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# Table of Contents

Call For Papers Page 7

Subscription Information Page 9

*Book Review: Sherlock Holmes and the Sword of Osman*
By Tim Symonds

Xanthe Mallett
Sydney Australia

*Habermas on Justice* Page 13

J G Moore
JD Student
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*The Contribution of Empirical Research to Law* Page 29

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The field of jurisprudence lies at the nexus of law and politics, the practical and the philosophical. By understanding the theoretical foundations of law, jurisprudence can inform us of the place of legal structures within larger philosophical frameworks. In its inaugural edition, *The Journal Jurisprudence* received many creative and telling answers to the question, “What is Law?” For the second edition, the editors challenged the scholarly and lay communities to inquire into the intersection between jurisprudence and economics.

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Book Review:

*Sherlock Holmes and the Sword of Osman*

*By Tim Symonds*

Xanthe Mallett

Sydney, Australia

In 2012 I was fortunate enough to be asked to review Tim Symonds book *Sherlock Holmes and the Case if the Bulgarian Codex*. I am a huge Conan Doyle fan, having read all of Holmes original stories many times.

Frankly I expected Symonds’ tale to let the original down. I was pleasantly surprised in that I thoroughly enjoyed Symonds 2012 contribution to Holmes’ exploits, and so was very happy to accept an invitation to review his new adventure – *Sherlock Holmes and the Sword of Osman*.

Symonds has yet again captured Holmes’ aloof mannerisms and Watson’s somewhat bumbling attempts at assistance, to the point where I forgot that Conan Doyle was not the mind behind the escapade.

The story in brief: Holmes and Watson are reunited after a threat is uncovered to steal the Sword of Osman from the ruler of the Turkish Empire – a theft that would see the fall of the Ottoman Empire and have cataclysmic results the world over as European powers would fight for the spoils and with it trade routes essential to the British. The world would be brought to the brink of war; the fortunes – and indeed lives – of
thousands are once again in Holmes’ hands. A tale of espionage, double-crossing, intrigue, and murder ensues. But who is the mastermind behind the plot? It couldn’t be Moriarty, Holmes’ most dangerous and cunning adversary, after his watery demise at the end of *Sherlock Holmes and the Case if the Bulgarian Codex* (sorry if that was a spoiler), or could it…

I thoroughly enjoyed this romp through Edwardian-era Stamboul in high summer; with its colourful descriptions of jewelled swords that rule empires, ghosts that haunt palaces, and tyrannical rulers flanked by their murdering eunuchs.

The language and characters Symonds evokes are true to Conan Doyle’s style, and he carries the reader along with Watson’s engaging narrative style.

As with *the Case if the Bulgarian Codex* I didn’t want to story to end. So it you, like me, are a Conan Doyle devotee, I recommend *the Sword of Osman* as a thoroughly enjoyable route to Conan Doyle escapism.
INTRODUCTION

In his discourse theory of law and democracy, Habermas seeks to reconcile law and morals as well as human rights and popular sovereignty. In doing so, he attempts to situate justice within law and the deliberative democracy that produces, enforces and applies the law. His success relies upon his conception of justice, which he takes to depend on the discursively rational, and, therefore, intersubjective, justification of legal norms.

The purpose of this paper will be to argue that although justification may depend on rational discourse, justice is independent of such discourse. In attempting to achieve this purpose, the body of this essay will consist in three parts. First, Habermas’s theory of law and democracy will be summarised. Second, Habermas’s conception of justice will be discussed. Third, Habermas’s discourse principle will be analysed in connection with moral realism.

II ARGUMENT

A Habermas’s Discourse Theory of Law and Democracy

1 Law and Morals

In this connection, Habermas attempts to place himself between legal positivism and natural law. Legal positivism, which has its origins in Bentham and Austin,
maintains a distinction between law as it is, and law as it ought to be. In other words, for positivists, a law can be valid even if it is immoral. Natural law, on the other hand, which has implicit origins in Plato and the Stoics, and an explicit origin in Aquinas, is the view that there is a necessary connection between law and morals.

Habermas begins with the ‘post-metaphysical’ ‘assumption’ that law and morals ‘appear side by side as two different but mutually complementary kinds of action norms’. As the term suggests, action norms are supposed to move one to action. More precisely, they are ‘generalized behavioural expectations’ of a temporal, social and substantive nature.

One reason for this assumption, is that Habermas is trying to avoid reducing law to social facts, as the positivists do. He refers to such reductionism as the ‘sociological disenchantment of law’. His idea is that law is not a mere assemblage of social facts, but rather something the validity of which can be the subject of rational discourse. Indeed, for Habermas, one can act on a desire to respect the law, just as one can act on a desire to respect morality.

Another reason for the assumption, is that Habermas is trying to avoid subsuming law to morals, as the natural lawyers do, since this would be ‘sociologically implausible’ and ‘normatively awkward’. For example, unlike morals, the law is backed by the coercive power of the state; and moral norms

4 Ibid 256.
5 Habermas, above n 1, 105.
6 Ibid 107.
7 Ibid Ch 2.
8 Ibid 43.
9 Ibid 104–18.
10 Ibid 107.

(2015) J. Juris. 14
are universal, whereas legal norms are specific to a particular legal system.\(^{11}\) In addition, the law is ‘the only medium through which a “solidarity with strangers” can be secured in complex societies’.\(^{12}\)

Thus, for Habermas, law and morals are distinct. However, he brings them together in his discourse principle. According to him, this principle ‘lies at a level of abstraction that is still neutral with respect to morality and law, for it refers to action norms in general’.\(^{13}\) He defines the discourse principle in the following way:

\[ D: \text{Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses.} \]

When applied to moral norms, the discourse principle becomes the universalisation principle.\(^{15}\) This principle ‘results when one specifies the general discourse principle for those norms that can be justified if and only if equal consideration is given to the interests of all those who are possibly involved’.\(^{16}\) When applied to legal norms, the discourse principle becomes the democratic principle, according to which, ‘a law may claim legitimacy only if all those possibly affected could consent to it after participating in rational discourses’.\(^{17}\)

Thus, if the discourse principle is the genus, then the universalisation and democratic principles are its species.

