influenced by parties' assessments of their ultimate chances of success in litigation. A large and sustained change in the win rate will ultimately have an effect on primary conduct. We suspect that even if parties themselves are not aware of the longitudinal trend, lawyers and other repeat participants in the justice system will

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<sup>91</sup> Authors' calculations relying on the AO dataset, described *supra* note 1.

<sup>92</sup> See Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 234-37 (1982) (settlements reflect outcomes in litigated cases); Keith N. Hylton, *An Asymmetric-Information Model of Litigation* 15-17 (Bos. Univ. Sch. of Law, Working Paper No. 00-03, 2000) (theoretical model integrating defendants' primary decisions about level of care with plaintiffs' decisions to file suit and settlement/adjudication outcomes).

experience the falling win rate first hand, even if they have not quantified that change. This is especially true if settlements are invisible, as they often are, and other parties only know the results of litigated cases.<sup>93</sup>

Assessing court output at the individual case level is consistent with a common law theory of judging. The rule of law has traditionally been understood to require judges to give, or at least to *have*, reasons justifying their decisions at the level of the individual case — hence, the judicial opinion.<sup>94</sup> Every opinion supports a decision, and decisions are appealable and therefore subject to correction. Judges are also supposed to be consistent, not only about the reasons they give but the outcomes they reach.<sup>95</sup> This is captured in the aphorism that like cases ought to be decided alike.

As evidenced by the fact that the system does not track the overall win rate, the unstated theory of the administration of the federal courts seems to be that if individual cases are decided correctly most of the time, and corrections can be made through appeals, then the system is working well and there is no need to measure global outputs. We do not know whether individual cases *were* decided correctly over the thirty year period documented here, and no quantitative analysis can reveal the answer to that question. But if like cases are being decided alike across time, then win rates should remain stable, apart from whatever variation that can be accounted for by changes in legal rules or exogenous changes such as a rise in filings of a particular type

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<sup>93</sup> See Stephen C. Yeazell, *Transparency for Civil Settlements: NASDAQ for Lawsuits?*, in CONFIDENTIALITY, TRANSPARENCY AND THE U.S. CIVIL JUSTICE SYSTEM 143, 143-44 (demonstrating how little is known about settlement rates in the civil justice system).

<sup>94</sup> See, e.g., FED. R. CIV. P. 56(a) (2018) (“The court should state on the record the reasons for granting or denying the motion.”); Mathilde Cohen, *The Social Epistemology of Public Institutions*, in NEW WAVES IN PHILOSOPHY OF LAW 185, 185-208 (Maksymilian Del Mar ed., 2011); Fallon, *supra* note 14, at 8 (stating that a generally agreed upon aspect of the rule of law is that “people must be able to understand the law and comply with it”); Schauer, *Giving Reasons*, *supra* note 6, at 638 (arguing that reasons are typically “propositions of greater generality than the conclusions they are reasons for,” which means that they serve as a constraint on future decision-making). Similarly, the most fundamental requirement of due process is that decisions not be arbitrary. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (“Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action . . .”). Not everyone agrees on where to draw the line, but the determination of arbitrariness must depend to some extent on whether there is a reason for the decision.

<sup>95</sup> See Fallon, *supra* note 14, at 8 (discussing stability as an element of the rule of law). Sometimes this value is referred to as predictability or consistency. The purpose of this value is that it allows people to plan.



of claim. We suggest that the rule of law requires a change in the legal standards or other justification for the higher-order phenomenon we have uncovered.

The federal courts track many other aspects of their work that the public would care about, including the number of filings and the median time from case filing to disposition.<sup>96</sup> As a result of congressional mandate, the courts also track motions pending more than six months and cases pending more than three years.<sup>97</sup> These are perhaps not as central to rule of law questions as actual outcomes, but they are relevant from a justice perspective. For example, the Civil Justice Reform Act shows that Congress cared about speedy resolution of cases, a value also expressed in Federal Rule of Civil Procedure 1.<sup>98</sup> There is good reason to care about timing of disposition, as delay can be detrimental to litigants and, in fact, litigants may be willing to trade off accuracy for speed in some cases.<sup>99</sup>

There are also some limited longitudinal studies of the work of the federal courts. For example, the Federal Judicial Center has studied changes in filing of motions to dismiss and motions for leave to amend complaints after major Supreme Court decisions,<sup>100</sup> changes to summary judgment practice over time, including changes in the grant rates of these motions,<sup>101</sup> and the effect of jurisdictional changes on class action filings over time.<sup>102</sup> These types of studies are precedent

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<sup>96</sup> *Federal Court Management Statistics*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics>; see also *Judicial Business of the United States Courts*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts>.

