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EVIDENCE-BASED FEDERAL CIVIL RULEMAKING: A NEW CONTEMPORANEOUS CASE CODING RULE

Will Rhee*

Introduction

Consistent with democratic ideals, evidence-based policymaking (“EBP”) seeks to elevate facts over politics. Evidence-based federal civil rulemaking attempts to use objective factual evidence¹ to evaluate the effectiveness of new or proposed amendments to the Federal Rules of Civil Procedure. As Maurice Rosenberg recognized, “To know the impact of a rule of civil procedure requires answering but two straightforward questions: Does the rule work? Does it achieve the intended results without unacceptable side effects?”² This Article proposes a new Federal Rule (the “Model Rule”) concerning the federal courts’ online case management/electronic case filing system (“CM/ECF”).

* Associate Professor of Law, West Virginia University College of Law. I thank Jena Martin-Amerson, Megan Annitto, Kelly Behre, Tom Cady, Vince Cardi, Eric Chaffee, andré cummings, Jean Dailey, Atiba Ellis, Matt Green, Victor Quintanilla, Dale Olson, Bertha Romine, Mark Spottswood, and Elaine Wilson for their outstanding comments; Felix Kumah-Abiwu, Dominique Razzoock, and Ron Virts for their excellent research assistance; and the *Pace Law Review* staff for their exemplary editing. In addition, this Article was presented at the June 14, 2012, Ohio Legal Scholarship Workshop and the January 17, 2013, West Virginia University College of Law Faculty Colloquium. Finally, I thank the Hodges Research Fund for funding. All errors are my sole responsibility. I welcome comments at william.rhee@mail.wvu.edu.

1. For a definition of “evidence,” see *infra* notes 21-22 and accompanying text.

2. Maurice Rosenberg, *The Impact of Procedure-Impact Studies in the Administration of Justice*, 51 LAW & CONTEMP. PROBS. Summer 1988, at 13, 14.

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Whenever a party, the court clerk, or the presiding judge in a civil lawsuit electronically files a document, the Model Rule requires her to answer standardized online questions about that document.³ These questions are limited to indisputable factual information about case-related outcomes.⁴ By answering these questions, the filer codes research variables⁵ contemporaneously with the filing of every document. Such mandatory contemporaneous coding would provide comprehensive, reliable, and inexpensive descriptive empirical data⁶ for evidence-based rulemaking. This Federal Courts CM/ECF Descriptive Dataset (“FCCEDD”—pronounced “fuh-said” for short) should be publicly available.

For example, assume that a judge⁷ has finished writing her memorandum order ruling on a motion for summary judgment. She wants to enter the order on CM/ECF. The judge would log on to CM/ECF using her assigned log-in and password, select the “order” option from an online drop down menu,⁸ and then

3. As explained further below, the Rule requires responses to a uniform national set of mandatory questions and encourages responses to any jurisdiction-specific voluntary questions that an individual court may choose to add. *See infra* Part IV.

4. Case-related “outcomes” are facts idiosyncratic to the specific lawsuit about personal characteristics (e.g., judge’s name, party’s name, counsel’s name, location of party’s residence/headquarters), arguments (e.g., the stated legal basis for each of the three causes of action in the complaint—what a side is claiming regardless of the claim’s actual legal merit), and litigation results (e.g., the fact the court denied the defendant’s motion to dismiss in full). *See generally* Will Rhee, *Entitled to Be Heard: Improving Evidence-Based Policy Making Through Audience and Public Reason*, 85 IND. L.J. 1315, 1317-18 (2010). For further discussion, see *infra* Part IV.

5. “Coding variables” is “the process of translating properties or attributes of the world (i.e., variables) into a form that researchers can systematically analyze after they have chosen the appropriate measures to tap the underlying variable of interest.” Lee Epstein & Andrew Martin, *Coding Variables*, in *ENCYCLOPEDIA OF SOCIAL MEASUREMENT* 321 (Kimberly Kempf-Leonard ed. 2005) [hereinafter Epstein & Martin, *Coding Variables*].

6. Empirical data are the product of empirical research. For a definition of “empirical research,” see *infra* note 23.

7. Although most of the examples in this Article concern the federal district court, the same principles apply to all federal courts. There is no reason why contemporaneous coding cannot be applied to specialized federal courts, the circuit courts, and the Supreme Court.

8. A “drop down menu” is a “horizontal list of options that each contain a vertical menu. When you roll over or click one of the primary options in a drop down menu, a list of choices will ‘drop down’ below the main menu.”

select the defendant's motion for summary judgment previously filed in the case to associate her order as a response to that motion. At this point, a dialog box⁹ would pop up in CM/ECF asking the judge a set of standardized research questions about the content of her order. To answer the questions, the judge would either select further options in additional drop down menus or enter the appropriate text in blank boxes. By answering these questions, the judge would code outcome variables about her order contemporaneously with her filing of that order. Only after the judge has finished answering all required questions would CM/ECF let her complete electronically filing the order.

As most orders to be filed by a court are drafted by a party, the party's attorney or pro se party has not only the best knowledge of the case but also a sanctionable duty of candor to the court under Rule 11 of the Federal Rules of Civil Procedure.¹⁰ The coding of the electronic file is likely to be highly reliable under the watchful eyes of opposing counsel and the judge. Because the coding also is directly associated with the underlying source document, the court, opposing counsel, or a researcher can easily confirm the coding's accuracy. Because the coding merely describes the underlying source document, it lacks legal precedential authority independent of its underlying

Drop *Down* *Menu,* TECHTERMS.COM,
<http://www.techterms.com/definition/dropdownmenu> (last visited Nov. 24, 2012).

9. A "dialog box" initiates a "dialog with the user. It is a window that pops up on the screen with options that the user can select. After the selections have been made, the user can typically click 'OK' to enter the changes or 'Cancel' to discard the selections." *Dialog Box*, TECHTERMS.COM, <http://www.techterms.com/definition/dialogbox> (last visited Nov. 24, 2012).

10. FED. R. CIV. P. 11. Although lawyers might be loath to file for Rule 11 sanctions against other lawyers, there is anecdotal evidence that the current version of Rule 11 "has caused litigators to undertake some disinterested evaluation and certification in their everyday practice." Sung Hui Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73, 118 n.279 (2010). A 2005 Federal Judicial Center survey of 278 federal district court judges concluded that eighty percent of surveyed judges agreed: "Rule 11 is needed and is just right as it now stands." DAVID RAUMA & THOMAS E. WILLGING, REPORT OF A SURVEY OF UNITED STATES DISTRICT JUDGES' EXPERIENCES AND VIEWS CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE 2 (2005).

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source document.¹¹ Furthermore, because the FCCEDD shall be open to the public online and be searchable by name, both the court and counsel will have personal incentives to ensure the coding's accuracy and thereby protect their public reputation.

While the current CM/ECF system is mandated in a decentralized fashion through local rules,¹² only a new uniform Federal Rule can guarantee the centralized coding and collection necessary to create useful baseline data. Although adversaries can continue to disagree over the interpretation of this data, the required online coding of case outcomes simultaneous with the electronic filing of case documents should provide an objective, universally acceptable starting point for debate. Because all law seeks to influence aggregate human behavior,¹³ it must rely upon implicit or explicit empirical assumptions about how humans behave. To maximize law's effectiveness, therefore, those empirical assumptions must be tested. If those underlying assumptions prove inaccurate, then the corresponding laws should be amended accordingly.¹⁴

This Model Rule is ripe for consideration now. At present, the Administrative Office of U.S. Courts is poised to begin designing the "Next Generation of CM/ECF" to replace the current system.¹⁵ The federal courts already operate "the world's most transparent court system."¹⁶ Implementing this Model Rule in the next generation CM/ECF system would take transparency and evidence-based rulemaking to a higher level.

11. In this limited respect, mandatory case coding is analogous to the Reporter of Decisions's syllabus to a Supreme Court decision. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906). For further discussion, see also *infra* Part IV.A.2.

12. FED. R. CIV. P. 5(d)(3); see also FED. R. CIV. P. 83.

13. See Harry Surden, *The Variable Determinacy Thesis*, 12 COLUM. SCI. & TECH. L. REV. 1, 34 (2011).

14. See discussion *infra* Part II.A.

15. The Third Branch, *Task Force Elicits User Views on "Next Gen" CM/ECF*, U.S. CRTS. (Apr. 2012), http://www.uscourts.gov/news/TheThirdBranch/12-04-01/Task_Force_Elicits_User_Views_on_Next_Gen_CM_ECF.aspx. For further discussion, see *infra* notes 291-99 and accompanying text.

16. Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 484 (2009).

This thesis is examined in four parts. Part I explains why evidence-based policymaking needs not only objective descriptive data to provide a universal baseline for policy evaluation but also a paradigm shift in the way evidence is viewed and used in policymaking. Part II reviews the history of empirical research of federal civil rulemaking from its humble beginning, through its acceptance and institutionalization, to today's so-called "New Legal Realist" or "Empirical Legal Studies" movement.¹⁷ Part III summarizes the CM/ECF revolution in the federal courts and explains how contemporaneous coding can code more federal cases at less cost than current methods. Finally, Part IV explains the proposed empirical coding Model Rule and provides sample coding outcomes.

I. Evidence-Based Policymaking

The words "evidence-based" in evidence-based federal civil rulemaking refer to the larger evidence-based policymaking ("EBP") movement.¹⁸ EBP is "a policy process that helps planners make better-informed decisions by putting the best available evidence at the centre of the policy process."¹⁹ To attempt to accomplish such a lofty goal, EBP employs evaluative research, "the primary objective of which is to determine the extent to which a given program or procedure is achieving some desired result. The 'success' of an evaluation

17. For further discussion, see *infra* Part II.C.

18. See, e.g., KAREN BOGENSCHNEIDER & THOMAS J. CORBETT, EVIDENCE-BASED POLICYMAKING (2010); WHAT WORKS? EVIDENCE-BASED POLICY AND PRACTICE IN PUBLIC SERVICES (Huw T.O. Davies et al. eds., 2000) [hereinafter WHAT WORKS?]; William Solesbury, *Evidence Based Policy: Whence it Came and Where it's Going* (ESRC UK Ctr. for Evidence Based Pol'y & Practice, Working Paper No. 1, 2001), available at <http://www.kcl.ac.uk/sspp/departments/politiceconomy/research/cep/pubs/papers/assets/wp1.pdf>; Jeffrey J. Rachlinski, *Evidence-Based Law*, 96 CORNELL L. REV. 901, 910 (2011); Rhee, *supra* note 4, at 1317.

19. Marco Segone, *Evidence-Based Policy Making and The Role of Monitoring and Evaluation within the New Aid Environment*, in BRIDGING THE GAP: THE ROLE OF MONITORING AND EVALUATION IN EVIDENCE-BASED POLICY MAKING 16, 27 (Marco Segone ed. 2008) (internal quotation marks omitted), available at http://www.unicef.org/ceecis/evidence_based_policy_making.pdf.

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project will be largely dependent upon its usefulness to the administrator in improving services.”²⁰ Of the two types of policymaking, intuitive and analytical,²¹ EBP is much more analytical. But even intuitive decision making needs to be informed by some evidence to avoid jumping to conclusions.²²

All policymaking thus relies upon evidence to some degree. Evidence implies verifiable facts, not unsupported theories or hunches. Although the most common source of such evidence is empirical research,²³ the concept of evidence is broader than research.²⁴ Implicit in EBP is the premise that the most

20. Christina A. Christie & Marvin C. Alkin, *An Evaluation Theory Tree*, in *EVALUATION ROOTS: TRACING THEORISTS' VIEWS AND INFLUENCES* 12, 22 (Marvin C. Alkin ed. 2004) (citing EDWARD SUCHMAN, *EVALUATIVE RESEARCH* 21 (1967)).

21. PAUL BREST & LINDA HAMILTON KRIEGER, *PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS* 21-25 (2010) (citations omitted).

22. *Id.* at 23-24 (citations omitted). In the policymaking context, intuitive decision making is best for quick decisions made under time pressure with incomplete information. *Id.* at 22-23. Because the scope of this Article is limited to deliberative decision making where lawmakers can take their time to gather and analyze evidence, intuitive decision making does not apply here. If there is insufficient time to gather and analyze evidence, EBP is impossible.

23. “Empirical research” is

[I]nformation collected through systematic observation and experience (in contrast, for example, to information derived through theory or logic). . . . Generally, an empirical statement is one that can be proven wrong. Empirical research designs encompass experimental research, quasi-experimental research, observational studies, and case studies. Research methods include surveys and focus groups. Empirical research can take place in the field, in a laboratory, or even in a library setting. Samples of subjects to be studied can be selected on a random basis or for the convenience of the researcher. Empirical research can be reported on a quantitative or qualitative basis.

Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1126 (2002) (footnote omitted). Whereas quantitative research is a “strategy that emphasizes quantification in the collection and analysis of data,” qualitative research is a “strategy that usually emphasizes words rather than quantification in the collection and analysis of data.” ALAN BRYMAN, *SOCIAL RESEARCH METHODS* 380 (4th ed. 2012).

24. Solesbury, *supra* note 18, at 8.

effective evidence, rather than merely any evidence, should guide policy. Three “R” questions can guide the selection of evidence for EBP: “[H]ow *relevant* is this to what we are seeking to understand or decide? [H]ow *representative* is this of the population that concerns us? [H]ow *reliable*, how well-founded—theoretically, empirically—is it?”²⁵

Lawmakers would not champion—at least publicly—“evidence-ignoring” policy. Nevertheless, there are many examples of policymakers appearing to ignore considerable contrary evidence because of ideology or self-interest.²⁶ Just as people can have a sense of injustice without being able to precisely define justice,²⁷ EBP may be easier to define in its absence. Indeed, some policies are more driven by evidence than others.

EBP assumes that the best solution to a legal problem first requires an open-minded review of relevant objective factual evidence about the problem. Such evidence should then inform the formulation and selection of a possible policy solution.²⁸ Evidence should drive policy. EBP supports the idea that evidence is essential not only during initial policy development, but also throughout the entire policy cycle.²⁹ Objective factual evidence can not only be used to assess a new policy’s impact on a problem, but also to provide lawmakers with feedback to inform subsequent policy revisions. Ideally, lawmakers would

25. *Id.* at 8-9 (emphasis in original).

26. For example, American federal policymakers continue to take little action over climate change despite the considerable scientific evidence that climate change is indeed occurring. *See, e.g.*, NAT’L RESEARCH COUNCIL, ADVANCING THE SCIENCE OF CLIMATE CHANGE ix (2010), *available at* http://www.nap.edu/catalog.php?record_id=12782.

27. *See* AMARTYA SEN, THE IDEA OF JUSTICE 4-5 (2009).

28. *See* Martin Partington, *Empirical Legal Research and Policy-Making*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 1002, 1004 (Peter Cane & Herbert Kritzer, eds. 2010).

29. *See, e.g.*, NORMAN BLAIKIE, DESIGNING SOCIAL RESEARCH: THE LOGIC OF ANTICIPATION 74 (2d ed. 2010) (citing CAROL H. WEISS, EVALUATION RESEARCH: METHODS FOR ASSESSING PROGRAM EFFECTIVENESS 4, 6 (1972)); Ruth Levitt et al., *Evidence for Accountability: The Nature and Uses of Evidence in the Audit, Inspection and Scrutiny Functions of Government in the UK* (ESRC UK Ctr. for Evidence Based Pol’y and Practice, Working Paper No. 24, 2006), *available at* <http://www.kcl.ac.uk/sspp/departments/politiceconomy/research/cep/pubs/papers/paper-24.aspx>.

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test promising policy ideas through controlled, randomized experiments and use the resulting data to decide which policy idea to implement on a larger scale.³⁰

EBP cannot avoid politics because evaluation, “both as a process and in terms of research findings, affect[s] and [is] affected by the political context.”³¹ In light of the inherent politics of democracy, too often lawmakers do not choose policy based on evidence, but rather on “ideology, values, political interests, and other influences that are beyond the reach of the knowledge broker.”³² This political context has become unavoidable with the “massive rise” in the twentieth century of partisan “pressure groups of one sort or another, university researchers, independent ‘think-tanks[,]’ professional bodies and statutory organizations[,]” which seek “explicitly to advise or influence government[. . .].”³³

Once committed to a particular policy, lawmakers may pick and choose only evidence that agrees with their pet policy.³⁴ Such opinion-based policy “relies heavily on either the selective use of evidence (e.g.,) on single studies irrespective of

30. See, e.g., BLAIKIE, *supra* note 29, at 36; BRYMAN, *supra* note 23, at 50-51; JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 81 (7th ed. 2010); Lee Epstein & Andrew Martin, *Quantitative Approaches to Empirical Legal Research*, in *THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* 901, 903 (Peter Cane & Herbert Kritzer eds. 2010) [hereinafter Epstein & Martin, *Quantitative Approaches*]; Michael Abramowicz et al., *Randomizing Law*, 159 U. PA. L. REV. 929, 931 (2011). See generally ROBERT F. BORUCH, *RANDOMIZED EXPERIMENTS FOR PLANNING AND EVALUATION: A PRACTICAL GUIDE* (C. Deborah Laughton et al. eds., 1997).

31. Christie & Alkin, *supra* note 20, at 29 (citing CAROL WEISS, *EVALUATION RESEARCH IN THE POLITICAL CONTEXT* 214 (1991)).

32. BOGENSCHNEIDER & CORBETT, *supra* note 18, at 261 (citing Carol Weiss, *Research-Policy Linkages: How Much Influence Does Social Science Research Have?*, in UNESCO, *WORLD SOCIAL SCIENCE REPORT 1999*, at 194-205).

33. Huw Davies et al., *Introducing Evidence-Based Policy and Practice in Public Services*, in *WHAT WORKS?*, *supra* note 18, at 1.

34. See IAN AYRES, *SUPER CRUNCHERS: WHY THINKING-BY-NUMBERS IS THE NEW WAY TO BE SMART* 112-115 (2007); Charles Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2106 (1979); Robert MacCoun, *Biases in the Interpretation and Use of Research Results*, 49 ANN. REV. PSYCHOL. 259, 267 (1998); Monica Prasad et al., *“There Must Be a Reason”: Osama, Saddam, and Inferred Justification*, 79 SOC. INQUIRY 142, 155 (2009).

quality) or on the untested views of individuals or groups, often inspired by ideological standpoints, prejudices, or speculative conjecture.”³⁵ Aware of this tendency, partisan pressure groups eagerly assemble and present partisan “evidence” of varying quality to supportive lawmakers so that these lawmakers can claim the persuasive power of evidence without ever having really used it in their decision making.³⁶ In this instance, policy drives evidence.

Claiming the persuasive power of evidence can be an effective political response to the rising skepticism of and cynicism about democratic government from “an increasingly educated, informed and questioning public” seeking reassurance that its taxes are being used effectively.³⁷ To such a skeptical public, the ideal of EBP has a rhetorical appeal “as a means of ensuring that what is being done is worthwhile and that it is being done in the best possible way.”³⁸ For example, in 1997, a United Kingdom Labour government “was elected with the philosophy of ‘what matters is what works’—on the face of it signaling a conscious retreat from political ideology.”³⁹ Apparently, this political strategy did not “work” because the Labour Party was voted out of office in 2010 and became the opposition party.⁴⁰

The convergence of a number of contemporary conditions makes EBP appear more promising. In addition to an increasingly well-informed public seeking greater government accountability, the proliferation of cheap, easily accessible information technology—such as the internet—has contributed to the symbiotic expansion of the research community’s size and capabilities.⁴¹

35. Segone, *supra* note 19, at 27.

36. Huw Davies et al., *Introducing Evidence-Based Policy and Practice in Public Services*, in *WHAT WORKS?*, *supra* note 18, at 1.

37. *Id.* at 1-2.

38. *Id.* at 2.

39. *Id.* at 1.

40. See John F. Burns, *British Labour Party Looks to Rebuild*, N.Y. TIMES, May 16, 2010, at A4, available at http://www.nytimes.com/2010/05/17/world/europe/17britain.html?_r=0.

41. Huw Davies et al., *Introducing Evidence-Based Policy and Practice in Public Services*, in *WHAT WORKS?*, *supra* note 18, at 2.

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Federal civil rulemaking paradoxically presents both promise and peril for EBP. The federal civil rules and its rulemaking process are promising for EBP. Contrary to the federal criminal rules, where the government's obligation to prove the accused's guilt beyond a reasonable doubt inhibits transparent information sharing,⁴² the federal civil rules, the Federal Rules of Civil Procedure, encourage such transparency.⁴³

Moreover, the custodian of the federal civil rules takes its job very seriously.⁴⁴ Composed of appointed expert judges, lawyers, and law professors,⁴⁵ the Civil Rules Advisory Committee (the "Advisory Committee") currently appears to value empirical research in its slow and cautious deliberations over any possible rules amendments. As then chair Mark R. Kravitz explained three years ago, the Advisory Committee is "committed to gathering empirical data about the operation of the rules and any proposed rule changes so that we better understand the likely effect of rule revisions. Gathering and analyzing empirical data takes time."⁴⁶ Also, three years ago, former chair, Judge Lee Rosenthal, reiterated that the Advisory Committee is "committed to getting more empirical information . . . and we know we have only started."⁴⁷

42. See, e.g., FED. R. CRIM. P. 16 & advisory committee's notes (explaining discovery in federal criminal cases); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 549-53.

43. See *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."). See generally Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998).

44. For example, a former Chair of the Civil Rules Advisory Committee, Judge Lee Rosenthal, commented that she thought "that a glass of red wine and the pocket part of Moores or Wright & Miller is a great Saturday night" and that discussing changes to the rules "is the most interesting question in the world, right up there with the meaning of life." Alexander Dimitrief et al., *Update on the Federal Rules Advisory Committee*, 7 J.L. ECON. & POL'Y 211, 211 (2010) (statement of Judge Rosenthal).

45. See Mark R. Kravitz, *To Revise, or Not to Revise: That is the Question*, 87 DENV. U. L. REV. 213, 216-17 (2010).

46. *Id.* at 217 (footnote omitted).

47. Dimitrief et al., *supra* note 44, at 242 (statement of Judge Rosenthal).

Demonstrating that perhaps the lesson had sunk in, the former chair later interjected, “[s]ounds like we need some more of that empirical research to answer that question.”⁴⁸

Furthermore, the Federal Judicial Center, the congressionally created judicial think-tank,⁴⁹ can provide the Advisory Committee with professional empirical research upon request.⁵⁰ This expert Committee has a tradition of recommending the “best rules rather than rules that might be supported most widely or might appease special interests.”⁵¹ The Advisory Committee’s empirically informed annual rules amendments crafted “with exacting and meticulous care”⁵² are insulated from, and yet are still accountable to, popular democracy. Although these amendments become law by default, Congress retains the power to reject them.⁵³

In contrast, the federal civil litigation’s adversarial system⁵⁴ and high cost⁵⁵ are perilous for EBP. Law unavoidably

48. *Id.* at 245.

