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FURTHER EMPIRICAL INSIGHTS AND FINDINGS ON THE EIGHTH CIRCUIT

*Robert Steinbuch**

While empirical research is often eschewed in legal analysis, it can provide a firm basis on which to predict judicial decisions. As a follow-up to An Empirical Analysis of Reversal Rates in the Eighth Circuit During 2008, this Article provides further insights into the correlation between a district judge's political affiliation and the rate at which the judge is reversed. Correlation, whether with or without a causal connection, is a critical predictor of a case's success on appeal. Further objective research is encouraged beyond the Eighth Circuit. Such research should concentrate not on dissenting rates, but on isolating the factors that statistically impact reversal rates, as attorneys, clients, and the justice system will all benefit from more predictable outcomes.

I. INTRODUCTION

The well-respected academic and jurist Richard Posner once wrote: "A dearth of quantitative scholarship has been a serious shortcoming of legal research When hypotheses cannot be tested by means of experiments . . . and the results assessed rigorously by reference to the conventions of statistical inference, speculation is rampant and knowledge meager."¹ His son, and also

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1. RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 411 (2001); see also ROBERT LAWLESS ET AL., EMPIRICAL METHODS IN LAW 4 (2009) ("There is some empirical evidence (as seems fitting to cite) that the use of empirical techniques for investigating law is the most discernible recent trend in legal scholarship. Law schools are now full of scholars who are less persuaded by argumentation and more persuaded by empirical evidence. We think the next

well-noted academic, Eric Posner,² furthered: "It is never easy to evaluate judges, or to evaluate their [anecdotal] evaluators, especially when those evaluators insist on anonymity. Fortunately, data on judicial performance exist, and although the data have problems as well, they provide a firmer basis for evaluation."³

Others seem less inclined to use empirical research in legal analysis:

I eschew empirical descriptions of how female judges are doing their jobs, taking a more anecdotal approach. . . .

While it has become fashionable in legal academic circles for scholars to rely on or even conduct empirical research, there is much to be gained by other forms of knowledge.

Cases tell stories.⁴

And while I certainly agree that cases tell stories, and that much can be gained from studying the individual facts of cases, empirical research has emerged as a critical tool for the advancement of legal research.⁵ It should not be shunned. Rather, it should be understood and embraced as the rigorous and objective method of evaluation that it is.

Armed with this philosophy, I recently conducted an empirical research study and published an article that evaluates factors affecting outcomes in the U.S. Court of Appeals for the Eighth Circuit titled *An Empirical Analysis of Reversal Rates in the Eighth Circuit During 2008* ("Reversal Rates").⁶

In this Article, I present new conclusions (not included in *Reversal Rates*) derived from the original data and expand upon the discussion in *Reversal Rates*. In addition, since empirical analysis remains in legal academia a relatively unexplored area of legal

generation of judges, lawyers, legislators, and other policy makers trained by these legal scholars will be similarly more persuaded by empirical results." (footnote omitted)).

2. See Eric Posner, UNIV. OF CHI. LAW SCH., <http://www.law.uchicago.edu/faculty/posner-e> (last visited Aug. 28, 2010); see also ERIC POSNER, <http://www.ericposner.com> (last visited Sept. 1, 2010).

3. Eric Posner, *Judge Sonia Sotomayor: What the Data Show*, VOLOKH CONSPIRACY (May 13, 2009, 11:40 AM), <http://volokh.com/posts/1242229209.shtml>; cf. Nicholas Wade, *A Decade Later, Gene Map Yields Few New Cures*, N.Y. TIMES, June 13, 2010, at A1 ("One can prefer to be an optimist or a pessimist, but the best approach is to be an empiricist.").

4. Theresa M. Beiner, *Female Judging*, 36 U. TOL. L. REV. 821, 821–22 (2005).

5. See LAWLESS ET AL., *supra* note 1 and accompanying text.

6. Robert Steinbuch, *An Empirical Analysis of Reversal Rates in the Eighth Circuit During 2008*, 43 LOY. L.A. L. REV. 51 (2009).

research,⁷ I hope to provide some of the insights that I gathered in conducting my study and writing *Reversal Rates*.

