

ABF American Bar Foundation
EXPANDING KNOWLEDGE • ADVANCING JUSTICE

RESEARCHING LAW

AN ABF UPDATE

VOL 21 | NO 4 | FALL 2010

EMPIRICAL LEGAL RESEARCH AT THE ABF

**INSIDE: THE 2010 SUMMER
DIVERSITY FELLOWSHIP PROGRAM**

IN MEMORIAM: BARBARA ADELL CURRAN



Shari Seidman Diamond

Shari Seidman Diamond is a Research Professor at the American Bar Foundation and is Howard J. Trienens Professor of Law and Psychology at Northwestern University School of Law. A leading empirical researcher on the jury process and legal decision-making, she has published extensively in both law reviews and behavioral science journals. Her publications on juries have been cited by the U. S. Supreme Court, as well as by other federal and state courts.

She has taught at the University of Chicago, Harvard, and the University of Illinois at Chicago, served as editor of the *Law & Society Review*, and was president of the American Psychology-Law Society. As a member of the ABA's American Jury Project, she helped draft the Principles for Juries and Jury Trials adopted in 2005. She currently serves on the Seventh Circuit Committee on Pattern Criminal Jury Instructions.

Empirical Legal Scholarship in Law Reviews & Multi-Method Research in Empirical Legal Studies

“The empirical study of law” is a phrase often heard at the American Bar Foundation. For those who conduct empirical research, its meaning is clear, but ABF's constituency—the Fellows, the organized Bar, the larger legal community, students, and other interested parties—in short, the readership of this magazine—may wonder about the nature of empirical research in law, what it entails and why it is valuable.

Recently, ABF Research Professors Laura Beth Nielsen and Shari Seidman Diamond have published articles that shed light on this kind of research and its place in legal scholarship. In her article, “The Need for Multi-Method Approaches in Empirical Legal Research,” Laura Beth Nielsen reports on how large scale, multiple methods empirical

research projects—for which ABF is uniquely positioned—are ideally suited to analyze a phenomenon as multi-faceted as law and its function in society. In “Empirical Legal Scholarship in Law Reviews,” Shari Diamond traces the growing acceptance of empirical research in mainstream legal scholarship.

THE EMPIRICAL STUDY OF LAW

Before reporting on these new publications, however, what is meant by the empirical approach to the study of law? What sets empirical research—the approach that is almost always at the core of ABF research projects—apart from other scholarly pursuits in the field of law? According to J. Baldwin and G. Davis in the article, “Empirical Research in Law,” *The Oxford Handbook of Legal Studies* (2003), empirical legal research “...involves the study, through direct methods rather than secondary

“Many of the questions posed by scholars virtually demand empirical evidence, and when they do, scholars are increasingly producing it.”

sources, of the institutions, rules, procedures, and personnel of the law, with a view to understanding how they operate and what effect they have...It is not purely theoretical or doctrinal; it does not rest on an

analysis of statute and decided cases and it does not rely on secondary sources. What empiricists do, in one way or another, is to study the operations and effects of the law.”

In other words, in contrast to scholars who focus on legal doctrine, jurisprudence or pure theory, empirical researchers—including those at ABF—test theoretical understandings of socio-legal issues by amassing and analyzing social data. Critically analyzing the function of law through the lens of their social science specialties and in relation to carefully gathered data, they often bring new understanding to pressing legal and social issues that impact individuals and groups in the United States and around the world.