\(^{11}\) Ibid 104–18.
\(^{13}\) Habermas, above n 1, 107.
\(^{14}\) Ibid.
\(^{15}\) Ibid 109.
\(^{16}\) Ibid 107.
Be that as it may, at the level of legal norms, one applies the democratic principle, according to which it can be decided whether laws are legitimate or justified. For Habermas, legal norms can be justified through rational discourse, in which moral, ethical-political or pragmatic reasons may be given.\textsuperscript{18} That is to say, the justification of such norms is not given by moral reasons alone.\textsuperscript{19} However, moral \textit{reasons} can be given for taking a legal \textit{norm} to be justified, and in this respect ‘law has a reference to morality inscribed within it’.\textsuperscript{20} In this way, Habermas attempts to situate himself between legal positivism and natural law.

\section*{2 Human Rights and Popular Sovereignty}

In this connection, Habermas attempts to position himself between liberalism and republicanism.\textsuperscript{21} Liberalism, which has its origins in Locke,\textsuperscript{22} postulates the priority of the rights of individuals (private autonomy) over the rights of the majority (public autonomy).\textsuperscript{23} Republicanism, which finds expression in Rousseau,\textsuperscript{24} on the other hand, prioritises public autonomy over the private autonomy of liberalism.\textsuperscript{25} For republicans, human rights owe their ‘legitimacy to the ethical self-understanding and sovereign self-determination achieved by a political community’.\textsuperscript{26} For liberals, however, human rights provide ‘legitimate barriers’ to prevent the ‘sovereign will of the people’ from impinging on the freedom of individuals.\textsuperscript{27}

\begin{flushleft}
\footnotesize
\textsuperscript{18} Habermas, above n 1, 108.
\textsuperscript{19} Ibid 110.
\textsuperscript{20} Ibid 106.
\textsuperscript{21} Habermas, above n 17, 159.
\textsuperscript{22} Habermas, above n 1, 44.
\textsuperscript{23} Habermas, above n 17, 159.
\textsuperscript{24} Habermas, above n 1, 100–103.
\textsuperscript{25} Habermas, above n 17, 100–103, 159.
\textsuperscript{26} Ibid 159.
\textsuperscript{27} Ibid.
\end{flushleft}
Habermas’s alternative to liberalism and republicanism begins with communication. In this connection, he refers to his democratic principle, which, as has been seen, is the principle that ‘a law may claim legitimacy only if all those possibly affected could consent to it after participating in rational discourses’. As has also been seen, the democratic principle is a species of the discourse principle.

According to Habermas, the democratic principle justifies ‘the presumption of legitimate outcomes’, but ‘the forms of communication necessary for a reasonable will-formation of the political lawgiver, the conditions that ensure legitimacy, must be legally institutionalized’. For Habermas, any such institutionalisation must recognise the internal relation between human rights and popular sovereignty. That is to say, the notion that private and public autonomy presuppose each other.

For Habermas, private autonomy presupposes institutional arrangements that secure the human rights of individuals, but such rights are expressions of liberty only if individuals can understand themselves to be both the authors and the addressees of the laws that institutionalise such rights. That is to say, only if the laws that guarantee private autonomy derive from the people’s public autonomy as citizens. Thus, the rights that define the liberty of individuals presuppose the rights to participate politically, and vice versa. According to Habermas, the

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28 Ibid 160.
29 Ibid.
32 Ibid.
33 Habermas, above n 17, 161.
relation between private and public autonomy is co-original. In this way, Habermas attempts to position himself between liberalism and republicanism.

3 Justice and Justification

For Habermas, ‘justice’ designates 'the validity of universal normative sentences that express general moral norms'. Thus, ‘justice is not one value among others’, but rather it poses an ‘absolute validity claim’. Whereas, “legitimacy” designates the specific kind of prescriptive validity (Sollgeltung) that distinguishes law from “morality”. For Habermas, therefore, valid moral norms are just, while valid legal norms are legitimate.

Of course, Habermas considers that legitimate law has ‘a reference to morality inscribed within it’, and thus a legitimate law is a just law. However, it is hard to see how morality, which is universal, could be inscribed within law, which is not. Of course, the universal ‘red’, for example, can be inscribed, or instantiated, in a red particular. In the case of justice, however, to say that such and such is just is to make a universal claim, and it is hard to see how such a claim can remain universal within a non-universal system of law. That is to say, if there is only a reference to morality within the law, then there is only a reference to justice, since justice designates the validity of universal moral norms.

Habermas recognises this problem. For him, certain legal norms (i.e., human rights) are ‘Janus-faced’. That is to say, they look ‘simultaneously toward morality

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34 Ibid.
35 Bohman and Rehg, above n 31.
36 Habermas, above n 1, 153.
37 Ibid.
38 Ibid 156.
39 Ibid.
40 Ibid 106.
42 Habermas, above n 17, 161.
and the law’. However, although they have moral content, which is universal, as legal norms they protect only those who belong to a particular community of legally constituted individuals. This reply may be philosophically unsatisfying; nevertheless, Habermas takes justice to enter the law via the democratic principle in three ways. First, it allows moral reasons to be given for the validity of legal norms. Second, it allows the addressees of the law to be the authors of the law. Third, it provides for the discursively rational, and therefore, intersubjective, justification of legal norms. That is to say, a just law is a discursively justified law. A question arises, however, as to whether justice is really dependent on discourse.

B Habermas and Moral Realism

Moral realism is the view that morality is grounded in the nature of things, rather than in intersubjective agreement. In this connection, it is the view that justice is independent of discourse. Habermas explicitly opposes this view. However that may be, in what follows, it will be argued that while intersubjective agreement may be necessary for justification, in the sense that one must have good reasons for supposing one’s conclusions to be just, such agreement is not necessary for justice itself. That is to say, justice is independent of intersubjective agreement, including that given in rational discourse. For this reason, Habermas’s discourse theory of law and democracy does not situate justice within law and the deliberative democracy that produces, enforces and applies the law.