II. MODELING, CONCLUSIONS, AND FURTHER CONCLUSIONS

A. Factors Affecting Reversal

In *Reversal Rates*, I modeled the likelihood of reversal as a function of various factors that the literature discusses as possibly affecting judicial decision making.⁸ Based on its preeminence in the literature in the field, I first considered the party of the judge: Democrat or Republican. Similarly, I also considered:⁹ whether the judge's status was active or not, the number of appeals taken from the judge's decisions that year, the type of case appealed,¹⁰ and the interactions of any of the above factors.¹¹

7. See LAWLESS ET AL., *supra* note 1 and accompanying text.

8. See, e.g., LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 143–44 (2005); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 157–60 (1997); RICHARD A. POSNER, *HOW JUDGES THINK* 174 (2008); Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges?*, 37 J. LEGAL STUD. 87 (2008); Harry Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 837–38 (1991); Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 827–28 (1990); F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 433–34 (2004); Joanna M. Shepard, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169, 171 (2009); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 614 (2004). See generally CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006) (discussing whether politics affect judicial decision making).

9. See LAWLESS ET AL., *supra* note 1, at 172 (discussing coding data into variables).

10. I disaggregated this data into four separate categories: civil, criminal, habeas corpus, and other.

11. For example, my study analyzed the interaction of political party and the number of appeals taken from each judge to see whether any disparity in reversal rate that correlated to political affiliation of the trial judge could also be related to the fact that more appeals were taken from judges of one party. The data presented no such interaction. I did not include other factors in the regression analysis, such as who won at the trial level, if the variable was highly collinear with my included factors, such as party affiliation. See, e.g., Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1585 (2008). The use of this variable would result in multicollinearity, thereby undermining the study's results. The best regression models are those in which the independent variables each correlate highly with the dependent variable but correlate only minimally with each other. Such a model is often called "low noise" and will be statistically robust; i.e., it will predict reliably across numerous samples of variable sets drawn from the same statistical population. Statisticians and empiricists strive to eliminate multicollinearity in their studies. See LAWLESS ET AL., *supra* note 1, at 326 (discussing the risks of multicollinearity and the need to avoid it: "The most obvious method of avoiding the problems associated with multicollinearity is to think carefully about the independent variables that you will include and *not* to include those that are likely to be

For the first factor—political party—I categorized the judge based on the party of the appointing President. This well-accepted approach is known in various circles as the attitudinal model of judicial decision making.¹² Using this method of political-party assignment reasonably avoids the virtually impossible task of implementing an unbounded continuous variable for political party based on subjective evaluations of each jurist or of assigning different political affiliations to judges appointed by different presidents of the same party—particularly with a sample set of judges dating back to a Kennedy appointee.

In *Reversal Rates*, I examined over one thousand district court decisions that the Court of Appeals for the Eighth Circuit reviewed in 2008.¹³ The conclusion of the study on this issue was remarkable. The study showed a distinct correlation between a district court judge's political affiliation and the rate at which the Eighth Circuit reversed the judge on appeal.¹⁴ Using a logistic regression analysis,¹⁵ the study revealed that district court judges affiliated with the Democratic Party were reversed on appeal by the Eighth Circuit—which currently has fourteen Republican and three Democratic judges—approximately one and a half times more often than district court judges affiliated with the Republican Party.¹⁶

As it turned out, this was the only factor that correlated to reversal. Since the investigation was designed to determine the characteristics of the trial judge that correlate with reversal by the

collinear”) (emphasis added)); *cf. id.* at 236 (regarding the relevance of reporting determinations of no statistically significant correlation of examined factors).

12. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 64 (1993); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 302–03, (2004) (“Many people believe that political ideology should not and generally does not affect legal judgments, and this belief contains some truth. . . . It might be predicted that even when the law is unclear, ideology does not matter; the legal culture imposes a discipline on judges, so that judges vote as judges, rather than as ideologues. Or it might be predicted that in hard cases, the judges’ ‘attitudes’ end up predicting their votes, so that liberal judges show systematically different votes . . . from those of conservative judges. . . . It is extremely difficult to investigate these questions directly. It is possible, however, to identify a proxy for political ideology: the political affiliation of the appointing president. Presidents are frequently interested in ensuring that judicial appointees are of a certain stripe.”).

13. See Steinbuch, *supra* note 6, at 55.

14. *Id.* at 61.

15. See LAWLESS ET AL., *supra* note 1, at 345–47 (discussing logistic regression).

16. See Steinbuch, *supra* note 6, at 61.

Eighth Circuit, someone armed with information from my study could analyze the statistical likelihood of success of an appeal based on non-case-specific criteria.