<sup>97</sup> *Civil Justice Reform Act Report*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports/analysis-reports/civil-justice-reform-act-report>. The operation of the Six Month List is the focus of other work. De Figueiredo et al., *supra* note 45, at 8-10.

<sup>98</sup> FED. R. CIV. P. 1 (2018) (stating that the Federal Rules of Civil Procedure “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding”).

<sup>99</sup> See A.A.S. Zuckerman, *Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments*, 14 OXFORD J. LEGAL STUD. 353, 386-87 (1994), for a theoretical discussion of the costs of delay as balanced against the costs of accuracy.

<sup>100</sup> JOE S. CECIL ET AL., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON THE CIVIL RULES 1-2 (2011), <https://www.fjc.gov/sites/default/files/2012/MotionIqbal2.pdf>.

<sup>101</sup> Cecil et al., *Quarter Century*, *supra* note 80 (manuscript at 6-7).

<sup>102</sup> EMORY G. LEE III ET AL., IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS: PRELIMINARY FINDINGS FROM PHASE TWO'S PRE-CAFA SAMPLE OF DIVERSITY CLASS ACTIONS 1-2 (2008), [http://www.uscourts.gov/sites/default/files/preliminary\\_findings\\_from\\_phase\\_two\\_class\\_action\\_fairness\\_study\\_2008\\_1.pdf](http://www.uscourts.gov/sites/default/files/preliminary_findings_from_phase_two_class_action_fairness_study_2008_1.pdf).

for considering systemic changes in the court system over time and demonstrate that the courts and the public are interested in the performance of the justice system in general as well as on a case-by-case basis.

In addition to the fact that the win rate does not track expectations, and that there is precedent for systemic studies of the justice system, there is an additional reason to pursue an explanation for the falling win rate. Our concern is that there may be “emergent” properties of the justice system that only an aggregate analysis can expose. We analogize this to epidemiological studies that detect the increased incidence of a disease in people exposed to certain toxins. These studies cannot predict whether any individual will develop the disease, and indeed most exposed individuals will not become ill, but such studies are still important to help policymakers determine whether to regulate aggregate exposure.

Consider the following example: suppose that the universe at time  $t$  consists of 100 cases, which are divisible into three groups. Thirty cases would yield a plaintiff win by virtually any judge who heard them, while another thirty cases would generate obvious defendant wins. Outcomes in the remaining forty cases are “uncertain,” in the sense that a skillful judge could justify a decision favoring either party. As it happens, suppose that at time  $t$ , all forty of the “uncertain” cases are decided in favor of plaintiffs, yielding a win rate of 70% (i.e.,  $(30+40)/100$ ). Now assume that the distribution and number of cases is constant over time, but that at time  $t+1$ , the uncertain cases are, for some reason, all resolved in favor of *defendants*. The overall win rate then falls to  $30/100 = 30\%$ .

Crucially, every outcome — both at time  $t$  and at time  $t+1$  — is accompanied by a written opinion justifying its findings of fact and conclusions of law. At an individual level, there would be nothing to complain about, since every decision is accurate in the sense that it is within the bounded set of reasonable outcomes.<sup>103</sup> Yet even though each decision was appropriately justified under the system’s rules, we think that something more is needed. The legitimacy of the system as a whole requires an explanation for why all of the uncertain cases were resolved one way at one time and in the opposite way at a different historical moment.<sup>104</sup>

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<sup>103</sup> Bone, *supra* note 8, at 1161.

<sup>104</sup> It might be said, in the defense of the later judges in this hypothetical scenario, that since the plaintiff bears the ultimate burden of proof in civil litigation, it is consistent with impartiality for judges to determine uncertain cases in favor of defendants. First, this is only true with respect to the burden of proof on questions of

We stress that we are *not* suggesting that something of this kind has occurred in the district court data we analyze. Rather, we raise this theoretical possibility because it highlights the need for supra-individual reason-giving. Persistent and otherwise-inexplicable changes in aggregate outcomes require some sort of explanation *at an aggregate level*, even if every outcome is already justified at an individual level, precisely because of the possibility outlined above.

