INTRODUCTION: MEASURING VALUE

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I am honored to have the opportunity to introduce this colloquium issue of the *Wisconsin Law Review*. The colloquium Essays address the role of empirical research in identifying, measuring, and clarifying crucial issues of service delivery, resource allocation, and access to justice in American law and society. I recently retired after teaching for twenty-two years at the Frank J. Remington Center, a clinical program of the University of Wisconsin Law School, so the questions raised in this Colloquium are dear to my heart.

The Colloquium was inspired by the publication of a groundbreaking empirical study published in 2012 by Harvard Professor D. James Greiner and College Fellow Cassandra Wolos Pattanayak.[1] Although all of the colloquium Essays touch on aspects of this study, it seems helpful to provide a quick overview of the study itself and the legal community's response to it.

Describing randomized trials as the "gold-standard" of empirical research,[2] Greiner and Pattanayak asserted that, while the effectiveness of legal representation has been studied dozens of times over the past forty years, "very few of these studies (only two, really, both of which were randomized) are worthy of credence."[3]

Accordingly, Greiner and Pattanayak set out to create a truly randomized research design. Specifically, they studied the effect of randomized offers of representation in unemployment appeals by the Harvard Legal Aid Bureau (HLAB), a clinical program of Harvard Law School.[4] The outcome of the study was surprising, even to its authors: the results showed that an offer of representation from HLAB had no statistically significant effect on the likelihood that the unemployment claimants would prevail on appeal, but that such an offer did delay proceedings for the claimants by, on average, about two weeks.[5] Given that approximately one-third of the claimants eventually prevailed on

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1. D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118 (2012).

2. *Id.* at 2122.

3. *Id.* at 2125.

4. *See* Greiner & Pattanayak, *supra* note 1.

5. *Id.* at 2118, 2124.

appeal, the delay in the proceedings for those who received HLAB offers may have caused them real harm.[6]

It is important to point out that the study randomized *offers* of representation, rather than representation itself.[7] Greiner and Pattanayak noted about thirty-nine percent of the claimants who did not receive an offer of representation from HLAB were in fact represented by other legal service providers, while some claimants who received an offer from HLAB were not ultimately represented by HLAB.[8] The authors explained that it was neither feasible nor ethical to randomize actual representation; therefore, the only thing within the control of the HLAB (and hence of the study's design) was whether or not to offer representation to someone requesting assistance.[9]

If Greiner and Pattanayak had proved that an offer of legal representation produced measurably better results for clients, their study would likely have ended up in a footnote with a long list of similar studies.[10] But because the study's results appeared to contradict the conventional wisdom, it exploded on the academic and practice landscape like a bombshell.

The response of the clinical and legal research community was swift and skeptical. In an online symposium, critics outlined their objections to the study, to which Greiner graciously responded.[11] As described in an article in the *Yale Law Journal Online*, coauthored by Jeffrey Selbin, Jeanne Charn, Anthony Alfieri, and Stephen Wizner (all of whom have contributed to this Colloquium), the critiques fell into three rough categories.

Validity: Some critics argued that the study was poorly done. By focusing on offers of representation rather than actual representation, Greiner and Pattanayak "asked the wrong question"; by examining a law school clinic rather than a legal aid office, they chose "the wrong site of inquiry."[12]

Tradeoffs: Critics also pointed out that even if something useful can be gleaned from carefully designed empirical studies like that of Greiner

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6. *Id.* at 2125.

7. *Id.* at 2127–28.

8. *Id.* at 2128.

9. *Id.* at 2129.

10. *See id.* at 2175 n.154; Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study Access to Justice*, 2013 WIS. L. REV. 101, 101 n.1.

11. Jim Greiner, *How Much Enthusiasm for Randomized Trials? A Response to Kevin Quinn and David Hoffman*, CONCURRING OPINIONS (Mar. 28, 2011, 9:11 PM), http://www.concurringopinions.com/archives/category/representation-symposium.

