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## WHAT EMPIRICAL LEGAL SCHOLARS DO BEST

*Robert M. Lawless\**

This Essay, prepared for the Symposium honoring the work of Professor Bill Whitford, makes the claim that empirical legal scholars have strengths as compared to scholars from other disciplines who also do socio-legal scholarship. Most significantly, empirical legal scholars have an in-depth knowledge of fine-grained institutional detail that can unlock patterns that otherwise might remain hidden—Whitford’s work provides several examples. Empirical legal scholars also will tend to write about the legal system as such, helping us understand how the legal system works. Empirical legal scholars identify topics others might miss and often write scholarship that connects with policymakers. The claim here is not that empirical legal scholars are somehow “better”—indeed empirical legal scholars also have weaknesses. Rather, the claim is only that empirical legal scholars produce scholarship that is different, scholarship that expands our knowledge of how the world works, and hence scholarship that is useful.

1.

In the late 1990s, I remember vividly a colleague’s hallway conversation in which she described the two of us as “ELS” scholars. Befuddled, I asked to what she possibly could be referring and received what is now the obvious acronymic explanation in a law school hallway—“empirical legal studies. “Before that moment, I had thought of my work certainly as involving “studies,” but it was good to hear there was an *E* and *L* now to go along with the *S*. I have always marked that conversation as about the moment in time when the empirical legal studies movement became self-aware. Westlaw provides some confirmatory evidence with fourteen uses of the phrase “empirical legal studies” in the law reviews before 2000—six of which are only references to a title in a biographical footnote—and 972 uses of the phrase since then.

With self-awareness should come self-reflection. This Essay asks what it is that empirical legal scholars do well. Specifically, I claim that empirical legal scholars have some strengths over scholars from other disciplines who do socio-legal scholarship. That is not to claim that empirical legal scholars do “better” work. Rather, just as biochemistry, biophysics, molecular biology, and anatomy combine to give us a more complete understanding of living organisms, our knowledge from empirical legal studies combines with work from fields such as economics, political science, psychology, and sociology to give us a more complete understanding of the societies in which we live. In short, empirical legal

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\* Max. L. Rowe Professor of Law, University of Illinois.

studies provide something different than what we otherwise would have and hence something useful.

A Symposium honoring the work of Bill Whitford is an especially appropriate place to assess what empirical legal studies contributes to the broader social-science literature. Whitford was a scholar just doing studies to figure out how the world worked before it became fashionable to label them “empirical legal studies.” Indeed, empirically minded bankruptcy scholars like Whitford helped to inspire later generations of scholars to get out of their office and figure out how the bankruptcy system worked in practice.

The study of bankruptcy was one of the earliest subjects for empirical legal studies. For example, in 1929 then–Yale law professor William O. Douglas did face-to-face interviews with individual bankruptcy debtors in New Jersey and later Massachusetts. The findings were published in a series of law review articles from Douglas and his co-investigators.<sup>1</sup> Douglas’s goal was to trace “the social, economic, and legal antecedents” of bankruptcy.<sup>2</sup> He found, among other things, that medical debt and illness, divorce, and unemployment played a role in many bankruptcies.<sup>3</sup> The song often remains the same. Work continued in the arena of consumer bankruptcy with large-scale studies like the Brooking Institution Report<sup>4</sup> of the 1960s or the work of the Consumer Bankruptcy Project<sup>5</sup> from the 1980s to today as well as numerous papers on specific topics.

In corporate bankruptcy, it was again William O. Douglas who in 1938 spearheaded empirical studies, this time in the Douglas Report from the Securities Exchange Commission on corporate reorganization.<sup>6</sup> Legal scholars,

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1. See William Clark, William O. Douglas & Dorothy S. Thomas, *The Business Failures Project—A Problem in Methodology*, 39 YALE L.J. 1013 (1930); William O. Douglas, *Some Functional Aspects of Bankruptcy*, 41 YALE L.J. 329 (1932); William O. Douglas & Dorothy S. Thomas, *The Business Failures Project—II. An Analysis of Methods of Investigation*, 40 YALE L.J. 1034 (1931); William O. Douglas & J. Howard Marshall, *A Factual Study of Bankruptcy Administration and Some Suggestions*, 32 COLUM. L. REV. 25 (1932).

