

[Forthcoming in 80 Tul. L. Rev. 1009 (2006)]

Go Out and Look: The Challenge and Promise of Empirical Scholarship in Contract Law

David V. Snyder*

The opportune scholarly moment has arrived for empirical scholarship in contract law. Exhortations to do empirical work have long resounded through the academy, at least since the time of the Legal Realists, but as is often observed, the Realists accomplished little of the kind of empirical work that they had in mind, or of the kind we mean when we speak of empiricism (a definitional point that will be taken up shortly).¹ Not until the pioneering work of Stewart Macaulay, as well as Lawrence Friedman and others of the Wisconsin School, did empirical work get off the ground in an important way, at least as far as contracts are concerned.² And aside from the work of the Wisconsin School,³ the law reviews for many years continued their long record of purity, largely unsullied by empiricism. In recent years,

* Professor of Law, Tulane University School of Law; Chair, Section on Contracts, Association of American Law Schools (2005-2006). All of the papers published here were first presented at the annual meeting of the AALS Section on Contracts on January 6, 2006, in Washington, D.C. I would like to thank all of the participants in the symposium and the editors of the *Tulane Law Review* for their extraordinary efforts in making this symposium happen without so much as a hiccup, despite the worst natural disaster in the history of the nation, a change of venue of more than 1000 miles, and a rearrangement of the schedule. I owe particular gratitude to Stewart Macaulay for his comments on a draft, and I would also like to acknowledge the extremely able research assistance of Jamie L. Walter.

1. See WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 39 (1973); Stewart Macaulay, *Contracts, New Legal Realism and Improving the Navigation of The Yellow Submarine*, 80 TUL. L. REV. 1159 (2006).

2. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 55-67 (1963) (using empirical methodology to examine the use of contracts in exchange relationships); LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY 3, 9-13 (1965) (analyzing over 500 Wisconsin contract cases in order to explore the relationship between contract law and societal institutions).

3. See Symposium, *The Relevance of Contract Theory*, 1967 WIS. L. REV. 803.

EMPIRICAL SCHOLARSHIP

though, the pages have gained texture from empirical work, and there is now certainly enough of it to warrant a gathering devoted to empirical scholarship in contract law.

My role in this symposium, as well as the role of these introductory reflections, is adventurous. I am no empiricist. Yet nearly all scholars of contract law are inevitably interested in empirical work on the subject, and nearly all of us are consumers of empirical scholarship. We read it and are informed by it. Our views are shaped by it. Our classes and writings reflect it. With more careful study and closer thought, however, we may find that we are less reliably informed than we think, and we are correspondingly in greater need of more work done with greater rigor. The reflections that follow are those of a consumer of empiricism, and they are directed at fellow consumers as well as those who offer empirical work. These ruminations are centered on three points: what we mean by *empiricism*, how we may be misled by failures to adhere to established rules of inference, and why we must be wary of pinning too much on scientific appearances.

The necessary starting point is definitional, and it is surprisingly convoluted. The word *empiric* and its various forms have long carried connotations of the worst kind of pseudo-science.⁴ For a long time, a practitioner of empiricism was, by definition, “a quack” or “[a] pretender, impostor, [or] charlatan.”⁵ This meaning seems to come from a school of medical and scientific thought that eschewed theory and based its practices solely on observation, experience, or experiment.⁶ Whatever ancient patina (through an association with the Greek sect of *Ἐμπειρικοί*) might otherwise have lent respectability to empirical practices seems largely to have dissipated in the usage of Renaissance and early Modern times.⁷ Instead, empiricists were the sort of quack physicians so well known, even now, to all contracts scholars—and probably most contracts students.⁸

Certainly this sort of definition is more than a little uncongenial for a symposium devoted to empirical scholarship, and obviously the word has somehow been rehabilitated, becoming not only respectable

4. OXFORD ENGLISH DICTIONARY 188 (2d ed. 1989) (defining “empiric”).

5. *Id.*

6. *See id.*

7. *See id.*

8. *See* Carllill v. Carbolic Smoke Ball Co., (1892) 1 Q.B. 256 (Eng. Ct. App.); A.W.B. Simpson, *Quackery and Contract Law: The Case of the Carbolic Smoke Ball*, 14 J. LEGAL STUD. 345, 345 (1985).

