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DOES EMPIRICAL EVIDENCE ON THE CIVIL JUSTICE SYSTEM PRODUCE OR RESOLVE CONFLICT?

Jeffrey J. Rachlinski*

INTRODUCTION

Is the current United States Supreme Court an excessively pro-business court? The case that it is can and has been made.¹ Businesses complained about punitive damage awards and the Court created constitutional judicial review of jury awards.² Businesses complained about pleading rules that make it easy for consumers to bring lawsuits against business practices and the Court created heightened pleading standards.³ Businesses complained about class actions and jury trials and the Court embraced arbitration clauses, even to the point of preempting state law.⁴ Business interests, indeed, seem to be on a roll in front of the Court. Whatever other ideological bents the Court might have it would seem to be a place where business interests do well at the expense of consumers and tort victims.

Naturally, a counter-narrative exists. Business interests have long argued that American litigation practices are costly and inefficient.⁵ Lax pleading rules and a widespread embrace of class actions arguably facilitate frivolous litigation. Greedy plaintiffs' lawyers who bring bogus claims that are expensive to defend can extract costly settlements

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1. Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 *MINN. L. REV.* 1431, 1431–32 (2013). “[T]he Roberts court is indeed highly pro-business” *Id.* at 1449.

2. See Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analysis Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 *J. EMPIRICAL LEGAL STUD.* 263, 263–64, 264 nn.1–2 (2006) (describing cases that articulate the U.S. Supreme Court’s disdain for punitive damages).

3. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *But see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (“We do not require heightened fact pleading . . . only enough facts to state a claim”).

4. See David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution* 3–4 (U.C. Davis Legal Studies Research Paper Series, Research Paper No. 443, 2015), http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2646028_code366600.pdf?abstractid=2637364&mirid=1&type=2 (discussing the Court’s favorable treatment of arbitration clauses and subsequent approval by the business community).

5. See, e.g., WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 1 (1991).

from honest businesses. Defendants who refuse to settle expose themselves to juries that can impose unpredictable and excessive damage awards. In this environment, the Supreme Court's limitations on access to the courts is not a naked pro-business strategy so much as an effort to purge the system of litigation of the excesses of plaintiffs' attorneys. The narrative further suggests that consumers are not really at risk of grave depredation by businesses because a competitive market for consumer loyalty ensures that businesses try to serve, rather than cheat, their customer base.

Which narrative is correct? Fortunately, we live in a new era of empirical legal scholarship. No area of legal scholarship has experienced anything like the growth that empirical legal scholarship has enjoyed since the turn of the millennia. At one time, a common aphorism held that, for lawyers, "data is the plural of anecdote."⁶ Although that aphorism may be amusing, courts, legislatures, and administrative agencies have historically had nothing but anecdotes to rely on to understand the need for, and implications of, the Supreme Court's approach to litigation reform. Today, evidence-based law has become a real possibility.⁷ Courts need not guess whether frivolous litigation plagues the system or whether reform strategies choke off litigation that would otherwise function as a useful check on business excess.

Empirical legal scholarship, however, is not the same as evidence-based law. Empirical legal scholarship commonly addresses highly contentious, overtly political issues that are difficult to study. Partisans can thus pick and choose studies to suit their political preferences. Consequently, empirical work might largely fuel, rather than resolve, debate. As this Article documents, even when the empirical scholars completely agree on the underlying facts, interpretation of the results can dramatically differ. Empirical legal scholarship is still worth conducting, but the hope that it will resolve partisan debates in law is unrealistic. The Supreme Court's approach to civil litigation provides a notable case in point. As discussed *infra*, even identical pieces of information can be interpreted in ways that support completely opposite conclusions.

6. Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not To Compete*, 74 N.Y.U. L. REV. 575, 612 n.111 (1999).

7. See Jeffrey J. Rachlinski, *Evidence-Based Law*, 96 CORNELL L. REV. 901, 904 (2011) (noting a recent "exponential growth" of empirical legal scholarship and an increased reliance on, or presentation of, empirical research by law review articles).

II. THE ROLE OF EMPIRICAL RESEARCH

Every social scientist interested in legal systems owes a debt to the legal realists. Without shaking loose the notion that law arises from neutral, formal principles, sociologists, psychologists, political scientists, and even economists have little voice in legal discourse. The realists succeeded in undermining formalism in law in two ways. First, they began the study of law in action, thereby creating the foundation for empirical research on how law affects its intended targets. The realists demonstrated that some questions about law cannot be answered by formal logic—they require research. Second, realists also undermined the idea that judges rely on neutral, formal principles, thereby creating the framework for contemporary research on political attitudes and judicial decision making.⁸ Realists would have recognized the current narrative and counter-narratives concerning business interests and the Supreme Court. Realists argued that judges' attitudes, backgrounds, and political orientations influence their judgments.⁹ Judges with business backgrounds might thus be expected to side with the probusiness narrative concerning civil litigation.

For contemporary empirical legal scholars, the resolution to the debate lies with empirical research on the civil justice system. For these scholars, debate over the role of civil litigation and business is just another example of research on law in action. All of the questions raised by the current debate are essentially empirical and are thus amenable to research.

However, the question of whether civil litigation helps safeguard consumers against unsavory business practices or whether it is a wasteful undertaking is not so easily resolved by research alone. The research on judicial attitudes suggests that judges will not absorb research in a neutral fashion. Rather, they will approach the research in a partisan fashion, picking and choosing studies that support their pre-existing beliefs. In effect, the two main strands of legal realism are in tension with each other. Research on judicial ideologies predicts that judges will consume research on the law in action in an ideological fashion.

8. See generally Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1148 (1999) (reviewing ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* (1998) and describing legal realism).