What phenomena such as the falling win rate require is an explanation that is consistent with the values that the justice system espouses, in particular that decisions not be arbitrary (justification) and that decisions not be biased (impartiality). While we generally expect stability from the legal system, we also recognize that sometimes previous decisions do not hold up under scrutiny and new justifications, understandings, or facts require changes in legal rules.<sup>105</sup> Changes in the law, therefore, would provide a valid reason for systemic changes in the win rate that is consistent with rule of law values. We recognize that such changes may be controversial, but they offer a sufficient explanation for the larger phenomenon of a systemic change in the win rate. Similarly, random fluctuation in the win rate, at least within reasonable bounds, can be justified by positing that natural fluctuations in the quality of cases caused the change consistent with the impartial administration of justice, even if proving this empirically is challenging. But a sustained and consistent trend such as the one highlighted in this Essay calls out for an explanation consistent with the values of justification and impartiality.

What kind of system level consequences require an explanation? The short answer is system level consequences that are inconsistent with the understandings of how the civil justice system should work. The civil justice system is understood to have certain features which in turn dictate what we predict about the stability of the win rate over time.

First, the justice system is supposed to be impartial. That is, the identity of the person before the court should not affect the outcome of the case. This is the reason that judges recuse themselves when they have an interest in the case before them, for example.

Second, the system promises rectitude. That is, judges are supposed to apply the law to the facts before them, and the theory is that in doing so they will impartially determine who wins. Sometimes, the law

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fact. It is not clear that this is true with respect to the law as it may easily be the case that a defendant bears the burden of persuading the judge as to the validity of its preferred legal standard. More importantly, since in this scenario, the allocation of burdens did not change, we should not expect a change in the treatment of uncertain cases.

<sup>105</sup> See Schauer, *Generality of Law*, *supra* note 7, at 233.

favors one party. For example, where the burden of proof is placed favors the party that need not meet that burden. So long as the rule in question is a general rule, known in advance, and the law is not adjusted based on the identity of the party at the individual hearing, a substantive legal rule that favors one side over the other is considered legitimate from a rule of law perspective. If the law as generally applied systematically favors one type of person over another, this leaves the law open to a normative critique. The disagreement over whether heightened pleading standards should be adopted is an example of a normative critique of law, and this is not different than critiques of enforcing adhesion contracts or the contributory negligence defense. At some point, if the perception is that the rules “rig” the system in favor of one type of party, these normative critiques will implicate the rule of law. But in general, they are not considered to call into question the rule of law itself, that is, they are not foundational criticisms. Judicial determination of outcomes without applying the law to the facts does call into question the rule of law.

Third, the system promises transparency and reasoned decision-making. That is, judges are supposed to explain their decisions so that these litigants and future litigants understand how the law is applied. This is so that litigants can adjust their primary behavior going forward. Because the law is not static, there will be moments of inflection between substantive legal regimes when people may not yet be aware of the new legal rule. The legitimacy of the system depends on these inflection points being short-lived. For example, when a new burden of proof is articulated, litigants are supposed to plan their cases accordingly going forward.

Under a system where the law is consistently and fairly applied to the facts, the law is known to litigants, and there are no other social changes, we would expect that the win rate would be more or less stable. As legitimate (in the sense of made through the correct channels, not in the sense of normatively desirable) decisions are made which change the law, there may be periodic changes in the win rate as parties adjust to the new legal standards. For example, it would be reasonable to expect that the plaintiff win rate would dip momentarily in tort cases if the tort rule were changed from a negligence to an absolute contributory negligence regime. We would anticipate, however, that lawyers will learn of the new rule over a relatively short period of time, and that fewer cases where the plaintiff was contributorily negligent would be brought, returning the win rate to its former state.

One complication of this prediction is the relationship between facts and law. The law may be relatively clear, but the facts of each individual case differ. Over the run of cases, however, we would anticipate that the variance in the facts of individual cases would not matter to the overall win rate.