EMPIRICAL SCHOLARSHIP

but scholarly, and perhaps even scientific. I will not pretend to know how this change occurred, but an apparent correlation may be observed: the negative connotation of empiricism disappeared along with the empiricists' disdain for theory. Indeed, much legal scholarship is both theoretical or doctrinal as well as empirical.⁹ Perhaps this coupling of empirical observation with theoretical thinking or doctrinal analysis helps to rescue empiricism from quackery, or irrelevance.

A further etymological observation may help us further understand the role of empiricism in today's scholarship. Beyond its association with the *Εμπειρικοί*, the word is related to *ἐμπειρία*, or experience.¹⁰ At a time when long experience in practice is often eschewed by legal academia, empirical research allows the academy a different, more scientific form of experience. Lacking years of courtroom argument or contract negotiation, scholars nonetheless hope—and need—to know what is happening outside the stone walls of the law school. Empirical work, done properly, can help to fill that need, and in some ways it can do so in a way that is more reliable than first-hand experience. Experienced experts can explain, on their own authority, what has happened in their experience, and if they enjoy long experience and expertise, they may well assume and assert that practice elsewhere is the same as in their bailiwick. Empirical digging is necessary to verify these assertions, and the digging often shows that practice is more varied than the expert disclosed, or even knew.¹¹ In addition, the reach for empiricism fits with the push away from professional training and the pull toward the sort of scholarship valued in the nonprofessional departments of the university. This point will arise again later.

Etymological discursus notwithstanding, delving into the dictionary has yet to disclose the kind of definition that seems comfortable in the legal academic setting. Many legal academics are referring to statistical or other quantitative analysis when they discuss empirical scholarship,¹² but the endeavor is broader.¹³ Professors

9. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 3-6 (2002).

10. See OXFORD ENGLISH DICTIONARY, *supra* note 4, at 188.

11. See James J. White, *The Influence of International Practice on the Revision of Article 5 of the UCC*, 16 NW. J. INT'L L. & BUS. 189, 213 (1995).

12. See Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 810 (1999); Craig Allen Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession*, 30 WAKE FOREST L. REV. 347, 349 (1995); Peter H.

EMPIRICAL SCHOLARSHIP

Epstein and King offer the following definition, noting that it includes quantitative and qualitative work: “The word ‘empirical’ denotes evidence about the world based on observation or experience.”¹⁴ *Empiricism*, they say, is simply about “basing conclusions on observation or experimentation.”¹⁵ Their article, still relatively recent, is probably the most authoritative guide to empirical work for legal scholars, and it aims to bring the rigor of the sciences into the legal academy.¹⁶ The core of the definition—observation, experience, or experiment—resonates reasonably well with the sort of work that contracts scholars often mean when they speak of empiricism, and the remainder of this Article will take Professors Epstein and King’s definition as authoritative.

As a mere consumer of empirical work, I am hardly in a position to criticize these masters. Yet a reader and consumer may still observe that their definition includes a term that they importantly recharacterize later in the article.¹⁷ To be empirical, they say, the evidence must be “about the world.”¹⁸ In this form, the phrase seems to carry little meaning, as there is little that is not in some way “about the world.”¹⁹ Even most theory has to do with the world in one way or another. Still, Professors Epstein and King are driving at a significant point that comes out when they rephrase and speak repeatedly of the “*real* world.”²⁰ They seem hesitant to use the phrase formally, but their urge to link empiricism with the real world is the best instinct. It again brings back the Legal Realists.

In their efforts to free the law from what they considered an arid conceptualism, the Realists suggested an antidote that might be summed up by a slogan: Go out and look. This idea, I would suggest, is at the heart of the sort of work that contracts scholars would identify as empirical. The slogan includes the point that empiricism may be qualitative as well as quantitative, and that the answer to what is often called “an empirical question” need not involve any numbers, much

Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 323 (1989).

