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Life's Golden Tree: Empirical Scholarship and American Law

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Life's Golden Tree:
Empirical Scholarship and American Law

Carl E. Schneider* & Lee E. Teitelbaum†

Grau, teurer Freund, ist alle Theorie
Und grün des Lebens goldner Baum.

[Gray, dear friend, is all theory,
And green life's golden tree.]

Johann Wolfgang von Goethe
Faust

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*Chauncey Stillman Professor of Law and Professor of Internal Medicine, University of Michigan. I am grateful to the editors of the Utah Law Review for generously releasing this article from obedience to the usual conventions, including the practices and citation rules of The Bluebook: A Uniform System of Citation and those of the Utah Law Review. In turn, I cheerfully release the editors from responsibility for any errors, confusions, and infelicities that may have ensued.

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A PREFATORY WORD FROM DEAN TEITELBAUM'S CO-AUTHOR

More years ago then I like now to remember I sat in this building and listened to—yes, more than that, was dissected by—men all but one of whom are now dead. What I got from them was not alone the Rule in Shelley’s case . . . . I carried away the impress of a band of devoted scholars; patient, considerate, courteous and kindly, whom nothing could daunt and nothing could bribe. The memory of those men has been with me ever since. Again and again they have helped me when the labor seemed heavy, the task seemed trivial, and the confusion seemed indecipherable.

Learned Hand

The Bill of Rights

Lee Teitelbaum and I drafted this article several years before his lamentable death. We were both distracted by other projects and laid the piece aside. When he died, I undertook to complete it to honor a man who as friend and colleague brought more goodness to my life than I could ever have deserved.¹

I have tried to let this article reflect the qualities that made Dean Teitelbaum so distinguished in his calling. He was an irresistible teacher, an influential scholar, a solicitous colleague, a superb dean. He succeeded in those things because he turned all his intelligence and energy on them. More, he was attentive to the human beings around him. Not just to his students, colleagues, and staff, but to the people—the individual human beings—who lived under the law he studied. Dean Teitelbaum wrote about theory, but he thought about people.

This article, then, is not just about using empirical research to improve legal scholarship. It is about how we law professors lead our lives and do our work, about the responsibilities we owe the society whose government we instruct. It is, then, more a collegial colloquy than a law review “Article” in the dreadful sense that term has acquired.

Dean Teitelbaum exemplified the traditions of learning in which he was raised. He was a skilled lawyer, but he was more than a technician. He was a liberally educated and broadly read gentleman to whom craft was a duty and elegance a delight. I have here given myself a pleasure he too often denied himself—allowing good taste to subdue foolish custom. For example. Legal scholarship now drags behind it a Marley’s chain of citation forms, participial parentheticals, stylistic dogmas, abbreviation rules, signaling conventions, and footnoting formulas.

Again the spectre raised a cry, and shook its chain and wrung its shadowy hands.

‘You are fettered,’ said Scrooge, trembling. ‘Tell me why?’

‘I wear the chain I forged in life,’ replied the Ghost. ‘I made it link by link, and yard by yard; I girded it on of my own free will, and of my own free will I wore it. Is its pattern strange to you?’

I have freed Dean Teitelbaum from the fetters of the Bluebook by replacing it with the Chicago Manual of Legal Citation² and from the usual strictures of the law review regimen in order to present and preserve his voice and vision.

I. INTRODUCTION

For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.

Oliver Wendell Holmes

The Path of the Law

A. THE PROBLEM OF LEGAL SCHOLARSHIP

I flatter myself that I love a manly, moral, regulated liberty as well as any gentleman of that society . . . . But I cannot stand forward and give praise or blame to anything which relates to human actions, and human concerns, on a simple view of the object, as it stands stripped of every relation, in all the nakedness and solitude of metaphysical abstraction.

Edmund Burke

Reflections on the Revolution in France

By the end of the last century, the lessons for legal scholarship of its beginning had been confirmed but not learned. Those were the lessons of the legal realists who summoned their colleagues to empirical research. Throughout the century other voices reiterated the advice. When, sporadically, it was taken, the results demonstrated its wisdom. But neither adjuration nor example has won enough practicing converts. As this century opens, the legal academy still scants

²This choice is wittily and crushingly explained in Richard A. Posner, Goodbye to the Bluebook, 53 U Chicago L Rev 1343 (1986).
the empirical research so necessary to its work. But let us not be weary in well
doing: for in due season we shall reap, if we faint not. The cause is right, the
moment ripe.

We will not trek through the long argument for empirical scholarship in legal
studies. That has been done, admirably and often, and the case’s merits are now
plain and familiar. We cannot debate them because no one will mount a
systematic argument against them. Our problem, rather, is to persuade more
people to practice what many people preach.

Whatever the virtues of empirical research, a derisory fraction of us do it. As
Peter Shuck observes, “[E]mpirical research . . . is a decidedly marginal activity
in the legal academy today. Quantitatively, at least, it comprises a trivial
proportion of the work that most law professors do.” Richard McAdams and
Thomas Ulen concur: “Empirical methods are still rare in legal scholarship: very
few law professors buttress their arguments by appeal to tests of statistical
significance or even with descriptive statistics. . . . The systematic organization
of data and its presentation in revealing ways may be a routine part of many
scholarly disciplines, but it is not yet a routine part of legal argumentation.”
Thus one study found that “a vast majority of those [law professors] surveyed
believed that there was a lack of empirical research in legal scholarship.”
Robert Gordon’s analysis of changes in legal research did not even find empirical
research prominent enough to be a category. Russell Korobkin

conducted an extensive search for articles relevant to the topic [of
empirical research on contract law] over the last fifteen years. Despite

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3“[C]alls for greater empiricism in legal scholarship are routine.” Tom Ginsburg, Ways of
Criticizing Public Choice: The Uses of Empiricism and Theory in Legal Scholarship, 2002 U
Illinois L Rev 1139, 1164.

4To incite an argument about empirical research, you don’t advocate it; you say that law
professors bungle it. See Lee Epstein & Gary King, The Rules of Inference, 69 U Chicago L Rev
1 (2002), and the indignant replies that ensue.

5Peter Schuck, Why Don’t Law Professors Do More Empirical Research?, 39 J Legal
Education 323, 323 (1989). To like effect: “While Professor Schuck’s earlier observation that the
two main forms of legal scholarship—theoretical and doctrinal—account for ‘almost the entire
corpus of legal scholarship’ remains largely accurate, it is especially accurate if one views legal
scholarship in its entirety.” Michael Heise, The Importance of Being Empirical, 26 Pepperdine L
Rev 807, 812 (1999). “[L]aw reviews contain a surfeit of doctrinal writing as well as high theory,
to the exclusion of scholarship that connects doctrine and theory with the way law actually

6Richard H. McAdams & Thomas S. Ulen, Introduction, Symposium: Empirical and

7Craig Allen Nard, Empirical Legal Scholarship: Reestablishing a Dialogue Between the

8Robert W. Gordon, Lawyers, Scholars, and the “Middle Ground,” 91 Michigan L Rev 2075,
the fact that more than 500 law journals are published regularly in the United States alone, and that contract law is a relatively rich area for legal scholarship, I was able to identify fewer than thirty articles relevant to this review, and many of these either only arguably meet the definition of "empirical" or provide a tenuous link between the data gathered and any contract doctrine. 9

Finally, in what follows we proffer example after example of ways empirical legal scholarship is as wretchedly scant as it is sorely needed.

Not only is empirical scholarship not done; it is disfavored. Lawyers and law professors "are very apt to be scornful of the findings of social science. This is an offshoot of a professional self-image of omnicompetence . . . . It is also a reflection of the lawyer's wish to maintain a pattern of practice and teaching in which he can play by ear." David Riesman wrote those words half a century ago, but they remain too true. 10 Only a decade ago Robert Weisberg had to say that "almost all criminal law scholars ignore [criminology's theories] out of a predisposed disdain for the intellectual power of sociology." Similar sentiments still echo in faculty lounges around the country.

"But shall we live in hope? All men, I hope, live so." Law professors today do more empirical research than ever before. This is partly because there are many more scholars under much more pressure to do much more scholarship. But empirical scholarship has probably increased proportionately too. A hint of this comes from a survey of scholarship which found two significant changes between 1960 and 1985, one of which was that "work that seeks to evaluate the effectiveness of law increased." 11 A later survey concluded that while doctrinal

work still dominates legal scholarship, empirical work "recently and dramatically has expanded in law reviews, at conferences, and among leading law faculties. One cause and consequence of this welcome trend is the rise of two influential movements. The Law and Society movement's very raison d'être is to promote the study of law's functioning as a social institution and its effects on social behavior. It has brought some social scientists into law and some lawyers to the social sciences. The Law and Economics movement has also been beneficial, since while it promulgates theories that sometimes seem to make empirical inquiry superfluous, it also provides testable hypotheses and has "stimulated some imaginative empirical investigation." Indeed, the adamant simplicity of the economist's model has provoked skeptics to create whole new subfields, like behavioral economics.

And still on the brighter side: American law professors embrace empirical research much more warmly than their counterparts abroad, particularly those in civil-law systems. As Graham Hughes observes, "part of the grand success achieved by American law schools and legal scholarship has been to marshal and deploy the many disciplines and techniques they need to execute their many missions." This, and the greater tendency of the common-law tradition to see law as "a set of procedures for continually adapting some broad principles to novel circumstances" rather than "a final codification of legal rules," as driven by experience more than logic, have helped make American law professors international leaders in empirical legal scholarship.

So what is our plan? We briefly review the reasons empirical scholarship is crucial to the intelligent and productive study of law. We then search for the arguments contra. Since those arguments live in the hearts and not the writings of law professors, we draw on years of discussions with colleagues. Having winkled out the arguments against empirical scholarship, we dispute and, we

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13 Tracey E. George, An Empirical Study of Empirical Legal Scholarship: The Top Law Schools, Vanderbilt Law & Economics Research Paper No. 05-20 2 (2005). Even a decade ago, Robert W. Gordon, Lawyers, Scholars, and the "Middle Ground," 91 Michigan L Rev 2075, 2085 (1993), could argue that "[s]everal fields of law, which until recently scholars rarely studied in social context, have begun to develop rich empirical literatures," including topics in labor law, administrative law, bankruptcy law, employment discrimination, and criminal law. But Professor Gordon is no more content than we: "[I]f I had the power... to redirect legal scholarship, I would use it to try to promote more empirical work, institutional description, and law-in-action studies. Sometimes I think I would happily trade a whole year's worth of the doctrinal output turned out regularly by smart law review editors and law teachers for a single solid piece describing how some court, agency, enforcement process, or legal transaction actually works." Ibid at 2087. Amen.


believe, refute them. No small part of the resistance to empirical scholarship seems to be the feeling that it cannot describe the world well enough to be useful in legal scholarship. True, empirical research reveals the world through a glass, darkly. But without empirical research, the lawmaker and the scholar know fearfully little, and much of that is wrong. Sociologically, law professors inhabit a ludicrously unrepresentative sliver of American society. Psychologically, an impressive literature establishes that we all systematically misperceive the life we lead and the worlds we inhabit. So when law professors prefer their own perceptions to systematic study, they cannot trust what they see.

As we said a moment ago, the argument in principle for empirical research is little controverted, but the research itself is little done. We hope, fondly and perhaps fatuously, to inspire more research not by admonition, but by examples. We proffer two kinds of examples. First, we detail the ways one field—family law—suffers from the absence of empirical research and would profit from its abundance. Second, we detail the ways the law has repeatedly and wretchedly failed to achieve its purposes, a failure whose causes lie partly in the lack of empirical research and a failure which can only be discovered and repaired through that research.

B. THE VARIETIES OF LEGAL SCHOLARSHIP

There are and can be only two ways of inquiry into and discovery of truth. The one flies from the senses and particulars to axioms of the most general kind, and from these principles and their [supposed] immutable truth, proceeds to judgement and to the discovery of intermediate axioms. And this is the method that is now in use. The other calls forth axioms from the senses and particulars by a gradual and continuous ascent, to arrive at the most general axioms last of all. This latter is the true but untried way.

Francis Bacon

Novum Organum

Three ideal types of legal research can usefully be distinguished. First, doctrinal research. This is the study and development of legal doctrines by the beloved traditional methods of case and statutory analysis. At its heart is the effort to construct rational and coherent legal rules. It is a crucial and estimable enterprise. It is the enterprise for which law professors are specially trained and at which lawyers are uniquely skilled. It demands ample experience, fine acuity,
and rare judgment.\textsuperscript{17} It is a task to which even the most empirical of law professors can return with the confident anticipation of craft pleasure.

