

AN EMPIRICAL ANALYSIS OF EMPIRICAL LEGAL SCHOLARSHIP PRODUCTION, 1990–2009

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Inspired by the retirement of Professor Tom Ulen of the University of Illinois, the author considers the growth and development of empirical legal scholarship over two decades—a period of time that corresponds, not coincidentally, with Professor Ulen’s career. Starting in the 1990s when empirical scholarship had not yet “caught on,” the author first documents the increase in quantity of empirical scholarship over two decades. Next, the author applies a law and economics perspective to the recent surge in empirical scholarship, explaining that the trend has been fueled by an increase in the number of empirically trained scholars and also by increased demand for this type of scholarship. The author concludes by reflecting on Professor Ulen’s contribution to legal scholarship and suggests the time has come to ask not whether empirical legal scholarship has arrived but why it took so long to do so.

Retirements, such as Professor Tom Ulen’s, fuel reflection. In addition to backward glances, reflection often prompts one to take stock of the present as well as gaze into the future. An invitation to reflect on empirical legal scholarship, with an emphasis on recent advances, is difficult to resist. Empirical legal scholarship’s past, present, and future intertwine as my brief accounting of the past frames my assessment of recent advances. Although empirical legal scholarship benefits from an enviable array of recent advances, this Article focuses on one—the increased production of empirical legal scholarship over time. I note that this growth roughly coincides with Professor Ulen’s scholarly career and that this relation is far from spurious.¹

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1. Indeed, not only did Professor Ulen observe this trend in 2002, but his own work contributed to it. See, e.g., Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV. 875.

During the early 1990s, leading intellectual historians noted that empirical scholarship (as traditionally construed²) had “not caught on” in the U.S. legal academy.³ Similarly, writing in 2002, Professor Ulen (and coauthor Richard McAdams) observed that the “systematic organization of data and its presentation . . . is not yet a routine part of legal argumentation.”⁴ The absence of data and analysis helped transform these observations into conventional wisdom. Indeed, explanations for the apparent paucity of empirical legal research, especially those focusing on practical barriers that impeded empirical research by law professors, resonated with many.⁵ Of course, the commonly held assumptions that empirical legal scholarship had not yet “caught on” are, themselves, empirical in nature. Insofar as such assumptions involved empirical legal scholars, especially those not inclined to rely on intuitions, it was perhaps inevitable that some of these very scholars would set out to subject some of the commonly held assumptions to data and systematic analysis.

More specifically, scholars soon began to test the proposition that empirical legal scholarship had not yet “caught on” with more rigor. In particular, Professor Ellickson’s citation study of legal scholarship trends in 2000 included an assessment of empirical legal scholarship’s growth in law reviews between 1982 and 1996. Professor Ellickson’s conclusion—that the data only “hint[s] that law professors and students have become more inclined to produce (although not consume) quantitative analyses”—largely comported with prevailing wisdom though suggestive of change.⁶ Six years later, Professor George updated Professor Ellickson’s study in 2006 and analyzed a more recent cohort of publications between

2. While I acknowledge that the point is disputed, when I speak of empirical legal scholarship, I refer only to the subset of empirical legal scholarship that uses statistical techniques and analyses. By statistical techniques and analyses, I mean to reference those studies that employ data (including systematically coded judicial opinions) to describe or support inferences to a larger sample or population. Such studies must also be amenable to replication by other scholars. My narrow definition of empirical legal scholarship admittedly excludes a rich array of legal scholarship that can also plausibly be construed as empirical. (For one example of an alternative definition of empirical legal studies, see, e.g., Mark C. Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 ANN. REV. L. & SOC. SCI. 555 (2010).) While others may quibble with it, my narrow definition has the advantage of focusing on one of the more visible and distinct types of empirical legal scholarship and sets it apart from its more traditional theoretical and doctrinal counterparts. See, e.g., Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 810–11 (1999) [hereinafter Heise, *Importance*]; Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 820–21 [hereinafter Heise, *New Empiricism*]; Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 323 (1989).

3. See, e.g., NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 445 (1995) (“Law and society scholarship never really caught on in the American law schools.”); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 252 (1995) (“Why has empirical legal research not caught on, not taken hold in the law schools?”).