13. Epstein & King, *supra* note 9, at 2-3.

14. *Id.* at 2; *see also* OXFORD ENGLISH DICTIONARY, *supra* note 4, at 189 (providing a second definition of *empirically* as “[b]y means of observation and experiment”).

15. Epstein & King, *supra* note 9, at 2.

16. *See id.* at 1-2.

17. *See id.* at 2.

18. *See id.*

19. *See id.*

20. *Id. passim* (emphasis added).

EMPIRICAL SCHOLARSHIP

less sophisticated statistical analysis or learned use of Greek letters. (The reverse is true as well: the presence of numbers and Greek letters does not make an article empirical. These reflections are indeed a case in point.)

At the same time, the thirst to know what may be learned from going out and looking is slaked only unsatisfactorily by pulling case reporters from the library shelves or running searches through Westlaw or Lexis. In understanding the sort of empiricism that I am arguing for, I would like to begin with three nonrigorous suggestions:

1. Judicial case analysis does not *seem* empirical.
2. Quantitative analysis is not necessarily empirical.
3. Empirical scholarship must have to do with a world that we are willing to call “real.”

To begin with the first proposition, consider a hypothetical article about a single Supreme Court case, say, *Carnival Cruise Lines v. Shute*.²¹ Assume the article dissects the majority opinion and predicts the implications for future doctrine. The article considers the dissent and places the entire case in the context of preceding cases, statutes, and scholarship. It is a thoroughly done piece, useful, and perhaps important. It does not seem empirical; most contracts scholars would not refer to it as a new empirical article on contracts of adhesion, unconscionability, forum selection clauses, or anything else. This description would still hold even if the article includes a copy of the cruise ticket as it is reproduced by Justice Stevens.²² The article would need something more to be considered empirical: the author would have to go out and look at something, and he would need to look at something other than cases, statutes, and articles.

For the same reason, a quantitative statistical analysis of the case law would make the article no more empirical. Suppose the author surveyed all cases weighing the unconscionability of forum selection clauses. The cases are coded for purposes of statistical analysis and reported in tabular form (similar to the work on promissory estoppel by Professor Hillman, some of whose tables appear in Figure 1 to help give a flavor of the kind of statistical summary that is involved).²³ This work would make the article more useful, and more important,

21. 499 U.S. 585 (1991).

22. *See id.* at 605 (Stevens, J., dissenting).

23. *See* Robert A. Hillman, *Questioning the “New Consensus” on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, tbls. 1.3, 2.1-2 (1998).

EMPIRICAL SCHOLARSHIP

but it is no more empirical for having used either numbers or statistical techniques. While this view may be controversial, particularly given current usage within the legal academy,²⁴ it can in fact be defended rigorously, based on the King and Epstein definition that we have taken as authoritative.²⁵ Similarly, an article is no less empirical for stressing qualitative factors.²⁶ Thus the second proposition holds, even under careful assessment.

FIGURE 1

Table 1.3²⁷

Win Rate of Promissory Estoppel Claims on the Merits—Trial Courts

	Plaintiff Wins		Plaintiff Loses		Total
	N	(%)	N	(%)	
Promissory Estoppel Claims ⁶⁴	6	(5.45)	104	(94.55)	110
Comparison: Win Rates for Contract Claims in Federal District Court Cases ⁶⁵	14,308	(54.77)	11,818	(45.23)	26,126

⁶⁴These state trial court and federal district court claims from the data were successful or failed on the merits, as defined *supra*.

⁶⁵These data are derived from a “database of about 3.7 million federal district court civil cases terminated over the last 17 fiscal years. The data were gathered by the Administrative Office of the United States Courts, assembled by the Federal Judicial Center, and disseminated by the Inter-university Consortium for Political and Social Research.” Quoting from the Internet at <<http://teddy.law.cornell.edu:8090/questcv2.htm>> (visited Feb. 3, 1998) (on file with the *Columbia Law Review*) where the data is available. The plaintiff win rate reported in this Table is for all types of contract cases terminated in federal district courts during fiscal years 1990-1994 (July 1, 1989 through September 30, 1994) for which the method of disposition was a pre-trial motion, jury verdict, directed verdict, or non-jury trial. Cases that were disposed of by default judgment or consent judgment are not included.