9. Akhil Reid Amar, *Law Story*, 102 HARV. L. REV. 688, 693 (1989) (reviewing PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (3d ed. 1988)) "According to the legal realists, adjudication was not, and never could be, wholly mechanical and apolitical." *Id.*

A. The Rise of Empirical Legal Scholarship

Empirical legal scholarship has expanded dramatically in the past decade. The best evidence of this expansion is the rising number of empirically oriented faculty at leading law schools in the United States.¹⁰ In the past ten years, law schools at Duke, Northwestern, Stanford, the University of Chicago Law School, the University of Pennsylvania Law School, Vanderbilt, and Yale have all dramatically expanded the number of empirically oriented faculty.¹¹ Many top law schools now seem to believe that having empirically trained scholars is critical to a fully successful law faculty.

Furthermore, articles in U.S. law journals increasingly either rely heavily on empirical research in supporting their arguments or actually present primary empirical evidence.¹² Documenting the extent of this rise is challenging, but one recent study conducted by Michael Heise revealed that the number of empirical studies in law reviews has markedly expanded.¹³ Between 1990 and 1994, Heise found that roughly 200 empirically based articles appeared in law reviews in the United States.¹⁴ In contrast, between 2005 and 2009, that number had increased to roughly 700.¹⁵

Empirical submissions have become so common to law reviews that some top law reviews are developing policies for reviewing empirical work. Yale Law School, for example, requires authors to submit their data to the students who run the journal, along with the article submission.¹⁶ The reliance on empirical methods has pushed other journals, notably the *Harvard Law Review*, to mimic the peer-review process common to the social sciences.¹⁷ Similarly, peer-reviewed legal publications, such as the *Journal of Legal Studies*, which is spon-

10. Rachlinski, *supra* note 7, at 906.

11. *See id.*

12. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 3–6 (2002) (describing the trend of legal academics to rely on empirical research).

13. Michael Heise, *An Empirical Analysis of Empirical Legal Scholarship Production, 1990–2009*, 2011 U. ILL. L. REV. 1739, *passim*.

14. *Id.* at 1743 fig.1.

15. *Id.*

16. *See* ANTHONY SEBOK, LAW REVIEWS SUBMISSION GUIDELINES, SPRING '07 VERSION 1.0, http://prawfsblawg.blogs.com/prawfsblawg/files/spring_07_submission_guide_1.0.doc (quoting YALE L.J., <http://www.yalelawjournal.org/> (last visited Oct. 18, 2015) (“For empirical work, please upload all materials required for replication (including computer programs and data sets).”).

17. The *Harvard Law Review* asserts that it conducts a peer review of all submitted articles. *Submissions*, HARVARD L. REV., <http://www.harvardlawreview.org/submissions.php> (last visited Oct. 10, 2015) (“[A]t least two editors review every submission, and many pieces go through substantially more stages of review, including an Articles Committee vote, a preemption check, faculty peer review, and a vote by the body of the *Review*.”).

sored by the University of Chicago Law School, now commonly publish empirical pieces.¹⁸

Further evidence of the rise of empirical work can be found in the success of the *Journal of Empirical Legal Studies* (JELS).¹⁹ JELS exclusively publishes empirical work. Its website states:

[JELS] is a peer-edited, peer-refereed, interdisciplinary journal that publishes high-quality, empirically-oriented articles of interest to scholars in a diverse range of law and law-related fields, including civil justice, corporate law, criminal justice, domestic relations, economics, finance, health care, political science, psychology, public policy, securities regulation, and sociology.²⁰

Even though JELS is only a decade old, studies of the impact of law journals show that it is among the most cited peer-reviewed law journals in the last five years.²¹ JELS also helped inspire the creation of the Society for Empirical Legal Studies, which now holds an annual conference that, by its second year, was already attracting between 300 and 400 attendees annually. Combined with an ever-increasing demand for empirically trained legal scholars, these trends suggest that the reliance on empirical evidence represents a significant movement in the legal academy just as it does in other disciplines.

To be sure, empirical scholarship has long graced the pages of law reviews. Over seventy years ago, Underhill Moore and Charles Callahan published a lengthy (and some would say tedious) study of parking laws in New Haven, Connecticut.²² Further, the *Law and Society Review* has been publishing empirical legal studies since the 1960s,²³ and the first volume of the *Journal of Legal Studies* itself contained multiple empirical papers.²⁴ What differs today, however, is that many law professors believe that empirical work constitutes mainstream scholarship. In 1986, Lawrence Friedman described law and social science as akin to “thick rugs in the dean’s office”; that is, some-

18. William M. Landes, *The Empirical Side of Law & Economics*, 70 U. CHI. L. REV. 167, 172, 172 fig.1 (2003).

19. As a disclaimer, I am one of the founding editors of the *Journal of Empirical Legal Studies*.

20. *JELS Journal*, CORNELL U.L. SCH., <http://www.lawschool.cornell.edu/SELS/journal.cfm> (last visited Oct. 18, 2015).

21. See <http://lawlib.wlu.edu/LJ/> for more information regarding the current ranking of JELS.

22. Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1 (1943).

23. The first volume of the *Law and Society Review* was published in 1966. See Richard D. Schwartz, *From the Editor*, 1 L. & SOC’Y REV. 6 (1966) (introducing the journal).

24. Richard A. Posner, *Volume One of the Journal of Legal Studies—An Afterward*, 1 J. LEGAL STUD. 437, 437 (1972) (“The aim of the *Journal* is to encourage the application of scientific methods to the study of the legal system.”).

thing that is nice to have but not really necessary.²⁵ Judging by the volume of empirical work produced and the hiring patterns of top law schools, empirical work now occupies a central place in a modern law school's mission.