43 Ibid.
44 Ibid.
45 Habermas, above n 1, 106.
46 Bohman and Rehg, above n 31.
47 Blackburn, above n 3, 251.
48 Habermas, above n 1, 256.
Habermas opposes moral realism on the grounds that it is contrary to post-metaphysical thinking.\textsuperscript{49} As a neo-Kantian, Habermas distinguishes between morals, which have to do with what is universally right, and ethics, which have to do with what is good relative to a particular community.\textsuperscript{50} In this way, he distinguishes between neo-Kantian morals and neo-Aristotelian ethics.\textsuperscript{51} According to Habermas, moral realists ‘reify goods and values into entities as existing in themselves’ and ‘claim universal validity for the highest values or goods.’\textsuperscript{52} Thus, he equates moral realism with neo-Aristotelianism.\textsuperscript{53} However, in distinguishing between rights-based theories and moral realism, Habermas ignores the possibility of a neo-Kantian moral realist, such as Nagel, the well-known philosopher and jurist.\textsuperscript{54}

It has been suggested that Habermas’s anti-realism motivates his intersubjective thesis.\textsuperscript{55} But it may be the other way round. For example, according to Habermas, realism presupposes that one can justify norms and non-norms independently of the intersubjectively acquired concepts that are the building blocks of language and discourse.\textsuperscript{56} For Habermas, this would require that one could have access to a transcendent reality that is independent of intersubjectively acquired concepts.\textsuperscript{57} However, according to Habermas, such

\textsuperscript{49} Ibid.
\textsuperscript{50} Ibid 256–260.
\textsuperscript{51} Ibid 256.
\textsuperscript{52} Ibid.
\textsuperscript{53} Ibid 256–257.
\textsuperscript{57} Ibid.
access is impossible, since all experience of the world is dependent on such concepts.\(^{58}\)

Of course, there is nothing controversial in the idea that the justification of norms and non-norms depends on intersubjective agreement. However, intersubjective notions of justification are consistent with both normative and non-normative realism. For example, according to Sellars, the justification of sensory experiences as veridical representations of the non-normative world is dependent on intersubjectively acquired concepts.\(^{59}\) If this is so, then the intersubjective nature of normative concepts, such as justice, will entail anti-realism only if the intersubjective nature of non-normative concepts entails idealism. That is to say, the view that there is no reality independent of concepts.\(^{60}\)

At this point, it may be useful to consider what Sellars has to say in this connection. Sellars questions what Descartes takes for granted. That is to say, Descartes never questions whether one can justify one’s sensory experiences, \textit{qua} sensory experiences.\(^{61}\) Rather, he questions whether sensory experiences are veridical representations of a mind-independent reality. Sellars, on the other hand, goes one step further. For him, one cannot even be sure whether sensory experiences are veridical representations of pre-conceptual sensory states. For Sellars, all experience is dependent on intersubjectively acquired concepts. That is to say, one’s pre-conceptual sensory states are conceptually mediated to form an experience. Thus, one cannot experience ‘a red ball over there’ until one has acquired the necessary intersubjective concepts that allow one to experience the

\(^{58}\) Ibid.


\(^{60}\) Blackburn, above n 3, 184.

various particulars, properties and relations involved. Such concepts are necessary in order that one may interpret or construct an experience from pre-conceptual sensory states. According to Sellars, the experience is not ‘given’, and nothing is ‘given’ in experience.  

Thus, for Sellars, experience of the world is dependent on intersubjectively acquired concepts. If this is so, then a fortiori, the justification of one’s beliefs about the world is dependent on intersubjective agreement. Indeed, since intersubjectively acquired concepts presuppose discourse, there is no reason to deny that the justification of non-normative beliefs is discourse-dependent. In any event, Sellars gives goods reasons to doubt the verity of conceptually mediated sensory experience. Further, if one may doubt the truth of sensory experience, then, a fortiori, one may doubt the existence of a reality that is independent of concepts and discourse. Despite such arguments, however, few would doubt the existence of a discourse-independent world that contains such things as aardvarks and protons. Similarly, the realist may contend that the discourse-dependence of normative justification does not imply the discourse-dependence of justice.

Of course, to say that justice is independent of discourse, is to say that justice resides in the nature of things. Perhaps, for example, there is something about humans that makes torturing them morally wrong. Indeed, to paraphrase Russell, it is hard to believe that the only thing wrong with wanton cruelty is that rational people disagree with it.  

However that may be, it is clear that realists are committed to the notion that one can move from premises about the natural

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63 Bertrand Russell, Last Philosophical Testament: 1943–68 (Routledge, London, 1960) 310–311. His actual words were, ‘I find myself incapable of believing that all that is wrong with wanton cruelty is that I do not like it’.
world to conclusions about justice, and surely this is a violation of Hume’s law. That is to say, the view that it is impossible to derive an ‘ought’ from an ‘is’; or, in other words, the view that propositions about the natural world cannot logically entail propositions about justice. 64

In reply, it could be said that there are propositions that one takes to be true, despite the fact that nothing logically entails their truth. For example, not even a corroborated experience of what one takes to be an aardvark logically entails the existence of the aardvark, since one’s experience may not be a veridical representation of an external reality. Yet most philosophers are happy to accept that aardvarks exist. That is to say, most philosophers do not let a lack of logical entailment lead to the sort of idealism that rejects the existence of a concept-independent reality. Thus, there is no reason for the moral realist to be perturbed by Hume’s law.

In any event, according to Lafont, there is tension between realism and anti-realism in Habermas’s theory. 65 On the one hand, Habermas agrees with the anti-realists that normative judgements do not describe a moral order that is grounded in the nature of things, and which is ‘heteronomously’ imposed on humanity independently of practical reason. 66 On the other hand, he wants to assert the objectivity of normative judgements, which he grounds in the shared interests and needs of human beings. 67

The claim to moral objectivity characteristic of Habermas’s theory makes the validity of norms depend on assumptions about the existence of common interests and needs amongst rational humanity. 68 It is this assumption that gives

64 Blackburn, above n 3, 180.
65 Lafont, above n 53, 27.
66 Ibid 28.
67 Ibid 28.
68 Ibid 27.
credence to the claim that justice can be given by a procedure that will produce objectively right answers.\textsuperscript{69} However, in grounding discourse in the universal interests of humanity, there are vestiges of the Platonism that Habermas finds in Kant’s legal theory.\textsuperscript{70} That is to say, that the validity of law is measured against norms given by an ideal moral realm.\textsuperscript{71} Thus, when Habermas stipulates what rational discourse requires, he may commit himself to a weak form of moral realism.\textsuperscript{72}

Moreover, Habermas is a moral cognitivist.\textsuperscript{73} That is to say, he believes that moral knowledge is possible, insofar as one can know which norms are just by applying the relevant principle of discourse. Thus, Habermas makes epistemic commitments that moral realists eschew. Of course, moral realists make ontological commitments about a moral reality, but they balk at the suggestion that one can have moral knowledge.\textsuperscript{74} In this way, moral realism is consistent with moral scepticism in a way that Habermas’s theory is not.\textsuperscript{75} Thus, he is wrong to say that realism could lead the judiciary to disregard the views of the majority and ‘to concretize norms in a manner equivalent to implicit lawmaking, which gives constitutional adjudication the status of a competing legislation’.\textsuperscript{76} Further, anti-realists, from Ayer onwards,\textsuperscript{77} typically adhere to some version of expressivism.\textsuperscript{78} That is to say, to the view that sentences that express moral propositions cannot be objectively true or false, but rather simply express non-

