



Let the data tell their own story: a tribute to Ted Eisenberg

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Abstract

Empirical legal studies (ELS) is a sibling discipline to law and economics. Conceived by a visionary scholar almost 40 years ago, it has today become a reality. ELS is currently one of the most interesting phenomena in legal academia. We here celebrate its founder Theodore Eisenberg, and provide a glimpse of this important step forward in modern legal scholarship, for a law and economics audience.

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1 Introduction

There are different kinds of revolutions. Some are noisy, bloody and conflictual. Others are silent, bloodless and underground—until they emerge and show that change is unavoidable. The latter type of revolution is less visible but not for this less disruptive, since it has the power to gradually change things until a point of no return is reached.

One such revolution was engendered in the mind of a visionary scholar and within the circle of his department colleagues. It matured over a couple of decades, and began to manifest itself at the start of the new millennium. In the twenty years since then it has continued to spread, to become today one of the major innovations in current legal scholarship and its surrounding fields.

We are talking about empirical legal studies (ELS), a label that sounds almost like an oxymoron, but which is actually the disruption that has shaken legal academia to its roots in the last two decades. This merit is doubly deserving of applause if we consider that the legal community has for a long time, as a number of commentators

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note, “been remarkably successful in insulating itself against any infiltration of scientific knowledge” (Loevinger 1949, p. 475).

ELS brought about that change. It was disseminated by a handful of scholars at Cornell Law School led by Theodore Eisenberg, a totemic figure among US legal researchers. “Ted”, as he was known to friends and colleagues, was a kind of quiet revolutionary who through hard work and great enthusiasm started the cross-contamination of legal studies and statistics, and made Cornell Law School the birthplace of the silent ELS revolution.

Prof. Eisenberg worked there for 33 years, teaching many courses in legal scholarship. He was also a prolific scholar who soon introduced into his writings the use of statistical methods to disentangle complex legal issues such as bankruptcy, damages, and juries. He was, in the words of the Dean Prof. Stewart J. Schwab, “a giant in the legal academia”, who not only conceived the ELS approach but also promoted it around the world. Indeed, while Cornell Law School and the US legal community can be regarded as the ‘cradle’ of ELS, it was Ted who untiringly spread the approach everywhere as “a superstar on the world stage” (Clermont 2014, p. 1), thanks to his intensive travel and teaching in many countries. In particular, he visited Europe several times and there engaged in a number of promotional activities, including giving courses on ELS. As a result, a great many scholars were able to directly learn from him and put his lessons into practice, while many others were indirectly exposed to ELS through various types of meetings. We as individual scholars, and the PhD programs that we chair, were among those lucky enough to have shared his friendship and scholarship to the point of being “infected” by his enthusiasm for statistics, and were thus directly attracted to ELS.¹

This journal issue springs from a workshop on empirical legal studies held on the occasion of the XIIth conference of the Italian Society of Law and Economics and organized by the International IEL program in Torino. It was prepared in memory of Ted Eisenberg, simply to show once more how his scholarship spread across national boundaries, to create a worldwide group of people who, in one way or another, have taken his lesson on board.

Even this journal, which as its title indicates is chiefly devoted to law and economics, has been somewhat influenced by Ted’s scholarship as an author and as a mentor for a generation of researchers.² Today, a large part of what is published

¹ Ted Eisenberg was on board of the IEL International PhD Program in Torino for more than 8 years and he regularly taught there a class on ELS and supervised a number of PhD candidates. He also actively contributed in fostering research and local conferences such as the project on judicial efficiency started that lead to a first set of articles (see Ramello and Voigt 2012) and then triggered a substantial set of research partially ongoing. For a glimpse of the first wave of studies on the topic somehow connected to this research see Voigt (2016).

² Although Ted launched his own journal in 2004, he widely contributed with empirical studies to the law and economics community and specifically to this journal. In 2004 the European Journal of Law and Economics published an empirical study on bankruptcy in Finland by Ted Eisenberg himself (Bergstrom et al. 2004) and, though the journal has always been open and sensitive to statistical approaches, he influenced the greater emphasis endorsed by the editors in the new aims and scope (<https://www.springer.com/journal/10657>).

in the journal is empirical, and even some of the topics covered, first and foremost among them litigation, are ones that he investigated.