4. Richard H. McAdams & Thomas S. Ulen, Tribute to Gary T. Schwartz, *Introduction*, 2002 U. ILL. L. REV. 791, 791 (discussing empirical and experimental methods in law). The authors also went on to note “signs that empirical and experimental methods are becoming more common in legal scholarship.” *Id.*

5. See, e.g., Heise, *Importance*, *supra* note 2, at 815–23; Schuck, *supra* note 2, at 325–26.

6. Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517, 528–29 tbl.4 (2000).

1994 and 2004. Professor George concluded that empirical legal scholarship, or, more accurately, the number of references to it, “continues to grow.”⁷⁷ Indeed, Professor George wrote in 2006 that empirical legal scholarship “is arguably the next big thing in legal intellectual thought.”⁷⁸

Now that more than a decade has passed since Professor Ellickson’s study, and six years since Professor George’s follow-up study, it is perhaps time once again to revisit the question of whether empirical legal studies have “caught on” in legal scholarship and whether it has, indeed, become legal scholarship’s next “big thing.” That is, it would be useful to know whether what Professor Ellickson detected as a “hint” in 2000, and Professor George described in 2006 as a discernible trend, has persisted or retreated.⁹ In Part I of this three-part Article, I review evidence of my central claim: that the quantity of empirical legal scholarship has increased over the past two decades. Part II considers possible reasons for this increase and, in a nod to Professor Ulen (and the focus of this conference), adopts a law and economics perspective. Specifically, I explain the relatively recent surge in empirical legal scholarship as a function of the increased supply of empirically minded legal scholars (who frequently—though not always—possess formal training in law and another field) and the increased demand for such scholarship created by a growing number of law reviews as well as specialty journals. Part III seeks to briefly assess what to make of these findings and their implications for law schools, legal education, and legal scholarship. In light of the sustained ascendance of empirical legal studies, I conclude by proposing that it is now appropriate to consider flipping the presumption surrounding empirical legal studies’ station within the galaxy of legal scholarship. Specifically, the salient question no longer is if empirical legal scholarship will “catch on,” but rather, why it took so long to do so.

I. EVIDENCE OF A RISE IN EMPIRICAL LEGAL SCHOLARSHIP

A. *Data and Methodology*

Quantitative assessments of changes in the production of empirical legal scholarship over time must navigate important data and methodological hurdles. Such assessments require a database that accounts for a large volume of legal scholarship that can also be systematically searched at the individual article level. West Publishing’s Journal and Law Reviews (JLR) database contains most scholarly legal publications since at

7. Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141, 147 (2006) (replicating and updating Professor Ellickson’s 2000 study).

8. *Id.* at 141.

9. A related, though distinct study published in 2010 analyzes different types of empirical legal research (primary vs. secondary data analyses) in a select number of student-edited law reviews (the proverbial “top-30”) in two distinct years (1998 and 2008). Shari Seidman Diamond & Pam Mueller, *Empirical Legal Scholarship in Law Reviews*, 6 ANN. REV. L. & SOC. SCI. 581 (2010).

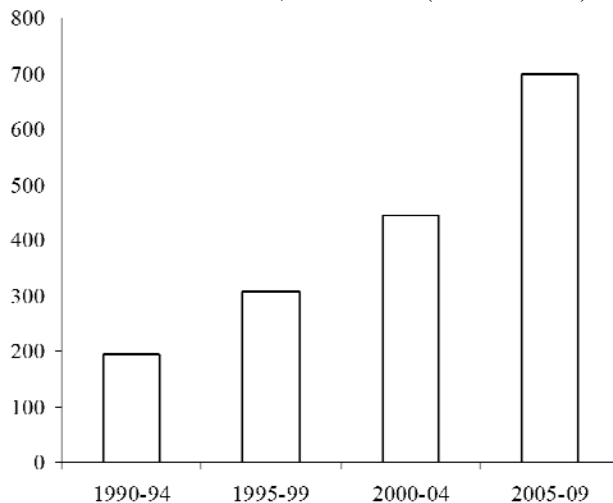
least 1990. Another hurdle is to identify words that serve as plausible and consistent proxies for empirical legal scholarship. To better align with past studies, I selected the words (or terms) *empiric!*, *quantitat!*, and *statistic!* and searched for any one (or more) of these terms in the title of a legal publication included in Westlaw's JLR database.

