

What should count as empirical research about law?

The President's theme reminds us that law practice is ultimately practical. Lawyers have derived knowledge about law and its role in society from observation and experimentation since the dawn of the profession. Lawyers observe and query clients, witnesses, citizens at large who are involved with the law, other lawyers, courts, cops, juries, DAs, and legislators, and they synthesize and update that information, sometimes with keen perception and brilliant effects. Their ability to observe and synthesize yields much of what they have to offer clients. We are drawn back to the practical – and empirical – core of the profession's work by the President's theme.

My message for the next few minutes will be one of encouragement – not only to encourage law faculty who already employ observation or experimentation in any of a wide variety of forms of empirical inquiry to continue, but especially to offer encouragement to those who have not undertaken empirical research and to suggest ways to begin that are suited well to what lawyers can do without extensive special training or collaboration with social scientists.

There are reasons why encouragement might be necessary. I remember attending sessions at previous meetings that were intended to encourage reluctant law faculty to try empirical research. Experienced researchers talked informally about their research. On each of these occasions, the elephant in the room was research method. Even after these talks, many felt that empirical research was daunting.

Reference to “empirical research” suggests to many that only arcane methods of data collection and analysis enable results to “count” as valid empirical knowledge about law.

The term “empirical” also evokes well-rehearsed disputes about appropriate social science method. Advocates for qualitative or quantitative social research have long attacked the shortcomings of the other methodology and defended their own. Both groups are right, of course. Both methodologies are valid for particular purposes; yet both have limitations that a practitioner of research must respect.

A related recent controversy arises from Professors Andrew King and Lee Epstein's criticism, naming names, of the quality of empirical research undertaken by law

faculty. They claim, with some foundation, that lack of faculty training and the lack of adequate law review editorial expertise in social science methodology led to publication of empirical research by law faculty that violated accepted social science rules of inference, i.e. rules about how generalizations may be drawn from data.¹ Their attack may be broader than it needed to be but at its core is an appropriate word of caution about employing empirical research methods heedless of well-established limitations.

Invited to enter this minefield, who could be blamed for reluctance to consider doing empirical research?

I'll come back to these concerns in a moment.

I. Questions

First, why is empirical research a compelling part of legal scholarship? Why should we look for ways to bring more of it into our research and even into our teaching?

To explain social research I often turn to Peter Berger's *Invitation to Sociology: A Humanistic Perspective*.

Berger describes what makes social research compelling for many experienced researchers. Most important, he says, is not emulation of natural science methods, but the kinds of questions that empirical research seeks to answer. At its core empirical research attempts to understand human society (15), and an aspect of it such as law, "in a disciplined way" (27). The discipline he refers to is the pursuit of objectivity, which, in turn, may require acceptance of certain rules of evidence. Science in this broadest sense means commitment to control personal biases and prejudices and to "perceive clearly rather than judge normatively" (28).

Fundamental to Berger's understanding of empirical inquiry is, in his words, a peculiarly modern form of consciousness—a readiness to free oneself from received points of view and to ask challenging questions about society's organization or the actions of individuals within it. It is a "perspective [that] involves a process of 'seeing through' the facades of social structures" (43) in order to understand how social

¹ Concern about their claims has no doubt been sharpened in the minds of many in the aftermath of questions raised last year about Prof Richard Sanders' research on the relationship between affirmative action in law school admissions and bar passage rates.

relationships and social systems work. He contrasts the normative perspective of the lawyer or judge with the interest of the social researcher in how social relationships come to exist and function (40-41). This perspective is operating in its best and most profound way not when the researcher attempts to discover what “went wrong” from the viewpoint of “authorities and the management of the social scene,” but when the goal is understanding “how the whole system works in the first place, what are its presuppositions and by what means it is held together” (50). Berger describes a task which the greenest student of law as well as the experienced scholar may be invited to undertake.

Bill Hine’s theme statement provides an important starting point. Laws may be judged by their effects. The modern law and society movement began with the so-called “gap paradigm”—exploring reasons for the perceived gap between law in action and law on the books. Empirical legal research draws on observation and experiment to examine whether law has its intended effects (or other unintended effects)?