\textsuperscript{69} Ibid 31.
\textsuperscript{71} Ibid.
\textsuperscript{72} Davis, above n 58, 125.
\textsuperscript{73} Lafont, above n 53, 28.
\textsuperscript{74} Thomas Nagel, The View from Nowhere (Oxford University Press, New York, 1986) 67–70.
\textsuperscript{75} Ibid 142, 154. See here, for the connection between moral realism and moral scepticism.
\textsuperscript{76} Habermas, above n 1, 258.
\textsuperscript{78} Lafont, above n 53, 28.
cognitive attitudes.\textsuperscript{79} Thus, according to Lafont, if Habermas is an anti-realist, then he is an ‘anomalous’ one.\textsuperscript{80}

Be that as it may, according to moral realists, justice does not depend on discourse. Of course, discourse may provide epistemic support for the conclusion that justification has been achieved.\textsuperscript{81} To this extent, the realist can be both a cognitivist and a discourse-theorist. However, for the realist, justice and justification are conceptually distinct. That is to say, ‘justice’ has uniquely moral connotations, whereas ‘justification’ may relate to almost any type of reasoning, including that which is purely pragmatic. Even in its moral sense, justification is a process that simply aims at justice. Indeed, Habermas implicitly recognises this in his discussion of justice and justification.\textsuperscript{82}

Further, realism allows for the possibility that participants in rational discourse could be justified in taking a norm to be just, and yet the norm be unjust. It seems for Habermas, however, that if a norm is rationally and discursively justifiable on one occasion, then it is just on that occasion, and if it is rationally and discursively unjustifiable on another occasion, then it is unjust on that other occasion. However, the concept of justice, as it is commonly understood, is such that if a norm turns out to be unjust, it has always been unjust.\textsuperscript{83} In this connection, it will be remembered that intersubjectively acquired normative concepts do not entail anti-realism, anymore than intersubjectively acquired non-normative concepts entail idealism.

\textbf{III RECAPITULATION}

\textsuperscript{79} Ibid.
\textsuperscript{80} Ibid.
\textsuperscript{81} Ibid 46.
\textsuperscript{82} Habermas, above n 1, 108–109, 154.
\textsuperscript{83} Lafont, above n 53, 47.
In his discourse theory of law and democracy, Habermas seeks to reconcile law and morals as well as human rights and popular sovereignty.\(^8^4\) In doing so, he attempts to situate justice within law and the deliberative democracy that produces, enforces and applies the law. His success relies upon his conception of justice, which he takes to depend on the discursively rational, and, therefore, intersubjective, justification of legal norms.

The purpose of this paper was to argue that although justification may depend on rational discourse, justice is independent of such discourse. In attempting to achieve this purpose, the body of this essay consisted in three parts. First, Habermas’s theory of law and democracy was summarised. Second, Habermas’s conception of justice was discussed. Third, Habermas’s discourse principle was analysed in connection with moral realism.

**IV CONCLUSION**

It has been suggested that Habermas’s discourse theory of law and democracy is as important as Weber's sociology of law or Hegel's philosophy of law.\(^8^5\) This can scarcely be doubted. However, Habermas’s theory is not without its problems. For example, his claim to cognitive anti-realism seems anomalous.\(^8^6\) Indeed, in grounding discourse in the universal interests of humanity, he may commit himself to a weak form of moral realism.\(^8^7\) Be that as it may, it is hard to believe that the only thing wrong with wanton cruelty—towards animals and

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\(^8^4\) Habermas, above n 1, 84, 104.
\(^8^6\) Lafont, above n 53, 28.
\(^8^7\) Davis, above n 58, 125.
infants, for example—is that rational people disagree with it. Thus, in taking justice to depend on discourse, Habermas conflates justice with justification.

In support of moral realism, it was argued that justice does not depend on discourse. Of course, discourse may provide epistemic support for the conclusion that justification has been achieved. To this extent, the realist can be both a cognitivist and a discourse-theorist. Nevertheless, since justice is independent of intersubjective agreement, including that given in rational discourse, Habermas’s discourse theory of law and democracy does not situate justice within law and the deliberative democracy that produces, enforces and applies the law.

V BIBLIOGRAPHY


Habermas, Jürgen, *Ergänzungen zur Theorie des Kommunikativen Handelns* (Suhrkamp, Frankfurt, 1986)

Habermas, Jürgen, ‘Reply to Symposium Participants’ in Michel Rosenfeld and Andrew Arato (eds), *Habermas on Law and Democracy: Critical Exchanges* (University of California Press, Berkeley, 1998) 381


Abstract

Over the last decade empirical legal studies have become a popular subfield of legal research. Legal scholars have increasingly begun to employ social science research methods in their attempts to provide answers to research questions in the field of law. The goal of empirical legal research is to make a contribution to all subjects and phenomena that are of interest to law and for which no methods have previously been available. The use of empirical methods in legal science can lead to results that cannot be achieved by the methods of traditional law research. The ultimate aim of the approach is to contribute to a systematic understanding of our legal system based on empirical data. In this article I give an overview of the development of empirical legal studies as an independent subfield of legal research, followed by an introduction to two popular studies to illustrate the potential and limitations of this new field of research. I then discuss some controversial topics such as the widespread view that empirical research is objective and value-free, the relevance of methodological problems and the problem of over-simplification of the complexity of legal issues. I conclude with a look at future prospects for empirical legal research.

