1995

Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession

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EMPIRICAL LEGAL SCHOLARSHIP: REESTABLISHING A DIALOGUE BETWEEN THE ACADEMY AND PROFESSION

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Many contemporary commentators have perceived there to be a gap between the abstractions of the law school classroom and the exigencies of realistic legal practice. The author argues that law professors should conduct more empirical research to narrow this gap. Adopting a pragmatic approach in scholarly legal writing and utilizing more empirical research will help legal scholars to focus better on the actual effect which law has on society. Based in part on the results of a telephone survey of law professors, the author concludes that the reason for the shortage of empirical research is that legal scholars today suffer from a lack of training in how to conduct empirical research. To remedy this problem, he proposes, among other things, that law schools should offer more empirical training and be more receptive to empirically based scholarship.

Does it end in conclusions which, when they are referred back to ordinary experiences and their predicaments, render them more significant, more luminous to us, and make our dealings with them more fruitful?[1]

John Dewey

Let us not become legal monks.[2]

Roscoe Pound

How am I doing?[3]

Ed Koch

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1. JOHN DEWEY, EXPERIENCE AND NATURE 7 (1929) [hereinafter DEWEY, EXPERIENCE AND NATURE]. Dewey asserts that this query is "a first-rate test of the value of any philosophy which is offered to us."

2. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 36 (1910) [hereinafter Pound, *Law in Books*].

3. Former Mayor of New York City, Ed Koch, was well known for parading the streets of New York City while he was mayor in an attempt to gauge his performance in office. In effect, Mr. Koch was employing, although informally, his own version of empirical research.

INTRODUCTION

An ever increasing "gap" endures between the legal academy and the legal profession,[4] and there is a growing sense among judges and practitioners that the legal academy, especially the "elite" institutions, is mostly to blame. The legal profession[5] is experiencing feelings of abandonment, and, as evidence of such, points to, among other things, the inveterately abstract nature of legal scholarship and its inapplicability to the bench and bar.[6] Indeed, this claim is particularly germane to most scholarship produced today, a vast majority of which is theoretical in nature.[7] Yet, to the extent that legal scholarship is responsible for this rift, I

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4. *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) ("I have been deeply concerned about the growing disjunction between legal education and the legal profession.") [hereinafter Edwards, *Growing Disjunction*]; Harry T. Edwards, *The Role of Legal Education in Shaping the Legal Profession*, 38 J. LEGAL EDUC. 285, 291 (1988) (noting that "[t]here are certain things that only the law schools can do adequately, which are not being done because the law schools are not doing them"); David M. Rabban, *Does Professional Education Constrain Academic Freedom?*, 43 J. LEGAL EDUC. 358, 363 (1993) (stating that the "growing gap between the legal academy and the legal profession may produce unprecedented pressures on the traditional autonomy of law schools"); Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 325 (1989) (noting that there is a "widespread conviction that the gap (perhaps "chasm" would be more accurate) between the legal academy and the real world of practice and public policy is already alarmingly wide and may be approaching potentially unbridgeable dimensions"); Harry H. Wellington, *Challenges to Legal Education: The "Two Cultures" Phenomenon*, 37 J. LEGAL EDUC. 327, 327 (1987) (noting that "law teachers today are more academically oriented than they were 25 to 30 years ago . . . and less professionally oriented"). See generally SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AMERICAN BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT].

5. The terms "legal profession" and "profession" are used interchangeably and are meant to include not only practitioners, but judges, administrators, and legislators, as well.

6. MACCRATE REPORT, *supra* note 4, at 5 (1992) ("Practitioners tend to view much academic scholarship as increasingly irrelevant to their day-to-day concerns . . . ."); Edwards, *Growing Disjunction*, *supra* note 4, at 42 ("The growing disjunction between legal education and legal practice is most salient with respect to scholarship. There has been a clear decline in the volume of 'practical' legal scholarship."); Louis J. Sirico & Beth A. Drew, *The Citing of Law Reviews By the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051, 1053 (1991) (speculating that one of the reasons federal circuit courts cite law reviews so infrequently is that "judges may find legal periodicals to be of limited value"); Louis J. Sirico & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 U.C.L.A. L. REV. 131, 135 (1986) ("A growing portion of academic writing, particularly in the elite journals, may be directed toward the scholar, rather than the bar or the bench."); Steven D. Smith, *Why Should Courts Obey the Law?*, 77 GEO. L.J. 113, 160 (1988) ("So long as judges and commentators inhabit different worlds and speak in different tongues, academic criticism of the courts is likely to be ineffectual."). For other criticism of legal scholarship, see Edwards, *Growing Disjunction*, *supra* note 4, at 291; Judith S. Kaye, *One Judge's View of Academic Law Writing*, 39 J. LEGAL EDUC. 313, 320 (1989); Patricia M. Wald, *Teaching the Trade: An Appellate Judge's View of Practice Oriented Legal Education*, 36 J. LEGAL EDUC. 35, 42 (1986).

7. Considering that theoretical scholarship has usually been signalled out for criticism in this regard, I would like to emphasize that it is not my intention to diminish the importance of theoretical scholarship. Certainly, scholarship relating to critical legal studies, law

would not place the blame solely on the propensity of legal academics to engage in theoretical scholarship.

Most legal scholarship produced today is either theoretical and normative in nature, or, to a lesser extent, doctrinal and descriptive.[8] Both forms of scholarship, while very important to legal education and our legal culture, have contributed to the gap between the legal academy and the profession by failing to focus on the societal *effect* of particular legal mechanisms. In other words, there has been a lack of empirical legal scholarship;[9] that is, scholarship based on a detailed statistical study and analysis from which one could draw conclusions and formulate or reformulate policy.[10]

Ultimately, policy choices must stand or fall on the basis of empirical evidence. Empirical scholarship is a window on the pathologies of the law and allows us to gauge the effect and efficiency, or lack thereof, of particular legal mechanisms as they presently operate within our society. Empirical scholarship speaks directly to those who are most profoundly involved in our legal institutions, by furnishing the profession with a compass in our sometimes foggy legal waters. Judges,[11] legisla-

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and literature, critical race theory, and feminist jurisprudence has contributed significantly to legal education. However, theoretical scholarship, with few exceptions, does not have as its audience judges and practitioners. At the very least, judges and practitioners are not the primary audience. *See* Sanford Levinson, *The Audience for Constitutional Meta-Theory (Or, Why, and to Whom, Do I Write the Things I Do?)*, 63 U. COLO. L. REV. 389, 393 (1992) ("In most of my work, I write as a self-conscious legal academic to and for other similarly self-conscious legal academics. Part of my own self-consciousness—and, I think, that of many of the people I am most eager to have read my articles—consists of a certain kind of detachment from the law and its institutions . . . ."); Banks McDowell, *The Audiences of Legal Scholarship*, 40 J. LEGAL EDUC. 261, 262 (1990) ("The elite scholars address each other in increasingly abstract and esoteric ways; they tend to be more interested in addressing the elite scholars of other disciplines, such as economics or philosophy, than in writing for other lawyers."); Ellen A. Peters, *Reality and the Language of the Law*, 90 YALE L.J. 1193, 1193 (1981) ("There is an increasing divergence between the theoretical interests of the aspiring academic lawyer and the pragmatic interests of the successful practitioner.").

8. The distinction between normative and descriptive scholarship may not be as clear as one initially would assume. *See* Pierre J. Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 812-14 (1991).

