

OPENING REMARKS: THE ROLE OF EMPIRICAL RESEARCH

AWARD RECIPIENT

Vicki Been, *Judge Edward Weinfeld Professor of Law at NYU School of Law, Affiliated Professor of Public Policy at the NYU Wagner Graduate School of Public Service, a faculty director of NYU's Furman Center for Real Estate and Urban Policy, and New York City's Deputy Mayor for Housing and Economic Development.*

BEEN. Thank you, Lynda and Dean Spencer. Joe, thank you for that heartfelt and heartwarming description of exactly who Toby was. And also thank you to Toby's family: it is an honor to be here with Amy and to have Andy on Zoom. And I will just say again how delighted and humbled I am to receive the award named after Toby and to join the incredibly amazing group of people who have received the award before me.

I want to talk this morning about empirical legal scholarship, which I define as research that employs economic tools to use data and other information to examine legal phenomena—the players, the actors, the institutions, and the processes that relate to or interact with the law. That scholarship has gained a lot of ground over the past few decades. Given the increasingly demanding and acrimonious debates about property rights across the country—whether we are talking about the current emphasis on landlord-tenant issues, the racial homeownership gap, the need to better integrate communities, the crisis of housing affordability, or the demands of resiliency given climate change—it is a propitious time to evaluate the contributions, the promise, and the limits of empirical scholarship.

Let me turn first to some of the positive contributions that empirical legal scholarship has made to those debates, talk a little bit about the constraints and limits of the scholarship, and then talk about some of the remaining potential. Now, I have to confess that being deputy mayor during a pandemic, and the ensuing economic and other crises, has not left me a lot of time to keep up with all the literature. I am looking forward to being back at NYU where I can do all of that reading, but I'm going to focus my examples on the two areas that as deputy mayor I deal with on an hourly basis: landlord-tenant issues and land use issues. I apologize to all those whose scholarship I have missed.

To examine the contributions empirical legal scholarship has made, we need to articulate first what the scholarship can tell us. The first thing that it is able to tell us is whether or not the current legal system is working: is the law even being used (and often it isn't), and if so, by whom and under what circumstances; is the law achieving its intended goals; is it the most efficient way of achieving those goals; does the law have inefficient or unfair consequences (intended or unintended). Let me just highlight a few examples of scholarship that has helped answer those questions—again with apologies to all those whose work I neglect. The pandemic has resulted—and here I'll speak specifically about New York—in billions of dollars of rent arrears over the course of the pandemic. Policymakers across the country have really struggled to anticipate exactly what will happen when the eviction moratorium ends; how governments can best mitigate the effects of the evictions that will undoubtedly follow the lifting of the moratoria; and how to mitigate the effects that the rent arrears are causing to landlords, to the housing market, and to the surrounding neighborhoods. All of that requires an understanding of how the eviction process actually works: how often does the process actually result in evictions (in New York, very few eviction filings actually result in evictions, for example); the characteristics of the landlords and the tenants who end up in housing court; the effect that evictions have on the tenants, landlords, neighbors; how the assignment of counsel matters in that process; what success eviction prevention and early intervention programs have; and things like how mediation or other alternatives to eviction actually work. Though there's a lot more that we need to understand, real progress has been made in our understanding of those questions because of empirical legal scholarship.

Here I would cite just a few examples: Eva Rosen's and Phil Garboden's work on how landlords use the threat of eviction;¹ Peter Hepburn's, Lillian Leung's, and Matt Desmond's work on serial evictions—people who constantly are being evicted or getting eviction filings, not necessarily being evicted;² and Nicole Summers' recent

1. Philip ME Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, 18 CITY & CMTY. 638 (2019).

2. Lillian Leung et al., *Serial Eviction Filing: Civil Courts, Property Management, and the Threat of Displacement*, 100 SOC. FORCES 316 (2020).

University of Chicago Law Review piece, *The Limits of Good Law: A Study of Housing Court Outcomes*.³ All of those recent pieces have taught us a great deal about the context in which evictions are taking place, and the ways that eviction processes are being used by different kinds of landlords. Even more progress has been made in identifying and quantifying the possible costs and benefits of mitigating the harms of eviction and uncollected arrears. Several studies by Matt Desmond and his colleagues at Princeton's Eviction Lab, work by Rob Collinson and Davin Reed at the Federal Reserve,⁴ and a recent National Bureau of Economic Research paper by John Eric Humphries and his colleagues⁵ are just a few of the empirical studies that have pointed to the private and the societal benefits of intervening long before a case ever reaches the point of an eviction filing.