12. Jeffrey Selbin, Jeanne Charn, Anthony Alfieri & Stephen Wizner, *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, 49–50 (2012).

and Pattanayak, it would be unwise to divert resources from legal services to such efforts.[13]

Vulnerability: Underlying much of the criticism was the fear that such research would be seized upon to further ongoing attacks on legal services. [14]

Selbin and his coauthors, however, viewed Greiner and Pattanayak's study as an important and useful opportunity to create space for "new ideas, debate, and action."[15] Asserting that we are in a "moment of crisis in American law and society," they pointed out that "[h]igh-quality research offers a valuable opportunity to understand and improve local and institutional responses to this growing crisis."[16] Specifically, they emphasized the urgent need to develop a better, evidence-based understanding and evaluation of supply, demand, and delivery systems for civil legal services.[17]

This Colloquium takes up that challenge. The contributors build on Greiner and Pattanayak's study in order to outline a varied, broad-based, and ambitious research agenda that seeks to determine how law can be most effectively mobilized to provide access to justice, quality legal services and legal education, and meaningful social change.

The contributors take a variety of approaches to the topic. There is general agreement that Greiner and Pattanayak's study provides a necessary and useful jumping-off point, in part because of its counterintuitive results (maybe our common-sense or anecdotal beliefs about the importance of legal representation are wrong?), and in part because of the questions it did *not* answer: Was the lack of a statistically significant "win" rate a function of the kinds of cases (unemployment appeals in an administrative setting) handled by HLAB?; the kinds of clients involved? (maybe people who have previously held jobs are capable of self-representation); the ready access to representation for those turned down by HLAB?; or a pro se friendly forum for unemployment appeals? The only way to answer these questions is further study. In short, the effect of Greiner and Pattanayak's study has been to encourage legal service providers to take a hard, careful look at their systems and practices in order to best help citizens in need.

But the Essays in this Colloquium ask even more searching and wide-ranging questions. The most fundamental question is, "*What* should we measure?", and the Essays suggest different answers. Catherine Albiston and Rebecca Sandefur outline an ambitious research agenda

13. *Id.* at 50.
14. *Id.* at 50–51.
15. *Id.* at 46.
16. *Id.* at 67.
17. *Id.* at 46.

seeking to measure how citizens can obtain "access to justice."[18] Jane Aiken and Stephen Wizner, in contrast, focus on defining and measuring "justice," rather than "access to justice."[19] Jeanne Charn and Jeffrey Selbin assert that we know "almost nothing about the relative efficacy of various service delivery models in terms of outcomes or cost-effectiveness," and suggest that law school clinics can serve as "labs" to seek answers.[20] Anthony Alfieri broadens the landscape of empirical inquiry to encompass community education and partnerships.[21] And Scott Cummings suggests a research agenda that focuses less on justice in individual cases and more generally on how law is mobilized for social change as "a tool of transformational politics."[22]

Albiston and Sandefur suggest that, at present, access to justice research lacks a theory of effectiveness—that is, "an explicit theory of the meaning of effectiveness from which these empirical measures may be derived."[23] This insight is echoed by all of the contributors, who emphasize the complexity of measuring a successful outcome, even in an individual case. For an individual facing a legal problem, "justice" may mean a monetary gain after litigation; a greater understanding of his or her situation and the realistic likelihood of success from engaging in the legal system at all; a sense of dignity or empowerment from experiencing "procedural justice"; and/or an informal, non-legal resolution that avoids the transactional costs of the legal process. "Justice" may also involve tradeoffs of competing interests, which are not easily measured by binary test mechanisms. In Aiken and Wizner's words: "Designing ways to quantify the work we do, to measure justice, so to speak, is an important mission. However, . . . we urge that the efforts to measure justice capture the complexity of that project."[24]

In short, the challenges facing empirical researchers are complex. But this is not to say that they are insoluble. Indeed, the colloquium contributors, individually and collectively, argue for an even *more* ambitious research agenda—one which employs a variety of metrics and

18. *See* Albiston & Sandefur, *supra* note 10.

