BEYOND FIRESIDE INDUCTIONS

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Paul Meehl observed some time ago that many legal doctrines depend less for their origins on systematic empirical research than on the lawyer's "fireside inductions," or "commonsense empirical generalizations about human behavior which we accept on the culture's authority plus introspection plus anecdotal evidence from ordinary life."[1] As any evidence professor can tell you, behind many of the rules of evidence lurks much armchair theorizing about human nature by eminent jurists and little careful study of human behavior.[2]

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* Associate Professor, Florida State University College of Law. I am personally grateful to the participants in the conference on the Behavioral Analysis of Legal Institutions: Possibilities, Limitations, and New Directions for investing the considerable effort needed to produce the thoughtful articles and comments that made the conference a great success. I also appreciate the support provided by Dean Don Weidner for the conference and the efforts of Adam Hirsch, Mark Seidenfeld, Jim Rossi, J.B. Ruhl, the members of the *Florida State University Law Review*, and especially Stephanie Williams in the planning and administration of the conference.

1. Paul E. Meehl, *Law and the Fireside Inductions (with Postscript): Some Reflections of a Clinical Psychologist*, 7 BEHAV. SCI. & L. 521, 522 (1989) [hereinafter Meehl, *Law and the Fireside Inductions (with Postscript)*]. Meehl first wrote about the role of fireside inductions within the law in 1971. Paul E. Meehl, *Law and the Fireside Inductions: Some Reflections of a Clinical Psychologist*, 27 J. SOC. ISSUES 65 (1971). Eighteen years later he added a postscript to the original article. The version of the article that I cite to contains the postscript to the original article and also contains abridgements to the original article. A full version of the original article, with postscript, can be found in a collection of Meehl's works. *See* PAUL E. MEEHL, *Law and the Fireside Inductions: Some Reflections of a Clinical Psychologist*, *in* SELECTED PHILOSOPHICAL AND METHODOLOGICAL PAPERS 440 (C. Anthony Anderson & Keith Gunderson eds., 1991).

2. The hearsay rule and its exceptions exhibit this tendency to favor fireside inductions over empirical research perhaps better than any other area within evidence law. *See, e.g.*, John E.B. Myers et al., *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, 65 LAW & CONTEMP. PROBS. 3, 3 (2002) ("Exceptions to the hearsay rule grew out of intuitive beliefs about human nature."); Roger C. Park, *Visions of Applying the Scientific Method to the Hearsay Rule*, 2003 MICH. ST. L. REV. 1149, 1170 ("Pending further empirical research, legal policymakers seeking answers to questions such as whether the hearsay rule should be abolished or modified will have to rely upon their traditional tools of history, experience and fireside induction."). Wigmore, for example, was an important advocate of the "excited utterance" exception to the hearsay rule based on his own theorizing about how people act under stress.

> According to Wigmore, this "immediate and uncontrolled domination of the senses" lasts for a "brief period." During this short time, neither thoughts of "self-interest" nor other "reasoned reflection" arise. Therefore, the utterance is "particularly trustworthy" and may be admitted despite its hearsay character. Wigmore even hinted that such evidence is superior to in-court testimony because of its spontaneity and closeness to the event.

Aviva Orenstein, "*My God!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CAL. L. REV. 159, 170 (1997) (footnotes omitted). Orenstein also noted:

> Wigmore postulated that precise contemporaneousness was not required to meet the excited utterance exception and believed that the doctrine did not have a fixed time limit between startling event and excited utterance. . . . He believed that duration of stress, rather than exact timing, played the predominant role justifying this exception to the hearsay rule.