While *Reversal Rates* discussed possible reasons for the correlation, e.g., causation,¹⁷ this is an area that empiricists are rightly cautious to broach. Statisticians find causation far more challenging than correlation.¹⁸ The beauty of the findings of *Reversal Rates*, however, is that correlation itself is rich with useful information. Correlation informs the user regardless of the cause. Take, as examples, two illustrations:

First, imagine that an eccentric hermit claims that he can make it rain. And every time he emerges from his solitude and engages in his efforts to create rain, it, in fact, rains a day later. Most would believe that the individual was not controlling rain. However, if he was able to repeat his actions well beyond the likelihood of mere chance (as shown through statistics), then the correlation, nonetheless, would be useful. We could use the eccentric's claims of creating rain as a method to predict rain (for travel, crops, etc.) to our benefit. In other words, the correlation itself is useful, notwithstanding that we actually reject the claimed causation and may not (as of yet) have an alternative explanation.

Second, research has demonstrated that the use of mouthwash containing alcohol correlates with mouth cancer.¹⁹ A simple mistake would be to conclude that the mouthwash causes cancer. The conclusion may be true, but it may also be false. An alternative explanation may be that people with developing mouth cancer may have bad breath. As a consequence, these people may be more likely to use mouthwash to address their illness. Thus, under the first

17. *Id.* at 65 ("This study supports the conclusion that judicial decision making is more than a mechanical exercise; it is instead a product of many factors including a judge's political and world views. This study suggests that when the political and world views of the appellate court judges align with those of a district court judge in a subordinate court, the district court judge's decisions are less likely to be reversed by the appellate court. It should be noted that there is no evidence in this study to suggest that politics was a direct and nefarious cause of the higher reversal rate of Democratic judges. In other words, *this* study does not suggest that the judges on the Eighth Circuit directly considered the political party affiliation of any given district court judge in deciding whether to reverse a case. This study does demonstrate, however, that there is a latent but discernible correlation between a district court judge's political party affiliation and the propensity of the Eighth Circuit to reverse the judge's decisions." (footnote omitted)).

18. See LAWLESS ET AL., *supra* note 1, at 290, 311–12 (discussing causality and causation).

19. A. Weaver et al., *Mouthwash and Oral Cancer: Carcinogen Versus Coincidence?*, 37 J. ORAL SURGERY 250, 250–53 (1979).

hypothesis, we would recommend the discontinuation of mouthwash, and under the second, we would not. However, in either event, we can determine that there is a subset of the general population with a higher incidence of mouth cancer, i.e., people who use mouthwash with alcohol in it.²⁰ Armed with this information, regardless of the cause of the cancer, we would want to screen mouthwash users for cancer more frequently than non-users. We would, as a result, discover more cases of cancer for the same effort when compared to screening the whole population. These two examples serve to highlight the usefulness of demonstrated correlations without conclusions as to causation.

B. Value for Predicting Outcomes

The practical ramifications of the conclusions of *Reversal Rates* for attorneys, litigants, and the judicial system are, indeed, highly significant, as the results invariably aid in predicting appellate outcomes.

Prediction of success is of paramount importance in the system for several reasons. In the course of litigation, lawyers constantly make strategic decisions and/or advise their clients on the basis of these predictions. Attorneys make decisions about future courses of action, such as . . . whether to advise the client to enter into settlement negotiations, and whether to accept a settlement offer or proceed to trial. Thus, these professional judgments by lawyers are influential in shaping the cases and the mechanisms selected to resolve them. Clients' choices and outcomes therefore depend on the abilities of their counsel to make reasonably accurate forecasts concerning case outcomes²¹

Whether a lawyer is able to predict accurately the outcome of a case has a direct effect on three areas relevant to attorneys: "(a) the lawyer's professional reputation and financial success; (b) the

20. Studies further undertaking the causal-relationship analysis suggest that the causal relationship does exist. Deborah M. Winn et al., *Mouthwash Use and Oral Conditions in the Risk of Oral and Pharyngeal Cancer*, 51 *CANCER RES.* 3044, 3047 (1991).

21. Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 *PSYCHOL. PUB. POL'Y & L.* 133, 134 (2010).

satisfaction of the client; and (c) the justice environment as a whole. Litigation is risky, time consuming, and expensive.”²²

Indeed, the consequences of misjudging outcomes can be costly for lawyers, their clients, and the justice system.²³ Lawyers who frequently advise clients to pursue litigation without delivering successful outcomes will diminish their client base.²⁴

Likewise, a client will be most satisfied with a lawyer who is accurate and realistic when detailing the potential outcomes of the case. At the end of the day, it is [sic] the accurate predictions of the lawyer that enable the justice system to function smoothly without the load of cases that were not appropriately vetted by the lawyers. Several lines of research support the proposition that lawyers’ assessments of goals are central in the legal system. Some research singled out the attorney’s estimate of the probability of success as the most crucial variable in shaping decisions whether to litigate or settle a case in controversy.²⁵

Thus, if any of the factors considered in *Reversal Rates* correlated positively with reversal (as one did), an attorney considering whether to appeal the decision of a district judge in the Eighth Circuit should look for the existence of this (or these) factor(s) to aid in making more accurate the critical prediction of success. Given that the political affiliation of the trial judge—and only this one of the considered factors—was shown in *Reversal Rates* to correlate with the likelihood of reversal by the Eighth Circuit, all else being equal, an attorney practicing in the relevant jurisdictions should be more inclined to appeal decisions of Democratic district judges.

Of course, all else is often not equal, as cases always have unique aspects. However, research demonstrates that when faced with subjective determinations of the strength of a case, attorneys

22. *Id.*

22. Jane Goodman-Delahunty et al., *Lawyers—Especially Men—May Be Too Optimistic About Case Outcomes, Survey Says*, 16 PSYCHOL. PUB. POL’Y & L. 133, 134 (2010).

23. *Id.*

24. *Id.*

25. *Id.*

often overestimate the likelihood of success.²⁶ Indeed, empirical research further shows that this overconfidence is correlated with gender (male).²⁷ And experience was not a moderating factor in the accuracy of attorneys' predictions.²⁸ Equally, neither whether the attorney handled civil or criminal matters nor the temporal distance to trial influenced the predictive abilities of the attorneys handling the cases.²⁹ Thus, using objective data to aid in predicting outcomes is critical. While data likely will never fully supplant subjective evaluations, it will, hopefully, inform them positively. Indeed, research again supports this proposition: "Studies of forecasting in other professional domains showed that when the ambiguity of the problem was reduced, forecasters relied on more objective and fewer subjective factors in making their predictions."³⁰

C. Basis for Party-Affiliation Effect

The showing of a statistically significant correlation between party affiliation and reversal rate likely reflects the fact that the judicial philosophy of the Eighth Circuit—which is largely Republican—is more in line with the philosophy of Republican district judges when compared to Democratic district judges.³¹ The study does not imply that the Eighth Circuit sinisterly screens cases on appeal for the political affiliation of the trial judge (although such a cause is theoretically possible).³² Rather, the study likely provides support for the conclusion that judicial decision making is more than a mechanical exercise. It is a product of many factors, including judges' world view and political philosophies.³³

While some suggest that certain political philosophies should be used to disqualify decision makers with whom the appointers (the president and Senate in the federal system) disagree,³⁴ others suggest

26. *Id.* at 141.

27. *Id.* at 142–43.

28. *Id.* at 144.

29. *Id.* at 145.

30. *Id.* at 149.

31. See Steinbuch, *supra* note 6, at 64–65.

32. *Id.*

33. *Id.*

34. See, e.g., CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS 188 (2007) ("In this way, each and every justice has identified some set of values and principles that, in his or her view, deserve judicial protection. Values and

just the opposite.³⁵ Regardless of one's position on this debate, the notion that political and moral philosophies affect how judges see the law is well discussed.³⁶ *Reversal Rates* adds an important dimension to this debate—further scientific support.

Thus, rather than eschewing empirical descriptions of how judges and courts do their jobs, *Reversal Rates* adds to the growing literature by employing a systematic method to build on the less-than-rigorous anecdotal approach. This method of analysis—empirical research—adds a dimension of intellectual precision and thoughtfulness often absent from solely anecdotal descriptions of cases and events, which might be called, at times, intellectual whimsy.

principles of this kind, define a justice's judicial philosophy. . . . When the president nominates a justice, the Senate must assess the nominee's judicial philosophy and determine whether it is sound enough to warrant confirmation."); cf. Richard J. Peltz, *From the Ivory Tower to the Glass House: Access to De-Identified Public University Admission Records to Study Affirmative Action*, 25 HARV. BLACKLETTER L.J. 181, 197 n.23 (2009) (discussing how a University of Arkansas at Little Rock Bowen Law School administrator suggested that individuals with a certain political or philosophical preference should be excluded from certain decision-making positions).

