

Why Do Empirical Legal Scholarship?

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People conduct legal scholarship for many different reasons. This Article focuses on the demand for and reaction to scholarship that helps inform litigants, policymakers, and society as a whole about how the legal system works. Law schools do little to train generations of lawyers in how to systematically assess the state of the legal system and the legal system's performance. Schools leave such assessments largely to self-interested advocates and to other disciplines. Self-interested advocates have less interest in objective assessment of the system than in pushing preferred policy agendas. Academic disciplines other than law have a distinct advantage in that some of them have trained many of their members in the methodologies needed to assess law-related programs. But nonlawyers have the distinct disadvantage of often not understanding legal doctrine or the state of the law. This sometimes leads to blunders that compromise empirical analyses. The need for legally sophisticated empirical analysts is clear.

I. EVIDENCE OF GROWTH IN EMPIRICAL LEGAL STUDIES

It is not that we lack calls for law-trained experts to do more empirical legal scholarship. Scholars have long commented on the relative paucity of empirical work by law professors.¹ But any establishment moves

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1. See generally Robert C. Ellickson, *The Case for Coase and Against "Coaseanism"*, 99 YALE L.J. 611 (1989); Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807 (1999); Richard K. Neumann, Jr. & Stefan H. Krieger, *Empirical Inquiry Twenty-Five Years After The Lawyering Process*, 10 CLINICAL L. REV. 349 (2003); Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323 (1989); Elizabeth Warren, *The Market for Data: The Changing*

slowly. And law schools' demand for professors with the training and interest to do serious empirical legal scholarship is only recently becoming visible. Robert Ellickson's innovative study of trends in legal scholarship reports that law professors have become more inclined to produce empirical legal scholarship (though not necessarily more inclined to cite such scholarship).² Several schools have programs or initiatives that should lead to greater empirical legal work. Washington University in St. Louis has taught three mini-courses on conducting empirical legal scholarship³ and has an active program of empirical legal studies.⁴ UCLA Law School has an Empirical Research Group that "supports the UCLA School of Law in the management, design and execution of empirical research."⁵ Harvard Law School has a Program on Empirical Legal Studies, which promotes "the use of empirical analysis in legal scholarship and teaching."⁶ The Institute for Legal Studies at the University of Wisconsin Law School has long supported that institution's commitment to interdisciplinary and empirical scholarship.⁷ And Cornell Law School, in collaboration with Blackwell Publishers, started in 2004 the *Journal of Empirical Legal Studies (JELS)*,⁸ the only peer-reviewed (or non-peer-reviewed) journal dedicated solely to the publication of law-related empirical legal studies. The American Bar Foundation, the National Center for State Courts, and the RAND Institute for Civil Justice have all had programs with strong empirical components for a long time. Continuing interest in empirical legal scholarship is also reflected in the United Kingdom's study of sociolegal studies in the Nuffield Foundation sponsored "Inquiry on Empirical Research in Law."

II. POLICY INTEREST IN EMPIRICAL LEGAL STUDIES

Because I am most familiar with the empirical scholarly articles published in *JELS*, I will primarily address responses to those articles. In no way do I mean to downplay the importance of empirical work in

Role of Social Sciences in Shaping the Law, 2002 WIS. L. REV. 1, 2 n.2 (collecting studies); Jay Lawrence Westbrook, *Empirical Research in Consumer Bankruptcy*, 80 TEX. L. REV. 2123 (2002).

2. Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517, 527-29 (2000).

3. See <http://law.wustl.edu/centeris/pastevents> (last updated June 24, 2004).

4. See, e.g., Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004).

5. <http://www1.law.ucla.edu/~erg/index.html> (last visited Sept. 11, 2004).

6. <http://www.law.harvard.edu/programs/pels/index.htm> (last updated Aug. 27, 2004).

7. <http://www.law.wisc.edu/ILS> (last updated Aug. 27, 2004).

8. <http://www.blackwellpublishing.com/jels> (last visited Sept. 11, 2004).

other fora. However, the fact that a new peer-reviewed journal, in its first year of operation, has generated so much elite media interest may say as much about the thirst for systematic knowledge of the legal system as it says about the particular journal.

