

By Cynthia Georges

Empirical Research in the Law

What the latest legal research is telling us about how the world works



CHERYL TADIN

Professors Pauline Kim, left, and Andrew Martin discuss empirical research projects with political science graduate student Amanda Driscoll.



An early champion of empirical research in the law, Professor Pauline T. Kim acknowledges that while not all legal questions are empirical in nature, empirical studies can be particularly useful for elucidating policy issues.

“Some legal questions cannot be answered empirically due to data or other methodological limitations, while others raise fundamental value choices,” says Kim, associate dean for research and faculty development. “But where policy debates get bogged down over clashing assumptions about how the world, in fact, works, empirical studies can help to sort out these questions.”

An expert in employment law, workplace privacy, and litigation and the courts, Kim has played a key role in building a dynamic empirical research

community at the law school. Faculty have turned to sharp-edged empirical analyses to examine provocative topics, such as the use of injunctive relief to combat employment discrimination and the role of national courts in articulating public policy in modern democracies. They also have analyzed judicial pay and performance; patterns in corporate fraud prosecutions; measurements of judicial ideology; and the significance of procedural justice in negotiations.

The law school's Center for Empirical Research in the Law (CERL) has fostered much of this work. A member of its core faculty, Kim has leveraged its resources in a number of projects, including a recent one on how judges make decisions in the federal courts of appeal.

Her study, published in the spring 2009 *University of Pennsylvania Law Review*, looks at decision-making on federal appellate courts' three-judge panels. This institutional structure is designed to promote discussion and collaboration among judges, who, in turn, presumably make better decisions as a panel.

Scholars have posited many theories to explain how federal appeals court judges who hear cases together influence one another's votes—what scholars call “panel effects.” However, Kim's research is one of the first to do so empirically. “The study explores when panel effects occur in an effort to better understand why they occur,” she says.

To learn how judges influence one another, Kim tested two competing explanations of panel effects. She analyzed data from 787 sex discrimination cases decided between 1995 and 2002. In her study, Kim constructed an empirical test to distinguish whether judges are influenced by the internal deliberations of the panel, or by the judges' strategic anticipation of how their decision will be viewed by the Supreme Court or their other circuit colleagues.

Kim found that panel effects do not appear to be the result of a dynamic exclusive to the three-judge panel, but are conditioned on the preferences of all the appellate judges on the circuit. “Judges are strategic actors influenced not only by their policy goals, but also by the institutional context in which they operate,” she observes.

“Pauline's research is very interesting,” says Andrew D. Martin, professor of law, CERL founding director, and professor in and chair of the Department of Political Science in Arts & Sciences. “It's what we call a judicial politics project, and it holds important implications for understanding judicial policy and institutional design.”

Kim and Martin have collaborated on a handful of projects supported by CERL, a burgeoning epicenter for interdisciplinary studies at Washington University. Among them is a study of government-initiated, employment discrimination litigation in the federal courts.

With Professor Margo Schlanger, now on the law faculty at the University of Michigan, the research team collected and coded more than 2,000 cases initiated by the Equal Employment Opportunity Commission (EEOC) between 1996 and 2006.



The Center for Empirical Research in the Law uses sophisticated computer modeling to assist faculty with empirical research.

Data analysis is under way, to be followed by reports that will shed light on how the EEOC operates, litigation dynamics, and the extent to which judges shape the outcomes of cases.

Another CERL-supported project, the U.S. Supreme Court Judicial Database, has received National Science Foundation funding. This project extends the Supreme Court Judicial Database, which was originally created by Michigan State Professor Harold Spaeth, and collects critical information about Supreme Court cases from 1953 to the present.

CERL is collaborating with five universities—Michigan State, Northwestern, University of Pennsylvania, Princeton, and Stony Brook—to back-fill data from 1789 through 1953. When complete, the repository will serve as the most comprehensive and useful statistical record available for the Supreme Court.

International Courts in Modern Democracies

CERL IS AS MUCH A VEHICLE for advancing the study and practice of empirical research as it is a rich training ground for students eager to sample its goods.

“CERL provides an interface between the law school and the political science department, whose Law & Courts program was recently ranked No. 1 in the country,” Martin says. “Our students have done amazingly well because CERL involves them in the life of the law school. In turn, our PhDs have helped the law faculty improve upon their scholarship.”

