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Phoebe's Lament (Symposium: Empirical Research in Commercial Transactions)

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PHOEBE'S LAMENT

*James J. White**

Assume a bright hypothetical social scientist — call her Phoebe — who is completely ignorant of legal research as it is practiced in today's law schools. Phoebe might speculate about legal research as follows. First, she would note that the law schools are joined with and are the exclusive source of the practitioners of a profession. Second, she would note that commercial and legal actors rub up against and are influenced by the law in countless ways every day. Third, she might remark that this interaction occurs practically on the doorsteps of our law schools. Unlike anthropologists, who may have to travel to New Guinea to observe their subjects' behavior, or psychologists, who must devise clever experiments to observe their subjects' hidden motives and instincts, the interaction of law with the commercial life of various actors is practically lying in the street to be picked up by any passerby. And finally, she might note that discreet bodies — state and federal legislatures — pass new laws every year in response to apparent needs of commercial actors or in response to apparent difficulties with existing law.

Making these observations, Phoebe might then predict that a large share of legal research would consist of the collection of data about the interaction of law and life and the statistical analysis of those data to determine what is happening, how the law influences behavior in wise or unwise ways, and what new laws should be enacted and in what form. She might further speculate that much of this research would be directed to and have a large influence on state, federal, and elite (ALI and NCCUSL) legislatures.¹ Moreover, she could support her prediction by noting that distinguished lawyers such as Oliver Wendell Holmes, Derek Bok, Peter Schuck, and Michael Heise have long exhorted law professors to undertake such work, in some cases even predicting that empirical research would ultimately become the dominant form of legal scholarship.²

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1. See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 629 (1995).

2. See [Justice] Oliver Wendell Holmes, *The Path of the Law*, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 467 (1897), reprinted in OLIVER WENDELL HOLMES, *COLLECTED LEGAL PAPERS* 167, 187 (1920) ("For the rational study of the law . . . the man of the future is the man of statis-

Of course, her speculation would be wrong — almost completely wrong. Law professors do limited empirical work and almost none of that work is the statistical analysis of large bodies of data.³ Some of this empirical work is directed at the legislatures and put before them, but the legislatures seem to consume little of it.⁴ So Phoebe's speculation would be confounded. But why is that so, why does the world not conform to this plausible speculation?

The question why law professors do not do more elaborate empirical work⁵ has been carefully addressed by Peter Schuck⁶ and Michael Heise.⁷ Their explanations are persuasive, and if any of you law professors would like to know why you are unlikely ever to undertake a large empirical study, notwithstanding your demonstrated interest in empirical work, you can find out by reading their work. So I pass this first question — why law professors do not do more big empirical research — and I ask you to think with me about the second question — why the legislatures seem not to rely on empirical work. Of course, if you share my conclusions about the legislatures' behavior and about the reasons for that behavior, it may influence your decision to move on to larger empirical studies or to backslide into conventional law professor research. I believe that empirical work has had a most limited impact on commercial legislation and that strong reasons will keep it so.

tics and the master of economics.”); Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 581-82 (1983); Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807 (1999); Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323 (1989).

3. See, e.g., Heise, *supra* note 2, at 810-12; Craig Allen Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession*, 30 WAKE FOREST L. REV. 347, 362 tbl.1 (1995) (noting that a large majority of the small group of law professors surveyed feel that there is not enough empirical research in legal scholarship); Schuck, *supra* note 2, at 323-24.

4. See, e.g., Teresa A. Sullivan et al., *The Use of Empirical Data in Formulating Bankruptcy Policy*, LAW & CONTEMP. PROBS., Spring 1987, at 195, 195 (“[W]e must begin with the striking fact that empirical research has played almost no role in the development of bankruptcy policy.”). Also, in an e-mail dated February 18, 2000, John McCabe, Legislative Director of NCCUSL, indicated that he could not recall any instances where NCCUSL had looked at an empirical study prior to commencing work on an act. (E-mail on file with author).

5. This is not to say that the types of empirical work more commonly done by law professors are without value. Phoebe, our hypothetical social scientist, might describe the research method of using case studies in the following way:

Methods are not good or bad per se, and social scientists would not reject case studies out of hand. They are good for the initial exploratory stages, okay for checking the real world generalizability of lab experiment results. They are not good for testing hypotheses definitively or for establishing that a relationship is generally true, and that is what you would want as a basis for changing law or precedent.

6. See Schuck, *supra* note 2.

7. See Heise, *supra* note 2.

That the legislative process has a powerful immunity to empirical work is ironic but nearly indisputable. Every single day of the year, the state or federal legislatures, not to mention the elite legislatures (ALI, NCCUSL), make decisions that could be informed and improved with greater knowledge of prevailing practices and motives of the relevant parties. Yet, the proudest example of legislation informed by empirical research is the small loan laws that were apparently adopted as a direct result of the 1907 study in New York by the Russell Sage Foundation.⁸ That we must reach to 1907 for the best example is discouraging.

