



# Empirical Research in Legal Communication

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Thanks for allowing me to speak on this important topic. My comments here are in part derived from a very drafty article that appears in the bibliography for the session. These slides and the transcript of my comments are available by use of the QR code.

We should start first by saying what empirical research is [NEXT]

## BIBLIOGRAPHY FOR THIS SLIDE

1. Brian N. Larson, *DOURS: A Heuristic for Discovering Research Questions* (September 7, 2020). Available at SSRN: <https://ssrn.com/abstract=3688476>. or <http://dx.doi.org/10.2139/ssrn.3688476>. This quite-drafty draft of an article on developing research questions in our field is the foundation for my talk today.

## What is “empirical” research?

an effort by an investigator to describe or explain (or both) phenomena by looking at them systematically



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(DON'T USE: The term “empirical” has its roots in a Latin word that referred to a certain type of physician, an “empiricus,” one who developed methods of treatment by experience, as opposed to rationalist physicians, who believed that physicians needed to reason from theory to treatment. Think of the difference this way: A rationalist might reason that men have fewer ribs than women on grounds that God took one of Adam’s to form Eve. An empiricist would simply count ribs of actual people. The word has older roots in the Greek ἐμπειρία (empeiria), which Plato used derisively to refer to mere experience or practice without theoretical knowledge (Plato, *Gorgias* 463b).)

I think it’s helpful to think of empirical research as an effort by an investigator to describe or explain (or both) some phenomena by looking at them systematically.

This is not just counting things or “quantitative” research. Much (if not all) research has qualitative dimensions, ones not focused merely on *counting* but on assessing data. [NEXT]

## Describe or explain (or both) phenomena by looking at them systematically

1. Articulating research question(s).
2. Finding an entry point in the “conversation.”
3. Research paradigms, methodology, and methods.
4. Project-oriented rather than article-oriented work.



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This definition has implications for:

- what kinds of questions we ask,
- how they fit into the scholarly conversation,
- what research paradigms we use to answer them,
- and how we report our answers.

Because of the effort involved, it also calls for a strategic use of resources, approaching empirical work as project oriented rather than article oriented. I'll touch on these matters with reference to a project that I've been working on for the last few years, which I call the "Legal Analogy Project."

## DOURS provides a heuristic for finding research questions

1. Dissonance
2. Originating question
3. Unknown
4. Rationale
5. Specifying question



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(This slide's content drawn from Brian N. Larson, *DOURS: A Heuristic for Discovering Research Questions* (Sept. 7, 2020). [PDF](#) on SSRN.)

The first thing you need to do to do empirical research is to have a research question. The DOURS heuristic is a great way to develop one.

1. Here D stands for **dissonance**, a felt unease or sense that something is not quite right with your theoretical understanding, practice, or pedagogy on some issue. For my Legal Analogy Project, it was the way contemporary scholars talked about how legal analogy should work in legal reasoning. It just didn't seem right to me. I read a lot, both inside and outside the legal literature to understand my dissonance and its theoretical landscape.
2. O is for the **originating question**, the big question your research project contributes to answering. In my case, it was "How do lawyers and judges use cited court opinions in their legal reasoning?" This question is much too big to be answered with one empirical study or one article. Instead, it should sustain my interest over a project that spans many years and multiple articles.
3. U is for the **unknown**. You can't say what's unknown (and propose to answer a new question) without considering what IS known. Here, you need to spend time reading to see what others have found. After that literature review, you can say

what is unknown, and you can begin to identify how you'll answer those questions. For my Legal Analogy Project, there just was not any empirical research about **how** lawyers and judges used cited court opinions in their legal reasoning; just some articles focused on counting citations and looking very anecdotally at single cases.

4. R is for the **rationale**. Your deep interest in a question may sustain your interest for a time, but if your research is “to become part of the science or knowledge in the field rather than remaining a personal hobby, [it] must be relevant to other ideas and facts in the discipline.” That was easy for me to do with the Legal Analogy Project, because it was about how lawyers and judges use cited opinions in their arguments, something important to all of us.
5. S is for the **specifying question**, one that you can pose and actually answer with a single study. For me, that meant narrowing scope: I randomly selected court opinions from one type of court, relating to one type of legal claim, during a specified period. I used federal district court cases addressing fair use in copyright infringement between 2012 and 2018. I asked “How do lawyers and judges use cited court opinions in **this set of texts?**” On the down side, this design does not allow me to generalize my answer across all legal contexts—to answer my originating question—but by carefully trying to answer this specifying question, I can hope that my findings can be transferred to other contexts.