19. *See* Jane H. Aiken & Stephen Wizner, *Measuring Justice*, 2013 WIS. L. REV. 81.

20. *See* Jeanne Charn & Jeffrey Selbin, *The Clinic Lab Office*, 2013 WIS. L. REV. 145, 147.

21. *See* Anthony V. Alfieri, *Community Education and Access to Justice in a Time of Scarcity: Notes from the West Grove Trolley Garage Case*, 2013 WIS. L. REV. 121.

22. *See* Scott L. Cummings, *Empirical Studies of Law and Social Change: What Is the Field? What Are the Questions?*, 2013 WIS. L. REV. 171.

23. Albiston & Sandefur, *supra* note 10, at 113.

24. Aiken & Wizner, *supra* note 19, at 81.

expands the arena of study well beyond conventional lawyer-client representation in an individual case.

Alfieri, for example, describes an innovative partnership between the University of Miami School of Law and Miami's Historic Black Churches, one which focuses on community education, community research, and historic preservation.[25] He suggests that such an endeavor can provide community members the opportunity to play an active problem-solving role in resolving both legal and nonlegal problems.[26] However, broadening this model to a wider population of clients and geography requires "a more thorough evaluation of the methods and metrics of community education programs."[27] Similarly, Charn and Selbin call for empirical research to answer "pressing questions about delivery of legal services in low-income communities."[28]

Albiston and Sandefur, in contrast, decry the current focus on measuring the effectiveness of legal representation solely for the poor—if we really want to determine whether the poor have sufficient access to justice, they observe, we need to study access in both privileged and nonprivileged communities.[29] They also point out that past studies have concluded that "rich and poor alike" do not turn to law as a first choice and suggest that it would be useful to know why.[30]

Albiston and Sandefur hearken back to the landmark Civil Litigation Research Project (CLRP) of the early 1980s, which looked outside of the courthouse to consider the social landscape and processes by which disputes came into the legal system in the first place.[31] CLRP "revolutionized how scholars understood legal problems and disputes. Scholars stopped regarding disputes as found objects in the world and instead recognized disputes for what they are: social constructs."[32] Albiston and Sandefur's proposed research agenda "shifts focus from individualistic measures limited to legal remedies to consider how legal problems affect the well-being of claimants, their families, and society in multiple, interconnected ways."[33]

Even more broadly, Cummings argues that the time is ripe for ambitious empirical research into the entire field of social action and the

25. *See* Alfieri, *supra* note 21.
26. *See id.* at 138–39.
27. *Id.* at 140.
28. Charn & Selbin, *supra* note 20, at 146.
29. Albiston & Sandefur, *supra* note 10, at 110–11.
30. *Id.* at 117.
31. *See id.* at 103–05.
32. *Id.* at 104.
33. *Id.* at 113.

role that law and lawyers play within it.[34] He situates lawyers and the law explicitly as a subset of social change actors and strategies, and emphasizes that any attempt to measure the effectiveness of legal action must consider the effectiveness (or ineffectiveness) of nonlegal alternatives as well.[35]

In light of these varied opinions on *what* should be measured by empirical research, the colloquium's contributors take on a second important question, "*how* should we measure?" The contributors agree that randomized trials, while they may be the "gold-standard" of empirical study, are not possible or appropriate for all inquiries into how law can affect people's lives. The varied sites and dimensions of empirical inquiry proposed in these Essays demand a variety of social science research methods, including randomized trials, data mining, carefully crafted surveys and interviews, focus groups, longitudinal studies, and comparative studies. Albiston and Sandefur, for example, assert that their proposed research questions "can be measured by using readily available data collection and analysis methods."[36] Cummings suggests a series of questions that researchers should consider as they attempt to measure the ways in which, and the extent to which, law and lawyers bring about social change.[37]