Reaction to studies appearing in *JELS* (and, of course, elsewhere) suggests that society's demand for serious, law-related empirical scholarship far exceeds what the legal academy has been willing or able to supply. Articles in *JELS* already consider issues with respect to which policymakers and media demand empirical information. High-end media entities such as *The New York Times*,⁹ *The Wall Street Journal*,¹⁰ *The Atlantic Monthly*,¹¹ *The Economist*,¹² *The Financial Times*,¹³ *Congressional Quarterly*,¹⁴ and others have run stories with substantial content based on articles published or to be published in *JELS*. People sometimes talk about a new genre of legal scholarship.¹⁵ The genre has long existed but it may now be beginning to come into its own.

What are some of the current issues that empirical scholarship can shed light on? Leading media have found contributions in both criminal and civil law. On the criminal law side, in 2000, Professor James Liebman and colleagues at Columbia University issued a massive report on the rate of error in the capital punishment system. They found that two out of three death penalty convictions were overturned on appeal, "mostly because of serious errors by incompetent defense lawyers or overzealous police officers and prosecutors who withheld evidence."¹⁶ The report was front page news in *The New York Times*.¹⁷ For a few years, this work, though available online via large PDF files, went

9. Jonathan D. Glater, *Study Disputes View of Costly Surge in Class-Action Suits*, N.Y. TIMES, Jan. 14, 2004, at C1; Adam Liptak, *Study Revises Texas's Standing as a Death Penalty Leader*, N.Y. TIMES, Feb. 14, 2004, at A10.

10. Jess Bravin, *Death Penalty Imposed Less Often in US South—Study*, DOW JONES INT'L NEWS, Feb. 14, 2004.

11. *The Facts of Death*, THE ATLANTIC MONTHLY, May 2004, at 46.

12. *How Bad Was Andersen?*, THE ECONOMIST, Dec. 6, 2003, at 68, available at 2003 WL 58585097.

13. Paul Koster, *Europe's Auditors Should Give Us the Bad News*, FINANCIAL TIMES, Jan. 19, 2004, at 13, available at 2004 WL 56799548.

14. Seth Stern, *Lawsuits, Lagging Economy Linked in Tort Reform Push*, CONG. Q. WKLY., May 29, 2004, at 1270.

15. The 2003 meeting of the Association of American Law Schools had a panel exploring this theme.

16. Fox Butterfield, *Death Sentences Being Overturned in 2 of 3 Appeals*, N.Y. TIMES, June 12, 2000, at A1.

17. *Id.*

unpublished. The Columbia group has now assembled key findings into an article-length version appearing in the July 2004 issue of *JELS*.¹⁸ Additional substantial news coverage accompanied a *JELS* article showing that Texas obtains death sentences at a rate not materially different than that of most other states.¹⁹

On the civil side, empirical scholarship has helped to inform several topics. These include the decline in civil trials, long-term trends in award levels, the outcome of employment discrimination cases, time trends in class actions, and fee awards in large Chapter 11 bankruptcy cases.

In December 2003, *The New York Times* took the unusual step of running a front page story on a conference on the state of trials in the United States.²⁰ The conference addressed the topic of the disappearance of trials in federal courts. The *Times*, summarizing a study by Marc Galanter, reported that in 1962, 11.5 percent of all civil cases in federal court went to trial. By 2002, that rate dropped to 1.8 percent. And even though there were five times as many lawsuits in 2002 than 1962, the raw number of civil trials dropped as well. The number of civil trials peaked in 1985 at 12,529, but in 2002, only 4569 civil cases were tried in federal court.²¹ The papers presented at that conference addressed many aspects of the disappearing trials pattern. The American Bar Association and Blackwell Publishers reached agreement to publish the papers in the November 2004 issue of *JELS*.²²

Nicholas Pace, Seth Seabury, and Robert Reville of the RAND Institute for Civil Justice used data assembled by RAND to study the long-term trend in tort awards in the two major locales for which such data were available—San Francisco County, California and Cook County, Illinois. They reached a remarkable conclusion, published in the first issue of *JELS*. Tort awards over a forty year period had increased *less* than real income. They wrote:

Our results are striking. Not only do we show that real average awards have grown by less than real income over the 40 years in our sample, we also find that essentially all of this growth can be explained by changes in observable case characteristics and claimed economic losses (particularly claimed medical costs). However, focusing on the average award masks considerable heterogeneity in the growth rates for different kinds of cases. In particular, we

18. Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209, 209–61 (2004).