49. *See infra* Part II.B.2 for further discussion.

50. Russell Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, 51 LAW & CONTEMP. PROBS. 31, 39-40 (1988). The FJC has declined Committee research requests only a few times, apparently with mutual consent. William W. Schwarzer, Tribute, *The Federal Judicial Center and the Administration of Justice in the Federal Courts*, 28 U.C. DAVIS L. REV. 1129, 1141 & n.46 (1995) (citing Report of the Ad Hoc Committee to Study the Relationship between the Federal Judicial Center and the Administrative Office of the United States Courts 7 (Sept. 24, 1991) (on file with the Federal Judicial Center)).

51. Daniel R. Coquillette, *A Self-Study of Federal Judicial Rulemaking: A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679, 685 (1995) (Report prepared by Thomas E. Baker and Hon. Frank H. Easterbrook).

52. Judge Thomas F. Hogan, *The Federal Rules of Practice and Procedure*, U.S. CRTS. (Oct. 2011), <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx>.

53. *See* 28 U.S.C. § 2074 (2006).

54. Stephan Landsman, *Introduction to the Adversary System*, in READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 1 (Stephen Landsman ed. 1988).

55. *See, e.g.*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (2009), available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/Conte>

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relies upon politics and competing normative assumptions.⁵⁶ The zero-sum character of litigation means there is almost always a loser and a winner. Furthermore, the rules—although seemingly neutral on their face—incorporate policy tradeoffs that unavoidably favor or burden one adversary more than the other.⁵⁷ While the Advisory Committee can attempt to calibrate the commensurate level of favoritism or burden at each stage of litigation, the ultimate tradeoffs contained in the rules are the inevitable by-product of the adversarial system.⁵⁸

Thus, in public debate over the rules, not surprisingly self-interest reigns: defense-friendly interests seek defense-friendly rules, and plaintiff-friendly interests seek plaintiff-friendly rules.⁵⁹ And if their adversary brandishes empirical research against them, then that research must either be obvious or wrong.⁶⁰ In the context of adversarial litigation, often the only acceptable empirical research is that which agrees with one's position.⁶¹ Viewing evidence through a biased, self-interested lens is integral to the adversarial system.⁶²

ntDisplay.cfm&ContentID=4008.

56. See Rachlinski, *supra* note 18, at 917-18. "Norms" are "[s]tandards for how one ought to act. . . . In the terms of practical reasoning, norms are standards that give reasons for action." BRIAN H. BIX, A DICTIONARY OF LEGAL THEORY 149 (2004). The word "normative" implies "[w]hat *ought* to be done. The normative aspect of a discussion or a set of facts is its implications for how people should act, how rules should be changed, or even how theories should be constructed." *Id.* at 148. Normative questions are "'should' questions, questions about how individuals or institutions should behave." Aaron Rappaport, *The Logic of Legal Theory: Reflections on the Purpose and Methodology of Jurisprudence*, 73 MISS. L.J. 559, 572 (2004).

57. See Alan Morrison, *The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System*, 90 OR. L. REV. 993, 995 (2012).

58. *Id.* at 995-997.

59. See Arthur Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 16 (2010) (discussing FED. R. CIV. P. 8).

60. Pioneering empiricist and Advisory Committee member Maurice Rosenberg said that there are "two kinds of empirical data bearing on courts:" (1) "the kind that lawyers and judges dismiss as a demonstration of the obvious; of course, they say, we already knew that" and (2) "data that lawyers and judges dismiss as counterintuitive; nuts, they say, that cannot be so." Paul Carrington, *Maurice Rosenberg*, 95 COLUM. L. REV. 1901, 1903 (1995); see also Rosenberg, *supra* note 2, at 29.

61. See *supra* note 34.

62. See Christopher P. Guzelian & John F. Pfaff, *Evidence Based Policy* 1, 21-22 (Fordham Law Legal Studies Research Paper No. 976,376, 2007),

Karen Bogenschneider and Thomas Corbett, two leading researchers at the Institute of Research on Poverty at the University of Wisconsin—Madison (“IRP”),⁶³ have confirmed that such bias is not limited to litigation. Combined, Bogenschneider and Corbett have decades of personal experience in seeking EBP and have considerable credibility in the field. Founded in 1966, the IRP was the first federally sponsored academic think-tank devoted to “poverty-related investigations.”⁶⁴ Based on their experience with poverty-related investigations, a hot-button political issue, and qualitative research of EBP efforts in the United States, Bogenschneider and Corbett concluded that the

story of U.S. social policy reveals a disturbing disconnect between the research community . . . and the policymaking community. . . . Although the quality of research has expanded dramatically in recent decades, its role in shaping policy decisions seldom matches the level warranted by the magnitude of the investment in science by government and the philanthropic communities, among others. This is a conundrum demanding thoughtful attention.⁶⁵

There are of course exceptions to this general disconnect. For instance, the fact that the Advisory Committee values evaluative research in its policymaking⁶⁶ is a key motivation behind this Article. Such exceptions notwithstanding, however, most commentators appear to concur with this dismal assessment.⁶⁷ A presidential candidate’s “love of data” was once

available at <http://ssrn.com/abstract=976376>. For an argument that empirical research of civil rulemaking is somewhat an exercise in futility because it has not resulted in actual rules change, see *infra* note 107.

63. BOGENSCHNEIDER & CORBETT, *supra* note 18, at iii.

64. *Id.* at 6.

65. *Id.* at ix.

66. For further discussion, see *infra* Part II.B.1.

67. BRIDGING RESEARCH AND POLICY IN DEVELOPMENT: EVIDENCE AND THE CHANGE PROCESS ix (Julius Court et al., eds., 2005); Huw Davies et al., *Introducing Evidence-Based Policy and Practice in Public Services*, in WHAT

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criticized by a commentator who stated: “See how many votes data gets you!”⁶⁸ Perhaps such pessimism is not surprising because “politics is more about the art of the possible or generally acceptable than what is rational or might work best.”⁶⁹ In general, policymaking in a democracy,⁷⁰ particularly in the United States,⁷¹ appears to be based on evidence selectively, if at all.

WORKS?, *supra* note 18, at 31-32; RAY PAWSON, *EVIDENCE-BASED POLICY: A REALIST PERSPECTIVE* viii, 1-2 (2006).

68. Howard Fineman, *Rep. Paul Ryan VP Choice Draws Criticism from Some Conservatives*, THE HUFFINGTON POST (Aug. 11, 2012, 2:55 PM), http://www.huffingtonpost.com/howard-fineman/rep-paul-ryan-vp_b_1768137.html. In an interview with former President Bill Clinton, comedian Jon Stewart satirically demonstrated this disconnect when he quipped:

The idea that you would use (*thunderous applause and laughter*) you would use in your argument; I know, this is interesting; that you thought that you would utilize in your argument . . . facts (*laughter*). And they would have; you would attach numbers to them that were real (*laughter*). I thought it was a bold choice on your part.

hungrycoyote, *President Bill Clinton: “The problem with any ideology . . .” UPDATED with transcripts of both parts*, DAILY KOS (Sept. 21, 2012, 3:28 AM), <http://www.dailykos.com/story/2012/09/21/1134679/-President-Bill-Clinton-The-problem-with-any-ideology>.

69. Huw Davies et al., *Introducing Evidence-Based Policy and Practice in Public Services*, in *WHAT WORKS?*, *supra* note 18, at 14 (citation omitted).

70. *Id.* at 30.

71. *Id.* at 31-32. British researchers ironically observed that the U.S. might have the best evidence and the worst EBP:

The apparent lack of influence of social scientists in the USA may seem surprising given the USA’s strong reputation for policy analysis and evaluation. There seems to be an inverse relationship operating here. The USA has a reputation for careful evaluation research but in the fragmented and decentralized political economy of that country this is often single-issue research, focusing on short-run effects and used for political ammunition rather than policy planning.

Id.

A. *Policymaking Selectively Based on Evidence*

The personal experience of two thoughtful, respected, policymaking experts demonstrates the selective use of evidence in American legislation.⁷² First, Ron Haskins has examined welfare policy from the perspective of the federal government, the academy, and the non-governmental organization (NGO) domain.⁷³ In light of Haskins's extensive welfare policy experience in government, the academy, and NGOs, he is well-informed to opine on the state of EBP in federal welfare policy. When asked by welfare policy academics how influential research was in an ongoing contentious congressional debate about welfare reform, Haskins estimated, based upon his personal experience, that "the best research might exert 5% of the total influence on the policy debate, with

72. The complex nature of policymaking makes quantitative studies of EBP effectiveness methodologically difficult. As a result, most EBP effectiveness studies tend to be qualitative. *Cf.* Guzelian & Pfaff, *supra* note 62, at 8-9 & n.17 (limiting their empirical research to quantitative data). Ironically, there is "little evidence" that EBP actually works. "It remains an act of faith." Huw Davies et al., *Introducing Evidence-Based Policy and Practice in Public Services, in WHAT WORKS?*, *supra* note 18, at 29-31. There is thereby a need for empirical research on the impact of empirical research on law and policy-making. Partington, *supra* note 28, at 1003.

73. Haskins served in the U.S. federal government as President George W. Bush's Senior Advisor for Welfare Policy; Majority Staff Director, Subcommittee on Human Resources, Committee on Ways and Means, U.S. House of Representatives; and Welfare Counsel, Republican Staff, Subcommittee on Human Resources, Committee on Ways and Means, U.S. House of Representatives. *Ron Haskins*, BROOKINGS INSTITUTION, <http://www.brookings.edu/experts/haskinsr> (last visited Nov. 26, 2012). He also served in the academic field as a Research Professor at the University of North Carolina at Chapel Hill's Frank Porter Graham Child Development Center. *Id.* At present, he is a policy expert at the non-profit Brookings Institution, where he is Co-Director of the Center on Children and Families, an Expert for the Budgeting for National Priorities Project, and a Senior Fellow for the Economic Studies Program. *Id.* Haskins also is a Senior Consultant at the Annie E. Casey Foundation and a Senior Editor of the joint Princeton University-Brookings journal *The Future of Children*. *Id.*; see also *About, THE FUTURE OF CHILDREN*, <http://futureofchildren.org/futureofchildren/about/> (last visited Nov. 26, 2012). *The Future of Children* even has an EBP mission, "to translate the best social science research about children and youth into information that is useful to policymakers, practitioners, grant-makers, advocates, the media, and students of public policy." *Id.*

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an upside potential of 10%.”⁷⁴ He added that “[p]ersonal values and political power” were “what really mattered in Congress.”⁷⁵

Second, an anonymous “distinguished state welfare official, who also has held a top research-oriented position in the U.S. Department of Health and Human Services,” provided another example of how narrowly policymakers can view evidence.⁷⁶ The anonymous official managed to convince a “key” Florida state legislator to sponsor welfare reform legislation. When critiquing the draft bill, the official “asked for additional resources to evaluate whether the proposed changes might be effective.”⁷⁷ The Florida legislator responded “with incredulity: ‘If you don’t know whether or not the program is going to work, why are you asking me to sponsor it?’”⁷⁸ From that statement, the legislator demonstrated ignorance of both the (un)certainly of policy research and the continuing need to evaluate policy in action. Objective baseline descriptive data are essential not only to formulate policy but also to evaluate its subsequent effectiveness.

B. *The Need for Objective Baseline Descriptive Data*

As Sherlock Holmes observed, “It is a capital mistake to theorize before you have all the evidence. It biases the judgment.”⁷⁹ It is axiomatic that before you can even attempt to solve a problem, you first must diagnose the problem. For example, if your problem is financial debt, spending more than you make, then the first step is to diagnose how you currently spend your money. After meticulously tracking how you spend every penny over a month, you then would have enough diagnostic descriptive data to start making decisions about how to change your spending patterns and solve your debt problem. Any changes you made before collecting the diagnostic descriptive data would be based upon feeling or hunch.

74. BOGENSCHNEIDER & CORBETT, *supra* note 18, at 1.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. ARTHUR CONAN DOYLE, *A STUDY IN SCARLET* 27 (Simon & Brown 1979) (1887).

“Lawyers, including judges and law professors, have been lazy about subjecting their hunches—which in honesty we should admit are often little better than prejudices—to systematic empirical testing.”⁸⁰

After carefully reviewing this “evidence,” you might create a new “policy”—a new monthly budget. After implementing this new budget, you would still want to continue to track your actual spending to determine whether your policy in action was working to solve your problem and lower your debt. After reviewing this additional descriptive evidence, you might tweak your budget further. Each time you revise your policy, you will want to continue to collect and review additional descriptive evidence to evaluate your policy’s factual success in solving your problem.

While this example is admittedly much simpler than most contemporary public policy problems, it illustrates a fundamental need for baseline descriptive data to evaluate the success of any policy in solving problems. The “best way to define something as a problem ‘in our profoundly numerical contemporary culture’ is to measure it.”⁸¹ Descriptive data simply “describe[] the state of the world.”⁸² Because law is the primary means by which governments implement policy, “it seems logical to suggest that policymakers should have as much understanding as possible of how law works in the real world.”⁸³ Roscoe Pound observed the disparity between the “law in books” and the “law in action.”⁸⁴ It is well understood that policies once implemented in the real world may have unintended results. The only way to examine such unintended results comprehensively is through descriptive data.

80. Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 367 (1986).

81. Stephen Daniels & Joanne Martin, *Punitive Damages, Change, and the Politics of Ideas: Defining Public Policy Problems*, 1998 WIS. L. REV. 71, 91 (quoting DEBORAH A. STONE, POLICY PARADOX AND POLITICAL REASON 136 (1988)).

82. ROBERT LAWLESS ET AL., EMPIRICAL METHODS IN LAW 29-30 (2010).

83. Partington, *supra* note 28, at 1006.

84. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910) (“[T]he distinction between legal theory and judicial administration is often a very real and a very deep one.”).

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For descriptive data to serve as a baseline for policy debates, however, that data must be truly objective.⁸⁵ All sides in a policy debate must accept the descriptive data's relevance, representativeness, and reliability.⁸⁶ In the civil litigation context, the accurate description of litigation lawsuits is essential to knowledgeable policymaking about litigation

85. In an important forthcoming article, Mark Spottswood proposes a measurement protocol for measuring “[o]utcome accuracy—meaning a correspondence between the factual understandings that motivate legal decisionmakers and the historical facts that gave rise to litigation.” Mark Spottswood, *Evidence-Based Litigation Reform*, 51 U. LOUISVILLE L. REV. 25, 27 (2012). His protocol “entails obtaining a record of what facts motivate those who are responsible for producing legal outcomes, and then comparing those beliefs with the results of a more detailed, in-depth investigation into the factual background of the case.” *Id.* Unlike Spottswood’s outcome-accuracy data, this Article’s descriptive data focuses on objective factual case outcomes over which all parties in a lawsuit could agree (e.g., was the motion to dismiss granted?) without evaluating whether these factual case outcomes accurately reflect the underlying facts of the case and a fair understanding of such facts by a reasonable judge (e.g., was the grant of summary judgment accurate because the plaintiff’s claim lacked merit?). Although a particular district court could implement Spottswood’s outcome-accuracy protocol as part of the voluntary coding of the proposed Rule, *see infra* Part IV.B, as Spottswood himself recognizes, it would “be expensive and difficult” to implement his outcome-accuracy protocol in every newly filed CM/ECF case. Spottswood, *supra*, at 29. Because parties most likely would disagree over the perceived accuracy of such case outcomes, coding such accuracy would probably require his experimental protocol and “reference-standard evaluators” in nearly every case. *Id.* at 85. Nevertheless, Spottswood is correct that

[s]o long as we fail to measure accuracy, information about the variables we can track cannot provide a strong platform on which to base rule-design decisions, because we can never be sure that the improvements in other procedural values are not coming at the expense of the system’s accuracy.

Id. at 29. In the final analysis, much like using both inexpensive observational data such as “cholesterol levels or blood pressure” and “something that is harder to measure, like long-term changes in mortality or subjective assessments of overall patient well-being” in medicine, *id.* at 68, both this Article’s outcome-based descriptive data and Spottswood’s outcome-accuracy data can prove useful in analyzing the effectiveness of the rules. There is value in using both “easily measurable surrogate outcomes and also more subjective ultimate outcomes of deeper theoretic interest, depending on the specific goals of an investigation.” *Id.* at 81.

86. *See* Solesbury, *supra* note 18, at 8-9.

reform.⁸⁷ Given the proliferation of partisan pressure groups happy to manufacture self-serving, subjective “evidence,”⁸⁸ there is a danger of evidence overload. Furthermore, different academic disciplines and different research cultures disagree over the objectivity of various research methods.⁸⁹ If policymakers mistrust all evidence as loaded, then they might feel justified paradoxically to ignore evidence altogether.⁹⁰ Objective baseline descriptive data would prevent such a paradox.

Because descriptive data are simple, so long as its collection and coding process is transparent, the most jaded ideologues and most doctrinaire academics would have difficulty spinning its interpretation. If there is popular consensus over the accuracy of descriptive data, then there should be greater popular support for EBP rationally based upon such data. Even if ideologues and academics continue to argue over the correct interpretation of such descriptive data, the descriptive data will have served their public purpose of providing a shared baseline upon which to ground policy debates. The distinction between descriptive data and their normative interpretation parallels the distinction between positive economics and normative economics.⁹¹

87. See Michael J. Saks, *Do We Really Know Anything about the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1149 (1992).

88. See *supra* notes 34-37 and accompanying text.

89. See Huw Davies et al., *Introducing Evidence-Based Policy and Practice in Public Services*, in *WHAT WORKS?*, *supra* note 18, at 3; Rhee, *supra* note 4, at 1317.

90. Elizabeth Warren has pointed out that there is a “vigorous market for data” in the policymaking world, often “to support foregone conclusions.” Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 WIS. L. REV. 1, 3. “Ironically, the power of this market threatens to crush serious, policy-directed, empirical work. . . . Indeed, the market is creating an anti-market in which one study seems to contradict another, leaving policymakers free to ignore all data and making such scholarship not only difficult, but useless.” *Id.* at 3-4.

91. Whereas “positive economics” are descriptive statements “about how the world is,” “normative economics” are proscriptive statements “about how the world *ought to be*.” N. GREGORY MANKIW, *PRINCIPLES OF MICROECONOMICS* 31, 136, 491 (6th ed. 2010). Peter Boettke uses a “devil’s test” to distinguish between the two. Under this test, “*the analysis* could be agreed upon by either an angel or the devil, but the angel and devil would differ on the normative implications.” PETER J. BOETTKE, *LIVING ECONOMICS: YESTERDAY, TODAY AND,*

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Ideally, independent, professional civil servants similar to the U.S. Census Bureau⁹² would be responsible for collecting, disseminating, maintaining, and improving such descriptive data. Not only could impartial civil servants safeguard the data's objectivity, but also such professionals could dispassionately assess partisan criticisms of their research methodology and make constructive improvements.⁹³ Over time, all legitimate sides in a policy debate could accept in good faith that the relevant descriptive data provide a fair factual starting point. This fair starting point is even more important in light of the increasingly partisan nature of modern media, where anyone can obtain her news only from sources that share her own ideological bias.⁹⁴ Even the fairest starting point, however, is useful only if lawmakers actually agree to use it as shared common ground.

C. A Paradigm Shift

Perhaps the most common objection to EBP is that the “variables underlying” policymaking cannot “be quantified and

TOMORROW 28-29 (2012). This test distinguishes “economic knowledge from normative concerns or preferences.” Diana Weinert Thomas & Michael David Thomas, *Encouraging a Productive Research Agenda: Peter Boettke and the Devil's Test*, 26 J. PRIV. ENTER. 103, 104 (2010).

92. The Constitution and a federal statute mandate that the U.S. Census Bureau every decade collect demographic information about the United States “to draw political boundaries, allocate funds to state and local governments, and track a wide range of demographic and economic information.” Brendan Kearns, *Down for the Count: Overcoming the Census Bureau's Neglect of the Homeless*, 8 STAN. J. C.R. & C.L. 155, 160 (2012) (citations omitted).

93. For a discussion on the role of a proposed National Academy of Justice to oversee the FCCEDD, see *infra* notes 450-55 and accompanying text.

94. For example, former Vice President Cheney may watch only Fox News, and lawyer and consumer advocate Ralph Nader may read only *Mother Jones*. AYRES, *supra* note 34, at 21; see also Lymari Morales, *Americans' Confidence in Television News Drops to New Low*, GALLUP (July 10, 2012), <http://www.gallup.com/poll/155585/Americans-Confidence-Television-News-Drops-New-Low.aspx> (surveyed adults expressing “a great deal or quite a lot of confidence” in U.S. TV news was twenty-one percent and in U.S. newspapers was twenty-five percent). All policymakers need to be exposed not only to challenging opposing points of view, but also to objective facts that transcend political spin.

reduced to a non-discretionary algorithm.”⁹⁵ Even assuming this is true, policy nevertheless can be empirically tested to see if it is actually achieving the promised or expected outcomes.⁹⁶ Nothing beats results. By analogy, although modeling the detailed intricacies of a football team’s play calling and execution might be extremely difficult, we can check the final score of its games or the team’s overall win-loss record to determine whether the team is actually achieving its desired results.

Although lawyers have long used empirical research instrumentally as another tool in their advocacy toolkit,⁹⁷ for EBP to succeed, American lawyers—who have a monopoly on the judicial branch and dominate the executive and legislative branches and private corporations⁹⁸—must shift their policymaking paradigm. After all, law remains the principal tool of social and economic policy.⁹⁹

EBP requires true empirical research.¹⁰⁰ True empirical research is not another argument that happens to use statistics.¹⁰¹ EBP requires rigorously testing every factual assumption with careful observations of the world.¹⁰² The strongest argument in support of a particular policy is to

95. Huw Davies et al., *Introducing Evidence-Based Policy and Practice in Public Services, in WHAT WORKS?*, *supra* note 18, at 103.

96. *See id.* For a definition of “outcomes,” see *supra* note 4 and accompanying text.

97. *See* Elizabeth Mertz, *Introduction to THE ROLE OF SOCIAL SCIENCE IN LAW* i (Elizabeth Mertz ed. 2008).

98. “Although members of the legal profession constitute approximately two-thirds of 1 percent of the working adult population in the United States, they hold a high proportion of the positions with formal directing authority in government relative to the members of all other occupations.” Neil Hamilton, *Ethical Leadership in Professional Life*, 6 U. ST. THOMAS L.J. 358, 361 (2009).

99. *See* Partington, *supra* note 28, at 1006.

100. *See supra* notes 22-25, 28-30 and accompanying text. In practice, even social science and medical academics fall short of this empirical ideal. *See* Theodore Eisenberg, *Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns*, 2011 U. ILL. L. REV. 1713, 1730 n.66 (collecting authorities). But most social science and medical academics would probably accept this ideal, at least theoretically, whereas some lawyers and legal academics might reject it outright.