I've mentioned a couple places here where reference to the existing literature is important. I'd like to continue a bit more on that line [NEXT]

(Add but don't read: Specifying questions from 2021 study.)

## Find theories and methods where you can enter the conversation

- Numbers without explanations are dull.
- Research is usually theory-laden.
- Without a theory, you cannot really justify what you are counting.
- We write to affect the theories and methods of others.

Academic research is typically theory-laden.

- Just counting things is just not very interesting.
- And in a sense, you cannot really know what you should be counting unless you start with a theory of how the phenomenon works.

I STRONGLY urge folks in legal communication to look outside the law-review literature:

- Researchers in the fields of rhetoric and composition, technical communication, argumentation theory, and writing studies have tackled a vast array of theoretical and practical questions relevant to us.
- They offer a rich set of theories and methods that you can use to structure your own studies.
- You may be able to show how the methods used there work in legal communication, or you may provoke discussion about how and why those methods don't work in legal communication.

Remember that at bottom, your research is joining an ongoing scholarly conversation. You want to contribute at points that will advance the shared project while sustaining your own interest and career. One thing you will notice about the conversation you

are entering is that the folks in it have a variety of philosophical or theoretical orientations. You'll need to develop yours [NEXT]

## You probably fit into one or more of three empirical paradigms\*

	Philosophy and Assumptions	Values
Discovery Paradigm	Objective reality exists Research moves our understanding closer to it	Explanatory precision & power Reliability & validity Reproducibility
Interpretive Paradigm	In <i>communication</i> research, we should understand how individuals, organizations, cultures, etc., interpret and understand their communication	(Inter)Subjectivity Rich Description
Critical/Cultural Paradigm	“[R]eality is always influenced by underlying systems of often hidden influence and power, and such structures must be evaluated....”	Voice Liberation Action

\* Different folks have different labels and definitions for these paradigms. None is official.

[READ TITLE]

For those in the Discovery Paradigm:

- There is “a singular objective reality” and they use “various methods of objectification, including experiments, control, and quantification... to inch every closer to that reality.”
- Their stated goal is to be as objective as possible, to minimize the impact of their own beliefs and experiences on the observations.
- Much contemporary criticism has brought the possibility of such objectivity into doubt, but the result has been that discovery paradigm researchers have worked even harder to address objectivity concerns.

Interpretivists believe that [READ]

- They value subjectivity, the idea that “perceptions of reality are every bit as important as . . . any reality that exists independent of human perception.”
- Interpretive research starts by attempting to set aside or “bracket” the researcher’s own understanding of phenomena and instead learn the understanding of the participants.
- It uses methods that should have findings that are transferable, meaning that the

insights from a study can “be used to help understand communication in other settings.”

According to Critical/Cultural researchers, [READ]

- Often studies in the critical or cultural paradigm begin with a theoretical way of seeing the world and its power relations, such as Marxism, or “postmodern” theories such as “othering” theory and queer theory.
- Their arguments are motivated by a desire to give voice to those who are underrepresented in the dominant discourse.
- Researchers here are often quite explicit about situating themselves within the research, acknowledging what they call their positionality.
- There are many, many flavors of this paradigm.

Entwined with questions about research paradigms are questions about which methods are suitable for each. [NEXT]

**Your paradigm(s) will determine (to some extent) the methods you will like**

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Your paradigm will determine the philosophy you have toward research methods, your methodology. Methodology is just the study of methods and their suitability for answering certain types of questions.

There's no time here to talk about the great variety of empirical methods available to researchers in communication. My best advice is that you get a couple introductory texts on research methods in this space. If you have a specific area that you are interested in, you might be able to find a collection that talks about methods specific for that topic. For example, I reviewed the volumes pictured here for my dissertation research, which involved gender and language use.