35. See, e.g., Michael Saul, *Supreme Court Nominee Sonia Sotomayor 'Open,' Will Follow Law on Abortion Issue, Says Friend*, N.Y. DAILY NEWS (May 29, 2009, 5:19 PM), http://www.nydailynews.com/news/politics/2009/05/29/2009-05-29_supreme_court.html ("[Supreme Court nominee Sonia Sotomayor] will follow what she thinks is the law on that, and her personal beliefs will not interfere with that analysis because my view of her is that she does not allow her personal beliefs to interfere with her analysis of legal issues."); see also Robert Steinbuch, *Bonding Justice*, 80 MISS. L.J. 377, 385 n.9 (2010) (book review) (citing the above).

36. See generally EILEEN BRAMAN, *LAW, POLITICS, AND PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING* (2009) (discussing how decision makers' views play a significant role in judicial decisions and how judges are unconsciously more likely to find legal authority to support their preferences, while recognizing that facts, law, and accepted norms of legal reasoning limit the judges' ability to impose their personal views); Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709 (2007). But see Michael A. Wolff, *Law Matters: What Do Judges Believe . . . Really?*, YOUR MISSOURI COURTS: THE JUDICIAL BRANCH OF STATE GOVERNMENT (Feb. 27, 2006), <http://www.courts.mo.gov/page.jsp?id=1080> ("Court opinions are not personal beliefs. Supreme Court opinions are directed at one result: resolving a legal dispute. They do not necessarily reflect any judge's personal views about the subject matter, nor are they pronouncements of political policy. A review of the Court's opinions would show that decisions are based on laws enacted by the General Assembly, previous court decisions, court rules, constitutional provisions or other guiding legal authority. Different judges may differ on what a legal provision means or what legal principle controls a case. An individual judge may write a separate opinion dissenting or concurring with the opinion of the Court; there you may find an expression of one judge's individual views about what a legal provision means or what legal principle should control. . . . Judges, as other citizens, have personal beliefs. When citizens come to courts to serve as jurors, we instruct them to set aside their persons beliefs and decide cases based on the law and the facts. The same is true for judges, who take an oath to do just that.").

D. Outlier Judges

Reversal Rates also discussed how the Eighth Circuit only reversed eight of its over sixty district judges for abusing their discretion more than once in the 2008 calendar year (adjusting out sentencing-guideline cases due to the transitional nature of this area of law).³⁷ These judges are:

- Judge Gary A. Fenner, Western District of Missouri
- Judge Fernando J. Gaitan, Jr., Western District of Missouri
- Judge Jean C. Hamilton, Eastern District of Missouri
- Judge Charles B. Kornmann, District of South Dakota
- Judge Nanette K. Laughrey, Western District of Missouri
- Judge James M. Rosenbaum, District of Minnesota
- Judge Karen E. Schreier, District of South Dakota
- Judge William R. Wilson, Jr., Eastern District of Arkansas³⁸

Reversal Rates did not discuss certain other conclusions that the collected data also showed. I now present them here.

First, the aforementioned adjustment for sentencing-guideline cases only removed one judge from the total number reversed more than once in 2008 for an abuse of discretion.³⁹ Thus, only nine out of the sixty-plus district judges in the Eighth Circuit were reversed for an abuse of discretion more than once in the calendar year 2008. Similarly, the data further revealed that the reversals for an abuse of discretion by these nine judges represented a startling amount—totaling over half of all of the reversals under the abuse-of-discretion standard (the most deferential of all of the standards of review) by the Eighth Circuit in 2008.⁴⁰

The remaining fewer-than-half of the abuse-of-discretion cases were scattered among twenty-one judges. Thus, nine district judges were responsible for twenty-five abuse-of-discretion reversals, and the remaining twenty-one reversals under this standard were individually distributed among twenty-one judges.

Finally, if one analyzes only judges whom the Eighth Circuit reversed three or more times under the abuse-of-discretion standard,

37. See Steinbuch, *supra* note 6, at 64, 73–78 tbl.B.

38. *Id.* at 64.

39. *Id.* at 73–78 tbl.B.

40. *Id.*

the number drops to four—with the maximum number of reversals for any one judge rising to five for Judge Fernando J. Gaitan, Jr.⁴¹

III. NOTES OF CAUTION

A. *Where to Start*

My study required that I pick a federal appellate court, because analyzing all twelve general circuit courts and the specialized Federal Circuit would have been too unwieldy and costly for a study of this type.⁴² Since I work for a state school in the Eighth Circuit, it seemed appropriate (all else being equal) for my school and state to first fund research of its federal appellate court before looking at other circuits.⁴³

There is, however, also a methodological reason for this choice: the Eighth Circuit is overwhelmingly Republican. As such, the three-member appellate panels were for the most part either strongly Republican or completely Republican. As a consequence, there is no significant concern that the observed party effect is panel-party-composition specific. This inevitably made the study's results more robust.