88 Prof. Dr. iur. Alexander J. Wulf, MSc (LSE), MLB (BLS/WHU) SRH Hochschule Berlin and Institute of Law and Economics, University of Hamburg. Address: Ernst-Reuter-Platz 10, 10587 Berlin, Germany; email: alexander.wulf@srh-hochschule-berlin.de. This is a revised and extended version of the entry “Empirical Analysis” written for the Encyclopedia of Law and Economics, see Wulf, 2015. I thank Florian Faust, Hans-Bernd Schäfer and Stefan Voigt for helpful comments and suggestions and their kind support. The author is responsible for any remaining shortcomings.
1. Empirical Legal Studies

In empirical legal studies (ELS) research methods from the social sciences are used to examine research questions in the legal sciences in order to study the operative and functional aspects of the law and their effects.\textsuperscript{89} The increasing trend towards testing hypotheses and questions has been described as “the next big thing” in legal science,\textsuperscript{90} even as a revolution\textsuperscript{91} whose significance has as yet been underestimated.\textsuperscript{92}

In the United States of America the research approaches of the social sciences first began to take on greater significance in connection with legal realism. Legal realism grew up in the nineteen thirties and forties, mainly in the USA,\textsuperscript{93} and was characterised especially by the use of interdisciplinary methods borrowed from the social sciences.\textsuperscript{94} In legal realism it was, for example, assumed that judges’ decisions were determined not only by laws, precedents and general legal principles, but also by the judges’ social backgrounds and political convictions.\textsuperscript{95} For example, social scientific methods were needed to be able to analyse judges’ verdicts from this viewpoint. Since these methods are often empirical, legal realism introduced the empirical paradigm into the legal sciences for the first time. However, these early empirical research efforts remained few and far between and thus legal realism fell short of its empirical potential. Because legal

\textsuperscript{89} Baldwin and Davis, 2003: 882.
\textsuperscript{90} Ulen, 2008: 73; George, 2005: 142.
\textsuperscript{91} Ho and Kramer, 2013.
\textsuperscript{92} Fortney, 2009: 2-3 cites Gordon, who describes empirical legal studies as the „most neglected and ridiculously undervalued as well as the most potentially fruitful branch of legal studies”. Gordon, 1993: 2085.
\textsuperscript{93} See for example, Baldwin and Davis, 2003: 882; Ulen, 2008: 900; George, 2005: 144. For more extensive information on this topic see also: Kritzer, 2010; Kritzer, 2009; Schlegel, 1995; Monahan and Walker, 2011.
\textsuperscript{94} Eisenberg, 2011: 1720.
\textsuperscript{95} Baldwin and Davis, 2003: 882.
realism brought the empirical approaches into the legal sciences and thus prepared a basis for their acceptance, it is seen as the trailblazer of empirical research in the legal sciences.  

Since the beginning of this century the main country in which empirical legal research has been practiced to any great extent is the USA. Today it has a wide forum in a number of journals with international repute, at conferences, academic societies and university research centers. It appears likely that its initial rapid growth will continue in the future. The success of empirical methods in the legal sciences is partially due to the fact that it brings together scholars from several different disciplines who have been working independently of each other on different aspects of the legal system, e.g. the sociology of law (“Law and Society”) and the economic analysis of law (“Law and Economics”). This promotes interdisciplinary legal research.

96 George, 2005: 144-145.
97 Kritzer, 2009: 925; George, 2005: 141-142.
98 Eisenberg, 2011: 1713-1714.
100 For example the annual Conference on Empirical Legal Studies and the annual Conference of the European Association of Law and Economics.
101 For example the Society for Empirical Legal Studies, the American Law & Economics Association, the European Association of Law and Economics.
102 For example, the University of California at Berkeley - Center for the Study of Law and Society, University of California, Los Angeles - School of Law Empirical Research Group and Humburg University - Institute of Law and Economics, Germany.
103 Lindgren, 2006. Lindgren argues that among others the following developments will further contribute to the growing importance of empirical legal studies: the increasing training of legal scholars in statistical methods, the development of new statistical methods, the growing computing power to conduct statistical calculations, the growing availability of statistical datasets. Baldwin and Davis, 2003: 883 add to this list the growing number of law professors who do not only have a degree in law but also in the humanities or the social sciences.
The common goal of these different disciplines is to develop a systematic understanding of the legal system based on empirical data. The issues covered by this research are broad. The main focus is on analysing how legislators enact and implement legal regulations and how these regulations affect the behaviour of those to whom they are applied. Empirical legal research strives as far as possible to make a contribution to all issues and phenomena which, while they are of importance for lawyers, have not previously been empirically investigable because of the lack of methods.

The development of empirical legal research as an independent field of legal science is sometimes seen as a response to the fact that traditional scholars of legal doctrine neglected to do empirical research on the actual functioning of the legal system. On this view, as a result of the lack of empirical data on our legal systems, many of the theories, assumptions and prognoses on which traditional legal research has been based, either implicitly or explicitly, have been left without empirical support and therefore remain vague. Moreover, as a result of this neglect the actors involved in the legal system such as the courts, parties to actions, lawyers, political decision-makers and society in general are only insufficiently informed about the functional aspects of the legal system. Empirical legal research can be seen as an attempt to remedy this state of affairs.

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105 Eisenberg, 2011: 1720
106 Ulen, 2008: 74.
109 Ho and Kramer, 2013: 1202
110 Eisenberg, 2011: 1736-1737
2. Examples from Empirical Legal Studies

To give an impression of this area of research in what follows I will briefly present two studies from the domain of empirical legal research.111

2.1 Example A: Donohue & Levitt - The Impact of Legalized Abortion on Crime

The article entitled "The Impact of Legalized Abortion on Crime" by John J. Donahue from Stanford University and Steven Levitt from the University of Chicago was published in the prestigious “Quarterly Journal of Economics."112 The article, which attracted considerable attention, puts forward the provocative thesis that the fall in the crime rate in the USA in the 1980s and 1990s can be explained not only by the factors to which it is generally attributed, such as a rise in the number of prison sentences or an increase in the numbers of police113, but above all by the legalisation of abortion in the 1970s. The article sparked off a lively controversy in both academic circles114 and popular science literature.115

Abortion had been prohibited in all states of the USA since the beginning of the twentieth century. Five federal states took the lead and legalised abortion in 1970. Finally, in 1973, in a landmark decision on the case of “Roe v. Wade”, the

111 For a comprehensive overview of the different topics that have been treated by empirical legal studies scholars see Cane and Kritzer, 2010.
113 Other frequently cited factors are: growth in the number of police personnel, the introduction of improved police strategies, the decline of the crack epidemic, the increase in economic growth and a general increase in expenditure on security measures such as watchmen and alarm systems. See Donohue and Levitt, 2001: 379-380.
114 It shall be noted that the research results of Donohue and Levitt were conversely discussed and that the review of their results is still ongoing. However, it would go beyond the scope of this article to depict the entire discourse in detail. At this point it shall only be noted that Donohue and Levitt's study is generally regarded as sophisticated and methodologically sound. See Lawless, Robbenolt, et al., 2010: 12-14. For criticism on their study see the relevant literature: Joyce, 2004; Donohue and Levitt, 2004; see also Lott and Whitley, 2007; Foote and Goetz, 2005; Reyes, 2007.
115 For a popular scientific summary of Donohue & Levitt's research see Levitt and Dubner, 2007.
Supreme Court of the United States made abortion legal across the whole of the United States.\textsuperscript{116} Following the legalisation there was a dramatic increase in the number of abortions carried out in the USA.\textsuperscript{117} Donohue and Levitt argue that those women who decide in favour of an abortion are particularly often, also those whose children would have had an increased risk of becoming criminals, if they were born. These women usually have one or more of the following characteristics: they are very young, black, unmarried, single mothers or poor or a combination of these. After the legalisation of abortion in 1970 fewer and fewer unwanted children of mothers with these characteristics were born. This led to a fall in criminality from 1992 onwards, in those years in which the criminal careers of the children of this cohort would have reached their climax – which is typically between the ages of 18 and 24.\textsuperscript{118}