B. The Promise of Empirical Legal Scholarship

Anything that one might properly term a “trend” in law should have an underlying motivation. The legal realist movement's goal was to expand the horizons of legal theory beyond the formalist view that law is simply the application of statutes and logic. Realism effectively destabilized the legitimacy of law by showing it to be indeterminate.²⁶ Reactions to that lack of legitimacy inspired the legal process movement of the 1950s.²⁷ The “law and society” movement in the 1960s resurrected strains of realism but added a strong dose of progressive political thinking.²⁸ The law and society movement saw itself as embracing a study of how the law affected (often adversely) the lives of ordinary individuals.²⁹ The 1970s and 1980s witnessed the rise of “law and economics,” which espoused the goal of using economic principles to understand how law develops and functions.³⁰ The critical legal studies movement (along with the critical race and gender studies movements) of the 1980s sought to uncover how supposedly neutral laws supported existing power and wealth structures.³¹ Individuals within these movements varied in their vision for the trends that they joined, but each of these movements had an organizing principle that provided both the motivation for scholarship and analytic force.

But what are the goals of the new empirical legal studies movement? Part of the answer to that question involves the reasons why empirical legal studies has such a presence in today's the legal academy. Several factors account for the rise in empirical legal scholarship.³² First, the supply of people trained to conduct empirical work and trained in law has grown enormously. Law school faculties are

25. Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 777 (1986).

26. Leiter, *supra* note 8, at 1148.

27. See generally David Kennedy & William W. Fisher, *Introduction*, in THE CANON OF AMERICAN LEGAL THOUGHT 1, 11–12 (David Kennedy & William W. Fisher III, eds., 2006) (describing the rise and fall of the legal process movement).

28. See Friedman, *supra* note 25, at 763, 778 n.** (quoting William Simon).

29. See Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory*, 95 CORNELL L. REV. 61, 95 (2009).

30. See ROBERT COOTER & TOM ULEN, LAW AND ECONOMICS viii (5th ed. 2008) (describing how legal theory has absorbed the principles of economics).

31. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

32. Rachlinski, *supra* note 7, at 907–09.

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increasingly filled with scholars who have both a law degree and a PhD in some other discipline, often a social science. Second, empirical legal scholarship has become much easier to accomplish. In the 1970s, an empirical study of a judicial reform would have required marshaling a team of research assistants to descend on court archives to gather data that would then need to be coded, using punch cards, into a barely decipherable statistical software package and then run through the university's mainframe computer system. Researchers faced many obstacles, including: inaccurately punched computer cards, inept research assistants, irritable court clerks, and misfiled cases. Today, the combination of publicly available databases and the easy-to-use statistical software has eliminated many of these obstacles. Third, empirical legal studies builds on the strengths of both the law-and-economics and law-and-society movements. Both of these fields introduced the idea that empirical work is critical to understanding how law functions. Law and economics, in particular, aspires to identify its assumptions carefully and state the foundations for its conclusions in ways that can easily be tested.

The problem with these factors is that they suggest that empirical legal scholarship lacks an underlying mission. Legal scholars now arguably engage in empirical work because they can rather than because they should. The empirical scholarship of the law-and-society movement has a progressive political agenda behind it. Likewise, the empirical scholarship in law and economics serves the goal of understanding how economic principles function in law. Indeed, to some commentators, the new work in empirical legal studies is just "law and economics in sociologists' clothing."³³ This statement suggests that the empirical legal studies movement has a hidden agenda.³⁴ Empirical legal scholarship can thus be characterized as either disguised politics or number crunching for the sake of number crunching. Ideally, empirical legal studies is more than the iconic sign outside Snowmass, Colorado, which reads:

Established	1967
Elevation	8388
Population	1866
Total	12,221

The empirical legal studies movement, however, has an aspiration. The aim of scholars who conduct empirical work is to bring a realistic,

33. Mark Suchman, *Empirical Legal Studies: Sociology of Law, or Something ELS Entirely?* AMICI, Summer 2006, at 1, 2.

34. Nourse & Shaffer, *supra* note 29, at 121.

scientific understanding of the effects of law on legal actors and legal institutions. Scholars who conduct empirical work closely attend to the purposes behind legal rules and seek to test whether the rules adopted actually advance those purposes. These scholars want to replace anecdote and hunch with reality. As the website for JELS states, the goal of the journal is “informing litigants, policymakers, and society as a whole about how the legal system works.”³⁵ That mission clearly states the mission of empirical legal scholarship as well.

David Zaring’s piece, “The Use of Foreign Decisions by Federal Courts: An Empirical Analysis,” which was published in JELS in 2006, represents a successful example of this goal.³⁶ Zaring’s piece responds to a political reaction to a series of Supreme Court decisions as illustrated by *Roper v. Simmons*.³⁷ The case prohibited the execution of individuals who committed their crimes before age eighteen.³⁸ The majority declared that this punishment constituted “cruel and unusual punishment” and, hence, ran afoul of the Eighth Amendment to the U.S. Constitution.³⁹ In past cases, the Court asserted that the application of the Eighth Amendment’s prohibition against cruel and unusual punishment must be assessed according to evolving standards of decency. In support of its view that executing a minor violated evolving standards of decency, Justice Kennedy, writing for the majority of the justices, relied on numerous sources, including an “international consensus” against executing minors.⁴⁰ He noted that “only seven countries other than the United States ha[d] executed juvenile offenders . . . : Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China.”⁴¹ The dissenting opinion in the case attacked the majority for its citation of foreign law.⁴² Political commentators chimed in as well, complaining that Justice Kennedy’s reliance on the laws of other nations represented a novel—and undesirable—approach to constitutional law.⁴³

35. Theodore Eisenberg, *Why Do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741, 1741 (2004).

36. David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297 (2006).

37. 543 U.S. 551 (2005); Zaring, *supra* note 36, at 310.