9. This assertion is based on my general review of law review articles and on telephone conversations with 20 non-tenured and 20 tenured law professors from 20 different law schools (two professors from each school). The spectrum of law schools ranged from nationally recognized private and state schools to regional private and state schools. For an analysis of these conversations, see *infra* part II. *See also* Julius G. Getman, *Contributions of Empirical Data to Legal Research*, 35 J. LEGAL EDUC. 489 (1985); Schuck, *supra* note 4, at 325-33.

10. For a discussion of the lack of empirical legal research, see *infra* part II.

11. *See* Ochoa v. Superior Court, 703 P.2d 1, 16 (Cal. 1985) ("Absent legislative guidance, courts cannot avoid making such policy decisions, and in the process of making them we are likely to benefit from all the assistance, in the form of analysis and empirical evidence, that the parties can provide."); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1890 (1988) ("[J]udges are increasingly concerned with the empirical basis and the real world effects of their decisions."); *see also* Peters, *supra* note 7, at 1194 (noting that "the initial fact finder . . . only hears and perceives a small fraction of the reality of the case"). Furthermore, the use of empirical scholarship may

tors,[12] and practitioners[13] want to know, and in fact, should know, the societal effects of their decisions and actions. Towards this end, legal academics, by the very nature of their institutional position within our legal culture,[14] can contribute tremendously by producing more empirical research, which, in essence, asks and answers:[15] "How is the law doing?"

Should legal academics begin to engage in a greater degree of empirical scholarship, I believe that the gap between law schools and the profession will not only cease to distend, but actually will begin to contract. If what I assert is true, or even partially true, the question remains: Why is there such a paucity of empirical legal scholarship?

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even provide a check on illegitimate governmental action. As Professor Faigman asserts, "[t]he Court retains legitimacy only so long as it remains within accepted bounds when exercising its discretion. Empirical research assists in the definition and enforcement of those boundaries." David L. Faigman, *"Normative Constitutional Fact-Finding:" Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 602 (1991).

12. *See* Rubin, *supra* note 11, at 1887. Rubin asserts:

> To speak to a legislature or agency, legal scholars must first identify the social policies which their recommendations seek to implement . . . . Secondly, the recommendations must be supported by empirical data, not doctrinal argument. Data provides the intellectual framework of legislative or administrative action . . . . To the extent that scholars can persuade policy-oriented decision-makers, they will do so only by presenting empirical arguments, connected to clearly stated normative positions.

Id. See also G. EDWARDS AND I. SHARKANSKY, THE POLICY PREDICAMENT: MAKING AND IMPLEMENTING PUBLIC POLICY 6-10 (1978); RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES (1973); WILLIAM MUIR, LEGISLATURE: CALIFORNIA SCHOOL OF POLITICS 105-37 (1982).

13. *See* Faigman, *supra* note 11, at 550 ("Increasingly, commentators and litigants are checking the modern Court's fact-finding on the basis of empirical research that only sometimes supports, and often contradicts, the Court's 'best guesses' about the world. In some cases, the empirical data indicates results contrary to the Justices' normative desires.").

14. *See* Rubin, *supra* note 11, at 1890 ("[Judges] have no systematic way to gather data, or to measure [the] effects [of their decisions] . . . . Given the current structure of our judicial system, empirical published information of this kind will not be available unless it has appeared in published scholarship."). Justice Brennan also has commented that "[i]t is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique." Craig v. Boren, 429 U.S. 190, 204 (1976). Law professors are not well trained in the empirical method. However, law professors are better situated to learn and teach "experimental or statistical technique" than judges, practitioners, or legislators. Law professors certainly are better positioned to perform empirical research.

15. This calls to mind Plato's *Republic* when, enraged by Socrates' elusiveness, Thrasymachus bellows:

> What is this nonsense that has possessed you for so long, Socrates? And why do you act like fools making way for one another? If you truly want to know what the just is, don't only ask and gratify your love of honor by refuting whatever someone answers——you know that it is easier to ask than to answer——but answer yourself and say what you assert the just to be. And see to it you don't tell me that it is the needful, or the helpful, or the profitable, or the gainful, or the advantageous; but tell me clearly and precisely what you mean, for I won't accept it if you say such inanities.

PLATO, THE REPUBLIC, BOOK ONE 13-14 (Allan Bloom, trans., Basic Books 1968).

Part I of this article discusses the importance and value of the empirical method and empirical scholarship by briefly exploring the philosophy of Pragmatism and its influence on the law. Thereafter, part II explores why legal academics do not engage in empirical scholarship on a more frequent basis. Last, this article proposes a potential remedy with the hope of encouraging the production of more empirical scholarship.

I. THE VALUE OF EMPIRICAL RESEARCH

A. Pragmatism, Dewey, and the Relationship Between Mind, Matter, and Progress

The philosophy of Pragmatism[16] was one of the most successful attempts to resolve a major intellectual crisis of the late nineteenth century. The crisis involved the collapse of accepted theories of truth. Most philosophers, especially the Transcendentalists such as Emerson, though debating various fine points, had agreed that there existed an absolute truth, which either corresponded to or cohered with the order of objectively existing reality. However, this theory of absolute truth became untenable after Charles Darwin and his theory of evolution. Reality no longer seemed orderly, religious texts were subjected to "higher criticism," and a crisis of faith ensued.

The Pragmatists, namely John Dewey,[17] attempted to solve this crisis of faith caused by Darwin's naturalization of humanity[18] by tempering

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16. Charles Sanders Peirce is credited with developing and naming the philosophy of Pragmatism in the 1870s. In 1898, William James reformulated Pragmatism. According to Bertrand Russell, Peirce

> maintained that, in order to attain clearness in our thoughts of an object, we need only consider what conceivable effects of a practical kind the object may involve. James in elucidation, says that the function of philosophy is to find out what difference it makes to you or me if this or that world-formula is true. In this way theories become instruments, not answers to enigmas . . . . Ideas, we are told by James, become true in so far as they help us to get into satisfactory relations with other parts of our experience.

BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 816 (1972).

17. John Dewey, in his early years as a philosopher, was influenced by G. Stanley Hall, G.S. Morris, and Charles Peirce, all of whom taught at Johns Hopkins when Dewey was a student there. As Dewey matured as a philosopher, he was affected immeasurably by William James. *See* MORTON G. WHITE, THE ORIGIN OF DEWEY'S INSTRUMENTALISM 3-11 (1964); *see also* 1 THE ENCYCLOPEDIA OF PHILOSOPHY 380 (1990).

18. Prior to Darwin, it generally was thought that as a species we possessed a spiritual purpose which guided our growth throughout life to the ultimate realization of our own perfection. Darwin severely undercut this proposition. John Dewey, in writing about Darwinian philosophy, stated:

> The Darwinian principle of natural selection cut straight under this philosophy [of purpose and design]. If all organic adaptations are due simply to constant variation and the elimination of those variations which are harmful in the struggle for existence that is brought about by excessive reproduction, there is no call for a prior intelligent causal force to plan and preordain them.

JOHN DEWEY, THE INFLUENCE OF DARWIN ON PHILOSOPHY 11-12 (1951) [hereinafter DEWEY, INFLUENCE OF DARWIN].