Charn and Selbin suggest that law school clinics are uniquely positioned to conduct empirical research on the legal system, given their access to research faculty and support, independence in governance and funding compared to legal service agencies, and professional incentives to take the lead in "an important area of public policy research."[38] They provide examples of ongoing studies at Berkeley School of Law's East Bay Community Law Center (EBCLC), including a comparative study of earnings of individuals who did or did not receive assistance from the EBCLC in expunging their criminal records, and an assessment of the dignitary benefit experienced by EBCLC's clients, as well as a longitudinal study of the post-assistance financial status of individuals who previously received assistance from Harvard Law School's Legal Services Center on foreclosure and debt issues.[39]

It is entirely appropriate that this Colloquium is sponsored by the *Wisconsin Law Review*, because empirical legal research has particular resonance at this law school. Indeed, it is integral to our intellectual tradition, which has long focused on "law in action" as well as "law on

34. *See* Cummings, *supra* note 22.
35. *See id.*
36. Albiston & Sandefur, *supra* note 10, at 113.
37. *See* Cummings, *supra* note 22.
38. Charn & Selbin, *supra* note 20, at 162–64.
39. *Id.* at 164–66.

the books." It is no coincidence that the University of Wisconsin Law School was a co-investigator of the CLRP, the empirical study that revolutionized scholars' understanding of civil legal disputes in the early 1980s.[40] Similarly, the interdisciplinary "new empiricism" described by Scott Cummings was highlighted several years ago in a symposium volume of the *Wisconsin Law Review*.[41]

Closer to home for me is the fact that the Remington Center, which I directed for sixteen years, was a direct outgrowth of Professor Frank Remington's empirical research into the criminal justice system. I have written extensively about the history of the Remington Center elsewhere,[42] but the short version is that, starting in the mid-1950s, Remington directed a massive ten-year empirical study of the nation's criminal justice system, funded by the American Bar Foundation (ABF). The ABF study, published in five groundbreaking volumes beginning in 1965,[43] described then-little understood practices such as plea bargaining, the exercise of discretion at all points in the system, and the use of the criminal justice system to address not only serious crime, but also social problems such as mental illness and substance abuse. Like the CLRP years later, the ABF study "revolutionized" the prevailing understanding of a legal system. It is important to note that neither of the CLRP nor the ABF study involved randomized statistical trials; rather, they entailed careful, detailed observations and interviews that, taken as a whole, allowed scholars to understand and analyze the landscape of the civil and criminal justice systems.

Based on his work with the ABF study, Remington came to believe that law graduates, while they had sufficient technical legal skills, had an

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40. DAVID M. TRUBEK ET AL., CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT (1983). For results of the CLRP and comments on those results, see *Special Issue on Dispute Processing and Civil Litigation*, 15 LAW & SOC'Y REV. 391 (1980–81). For a bibliography of the CLRP, see Herbert M. Kritzer, *Bibliography of Publications and Papers of the Civil Litigation Research Project*, U. WIS., http://users.polisci.wisc.edu/kritzer/research/clrpbib.htm (last visited Feb. 24, 2013).

41. *See* Symposium, *New Legal Realism Symposium: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335.

42. *See* Meredith J. Ross, *A "Systems" Approach to Clinical Legal Education*, 13 CLINICAL L. REV. 779 (2007).

43. Published volumes included ROBERT O. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE (1969); WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965); FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1970); DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966); and LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT (1967). Many years later, a follow-up volume was published. *See* DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY (Lloyd E. Ohlin & Frank J. Remington eds., 1993).

insufficient understanding of the complexities of the criminal justice system. Accordingly, in 1964, Remington enrolled the first summer interns in what was then called the Correctional Internship Program (later the Legal Assistance Program and, eventually, the Frank J. Remington Center). In its first iteration, the program was not a "clinic" in which law students assisted clients with legal problems. Rather, the earliest placements put students in the role of observers, learning about the complexities of the criminal justice system. Interns spent the summer riding in police cars, chauffeuring members of the Wisconsin Parole Commission to hearings, and assisting recreational staff and social workers in Wisconsin prisons. By the mid-1960s, however, students (often at the request of prison staff) had begun assisting inmates with their legal concerns; and, in 1969, the program entered into a contractual service agreement with the Wisconsin Department of Corrections that lasts to this day. Beginning in the mid-1970s, the program entered into a similar agreement with the Federal Bureau of Prisons to assist inmates at a federal correctional institution in Oxford, Wisconsin.