A second way that empirical research can inform legal thought is by telling us whether there are problems that the law or other institutions need to solve. The numerous studies that have addressed whether low-income residents of a neighborhood are displaced by gentrification are a good example. The work of so many economists, some lawyers, and some sociologists have found little evidence of displacement despite all of the debate over displacement. My NYU colleagues, Kacie Dragan, Ingrid Ellen, and Sherry Glied, for example, used Medicaid data to track the movements of families with children over seven years in rapidly gentrifying neighborhoods, and found no evidence that gentrification was contributing to higher rates of mobility among those families.⁶ That is not to say that there is not displacement in some circumstances, but the scholarship tells us that we have not gotten to the bottom of what the problem is, or how widespread it is, and therefore we need to tread carefully before imposing solutions.

3. Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145 (2020).

4. Robert Collinson & Davin Reed, *The Effects of Evictions on Low Income Households* (Feb. 2019) (unpublished manuscript), https://robcollinson.github.io/RobWebsite/jmp_rcollinson.pdf.

5. Robert Collinson et al., *Eviction and Poverty in American Cities* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26139, 2022), https://www.nber.org/system/files/working_papers/w26139/w26139.pdf.

6. Kacie Dragan et al., *Does Gentrification Displace Poor Children? New Evidence from New York City Medicaid Data* (Nat'l Bureau of Econ. Rsch., Working Paper No. 25809, 2019), https://www.nber.org/system/files/working_papers/w25809/w25809.pdf.

Third, empirical research can tell us what is actually causing a particular problem or a perceived problem. Recent empirical work on the effects that new buildings have on rents and prices in the host neighborhood is a good example. Advocates and many policymakers claim that building market-rate housing (which is always described as luxury housing no matter what its price point) will raise prices in the neighborhood, cause gentrification, and result in displacement. But work in the last few years—Kate Pennington’s 2021 paper, for example, looking at construction in San Francisco;⁷ Xiaodi Li’s work on high-rises in New York City;⁸ and the 2020 work by Brian Asquith, Evan Mast, and Devon Reed on the effects the construction of large new apartment buildings has on the neighborhood⁹—all show that new construction of market-rate housing decreases prices and rents in the surrounding neighborhood rather than increasing prices, spurring gentrification and possibly displacement.

Fourth, empirical legal scholarship can help us understand how a particular world works, so that we can craft the law to give incentives that actually will work given the practices and characteristics of the industry. The work that I mentioned earlier on evictions is a really good example of this, because it shows that large property managers and small building landlords operate in two completely different worlds. We should not be thinking that the things that would work in large property management situations are going to work when it comes to small landlords.

And lastly, empirical legal scholarship can tell us whether the assumptions on which a particular law or a proposed law is based are accurate. And not to be self-referential here, but I would point to my own work—looking at the pattern of up-zonings and down-zonings in New York City to test the assumption, held by many courts, that the so-called “growth machine” controls the land use processes and therefore that neighbors’ concerns should be given more deference

7. Kate Pennington, *Does Building New Housing Cause Displacement?: The Supply and Demand Effects of Construction in San Francisco* (Urb. Econ. & Reg'l Stud. EJournal, Working Paper, 2021), <https://www.gwern.net/docs/economics/2020-pennington.pdf>.

8. Xiaodi Li, *Do New Housing Units in Your Backyard Raise Your Rents?*, J. ECON. GEOGRAPHY (2021), <https://academic.oup.com/joeg/advance-article-pdf/doi/10.1093/jeg/lbab034/40257286/lbab034.pdf>.

9. Brian J. Asquith et al., *Local Effects of Large New Apartment Buildings in Low-Income Areas*, REV. ECON. & STAT. (2021), https://doi.org/10.1162/rest_a_01055.

than developers' and owners' concerns—as an example.¹⁰ I'm sure that you all can think of many more examples, and that is really my point: empirical legal scholarship has helped shape our understanding of the problems that the law is trying to solve, the actors and institutions that are involved in those problems, the ways in which the legal institutions work, the efficacy of current legal regimes, and the correctness of the underpinnings of those regimes.