A discussion of Douglas’s empirical work appears at Robert M. Lawless & Elizabeth Warren, *Bankruptcy & Insolvency*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL STUDIES 202–04 (Peter Cane & Herbert M. Kritzer eds., 2010).

2. Clark et al., *supra* note 1, at 1013.

3. Douglas & Marshall, *supra* note 1, at 52.

4. DAVID T. STANLEY & MARJORIE GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* (1971).

5. The Consumer Bankruptcy Project (CBP) is a multi-wave, multi-investigator project started by Professors Teresa Sullivan, Elizabeth Warren, and Jay L. Westbrook in 1981 and in which this Essay’s author is involved. A history of the CBP along with a detailed methodology for the 2007 wave appears in the appendix to Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A.E. Pottow, Deborah K. Thorne & Elizabeth Warren, *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 487–98 (2008). Data from the CBP have been reported in dozens of articles and several books such as TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *AS WE FORGIVE OUR DEBTORS* (1999); TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* (2001); and *BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS* (Katherine Porter ed., 2012).

6. The U.S. Government Printing Office published the SEC report in eight parts from 1937–1940 all under the title “Report on the Study and Investigation of the Work, Activities, Personnel, and

however, largely abandoned empirical work on corporate bankruptcy and left the subject to the business schools. Even in that discipline interest was low. Things changed in the 1990s after Whitford and his coauthor, Lynn LoPucki, published a series of studies on large corporate Chapter 11 reorganizations.<sup>7</sup> Empirical study of corporate bankruptcy boomed. Consider, for example, that a comprehensive literature review on bankruptcy in the *Handbook of Empirical Corporate Finance* cites no articles before 1977, and of the 132 works that are cited, 84% were published in 1990 or after.<sup>8</sup> Of course, correlation is not causation, and undoubtedly many factors such as data availability and cheaper computing power almost certainly contributed to the trend. But, for those of us who remember the well-deserved attention that the LoPucki and Whitford articles received, it is hard to believe that the explosion of interest was entirely coincidental.

Whitford's corporate reorganization work with LoPucki will be a source of primary evidence for my claim that empirical legal scholars have strengths unique to their scholarly voice. Making a broad claim about the nature of scholarship probably should entail an exhaustive reading of many different works and an extensive bibliography. That did not happen for this short Essay. Given that both this Essay's author and audience are most familiar with bankruptcy, most all of the evidence comes from that field. My claim generalizes, however, to any field where empirical legal scholars toil. It has to be admitted that this Essay provides only thin evidence for the generalization, but no ready reason comes to mind as to why the claims in this Essay would not generalize beyond the field of bankruptcy.

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Functions of Protective and Reorganization Committees," which came to be known as the "Douglas Report." Overviews of the report can be found at E. Merrick Dodd, Jr., *The Securities and Exchange Commission's Reform Program for Bankruptcy Reorganizations*, 38 COLUM. L. REV. 223 (1938); and John F. Meck, Jr., *Book Review*, 54 HARV. L. REV. 1253 (1941) (reviewing THE SECURITIES AND EXCHANGE COMMISSION, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL, AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES. PART VIII: A SUMMARY OF THE LAW PERTAINING TO EQUITY AND BANKRUPTCY REORGANIZATIONS AND OF THE COMMISSION'S CONCLUSIONS AND RECOMMENDATIONS (1940)).

7. Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125 (1990) [hereinafter LoPucki & Whitford, *Bargaining*]; Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669 (1993); Lynn M. LoPucki & William C. Whitford, *Patterns in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 78 CORNELL L. REV. 597 (1993); Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11 [hereinafter LoPucki & Whitford, *Venue Choice and Forum Shopping*].

8. Edith S. Hotchkiss, Kose John, Robert M. Mooradian & Karin Thornburn, *Bankruptcy and the Resolution of Financial Distress*, in 2 HANDBOOK OF EMPIRICAL CORPORATE FINANCE 235 (B. Espen Ecko ed., 2008). The pioneering and continuing work of Ed Altman, although predating the works mentioned in the text, was primarily concerned with predicting bankruptcy filings rather than investigating how insolvent firms work and what happens to them. *E.g.*, Edward I. Altman, *Financial Ratios, Discriminant Analysis and the Prediction of Corporate Bankruptcy*, 23 J. FIN. 589 (1968).

