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It's Not All Statistics: Demystifying Empirical Research

“For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics....”

--Oliver Wendell Holmes (1897)<sup>1</sup>

Although Oliver Wendell Holmes was touting the merits of empirical research over one hundred years ago, only recently have legal academics created a journal and conference dedicated to empirical legal studies.<sup>2</sup> Interestingly, topics of interest to legal writing professors have been a source for empirical research well before the emergence these specialized journals and conferences. For example, empirical research comparing the use of legal prose to plain English in appellate briefs was taking place over 25 years ago.<sup>3</sup> In 1996, the second volume of *The Journal of Legal Writing Institute* included an empirical study evaluating which professors' comments students found the most useful.<sup>4</sup> More recently, the use of laptops in the classroom has become a topic for empirical research by law professors.<sup>5</sup>

Like many legal writing professors, I have found these and other articles with empirical research useful to both my understanding of the doctrine of legal writing and to my teaching of this subject. In engaging in my own empirical research, however, I have discovered that empirical research encompasses more than the statistics espoused by Oliver Wendell Holmes. The legal writing professor of the future should understand that empirical research can be done in a variety of ways and is a viable area for legal scholarship.

**Empirical research can involve numbers, but it does not have to.** The word empirical “denotes evidence about the world based on observation or experience. That evidence can be numerical (quantitative) or nonnumerical (qualitative); neither is any more empirical than the other.”<sup>6</sup> But, quantitative and qualitative methods produce different kinds of information.

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<sup>1</sup> Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 468-69 (1897).

<sup>2</sup> The *Journal of Empirical Legal Studies* was established in 2004 and the inaugural Conference on Empirical Legal Studies occurred in 2006.

<sup>3</sup> Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 LOY. L.A. L. REV. 301 (1987).

<sup>4</sup> Anne Enquist, *Critiquing Law Students' Writing: What the Students Say Is Effective*, 2 J. LEG. WRITING INST. 145 (1996).

<sup>5</sup> Kristen E. Murray, *Let Them Use Laptops: Debunking the Assumptions Underlying the Debate over Laptops in the Classroom*, 36 OKLA. CITY U. L. REV. 185, 186 (2011); Jana R. McCreary, *The Laptop-Free Zone*, 43 VAL. U. L. REV. 989 (2009).

<sup>6</sup> Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 2 (2002).

Quantitative research may provide information about a pattern, while qualitative research may provide an understanding of why such pattern exists.

Legal writing professors have used quantitative methods to study law students' expectations and attitudes about grades<sup>7</sup> and the use of intensifiers in appellate briefs.<sup>8</sup> These studies used statistical tests, but not all empirical studies do. Simple math such as determining percentages is often enough to generate data that can be quantitatively analyzed.<sup>9</sup> Many legal scholars, however, have noted the limitations of relying on numbers alone.<sup>10</sup>

Qualitative research can be done as alternative or in addition to quantitative research. Instead of focusing on numbers, qualitative research evaluates the how and why behind the numerical results. Open ended surveys, interviews, and textual analysis are typical research methodologies used in qualitative research. Such research could involve an in-depth study of law students with ADA<sup>11</sup> or analysis of the content of judicial opinions for judicial activism.<sup>12</sup>

Both quantitative and qualitative research offer information that is useful to the legal academy; neither one is more impressive or given greater weight.<sup>13</sup> Regardless of the type research, however, "a study can be no better than the data on which it is based, and that data need to be properly drawn and defined."<sup>14</sup> Consequently, designing a study is perhaps the most important step in empirical scholarship.

**Empirical research can take a lot of time, but it does not have to.** All scholarship takes time. Unlike traditional scholarship, however, the most laborious part of empirical scholarship occurs

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<sup>7</sup> Emily Zimmerman, *Do Grades Matter*, 35 SEATTLE U.L. REV. 305 (2012)

<sup>8</sup> Lance N. Long & William F. Christensen, *Clearly, Using Intensifiers Is Very Bad-or Is It?*, 45 IDAHO L. REV. 171 (2008).

<sup>9</sup> See e.g., Judith D. Fischer, *Got Issues? An Empirical Study About Framing Them*, 6 J. ASSN. LEG. WRITING DIRECTORS 1, 11 (2009).

<sup>10</sup> See Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 603, 610 (2007) (noting that judicial results are more easily quantified, qualitative research can evaluate the reasoning behind the result); See also Cass R. Sunstein et al., *ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* 65 (Brookings 2006) (stating "data capture[s] votes rather than opinions. For the actual development of the law, the opinion matters a great deal.").

<sup>11</sup> See e.g., Leah Christensen, *Law Students Who Learn Differently: A Narrative Case Study of Three Law Students with Attention Deficit Disorder (ADD)*, 21 J.L. & HEALTH 45 (2008).