Given that evidence law is not the only field overpopulated by lay psychologists *qua* lawmakers, who prefer their own introspection and observation to the systematic research of behavioral scientists,[3] it is somewhat surprising that we have witnessed over the last decade a widespread interest in using behavioral studies of legal institutions to move beyond fireside inductions as the bases for legal policy.[4] Empirical research into trial issues remains vigorous, but the domain of law and behavioral science now extends well beyond jury and eyewitness research to encompass such diverse topics as the behavioral foundations of estate tax law[5] and the psychology of the plea bargaining process.[6] Indeed, one possessed of a short memory and an optimistic outlook might even go so far as to say that empirical legal research has finally become an accepted and important form of inquiry within the legal academy.[7]

Id. at 171. Wigmore also famously rejected the application of psychological research to evidence law in a scathing critique of early eyewitness research by the German psychologist, Hugo Muensterberg. *See* John H. Wigmore, *Professor Muensterberg and the Psychology of Testimony*, 3 ILL. L. REV. 399 (1909). Wigmore's view of psychology (at least the part represented by Muensterberg's work) as something less than scientific surely contributed to his attack on Muensterberg, for earlier Wigmore had written that "jurisprudence is best founded and most respected when it keeps pace with the progress of science." John H. Wigmore, *Scientific Books in Evidence*, 26 AM. L. REV. 390, 390 (1892).

3. *See, e.g.*, David P. Bryden, *Scholarship About Scholarship*, 63 U. COLO. L. REV. 641, 645 (1992) ("I have the impression that legal scholarship is very gradually becoming more social-scientific. Yet it remains true that we rely, 99 times out of 100, on unproven fireside inductions about how the law shapes conduct.").

4. One measure of lasting interest in a topic is the number of symposia addressing the topic over time. Since 1998, beginning with the Vanderbilt conference on behavioral approaches to judgment and decisionmaking organized by Donald Langevoort, no less than seven conferences (not counting the present conference) have been held with significant parts devoted to behavioral approaches to legal judgment and decisionmaking. *See* Symposium, *Empirical Legal Realism: A New Social Scientific Assessment of Law and Human Behavior*, 97 NW. U. L. REV. 1075 (2003); Symposium, *Getting Beyond Cynicism: New Theories of the Regulatory State*, 87 CORNELL L. REV. 267 (2002); Symposium, *Law, Psychology, and the Emotions*, 74 CHI.-KENT L. REV. 1423 (2000); Russel B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 103 (2000); Symposium, *Rational Actors or Rational Fools? The Implications of Psychology for Products Liability*, 6 ROGER WILLIAMS U. L. REV. 1 (2000); Symposium, *Research Conference on Behavioral Law and Economics in the Workplace*, 77 N.Y.U. L. REV. 1 (2002); Symposium, *The Legal Implications of Psychology: Human Behavior, Behavioral Economics, and the Law*, 51 VAND. L. REV. 1497 (1998). Of course, whether behavioral approaches to legal judgment and decisionmaking will continue to enjoy such attention in the coming years remains to be seen, but a substantial jurisprudential foundation for further work in this area has been laid.

5. *See* Lee Anne Fennell, *Death, Taxes, and Cognition*, 81 N.C. L. REV. 567 (2003).

6. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

7. *See, e.g.*, Rachel Croson, *Why and How to Experiment: Methodologies from Experimental Economics*, 2002 U. ILL. L. REV. 921, 945 ("[M]ore [legal experiments] should be used in the future. Experiments are an important addition to the researcher's toolbox that can help achieve our goal of better understanding and explaining our world."). Consider first Julius Getman's optimistic view:

Part of this recent interest in behavioral research may be attributable to an increase in the number of law professors with training in the behavioral sciences,[8] and another part is surely due to the hard work of several scholars to bring behavioral insights to a wide range of worn-out legal explanations and predictively challenged legal doctrines.[9] The more attention behavioral studies receive, the greater the recognition should be of the substantial payoffs that a behavioral analysis of legal institutions can yield. The articles published in this Symposium provide excellent examples of the potential payoffs in this behavioral approach.

One of the main points of Meehl's critique of fireside inductions concerns their unreliability: case-based judgments, despite the confi-

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> I believe that the highest goal of legal scholarship should be sophisticated investigation into the reality of people's lives as an underpinning for the evaluation of legal rules. Empirical study has the potential to illuminate the workings of the legal system, to reveal its shortcomings, problems, successes, and illusions, in a way that no amount of library research or subtle thinking can match.