Darwin's ideas with those of the German philosopher, G.W.F. Hegel.[19] From Darwin, Dewey learned that humans are not distinct from nature, but part of the evolutionary process, and that "the brain is first and foremost an organ of adaptive response."[20] According to Dewey, Darwinian logic begot an intellectual transformation:

> Interest shifts from the wholesale essence back of special changes to the question of how special changes serve and defeat concrete purposes; shifts from an intelligence that shaped things once and for all to the particular intelligences which things are even now shaping; shifts from an ultimate goal of good to the direct increments of justice and happiness that intelligent administration of existent conditions may beget and that present carelessness or stupidity will destroy or forego.[21]

Hegel, on the other hand, provided Dewey with the notion that reality is contradictory and that conflicts are fruitful collisions yielding a higher synthesis.[22] Dewey once wrote "that there is no knowledge of anything except as our interests are alive to the matter, and our will actively directed toward the end desired. We know only what we most *want* to know."[23] With that in mind, the influence of Hegel on Dewey is apparent when we consider the following: "To Hegel, there is no reality until we know it. We exist by virtue of knowing the outside world—but the world also exists only by virtue of our knowing it."[24] Thus, where Descartes uttered *"Cogito ergo sum,"* Hegel went one step further and said, "My thinking does more than prove my existence: it creates it."[25]

In essence, Hegelian philosophy allowed Dewey to overcome the British empiricist notion of "dualism of subject and object" or "mind and

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19. STEVEN C. ROCKEFELLER, JOHN DEWEY: RELIGIOUS FAITH AND DEMOCRATIC HUMANISM 365 (1991) ("Using neo-Hegelian theories or experience, which [Dewey] in time reconstructed in the light of the Darwinian psychology of James and Mead, Dewey developed a new biological and social view of experience.").

20. *Id.* at 369.

21. DEWEY, INFLUENCE OF DARWIN, *supra* note 18, at 15.

22. Hegel, like Kant who preceded him, was engaged by the question: What is the connection between the human mind and that which is outside of it? Hegel believed that there is an unity of opposites between the knower and what she knows, and that this unity persists throughout human progress. This method is the dialectic and can best be illustrated with the following example put forth by Professors Bronowski and Mazlish:

> In the dialectic we begin with a thesis—say, with a man as a person who seeks to know. To this thesis, nature presents an antithesis: the impersonal world resists the knower. There is a conflict between the thesis and the antithesis, and this is resolved only by a step of synthesis, which fuses the two: the knower and what is to be known generate a higher synthesis—generate knowledge itself.

J. BRONOWSKI & BRUCE MAZLISH, THE WESTERN INTELLECTUAL TRADITION 481-82 (1960). This "higher synthesis" produces another thesis and a concomitant antithesis, and this dialectical process proceeds each time on a higher level. III CLASSICS OF WESTERN THOUGHT, THE MODERN WORLD 338-39 (1988).

23. Beatrice H. Zelder, *Dewey's Theory of Knowledge*, *in* JOHN DEWEY: HIS THOUGHT AND INFLUENCE 60 (1960).

24. BRONOWSKI & MAZLISH, *supra* note 22, at 483.

25. *Id.*

matter."[26] Employing this Darwinian and Hegelian view of humankind, Dewey, standing on the shoulders of William James, worked out a new pragmatic theory of truth that described the human mind as interacting with the contingencies of an unstable, ever-evolving nature.

Pragmatism espoused that truth was temporary and evolving. There is no fixed truth, for it possessed a temporal dimension. Pragmatism rejected teleological notions of society and averred that humans discover truth and truth comes out of the "experience-continuum."[27] Truth is utility; truth is what works, and to find out if it works it must be put to the test (i.e., experience).[28] In essence, the validity of an idea is in its results, not its sacredness, and the way to measure results is through the use of empirical research.[29] Professor Steven C. Rockefeller's explanation of John Dewey's empirical method is illustrative:

> The empirical investigator starts with a problematic situation which is directly encountered in ordinary experience. The investigator in seeking a solution to the problem may well use imagination, reason, and calculation extensively. The critical point, however, is that all such imaginative and theoretical reflection must in the final analysis be referred back to directly experienced subject-matters for testing and verifica-

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26. ROCKEFELLER, *supra* note 19, at 365-66 (noting that Dewey "replaced the dualistic, mechanical, atomic, and passive emphasis in British sensationalism with a stress on experience as a fundamentally active affair involving interactions . . . between an organism and its environment with which it is intimately related"). Others have asserted:

> [English and French] [e]mpiricist philosophers had simply thought of two worlds—the public world outside a man's head, and a private world inside it. For the empiricists, these were loosely connected by the man's senses; but the two were as concrete, and as separate, as a color film and a black-and-white copy.

BRONOWSKI & MAZLISH, *supra* note 22, at 483.

27. WILLIAM JAMES, THE MEANING OF TRUTH 151-52 (1914). *See also* WILLIAM JAMES, PRAGMATISM (1907).

28. The Legal Realists advocated this approach for determining the "success" of a law. Generally, if a law worked in practice, then it was successful. For a discussion of the influence of Pragmatism on the law, see *infra* part I.B.

29. In the late 17th century, the English philosopher John Locke attacked the Platonic notion of innate ideas and espoused a doctrine of empiricism:

> Let us then suppose the mind to be, as we say, white paper, void of all characters, without any ideas: How comes it to be furnished? Whence comes it by that vast store, which the busy and boundless fancy of man has painted on it with an almost endless variety?
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> Whence has it all the materials of reason and knowledge? To this I answer, in one word, from EXPERIENCE. In that all our knowledge is founded, and from that it ultimately derives itself.

JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 121-22 (1894). Early in Dewey's career, he defended Locke's emphasis on empiricism. *See* ROCKEFELLER, *supra* note 19, at 363. Furthermore, Jeremy Bentham's theory of legislation and morals stressed that law should be constructed to provide the greatest happiness for the greatest number of people. Because Bentham sought to codify his work, some have asked: "Are we justified in seeing the beginnings of logical positivism [in Bentham]? Can we number among his disciples . . . the logical positivists—those who assert that statements, such as 'this is a beautiful thing,' which are not 'empirically verifiable,' are merely nonsense, i.e., of no sense?" BRONOWSKI & MAZLISH, *supra* note 22, at 498.

> tion. Verification involves determining if a solution to the original problem has been in fact achieved. An empirical inquiry, then, starts and terminates in concrete experience. As a consequence an empirical investigation and the knowledge it generates increase understanding of the things of concrete experience and function as a means of control making possible an increase in the beneficial use and enjoyment of these things.[30]

Dewey envisioned a community of inquirers. In fact, for Dewey, inquiry both requires such a community and helps to further the development of this community.[31] Viewed in this light, empirical research is a reflective evaluation, which acts as a loran, a guide for social reform,[32] individual growth,[33] and progress towards the "good life,"[34] in that it provides a veritable understanding of that which affects our lives,[35] including

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30. ROCKEFELLER, *supra* note 19, at 364.

31. THE ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 17, at 383. This is remindful of the work of Francis Bacon and his "Experimental Philosophy," whereby he envisioned a community of scientists actively engaged in experimentation while paying little attention to theory. Bacon, who viewed science as a means of serving society, greatly influenced the Royal Society of 17th century England and its "Fellows" like Christian Huygens, Robert Boyle, and Robert Hooke. BRONOWSKI & MAZLISH, *supra* note 22, at 186-87.

32. *See* BRONOWSKI & MAZLISH, *supra* note 22, at 250 (noting that philosophers of 18th century France used empiricism as a means of social and political reform).

33. According to Professor Daniel J. Boorstin, "Dewey's grand encompassing aim was 'growth'—growth for every citizen, and growth for society." DANIEL J. BOORSTIN, THE AMERICANS: THE DEMOCRATIC EXPERIENCE 498 (1974).