In order to give weight to their argument Donohue and Levitt presented empirical data that they had analysed by both descriptive and inferential statistical methods. Statistical analyses were necessary in order to demonstrate that the effect on criminality of legalising abortion was not merely a correlation, but that there was a causal connection. A correlation is a simple association between two variables, which does not, however, show whether one variable is the cause of another.\textsuperscript{119} An (imaginary) example would be the connection between high temperatures and shark attacks. When the temperature rises, the number of reported shark attacks also increases. In this case it would be wrong to conclude that the high temperatures were the cause of the shark attacks. A more plausible

\textsuperscript{116} Roe v. Wade, 410 U.S. 113 (1973). In its ruling the Court argued that the right to a privacy guaranteed by the constitution also includes a woman’s decision as to whether she wishes to have a pregnancy terminated or not. It was referring to the mental and physical harm that a woman suffered when a federal state refused her the right to abortion.

\textsuperscript{117} Donohue and Levitt, 2001: 384-385.

\textsuperscript{118} Donohue and Levitt, 2001: 381-382 & 386-389; see also Levitt and Dubner, 2007: 272.

\textsuperscript{119} Lawless, Robbennolt, et al., 2010: 289-291.
explanation would be that this is simply a correlation. In fact, when the weather is good more people go swimming in the dangerous areas and that is the reason why more people are attacked at these times. An example of a true causal connection is lung cancer resulting from smoking. Today this casual connection is considered proven due to the following factors. There is a moderate, but stable association between smoking and lung cancer (smokers suffer from lung cancer more frequently than non-smokers), the time sequence that fits (first one begins to smoke, then one gets lung cancer) and, in addition, no other or better explanation has been found for this association. Using statistical methods such as regression analysis, which is frequently employed, the connections between several variables can be tested at once. By employing such methods, Donohue and Levitt were able to examine the association between criminality and abortions while at the same time controlling for other possible factors that could have an influence on the crime rate. By means of a suitable research design and supporting theoretical considerations possible causal relationships can be identified.

Donohue and Levitt’s statistical analysis supports the hypothesis that the legalisation of abortion played a decisive role in the fall in criminality in the USA. One justification given by the authors for their claim was that the five states which legalised abortion before the others were also the first to experience a fall in crime rates. The crime rate also fell further in those states which had higher

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121 Donohue and Levitt used panel analysis to analyse their data. This method is particularly suitable for the kind of data they had collected.
122 However, it must be pointed out that causal connections cannot be demonstrated by means of statistical analyses alone. Further theoretical and logical considerations or suitable experiments are needed, however, these are difficult to carry out in the social sciences and economics, particularly in the area of research addressed here. See Backhaus et al., 2008: 53.
abortion rates. Interestingly, the number of arrests\textsuperscript{124} did not fall consistently in all cohorts, but only in those born after the legalisation of abortion.\textsuperscript{125} Donohue and Levitt substantiated their claim that the above association is a causal one in particular by showing that there was no connection between the frequency of abortions and the crime rate before the cohorts affected by the legalisation of abortion reached an age at which young people chiefly become criminals. Moreover, the general decrease in the crime rate was almost completely attributable to the fall in the crime rate in the cohorts affected by the legalisation of abortion. Only small changes in crime rates were found for the cohorts born before legalisation.\textsuperscript{126}

Finally, Donohue and Levitt used their calculations to quantify the effect of the legalisation of abortion on the crime rate more exactly. They predicted that an increase of 100 abortions in 1,000 live births would lead to a decrease of roughly 10\% in the crime rate in the respective cohort group. They estimated that the crime rate was 15-20\% lower in 1997 than would have been the case if abortion had not been legalised, but that after that point the legalisation was the reason for up to 50\% of the fall in the crime rate recorded in the USA since the 1990s. This drop in the crime rate led to a fall in expenditure of roughly 30 billion dollars a year. This and the increase in the number of criminals incarcerated as a further factor explain most of the fall in the crime rate. Since roughly half of the crimes in the USA are committed by a member of cohorts born before the legalisation of abortion, the effect described is likely to continue to rise even further in the years to come. If the other conditions remain constant, the legalisation of abortion will lead to a sustained annual reduction in the crime rate

\textsuperscript{124} In this additional calculation the number of arrests was entered as a proxy for the crime rate.
\textsuperscript{125} Donohue and Levitt, 2001: 407-413.
\textsuperscript{126} Donohue and Levitt, 2001: 382.
of 1% in the next decade. In conclusion, Donohue and Levitt point out that their study militates neither in favour of nor against abortion (see “3.1 Objectivity and Value Neutrality”, below) and that the same effect could probably be achieved by alternatives to abortion such as improved birth control or better environments for the children at the greatest risk of becoming criminals.

2.2 Example B: Becker and Elias - Introducing Incentives in the Market for Live and Cadaveric Organ Donations

Trade in organs is prohibited in the USA, Germany and most other countries of the world. In their article "Introducing Incentives in the Market for Live and Cadaveric Organ Donations" Nobel laureate Gary S. Becker of the University of Chicago and Julio Jorge Elias of the University at Buffalo argue in favour of abolishing this prohibition and introducing financial incentives for live organ donations. Donations of live organs are generally possible for kidneys, where

