
**BILL WHITFORD: A NEW LEGAL REALIST SEEKING
TO UNDERSTAND LAW OUTSIDE THE LAW
SCHOOL'S DOORS**

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Many law professors, including Bill Whitford, have gone beyond appellate cases and turned to reporting and analyzing how law works in society—in short, they've looked at the law in action. Some of us have called this developing trend “new legal realism.”¹ What is a new legal realism? Lynn Lopucki tells us: “Born of the old Realism and nurtured in the law and society movement, the New Realism seeks to discover and teach *the meaning of law from its impact at the point of delivery*—not just in the courtroom, but in the hallway, the lawyer's office, and occasionally even more distant realms.”² “At its narrowest, law include[s] the activities of lawyers. At its broadest, the study of law [is] no less than the study of society.”³ Willard Hurst told us: “[W]e simply have to break out of this exaggerated preoccupation with the judicial process.”⁴ Marc Galanter sketched the tacit model of much, if not most, law review writing.⁵ He finds that we tend to assume that if you read an appellate opinion, you will understand its consequences: If you assume that the behavior of legal actors generally conforms to the rules, it then follows that “[t]he authoritative normative learning generated at the higher reaches of the system provides a map for understanding

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1. See, e.g., Stewart Macaulay & Elizabeth Mertz, *New Legal Realism and the Empirical Turn in Law*, in *LAW AND SOCIAL THEORY* 195 (Reza Banakar & Max Travers eds., 2d ed. 2013).

2. Lynn M. LoPucki, *Bringing Realism to the Classroom—A Review of Warren and Westbrook's The Law of Debtors and Creditors*, 1987 WIS. L. REV. 641 (book review) (emphasis added) (footnotes omitted); LoPucki and Walter O. Weyrauch offer a wonderful example of “the activities of lawyers,” in Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1414–25 (2000). They tell the story of the litigation and appeals behind the published opinion in *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App. 1987). *Id.* “Even if the ‘merits’ should ever reach a decisionmaker, it will be a decisionmaker identified by the game, and the ‘merits’ will reupch that decisionmaker in a form determined by the game.” *Id.* at 1412.

3. LoPucki, *supra* note 2, at 642.

4. Interview with James Willard Hurst, Vilas Professor of Law, University of Wisconsin-Madison, in *LAW AND . . . INTERDISCIPLINARY LEGAL STUDIES AT THE UNIVERSITY OF WISCONSIN MADISON*, 5, 8 (on file with author); JAMES WILLARD HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836–1915*, at xi (1964) (“‘Great cases’ and constitutional debate deserve their place in the telling of legal history. But most of life is not melodrama . . .”).

5. Marc Galanter, *Notes on the Future of Social Research in Law*, in *LAW & SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW* 25, 25–27 (Stewart Macaulay, Lawrence M. Friedman & John Stookey eds., 1995).

[the entire legal system].”⁶ Of course, few of us say or even think this; it is too often just taken for granted in what we publish.

It is not easy to discover “the meaning of law from its impact at the point of delivery.”⁷ The very nature of studying law in action and what lawyers do means that hard quantitative social science methods—coding, counting, and making inferences from observations—can only do part of the needed work. Sometimes we have to put aside full scientific rigor in order to get backstage and see how things operate—or just to see where the stage ends and the orchestra pit begins. The methods must match the question.

Mark Suchman and Elizabeth Mertz note that “rather than demanding that legal scholars engage more directly with the social world, ELS [empirical legal studies] emphasizes the ease with which statistically skilled law professors can pluck low-hanging empirical fruit in the comfort of their campus offices.”⁸ Work with already assembled large data sets does not require the arduous and slow work of original data gathering; this fits with the legal academy’s preference for research that can be conducted solely in libraries without stepping outside of the doors of the law schools. This is not to deny that some of this work could prove accurate and highly important. However, those who rely on already assembled large data sets run real risks of just getting it wrong, particularly when they seek to explain the patterns that they find.