There are two types of explanations for the falling win rates: those that are internal to the court system and those that are external to it. By explanations internal to the court system, we mean explanations for change that come from the behavior of judges (or clerks). The example of judges consistently deciding uncertain cases in favor of one type of party is an explanation for change that is internal to the court system. This example raises questions about judicial impartiality. There is an argument that given an impartial judiciary, cases that could go either way *should* go either way. Therefore, the results in uncertain cases should be evenly distributed across parties. Note that uncertain cases are not cases without a factual predicate to rule for one side; they are cases where the court could legitimately rule for either side. This example illustrates that there can be a gap between the individual decision—which is valid under this scenario—and systemic outcomes which are suspect or even invalid.

By explanations external to the court system we mean litigant behavior and social forces. Take the Prison Litigation Reform Act (“PLRA”) as an example.<sup>106</sup> The PLRA made it much more difficult to sustain lawsuits by prisoners. As one might predict based on common sense (though not necessarily on formal models of litigation!), the win rate for prisoner cases fell after the act was passed. To the extent that this was the result of judges applying the new law with rectitude, it remains consistent with judges applying the law impartially, even though it could be criticized on normative grounds.

Now suppose that percentage of prisoners filing suits stays stable, but more prisoners file suits because incarceration rates go up. This is not a change in litigant behavior, but rather a change in larger social forces. It might also cause the win rate to decline, but for different reasons. This change in society can also be criticized on normative

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<sup>106</sup> See Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, §§ 801-10 (110 Stat. 1321) 1321-66 to -77 (1996); 18 U.S.C. §§ 3624, 3626 (2018); 28 U.S.C. §§ 1346, 1915 (2018); 42 U.S.C. § 1997a-h (2018). See generally Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003) (providing an empirical study describing the effects of the PLRA on prisoner litigation); Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 UC IRVINE L. REV. 153, 154 (2015) (issuing a follow up study).

grounds, but it is consistent with courts applying the existing law impartially and with rectitude.

Now suppose that the prison population remained the same and for some reason increasing numbers of prisoners decide to bring lawsuits that they lose under the Act. The win rate would fall. But that would not be due to changes in judicial behavior, but rather the change in the volume of lawsuits that are likely to lose. This is an example of changing litigant behavior. This change is consistent with rectitude and impartiality if the judges consistently apply the law across all litigants; the change is attributable to an increased flow of losing cases into the justice system.

Finally, suppose that the same number of prisoners bring suits but they are no longer represented by counsel because counsel fees have been reduced under the Act. And assume that these prisoners are unable to adequately pursue valid claims as a result; they simply do not know how to make their case in legal language which a court will accept. This could be a problem for the rule of law because the inability of the litigants to make their case makes it less likely that judges who depend on adversarial representation of the case will have the tools to apply the law with rectitude and impartially. If a change in the win rate is attributable to litigants being too poor to afford adequate counsel, we might say that this is a systemic problem for the rule of law, although it comes from outside the court system.

In sum, each type of potential reason for the decline of the win rate raises different, and valid, normative questions. Only some of these reasons implicate the rule of law and are under judicial control.

#### CONCLUSION

This Essay has provided a partial explanation for the fall in the plaintiff win rate consistent with rule of law values because some of the change can be attributed to a shift in the type of cases brought. From a systemic point of view this explanation is not troubling. We think these changes in the makeup of the federal caseload do not raise concerns from the perspective of the legitimacy of the court system as a whole or in the quality of the administration of justice because they indicate a certain stability in the win rate itself over time *within* categories of cases. In other words, judges were not doing anything differently; litigants simply changed the kinds of cases they brought for reasons exogenous to the system and in a way that does not implicate its impartiality. The fact that win rates differ depending on category of case has been widely known and accepted in the justice system. We think the reason for this is that participants in

the system believe that this win rate reflects the substantive law and procedural rules, which provide a justification for differences among case outcomes. We note that differences in win rates across case types raises the issue of the normative desirability of any particular win rate for a given category of case, a topic we do not address in this Essay.<sup>107</sup> But it does not raise system-wide concerns with respect to impartiality.

