

Empirical Legal Studies in America

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Sichuan University
University Immersion Program

July 8-10, 2018

Agenda for 1st Class

- Sunday, July 8, 8:15AM-11:45AM
 - With 30 minutes of breaks
- Introduction to Course
- History of Empirical Legal Studies in America
 - 15 minute break
- Field Experiments
 - Greiner, "The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future" (2013)
 - 15 minute break
 - Bertrand & Mullainathan, "Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Discrimination" (2004)

Introduction to Course

Empirical Legal Studies

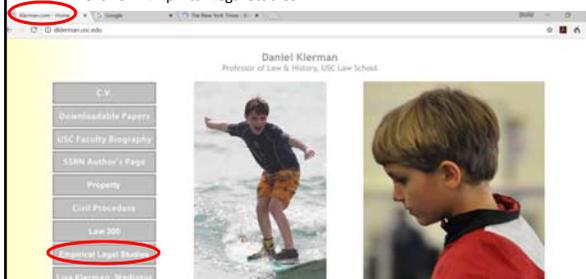
- Empirical legal studies is the use of data to understand the legal system
 - Data is usually, but not always, quantitative
 - Helps understand which laws work and which do not
 - Provides information for legal reform
 - Provides information for lawyers to do their best for clients
- Cannot really understand legal system by reading laws and cases
 - Need to understand how works in real world
 - Often disjunction between
 - "Law on Books"
 - "Law in Action"
 - Law can
 - Be ignored
 - Be used in unanticipated ways
 - Be misapplied
 - Face resistance
 - Have unanticipated consequences
 - Fail for many reasons

This Course

- Introduces different types of empirical studies
- Focuses on design
 - What question is study trying to answer?
 - How does it try to answer that question?
 - How does it distinguish correlation from causation?
 - What data does it use?
 - How does it analyze that data?
 - What are strengths and limitations of study design and analysis?
- Will not teach statistics
 - Impossible in just 3 days
 - Statistics are important
 - I highly recommend that you take a course in statistics
 - But statistics are less important than the design of a study
 - If study design is strong, statistics will be relatively easy and confirm what can be seen in simple graphs and charts
 - If study design is weak, even the best statistics cannot produce persuasive results

Webpage

- Materials on webpage
 - Readings, slides, audio recordings
 - www.klerman.com
 - Click on "Empirical Legal Studies"



Empirical Legal Studies in America
Sichuan University
University Immersion Program

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[Syllabus](#)

	Topic	Readings	Slides	Slides for Notes	Audio Recording
Sunday, July 8	Introduction History of ELS Field Experiments	Lisensky 2011 Lisensky et al. 2013 Becerra & Mullainathan 2014	S1	N1	A1
Monday morning, July 9	Lab Experiments Designing Empirical Studies Natural Experiments	Kothari et al. 2001 Fustein & Martin 2010 Sunstein et al. 2004	S2		A2
Monday afternoon, July 9	Panel Data Event Studies Cross-Country Studies	Deaton & Cartwright 2018 Deaton & Cartwright 2018 Gallagher et al. 2013	S3		A3
Tuesday, July 10	Contracts Qualitative Research File Review	Mansilla-Wingler 2007 Bernstein 1992 Snuckert 2006	S4		A4

History of Empirical Legal Studies in America

Early History

- Oliver Wendell Holmes, Jr. (1841-1935)
 - Lawyer, legal philosopher, and US Supreme Court Justice
 - "For the rational study of the law the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."
 - The Path of the Law (1897)
- Louis Brandeis (1856-1941)
 - Lawyer, US Supreme Court Justice
 - "Brandeis Brief"
 - Muller v. Oregon (1908)
 - Legal argument that relies on statistics rather than legal authority
 - Argued that long working hours had a negative effect on the "health, safety, morals, and general welfare of women."