Julius G. Getman, *Contributions of Empirical Data to Legal Research*, 35 J. LEGAL EDUC. 489, 489 (1985). William Landes' comments temper Getman's optimism:

> [E]mpirical work does not occupy an exalted place at law schools. It would only be a modest exaggeration to say that most law professors regard empirical work as a form of drudgery not worthy of first-class minds. In the legal academic pecking order, empirical research does not rank as high as theory. This translates into a downward shift in the demand for empirical relative to theoretical scholarship in law and economics.

William M. Landes, *The Empirical Side of Law & Economics*, 70 U. CHI. L. REV. 167, 180 (2003).

For a brief history of organized efforts after World War II to infuse legal doctrine with empirical research findings after the upstart efforts of the empiricists within the legal realist movement, see JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 238-57 (1995). Schlegel concludes that the effort to convert law schools and law professors to true believers in the value of empirical legal research has not been particularly successful. *Id.* at 251 ("If it is not inappropriate to invoke the memory of Harry Kalven, one might capture the team's overall performance as 'one hit, no runs, innumerable errors.'").

8. *See, e.g.*, Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1323 (2002) (noting that "[t]he number of dual-degree (Ph.D.-J.D.) law professors is increasing"); *see also* David E. Van Zandt, *Discipline-Based Faculty*, 53 J. LEGAL EDUC. 332, 335 (2003) ("The research faculty of the future law school will be composed largely of academics with a strong disciplinary training in one of the social sciences (including fields such as philosophy and history) who are also well-trained lawyers with a strong grasp for the functioning of law and legal institutions.").

9. Any list of important empirical legal researchers would of course be incomplete, but we were lucky enough to have as participants in the conference some of the most active and important proponents of the application of behavioral science techniques and research to legal topics, including leading jury and judicial behavior scholars and founding members of the behavioral law and economics movement, which has done much recently to expand the domain of behavioral inquiry as scholars within this movement consider the propriety of using the rational-actor assumption to found legal doctrine across all areas of the law. *See* Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1500 (1998) ("Something more rigorous is . . . expected when normative claims are advanced, and the place of the social sciences has expanded in legal discourse to satisfy this expectation.").

dence so often placed in them, typically fail to predict behavior as well as judgments based on a linear regression model derived from a collection of cases.[10] Thus, one of the primary benefits of behavioral study is the emphasis on data collection and analysis rather than reliance on unrepresentative and unreliable personal knowledge. The article by Sharfman,[11] with its collection and analysis of judicial valuations in bankruptcy, represents the positive preference within behavioral studies for more data over less and guided analytical methods over impressionistic analysis. As behavioral analysis gains more adherents, more and more original empirical research is being published in law reviews addressing a broad range of legal topics.[12]

The prospect of gaining new legal knowledge through empirical research remains the key impetus behind much of the behavioral study of legal institutions, but legal scholars need not conduct their own empirical work to use behavioral science evidence in ways that lead to more reliable legal knowledge. The articles by Guthrie and George,[13] Krawiec,[14] Paredes,[15] and Robbennolt[16] demonstrate the utility of literature reviews that bring to bear large bodies of existing social-scientific evidence to evaluate the status of different theoretical positions within legal debates. When the collective evidence is sufficiently abundant and clear in its conclusions, literature reviews can serve a falsifying function, demonstrating the incorrectness of one or more theoretical positions. When the evidence is less abundant or clear, literature reviews can serve the equally important function of clarifying the issues in the debate and directing research toward important open empirical issues that must be resolved to advance the debate.

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10. *See, e.g.*, Robyn M. Dawes, David Faust & Paul E. Meehl, *Clinical Versus Actuarial Judgment*, 243 SCIENCE 1668, 1673 (1989) ("The research reviewed in this article indicates that a properly developed and applied actuarial method is likely to help in diagnosing and predicting human behavior as well or better than the clinical method, even when the clinical judge has access to equal or greater amounts of information.").

