I N AN ADDRESS to the Ninth Circuit Judicial Conference last September, Justice Anthony Kennedy urged legal scholars to undertake — and law journals to publish — empirical research. Doing so, he said, would significantly benefit the legal profession.

When writing opinions, Kennedy explained, Supreme Court justices make assumptions “based on what we think we know is happening in the legal profession,” although most of the
justices themselves are years, even decades, removed from practice. By way of example, he listed several recent cases where the justices could have benefited from statistical evidence in the briefs to guide them as they deliberated or where subsequent studies could help test their assumptions.

Dean David F. Levi observes that it isn’t only Supreme Court justices who find themselves operating on speculation. “If you look at any of the big questions that come to the courts and even to Congress for resolution, the decision maker is almost always in the position of having to make certain assumptions about the legal world as we know it and also about what the effect of the new legislation or rule of law will be,” says Levi, who served on the federal bench for 17 years prior to becoming dean. “Many of the justices have said that the Court would welcome help in understanding whether its predictions and assumptions were right. Did the justices make the right prediction? If not, then over time the Court can correct itself.”

Solid data and interpretation, says Levi, are likely to generate the reform proposals that will help courts and legislatures make necessary corrections.

Neil Vidmar has spent his career generating and analyzing data to test assumptions underlying law and policy and, where necessary, to affect change. The Russell M. Robinson II Professor of Law and a social scientist by training, Vidmar conducts intensive quantitative and qualitative examinations of jury behavior, medical malpractice litigation, punitive damages, and dispute resolution.

Vidmar was a somewhat novel hire for Duke in 1989. Today, he is gratified to find himself among a number of empiricists on the Law School faculty and in the legal academy.

Taking academic inquiry beyond the ivory tower and beyond legal doctrine has, in fact, long been a central tenet of a Duke Law education; since 1933, for example, the journal Law and Contemporary Problems has examined how specific areas — and doctrines — of law operate when challenged by social, economic, and political factors, among others. Empirical research has factored into almost every issue.

“Empirical research is a high-impact area,” says Levi. “It can affect the development of law, it can affect the design and construction of legal institutions, and it can affect funding decisions. It’s knowledge in the service of society.”

Completing the scholarly circle
All lawyers benefit from understanding empirical tools, says Professor Barak Richman. “It’s wildly useful for a lawyer to understand basic statistics, theory of causality, how a theory generates hypotheses, and what data you need to prove or disprove those hypotheses,” he says. “If you understand empirical tools you can litigate better, you can understand how the law itself operates and then find ways to improve the law. You can begin to look at concrete consequences of legal rules and legal actions, and you can measure them, evaluate them, and come up with ideas about how to improve them.”

Richman, who has a PhD in business administration in addition to his JD, engages in theoretical and empirical inquiry in his own scholarship on institutional economics, antitrust, and health care policy. On the empirical side he has, among other efforts, co-authored case studies comparing the delivery of cardiac care in the United States to that in India and the relative effectiveness of white and minority physicians in communicating treatment advice to minority patients; he also has undertaken a quantitative inquiry into whether equalizing health insurance coverage actually equalizes insurance use across race and class. (See more, Page 22.)

Many of his Duke Law colleagues, like Vidmar, employ a broad range of methodologies — from observational studies and interviews to database analysis — are cross-disciplinary in their training, and collaborate with colleagues from other scholarly disciplines.

Vidmar, who serves as research director for the Center for Criminal Justice and Professional Responsibility (CCJPR), has used...
his research findings to challenge assumptions made by courts, policymakers, and legislators. He recently published a major study on jury awards made in 2005 in the 75 largest county courts in the United States and, in the process, challenged the Supreme Court’s concerns, voiced in Exxon Shipping Co. v. Baker, that juries are prone to make sky-high awards of punitive damages. (See more, Page 19.)

In recent months Vidmar also has used empirical data to argue, as a friend of the court, that death-qualified African American jurors are routinely excluded from juries in North Carolina and, in Judicature, that the Supreme Court should rethink its stance on eyewitness confidence articulated almost 40 years ago in Neil v. Biggers. He and CCJPR co-directors James Coleman, the John S. Bradway Professor of the Practice of Law, and Clinical Professor Theresa Newman ’88 are now bringing empirical methods to bear on the criminal justice process that sometimes leads to wrongful convictions.

As a member of the psychology faculty, Vidmar is an example of Duke University’s institutional commitment to interdisciplinarity, long embraced by its legal scholars. The tradition gives rise to countless innovative collaborations, notes Professor James Cox.

“Duke is a pretty seamless environment in terms of being able to work across disciplines and schools,” he says. “It’s easy for individuals who don’t have quantitative skills to ‘marry up’ with others in the academy who do. I expect that we’ll see more of these marriages happening.”