Legal Realism

- Legal philosophy that began in 1920s America
 - Roots in Germany, still influential today
- Legal reasoning is more than logical deduction and literal interpretation
 - Inevitably involves considerations of policy, morality, economics, justice, politics, and ideology
 - Emphasis on how judges decide hard cases
 - Judges have great power to interpret or even make law in common law system
 - Policy, morality etc. often have unconscious effect on legal reasoning
 - Or, even if judge is conscious of effect of policy, morality etc.
 - Judge may not refer to those factors in written decisions
- Legal realists thought policy, morality, economics
 - Should be studied rigorously
 - Should be referred to explicitly in legal opinions
- Led to some empirical study of law, but limited because
 - Social science of time did not provide good hypotheses and frameworks
 - Statistical techniques and computing too primitive

Law & Society Association

- Founded 1964
- Primarily sociologists
 - But also law professors, historians, and political scientists
- Journal: Law & Society Review
 - Continues to be influential
- Large annual conferences
- Marc Galanter
 - University of Wisconsin Law School
 - “Why the ‘Haves’ Come out of Ahead” (1974)
 - “Reading the Landscape of Disputes” (1983)
 - “The Vanishing Trial” (2004)



Kalven & Zeisel, The American Jury (1966)

- Law professor and sociologist
 - At University of Chicago
- Compared jury and judicial decisions
 - Jury of 12 citizens decides most criminal cases in US
 - No legal training
 - Also many civil cases
- Questionnaires to judges
 - How did jury decide case?
 - How would you have decided the case?
- Judge and jury agreed 75% of time
 - Jury more likely to acquit than judge
 - Judges thought jury decisions “without merit”
 - Only 1/3rd of times which disagreed
 - So less than 10% overall



Law & Economics



- Ronald Coase, "Problem of Social Cost" (1960)
- Richard Posner, *Economic Analysis of Law* (1st ed. 1973)
- Coase & Posner were professors at the Univ. of Chicago Law School
 - Posner was also judge on 7th Circuit Court of Appeals (1981-2017)
- Initially mostly theoretical
 - Coase did some qualitative empirical research into cases
 - Posner did some quantitative work with Bill Landes
- Most importantly
 - Linked law to economics
 - Encouraged aspiring law professors to get Ph.D.s in economics
 - Encouraged economists to work on legal topics
 - As economics turned more and more to empirical studies
 - Law & economics followed, so more and more empirical work
- Best journals: *Journal of Legal Studies*; *Journal of Law & Economics*; *Journal of Law, Economics & Organization*; *American Law & Economics Review*; *International Review of Law & Economics*
- Conferences: American Law & Economics Association (ALEA); NBER Summer Institute

Deborah Hensler



- Political Scientist
 - Founder of RAND Institute of Civil Justice, 1979
 - Work mostly funded by US government or insurance companies
 - Professor at USC Law school and now Stanford Law School
- Study of Civil Justice Reform Act of 1990
 - Legislation reforming civil justice had little effect on litigation cost, delay, or lawyer satisfaction or views of fairness

JELS, CELS, and SELS



- Journal of Empirical Legal Studies (JELS)
 - Founded 2004 by Theodore ("Ted") Eisenberg, Cornell Law School
- Conference on Empirical Legal Studies (CELS)
 - Annually 2006 to present
 - Held at US Law Schools
 - But international scholars welcome
- Society for Empirical Legal Studies
 - (SELS)
 - Runs JELS and CELS
- CELS Asia
 - 2017 in Taiwan
 - 2019 at Sichuan University?
- CELS Europe
 - Annually starting in 2017

Empirical Legal Studies Today

- Brings together different types of scholars
 - Law Professors
 - Many with Ph.D.s in Economics, Political Science, Psychology or other social sciences
 - Social Scientists
 - Economists, psychologists, political scientists....
 - Statisticians
- Often heavily influenced by other disciplines
 - Economics, political science, psychology, etc.
- Often collaborations between law professors and social scientists
- Scholars from all over the world
- Many different legal topics
 - criminal law, corporate and securities law, contract, property, tort, family law, legal history, antitrust, Supreme Courts, legal decisionmaking, legislation, regulation, juries
- Journals: JELS, Law & Society Review, law reviews, law & economics journals mentioned in previous slide, social science journals
- Conferences: CELS, American Law & Economics Association, Law & Society

Discussion

- Any questions about the history of empirical legal studies in America?
- Any criticisms of Ted Eisenberg's study?
- Could you write an article similar to Ted Eisenberg's about empirical legal studies in China or Asia?