Obviously, one can fuss over whether the three terms used in this study are the best possible terms or whether the focus on article titles performs the desired analytical work. Potential quibbles aside, as it relates to trends over time, the approach appears stable. Thus, even if this selection protocol undercounts the actual amount of empirical legal scholarship there is little reason to assume *ex ante* that such undercounting will not be consistent and stable. Insofar as this study seeks to uncover possible trends, such measurement error—if it exists—is tolerable (though, admittedly, far from ideal). Finally, the specific search words used in this study have the virtue of linking this study with past efforts to assess changes in the production of empirical legal scholarship.¹⁰ In any event, given the limitations of the JLR database as well as my search strategy, one should regard the findings presented below as suggestive of basic trends rather than specific point estimates.

Results in Figure 1 support my central claim as well as anecdotal evidence that the production of empirical legal scholarship has increased between 1990 and 2009. Notable is the smooth, almost linear, trend over the past two decades. Visual inspection also suggests that the rate of increase from 2000 to 2004 and from 2005 to 2009 appears to have accelerated.

10. See Ellickson, *supra* note 6, at 528–29 tbl.4.

FIGURE 1:
TRENDS IN ARTICLE TITLES THAT REFLECT AN EMPIRICAL APPROACH:
ALL LAW JOURNALS, 1990–2009 (UNADJUSTED)



SOURCE: Westlaw JLR database, 1990–2009.

B. *Adjusting for Changes in the Westlaw Database over Time*

As Professor Ellickson (and others) have previously noted, another key methodological hurdle for those seeking to detect changes in the production of legal scholarship over time flows from the dynamic nature of Westlaw’s JLR database. This study begins with articles published in calendar year 1990 as the Westlaw database was far from thorough prior to the mid-1980s.¹¹ Moreover, between 1990 and 2009, inclusive, Westlaw’s JLR database grew.¹² As of 2010, the number of individual titles included in the JLR database is 944.

Concurrent with changes to the universe of journals included in Westlaw’s JLR database over time are changes to coverage within individual journals. When a new journal was added to the Westlaw database in the early 1980s, it typically involved only “selective” coverage of that journal’s contents. By 1994, however, Westlaw’s JLR database had shifted to full content coverage for most journals.¹³

Owing to these two changes to Westlaw’s JLR database during the scope of this study, the raw number of articles in the database increased between 1990 and 2009.¹⁴ These changes to the JLR database during the

11. *Id.* at 521.

12. The number of titles in Westlaw’s JLR database has grown steadily over the years: 397 in 1992, 566 in 1995, 699 in 2000, 806 in 2005, and 944 in 2010.

13. Ellickson, *supra* note 6, at 521.

14. Professor Ellickson notes a “roughly” ninefold increase between 1982 and 1996. *Id.*

period of this study (1990–2009) require a technical adjustment. Without a deflator that adequately neutralizes the independent influence of the Westlaw JLR database growth over time, database growth could contribute to an artificially inflated picture of the growth of empirical legal scholarship.¹⁵

To construct such a deflator, I drew from prior efforts in the literature, notably Professor Ellickson's citation study from one decade ago and focused on two plausible deflator alternatives. One deflator flows from the increase in the raw number of documents in the JLR database between 1990 and 2009. The efficacy of this deflator rests on the assumption that the character and nature of the typical JLR document did not systematically change during the past two decades. If the assumption holds, then a simple "raw document count" deflator would perform the necessary work.

If one assumes that the "typical" JLR document did, in fact, systematically change over the past two decades, however, an alternative deflator is needed that accounts for changes in the documents themselves. Similar to Professor Ellickson, I settled upon a "rare-word" deflator as an alternative. The rare-word deflator reflects the trend in the number of JLR documents that contain any one of ten "substantively neutral, ordinary English words that authors seldom use."¹⁶ Assuming that these "seldom used" words are seldom used equally over time, their usage proxies for the increase in the JLR database.