Table 2.1²⁸

Win Rates of Promissory Estoppel Claims by Subject Matter—
Outcome of Cases Decided on the Merits

Subject Matter of Dispute	PE claim succeeded on the merits		Total
	N	(%)	
Employment	6	(4.23)	142
Construction	2	(22.22)	9
Sale of Real Property	1	(10.00)	10

24. See *supra* note 12 and accompanying text (citing Heise, Nard, and Schuck).

25. See *supra* note 14 and accompanying text.

26. See, e.g., Juliet P. Kostritsky, *The Rise and Fall of Promissory Estoppel or Is Promissory Estoppel Really as Unsuccessful as Scholars Say It Is: A New Look at the Data*, 37 WAKE FOREST L. REV. 531, 584-85 (2002) (recognizing the importance of qualitative judgments in understanding win/loss rates); cf. Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 WIS. L. REV. 943, 943 (discussing judicial receptivity to commercial actors’ efforts to minimize liability based on promissory estoppel).

27. Hillman, *supra* note 23, at 591.

28. *Id.* at 593.

EMPIRICAL SCHOLARSHIP

Lease of Real Property	0	(0.00)	4
Loaning of Funds	0	(0.00)	13
Sale of Goods	4	(22.22)	18
Sale of Intangibles	0	(0.00)	4
Lease of Equipment	1	(33.33)	3
Promissory Note	0	(0.00)	5
Other	15	(16.85)	89
Unclear	0	(0.00)	2
Total	29	(9.70)	299

Table 2.2²⁹

Win Rates of Promissory Estoppel Claims in Which Subject Matter
Was Employment—Outcome of Cases Decided on the Merits

Subject Matter of Dispute	PE claim succeeded on the merits		Total
	N	(%)	
Employment	6	(4.23)	142
All Other Subject Matter	23	(14.65)	157
Total	29	(9.70)	299

Fisher's exact test (2-sided) $p = 0.003$

The only point of this argument that cannot be defended rigorously is the first and seemingly most obvious piece: that a simple case note is not empirical. Whether that case note merits the adjective “empirical” turns on what we consider to be the “world” for purposes of empirical research. If the library and the Supreme Court are part of the world—and in some way, surely they must be—then the case note is empirical scholarship.³⁰ In fact, so is Professor Hillman’s work debunking the new consensus on promissory estoppel.³¹ And both, as is important below, are subject to the rules of inference.³² Again, though, Professor Hillman’s work is no *more* empirical just because it uses statistical analysis.

The urge that prompted the Realists to want to go out and look, which is perhaps the same urge that prompts Professors Epstein and King to refer to the “real world,” indicates a desire and need to know more about what happens in matters that are not reflected within the library of the law school or the computer in each faculty office. The intellectual history of contract scholarship suggests that this urge to go out and look needs encouragement wherever possible. Focusing the

29. *Id.*

30. This point was made at the live symposium by Professor Richard Owen Lempert of the University of Michigan. Richard Owen Lempert, Remarks at the Association of American Law Schools Annual Meeting, Panel on Empirical Scholarship in Contract Law (Jan. 6, 2006) (transcript available at <http://www.aals.org/am2006/program/Friday.html>).

31. See Hillman, *supra* note 23, at 582, 595-96.

32. See Epstein & King, *supra* note 9, at 2.

EMPIRICAL SCHOLARSHIP

current interest in empiricism on the world outside the law schools and the appellate courts could lead to much-needed illumination—light that could and should be put to use in the practical and important work done by lawyers, law professors, and judges.³³

Note that the argument that empirical work is about going out and looking is not an argument about what is important. Although they did not do it much, some of the Realists did go out and look a bit. Possibly they were naïve; in any event, some of their labor appears remarkably unimportant though perfectly empirical. Underhill Moore's studies of parking in New Haven are perhaps the most famous example, "a symbol of the ridiculous and expensive pursuit of trivia by the highly talented."³⁴ Similarly, unempirical work can be of immense utility and importance, taking as an example much of the work of the late Professor Farnsworth.³⁵ When we say that work is empirical we mean that it undertakes something beyond the doctrinal or the theoretical, and that different aspect is what these reflections aim to highlight. It turns out to be, I think, the need to go out, look, and report back.