For example, as all lawyers know, published legal opinions—the backbone of traditional legal scholarship—represent only a small fraction of the cases that go to trial, and cases that go to trial represent only a fraction of disputes or perceived injuries. Thus, while the line of case precedent and the strength and logical coherence of legal arguments can be analyzed and critiqued by examining published cases, they are of less value in determining the nature of the dispute resolution process. An empirical researcher, on the other hand, can design a study that bypasses published opinion in favor of statistical data on *all* disputes, trials and outcomes in a given, representative sample, or can design a study to gauge ordinary



Laura Beth Nielsen

Laura Beth Nielsen is a Research Professor at the American Bar Foundation and Assistant Professor of Sociology and Law at Northwestern University. She holds a Ph.D. from the University of California, Berkeley’s Jurisprudence and Social Policy Program and a J. D. from UC Berkeley’s Boalt Hall School of Law. Her primary field is the sociology of law, with particular interests in legal consciousness and the relationship between law and inequalities of race, gender, and class. She is the author of numerous law review and peer-reviewed articles on civil rights generally including “The Procedural Attack on Civil Rights: The Empirical Reality of *Buckhannon* for Public Interest Litigation,” (*UCLA Law Review*, 2007 with Catherine R. Albiston) and employment civil rights in particular, co-editing three books on these topics including *Theoretical and Empirical Perspectives on Rights*, (Ashgate, 2007) and *Handbook of Employment Discrimination Research: Rights and Realities*, (with Robert L. Nelson, Springer, 2005). Professor Nielsen’s book, *License to Harass: Law, Hierarchy, and Offensive Public Speech*, (Princeton University Press, 2004 and winner of the Law & Society Association Dissertation Prize), examines hate speech, targets’ reactions and responses to it, and their attitudes about using law to deal with such speech.

citizens' *attitudes* toward the legal system, to gain a broader, more accurate picture of how those attitudes influence the use of legal services. Insights derived from such studies can raise awareness of problems in the legal system—and potential solutions—that are of interest not only to scholars but also to legal practitioners and policy makers.

EMPIRICAL LEGAL RESEARCH IN LAW REVIEWS

While empirical research on law has traditionally been published in peer-reviewed academic journals, Shari Diamond reports that such research is increasingly finding its way into law reviews. In “Empirical Legal Scholarship in Law Reviews,” Diamond and co-author Pam Mueller of Northwestern Law School, “measure the penetration of empirical scholarship in mainstream law reviews” in order to assess the prevalence, nature, and trajectory of empiricism in legal scholarship. They also offer some predictions for what the future is likely to hold.

Diamond and Mueller conducted an empirical study of empiricism in law reviews by analyzing a sample of 1641 articles from 60 law review volumes from the years 1998 and 2008. They conducted a content analysis of the articles, coding each one for empirical content and determining whether the articles with empirical content were reporting empirical

data from the author's own research or were drawing only on empirical work by others. They also investigated “differences in empirical work in law reviews of different rankings.”

Diamond and Mueller found that while only 5.7% of the 1641 articles presented original empirical content, by 2008 almost half (45.8%)

“The trend continues to be upward, as lower-ranked law reviews have increasingly joined the top ranked law reviews in publishing more work containing empirical evidence.”

included some empirical content if secondary use of empirical content was included. Elite law reviews were more likely than others to publish original empirical research. “The trend, however,” they remark, “continues to be upward, as lower-ranked law reviews have increasingly joined the top ranked law reviews in publishing more work containing empirical evidence.”

Some legal scholars have criticized

empirical legal research as a mere academic exercise with little practical application, but Diamond and Mueller counter that claim. While not all empirical legal scholarship is of equal quality, they state, “many of the questions posed by scholars virtually demand empirical evidence, and when they do, scholars are increasingly producing it. To take an example, how can we know whether the Miranda decision decreases police effectiveness without examining evidence of behavior? We may disagree about the appropriate way to measure that behavior, but we have passed the stage where armchair speculation will substitute for evidence.” While empirical legal scholarship sometimes provides entirely new insights into the function of law in society, the authors also found that “most of the articles we reviewed... used empirical findings to bolster a doctrinal claim, or reported results of independent empirical work aimed at affecting policy, not performed as a mere academic exercise. This suggests that articles containing empirical work are serving as a beneficial addition to traditional scholarship, rather than a substitute for it.”