38. *Roper*, 543 U.S. at 568.

39. *Id.* at 575.

40. *Id.* at 576.

41. *Id.* at 577.

42. *Id.* at 622–28 (Scalia, J., dissenting).

43. See Comment, *The Debate over Foreign Law in Roper v. Simmons*, 119 HARV. L. REV. 103, 103–05 (2005) (“[The] *Roper* decision has prompted a national debate over the propriety of citing foreign and international law in domestic constitutional cases.”).

The debate concerning the use of foreign law by the Supreme Court in *Roper* was remarkably vigorous. Within the legal academy, the *Harvard Law Review* devoted an entire issue to the “new” use of foreign law by the Supreme Court.⁴⁴ Justice Kennedy’s reference to foreign law also fueled a reaction by politicians. It gave new life to legislation introduced in the House of Representatives by Tom Feeney and Bob Goodlatte meant to curtail a supposed growth in reliance on foreign law.⁴⁵ It specifically admonished judges that reliance on foreign law would indicate that “they are no longer engaging in ‘good behavior’ in the meaning of the Constitution and they may subject themselves to the ultimate remedy, which would be impeachment.”⁴⁶ Although the resolution did not pass, it showed the dramatic reaction many had to this supposedly new trend in jurisprudence.

The reform this resolution would have embraced presumed that the Court had taken a new direction and needed to be rebuked. But, was Justice Kennedy’s citation of foreign law a new trend? Zaring adopted an empirical approach to the question. He studied sixty years of federal court opinions to uncover citations to foreign law. Zaring found that the Court rarely cited foreign law.⁴⁷ Furthermore, it most commonly did so when foreign law was directly at issue, such as when foreign law must be applied in a United States court or when the interpretation of an international treaty is involved.⁴⁸ References to foreign law as an aide to interpretation occur less than once every other term.⁴⁹ Furthermore, Zaring found no trend towards more or less use of foreign law by the Supreme Court. In fact, he concluded that “the Supreme Court uses less foreign law now than it has at any other time in its history.”⁵⁰ The premise that the Supreme Court has embarked on a new strain of jurisprudence that would turn over U.S. constitutional law to foreign courts was completely unfounded.

Zaring’s study required no high level of sophisticated statistical analysis or complex methodology. Rather, he conducted a simple, straightforward paper that answered a question that had entered de-

44. *See id.* (describing the special issue).

45. H.R. Res. 372, Reaffirmation of American Independence Resolution, 110th Cong. (2007). “This resolution advises the courts that it is improper for them to substitute foreign law for American law or the American Constitution” Tom Curry, *A Flap over Foreign Matter at the Supreme Court*, NBC NEWS: POL., http://www.nbcnews.com/id/4506232/ns/politics-tom_curry/t/flap-over-foreign-matter-supreme-court/#.ViPyOBCrSRs (last updated Mar. 1, 2014) (quoting Rep. Tom Feeney).

46. Curry, *supra* note 45.

47. Zaring, *supra* note 36, at 297.

48. *Id.* at 306.

49. *Id.* at 313.

50. *Id.* at 299.

bate in academia and the broader public. As such, his piece embodied the core goal of empirical legal studies. Before empirical work like this, a simple, salient example of the Supreme Court's use of foreign law would have been enough to assert confidently that a paradigm-shifting event had occurred that demanded both public and academic response. Afterwards, however, the existence of this supposed shift can be tested in a straightforward manner. Zaring's conclusions revealed that legislative efforts were a political stunt rather than a response to a meaningful issue.

C. *The Reality: Empirical Work in a Partisan Environment*

Empirical legal scholarship, however, includes few papers that address a simple question in a convincing fashion like Zaring's paper. Most empirical legal scholarship addresses highly complicated social questions on which clear empirical tests cannot be conducted. Furthermore, the most interesting questions in empirical legal scholarship relate to hotly debated social questions. This environment undermines the goal of informing public policy debate because empirical legal scholarship is invariably used in a highly partisan context. Both sides in a partisan debate now try to occupy the empirical high ground by claiming that empirical research supports their position. The result of empirical scholarship is, thus, sometimes noise and obfuscation rather than clarity.

The debate on the deterrent effect of the death penalty illustrates this state of affairs well. The death penalty has remained an important part of public debate in the United States since 1972, when the Supreme Court ordered a temporary moratorium on its use in *Furman v. Georgia*.⁵¹ In *Furman*, the Court concluded that every death penalty statute in the United States failed to provide juries with adequate guidance on how to decide whether to impose a sentence of death on a criminal defendant.⁵² States reacted quickly by creating more detailed death penalty statutes, and the Court proclaimed itself satisfied with these measures four years later in *Gregg v. Georgia*.⁵³

The temporary moratorium on executions sparked public debate and empirical scholarship on whether the death penalty deters crime. To be sure, the deterrent effect of the death penalty was neither central to *Furman*'s holding nor is evidence that it deters crime essential to embracing the death penalty. The death penalty can be justified on

51. 408 U.S. 238 (1972).

52. *Id.* at 240.

53. 428 U.S. 153, 195, 206–07 (1976).

retributive grounds alone even if the penalty has no instrumental value in deterring crime.⁵⁴ But, embracing retributive goals seems barbaric to many, and most who support the death penalty believe that it is both a just punishment in some cases and an effective deterrent.⁵⁵ But, is that assumption correct? Answering that question would be a highly useful contribution for legal scholars who conduct empirical work.