The other two points of these reflections can be made more briefly. The first is the need for care when doing or using empirical research. Because so many of us without training in science or social science nevertheless need to use the fruits of empirical work, it is easy both to miss the flaws that make some empirical work unreliable, and it is just as easy to misuse or misunderstand perfectly good empirical scholarship. Fortunately, a solution to this problem is readily available. In *The Rules of Inference*, Professors Epstein and King take on the task of educating the legal academy on the rules to be followed.³⁶ In this regard, the widest definition of empiricism is necessary, for almost all legal research is subject to at least some of the rules of inference. Indeed, in that sense we have all been doing empirical research, though we may be just as surprised as M. Jourdain

33. Though technically outside the field of contract law, Professor White's lament about the drafting of revised Article 5 (Letters of Credit) of the Uniform Commercial Code (UCC) without the benefit of empirical knowledge illustrates the point nicely, and the same point could be made with respect to much of the drafting that is even closer to the contracts field, such as the amendments to UCC Article 2 (Sales). See White, *supra* note 11, at 189, 211-13.

34. TWINING, *supra* note 1, at 63, 65-66.

35. For example, the following works are unempirical in the sense used here, but nonetheless important: E. ALLAN FARNSWORTH, *CONTRACTS* (4th ed. 2004); E. ALLAN FARNSWORTH, *CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS* (1998).

36. See Epstein & King, *supra* note 9.

EMPIRICAL SCHOLARSHIP

was to discover that he had been speaking prose for forty years without knowing it.³⁷ Now that we know it, we can do so more consciously, with some awareness of the rules, and with an effort to distinguish the good from the bad.³⁸

Professor Epstein and King's article is not only crucial reading for both producers and consumers of empirical research, it is easily accessible. True, it is long. But the basic points can be gleaned quickly. The length of the article comes from the many examples of missteps in the legal literature.³⁹ The authors explain the rules and their significance in language that is clear even for untutored law professors. While the rules and principles are easy to understand once they are explained, they are not all obvious, and it is a mistake to assume that common sense is enough to evaluate whether and how to rely on empirical scholarship. Without considering the arguments that arise from their piece (or similar learning), we are doomed to repeat the nearly constant errors that Professors Epstein and King have found. Without due care, these mistakes will pervade our thinking everyday, from basic conceptions about the way the world of contracting works to what we teach in the classroom.

The third and final point is a cautionary musing about the American legal academy: the current popularity of empirical research and seductive quantifications is a striking parallel to the nineteenth-century idea of legal science, as well as various reprises of that perennial yearning.⁴⁰ The stereotypical image of a Langdellian legal scholar working "in much the way that a scientist discovers scientific principles" has now been largely discredited, even if we still feel the same pull that Langdell did to prove the worth of legal scholarship in the context of a university.⁴¹ Even scholars as early as Williston recognized that these scientific, purely deductive, and almost

37. See JEAN-BAPTISTE POQUELIN (MOLIÈRE), *LE BOURGEOIS GENTILHOMME* act 2, sc. 4 (Claude K. Abraham ed., Prentice-Hall, Inc. 1966) (1670) ("*Par ma foi! il y a plus de quarante ans que je dis de la prose sans que j'en susse rien . . .*").

38. Curiously, Grant Gilmore made this very observation. GRANT GILMORE, *THE DEATH OF CONTRACT* 5-6 (1974) ("Once it has been revealed to us that it is really prose that we are speaking, we immediately become concerned about a theory of language, about rules of grammar and syntax, about differentiating good usage from bad.").

39. See Epstein & King, *supra* note 9, *passim*.

40. Certainly the most amusing account is GRANT GILMORE, *THE AGES OF AMERICAN LAW* 41-67 (1977) (noting the scientific impact on American Law prior to World War I, specifically influenced by Christopher Columbus Langdell and his contemporaries).

41. W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 2-4 (1997); see, e.g., Dennis Patterson, *Langdell's Legacy*, 90 NW. L. REV. 196, 196 (1995).