Thus, unlike many other law school clinics also emerging in the 1970s, the Remington Center's origins involved neither a large-volume legal services model nor "skills training." Rather, the Remington Center's educational goals were to develop professional responsibility and judgment in law students and to introduce them to the on-the-ground complexity of the criminal justice system. But Remington, as well as Professor Walter Dickey, his successor as Faculty Director of the Remington Center, consistently stressed that the Remington Center was more than just an educational program: its three core missions were education, service, and *research*—specifically, empirical research about lawyering and legal systems.

Today, the Remington Center is a complex umbrella program that enrolls over a hundred students annually in seven in-house clinics[44] and three externship projects[45] sited primarily in the criminal justice system. A spin-off from the Remington Center is the Economic Justice Institute (EJI), which enrolls approximately thirty additional students in five

44. The in-house clinics include the Legal Assistance to Institutionalized Persons (LAIP) Project and the Oxford Federal Project, which assist Wisconsin state and federal inmates, respectively, with both civil and criminal legal concerns; the Wisconsin Innocence Project, which investigates and litigates claims of innocence; the Criminal Appeals Project, which represents state defendants on appeal from criminal convictions; the Family Law Project, which assists inmates with divorce, visitation, paternity, child support, and guardianship issues; the Re-entry Project, which assists released and soon-to-be released prison inmates with reintegrating into their communities; and the Restorative Justice Project, which facilitates victim-initiated conferences with incarcerated offenders.

45. The externship projects include the Prosecution Project, the Hayes Police-Prosecution Internship, and the Public Defender Project.

in-house civil law clinics.[46] The law school also houses two other clinical programs: the Center for Patient Partnerships, an interdisciplinary healthcare advocacy center in which law students work with graduate students in medical fields to assist individuals living with a serious illness, and the Law and Entrepreneurship Clinic, a transactional clinic in which students assist startup businesses and entrepreneurs.

Despite the growth and diversity of the University of Wisconsin Law School's clinical programs, the ethos of Remington's ABA study lingers: we recognize, as do Charn and Selbin, that law school clinics have both the opportunity and the obligation to develop meaningful, fact-based information about the world.[47] Based on my experiences at the Remington Center, I urge researchers generally, and clinicians in particular, to think expansively about possible topics of empirical inquiry. To illustrate, I would like to highlight two of the research projects currently being undertaken by Wisconsin clinicians and students.

Certainly, as Selbin and Charn suggest in this issue, it is important to learn what kinds of delivery methods provide the most efficient and effective legal services to members of the community. Clinical Professor Marsha Mansfield, Director of EJI, is engaged in such a study. Several years ago, EJI developed the Family Court Clinic (FCC) at the request of local judges, who were concerned about systemic inefficiencies and substantive outcomes resulting from the large number of unrepresented litigants they saw each day in family cases. FCC students operate out of a walk-in clinic at the county courthouse. Working under the supervision of clinical faculty, the students provide information, forms, and guidance to self-represented litigants who seek assistance in all areas of family law. Where appropriate, the students provide legal information and limited legal assistance. Using the 2010 calendar year as her database, Mansfield is comparing outcomes and other less tangible factors in cases in which litigants were assisted by the clinic and cases where they were not. The study entails a review of FCC files, data mining through Wisconsin's online court records website, and phone interviews with individuals assisted by FCC. The ultimate goal is to determine whether limited scope or unbundled clinics are effective at increasing procedural efficiencies, substantive justice, and litigant satisfaction in family law cases, as compared to unassisted self-representation.