Theory is the second kind of legal scholarship. By theory we mean “no more than systematic explanation at some level of abstraction of how law acts or of why it should act in a particular way. Free-speech theory, for example, in some of its forms explains how free speech promotes wiser government and why free speech is morally and socially desirable apart from that consequence.”\textsuperscript{18} Theoretical work too is demanding. It is necessary to a systematic understanding of the way legal institutions work and of the principles that should animate the law. It is not the presence of theory we deplore; it is the absence of empirical research. It is theory that drives out fact.

The third category of legal research is, of course, empirical. Many of our colleagues understand the term to denote only elaborate and abstruse quantitative research. For us, “empirical” describes any attempt to gather information in some disciplined way about how the world actually works. In other words, we treat as empirical research any attempt to acquire data about social behavior the law seeks to regulate, the way legal institutions behave, and the effect of law on social behavior. The social sciences have many methods of acquiring that knowledge. Survey research is one, but so are participant observation and ethnological investigation. These methods range broadly in their rigor and rewards. But all of them can fall within our definition of “empirical.”

To illustrate by example: Marsha Garrison’s examination of court records to determine how judges actually allocate spousal wealth on divorce is empirical. Stewart Macaulay’s interviews with businessmen about their contractual relations are empirical. Sarat and Felstiner’s observation of divorce lawyers and their clients is empirical. Carol Weisbrod’s reading of historical documents concerning the contractual relations between nineteenth-century communes and their members is empirical. Tom Tyler’s survey of how various populations feel about obeying the law is empirical. Richard Uviller’s sojourn with the New York City police is empirical. In the house of empiricism there are many mansions.

We want to inspire the empirical research that provides a basis for proposing laws wisely and evaluating them intelligently. However, we also value a scholarship that falls between our stools. Sometimes empirical research relevant to law has already been conducted by academics from elsewhere in the university. Because it is done by the adepts of other disciplines, is reported in the journals of other specialties, and is readily comprehensible only to other adepts, law professors often overlook it. Regrettably. There should be an honorable place

\textsuperscript{17}Carl E. Schneider, \textit{Teaching Lawyers: American Practice and Japanese Possibilities}, 42 Law Quadrangle Notes 72 (Summer 2002).
in our discipline for analyses of the empirical research other disciplines have done. The reviews by Phoebe Ellsworth and Robert Levy\textsuperscript{19} and by David Chambers\textsuperscript{20} of the psychological literature on how custody arrangements affect children exemplify this worthy enterprise.

II. WHY EMPIRICAL RESEARCH?

Each prudent, small step, based on prior experience, yields new and not completely predictable effects that become the point of departure for the next step. Virtually any complex task involving many variables whose values and interactions cannot be accurately forecast belongs to this genre . . . . Where the interactions involve not just the material environment but social interaction as well—building and peopling new villages or cities, organizing a revolutionary seizure of power, or collectivizing agriculture—the mind boggles at the multitude of interactions and uncertainties . . . .

James C. Scott

Seeing Like a State

A. THE EMBARRASSINGLY SIMPLE CASE

One must know concrete instances first; for, as Professor Agassiz used to say, one can see no farther into a generalization than just so far as one's previous acquaintance with particulars enables one to take it in.

William James

The Varieties of Religious Experience

The case for empirical research is embarrassingly simple: "If laws are intended to produce certain results, questions about whether they do produce the expected results, whether they produce other results, and whether the identifiable results are as consistent with the reason for law as one might have anticipated, are all important to examine."\textsuperscript{21} The less you know about the world, the harder it is to write good rules to govern it (however easy ignorance makes it to write bad

\textsuperscript{19}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 Law & Society Rev 167 (1969).


More precisely, to legislate well, you need to understand the social situation you want to regulate, how the legal institutions you deploy will behave, and how people and institutions will respond to that behavior. To evaluate your rule, you need to know how it is applied and what effects its application has had. In a complex society, none of this can be ascertained without empirical research.

When we say this to some of our colleagues, they rush to insist that knowledge of the world is insufficient. You must decide what you want to accomplish; you need principles to guide your choices. No doubt. Empirical knowledge is a necessary, not a sufficient, condition. But principles too are only a necessary, not a sufficient, condition. Principles cannot tell you where you are, how to get where you want to go, or whether you have arrived. “It is no doubt true that you cannot get from is to ought. But you ought to know what is is before you say what ought ought to be.”

In short, we do not suppose that all research must be empirical. Courts reach decisions by analyzing doctrines, and law professors should help them do so. Some of that analysis relies more on logic than experience, for legal doctrines should be internally consistent and fit intelligibly with their neighbors. But doctrines serve social ends, and they must negotiate the world in which they operate.

Put it another way. Every doctrine, every theory, rests on assumptions about the behavior of the regulators and the regulated. For this reason, most debates about legal doctrine reflect disagreements about fact whose resolution shapes the normative issues involved. For example, at the heart of the Miranda controversy are questions about how often it frees the guilty and cripples the police. If rarely, the issue hardly merits the vehemence it provokes. If often, more empirical questions arise: Does Miranda in fact lead police to treat suspects appropriately? Can we find better ways of supervising the police?

Empirical questions pervade even doctrines that seem most instinct with principle and that are most persistently discussed at Everests of abstraction. Judge Posner, for example, thinks “the greatest need of constitutional adjudicators...is the need for empirical knowledge...” Unanswered questions proliferate:

Above all what are the actual and likely effect of particular decisions and doctrines? Did Brown v. Board of Education improve the education of blacks? Did Roe v. Wade retard abortion law reform at the state level? What effect have the apportionment cases had on public policy?... Some of these questions might actually be answerable, and

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the answers would alter constitutional practice more than theorizing has done or can do.\textsuperscript{24}

Our quarrel, then, is not with scholarship that develops and refines theory (or doctrine, of course). We want to emphasize this point. Some theory develops the tools for the normative evaluation of the ends and means of law. This has always been necessary legal scholarship and always will be. Other theory seeks to make systematic our understanding of how human beings, social institutions, and legal agencies behave. When that work succeeds, it guides law-makers in writing regulations and scholars in advising law-makers.

Nevertheless. A primary development in recent scholarship has been the elevation of theoretical work to a new dignity. In one study, "[w]hile only about fifteen percent of the 1960 articles were viewed as theoretical pieces, more than forty percent of the 1985 articles were seen as theoretical."\textsuperscript{25} The change is not just quantitative. Theory has gained prestige; doctrine has lost it. These changes concern us, for several reasons.

First, we need empirical research more than theory. Theories abound, from the concretely doctrinal to the abstractly philosophical. The best contribution law professors can make to most theories is to test them empirically. Thus are theories refined and made workable.\textsuperscript{26}

Second, we often hear that theory is "prior" to empirics, that we cannot begin empirical work until we formulate a theory that tells us what to ask. This may well be backwards, as Sherlock Holmes himself taught: "It is a capital mistake to theorize before one has data." Good theory about social behavior and about legal institutions seems at least as likely to grow out of a well-informed sense of the world (just as Max Weber's theories emerged from his extensive and intensive engagement in empirical research). This is not surprising. As one investigates the world, theoretical ideas are generated through the attempt to explain one's discoveries. Empirical work produces surprises which must be explained. Even when empirical work is inspired by a theory, its most interesting results are often unrelated to it. Robert Ellickson's study of Shasta County, for instance, moved from its origins in the Coase Theorem to a richly fruitful study

\textsuperscript{24}Ibid at 11-12.


\textsuperscript{26}For example: "The evidence shows that the criticism that public choice lacked empirical support was partly correct, and that the negative implications drawn from public choice theory have not been supported by empirical testing. Rather than abandon the theory, scholars refined their propositions to reflect experimental results and have more explanatory power." Tom Ginsburg, \textit{Ways of Criticizing Public Choice: The Uses of Empiricism and Theory in Legal Scholarship}, 2002 U Illinois L Rev 1139, 1140.
of how informal norms organize social life and shoulder aside legal institutions and ideas.  

Third, really good theory is really hard to do. It requires a level of learning few people can boast and an aptitude for abstract thought that is rare. And in some areas (constitutional law comes to mind), theorists compete with the best thinking of two millennia. Frankly, most of us will not significantly contribute to most theory. On the other hand, many of us can contribute intelligent and useful empirical work that improves theory and doctrine alike.

Fourth, today no one thinks something can be good in theory but bad in practice. But far too much theory is absorbed in the former to the exclusion of the latter. Academics across the ideological spectrum have bemoaned this. Professor Schuck: "The kind of theory deployed in legal scholarship . . . frequently ignores the positive, behavioral side of the relevant disciplines, such as economics, political science, and sociology. Sometimes the theory is drawn from other academic fields that do not seem to take facts very seriously." Professor Gordon "mention[s] some types of theory that one can find in today's law reviews that strike me as, if not always useless, not very useful." (His list is long.) In short, we object not to theory, but to fact-averse theory. Don Herzog is right—"theory had better not be what you get when you leave out the facts."

A last point. Our colleagues sometimes concede the value of empirical work but deny that law professors should do it. Why not leave empirical research to social scientists who are trained to do it? The short answer is the rule of necessity—social scientists will never do enough of the kinds of research lawmakers and their advisors need. Students of sociology, psychology, anthropology, economics, medicine, and many other fields all contribute empirical research which is crucial to legal scholarship. The more they can be induced to do, the better. The more they will collaborate with law professors on empirical projects, the better.

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But social scientists’ research is usually driven by the theoretical concerns and traditional topics of their disciplines, not what lawmakers need to know. Lawyers care about some questions—like how legal institutions operate—that are not solidly within the purview of other disciplines. Legal academics, because of their legal training, can perceive and grasp some critical things about legal institutions better than lay scholars. Finally, lawyers may feel free—almost obliged—to integrate the empirical and the normative in a way many social scientists will not but somebody must.

B. THE LAW-MAKER’S VIEW

[T]he proper organization of a society and the conduct of its affairs were based upon abstract principles . . . . They were to be discovered in nature by human reason, by a technique of inquiry available alike to all men and requiring no extraordinary intelligence in its use.

Michael Oakeshott
Rationalism in Politics

Empirical research would be unnecessary if lawmakers knew all the relevant facts about regulatory issues. Of course they do not. The happy conceit of classic common-law theory was that judicial error is self-correcting. That theory supposed that the stream of cases would reveal misunderstandings of fact and miscalculations about rules. This was always dubious, and today the common-law supposition is so outlandish that it is virtually forgotten.

Cases can force micro-doses of reality on courts, but micro-doses are not enough. Even the micro-doses are processed in ways that distort their reality. For example, Judge Posner testifies: “Judges can rarely resist analogies, a form of ‘evidence’ (if it can be called that) that is generated by ingenuity rather than by knowledge. Analogies are typically . . . inexact and often . . . misleading.” Or as Bacon put it, “The human understanding on account of its own nature readily supposes a greater order and uniformity in things than it finds . . . [I]t devises parallels and correspondences and relations which are not there.”

Law-making institutions usually have some capacity to discover some facts, and sometimes they even use that capacity. Trial courts can gather some sorts of data. But however good they may be with what Horowitz calls “historical facts”

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33Francis Bacon, Novum Organum 56 (Open Court, 1994).
"("the events that have transpired between the parties to a lawsuit"), they are bad at "social facts" ("the recurrent patterns of behavior on which policy must be based"). Limited though trial courts are, appellate courts are worse. And the higher the court, the worse it becomes. A homely illustration: When Professor Schneider clerked, he wrote memoranda on two thousand cert petitions and kept up on fifty argued cases. When he drafted opinions, he had ten days from start to finish. Therefore, even if social facts were available—and they rarely were—he had little time to study them, and his Justice had less.

Administrative agencies have experts on staff, may commission studies, and must solicit comments on proposed rules. But even this apparatus cannot supply the research agencies need. For example, administrative agencies must calculate the economic impact of significant regulations. However, agencies apparently fare badly at collecting and analyzing the information they need for calculating that impact, as any student of HIPAA confidentiality rules will believe.