Although both the raw document count and rare-word deflators illustrate different approaches to remedying the influence of changes to the size of the JLR database, each deflator rests on its own set of unique assumptions. Fortunately, as the results in Table 1 make clear, both deflator alternatives largely mirror one another. Moreover, this finding largely comports with Professor Ellickson's results from a decade earlier.¹⁷ Thus, so long as one of the deflator options is used, a decision about which option is used becomes unimportant. To promote comparability across studies and time, however, I settled upon the rare-word deflator for this study.

15. As Professor Ellickson notes, efforts to deflate such databases have persisted. *Id.* at 522 n.9. See also Ian Ayres & Fredrick E. Vars, *Determinants of Citations to Articles in Elite Law Reviews*, 29 J. LEGAL STUD. 427, 435 nn.27 & 31 (2000) (deflating changes in the Social Science Citation Index database); Theodore Eisenberg & Martin T. Wells, *Ranking and Explaining the Scholarly Impact of Law Schools*, 27 J. LEGAL STUD. 373, 384–85 (1998) (deflator-adjusting data obtained in searches conducted on different days).

16. Ellickson, *supra* note 6, at 522.

17. *Id.* at 542 fig.A1. It should be noted, however, that Professor Ellickson's work on alternative deflators is far more extensive than mine.

TABLE 1:
DEFLATION INDEXES FOR WESTLAW JLR DATABASE

	1990–94	1995–99	2000–04	2005–09
Raw document count deflator	2.287	1.295	1.133	1.000
Rare-word deflator	1.921	1.266	1.122	1.000

SOURCE: Westlaw JLR database, 1990–2009.

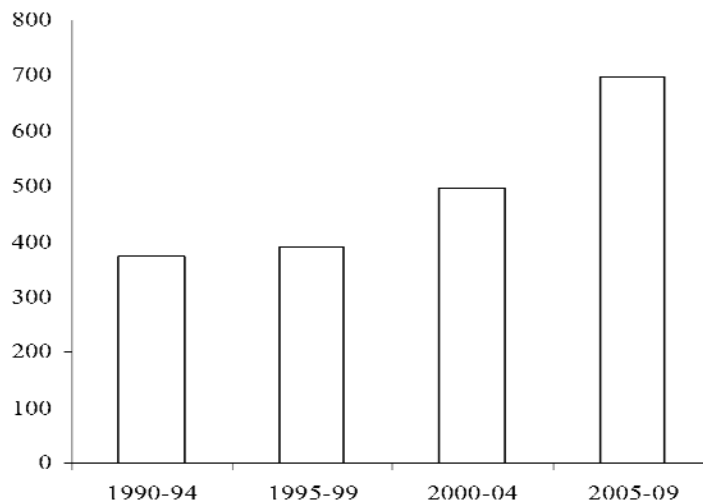
NOTE: Base years = 2005–2009.

Figure 2, below, replicates Figure 1 after indexing for changes over time to the Westlaw JLR database. Comparing Figures 1 and 2 underscores the need to account for the Westlaw database growth as the two Figures convey slightly different pictures. Although the unadjusted results in Figure 1 imply a steady, smooth rise over the four five-year increments, results that account for growth in the Westlaw JLR database over the past two decades in Figure 2 illustrate that empirical scholarship was essentially flat during the 1990s and has steadily risen since. Thus, while changes to the size of the Westlaw JLR database or the nature of the JLR documents themselves from 1990 to 1999 account for the rise in empirical legal scholarship, conveyed in Figure 1, such changes do not explain the increase observed in Figure 2 from 2000 to 2009. Thus, the increase during the twenty-first century's first decade can be construed as a “real” increase.

The adjusted results presented in Figure 2 largely comport with Professor Ellickson's assessment of his review of 1982–1996 data as well as Professor George's findings for 1994–2004. Professor Ellickson noted a “hint” of an increase,¹⁸ and a similar hint is discernable in Figure 2 from 1990 to 1994 and from 1995 to 1999. The “hint” of an increase in the production of empirical legal scholarship that Professor Ellickson noticed in 1996, however, has blossomed into a palpable increase since then that, if anything, has increased in velocity during the past decade. Judgments about whether these findings support the conclusion that empirical legal scholarship has become the “next big thing” are inherently subjective and, in any event, require more data.

18. *Id.* at 528–29 tbl.4.