But the Remington Center's research is not limited to a review of service delivery systems or outcomes. Rather, in the tradition of Frank

46. These include the Family Court Clinic, the Consumer Law Clinic, the Domestic Violence Immigration Clinic, the Neighborhood Law Clinic, and the Mediation Clinic.

47. *See* Charn & Selbin, *supra* note 20, at 147.

Remington, we seek to learn more about the justice system itself. A good example is an interdisciplinary empirical study being conducted at the Remington Center by Clinical Associate Professor Mary Prosser in conjunction with a clinical psychologist at the University of Wisconsin. This study seeks to determine whether or not the widely-used "risk instruments" that purport to predict future dangerousness for sex offenders, and which were originally developed based on older offenders, are accurate with regard to young male offenders convicted of consensual underage sexual offenses ("statutory rape"). To that end, Prosser and her colleague are examining a randomized group of underage sex cases from eight Wisconsin counties over a nine-year period to determine whether the convicted offenders have gone on to commit further sex offenses, violent offenses, or nonviolent offenses. These standardized risk instruments are routinely used as a basis for lifetime "sex predator" commitments for sex offenders, including young offenders. Thus, Prosser's study has the potential to significantly affect practices in Wisconsin and beyond.

I would like to close with a personal anecdote that, to me, illustrates the changes in sociological research methods over time. At the turn of the twentieth century, my great-grandfather, Edward Alsworth Ross, was a pioneer in the new academic field of sociology. Since sociology was in its infancy, E.A. Ross could do whatever he wanted. Among other things, he liked to travel. He would travel to a country—Russia, China, or Mexico—stay for six weeks or so, and then write a book describing and analyzing that society's social structures. Of course, such an approach could—and did—result in some degree of misinformation, misunderstanding, and cultural bias. On the other hand, the field had to start somewhere, and E.A. Ross's insights helped to sketch the overall landscape of these cultures in a way that allowed later researchers to employ more nuanced methodologies.

Fast forward sixty years. In 1980, I was a graduate student in the English Department at the University of Wisconsin, studying literature and working as a teaching assistant in undergraduate courses. In the spring of 1980, the teaching assistants' union went on strike across the campus. It was a stressful time for all of us; we spent our days carrying picket signs and worrying about how to pay the rent, and our evenings attending interminable union meetings. One benefit of the experience, however, was that we got to meet graduate students from other departments.

One day, I was marching in a picket line with a graduate student in sociology, whom I will call "Will Brown." To alleviate the boredom of our endless march, I asked Will about his dissertation topic. He explained, "I am conducting a three-year, grant-funded statistical study of what kind of people drop out of college." "Well that sounds

interesting!" I said. "What kind of people drop out of college, Will?" His response: "Dumb people and poor people drop out of college. And whenever anybody says that in the future, they will have to cite 'Brown, 1982.'" I was dumbfounded. All I could think was, "Really!? Really!? They are giving you money for that!?" It struck me as preposterous that sociological research had refined its methodologies to a point where someone could spend three years so painstakingly documenting the obvious.

And yet, as we have learned from Greiner and Pattanayak, the results of painstaking statistical research can sometimes be anything but intuitive or obvious. There should be room in the academy for both E.A. Ross and Will Brown. The Essays in this Colloquium make clear that different questions require different methodologies and will result a rich array of answers. But all knowledge will advance the discussion. As Selbin and Charn observe, we need to seek "data and evidence for what it reveals without fetishizing or over-reading the results of our inquiries."[48] Or, in the words of the statement that has guided my university since 1894, "[w]hatever may be the limitations which trammel inquiry elsewhere, we believe that the great state University of Wisconsin should ever encourage that continual and fearless sifting and winnowing by which alone the truth can be found."[49]

48. *Id.* at 168.

49. *See Odd Wisconsin Archive*, WIS. HIST. SOC'Y, http://www.wisconsinhistory.org/odd/archives/001247.asp (last visited Feb. 24, 2013).