By contrast, a significant change in the win rate across a wide swath of cases which is not attributable to a change in the composition of filed cases is troubling from the perspective of systemic legitimacy and calls for an explanation. For example, if it could be shown that changes in judicial appointments drove the drop in the win rate, this finding would call into question the impartiality of judges. While we do not think this is a likely explanation for what happened, the possibility needs to be confronted.<sup>108</sup> *Something* changed in the years following 1985, and we should figure out what it was. We underscore that it is the fact of unexplained change itself, rather than its direction, that is the problem; it would be equally troubling if the plaintiff win rate dramatically increased.

Similarly, if we were able to determine that the fall in the win rate was attributable to a shift in the type of litigant, that would open another set of normative questions. Given that the justice system promises “equal right to the poor and to the rich,”<sup>109</sup> empirical proof that the win rate across all case types depends on litigants’ resources (or other irrelevant aspects of their identities), rather than on the applicable law or the merits of their suit, should be deeply troubling because it calls into question the impartiality of the justice system. And if the decline in the win rate were found to be caused by changes to the political economy of legal practice, that too would be problematic. At a minimum, it would suggest significant flaws in the regulations governing the market for legal services.<sup>110</sup>

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<sup>107</sup> Whether a given win rate is normatively good will depend on the substantive law in question (that is, whether it is good for society to encourage litigants to bring risky cases), and the relationship between that judgment and the economics of information (who has it and how costly is it to access) and the legal market in that substantive area of the law.

<sup>108</sup> See *supra* Figure 13, for a discussion of the role of changes in judicial personnel in explaining the falling win rate.

<sup>109</sup> 28 U.S.C. § 453 (2018); ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 112-13 (2017); Richard M. Re, *Equal Right to the Poor*, 84 U. CHI. L. REV. 1149, 1216 (2017).

<sup>110</sup> See generally GILLIAN K. HADFIELD, RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY (2017) (discussing how the flaws in the regulation of legal services limit innovation).

Ultimately, providing an explanation for the change in the win rate which is consistent with impartiality in the administration of the law is important to both the moral and sociological legitimacy of the court system.<sup>111</sup> If it turns out that the explanation that best fits the data raises concerns, this provides an opportunity to improve the administration of justice so that it is in line with our basic values. We therefore close with a plea to those who administer the U.S. courts to collect, and to share with researchers, the data that can help explain the curious incident of the falling win rate. We recognize that giving researchers more data can itself raise concerns about the legitimacy of the court system, as well as the privacy of its participants. But at least with respect to the changing pattern of win rates, the problem has already been exposed. Given what we already know, the failure to discover a valid reason for the win rate drop will be just as damaging to the system's legitimacy as the risks from disclosure of more data.

The purpose of the court system is to produce just outcomes consistent with the rule of law. To the extent that this goal is not being met on an aggregate basis, the duty of the participants in the court system is to repair it to the best of their ability so that the system can achieve these goals. Refusing to unearth or acknowledge unpleasant facts stands in the way of remedying them. In the specific case of the federal court system, it is our belief that the participants in that system want to do justice and that self-knowledge will contribute to that imperative.<sup>112</sup>

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<sup>111</sup> See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1796-97 (2005) (defining sociological and moral legitimacy).

<sup>112</sup> "Full wise is he that can himself know." GEOFFREY CHAUCER, *The Canterbury Tales: Fragment VII: The Monk's Prologue and Tale*, in THE RIVERSIDE CHAUCER 240, 243 (Larry D. Benson ed., 1987).



APPENDIX TABLE 1: CHANGES IN WIN RATES AND ADJUDICATION  
VOLUMES OVER 1984–2016 (BY ADJUDICATION VOLUME IN 1984), FOR  
35 LARGEST NATURE OF SUIT TYPES IN 1984