11. Keith Sharfman, *Judicial Valuation Behavior: Some Evidence from Bankruptcy*, 32 FLA. ST. U. L. REV. 387 (2005).

12. Elsewhere I discuss the increasing frequency with which original empirical research is being published in student-edited law reviews and some of the implications of this trend. *See generally* Gregory Mitchell, *Empirical Legal Scholarship as Scientific Dialogue*, 83 N.C. L. REV. 167 (2005).

13. Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357 (2005).

14. Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571 (2005).

15. Troy A. Paredes, *Too Much Pay, Too Much Deference: Behavioral Corporate Finance, CEOs, and Corporate Governance*, 32 FLA. ST. U. L. REV. 673 (2005).

16. Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469 (2005).

The articles by Devins and Meese,[17] Malloy,[18] Rachlinski,[19] and Stake[20] illustrate another important use of preexisting behavioral science evidence and theoretical frameworks within the behavioral sciences, namely, to analyze recurrent legal problems in new ways that draw attention to hitherto unrecognized problems and possible solutions. Devins and Meese, for example, raise new concerns about judicial review using research on cognitive limitations and an institutional analysis of appellate case selection.[21] They also propose novel reforms to the Supreme Court's certiorari process designed to counter biases in the making of constitutional law that result from the use of unrepresentative cases presenting incomplete sets of constitutionally relevant facts.[22] Devins and Meese's article is a good example of the negative and positive role for behavioral analysis: although behavioral research can be used to deconstruct judicial review, it can also be used to better align case management policy with the goal of reaching sound constitutional decisions based on an accurate factual record. It is this positive, constructive role that helps to ensure a permanent place in legal scholarship for the behavioral analysis of law because that role makes it possible for behavioral studies to avoid the ultimately self-defeating nature of critical movements that can serve only negative, deconstructive roles.[23]

Another important payoff of the turn toward behavioral science is the increase in critical self-scrutiny and critical dialogue that comes with the adoption of scientific methods for the collection of evidence and scientific standards for the evaluation of evidence and inferences

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17. Neal Devins & Alan Meese, *Judicial Review and Nongeneralizable Cases*, 32 FLA. ST. U. L. REV. 323 (2005).

18. Timothy F. Malloy, *Disclosure Stories*, 32 FLA. ST. U. L. REV. 617 (2005).

19. Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529 (2005).

20. Jeffrey Evans Stake, *Evolution of Rules in a Common Law System: Differential Litigation of the Fee Tail and Other Perpetuities*, 32 FLA. ST. U. L. REV. 401 (2005).

21. Devins & Meese, *supra* note 17, at 325-36.

22. *Id.* at 351-55.

23. For instance, Jeffrey Rachlinski noted recently:

> If legal scholars cannot use [behavioral decision theory (BDT)] effectively, then BDT has no serious future in legal scholarship, other than providing critics of law and economics with another weapon. If so, then BDT risks devolving into a degenerate research agenda with no positive theories, as has been the fate of critical legal studies.

Jeffrey J. Rachlinski, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 741-42 (2000) (footnote omitted). Mark Tushnet made similar comments several years ago:

> Perhaps the program of interminable critique swallows itself. If it is widely accepted, people may at first resign themselves to their inability to transcend critique. But they may come to see that that inability is itself transcendent, creating a new form of life in which the terms on which critique must proceed today have become unintelligible.

Mark Tushnet, *Critical Legal Studies: An Introduction to Its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505, 516 (1986).

from the evidence.[24] Throughout the articles in this issue, we see this self-critical attitude, but this positive trait is most on display in Bornstein and McCabe's critical examination of common methods used within mock jury research[25] and Klick's reexamination of Korobkin's bounded rationality explanation for consumer acquiescence to unfavorable terms in standard form contracts,[26] as well as in the commentaries by Aviram,[27] Hirsch,[28] Korobkin,[29] and MacCoun.[30] This critical dialogue provides an important disciplining effect to proponents of behavioral claims: unless a claim can be phrased in testable terms (that is, unless the advocate of an idea can specify ways that her idea could be proven wrong by others), then the argument is out of bounds from a behavioral science perspective and should be ignored until it can be stated in such terms.