#### BIBLIOGRAPHY FOR THIS SLIDE

1. Overviews of empirical methods. These two texts provide good overviews of methods in communication research (empirical and rhetorical). If you read them and some of the studies they cite, you can get a good sense of the research paradigms(s), methodological stance(s), and method(s) with which you might be comfortable.
  - a. Stephen M. Croucher & Daniel Cronn-Mills, *Understanding Communication Research Methods: A Theoretical and Practical Approach* (2d ed. 2018).

- b. Gerianne Merrigan & Carole L. Huston, *Communication Research Methods* (4th ed. 2019).
1. The latter two volumes are topic-specific collections focused on methodology and methods for studies of gender and language.
    - a. *Gender and Language Research Methodologies* (Kate Harrington, Lia Litosseliti, Helen Sauntson & Jane Sunderland eds., 2008).
    - b. *The Handbook of Language and Gender* (Janet Holmes & Miriam Meyerhoff eds., 2003).

## Sustain yourself by making empirical research project oriented

2019 *Law's Enterprise*

2020 *Civil Procedure as a Critical Discussion* (w/Provenzano)

2021 *Precedent as Rational Persuasion*

2022 *Endogenous & Dangerous*

2023? *Unruly Analogies* (w/Morrison)



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(2.5 mins)

This may all seem like a lot of work, and it is. But the way to make it sustainable is to build a **project** around an empirical study. That's what I did with my Legal Analogy Project:

- I started in 2019 with an article that laid out the theoretical concerns surrounding the question(s) I wanted to ask, my dissonance. There was no empirical work here. But it identified the place in the conversation where I thought I belonged.
- In 2020, working with Sue Provenzano, I was able to identify a theoretical framework for analyzing the data I was collecting in 2019 and 2020.
- In early 2021, I reported my “principal findings”—that is, findings at the most general level—from the empirical study. That article explained the empirical methods in depth and provided access to the coding guide and data for the project.
- In an article coming out this year, I took a digression from my main path. An article by Kevin Bennardo and Alexa Chew on citation stickiness inspired me to “slice” my data in a different way and talk about judges who do or do not cite the opinions that attorneys used in their briefs. This publication allowed me join a timely conversation without having to do extra data collection or complex analysis.
- Finally, I now have an abstract under review with editors of a special issue of the

peer-reviewed journal *Argumentation*. For this article, my co-author and I qualitatively re-analyze the data from the 2021 article to focus on the question of how legal analogies are used in the texts there. Here, finally, I get a chance to begin to answer the most important question posted in the first article nearly four years earlier.

The effort I invested at every phase of this project propelled the other stages forward, providing several advantages:

- I did not find myself re-acclimating to a new batch of literature each time I sat down to writing a new article.
- I've gotten very familiar with my data, understanding what it can and can't tell me about the phenomena I'm exploring.
- This is much easier if you start with that big originating question and work gradually through the specifying questions it makes possible.
- It also makes it very unlikely you will sit down for a writing session and not have something you want to write about.

Thanks for your attention!

#### BIBLIOGRAPHY FOR THIS PAGE

Legal Analogy Project: This series of articles illustrates one way to construct an empirical project and report its results. Painfully self-promotional, perhaps, but I know my own works best. –Brian

1. Brian N. Larson, *Law's Enterprise: Argumentation Schemes & Legal Analogy*, 87 *University of Cincinnati Law Review* 663 (2019). [PDF](#) on SSRN.
2. Susan E. Provenzano & Brian N. Larson, *Civil Procedure as a Critical Discussion*, 20 *Nevada Law Journal* 967 (2020). [PDF](#) on SSRN.
3. Brian N. Larson, *Precedent as Rational Persuasion*, 25 *Legal Writing: The Journal of the Legal Writing Institute* 135 (2021). [PDF](#) on SSRN.
4. Brian N. Larson, *Endogenous and Dangerous*, 22 *Nevada Law Journal* \_\_\_\_ (forthcoming 2022). [PDF](#) on SSRN.
5. Brian N. Larson & David S. Morrison, *Unruly Analogies: Argumentation by Example in American Legal Texts*, abstract under review with editors of special issue of peer-reviewed journal *Argumentation* focused on norms of public argumentation, appearing (hopefully) early in 2023.