Nature of Suit	Win Rt.	Num. Adjud.	Win Rt.	Num. Adjud.	Win Rt.	Num. Adudj.	Abbrev.
	1984		2016		% Change:		
Overpayments of Veterans Benefits	99.5%	23,297	.-	0	.-	-100%	VETR
DIWC/DIWW (42 USC 405(G))	57.8%	9,241	28.4%	1,771	-51%	-81%	DIWC
Other Contract Actions	77.0%	6,784	59.3%	1,991	-23%	-71%	OTHK
Prisoner - Civil Rights	3.0%	6,164	2.0%	4,392	-34%	-29%	PRIS_CR
Prisoner Petitions – Habeas	4.8%	4,479	2.3%	5,836	-52%	30%	PRIS_HB
Foreclosure	98.9%	4,030	68.6%	1,532	-31%	-62%	FORE
Other Civil Rights	20.7%	3,090	9.0%	3,661	-57%	18%	OTH_CR
Civil Rights Jobs	18.8%	2,575	8.1%	2,145	-57%	-17%	EMP_CR
Negotiable Instruments	96.9%	2,457	74.8%	127	-23%	-95%	NEGIN
Recovery of Default Stud. Loans	99.2%	1,940	98.1%	687	-1%	-65%	LOAN
Other Forfeiture & Penalty Suits	97.1%	1,926	93.5%	292	-4%	-85%	FORF
Other Statutory Actions	55.9%	1,877	52.4%	1,112	-6%	-41%	OTHSTT
SSID (Title XVI)	50.2%	1,505	26.0%	1,711	-48%	14%	SSI
Insurance	46.1%	1,455	45.1%	1,183	-2%	-19%	INS
ERISA	86.2%	1,393	75.9%	1,430	-12%	3%	ERISA
Other Personal Injury	37.9%	1,393	17.5%	714	-54%	-49%	OTHPI
Labor/Management Relations Act	50.0%	1,307	54.7%	212	10%	-84%	LMRA
Personal Injury-Product Liability	20.7%	1,262	3.0%	1,167	-85%	-8%	PI_PL
Tax Suits	31.4%	1,156	79.3%	347	152%	-70%	TAX
Marine Contract Actions	84.1%	1,062	70.2%	121	-16%	-89%	MAR_K
Motor Vehicle Personal Injury	56.4%	913	44.2%	172	-22%	-81%	MV_PI
Trademark	89.4%	746	87.3%	675	-2%	-10%	TMRK
Bankruptcy/Bankruptcy Appeals	34.0%	744	16.7%	216	-51%	-71%	BKRPT
Marine Personal Injury	57.1%	711	53.1%	81	-7%	-89%	MAR_PI
Overpmts & Enforc. of Judgment	95.6%	702	71.7%	127	-25%	-82%	OVR_PY
Copyright	88.8%	663	78.1%	466	-12%	-30%	CPRT
Prisoner Petitions-Vacate Sent.	14.1%	658	21.2%	4,647	50%	606%	PRIS3
Fair Labor Standards Act	86.6%	606	76.3%	878	-12%	45%	FLSA

Other Labor Litigation	55.7%	497	33.3%	198	-40%	-60%	LAB_OTH
Securities, Commodities, Exch.	61.0%	484	71.1%	339	17%	-30%	SEC
Other Personal Property Damage	58.2%	407	35.2%	128	-40%	-69%	OTHPP
Land Condemnation	50.4%	401	47.6%	42	-5%	-90%	LAND
Other Real Property Actions	47.1%	329	31.8%	406	-33%	23%	OTHRP
Medical Malpractice	30.6%	317	17.1%	140	-44%	-56%	MEDM
Fraud or Truth in Lending (1970-1982); Other Fraud (1983-2008)	60.0%	310	39.3%	323	-34%	4%	FRAUD
Total Adjudicated in These Categories		86,881		39,269			
Total Adjudicated Cases, all NOS Codes		91,665		46,287			
Proportion		94.8%		60.4%			

APPENDIX TABLE 2: DISTRIBUTION OF US GOVERNMENT DEFENDANT CASES, BY BROAD NATURE OF SUIT AND ADJUDICATION STATUS, 1980–2009

	All Cases	Adjudicated Cases	% of Adj'd. US Def. Cases	Win Rate
Social Security	410,395	145,044	45.7%	30.0%
Prisoner	259,828	88,948	28.0%	9.8%
Administrative	116,110	32,576	10.3%	21.0%
Tort/Property	100,111	22,718	7.2%	35.3%
Civil Rights	57,595	19,034	6.0%	8.7%
Commercial	24,104	5,607	1.8%	26.5%
Labor	4,717	1,543	0.5%	18.0%
Other	5,640	1,225	0.4%	19.8%
Bankruptcy	1,615	352	0.1%	21.0%
Student Loan	672	377	0.1%	88.6%
Total	980,787	317,424	100.0%	32.4%

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