Cox, the Brainerd Currie Professor of Law and an expert in corporate and securities law, is no stranger to empirical inquiry; along with a colleague at Vanderbilt Law School and others, he has assembled and analyzed a database that now includes well over 800 securities class action settlements spanning a two-decade period. He says this project, which has yielded nine well-received articles over the past five years, has sharpened his insights into the issues surrounding shareholder litigation.

“While I continue to believe that shareholder suits are often necessary, my empirical work has made me more cognizant of where the problem areas are than I ever was before,” he says.

Fresh insights generally raise fresh questions, he observes. Having found in his recent study, for example, that firms exposed to securities class action settlements are “significantly more likely” to experience financial distress around the time of the settlement, Cox wonders “if things would be different if more of the settlements were paid by real individuals — the people who actually ‘cooked the books’ — as opposed to the corporations.” (See more, Page 20.)

Two cutting-edge empiricists joined the faculty last July. John de Figueiredo, whose research interests intersect law, economics, and political science, came to Duke Law from the UCLA Anderson School of Management and School of Law. He engages in mathematical and statistical modeling of business problems; his research integrates all three disciplines in such areas as law and economics, political and legal strategy, the management of technology and innovation, and competitive strategy.

A highly prolific scholar, de Figueiredo’s empirical studies have focused on such diverse topics as the role of politics in expanding the number of federal trial judges, competitive interactions between dominant and fringe firms in various industries, and the mechanics of lobbying; his extensive examination of lobbying includes how corporate lobbyists affect Federal Communications Commission policy and how state-level lobbying firms work. (See more, Page 20.)

Daniel Chen, a former Kauffman Fellow at the University of Chicago Law School, is a JD and PhD economist. A key aspect of his wide-ranging research agenda involves measuring the moral and economic consequences of judicial discretion and the effects of particular laws and regulations. (See more, Page 21.)

Among other studies, Chen is currently investigating how interactions with pharmaceutical companies affect the way physicians prescribe drugs. He is using two complex data sets — one containing prescription information for 80,000 physicians and the other culled from pharmaceutical companies’ disclosures to state attorneys general regarding their payments to physicians. Another recent project involved a series of experiments on incentive schemes for motivating workers in an online labor market; Chen posed a number of questions to data-entry workers to test how their moral commitments were affected by different incentives.

Like de Figueiredo, Chen is interested in empirical scrutiny of claims made about laws and regulations. “Politicians or lawmakers will debate an issue and make claims and counterclaims, yet very often there is no data to back up either side,” he says.

Cox is pleased by the increased scope of empirical inquiry de Figueiredo, Chen, and others are bringing to Duke.

“In finding individuals who have an interest in law and legal institutions and come to that with good quantitative skills, we’re in step with a movement that has been going on across the legal academy,” says Cox. “We are all informed by the data.”
Excellence in theory, however, remains critical to the enterprise, he points out.

“Empirical research completes the circle at Duke. You can’t do good empirical research unless you have a good hypothesis, and hypotheses come from good theory,” says Cox. “But at some point, you have to test the hypothesis. You have to ‘eat your own cooking,’ so to speak. To me, it makes things more complete.”

Formulating the right questions

Duke is home to two of the leading scholars in the empirical study of the judiciary, Professors G. Mitu Gulati and Jack Knight. Gulati, whose diverse scholarship has addressed such issues as sovereign debt, the evolution of contract language, and the history of international financial law, has co-authored several studies designed to measure judicial performance, among other empirical investigations relating to judicial behavior; one 2009 study challenged the common assumption that judges are underpaid through the compilation and analysis of a unique data set of judicial rulings from the high courts of every state between 1998 and 2000.

Knight, a political scientist and legal theorist, examines judicial behavior and decision making as part of a broader research agenda focused on institutional design and governance. Among other books and articles on the subject, he is the co-author of the award-winning 1997 book The Choices Justices Make, which has been particularly influential in the field.

Levi, Gulati, and Knight, who are research and teaching collaborators, have convened two interdisciplinary workshops at which legal scholars, social scientists, and jurists have considered exactly what questions can and should be studied to help understand and possibly improve judicial decision making. Their approach reflects their firm belief that the quality of all empirical research is predicated on asking the right questions.