Field Experiments

Correlation & Causation I

- Recent turn to experiments in legal scholarship
- Hard to prove causation with observational data
- Problems
 - Selection bias
 - Unobserved characteristics differ between treatment and control
- Consider study about relationship between visits to doctors and health
 - Would find that people who visited doctor more often were sicker
 - Negative correlation between number of visits to doctor and health
 - But does that mean that doctor visits cause bad health?
 - Probably not
 - Problem is that treatment and control differ
 - Treatment: those who go to the doctor more often
 - Control: those who never go to doctor or go to doctor less frequently
 - Likely that those in treatment group are less healthy to begin with
 - Most people go to the doctor when/because they are sick
 - Those in control group are more likely to be healthy
 - Healthy people go to doctor infrequently (e.g. yearly check up)

Correlation & Causation II

- Could try to control for people's health
 - Compare people with similar diseases who go to doctor and who do not
 - But may not cure problem
 - People who go to doctor voluntarily may have other good habits
 - Comply with treatment, eat better, procrastinate less
 - So, even if find that those who go to the doctor more often are healthier
 - Good outcomes may not be cause by doctor
 - Good outcomes may be caused by patient's good habits
- Experimental solution
 - Randomly assign sick people to treatment or no treatment
 - Random assignment with large number of subjects means that treatment and control groups are likely to be very similar
 - Big ethical problems
 - Unethical to deny people treatment known to be effective
 - But can assign people different treatments
 - If shortage of doctors or money in health care system, might be able to randomly assign people to treatment and no treatment
 - Or might be ethically required to treat those most in need

A Legal Example: Mediation

- Suppose trying to study effectiveness of mediation
 - Does mediation increase probability of settlement?
- Could compare settlement rates of cases where parties went to mediator and those which did not
 - But selection bias problem
 - Treatment: Cases that went to mediation
 - Control: Cases that did not go to mediation
 - Treated cases may be different
 - Perhaps judges refer cases to mediation, because they think they are otherwise less likely to settle?
 - Or perhaps because they think the case is less likely to settle?
 - Perhaps litigants choose mediation because more (or less) likely to settle?
- Could try to control for settlement probability
 - But hard to predict whether case would settle
- Experimental solution
 - Randomly assign cases to mediation or no mediation
 - May be ethical, if mediation provided free, but not enough mediators

2 kinds of experiments

- Field Experiments
 - Randomly vary conditions in real world
 - Greiner (2013)
 - Effect of free lawyer on housing disputes
 - Advantage: realism
 - Disadvantage: expensive, not always possible or ethical
 - Inspired by natural sciences, medical research, economics
- Lab experiments
 - Give subjects fact pattern on paper or computer
 - Ask to make legal decision or to negotiate agreement
 - Babcock & Loewenstein (1997)
 - Settlement negotiation and self-serving bias
 - Advantages: cheap, easy to control everything
 - Disadvantage: external validity (applicability to real world)
 - Inspired by psychology
 - Will discuss in next class

D. James (“Jim”) Greiner,
Cassandra Wolos Pattanayak,
and Jonathan Hennessy



The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future (2013)



Do Lawyers Matter?