If we are to make a case for qualitative approaches, we must, however, insist that those who report what they have been told while keeping confidential the name of their informant; those who draw conclusions when they lack a random sample; or those who rely on other qualitative approaches to social science have an obligation to do what they can to minimize the dangers of resting their conclusions on what just isn’t so. There are principles that help such work avoid at least some threats to accuracy. And we must recognize common problems and do what we can to cope with them. We cannot just sing Cole Porter’s “Anything Goes.”⁹ We must be realistic and modest about what can be claimed on the basis of nonrepresentative studies.

Bill Whitford was one of the pioneers in looking at the impact of reform laws. His work vividly shows us that there are research questions that only can be answered by qualitative methods. He conducted a series of studies on the impact of various aspects of consumer law. For example, he published a case study of automobile warranties.¹⁰ He wrote about the functions of disclosure regulation

6. *Id.* at 27.

7. LoPucki, *supra* note 2, at 641.

8. Mark C. Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 ANN. REV. L. & SOC. SCI. 555, 560 (2010).

9. The song is from Porter’s 1934 musical of the same name. More recently Tony Bennett and Lady Gaga sang it as a duet. TONY BENNETT & LADY GAGA, *Anything Goes*, on CHEEK TO CHEEK (Streamline Records 2014). “Anything Goes” features the nice lines: “In olden days, a glimpse of stocking was looked on as something shocking. But now, Heaven knows, anything goes.”

10. William C. Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty*, 1968 WIS. L. REV. 1006 [hereinafter Whitford, *Law and the Consumer Transaction*].

in consumer transactions.¹¹ He sought to determine the impact of denying self-help repossessions of automobiles and the requirements of the Wisconsin Consumer Act.¹² He wrote about structuring consumer protection legislation to maximize effectiveness.¹³ More recently, Whitford and a coauthor (me) looked behind the appellate opinion in *Hoffman v. Red Owl*,¹⁴ asking how an individual who was hardly wealthy got the Wisconsin courts to adopt a new doctrine and apply it to his benefit.¹⁵ Some thirty years after the trial and the appeal, Whitford was able to interview Joseph Hoffmann about his memories of the transaction that provoked the litigation and the trials and appeals that followed.

Whitford has matched his methods with the demands of answering his questions. With some help from an expert social scientist and the University of Wisconsin's Survey Center, he has done surveys sent to samples of populations.¹⁶ He even offered a long footnote in an article in the *Wisconsin Law Review* reporting a chi-square statistical analysis.¹⁷ While this may be *de rigueur* among young scholars today, it was virtually unheard of when Whitford did it.

However, he has used many other approaches in his research. He relied on statistics gathered by others.¹⁸ He looked at historical records found in the files of legal agencies.¹⁹ He interviewed the heads of trade associations and used their influence to get members to talk with him about practices²⁰—what researchers call “snowball samples.” One observation is accompanied by a citation to “conversations with legal aid lawyers having sizable consumer caseloads.”²¹

11. William C. Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 WIS. L. REV. 400 [hereinafter Whitford, *Functions of Disclosure Regulation*].

12. William C. Whitford & Harold Laufer, *The Impact of Denying Self-Help Repossession of Automobiles: A Case Study of the Wisconsin Consumer Act*, 1975 WIS. L. REV. 607.

13. William C. Whitford, *Structuring Consumer Protection Legislation to Maximize Effectiveness*, 1981 WIS. L. REV. 1018 [hereinafter Whitford, *Structuring Consumer Protection Legislation*].

14. 133 N.W.2d 267 (Wis. 1965).