Legislatures rarely undertake systematic research; rather, they assemble the research of others. Legislators have staffs and legislative committees have staffs, and sometimes they hold lengthy hearings and amass stacks and stacks of data. Even then, however, the data are often swamped by competing kinds of evidence and argument. Consider David Hyman’s dismaying description of how Congress passed a “drive-through delivery” law. Such laws, which discourage managed care organizations from sending mothers home from the hospital soon after delivering a child, were adopted by state legislatures “with breathtaking speed.” In Congress, “Senators from across the political spectrum condemned drive-through deliveries as ‘unconscionable’ (Senators DeWine and Helms), ‘scary’ (Senator Biden), and ‘simply unacceptable’ (Senator Snowe).” What was the evidence for these confident and harsh assertions?

“The case against drive-through deliveries was built with anecdotal reports of infants who died following rapid postpartum discharges.” The anecdotes were confirmed by Senators’ “personal experiences, including discussions with their daughters and daughters-in-law.” This evidence was so inflammatory that “[e]mpirical studies casting light on the issue were ignored.” Who needs studies when the facts are obvious?

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Individual Senators argued that it was “common sense” for an insurance policy to include the mandated coverage (Senator Bradley) because physicians could not detect certain common medical problems within the first twenty-four hours of birth (Senators Bradley, Moseley-Braun, Kennedy, Snowe, Bryan, and Feinstein), and, therefore, there were “clear health problem[s] with women who are discharged too early” (Senator Bradley).

This “common sense” was convincing because it jibed with other self-evident assumptions: “The Congressional Record is replete with condemnation of insurance companies’ greed and MCOs’ willingness to place the lives of women and infants at risk.”

In fact, the anecdotes were misleading and the common sense wrong. “The empirical scholarship on the appropriate postpartum length of stay does not support the conventional wisdom that there are significant perils associated with early discharge.” More specifically,

no study has demonstrated any statistically significant increase in infant or maternal mortality after a rapid postpartum discharge. One recent study of neonatal mortality demonstrated that of the infants who died in the neonatal period, 90% “were symptomatic in the first 8 hours of life, 93% in the first 12 hours, and 99% by 18 hours of life.”

Furthermore, “to prevent one incremental readmission (which will last on average 2.5 days), we would have to provide extended postpartum hospitalization for at least 232 well newborns, and perhaps as many as 866.” This is not only expensive, it is risky, since hospitals are dangerous places (one reason for the movement to shorten hospital stays). And there are better ways to deliver good postpartum care than hospital confinement.

In sum, Congress’s decision to allocate social resources (between $.9 and $1.8 billion annually) to prolonged postpartum hospital stays primarily rested on anecdotes, many of them peddled by medical groups with an economic interest in the legislation. The anecdotes were trumpeted by the always credulous press. They were confirmed by the personal experience and common sense of the American Congress. The systematic evidence carefully developed over many years was obliterated by dubious stories and false assumptions.

So law-makers can be led to empirical research, but they cannot be made to use it. Empirical data compete with less reliable but more alluring evidence. It does not follow, however, that empirical research does not matter. Bryant Garth hopes that empirical research “can help civilize debates by providing a certain common ground, or at least a common language.” He concedes that the way “the evidence is used is not always a pretty sight, but the cumulative effect of battles
fought in terms of evidence is to make the evidence gain importance.” One reason is that “legitimate argument today . . . requires that ‘data’ be examined,” so that “one way to gain an advantage in an argument is to produce data . . . . And when one side produces data, the other side needs data as well.” Law-makers “must take into account or distinguish credible and legitimate evidence.” This is not everything, but it is something.

This process can build a groundwork of conceded data. Professor Garth gives an example: “[N]o one after the RAND report can say with any credibility that case management today is radically changing litigation for better or worse; nor that litigants are particularly upset about any recent changes in judicial behavior; nor that ADR is detested by litigants or lawyers; nor that ADR as practiced dramatically saves litigant time and money.”

C. THE SCHOLAR’S VIEW

God forbid I should insinuate anything derogatory to that profession which is another priesthood, administering the rights of sacred justice. . . . [T]hey are good and useful in the composition; they must be mischievous if they preponderate so as virtually to become the whole. . . . [W]hen men are too much confined to professional and faculty habits and, as it were, inveterate in the recurrent employment of that narrow circle, they are rather disabled than qualified for whatever depends on the knowledge of mankind, on experience in mixed affairs, on a comprehensive, connected view of the various, complicated, external and internal interests which go to the formation of that multifarious thing called a state.

Edmund Burke
Reflections on the Revolution in France

1. Reasons for Resistance

People hunger and thirst after theories to such a degree that whatever puts their own wishes into a compact and intelligible form will obtain from them a degree of allegiance which may be called either touching or terrible.

James Fitzjames Stephen
Liberty, Equality, Fraternity

38Ibid at 115.
If law-makers do not have, cannot get, and will not use information adequate to their needs, it falls to scholars to supply it. Law professors make their contribution by providing information, proposals, and theories to law-makers. The information must be sound and systematic, and proposals and theories not based on such information will be untrustworthy.

In our experience, some law professors acknowledge that policy built on poor evidence is like a house built upon the sand but still doubt that empirical research is worth doing. They do not justify this view systematically, but their implicit thinking appears to endorse what Professor Schneider calls "hyper-rationalism." Hyper-rationalism is

"the substitution of reason for information and analysis. It has two components: first, the belief that reason can reliably be used to infer facts where evidence is unavailable or incomplete, and second, the practice of interpreting facts through a [narrow] set of artificial analytic categories." Hyper-rationalism, in other words, tempts us to believe we can understand how people think and act merely by reasoning and without investigating.⁴

Hyper-rationalism is a dominant tradition in the legal academy, though it is more honored in the breach than the observance. Even after the legal realists—when it was acknowledged that "one had to know something about society to be able to understand law, criticize it, and improve it"—hyper-rationalism could persist because the "something"

was what any intelligent person with a good general education and some common sense knew; or could pick up from the legal texts themselves (viewed as windows on social custom); or, failing these sources of insight, would acquire naturally in a few years of practicing law: a set of basic ethical and political values, some knowledge of institutions, some acquaintance with the working of the economy.⁴⁰


For hyper-rationalists, then, empirical research is not undesirable, just unnecessary. They know enough to analyze doctrine and develop theory. Why consult social science if it largely reports the obvious?

Michael Saks devilishly answers this question. He lists a handful of uncontroversial propositions. Like this: “If children are raised to have positive attitudes toward individual freedom, they are more likely as adults to tolerate the exercise of rights by fellow citizens...” Then he cites research undercutting the uncontroversial propositions, research that itself seems pretty obvious. Like this: “Children, like adults, endorse freedom as an abstract principle but do not carry that endorsement through to concrete situations.” Saks’ lesson? “[T]here are no ‘obvious’ findings. Most outcomes are plausible.”

Law and life abound in the peculiar and the unpredictable. Who would have thought, for example, that people who had just tested positive for HIV experience no “significant increase in levels of distress”? That even smokers greatly overestimate the risks of smoking and that young people over-estimate them even more than adults? That 20% of the population would rather have two weeks of vacation when others have only one than four weeks of vacation when others have eight? The unpredictability of human behavior is a basic fact of law-making that is crucial and crucially under-appreciated, if it is noticed at all.

Hyper-rationalists reject empirical research because it only proves the obvious. Others of our colleagues reject it (implicitly if not always explicitly) because it cannot prove anything. They point triumphantly to the conflicting results research often yields, to poorly executed empirical research, and to the methodological perplexities of even excellent empiricism. They lavish their hypertrophied critical skills on identifying the weakness of any study. Propose an empirical project to a law professor and be barraged with reasons the project must fail. Propose the project to a sociologist and receive imaginative suggestions for making the project work. How much has changed from the time decades ago when David Riesman—the distinguished sociologist and erstwhile law professor—discovered that when he described his social-psychological studies of freedom of speech and libel in England and America, his “law professor
friends, most of them concerned with large questions of public law, thought all this was interesting but could not respond to it in a collegial way; but [Paul] Lazarsfeld, Harold Lasswell, Robert and Helen Lynd, Erich Fromm, and Marie Jahoda did respond to this work...”⁴⁶

So what of the “reliability” criticism of empirical research? First, it is overstated. Careful and thorough research often establishes propositions with as much certainty as is vouchsafed in human affairs. (Recall, for example, Professor Garth’s description of the effect of the RAND study of civil litigation.)⁴⁷

Or consider one aspect of the “reliability” criticism—the claim that empirical research is unreliable because researchers must be parti pris. The concern is legitimate, especially when “advocacy” competes with “scholarship” as the law professor’s vocation. A pre-eminent family law empiricist writes that lack of confidence in the unbiased nature of the principal investigators involved in the smaller scale studies presents grave difficulties. Since . . . panel study projects are so large and time consuming . . . many influential studies come from those with personal stakes in the outcome. In fact most of the research on same-sex relationships, for example, comes from people who are in same-sex relationships. Some of the work on the effects of no-fault divorce came from proponents of the movement or those who took advantage of the new laws themselves, and much of the smaller scale research on the effects of third party day care or the effect of father custody seems to be of the same ilk.⁴⁸

Nevertheless, empiricists can reach conclusions that confound their preferences. Professor Chambers did not want to find that jail worked.⁴⁹ Michael Wald was a principal proponent of leaving abused children in their homes but found little consolation in his research.⁵⁰ Robert Mnookin’s study of child custody clouded his predictions about negotiating in the shadow of the law.⁵¹

⁴⁷Supra note 37.
And there remains the standard answer to the reliability criticism—Al Smith's answer to criticism of democracy: the only cure for it is more of it. In this way, social science is like science—research must stand the test of replication.\(^5\)

The mystery about the reliability criticism is that it has no alternative to empirical research that is not plainly and grossly inferior. As Dean Teitelbaum wrote,

Whether such research is done or not, legal scholars of every persuasion will continue to make assertions about the world, about the place of law within it, and about the beliefs and conduct of legal agencies or of the entire legal culture. These statements are uttered confidently because they reflect no methodology which would remind us of their limits.\(^5\)

2. The View from the Tower

_The special information that lawyers derive from their studies ensures them a separate rank in society, and they constitute a sort of privileged body in the scale of intellect. This notion of their superiority perpetually recurs to them in the practice of their profession: they are the masters of a science which is necessary, but which is not very generally known; they serve as arbiters between the citizens; and the habit of directing to their purpose the blind passions of parties in litigation inspires them with a certain contempt for the judgment of the multitude._

Alexis de Tocqueville

_Democracy in America_

When scholars lack the research they need for making policy, they are thrown back on their own scanty resources, forced to draw conclusions about the world from their observations of it. How reliable are those observations? We answer from two perspectives—the sociological and the psychological.

\(^{52}\)As Professor Brinig notes, for example, the once flourishing "shadow of the law" theory in family law has been eroded not just by Professor Mnookin, but by a number of other studies. Brinig at 1100.

a. The Sociological Perspective

Of the power of favor or prejudice in any sordid or vulgar or evil sense, I have found no trace, not even the faintest . . . But every day there is borne in on me a new conviction of the inescapable relation between the truth without us and the truth within. The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place.

Benjamin N. Cardozo

The Nature of the Judicial Process

When law professors look out on the world, they see little, and that unrepresentative. Law professors, especially the elite law professors who publish disproportionately and enjoy disproportionate influence, generally come from and inhabit an atypical iota of society quite isolated from their countrymen. They nestle in the cocoon of university campuses, and in a prosperous pocket of those campuses. They attended elite law schools, clerked for elite judges, took elite law jobs, receive elite salaries, and flock with other elites. Not only is theirs the world of elites, their professional experience outside the academy is today small. Elite law professors have often clerked for a judge or two and worked a few years in a large law firm, but the “young teacher is usually not deeply informed about specific aspects of the legislative or regulatory process.” And as law schools re-orient themselves from the profession to the academy, it becomes ever harder for young teachers to broaden their professional experience.

Law professors not only occupy a small and odd niche; the culture of that niche is astonishingly uniform. Even demographically. Professor Schneider recently examined the website biographies of colleagues who joined his school’s faculty in the last couple of decades. Half of those with a law degree received it from Yale, one third from Harvard, three from Columbia, one from Virginia, and one from Yeshiva. (The last of these also had a Harvard Ph.D.) Roughly half are Jewish; apparently one is Catholic; few are religious. They seem largely to come from the class of which they are now members—the professional upper-middle class. The faculty boasts a wonderful range of interdisciplinary expertise, but otherwise it is hard to imagine a more homogeneous group in such a heterogeneous society.