34. RONALD DWORKIN, JUSTICE AND THE GOOD LIFE 9 (1990). Dworkin addresses the connection between living a good life (i.e. well-being) and justice, and asserts that justice is not only a component of well-being, but a condition, as well. Dworkin calls this assertion the "parameter thesis": "It assumes that someone's well-being must be judged in terms of how adequately that person has responded to the challenges and constraints of his culture and circumstance, and insists that these constraints include parameters of fairness and justice . . . ." *Id.*

Dworkin proceeds to define the "good life" in terms of what he calls the "response account":

> [A] life is a good one in virtue of being an appropriate response to the opportunities and challenges provided by the circumstances in which it is lived . . . . Like athletics and art, living well cannot be defined in the abstract. There is no such thing as *just* living well: people live well by making the appropriate response to their physical powers and circumstances, to their expected life span, to their culture and the expectations of their society, and to the economy of supply and demand in which they find themselves.

Id. at 11-12.

Dworkin's "response theory" operates within the norms of everyday life. A "good life" is judged by the response one makes to the realities of one's daily life. Thus, it is important to understand what these realities are so that a person desiring to lead a "good life" could respond accordingly. What that response should be, however, is a separate matter, beyond the scope of this paper.

35. Ludwig Wittgenstein, for whom "propositions were representations of reality," thought that silence is inevitable where knowledge is lacking:

> [H]e who understands [my propositions] finally recognizes them as senseless, when he has climbed out through them, on them, over them. (He must so to speak throw away the ladder, after he has climbed up on it.)
> He must surmount these propositions; then he sees the world rightly.

the decisions and promulgations of our legal institutions.[36] Once armed with such an understanding, we as members of a liberal state acting thorough our duly elected representatives have a responsibility, a *devoir,* to take action to better our lives and to facilitate the fulfillment of our respective "potentialities." We are not passive spectators, but players, constantly interacting with our evolving environment.[37] In fact, Dewey interpreted Darwinian philosophy as introducing "responsibility into the intellectual life:"

> To idealize and rationalize the universe at large is after all a confession of inability to master the courses of things that specifically concern us. As long as mankind suffered from this impotency, it naturally shifted a burden of responsibility that it could not carry over to the more competent shoulders of the transcendent cause. *But if insight into specific conditions of value and into specific consequences of ideas is possible, philosophy must in time become a method of locating and interpreting the more serious of the conflicts that occur in life, and a method of projecting ways for dealing with them: a method of moral and political diagnosis and prognosis.*[38]

This is what Dewey meant by "method of intelligence;" that is, "a conversion of past experience into knowledge and projection of that knowledge in ideas and purposes that anticipate what may come to be in

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Whereof one cannot speak thereof one must be silent.

LUDWIG WITTGENSTEIN, TRACTATUS LOGICO—PHILOSOPHICUS 189 (1922). This last sentence is noteworthy. Empirical research can be viewed as a means of preventing silence, a ladder which leads to greater understanding.

36. Frank Munger, *Sociology of Law For a Postliberal Society,* 27 LOY. L.A. L. REV. 89, 92 (1993). In discussing the tension between legal scholarship and social science scholarship, Professor Munger states that "empirical research has always offered the promise of improved understanding of the reasons or the consequences of the legal system's decisions and actions, and thus, has always been quite compatible with enlightened law scholarship." *Id. See also* MARTHA FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 143 (1991) (stating that "empirical scholarship is more than simply counting").

37. Experience for Dewey was a process of perpetual interaction and adaptation. Dewey writes: "When objects are isolated from the experience through which they are reached and in which they function, experience itself becomes reduced to the mere process of experiencing, and experiencing is therefore treated as if it were also complete in itself." DEWEY, EXPERIENCE AND NATURE, *supra* note 1, at 11. Professor Robert Pollack also has written:

> In the open, incomplete, temporal world of the pragmatists there is a marked gain in visibility with respect to the true setting of human experience. Given a world that is still in the making, and in which nature is gropingly and experimentally pushing forward, it would seem that, of necessity, a being capable of thought must play a more active part in the cosmic story. "We are not utter foreigners in the world," says Peirce. And indeed, so truly do we belong within nature, that as rational beings our role can be nothing less than efficient and codetermining, if only through our capacity to remake our own lives and to adapt to our environment to the immensities of the human spirit.

Robert C. Pollock, *Process and Experience, in* JOHN DEWEY: HIS THOUGHT AND INFLUENCE 180 (1960).

38. DEWEY, INFLUENCE OF DARWIN, *supra* note 18, at 17 (emphasis added).

the future and that indicate how to realize what is desired."[39] Dewey's "method of intelligence" is an empowering message, for we have the ability to diagnose our lives and take steps to improve them. Thus, for Dewey, the empirical method infuses into this notion of "experience" an educative element, which leads to a better understanding of the human condition.[40]

B. *The Influence of Pragmatism on the Law*

In the early twentieth century, philosophical Pragmatism greatly influenced the introduction of the social sciences to the study of law.[41] In

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39. JOHN DEWEY, LIBERALISM AND SOCIAL ACTION 50 (1935). Dewey also asserted that "[s]ince the ends of liberalism are liberty and the opportunity of individuals to secure full realization of their potentialities, all of the emotional intensity that belongs to these ends gathers about the ideas and acts that are necessary to make them real." *Id.* at 51.

40. In his *Experience and Nature*, Dewey distinguishes between primary and secondary experience. Primary experience is not cognitive, does not take the self into account, and cannot distinguish between subject and object. Yet this primary experience can be transformed into secondary experience by what Professor Rockefeller says is a "process of intellectual reflection into conceptual objects including the distinction between subject and object." ROCKEFELLER, *supra* note 19, at 366. Professor Rockefeller illustrates Dewey's notion of experience as a social process with clear Hegelian and Darwinian overtones:

> For Dewey, experience entails a process of interaction in which there is a perception of the connections between what we do and what we suffer and enjoy as a consequence . . . .
>
> Experience alternates between settled situations, in which there is harmony with the environment and a sense of well-being, and problematic situations which generate dissatisfaction, anxiety, and desire. Reflection and the quest for knowledge arise when the self in the course of the action-undergoing that constitutes primary experience encounters disharmony with its environment or suffers certain problems. The basic function of thinking is increased power of prediction and control, making it possible to expand and better the subject matters of experience.

Id. at 369.

41. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 956 (1987). *See also* Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861, 871 (1981) (discussing the influences of Pragmatism on legal philosophy). Dewey's influence on the law in the first half of the 20th century has been expressed as follows:

> As one looks back from the mid-point of the twentieth century at the striking social, economic, political, and legal changes that have occurred during that century, what basic philosophic pattern or patterns can one find in the turmoil of ideas and events? One was an attack upon the self-sufficiency of the legal order, upon its capacity to yield solutions for every legal problem from its store of traditional axioms and postulates, and, on the positive side, an insistence that the solutions of legal problems depended, in part at least, upon the appraisal of social factors. Another was the belief that social change, the amelioration of living conditions, need not be left to the control of inscrutable "natural" laws of economics, biology and sociology, but could be promoted by well-planned governmental action through law. A third, more esoteric in character, had to do with the judicial process. However courts may decide the controversies brought before them by legal procedure, they are, in many cases at least, not compelled by the inexorable compulsion of established premises to decide the case just one way.

fact, it has been said that "Pragmatism seems especially congenial to the legal mind."[42] The Pragmatists challenged the Langdellian notions of the law as an exact science based on objective rules,[43] and furnished legal scholars with a result-oriented logic.[44] The Pragmatists focused on the effect that the law was having on society and on the importance of empirical research in measuring this effect.[45]

Oliver Wendell Holmes, Jr., the progenitor of Legal Realism, and Roscoe Pound applied these Pragmatic notions to the law.[46] Holmes emphasized that "the life of the law has not been logic: it has been experience,"[47] and lawyers should "think things not words."[48] Roscoe Pound admonished his contemporaries to study "the law in action,"[49] and defined mechanical jurisprudence, as Dewey would have, as "the rigorous logical deduction from predetermined conceptions in disregard of and

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> Rather the decision involves deliberation and discretion, in which the attitudes and beliefs of the judge or judges have some sway. All three of these generalizations have, on the positive side, been stated above more moderately and cautiously than their most ardent proponents have stated them. As so stated they are compatible with, and have been immeasurably influenced by, John Dewey's philosophy.