15. William C. Whitford & Stewart Macaulay, *Hoffman v. Red Owl Stores: The Rest of the Story*, 61 HASTINGS L.J. 801 (2010). The title refers to an earlier article that was very critical of the *Red Owl* case. See Robert E. Scott, *Hoffman v. Red Owl Stores and the Myth of Precontractual Reliance*, 68 OHIO ST. L.J. 71 (2007) [hereinafter Scott, *Myth of Precontractual Reliance*]. Professor Scott responded to our article. See Robert E. Scott, *Hoffman v. Red Owl Stores and the Limits of the Legal Method*, 61 HASTINGS L.J. 859 (2010); see also Robert A. Hillman, *Precedent in Contract Cases and the Importance(?) of the Whole Story*, 87 TEMP. L. REV. 759 (2015) (discussing the *Red Owl* debate).

16. See Whitford, *Law and the Consumer Transaction*, *supra* note 10, at 1010–13; William C. Whitford & Spencer L. Kimball, *Why Process Consumer Complaints? A Case Study of the Office of the Commissioner of Insurance of Wisconsin*, 1974 WIS. L. REV. 639, 657–61; Whitford & Laufer, *supra* note 12, at 630.

17. Whitford, *Functions of Disclosure Regulation*, *supra* note 11, at 451 nn.153–54. This article also contains his wise observation: “Sellers have long known that it is precisely in the contract, and only in the contract, that information consumers are *not* supposed to notice is to be put.” *Id.* at 425–26.

18. See, e.g., *id.* at 410–12 (referencing studies conducted by the National Commission on Consumer Finance and the University of Michigan).

19. Whitford & Kimball, *supra* note 16, at 645–57.

20. Whitford, *Law and the Consumer Transaction*, *supra* note 10, at 1008–13.

21. Whitford, *Structuring Consumer Protection Legislation*, *supra* note 13, at 1021 n.11.

Another is footnoted to conversations with “persons in the debt collection business.”²² And, as I have said, in the article about *Red Owl*, he interviewed Joseph Hoffmann, but he tested Hoffmann’s memories against the full transcript of the trial and not just the excerpts that went to the Supreme Court of Wisconsin on the appeal.²³ Whitford is a careful scholar, and when he must rely on opinions and memories, he is cautious and he warns his reader about possible threats to validity.

Whitford has always credited a 1966 summer seminar in socio-legal method with giving him the necessary background to do research on the impact of law designed to change the behavior of the more powerful. It was sponsored by the Russell Sage Foundation’s Law and Society Program at the University of Wisconsin. Professor Burton Fisher of the Department of Sociology ran the seminar.²⁴ We need more such programs dealing with qualitative as well as quantitative methods.

If we are going to look at law’s impact at the point of delivery, we will face many problems in gaining reliable evidence about what is going on. Let me note just a few of these problems; I haven’t the space (nor the ability) to offer a methods course,²⁵ but I can remind us of some examples.

For many reasons, if we want to look at the law as delivered, we will often have to use the best evidence that we can get with a reasonable expenditure of funds and effort. And “best” can mean no more than “least bad.” Let me be clear: When we can gather meaningful random samples and apply statistical tests, we should. Today, easy-to-use statistical packages and readily available data make this possible for certain kinds of projects. Many law professors, including me, will need an expert coconspirator to make it safely through the jungle of methods and statistics.

In any case, most of us would benefit from at least some idea about the limits of such quantitative studies.²⁶ We can encounter an impressive-looking study filled with tables and statistical tests, but we need to be cautious about who produced the tables of numbers and for what ends. We must be concerned with the integrity of the original data and how it has been coded. For example, police departments have been known to manufacture reports about the increasing or decreasing crime rate.²⁷ There are events that happen in the world, but some

22. *Id.* at 1023 n.18.

23. Whitford & Macaulay, *supra* note 15.

24. See Whitford, *Law and the Consumer Transaction*, *supra* note 10, at 1006 n. †.

25. Those interested in doing or using such research would benefit from reading CONDUCTING LAW AND SOCIETY RESEARCH: REFLECTIONS ON METHODS AND PRACTICES (Simon Halliday & Patrick Schmidt eds., 2009).