EMPIRICAL SCHOLARSHIP

Euclidean pretensions at science were troubled, and the shortcomings of that approach are even more apparent now.⁴²

No doubt the current moves toward empiricism are better placed than the now-discredited ones, with better qualified scholars working with more sophisticated methods. Nevertheless, an outsider might still wonder if he observes the same straining that Williston identified when he reacted to the previous generation's conceptions of legal science:

Law is a science but it is a pragmatic science. It can rarely deal with the absolute. Questions of how far and how much constantly intrude, and the questions of degree thus introduced require for their solution determination of doubtful facts and comparative valuing of interests, which have no mathematical equivalents.⁴³

That lesson is a hard one to learn. The lesson includes the limits of scientific approaches, the dangers of their illusions of certainty, and the merits of less scientific inquiries.⁴⁴ Langdell taught us much, and gave us much.⁴⁵ That experience has clarified the shortcomings of this method and the misguided nature of his scientific aspirations does not make his work useless. On the other hand, if we fail to see some of the same scientific aspirations in current empirical scholarship, and feel not enough of a twinge of recognition to require care before we pin too much on legal scientific aspirations, then we have indeed failed to learn from Langdell, or from Williston, much less Corbin and the Realists.

That we cannot pin the world on empiricism, though, hardly takes away anything real. Empirical scholarship is full of insight and learning for all teachers and scholars of contract law, and the present papers are fine examples. The study presented here by Stephen Choi and Mitu Gulati may come from a rarefied stratum of the contracts world, but it raises immediate questions for contracts scholars and teachers.⁴⁶ The data come from sovereign debt contracts—in other

42. See SAMUEL WILLISTON, LIFE AND LAW: AN AUTOBIOGRAPHY 202 (1940).

43. *Id.*

44. On the last point, see Professor Macaulay's contribution to this symposium, as noted *supra* note 1.

45. Observing Holmes's citations to Langdell is an interesting exercise in itself; Holmes certainly knew both the use and the limits of Langdell's work. See, e.g., O.W. HOLMES, JR., THE COMMON LAW 286, 305-06, 335 (1881); see also Patterson, *supra* note 41. For a more critical view, see John Henry Schlegel, *Langdell's Legacy or, The Case of the Empty Envelope*, 36 STAN. L. REV. 1517 (1984) (reviewing ROBERT B. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983)).

46. Stephen J. Choi & G. Mitu Gulati, *An Empirical Study of Securities Disclosure Practice*, 80 TUL. L. REV. 1023 (2006).

EMPIRICAL SCHOLARSHIP

words, government bonds. These contracts for enormous loans, starting in the hundreds of millions of dollars, can and do support expensive, elite lawyering. They are also subject to elaborate disclosure rules promulgated by the SEC. Yet empirical investigation shows that the actual disclosures made in the real world are topsyturvy, with issuers uselessly disclosing well-known information that may not even need to be mentioned, but failing to disclose more important information, even though this failure may well violate the securities laws.⁴⁷ Even more curiously, the empirical findings do not suggest that issuers are hiding damaging information while touting the encouraging points. More likely, these expensively lawyered transactions seem simply to be following the practices perceived as usual in the marketplace, a seeming network effect that is leading to systematically unbalanced disclosures.⁴⁸ For contracts teachers who must take on the slippery problems associated with duties to disclose,⁴⁹ there are important lessons here, most pointedly about the questionable efficacy of imposing rules. If the SEC cannot achieve optimal disclosure, can the common law?

George Geis takes on a different common law issue in his article: the optimal precision of default rules.⁵⁰ Would it be better to have different default rules for different contexts, or the same simple default for all? In his inquiry, he takes on *Hadley v. Baxendale*,⁵¹ the typical testing ground for default rule research, and asks whether the law might do better to have different default rules for different kinds of contracts. To answer this question, he uses rigorously collected and analyzed marketing data to create computerized simulations of “sample economies.” The article tests whether a single, simple default rule would work better than a more complex “compound default rule” that is more sensitive to context. The method itself is particularly intriguing, as it shows how the rich world of marketing data can be used in contracts scholarship. The method also has the benefit of showing how Baron Alderson’s opinion works when it meets a digital music player, an autologous blood donation, or the quotidian travel mug, among other things.