Washington University students—“literally an army,” Martin says—have been recruited to collect and code decision data in yet another ambitious CERL-supported project: a cross-national study of 60 constitutional courts.

“If you look across the globe, you will see that these courts play very different roles in modern democracies,” Martin says. “Our study will look at why some courts exert influence over public policy outcomes while others do not. It also will attempt to answer if such influence can be induced by institutional design, or if other factors such as public opinion hold sway.”

Working with Matthew J. Gabel, associate professor of political science in Arts & Sciences, and with professors at both

Emory University and the University of Rochester, Martin is testing three competing arguments at the center of theoretical debates about the relationship between institutional design and judicial influence. To this end, the team is building a Web-based information system to coordinate data collection from courts around the world.

“We’re tapping the entire University community, especially those with specialized language skills, because many of the opinions are written in languages other than English,” Martin adds.

Judicial Pay and Performance

WHEN U.S. CHIEF JUSTICE John G. Roberts claimed that low judicial salaries were creating a “constitutional crisis” in his 2006 report on the federal judiciary, Professor Scott A. Baker wanted proof. Baker knew that many in the legal field shared Roberts’ view. The salary discrepancy between judges on the bench and attorneys in private practice had grown increasingly wider, fanning heated debates.

But has the salary gap compromised the quality and performance of the federal judiciary? Baker set out to answer the question with an empirical study that compared judicial salaries to those salaries of the next best financial opportunity for most circuit judges. His findings were published in the *Boston University Law Review* in 2008.

Baker recorded data for 259 circuit judges appointed between 1974 and 2004. Law firm partnership salaries in the region at the date of judicial confirmation provided a relevant benchmark for attorneys the same age as the judges in the study. Examining a wide range of judicial output measures—voting patterns, citation practices, speed of disposition, and opinion quality—the study found little evidence to support Chief Justice Roberts’ claim of a constitutional crisis.

Baker views “this study as a first glimpse at the issue, based on the best available opportunity data,” which, he says, “without doubt, is imperfect.” When it comes to important issues like judicial salaries, Baker says, one study is not enough. Multiple studies are needed from a host of different angles, using many different data sets.

Baker, who works at the intersection of law and economics, spends his time on an array of topics. His other co-authored studies include one on the economics of limited liability partnerships among New York law firms, which was published in the *University of Illinois Law Review*. He and his co-researchers also are studying the effects of major patent court decisions on the stock prices of firms filing amicus briefs. Baker specifically has documented effects resulting from the 2006 decision of the U.S. Supreme Court in *eBay Inc. v. MercExchange LLC*.

Tracking Corporate Fraud

EMPIRICAL RESEARCH has spread to topics exploring white collar crime and the corporate fraud trials that have peppered the news.

Dozens of executives charged with securities and bank fraud, conspiracy, perjury, obstruction of justice, and other crimes are awaiting trial in U.S. courts. How might these cases impact the spiraling rate of corporate fraud and the prosecutorial practices aimed at controlling it?

Kathleen F. Brickey, the James Carr Professor of Criminal Jurisprudence, is tackling that question. A nationally recognized expert on corporate and white collar crime, Brickey tracks data on major corporate fraud prosecutions that have been brought to light since the Enron scandal broke in 2001.

For a seminal study, Brickey collected data that covers the period of March 2002 through January 2006, examining trials relating to scandals at 17 major companies. She documented her findings in a paper, “In Enron’s Wake: Corporate Executives on Trial,” published in the *Journal of Criminal Law & Criminology*.

Analyzing data sets from the Enron case, as well as high-profile cases involving top-line executives at companies such as Adelphia, Credit Suisse First Boston, ImClone, Qwest, Tyco, and WorldCom, Brickey notes that by the end of January 2006, some 46 defendants had gone to trial in 23 separate prosecutions and that a number of other executives who had been charged were awaiting trial. More significantly, as of mid-2004, prosecutors had already struck plea agreements with 73 defendants, many of whom became cooperating witnesses and testified against their peers.

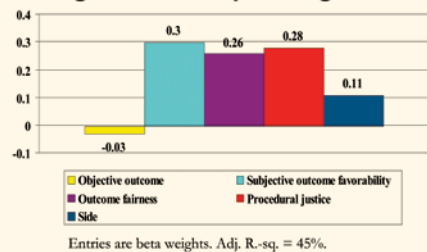
She concludes that “while guilty pleas and cooperation agreements are strategically significant in developing these cases, the number of CEOs, CFOs, and other senior managers who have been charged and tried belies critics’ assertions that mid-level managers who plead guilty become scapegoats, while their superiors go scot free.”