Edwin W. Patterson, *Dewey's Theories of Legal Reasoning and Valuation*, *in* JOHN DEWEY: PHILOSOPHER OF SCIENCE AND FREEDOM 118, 118 (Sidney Hook ed., 1950).

42. Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1342 (1988).

43. Summers, *supra* note 41, at 866.

44. *See* John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924) (defending decisions based on unreasoned common sense as producing fair results).

45. Aleinikoff, *supra* note 41, at 956-57 ("This message of truth-in-consequences supported a view of law as dynamic, functional, relativistic, and experimental. Law was not a 'brooding omnipresence,' but rather a particular means to socially defined ends, and the test of the law was empirical."). It also is important to note that in the late 19th and early 20th centuries, European sociologists Max Weber and Emile Durkheim espoused a scientific approach to society and advocated the use of empirical research as a means of gathering knowledge about the society in which they lived. Furthermore, H.L.A. Hart has emphasized the importance of studying law in a societal context or what he calls "descriptive sociology":

> [F]or the suggestion that inquiries into the meanings of words merely throw light on words is false. Many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on a social context, itself often unstated.

H.L.A. HART, THE CONCEPT OF LAW vii (1961).

46. Patterson, *supra* note 41, at 121 ("Dewey's influence would be misleading without the reservation that two of the most influential American legal philosophers of the present century, Oliver Wendell Holmes, Jr. and Roscoe Pound, derived their inspiration and initial guidance chiefly from William James, of whom Dewey was a follower.").

47. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Dover 1991) (1881).

48. Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899).

49. Pound, *Law in Books*, *supra* note 2, at 12; Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909) [hereinafter Pound, *Liberty of Contract*]; Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). In fact, it was Pound who made the link between Pragmatism and legal scholarship. Aleinikoff, *supra* note 41, at 957; Summers, *supra* note 41 at 868-69.

often in the teeth of the actual facts."[50] Legal academics at Yale and Columbia, where Dewey's tenure extended from 1904 to 1939, such as Underhill Moore, William O. Douglas, Herman Oliphant, and Hessel Yntema, were also influenced by the Pragmatists.[51] These legal academics and others of like mind stressed the applicability and relevance of the social sciences and empirical research to legal studies.[52] As a result, the social sciences assumed an increasingly important role in legal education, especially at Columbia, which eventually gave birth to "legal functionalism."[53] Legal functionalism has been defined as "sociologically-based and result-oriented"[54] or that which is "related to the areas of social life affected by law."[55] In essence, legal functionalism focused on the way in which law functioned in society.

The Legal Realists, which, to a certain extent, were the heirs apparent of the "Functionalists," drove yet another, if not the final, nail in the coffin of Langdellian legal science.[56] Although difficult to isolate a common, unifying principle of the Realists, they did share a skepticism about the notion of an objective, value-free legal system:

> The major contribution of the Realist movement was to kill the Langdellian notion of law as an exact science, based on the objectivity of black-letter rules. When it became acceptable to write about the law as it actually operated, legal rules could no longer be assumed to be value-free. This change inevitably caused the predictive value of doctrine to be seriously questioned. The vantage point of American legal scholarship was finally established as being process rather than

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50. Pound, *Liberty of Contract*, *supra* note 49, at 462.

51. John H. Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case for Underhill Moore*, 29 BUFF. L. REV. 195 (1980) (discussing the shift away from American Legal Realism at Yale University); John H. Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459 (1980) (same). *See generally* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 131-54 (1983) (discussing pragmatic influences on Columbia University law professors); Patterson, *supra* note 41, at 128 (noting Dewey's pragmatism in the work of Oliver Wendell Holmes, Jr., Welsey H. Holifield, and Arthur L. Corbin).

52. John H. Schlegel & David M. Trubek, *Charles E. Clark and the Reform of Legal Education*, *in* JUDGE CHARLES EDWARD CLARK 81 (Peninah Petruck ed., 1991). Dean Clark sought to reorient legal scholarship by developing a program at Yale, which "[a]t its core [has] the idea that legal scholarship should move away from the study of appellate cases to empirical inquiry into law and social problems." *Id.*

53. STEVENS, *supra* note 51, at 139-40. Eventually, the Columbia movement toward integrating the social sciences to legal studies failed. Herman Oliphant and Hessel Yntema thereafter helped found the Johns Hopkins Institute for the Study of Law, which had as its focus empirically based research. However, due partly to the depression, the Johns Hopkins experiment did not succeed. Underhill Moore and William O. Douglas left for Yale, but their efforts to engage in sustained empirical research also fell short. *Id.*

54. Peter N. Swisher, *Judicial Rationales in Insurance Law: Dusting Off the Formal For the Function*, 52 OHIO ST. L.J. 1037, 1042 (1991).

55. STEVENS, *supra* note 51, at 137, 147 n.56.

56. *Id.* at 156. *See also* KERMIT L. HALL, THE MAGIC MIRROR 269 (1989) ("Legal realism stressed the functions of law rather than the abstract conceptualization of it, to which Langdell had been wedded.").

substance.[57]

The Legal Realists, like the Functionalists, focused on how the law operated within society, the current effect the law had on society, and "constantly asked: what use is this rule?"[58] In rejecting the operational objectivity of the law and purity of concept, the Realists put their faith in facts and were "united in calling for empirical studies of law as the prerequisite to reform."[59] Indeed, "the empirical study of legal institutions . . . has it roots in legal realism."[60]

However, as the Second World War came to a close, so to did the Realist movement; but the Realists' belief that the law should be studied as it actually operates has currency in the form of the Law and Society movement, the successor to the Realists.[61] Professor Lawrence Friedman has defined the Law and Society movement as a "scholarly enterprise that explains or describes legal phenomena in social terms."[62] Although Law and Society scholars are part of the current legal academic landscape, their presence is relatively small and generally not warmly received.

While the previously described "reality-based"[63] movements differ from one another to a certain extent, they have in common and have laid stress to the belief that the law has sociological ramifications, and the way to measure these ramifications is through the employment of empirical

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57. STEVENS, *supra* note 51, at 156. Stevens also said about the Realists that "[i]t was one thing to agree that legal objectivity and neutrality were myths; it was another to destroy such myths, providing as they do vital elements of social control, without offering any alternatives. Such an undermining of legal sinews proved to be the Realists' lasting monument." *Id.* (citations omitted). Not surprisingly, the Critical Legal Studies movement has come under similar attack. *See* Edwards, *Growing Disjunction*, *supra* note 4, at 47.

Yet not all movements that have cast doubt on Langdellian objectivity have left a void in their wake. According to Professor Aleinikoff, "[P]ragmatism reassured legal scholars that abandonment of the goal of formal certainty did not necessarily entail nihilism; on the contrary, it liberated scholars to develop and test new rules for new social conditions." Aleinikoff, *supra* note 41, at 957.

58. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 591-92 (1973). *See also* Summers, *supra* note 41, at 937-46.

59. Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 443 (1987).