Therefore, although this issue is specifically devoted to honoring Ted's legacy, many of the articles submitted and published in other issues likewise testify to the importance of the ELS revolution, and its impact not just in the place that was its cradle but all around the world.

2 ELS in a nutshell

Although law and economics has a robust empirical tradition, it is important to point out the novelty that ELS represents in this respect. Traditionally, law and economics scholars follow the econometric habit of starting from theoretical modeling as a basis for empirical investigation. The idea in general is to build up a model and then to test it empirically.

The novelty of the ELS approach, as Ted conceived it, is to start from data. He was in fact saying, "I like to let the data tell their own story, not try to superimpose one. As in any good scholarship, you check your assumptions. If you don't have the real facts, people will make them up or follow the headlines." (Brandt Myers 2008, p. 10).

An additional unavoidable tenet of ELS research is to be free from any bias or political agenda. According to Ted, facts are in general more interesting than any assumption and, when indisputable, they have the ability to shed light on societal problems and to accordingly inspire the need for changes (Brandt Myers 2008).

In this respect, although at the end of the day "accurate description of the legal system's operation can in turn influence the outcome of specific cases [... and] can supply the information for sound policymaking", according to Ted Eisenberg the primary goal of ELS was helping to understand "how legal system operates" (Eisenberg 2000, p. 665). When speaking about the use of statistics in law, he used to make the distinction between 'hard' and 'soft' scientific empirical analysis, and empirical legal studies. 'Hard' scientific empirical analysis is used for the sole purpose of providing evidence in common and civil law cases, such as scientific evidence used for forensic identification, or for establishing damages in price-fixing cases. 'Soft' scientific empirical analysis uses social statistics to analyze human behavior in legal disputes, such as studies aimed at demonstrating in an appeal that race or other determinants have affected a sentence delivered by a lower court. By contrast, in the empirical analysis of legal systems (ELS) scholars are unconstrained by the need to serve the afore-mentioned purposes. Instead, they can use the broad and inexpensive law-related resources available for "providing an accurate portrayal on how legal system operates" (Eisenberg 2000, p. 667), with the aim of promoting progress on wider policy questions, especially tackling enduring misperceptions.

Eisenberg began advancing his project along these lines in the early eighties, undertaking research, with the help of his students, on the number of civil rights cases in order to challenge (successfully) the common view that those cases were clogging the courts. The outcome was an article in the Cornell Law Review in which he proposed an empirically "accurate picture in order to definitively defeat

false impressions” (Eisenberg 1982, p. 482) characterizing at that time the application of Section 1983 of the U.S. Code and leading to the wrong impression that this was overwhelming federal courts.

Since then Ted never stopped doing empirical legal work any time he could get a hold of good data, showing that a look at the real world and the truth of figures are fundamental also for legal reasoning.

Indeed, Ted showed several times how preconceptions and wrong information might lead citizens and policymakers to pursue misguided policies on the basis of wrong premises.

In other words, he was able to accomplish the prescient intuition of Justice Holmes who, at the end of the 19th century asserted that “For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics” (Holmes 1987, p. 469). Law and Economics, through the work of its pioneers Guido Calabresi, Ronald Coase, Henry Manne and Richard Posner, made the second part of this intuition a reality; and Eisenberg, despite the mild reception afforded to Jurimetrics in the mid-1950s, fostered the next step forward of legal studies towards empirics, and finally realized the first part, making legal scholars “men of statistics” (Loevinger 1949).³

Thanks to Eisenberg, empirical legal research today is a reality that applies rigorous social science methodology to subjects that have a legal component but can involve areas as wide-ranging as criminal justice, corporate law, healthcare, and securities regulation. As a wise and forward-looking man, alongside the legacy of many scholars and a network of friends/colleagues, he left a number of institutions instrumental to supporting ELS in academic life. These are the Society for Empirical Legal Studies (SELS)—which organizes an annual conference (CELS), a blog, and finally the Journal of Empirical Legal Studies (JELS). The Journal in particular had been a dream of Ted’s, following the Coasean lesson of how Law and Economics crucially benefited from the existence of the Journal of Law and Economics to transform an intuition into a well-structured scientific approach and disseminate it worldwide (Eisenberg 2011). All these institutions are in good health and well-known to anyone in the community. We are thus celebrating here not just those institutions but also the network of colleagues, which some scholars define as the “invisible college” that Ted built all around the world.