The first, held in February 2009, examined the often-controversial efforts by social scientists and others to develop a body of empirical evidence regarding the way judges make decisions; proceedings from the conference appear in an April 2009 symposium issue of the Duke Law Journal. A September 2009 workshop, funded by a National Science Foundation grant and co-convened by Professor David E. Klein of the University of Virginia, added the perspectives of scholars of jurisprudence to help determine “whether different theories of judging could lead us to ask different empirical questions and lead to a new understanding of judicial decision making,” Levi explains. (Gulati and Knight report and reflect on how judges view their profession and empirical measurement of their work in “Talking Judges,” http://scholarship.law.duke.edu/faculty_scholarship/2213/)

They believe in listening to the skeptics and, in this regard, Levi notes the significant contributions of Ernest Young, Duke’s Alston & Bird Professor of Law. In a forthcoming paper, Young criticizes the “attitudinal model” of judicial behavior, prevalent among social scientists who attempt to empirically study the field.

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Positing that judicial officers make decisions dictated primarily by their ideological, policy, and political preferences, without feeling constrained by legal precedents, “the attitudinalists constantly strip judicial decision making of all nuance, repeatedly relying on crude and, frankly, unrealistic definitions of law, ideology, and coding criteria that elide the complexities of real cases,” Young writes. He suggests that empiricists can make a more useful contribution to the study of judicial behavior in studies concentrated on particular subject areas or focused on improving traditional legal analysis.

Moving beyond the casebook
Familiarity with empirical research and methodologies is essential for students heading into careers in law and business, Levi says, recalling that he often presided over statistically complex cases as a judge.

“The practice of law is fact intensive,” he notes. “When our students move into practice, most will find that what is confusing or difficult, and what is at issue in any particular case, is not so much the law itself, but its factual context. They are going to spend a lot of time trying to understand the facts — what happened in a particular transaction or how an industry or a market works. They are frequently going to be working with experts who are empiricists and who study certain areas of the economy or of the society, and they will need to understand statistical studies. These are just basic tools that a lawyer needs to know.”

De Figueiredo, who teaches classes relating to business and administrative law strategy, says that introducing students to analytical methods and teaching them to spot patterns in data helps them better serve their clients.

“If your client is a corporation, you need to understand what they’re doing. Not all lawyers need to be able to do the statistics, but they need to be able to understand them to act on their clients’ behalf and make good decisions,” he says. “Hugely important legal issues are being determined by experts using statistics. If lawyers can’t convey their clients’ position relative to these issues clearly, they’re at the mercy of confusion.”

De Figueiredo incorporates empirical research into his classes, and says the Law School’s institutional appreciation for the importance of economic and empirical study in legal education was a key factor in his decision to come to Duke.

“Duke Law School has made a decision to teach lawyers to learn the law not just on a case-by-case basis, but by learning to recognize the patterns in the law,” he says.

In Empirical Methods and the Law, Chen teaches upper-year students the tools of statistics and econometrics that are increasingly used in litigation and regulation. As students undertake a term-length project examining the consequences of judicial discretion in legal areas of their choosing, they learn how to critically evaluate claims about law and public policy and execute an evaluation in a simulated partnership with an expert witness or government consultant.

Courses and seminars taught by other faculty, such as Vidmar and Professor of the Practice Bill Brown ’80, involve deep dives into statistical and economic analysis, decision analysis, game theory,
law and economics, and the use of social science evidence in law, with some involving simulation exercises that demonstrate their use in different areas of practice.

In order to both illustrate the consequences of judicial opinions and to introduce their students to social science research tools applicable to law, Levi, Knight, and Gulati launched a classroom examination of the Supreme Court’s 1984 ruling in United States v. Leon in their seminar on judicial behavior; they invited police officers, federal magistrate judges, and other legal actors to share with students their firsthand experiences in applying the Leon criteria for the “good faith” exception to the exclusionary rule for evidence.

The central aim of the exercise was to demonstrate the consequences of the Leon ruling, Knight explains. “When a ruling starts to filter down from D.C., what effect does it have on the ground in the day-to-day lives of the people who have to enforce the laws and implement the decisions? We wanted our students to consider what effect they really have, not to simply assume they are important.” The three professors eventually decided that the classroom exercise raised issues worthy of deeper study and launched their own research project. (See more, Page 24.)

For Levi, the growth in empirical activity at Duke Law is another facet of the school’s deepening partnership with the profession, bringing the practice and practitioners into the classroom both literally and figuratively in new and exciting ways.

And, having himself become an empiricist in both his teaching and scholarship, Levi says the interaction among the faculty and students who are embracing empirical study has been intellectually invigorating, providing another dimension to the sort of scholarly engagement and collaboration that is a Duke Law hallmark.

“Empirical studies engage faculty who are doing exciting scholarship and engage members of the profession because they are looking at how the legal system works,” he says. “It’s a great place for a law school that is training professionals and that is trying to have an impact on law reform and the way we understand our legal system. It’s important to young lawyers as part of their training, it’s important to our alumni and to the legal profession, and it’s a tremendous area for pure scholarship. It brings everything together.”