60. Paul Brest, *Plus Ca Change*, 91 MICH. L. REV. 1945, 1946 (1993).

61. *Id.*

62. Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 763 (1986) [hereinafter Friedman, *The Law and Society Movement*]. Professor Friedman has also commented that Law and Society "scholars try to be systematic about their subject; they try to achieve rigor in method or theory, and they attempt to separate normative from descriptive issues. Typically, their object of study is living law . . . ." *Id.*

63. The term "reality-based" incorporates the Legal Functionalists, Legal Realists, and the Law and Society movement. I chose this term for two reasons. First, it is linguistically convenient. Simply using one term to describe three movements is more convenient that restating the names of all three. Second, I think it adequately describes the three movements in that all profess to be grounded in reality in the sense that they focus on the sociological ramifications of the law and utilize the empirical method. At the very least, these reality-based movements place a great deal of emphasis on how the law operates within society. Possibly a better term would have been "empirically based" movements.

research. These movements also assert that the law should be result-oriented, measuring the results with empirical research. Yet empirical research should not only be embraced by a few select legal movements, for it is a natural concomitant to the law as a whole. The law affects the lives of those to whom it applies. These effects, like Dworkin's "good life," cannot be measured in the abstract, but must be viewed in the context of reality where inefficiencies and unexpected results could be ascertained and calls for reform sustained. As Judge Peters states: "From where I sit, legal scholarship is, and must be a continuing dialogue with reality. The mission that ultimately unites us all is the fundamental struggle of the law to cope with unruly reality."[64]

The social utility of empirical research has changed very little from the time of John Dewey and the Pragmatists to the present. In the context of our legal system, to convert our experiences into knowledge, law professors, as a community of inquirers, should distance themselves from *a priori* normativity and become more receptive to the empirical method, where the focus is on the efficacy of law and how it influences our lives.[65] By examining the law in its social setting, the legal profession is better able to understand its social function, remedy existing misperceptions, and determine what changes in the law, if any, can be made to "realize what is desired," namely, a societal atmosphere conducive to human growth and justice. In short, a "good life." Thus, I do not believe I am straining one's sense of credulity by asserting that empirical research is, potentially, an empowering instrument which can be used to better our lives.

I realize that I am portraying the role of empirical research very favorably, without discussing some of its negative aspects. For example, once the results of an empirical survey have been obtained the question remains: What are we to do now?[66] That is, a guiding principle is needed to achieve or remedy what the empirical data uncovers. It is at this point

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64. Peters, *supra* note 7, at 1193.

65. I agree with Professor Summers that an efficacy determination must go beyond mere observation. There is an evaluative contextual component to this determination, for "[t]he ultimate question is whether the use of the law being judged is *sufficiently* effective, and an answer to this calls for the exercise of evaluative judgment." Summers, *supra* note 41, at 938. Once the facts are gathered, they cannot be viewed without considering a number of contextual factors associated with law and what it was trying to achieve. With that in mind, "the issue becomes one of sufficiency of effects in relation to such factors as the difficulties of realizing the goals, the amenability of the goals to direct means, the extent to which resources are allocated to the problem, the conflicting goals that are affected, and the time interval required for the use of law to take hold." *Id.* at 939.

66. This, of course, assumes that those conducting the empirical research arrived at the same conclusion. However, individual researchers may have their own political and social agenda, and may structure their research to accommodate this agenda. The researchers' empirical data must sustain mutual scrutiny. What we are left with, at times, is a sense of confusion and frustration. Such a scenario is common among politicians who, depending on your political bent, cite figures on the federal deficit or tax policy wholly inconsistent with each other. This leads to the question: How can a solution or policy be agreed upon if the problem itself is subject to disagreement?

that socio-economic and political biases of judges and legislators are manifested. For instance, given the fact that there is a federal deficit, many would agree that it is important to balance the budget. Yet, indisputable empirical data may beget numerous potential solutions. With this weakness in mind, however, empirical data still has a positive effect in that it serves a democratic purpose. Confronted with a societal problem, our officials, assuming they desire to address the issue, are forced to divulge their political and legal philosophy. This gives the electorate something to debate.[67] In turn, the public benefits from a sense of stability in that political and legal decisions comprise a collective component. That is, decisions are not based on a judge's or legislator's personal bias, but on collective agreement within the community. Empirical data helps us ascertain whether our policies will survive their first articulation.

II. WHY ISN'T THERE MORE EMPIRICAL LEGAL SCHOLARSHIP?

Initially, let me say that while most legal scholarship produced today is theoretically based, I believe that there has been an increase in the amount of empirical research by legal scholars.[68] Yet, despite the recognized benefits of empirical research, this increase is relatively small. Although I think that most legal academics would like to see more empirical research,[69] few engage in such a task. Why is this the case? The results of a telephone survey I conducted suggest at least three reasons.

In this survey, I asked forty law professors[70] from twenty different law schools[71] the following question: Do you think there is a lack or

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67. This debate informs our vote whether it be for a federal, state, or local official. Another example is Senate confirmation hearings for appointments to the United States Supreme Court. Recall the vigorous debate surrounding the confirmation hearings of then Judge Robert Bork. In spite of much of the hyperbole, reasonable minds certainly could differ on Mr. Bork's judicial philosophy as set forth in his writings and opinions.

68. For a list of significant empirical studies, see Schuck, *supra* note 4, at 329-30 n.28. For three excellent recent empirical studies in the area of administrative law, see Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994); Peter H. Schuck & Donald E. Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (1990).

69. *See* Robert W. Gordon, *Lawyers, Scholars, & the Middle Ground*, 91 MICH. L. REV. 2075, 2087 (1993).

> [I]f I had the power—which of course I do not except insofar as I can influence students who then go into law teaching—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.

Id. See also Teresa Sullivan et al., *The Use of Empirical Data in Formulating Bankruptcy Policy*, LAW & CONTEMP. PROBS. Spring 1987, at 195, 196 (1987) ("Our thesis is that empirical research is vitally needed in the formation of bankruptcy policy and that it is possible to develop empirical data that will become an indispensable part of that process.").

70. For this survey, I randomly selected 20 tenured and 20 non-tenured law professors.

71. The selected law schools were diverse with respect to both reputation (i.e., na-

shortage of empirical research in legal scholarship? The results of my survey are shown in Table 1.

Table 1. Do you think there is a lack or shortage of empirical research in legal scholarship?

Law Professors	Yes	No
Tenured	80%	10%
Non-tenured	95%	0%
Overall	87.5%	5%

As indicated, a vast majority of those surveyed believed that there was a lack of empirical research in legal scholarship. Implicit in this finding is that law professors recognize the benefits of empirical research. The question remains as to why more research of this kind is not produced.

I asked the professors who answered affirmatively to question one the following: Why do you think there is a lack or shortage of empirical research in legal scholarship? The results are shown in Table 2.

Table 2. Why do you think there is a lack or shortage of empirical research in legal scholarship?

Law Professors	Lack of Training	Not Viewed Favorably for Tenure	Too Labor Intensive/ Time Consuming
Tenured	70%	35%	25%
Non-tenured	95%	25%	15%
Overall	82.5%	30%	20%

The overwhelming response, especially from non-tenured professors, was a lack of training in the empirical method.[72] This response should come as no surprise. The curriculum at most, if not all, law schools is not designed to train students in the empirical method. Thus, law students, some of whom are destined to become law professors, graduate without any understanding of the empirical method or statistical analysis and they are not likely to gain any such understanding in practice or on the bench. This lack of training deters law professors, whether tenured or not, from performing empirical research. Why would law professors embark on an unknown course without the requisite training and tools? It is less demanding and potentially more rewarding to stay in one's office,

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tional, regional, or state school) and geography.