## 2.

An initial task is to define what we mean by an “empirical legal scholar”—that is, a person who does empirical legal studies. I will use the terms “empirical legal scholar” and “empirical legal studies” interchangeably to describe the person and the activity. These terms might include any of the following sorts of scholars. First, there are scholars at law schools with a law degree doing empirical work, some of whom also have a doctoral degree in another field such as economics, psychology, sociology, or political science. Second, there are scholars at law schools without a law degree but possessing a doctoral degree in another field. Third, there are scholars in other departments who study law and the legal system. We would clearly recognize all of these persons as “empirical” scholars, but what makes them also “legal” scholars?

For purposes of this Essay, I will define an “empirical legal scholar” as a mindset, and the mindset to which I refer is perhaps best defined by anecdote. When I was a new law professor, a more senior colleague once described to me the shifts he had seen in legal scholarship. He said that when he was first a law teacher just after World War II, the people gathered in the faculty lounge tended to see themselves as lawyers first and law faculty second. He described how that mentality had flipped to law faculty first and lawyers second, with the point being that the change in mindset directly led to a change in the type of scholarship that was being produced. Hence, law faculty now wrote for other law faculty rather than for the judiciary and practicing bar.

The benefit of the anecdote is that it helps to capture the idea around which we can define an “empirical legal scholar.” We are looking for a mindset about the intended audience. Specifically, we are looking for scholars who write principally for a legal audience—judges, lawyers, policymakers, and law-school scholars. That is not to say these scholars might not also want the attention of scholars in other fields, but the primary audience is a legal one.

As a matter of practice, our definition thus would include most every scholar with a terminal degree in law and exclude most every scholar with a doctoral degree in another field working outside of law schools. Scholars at law schools with doctoral degrees, either with or without a law degree, would be within the definition depending on how they envision their scholarship. Another way to phrase it is that we want to include scholars at a law school who happen to be economists or psychologists or sociologists or political scientists but exclude economists or psychologists or sociologists or political scientists who happen to be at a law school. The definition offered here is not meant as an idealized definition for all times and purposes of what makes for an empirical legal scholar but just to delineate the claims made in this Essay.

Some may read this Essay as claiming that empirical legal studies constitutes a distinct field of study, a claim that might meet resistance. Many empirical legal scholars identify principally with a subject-matter specialty like any other legal scholar. Colleagues who do empirical legal studies tell me they think of themselves as criminal law scholars or torts scholars, and I think of myself as a bankruptcy scholar. Whether empirical legal studies is a distinct field,

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however, is ultimately not at issue in this Essay. The claim is only that empirical legal scholars have advantages that produce useful scholarship that otherwise would not be produced. The fact that empirically minded scholars of law tend to come together in their own conferences suggests the utility of the enterprise. The label that is put on the enterprise ultimately does not matter. Academic disciplines are here to serve us, not vice versa.

3.

Perhaps the most significant strength that empirical legal scholars possess is an understanding of fine-grained institutional detail in the legal system. That is, empirical legal scholars tend to have deep knowledge of the legal doctrine and of the systems in which it operates, deep knowledge that comes from experience in legal practice and policymaking settings that many empirical legal scholars possess. Ted Eisenberg, a leader of the empirical legal studies movement, articulated similar sentiments: “But nonlawyers have the distinct disadvantage of often not understanding legal doctrine or the state of the law. This sometimes leads to blunders that compromise empirical analyses. The need for legally sophisticated empirical analysts is clear.”<sup>9</sup>

Consider, for example, the question of violations of the absolute priority rule, the requirement generally stated that in a Chapter 11 senior classes must be paid in full before junior classes receive anything.<sup>10</sup> The optimal level of absolute priority rule violations is not zero. To know what distributions are due essentially requires a firm valuation, an often-contested proposition. Senior creditors will often find it efficient to “buy the peace” rather than suffer the expenses and delay of lengthy litigation.<sup>11</sup> Nonetheless, some articles report alarmingly high incidences of violations of absolute priority in three-fourths of cases.<sup>12</sup> These articles, however, tend not to be careful about the distinctions between different types of “senior classes.” Absolutely priority is not necessarily violated if a “senior creditor” holding a \$100 million claim receives only \$80 million while payment is made to “junior creditors.” We need to know more about the claims.