26. See Richard Lempert, *Empirical Research for Public Policy: With Examples from Family Law*, 5 J. EMPIRICAL LEGAL STUD. 907, 925–26 (2008). Lempert offers five points that consumers of policy-relevant empirical research should keep in mind. I particularly like the fifth: “If results seem too good to be true, this is often because they are not true.” *Id.*

27. See, e.g., Carl Bialik, *Fuzzy Facts Can Make Crime Rankings Suspect*, WALL ST. J., Jan. 28, 2012, at A2 (“Homicide is . . . ‘well-measured That is not to say that there aren’t a variety of ways for fudging the measurement.”); Jim Dwyer, *An Officer Had Backup: Secret Tapes*, N.Y. TIMES, Mar.

human has to write a report putting each event into a category. To cut the serious crime rate, employees of a police department can just ignore the killings of homeless people found on the streets or in the alleys. Fights in or just outside of a bar can be categorized in many ways, as can events of domestic violence. Moreover, when we read the report of a statistical study, we often find that data can take us only so far, and the authors turn to other more speculative approaches to explain the patterns found in their tables of numbers. Those of us lacking formal training in a social science must learn to translate the articles and reports in any field. At the minimum, we should not overgeneralize from what any study finds or ignore the qualifications on what it claims to have found. Furthermore, even a fine quantitative study may not age well. The law may change, as may the attitudes and practices of those affected by the law.

If we want to pursue a new legal realism, in many cases the only practical way to gain information is to turn to qualitative approaches—asking people questions, and not merely counting observations of behavior. It is hard to draw a sample because we cannot know the population that we want to study. For example, imagine trying to sample those who had a plausible cause of action for breach of contract but decided not to sue. Such people do not register in a central location for our convenience.²⁸ Participant observation has been refined by anthropologists,²⁹ but today it is used by many other social scientists as well. Sometimes we can use this method in studying the legal system. A famous example is Austin Sarat and William Felstiner's study of divorce lawyers and their clients.³⁰ They observed a series of conferences between lawyers and clients and reported on their interactions. They learned a great deal about such things

14, 2012, at A22 (“He [the police officer] also documented cases in which armed robberies were classified as ‘lost property’ cases.”); Ben Poston, *Flynn: Department Misreported More Than 5,300 Violent Assaults*, MILWAUKEE J. SENTINEL, June 21, 2012, at A1 (“An internal department audit shows that 20% of aggravated assaults were underreported [by the Milwaukee Police Department] as lesser offenses that didn’t get counted in the city’s violent crime rate during that time.”).

28. Cf. Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC’Y REV. 11 (2005) (discussing the impact of social institutions on the assertions of rights under the Family and Medical Leave Act). Albiston found her subjects through “a statewide telephone information line in California run by a nonprofit organization that gives informal legal assistance to workers.” *Id.* at 21. Of course, she could not be sure that those who called the information line and consented to be interviewed by her represented the views of all the workers considering asserting such rights who did not call the nonprofit organization. *See id.* at 21–22. Her report respected the limits of her data.

29. For a very critical review, see John Van Maanen, *The Fact of Fiction in Organizational Ethnography*, 24 ADMIN. SCI. Q. 539 (1979). *See also* Matt Bradshaw, *Contracts and Member Checks in Qualitative Research in Human Geography: Reason for Caution?*, 33 AREA 202, 203 (2001) (“[T]here are differences in the power relations between a researcher and a low-income householder, as opposed to those between a researcher and a senior manager.”); David Shulman, *Dirty Data and Investigative Methods: Some Lessons from Private Detective Work*, 23 J. CONTEMP. ETHNOGRAPHY 214, 250 (1994) (“Although fieldworkers must carefully avoid representing informants as the fieldworkers would like to have them be, they should also be cognizant of not just depicting subjects as subjects want.”); Robert J. Thomas, *Interviewing Important People in Big Companies*, 22 J. CONTEMP. ETHNOGRAPHY 80 (1993).

30. AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* (1995).

as who controlled the interactions, the degree to which things other than legal rules affected decisions, and the pressure to find ways to influence settlements apart from legal rights. As you would imagine, the authors were able to persuade only a limited number of lawyers and clients to let the researchers observe and report what they saw and heard.³¹ We must be very cautious about generalizing their study to other situations where differences might make a difference.³² However, at the very least, Sarat and Felstiner raise many questions that others can ask in different situations. Their study can provide a frame of reference in which good quantitative work may then be developed.

More commonly, we study law as delivered by interviewing judges, administrators, lawyers, and police officials. While we can learn much, there are many well-known problems. Often we will need someone to endorse us so we can gain access. In several studies, Whitford, for example, relied on a trade association official to get members of the association to talk with him. Moreover, if you want to gain information from those connected with the legal system, you likely will have to promise confidentiality. Those who know what we want to know may not be willing to speak on the record.³³ Some things will be covered

31. See David L. Chambers, *Divorce Attorneys and 40 Clients in Two Not So Big but Not So Small Cities in Massachusetts and California: An Appreciation*, 22 LAW & SOC. INQUIRY 209, 216 (1997) (reviewing SARAT & FELSTINER, *supra* note 30, and noting that only thirty percent of the lawyers Sarat and Felstiner met with ultimately provided a case). Another noted example of participant observation is John Flood, *Doing Business: The Management of Uncertainty in Lawyers' Work*, 25 LAW & SOC'Y REV. 41 (1991). Flood did his research as an associate in a large law firm. *Id.* at 45. He tells us that corporate lawyers put together business deals in ways that limit their clients' concerns about uncertainty. *Id.* at 67. Lawyers admire an ability to improvise and convince the client that everything is under control when the lawyers are unsure. He concludes that lawyers manage uncertainty rather than solve problems. Often their skill is putting aside problems and hoping that they will not have to deal with them later.

32. See Jacqueline Macaulay, *Some Barriers to Drawing Conclusions from Social Science Research* (Jan. 1979) (unpublished manuscript) (on file with the University of Wisconsin Law School), available at www.law.wisc.edu/facstaff/macaulay/papers/barriers.pdf (dealing with the dangers of turning to social science to provide facts to plug into theories of economists and law professors). Despite its age, the report is still well worth reading. Jacqueline Macaulay notes:

The problem may not be intrinsic to the reports themselves but rather may stem from the natural tendency to generalize from a few cases or a specific situation to a whole population. An ethnographic report may be accurate, subtle and insightful but the cases covered may represent atypical rather than typical situations. . . . The most highly visible, vivid, poignant or arresting examples . . . are probably exceptions rather than the rule. The use of . . . vignettes and snapshots properly lies in exemplification, not proof. They are valid examples of what can come about but not reliable bases for generalizations about an entire group.

Id. at 1.

33. See Jonathan C. Lipson, *Price, Path & Pride: Third-Party Closing Opinion Practice Among U.S. Lawyers (A Preliminary Investigation)*, 3 BERKELEY BUS. L.J. 59, 127 (2005), where Professor Lipson got his twenty-seven lawyers who had experience in closing opinion practice to sign consent forms. The forms stated that they agreed to be interviewed and indicated whether the lawyers would permit attribution of quotes. *Id.* Lipson notes: "Despite the agreement to be interviewed and quoted, many asked that their quotes not be attributed to them . . . [I]n order to preserve their anonymity while also maintaining the integrity of the data, I have cited them by code, e.g., Interview with Attorney [A-1](date), transcript at []. Redacted transcripts of these interviews were provided to the *Berkeley Business Law Journal*." *Id.*

by lawyer-client privilege. Other things might involve trade secrets. Some things we want to know may offend those who can retaliate against our subject. Indeed, I find that many lawyers and those who hold official positions in the legal system see little cost if they refuse to talk to us but some unknowable risk if they do.³⁴ Legal researchers do not possess the power to force people who know stuff about what we want to know to talk to us.