Similar in situation, elite law professors are similar in thought. The range of political views among them is so straitened that the greater part of American

political opinion is virtually excluded (and little welcome). On many social issues, opinion is so standard that law professors repeatedly assume strangers agree with them, even though their views are markedly unrepresentative.\(^5\)

No one in a large and complex society can understand much of it from personal observation. But most law professors see so particularly tiny a tidbit of the world that they can have little sense of how most of it works. Worse, little in their lives makes it likely that professors will recognize their ignorance. Not having seen the rest of the world, they assume it resembles their own. Only empirical research can correct that error.

b. The Psychological Perspective

_The human understanding, once it has adopted opinions, either because they were already accepted and believed, or because it likes them, draws everything else to support and agree with them. And though it may meet a greater number and weight of contrary instances, it will, with great and harmful prejudice, ignore or condemn or exclude them by introducing some distinction, in order that the authority of those earlier assumptions may remain intact and unharmed._

Francis Bacon

*Novum Organum*

Suppose away the sociological problem and another remains. Human psychology distorts what human beings see. "The human adult . . . makes egregious judgments and ill-considered decisions, harming himself and others through the misapplication of informal, but usually helpful strategies and through

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\(^5\)Samuel Issacharoff observes that "among Columbia[ Law School]’s sixty-five or so faculty members, there are but a handful of Republicans . . . . Similarly, I know few of my colleagues to be religiously devout despite the clear prevalence of such views in the population . . . ." *Law and Misdirection in the Debate over Affirmative Action*, 2002 U Chicago Legal Forum 11, 17. More systematically, one study of law professors found that a "large majority of respondents (75.4%) characterized themselves as 'moderately' or 'strongly' liberal or left. Another 14.6% chose the 'middle-of-the-road' designation. Only 10.0% of the population characterized themselves as conservative to some degree . . . ." Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 Chicago-Kent L Rev 765, 780 n54. Another investigation reports that "81% of law faculty members in the study who make political contributions contribute wholly or predominantly to Democrats, while 15% contribute wholly or predominantly to Republicans." John O. McGinnis et al, *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 Georgetown L J 1167, 1170 (2005). At Professor Schneider's institution, then, twelve people contributed exclusively to the Democratic Party and one to the Republicans. Ibid at 1205. Ah, diversity.
the inability or unwillingness to apply more formal inferential principles. That is, people rely on "knowledge structures" which allow the individual to define and interpret the data of physical and social life and "judgmental heuristics" which reduce complex inferential tasks to simple judgmental operations. These knowledge structures and heuristics work handily when they work routinely. But they betray us when we forsake the familiar. Francis Bacon saw this keenly:

The human understanding is most moved by things that strike and enter the mind together and suddenly, and so fill and inflate the imagination; and it then imagines and supposes, without knowing how, that everything else behaves in the same way as those few things with which it has become engaged. The understanding is slow and awkward at ranging over the whole field of remote and heterogeneous instances, by which axioms are tested as if in the fire, unless it is constrained to such action by strict rules and a powerful authority.

Today, the ways human minds warp what they perceive have been catalogued at disheartening length. For instance:

Characterization of samples is distorted by the differential "availability" in experience and memory of various events. Characterization of the population is compromised by ignorance of statistical considerations, chiefly those of sample size and sample bias. Covariation assessment is overly influenced by prior theories of expected covariation and is insufficiently influenced by actual data configurations. Causal analysis suffers from a similar overutilization of prior theories and from overreliance on the sheer conspicuousness of potential causal candidates. People have little knowledge of the regression considerations underlying prediction tasks and substitute simple similarity or representativeness judgments. Finally, people have little appreciation of strategies for disconfirmation of theories and often persist in adhering to a theory when the number of exceptions to the theory exceeds the number of confirmations.

An example or two may help the reader digest that wholesome but unappetizing quotation. Many distortions in thinking lead people to mis-estimate how common

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56Richard Nisbett & Lee Ross, Human Inference: Strategies and Shortcomings of Social Judgment xii (Prentice-Hall, 1980). This is an excellent (although dated) introduction to the problem.
57Ibid at 6–7.
58Francis Bacon, Novum Organum 58 (Open Court, 1994).
59Nisbett & Ross at xii.
events are. For instance, the "availability heuristic" induces us to over-estimate the frequency of vivid things. So people wrongly suppose flying is more dangerous than driving (per mile traveled) because airplane accidents make a strong and lasting impression.

Another example. People see patterns whether they are there or not, and having seen patterns, cling to them despite tsunamis of evidence. "The lay scientist seems to search only until a plausible antecedent is discovered that can be linked to the outcome through some theory in the repertoire. Given the richness of diversity of that repertoire, such a search generally will be concluded quickly and easily." So coaches, sportscasters, and fans unite in believing in the hot hand in basketball, even though statistical analysis proves it illusory.

We have dipped our oar into the ocean of evidence about the ways and reasons people misunderstand the world. Their misunderstanding is compounded because few people know how gruesomely normal it is to reason badly. On the contrary: "Philosophers have long noted that people are often much too confident of their 'knowledge' and the accuracy of their judgments. Empirical research has provided evidence of this overconfidence and of the alarming extent to which confidence may often be completely unrelated to accuracy. . . ." Often wrong but never in doubt describes most of us most of the time. Oblivious to our ignorance, we cannot ameliorate it. And do education and intelligence make academics different? "Ninety-four percent of college professors believe they are more productive than their average colleague."

In short, the problem is not just that law-makers and scholars need empirical information they do not have. It is also that without reliable information, law-makers and scholars—like the rest of us—speculate in miserably unreliable ways, do not realize that they are doing so, and are perversely confident in error. Unaided by empirical research, law-makers and scholars are not just ill-informed; they are wrong.

We have now stated the core of the case for empirical research. The case was always strong. It grows daily stronger. There are no good arguments against it. Yet empirical scholarship remains too little done. We think that most of our colleagues acknowledge our points but have not recognized their power. To lend verisimilitude an otherwise bald and unconvincing narrative, we now offer two

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60Ibid at 19–20.
kinds of examples—first, examples of how empirical research can enrich a field; second, examples of how the absence of empirical research can impoverish one.

III. OPPORTUNITIES

If I were asked to condense the reasons behind these failures into a single sentence, I would say that the progenitors of such plans regarded themselves as far smarter and farseeing than they really were and, at the same time, regarded their subjects as far more stupid and incompetent than they really were.

James C. Scott
Seeing Like a State

To show how convincing the case for empirical research is, to show how empirical issues pervade a single area of law, to show how empirical research can transform a field, we turn to family law. There is hardly an aspect of the field whose intelligent treatment does not depend on empirical research, empirical research which has not been supplied. In recent years, family law has changed crucially, yet those changes rest on fragile empirical foundations. And this despite a history of family law reforms that have monotonously failed to reach, and may even have detracted from, their goals.

A. THE CONSTITUTION OF THE FAMILY

Tho’ marriage makes man and wife one flesh, it leaves ‘em still two fools.

William Congreve
The Double Dealer

Who, since Jonathan Swift, depreciates the welfare of the young? Who is not a congregant in the religion of “the family”? Democrats and Republicans, feminists and patriarchalists (if any such there be), unite in that one true faith. But become programmatic, and the faith splinters into sects. What is a family; what should it be? Orthodoxy answers: A man and a woman marry and (probably) have children. Behold, a family. Law-makers often take the standard case as the only case, descriptively and normatively. Departures seem uncommon descriptively and therefore deviant normatively. This raises many questions. Most basically, is the standard case as general as we presume? The answer to this question is found in the work of demographers and sociologists.
The standard family arises from marriage. In 1995, more than three-fourths of white (and Asian) families were headed by married couples. But "standard" is not "universal." Substantially fewer Hispanic households (68%), and less than half of African-American households (46%), were headed by married couples. Female-headed households made up 57% of all African-American households and 34% of all Hispanic households. Moreover, families based on a married couple are becoming fewer. Among whites, the proportion declined from 73% in 1970 to 63% in 1994. The more precipitous declines among Hispanics and African-Americans were from 72% to 58% and from 64% to 43% respectively. In short, the assumption that families are constituted by married couples is only somewhat and variously true and less true than before.

In the standard family, children live with both parents. Indeed, in 1970 only 12% of all families with children were headed by a single parent. In 1994, however, more than one-quarter of American children (28%) lived in single-parent households, almost always (86%) with their mothers.64 Sixty-eight percent of American children live with two parents, but only about 51% live with both biological parents. The "standard" arrangement for children accounted for barely more than half of all such arrangements in 1991.65

These data—which are reasonably well known to family-law specialists—suggest any number of topics for study. Why the diminution in the standard case? Demographic data point to some reasons. For example, fewer people marry. The percentage of married adults in the population was 72% in 1970; it was less than 61% in 1996. Never-married Hispanics increased from 19% to 30%, never-married African-Americans from 21% to almost 40%. People also marry later. The median age of women's first marriage was 20.6 years in 1970 and 24.8 years in 1995. The median age for men increased from 22.5 years to 27.1 years.

A declining cultural commitment to marriage as the sole occasion for intimacy is part of the story, but it itself opens up researchable questions. Some of them can be identified a priori, like the hypothesis that that weakening reflects a commitment to an ideology of individualism at the expense of institutional or even small group concerns. Other hypotheses, however, call for empirical inquiry. Is the increase in age at first marriage based on a diminished importance of marriage as an avenue for intimacy and, if so, why do so many people who begin by cohabiting ultimately wed? Does age at marriage reflect not ideology but employment opportunities that delay marriage for women, as for men?

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A decline in marriage rates and a rise in marriage ages need not imply an explosion in nonmarital births. Nonetheless, nonmarital births have soared, especially among young and African-American mothers. Between 1960 and 1989, the number of births to unmarried girls under nineteen went from 87,000 to 337,000—almost quadrupled. It’s remarkable: In 1960, about 15% of all births to teenagers were out of wedlock. In 1989, two-thirds (67%) of all teenage mothers were unmarried. In short, unmarried childbearing became the typical case for teenage parents during the 1980s.

All these questions go directly to some of the most basic issues in family law. And without well-founded evidence about those questions, family law must rest on unsound foundations. But such evidence remains elusive.

B. THE EXPERIMENT IN DIVORCE REFORM

Now divorce implies a weakening of matrimonial regulation. Where it exists, and especially where law and custom permit its excessive practice, marriage is nothing but a weakened simulacrum of itself; it is an inferior form of marriage. It cannot produce its useful effects to the same degree. Its restraint upon desire is weakened; since it is more easily disturbed and superceded, it controls passion less and passion tends to rebel. It consents less readily to its assigned limit.

Emile Durkheim
_Suicide_

_The Triumph of No-Fault Divorce._ The shift away from the two-spouse family is associated with the transformation of American divorce. Until mid-century, the connection between family stability and social welfare seemed obvious and seemed to require restricting the grounds for divorce. No longer. All states now allow some kind of no-fault divorce. Typically, one spouse need only assert that the marital relationship is irretrievably ended.

The divorce revolution is a natural experiment in domestic relations, an experiment done not in a laboratory with carefully developed and sharply focused hypotheses, but a diverse series of experiments affecting millions of people over several decades. The experiment rested on a series of premises. Underlying them

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67Mark F. Testa, _Introduction_, in Margaret K. Rosenheim & Mark F. Testa, eds, _Early Parenthood and Coming of Age in the 1990s_ (Rutgers U Press, 1992).


69E.g., Uniform Marriage and Divorce Act, sec 305(b); Desrochers v. Desrochers, 347 A2d 150 (NH 1975); McCoy v. McCoy, 225 SE2d 682 (GA 1976).
was, as Professor Schneider has argued, a shift in public discourse—one that de-emphasized moral discourse in favor of instrumental claims, especially the psychological goal of individual satisfaction.\(^7^0\) Divorce, it was said, liberated spouses from dead marriages. From a family therapeutic point of view, divorce was not "no fault" but "equal fault." Law and therapy both preached that divorce reform promised enhanced happiness for the whole family.\(^7^1\) Against the earlier belief that divorce traumatizes children, reformers claimed that divorce spared children the trauma of parental conflict.\(^7^2\) "Creative divorce" might even make children more sensitive and tolerant.\(^7^3\)

What of this experiment that touches so many lives? Some effects are direct and obvious. Changes in divorce policy and practice are associated with a heightened divorce rate—which now approaches 50% for those who married in the 1970s—with the resulting substitution (at least pro tem) of two families headed by a single person for one "standard" family.