72. A few professors indicated their belief that lack of funding was another reason for the lack of empirical research. I chose not to include this answer in the table, however, because while this is indeed a serious problem, I believe it is closely tied to lack of training. *But see* James E. Herget, *Shaking Loose From An Old Jurisprudence: What is the Price?*, 36 Sw. L.J. 807, 810 (1982) ("Down to the present time [empirical] scholarship . . . has been but a small part of the vast bulk of scholarly discourse in the law reviews, legal treatises, and texts, despite funding and encouragement from the American Bar Foundation and other national funding agencies.").

before one's computer, and theorize; an endeavor for which law professors are well equipped.

Furthermore, upon entering the legal academy, assistant and non-tenured associate professors have tenure as one of their goals. In my survey, twenty-five percent of non-tenured professors were concerned that empirical research would not be viewed favorably by their respective tenure committees. An even greater percentage of tenured professors, thirty-five percent, voiced the same concern. I believe, however, that this concern improperly views empirical scholarship in a vacuum. At present, to the extent that empirical scholarship is disfavored with respect to tenure, such a position is inextricably linked to the fact that law professors lack the training to engage in empirical research.[73] Given this fact, why would a non-tenured professor endeavor to produce an empirical piece of scholarship without the requisite training and then proceed to rely on that scholarship as a tenure piece? Even if the empirical scholarship is well done, there may persist, at least initially, a negative perception by a tenure committee simply because of the nature of the scholarship; and the committee's own lack of training in empirical research may hinder the evaluative process. In addition, collaborative scholarship with, for instance, a sociologist, is frowned upon for tenure purposes even though collaborative efforts are common in other disciplines such as medical research or economics.[74]

Although the desire to obtain tenure is a factor, it should not be overemphasized because, if for no other reason, it fails to explain why tenured professors do not engage in empirical research. Their decision not to engage in such research must be motivated by another factor. While there are a number of reasons as to why law professors do not engage in more empirical research, I believe that for most professors, whether tenured or non-tenured, the lack of training alone is an adequate deterrent.[75]

Although the amount of work and time associated with empirical re-

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73. I also believe the "too labor intensive/time consuming" factor is tied in to lack of training.

74. I never quite understood why collaborative research efforts are discouraged. To the extent that a tenure committee is unable to ascertain a candidate's contribution to a scholarly work, I would think that such a concern is subordinate to more important determinations: Does the work have merit and is it something with which the law school would want to be associated? The single authorship requirement may more easily be justified with respect to theoretical or doctrinal scholarship. With empirical scholarship, however, such a requirement is counter-productive. It not only discourages the production of potentially good scholarship, but also acts as a disincentive for law professors to entertain new disciplines, new ways of thinking, and professional camaraderie. For a further discussion of this situation, see *infra* note 83.

75. In addition to lack of training, tenure, time constraints, and resources, Professor Schuck cites other reasons for the present lack of empirical scholarship in the legal community: (1) inconvenience; (2) lack of control; (3) tedium; (4) uncertainty; and (5) ideology. Schuck, *supra* note 4, at 331-33. I agree that all of these reasons contribute to the paucity of empirical research. Yet these reasons, with the possible exception of ideology and uncertainty, may so be related to the fact the law professors are not trained in the empirical method as to become simply part of the "lack of training" explanation.

search is significant, I would assert that, to a lesser extent, such burden inheres to the production of most valuable scholarship. More important, however, unfamiliarity with the empirical method may lead to an exaggerated perception of its difficulty. This misconception may, in turn, overshadow the value of empirical research.[76] If legal academics were better trained in the empirical method, perhaps their perception would soften. This is not to suggest that training will make the work associated with empirical research become any less rigorous or time consuming. Rather, through training, the prospect of an empirical enterprise may become less intimidating.[77] Moreover, I know of few law professors who chose their profession for its simplicity.

The problem faced by those of us who would like to see more empirical research can best be illustrated by looking to law schools' lack of receptiveness to the Law and Society movement. This movement, with its emphasis on empirical research, has made some inroads into the legal academy, yet remains "a stepchild in the law school world."[78] Professor Friedman has discussed the disfavor in which most legal academics view the Law and Society movement and has suggested possible reasons for it:

> To begin with, empirical research is hard work, and lots of it; it is also nonlibrary research, and many law teachers are afraid of it; it calls for skills that most law teachers do not have; if it is at all elaborate, it is team research, and law teachers are not used to this kind of effort; often it requires hustling grant money from foundations or government

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76. This sense of difficulty also may include some of Professor Schuck's reasons, such as inconvenience, lack of control, and tedium. Schuck, *supra* note 4, at 331. With respect to the "uncertainty" reason, Professor Schuck states:

> Until one gathers and analyzes the data, one cannot know whether one will make important new findings or "merely" confirm what everybody (especially in retrospect) "already knows." In contrast, the articles that we typically write exhibit a kind of predestination; once we have thought our ideas through, we know where we are headed. Few surprises await us, and perhaps we prefer it that way.

Id.

Perhaps law professors do "prefer it that way." Yet is it not uncertainty that begets an empirical study? That is, empirical research is valuable because it can turn uncertainty into certainty, or at least, a greater degree of certainty. Although initially it may be disappointing to discover that the data does not support one's policy position, at least one is better informed and can begin to rethink one's position. If it turns out that one only "confirmed what everybody . . . 'already knows[,]' " that does not necessarily mean that the research was a waste of time. Researchers have different political and social agenda and may employ an empirical research strategy to accommodate those agenda. Society thus may be better served if various empirical research methods result in the same findings, for duplicate findings serve to ensure a greater degree of certainty.

77. Edward L. Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 MICH. L. REV. 792, 827 (1991).

> While all of this social science can appear to be a daunting prospect to academics whose training consisted of reading appellate decisions, law professors, in theory, are able to perform social science studies. Some have, and most probably could with a combination of self-training, collaborative efforts, and the collegial assistance generally available on a university campus.

Id.

78. Friedman, *The Law and Society Movement*, *supra* note 62, at 774.

> agencies, and law teachers simply do not know how to do that. . . . Prestige is a factor too. Law schools . . . tend to exalt "theory" over applied research. Empirical research has an applied air to it, compared to "legal theory." The law and society movement stresses the importance of what is happening in society, as opposed to exclusive attention to what is 'inside' the system. This means, first of all, that one has to know something about the surrounding society—things lawyers are unlikely to know, in any systematic way.[79]

Some law professors, however, recognize the advantages of empirical research and would like to see more. So what is to be done? In the next section, I avail myself to make some suggestions that, although not panacean, I hope will encourage current and future legal academics to produce more empirically based legal scholarship, or, at least, begin to consider such an endeavor.

III. What Can Be Done?

As stated above, there are several reasons why law professors do not engage in more empirical research. However, I believe that most of these reasons are inextricability linked to the fact that lawyers generally, and law professors specifically, are not well trained in the empirical method. If law professors were better trained in the empirical method, the discouraging effects of many of the other reasons might be mollified. For instance, non-tenured law professors might feel more confident in their abilities to produce a scholarly empirical piece. Tenured faculty members might have an enhanced sense of appreciation for the amount of work and difficulty associated with empirical research. This enhanced sense of appreciation might also encourage tenured faculty to pursue their own empirical studies and to recognize the efforts of others when it comes time to make tenure decisions. Further, funding for empirical research might increase as law professors become better trained and the beneficial effects of empirical research become more pronounced. Obviously, legal academics need to address this lack of training in the empirical method. I propose the following:

(1) *Require students to take a course in empirical or statistical methodology during their first year.* To require such a class is a bold suggestion, and anything resembling it is unlikely to be implemented in the near future. Most law schools require their students to take, in the first year of study, a "legal methods" or "legal process" class, wherein the student is introduced to legal institutions and processes. I do not question the importance of these classes, but it is not fantastic to suggest that students be required to take "legal methods," for example, in the second or third year of law school and introduce empirical methodology in the first year curriculum.[80] Any difficulty could be addressed by grading the class

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79. *Id.*

80. *Id.* Columbia University School of Law offers a class entitled "Statistics for Lawyers." This non-required class is taught by a Lecturer in Law, not a full-time member of the

on a pass/fail basis. With such a grading system, students, who are likely to experience some uneasiness, will feel less intimidated in the face of empiricism.