Social scientists interested in law responded to the public debate on the death penalty in the 1970s. Shortly after the Court decided *Furman*, Isaac Ehrlich published a study assessing crime statistics and concluded that the availability of the death penalty deters homicides.⁵⁶ In fact, Ehrlich concluded that each execution saves eight innocent lives.⁵⁷ Naturally, this was not the last word. Using a similar data set, a research team organized by the National Academy of Sciences in 1978 concluded that the available evidence did not support the conclusion that the availability of the death penalty reduces homicide rates.⁵⁸

The death penalty remains a controversial topic, and, thus, the subject of continued academic study. Surprisingly, little has changed in over thirty years of research. Researchers who took up the issue in the 1990s essentially replicated the debate that occurred in the 1970s. That is, a research team published a study indicating that the death penalty is an effective deterrent to homicide. Indeed, the research suggests that after the reforms following *Furman*, the death penalty has become more efficient—saving eighteen innocent lives for every person executed.⁵⁹ This research was followed by further research, once again re-analyzing the same basic data set and finding no deterrent effect.⁶⁰

54. See Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 771–75 (2005).

55. See John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 792–94 (2005) (“The current state of the political debate over capital punishment is one of disagreement, controversy, and division.”).

56. Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Matter of Life and Death*, 65 AM. ECON. REV. 397, 415–17 (1975).

57. *Id.* at 414.

58. See Lawrence R. Klein et al., *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*, in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 358 (Alfred Blumstein et al. eds., 1978) (“[I]t seems unthinkable to us to base decisions on the use of the death penalty on Ehrlich’s findings, as the Solicitor General of the United States has urged. They simply are not sufficiently powerful, robust, or tested at this stage to warrant use in such an important case.” (citation omitted)).

59. Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344, 373 (2003).

60. Donohue & Wolfers, *supra* note 55, at 798, 841.

The fact that the social science research on the death penalty is mixed does not undermine the goals of the empirical legal studies movement. Controlled experiments are impossible in many areas, and consequently, the data available are apt to be messy. Researchers must employ complex statistical models to assess the effect of legal rules. More troubling to the movement is that researchers use the same data to reach radically different conclusions. Using the same data set, Dezhbakhsh, Rubin, and Shepherd argued that the deterrent effect of the death penalty was fairly intense,⁶¹ while Donohue and Wolfers contended that there was no effect at all.⁶²

Donohue and Wolfers might be correct.⁶³ They revealed several other contemporary studies in an attempt to synthesize the research into a coherent whole.⁶⁴ This level of complexity, however, undermines the goal of “informing litigants, policymakers, and society as a whole about how the legal system works.”⁶⁵ For most outside observers, the debate among the scholars does not inform society. Rather, it creates a new front on which to wage political conflict.

Research on how people react to social science studies supports the concern that empirical legal research only fuels debate. In a study conducted in the late 1970s, social psychologists Charles G. Lord, Lee Ross, and Mark R. Lepper assessed what reaction ordinary citizens might have to the conflicting studies on the death penalty.⁶⁶ These researchers presented summaries of two studies regarding the deterrent effect of the death penalty along with critiques of the studies to partisans within the death penalty.⁶⁷ The research participants consisted of both strong supporters and strong opponents of capital punishment. One of the two studies concluded that the death penalty deters crime while the other concluded that it had no effect.⁶⁸ Not surprisingly, before reading the studies, supporters of the death penalty expressed the belief that the death penalty deters crime, while opponents of the death penalty expressed the opposite view. Because the two studies were mixed and both had flaws, a reasonable response

61. Dezhbakhsh et al., *supra* note 59, at 373.

62. Donohue & Wolfers, *supra* note 55, at 794.

63. Paul H. Rubin, *Reply to Donohue and Wolfers on the Death Penalty and Deterrence*, *ECONOMISTS' VOICE*, April, 2006, at 1, 1–2, [http://users.nber.org/~jwolfers/Press/DeathPenalty\(Rubin\).pdf](http://users.nber.org/~jwolfers/Press/DeathPenalty(Rubin).pdf). Although Rubin, one of the coauthors of the Dezhbakhsh Study, replied in their defense.

64. Donohue & Wolfers, *supra* note 55, at 818–21.

65. Eisenberg, *supra* note 35, at 1741.

66. Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 *J. PERSONALITY & SOC. PSYCH.* 2098 (1979).

67. *Id.* at 2100.

68. *Id.*

to reading them would be to moderate one's beliefs regarding the deterrent effect of capital punishment. That is not what happened, however. Reading the studies further polarized the groups.⁶⁹ After reading the studies, supporters of capital punishment expressed an even stronger belief that the death penalty deters crime while opponents expressed an even stronger belief that it does not. Each side concluded that the studies that supported their position were well done while the studies that undermined their position had used suspect methods. The net result was that both sides of the debate were able to find support in the mixed results. In effect, the research fueled partisanship rather than resolved the debate.

The tendency for empirical work to polarize political partisans is not limited to the death penalty. A similar exchange surrounds the issue of gun control. In 1998, John Lott Jr. published a book, *More Guns, Less Crime*, in which he argued that a greater presence of privately owned handguns reduces crime.⁷⁰ The book offered numerous graphs demonstrating increasing gun ownership rates during the 1990s and decreasing crime rates in the United States during that same period.⁷¹ These statistics are problematic because other factors might have produced these effects. Notably, increased public concern with crime rates might induce individuals to buy guns and support greater spending on law enforcement services (which can reduce crime rates). Sorting out cause from correlation is difficult or even impossible. To address this problem, Lott assessed the effect of so-called "right-to-carry laws," which allow ordinary individuals to carry concealed handguns. States have varied over the years on these laws thereby allowing researchers a better chance of isolating the effects of gun ownership and use on crime. Lott concluded that adopting these laws reduces crime rates.⁷²

Lott's research inspired a flurry of studies on the issue. Several studies supported Lott's initial conclusion⁷³ while several studies sug-

69. *Id.* at 2105.

70. JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* 19 (1998).

71. *Id.*

72. *Id.* at 159 (incorporating John R. Lott, Jr., *The Concealed-Handgun Debate*, 27 J. LEGAL STUD. 221 (1998) and John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1, 64 (1997)).

73. See, e.g., William Alan Bartley & Mark A. Cohen, *The Effect of Concealed Weapons Laws: An Extreme Bound Analysis*, 36 ECON. INQUIRY 258 (1998); Stephen G. Bronars & John R. Lott, Jr., *Criminal Deterrence, Geographic Spillovers, and the Right To Carry Concealed Handguns*, 88 AM. ECON. REV. 475 (1998); Eric Helland & Alexander Tabarrok, *Using Placebo Laws To Test "More Guns, Less Crime,"* ADVANCES ECON. ANALYSIS & POL'Y, Dec. 2004, at 1, 5; John R. Lott, Jr., *The Concealed-Handgun Debate*, 27 J. LEGAL STUD. 221 (1998); Michael D.

gested that right-to-carry laws have no effect or even increase crime rates.⁷⁴ As with the death penalty, research on these laws did not inform the public but, rather, fueled a contentious debate about gun control. In fact, debate within the legal academy on this issue is just as heated as debate in the public arena, if not more so. Lott even filed a lawsuit against one of his detractors.⁷⁵ Academia is truly just another front on which public debate is waged. Proponents and opponents of gun control can each find ample support for their positions in the mélange of studies and intricate regressions. And, just as occurs with the debate on the deterrent effect of the death penalty, both sides of the debate use the same data to reach opposite conclusions. As recent events in the United States (sadly) demonstrate, anecdote is ultimately apt to be a more powerful influence on public debate than regression analysis.

Scholars have also found that the rancorous scholarship on gun laws polarizes opinion. Dan M. Kahan and Donald Braman found that people's assessments of whether handgun control laws reduce crime are highly correlated with their cultural and political commitments.⁷⁶ For those who embrace a patriarchal, individualistic approach to the world, handgun ownership is a male obligation related to the duty to protect one's family. For these individuals, the belief that handgun ownership is actually harmful or destructive is antithetical—even threatening. In contrast, for those who embrace a communitarian ethic, handgun ownership is a dangerous threat to the strongly held belief that we should protect each other through civic engagement and community partnerships with law enforcement. Each side views the

Maltz & Joseph Targonski, *A Note on the Use of County-Level UCR Data*, 18 J. QUANTITATIVE CRIMINOLOGY 297 (2001); Carlisle E. Moody & Thomas B. Marvell, *The Debate on Shall-Issue Laws*, 5 ECON. J. WATCH 269 (2008); Florenz Plassmann & John Whitley, *Confirming 'More Guns, Less Crime'*, 55 STAN. L. REV. 1313 (2003).

74. See, e.g., Ian Ayres & John J. Donohue III, *More Guns, Less Crime Fails Again: The Latest Evidence From 1977–2006*, 6 ECON. J. WATCH, 218 (2009); Ian Ayres I. & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193 (2003); Dan A. Black & Daniel S. Nagin, *Do Right-to-Carry Laws Deter Violent Crime?*, 27 J. LEGAL STUD. 209 (1998); John J. Donohue III, *The Final Bullet in the Body of the More Guns, Less Crime Hypothesis*, 2 CRIMINOLOGY & PUB. POL'Y 397 (2003); Mark Duggan, *More Guns, More Crime*, 109 J. POL. ECON. 1086 (2001); Tomislav V. Kovandzic & Thomas B. Marvell, *Right-to-Carry Concealed Firearms and Violent Crime: Crime Control Through Gun Decontrol?*, 2 CRIMINOLOGY & PUB. POL'Y 363 (2003); Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence From State Panel Data*, 18 INT'L REV. L. & ECON. 239 (1998).

75. Michael Higgins, *Best-Seller Leads Scholar To File Lawsuit*, CHI. TRIB., Apr. 11, 2006, http://articles.chicagotribune.com/2006-04-11/news/0604110214_1_lott-harpercollins-publishers-scholars.

76. Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1298 (2003).

research in a way that is consistent with their views about how society should function and how they see their place in it. Kahan and Braman concluded that research cannot resolve this debate. They asserted that rather than

focus[ing] on the consequences of various types of [gun control] regulation, academics and others who want to help resolve the gun controversy should dedicate themselves to identifying with as much precision as possible the cultural visions that animate this dispute, and to formulating appropriate strategies for enabling those visions to be expressively reconciled in law.⁷⁷

III. CIVIL PROCEDURE AND THE U.S. SUPREME COURT: DISSENSION FROM AGREEMENT

Perhaps clarity is too much to expect from empirical research on contentious issues such as capital punishment and gun control. In both areas, a clean research study in which nothing else changes except the law is impossible. State laws change in response to social pressures, which also affect other factors that can influence the target measure. Complex regression analysis is essential to conducting research in these areas. Furthermore, the areas are highly politically charged. As Kahan and Braman argued, results that undermine a preferred policy agenda are not just inconsistent with beliefs, rather, they actually threaten people's role in society. As Zaring's study demonstrated, empirical legal scholarship can illuminate underlying facts in some settings in helpful ways; but, perhaps capital punishment and gun control are outliers.