101. *See* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 2 (2002).

102. *Id.* at 2-3.

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challenge that policy with the “best possible opposing arguments.”¹⁰³ Instead of cherry picking only the empirical research that happens to agree with an arbitrary adversarial position,¹⁰⁴ EBP requires a sincere commitment to the principles of “*empiricism*—basing conclusions on observation or experimentation—and *inference*—using facts we know to learn about facts we do not know.”¹⁰⁵ Because of the importance of empirical evidence, familiarity with empirical methods sufficient to be a good consumer of empirical research is an essential lawyering skill.¹⁰⁶ Over the last two decades, federal civil rulemaking has demonstrated a growing commitment to both empiricism and inference.¹⁰⁷

103. *Id.* at 10.

104. *See supra* note 34 and accompanying text.

105. Epstein & King, *supra* note 101, at 2 (emphasis added) (footnote omitted). Epstein and King explain the disparity between the idealized EBP paradigm of a social science PhD and the idealized adversarial paradigm of a litigator:

While a Ph.D. is taught to subject his or her favored hypothesis to every conceivable test and data source, seeking out all possible evidence *against* his or her theory, an attorney is taught to amass all the evidence *for* his or her hypothesis and distract attention from anything that might be seen as contradictory information. An attorney who treats a client like a hypothesis would be disbarred; a Ph.D. who advocates a hypothesis like a client would be ignored.

Id. at 9.

106. LAWLESS ET AL., *supra* note 82, at 1. Such familiarity also would make lawyers into better advocates, better able to self-diagnose the quality of her own empirical research and to criticize the flaws of her adversary’s empirical research.

107. Carrie Menkel-Meadow and Bryant Garth are less sanguine about empiricism’s lasting impact upon federal civil rulemaking. In their opinion, although past history demonstrates cycles of increasing empirical research in rulemaking, the end result consistently has been little-to-no actual change in the rules. Carrie J. Menkel-Meadow & Bryant G. Garth, *Civil Procedure and Courts*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 679, 695 (Peter Cane & Herbert M. Kritzer eds. 2010).

II. Empirical Research of Federal Civil Rulemaking

Empirical research of federal civil rulemaking had humble beginnings. When drafting the original Federal Rules of Civil Procedure, the first Advisory Committee did not utilize any empirical research. After maintaining this neglect for fifty years, the Civil Rules Advisory Committee began commissioning the Federal Judicial Center (the “FJC”) to conduct empirical research of the Rules only in 1988.¹⁰⁸ Although in 1978 Chief Justice Warren Berger commissioned a FJC study of controlled experimentation of rules changes¹⁰⁹ and several academics have since recommended such experimental research,¹¹⁰ experimentation has yet to be adopted in a consistent and comprehensive manner throughout the federal courts.¹¹¹ Meanwhile, both the Advisory Committee and the legal academy have subsequently embraced empirical research.¹¹²

108. Willging, *supra* note 23, at 1143 tbl.1.

109. FEDERAL JUDICIAL CENTER, EXPERIMENTATION IN THE LAW: REPORT OF THE FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW, at v (1981).

110. *See, e.g.*, Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 683 (1998) (stating it is “encouraging” that the advisory committee “has commissioned empirical research in advance of possible rulemaking”); Laurens Walker, *Avoiding Surprise from Federal Civil Rule Making: The Role of Economic Analysis*, 23 J. LEGAL STUD. 569, 572 (1994) (discussing the positive benefits of using empirical research, but stating that existing research should be utilized due to cost and barriers to institutional reform).

111. Although an amendment to Rule 83 allowing experimental rules testing was proposed in 1991, it was never adopted. *See* Committee on Rules of Practice & Procedure, Judicial Conference of the United States, *Proposed Rules: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 153 (1991).

112. Not everyone agrees, however, with the objectivity of empirical studies on civil rulemaking. For example, Menkel-Meadow and Garth have concluded that

[E]mpirical studies of how rules actually operate have, for the most part, been used in partisan ways to advocate for particular reforms in the interests of one or another legal or client constituency. . . . Only relatively rarely has empirical study of civil procedure been conducted by more disinterested or “neutral” social scientists and legal scholars. . . . Indeed, . . . many of those conducting or

A. *Humble Beginnings*

Several careful historical studies have extensively examined the original intent of the Founding Fathers¹¹³ of the Federal Rules of Civil Procedure.¹¹⁴ While these “lionized”¹¹⁵ Founding Fathers created a “Big Bang” by completely remaking “the civil justice system in America,”¹¹⁶ the first rules they created in 1938 were based upon “little empirical evidence.”¹¹⁷ Empirical legal research at that time was in its methodological infancy.¹¹⁸ Although Charles Clark—the Reporter of the first Rules Advisory Committee¹¹⁹—did employ empirical research to study civil procedure,¹²⁰ his results were often ignored or rejected.¹²¹ Even back then, there was a

commissioning empirical studies of civil procedural processes have been directly involved as advocates for particular procedural reforms.

Menkel-Meadow & Garth, *supra* note 107, at 680.

113. The original Advisory Committee was composed entirely of men. See Order, Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774, 774-75 (1935) (listing original Advisory Committee names).

114. See, e.g., Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1025 (1982); David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 371-73 (2010); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 496-98 (1986); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 912-14 (1987).

115. Coquillette, *supra* note 51, at 685.

116. Kravitz, *supra* note 45, at 215.

117. Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 782 (1993).

118. John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFF. L. REV. 195, 196 (1980); see also Wheeler, *supra* note 50, at 31-33.

119. Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE. L.J. 914, 915 (1976). Charles Clark was the Dean of Yale Law School and a Federal Judge, sitting on the United States Court of Appeals for the Second Circuit. *Id.*

120. John Henry Schlegel & David Trubek, *Charles E. Clark and the Reform of Legal Education*, in JUDGE CHARLES EDWARD CLARK 108-11 (Peninah Petruck ed. 1991); see MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960* 233, 312 & n.85 (1992) (describing how “one of the earliest examples of an emerging actuarial argument” in a case was dicta).

121. JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL*

“tension between norm-oriented lawyers and number-crunching social scientists.”¹²² Clark reportedly lamented that all that was expected from empirical research was more “interpretation” and fewer facts.¹²³ Clark, however, helped create the precursor system¹²⁴ of today’s federal court statistical data system.¹²⁵

The fact that empirical research did not inform the original 1938 rules highlights the need for empirical testing of the current rules. Although the combined experience of the First Advisory Committee provided a form of qualitative evidence, they do not appear to have used any methodologically rigorous, testable empirical research.¹²⁶ The original rules passed into law automatically in 1938 without a congressional vote.¹²⁷ Because of the slow, conflict-adverse nature of federal civil rulemaking,¹²⁸ many of the assumptions in the original 1938 rules remain untested in the current version of the Federal Rules.¹²⁹

Here are two examples that illustrate the problems underlying untested assumptions. The first could be considered pro-defendant whereas the second could be considered pro-plaintiff. First, Rules 1 and 81¹³⁰ make clear that the rules are

SOCIAL SCIENCE 8-11, 113-14 (1995); Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 831 & n.59 [hereinafter Heise, *Past, Present, and Future*]; David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433, 504-05 (2010).

122. Menkel-Meadow & Garth, *supra* note 107, at 685.

123. SCHLEGEL, *supra* note 121, at 94.

124. See Will Shafroth, *Federal Judicial Statistics*, 13 LAW & CONTEMP. PROBS. 200, 205 (1948).

125. See 28 U.S.C. §604(a)(2), (b) (2006). Current federal court statistics are available online. See Statistics, U.S. CRTS., <http://www.uscourts.gov/Statistics.aspx> (last visited Dec. 17, 2012).

126. For a definition of empirical research, see *supra* note 23.

127. Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 297 (1994).

128. See Kravitz, *supra* note 45, at 213, 215-17.

129. See generally Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 116 (1989) (describing the uncertainty within the current debate over the procedure crisis).

130. FED. R. CIV. P. 1, 81.

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transsubstantive as they apply to most federal civil lawsuits regardless of the nature of the parties or the underlying claim.¹³¹ The original Advisory Committee adopted this one-size-fits-all premise without any debate.¹³² However, this premise ignores possible power disparities in litigation. Transsubstantivity means that a lawsuit between two sophisticated corporations with tremendous resources (e.g., two “Goliaths”) is treated the same as a lawsuit between an indigent plaintiff and a defendant corporation or government (e.g., a “David” versus a “Goliath”). Behind transsubstantivity lies an implicit empirical assumption—that subjecting Davids to the same rules as Goliaths will not affect the outcome. In other words, transsubstantivity assumes that there is no need to have different procedural rules for lawsuits between Goliaths and lawsuits between Davids and Goliaths, because the final disposition would be the same under either procedural regime. Considerable empirical research casts doubt on this assumption.¹³³

Second, Martin Redish and Colleen McNamara have questioned another foundational presumption of the original rules, that discovery costs were to remain where they fell. “[A] party required to produce discovery requested by another party was—and to this day continues to be—assumed to bear whatever costs it incurred in the course of that production.”¹³⁴ Implicit behind this policy presumption is the empirical assumption that this arrangement—in the words of Rule 1—is the speediest and most inexpensive way to organize discovery in a just manner.¹³⁵ Redish and McNamara traced this assumption back to the

131. See, e.g., Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 378 (2010).

132. *Id.* at 383 (footnote omitted).

133. See, e.g., Jayanth K. Krishnan & Stewart Macaulay, *Toward the Next Generation of Galanter-Influenced Scholars: The Influential Reach of a Law-and-Society Founder*, 71 LAW & CONTEMP. PROBS., at i (2008).

134. Martin H. Redish & Colleen McNamara, *Back To the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 774 (2011).

135. See FED. R. CIV. P. 1.

[I]nertia that began with the original adoption of the Federal Rules in 1938. The drafters of the original Federal Rules failed to seriously consider moral, economic, or democratic first principles when they apparently assumed, without discussion, that producing parties, rather than requesting parties, would bear the costs of discovery.¹³⁶

Given that practitioners and judges frequently complain about the high discovery costs in civil litigation¹³⁷ and that discovery costs, unlike other forms of policy, are easily quantifiable, it is remarkable that this original assumption has not been empirically tested.¹³⁸ Accordingly, the current rules carry over empirical assumptions from the original rules that need to be tested and verified. Fortunately, in recent years, the federal civil rulemaking process has gradually accepted, and even institutionalized, increased empirical research of the rules.

B. *Gradual Acceptance and Institutionalization*

The two government organizations arguably most instrumental to current empirical research of the rules are the Civil Rules Advisory Committee and the Federal Judicial Center.¹³⁹

1. Civil Rules Advisory Committee

The Civil Rules Advisory Committee (the “Advisory Committee”) is the modern descendant of the original Advisory Committee.¹⁴⁰ During the first fifty years since enacting the

136. Redish & McNamara, *supra* note 134, at 775.

137. *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558-59 (2007) (complaining of high discovery costs in federal civil litigation); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 55, at 2.

138. *See* Redish & McNamara, *supra* note 134, at 776.

139. *See* Kravitz, *supra* note 45, at 216.

140. In 1942, the Supreme Court designated the original Advisory Committee “a continuing Advisory Committee to advise the Court with

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Federal Civil Rules, the Advisory Committee rarely referred to empirical research when evaluating proposed rules amendments.¹⁴¹ A 1988 bibliography of empirical research in civil procedure concluded, “little of merit was published prior to the 1960’s.”¹⁴² Before 1988, the Advisory Committee apparently mentioned empirical research in its notes to rules amendments only four times.¹⁴³ In 1970, the Advisory Committee cited the field study produced by the Columbia Project for Effective Justice in support of amendments to the federal discovery rules.¹⁴⁴ In 1980, the Advisory Committee cited another empirical study in support of its amendments to Rule 26(f).¹⁴⁵ Finally, in 1983, the Advisory Committee cited empirical studies in support of its amendments to Rules 16¹⁴⁶ and 26(f).¹⁴⁷ Ironically, that same year, the Advisory Committee’s 1983 amendments to Rule 11 were criticized as not being based upon any empirical research.¹⁴⁸

respect to proposed amendments or additions to the Rule” Continuation of Advisory Committee, 314 U.S. 720, 720 (1942). While the Advisory Committee was later “discharged with thanks” in 1956, Discharge of Advisory Committee, 352 U.S. 803, 803 (1956), the Advisory Committee became permanent in 1958. See Act of July 11, 1958, Pub.L. No. 85-513, 72 Stat. 356. The annual rulemaking process is explained in 28 U.S.C. § 2074 (2006). See also Announcement, 54 Fed. Reg. 13,752 (Apr. 5, 1989) (publishing Procedures adopted by the Judicial Conference of the U.S. on Mar. 14, 1989); Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655 (1995).

141. Willging, *supra* note 23, at 1121 (citing Rosenberg, *supra* note 2, at 14).

142. Michael Chiorazzi et al., *Empirical Studies in Civil Procedure: A Selected Annotated Bibliography*, 51 LAW & CONTEMP. PROBS. 87, 89 (1988); see Wheeler, *supra* note 50, at 41-42 (for a listing of major 1960’s empirical research in civil procedure).

143. See Willging, *supra* note 23, at 1121 nn.3-4.

144. *Id.* at 1121 n.3 (citing Rosenberg, *supra* note 2, at 25-27).

145. *Id.* at 1122 n.4 (citing PAUL CONNOLLY ET AL., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY (1978)).

146. *Id.* at 1121 n.3 (citing STEVEN FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN U.S. DISTRICT COURTS (1977)).

147. *Id.* at 1122 n.4 (citing CONNOLLY ET AL., *supra* note 145).

148. Willging, *supra* note 23, at 1122. In fairness to the Advisory Committee, there were not many reported Rule 11 decisions before the 1983 amendments. From 1938-1983, there were a total of 25 reported Rule 11 cases. Mark Spiegel, *Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules*, 32 CONN. L. REV. 155, 157 (1999).

Beginning in 1988, the Advisory Committee began asking the Federal Judicial Center (the “FJC”) for empirical studies to inform the Advisory Committee’s rulemaking.¹⁴⁹ In the early 1990s, commentators increasingly criticized the Advisory Committee’s failure to base its rulemaking upon empirical research.¹⁵⁰ In 1993, Stephen Burbank “lament[ed]” the Advisory Committee’s “studied indifference to empirical questions” and even went so far as to call for a moratorium “on procedural law reform, whether by court rule or by statute, until such time as we know what we are doing.”¹⁵¹ As a member of the Judicial Conference of the United States (the “JCUS”) Standing Committee observed in 1995, “[r]esponding to recommendations from judges and scholars that ‘rules changes be predicated on a sounder empirical basis,’ the various rules advisory committees increased ‘their requests for assistance from the [FJC] to conduct research on litigation practices and the impact of the rules.’”¹⁵²

In 1995, the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States (the “Subcommittee”), composed of Professor Thomas Baker and Judge Frank Easterbrook, validated this call for increased empirical research:

It is frequently asserted, most often by academic critics, that federal rulemaking today is too dependent on anecdotal information rather than empirical research. Rules changes more often

149. McCabe, *supra* note 140, at 1680 (“[T]he advisory committees have been increasing their requests for assistance from the [FJC] to conduct research on litigation practices and the impact of the rules.”).

150. See, e.g., Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323, 335 (1991); Coquillette, *supra* note 51, at 713-15; Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 841 (1993); A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1585-94 (1991); Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 810 (1991); Walker, *supra* note 110, at 572.

151. Burbank, *supra* note 150, at 841-42.

152. Willging, *supra* note 23, at 1141 (citing McCabe, *supra* note 140, at 1680).

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than not depend on the legal research of the Reporters combined with the informed judgment of the members of the rules committees. To make this argument is not necessarily to find fault with the model of disinterested experts as rulemakers. Nor does the argument deny the not-infrequent, well-documented instances when rulemakers have relied on empirical research. *Yet not enough has been done to incorporate empirical research into rulemaking on a regular basis.*¹⁵³

The Subcommittee encouraged the FJC to “engage in original rules-related empirical research to determine how procedures are working.”¹⁵⁴ Finally, the Subcommittee recommended that the Advisory Committee “rely to the maximum possible extent on empirical data as a basis for proposing rules changes”¹⁵⁵ and concluded that “[e]ach Advisory Committee should ground its proposals on available data and develop mechanisms for gathering and evaluating data that are not otherwise available, and should use these data to decide whether changes in existing rules should be proposed.”¹⁵⁶

Given such recommendations, the Advisory Committee not surprisingly increasingly referred to empirical research during its rulemaking deliberations. In 1995, in response to a 1994 FJC random survey of 150 federal judges on attorney voir dire,¹⁵⁷ the Advisory Committee expressed openness to experimental testing of Rule 47(a),¹⁵⁸ stating that there “may be some room for systematic experimentation to test the information provided by the FJC survey of federal judges.”¹⁵⁹

153. Coquillette, *supra* note 51, at 699 (emphasis added) (footnotes omitted).

154. *Id.*

155. *Id.*

156. *Id.*

157. Willging, *supra* note 23, at 1143 tbl.1.

158. FED. R. CIV. P. 47(a).

159. Willging, *supra* note 23, at 1165 (quoting Minutes, Civ. Rules Advisory Comm., Rule 47(a) (Edward H. Cooper, Reporter, Apr. 18-19, 1996), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/cv4->

Starting in 2004, the Advisory Committee referred more frequently to empirical research in its Committee minutes.

In 2004, the Advisory Committee reviewed a FJC empirical study of sealed settlement agreements filed in federal courts.¹⁶⁰ In addition, the Advisory Committee mentioned that the Administrative Office of the United States Courts (the “AOUSC”) was conducting informal empirical research on Rule 29.¹⁶¹ In 2005, the Advisory Committee reviewed a FJC empirical study on hung juries.¹⁶² In 2011, the Advisory Committee mentioned that many organizations other than the FJC “are pursuing empirical work that should shed further light, not only on the experience in litigation but on the all-important questions of pre-litigation behavior.”¹⁶³

In 2010, the Advisory Committee observed that “[s]ome of the same information-technology changes that gave rise to electronic discovery also provided the promise of improved access to empirical information about the costs and burdens imposed in civil lawsuits in federal courts”¹⁶⁴ and mentioned a FJC study of “federal civil cases that terminated in the last quarter of 2008.”¹⁶⁵ To address conflicting empirical data claiming that federal civil lawsuits either suffer from “undue and rising cost and delay” or are “handled relatively quickly and efficiently,”¹⁶⁶ the Advisory Committee invited more than

1896.htm (last visited Dec. 18, 2012) (internal quotation marks omitted)).

160. Minutes, Civ. Rules Advisory Committee 43-44 (Edward H. Cooper, Reporter, Apr. 15-16, 2004), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC0404.pdf> (last visited Dec. 18, 2012).

161. Report of the Judicial Conference, Comm. on Rules of Practice and Proc. 6-7 (David F. Levy et al., Reporters, Mar. 2004), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST3-2004.pdf> (last visited Dec. 18, 2012).

162. Minutes, Civ. Rules Advisory Committee 19-20 (Edward H. Cooper, Reporter, Oct. 27-28, 2005), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2005-min.pdf> (last visited Oct. 27, 2012).

163. Report to the Standing Committee on Rules of Practice and Procedure, Civ. Rules Advisory Committee 99 (Dec. 6, 2010), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV12-2010.pdf> (last visited Dec. 18, 2012).

164. *Id.* at 189.

165. *Id.*

166. Report of the Judicial Conference Committee on Rules of Practice

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seventy people to a Litigation Review Conference in May 2010.¹⁶⁷ The Advisory Committee intended to focus Part I of the Conference on empirical research as “a cornerstone.”¹⁶⁸ Prominently discussed at the Conference was a practitioner opinion survey concerning whether the civil rules were “conducive to meeting the Rule 1 goals of just, speedy, and inexpensive” litigation.¹⁶⁹ The Advisory Committee also noted that a “great amount of empirical data was assembled in preparation” for this Conference and that the “rich and detailed data generated by all this work provided an important anchor for Conference discussion and will be a basis for further assessment of the federal civil justice system for years to come.”¹⁷⁰

In 2011, the Advisory Committee referred to an FJC study concerning the frequency of spoliation motions in federal court and recommended more “pilot projects testing new procedures” to “provide fertile sources of information for considering future rules amendments.”¹⁷¹ Such pilot programs “work best,” observed the Advisory Committee, “when they are framed from the beginning in ways that will enable the [FJC] to provide rigorous evaluation of the results.”¹⁷² With regard to a motion

and Procedure 18 (Sept. 2010),
<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2010.pdf> (last visited Dec. 18, 2012).

167. *Id.*

168. Minutes, Civ. Rules Advisory Committee 30 (Edward H. Cooper, Reporter, Apr. 20-21, 2009),
<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-2009-min.pdf> (last visited Dec. 18, 2012).

169. Minutes, Civ. Rules Advisory Committee 7 (Edward H. Cooper, Reporter, Mar. 18-19, 2010),
<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV03-2010-min.pdf> (last visited Dec. 18, 2012).

170. Report to the Standing Committee on Rules of Practice and Procedure, Civ. Rules Advisory Committee 189 (Dec. 6, 2010),
<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV12-2010.pdf> (last visited Dec. 18, 2012).

171. Memorandum from Hon. David G. Campbell to Hon. Mark R. Kravitz Regarding the Report of the Civil Rules Advisory Committee 7 (Dec. 2, 2011), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV12-2011.pdf>.

172. Minutes, Civ. Rules Advisory Committee 4 (Edward H. Cooper, Reporter, Nov. 7-8, 2011) [hereinafter Nov. 7-8 Advisory Committee

to dismiss study, both authors of the original FJC study¹⁷³ and the law professor critique¹⁷⁴ addressed the Advisory Committee.¹⁷⁵ The Advisory Committee also mentioned four other motions to dismiss empirical studies¹⁷⁶ and reviewed the preliminary results of a Rule 16(b) survey.¹⁷⁷

The FJC's chief empiricist to the Advisory Committee concluded in 2002 that the Advisory Committee "has established a pattern of continuing consultation with the FJC and other empirical researchers about empirical questions. Such consultations occur before the Advisory Committee proposes rules changes, while it reviews and hears comments on proposals that have been made, and while it deliberates about those proposals."¹⁷⁸ Many of the empirical studies upon which the Advisory Committee has relied on were completed by the FJC.¹⁷⁹

2. Federal Judicial Center

Congress created the FJC in 1967.¹⁸⁰ Chief Justice Earl Warren, who chaired the Warren Commission investigating President Kennedy's assassination,¹⁸¹ used his personal influence with President Lyndon Johnson to have the FJC's appropriation placed in a crime control bill.¹⁸² The authorizing

Minutes],

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2011-min.pdf> (last visited Dec. 20, 2012).

173. *See infra* note 199 and accompanying text.

174. *See infra* note 198 and accompanying text.