- Research question
 - Do lawyers matter?
 - Does a client represented by a lawyer do better in court than a client who represents him or herself?
- Answer might seem obvious, but not
 - If law is relatively simple, people might be able to represent themselves well
 - Judges may help persons without lawyers
 - If lawyers are corrupt, they may not help clients
 - But only enrich themselves by charging high fees
 - Prior empirical work was mixed

Selection Bias in Studies of Lawyers

- Observational studies of lawyers suffered from selection bias
 - Those with weaker cases may be more likely to hire lawyers
 - Those less able to represent themselves may be more likely to hire lawyers
 - Those less able to represent themselves may have kept worse records and therefore had weaker cases
- Or, maybe those with stronger cases were more likely to hire lawyers
 - More worthwhile to spend money on lawyer if payoff is higher
 - Richer people more likely to hire lawyers
 - Their cases may be stronger, because they may be more effective at preserving evidence
 - Or because it's only worthwhile for a richer person to bring a case if it's likely to be meritorious
- Often hard to know how selection bias affects observational studies
 - Multiple effects likely
 - May get no effect when there is a real effect (false negative)
 - Observed effect may be spurious (false positive)

Greiner's Experiment

- Experimental subjects: 129 renters facing eviction from housing who sought help from legal aid society and/or for whom legal aid lawyers thought a lawyer might be helpful
- Treatment group
 - 76 persons represented by free legal-aid lawyer
- Control group
 - 53 persons given information and help with forms and procedures, but NOT represented by a free legal-aid lawyer
- Subjects randomly assigned to treatment and control groups
 - Lose benefit of experiment if persons not randomly assigned
 - E.g. if those with greater need given a lawyer
 - E.g. if those more likely to benefit given a lawyer
 - E.g. if lawyers chose clients they want to represent
 - E.g. if judges chose persons who get representation

Greiner's Experiment II

- Ethical because legal aid could not help everyone
 - Even those who did not get a lawyer got some help
 - No one harmed by being in study
- Even with randomization, there may still be differences between treatment and control
 - Need to check "covariate balance"
 - Do treatment and control groups look similar on things can observe (e.g. why being evicted, male/female, black/white, disabled, etc.)
 - Try to control for differences, if any, during analysis
 - Less of a problem, if sample is large
- Can sometimes assure covariate balance by selecting "stratified random sample"
 - Randomize men and women separately, so same % of men and women in treatment and control
 - Randomize based on other characteristics (e.g. race, disability)
 - Not always possible or practical

Greiner's Experiment III

- Experiments are never perfect
 - 2 people assigned a free lawyer didn't use them
 - But still need to analyze with treatment group
 - Otherwise subject to selection bias
 - 6 people not assigned a free lawyer hired one anyway
 - Still need to analyze with control group, otherwise selection bias

Results I

	Treated Rate	Control Rate	P-Value
Actual Possession, Evictor	0.34	0.62	0.01
Judgment of Possession, Evictor	0.17	0.75	<0.01

Results II

- Those with representation also were required to pay much less rent to keep their apartments
 - Judge approved counterclaims (such as lack of maintenance) that excused failure to pay rent
- Treatment group: 1.9 months rent
- Control group: 9.4 months rent

Results III			
	Treated Average (SD)	Control Average (SD)	P-Value
Case Length, Days Complaint to Judgment	117 (128)	69 (67)	0.01
Number Prejudgment Motions, Evictor	0.36 (0.92)	0.42 (0.82)	0.38
Number of Prejudgment Motions, Occupant	1.39 (1.55)	0.81 (1.53)	0.03
Number of Prejudgment Motions, Occupant	1.43 (1.67)	1.06 (1.96)	0.29
Number of Judge Rulings	0.27 (0.89)	0.51 (0.87)	0.07
Case Had Evidentiary Hearing	0.04 (...)	0.00 (...)	0.28

Other Studies

- Greiner has conducted other studies of representation
- 2012 study found no effect of free legal assistance by Yale law students in unemployment benefits disputes
- Why different results?
 - Complexity of law?
 - Importance of factual investigation?
 - Degree to which judges were involved and helped?
 - Quality of representation?
- 2012 study involved no outreach
 - So those control group may have been better informed and motivated and thus better able to represent themselves

Discussion

- Any questions about Greiner's study?
- Any criticisms of Greiner's study?
- Could you conduct a similar study in China?
 - What do you think it would find?
- Can you think of other field experiments you could conduct?