The general statement of the absolute priority rule is only correct as far as it goes. More developed, the rule requires that a class of secured creditors receive the value of their collateral. The secured creditor’s right is to recover the collateral; being a secured creditor is not an abstract senior position. It is not a contract right to be paid first. To the extent a creditor’s claim exceeds the value of its collateral, the creditor is treated as unsecured. Thus, the same creditor can be treated in a secured creditor class and an unsecured creditor class. The upshot

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

10. *E.g.*, Julian R. Franks & Walter N. Torous, *An Empirical Investigation of U.S. Firms in Reorganization*, 44 J. FIN. 747, 752 (1989).

11. LoPucki & Whitford, *Bargaining*, *supra* note 7, at 144.

12. *See, e.g.*, Franks & Torous, *supra* note 10; Lawrence A. Weiss, *Bankruptcy Resolution: Direct Costs and Violation of Priority of Claims*, 27 J. FIN. ECON. 285 (1990); *see also* Hotchkiss et al., *supra* note 8, at 255–56 (collecting studies).

is that a creditor with a \$100 million claim and collateral worth \$80 million will be in a secured class for \$80 million and in an unsecured class for \$20 million. So long as the creditor receives the \$80 million value of its collateral, absolute priority is observed as to that portion of the claim. The creditor is unlikely to receive full payment on its unsecured claim. Less-than-full payment on the unsecured portion of a secured claim while payment is made to junior claimants is not by itself an absolute priority rule violation.

In their study, LoPucki and Whitford get these institutional details right by focusing not on the “seniority” of claims but on the split of distributions between unsecured creditors and equityholders.<sup>13</sup> If one is trying to understand how the bankruptcy system operates and whether the legal system respects creditor’s rights, these very fine institutional details matter. The legal doctrine gives the secured creditor an interest in its collateral and a deficiency claim for the unpaid amount. Treating the secured creditor’s claim as a contractual priority to seniority may simplify a valuation of claims against a firm, but it distorts empirical findings and the lessons that can be drawn therefrom.

On the consumer side, an institutional detail that matters is Chapter 7 versus Chapter 13 bankruptcy. A Chapter 7 contemplates liquidation of the debtor’s nonexempt assets, excluding assets serving as collateral, with the proceeds used to pay creditors. A Chapter 13 contemplates the debtor devoting all of his or her disposable income to creditor repayment over a three- to five-year plan. In both chapters, any unpaid debts (with a few exceptions) are discharged, although the debtor must continue to pay any secured debt if the debtor wants to retain the collateral.

Although the procedures may seem to have similar outcomes, they are quite divergent in practice. Over 90% of Chapter 7 debtors do not have any nonexempt assets to turn over.<sup>14</sup> For most Chapter 7 debtors, the process is nothing more than a filing of papers and a discharge within six months. In Chapter 13, the debtor does not receive a discharge until after completion of the three- to five-year plan, and perhaps only 40% of debtors complete the plan.<sup>15</sup> The 60% of Chapter 13 filers who do not complete the repayment plan are thrust back into their prebankruptcy situation and also will have paid an attorney’s fee that is three times as great as paid by the average Chapter 7 filer. Rather than treating the chapters as equivalents, an empirical legal scholar will account for these differences in assessing the bankruptcy system.<sup>16</sup>

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13. LoPucki & Whitford, *Bargaining*, *supra* note 7.

14. Dalié Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795, 800–01 (2009).

15. The plan completion rate was 45% for 2013, the most recent year for which data are available. The plan completion rates were 37% in 2012 and 22% in 2011. See *2013 Report of Statistics Required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, UNITED STATES COURTS, <http://www.uscourts.gov/Statistics/BankruptcyStatistics/bapcpa-report-archives/2013-bapcpa-report.aspx> (last visited Sept. 15, 2015).