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127 Note that Donohue and Levitt's study was published in 2001.
129 Becker and Elias, 2007: 3. Becker and Elias name India in the 1980s and early 1990s and Iran from 1988 onwards as exceptions. In regard to the prohibition in Germany see also: § 17, § 8 subpara. 1 sent. 2 and § 8 subpara. 3 sent. 2 of the German Transplant Act. See also Seidenath, 1998: 253 “The provisions of the Transplant Act are (…) explicitly against the permitting anonymous live organ donations as was discussed in the proceedings on the draft bill. The main reason for this is the associated increased risk of prohibited trade in organs which must be avoided at all costs” (translation from German by author). According to § 8, subpara. 1, sent. 2 of the German Transplant Act “[t]he removal of a kidney, part of a liver or other non-regenerable organ (…) shall only be permissible for the purpose of transferring it to first- or second-degree relatives, spouses, registered life partners, fiancés/fiancées or other persons who are obviously in an especially close relationship with the donor.” (translation from German by author). It is thus also questionable as to whether the “New England Program for Kidney Exchange” described by Becker and Elias would be legal in Germany, in which donor/recipient couples who are incompatible engage in exchanges of organs with other couples. See Becker and Elias, 2007: 20-21. However, Seidenath argues that such donations might be legal in Germany. The donor/recipient couples are “companions in misfortune” and may develop a close, heartfelt relationship with each other. Seidenath, 1998: 255-256.
130 Becker and Elias, 2007; see also Becker, 2009.
they account for 50% of donations, and for livers, where they account for approx. 8% of the total number of donations.\textsuperscript{131} Becker and Elias's main argument is that legalising the purchase and sale of organs would lead to organ donations' being made not only by close relatives for altruistic motives, but also by anonymous third persons for financial motives. As a result the supply of live organ donations on the human organ market would improve, while the overall costs of an organ transplant would rise by only approx. 12%. The waiting time for a transplant, which is currently several years, would be shortened and thus the suffering and the number of deaths among those waiting would be reduced.\textsuperscript{132}

In their article, the authors also take an explicit stand on value issues and make normative arguments. However, in what follows I shall not further address this part of the authors' argument, but focus on their empirical statements. In their empirical analysis Becker and Elias do not use inferential statistics, i.e. stochastic models, but instead calculate on the basis of descriptive statistics how much it costs to achieve an adequate supply of organs for the constantly increasing number of transplant recipients.\textsuperscript{133}

According to the authors' calculations, in order to close the gap between supply (organ donors) and demand (transplant recipients) the financial incentive for the donor or a kidney would have to be roughly $15,000 and that for the donor of a

\textsuperscript{131} Becker and Elias, 2007: 4. Becker und Elias argue that even if trade in organs were legalised, the majority of donations would still take place post mortem. Nonetheless, the price of all organs would be oriented towards the market for live organs. Live organs have decisive advantages over organs donated post mortem. For example, there is then no urgency for the transplant to be carried out. Thus it would be possible to select the donors who are best as regards blood group, state of health, etc. This would raise the recipients' chances of survival. See Becker and Elias, 2007: 16-20.

\textsuperscript{132} Becker and Elias, 2007: 3; see also Becker and Elias, 2007: 6-7 and 14-16.

\textsuperscript{133} Becker and Elias, 2007: 4-8.
liver about §35,000.\textsuperscript{134} The calculations are based on three elements: compensation for the risk of death, compensation for the time lost during recovery and compensation for the risk of a reduced quality of life. In what follows these considerations are briefly illustrated, taking the calculation of the price of a kidney as an example. The calculation for financial compensation for donating a liver is carried out along the same lines. The statistical risk of dying as a consequence of a kidney transplant is approx. 0.1%. Statistically the value of the life of a young United States citizen with an annual income of approx. $35,000 is $5,000,000. An appropriate amount for financial compensation for the risk of mortality would thus be $5,000.\textsuperscript{135} The financial compensation for the time lost during recovery is calculated on the basis of the income lost. For a person with the above-mentioned characteristics and an average recovery period of four weeks it is about $2,700. According to Becker and Elias the most difficult thing to work out is, what is a fitting financial compensation for the risk of impaired quality of life. They give a “generous” estimate of $7,500. This figure is the product of a 1-2% risk of experiencing non-fatal harm during transplantation and the reduction in quality of life estimated on the basis of comparable empirical data for loss of sight and amputations.\textsuperscript{136} Thus calculated, $15,200 is a suitable financial incentive for donating a kidney.\textsuperscript{137} Becker and Elias tested this calculation by comparing it with prices in other countries in which the donation of live organs is or used to be permitted or are carried illegally. They come to the conclusion that their estimates are within an appropriate range.\textsuperscript{138}

\textsuperscript{134} Becker and Elias, 2007: 10-11.
\textsuperscript{135} $5.000.000 \times 0.001 = $5.000.
\textsuperscript{136} Becker and Elias, 2007: 9-10; see also Becker and Elias, 2007: 14.
\textsuperscript{137} Becker and Elias, 2007: 9-10.
\textsuperscript{138} Becker and Elias, 2007: 11-12.
Becker and Elias argue that compared to the overall costs of a transplant, which are around $100,000 for a kidney and $175,000 for a liver, these additional costs are almost negligible. The demand for organs might nonetheless fall slightly as a result of the increase in price. However, the supply of organs would definitely improve and thus the acute shortage of donated organs would be overcome. As a result the total number of transplants would rise by approx. 44%.\textsuperscript{139} Becker and Elias therefore conclude that establishing a free organ market is the best way to reduce the suffering of people waiting for a transplant. However, for a number of reasons the authors believe that trade in organs will not be legalised in the foreseeable future. In their view, the strong existing criticism of such a practice cannot be overcome. However, in view of the many lives that could be saved by this practice, Becker and Elias do not consider this criticism convincing.\textsuperscript{140}

3. The Contribution of Empirical Research to Legal Science

The above examples demonstrate that using empirical methods in the legal sciences can lead to insights that cannot be achieved by the methods of traditional legal research. This section addresses the limits of empirical research. However, for reasons of space this analysis must be restricted to some individual central aspects.

3.1 Objectivity and Value Neutrality

In the above example “The Impact of Legalized Abortion on Crime” Donohue and Levitt assume the following position on the moral, i.e. normative issues of their research:

\textsuperscript{139} Becker and Elias, 2007: 12-13.
\textsuperscript{140} Becker and Elias, 2007: 21-22; see also Becker, 2009: 81.
"In attempting to identify a link between legalized abortion and crime, we do not mean to suggest that such a link is 'good' or 'just,' but rather, merely to show that such a relationship exists. In short, ours is a purely positive, not a normative analysis, although of course we recognize that there is an active debate about the moral and ethical implications of abortion. (...) While falling crime rates are no doubt a positive development, our drawing a link between falling crime and legalized abortion should not be misinterpreted as either an endorsement of abortion or a call for intervention by the state in the fertility decisions of women." \textsuperscript{141}