Marianne Bertrand & Sendhil Mullainathan



Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Discrimination (2004)



History of Discrimination in U.S.

- There is a long history of discrimination in the United States
 - Enslavement of African American until 1865
 - Discrimination against racial minorities was legal and open until 1960s
 - Women did not achieve legal equality until 1970s
 - Gays, lesbians, and transgender people are still fighting for equality before law
- Civil Rights Act of 1964 outlawed discrimination in employment, education, and public accommodations (hotels & restaurants) on basis of race, national origin, religion, or gender
 - But law has been difficult to enforce
 - How prove discrimination?
 - Employer can usually come up with non-discriminatory explanation for not hiring or promoting
 - Suing employer for discrimination may harm reputation and employment prospects

Debates About Discrimination Today

- Many white males think that there is no more discrimination
 - Confident that they don't discriminate
 - Think others don't
 - Think women and minorities benefit from "affirmative action"
- Asian American have sued Harvard and other elite colleges for discriminating against them in admissions
 - Allege discrimination in favor of whites, African Americans, and Hispanics
- Most women and minorities think discrimination continues
 - Tell stories about discrimination in their own lives
- Most agree that much less discrimination than before 1965
 - But hard to measure extent to which discrimination continues
 - And therefore extent to which law and policy should try to counteract

Observational Studies

- Many observational studies show women and minorities do worse
 - Women and minorities earn less
 - African Americans and Hispanics less likely to go to prestigious colleges
 - African Americans and Hispanics more likely to go to prison
- But these results may not reflect discrimination
 - May reflect women's choices regarding family
 - May reflect lingering effects of historical discrimination
 - May reflect culture, effort, individual choices, or other factors

Experimental Studies

- Some field experiments relating to discrimination
- "Paired-tester" studies
 - White and black persons try to rent apartments
 - White and black person are matched on income and other characteristics
 - If most blacks are told "no apartments for rent," and most whites are shown apartments, then that is evidence of discrimination
 - Men and women apply for same or similar jobs
 - Many and woman matched on qualifications
 - If more men offered jobs than women, that is evidence of discrimination
- Problems
 - White and black testers may not be the same in relevant ways
 - White person may dress better, speak better, be more polite
 - Especially a problem because black testers may want study to prove discrimination, so may, consciously or unconsciously, present themselves worse so that study shows discrimination
 - Similar issues with male/female testers

Bertrand & Mullainathan Study

- Sent nearly 5000 resumes for over 1300 employment positions in sales and administration
 - Some high quality resumes and some low quality resumes
 - High and low quality resumes were randomly assigned names
 - Names that are more typically white or African American
 - Greg or Jamaul
 - Emily or Lakisha
 - Co-variate balance assured by stratified randomization
 - 4 resumes sent for each job
 - One high-quality African American
 - One high-quality white
 - One low-quality African American
 - One low-quality white
 - All resumes same sex for each job

Results				
	Percent callback for White names	Percent callback for African-American names	Ratio	Percent difference (p -value)
Females	9.89	6.63	1.49	3.25 (0.0003)
Males	8.87	5.83	1.52	3.04 (0.0513)

- Also, high quality resumes helped African Americans less than they helped whites
- Large employers did not discriminate less than smaller ones

Discussion
<ul style="list-style-type: none"> • Were you surprised by the results? • Do you have any criticisms of the study? • Could a similar study be done in China? <ul style="list-style-type: none"> • What do you think it would find?

Tomorrow
<ul style="list-style-type: none"> • Morning and afternoon classes • Monday, July 9 (morning) <ul style="list-style-type: none"> • Lab Experiments • How to Do Empirical Legal Research • Natural Experiments • Monday, July 9 (afternoon) <ul style="list-style-type: none"> • Panel data: Crime • Event studies • Cross-Country Studies