16. Compare Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy’s Fresh Start*, 92 CORNELL L. REV. 67 (2006) (studying Chapter 7 debtor outcomes), with Katherine Porter, *The*

Another example that goes not to the doctrinal details but to the legal system itself as an institution is the Chapter 13 experience, which varies dramatically from district to district. Jean Braucher's valuable work showed that these differences have their roots in the local legal culture of the lawyers, trustees, and judges in the community.<sup>17</sup> National averages hide this variation. Studies that ignore the strong influence of local legal culture fail to learn the lesson from the old story about the person with one foot in a bucket of boiling water and the other foot in a bucket of ice water but who is just fine "on average."

The attention to institutional detail of empirical legal scholars provides strengths not only in what gets studied but also how it gets studied. Any empirical study is only as good as its research design. Getting institutional detail right can extend the validity of empirical work and lead to discoveries that otherwise might not have appeared.

An example perhaps comes from my own work. A colleague who worked on apologies in legal contexts and I had been discussing whether we would see similar effects in bankruptcy. A previous study had found no effect of an apology in a bankruptcy context, but we felt the study lacked verisimilitude. It had asked bankruptcy judges whether they would "discharge" a particular debt. Bankruptcy judges can enter a judgment of nondischargeability in an adversary proceeding if a creditor has proven the specific elements of a particular dischargeability exception, but they do not have free discretion simply to deny "discharge." Even if judge-respondents understood the task they were being asked to perform in the research, they were being asked to perform a task that did not correspond to their daily experience.

Attention to institutional detail in our study meant putting the bankruptcy judges in a more familiar setting, even in the context of a pencil-and-paper survey. Hence, we asked the judges to rule on a motion to confirm a Chapter 13 plan to which the Chapter 13 trustee had objected. The fact setting was based both on a problem in a leading textbook and a survey instrument that had been used successfully in a previous study. The characteristics and finances for the hypothetical debtors were based on median debtors from the Consumer Bankruptcy Project. The results were that the judges who heard an apology from the debtors were more likely to view the debtors as remorseful which in turn led to higher confirmation rates, findings consistent with a broader literature finding apology effects in a broad array of legal settings.<sup>18</sup>

The examples so far show that empirical legal scholars deploy a deep knowledge about institutional detail, but empirical legal scholars also care about

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*Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103 (2011) (studying Chapter 13 dropouts).

17. Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501 (1993). I am indebted to Bill Whitford for this example of institutional detail that is important to empirical legal studies.

18. Jennifer K. Robbennolt & Robert M. Lawless, *Bankrupt Apologies*, 10 J. EMPIRICAL LEGAL STUD. 771 (2013).

these institutional details. Stated differently, empirical legal scholars write papers that help us better understand these fine institutional details. The reasons are disciplinary. Because they write for the legal community, they seek to explain legal phenomenon as such.

LoPucki and Whitford's work again provides a good example. In motivating the research in *Venue Choice and Forum Shopping*, they state, "The power to choose the forum for a large bankruptcy reorganization is important because it determines where hundreds or thousands of parties will go to court and may be determinative of the outcomes of cases."<sup>19</sup> These are points that empirical legal scholars quickly see and care about. Not all courts are the same. Law firms representing large corporate debtors now routinely explore the case precedent in a particular jurisdiction before filing exactly so as to increase the likelihood of a favorable outcome for their clients. Judges matter too. Even a judge who has no motivation other than faithfully following the law may reach outcomes that differ from a similarly faithful jurist. The question of venue choice and forum shopping is of immense importance to the bankruptcy system, especially in light of later work suggestive of an unhealthy competition for large corporate reorganizations.

Empirical legal scholars are not "better" because they might write a paper about venue choice and forum shopping. Rather, empirical legal scholars are just more likely to identify the issue as well as more likely to be motivated to write about it. Scholars from other fields may be more interested in the courts as social organizations or how a bankruptcy process might affect firm value. Empirical legal scholars write about venue choice as such, exploring how venue choice might be distorting case outcomes. These efforts produce knowledge that otherwise might not get generated, helping us to better understand our world and make it a better place.

Another example comes from work underway on the U.S. Patent and Trademark Office (PTO). In a series of papers, Michael Frakes and Melissa Wasserman have been looking at the incentives of the PTO and how these incentives may be distorting the granting of patents. So far, their results suggest the PTO's fee schedule biases the PTO toward granting patents with "relatively stronger sensitivity" for the types of patents where the PTO will see the highest patent fees.<sup>20</sup> Later work provided evidence that in time of budgetary constraint, the PTO is more likely to preference patent applications in the queue that are cheaper to process and that are more likely to result in continuation fees.<sup>21</sup> Another paper in the series examines the structure of the PTO's career path and suggests that it is creating time pressures that result in the overgranting of

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19. LoPucki & Whitford, *Venue Choice and Forum Shopping*, *supra* note 7, at 13.