<sup>12</sup> See e.g., David S. Caudill & Donald E. Curley, *Strategic Idealizations of Science to Oppose Environmental Regulation: A Case Study of Five TMDL Controversies*, 57 U. KAN. L. REV. 251, 263 (2009).

<sup>13</sup> See Michael Heise's Comment, *Combining Quantitative and Qualitative Methods in Socio-legal Research*, EMPIRICAL LEGAL STUDIES BLOG, [http://www.elsblog.org/the\\_empirical\\_legal\\_studi/2006/06/combining\\_quant.html](http://www.elsblog.org/the_empirical_legal_studi/2006/06/combining_quant.html) (June 21, 2006, 15:59 EST) (stating that "different methodological approaches possess different blends of strengths and weaknesses and none possess an exclusive lock on advancing knowledge") (last visited Nov. 30, 2012).

<sup>14</sup> Frank Cross et. al., *Above the Rules: A Response to Epstein and King*, 69 U. CHI. L. REV. 135, 137 (2002).

early on when designing and conducting a study. Writing about the results, on the other hand, is fairly straight forward. Articles involving empirical research follow a format which includes describing the study and reporting the results. Once a study is complete and the data collected, a significant portion of the article is already complete.

Ample time should be spent formulating a question, designing a study and then implementing the study. If you intend to conduct a study using students, your study must be approved by your school's institutional review board. Such approval may involve completing an application along with submitting your survey or questionnaire. Once your study has been approved, the time it takes to conduct the study depends on the method by which you intend to gather your data. Collecting data using focus groups and interviews takes more time than using a one-time survey or poll.

While some studies take several years design and conduct and involve a large number of subjects, not all empirical research needs to be this complex. Time-saving techniques include using pre-existing data or implementing a pre-existing survey.<sup>15</sup> Consider using a straightforward data collection method, such as a one-time survey<sup>16</sup> or a poll at the end of class,<sup>17</sup> to save time. If your study is rather involved, you can always write about your study before your results are complete.<sup>18</sup> The theory behind a study can be just as important as the results.

**Empirical research is becoming a pervasive part of legal scholarship.** In 2006, the AALS devoted its annual meeting to exploring the “place of empirical research in the scholarly mission of law schools.”<sup>19</sup> At this year's annual meeting, AALS is holding additional sessions on conducting quantitative and qualitative research. The *Journal of Empirical Legal Studies* and the annual Conference on Empirical Legal Studies have further elevated the profile of empirical research.

Empirical scholarship covers a variety of topics, from environmental law, to professionalism, to Supreme Court jurisprudence. More recently, as legal education changes to meet the needs of law students and their future employers, scholarship on teaching methods, student assessment,

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<sup>15</sup> See Robin Boyle, Jeffrey Minneti & Andrea Honigsfield, *Law Students Are Different from the General Population: Empirical Findings Regarding Learning Styles*, 17 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 153 (2009) (using The Building Excellence (BE) Survey, an online learning style assessment survey developed and administered by Performance Concepts International (PCI)).

<sup>16</sup> See e.g., Murray, *supra* n. 4 at 198.

<sup>17</sup> See e.g., Jeffrey Minneti & Catherine Cameron, *Teaching Every Student: A Demonstration Lesson That Adapts Instruction to Students' Learning Style*, 17 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 161 (2009).

<sup>18</sup> See e.g., Mary-Beth Moylan & Stephanie Thompson, *Enduring Hope? A Study of Looping in Law School*, 48 DUQ. L. REV. 455 (2010).

<sup>19</sup> <http://www.aals.org/am2006/theme.html> (last visited Nov. 25, 2012).

and student learning has become not only increasingly popular, but increasingly necessary.<sup>20</sup> Within the legal academy, legal writing professors are well positioned to write on these topics. We often use teaching methods other than the Socratic method, we assess our students throughout the semester, and, because of smaller class sizes and close student contact, we are particularly in-tune to our students' needs. These topics are also well suited for empirical research because they can be evaluated both qualitatively and quantitatively.

Regardless of your area of interest, before you begin empirical research consider consulting the variety of resources that exist on empirical research including: past conferences, published empirical research, and, of course, legal writing professors who engage in this type of scholarship. In addition, the recently published *Oxford Handbook on Empirical Legal Research*<sup>21</sup> is an excellent resource for those thinking of engaging in empirical legal research. After perusing these resources, you too will agree, that future of empirical scholarship includes more than just statistics.

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<sup>20</sup> See Eric A. DeGroff, *Training Tomorrow's Lawyers: What Empirical Research Can Tell Us About the Effect of Law School Pedagogy on Law Student Learning Styles*, 36 S. ILL. U. L.J. 251, 255 (2011) (noting that “[l]egal education lags behind other disciplines in the development of scholarship, and particularly empirical scholarship, about teaching, assessment and student learning”).

<sup>21</sup> OXFORD HANDBOOK ON EMPIRICAL LEGAL RESEARCH ( Peter Cane & Herbert M. Kritzer eds., 2010).