That there are few other acknowledged examples says more. In revising the Bankruptcy Act of 1898, Congress appointed a commission that did considerable empirical work and prepared a draft of the statute that Congress eventually passed.⁹ How much of that statute eventually was influenced by the studies is not clear, but no one has claimed that it had a large impact.¹⁰ The Conard study of auto accidents in Michigan¹¹ may have influenced the adoption and form of no fault laws in some states, but that, too, is subject to dispute.¹² Of course, one might argue that the paucity of studies insures paucity of influence, but that argument is not persuasive. Even though empirical studies have been only a small part of all law professors' work, in the aggregate, that work, particularly when combined with the work of economists and other nonlawyers, is substantial, yet there is little evidence that this work has significantly influenced legislatures.¹³

Despite the fact that each purports to be interested only in "improving the law," even the ALI and the National Conference seem

8. See DAVID J. GALLERT ET AL., SMALL LOAN LEGISLATION: A HISTORY OF THE REGULATION OF THE BUSINESS OF LENDING SMALL SUMS 54-60 (1932).

9. See COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, pt. 1 corrected, pt. 2 (1973).

10. See Sullivan et al., *supra* note 4, at 195 n.2; *Discussion*, LAW & CONTEMP. PROBS., Autumn 1977, at 123, 129 (suggesting that the opinions of the commission were formed prior to the receipt of empirical data).

11. ALBERT F. CONARD ET AL., AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION (1964).

12. See Virginia E. Nolan & Edmund Ursin, *Foreword*, *Symposium on the American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 213, 214 (1993) (suggesting that the adoption of the no-fault regime was as much the result of the work of Robert Keeton and Jeffery O'Connell as it was of the Conard study).

13. See *Discussion*, *supra* note 10, at 128-29 (describing the legislative process, Phil Schuchman said: "One gets very little time and can't mount studies, because they take too long and the data are messy. Congress wants answers, and its notion of empirical study is to poll a group of experts. If it wants to find whether and how to change the law, it asks a hundred lawyers.").

never to have used empirical studies.¹⁴ As the Reporter for the revision of Article 5 of the Uniform Commercial Code, a member of the drafting committee to revise Article 1, and a member of another committee for Articles 2 and 2A, I have not once seen or heard the citation of an empirical study to support a particular proposition. And that is not because the drafters do not make judgements about the merits of proposals based on their beliefs about the underlying practices and disputes. For example, we revised Article 5 to make it more difficult for an applicant to enjoin the honoring of a letter of credit. We did that because we believed that letters of credit were threatened more by those who might falsely allege fraudulent acts by beneficiaries than by those beneficiaries who might present fraudulent documents to secure payment.¹⁵ The judgement about that threat was based on a nonsystematic reading of the reported cases (hardly the best source) and on purely anecdotal evidence out of the mouths of bankers and lawyers who came to the drafting table and made assertions about practice.

So why are empirical studies so sparse and so uninfluential? The first reason is timing. Conventional legislatures almost always act in response to the political goals of their members or constituents. Rarely will legislatures be willing to wait one, much less three or four, years for a study. If any formal study will take two, or even three or four years from start to finish, the person doing the study needs more warning than a legislature can give. Even the ALI and NCCUSL are not normally willing to wait three or four years after they have decided to proceed with a topic.¹⁶

The second reason why empirical studies are so sparse and uninfluential is the problem of commitment to a particular value or ideology.¹⁷ Any question worth studying must have at least two plausible answers; in many cases one of those answers will be unacceptable to the legislative sponsor who is already committed to one outcome irrespective of the facts. To put the point more generously, even the most powerful empirical study might not change the mind of a legislative participant if that person's commitment to a particular value is strong enough.

14. See E-mail from John McCabe, Legislative Director, NCCUSL, *supra* note 4 (“I do not know of any empirical studies that have ever been done as part of an R & D effort before work on an act has commenced.”). One exception to this general proposition that has come to my attention is an early study by Phoebe Ellsworth, which was adopted by the ALI in its Model Code on the subject. Phoebe C. Ellsworth & Robert J. Levy, *Legislative Reform of Child Custody Adjudication: An Effort to Rely on Social Science Data in Formulating Legal Policies*, 4 L. & SOC'Y REV. 167 (1969).

15. Compare U.C.C. § 5-109 (1995) with U.C.C. § 5-114 (1992) (making it more difficult to obtain injunctions against honor).

16. See *Discussion*, *supra* note 10, at 128-29.

17. See Schuck, *supra* note 2, at 332.

Consider Professor Michelle White's study of exemptions in bankruptcy and her analysis of the effect of exemptions on debtors' behavior.¹⁸ She suggests that high exemptions encourage individual debtors to file and that the expansive exemptions available in places like Texas and Florida predominantly benefit comparatively affluent debtors. Those findings make no impact on one who believes that a much-expanded Chapter 7 would be desirable, nor on one who believes that even relatively affluent persons should keep their houses — however large — from all but their mortgagees. Surely many legislative disputes, that appear to concern the relevant facts, are in truth ideological disputes that cannot be resolved by knowing more facts.