20. Michael D. Frakes & Melissa F. Wasserman, *Does Agency Funding Affect Decisionmaking?: An Empirical Assessment of the PTO's Granting Patterns*, 66 VAND. L. REV. 67, 70 (2013)

21. Michael D. Frakes & Melissa F. Wasserman, *Does the U.S. Patent & Trademark Office Grant Too Many Bad Patents: Evidence from a Quasi-Experiment*, 67 STAN. L. REV. (2015); Michael D. Frakes & Melissa F. Wasserman, *The Failed Promise of User Fees: Empirical Evidence from the U.S. Patent and Trademark Office*, 11 J. EMPIRICAL LEGAL STUD. 602 (2014).

patents.<sup>22</sup> Frakes and Wasserman's work ties into the scholarship of organizational behavior and political economy. The U.S. patent system is tremendously important to the ever-increasing share of knowledge-based assets in the world's largest economy. Yet, no one had studied the incentives that organizational structure and funding created on the legal issue of whether a patent would be granted. That is, no one had explored these issues for the sake of the legal outcome the system is producing.

It is not my contention that scholars from other fields would not be able to conduct such studies or that empirical legal scholars limit themselves to these sorts of studies—Frakes and Wasserman certainly discuss the relevance of their findings for broader issues of innovation policy. My contention is only that the disciplinary incentives make empirical legal scholars more likely to tackle studies that study the legal system for itself. Further, empirical legal scholars tend to have practice experience that increases the likelihood of success and the utility of these studies. Understanding the legal system for itself improves the administration of justice for those who it serves.

#### 4.

A claim that empirical legal scholars bring strengths to the topics they study is not a claim they do not have weaknesses. The first weakness is also one of the strengths just mentioned. Empirical legal scholars will tend to study the legal system as such. This research orientation is not a problem so long as one is studying a legal system that is completely disconnected from the society in which it operates. In this case, studying the legal system for itself and to better understand it makes sense in the same way we might study, say, the properties of a black hole to better understand it. Of course, no legal system operates in isolation from the social contexts in which it occurs. Indeed, Whitford's body of work emphasizes the social context of law, which is a central theme of the law-and-society movement or, as it is sometimes called, the Wisconsin School.

Thus, inquiries that count case outcomes or understand case outcomes as a function of some set of legal inputs can be extraordinarily enlightening, but they are also only part of the story. When empirical legal studies fail to acknowledge the big picture—fail to acknowledge that the legal outcomes are contingent upon social context—the results can overstate the role that the legal system plays. Concluding that doctrine, judges, and lawyers play the dominant roles may appeal to those who write for law professors, lawyers, and judges, but it is not good social science.

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22. Michael D. Frakes & Melissa F. Wasserman, *Is the Time Allocated to Review Patent Applications Inducing Examiners to Grant Invalid Patents?: Evidence from Micro-Level Application Data* (Nat'l Bureau of Econ. Research, Working Paper No. 20337, 2014), available at <http://www.nber.org/papers/w20337.pdf>; see also Brian Fung, *Inside the Stressed-Out, Time-Crunched Patent Examiner Workforce*, WASH. POST: THE SWITCH (July 31, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/07/31/inside-the-stressed-out-time-crunched-patent-examiner-workforce/> (discussing the Frakes and Wasserman paper).

Those who read our *Credit Slips* blog have a ready example. Our regular readers will know that my postings tracking the bankruptcy filing rate border on the obsessive. The monthly ups and downs of the daily filing rate are tracked along with an eye toward whether they represent an increase or decrease from the previous year. A reader once took me to task for all the attention on the filing rate, questioning what these data told us.<sup>23</sup> My response was that knowing about the filing rate could help lawyers gauge consumer demand for their services, leads to a better understanding of the workload in the federal bankruptcy courts, tells us about how people come to “save up” for bankruptcy because of the cyclical nature of the filing rate,<sup>24</sup> and informs lenders about the collectibility of their accounts. The reader was right, however, to ask the question. These explanations are all internal to the bankruptcy system and justify the work as a means to give us more knowledge about the system itself. They tell us nothing about the social contexts in which bankruptcy operates. The information about the bankruptcy system adds to our knowledge and hopefully helps to improve the system. Again, that is a valuable service. The mistake is when empirical legal scholars do not merely just stop at the legal system but also fail to consider that a broader context exists.