Research on the civil justice system is a common area of empirical scholarship that might provide more fruitful grounds for research than capital punishment or gun control. Policy makers commonly tinker with the civil justice system in an effort to facilitate a more efficient dispute resolution system. They often do so with little information available even though data on the outcome of civil lawsuits are both widely and increasingly available to scholars. Politics and anecdote plays a role in this area as well. Most Americans can recall an example of an outrageously high damage award—the most salient example being a multi-million dollar jury award to an elderly woman who was injured when she spilled hot coffee on her lap at McDonald's.⁷⁸ Industry also has a stake in reducing access to the justice system for injured plaintiffs, ensuring that research will be subject to some parti-

77. *Id.* at 1294.

78. *Liebeck v. McDonald's Rests.*, No. CV-93-02419, 1995 WL 360309 (D.C. Aug. 18, 1994).

san scrutiny. But, if empirical legal scholarship cannot inform this area, then its goal of informing policy debate might be unattainable.

Within the research on civil justice, research on punitive damages provides a good case study. The U.S. Supreme Court inspired public and scholarly debate on the issue of punitive damages with a series of cases.⁷⁹ In these cases, the Supreme Court concluded that the Due Process Clause of the Fifth and Fourteenth Amendments require that punitive damages may not be grossly excessive or arbitrary. Hence, a jury award of punitive damages is not the last word on liability for a defendant. A court must further review the award to ensure that it is not arbitrary.

Seizing on the Court's insistence on lack of arbitrariness, scholars began to study punitive damage awards. Some scholars, largely led by Hersch and Viscusi, argued that the way juries currently assign punitive damage awards makes the awards erratic and unpredictable.⁸⁰ Under this view, punitive damage awards chronically undermine due process and are in need of reform (or elimination). These scholars asserted that punitive damage awards are essentially arbitrary. Other researchers, largely led by my late colleague, Theodore Eisenberg, argued that punitive damages are closely related to compensatory awards.⁸¹ Theodore Eisenberg and colleagues contended that blockbuster awards are rare outliers that can easily be managed by the appellate process. Hence, punitive damages are not in need of greater policing, reform, or abolition.

The debate thus seems to track closely the discussion of the death penalty and gun control with two competing academic groups lining up on different sides of the public debate. Once again, both sides use exactly the same sources of data. In this case, however, the situation is even more troubling for empirical legal studies. Not only do both sides of the debate agree on what data are relevant, they completely agree on what the data actually demonstrate. Nevertheless, each camp endorses polar opposite conclusions as to what the data mean for public debate.

The data that both sides of this debate use consist of research on verdicts in actual cases. These data, collected by the National Center

79. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

80. See Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1, *passim* (2004).

81. See Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997); see also Eisenberg et al., *supra* note 2, at 264–65 (reporting similar results for both judge and jury trials).

for State Courts, consist of hundreds of cases from numerous jurisdictions in which juries awarded punitive damages.⁸² These data produced two completely opposite conclusions. Hersch and Viscusi asserted that, in these data, the correlation between compensatory awards and punitive awards was essentially zero.⁸³ Thus, they concluded that the punitive damage awards were arbitrary. Eisenberg and his collaborators showed that in these same cases, the log of the compensatory awards correlated remarkably well with the log of the punitive awards.⁸⁴ Both camps also defended their methodological approaches. Hersch and Viscusi argued that defendants cannot write checks in “log-dollars” but must use actual dollars, and, hence, the awards are erratic in a way that matters most to defendants.⁸⁵ Eisenberg asserted that the use of logs is the only meaningful way to analyze data like damage awards, which are highly positively skewed and therefore violate the statistical assumptions underlying a meaningful use of the correlation coefficients that Hersch and Viscusi used.⁸⁶ For Eisenberg, the remarkably high correlation revealed an underlying regularity in what juries (and judges) are doing when they assign punitive damage awards.⁸⁷

The nature of the task of assigning a punitive damage awards facilitates the unlikely combination of agreement and disagreement. Other researchers conducted experimental studies to determine how lay adults assign punitive damages that explain the discrepancy between the two competing positions.⁸⁸ These researchers gave mock juries a set of cases wherein they had to assess punitive damages. They found that juries exhibited “predictable incoherence”; that is, lay adults rank-order the fact patterns on the basis of severity in meaningful ways and can even assign them meaningful quantitative labels in which more serious misconduct is treated as more troublesome than less serious misconduct. People rank the cases in similar ways, both within and between individuals. But, when asked to assign dollar amounts for punitive damage awards, adults have difficulty translating their desire to punish into dollars. This translation becomes erratic

82. MARIKA F. X. LITRAS ET AL., U.S. DEP'T OF JUST., OFFICE OF JUST. PROGRAMS, BUREAU JUSTICE STATISTICS BULLETIN, CIVIL JUSTICE SURVEY OF STATE COURTS 1996: TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 1996 (2000).

83. Hersch & Viscusi, *supra* note 80, at 13 tbl.2, 15 fig2, 24.

84. Eisenberg et al., *supra* note 81, at 651, tbl.6. *See also* Eisenberg et al., *supra* note 2, at 281 tbl.5 (for similar results).

85. Hersch & Viscusi, *supra* note 80, at 34–35.

86. *See* Eisenberg et al., *supra* note 2, at 272–73.

87. *Id.* at 293.

88. *E.g.*, CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2002) (summarizing studies from a diverse group of scholars).

and unreliable. This outcome is essentially identical to the outcome in real cases; juries understand their task well but have difficulty assigning a dollar amount to that understanding. Converting the actual awards to logs flattens out jurors' erratic conversions, revealing the underlying regularity.

So who is right—Hersch and Viscusi or Eisenberg? They are both correct. Eisenberg is certainly right to assert that a standard correlation between highly skewed data is meaningless. All statistical tests make some assumptions concerning the nature of the data, and running a test that violates the assumptions only produces meaningless results. The high correlation among the logged data, along with the regularity in the Schkade and colleagues' experimental studies, also strongly suggests that juries are hardly spinning a roulette wheel to identify appropriate awards.⁸⁹ If the Supreme Court's purpose is to ensure that punitive damage awards are meaningful, then Eisenberg's analysis suggests that, overall, awards are not arbitrary.