Witness the debates in Congress in 1998 and 1999 over proposals to make Chapter 13 (consumer payment plans) mandatory for some debtors. Creditors' advocates argued that the data called for a restriction on Chapter 7 filings while debtors' advocates argued that the same data demanded no change in the law.¹⁹ In reality, this was an ideological dispute about which facts had little to say. What would even the most elegant and persuasive empirical study add to the public debates over abortion? I doubt that such a study would move even one pro-life advocate into the pro-choice camp, or vice versa, so strong is their ideology.

A third reason for the lack of influence in the legislatures is the skepticism of the players. I would expect partisan political actors to be instinctively skeptical of any researcher's impartiality. Since large-scale studies are expensive and there is a limited amount of disinterested money available, this can be a monumental problem. Who will believe a study — even by researchers purer than Caesar's wife — if it is funded by the tobacco industry, NOW, or General Motors? Every one of us is rightly skeptical of studies that relate to a sponsor's economic or political interests, yet that is where most of the money is. When that appropriate skepticism is magnified by the animosity and suspicion always present between partisan politicians in a legislature, and when that magnified skepticism is yet again enlarged by adding the layman's natural skepticism of counterintuitive conclusions that are justified only by statistical analysis, how could an honest empiricist ever hope to persuade a legislature?

18. See Michelle J. White, *Why it Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change*, 65 U. CHI. L. REV. 685 (1998).

19. Compare, e.g., *Prepared Testimony of Ms. Beth Climo, Group Director for Financial Industry Affairs, American Bankers Association*, Hearing on Bankruptcy Reform and Financial Services Issues, Senate Banking Comm., 1999 WL 170244 (Mar. 25, 1999) with *Prepared Testimony of Mr. Gary Klein, Staff Attorney for National Consumer Law Center*, Hearing on Bankruptcy Reform and Financial Services Issues, Senate Banking Comm., 1999 WL 8086173 (Mar. 25, 1999).

A fourth, related reason arises from legislators' unfamiliarity with empirical work. Because they are not familiar with conventional statistical analysis and because they are ignorant of common but subtle errors that can occur even in well-intended work,²⁰ legislators are mostly incapable of distinguishing between good and bad work, between studies that should be dismissed or doubted and those that should be accepted and believed.

Fifth, empirical findings are often indeterminate. It would be quite possible to do a competent study of those who have filed for bankruptcy and of those who are likely candidates for filing and yet find no help on the question whether an expanded Chapter 13 would ultimately reduce bankruptcies or return larger payments to creditors than the current system does. The study might fail because the wrong people were examined, because the wrong questions were asked, or because the study could not anticipate the actions of debtors and creditors in response to new law.

A sixth reason is that even a first-rate study may have difficulty in the face of competing anecdotes.²¹ Even a careful, dispassionate study, which showed the provision of drugs to be successful and optimal under current Medicare and Medicaid practices, could not compete with a single live witness who might appear before a congressional committee to report how her child died in her arms for the want of a particular drug. This phenomenon — that the lesson of a single vivid example will outweigh the far more reliable lesson of the abstract data from multiple respondents — is well known in the psychology literature.²² Where there are two sides in a legislative dispute, one side will often be able to confront any damaging empirical study with vivid counterexamples.

The experience recounted above and the reasons behind that experience tell me that persons who assume that significant legislative benefits will flow from more empirical legal research are at least too facile and, possibly, wrong. This failure to influence the legislative process does not arise primarily from defects in the empirical work; it is like an autoimmune reaction of the legislative body to a beneficial treatment. The reaction arises partly from characteristics of the problems that confront the legislatures (value-laden), partly from the structural qualities of legislatures (composed of partisan opponents

20. See JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW* 45-66 (1985) (discussing common threats to validity of social science research, such as non-representative subjects, lack of geographical diversity, and research performed across too great a time period).

21. See RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 55-59 (1980) (explaining why vivid, anecdotal case-studies have a stronger effect on inferences than statistical data that is actually more probative on the issue in question).

22. See *id.*

who have relatively short timelines), and partly from the limits inherent in empirical research (time needed; difficulty in competing with vivid counterexamples or strong beliefs).

So I do not mean to discourage you from your current endeavors — case studies — nor from going on to more elaborate empirical work. I say only that you should not do it with the expectation that the legislatures, even the elite ones, will attend to your findings. And when social scientists criticize your work as “anecdotal” and insufficient to support legislation, you can at least respond that more grand and expensive work would have no greater impact. Of course, it is possible that I am only restating every law professor’s lament — that the legislatures pay too little attention to us whether we write about theory, doctrine, or life.