Brickey continues to update and expand the data set, which provides the most comprehensive picture of executives on trial available to date.

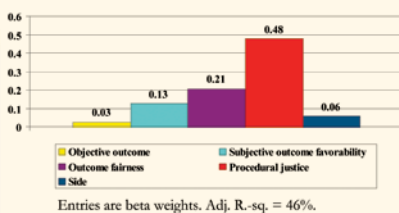
Justice in Legal Negotiation

IN HER DAYS AS A HARVARD LAW STUDENT, Professor Rebecca Hollander-Blumoff learned that legal endowments play a critical role in legal negotiations. Soon after going into practice at a small white collar criminal defense firm in New York, however, she noticed a phenomenon she had not read or studied much:

Willingness to accept the agreement



Collaboration



The dynamics between attorneys influenced negotiations just as much as the legal rules the parties brought to the table.

“Prior relationships, reputations, and negotiation behavior played a much bigger role than I had expected,” Hollander-Blumoff says. “I began to think more about how the study of human behavior—the psychology of negotiation—could contribute meaningfully to the advancement of the field of legal negotiation.”

Her recent empirical scholarship in negotiations has produced several papers, including “Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential” (with Tom R. Tyler), published in *Law & Social Inquiry*; “The Objective Antecedents of Procedural Justice in Bilateral Negotiation,” currently in progress; and “Just Negotiation,” selected for presentation at the Stanford–Yale Junior Faculty Forum in May 2009.

Hollander-Blumoff argues that fairness of process in negotiation is critically important in legal negotiation. “Negotiators are affected by procedural justice,” she explains. “That effect is independent of the effect that favorability of the outcome (how good the outcome is) has on people, and it is independent of the effect of how fair the outcome is.”

“People care, independently, about the way they are treated in negotiation. When people feel that they have been treated more fairly, they are more enthusiastic about accepting the agreement.”

Of her studies, Hollander-Blumoff says, “Empirical work is a great way to connect legal theory and legal doctrine to what lawyers and other players in the legal system really do. That’s a key reason why it’s gained currency.”

An Empirical Study of Empirical Research

“AT THE HEART OF THE LEGAL ACADEMY and legal profession, there remains skepticism, and at times even hostility, toward empirical scholarship aimed at capturing the impact of ideology on judicial behavior,” says David S. Law, professor of law and of political science.

Law and his co-author Joshua B. Fischman of the University of Virginia law faculty set out to remedy the situation in their

paper, “What Is Judicial Ideology, and How Do We Measure It?” Published in the spring 2009 *Washington University Journal of Law & Policy*, the study takes a critical look at a major building block of empirical work in judicial behavior—namely, the definition and measurement of judicial ideology.

According to Law, there are many ways by which one can measure judicial ideology, but little has been written about how researchers should go about choosing among these methods. “We acknowledge and thoughtfully discuss some of the recurring theoretical and practical obstacles of doing empirical research on judicial ideology,” Law says. “We also offer a practical guide to empirical researchers as to how different approaches have sought to tackle these obstacles, how the approaches perform relative to one another in different contexts, and how context-specific the selection of an appropriate measurement approach happens to be.”

Active in a number of scholarly fields, Law has written on topics including voting and publication patterns among court of appeals judges, the nature of judicial power, and the globalization of constitutional rights.

In his most recent study, he draws on interviews he conducted in Japan with judges, officials, scholars, and members of its Supreme Court to explore why Japan’s Supreme Court has failed to actively enforce the country’s postwar constitution. The resulting paper, “The Anatomy of a Conservative Court: Judicial Review in Japan,” is forthcoming in the *Texas Law Review*.

Law says: “The more that empirical scholarship is produced in both quality and quantity—thanks in no small part to the leadership role that Washington University Law is playing—the more that scholars elsewhere must, themselves, engage in empirical scholarship, if they are to participate in the relevant debates.” ■■■

[Research Excerpt]

“This article attempts to transcend the partisan divide and engage the debate over substantive media regulation ... It seeks to impose order on, and develop some insights from, arguments for and against substantive media regulation that allow for some government role in making the mass media more broadly accessible and more informative about matters of public concern.”

Gregory Magarian, Professor of Law
“Substantive Media Regulation,”
The George Washington Law Review