Gaining access by using contacts to vouch for us and promising confidentiality means, however, that others will not be able to replicate our work. Lee Epstein and Gary King, two political scientists, are highly critical of empirical work by law professors.³⁵ They say: “Good empirical work adheres to the *replication standard*: another researcher should be able to understand, evaluate, build on, and reproduce the research without any additional information from the author. . . . Unfortunately, the present state of legal scholarship nearly always fails this most basic of tests.”³⁶

They explain that only if another scholar can appraise the source of my conclusions about the world, can that scholar make a judgment about how reliable those conclusions are. Obviously, where we can disclose who told us what, our study is more persuasive and more likely to contribute to knowledge because others can challenge our subject’s authority or qualify what we claim. Often, however, we are faced with a choice between doing nothing and relying on assumed facts or publishing a study that other scholars cannot replicate precisely. Epstein and King write as if they advocate doing nothing when our informants are unwilling to go on record. I do not think that we can afford this luxury. Even if we find numbers and statistical tests more comforting, we need to know far more about law as delivered in order to know what to count and how to explain the patterns that survive our statistics. Moreover, it is likely that there is much that we need to know that we will never be able to establish in ways that would satisfy Epstein and King.

34. See Shirley A. Dobbin et al., *Surveying Difficult Populations: Lessons Learned from a National Survey of State Trial Court Judges*, 22 JUST. SYS. J. 287, 288 (2001) (“[I]nterest in the topic of study is a good predictor of a decision to participate in the survey project, especially when surveying busy professionals with heavy time demands.”); Brion Sever, Ronald L. Reisner & Ryan S. King, *Successfully Acquiring Data from the Criminal Courts: Is It What You Know, Who You Know, or What You Don’t Tell Them?*, 22 JUST. SYS. J. 315, 315 (2001) (“[S]trategies include using a contact within or close to the agency, as well as withholding the exact nature of the researcher’s study.”). This last quotation should warn us that qualitative methods sometimes may provoke objections by a human subjects review committee at our universities. See Yvonne Lincoln & William Tierney, *Qualitative Research and Institutional Review Boards*, 10 QUALITATIVE INQUIRY 219 (2004); Am. Anthropological Ass’n, *American Anthropological Association Statement on Ethnography and Institutional Review Boards* (June 4, 2004), <http://www.aaanet.org/stmts/irb.htm>.

35. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002). Let me make clear that there is much in this article that I applaud. Those thinking of doing empirical work who are not trained in one of the social sciences should read it, of course, they should do so carefully and critically.

36. *Id.* at 38; see also Russell Korobkin, *Empirical Scholarship in Contract Law: Possibilities and Pitfalls*, 2002 U. ILL. L. REV. 1033, 1050–51 (“Careful empiricists. . . . describe their methods of collecting data in sufficient detail that the process could be replicated by other scholars.”).

This, however, raises a problem that those of us advocating a new legal realism must consider. It is clear that we must disclose what we can. Moreover, we can make only tentative claims about what we have been told and what seems plausible in light of the context.³⁷ Insofar as we can do so, we should offer what we know about possible qualifications or arguments against what we have been told.³⁸ We can hope that future studies address our problem or problems analogous to it. If what they find is much the same as what we found, we can place greater reliance on our original conclusion.³⁹ We can try to make our

37. See Lipson, *supra* note 33, at 64. Lipson flags the problem near the beginning of his article: "Although the evidence is preliminary and qualitative (and therefore subjective), it appears that non-economic social forces, not just the market, shape closing opinion practice." *Id.* He also places a warning in his title where he labels his work "(A Preliminary Investigation)." *Id.* at 59. At the end of his article, he describes the twenty-seven lawyers whom he interviewed. *Id.* at 127. We learn where they practiced and the nature of those practices. He also suggests that even after his study, "there are a number of interesting empirical avenues to pursue." *Id.* at 125.