The questions go well beyond demographic effects. Changing divorce changed marriage. These developments have helped bring us to ALI proposals that yearn for the death of marriage as we know it.\(^7^4\) These developments are not due to no fault-divorce alone. They explain why people can divorce, but not why nearly half those who marry do so. Perhaps, as reformers assumed, the divorce rate merely reflects a long-standing level of failed marriages that, earlier, caused sustained marital unhappiness. Perhaps no-fault divorce only supplied an honest basis for recognizing dissolutions once possible only on perjurious grounds.\(^7^5\) Or perhaps divorce reform itself contributed to marital breakdown by elevating marital satisfaction over marital constancy. Perhaps the frequency of divorce encouraged people to think marriage a poor place for intimacy. All these are plausible suggestions with clashing implications for public policy. None has a sound basis beyond speculation.

Relatedly, is the experience of divorce transmitted from generation to generation? Reasoning without data, one could presume: (1) that the children of

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\(^7^1\) Barbara Dafoe Whitehead, *The Divorce Culture* 53–65 (Alfred Knopf, 1997).

\(^7^2\) For example, Susan Gettleman & Janet Markovitz, *The Courage to Divorce* 86–87 (Simon & Schuster, 1974), think divorce "can liberate children."

\(^7^3\) Mal Krantzler, *Creative Divorce: A New Opportunity for Growth* 211 (Lippincott, 1974).


divorce would especially appreciate the reasons to stay married; (2) that such children would find divorce unremarkable and acceptable; or (3) that divorce causes psychological or economic sequelae for children that make their marriages frail. Yet the association between parental divorce and divorce by their children has only begun to be analyzed. There is some evidence of an intergenerational effect, especially when wives or both spouses are the children of divorce. But far too little is known to assess these key sequelae of the divorce revolution.

Little as we know about how modifying marriage affects divorce, we know less about what promotes marriage. Little research has been done, and what has been done—as is true of much research in family law—relies on small samples of convenient subjects. A related question: Has divorce reform delivered its promised benefits? Are unhappy spouses entering happier relationships, or simply other dismal ones? Are husbands and wives affected equally? Wives are likelier to seek divorce than husbands. Are husbands less willing to divorce and therefore less likely to be made happy by divorce? Do the deleterious effects of divorce on wives, especially long-married women who did not accumulate substantial wealth, point in the other direction?

Enthusiasts for creative divorce thought divorce protected children from their parents’ destructive conflicts. Perhaps. However, those enthusiasts also wanted parents to collaborate after the divorce. So what is the best way to protect children of fighting parents? Has any reduction in conflict been offset by other consequences of divorce? Recent research suggests that children of divorce are badly distressed initially and suffer some long term problems, including difficulties with school and with adult relationships. Other research finds

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77For example, one of the few studies of marital success is Judith S. Wallerstein, The Good Marriage: How and Why Love Lasts (Houghton Mifflin, 1995), a qualitative study based on interviews of fifty couples.

78As of 1990, wives filed for six of ten divorces. Paula Mergenhagen DeWitt, Breaking Up Is Hard To Do, American Demographics, October 1992, at 53.


80Judith Wallerstein & Sandra Blakeslee, Second Chances: Men, Women, and Children a Decade After Divorce (Ticknor & Fields, 1989).
greater evidence of long-term adaptation and great variability in responses. Most of the research suffers from small and sometimes dubious samples. In short, about the psychological effects of divorce on children, as about so much else, we know little but legislate freely.

And money. What are the economic consequences of divorce? We think we know some things: that families have paltry resources after divorce and that mothers are worse off than fathers. But what are the long-term effects for children? We do not know, even though the law of child-support has recently been an active subject for reform.

There is, ultimately, much to understand about the divorce revolution which cannot be supplied by reasoning without data. The need is, if anything, enhanced by a nascent counter-revolution which includes proposals for covenant marriage, for restricting divorce, and for letting judges consider a divorce’s effect on children in deciding whether to grant matrimonial relief. The counter-revolution raises as many unanswered questions as the movement to which it responds. Should we anticipate another natural experiment? Will we do the research to prepare for and evaluate it?

The Revolution in Spousal Support. The divorce revolution’s emphasis on individual satisfaction and its withdrawal from moral discourse have combined with other policies to influence not only the grounds but the concomitants of divorce. Until several decades ago, a married woman had fairly clear expectations about a divorce. If she had been married for some time, if she had committed no marital wrong, and if her husband could afford it, she was entitled to enough alimony to live at the marriage’s level. She was also entitled to enough child support to keep her minor children at that level.

No longer. Divorce is now a liberation. And if a liberation, should not the spouses’ personal and economic links be severed? The erosion of fault grounds, coupled with the impetus for gender equity, further implied that the parties should be equal and independent after divorce and that the divorce should substantially

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82 On covenant marriage, see John Witte, Jr., & Eliza Ellison, Covenant Marriage in Comparative Perspective (Eerdmans, 2005).
83 Elizabeth S. Scott, Rational Decision-Making About Marriage and Divorce, 76 Virginia L Rev 9 (1990); Elizabeth S. Scott, Rehabilitating Liberalism in Modern Divorce Law, 1994 Utah L Rev 687, 731–34. Professor Scott recruits Mill’s “harm principle” to oblige parents and spouses to “rescue” children from injuries following divorce.
84 However, women at fault received no alimony, and alimony was not routine. William J. Goode, After Divorce 217 (Free Press, 1956); Marsha Garrison, Good Intentions Gone Awry: The Impact of New York’s Equitable Distribution Law Upon Divorce Outcomes, 57 Brooklyn L Rev 621, 660 (1991).
These changes had theoretical and practical implications for economic orders at divorce. Alimony as a life-long “pension” for the wronged spouse affronted the modern antipathy to fault and the goal of terminating the relationship. And the movement of women into the workforce suggested that divorcées could, and should, support themselves. So spousal support became an evil to be ordered only if the wife could not support herself decently. The Uniform Marriage and Divorce Act, which is law in some states and policy in others, permits maintenance *only* if the divorced spouse cannot support herself through “appropriate” employment or is the custodian of a young child. Several states explicitly limit the duration of alimony. And some commentators want alimony only to compensate for the residual loss of earning capacity arising from economically rational spousal decisions, and not for other choices, like culturally valued but economically irrational choices (including house-keeping but not child care). The UMDA, and most states, also extend the de-emphasis of fault for marital dissolution to alimony, making nonfinancial misconduct irrelevant to financial awards.

In the law of marital property, similar reasoning has led to attempts to distribute wealth on divorce with an eye to avoiding maintenance. Drawing on a social re-evaluation of women’s domestic work, legislatures and courts attribute assets acquired during marriage to the labor of both spouses, labor which is, in some views, presumptively of equal value. In short, “equitable distribution” of property supplants alimony. Many empirical assumptions and questions arise from this experiment in redefining the finances of divorce. The experiment relies on accumulated wealth to give both spouses an initial financial foundation, but do families have such resources? If not—and they often don’t—is the hostility to alimony imprudent and unfair?

Some of the antipathy to permanent alimony assumes women now can command salaries comparable to men’s, although the contrary is also asserted. It is widely assumed that women whose children are in school can and should...
support themselves, preferably by working full-time. With this go less-often articulated assumptions. One is that the absence of alimony moves women into the paid economy. Perhaps. But is their employment commensurate economically and socially with their marital standard of living? If not, how do such diminutions affect spouses and children? More generally, confining alimony to rare and exigent cases may discourage wives from committing themselves to their household and their children and encourage devotion to work and career. Rightly, perhaps. But can alimony laws affect behavior in matters so instinct with cultural values? If so, what other consequences does the new regime have? Would children be affected? Would both parents be deterred from pursuing their careers? What would that do to the family’s income and thus to opportunities for family members (including children)?

When parents will not or can not assume responsibility for child care, it must be purchased from others, donated by a relative, or foregone. Readiness to accept these alternatives presumably reflects a belief that direct parental care for children is relatively unimportant, even if generally desirable. This assumption requires examination, examination that distinguishes direct child care, relative care, and latchkey arrangements.

The Revolution in Custodial Principles. The “best interest of the child” remains the lodestar for custody decisions. To apply this truly vague standard consistently and efficiently, courts have created second-level rules. Pre-eminent among them has been the maternal preference, especially for children of “tender years.” It embodied an assumption that mothers would, ceteris paribus, take better care of their children than would fathers. That assumption was sometimes expressed in “essentialist” terms. But recently, the maternal preference has been assailed on all sides. For some feminists, it reflects traditional roles and compromises women’s capacity to work full time. For some men, it overlooks fathers’ increased readiness to be engaged parents. From both perspectives, and

92 Typically, alimony will be provided only for mothers whose children are below school age. Child-support practice takes the same direction, imputing income based on full-time employment unless children are very young.
93 There is some evidence in this direction. In 1970, 41% of American women were in the labor force; in 1990, their participation rate increased to 58%.
94 See Ira Mark Ellman, The Theory of Alimony, 77 California L Rev 1, 63 (1989). See also Herma Hill Kay, Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath, 56 U Cincinnati L Rev 1, 79–80 (1987), which suggests that “we should [not] encourage future couples entering marriage to make choices that will be economically disabling for women, thereby perpetuating their traditional dependence upon men and contributing to their inequality with men at divorce.”
95 See, e.g., Margaret F. Brinig, Comment on Jana Singer’s Alimony and Efficiency, 82 Georgetown L J 2461 (1994), for a survey of some of the disadvantages associated with the absence of parents in the home.
96 E.g., Freeland v. Freeland, 159 P 698, 699 (WA 1916).
less ideologically too, one appealing solution was the “primary caretaker” preference.  

It preserves traditional assumptions that continuity in care is desirable and that experienced parents are better parents. But what new consequences does it have? If, as is usual, the primary caretaker is the mother who, under current alimony rules, is expected to work, she will have custody even where the father has remarried and his wife would care for his child at home. Does this matter?

And does it matter that the primary-caretaker preference assumes that one parent will have custody? That assumption was challenged by a sudden and dramatic movement that shared roots and momentum with the no-fault revolution. Its proponents said that shared legal responsibility keeps both parents involved with their children. Joint legal custody (which authorizes both parents to participate in important decisions) became common, and joint physical custody became less uncommon. Quite soon, enthusiasm for joint-custody subsided in some states, but the actual effects of custody arrangements remains little understood. Is it dangerous to divide the child’s loyalties? Better to divide children’s loyalties than let them lose touch with a parent? Neither supposition is silly, neither compelling. It would be nice to know.

And what is the reality of “joint custody”? Do legislative and judicial preferences for joint custody affect judicial decisions? How does joint custody work in real life? Do fathers with joint legal custody actually maintain closer contact with their children and pay child support more faithfully than fathers without it? How often does the parent without physical custody actually participate in decisions? How often do joint custodians disagree about decisions, and what happens when they do? Are joint decisions better decisions? How stable and happy are joint physical custody arrangements? How does changing houses periodically affect a child’s happiness, peer relationships, school work, and prospects?

Other custody standards have recently changed. Many courts once considered non-marital sexual relationships strong evidence of unfitness, especially when the non-marital partner lived in the children’s home, and placement with a parent of atypical sexual inclinations was disfavored. Current attitudes are more mixed, and many courts treat heterosexual and homosexual

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99Eleanor E. Maccoby & Robert H. Mnookin, Dividing the Child: Social and Legal Dilemmas of Custody 107 (Harvard U Press, 1992), found that joint legal custody had become the norm, awarded in three-quarters of all cases studied. Joint custody was awarded in 20% of the cases. 
conduct alike in denying custody only where the child is evidently harmed. Similarly, the principle of psychological parenthood has eased recognition of custody and visitation claims of people besides natural parents—stepparents, same-sex partners, and especially grandparents. These last had no common-law right to visitation over the parent’s objection, but every state now permits grandparents to petition for visitation in some circumstances.

The custodial revolution nearly matches the divorce revolution in its sweep, and it raises nearly as many empirical questions. Since the child’s best interests remain the touchstone, insight into those interests remains crucial. But our information is partial and problematic. So is our information about the second-level rules. Is it pernicious to offer the law’s coercive authority to meddling grandparents and in-laws? Do the rule of gender neutrality in custody awards and the primary-caretaker presumption cancel each other out, as some research seems to suggest? More generally, are the assumptions undergirding changes in custodial principles well founded? Do current standards effectively guide courts, lawyers, and parents? Is the child’s well-being truly unaffected if the former primary caretaker must work after divorce, as a strong version of that presumption supposes? Are financial resources irrelevant to the choice of custodian? We know so little that our answers to these empirical questions can only be guesses. A poor basis, alas, for law that affects so many so much.