FIGURE 2:
INDEXED TRENDS IN ARTICLE TITLES
THAT REFLECT AN EMPIRICAL APPROACH:
ALL LAW JOURNALS, 1990–2009



SOURCE: Westlaw JLR database, 1990–2009.

NOTE: Base years = 2005–2009.

II. EXPLANATIONS FOR THE RISE IN EMPIRICAL LEGAL SCHOLARSHIP OVER THE PAST TWO DECADES

What accounts for the rise in empirical legal scholarship? As reasons for the increase in empirical legal scholarship have been previously discussed,¹⁹ and out of respect for Professor Ulen's economics training, I will limit my discussion to two specific, though related, explanations that emerge with greater clarity from a law and economics perspective. One reason is that, on the supply side of the equation, an ever-increasing number of law professors possess either formal training in an array of social science fields (including, but not limited to, economics) or a substantial appreciation for social scientific methodologies. This increased supply in the pool of empirically inclined legal scholars has led to an increased production of empirical legal scholarship. A second reason, concurrent with (and, to some degree, a function of) an increased supply, is an increased demand for empirical legal scholarship by a growing number of specialty law journals expressly devoted to empirical legal scholarship. The interaction of these two factors—an increased supply of, and demand for, empirical legal scholarship—helps account for the rise il-

19. See, e.g., Theodore Eisenberg, *Why Do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741, 1741–46 (2004); Heise, *New Empiricism*, *supra* note 2, at 826–32.

lustrated in Figure 2. These two factors also help explain Professor Ulen's important contributions to this trend.

A. More Law-School-Based Scholars with Greater Social Science Preferences: The Supply of Empirical Legal Scholars and Relevant Data

Few teaching in law schools today would dispute the observation that the various changes to law faculty demographics over time include a greater presence of faculty that either possess only an advanced degree other than law or, more commonly, possess both a law degree as well as an advanced degree in a field other than law. Moreover, although helpful data sets remain a relatively scarce commodity, the number and utility of data sets germane to legal scholars have increased over time. As the supply of law professors with the necessary empirical skills and the number of relevant data sets increase, the cost of producing empirical legal scholarship falls. Finally, other barriers to empirical legal scholars, including attitudes and norms within the legal academy, recede over time and reduce the professional costs associated with pursuing an empirical research agenda. As associated costs fall, classic economic theory predicts an increase in production of empirical legal scholarship. On this prediction, economic theory gets it right.

Data on the major pool from which law faculty hiring committees draw evidences an increase in the number of empirically minded law professors. Many (but not all) candidates seeking to enter the law teaching market participate in the annual Association of American Law Schools (AALS) conference that is designed to facilitate the collision of supply (those seeking law faculty appointments) and demand (law school hiring committees seeking to identify and hire promising candidates).²⁰ Candidates participating in the annual conference complete a one-page form that is collected by the AALS and distributed to law schools in an annual Faculty Appointments Registrar (FAR). The candidate's one-page registrar form distills critical information, including any advanced degrees held by the candidates. From 2006 to 2008, the raw number of candidates seeking to join law faculties that possess both a law degree as well as an advanced degree in a field other than law increased over 45 percent (from 64 to 93).²¹ Moreover, the proportion of dual-degreed faculty candidates similarly increased from 7 to 10.6 percent during these three years. The 2006–2008 data, however, merely captures the tip of a palpa-

20. For an extensive description of the entry-level law professor market, see David W. Case, *The Pedagogical Don Quixote de la Mississippi*, 33 U. MEM. L. REV. 529, 530–33 (2003).

21. See Pati Abdullina, *2006-2007 AALS Statistical Report on Law Faculty*, ASS'N AM. L. SCH., <http://www.aals.org/statistics/0607/FAR-spss/degree.html> (last visited July 19, 2011); Pati Abdullina, *2008–2009 AALS Statistical Report on Law Faculty*, ASS'N AM. L. SCH., <http://www.aals.org/statistics/2009far/degrees.html> (last visited July 19, 2011).

ble trend that has been unfolding over the past decade.²² The relative and absolute number of law faculty with formal empirical training is important as such training reduces the cost of producing empirical legal scholarship.