But empirical legal scholarship, like all scholarship, has its flaws, limits, and constraints. I am not going to catalog all of them, but I want to suggest a few, and here I am going to put on my current hat as a policymaker reading empirical studies and trying to glean from them what we in government should do as a matter of policy. First, the question that a study is asking, or its relevance to actual policy decisions, too often is unclear. Often I read an empirical study and wonder “what are they really asking, and does the evidence that they gathered and analyzed actually answer the question they said they were asking?” Relatedly, too many studies lack a sound theoretical basis for the questions they ask. If a researcher does not have a theoretical basis for the hypothesis—a view about what could cause the hypothesis to be true or false—then what the researcher learns about the hypothesis may not be all that helpful for the policymakers trying to design a solution or response to the problem being studied.

Even clear and precise questions are not always framed in ways that will make the research helpful to policymakers. Sometimes researchers think that they should not make policy recommendations based upon their empirical work because empirical work is rarely as clear in its answers to questions as policymakers would like it to be. But pushing to try to answer actual policy questions, and to then make suggestions about ways in which policymakers can actually use that evidence, is extremely helpful.

Some studies offer false precision—I cannot tell you how many times advocacy organizations use interns who just took statistics, and they come in with evidence of something like “if you do X, 0.7 fewer people will be evicted every half hour.” Maybe that level of precision is justified, but often what the study really shows is much more nuanced and dependent on assumptions. When you're a policymaker trying to budget funds for a particular program, you need a

10. Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227 (2014).

general sense of the order of magnitude of the results you should expect, but you should not over-promise, and should instead be humble about all that could affect those results. More generally, one has to understand that an empirical study is never enough. Just like any one piece of legal scholarship may change the way that we think about a problem but leave lots of unanswered questions, one piece of empirical scholarship is rarely going to provide everything you need to know to tackle a problem. And here I would give as an example all the work that has been done on the question of whether gentrification, however it is defined, displaces low-income residents from the neighborhood. As I mentioned earlier, there are dozens of different studies that do not find evidence of displacement. But those results are not satisfying to policymakers, in part because the studies do not explain how lower income households manage to stay in neighborhoods when rents and housing prices increase, and in part because they are not able to distinguish between what people in the neighborhood perceived as displacement and “normal” rates of turnover. Because the legal context is so idiosyncratic and varies from city to city and state to state, because of the differences between small and large properties, local government structures, market cycles, and so on, the generalizability of any study is going to be called into question. So it is usually going to take a series of studies that are really probing the underlying theories and differences in contexts for us to believe the results.

Let me end by suggesting that there is enormous need for and promise of empirical legal scholarship. The problems that we face today—and again I am going to focus on landlord-tenant issues here for a moment—are huge: we know very little about how the arrears that are piling up, and the evictions that may come when moratoria are lifted, will affect local governments, the real estate industry, the housing stock, and most importantly, the welfare of our households; and an enormous amount is at stake. You have got policymakers under enormous pressure to “do something.” Having the kind of information that empirical legal scholarship can bring is so critical. We do not know, for example, how often, and under what circumstances, landlords and tenants worked out informal means of dealing with people’s loss of income during the pandemic. How did legal rules facilitate or hinder those kinds of informal mechanisms? How did the availability of moratoria and the promise of rent relief programs

affect the behavior of tenants and landlords? We are finding in New York enormous difficulty in getting tenants to apply for rent relief—why? Similarly, we are having enormous trouble getting landlords and tenants to cooperate in applying for rent relief that would make them both whole. What does that tell us about the relationship between landlords and tenants and ways that we may need to repair and strengthen that relationship? How does the law shape incentives to cooperate or not cooperate? How are the arrears incurred during the pandemic going to affect the housing market? What are they doing to housing quality? How are landlords managing, if at all, to maintain their properties in these situations? And again, how does the law hinder or facilitate all of that? These are the questions that governments, the industry, philanthropy, and advocates all across the United States are struggling to understand, so that we can shape policy in a way that will be efficient and fair rather than providing the wrong incentives. These are the kinds of things that empirical legal scholarship can help us understand. So the need for, and the promise of, empirical research are tremendous. I very much look forward to being back at NYU and to the thousands of hours that I'm going to spend reading and catching up on all of the literature, but also working with scholars—many of you in the room and on Zoom—to try to tackle some of these questions. Thank you very much.