175. Nov. 7-8 Advisory Committee Minutes, *supra* note 172, at 53.

176. Report to the Standing Committee on Rules of Practice and Procedure, Civ. Rules Advisory Committee 226-28 (May 2, 2011), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2011.pdf> (last visited Dec. 20, 2012).

177. *Id.* at 275.

178. Willging, *supra* note 23, at 1141-42 (footnote omitted).

179. *See id.*

180. Wheeler, *supra* note 50, at 38-41.

181. *Id.* at 40.

182. *Id.*; *see also Landmark Judicial Legislation: Establishment of the Federal Judicial Center*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/landmark_18.html (last visited Oct. 27, 2012).

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legislation stated that the FJC “will enable the courts to begin the kind of self-analysis, research and planning necessary for a more effective judicial system.”¹⁸³

The FJC’s statutory mission is “to conduct research and study of the operation of the courts of the United States, and to stimulate and coordinate such research and study on the part of other public and private persons and agencies.”¹⁸⁴ To maintain the integrity of its research, the FJC, while considered part of the judicial branch, is organizationally independent from the AOUSC¹⁸⁵ and the rest of the judicial branch.¹⁸⁶ As the Chief Justice Rehnquist’s Ad Hoc Committee observed, “[i]n matters relating to research and the formulation of conclusions, the FJC should have complete independence to explore ideas and proposals and to make evaluations, whether or not their findings comport generally with the findings of the” AOUSC.¹⁸⁷ Chief Justice Rehnquist concluded that both the FJC and the AOUSC were “separate but mutually reinforcing support agencies . . . provid[ing] the courts and the [JCUS] complementary services and, on occasional major matters of policy, diverse perspectives that benefit the decision-making process.”¹⁸⁸ The FJC has occasionally disagreed with the JCUS’s policy recommendations.¹⁸⁹ The FJC’s “independence,

183. Wheeler, *supra* note 50, at 39 & n.52 (internal quotation marks omitted).

184. 28 U.S.C. § 620(b)(1) (2006). *See generally* FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/> (last visited Dec. 20, 2012).

185. Wheeler, *supra* note 50, at 50-51.

186. Although the FJC is “governed by judges,” it remains “independent within the judicial branch.” Schwarzer, *supra* note 50, at 1134. The FJC is a “separate agency ‘within the judicial branch,’ rather than as part of or reporting to another component of the judiciary.” *Id.* at 1135 (quoting 28 U.S.C. § 620(a) (2006)). Although the FJC’s Board is composed of federal judges (and the AOUSC’s Director *ex officio*), judges are forbidden from serving on both the FJC’s Board and the Judicial Conference at the same time. 28 U.S.C. § 621 (2006). The Board also appoints the FJC’s Director. 28 U.S.C. § 623 (2006).

187. Schwarzer, *supra* note 50, at 1141 (alteration in original) (internal quotation marks omitted).

188. William H. Rehnquist, *1992 Year-End Report on the Federal Judiciary*, reprinted in 16 AM. J. TRIAL ADVOC. 609, 615 (1993).

189. For example, the FJC at least twice has recommended continuing pilot programs over the Judicial Conference’s objection. *See* Schwarzer, *supra* note 50, at 1141-42.

the value of which is generally accepted, is tempered, however, by the necessity of maintaining a productive working relationship with the [Judicial] Conference and its committees.”¹⁹⁰

Because of the AOUSC’s statutory responsibility to collect “statistical data and reports as to the business of the courts,”¹⁹¹ however, the FJC works closely with the AOUSC. Much like the legislative branch’s Congressional Research Service¹⁹² or Government Accountability Office,¹⁹³ the judicial branch’s FJC enjoys a credible nonpartisan reputation of professional independence.¹⁹⁴ Much of the FJC’s research is empirical research commissioned by the Advisory Committee, the JCUS, or Congress.¹⁹⁵ Since 1988, the FJC has completed many empirical studies at the Advisory Committee’s request concerning Rules 1, 11, 12, 16, 23, 26, 26-37, 47, 53, 56, 58, and 68.¹⁹⁶

Although it is the official research arm of the federal judiciary, the FJC of course is not the only game in town. The FJC’s empirical research interacts with other public and private research. In fact, there is a “small industry” of empirical researchers “oriented toward the Federal Rules of Civil Procedure in the United States and measurement and comparison of the efficiency of rules and processes outside of the United States.”¹⁹⁷ For example, Professor Lonny Hoffman

190. *Id.* at 1140.

191. 28 U.S.C. § 604(a)(2) (2006). Scholars have criticized the reliability of the AOUSC’s data. *See infra* note 442 and accompanying text.

192. *See, e.g.*, Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1316-17 (2001).

193. *See, e.g.*, Nicholas Bagley, Response, *Agency Hygiene*, 89 TEX. L. REV. SEE ALSO 1, 6 (2010).

194. *See* Wheeler, *supra* note 50, at 51 & n.142 (citing Gordon Bermant & Russell Wheeler, *From Within the System: Educational and Research Programs at the Federal Judicial Center*, in REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH 102, 143 (Gary B. Melton ed. 1987)) (the FJC now has nearly one hundred personnel positions and a low turnover rate).

195. *See generally* Wheeler, *supra* note 50, at 41 & n.72 (describing the “research function” of the FJC).

196. *See* Willging, *supra* note 23, at 1143 tbl.1; *see also supra* notes 148-78.

197. Menkel-Meadow & Garth, *supra* note 107, at 695.

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criticized¹⁹⁸ the FJC's recent empirical study¹⁹⁹ of federal civil pleading in response to the Supreme Court's seminal decisions in *Bell Atlantic Corp. v. Twombly*²⁰⁰ and *Ashcroft v. Iqbal*.²⁰¹ Hoffman's empirical critique reflects the increasing popularity of empirical research in the legal academy.

C. *The New Legal Realist Study of Civil Litigation*

In addition to the Advisory Committee's increasing desire to base its rulemaking upon empirical evidence²⁰² and the FJC's increasing expertise in empirical research,²⁰³ another reason why the present time is ideal for evidence-based federal civil rulemaking is the current renaissance of the empirical study of law in the legal academy. "For the first time in at least a generation, serious empirical research appears to be taking root and blossoming within the legal academy."²⁰⁴ Commentators have bestowed loosely defined labels such as Empirical Legal Studies ("ELS") and New Legal Realism ("NLR") on this scholarly movement.²⁰⁵ Although the original legal realists²⁰⁶ long ago advocated the use of empirical methods to study law,²⁰⁷ a perfect storm of an increasing

198. See generally Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1 (2011).

199. Joe Cecil, et al., *Motion to Dismiss for Failure to State a Claim after Iqbal: Report to the Judicial Conference Advisory Committee on Civil Rules*, FEDERAL JUDICIAL CENTER 10 & tbl.2, 21 (Mar. 2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf).

200. 550 U.S. 544 (2007).

201. 556 U.S. 662 (2009).

202. See *supra* Part II.B.1 for further discussion.

203. See *supra* Part II.B.2 for further discussion.

204. Mark C. Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 ANN. REV. L. & SOC. SCI. 555, 556 (2010).

205. *Id.*; see also Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 834–35 (2008).

206. "[L]egal realism" is a loose label for "legal commentators, primarily from the 1930s and 1940s," who sought to enable "citizens, lawyers, and judges to understand what was *really* going on behind the jargon and mystification of the law." BIX, *supra* note 56, at 3 (emphasis in original).

207. The celebrated American jurist Justice Oliver Wendell Holmes, Jr., himself wrote in 1897, "[f]or the rational study of the law . . . the man of the

number of empirically trained Ph.D.s entering the legal academy,²⁰⁸ the easy availability of powerful statistical software programs that run on a personal computer,²⁰⁹ the proliferation of educational empirical legal resources,²¹⁰ and the increasing prestige of empirical legal scholarship in the legal academy²¹¹ joined to contribute to the emergence of NLR.

Like the legal realist empiricists before them, these New Legal Realists share “a desire to inject serious empirical inquiry into legal and policy debates.”²¹² “Law and” social scientists, of course, have long employed empirical techniques to study law.²¹³ In the civil litigation context, political scientists have used empirical research to study judicial decision-making,²¹⁴ social psychologists have used empirical research to study procedural justice,²¹⁵ and the Law and Society Movement has “sought to promote dialog between empirical social science and law.”²¹⁶ Like Law and Society, NLR “embraces a ground-level up perspective that draws attention to the effect of law on the everyday lives of ordinary people—in addition to the

future is the man of statistics.” Oliver Wendell Holmes, *The Path of the Law*, 78 B.U. L. REV. 699, 708 (1998); see also, e.g., SCHLEGEL, *supra* note 121, at 8-11, 113-14; Heise, *Past, Present, and Future*, *supra* note 121, at 823; Herbert M. Kritzer, *Empirical Legal Studies Before 1940: A Bibliographic Essay*, 6 J. EMPIRICAL LEGAL STUD. 925, 926 (2009).

208. Michael Heise, *Empirical Analysis of Empirical Legal Scholarship Production, 1990-2009*, 2011 U. ILL. L. REV. 1739, 1747-48 n.22 [hereinafter Heise, *Empirical Analysis*].

209. See, e.g., LAWLESS ET AL., *supra* note 82, at 171.

210. For example, the Conference on Empirical Legal Studies has become “perhaps the largest annual refereed academic legal conference in the world.” Eisenberg, *supra* note 100, at 1713. There is an *Oxford Handbook of Empirical Research* and a law school casebook. *Id.* at 1714. Centers for empirical legal research have been established at the University of California, Los Angeles, Cornell, Washington University, Harvard, and Berkeley. *Id.*

211. See Heise, *Empirical Analysis*, *supra* note 208, at 1741.

212. Suchman & Mertz, *supra* note 204, at 557.

213. *Id.* at 556.

214. See, e.g., *id.* at 559; see also Jeffrey M. Chemerinsky & Jonathan L. Williams, *Measuring Judges and Justice*, 58 DUKE L.J. 1173, 1174 (2009).

215. See, e.g., Suchman & Mertz, *supra* note 204, at 559; see also Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 138 (2011).

216. Suchman & Mertz, *supra* note 204, at 567.

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experiences of elites and professionals.”²¹⁷ Social scientists understandably might ask, why all the fuss now? We’ve been here the whole time.

The difference is that this empiricism is centered within the legal academy itself.²¹⁸ By seeking “to legitimate empirical research within the legal academy itself,”²¹⁹ ELS and NLR may facilitate greater use of and respect for empiricism in the general legal profession.²²⁰ The vast majority of American lawyers and judges must spend three years in law school before becoming a member of the Bar.²²¹ While there remains grumbling over the relationship between the legal academy and the practicing Bar,²²² because of this training pipeline connection, unlike outside researchers from other “law and” disciplines,²²³ legal academics and legal practitioners are considered part of the same legal profession.²²⁴ Consequently, “legal scholarship—perhaps to a greater degree and more immediately than most other research—has the potential to influence public policy as it is promulgated by judges, legislators, and bureaucrats.”²²⁵

217. *Id.* at 561.

218. *Id.* at 556; see also Karen Sloan, *Empiricism Divides the Academy: Upstart Number-Crunchers Attract Praise and Derision*, NAT’L L.J., Feb. 28, 2011, at A1.

219. Suchman & Mertz, *supra* note 204, at 556.

220. *Accord* Eisenberg, *supra* note 100, at 1728-29 (stating that ELS has helped law professors not trained in other “law and” disciplines recognize that the “empirical study of law is a tool that might be considered for use by any legal scholar when an empirical issue is of interest”).

221. See, e.g., Robin Cheryl Miller, Annotation, *Validity, Construction, and Application of Enactment, Implementation, or Repeal of Formal Educational Requirement for Admission to the Bar*, 44 A.L.R.4th 910, § 2 (1986).

222. See, e.g., Brent E. Newton, *Preaching What They Don’t Practice: Why Law Faculties’ Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105 (2010).

223. See, e.g., STEWART MACAULAY ET AL., *LAW IN ACTION: A SOCIO-LEGAL READER* (2007).

224. Cf. Richard Brust, *The High Bench vs. the Ivory Tower*, A.B.A. J., Feb. 1, 2012, at 50, available at http://www.abajournal.com/magazine/article/the_high_bench_vs_the_ivory_tower/ (discussing the use of legal scholarship).

225. Epstein & King, *supra* note 101, at 7 & n.20 (collecting authorities).

Although ELS, NLR, and the “Law ands”²²⁶ share a synergistic relationship with EBP, the point of EBP is “not to produce a set of empirical term papers that we academics can present to each other at conferences. The point is to create better law—law informed by reality.”²²⁷ As Maurice Rosenberg commented, EBP research is not as obsessed with revisionist originality as traditional academic research “and is willing to work three years without necessarily turning up a tremendous new discovery, but just adding one more brick to the edifice of knowledge.”²²⁸ In response, empirical academics might warn would-be evidence-based policymakers of the “pull of the policy audience,”²²⁹ where hyper-focus on current policy relevance can subtly yet dangerously cloud research objectivity.²³⁰ This is not to say that pure research is not useful. It clearly is. By virtue of academic freedom, there must always be pure research.²³¹ But, EBP unapologetically seeks to apply research to real-world problems.

Fortunately for EBP, academic empiricists can provide not only another rich (and perhaps more independent) source of relevant empirical research but also a check on the FJC, RAND,²³² and other more explicitly policy-focused institutions.²³³ Whether to produce academic term papers or

226. See Marc Galanter & Mark Alan Edwards, *Introduction: The Path of the Law Ands*, 1997 WIS. L. REV. 375, 376.

227. Rachlinski, *supra* note 18, at 910.

228. Schwarzer, *supra* note 50, at 1159 (internal quotation marks omitted).

229. Suchman & Mertz, *supra* note 204, at 575 (quoting Austin Sarat & Susan Sibley, *The Pull of the Policy Audience*, 10 L. & POLY 97, 97 (1988)) (internal quotation marks omitted).

230. *Id.* at 575-76.

231. See, e.g., Schwarzer, *supra* note 50, at 1158.

232. The RAND Institute for Civil Justice has conducted considerable private and government-funded empirical research of the federal courts. For example, Congress and the AOUSC commissioned RAND to evaluate the Civil Justice Reform Act of 1990. See JAMES KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE?: AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996).

233. For example, consider the recent academic critique of the FJC’s *Twombly/Iqbal* pleading study. Compare Cecil et al., *supra* note 199, and Hoffman, *supra* note 198. There is an all-your-eggs-in-one-basket “danger of an over-reliance on a single government-controlled source of research evidence.” Huw Davies et al., *Introducing Evidence-Based Policy and Practice*

reality-based policy, all empirical research shares a basic common methodology. In the civil litigation arena, such methodology includes the challenge of coding cases to make them empirically useful.

III. The Challenge of Case Coding

Mark Twain may have quipped: “Facts are stubborn things, but statistics are more pliable.”²³⁴ For EBP to work, it must have access to relevant, representative, and reliable empirical data.²³⁵ Because empirical research—like all research—can be manipulated,²³⁶ policymakers need to be good consumers of empirical research.²³⁷ The representativeness and reliability of EBP depends upon the quality of the input evidence. Garbage in, garbage out.²³⁸ To be useful for EBP, an empirical study thus must utilize a rigorous, sound research methodology.

Generally, the methodology for all empirical research has four steps: (1) design the empirical project; (2) collect and code data; (3) analyze the data; and (4) present the final results.²³⁹ This Part focuses upon the second step, data coding. All raw data—from a pile of pleadings to electronic docket entries in a court database—need to be analyzed and labeled before they

in Public Services, in WHAT WORKS?, supra note 18, at 8. Insider policy researchers might suffer from a myopic “preoccupation with research geared simply to fulfilling established and unquestioned policy objectives.” Francis Terry, Transport: Beyond Predict and Provide, in WHAT WORKS?, supra note 18, at 200. The more an academic researcher becomes a government insider, the greater the “pull of the policy audience” to compromise objectivity. See supra note 228 and accompanying text.

234. AYRES, *supra* note 34, at 79 (quoted with no citation).

235. See *supra* note 18 and accompanying text.

236. See, e.g., JOEL BEST, STAT-SPOTTING: A FIELD GUIDE TO IDENTIFYING DUBIOUS DATA (2008); HANS ZEISEL & DAVID KAYE, PROVE IT WITH FIGURES: EMPIRICAL METHODS IN LAW AND LITIGATION (1997); Jennifer K. Robbennolt, *Evaluating Empirical Research Methods: Using Empirical Research in Law and Policy*, 81 NEB. L. REV. 777 (2002).

237. Accord LAWLESS ET AL., *supra* note 82, at 1.

238. See *supra* notes 37-40, 88-90 and accompanying text.

239. Epstein & Martin, *Quantitative Approaches, supra* note 30, at 904. There are of course other formulations of these steps but they all share the same basic substance. See, e.g., LAWLESS ET AL., *supra* note 82, at 395-96.

can be useful. Whether qualitative,²⁴⁰ quantitative,²⁴¹ experimental,²⁴² or multi-method,²⁴³ all empirical research must code raw data into standardized variables that can be analyzed.²⁴⁴

Although the best empirical design begins with a research question to guide data collection,²⁴⁵ in light of the expense of collecting and coding data, “so-called ‘multi-user’ datasets, designed for a wide-range of problems,”²⁴⁶ are worthy empirical projects. Using such multi-user datasets is often called “archival research,” because it “involves the use of data that have been stored (or archived) in some form,”²⁴⁷ or “secondary data-analysis,” because someone else initially collected and coded the primary data.²⁴⁸

Such datasets, however, “are like the apple in the Garden of Eden: tempting but full of danger.”²⁴⁹ Although multi-user datasets “constitute a rich lode of materials on which many substantial analyses can be performed,”²⁵⁰ they “cannot be plucked mechanically from their source and entered into an analysis. Without exception, all published statistics should be treated with suspicion.”²⁵¹ The key to using a preexisting, publicly available dataset is ensuring that it provides the correct data necessary to answer one’s research question. One’s

240. See BRYMAN, *supra* note 23, at 19-20.

241. *Id.*

242. See generally BORUCH, *supra* note 30.

243. “Multi-method” empirical research “uses more than one research technique or strategy to study one or several closely related phenomena.” Laura Beth Nielsen, *The Need for Multi-Method Approaches in Empirical Legal Research* in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 953 (Peter Cane & Herbert Kritzer, eds. 2010). For example, the Civil Litigation Research Project (“CLRPP”) employed both qualitative and quantitative empirical research methods to explore “how many people used the [legal] system and why.” *Id.* at 956-57 (collecting authorities).

244. LAWLESS ET AL., *supra* note 82, at 166 (citing EARL R. BABBIE, THE PRACTICE OF SOCIAL RESEARCH 325 (11th ed. 2006)); Epstein & Martin, *Coding Variables*, *supra* note 5, at 321.

245. Epstein & Martin, *Quantitative Approaches*, *supra* note 30, at 905.

246. *Id.* at 909.

247. LAWLESS ET AL., *supra* note 82, at 125.

248. *Id.* at 128-29.

249. HERBERT JACOB, USING PUBLISHED DATA 9 (1984).

250. *Id.* at 50.

251. *Id.* at 50-51.

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research question should always drive the dataset and not vice versa.²⁵²

Consequently, a multi-user dataset may suffer from two research shortcomings. First, it may have selective deposit, where it lacks “data on all of the variables in which the researcher might be interested and that might influence the relationships under investigation.”²⁵³ Second, its data might suffer from selective survival, where either “not all possible data were recorded” or “decisions about the maintenance of the data may mean that some data are retained and other data discarded.”²⁵⁴ When evaluating a multi-user dataset for EBP, a researcher thus must ask: “Who collected it and for what purpose? What procedures were used for collecting the data? How were variables defined? What categories or classifications were used? At what level of aggregation were the data collected? . . . What documentation is available?”²⁵⁵

There are many examples of such multi-user datasets in the federal government²⁵⁶ and the academy.²⁵⁷ Such public

252. For example, Brian Leiter has criticized too much ELS work as

[D]riven by the existence of a data set, rather than an intellectual or analytical point. But the existence of a data set then permits a display of technical skills, which is satisfying to those with a technical fetish. But for everyone else, the question remains: *why does this matter? why should one care?* and so on.

Brian Leiter, *On So Called “Empirical Legal Studies” and Its Problems*, BRIAN LEITER’S L. SCH. REP. (July 6, 2010), <http://leiterlawschool.typepad.com/leiter/2010/07/on-socalled-empirical-legal-studies.html>.

253. LAWLESS ET AL., *supra* note 82, at 126-27.

254. *Id.* at 127.

255. *Id.* at 131.

256. The best starting point for U.S. federal statistics is the *Statistical Abstract of the United States. What is the Statistical Abstract?*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/compendia/statab/> (last visited Dec. 21, 2012).

257. For example, the U.S. Supreme Court Database (often called “Spaeth’s Database” after the principal investigator) has “not just helped fill gaps in our knowledge. It is one of those rare creatures in the law and social science world: an *invention* that has substantially advanced a large area of study, inspiring research by scholars hailing from no fewer than three and as many as seven disciplines.” *The Genesis of the Database*, THE SUPREME COURT

data-sharing has many benefits, which include: (1) reinforcing “open scientific inquiry” that allows subsequent studies on the same data to correct any errors in previous studies; (2) encouraging a “diversity of analysis and opinions” where “[r]esearchers having access to the same data can challenge each other’s analyses and conclusions”; (3) promoting new research and allowing for the testing of new or alternative methods, even using the data “in ways that the original investigators had not envisioned”; (4) improving data collection and measurement methods through peer review; (5) promoting methodological consensus over publicly available data; and (6) “[r]educ[ing] costs by avoiding duplicate data collection efforts.”²⁵⁸

Because this Article’s thesis is to create a new multi-user dataset of federal court outcomes,²⁵⁹ the more cases that can be coded and added to the dataset the better for two reasons.

DATABASE, <http://supremecourtdatabase.org/about.php> (last visited Dec. 21, 2012). A similar database exists for the U.S. Court of Appeals. *U.S. Appeals Courts Database*, THE JUDICIAL RESEARCH INITIATIVE, <http://www.cas.sc.edu/poli/juri/appct.htm> (last visited Dec. 21, 2012) (often called the “Songer Database”).

There are many more academic multi-user datasets available. Two comprehensive portals to multiple publicly available datasets are maintained by ICPSR and IQSS. The University of Michigan Inter-University Consortium For Political and Social Research (“ICPSR”) “maintains a data archive of more than 500,000 files of research in the social sciences.” *About ICPSR*, <http://www.icpsr.umich.edu/icpsrweb/content/membership/about.html> (last visited Dec. 21, 2012). The Harvard University Institute for Quantitative Social Science (“IQSS”) Dataverse Network “is an open source application to publish, share, reference, extract and analyze research data. It facilitates making data available to others, and allows to replicate others work.” *About the Project*, THE DATAVERSE NETWORK PROJECT, <http://thedata.org/book/about-project> (last visited Dec. 21, 2012). The actual Network is located at <http://dvn.iq.harvard.edu/dvn/>.

258. INTERUNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH, GUIDE TO SOCIAL SCIENCE DATA PREPARATION AND ARCHIVING: BEST PRACTICE THROUGHOUT THE DATA LIFE CYCLE v (3rd ed. 2005) (citing Stephen Feinberg, *Sharing Statistical Data in the Biomedical and Health Sciences: Ethical, Institutional, Legal, and Professional Dimensions*, 15 ANN. REV. PUB. HEALTH 1 (1994)), *available at*, http://deepblue.lib.umich.edu/bitstream/2027.42/61289/1/ICPSR_dataprep_pdf (last visited Dec. 21, 2012).

259. For further discussion of outcome-based research, see *infra* notes 367-73 and accompanying text.

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First, “as a general rule, researchers should collect as much data as resources and time allow because basing inferences on more data rather than less is almost always preferable.”²⁶⁰ Second, because a multi-user dataset is intended for multiple users and is not custom-tailored to a specific research question,²⁶¹ the more data, the less the likelihood of selective deposit²⁶² or selective survival.²⁶³

This Part focuses upon coding CM/ECF outcomes into the Federal Courts CM/ECF Descriptive Dataset (“FCCEDD”). Although the CM/ECF system has revolutionized online access to the federal courts, the present system is not conducive to efficient empirical research. Specifically, coding CM/ECF cases currently is cumbersome and expensive. Contemporaneous coding promises to code many more cases at minimal cost.

A. *The Electronic Case Filing Revolution*

Given the prevalence of internet access among American lawyers,²⁶⁴ it is not surprising that the federal courts allow attorneys and pro se litigants²⁶⁵ to file and receive official documents in ongoing federal civil litigation online via the internet and electronic mail. Rule 5(d)(3) states that a federal court “may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any

260. Epstein & Martin, *Quantitative Approaches*, *supra* note 30, at 910.

261. *See supra* note 246 and accompanying text.

262. *See supra* note 253 and accompanying text.

263. *See supra* note 254 and accompanying text.

264. For example, virtually all American lawyers the ABA surveyed in 2011 had access to the internet. *See* 1 AM. BAR ASS’N, 2011 LEGAL TECHNOLOGY SURVEY REPORT xvi-xvii, 35 (2011).

265. For a discussion of how pro se litigants have less access to the internet than lawyers, see, for example, Donald E. Shelton, *All Aboard? Electric Filing, the Digital Divide, and Access to Courts*, 40 JUDGES’ J., no. 3, 2001 at 31. The AOUSC recently admitted that very few pro se litigants use CM/ECF. *See* ADMIN. OFFICE OF U.S. COURTS, LONG RANGE PLAN FOR INFORMATION TECHNOLOGY IN THE FEDERAL JUDICIARY: FISCAL YEAR 2012 UPDATE 5 (2011) [hereinafter AOUSC, LONG RANGE PLAN FOR INFORMATION TECHNOLOGY], *available at* <http://www.uscourts.gov/uscourts/FederalCourts/Publications/2012ITLongRangePlan.pdf>.

technical standards established by the [JCUS].”²⁶⁶ The JCUS established those technical standards in its CM/ECF project.²⁶⁷ CM/ECF has “revolutionized the way in which the federal courts manage their cases and documents. This easy-to-use system allows attorneys to file documents directly with the court over the [i]nternet and allows courts to file, store, and manage their case files in an easy-to-access, transparent way.”²⁶⁸

Today, CM/ECF contains the filed documents for forty-one million federal cases.²⁶⁹ More than 600,000 federal court attorneys and pro se litigants have filed documents in CM/ECF.²⁷⁰ Most federal bankruptcy courts, district courts, and appellate courts operate CM/ECF via their respective court webpages.²⁷¹ The CM/ECF project began in 1989 as the Public Access to Court Electronic Records (“PACER”) program.²⁷² PACER has 1.2 million registered users²⁷³ who can access court documents and information online but cannot file or respond to lawsuits. In response to the evolution of PACER into an online electronic case docket, in 1998 the AOUSC began developing

266. FED. R. CIV. P. 5(d)(3).

267. *About CM/ECF*, ADMIN. OFF. OF U.S. CTS., www.uscourts.gov/FederalCourts/CMECF/AboutCMECF.aspx (last visited Dec. 22, 2012) [hereinafter *About CM/ECF*].

268. *Id.*

269. ADMIN. OFFICE OF U.S. COURTS, NEXT GENERATION OF CM/ECF: ADDITIONAL FUNCTIONAL REQUIREMENTS GROUP FINAL REPORT 1 (2012) [hereinafter AOUSC, NEXT GENERATION OF CM/ECF].

270. *Id.*

271. For a current list of federal district courts utilizing the CM/ECF system, see *Courts Accepting Electronic Filings*, ADMIN. OFF. U.S. CTS., <http://www.uscourts.gov/FederalCourts/CMECF/Courts.aspx> (last visited Dec. 22, 2012).

272. See *Chronology of the Federal Judiciary’s Electronic Public Access (“EPA”) Program*, PUB. ACCESS CT. ELECTRONIC RECS., <http://www.pacer.gov/documents/epachron.pdf> (last visited Dec. 22, 2012). The terms PACER and CM/ECF are used almost interchangeably. Technically, a non-lawyer can access PACER to obtain copies of federal civil litigation documents without interacting with CM/ECF whereas only lawyers or pro se litigants can access CM/ECF to file and receive litigation filings. See *CM/ECF Registration*, U.S. DISTRICT CT. FOR THE DISTRICT OF N.M., <http://www.nmcourt.fed.us/web/DCDOCS/cmecf/registration.html> (last visited Dec. 22, 2012).

273. AOUSC, LONG RANGE PLAN FOR INFORMATION TECHNOLOGY, *supra* note 265, at 2.

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CM/ECF.²⁷⁴ In 2006, Rule 5(d)(3) was amended so that a “local rule may require electronic filing only if reasonable exceptions are allowed.”²⁷⁵ However, Rule 5(d)(3) “does not define the scope of those exceptions.”²⁷⁶ The amendment “acknowledge[d] that many courts have required electronic filing by means of a standing order, procedures manual, or local rule.”²⁷⁷ Most federal courts require that attorneys initially register to use CM/ECF to submit and receive filings in any federal civil case and that once initially registered, attorneys must continue to use CM/ECF in all subsequent cases in front of that particular court.²⁷⁸ Rule 5.2 requires electronic filers to redact confidential personal information from electronically filed documents.²⁷⁹

Although functionally CM/ECF is just an online electronic version of the traditional paper and “snail mail” filing system it replaced,²⁸⁰ what makes electronic case filing revolutionary is not only its increased convenience and broader public access,²⁸¹ but also its potential for empirical research. The AOUSC recognizes that “information technology presents opportunities not simply to replicate old paper processes in digital form but to rethink many aspects of those processes altogether.”²⁸² In general, recent innovations in information access, information management, and data storage have provided the technological

274. *Chronology of the Federal Judiciary’s Electronic Public Access (“EPA”) Program*, *supra* note 272.

275. FED. R. CIV. P. 5(d)(3).

276. FED. R. CIV. P. 5(d)(3) advisory committee’s note (2006 Amendment).

277. *Id.*

278. 1 MARY SQUIERS, MOORE’S FEDERAL PRACTICE—CIVIL § 5.04(2)(c)(i) (2012).

279. FED. R. CIV. P. 5.2(a); *see also About CM/ECF*, *supra* note 267.

280. *See Looking for the Next Generation of the CM/ECF System*, ADMIN. OFF. U.S. CTS., http://www.uscourts.gov/News/TheThirdBranch/09-05-01/Looking_for_the_Next_Generation_of_the_CM_ECF_System.aspx (last visited Dec. 22, 2012) [hereinafter *Looking for the Next Generation of the CM/ECF System*]. Indeed, Rule 5(d)(3) recognizes that a “paper filed electronically in compliance with a local rule is a written paper for purposes of these rules.” FED. R. CIV. P. 5(d)(3).

281. *See generally* PUB. ACCESS COURT ELEC. RECORDS, PACER USER MANUAL FOR ECF COURTS 1 (2012), *available at* <http://www.pacer.gov/documents/pacermanual.pdf>.

282. AOUSC, LONG RANGE PLAN FOR INFORMATION TECHNOLOGY, *supra* note 265, at 1.

capability necessary for data-driven decision making.²⁸³

Specifically, the CM/ECF web interface is menu-driven and requires electronic filers to code variables²⁸⁴ with basic information about the court filing before it is submitted online.²⁸⁵ The filer is required to label the uploaded electronic files containing the Adobe portable document format (“PDF”) images²⁸⁶ of the paper court documents with values for simple variables.²⁸⁷ This way an original source document is directly associated with its coded values.

For example, if a registered plaintiff’s attorney wants to file a motion for a preliminary injunction,²⁸⁸ she must code the PDFs of the paper motion, memorandum in support, certificate of service, and other attachments²⁸⁹ contemporaneously with electronic filing.²⁹⁰ The filing then is coded by the type of case

283. See AYRES, *supra* note 34, at 154-55; Huw Davies et al., *Introducing Evidence-Based Policy and Practice in Public Services*, in WHAT WORKS?, *supra* note 18, at 2.

284. *Accord* LoPucki, *supra* note 16, at 484; see also *supra* notes 3 and 235 and accompanying text.

285. See *CM/ECF Attorney’s User Guide Chapter 7*, U.S. DISTRICT CT. FOR THE N. DISTRICT OF FLA., http://www.flnd.uscourts.gov/attorneys/cmecf/User_Manual/Ch7_Filing_Docs_in_CV_Cases.pdf (last updated July 13, 2009).

286. *About CM/ECF*, *supra* note 267.

287. Current variables include

[a] listing of all parties and participants including judges, attorneys and trustees[;] [a] compilation of case related information such as cause of action, nature of suit and dollar demand[;] [a] chronology of dates of case events entered in the case record[;] [a] claims registry[;] [a] listing of new cases each day in all courts[; and] [j]udgments or case status.

Frequently Asked Questions, PUB. ACCESS CT. ELECTRONIC RECS., <http://www.pacer.gov/psc/faq.html> (last visited Dec. 22, 2012) (click “PACER” tab; then click “Case Related” tab; then click “What information is available on PACER?”).

288. See FED. R. CIV. P. 65(a).

289. *CM/ECF Attorney’s User’s Guide Chapter 7*, *supra* note 285, at 2-10 (explaining how to code a motion for preliminary injunction).

290. A CM/ECF electronic filing is considered filed at the time listed in the Notice of Electronic Filing (“NEF”) automatically generated and e-mailed to the filer’s registered e-mail address once CM/ECF receives the filing. *Id.* at 19.

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(civil), type of document to be filed (motion), motion type (preliminary injunction), case number, party/parties filing the document, filing attorney, and name(s) of attachment(s).²⁹¹

Although currently the required information is rather basic—generally the information included in a standard case docket sheet—the coding is completed by the certifying attorney of record responsible for the court filing under Rule 11(a).²⁹² Under Rule 11, the filing attorney thus certifies the accuracy of her coding under penalty of sanctions.²⁹³ CM/ECF automatically electronically mails the filing—and associated coding—to the court, the clerk, and all other counsel of record, including opposing counsel.²⁹⁴

Accordingly, three unique facts increase the likelihood of CM/ECF's coding accuracy. First, the filing is coded contemporaneously with the formal submission of the filing when the coder's knowledge of the filing is the clearest. Second, the coder is the attorney or pro se party with firsthand knowledge of the filing. Finally, the coding is reviewed by both opposing counsel and the court under penalty of Rule 11 sanctions.

At present, the AOUSC and the FJC²⁹⁵ are designing the “Next Generation of CM/ECF.”²⁹⁶ In 2008, the AOUSC appointed a steering group for the CM/ECF Next Generation (“Next Generation”) Project “to develop and prioritize system

291. *Id.* at 2-10.

292. FED. R. CIV. P. 11(a), (b). The registered attorney's (or *pro se* litigant's) CM/ECF username and password is needed to access the system serve as the registered filer's signature. MICHAEL SMITH, O'CONNOR'S FEDERAL RULES: CIVIL TRIALS 21 (2012) (citing D. AZ. LOC. R. 5.5(g)); U.S. DIST. COURT FOR THE S. DIST. OF CAL., ELECTRONIC CASE FILING ADMINISTRATION POLICIES & PROCEDURES MANUAL 11 (2012), *available at* <http://www.casd.uscourts.gov/cmecf/pdf/CASDPolicies.pdf>.

293. FED. R. CIV. P. 11(a), (b).

294. *CM/ECF Attorney's User's Guide Chapter 7, supra* note 285, at 19-20.

295. Although the FJC retains “evaluat[ion of] emerging technologies . . . for their application to future needs of the Judiciary[.]” the FJC transferred “all development, implementation, and evaluation of court automation systems and supporting technologies” to the AOUSC in 1990. Schwarzer, *supra* note 50, at 1145-46 (citing Memorandum to the Chief Justice (Jan. 29, 1992) (on file with the Federal Judicial Center)).

296. AOUSC, NEXT GENERATION OF CM/ECF, *supra* note 269, at 1.

requirements for a new application.”²⁹⁷ The question they seek to answer is: “If we could change CM/ECF in any way, what would we want the Next Generation system to look like?”²⁹⁸ In 2009, the AOUSC also appointed an Additional Stakeholders Functional Requirements Group (the “ASFRG”) to canvass selected users of CM/ECF outside the federal judiciary.²⁹⁹ Professor Ted Eisenberg, editor of the *Journal of Empirical Legal Studies*,³⁰⁰ represented the Association of American Law Schools on the ASFRG.³⁰¹ The ASFRG completed its final report on February 27, 2012.³⁰² This requirements-phase appears complete and “will be followed by design, coding, testing, and implementation phases.”³⁰³

To facilitate empirical research and EBP fully, the Next Generation system design should include the automated ability to: (1) search the full-text of all available CM/ECF information with keywords (to include docket coding and the text of filed documents); (2) download relevant CM/ECF documents automatically; (3) import data from downloaded documents automatically into computer software used for empirical analysis; and (4) update the data from previous CM/ECF searches automatically.³⁰⁴

The first and second design features are interrelated. The ability to keyword search all CM/ECF information would allow researchers to identify which documents to download automatically. Internal CM/ECF court users apparently

297. *Id.*

298. *Looking for the Next Generation of the CM/ECF System*, *supra* note 280 (internal quotation marks omitted).

299. AOUSC, NEXT GENERATION OF CM/ECF, *supra* note 269, at i.

300. *Journal of Empirical Legal Studies*, WILEY ONLINE LIBR., [http://onlinelibrary.wiley.com/journal/10.1111/\(ISSN\)1740-1461](http://onlinelibrary.wiley.com/journal/10.1111/(ISSN)1740-1461) (last visited Dec. 22, 2012).

301. AOUSC, NEXT GENERATION OF CM/ECF, *supra* note 269, at 2.

302. *Id.* at i.

303. ADMIN. OFFICE U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR, ADMIN. OFF. U.S. CTS., http://www.uscourts.gov/annualreport_2011/Key_Studies_Projects_And_Programs.aspx (last visited Dec. 22, 2012) (follow “Key Studies Projects and Programs” hyperlink; then follow “Case Management/Electronic Case Files” hyperlink).

304. *See* LoPucki, *supra* note 16, at 486-88.

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already have this search capability.³⁰⁵ The ASFRG identified similar design features in its final report.³⁰⁶ So far, CM/ECF planners have hesitated to make this search capability publicly available for two reasons. First, they are concerned that such complex searches might negatively impact CM/ECF's technical performance.³⁰⁷ Second, because the general public then would be able to search for all information under a particular judge's name, they believe that this capability might violate the long-standing JCUS policy of not releasing judge-specific information.³⁰⁸

The third design feature would require all CM/ECF filers to upload their documents to CM/ECF in an automatically importable electronic format. Such an automatically importable format has been the subject of an ongoing software trial in the federal bankruptcy courts. Since 2005, the federal bankruptcy courts have mandated the use of data-enabled "fillable" PDF bankruptcy forms in most electronically filed bankruptcy cases.³⁰⁹ "Users of these forms 'code' the data as they create it, by entering it into fields (boxes) in specified formats—essentially the way customers fill out order forms on the [i]nternet."³¹⁰ These relational forms tag each entry "as the

305. AOUSC, NEXT GENERATION OF CM/ECF, *supra* note 269, at 11-12.

306. *Id.* at 18-19.

307. *Id.* at 12.

308. *Id.* at 12 n.8. This and other privacy concerns are examined below. This Article argues for a simple privacy standard where information that otherwise would be public should be publicly available on CM/ECF. *See infra* Part IV.A.4.

The Judicial Conference's policy is counter to public transparency and should be revoked. Because a judge's name on an individual case docket sheet or opinion is already publicly available, it is nonsensical to limit the searching and aggregation of what otherwise would be public information. Judges have a great deal of power—to include literally the power of life and death—and should be held publicly accountable. The public should be able to find out how judges have ruled overall in a variety of different kinds of cases. Allowing this policy to stand makes the Judicial Conference look like an elitist, self-promoting club and erodes public confidence in judicial integrity.

309. Memorandum from Admin. Office of U.S. Courts to Bankr. Petition Preparation Software Cos., U.S. DEPT. OF JUSTICE 1 (Sept. 23, 2005), http://www.justice.gov/ust/eo/bapcpa/defs/docs/smart_forms_ltr.pdf; *see also* LoPucki, *supra* note 16, at 484 & n.4.

310. LoPucki, *supra* note 16, at 484.

value of a characteristic of an object.”³¹¹ Data management, spreadsheet, and statistical analysis programs then “can process” such coded empirical data “into statistics, tables, and graphs.”³¹² The ASFRG also identified this design feature in its final report.³¹³

Before CM/ECF, litigants were required to complete and attach standard paper court forms to their paper filings when manually submitting them to the court clerk.³¹⁴ In a similar fashion, CM/ECF filers can be required either to attach a completed data-enabled fillable PDF form with the required coding to every electronic filing or to write all electronic filings solely on fillable PDF forms.

Finally, the ability to update automatically the results from previous CM/ECF searches with cases added since the last search would allow rulemaking empirical studies to stay current at minimal cost. According to one CM/ECF empirical researcher, because of the problems with the current system, “only a handful” of CM/ECF empirical studies are presently updated.³¹⁵

Incorporating these design features into the Next Generation system could potentially transform EBP not only in the federal judiciary but also, by example, in the rest of the federal government. The current CM/ECF system, however, actually hinders EBP.

B. *Current CM/ECF Coding Is Cumbersome*

As one researcher commented, using the current CM/ECF system for empirical research is almost prohibitively resource-

311. *Id.*

312. *Id.*

313. *See generally* AOUSC, NEXT GENERATION OF CM/ECF, *supra* note 269, at 17-19.

314. *See Court Forms by Number*, ADMIN. OFF. U.S. CTS., http://www.uscourts.gov/formsandfees/forms/courtforms.aspx#_UJcangqqEns.pdfonline (last visited Dec. 23, 2012). For example, a completed Form JS 044: Civil Cover Sheet has been attached to every federal civil complaint since 1974. *See, e.g., Civil Cover Sheet*, ADMIN. OFF. U.S. CTS. (Sept. 2011), <http://www.uscourts.gov/uscourts/FormsAndFees/Forms/JS044.pdf> [hereinafter AOUSC, *Civil Cover Sheet*].

315. LoPucki, *supra* note 16, at 486-87.

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intensive.³¹⁶ Although hundreds if not thousands of researchers use CM/ECF data,³¹⁷ they are unable to download usable data directly from CM/ECF.³¹⁸ Because CM/ECF's current search capabilities are extremely limited,³¹⁹ researchers often must identify relevant cases from separate sources, independent of CM/ECF.³²⁰ Although CM/ECF documents are PDFs,³²¹ they are not required to have renderable (and thus searchable) text.³²² Often the PDFs are merely scanned images of insufficient quality to be converted to text through optical character recognition software.³²³

As a result, researchers typically print out hard copies of relevant documents in every CM/ECF case and then have human coders manually code them.³²⁴ This Article shall call the current method of coding CM/ECF cases using human manual coders simply "current coding" and the contemporaneous coding of CM/ECF cases as mandated by the proposed Model Rule and as implemented in the FCCEDD³²⁵ simply "contemporaneous coding." Under current coding, training, hiring, and cross-checking manual coders can be quite time-consuming and expensive.³²⁶ By minimizing the need for manual coding, contemporaneous coding can improve the quality of federal court empirical data.

316. See Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 987 (2008).

317. LoPucki, *supra* note 16, at 486.

318. See *id.* at 486-87.

319. See AOUSC, NEXT GENERATION OF CM/ECF, *supra* note 269, at 11.

320. LoPucki, *supra* note 16, at 486. There are searchable, albeit limited, aftermarket CM/ECF databases available. See, e.g., Jennifer Behrens, Research Guides: Court Records and Briefs, J. MICHAEL GOODSON LAW LIBRARY AT DUKE UNIV. SCH. OF LAW, <http://law.duke.edu/sites/default/files/lib/recordsbriefs.pdf> (last updated July 2012).

321. *About CM/ECF*, *supra* note 267.

322. LoPucki, *supra* note 16, at 486-87.

323. *Id.*

324. *Id.* at 484.

325. For further discussion, see *supra* notes 1-16 and accompanying text.

326. See Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 110 n.192, 111 (2008) (collecting authorities).

C. *Contemporaneous Coding Can Code More Data at a Lower Cost*

The advantage of contemporaneous coding over current coding is not in accuracy but rather in economies of scale. Contemporaneous coding can code many more CM/ECF cases at a much lower cost than current coding.

As explained above, the primary difference between current coding and contemporaneous coding is that current coding is done retroactively by an uninvolved party³²⁷ whereas contemporaneous coding is done prospectively by an involved party.³²⁸ The current coding of CM/ECF cases requires hiring human coders to code every document in each case manually.³²⁹ Because the coder is unfamiliar with the case, she must take time to read over each document she is reviewing to ensure that the proper variables and values are coded. This reviewing time means that she would code this document much slower than someone who was already familiar with the particular document and the underlying lawsuit. To guide manual coders, researchers must also develop coding schema, “a detailing of each variable of interest, along with the values of each variable,”³³⁰ and carefully document such schema in codebooks, “guides they employ to code their data and that others can use to replicate, reproduce, update, or build on the variables the resulting database contains and any analyses generated from it.”³³¹ To double check the coding’s accuracy, another coder must re-code a random sample of the same documents to confirm that both coders applied the coding schema the same way.³³² It is easy to see how current coding can be costly and yet only code a small fraction of the available documents and cases on CM/ECF.³³³

327. *See supra* Part III.B.

328. *See supra* notes 5-10 and accompanying text.

329. *See generally* Hall & Wright, *supra* note 326, at 109-11, 110 n.192.