3 Sketch

Despite its quiet ascent, ELS today amounts to a disruptive innovation in legal scholarship—so that we can in a sense draw a distinction between the empirical legal literature before and after ELS. This special issue gathers together papers

³ On the seminal role played by the founding fathers of law and economics in establishing the discipline see among others Marciano and Ramello (2014), Ramello (2016) and Gordon et al. (2019) on Calabresi and Coase, Cass and Colombatto (2018) on Manne and Marciano and Ramello (2017) on Posner in the pages of this journal.

from the post-ELS revolution that have in one way or another been affected by its novel lesson and more specifically by Ted Eisenberg.

The first article, by Mark Ramseyer (in this issue), is a straightforward example of how data can be used in order to understand the real world. The paper in particular clarifies why in Japanese towns with nuclear reactors there are fewer investments and economic activities are more scant. While a simple misperception might ascribe to nuclear plants the responsibility for crowding-out investments in those regions, a careful analysis of the data shows that nuclear installations are attracted by towns in which social capital has already been depleted, and where there is already a substantial decline. Consequently, the risk associated to nuclear plants at worst simply exacerbates a dynamic already in progress.

The second paper, by Shay Lavie, Tal Ganor and Yuval Feldman (this issue), treads a similar methodological path, showing how data allows us to delve beneath the surface to understand the world, and advances the approach to the production of experimental data. The study explores whether the interpretation of legal standards is influenced by decision-makers' substantive decision, that is to say whether, beyond any formal declaration, there is interdependence between the merits decision and the interpretation of the legal rule. Interestingly, they observe that while decision makers do not shift the interpretation of legal standards, they may indeed shift their perception of the evidence.

The remaining set of papers deals with what can probably be considered the core of Ted Eisenberg's research, that it to say disentangling and understanding judicial systems and the ways in which they operate. Taken together, they provide a broad view spanning from the US to Taiwan.

The article by John Szmer, Robert Christensen and Samuel Grubbs (this issue) is devoted to understanding factors that influence the citation of judicial opinions written by U.S. Courts of Appeals judges. Since judges represent the core of judicial technology, citation patterns may reveal a vantage point for understanding how judicial decision-making works. The authors discover here that, contrary to the conventional wisdom, opinion-writer characteristics are the most influential class of regressors while panel-level effects are almost negligible.

The paper by Jerg Gutmann and Stefan Voigt (this issue) is aimed at solving an existing puzzle, namely why national levels of *de facto* judicial independence—independent of whether it is measured in terms of the perceptions of citizens and business people or based on objective data—are in general negatively associated with *de jure* judicial independence—that is, the existence of formal legislation favoring judicial independence. Typically, one would expect that better legislation is associated with better outcomes. Gutmann and Voigt rule out a number of possible explanations before they find that culture, measured in the form of either individualism or trust, might be responsible for the gap between *de jure* and *de facto* judicial independence in EU member states.

The paper by Peter Grajzl and Shikha Silwal (this issue) provides an empirical insight into the judiciary of a developing country, Nepal, and also advances the empirical literature on courts by using a novel measure of judicial staffing and suggesting a new instrumental-variable approach to tackle specific endogeneity

issues. Its findings, contrary to previous studies, indicate that judicial staffing exhibits a positive effect on court outputs.

Last but not least, the contribution by Yun-chien Chang and Su-hao Tu (this issue) fills a gap in empirical studies on attorney fees. Exploiting a database concerning the Taiwanese judicial systems, the authors are able to investigate the incentives provided by a fixed-fee scheme on attorneys and their clients. They discover that—despite the conventional expectation that risk-free compensation independent of case outcome might determine a low effort by an attorney—reputation and its effects on future business are canceling out this phenomenon. Rather, the low probability of winning may lead attorneys to decline representation, notwithstanding the secure income.

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