Patent Experimentalism

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Patent policy currently emphasizes uniformity: interpretation of U.S. patent law has been centralized in the Court of Appeals for the Federal Circuit, and other countries' discretion to experiment with innovation policy has been limited through TRIPS and other international agreements. But this emphasis on uniformity makes little sense in light of the vast empirical uncertainties about the patent system; rather, innovation policy should focus on improving innovation incentives through an experimental, evidence-based approach. By examining diverse methods of policy experimentation in the context of the patent system’s uncertainties, this Article addresses the second-order question of how to answer the open questions about patents: how do we incentivize innovation about incentivizing innovation?

Randomized assignment is the “gold standard” for comparing well-defined, static policies. But field randomization entails high costs, making smaller scale laboratory experiments preferable for initial tests of more radical ideas. And even aside from cost, randomization is ineffective for many of the nuanced, dynamic issues of patent law, such as the bounds of patent-eligibility for rapidly changing technologies in heterogeneous jurisdictions. These uncertainties may be better approached not through a static, short-term experiment, but rather through adaptive governance: in a system of regulated local autonomy, local actors—patent examiners, judges, or even individual countries—are granted broad discretion to meet centrally defined framework goals but must articulate their decisions through a process of peer review, promoting the propagation of positive norms. Even where local actors cannot effectively measure the success of their policies, the variation promoted through local autonomy generates diverse data to test theoretical models and to analyze as “natural experiments.”

But simply having empirical answers may not be enough to affect the current faith-based public discourse over patents. This Article thus also explores how an evidence-based innovation regime might be designed to increase open-minded consideration by patent advocates and policymakers with diverse values. In sum, although some uncertainties are difficult to resolve even via optimally designed experiments, complete standardization would make it impossible to answer any questions. Actors at all levels of innovation policy should thus embrace a new focus on patent experimentalism, both nationally and internationally.