MULTI-METHOD APPROACHES IN EMPIRICAL LEGAL RESEARCH

The blind men (or men in the dark) in the Indian parable of the elephant are empirical researchers

of a kind. Using the sense of touch they feel the elephant in order to gather direct primary data concerning its physical characteristics. Yet each blind man acting alone forms an incomplete picture of the nature of the elephant—the man feeling the tail reports that the elephant is like a brush, the man touching the ear says the elephant is like a fan, and so on. Commenting on this story in a new essay, “The Need for Multi-Method Approaches in Empirical Legal Research,” ABF Research Professor Laura Beth Nielsen states, “the lesson of multiple perspectives—indeed multiple truths—is often borne out in empirical legal research. Like the men in the dark, we often study a phenomenon using one approach. That approach may lead us to accurate information about some part of the phenomenon, but as researchers, we typically want to study the whole elephant.”

Every individual methodology “comes with important caveats” and limitations, Nielsen points out. *Experimental designs*, for example, are valid internally because the experimenter exercises control over manipulated conditions. But they may lack external validity if those conditions do not truly reflect conditions in the external world. *Surveys* provide snapshots of groups and conditions at a point in time, but cannot explain processes. “*Qualitative in-depth interviews* provide insight into processes and subjectivities, but often at the ex-

pense of representativeness,” Nielsen notes. *Document analysis and historiography* provide knowledge about formal process, but some of these documents are “constructed as part of an adversarial process” and thus should be viewed as “artifacts [that] must be understood in context rather than as representing some sort of neutral lens

“Multiple research methods are best suited to bring clarity to the complex relationship of law and society”

on the truth.” As Nielsen summarizes, “each research strategy is appropriate for certain kinds of questions, but we may wonder what we are missing by employing a single strategy when we seek to understand complex interactions, organizations, and institutions that make up our legal system.”

A social phenomenon such as law, which involves many different actors and institutions is best understood when approached with multiple research methods. As Nielsen points out, “the phenomenon of law itself consists of individuals, organizational settings, institutional fields and the

interactions among them.” The field of empirical legal studies has long used multiple research methods for this reason. Multiple research methods are best suited to bring clarity to the complex relationship of law and society.

Nielsen reports that much current empirical research on civil legal matters traces back to the Civil Litigation Research Project (CLRP), a seminal 1980 study conducted out of the University of Wisconsin and funded by the US Department of Justice. This project grew “out of observations from the emerging literature on unmet legal needs,” notably, the late ABF researcher Barbara Curran’s landmark 1977 study, *The Legal Needs of the Public* [see In Memoriam, page 10]. The CLRP studied claiming behavior of individuals that might have become lawsuits in the areas of “consumer problems, problems related to injuries, discrimination problems, debt problems (both debts owed to the respondent and debts owed by the respondent), property-related problems, landlord-tenant problems, problems with government benefits, and post-divorce problems.” The quantitative data from the CLRP demonstrated unequivocally that only a fraction of disputes reach trial and that various factors affect “whether a case ends up settling early or going all the way to trial.” Yet, as Nielsen notes, “the mechanisms that produced this variation were not well understood” at the

conclusion of the CLRP.

Thus, in the 1980s and 1990s the CLRP spawned many new empirical research projects focusing on legal processes. These studies, which covered topics such as the use (and non-use) of the civil litigation system by individuals, a comparison of lawyers and non-lawyers as advocates, and the nature of lawyer-client interactions in divorce disputes, were multi-method, combining “high quality quantitative data and explanatory research based on qualitative data” to produce “insights about the justice system that would not have been possible without multi-method research.”

To illustrate in more detail how a multi-method research project can work, Nielsen discusses her own ongoing research project, conducted with colleagues Robert L. Nelson, John Donohue, Peter Siegleman and Ryon Lancaster on employment civil-rights complaints and litigation. As Nielsen states, the research team is interested in “how ordinary citizens think of (or don’t think of) law as a possible solution to their everyday problems, and the process by which they begin to think of a problem as merely an annoyance or, by contrast, as something about which the law may be able to help.”