Another traditional barrier to the production of empirical legal scholarship is the paucity of relevant data germane to legal issues of interest. Of course, scholars remain free to undertake the oftentimes Herculean task of creating a useful data set. Such a task, however, often imposes consequential investments of time, energy, and resources. Institutions, such as the U.S. Department of Justice's Bureau of Justice Statistics, the Administrative Office of the U.S. Courts, and the National Center for State Courts, play a critical role by generating an increasing number of data sets that inform legal research questions. State-level data with demonstrated interest to many legal scholars include multiyear data sets on civil justice,²³ and data sets generated by the U.S. Administrative Office are frequently germane to research questions involving federal courts.²⁴

Finally, a shift in attitudes and norms about empirical scholarship within the legal academy further reduces barriers for the empirically inclined legal scholar. Not too long ago, the unmistakable ethos among law faculty either looked down or askance at legal scholars pursuing empirical research. Even as recently as 2003, Professor Landes notes, "[i]t would only be a modest exaggeration to say that most law professors regard empirical work as a form of drudgery not worthy of first-class minds."²⁵ One consequence of this ethos is a palpable attitude that preferences theoretical work over empirical work of equivalent quality in the legal academy.²⁶

Although legal theory continues to occupy an exalted seat at the high table of legal academia, empirical legal scholarship's status has risen over time. Not surprisingly, the market has responded to this attitudinal shift. Not only do an ever-increasing number of those seeking to become law professors claim an expertise in various empirical methods, but law

22. See, e.g., William M. Landes, *The Empirical Side of Law & Economics*, 70 U. CHI. L. REV. 167, 167 (2003) (noting the high number of JD/PhDs in economics on the University of Chicago Law School faculty); Ulen, *supra* note 1, at 916 (observing that JD/PhD candidates "are among the most highly sought entrants into the legal academy").

23. For examples of recent scholarship that has used these types of data sets, see, e.g., Theodore Eisenberg et al., *The Decision to Award Punitive Damages: An Empirical Study*, 2 J. LEGAL ANALYSIS 577 (2010); Theodore Eisenberg & Michael Heise, *Judge-Jury Difference in Punitive Damages Awards: Who Listens to the Supreme Court?*, J. EMPIRICAL LEGAL STUD. 325, (2011); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263, 264–65 (2006); Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 624–25 (1997).

24. For examples of recent scholarship that has used these types of data sets, see, e.g., Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11*, 4 J. EMPIRICAL LEGAL STUD. 441, 452 (2007).

25. Landes, *supra* note 22, at 180.

26. *Id.*

schools themselves have begun to highlight their commitment to empirical legal studies through centers, programs, and conferences.²⁷ While empirical legal studies do not pose any immediate threat to legal theory's lofty stature among legal academics, it is safe to say that legal empiricists are no longer viewed as second-class citizens by their "pure theory" counterparts.

*B. An Increase in the Number of Law Reviews and Specialty Journals:
The Growing Demand for Empirical Legal Scholarship*

An increased demand for empirical legal scholarship complements an increased supply of empirical legal research. An increase in the number of specialty journals focusing on empirical legal scholarship accounts for some of the rise in demand. When it comes to explaining the growth of empirical legal scholarship (as illustrated in Figures 1 and 2), however, an anomaly in the Westlaw JLR database may actually lead to an undercounting of empirical legal scholarship. It stands to reason, of course, that the emergence of leading peer-reviewed journals that focus on empirical legal scholarship, such as the *Journal of Law and Economics* in 1958, *Law & Society Review* in 1966, the *Journal of Legal Studies* in 1972, the *American Law and Economics Review* in 1999, the *Journal of Empirical Legal Studies*²⁸ in 2004, and, even more recently, the *Journal of Legal Analysis* in 2009, would contribute to a net rise in empirical publications. At least one of the more recent journals, the *Journal of Empirical Legal Studies*, does not yet appear in Westlaw's JLR database. Thus, to the extent that articles published in the *Journal of Empirical Legal Studies* would have appeared in other journals included in the Westlaw JLR database, then the results presented in Figures 1 and 2 likely understate the growth in empirical legal scholarship.