A side benefit of this self-criticism is a realization of the limits of empiricism, which should create a more cautious prescriptive stance within the law and behavioral science scholar. The commentaries by Korobkin and MacCoun directly address the important issue of the role that behavioral evidence can play in legal policymaking in light of the limitations of a behavioral approach. Korobkin advocates a "relative plausibility" test for choosing between competing theoretical positions in light of the available data,[31] and MacCoun advises researchers to be conscious of the policy payoffs associated with different research choices, emphasizing that time may be better spent developing a good theory that policymakers can work from than conducting additional tests to replicate or extend a finding of limited theoretical importance.[32]

Indeed, both Korobkin and MacCoun note the success of the law and economics movement in influencing legal policy despite the dearth of data supporting many of its recommendations,[33] a result

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24. *See* Mitchell, *supra* note 12 (discussing the importance of critical dialogue within scientific communities to the development of objective knowledge).

25. Brian H. Bornstein & Sean G. McCabe, *Jurors of the Absurd? The Role of Consequentiality in Jury Simulation Research*, 32 FLA. ST. U. L. REV. 443 (2005).

26. Jonathan Klick, *The Microfoundations of Standard Form Contracts: Price Discrimination vs. Behavioral Bias*, 32 FLA. ST. U. L. REV. 555 (2005). For Korobkin's analysis of standard form contracts, see Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

27. Amitai Aviram, *In Defense of Imperfect Compliance Programs*, 32 FLA. ST. U. L. REV. 763 (2005).

28. Adam J. Hirsch, *Evolutionary Theories of Common Law Efficiency: Reasons for (Cognitive) Skepticism*, 32 FLA. ST. U. L. REV. 425 (2005).

29. Russell Korobkin, *Possibility and Plausibility in Law and Economics*, 32 FLA. ST. U. L. REV. 781 (2005).

30. Robert J. MacCoun, *Comparing Legal Factfinders: Real and Mock, Amateur and Professional*, 32 FLA. ST. U. L. REV. 511 (2005).

31. *See* Korobkin, *supra* note 29, at 791.

32. *See* MacCoun, *supra* note 30, at 518.

33. *See* Korobkin, *supra* note 29, at 787-91; MacCoun, *supra* note 30, at 518.

that is due, no doubt, in part to the fact that economic analyses often reflect intuitions, common sense, and cultural understandings about the rationality of human behavior—which is just another way of saying that economic analysis often tracks powerful fireside inductions about behavior.[34] So, just as Paul Meehl warned in his original indictment of fireside inductions, we must recognize that behavioral science will never free us entirely of reliance on fireside inductions, but the behavioral analysis of the law can help us discard our most inaccurate and unreliable hunches and replace them with better models of behavior in some domains—or at least better hunches.[35]

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34. *Cf.* Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, *in* RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY 67, 89 (Robin M. Hogarth & Melvin W. Reder eds., 1986) ("The assumption of rationality has a favored position in economics. It is accorded all the methodological privileges of a self-evident truth, a reasonable idealization, a tautology, and a null hypothesis.").

35. Meehl closed his original article with these still relevant cautionary words:

> Unavoidably, the law will continue to rely upon the fireside inductions. They should be viewed with that skepticism toward anecdotal evidence and the received belief system that training in the behavioral sciences fosters, but without intellectual arrogance or an animus against fireside inductions in favor of overvalued or overinterpreted scientific research. I can summarize my position in one not very helpful sentence since nothing stronger or more specific can be said shortly: In thinking about law as a mode of social control, adopt a healthy skepticism toward the fireside inductions, subjecting them to test by statistical methods applied to data collected in the field situation; but when a fireside induction is held nearly *semper, ubique, et ab omnibus* a similar skepticism should be maintained toward experimental research purporting, as generalized, to overthrow it.

Meehl, *Law and the Fireside Inductions (with Postcript), supra* note 1, at 540. In the postscript to the original article, Meehl added some good reasons why lawmakers should be skeptical of claims based on social science evidence that conflict with the lawyer's fireside inductions. *See id.* at 540-47.