The project focuses on employment discrimination disputes, specifically on “how people begin to define discrimination as a legal problem in the workplace.” The project combines three large empirical studies

and employs “reading, interacting, and counting” methodologies. As Nielsen explains, “we are ‘counting’ and analyzing a confidential data set of 1.6 million Equal Employment Opportunity Commission complaints filed between 1988 and 2003...[and] ‘counting’ by conducting a quantitative analysis of a national ran-

“Actors in the legal system do not always accurately perceive what happens in a typical case even though they are active participants in the system.”

dom sample of 1,850 employment civil-rights cases filed in federal courts in seven federal judicial districts across seven states in the same time period.” Later in the project interviews (the ‘interacting’ component) with parties and lawyers were conducted on a sample of the cases to add another level of qualitative richness to the study.

Before the counting could begin, however, another method—reading—was employed so that all the case files in the sample were carefully and

systematically examined and coded so that they could be categorized. As Nielsen explains, “reading the full case files led to key insights about what to code and count. As we read case files, new questions emerged which we simply could not answer from the case files or by analyzing the quantitative data we extracted from the case filings. Together, our reading and counting informed our approach to the interviews (interacting). At this stage of the research, results garnered from one methodology informed another phase of the research in critical ways.”

In this particular research project, the researchers’ use of multiple methods brought to light “the organizational and institutional forces that shape civil rights disputes,” Nielsen explains. “One of the primary benefits of embedding high-quality qualitative research into a framework of systematic quantitative analysis is the synthetic approach that takes into account the various forces—individual (e.g. identity, consciousness), organizational (e.g., workplace, social movement groups), and institutional (e.g., gender, work, race)—that affect litigation. Moreover, embedded qualitative analysis does not draw attention away from broader patterns in the way that can happen with some qualitative research. Thus, embedding brings to light the organizational and institutional forces that shape civil rights disputes,” Nielsen comments.



Nielsen and colleagues found, for example, that, while some of the interviews showed that both defense and plaintiffs' lawyers thought that rates of summary judgment had changed over time, their quantitative analysis revealed that this was not the case—summary judgment rates had not changed significantly over the time period of the study. The research method of “sampling filings and carefully coding...outcomes makes visible a large class of cases that is invisible even to professionals working in this subfield,” Nielsen states. “As has been shown in other empirical research, our research demonstrates that actors in the legal system do not always accurately perceive what happens in a typical case even though they are active participants in the system.”

On the other hand, Nielsen points out, “in-depth interviews illuminate how plaintiffs experience the litigation process, a phenomenon not captured in the kind of counting we did in this project.” She cites the poignant comments—gleaned from one of the researcher's interviews—of a plaintiff who thought that his \$100,000 settlement represented failure, unaware that the median settlement result in the sample was \$30,000. In this plaintiff's view \$100,000 “wasn't anything big... I didn't want the money.” “Success” to the plaintiff would have meant getting his job back. While within the economic context of the sample revealed by Nielsen and colleagues' coding of the data, this plaintiff's case was, indeed, a “success,” the plaintiff's statements make clear that, to him,

the case had not reached a satisfactory resolution.

Commenting on the complementary interplay of quantitative and qualitative methods in the employment discrimination study Nielsen concludes, “our qualitative in-depth interviews with parties round out our understanding of our quantitative analysis of case-filings. The random draw of employment civil rights cases and analysis of the quantitative data helped shape our qualitative questions to plaintiffs (—‘why did you drop your case’—), the answers to which revealed fundamental misunderstandings of the civil justice process. On the defense side, we were able to identify some of the more difficult-to-quantify costs that these lawsuits impose on employing organizations; and this resulted in a fuller

understanding of the true costs imposed by the employment discrimination system on those organizations.”