III. WHAT TO MAKE OF THE INCREASE IN EMPIRICAL LEGAL SCHOLARSHIP?

Judge (and former Professor) Harry Edwards famously lamented about a growing rift between his perception of legal scholarly trends and the needs of the legal profession.²⁹ The American Bar Association similarly complains about a sense of "abandonment" of the legal profession's needs by law schools, especially elite law schools.³⁰ Many leading legal

27. See Suchman & Mertz, *supra* note 2, at 557–58.

28. In the interest of full disclosure, I have coedited the *Journal of Empirical Legal Studies* since 2005.

29. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) ("[M]any law schools ... have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy.").

30. See generally SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATIONAL AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MacCrate Report].

scholars, such as Professor Deborah Rhode, feel that law school faculty should be mindful of a duty to advance “understanding and promote improvement of their profession and its institutions.”³¹ Although in some ways empirical legal scholarship forms something of an easy target for critics, in other ways, however, empirical work is particularly well positioned to help bridge the gap, real or perceived, between the legal academy and profession.

Critics of empirical perspectives on legal questions note that the empirical movement discounts more traditional (and more familiar) legal analysis. Moreover, critics also assail some empirical research for failing to achieve its own objectives. For example, in pointing out flaws with empirical efforts to study federal appellate courts, scholars and judges point out that judicial decision-making models have been, thus far, unable to quantify judicial deliberations with accuracy.³² That such flaws exist should surprise few, especially for empirical scholarship published in the numerous student-edited law reviews. That specific problems, ranging from “[s]loppy survey techniques, skewed samples, and sweeping generalizations from unrepresentative findings,”³³ find their way into published law reviews will surprise only those unfamiliar with the tradition of student-edited law reviews. That editorial selections and decisions made by law students will falter on occasion is inevitable.³⁴ Owing partly to these problems, and others, some critics already question whether the current increase in empirical legal scholarship will last.³⁵

Given a context that already views legal scholarship with suspicion, the ascendance of empirical legal scholarship can easily be viewed as exacerbating a “gap,” real or perceived, between legal scholars and practitioners. A turn in legal scholarship towards coefficients, regression equations, standard errors, and many other arcane, technical aspects can easily fuel an argument that a rift between the legal profession’s needs and law professors’ wants has grown. Though such an outcome is entirely plausible, it is not inevitable. Indeed, to the extent that empirical legal scholarship provides some clarity on legal systems and how they function, such work can contribute to a *narrowing* of the gap between scholars and practitioners. Thus, I strongly suspect that even Judge Edwards and the authors of the *MacCrate Report* would approve of most, though assuredly not all, of today’s empirical legal scholarship.

See also Craig Allen Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession*, 30 WAKE FOREST L. REV. 347, 348 (1995).

31. Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1330 (2002).

32. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1963–66 (2009).

33. Rhode, *supra* note 31, at 1343.

34. *Id.* at 1356. Of course, a limited but growing number of law-school-based, peer-reviewed journals that specialize in empirical legal scholarship exist. Examples include the University of Chicago’s *Journal of Legal Studies*, Cornell’s *Journal of Empirical Legal Studies*, and Harvard’s *Journal of Legal Analysis*.

35. See, e.g., Robin Feldman, *Law’s Misguided Love Affair with Science*, 10 MINN. J.L. SCI. & TECH. 95, 111 (2009).

As Professor Nard notes, however, empirical scholarship is almost uniquely positioned to gauge the effect and efficacy, or lack thereof, of legal rules, decisions, and statutes.³⁶ Many judges, lawmakers, and lawyers want to know the societal consequences of their decisions and actions. Empirical legal scholarship can speak to this need by engaging such questions. Echoing a similar theme, then-Stanford Law School Dean, Kathleen Sullivan, described the “increasingly empirical study of law” as “one of the most dramatic trends in recent legal scholarship.”³⁷ What Dean Sullivan found particularly attractive was the promise empirical legal scholarship held for increasing our “knowledge of how law works.”³⁸ Finally, Professor Eisenberg notes how high-quality empirical scholarship can contribute to more accurate descriptions and analyses of how our legal system actually operates and is relevant to all those with a stake in the administration of justice.³⁹

IV. CONCLUSION: PROFESSOR TOM ULEN’S LEGACY AND REFRAMING QUESTIONS

For decades, intellectual historians have considered whether empirical legal scholarship has finally “caught on,” especially among legal academics. Results from this study support the proposition that while empirical work has, indeed, finally “caught on,” a clear acceleration in the production of empirical legal scholarship did not emerge until the twenty-first century. The present surge in empirical legal scholarship largely corresponds with the “sweet spot” of Professor Tom Ulen’s remarkable scholarly career.⁴⁰ But perhaps such a perspective misses a larger and more important point. Specifically, perhaps a more incisive question is not when did empirical legal scholarship finally “arrive” but, rather, why did it take so long?