A different weakness that can tend to crop up in empirical legal studies is the tendency to try to prove a case. The legal training that empirical legal scholars tend to have emphasizes evidence as a means toward a conclusion. The standard for conviction, for example, is not that the evidence is consistent with guilt but that the evidence proves the defendant is guilty beyond a reasonable doubt. Although one can only speculate, this training seems to push some empirical legal scholars toward thinking of their research studies in the same way.

The mental frame of looking for “proof” is not a starting point for good social science. Evidence accumulates gradually. Knowledge advances incrementally. Popperian reasoning—that is, reasoning based on the teachings of Karl Popper—teaches that one can never prove the truth of a proposition. One only can falsify a proposition. Our falsifications may accumulate and suggest, perhaps even strongly suggest, a particular state of the world, but they never will really be proof. Regardless of its explanatory force as a philosophy of science, Popperian reasoning provides the basis for the commonly used tools of statistical inference. Such thinking does not come easily to the legally trained:

Many a legal dispute revolves around whether Fact A or Fact B is true. Lawyers are hired to represent a particular side of the case, and the job of each lawyer is to find evidence supporting that side of the case. Inconsistent evidence is often ignored or, if the other side uses the inconsistent evidence, explained away. Of course, such an approach is the antithesis of the scientific method, which calls for the generation of hypotheses, experimentation, and the weighing of evidence.

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23. See Bob Lawless, *Downward Bankruptcy Filing Trend Continues*, CREDIT SLIPS (Apr. 5, 2012, 11:26 AM), <http://www.creditslips.org/creditslips/2012/04/downward-bankruptcy-filing-trend-continues.html>.

24. Cf. Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289 (2010).

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In an environment that rewards persuasion, it is not surprising that the legal profession has always valued those with strong oral or written rhetorical skills. We have seen evidence of the emphasis on rhetoric sometimes when listening to new law professors describe their first research projects as “I am going to establish such-and-so” or “I want to prove this.” Such a description suggests the conclusion has already been reached, and the scholar’s job is merely to marshal evidence to prove its truth. In every other social science, there is an importantly different emphasis: the investigator articulates a hypothesis about some real phenomenon and then sets out to find objective data that will confirm or refute the hypothesis. While she hopes to persuade her audience that the hypothesis and the search for confirmation or refutation is important and interesting, she does not seek to persuade an audience by mere rhetoric. The scholar’s ultimate goal is a true account of the world, not winning an argument.<sup>25</sup>

Again, the claim here is that these are only tendencies and certainly not the path that all empirical legal scholars follow.

A related point some make is that empirical legal scholars tend to lack the necessary skills to do empirical work or at least to do it well. Whatever weaknesses empirical legal scholars have, I do not think this is one of them. Certainly, there are bad empirical legal studies, but there are bad studies in many fields. And, there is bad legal scholarship that does not use any empirical methodology. I am skeptical there is a higher incidence of “bad” scholarship in empirical legal studies than in other areas. Empirical legal studies certainly can run afoul of established methodologies for research design and statistical inference. In these cases, mistakes can be apparent and their relative incidence can be much higher than might appear for other scholarly voices. As a non-empirically minded colleague once revealingly said to me, “You guys [and gals] do work where you can be wrong.” That sounds correct about empirical scholarship, but writing in a different scholarly voice where one is making claims that cannot be objectively wrong does not make the scholarship of that voice less prone to error. The mistakes in empirical legal studies just can be easier to spot.

## 5.

This Essay has made a number of empirical claims about the strengths of empirical legal scholars, yet has provided only limited anecdotal evidence. The irony is not lost on the author. Essentially, the Essay lays out a number of testable hypotheses, not that I expect them to be tested anytime soon.