38. See MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* (2012). They used a so-called "snowball sample" where one subject referred them to another. Moreover, they promised their elite lawyer respondents confidentiality. They recognized the problem, saying, "We attempt to shed light on the question of sticky boilerplate using what will undoubtedly strike some readers as a naïve technique." *Id.* at 11. I reviewed this book in Stewart Macaulay, *Notes on the Margins of Lawyering, in Three and a Half Minutes*, 40 HOFSTRA L. REV. 25 (2011). I said: "If we are going to study elite lawyers, this study represents the state of the art." *Id.* at 36. I noted the care the authors took to avoid claiming that they had discovered the one truth: "To put it mildly, Gulati and Scott were not about to accept what they were told just because of the authority of their interviewees. Even their final conclusions are set off with caveats." *Id.* at 35. For another noted study based on similar methods, see Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 LAW & SOC. INQUIRY 679, 682 (1996) ("The argument, here, takes the form of a detailed empirical counterexample, constructed from qualitative interview data on the role of lawyers and law firms in California's Silicon Valley.").

39. My 1963 study about business practices related to contracts and problems with contracts litigation to resolve disputes was not based on a random sample. Moreover, I used a "snowball" technique in gaining access to people to interview, and I promised those who talked with me confidentiality. No one could replicate this study. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). Notice that I signaled this in the title ("A Preliminary Study"), and the text made clear that the study was limited to the manufacturing industry. I am reassured by the large number of later studies in many countries that reach roughly the same conclusions that I did almost fifty years ago. See, e.g., Penny-Anne Cullen, Bob Butcher, Richard Hickman & John Keast, *A Critique of Contractual Relationships in the Aerospace Industry: Collaboration v. Conflict*, 1 INT'L J. L. CONTEXT 397, 397 (2005) (Cullen and her colleagues interviewed officials in the British aerospace industry and found a "divergence between the parties' intended working relationship and the agenda prescribed by formal contracts"); Tommy Roxenhall & Pervez Ghauri, *Use of the Written Contract in Long-Lasting Business Relationships*, 33 INDUS. MARKETING MGMT. 261, 267 (2004) ("Our study confirms that contracts are rarely used in connection with disputes. Business people probably feel that contracts should remain in the drawer because they strive for good relations with their customers and suppliers. They solve disputes informally without resorting to contracts or the legal profession."); Rosalinde Klein Woolthuis, Bas Hillebrand & Bart Nooteboom, *Trust, Contract and Relationship Development*, 26 ORGANIZATIONAL STUD. 813, 835 (2005) ("We have empirically shown that trust and contract need not be 'opposing alternatives' and, more important, shown why this is the case: trust and contract can well be complements because contracts are in practice often not used and interpreted in a strictly legal fashion with opportunism as a central focal point."). *But see* Matthew Braham, *Non-Contractual Relations in Business Re-examined:*

conclusions more accurate by interviewing more people who have different experiences. We often must suggest what seems to be so, rather than claim to have established “the facts.” Theodore Eisenberg, one of the champions of quantitative empirical legal studies, offers some perspective:

Nearly all data and results are limited by time and place, by techniques for gathering and analyzing data that change, and by reinterpreting old results in light of additional evidence. The humbling truth is that probably nearly all . . . scholars . . . make mistakes or may be shown to be incorrect by subsequent research.⁴⁰

There are more problems with asking the leaders of the tribe about its practices.⁴¹ For example, sometimes it is hard to be sure that our informants understand what we have asked and if they have a good basis for their opinion. Our informants may not know the answer, but they may hesitate to concede this. After all, we asked them because people in their position should know the answer. They may offer an answer based on their best guess rather than knowledge based on real experience. Or they may generalize from their own experience and what they have been told by others in similar positions. However, they may not know that other people in their position would see things differently. They may want to entertain us rather than appear dull and boring. They may draw on the most unusual or even shocking story that they know. The atypical may be offered as what happens every day. All of these problems of bias can limit the generalizability of qualitative empirical research, but they do not negate its utility.