But, much can be said for Hersch and Viscusi's point as well, even though they used an inappropriate statistical analysis. If the Supreme Court's goal is predictability in awards, then the data do not support the idea that dollar awards are predictable. Eisenberg's analysis illustrates that point. The study reported a regression of the log of the punitive damage awards on compensatory awards to produce the following equation:

$$\text{Log}(\text{punitive award}) = 0.75 + .81 [\text{log}(\text{compensatory award})] + \text{error variance.}^{90}$$

The model predicted over 50% of the variance in punitive damage awards thereby strongly supporting Eisenberg's point that the awards are predictable.⁹¹

However, the result also supports Hersch and Viscusi's point. Regression equations can be used to make point estimates as to the predicted award and construct confidence intervals around those estimates. For example, Eisenberg's equation predicts that a case in which a jury awarded a \$10,000 compensatory award would produce a punitive award of \$9,772. That is, the log of 10,000 is 4, multiplied by .81 to get 3.24, added the constant of 0.75 to yield 3.99 as the predicted log of the punitive award, and, lastly, 10 to the power of 3.99 produces a prediction of \$9,772 as the best estimate of the likely award. The model can also be used to estimate a 95% confidence interval for the award. Using 1.25 (in logs) as a roughly estimated range for the confi-

89. See *id.* at *passim*.

90. See Eisenberg et al., *supra* note 2, at 273.

91. *Id.* at 275.

dence interval indicates that there is a 95% chance that the log of the punitive award would be between 2.74 and 4.24 in a case with a compensatory award of \$10,000. Because the scale is in logs, the high end gets quite high. The estimates of the actual award in this case would be between \$550 and \$112,200. The upper bound for the confidence intervals becomes even more dramatic as the compensatory award increases, which Table 1 illustrates.

TABLE 1: ESTIMATED PUNITIVE DAMAGE AWARDS (IN DOLLARS) USING EISENBERG ET AL.'S (2006) ESTIMATES

(1) Actual Com- pensatory Award	(2) Actual Log of Compensatory Award	(3) Predicted Log of Puni- tive Award	(4) Predicted Punitive Award	(5) Upper Bound on Confidence Interval for Prediction (in logs)	(6) Upper Bound on Confidence Interval for Prediction
\$10,000.00	4	3.80	9,800	5.05	112,200
\$500,000.00	5.7	5.36	232,400	6.51	3,235,900
\$10,000,000.00	7	6.42	2,630,300	7.57	37,153,500

The large range on the higher awards means that the higher awards will appear to be more erratic, in total dollars, than the lower awards. Figure 1 and Figure 2 show the true split between Hersch and Viscusi's and Eisenberg's work

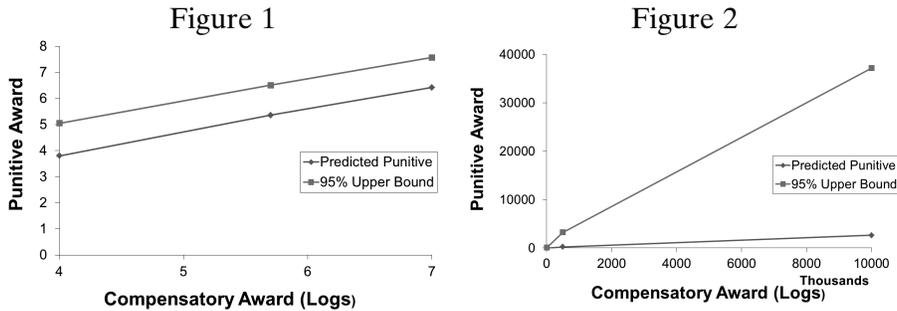


Figure 1 demonstrates the regularity that Eisenberg and colleagues identified as undermining the case for any reform of the punitive damages system. Figure 2 identifies the erratic nature of the awards that Hersch and Viscusi identified as support for reform.

The outcome is bad news for the empirical legal studies movement. The research on punitive damage awards is as clear as any set of social science studies in law is apt to produce. Jury (and judge) punitive damage awards are closely related to compensatory awards, but they

are also somewhat erratic. Juries have difficulty converting their reliable sense of outrage at the conduct that produced the award into a coherent dollar value, and their awards track a predictable pattern. But, this does not in anyway way settle the meaningful debate between scholars or policy makers about whether punitive damage awards are erratic in the due process sense. Instead, it has fueled further debate.

IV. CONCLUSION

Empirical legal studies are clearly not useless. The trend toward empirical legal research is a strong one that will not be undone by these observations, nor should it. Moreover, the analysis does not offer any meaningful advice for those who conduct empirical legal research, other than to have a thick skin and expect that you will come to believe that your work is apt to be miscited by partisans. Empirical scholarship certainly adds value. Even with regard to punitive damages, policy makers who read these studies will know more about what their reforms accomplish than if they had not read the studies. But, it is possible that the law and society scholars were correct to presume that all empirical work (perhaps like all legal scholarship) is inherently political.

For the U.S. Supreme Court, empirical scholarship seems unlikely to provide a neutral means of deciding whether plaintiffs' lawyers or businesses are out of control. Justices inclined to favor business can find scholarship to support their position, and Justices inclined to favor consumers can do the same. As the analysis of punitive damage awards demonstrates, even the same set of data can support opposite conclusions. Whatever empirical legal scholarship does, it does not provide a neutral mechanism for assessing the status of the litigation system.