My claims here are based on experience and principally my own experiences, although they are informed by the work of empirical legal scholars such as Whitford and many others. As such, the claims here best fit the U.S. legal academy. There is now an empirical legal studies movement in Europe and burgeoning movements in South America and East Asia. These movements may offer the best promise for legal studies to begin communicating across borders as

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25. ROBERT M. LAWLESS, JENNIFER K. ROBBENOLT & THOMAS S. ULEN, *EMPIRICAL METHODS IN LAW* 14 (2010).

the other social sciences do. We may be reaching a world where the writings of a Moldovan contract scholar will be of interest to a contract scholar in the United States and vice versa.<sup>26</sup> This convergence may be led by empirical legal scholars, but the claims here are based largely around the structure of the U.S. legal academy where most professors have a professional degree in law and have some real-world experience either in the private or governmental sector. Academies in other countries may not produce empirical legal scholars with the sorts of strengths the Essay identifies. It could be, for example, that an academy dominated by persons with PhD's in law with no practice experience might produce empirical legal studies that have the strengths of research from other disciplines rather than a uniquely "legal" voice. The composition of non-U.S. legal academies and the effects on empirical legal studies are again ultimately empirical questions.

If the claims about the unique strengths of empirical legal scholars are correct, then what should leaders in the empirical legal studies movement do? First, they should organize events where empirical legal scholars can gather to share their scholarly voice. Of course, this is already happening with events like the Conference on Empirical Legal Studies and smaller subject-specific conferences on empirical studies in intellectual property and bankruptcy. These efforts should continue and expand.

Second and somewhat paradoxically, empirical legal scholars should reach across interdisciplinary boundaries and should do so unapologetically. We should not worry that we have to add to sociology or psychology or economics or other fields. It is fine when we do so, but it is also fine when we do not. We can bring the perspectives of empirical legal studies for themselves to add to our knowledge of how the world works. These efforts also are somewhat occurring already on the wholesale level through the Law and Society Association but more on the retail level as empirical legal scholars make connections with scholars from other fields. At our home institutions, we should nurture these bridges across departments and make our law schools a hub of socio-legal studies.

Third, empirical legal scholars should be developing new methodologies that are particularly suited to the study of the legal system. These efforts are nascent. I am aware, for example, of a paper developing a test statistic for the abnormal market return for a single stock in an event study, an important point for damages in securities litigation.<sup>27</sup> To the extent methodology includes creating new outcome measures, LoPucki's efforts to define "success" in a

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26. The reference comes from the device in 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, 894–95, where he uses the Moldovan contract scholar to identify why legal scholarship is of limited interest across borders but then hypothesizes that we are seeing an increasing "scientification" of law typified by socio-legal studies. *Id.* at 897.

27. Jonah B. Gelbach, Eric Helland & Jonathan Klick, *Valid Inference in Single-Firm, Single-Event Studies*, 15 AM. L. & ECON. REV. 495 (2013).

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corporate reorganization are perhaps another example.<sup>28</sup> Other examples escape me, which is either a sign that they are not occurring or that I do not read broadly enough (or perhaps both). In some ways, the development of specialized methods is the acid test for the claims here, for if empirical legal scholars do not ultimately deploy their own methods—continue only to borrow methods from elsewhere—then the claim to empirical legal scholars having unique strengths is less likely to be true.

This Essay, however, hypothesizes that the claim is true. The evidence offered in these pages is admittedly incomplete. A bigger point comes from looking back on the work done by scholarly pioneers in the bankruptcy field alone by the like of William O. Douglas, Elizabeth Warren, Lynn LoPucki, and Bill Whitford. They have helped to build something. If nothing else, the Essay asks empirical legal scholars to reflect on what that is.

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28. These efforts captured primarily on LoPucki's website for the Bankruptcy Research Database. See UCLA-LoPucki Bankruptcy Research Database, *The BRD-Success-Modeling Project*, UCLA SCHOOL OF LAW (last visited Sept. 15, 2015), <http://lopucki.law.ucla.edu/success-modeling-project.htm> (last visited Sept. 15, 2015); see also Lynn M. LoPucki, *The Bankruptcy Success Modeling Project: A Participant's Guide*, AM. BANKR. INST. J., Aug. 2012, at 32.