THE COSTS AND BENEFITS OF MULTI-METHOD RESEARCH

The benefits of multi-method research come with significant costs, Nielsen reminds us. Multi-method research projects usually involve large sets of data, which are expensive whether they are purchased or gathered by project researchers. The sheer volume of data means that teams, rather than individual scholars are needed to analyze them. Finally, to ensure that data are accurately coded and analyzed a certain amount of time is necessary for a project to reach completion. While these challenges are very significant, ABF is in a strong position to conduct multi-method research in law and legal systems. ABF’s interdisciplinary faculty, with expertise in such diverse fields as sociology, psychology, anthropology, political science, economics, and law, is ideally positioned to bring a diversity of perspectives to complex research questions. It is this interdisciplinary strength, combined with the faculty’s exceptional track record in producing first-rate research that has enabled ABF to attract the funding necessary for these complex projects from The American Bar Endowment, the Fellows of the American Bar Foundation, the National Science Foundation and such private founda-

tions as the Law School Admission Council, M.D. Anderson Foundation, the Ford Foundation, and the NALP Foundation.

ABF is grateful for such support, and is committed to producing research that is valuable not only to the academic community but also

“Although multi-method research is costly, rigorous empirical research is always better than theoretical speculation or armchair empiricism based on anecdote.”

to its stakeholders, and to the legal community at large. For, as Nielsen comments, “to be effective, the law must be empirically examined in the real world and insights gleaned must inform law-makers through some sort of feedback mechanism. Although multi-method research is costly, rigorous empirical research is always better than theoretical speculation or armchair empiricism based on anecdote.”

Laura Beth Nielsen’s essay, “The Need for Multi-Method Approaches in Empirical Legal Research,” is published in P. Cane and H. Kritzer, eds., *The Oxford Handbook of Empirical Legal Research* (Oxford, 2010). Shari Seidman Diamond’s, “Empirical Legal Scholarship in Law Reviews,” is forthcoming in the *Annual Review of Law and Social Science* (December 2010). [I](#)

IF YOU ARE INTERESTED IN SUPPORTING ABF RESEARCH ON LAW OR OTHER IMPORTANT ABF INITIATIVES OR FELLOWSHIPS, PLEASE CONTACT LUCINDA UNDERWOOD AT 312-988-6573.

American Bar Foundation Hosts 2010 Summer Research Diversity Fellows

Four talented undergraduates with an interest in law and social science joined the ABF for eight weeks in June and July as Summer Research Diversity Fellows.

The students spent the summer learning how empirical research in law and social science is conducted, as they assisted and were mentored by ABF Research Professors in the design and implementation of research projects.

For its financial support of the program, ABF gratefully acknowledges the law firms of Seyfarth Shaw LLP and James D. Montgomery & Associates, Ltd. ABF is particularly grateful to Seyfarth Shaw, a continuous sponsor of the program since 2006. ABF is also grateful to receive funding for the program from the Lloyd A. Fry Foundation, the Kenneth F. and Harle G. Montgomery Foundation, and the National Science Foundation.

THE 2010 SUMMER RESEARCH DIVERSITY FELLOWS

Angela Addae, a native of Vicksburg, Mississippi, and a rising senior Sociology major at Fisk University in Nashville, TN, worked with ABF Research Professor Dylan C. Penningroth. **Joseph Bishop**, a native of Fayetteville, North Carolina, is a rising senior at Clemson University in Clemson, South Carolina. He is a Political Science major who assisted ABF Research Professor Stephen Daniels this summer. **Stephanie Caro**, a native of Oak Park, Illinois is a rising senior at Stanford University, majoring in Political Science. Stephanie worked with ABF Re-

search Professor Terence Halliday. **Eduardo-Antonio Navarro**, a native of Aurora, Illinois, is a rising senior at The University of Iowa in Iowa City. A Finance and Economics major, Eddie assisted ABF Research Professor John Hagan.