C. MORE

To try to regulate the internal affairs of a family, the relations of love or friendship, or many other things of the same sort, by law or by the coercion of public opinion, is like trying to pull an eyelash out of a man’s eye with a pair of tongs. They may put out the eye, but they will never get hold of the eyelash.

James Fitzjames Stephen

*Liberty, Equality, Fraternity*

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104 This is one way to understand Eleanor E. Maccoby & Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (Harvard U Press, 1992). Maccoby & Mnookin are surprised by the conflict they find between a strong legal preference for gender neutrality and the dominance of maternal custody. One way to explain this, however, is by the primary-caretaker preference, which ordinarily means mothers win. Lee E. Teitelbaum, *Divorce, Custody, Gender, and the Limits of Law: On Dividing the Child*, 92 Michigan L Rev 1808, 1832–38 (1994).
We have only begun to catalog the empirical questions that must be answered before wise family law can be written. We could go on. Take the fabled movement from status to contract. There has been much writing about marital and quasi-marital contracts, but little research. What expectations do cohabitants have, when do those expectations begin to look contractual, what terms do contracts contain, what were people’s relationships when they contracted, and what happens when cohabitants part? Are contracts formal or informal, explicit or implicit? How often are suits on such contracts brought? How are they decided?

And spousal contracts? Academics dream of a world in which contracts structure marriages. The Uniform Premarital Agreement Act allows “[p]arties to a premarital agreement . . . [to] contract with respect to . . . any . . . matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.” Yet how do people choose to enter into marital contracts, how do they negotiate them, what do the contracts say, how well do spouses understand them, how do they work, how are they enforced, and do spouses like them? We know not.

Contract law has also entered the realm of reproduction; surrogate-mother contracts are Exhibit 1. Critics believe they too often cause agonizing disputes. Do they? These contracts are several decades old, but this and other basic questions are rarely studied.

We know dreadfully little about how family law institutions behave. The interaction between divorce lawyers and their clients is little understood, despite several studies that dramatize the value of such research. What about the lawyers who handle family law problems? Are they specialists? What do they do well? Badly? What do they charge? How do they treat each other? Local psychologists? Family court judges? How competent are they? These are questions of the first importance, but apparently not of enough importance to have generated a full-fledged literature.

What of judges who hear family law cases? And the other actors in the family law story? Robert Levy has impressively shown how influential—and perverse—a role social welfare agencies can play in custody disputes. That study cries out for replication. It is now common to appoint guardians ad litem in custody disputes. That practice has been prolixly justified in abstract principle. But of its consequences we know only one thing with confidence—it adds to the

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expense of the proceedings. Does it improve, or even affect, decisions? Who is appointed? Competent but busy lawyers? Incompetent but idle hacks? What do guardians do? Do they present arguments no one else would have presented? How—if at all—do they affect the parties’ relations? How much influence do they have over the parties? Over judges? The questions are endless, crucial, and answerable. But unasked.

In sum, every comer of family law is drenched with empirical questions on whose answers good policy depends. Those questions are massively ignored. When, rarely, they have been carefully addressed, the usefulness of the inquiry has been resoundingly demonstrated. Yet partly because empirical research has been scanted, family law reforms have almost routinely disappointed the hopes so confidently expressed for them. It may be true that “[t]he jurisprudence of family law is increasingly influenced by social science research.” But Margaret Brinig can still write that “[m]ost family law reform... has been singularly uninformed by empirical studies...” And “[s]ince marriage and divorce reform in various guises is before virtually every state legislature, important decisions that will affect many, if not most Americans, will be made based on outdated (at best) statistical evidence.”

Professor Brinig provides a troubling example of such a decision. A study by Sherman seemed to show that the mandatory arrest of domestic abusers resulted in a lower rate of recidivism than did more traditional approaches to domestic abuse complaints made to law enforcement officers. Based on Sherman’s

106Family law provides our illustrations, but even casual research uncovers field after field where quite basic facts are undetermined. Examples? (1) “[W]e have no idea how much, if at all, criminal justice administration affects the crime problem.” Robert Weisberg, Criminal Law, Criminology, and the Small World of Legal Scholars, 63 Colorado L Rev 521, 524-25 (1992). (2) “[T]he scholarship produced by the plea bargaining debate has generally tracked the intellectual agenda of the doctrinal debates, largely indifferent to empirical research and the administrative culture of prosecutors, defense attorneys, and judges that may well be the major determinants of guilty plea rates.” Ibid at 531. (3) “[W]e have relatively little reliable data over time on the civil justice system on such matters as the costs of civil justice, alternative dispute resolution, or even relative increases or decreases in particular kinds of cases in the state and federal courts.” Bryant G. Garth, Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research, 49 Alabama L Rev 103,116 (1997). (4) “[O]ur society has been unable to produce research that is even minimally adequate to answer our most basic questions about the behavior of the civil justice system.” Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?, 140 U Pennsylvania L Rev 1147, 1288 (1992).

110This trend is evidenced in court decisions, interdisciplinary conferences, multidisciplinary professional organizations, and in major law reform projects...” Sarah H. Ramsey & Robert F. Kelly, Social Science Knowledge in Family Law Cases: Judicial Gate-Keeping in the Daubert Era, 59 U Miami L Rev 1, 3 (2004).


113Ibid at 1091.
study, the single most frequent reform these days is mandatory arrest. [But when the study was replicated,] . . . the results were quite different and in some cases completely opposite. . . . The follow-up studies have been largely ignored, apparently, by state legislatures working on domestic violence laws.\textsuperscript{114}

That problem was caused partly by reliance on out-of-date but ideologically appealing research. In a series of devastating articles, Marsha Garrison has shown how the virtual absence of empirical research has promoted the adoption and failure of several consequential family law reforms. For example, recent years have seen unusual agreement about improving child support law by writing guidelines. Yet “[w]hile Congress adopted the numerical guidelines requirement with the aim of significantly increasing award levels and decreasing award variability, available evidence suggests that these goals have not been met. Awards calculated under existing guidelines do not appear to differ dramatically from those produced under earlier discretionary standards.”\textsuperscript{115}

Similarly, few issues in family law have been more discussed than the division of marital wealth, and in few areas has there been as much change. To what end?

California replaced its equitable property distribution regime with a rule requiring equal division of marital property on the assumption that equitable distribution typically produced relatively equal awards for husband and wife. The change was expected to curb case variation without altering overall outcomes. But researchers later determined that wives had typically received more than half of the marital property under the old law, and they also discovered that deferred distribution of the marital home in cases involving minor children declined dramatically under the new one.\textsuperscript{116}

Few areas of law affect human beings as often, as directly, as momentously as family law. Few areas have been so much debated and reformed. Debate and reform have been animated by deep and angry convictions about how people

\textsuperscript{114}Ibid at 1095–96.
should treat each other and the law should treat people. But family law has been
restructured with so little information about the way people live and think and
about how the law works that we have little reason to suppose that the reforms
can accomplish their purpose. This cannot be right.

IV. FAILURES

As to Holmes, I observed that he sat frequently for half an hour on end,
with knitted brows and an abstracted air, but he swept the matter away
with a wave of his hand when I mentioned it. "Data! data! data!" he
cried impatiently. "I can't make bricks without clay."

Arthur Conan Doyle
The Adventure of the Copper Beeches

We have just illustrated the need for empirical research by showing how
many crucial questions about family law can only be answered with empirical
research which has hardly been begun. We now enterprise another kind of
illustration of the need for empirical research. Here we take up the inquiry that
we began at the end of the last section. That is, we examine research that has been
done for evidence about the law's effectiveness.

To be blunt: The law fails to achieve its intended effects with a regularity
that reproves law-maker and scholar alike. We are not talking about the
imperfections inevitable in all human institutions. We are talking about
widespread and substantial failures (of which we will give examples), failures of
which the law should be aware and which it should try to repair.

Much legal failure is unavoidable. Law fails because law-making is
unspeakably difficult. Some failures cannot be prevented; much law is an
experiment, as all life is an experiment. But some failures can be prevented or
cured if law-makers can and do consult careful and thorough empirical research.
In what follows we adduce three examples of this kind of legal failure. First, we
describe evidence that law plays a markedly smaller role in the lives of citizens
than law-makers anticipate and scholars believe. Second, we analyze the broad
and deep failure of one legal field—the law of bioethics—to begin to accomplish
its ends. Third, we study the chronic failure of one favorite form of
regulation—mandated disclosure—to solve the problems for which it is so
insistently and casually adduced.
A. COWS AND CONTRACTS

Those members of the community who fall short of this, somewhat indefinite, normal degree of prowess or of property suffer in the esteem of their fellow-men; and consequently they suffer also in their own esteem, since the usual basis of self-respect is the respect accorded by one's neighbours. Only individuals with an aberrant temperament can in the long run retain their self-esteem in the face of the disesteem of their fellows.

Thorstein Veblen
The Theory of the Leisure Class

If there is one thing law-makers need in making law and scholars need in formulating theories, it is an understanding of law’s effects. Here, we are all hyper-rationalists. Almost universally, law-makers, law professors, and citizens assume that law has some effect, even if it can’t do all it is intended to do, and that the direction of the effect is roughly the one intended. Everyone knows that no law is enforced rigidly (traffic laws teach everyone this lesson every day); everyone knows that even earnestly enforced laws are breached regularly (a lesson murder statistics teach too often). Nevertheless, we—law-makers and scholars and citizens—basically assume law basically works in basically successful ways.

We suppose this because it should be true. The incentives to obey and use and accommodate the law are numerous and sharp. Law enjoys impressive powers, civilly and criminally. It creates and reinforces social institutions. It has “expressive” powers; it “sends messages.” It has facilitative functions which it performs by offering people the means (contracts, for example) to accomplish their goals. Even when people do not directly use the law, they bargain in its shadow, they depend on its default provisions, they are unconsciously swayed by the symbols the law deploys and the messages it broadcasts. These are standard assumptions in scholarly thought. They are not flatly wrong, but they are so unreliable that they chronically lead law-makers and scholars astray. In this section, then, our goal is to convince our colleagues that

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the standard assumptions about law’s effectiveness are so fanciful that they must always be checked through empirical research.

One of the most disconcerting bodies of modern legal writing is the scholarship which makes sport of the idea (so natural and right to lawyers) that people know the law’s rules, accept them, respond to them, and use them. A seminal and classic work in this sobering and reproving genre is Stewart Macaulay’s Non-Contractual Relations in Business: A Preliminary Study. Professor Macaulay interviewed suppliers and purchasers in Wisconsin to see how they used contracts and how the law shaped their behavior. The firms did not think they were using contracts (even when, legally, they were), and disputes were “frequently settled without reference to the contract or potential or actual legal sanctions.” Far from heeding the law, businessmen devised their own norms and sanctions. As one said, “You don’t read legalistic contract clauses at each other if you ever want to do business again. One doesn’t run to lawyers if he wants to stay in business because one must behave decently.”

Or take Robert Ellickson’s fascinating sojourn among the ranchers and farmers in Shasta County, California. Professor Ellickson wanted to test the Coase Theorem’s principle that people bargain to reach economically efficient solutions to their disputes whatever the law’s allocation of tort liability. As the Theorem predicted, the locus of liability did not matter when wandering cattle damaged a farmer’s crops. But not because people bargained to achieve efficient results. Rather, disputes were avoided in deference to an informal norm of neighborliness and reciprocity, a norm enforced by the community’s homemade sanctions.

People can ignore the law even when brought face to face with its power. It’s no surprise that people marry in ignorance of the law of divorce. But even during divorces, when people are in the law’s grip, they often do not know what the law says or behave in the ways law-makers intended. Research suggests that when divorcing couples meet their lawyers, they frame their story in terms of their marriage’s moral relations. Lawyers may frame the case in the law’s terms, but clients often find those terms misconceived and perverse, and lawyers regularly fail to convince clients to adopt the law’s framework. Furthermore, because most families cannot afford to pay lawyers to negotiate for them,

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122 Lynn A. Baker & Robert Emery, When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage, 17 Law & Behavior 439 (1993). Nor do employees know basic facts about employment law. “Kim... found that the vast majority of those [workers] surveyed [wrongly] believed that the law prevents employers from discharging an employee because, among other reasons, the employer does not like them (89%) or the employer wishes to hire someone else at a lower wage (82%).” Russell Korobkin, Empirical Scholarship in Contract Law: Possibilities and Pitfalls, 2002 U Illinois Law Rev 1033, 1049.
divorcing spouses frequently negotiate for themselves. This they do in ignorance of, indifference to, and even contempt for the law’s standards. ("'If the law supposes that,’ said Mr. Bumble, squeezing his hat emphatically in both hands, ‘the law is a ass – a idiot. If that’s the law, the law is a bachelor; and the worst I wish the law is, that his eye may be opened by experience – by experience.’")