Economists and empiricists working in the legal sciences frequently adopt the view, which originated in the natural sciences, that empirical research is objective and can thus be value-free.\textsuperscript{142} However, it is highly doubtful whether it is really possible in the context of economics and the social sciences to explain, analyse and interpret data in a value-free way. If we assume that it is not possible, this empiricist view reduces the value of empirical research for institutions, decision-makers and politic.\textsuperscript{143} This may also apply to the legal sciences since this view may result in a neglect of moral and ethical issues. Empirical research data would then be of little use to legal scholars.\textsuperscript{144} Thus the support provided by empirical research for finding solutions to normative issues, which requires a weighing-up of philosophical and ethical arguments, is limited.\textsuperscript{145}

3.2 Qualitative and Quantitative Research Approaches

Since empirical legal studies are mainly US-based, it uses almost exclusively quantitative research methods, i.e. methods which are used to analyse statistical

\begin{footnotesize}
\textsuperscript{141} Donohue and Levitt, 2001: 382-383 and 415.
\textsuperscript{142} Friedman, 1953: 3; see also Sen, 1981.
\textsuperscript{143} Hausman and McPherson, 2006.
\textsuperscript{144} Hausman and McPherson, 2006: 291-308.
\textsuperscript{145} Lawless, Robbennolt, et al., 2010: 21.
\end{footnotesize}
data.\textsuperscript{146} To date qualitative research methods, which are widespread in the social sciences in Europe and are employed to evaluate data from sources such as texts and audio and video and other forms of visual material, have not played such an important role.\textsuperscript{147} One reason for this neglect is that in the USA empirical legal studies are closely allied to the economic analysis of law (“Law and Economics”). This movement originated in economics which, unlike other social sciences, does not use qualitative research methods on principle, since they are seen as being too “soft”, i.e. not sufficiently objective. Since in Europe the sociology of law has traditionally played an important role, its quantitative orientation may have constituted an additional barrier to the spread of empirical analysis in Europe.\textsuperscript{148}

The methods of the qualitative research approach are also closer to doctrinal legal research than quantitative methods.\textsuperscript{149} They are oriented towards interpretation and are therefore highly suitable for lawyers who wish to do empirical work but have no formal training in quantitative research methods.\textsuperscript{150} The fact that qualitative research methods are only rarely employed in empirical legal studies are also regrettable from the point of view of content. Qualitative methods make a good complement to quantitative methods as they can be used for different approaches and issues. For example, they are employed to further develop new research hypotheses so that they can be tested with strictly formalised quantitative methods. Qualitative methods are also suitable where quantification is not possible, e.g. for ethical and moral ideas. In such cases participant observation, interviews and analysis of documents can be used to

\textsuperscript{147} Baldwin and Davis, 2003: 891-892; see also Bauer and Gaskell, 2000; Diehl, 2006.
\textsuperscript{148} Posner, 1997: 5-6.
\textsuperscript{149} MacConville and Chui, 2007: 21-23; see also Webley, 2010.
\textsuperscript{150} Flick, 2011.
arrive at a “thick description” and generate knowledge. These and other strengths give reason to hope that in future these methods will become more widely used in the legal sciences.

3.3 Methodological Problems and Over-Simplification of the Complexity of Legal Issues

Like all interdisciplinary research approaches, research in empirical legal studies requires a high level of specialised knowledge of the various different scientific disciplines. The fact that legal scholars need to acquire the methodological know-how of the social sciences and social scientists the detailed knowledge that legal scholars have of the functioning of the legal system results in two main problems for empirical analysis. These are the methodological problems of empirical research and the problem of reducing legal complexity. Both problem areas are briefly described below.

Methodologically, empirical legal studies have been criticised for being of lower-than-average quality, although it can be doubted whether the standards of other forms of (interdisciplinary) research are actually any higher. The reasons for such methodological problems vary. They frequently arise from the incorrect use of methods adopted from the social sciences or from flawed research designs. In order to counteract these problems empirical legal studies needs to develop its own methodological discourse. In the long term this could promote a sustainable awareness of methods and thus improve the quality of empirical analysis. Some of the traditional publications of legal science, e.g. in the USA the student-edited law journals, and in Europe edited volumes, may not really be

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154 Eisenberg, 2011: 1730-1731.
suitable for ensuring the methodological quality of the empirical studies submitted for publication.\textsuperscript{155}

Another criticism frequently levelled at the empirical legal approach is that they reduce the complexity of legal issues.\textsuperscript{156} Such reduction is foreign to classical legal scholars, since it is not required for their traditional methods. However, if behaviour of relevance to law is to be investigated with sufficient methodological rigour in empirical studies it is often unavoidable. Thus the decision as to to what extent basic legal conditions should be taken into account in an empirical study is of substantial importance. If the legal facts are over-simplified in the interests of methodological stringency, the results of such research can have little relevance for legal science. In order to avoid this it is necessary first to present the legal issue to be examined in its full complexity. Only then can the complexity be reduced as required. Care must be taken to fully inform the recipient of the research results of this reduction.\textsuperscript{157} If the complexity is reduced in accordance with these requirements this usually satisfies the demands of legal science, particularly since it is rare for the results of empirical research to replace legal discourse; as a rule they merely provide an additional perspective.

Finally, it is important to be aware that there are areas of legal science in which such reductions in complexity are difficult and where an investigation by means of quantifying methods is challenging. Even technically well-implemented empirical projects may fail, if issues that cannot be quantified are more or less uncritically functionalised. However, the above introduced examples show that well carried out empirical research can also contribute novel and enriching

\textsuperscript{155} Chambliss, 2008: 26-28.
\textsuperscript{156} Baldwin and Davis, 2003: 883.
\textsuperscript{157} Faust, 2006: 849-850.
perspectives to fields of the law where the subject matter is of an ethical and moral nature. It is the task of discourse in legal science to then critically assess the value of such research results.

4. Future Directions

In continental Europe empirical legal research is currently less widespread than in the English-speaking countries and many obstacles to its gaining more acceptance still need to be overcome. Legal scholars who have no basic knowledge of the empirical research methods required may initially find it disturbing that the utility and scope of such research efforts in the legal sciences have often not been sufficiently clearly defined. Moreover, since it is often seen as being closely linked to economics, legal scholars sometimes think that empirical legal studies are theoretical and abstract, naively functionalist or politically conservative. Today these preconceptions can no longer be considered justified. Empirical analysis can contribute to a systematic, empirically based understanding of our legal system. It can therefore be assumed that it will play an increasing role in the future, not only in the English-speaking countries but also in continental Europe and other non-English-speaking countries.

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159 Klerman, 2002: 1167.
References