As a Stanford-trained economist, Professor Ulen’s journey through the legal academy has assuredly seemed a bit odd to him at times. The paucity of empirical legal scholarship prior the 1990s bewildered many social scientists and, especially, economists. Too many critical legal questions (and theories) literally cry out for rigorous, systematic, empirical testing. Most of the social science disciplines related to law, such as

36. Nard, *supra* note 30, at 349–50.

37. Kathleen M. Sullivan, *Foreword: Interdisciplinarity*, 100 MICH. L. REV. 1217, 1222 (2002).

38. *Id.*

39. Theodore Eisenberg, *The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns*, 2011 U. ILL. L. REV. 1713.

40. Emblematic of Professor Ulen’s contribution to the recent surge of empirical legal scholarship is his contribution (along with University of Illinois colleagues Robert Lawless and Jennifer Robbenolt) to the publication of a new casebook for the field, ROBERT LAWLESS ET AL., *EMPIRICAL METHODS IN LAW* (2009). The publication of this new casebook makes the lives of those considering developing an empirical methods class for the law school environment a bit easier.

economics, benefit from a strong empirical tradition and ethos.⁴¹ Empirical methods, statistics, and econometrics are baked into most economists' graduate training. Rather than relying on anecdotes, one's intuition, or instinct, theory fuels research hypotheses that, in turn, are submitted to data for testing and falsification. Increasingly, data are being developed that address such questions with the needs of legal scholars in mind. Professor Ulen's own publications list reflects this approach (as well, of course, his economics training). Professor Ulen has consistently subjected his own intuitions to the rigor of data. Recent topics that Professor Ulen has explored range from the composition of the legal academy⁴² to the growing presence of law and economics in leading law reviews.⁴³

Indeed, this symposium honoring Professor Ulen's retirement serves as both a symbolic capstone not only to a wonderfully rich academic career, but also to Professor Ulen's and the University of Illinois College of Law's deep engagement with empirical legal studies. Almost one decade ago, Professor Ulen was the moving force behind an exceptionally successful symposium (also hosted at the University of Illinois College of Law) focusing on empirical and experimental methods in law that involved scholars drawn from an array of formal academic disciplines, including economics, and reflected a diverse set of methodological perspectives and tools.⁴⁴ At that time, Professor Ulen (and coauthor Professor Richard McAdams) noted that "[e]mpiricism is also a unifying theme of several of the increasingly influential interdisciplinary approaches to the study of law."⁴⁵ On this point, Professor Ulen is a classic "participant-observer." That is, not only was Professor Ulen's observation about empirical legal studies capacity for influence and unification in legal scholarship apt, but his wonderfully rich scholarly career helped make his observation come to life. And for that, those of us who benefit by standing upon Professor Ulen's scholarly shoulders owe a significant debt. Knowing Professor Ulen as I do, I am certain his admonition to the beneficiaries of his work, including myself, would be for us to do our best to contribute to the knowledge base in a way that benefits the scholars behind us.

41. *But cf.* Landes, *supra* note 22, at 171–72 (arguing that the subfield of law and economics is less empirical than the economics field generally).

42. *See, e.g.*, Thomas S. Ulen, *The Impending Train Wreck in Current Legal Education: How We Might Teach Law As the Scientific Study of Social Governance*, 6 U. ST. THOMAS L.J. 302, 329 tbl.1 (2009) (citing RICHARD A. POSNER, *CATASTROPHE: RISK AND RESPONSE* 206 (2004)).

43. *See, e.g.*, Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States*, 59 ALA. L. REV. 1555, 1569–70 tbl.1 (2008).

44. I had the pleasure of participating in the symposium. *See* Heise, *New Empiricism*, *supra* note 2.

45. McAdams & Ulen, *supra* note 4, at 791.