330. Epstein & Martin, *Quantitative Approaches*, *supra* note 30, at 911.

331. *Id.*

332. MONAHAN & WALKER, *supra* note 30, at 67; *see* Hall & Wright, *supra* note 326, at 113.

333. *See* Hall & Wright, *supra* note 326, at 110 & n.192, 111.

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In contrast, contemporaneous coding should be inexpensive—if not free—and code *all* available CM/ECF cases and documents filed after the Model Rule’s adoption. Because the Model Rule and its implementation in the next generation of CM/ECF would make contemporaneous coding a required step in the electronic filing process, manual human coders would be needed only to double check a random sample of the relevant dataset.³³⁴ Furthermore, because the underlying case documents are associated with the relevant contemporaneous coding,³³⁵ manual human coders can easily access the documents associated with a coding sample and re-code them. Even though the adversarial process should ensure coding accuracy, researchers nevertheless always should double check a random sample.

This Article recommends contemporaneous coding not for its own sake, but rather so that the resulting descriptive empirical dataset can provide a shared baseline for policy debate.³³⁶ Because this dataset must be indisputably objective for all sides in a policy debate to accept it, contemporaneous coding is limited to case-related outcomes.³³⁷ Case-related outcomes are easily verifiable facts about the personal characteristics, proffered arguments, and litigation results in a particular case.³³⁸ They are facts over which the parties, the court clerk, and the presiding judge in a particular case would agree. Although there is often disagreement over an argument’s legal merit, there should be agreement over a description of the argument’s reasoning.³³⁹ Although coders normally should not have a personal stake in what they are coding,³⁴⁰ there is little risk of bias in the Model Rule. This is because contemporaneous coding is restricted to factual

334. *Id.*

335. For further discussion, see *supra* notes 285-90.

336. For further discussion, see *supra* Part I.B.

337. See *supra* note 4.

338. *Id.*

339. If there is disagreement, then the remedy is a motion for a more definite statement. FED. R. CIV. P. 12(e).

340. Epstein & Martin, *Coding Variables*, *supra* note 5, at 326; see also Richard A. Posner, *Some Realism About Judges: A Reply to Edwards and Livermore*, 59 DUKE L.J. 1177, 1181 (2010) (expressing skepticism over “judicial self-reporting . . . as a valid source of knowledge”).

outcomes vetted by the adversarial process.

While these case-related outcomes might be available on the current CM/ECF, many of them have not been coded.³⁴¹ For example, while the current CM/ECF might have a PDF of a motion for summary judgment available for download, current coding does not code any arguments in the motion. To obtain that information, a researcher currently must examine the PDF and code the arguments herself. In contrast, contemporaneous coding would have already coded the arguments in the motion in a downloadable format. This would alleviate the need to examine the PDF except to verify reliability.

Both current coding and contemporaneous coding can code case-based outcomes with comparable reliability. Of the three “R” questions to guide the selection of evidence for EBP,³⁴² the third “R”, reliability, concerns “how well-founded—theoretically, empirically”³⁴³—is the evidence? Although the word “reliability” was employed to maintain the alliterative acronym, this reliability idea can be broken down further into two related concepts—statistical reliability and statistical validity.³⁴⁴

First, contemporaneous coding should be at least as statistically reliable as current coding. Statistical reliability is “the extent to which it is possible to replicate a measurement, reproducing the same value (regardless of whether it is the right one) on the same standard for the same subject at the same time.”³⁴⁵ For example, a thermometer is statistically reliable if you can stick it your mouth one hundred times and get the same temperature reading. Although you do not know if the temperature reading is accurate, you do know that the thermometer is consistent. Because coding under either

341. See *supra* note 286 and accompanying text.

342. See *supra* note 25 and accompanying text.

343. Solesbury, *supra* note 18, at 9.

344. To avoid confusion, this Article uses the words “statistical reliability” to distinguish this concept from the broader “reliability” concept of the three R’s. See *id.* But the term “reliability” is usually used in empirical literature without the “statistical” modifier. See, e.g., LAWLESS ET AL., *supra* note 82, at 42. Likewise, the term “validity” is usually used in empirical literature without the “statistical” modifier. *Id.* at 36.

345. Epstein & King, *supra* note 101, at 83.

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method is limited to case-related outcomes, both current coding and contemporaneous coding should be able to code such simple facts consistently.

In fact, contemporaneous coding might arguably be more statistically reliable than current coding. With contemporaneous coding, the coders—the party counsel, court clerk, or presiding judge—not only have the most firsthand knowledge of the document which they are coding, but also have a special ethical and professional duty to code the document correctly.³⁴⁶ The formal authority of the proposed Model Rule, the adversarial process, the court’s scrutiny, the duty of candor under Rule 11, and the knowledge that the public can search the coding using a judge’s or counsel’s name³⁴⁷ should all help ensure contemporaneous coding’s statistical reliability. With current coding, the coders have neither firsthand knowledge of the document that they are coding nor a special ethical or professional duty to code the document correctly.

Second, contemporaneous coding should be as statistically valid as current coding. Statistical validity is “the extent to which a reliable measure reflects the underlying concept being measured.”³⁴⁸ For example, a statistically reliable, but invalid, thermometer might consistently give you the wrong temperature, ten degrees lower than the actual temperature. In comparison, a statistically valid thermometer would give you the correct temperature. Again, in light of the factual simplicity of case-based outcomes, both current coding and contemporaneous coding should be able to be statistically valid.

In fact, contemporaneous coding might be more statistically valid than current coding for legal outcomes because contemporaneous coders are generally legally trained whereas current coders need not be. There are complex questions of legal doctrine that attorneys or judges well versed in the relevant law might reliably code correctly, but non-legally trained (or legal novice) manual coders might reliably

346. See *supra* notes 291-93 and accompanying text.

347. See *infra* Part IV.A.1-2.

348. Epstein & King, *supra* note 101, at 87.

code incorrectly.³⁴⁹ As Judge Harry Edwards observed, legal doctrine is difficult to translate “into data that are susceptible to mathematical analysis.”³⁵⁰ The close study of legal doctrine “is impossible with currently available or readily foreseeable empirical tools.”³⁵¹ This is a serious issue, because precedents “fix the point of departure from which the labor of the judge begins.”³⁵²

With current coding, “the overriding goal of a codebook—and indeed the entire coding process—is to minimize the need for interpretation.”³⁵³ Consequently, current coding might avoid coding legal outcomes altogether even though they might nevertheless be factual, case-related outcomes.³⁵⁴

In contrast, contemporaneous coding can leverage its coders’ *insider* legal expertise to code legal outcomes better. When coding legal outcomes, there is no substitute for legal training. Recall that case-related outcomes require consensus from all parties and the judge.³⁵⁵ Thus, only bright-line, well-established legal outcomes can be coded.

Even researchers trained in *outsider* “Law and” disciplines who never went to law school might make coding decisions with which lawyers might disagree.³⁵⁶ Without losing the necessary

349. For an example of an empirical study that codes legal outcomes, see Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477, 481-82 (2009).

350. Hon. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1910 (2009).

351. *Id.* at 1903 (quoting FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 202 (2007)).

352. *Id.* at 1897 (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 20 (Yale Univ. Press 22nd ed. 1964) (1921)).

353. Epstein & Martin, *Coding Variables*, *supra* note 5, at 326.

354. For example, Judge Edwards claims that the Songer U.S. Court of Appeals Database does not code the content of any opinions. Edwards & Livermore, *supra* note 350, at 1926. *See generally* U.S. Appeals Courts Database, *supra* note 257.

355. *See supra* note 337 and accompanying text.

356. As David Kennedy and William Fisher III explained:

Scholars in [other fields] all refer to law, and each of these disciplines has its own—outsider’s—idea about what law is and how it works. The experience of lawyers and legal scholars reading the work of colleagues in other fields is

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focus on outcomes, contemporaneous coding can help innovate more sophisticated empirical approaches to understanding legal doctrine and legal decision making by “mov[ing] beyond asking which litigant prevailed in a case and now also ask[ing] how the advocates and the court framed the question presented and how the legal analysis unfolded in the opinion.”³⁵⁷ Perhaps contemporaneous coding can even help develop a uniquely legal empirical methodology.³⁵⁸

For example, school desegregation law is a complex, specialized area of legal doctrine.³⁵⁹ Although the distinction between de jure mandatory and de facto voluntary school segregation is elementary to anyone familiar with the law, it might be arcane to someone unfamiliar with the law. This simple distinction, however, is fundamental to school desegregation law because “[s]chool districts that had engaged in [de jure] segregation had an affirmative constitutional duty to desegregate; those that were [de facto] segregated did not.”³⁶⁰ This is because only de jure segregation violates the Equal Protection Clause of the Constitution.³⁶¹

often a frustrating one. “If only they had a better sense of how law worked from the *inside*,” we often think, or “if only they had gone to law school.”

David Kennedy & William W. Fisher III, *Preface to THE CANON OF AMERICAN LEGAL THOUGHT*, at ix (David Kennedy & William W. Fisher III, eds. 2006) (emphasis in original).

357. Gregory Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 885 (2008) (reviewing FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* (2007)); see also Edwards & Livermore, *supra* note 350, at 1927.

358. Hall & Wright, *supra* note 326, at 63.

359. Because new desegregation lawsuits are extremely rare, even most lawyers have little reason to know school desegregation law. Today, school desegregation law is primarily considered a historical legal doctrine whose relevance has largely passed. See, e.g., Mark V. Tushnet, *The “We’ve Done Enough” Theory of School Desegregation*, 39 HOW. L.J. 767 (1996).

360. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 794 (2007) (Kennedy, J., concurring).

361. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Washington v. Davis*, 426 U.S. 229, 239 (1976).

Whether a court has ever found a school district to have engaged in de jure segregation is a case-based legal outcome. Under contemporaneous coding, the trial lawyers or presiding judge in a school desegregation case would be able to code that legal outcome with no trouble. Under current coding, however, an outsider coder unfamiliar with school desegregation law might have difficulty coding that legal outcome. If the law changes, then the coding scheme must be revised to reflect the change.

Recall that the purpose of case coding is to create the FCCEDD, a new multi-user dataset of federal court outcomes. Because contemporaneous coding can code much more data than current coding, contemporaneous coding provides greater data on which to base inferences³⁶² and is less likely than current coding to create a dataset that suffers from selective deposit³⁶³ or selective survival.³⁶⁴

The comprehensive case outcome data produced through contemporaneous coding would be online, electronic, and searchable by computer. “Most case coding projects” since the early 1980’s “have taken advantage of the ability to select cases using structured computer searches”³⁶⁵ One of the FCCEDD’s potential scholarly contributions to the body of public electronic knowledge on the federal courts is the comprehensive coding of unpublished opinions.³⁶⁶

IV. Contemporaneous Coding of Federal Court Cases

The purpose of contemporaneous coding of cases in CM/ECF is to create the FCCEDD and thereby provide a descriptive baseline of objective empirical data for EBP.³⁶⁷ The

362. For further discussion, see *supra* note 258 and accompanying text.

363. For further discussion, see *supra* note 253 and accompanying text.

364. For further discussion, see *supra* note 254 and accompanying text.

365. Hall & Wright, *supra* note 326, at 106.

366. In 2007, less than seventeen percent of all court of appeals opinions were published. Edwards & Livermore, *supra* note 350, at 1923 & n.69. The Songer Database of court of appeals opinions codes only published opinions. *See id.* at 1922-23. The decision whether to publish or not to publish an opinion is far from random. *Id.* at 1923. Contemporaneous coding can supplement the Songer Database with unpublished court of appeals opinions.

367. For further discussion about the need for a descriptive empirical

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only way to do this is by ensuring that the resulting data are acceptable to all sides in any rulemaking debate. For the FCCEDD to be effective the data cannot be oversimplified or subjective. The data's reliability must be beyond question.³⁶⁸ Accordingly, the data must (1) be limited to authentic outcomes³⁶⁹ about the coded cases; (2) be coded and collected in a uniform manner; and (3) balance workability with utility.

First, authentic outcomes are facts that remain the same regardless of normative outlook.³⁷⁰ They are facts about the parties' idiosyncratic characteristics or proffered arguments and the results of the lawsuit over which there would be no dispute from the parties or the assigned judge.

For example, the fact that the defendant filed a motion to dismiss³⁷¹ two of the plaintiff's four causes of action would be an authentic outcome. It can be independently verified by examining the official case filings. Neither the plaintiff, nor the defendant, nor the court would disagree with that fact. Another outcome would be the fact that the court dismissed one cause of action but denied dismissing the other. Again, that outcome could be independently verified by consulting the case docket sheet³⁷² and the court's filed memorandum order.³⁷³

In contrast, whether the defendant's motion was well written or whether the court was correct in its ruling would not be an authentic outcome because such determinations are too subjective to garner universal agreement of its validity.³⁷⁴ Not everyone might agree with the criteria used to determine whether a motion is well written or whether a court's ruling is justified based upon the language of the pleadings and prior precedent. As another example, many empirical studies of judicial decision making measure judicial ideology.³⁷⁵ Even

baseline in EBP, see *supra* Part I.B.

368. For further discussion about reliability, see *supra* Part I.B.

369. See *supra* notes 4 and 257.

370. Rhee, *supra* note 4, at 1326-27.

371. See FED. R. CIV. P. 12(b)(6).

372. See also *Court Records*, ADMIN. OFF. U.S. CTS., <http://www.uscourts.gov/CourtRecords.aspx> (last visited Dec. 26, 2012).

373. See FED. R. CIV. P. 7(b)(1).

374. See Rhee, *supra* note 4, at 1326-27.

375. Edwards & Livermore, *supra* note 350, at 1903-04. *Accord* AYRES, *supra* note 34, at 181 (describing the conflict regarding the use of

though such ideological criteria might be represented as reliable measures clearly defined in a codebook,³⁷⁶ its statistical validity is questionable because they usually employ oversimplified assumptions to ensure reliability.³⁷⁷

Second, to ensure the FCCEDD's consistency, its data must be coded and collected uniformly. Rule 5(d)(3) currently allows electronic filing to be governed by local rule.³⁷⁸ While most local federal district and circuit court CM/ECF webpages appear substantially similar, they have implemented e-filing differently.³⁷⁹ Because jurisdictional coding differences would defeat the EBP purpose behind the data, only uniform national implementation of the next generation CM/ECF will accomplish the EBP purpose of contemporaneous case coding.³⁸⁰ Rule 5(d)(3) thus *should* be amended to read:

Papers filed, signed, or verified by electronic means must be consistent with the uniform technical standards established by the Judicial Conference of the United States. Such standards must allow reasonable exceptions to electronic filing. A paper filed electronically is a written paper for the purposes of these rules.

Finally, the FCCEDD's coding scheme must balance workability with utility. Coding should be relatively easy to complete and should not add a meaningful research or completion burden to any filing. Ideally, the additional fillable PDF forms or online drop down menus³⁸¹ used for CM/ECF

scientifically based methods verses holistic methods of teaching).

376. See Epstein & Martin, *Coding Variables*, *supra* note 5, at 321.

377. Edwards & Livermore, *supra* note 350, at 1905-07.

378. FED. R. CIV. P. 5(d)(3); *see also* FED. R. CIV. P. 83.

379. See AOUSC, NEXT GENERATION OF CM/ECF, *supra* note 269, at 6-11.

380. Recognizing the research utility of allowing some coding variance by judicial district or circuit, the proposed rule below makes public information coding uniform and mandatory but allows for regional experimentation with voluntary coding of nonpublic or specialized information. *See infra* Part IV.A.

381. For further discussion of these two possible technical implementations of the next generation CM/ECF, *see supra* Introduction &

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contemporaneous coding should ask for outcomes readily available to any filing counsel and not take more than a few minutes per filing. Furthermore, because many attorneys are already familiar with CM/ECF, it should not be difficult for them to learn how to code more variables. That being said, the Advisory Committee should privilege utility over workability. Even if practitioners consider the new coding requirements burdensome, they will comply because they want to file or contest lawsuits in federal court.³⁸²

To get the ball rolling, this Article proposes an imperfect working draft Model Rule (along with a draft Advisory Committee Note) and a possible FCCEDD coding scheme for complaints and answers. With its characteristic calm, care, and comprehensiveness,³⁸³ the Advisory Committee can no doubt improve upon this proposal. To ensure the FCCEDD's uniformity, contemporaneous case coding should be mandated

Part III.A.

382. Some practitioners invested in the status quo and adverse to change undoubtedly would oppose this proposal. Hopefully, they would recognize how a publicly-searchable FCCEDD would improve their tactical and strategic research of judges, opposing counsel, parties, and expert witnesses and potentially bring them additional business. *See infra* Part IV.A.4 for further discussion. Similar complaints of increased workload and general resistance to change were rejected when the federal courts first mandated electronic filing or when courts adopted “to video and audio recording, to microfilm and computer tape, and, in the more distant past, to novel indexing schemes like citation tables and legal citation indexes.” Amanda Conley et al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry*, 71 MD. L. REV. 772, 773 n.1 (2012) (citing Patti Ogden, “Mastering the Lawless Science of Our Law”: A Story of Legal Citation Indexes, 85 LAW. LIBR. J. 1 (1993)).

In the final analysis, technological or informational improvements in any area of government simply require the political will to force practitioners to comply with new requirements. If forced to comply, practitioners will fall in line with even seemingly ridiculous requirements because they are willing to pay to play. For example, the U.S. District Court for the Central District of California requires courtesy copies of electronic filings mailed to the Judge's chambers to be “blue-backed” with a blue backing paper. C.D. CAL. LOC. R. 5-4.5, *available at* <http://court.cacd.uscourts.gov/Cacd/LocRules.nsf/a224d2a6f8771599882567cc005e9d79/68db23614f0a0a058825768d00763043?OpenDocument>. While many practitioners might agree that this bizarre, anachronistic practice not only appears to defeat some of the benefits of e-filing but also is burdensome, they all comply because they must to file or to contest federal lawsuits in the Central District of California.

383. *See, e.g.,* Kravitz, *supra* note 45, at 216-18.

by a new Federal Rule. Likewise, to ensure the FCCEDD's representativeness and reliability, the coding scheme should focus on authentic outcomes and should be developed through collaboration between academics, practitioners, and judges.

A. *A New Federal Rule of Civil Procedure*

After presenting the Model Rule and a draft Advisory Committee Note explaining the Model Rule, this section examines the two most common criticisms of the Model Rule—concerns about cost and privacy.

1. The Proposed Model Rule

Rule 1.1. Evidence-Based Rulemaking

(a) **Purpose.** The success of these rules in implementing the goals of Rule 1 must be continually assessed with objective, transparent, and methodologically sound empirical evidence. In accordance with 28 U.S.C. §§ 2072-75, the Supreme Court, the Judicial Conference of the United States, all committees or subcommittees on civil rules of practice and procedure, and the Federal Judicial Center are committed to ensuring that these rules as much as possible embody assumptions based upon demonstrable empirical evidence and factual reality. This rule does not apply to any reasonable exceptions to electronic filing in accordance with Rule 5(d)(3).

(b) **Case Coding.** To provide empirical evidence with which to assess the rules' success in implementing Rule 1, all electronically filed cases will be subject to mandatory and voluntary case coding questions.

(1) **Mandatory.** The Judicial Conference of the United States will establish and maintain uniform technical standards for the mandatory coding of all electronically filed cases in the federal courts. A database of this mandatory coding called the Federal Courts CM/ECF Descriptive Dataset ("FCCEDD") will be publicly available and searchable by registered electronic filer name.

(A) *No Opt Out.* No federal court may opt out of this mandatory coding.

(B) *Publicly Available Information.* In general, mandatory coding will be limited to information that is already publicly available.

(C) *Signed Nonbinding Representation to the Court.* All registered electronic filers are required to answer all mandatory coding questions honestly before

electronically filing any pleading, written motion, or other paper. The Notice of Electronic Filing³⁸⁴ e-mailed to every registered user will contain the filing's mandatory coding.

(i) *Ethical Duty of Candor*. Such mandatory coding is considered to be a signed representation to the court and is thereby subject to all the applicable disclosure requirements in these rules.

(ii) *No Estoppel*. Although case coding will neither bind the parties nor have precedential value, the court and all parties share a professional obligation, consistent with the goals of Rule 1.1(a), to ensure that all mandatory coding accurately reflects the factual reality of their lawsuit.

(2) **Voluntary**. A court may, by local rule or administrative order, add voluntary coding questions to the uniform mandatory coding questions. Such voluntary coding must be consistent with any technical standards established by the Judicial Conference of the United States and will apply only to cases electronically filed in that particular court. Subject to the collecting court's conditions or limitations, this voluntary coding will be publicly available in the FCCEDD.

(A) *Flexible Purpose*. The purpose of voluntary coding is to provide a court with the discretion to conduct local experiments and to collect additional empirical evidence to evaluate the rules. To provide the court with accurate, useful research, all electronically filing parties are encouraged—but not required—to answer voluntary coding questions with the same candor as a signed representation to the court.

384. *See supra* text accompanying note 289.

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(B) *Can Include Non-Public Information.* Voluntary coding can collect non-public information. The court will make every effort to safeguard such nonpublic information. Unless a court order or local rule or procedure mandates otherwise, the Notice of Electronic Filing e-mailed to every registered user will not contain the filing's voluntary coding.

(C) *Limited Waiver of Privileged Non-Public Information.* If a court inadvertently discloses nonpublic information collected through voluntary coding, the privilege protections of Federal Rule of Evidence 502(b) and Federal Rule of Civil Procedure 26(b)(5)(B) will apply with the filing party acting as the holder of the privilege.

(c) **Correction Procedure.** There is a formal correction procedure only for mandatory coding.

(1) **Mandatory Coding.** Technical accuracy in mandatory coding should be enforced with the same level of care and professionalism as with any other rule. Opposing counsel, the court, and the court clerk should scrutinize mandatory coding with the same attention to detail given to the underlying filed document.

(A) *If a Party's Coding Is in Error.* If a party has erroneously coded its filed document, the opposing party must first attempt to meet and confer with the filing party to persuade it to amend its coding before submitting a motion to correct mandatory case coding.

(i) *Meet and Confer Requirement.* If opposing counsel believes that a filing party's mandatory coding does not accurately reflect the underlying filed document, opposing counsel should first attempt informally to meet and confer with the filing party in a manner similar to Rule 37(a)(1).

(ii) *Motion to Correct Mandatory Case Coding.* If the filing party refuses to amend its mandatory coding, opposing counsel should then file a motion to correct mandatory case coding with the court concisely detailing the disparity between the mandatory coding and the underlying filed document and include a certification that the movant has in good faith conferred or attempted to confer with the filing party to correct the erroneous mandatory coding without court action.

(B) *If the Court's Coding Is in Error.* If a party believes that the court's mandatory coding does not accurately reflect the underlying order of the court, then the party should file a motion to correct mandatory case coding with the court summarizing the error and specifying the requested correction.