No one supposes the law is wholly ineffectual, but the general impression of its effectiveness is wrong and the ordinary intuitions about its functioning are untrustworthy. The problem for law-makers and scholars is that they don’t know whether and how the general impression and ordinary intuitions are correct in a particular case. Only through empirical research can they find out.

B. DEFEAT AND FUTILITY

*What have we better than a blind guess to show that the criminal law in its present form does more good than harm?*

Oliver Wendell Holmes

_The Path of the Law_

The law, people imagine, is like the centurion: “I say to this man, Go, and he goeth; and to another, Come, and he cometh; and to my servant, Do this, and he doeth it.” But with dismaying and confounding frequency, laws betray the expectations which prompted their adoption. We propose the law of bioethics—a preponderance of which can plausibly be said to have failed—as our example.

The problems begin with the law-making process. When proponents of a rule present it to a legislature, an agency, or a court, they normally make their case by telling a story with a victim and a villain. Restrain the villain and the victim can be rescued. Law-makers evaluate the story, but they must husband their time and energies, and they command limited resources for studying evidence. Without a well-developed body of research, law-makers will be at the mercy of the stories told by proponents, and of course opponents, of regulations. These stories achieve their effects by making the complex simple. Much is then ignored. Research regularly reveals that the victim is not so simply a victim, that the villain is not so villainous, that victim and villain alike are constrained by circumstances they do not control, and that both respond to new rules in unexpected ways.

An example. For years it was assumed that dying patients (the victims) were being kept alive by doctors (the villains) professionally driven to keep metabolic function ticking. Why did patients acquiesce? Because, said the story, they were too ill and too cowed to make their own decisions, leaving doctors free to persevere. Patients could have left instructions in a "living will," but they didn’t because, the story continued, they knew naught of living wills. The solution, cheap and simple? Make medical institutions tell patients about living wills.
Congress heard and believed. With cursory debate and comforting consensus, it passed the Patient Self-Determination Act. To what effect? Apparently, none. The PSDA seems hardly to have touched end-of-life care. Why? First, patients are disinclined to sign living wills. Second, patients are more anxious to live, even in extremis, than Congress imagined. Third, doctors are today less intent on keeping patients alive than Congress thought. Fourth, end-of-life decisions have a dynamic of their own that is unaltered by living wills. So, the PSDA’s surest consequence is that medical institutions spend hundreds of millions of dollars setting up and administering otiose programs. One commentator even thinks that “the PSDA, rather than promoting autonomy has ‘done a disservice to most real patients and their families and caregivers.’ It has promoted the execution of uninformed and under-informed advance directives, and has undermined, not protected, self-determination. The PSDA looks like an utter failure.” And this was an idea whose merits were as undoubted as they were unexamined.

The problem is not just the PSDA; it is the living will. Promoting its use has become a legal and social virtue, yet research suggests that living wills do not work and never will. Cascades of evidence now show that patients do not formulate clear and reliable preferences in advance about end-of-life treatment and that patients’ preferences cannot be put into language that communicate them effectively. This evidence, however, is buried in medical journals. The law professors who are situated to make and analyze proposals for law reform do not do this kind of research themselves, and few of them carefully investigate the medical literature. So the conventional wisdom embracing living wills has penetrated unmolested to bar and medical association journals and to doctors’ and lawyers’ practices as another service to be sold to patients and clients.

The PSDA was legislation. Judicial law-making can be equally oblivious to empirical reality. In Canterbury v. Spence, Dr. Spence’s laminectomy left Mr. Canterbury a wreck. The court held that Dr. Spence had a duty to provide Mr. Canterbury with the information he needed to decide whether to have a laminectomy. The court imposed this duty of informed consent because doctors (the villains) were denying patients (the victims) their right to make medical decisions. The court consulted not a jot or tittle of real evidence about how

123 Doctors’ attitudes are affected by their age, location, specialty, and much besides. But doctors feel the same cultural currents that sway the rest of us, and many doctors have abandoned “life at any cost” and embraced “quality more than quantity.”


125 Living wills are demolished in Angela Fagerlin & Carl E. Schneider, Enough: The Failure of the Living Will, 34 Hastings Center Report 30 (March/April 2004).

126 464 F2d 772 (1972).
informed consent might work, nor did it display any interest in whether the cost of informed consent was repaid in benefits.

The court thought informed consent patently desirable, and what law-maker or scholar would disagree? Nevertheless, informed consent is at worst a failure and at best a frustrating disappointment. The court assumed that patients hunger to make their own decisions and are thwarted by imperialistic doctors. But decades of evidence now establish that many patients feel no such hunger and that as patients become older and sicker any such hunger dwindles away. Even doctors who try earnestly and arduously are baffled when they attempt to equip patients to make intelligent medical decisions. Patients misunderstand even the most basic facts about treatments, do not remember what they are told, and do not analyze it accurately.

Take a short sip from the flood of evidence. Clarence Braddock and his colleagues taped 1057 encounters between doctors and patients. “Overall, the completeness of informed decision making was low.... [F]ew decisions (9.0%) met criteria for completeness of informed decision making.” The “findings suggest that the ethical model of informed decision making is not routinely applied in office practice” and that the “low level of informed decision making suggests that physicians’ typical practice is out of step with ethical ideals.”

No one wants to return to the bad old days of medical tyranny. But regulating the relations of doctors and patients is as hard as it is important. Uninformed and ill-considered rules are doomed to disappoint. Only with empirical research can we get a realistic sense of what is possible and sensible ideas about how to achieve it.

In our discussion of the failures of the law of bioethics, we have used two examples—informed consent and living wills—because they have been so central and triumphant a part of that law. But many other aspects of it are also ineffective. For example, by 1990, eighteen states had passed laws regulating what doctors tell patients about treating breast cancer. The story that drove these laws was that doctors (the villains) were withholding information about lumpectomies. The effect of these laws? “[S]tate laws requiring the disclosure of alternatives for the treatment of breast cancer were temporally associated with slight increases (6 to 13 percent) in the use of breast-conserving surgery in the states with the most directive laws. The increases were transient, however, lasting from 3 to 12 months, after which the use of breast-conserving surgery reverted

to the level expected on the basis of the trend in states without specific legislation.”

Once again, the proponents of the legislation told a story whose simplifications so distorted the world that the legislation failed. No one remembered that “a major determinant of the choice of therapy appears to be the recommendation of the surgeon, which would not be expected to be affected by the legislation. Also, research by Nayfield et al suggests that only a minority of patients with cancer pursue a decision-making process that is enhanced by additional information; for some patients such information may complicate the process.” What is more, “[c]ontrary to tacit beliefs... patient involvement in surgical decision-making is associated with a greater likelihood of receiving mastectomy.” These laws, then, rested on demonstrably false assumptions about how human beings think and act, and the laws failed. What remains is more regulations whose futility convinces their subjects that the law is ignorant, witless, and malign, something doctors are already all too willing to believe.

The modern law of bioethics is now several decades old. Most scholarly writing simply ignores the evidence that that law mocks the hopes that led to its adoption, and hardly any of it investigates the success of the bioethical agenda. We know as much about it as we do not because of law professors, but because of doctors, who—deplorably—seem more interested than lawyers in doing the empirical work it takes to find out whether the law works.

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131 Ibid at 1039.
133 Bioethics is our example of legal failure that is partly caused by lack of empirical research and partly curable with a stiff dose of it, but similar problems curse many fields. A few examples. (1) “[T]hough criminal law scholarship has a distinct discipline to draw on—criminology—it has barely tried to benefit from the relationship. The best empirical studies in contemporary criminology tend to be intellectually and politically paralyzing, tending to show that most law enforcement or crime prevention policies are counter-productive or counter-intuitively irrelevant.” Robert Weisberg, Criminal Law, Criminology, and the Small World of Legal Scholars, 63 Colorado L Rev 521, 525 (1992). (2) “[W]hile there is enormous attention to deterrence as a goal of tort law, there is substantial doubt about the actual deterrence efficacy of tort law.” Gary T. Schwartz, Empiricism and Tort Law, 2002 U Illinois L Rev 1067, 1068. (3) “[I] have been struck by the absence of empirical evidence bearing on the traditional, defining assumption of administrative law theory—that reviewing courts can control agency behavior through judicial remands.” Peter Schuck, Why Don’t Law Professors Do More Empirical Research?, 39 J Legal Education 323, 334 (1989).
C. TELLING AND HEARING

He’ll sit here, and he’ll say, ‘Do this! Do that!’ And nothing will happen. Poor Ike—it won’t be a bit like the Army. He’ll find it very frustrating.

Harry Truman

In the preceding section, we used the law of bioethics to show what happens when laws are adopted with little empirical investigation and maintained without empirical assessment. In this section, we use another vehicle for a similar inquiry. When the strong deal with the weak, law often tries to deter the former from abusing the latter by requiring the stronger party to reveal information that allows the weaker party to make good decisions in the relationship. Are companies selling worthless stocks? Securities laws say, “Disclose!” Are creditors lending money usuriously? Consumer protection laws say, “Disclose!” Are manufacturers selling hazardous merchandise? Products-liability law says, “Disclose!” Are police bullying criminal suspects into waiving their rights? Miranda says, “Disclose!” Are spouses soliciting shady antenuptial contracts? Family law says, “Disclose!” Behold, then, disclosure, the sovereign remedy for all your ills. Does it work?

If disclosure requirements prosper anywhere, it should be in securities markets, since they are dominated by institutions which have reasons and resources to use the disclosed information. But even there, scholars cannot agree that companies would disclose less were there no securities laws (since companies have economic incentives to disclose information to investors) or that the disclosures that are made improve investors’ decisions.134

Most other disclosure regimes look worse, some much worse. Critics of Miranda have long contended that Miranda warnings work too well and let the criminal go free because the constable blundered. Miranda’s friends leap to its defense by arguing that its requirements “‘have little or no effect on a suspect’s propensity to talk . . . . Next to the warning label on cigarette packs, Miranda is the most widely ignored piece of official advice in our society.’ . . . Not only has Miranda largely failed to achieve its stated and implicit goals, but police have transformed Miranda into a tool of law enforcement . . . .”135

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Much law obliges manufacturers and employers to provide warnings about hazardous products and even products that may be used hazardously. While the evidence of failure is not uniform, "the efforts of researchers to prove by scientific means that on-product warnings are indeed effective to modify safety-related behavior in actual or simulated real-world applications have generally yielded disappointing results."

Mandatory disclosure is "the primary Federal mechanism for regulating the consumer credit market." The epitome of such regulation is the Truth in Lending Act, which requires lenders to disclose information about the loan to borrowers. But "it would not be an overstatement that the very core of TILA—the provision of the finance charge and the APR to facilitate comparison shopping—suffers from several theoretical and practical problems that have vexed commentators and regulators from the very passage of the Act." The "problems" are basic. "[E]xperts . . . express serious doubt as to whether consumers read their TILA disclosures." Even if they read them, many consumers lack the literacy and numeracy to understand them. Even if the words and numbers are understood, the ideas they convey are often misunderstood, since the ideas are unfamiliar and since lenders "charge a multiplicity of different fees, and inclusion in the APR is handled inconsistently from lender to lender." What is more, disclosures are buried in a mass of papers and come so late in the process that borrowers cannot practically back out. But fear not, "members of Congress have not given up on the concept of disclosure. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [requires]. . . enhanced disclosure for open-end credit plans and credit extensions secured by a dwelling, and new disclosures for introductory (teaser) rates and late payment deadlines and penalties."

A similar pattern appears in a newly critical area—decisions to purchase health-care. "Consumer-driven health care" is the dernier cri in health law as it undergoes the Götterdämmerung of managed care. Much effort has already been devoted to supplying patients with the information they need to choose health-care plans. These efforts are failing. For example, when focus groups are asked to respond to the report cards offered to consumers, they "commonly respond that they find the information overwhelming and confusing and that they do not know how to bring all the pieces of information together into a decision. Many say they prefer to have someone tell them which plan to choose."