47. *Id.* at 1062.

48. *Id.* at 1068.

49. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 160-161 (1981); *see also id.* § 153 (unilateral mistake).

50. George S. Geis, *An Experiment in the Optimal Precision of Contract Default Rules*, 80 TUL. L. REV. ____ (2006).

51. 9 Ex. 341, 156 Eng. Rep. 145 (Exch. 1854) (Alderson, B.).

EMPIRICAL SCHOLARSHIP

A symposium on empirical legal scholarship would not be complete without Professor Macaulay, and his entry in this volume calls for a new legal realism. He goes beyond the original realists in two important ways: as already noted, he actually did empirical scholarship,⁵² and more importantly for present purposes, he continues to try to pull scholars from their accustomed place in the mandarin, shaded by the baroque accretions that they have added to the edifice of appellate opinions. The “living law” or the “law in action”⁵³ is where Professor Macaulay wants us—studying the relational norms that hold contracts together,⁵⁴ the deterrent effect of terroristic civil trials,⁵⁵ the negotiation that is different for black people than for white people,⁵⁶ and the functional mix of public and private lawmaking.⁵⁷ This is a complex and resonant call, reverberating through economic, political, and historical theory, as is demonstrated in the margins of his article. His argument also takes on empirical theory, challenging the notion that studies which violate one or more of the lofty rules of inference, studies which lack a random sample, or which cannot be replicated, tell us nothing.⁵⁸ Through all of these complexities, his call is still centered on the urge to go out and look,⁵⁹ and then—only then—to draw a map of contract law that is real, that will help us avoid fatal collisions, that perhaps will keep us from getting lost. Until someone draws a better map.⁶⁰

Debora Threedy’s contribution on legal archaeology moves empirical scholarship forward on a number of fronts.⁶¹ Having practiced legal archaeology with her prominent study of *Alaska*

52. As noted *supra*, the original realists called for empiricism but did little, and what they did was of questionable utility. See *supra* notes 1, 34 and accompanying text. The pioneering work was Macaulay, *supra* note 2 and accompanying text.

53. See Macaulay, *supra* note 1, *passim*.

54. *Id.* at 1169, 1180.

55. *Id.* at 1165-67.

56. *Id.* at 1177-79.

57. *Id.* at 1171-72.

58. *Id.* at 1182 & n.94.

59. See *id.* at 1183 (stating that “our best bet is to find one or more people who know what is going on and ask them”).

60. See Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC’Y REV. 115, 118-20 (1979) (stating that the study “should be read as a preliminary study, offering suggestions the author thinks are true enough to warrant reliance until someone is willing to invest enough to produce better data and lucky enough to find a way to get them”).

61. Debora L. Threedy, *Legal Archaeology: Excavating Cases, Reconstructing Context*, 80 TUL. L. REV. 1195 (2006).

EMPIRICAL SCHOLARSHIP

Packers' Ass'n v. Domenico,⁶² here she takes on several theoretical and methodological challenges. The article helps fill the need for more work on methodology in legal scholarship, and it advances the argument for “grounded theorizing,” in which data are used to construct the theoretical agenda rather than the other way around. The method is appealing as producing theory based on evidence, although of course the true test for such theories will come as they are tested in new settings. The article goes on to show how this process can be achieved, and more importantly, how it can be pointedly useful rather than simply entertaining.⁶³ Canvassing the existing literature in legal archaeology, Professor Threedy shows how case studies and similar work can expose the relation between social change and the law, as well as the social constructions inherent in the legal process.

All of these scholars have gone out and looked. It is important work, and we all benefit.

62. 117 F. 99 (9th Cir. 1902); *see also* Debora L. Threedy, *A Fish Story*: Alaska Packers' Ass'n v. Domenico, 2000 UTAH L. REV. 185.

63. Professor Threedy's article is responding to the objections voiced by Professor William Twining, e.g., in *Cannibalism and Legal Literature*, 6 OXFORD J. LEG. STUD. 423, 430 (1986) (reviewing A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW* (1984)).