

A Vision For Economic Clerkships In The Legal System

By **Mona Birjandi and Matt Farber** (May 14, 2024, 5:18 PM EDT)

On March 26, the container ship Dali lost power and crashed into a support pylon, causing the Francis Scott Key Bridge in Baltimore to collapse into the Patapsco River and resulting in the deaths of six people.

Consequently, the city of Baltimore is preparing for litigation related to the bridge collapse, which is expected to include claims for economic and environmental damages.[1]

Quantifying damages in civil cases such as this one — and cases in intellectual property, breach of contract, private antitrust, class certification and class actions, personal injury, and product liability matters — is a complex task.

This article introduces the concept of an economic clerkship program as a solution to integrate early-career economists into the judiciary system. It explores how these economic clerks, working alongside legal professionals, can provide essential economic support to enhance judicial decision making.

As courts handle detailed economic analyses, the proposed economic clerkship program could not only advance economists' careers, but also improve the understanding and accuracy of legal outcomes, similar to the way legal clerkships do.



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Quantification of Damages

Civil filings that involve the quantification of damages comprise a large number of matters brought before U.S. judges. As mentioned, these matters include IP infringement, breach of contract, private antitrust, class actions, personal injury matters and product liability matters, among others.

Complex Economic and Statistical Techniques

Complex statistical and economic methods are used to quantify damages in these types of matters. Examples of such analyses used currently include choice-based conjoint surveys, event study analyses and hedonic regressions.[2] Future analyses may include the use of machine learning and artificial intelligence, or the design of A/B experiments to determine a proper damages figure.[3]

Complex Data

Today's legal cases that involve damages rely heavily on vast amounts of complex data. This data sometimes arrives in unstructured formats — e.g., texts — and is generated in unprecedented volumes.

Processing this type of data requires advanced analytical skills to derive meaningful and reliable insights. The same dataset can yield contrasting outcomes based on how it is analyzed by different parties conducting economic analyses.

A Potential Solution

Tasked with making impactful decisions regarding motions and case outcomes in matters involving damages analyses, courts may benefit from economic clerks who help them to understand the analyses and data in depth and make fully informed decisions.

We propose an economic clerkship system in which early-career economists, or other staff supporting economic or damages experts opining on damages, spend a period of time as a clerk in U.S. district courts and other courts that see a high share of damages-related matters.

The Proven Value of Law Clerks

Law clerks have been a vital part of the judiciary for more than a century. Presently, early-career lawyers, often immediately out of law school, compete for clerkships at a variety of federal and state courts.[4] The benefits of law clerkships include, but are not limited to, the following.

Judicial Support

The benefits to judges and the court largely revolve around having talented and enthusiastic labor to help perform myriad duties.

During these clerkships, these young lawyers conduct legal research, prepare bench memos, draft and proofread orders and opinions, verify citations, communicate with counsel, and assist the judge during courtroom proceedings.[5]

Legal Exposure and Networking

The benefits to the law clerks are also numerous. They see a wide variety of legal cases behind the scenes with differing legal and procedural issues; improve their research and writing; are exposed to a variety of legal skills, strategies and techniques; and build their attorney network.[6]

In the next section, we discuss how there would be similar benefits to both sides in an economic clerkship program.

How Courts Would Benefit From Economic Clerks

Courts might need economic clerks for several reasons.

Specialized Knowledge

Having an economic clerk on staff would provide deeper insight and specialized knowledge for important rulings that are highly impactful on both the case and experts' careers, such as Daubert

motion rulings, summary judgment rulings and motion in limine rulings.

These motions, written by attorneys representing the parties, may take a partial view of the analyses, and to rule properly, the judge must develop an independent understanding of the analyses performed on both sides.

Data Interpretation

As noted, today's legal cases increasingly rely on vast amounts of complex data. Different parties may interpret the same data differently, potentially leading to contrasting outcomes.

Economic clerks can play a crucial role in this context by leveraging their expertise to interpret and analyze such data effectively, making complex economic concepts more accessible to judges, juries and legal teams.

Cross-Disciplinary Collaboration

Economic clerks could facilitate collaboration between legal and economic experts. Working together, the economic clerk and the law clerks could determine the analyses performed, the assumptions and inputs that go into those analyses, and how they interact with the relevant legal precedents.

The judge would also have an additional resource available during hearings on such motions to better comprehend the arguments being made on both sides.

An economic clerk would be able to digest the analyses performed by both the parties' damages experts, and delineate the inputs and assumptions that differ, along with the impact of those differences.

Such an analysis could be helpful for the court to understand whether settlement is a possibility, and the barriers to settlement that might exist as they relate to the parties' damages analyses.

Decision Support

Lastly, these benefits would extend directly to bench trials, in which the judge is tasked with determining the proper damages amount should liability be found.

An economic clerk could be an additional resource for the judge and law clerks to determine which aspects of the parties' damages analyses are appropriate and best fit the facts of the case as part of a damages determination.

The economic clerk could highlight issues with either analysis, and explain how such issues may affect damages figures. These insights could inform judicial decisions, especially in cases where economic factors play a significant role.

How Economists Would Benefit From Clerkships

An economic clerkship can be an invaluable experience that provides great training and opportunity for growth for all economists involved in litigation, regardless of practice area. Some of the benefits to economists include, but are not limited to, the following.

Analytical Exposure and Learning

Much like early-career lawyers, an economic clerkship would likely be a boon to an early-career economist's future prospects. They would see a variety of analyses presented under a variety of damages-related matters in IP cases, personal injury cases, product liability cases and others.

For each of those, they would get a behind-the-scenes look at how the court reviews such analyses, including the various components, such as reports, different attachments and exhibits, depositions, and motions.

Economic clerks would work hand-in-hand with law clerks, developing an understanding of how legal precedent and the various economic analyses interact to produce certain outcomes. This would improve their own exposition and analyses in the future.

Networking

Economic clerks would be exposed to attorneys and damages experts, join a clerkship family of past and future clerks, and develop networks that could prove to be beneficial in the future as they develop their own expert careers.

Public Service

Clerking is a public service. Spending a year serving the public could start a service-oriented career for economists.

Conclusion

While not all U.S. courts may require the use of a full-time economic clerk or two, as discussed above, there would certainly be numerous benefits for the courts that see the highest flow of matters that involve the computation of damages.

These benefits would improve outcomes, allowing judges to make more informed rulings on motions and within bench trials. Because of the benefits for the economic clerks early in their careers, economists would likely compete for such positions much like young lawyers do now.

Thus, such an arrangement would benefit both parties, as well as the legal system at large.

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[1] <https://www.reuters.com/legal/government/baltimore-hires-law-firms-prepare-bridge-collapse-litigation-mayor-says-2024-04-15/>.

[2] <https://www.law360.com/articles/1593785/how-willingness-to-pay-informs-damages-methodology>; https://willamette.com/insights_journal/18/special_2018_7.pdf;
<https://www.law360.com/articles/1379763>.

[3] https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2023-24/march-april/bringing-experimentation-intellectual-property-litigation/.

[4] <https://law.utexas.edu/judicial-clerkships/types/>.

[5] https://oscar.uscourts.gov/duties_of_federal_law_clerks.

[6] <https://law.utexas.edu/judicial-clerkships/>.