19. John Blume et al., *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 165–66 (2004).

20. Adam Liptak, *U.S. Suits Multiply, But Fewer Ever Get to Trial, Study Says*, N.Y. TIMES, Dec. 14, 2003, at A1.

21. *Id.*

22. 1 J. EMPIRICAL LEGAL STUD. (forthcoming 2004).

find that the average award in automobile cases declined after controlling for claimed medical costs, offsetting persistent and unexplained growth in the average awards for other tort cases. In general, though, the growth (or decline) does not appear substantial enough to support claims of radically changing jury behavior over the past 40 years. Rising claimed medical costs appear to be one of the most important factors driving increases in jury verdicts.²³

In April 2004, the Bureau of Justice Statistics (BJS) issued a report on trial outcomes in forty-six of the largest counties in the United States in calendar year 2001. The study is consistent with the major time-trend findings by Galanter and the RAND researchers. The vast majority of the counties in the 2001 data were the object of a similar BJS study covering fiscal year 1992 and calendar year 1996. The BJS found that trials had declined in number since 1992 by 47 percent, and that, in real dollars, median tort awards had substantially declined since 1992.²⁴

In 2001, *The Wall Street Journal* reported findings on striking differences in appeal rates between plaintiffs and defendants in employment discrimination cases.²⁵ The research underlying the report culminated in a comprehensive study of federal employment discrimination cases in *JELS*.²⁶

A *JELS* article on class actions also generated news coverage. The article found that attorney fees in class action cases have not increased over the course of a decade, that class recoveries have not increased over the same period, and that the client class recovery is the factor that most clearly explains the size of the fee award.²⁷ Many other publications picked up the results.²⁸

23. Seth A. Seabury et al., *Forty Years of Civil Jury Verdicts*, 1 J. EMPIRICAL LEGAL STUD. 1, 3 (2004).

24. Thomas H. Cohen & Steven K. Smith, *Civil Trial Cases and Verdicts in Large Counties, 2001*, BUREAU JUST. STAT. 1, Apr. 2004, at 1.

25. Jess Bravin, *U.S. Courts Are Tough on Job-Bias Suits*, WALL ST. J., July 16, 2001, at A2.

26. Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004).

27. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27 (2004).

28. Casey J. Dickinson, *Cornell Study Shows No Rise in Class-Action Fees*, CENTRAL N.Y. BUS. J., Feb. 27, 2004, at 6, available at 2004 WL 65179360; Glater, *supra* note 9; Dan Margolies, *Bill Before Congress Would Place Stricter Standards on Lawsuits with Multiple Claimants*, KANSAS CITY STAR, Feb. 3, 2004, at D1; Shailagh Murray & Jess Bravin, *Democrats Block Bill to Overhaul Class-Action Suits*, WALL ST. J., Oct. 23, 2003, at A12; Stephen Nohlgren, *Jingly Justice or Puny Payoff?*, ST. PETERSBURG TIMES, Feb. 9, 2004, at 1B, available at 2004 WL 56618432; *Study: Class-Action Awards, Fees, Actually Holding Steady*, BEST'S INS. NEWS, Jan. 14, 2004, available at 2004 WL 61248490.

In the area of bankruptcy, Lynn LoPucki and Joseph Doherty studied professional fees in large Chapter 11 cases.²⁹ They found that the fees in large Chapter 11 cases from 1998 to 2002 were substantially lower than they had been twenty years earlier,³⁰ and that fees absorbed on average less than two percent of debtors' assets.³¹

Across a broad range of legal issues, empirical studies can inform policymakers and the public. Legally trained social scientists have unique opportunities to enhance description and understanding of the legal system. Law schools aspiring to train future leaders should expand and regularize instruction enabling their graduates to perform the analyses that society thirsts for.

29. Lynn M. LoPucki & Joseph W. Doherty, *The Determinants of Professional Fees in Large Bankruptcy Reorganization Cases*, 1 J. EMPIRICAL LEGAL STUD. 111 (2004).

30. Terry Brennan, *LoPucki Study Finds Bankruptcy Costs Falling*, DEL. L. WKLY., July 30, 2003, at D5; Terry Brennan, *Study: Fees in Large Bankruptcies Lower than 20 Years Ago*, N.Y. L.J., July 24, 2003, at 5.

31. LoPucki & Doherty, *supra* note 29, at 113.