(C) *Original Filing Court Final Arbiter of Motion.* The court where the disputed mandatory coding was originally filed will be the final arbiter of a motion to correct mandatory case coding. Although a court must enter an order into the record explaining its reasons for granting or denying the motion, such an order itself is non-appealable. It is, however, part of the record and as such can be used as evidence of error in a subsequent appeal. This arrangement should balance the need to ensure coding accuracy with a desire to avoid unnecessary satellite litigation.

(2) **Voluntary Coding.** Because Rule 1.1(b)(2)(A) states that voluntary coding is not required, there is no formal correction procedure.

2. Proposed Advisory Committee Note³⁸⁵

Rule 1.1 implements recommendations first made in a 1995 *Self-Study* commissioned by the Rules Standing Committee of the Judicial Conference of the United States. See Daniel R. Coquillette, *A Self-Study of Federal Judicial Rulemaking: A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679 (1995) (Report prepared by Thomas E. Baker and Frank H. Easterbrook). Specifically, the *Self-Study*'s Recommendation 6 stated, "Each Advisory Committee should ground its proposals on available data and develop mechanisms for gathering and evaluating data that are not otherwise available, and should use these data to decide whether changes in existing rules should be proposed." *Id.* at 699.

Evidence-based rulemaking seeks to make this recommendation a reality. Evidence-based rulemaking is a subset of so-called evidence-based policymaking, perhaps more accurately (but less pithily) labeled "evidence-informed policymaking or research-shaped decision making." KAREN BOGENSCHNEIDER & THOMAS J. CORBETT, *EVIDENCE-BASED POLICYMAKING: INSIGHTS FROM POLICY-MINDED RESEARCHERS AND RESEARCH-MINDED POLICYMAKERS* 4 (2010). Evidence-based rulemaking assumes that there is a set of research methods that serious "scholars agree constitutes a proper way for helping us distinguish fact from belief" and "that a body of sound knowledge can be developed to help address even the most contentious of social policy issues" including federal civil rulemaking. *Id.*

Specifically, the Rule leverages the federal courts' case management/electronic case filing ("CM/ECF") system to create comprehensive, reliable, and inexpensive empirical data in a national Federal Courts CM/ECF Descriptive Dataset ("FCCEDD"—pronounced "fuh-said" for short). Starting from the date of the Rule's adoption onward, Rule 1.1(b)(1) requires all parties, the court clerk, and the presiding judge to answer

385. Consistent with Advisory Committee formatting guidelines, all citations in this draft Note are in the text.

uniform mandatory coding questions before filing any pleading, motion, order, or other paper in the CM/ECF system. This coding should provide objective, transparent, and methodologically sound empirical data for the FCCEDD. In turn, the FCCEDD should provide an objective factual baseline with which to evaluate past and future rulemaking.

The only way such mandatory coding can provide an objective factual baseline is if it accurately reflects the factual reality in every electronically filed case. Because mandatory case coding is derivative of the underlying filed documents, there is no need to treat mandatory case coding independent of its underlying filed documents. Rule 1.1(b)(1)(C) thus recognizes that case coding, unlike the actual language of filed documents, lacks independent legal authority. Case coding is analogous to the Reporter of Decisions's syllabi to Supreme Court opinions. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906).

Notwithstanding mandatory coding's lack of binding legal authority, the federal courts and the Bar must cultivate a culture of coding compliance among judges, judges' law clerks, court staff, counsel, and counsel's staff to effectuate the goals of Rule 1.1(a). Although as recognized in Rule 1.1(b)(1)(C)(ii) a party may not be estopped by its own mandatory coding, that party is still subject to ethical and professional discipline to include Rule 11 sanctions.

The Administrative Office of United States Courts will maintain the FCCEDD. Ideally, the FCCEDD should be available to the public online, possess an easy-to-use user interface that allows for keyword and full-text searching (to include automatically updating prior searches with additional search results added since the last search), and allow the download of information automatically into electronic formats compatible with popular statistical analysis programs.

It is in everyone's self-interest to ensure accurate coding because not only shall the coding provide the raw data for this powerful, searchable, public database, but also as a result such coding will impact professional reputations of the judges, lawyers, and pro se counsel in the case. The general public—not to mention judges, lawyers, and potential clients—will be able to search the FCCEDD by name on the internet and

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receive as search results the aggregated coding in all electronically filed lawsuits where the searched name was a registered CM/ECF filer.

Making all registered filers in a particular electronically filed case publicly responsible for the accuracy of mandatory coding and limiting Rule 1.1(c)'s correction procedure only to mandatory coding attempts to balance ensuring mandatory coding's accuracy with avoiding unnecessary satellite litigation. To avoid unnecessary appeals over mandatory coding disputes, Rule 1.1(c)(1)(C) gives the court where the disputed mandatory coding was originally filed the final, unreviewable say on motions to correct mandatory case coding.

For example, if the disputed mandatory coding was originally filed in federal district court, then the presiding federal district judge would be the final arbiter on a motion to correct mandatory case coding. If the district court denies the motion, the movant cannot appeal based solely upon the denial but can refer to the district court's order denying the motion as evidence to support an appeal on another issue. If the court of appeals agrees with the movant and reverses the district court, then the court of appeals can order as part of its relief the correction of the erroneous mandatory coding.

If the disputed mandatory coding concerned an appellate brief filed in the court of appeals, then the assigned three-judge panel would be the final arbiter on a motion to correct mandatory case coding. If the circuit panel denies the motion, the movant cannot petition for a rehearing en banc or for a writ of certiorari based solely upon the denial but can refer to the panel's order denying the motion as evidence to support a rehearing or appeal on another issue. If the en banc court of appeals or the Supreme Court agrees with the movant that the panel erred, then it can order as part of its relief the correction of the erroneous mandatory coding.

Courts are encouraged to adopt standing orders or local rules and procedures to ensure coding accuracy. At a minimum, judges should formally inform all parties of the importance of accurate mandatory coding and how a party's coding accuracy, like properly stating the holding of a case precedent in a brief, can make a lasting positive first impression on the court and opposing counsel.

In a complementary manner, Rule 1.1(b)(2) allows individual federal district courts, a court of appeals, or the U.S. Supreme Court to ask the electronic filers in their respective jurisdictions to answer additional questions voluntarily. Because of the range of possible voluntary questions, the collecting court has discretion to limit or restrict access to such voluntary coding but as a general rule should aspire to make voluntary coding publicly available in the FCCEDD. Depending on the nature of the voluntary coding, the court may need to remove identifying data or to disassociate the voluntary coding from its underlying documents before posting it on the FCCEDD. Ideally, voluntary coding questions will employ the same CM/ECF user interface as mandatory coding questions.

To promote imaginative research, a court can be creative with its voluntary coding questions. Such voluntary questions can run the gamut from nonpublic outcome information, to surveys collected by the Federal Judicial Center or an academic researcher, to random experimentation. Rule 1.1(b)(2)(A)'s "local experiments" language refers both to the broader concept of decentralized laboratories of federalism similar to the district-by-district case management plans mandated by the Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990), and to actual random experiments testing the effectiveness of new or proposed rules amendments. A court can require participants in a policy experiment to answer what would otherwise be voluntary questions about the experiment. To ensure accurate coding, a court should stress to experiment participants that both the adversarial process and Rule 11 apply to their case.

Rule 1.1 should not be interpreted as authorizing random experimental testing of the rules. Only Congress should authorize such random experimental testing through federal legislation. See Fed. Judicial Ctr., *Experimentation in the Law: Report of the Federal Judicial Center Advisory Committee on Experimentation in the Law* (1981); Carl Tobias, *A Modest Reform for Federal Procedural Rulemaking: Complex Litigation at the Millennium*, 64 L. & Contemp. Probs. 283, 287 (2001); Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., *Proposed Rules: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*

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and the *Federal Rules of Evidence*, 137 F.R.D. 53, 153 (1991) (proposing a never-adopted revision to Rule 83(b), “[w]ith the approval of the Judicial Conference of the United States, a district court may adopt an experimental local rule inconsistent with these rules if it is consistent with the provisions of Title 28 of the United States Code and is limited in its period of effectiveness to five years or less.”).

Rule 1.1(b)(1)(C) expands upon Rule 5(d)(3)’s language that a “paper filed electronically is a written paper for purposes of these rules” to make clear that electronic filers are to treat mandatory coding with the same level of professionalism, diligence, and candor as any other signed representation to the court.

Finally, in the unlikely event that a court inadvertently discloses nonpublic information collected through voluntary coding, Rule 1.1(2)(C) provides the affected party with the same privilege protections in any subsequent lawsuit as if that party had mistakenly disclosed the information during discovery.

3. Cost Challenges³⁸⁶

Most progress, particularly technological progress, costs money. The technological enhancements to the next generation of CM/ECF recommended in this Article³⁸⁷ are no exception. They probably would be quite expensive, particularly if they are done right the first time. With its careful long-term planning,³⁸⁸ the AOUSC appears to grasp the benefits of designing the next generation of CM/ECF comprehensively up front because “[j]udges and Judiciary staff now regard information technology not as something separate from their day-to-day work, but simply as the means by which they do their jobs.”³⁸⁹ But is the cost worth it? The predictable but appropriate response is yes. The increased technological capabilities—to include providing an objective descriptive factual baseline for EBP³⁹⁰—are worth the money.

Fortunately, Congress had the foresight in 1990 to establish a special fund, the Judicial Information Technology Fund (the “JITF”),³⁹¹ “for the procurement . . . of information technology resources for [judicial] program activities.”³⁹² The money in the JITF automatically rolls over from year to year and cannot be used for other purposes without the AOUSC’s approval.³⁹³ From Fiscal Year 2012 to Fiscal Year 2016, the AOUSC has forecast its JITF expenditures to average \$3.7 million per year for “Court Administration and Case Management,”³⁹⁴ which “encompasses systems that manage

386. Concluding the draft Advisory Committee Note, this Article now returns to identifying authorities in footnotes.

387. *See supra* Part III.A.

388. *See id.*

389. AOUSC, LONG RANGE PLAN FOR INFORMATION TECHNOLOGY, *supra* note 265, at 1.

390. *See supra* Part I.B.

391. 28 U.S.C. § 612 (a) (2006).

392. *Id.*; *see also* Daniel Holt, FED. JUDICIAL CTR., FED. JUDICIAL HISTORY OFFICE, FEDERAL JUDICIARY APPROPRIATIONS: 1792–2010, at xii-xiii (2012), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/Appropriations.pdf/\\$file/Appropriations.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Appropriations.pdf/$file/Appropriations.pdf).

393. Holt, *supra* note 392, at xiii.

394. *See* AOUSC, LONG RANGE PLAN FOR INFORMATION TECHNOLOGY, *supra* note 265, at 10.

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cases and case files” like CM/ECF,³⁹⁵ \$4.56 million per year for “Judicial Statistics and Reporting,”³⁹⁶ which “includes the collection and reporting of statistical data in the Judiciary,”³⁹⁷ and \$134.86 million per year for the “Electronic Public Access Program,”³⁹⁸ which manages PACER.³⁹⁹

The AOUSC has managed the JITF well, maintaining a significant budget surplus. In 2007, the JITF carried a \$146.6 million surplus, \$32.2 million⁴⁰⁰ of which was public user fees paid to PACER.⁴⁰¹ In 2006, PACER user fees were estimated to be about \$60 million annually.⁴⁰² PACER has “become what appears to be a profit center that cross-subsidizes other IT functions of the Judiciary.”⁴⁰³ In fact, the AOUSC apparently plans to use PACER fees to fund the next generation of CM/ECF.⁴⁰⁴

While there is some debate over whether charging PACER fees “that are higher than the marginal cost of disseminating the information”⁴⁰⁵ violates the E-Government Act of 2002,⁴⁰⁶ using public PACER fees to pay for the next generation of CM/ECF is a clever and practical arrangement so long as it does not compromise CM/ECF’s integrity or capabilities.

395. *Id.* at 10-11.

396. *See id.* at 10.

397. *Id.* at 12.

398. *See id.* at 10.

399. *Id.* at 12.

400. Stephen Schultze, *Electronic Public Access Fees and the United States Federal Courts’ Budget: An Overview* 4 (2009) (unpublished manuscript) (on file with the Berkman Center for Internet & Society at Harvard University) (page number assigned as document is not otherwise paginated), *available at* http://cyber.law.harvard.edu/~sjschultze/Schultze_PACER_Budget_Working_Paper.pdf.

401. For further discussion of PACER, see *supra* notes 269-74 and accompanying text.

402. LoPucki, *supra* note 16, at 488 & n.17.

403. Schultze, *supra* note 400, at 5.

404. *Id.* (quoting H.R. REP. NO. 108-221, at 116 (2003)).

405. S. REP. NO. 107-174, at 23 (2002).

406. 44 U.S.C. §§ 3601-3606 (2006); see Schultze, *supra* note 400, at 8-10.

CM/ECF's system design should be focused solely on what works best and not on mercenary considerations such as the "willingness of the commercial sector to pay PACER fees."⁴⁰⁷ Neither should the AOUSC "grant, deny, or condition" PACER fee exemptions "in ways that encourage researchers to portray the [federal] courts in a positive light."⁴⁰⁸ Such self-interested decision making could compromise public perceptions of the AOUSC's impartiality.

4. Privacy Challenges

Even before the internet, court records have long been a battleground between government transparency and individual privacy.⁴⁰⁹ The internet and electronic court records have only exacerbated this battle. Paradoxically, the ease of public access to online electronic court records is, at the same time, the dream of open government advocates and the nightmare of privacy protectionists.⁴¹⁰

While allied with transparency true believers, EBP views online electronic transparency as more of a means than an end. Likewise, EBP pragmatically opposes privacy protections because eliminating access to individual data would reduce contemporaneous coding's research utility.⁴¹¹ From a research perspective, one of the most appealing aspects of contemporaneous coding is the direct association of the coding to the underlying documents.⁴¹² Such direct association not only is essential to confirm the statistical reliability and validity of coding⁴¹³ but also allows qualitative or mixed-method researchers to search the coding to find specific cases or documents that meet their research criteria.

407. Peter W. Martin, *Online Access to Court Records—From Documents to Data, Particulars to Patterns*, 53 VILL. L. REV. 855, 870 (2008).

408. LoPucki, *supra* note 16, at 515.

409. See, e.g., Amanda Conley et al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry*, 71 MD. L. REV. 772, 774 (2012).

410. See LoPucki, *supra* note 16, at 485.

411. See *id.* at 489-90.

412. See *supra* Part III.A.

413. See *supra* Part III.C.

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As far as the federal courts are concerned, however, the battle has been long over. The current—and predominant⁴¹⁴—federal “public is public” policy⁴¹⁵ should remain. As the Judicial Conference Committee on Court Administration and Case Management concluded, “[f]ederal court case files, unless sealed or otherwise subject to restricted access by statute, federal rule, or Judicial Conference policy, are presumed to be available for public inspection and copying.”⁴¹⁶ “[D]ocuments in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain ‘personal data identifiers’ are not included in the public file.”⁴¹⁷ “Unless the court orders otherwise,” Rule 5.2 requires parties to redact from a filing: (1) social security and tax identification numbers; (2) people’s birth dates; (3) minor’s initials; or (4) a financial account number.⁴¹⁸

As Rule 5.2 demonstrates, the federal courts have already heard—and rejected—the privacy pleas to further limit access to this otherwise public information.⁴¹⁹ Because Rule 5.2 gives

414. See LoPucki, *supra* note 16, at 517 (stating that the predominant view is that the “court files should be on-line to the same extent that they are available at the courthouse”).

415. Comm. on Court Admin. & Case Mgmt., *Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files*, ADMIN. OFF. U.S. CTS., (Sept. 2001, as amended Dec. 2006), <http://www.uscourts.gov/RulesAndPolicies/JudiciaryPrivacyPolicy/FormerJudicialConferencePrivacyPolicy2006.aspx> (last visited Dec. 27, 2012) (internal quotation marks omitted).

416. *Id.* (citing *Nixon v. Warner Comm., Inc.*, 435 U.S. 589 (1978)).

417. FED. R. CIV. P. 5.2 advisory committee’s note (2007).

418. FED. R. CIV. P. 5.2(a).

419. There are four possible privacy objections to contemporaneous coding: (1) the aggregation of publicly available personal information in court filings can be embarrassing or lead to identity theft; (2) making this “practically obscure” yet public information easy to find is an invasion of privacy; (3) it would put unnecessary pressure on judges; and (4) it would make it easy to plagiarize lawyer’s work product. LoPucki, *supra* note 16, at 514; see also *supra* note 407. For the persuasive refutation of all of these privacy arguments, see LoPucki, *supra* note 16, at 514-521.

All these arguments ask the wrong question. The real question is whether any of this information should be public in the first place. The uncontested answer is that all of this information is already public in individual cases. It is nonsensical to limit what is already public information in individual instances just because it is available in aggregate form online. Such reasoning essentially favors wealthier institutional parties. See LoPucki,

a court considerable discretion to redact or seal personal information in public court filings, the answer to all of these privacy objections is simply vigilant party counsel.

The Rule appropriately puts the onus of redacting or sealing personal information “with counsel and the party or non-party making the filing.”⁴²⁰ A filer or party thus may ask the court to redact additional information from a filing for “good cause”⁴²¹ or to place a filing under seal without redaction.⁴²² The court may later order that the sealed filing either be unsealed or that “a redacted version” be filed “for the public record.”⁴²³

B. Coding Questions

Multi-user databases like the FCCEDD aspire for a “combinatoric advantage” where researchers working together on a shared database can create more useful information than if they were working independently.⁴²⁴ Such databases seek to be “so rich in content that multiple users, even those with distinct projects, can draw on them.”⁴²⁵

As a result, the FCCEDD needs to provide data useful to all kinds of empirical research. Experimental,⁴²⁶ quantitative,⁴²⁷ qualitative,⁴²⁸ and mixed-method⁴²⁹ empirical research are all invaluable to evaluate EBP in general and

supra note 16, at 514-15. For example, assume that while individual data remained publicly available, CM/ECF restricted public access to aggregated data. What if an aftermarket third-party obtained the public individual data, aggregated it into a proprietary database, and then charged expensive fees to access the database? As a result, only the rich “Haves” would be able to benefit from the aggregated public information. Under the current “public is public” federal rule, the less wealthy “Have Nots” would also be able to benefit from aggregated public information.

420. FED. R. CIV. P. 5.2 advisory committee’s note (2007).

421. FED. R. CIV. P. 5.2(e).

422. FED. R. CIV. P. 5.2(d).

423. *Id.*

424. Epstein & King, *supra* note 101, at 21-23.

425. *Id.* at 21.

426. BORUCH, *supra* note 30.

427. BRYMAN, *supra* note 23, at 19-20.

428. *Id.*

429. Nielsen, *supra* note 243, at 953.

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federal civil rulemaking in particular. Each method is a useful EBP tool with complementary strengths and limitations.

A controlled policy experiment may make the most analytical sense for EBP but is fraught with political peril. “Without doubt, the most powerful and reliable way to investigate the impact of a legal rule [or] procedure . . . is to conduct a controlled experiment” because it can best “isolate the impact” of the new rule or rule amendment “by excluding all other factors that may account for the observed effects or relationships.”⁴³⁰ One of the advantages of experiments is that they are easy for non-experts to understand and hard to ignore.⁴³¹ The experiment’s weaknesses, however, are the possible constitutional and ethical objections to government policies that benefit or burden its citizens through random chance.⁴³² Recognizing the potential political difficulties of a controlled policy experiment, its considerable research effectiveness notwithstanding, this Article recommends that Congress pass authorizing legislation before the federal courts can employ controlled experiments to evaluate new or proposed rules amendments.⁴³³

While quantitative methods dominate EBP, are epistemologically the most scientifically rigorous, and provide the most direct way to analyze large multi-user datasets like the FCCEDD,⁴³⁴ qualitative methods can better answer the question of why one proposed amendment may be preferable over another in light of current political and factual realities.⁴³⁵ Qualitative methods “can help to formulate and focus the key evaluation questions, shed light on the underlying theories supporting intervention design, and highlight the outcomes to be examined.”⁴³⁶ Although the FCCEDD is at its core a

430. Rosenberg, *supra* note 2, at 14.

431. See Rachlinski, *supra* note 18, at 919.

432. Rosenberg, *supra* note 2, at 14-15. For an explanation of how these constitutional and ethical objections might be resolved, see Rachlinski, *supra* note 18.

433. For further discussion, see *supra* notes 108-10, and accompanying text.

434. Huw Davies et al., *Introducing Evidence-Based Policy and Practice in Public Services*, in *WHAT WORKS?*, *supra* note 18, at 10.

435. *Id.*

436. *Id.*

quantitative dataset, its ability to hyperlink to the underlying filed documents associated with particular coding is a unique feature that can help qualitative and mixed-method researchers identify particular cases or documents for qualitative analysis.⁴³⁷

The key is to use the right tool for the right task and, most importantly, to coordinate all the tools in the EBP toolkit effectively. The baseline descriptive data in the FCCEDD work with all empirical methods. Regardless of method, the FCCEDD can provide the necessary descriptive feedback to evaluate whether rules amendments are achieving “the intended results without unacceptable side effects.”⁴³⁸

Moreover, by providing a rich, shared data source to be used by quantitative and qualitative researchers alike, the FCCEDD can promote greater collaboration and understanding between different empirical methodologies. Identical FCCEDD data can be analyzed through different methodological lenses. A comparison of the similarities and differences between the resulting studies can help inform the strengths and limitations of each form of inquiry.⁴³⁹

To provide data useful to all empirical methods, however, requires flexible yet comprehensive coding questions. Perhaps the FCCEDD’s most difficult challenge is selecting the appropriate coding questions to gather such data. Perfecting the FCCEDD’s coding questions would be a massive undertaking requiring thoughtful analysis and careful testing and evaluation. Although a detailed discussion of drafting, testing, and revising such coding questions is beyond the scope of this Article, four general principles should guide the effort: (1) involve all stakeholders in creating the coding questions; (2) continuously evaluate the coding questions’ effectiveness; (3) safeguard the objectivity of coding through total transparency and thoughtful, timely responsiveness to constructive criticism; and (4) start with best practices, and don’t reinvent the wheel.

437. *See supra* notes 10-11, 286-88, 334-36 and accompanying text.

438. Rosenberg, *supra* note 2, at 14.

439. INTERUNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH, *supra* note 258, at 4.

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First, although the AOUSC should ultimately administer the FCCEDD, all stakeholders to include the practicing Bar, the academy, the Advisory Committee, and the FJC must be involved in the coding process to maintain the FCCEDD's objectivity. While the AOUSC has a statutory mandate "to prepare and transmit . . . statistical data and reports as to the business of the courts,"⁴⁴⁰ the AOUSC is not independent from the judiciary.⁴⁴¹ In the past, researchers examining AOUSC-supplied empirical court data have turned up "startling levels of inaccuracy."⁴⁴² In light of the AOUSC's less-than-stellar past track record⁴⁴³ and the separation-of-powers concerns that the AOUSC might influence the data coding process to be biased in favor of the federal judiciary,⁴⁴⁴ all other professional stakeholders in the federal court must be actively involved in the entire coding process. Perhaps the AOUSC can continue to use the ASFRG⁴⁴⁵ or commission a similar group to aid with the coding process.