(2) *Offer advanced upper-level classes in empirical or statistical methodology.* For students who want to build on the first-year class, an upper-level elective should be available. This course especially should seek to attract students who desire to enter the teaching profession. Most graduate programs in education require statistical methods courses so that future college professors will be able to approach research analysis properly. Future law professors should endeavor to have equivalent skills and familiarity with empirical analysis.

(3) *Encourage the faculty to emphasize to their students that the law has sociological ramifications.* An example of this is for law professors to use empirical data as a pedagogical tool. Empirical data could be used to demonstrate the effects of products liability suits on manufacturer safety efforts or could illustrate the impact of legislation on social concerns such as drunk driving. Another example would be to take a "field trip" to a trial or hearing that pertains to an area of the law that is currently being covered in class.[81] Such a "field trip" would provide a real life glimpse of the impact of the law on individuals and society as a whole. Additionally, attendance at a hearing or trial may provide a starting point for interest in collecting data to demonstrate the perceived effects of the law.

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faculty. A description of the class is as follows:

> In recent years, proof based on statistical evidence has come to play a key role in diverse types of litigation. Some prominent examples are epidemiological studies in mass tort cases, multiple regression models in employment discrimination class actions, and Bayesian probabilities in paternity contests. To comprehend statistical methods, to use them correctly, and to expose errors by others are challenges for most lawyers and judges. The purpose of this seminar is to prepare students for this brave new world by introducing them to the basic ideas of probability and statistics as they have appeared in the legal arena. The emphasis is not on calculation but on what might be called the legal logic of statistical inference. The goal is to equip students to recognize issues raised by quantitative methods and to work more knowledgeably with experts. The seminar ends with a mock trial of a statistical question in which students examine and cross-examine expert statisticians.

COLUMBIA UNIVERSITY SCHOOL OF LAW BULLETIN 14 (1994-95). With respect to enrollment, a total of 18 students chose this class as a first choice in the fall of 1994, and 14 students (10 third-year and 4 second-year) finished the class from beginning to end. In the fall of 1993, 5 students chose this class as a first choice, and 9 students (2 third year, 4 second year, 1 LL.M. student, and 2 transfer students) finished the class. Last, in the fall of 1992, a total of 12 students chose "Statistics for Lawyers" as a first choice, and 5 students (3 second year and 2 transfer) finished.

Although the class does not appear to be as popular with the students as some of the other electives, there has been an increase in enrollment from 1992 to 1994 (enrollment figures were not available prior to 1992); and, based on anecdotal evidence, students generally enjoy the class.

81. For example, Professor Curtis Berger of Columbia University School of Law, takes his property students to hearings relating to landlord-tenant law in an attempt to demonstrate that what they are studying in class affects the lives of everyday people.

(4) *Law schools should encourage, or at least not discourage, collaborative empirical scholarship.* As mentioned above, collaborative research efforts are generally not encouraged in the legal academy, especially for tenure purposes. Yet an empirical endeavor often requires the assistance of social scientists, for example, sociologists. In light of the value and contribution of empirical research, greater encouragement of collaborative research should be forthcoming from law faculties. Possibly, this encouragement could be pecuniary in nature. Alternatively, it could be tenure related. Tenured faculty should encourage collaborative research by expressing to non-tenured professors that empirical collaborative scholarship will be viewed equally with traditional forms of scholarship in tenure determinations.

Some may oppugn such a policy and claim that it would give rise to a Pandora's Box, inducing non-empirical collaborative research efforts by scholars who would come to expect that their scholarship is satisfactory for tenure purposes. In response to this claim, I demur. Collaborative legal scholarship, irrespective of subject matter, should be treated equally with single-authored legal scholarship. Physicians, scientists, economists, sociologists, psychologists, and other academics frequently publish collaborative research efforts. Why are legal academics different? Collaborative research provides law professors with the opportunity to entertain disciplines other than the law, to step outside the confines of the law and partake of the rich personal and professional offerings of the university community.[82]

(5) *Law schools should hire professors who express an interest in doing empirical research.* This may be a catch-22. Faculty candidates may not express an interest in empirical research if they believe that the law school is not receptive to empirical research. Even if the law school tells the candidate that empirical research is valued and encouraged, the candidate may be justifiably skeptical.[83] Thus, one way for the school to prove its sincerity is to show the candidate, empirically, that it values empirical research. That is, a faculty appointments committee may say to the candidate: "Those faculty members who decided to embark on empirical research were granted tenure based on that research;" or "over the past five years many members of our faculty have worked closely with professors from the sociology and anthropology departments at the uni-

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82. *See* TERESA SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS vii (1989), wherein the authors state in their preface:

> A fair number of law professors have done empirical studies, but all too often with little or no help from social scientists trained in survey research and statistical inference. On the other hand, despite devoting enormous resources to the study of income levels and sources, social scientists have largely ignored problems of debt. . . . Our team of two law professors and a demographer arose from the happy circumstance of personal and professional relationships that threw us together. We learned about common interests, but more importantly we came to be fascinated by the things that the other person knew and could do.

83. Schuck, *supra* note 4, at 333. Recall, 35% of the tenured professors that I surveyed stated that tenure is a factor relating to the lack of empirical scholarship.

versity, and have published over thirty collaborative law review articles."

(6) *Law schools or legal foundations should sponsor summer institutes on empirical research training.* Many law professors have learned economics by attending multiple week summer institutes. Perhaps, such an arrangement can work for training law professors in the empirical method; at least it will expose law professors to the rigors associated with empirical research. A summer institute would provide an immersion for law professors, which facilitates learning. Summer institutes also would provide an environment for the development of collegial relationships for collaboration and a germination of ideas and areas for empirical studies.

Of course, I do not expect to witness the implementation of these suggestions overnight. However, I do hope to contribute to the dialogue that is currently taking place within the legal community about the nature of legal scholarship and its effect on the relationship between the academy and the profession.

CONCLUSION

The gap between the legal academy and the legal profession is cause for concern. I believe that part of the reason for this rift is the lack of empirical legal scholarship being produced by law professors. Empirical scholarship speaks to the profession in that it allows judges, legislators, administrators, and practitioners to ascertain how the law affects our lives and what reforms, if any, need to be implemented. In this regard, empirical scholarship is also an instrument of individual and social growth. The Pragmatists realized as much, as did notable legal academics during the 1920s and 1930s, and the Law and Society movement does today. Yet, the legal profession is bereft of empirical scholarship, and the primary reason for this is that law professors are not well trained in the empirical method. As a remedial measure, law schools should become more receptive to courses in the empirical method and statistics; and law faculties should encourage the production of more empirical scholarship, whether it entails collaboration or not. In essence, legal academics need to reestablish a dialogue with the legal profession, and one way of accomplishing this is to be more receptive to empirical scholarship.