Contemporary law and society scholars find a much broader field of inquiry compelling. This broader inquiry might be understood as arising from the *persistence* of a gap between law on the books and law in action, a gap that varies over time and context. Contemporary empirical research often asks not merely why law fails to achieve its intended goals but what is law’s role in the first place? What role does law play in the makeup of institutions, social relationships, perceptions of the world, and other building blocks of society? How does law become active, and what difference does it make to everyday life? Legal scholars will always share this broader domain with scholars in other disciplines. At the founding of the Law and Society Association, Lawrence Friedman observed: “Law is too important to be left to lawyers.” Professor Friedman’s remark makes a case for the central importance of empirical research in legal scholarship.

Few law faculty have specialized training in complex methods of *quantitative* empirical research, but *qualitative* research offers an important alternative that does not require specialized training in statistics or complex research designs. Excellent texts on qualitative research provide necessary background and helpful practical advice.

Most importantly, many of the skills required are those in which lawyers excel. The art of interviewing, with particular attention to getting information in a thorough,

accurate narrative, is well-known to lawyers. Of course, each of us who pursues this method of empirical research, like those who employ any other method, must recognize its limitations. While the technology of qualitative research is simple, as a practice it can be full of challenges, as any young attorney interviewing clients for the first time will acknowledge. All forms of empirical research have limitations and pitfalls which arise when they are applied in particular contexts. Advice from more experienced practitioners of such methods will be invaluable.

II. Answering the questions

While the meaning of “empirical” is broad—including all knowledge that is derived from “observation or experiment” (Merriam-Webster Unabbr.)—advocates for quantitative research decry the apparent loose structure of qualitative, or “soak and poke,” research. Advocates for qualitative research reply that quantitative methods cannot provide an adequate understanding of the perspective and meanings that guide human action or the complex inner workings of relationships and institutions.

Qualitative research is not marked by the absence of scientific method, but rather has its own methods that aim at revealing important qualities of social life. The better view, held by many social scientists, is that quantitative and qualitative research methods are complimentary, each yielding insights which can fill in gaps created by limitations of the other.

Quantitative research relies on uniform procedures, random sampling of populations being studied, and statistical methods of inference. These methods rely on strict protocols for the operationalization of research hypotheses, controlling the introduction of bias by the researcher, checking the reliability and validity of objective measures of variables selected on the basis of theory, and careful examination of potential threats to the validity of the inferences drawn about the population which the sample represents. These methods are particularly well suited for rigorous hypothesis testing.

Yet there are particular kinds of questions for research which do not require such quantitative methods, or for which such methods may not be desirable, or where they could not be applied.

Qualitative research may take many forms, including observation of social interactions, documentary and archival research (including historical research), lengthy open-ended interviews, case studies of small numbers organizations, institutions, groups of people, or individuals. Strauss & Corbin's *Basics of Qualitative Research* 2d 1998, one of many excellent, easily accessible guides to qualitative research methods, describes some of the kinds of questions that are particularly appropriate for qualitative research. For example, attempts to understand the *experience* of persons encountering the law lends itself to "getting out in the field and finding out what people are doing and thinking" (Strauss & Corbin 2d 11) rather than surveying their opinions using a set of fixed categories (although this may be revealing as well). As we learn more about the importance of legal consciousness and the symbolic and cognitive force of law, complex processes of thought and perception have moved increasingly to the forefront of empirical research on law. Qualitative methodology has been particularly important in studies of this kind.

Strauss & Corbin suggest that qualitative methods
...can be used to explore substantive areas about which little is known or about which much is known to gain novel understandings...In addition, qualitative methods can be used to obtain the intricate details about phenomena such as feeling, thought processes, and emotions that are difficult to extract or learn about through more conventional research methods. (id 11).

To this list, we can add other research projects that do not lend themselves to sampling and data collection suitable for statistical analysis. For example, the only relevant examples of what we want to study may be few in number and not amenable to random sampling or strict controls. Where an individual "case" is highly complex—for example the internal response of a corporation to a new employee rights law, an in depth case study may be extremely valuable even though it does not provide data from which to infer a pattern across all similar organizations. Further, studies of a few carefully selected cases or situations may be valuable, where our goal is to disprove a generalization by finding and documenting exceptions. This method of inquiry can be an important preliminary step toward building a better, more complex understanding of the influence of a legal policy.