That notwithstanding, the study of *any* circuit is relevant in its own right, and I encourage others and hope myself to analyze the other U.S. appellate courts as well.

B. *Avoiding Misdirection*

It is important during such a project to clearly define its purpose, because suggestions will abound. I received many good and some not-so-good recommendations throughout my investigation. I would like to discuss one of the flawed ideas as a note of caution for the future researcher because of the relative unfamiliarity with empirical

41. *Id.* This last figure is interesting. It would not surprise me that appellate courts are more likely to reverse a trial judge under this standard when the appellate court has already done so in the past. This would be an interesting area for future study.

42. See LAWLESS ET AL., *supra* note 1, at 139–43, 149–53 (discussing the need for “sampling” and sample size).

43. Three Eighth Circuit judges maintain their chambers in Arkansas: Morris Arnold, Lavenski Smith, and Bobby Shepherd. All three are Republican appointees. Bobby Shepherd filled the vacancy made available when Judge Arnold took senior status. *History of the Federal Judiciary: U.S. Court of Appeals for the Eighth Circuit, Shepherd, Bobby E.*, FED. JUDICIAL CTR. <http://www.fjc.gov/servlet/nGetInfo?jid=3127&cid=15&ctype=ac&instat=08> (last visited Nov. 18, 2010).

research that remains in legal academia.⁴⁴ The proposal was not unique, but it does serve as a worthy illustration of some of the dangers of accepting less-than-fully informed suggestions.

The proffered idea was to consider whether the three judges appointed by Democrats sitting on the Eighth Circuit had higher dissenting rates. This recommendation, however, was inconsistent with the purpose of the study. Dissenting rates of either Democrats or Republicans on the appellate level do not advance an inquiry into the predictive value of aspects of the *trial court* on the rate of reversal, because dissents at the appellate level, by definition, do not affect the outcome of the appeal. In other words, given that the point of the study was to isolate the factor(s) that statistically impact reversals, a “dissenter” variable would be completely irrelevant. This is perhaps obvious given my presentation here, but this illustrates misdirected suggestions, among others, that on first blush may appear intriguing.

Moreover, the Eighth Circuit has, as discussed, fourteen Republicans and three Democrats. As such, even if there were a dependent variable to affect, any attempt to conduct a statistical analysis of Democratic-only dissents (which numerically would be very low) would nonetheless produce a standard deviation well beyond the acceptable range for social scientists.⁴⁵

Most importantly, however, it is ultimately unclear what end the proposed analysis would serve. Recall that the purpose of the study was to evaluate the factors affecting outcomes in the Court of Appeals for the Eighth Circuit, and the conclusion was that the largely Republican Eighth Circuit reverses Democratic district judges’ decisions significantly more often than those of Republican district judges. The perhaps obvious notion that the three Democratic judges on the Eighth Circuit may not agree as much with their Republican counterparts as the latter do with each other not only does not alter what has been demonstrated by the study, it does not further its goal.⁴⁶ Ultimately, that is the critical filter that must be applied to all suggestions.

44. LAWLESS ET AL., *supra* note 1, at 1, 3–4.

45. *Id.* at 233–34, 239 (discussing the generally accepted p-value of 5 percent for statistical significance).

46. A more interesting topic with some facial similarity to the Democratic-dissent proposal, which has been analyzed, is the willingness of a judge to disagree with co-partisans regardless of party. See Stephen Choi et al., *Judging Women* (Univ. of Chi. Law & Econ., Olin Working Paper No. 483, 2009), available at <http://ssrn.com/abstract=1479724>. This, however, is an analysis of

IV. CONCLUSION

Legal academicians have too often eschewed objective quantitative research in favor of finger-in-the-air analysis. Several reasons exist for why empirical studies appear to be anathema to many legal scholars, but, unfortunately, one reason is a lack of competence in this arena. Rigor and objectivity should be favored and encouraged over speculation and stories. In this Article I have expanded on my previous conclusions, discussing the factors that correlate with reversal in the Eighth Circuit, as well as the actions of outlier judges in this jurisdiction. Through such research, I believe that those interested in the law will be able to rely on more objective, and fewer subjective, factors in making predictions, thereby benefitting clients, attorneys, courts, and the justice system.

the appellate court's internal workings, and not, as was the case in *Reversal Rates*, an investigation of the relationship between the appellate court and the courts that it reviews.