Second, the AOUSC and other institutional stakeholders should continuously evaluate the coding questions' effectiveness. Before rolling out the coding questions nationally, the Advisory Committee, the FJC, the AOUSC, and the ASFRG (or similar stakeholder group) should carefully test and assess the proposed questions in pilot federal districts and circuits. This process of course should be transparent with the resulting data available to the public.

440. 28 U.S.C. § 604(a)(2) (2006).

441. For further discussion, see *supra* notes 185-90 and accompanying text.

442. LoPucki, *supra* note 16, at 519.

443. *Id.* at 519 n.130 (collecting authorities); see also Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 140 (2011); Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1310-11 (2005); Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455 (2003).

444. LoPucki, *supra* note 16, at 515 & n.117.

445. For further discussion, see *supra* notes 299-302 and accompanying text.

Third, the only way the FCCEDD can provide an objective descriptive baseline for policy debates is if it is maintained with total transparency. The “process by which the data came to be observed” must be recorded in detail.⁴⁴⁶ The FCCEDD’s so-called “chain of evidence”⁴⁴⁷ must be “fully documented and unbroken.”⁴⁴⁸ Furthermore, the institutional stewards of this data must respond to any legitimate criticisms thoughtfully and timely and, most importantly, adopt necessary changes to maintain the FCCEDD’s continuing credibility.

The best institutional steward of the FCCEDD and related EBP research would be a dedicated independent research organization.⁴⁴⁹ Such a federal dispute resolution research agency could be called the National Academy of Justice (the “NAJ”)⁴⁵⁰ and could be a federal justice addition to the National Academies (the “NA”).⁴⁵¹ Just as federal judges adjudicate cases while the AOUSC keeps the lights on in judges’ chambers, the NAJ could handle substantive decisions about the FCCEDD, while the AOUSC could handle the administrative details. Moreover, the NAJ could serve as an impartial monitor of policy experiments and report the results to the Advisory Committee.⁴⁵² The NAJ’s mission would be to seek fundamental knowledge about the American federal dispute resolution system and the application of that knowledge to further the just, speedy, and inexpensive resolution of disputes. It either could be restricted to the federal civil system or could include the federal criminal system.

446. Epstein & King, *supra* note 101, at 24.

447. A “chain of evidence” establishes that no unauthorized people have had access to critical evidence. See DEBORAH MERRITT & RIC SIMMONS, *LEARNING EVIDENCE* 124 (2d ed. 2012).

448. Epstein & King, *supra* note 101, at 24.

449. See *supra* notes 92-94 and accompanying text.

450. Accord Menkel-Meadow & Garth, *supra* note 107, at 687.

451. The National Academies (“NA”) include the National Academy of Sciences, National Academy of Engineering, Institute of Medicine, and National Research Council. *About Us*, THE NAT’L ACADS., <http://www.nationalacademies.org/about/index.html> (last visited Dec. 27, 2012) [hereinafter THE NATIONAL ACADEMIES].

452. See Rachlinski, *supra* note 18, at 910.

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The primary difference between the NAJ and other related organizations such as the National Institute of Justice (the “NIJ”) and the FJC is in organizational affiliation. Like the NA,⁴⁵³ the NAJ would have institutional independence from all government branches and enforce the highest standards of research quality and merit review. In contrast, the NIJ and FJC are affiliated respectively with the executive branch⁴⁵⁴ and the judicial branch.⁴⁵⁵

Finally, the AOUSC and other institutional stakeholders should not re-invent the wheel when gathering, archiving, and coding the FCCEDD. Federal, state, and local governments⁴⁵⁶ and public and private organizations⁴⁵⁷ in the United States and around the world continue to make constant innovations in e-Government technology and infrastructure. The AOUSC should comprehensively study such innovations (as they undoubtedly already are). There also are well-established best practices for authenticating, archiving, and coding multi-user datasets. For example, the National Conference of Commissioners on Uniform State Laws has drafted a Uniform Electronic Legal Material Act that provides “an outcomes-based approach to the authentication and preservation of electronic legal material.”⁴⁵⁸ Both the Dutch Data Archiving

453. See THE NATIONAL ACADEMIES, *supra* note 451.

454. A NA report on the NIJ concluded that the NIJ’s research has been “severely hampered” by a lack of “independence” and “authority.” NAT’L RESEARCH COUNCIL, STRENGTHENING THE NATIONAL INSTITUTE OF JUSTICE 2 (Charles Wellford et al., eds. 2010).

455. While the FJC is institutionally independent from the AOUSC, the FJC remains the Advisory Committee’s primary researcher. See *supra* Part III.B.2.

456. See generally GEORGE B. DELTA & JEFFREY H. MATSUURA, LAW OF THE INTERNET § 17.06 (2013).

457. One of the worldwide leaders in open government information is the Legal Information Institute (“LII”) at Cornell University Law School. See *About LII*, LEGAL INFO. INST., <http://www.law.cornell.edu/lii/about-lii> (last visited Jan. 20, 2013).

458. The Nat’l Conference of Comm’rs on Unif. State Laws, *Electronic Legal Material Act Summary*, UNIFORM L. COMMISSION, [http://www.uniformlaws.org/ActSummary.aspx?title=Electronic Legal Material Act](http://www.uniformlaws.org/ActSummary.aspx?title=Electronic%20Legal%20Material%20Act) (last visited Jan. 26, 2013); see UNIF. LEGAL MATERIAL ACT (2011), *available at* [http://www.uniformlaws.org/Shared/Docs/AM2011_Prestyle%20Finals/UELM A_PreStyleFinal_Jul11.pdf](http://www.uniformlaws.org/Shared/Docs/AM2011_Prestyle%20Finals/UELM_A_PreStyleFinal_Jul11.pdf).

and Networked Services (“DANS”) and the Swiss International Organization for Standardization (“ISO”) Standard Reference Model for an Open Archival Information System (“OAIS”) have specific guidelines for data-archiving and sharing.⁴⁵⁹ The FCCEDD should meet or exceed the DANS quality guidelines and the OAIS standards.⁴⁶⁰ Likewise, the FJC should comprehensively review the coding schemes employed by the many available civil justice datasets⁴⁶¹ and civil justice empirical studies⁴⁶² before the Advisory Committee drafts the FCCEDD’s coding questions. When drafting these coding questions, the FCCEDD should follow the ICPSR’s variable codebook guidelines.⁴⁶³

Table 1 below lists some sample mandatory and voluntary coding outcomes for a complaint or an answer.⁴⁶⁴ For simplicity, Table 1 assumes one individual plaintiff and one individual defendant with a civil lawsuit in federal district court. To obtain the outcomes listed in Table 1, CM/ECF might need to ask a number of follow-up questions with drop down menus⁴⁶⁵ or dialog boxes.⁴⁶⁶ Those questions are omitted from Table 1.

Table 1: Sample Complaint and Answer Mandatory and Voluntary Coding Outcomes

<i>Pleading</i>	<i>Mandatory Outcomes</i>	<i>Voluntary Outcomes</i>
Complaint	Name of district court where filed. Date and time filed. Case number. Case caption.	Plaintiff’s gender. Plaintiff’s age. Plaintiff’s educational level. ⁴⁶⁸ Lawyer’s age.

459. INTERUNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH, *supra* note 258, at 4-5.

460. *Id.*

461. *See, e.g.*, LoPucki, *supra* note 16, at 493 (describing datasets).

462. *See, e.g.*, *ELS Bibliography*, UCLA L., <https://apps.law.ucla.edu/els/> (last visited Dec. 27, 2012).

463. INTERUNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH, *supra* note 258, at 22-23.

464. FED. R. CIV. P. 7(a).

465. *See supra* note 8.

466. *See supra* note 9.

468. LoPucki, *supra* note 16, at 489 (explaining how these outcomes “would add to the power of the data”).

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<i>Pleading</i>	<i>Mandatory Outcomes</i>	<i>Voluntary Outcomes</i>
	<p>Party names and addresses.</p> <p>For each claim:</p> <ul style="list-style-type: none"> • Specific legal grounds for subject-matter jurisdiction. • Specific legal grounds for personal jurisdiction. • Specific legal grounds for venue. • Specific federal or state constitutional, statutory, or common law authority. • Specific judgment demanded and relief sought to include type and amount of damages or equitable relief. • Does the claim make a “nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law?”⁴⁶⁷ <p>Is there a request for a jury trial?</p> <p>Total number of words and paragraphs for:</p> <ul style="list-style-type: none"> • Factual allegations. • Legal or mixed factual/legal allegations. <p>Total number of pages</p>	<p>Lawyer’s educational information.</p> <p>Lawyer’s past professional experience in relevant specific areas of law.</p> <p>Lawyer’s fee arrangement.</p> <p>Fee billed on preparing the complaint.</p> <p>Number of hours spent on legal research.</p> <p>Number of hours spent drafting complaint.</p> <p>Number of hours spent on fact investigation.</p> <p>Basic diagnostic knowledge questions about relevant areas of law (e.g., knowledge of <i>Ashcroft v. Iqbal</i>, 556 U.S. 662 (2009); <i>Bell Atlantic Corp. v. Twombly</i>, 550 U.S. 544 (2007)).</p> <p>Would you be willing to be interviewed confidentially by a researcher about your complaint?</p>

467. FED. R. CIV. P. 11(b)(2).

<i>Pleading</i>	<i>Mandatory Outcomes</i>	<i>Voluntary Outcomes</i>
	<p>in complaint. Specify allegations made upon “information or belief.” If there are any exhibits: •Total number of exhibits. •Name and general purpose of each exhibit. Civil cover sheet completed? Summons completed? Certificate and Notice of Interested Parties? If yes, specify what parties. <i>In Forma Pauperis</i> Application filed? If yes, accepted or denied? On what grounds?</p>	
Answer	<p>Date and time filed. For each cross-referenced paragraph in the complaint: •Which part do you admit? Basis for admission. •Which part do you deny? Basis for denial. •Which part(s) do you lack sufficient information to answer and deem denied? For each affirmative defense in the answer: •Specific federal or state constitutional, statutory, or common law authority.</p>	<p>Defendant’s gender. Defendant’s age. Defendant’s educational level. Lawyer’s educational information. Lawyer’s past professional experience. Lawyer’s past professional experience in relevant specific areas of law. Lawyer’s fee arrangement. Fee billed on preparing the answer. Number of hours spent on legal research. Number of hours spent</p>

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Pleading	Mandatory Outcomes	Voluntary Outcomes
	<ul style="list-style-type: none"> •In response to what claim in the complaint. Total number of words and paragraphs (omitting text copied from the complaint) for: <ul style="list-style-type: none"> •Answering factual allegations. •Answering legal or mixed factual/legal allegations. Total number of pages in the answer. Specify allegations made upon “information or belief.” If there are any exhibits: <ul style="list-style-type: none"> •Total number of exhibits. •Name and general purpose of each exhibit. 	<ul style="list-style-type: none"> drafting the answer. Number of hours spent on fact investigation. Basic diagnostic knowledge questions about relevant areas of law. (e.g., knowledge of <i>Iqbal</i>, 556 U.S. at 662; <i>Twombly</i>, 550 U.S. at 544). Did you talk to opposing counsel before filing your answer? If yes, for how long and about what? Where there settlement negotiations before you filed the answer? If yes, what kind of negotiations, for what kind of relief, and to what result? Would you be willing to be interviewed confidentially by a researcher about your answer?

Conclusion

Federal civil rulemaking offers much promise for EBP. It utilizes an expert committee structure insulated from, yet accountable to, popular democracy.⁴⁶⁹ The Advisory Committee appears sincerely interested in EBP⁴⁷⁰ and takes its time—typically, three to five years—to evaluate proposed rules

469. For further discussion, see *supra* Part II.B.1.

470. For further discussion, see *id.*

amendments.⁴⁷¹ In addition, the Committee has an independent, professional researcher, the FJC, to conduct any empirical research the Committee needs.⁴⁷² Moreover, the increasing popularity of empiricism in the Academy facilitates additional research.⁴⁷³ Such academic research also provides a useful check on the FJC.⁴⁷⁴

But the expensive federal adversarial litigation system also offers peril for EBP. EBP cannot avoid normative concerns. Empirical research still must be interpreted through a normative lens.⁴⁷⁵ The scope and limits of empirical research are dictated by normative theory.⁴⁷⁶ And the adversarial process provides often diametrically different normative lenses through which to interpret empirical research.⁴⁷⁷

Take Rule 1, which states that the rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action.”⁴⁷⁸ Just by what standard? Determining the applicable standard of justice is a normative concern. Different players in the litigation might have different standards of justice. Justice might mean one thing in a small, simple lawsuit and another in a complex class action.⁴⁷⁹ Speedy according to whom? The plaintiff and the defendant will have different normative conceptions of process efficiency.⁴⁸⁰ Inexpensive according to whom? Do we factor in larger societal or economic costs in the expense calculus or

471. See Kravitz, *supra* note 45, at 216-17.

472. For further discussion, see *supra* Part II.B.2.

473. For further discussion, see *supra* Part II.C.

474. Huw Davies et al., *Introducing Evidence-Based Policy and Practice in Public Services, in WHAT WORKS?*, *supra* note 18, at 8.

475. See AYRES, *supra* note 34, at 124-128; LAWLESS ET AL., *supra* note 82, at 21. For further discussion, see *supra* Part I.A.

476. A “legal theory” is “a set of general propositions used as an explanation” of law that are “sufficiently abstract to be relevant to more than just particularized situations.” Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1601 n.3 (1991). A normative theory is a legal theory about norms. For a definition of “norms,” see *supra* note 56.

477. See *supra* notes 54-62 and accompanying text.

478. FED. R. CIV. P. 1.

479. See Dimitrief et al., *supra* note 44, at 214.

480. See *id.* at 214-15.

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limit ourselves to the real costs of the actual parties?⁴⁸¹

Although empirical research can and should inform normative debates, it can never resolve them.⁴⁸² Instead of opposing empirical research, policymakers who insofar have relied more on ideology, intuition, or experience should recognize empirical research's value-added contribution.⁴⁸³ The best policy will employ all available tools. All policymakers thus need at least to be familiar enough with empirical methods to distinguish quality from shoddy research.⁴⁸⁴ Empirical research—particularly the objective descriptive data for which this Article advocates—provides the best diagnostic starting point for formulating new policy and the best accountability for evaluating the effectiveness of implemented or experimental policy. But empirical research alone cannot answer normative questions.

In the civil litigation context, perhaps the greatest normative question facing the federal courts today is how to control access to the courts.⁴⁸⁵ Do we have too much litigation⁴⁸⁶ or is there a continuing need for private attorneys general to enforce our existing laws?⁴⁸⁷ The current “restrictive ethos”⁴⁸⁸ in federal civil litigation conflicts with the “liberal ethos” behind the original rules.⁴⁸⁹

In the past, fear, hysteria, and anecdote have dominated this debate. Although normative ideology in such debates is unavoidable, verifiable empirical assertions are cavalierly tossed around without any accountability. EBP requires policymakers to ante up the evidence behind such empirical assertions. Policy debates that rely upon false factual assertions are a disservice to the democratic process. As

481. *Id.* at 217.

482. LAWLESS ET AL., *supra* note 82, at 21.

483. *See, e.g.*, AYRES, *supra* note 34, at 11, 17.

484. For further discussion, see *supra* Part I.C.

485. *See* Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1906 (1989).

486. *See id.* at 1907-09.

487. *Id.*

488. A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 358-66 (2010).

489. *Id.* at 353-57.

Senator Daniel Patrick Moynihan recognized: “Everyone is entitled to his own opinions, but not to his own facts.”⁴⁹⁰

A cautionary tale of the misleading power of anecdote is the myth of the excessiveness of the jury verdict in the infamous McDonald’s coffee burn lawsuit, *Liebeck v. McDonald’s Restaurants*.⁴⁹¹ A dispassionate examination of the actual facts of the case shows that the verdict was reasonably based upon the considerable evidence of McDonald’s reckless indifference.⁴⁹² Despite the reasonableness of the final result, media organizations neglected to do their homework and instead uncritically accepted the tort-reform spin on the case. For example, the influential Associated Press newswire service dispensed with any pretense of objectivity and trumpeted the verdict as an “absurd judgment” and “a stunning illustration of what is wrong with America’s civil justice system.”⁴⁹³

As Judge Jack Weinstein has observed: “The truth about the ‘litigation explosion’ is that it is a weapon of perception, not substance. If the public can be persuaded that there is a litigation crisis, it may support efforts to cut back on litigation access.”⁴⁹⁴ Shoddy empirical research can be used to fuel ideological arguments. For example, Ted Eisenberg’s work has exposed the methodological flaws in a Chamber of Commerce commissioned civil litigation empirical study.⁴⁹⁵

This Article does not attempt to take sides in this access to justice debate. Arguments for increased access often are based upon ideology as much as arguments for a so-called “litigation explosion.”⁴⁹⁶ The questionable merit of some empirical studies

490. Clive Crook, *The Unhealthy Politics of Health Care*, BLOOMBERG (June 26, 2012), <http://www.bloomberg.com/news/print/2012-06-26/health-care-debate-shows-deeper-political-sickness.html>.

491. See Michael McCann et al., *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113, 121 & n.28 (2001) (citing *Liebeck v. McDonald’s Rest., P.T.S., Inc.*, No. 93 Cv. 02419, 1995 WL 360309 (N.M. Dist. Ct. 1994)).

492. *Id.* at 128.

493. *Id.* at 113 (quoting Associated Press, *Woman Burned by Hot McDonald’s Coffee Gets \$2.9 Million*, Aug. 18, 1994).

494. Weinstein, *supra* note 485, at 1909.

495. See Theodore Eisenberg, *U.S. Chamber of Commerce Liability Survey: Inaccurate, Unfair, and Bad for Business*, 6 J. EMPIRICAL LEGAL STUD. 969, 969-70 (2009).

496. Menkel-Meadow & Garth, *supra* note 107, at 690-91 (collecting

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advocating fewer lawsuits does not diminish the legitimate ideological reasons for a less litigious society.⁴⁹⁷ But while anti-litigation advocates are entitled to their own opinions, they are not entitled to their own facts.

The modest point of this Article is to establish baseline objective data like the FCCEDD with which to evaluate the unavoidable normative choices our democracy makes.⁴⁹⁸ As Bogenschneider and Corbett astutely noted, “stimulat[ing] a dialogue between those who spend most of their time producing knowledge (researchers, evaluators, and analysts), those who focus on the utilization of knowledge (legislators, agency executives, and program managers), and all those intermediaries who assist these officials” is a “modest” way “to improve the quality of government by bringing more rationality to the governance process.”⁴⁹⁹ A shared source of relevant, representative, and reliable⁵⁰⁰ descriptive data like the FCCEDD can promote such dialogue. An enlightened dictatorship that forced everyone to act only in ways supported by empirical evidence would best implement EBP. But we do not have a dictatorship and presumably do not want one.

As the ancient Greeks recognized, one of the costs of democracy is the risk of the public being swayed by popular hysteria or emotion.⁵⁰¹ Law unavoidably has conflicting goals. In the civil litigation context, as Rule 1 fails to recognize, “justice” for the individual often conflicts with “speed” and “inexpense” in litigation.⁵⁰² As Marc Galanter observed: “Civil justice issues involve value choices—and that means political choices. But an enhanced knowledge base can rescue us from a debate dominated by bogus questions and fictional facts.”⁵⁰³

authorities).

497. See, e.g., PHILLIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1995).

498. For further discussion, see *supra* Part I.B.

499. BOGENSCHNEIDER & CORBETT, *supra* note 18, at xii.

500. Solesbury, *supra* note 18, at 8-9.

501. See, e.g., Polybius, *Histories*, Book III, in 2 POLYBIUS: *THE HISTORIES* (Loeb Classical Library ed. 1922-1927), available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Polybius/3*.html (last visited Dec. 28, 2012).

502. FED. R. CIV. P. 1.

503. Marc Galanter, *News from Nowhere: The Debased Debate on Civil*

Menkel-Meadow and Garth recognized that the best empirical research can, at most, only inform these value choices:

There is very little that social science research and data can do to help resolve the fundamental questions about what purpose(s) courts serve and for whom (dispute resolution for the parties or public law generation for the larger society?). At best, social science research can help us to understand if particular rules are more or less likely to let in particular claims or particular claimants or whether particular procedural systems disproportionately serve particular kinds of cases or litigants.⁵⁰⁴

Perhaps as a democracy we have decided in civil litigation disproportionately to serve the “Haves.”⁵⁰⁵ That is a political choice. If true, then let us gather accurate empirical data about the consequences of that political choice so that the American public and its policymakers can choose with their eyes wide open. Such public, institutionalized empirical accountability of democratic decision making may be the ultimate realization of the legal realist project.⁵⁰⁶ Empirical research “just strips away all the roadblocks that you might have or at least it makes them bare. If the people are going to make a . . . decision” based on politics contrary to the research findings, “then they are going to make it despite the facts.”⁵⁰⁷

The unique circumstances of federal civil rulemaking and the CM/ECF system provide an unparalleled opportunity for EBP. This Article hopes that the Advisory Committee will seriously consider adopting the Model Rule⁵⁰⁸ and

Justice, 71 DENV. U. L. REV. 77, 102 (1993).

504. Menkel-Meadow & Garth, *supra* note 107, at 699-700.

505. Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974), available at <http://jan.ucc.nau.edu/~phelps/Galanter%201974.pdf>.

506. For further discussion about legal realism and new legal realism, see *supra* Part II.C.

507. AYRES, *supra* note 34, at 79-80 (quoting economist Paul Gertler about randomized trial evaluation).

508. For further discussion, see *supra* Part IV.A.

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implementing the contemporaneous coding of CM/ECF cases to create the FCCEDD.⁵⁰⁹ Mandating such coding would provide not only an invaluable, publicly accessible empirical baseline with which to assess federal civil rulemaking, but also an excellent example of how EBP can inform the difficult policy choices in democratic government.

Following the federal courts' lead, all branches of democratic government at local, state, and national levels could mandate that policymakers during the policymaking process must contemporaneously code outcomes into a publicly available, searchable electronic database. While perhaps not as formally as in litigation, all lawmaking relies to some extent on the adversarial process and a professional duty of candor. Legislation or regulations could formally assign fact-checking duties to institutional players in the policymaking process or to independent civil servants to safeguard the objectivity of these databases.

Publicly available electronic descriptive databases of policymaking outcomes are a simple way to leverage technology to provide comprehensive, reliable, and inexpensive evidence for EBP. Easy access to these objective empirical baselines would encourage both policymakers and the public to focus more on facts and less on politics.

509. For further discussion, see *supra* Part IV.B.