I can offer an illustration from my own research. A study I recently undertook with my colleague David Engel examined the effects of the ADA just after it took effect in 1992. The central conceptual question was “What is an ‘effect’?” One particular methodology for examining effects might be conducting a survey administered to a random sample of persons with disabilities. By itself, constructing such a sample would have presented an enormous challenge not only because of the Act’s own highly complex definitions of disability but also because the Act covers those who are perceived as having a disability—a virtually limitless category. Apart from the problem of sampling, what would we have asked each interviewee? What is an “effect?” Should effect be equated with formal invocation of the law? Can there be an effect only when there is a dispute about inclusion? Or could there be other, more subtle effects? It is well-known that even in our litigious society most individuals choose to “lump” legal injuries rather than turn to the law. What about the overwhelming majority of persons with disabilities who in all likelihood continue to lump their encounters with discrimination? Indeed, how are their encounters with others perceived and does the law have any relevance in these encounters?

Thus, we deemed the concept of an “effect” of the law highly problematic, and not definable in preconceived categories of perception and response. Yet we wanted to know how this new civil rights law might have become “active” in the lives of persons with disabilities through a broad range of social interactions. We were not only interested in the indirect effects of institutional change (i.e. curb cuts are constructed whether a particular individual uses them, notices them, or is even aware of the legal mandate), but also the influence of interactions with others who might or might not be aware of the law, the influence of changes in the general public’s discourse about disability, and the effects of other processes of individual perception and cultural change not yet documented and about which we could not even begin to speculate in a systematic way.

In the end, our methodology reflected the problems we encountered in defining the effects we wanted to study, and we were guided by focus group discussion which suggested that coping with a disability was a process that begin in early childhood. We decided to let our interviewees tell us about their identities, disabilities, and careers in

their own words in long, open-ended interviews, and to observe and listen to the role played by rights in these individual narratives. The individuals we interviewed were in no sense a random sample, but the group was as diverse as we could arrange through a variety of contacts with advocacy organizations, hospitals, and other intermediaries. We chose from two contrasting groups: persons with learning disabilities and person who used wheelchairs so that we could compare the experiences of persons with visible disability and those with an invisible disability. We chose (as randomly as possible) equal numbers of men and women and persons from across the age spectrum. There were weaknesses in this design—a bias toward more articulate, educated persons, and there were weaknesses (from a positive science point of view) in our open-ended, interactive interviews that depended to a large degree on an interviewees' own insight and articulateness, and to an unpredictable degree on our rapport with each individual. In our book we discuss how some of these problems might have affected our data and our interpretations.

While our study did meet all of the criteria for hypothesis testing, that was not our goal. What we derived was a new “recursive” theory of rights, according to which the meaning of rights and perceptions of the self evolve together, influencing the way that rights become active in each individual life, and more generally among the intended beneficiaries. Our theory might now be tested using data from a larger, randomly selected population, but I think it is unlikely that the pattern would have been apparent without analysis of life stories that incorporated the dimension of time (in the form of the remembered past) and permitted our interviewees great flexibility in conveying their experiences over life courses that were enormously varied. Quantitative research might have examined some aspects of this experience, but a predetermined, fixed format questionnaire could easily have missed what individuals themselves might identify as the most important aspects of their situation independently of the researcher's preconceptions.

Let me sum up my main points to here:

1. In my view, a view that is widely shared in the social science community, many forms of empirical inquiry are available to legal scholars, and they will yield valid

knowledge if they are applied in an appropriate way. Some of these forms of data collection and analysis are highly accessible to law faculty and their students. More complex methods can become accessible with collaboration and technical assistance.

2. Much of what social science “method” has to offer is practical experience gained in previous applications of a particular method of inquiry. For example, it may be apparent to an experienced researcher that a certain kind of question or series of questions have proven to be satisfactory as a way of getting at an idea over a number of studies conducted in different contexts. Or experience may show that a particular data collection process encounters difficulties that can be offset in some practical way. This knowledge is not arcane, and legal scholars have access to it through the literature on research and by consultation with colleagues. Everyone has to begin somewhere.

3. The heart of empirical research, ultimately, is replication. No empirical study is authoritative in the way a S. Ct. decision can be. Results gain credibility through repetition and controlled variation. “Robustness” is what is sought, not simply a one-time pattern in the results of research. Empirical research is a collective undertaking in this way even if it is not always collegial—i.e. a body of related studies is far more valuable than an equal number of well-conducted but isolated studies. One of the chief barriers to empirical research by legal scholars, I believe, is not its arcane methodology but a longer term commitment to repeated use of an empirical methodology, gaining experience with its strengths and limitations.