Dr. Johnson famously called a second marriage "the triumph of hope over experience." What can we say of mandatory disclosure? To the hyper-rationalist,

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mandatory disclosure's effectiveness is obvious. It has to work. But as we have been arguing by word and example throughout this section and indeed this article, the work of both law-makers and law professors rests on assumptions about human beings and legal institutions that seem right but that turn out to be wrong. Without empirical research into those assumptions before law is made, bad laws will be put in books. Without empirical research into the success of regulations, bad laws will survive in action. To empirical research, therefore, we call our colleagues and pledge ourselves.

V. CONCLUSION

Know then thyself, presume not God to scan
The proper study of mankind is man.
Placed on this isthmus of a middle state,
A being darkly wise, and rudely great:
With too much knowledge for the sceptic side,
With too much weakness for the stoic's pride,
He hangs between; in doubt to act, or rest;
In doubt to deem himself a God, or beast;
In doubt his mind or body to prefer;
Born but to die, and reas'ning but to err;
Alike in ignorance, his reason such
Whether he thinks too little, or too much;
Chaos of thought and passion, all confus'd;
Still by himself, abus'd or disabus'd;
Created half to rise and half to fall;
Great lord of all things, yet a prey to all,
Sole judge of truth, in endless error hurl'd;
The glory, jest and riddle of the world.

Alexander Pope
An Essay on Man
A. RAZING THE BARRIERS TO EMPIRICAL RESEARCH

Our colleges are supposed to be schools of science as well as of education, nor is it unreasonable to expect that a body of literary men devoted to a life of celibacy, exempt from the care of their own subsistence and amply provided with books, should devote their leisure to the prosecution of study, and that some effects of their studies should be manifested to the world.

Edward Gibbon
Autobiography

Ultimately, law professors do not do empirical research because they do not want to. They do not want to because they do not sufficiently value it. If they wanted to do it, the barriers to empirical research would rapidly, if arduously, be scaled and eventually razed.

One obstacle to large-scale empirical work is little within the profession's control—expense. But law professors are better supported than most scholars, and law schools have resources to help them in useful ways. Where all else fails, we must do what social and natural scientists routinely do—get grants from governmental agencies and private foundations. This is not pleasant, but why should we be exempt from burdens other academics bear without (undue) self-pity?

Another discouragement to empirical work lies at the feet of judges and other law-makers, who persist in the tradition of "judicial amateurism" which Professor Riesman castigated half a century ago and ignore empirical data even when offered it. As a distinguished jurist replied when one of us adduced some empirical evidence (which would in fact have confirmed the jurist's preferences), "I know other people live differently from the way I do, and I'm not interested." In a world where every political question becomes a judicial one, the Supreme Court too regularly decides cases as though facts were so many packing peanuts. The professorial writ does not run to judges, thank goodness. But

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140 Three examples. (1) "Romer and the VMI case were... so barren of any engagement with reality that the issue of their correctness scarcely arises. It is the lack of an empirical footing that is and always has been the Achilles heel of constitutional law, not the lack of good constitutional theory." Richard A. Posner, Against Constitutional Theory, 73 NYU L Rev 1, 21 (1998). (2) "The Court strikes down rules of criminal procedure because they 'fail to protect privacy... and impede effective law enforcement.' The Court upholds other rules because they embody a 'carefully crafted balance designed to fully protect both the defendant's and society's interests.' These statements, while obviously empirical, are made... with absolutely no attempt to assess relevant empirical evidence." Tracey L. Meares, Three Objections to the Use of Empiricism in Criminal Law and
judges (and clerks) were once law students. If we take empirical work seriously in our scholarship, the fruits of that work and a sense of its merit may gradually insinuate itself into our teaching and thence into the minds of lawyers and judges.

We do control most of the other barriers to serious empirical research. Professor Shuck describes one of them with appropriate candor: “From the perspective of an individual scholar seeking to maximize careerist objectives, empirical scholarship is something to be assiduously avoided.” Law faculties with good sense and a dollop of resolve can fix this problem. They can begin by reforming their behavior at tenure time, when it matters most. Today, too many of the tenured think empirical work cannot permit candidates to demonstrate the theoretical magnificence and prophetic intelligence elite law faculties think they want. Untenured faculty should not bear the burden of demonstrating the error of that attitude.

We are optimists, though (sort of). Young academics increasingly incorporate empirical work into their scholarship, and they are getting tenure. As they become more numerous they should make tenure decisions more wisely than their elders.

We now come to a critical issue for the prospects of empirical scholarship, one that demands a few moments’ reflection. Some law professors avoid empirical research because law journals dislike it and spurn it. Certainly they do. The students to whom we indolently confide our professional journals think scholarship is what scholars tell them it is. Few students are academic revolutionaries. On the contrary. While students in elite law schools lean steeply left on most political issues, on academic matters they cherish a conservatism that would make a backwoods Junker blink. Of course. They are frightened. They should be. They are too untutored to do the job we cruelly ask of them. Enough. We can no longer afford the costs—of which this is but one—of ceding our scholarly journals to terrified amateurs.


142Professor Schneider secretly longs for law schools to give tenure only for empirical work. This would swell the volume of empirical research, compel young scholars to learn to do it, offer them a compelling lesson in its usefulness, and deter them from theorizing about the world before they understand it. Of course, he knows just how likely this is.

The costs are not only great, they are growing. The core problem is well-known: Student editors are, at most, trained in doctrinal analysis. When that was the bulk of legal scholarship, a good school’s best students might aspire to a modest editorial competence. Now that less and less scholarship is doctrinal, even the best school’s best students cannot evaluate the articles submitted to journals, much less edit them. Indeed, no individual faculty member is competent to do so, which is why scholarly journals in other fields ask specialists to review every article they accept (something student editors are culpably reluctant to do).

Even while it is getting harder for students to edit law reviews, the quality of law review staffs is declining. The number of law reviews per school has increased, often several fold. At the same time, the size of law review staffs has swollen astonishingly. When Professor Schneider edited volume 77 of the *Michigan Law Review*, roughly thirty juniors joined the review each year. Today roughly fifty do. Volume 77 enjoyed one article editor (although two or three were probably more common) and no book review editors. Volume 105 sports six article editors, a symposium editor, and two book review editors. Because of these two developments, law reviews must accept less and less qualified students. Worse, there is a movement away from using grades to select editors toward student-judged writing competitions and toward affirmative action.

A scholarly field’s professional journals critically shape the field through their choice of articles to publish. A field, then, suffers when editors are incompetent (as students must be). It’s not just that bad decisions are made about individual articles. It’s that undesirable and even improper criteria too easily influence publication decisions. Editorial hostility to empirical research is the example that particularly exercises us, but there are vast swaths of law that student editors ignore. Judge Posner expresses other fears we share: Student editors seem to be “tempted by the increasing politicization of the enterprise to employ political criteria in their editorial decisions.” And, unable to evaluate articles well, “they look for signals of quality or other merit,” signals like the prestige of the author and the author’s school.¹⁴⁴ All these problems are compounded by the fact that most law professors act as though the acceptance of an article by an elite school’s journal says something valuable about the article’s merits and even the author’s. *La trahison des clercs.*

Law reviews are virtually unreformable. No institution whose membership changes annually can make its reforms stick. And the tradition of law review “independence”—where did this unaccountable and foolish notion come from?—means that the scholars who understand legal scholarship best are barred from shaping review policy. (They are already inhibited because it feels like bullying to criticize students, even students who are custodians of the

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profession’s journals.) Nor, crucially, do law professors yearn for the tiresome burden of editing their professional journals themselves.

Faculty-edited journals are hardly all they should be. For example, they can be impressively dilatory. Peer-review has its defects. Peer reviewers are not as objective, thorough, and reliable as we wish. They prefer research that confirms their own views, they may unduly prefer the conventional wisdom, and they have other faults besides. But these problems are as nothing compared with the disaster law reviews visit on legal scholarship. In our happy experience, the scholar-editors of journals in other disciplines at least do not harass their authors with the “stylistic” and substantive improvements beloved of law review editors, and they regularly offer substantive help—personally or through peer reviewers—that is substantively helpful.

One other barrier to empirical research deserves comment. Many law professors hesitate to do it because they do not know how. Scholars whose education ended in law school fear the forbidding quantitative techniques of the social sciences and proclaim themselves unequipped for empiricism. We dream utopian dreams for training law professors. Formal training in empirical methods should be required of all law students, since lawyers increasingly encounter methodologically sophisticated evidence and arguments in their work. Future law professors would then at least have a small start in empirical research, and they might then take advanced courses in other departments.

We could also revive the S.J.D. and make training in empirical techniques central to it. Law schools hire candidates with only a J.D. partly because of competition with law firms and among law schools. The expanding scope of legal scholarship and rising tenure standards make this unfortunate. Furthermore, the increasingly academic orientation of law faculties may be attracting candidates for whom the practice of law is less alluring and who therefore might accept a genuinely graduate education. Since law professors are among the least trained academics, these proposals seem modest enough.

Even without radical change, however, professors can surmount inadequate training. More and more of the people entering law school teaching already have (or are acquiring) Ph.D.s in other disciplines, and a few even earn degrees after being hired. But exemplary zeal is rarely necessary. Many empirical methods can be learned by taking a few courses or soliciting the help of colleagues from

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around the university.146 After all, we define "empirical" broadly, and many kinds of empirical work do not demand penetrating statistical sophistication. In our rewarding experience, social scientists are wonderfully generous in helping the eager law professor to adequate technical competence.

Law professors ought also to seek out collaborations with social scientists trained in empirical research. Collaboration to ameliorate lack of training flourishes in other parts of the university. (Medical schools are a model here.) There are fine and even famous collaborations in law, but our ethos runs against them: "[J]oint authorship has been and remains uncommon in law. No statistically significant increase in the rate of joint authorship occurred [in this study's period], nor does the rate of joint authorship vary across [prestige] quintiles."147 Collaborations not only help methodologically; they deepen and brighten the law professor's understanding of legal problems. Furthermore, we know from collaborating with each other and with other people that collaboration brings benefits, satisfactions, and joys to the collaborators they can hardly find otherwise.

In sum, the reasons law professors resist empirical work are many. A few of them present genuine difficulties. But most can be solved by individual law professors, and virtually all of them can be eliminated by a willing profession. It is time to try.

B. REAPING THE REWARDS OF EMPIRICAL RESEARCH

Of course, this is a somewhat vague conclusion. But in a question of significance, of worth, like this, conclusions can never be precise. The answer of appreciation, of sentiment, is always a more or a less, a balance struck by sympathy, insight, and good will. But it is an answer, all the same, a real conclusion. And in the course of getting it, it seems to me that our eyes have been opened to many important things.

William James

What Makes a Life Significant

146"[W]ith a little reading on methods and a handful of consultations with empiricist colleagues, there is no reason that a careful contract law scholar with no formal training in empirical techniques should have serious difficulty designing a methodologically satisfactory study." Russell Korobkin, Empirical Scholarship in Contract Law: Possibilities and Pitfalls, 2002 U Illinois L Rev 1033, 1051.

“Administrative man,” Herbert Simon wrote, “recognizes that the world he perceives is a drastically simplified model of the buzzing, blooming confusion that constitutes the real world. He is content with the gross simplification because he believes that the real world is mostly empty—that most of the facts of the real world have no great relevance to any particular situation he is facing and that most significant chains of causes and consequences are short and simple.” The lawyer uncomfortably resembles administrative man in his hyper-rationalism. Few law-makers can do the research which would reveal the buzzing, blooming confusion. But law professors can. It is their job. For a century, they have been called to it. Their duty has become too exigent to flout.

But this duty should also be a pleasure. We have saved the best for last. Law is not just a set of jigsaw puzzles to solve. Law is not just the reflection of great issues of principle. Law is about how people live their lives. Empirical research is satisfying because it allows those of us privileged to help shape the law to understand life as human beings live it. People are more interesting than legal theories suppose (and than legal theories themselves), and even the most distant and abstract empirical research soon uncovers the stubborn complexity and endearing perversity that baffle the law-maker but enchant the human being.

And when his studies let the scholar meet, talk with, and get to know the people the law regulates, he is blessed indeed. He is taken out of himself and his tower. Americans are almost madly generous with their time and their intimacy. If the researcher cares about them, they will invite him into their lives, show him their world, and teach him their thoughts. The fortunate researcher finds in his work preceptors to heed, people to admire, and friends to cherish. Und grün des Lebens goldner Baum.

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