THE SUMMER RESEARCH DIVERSITY FELLOWSHIP PROGRAM

Instituted in 1988, the Summer Research Diversity Fellowship Program seeks to interest undergraduate students in graduate study and to increase the presence of individuals who will add diversity to the law and social science community. The summer sessions are designed to introduce students to the rewards and



Left to right: Eduardo-Antonio Navarro, Stephanie Caro, Joseph Bishop, Angela Addae

demands of a research-oriented career in the field of law and social science. While the students work primarily as research assistants, they also attend a series of seminars conducted by ABF Research Professors who acquaint the students with their diverse research projects.

In addition to their ABF research involvement, the students are exposed to various legal career options and observe the justice system in action. A series of field trips provides the students with an opportunity to talk with legal actors in the real-world environments that are the focus of the ABF's empirical research. Each year the students visit, among others, the offices of Cook County's Public Defender, Public Guardian, and State's Attorney, the Illinois Solicitor

General, the juvenile and criminal courts and meet with individual private practitioners and judges.

SUMMER RESEARCH DIVERSITY FELLOWS ALUMNI

Since its inception in 1988 the program has hosted 94 undergraduates (68 women, 26 men) from 52 colleges and universities, who hail from 28 states as well as Puerto Rico, Hong Kong and Papua New Guinea. Of the 94 students who have participated in the program, about 53 percent identified themselves as African American, 20 percent Hispanic/Latino, 20 percent Asian, South Asian, biracial, or other, 5.5 percent Puerto Rican, and one person identified herself as Native American.

While many Summer Research Diversity Fellowship alumni go on to academic careers in the social sciences and law, many others have chosen to pursue careers as legal practitioners, to work in government, social policy, or business. Of the 78 alumni through 2006, ABF has been able to identify the work or study areas of 55. Of the 55, 23.6 percent were working in law firms, 20 percent had careers in academia, mostly in law, 18.2 percent were currently graduate students, mostly in JD, joint JD/PhD or JD/MA programs, 14.5 percent were using their legal skills in business settings, 14.5 percent were working in government, and 9.1 percent were working in the policy arena. [T](#)



In Memoriam
Barbara Adell Curran

October 28, 1928 ~ August 25, 2010

Research Professor and Associate Executive Director Emerita
 American Bar Foundation

On August 25, 2010, Barbara Adell Curran, whose association with the American Bar Foundation spanned five decades, passed away at the age of 82. Curran, who earned a J.D. from the University of Connecticut School of Law in 1953 and a LL. M. from Yale University in 1961, was hired by ABF as staff attorney in 1961. In the course of her career at ABF, Curran conducted research in the areas of consumer credit legislation, legal services for the poor, legal needs of the public, and gender bias in the courts. From 1971 to 1977 Curran directed a comprehensive national study on the legal needs of the public. The study culminated in Curran's book, *The Legal Needs of the Public* (1977), which remains widely cited more than thirty years after its publication. In 1976 she was appointed as ABF's first female Associate Executive Director, a position she held until 1987. Curran also carried forward one of ABF's signature projects, *The Lawyer Statistical Report* (1985, 1991, 1995, 2000, 2005, with Clara Carson), a detailed demographic and geographic snapshot of the U.S. legal profession, based on information supplied by Martindale-Hubbell. Barbara Curran was a Life Patron Fellow of the American Bar Foundation.

© 2010 American Bar Foundation. All rights reserved.

www.americanbarfoundation.org

phone : 312.988.6500

email : info@abfn.org

CONTACT

Bradley Sexton Designs

DESIGNER

Anne Godden-Segard

COPY EDITOR



Katharine W. Hannaford

WRITER | EDITOR

Robert L. Nelson

DIRECTOR

Richard Pena

PRESIDENT

AN ABF UPDATE

RESEARCHING LAW