4. All of this takes time, effort, repetition, and consultation with others who have done research. The practical art of research may seem unfamiliar at first, but it is not inscrutable, nor are the lessons of experience necessarily difficult or complex, especially in the settings I want to highlight in the last part of my talk.

III. Conducting research with students

The opportunity to encourage students to undertake empirical research has been particularly important to me as a law teacher and it has greatly benefited my own research. For the reasons that make qualitative methods accessible to faculty, the basics of qualitative research can be taught to students relatively easily within the framework of a seminar. Few students will enroll in a seminar to learn them; but students, in my

experience, find designing a modest empirical research project--conducting interviews or gathering archival data or observing situations in courtrooms or on the street--stimulating and thought-provoking, especially if they are required to formulate a research question and to design the data collection and analysis to address that question. I have found it useful to invest class time in talking about qualitative research methods and in allocating sufficient time for proposals, consultation with me, and for data collection. The papers have been interesting, challenging, and often teach me as well as the students about unexpected aspects of law or legal culture.

In some instances, these modest attempts at empirical research can become part of quite significant data collection projects. I would like to provide a few examples of uses of empirical research in my teaching that I would recommend to others.

Examples:

1. I often include an open-ended empirical component in my land-use and local government courses. Students are instructed to engage in investigative journalism away from the law library, and only later struggle to bring what they see into the framework of legal doctrine. While I do not consider this to be empirical research, it teaches students an important lesson derived from empirical research—that important elements of social life occurring within a legally regulated setting (such as land use) often do not easily translate into legal concepts of rights or formal dispute resolution. The purpose of the exercise is encourage development of an independence of vision and understanding of what happens. A valued colleague once told me, you must learn something from your data. In my view, many empirical researchers, and qualitative researchers in particular, conduct research so that their data do not surprise them. This exercise for my students is intended to counter a similar mindset created by law school.
2. In a number of seminars I have asked students to conduct modest empirical research projects. The most important element of such projects is a comparison between similarly situated individuals, organizations, programs, disputes which permits examination of controlled variation in context. Students learn a great deal about asking empirical questions, identifying

contrasting contexts that may teach them something about the issues, and careful inferences from data.

3. A particular application of this format in a slightly expanded format was a seminar for which I and a co-teacher selected a small nearby community in which all the student projects were conducted. Selecting a target community had several advantages. Not only could readings have been focused on legal issues in a very specific setting: juvenile justice, land use planning, special education law, and many other possible subjects come to mind (we didn't do this, but might easily have chosen such a focus). But students were encouraged to collaborate on projects, and even though students chose different projects and angles on law in that community, their projects intersected and complemented each other in interesting ways.
4. In the most ambitious example of involvement of students in research is a proposal for development of an empirical data base using students to collect data on an annual basis. One such proposal would be the core research practicum in an LLM program. Although the setting is quite unique, an LLM program being developed between an American law school and an SE Asian law school, the plan is adaptable elsewhere. The data base would consist of indicators of legal development in the SE Asian country. Students would add data annually by conducting carefully structured interviews, gathering archival data or other methods. Each would use some of the data from the archive in a research paper. Another potential project is being discussed at my own law school, and would involve gathering data on "trials" conducted in a wide range of tribunals in New York. Marc Galanter can speak to this present status of the project, but my point is that it is quite practical to consider development of enormously useful empirical data bases with student help....

IV. Conclusion

I conclude with a last dose of Peter Berger's sage advice:

One very important thing that many sociologists can learn from their fellow scientists in the natural sciences is a certain sense of play with regard to their

discipline. Natural scientists, on the whole, have with age acquired a degree of sophistication about their methods that allows them to see the latter as relative and limited in scope. Social scientists still tend to take their discipline with grim humorlessness, invoking terms such as ‘empirical,’ ‘data,’ ‘validity,’ or even ‘facts’ as a voodoo magician might his most cherished hobgoblins... (186)

These remarks, needless to say, are not meant to denigrate the serious study of society, but simply to suggest that such study itself will profit greatly from those insights that one can obtain only while laughing... (187)

[Empirical research] will be especially well advised not to fixate itself on humorless scientism that is blind and deaf to the buffoonery of the social spectacle...it may find that it has acquired foolproof methodology, only to lose the world of phenomena that it originally set out to explore...” (187-188)...

Thank you.....