A Critical Assessment of Macaulay's Legal Realism, 16 HOMO OECONOMICUS 463, 465–66 (2000) (asserting that my 1963 article “is so methodologically flawed that it should be treated with extreme care”). I agree that any such study must be treated with care, and people should not overgeneralize from the results. Braham, however, seems unaware of all of the many later studies reaching at least roughly the same conclusions. Moreover, somehow he manages to read my text as if I had said that legally enforceable contracts and contract law never mattered. *See id.* at 463. I never asserted, as he assumes, that contract law never plays some role in planning transactions and avoiding and resolving business disputes. As the 1963 article says: “One uses or threatens to use legal sanctions to settle disputes when other devices will not work and when the gains are thought to outweigh the costs.” Macaulay, *supra*, at 65. My position was and is: sometimes contract law as applied is useful; sometimes it plays an indirect role as an express or implied threat; sometimes it is almost totally irrelevant. My claim is that we lack a clear picture of when contract law plays a role in which situations and just what that role is. Moreover, I argue that academics often assume that contract law plays a larger role than it does or could play. However, I should stress that my research took place more than fifty years ago in the precomputer age. Even if the research were completely accurate at the time, things change. See Iva Bozovic & Gillian K. Hadfield, *Scaffolding: Using Formal Contracts to Build Informal Relations in Support of Innovation* (Univ. of S. Cal., Law & Econ. Research Paper No. C12-3, 2012), available at <http://ssrn.com/abstract=1984915>, which offers a major qualification when the authors looked at firms that described themselves as innovative. These people used contract negotiation to plan and to build relationships that were likely to last. However, they were no more likely to resolve disputes by contract litigation than the firms that I studied so long ago.

40. Theodore Eisenberg, *The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns*, 2011 U. ILL. L. REV. 1713, 1730–31.

41. See Stewart Macaulay, *Contracts, New Legal Realism, and Improving the Navigation of The Yellow Submarine*, 80 TUL. L. REV. 1161, 1184–86 (2006), where I reviewed these problems in more detail.

While there are many problems with qualitative methods, Whitford stresses that there are also real benefits as well. He says:

[What some critics call] [s]oft methodologies (e.g., participant observation) rest heavily on the subjective judgments of the observer, but it is often easier to detect what those biases are [than with hard methods].

Soft methodologies also have the advantage of being able, for a given expenditure of resources, to take account of so many more phenomena, including previously unanticipated ones. These unanticipated observations are often the ones with the greatest potential to stimulate us to see the world in radically different ways, and thus to escape from our current prison houses.⁴²

One of my favorite social scientists, Herbert Kritzer, stresses that a major error in empirical research is simply asking the wrong question.⁴³ I think that an open-ended interview with, say, an experienced lawyer is very likely to make you realize that you have done this. Too often, responses to a printed interview schedule sent to a random sample will not provide the same realization. As Hazel Genn says: “The difference between doing a quantitative survey and doing qualitative work is that with quantitative work you have to get it right before you start your fieldwork. Once you have got your questionnaire fixed you are stuck with it.”⁴⁴

Having listed some of the problems, I want to return to Whitford’s careful work as a model for all of us. Let me take just one example: I got to be a coauthor of the article on the background of *Hoffman v. Red Owl*,⁴⁵ but Bill did most of the heavy lifting. Here there was no problem of confidentiality. Joe Hoffmann gave us permission to report that we had talked with him and to report what he said.⁴⁶ Just finding Joe about thirty years after the case was decided was an achievement,⁴⁷ and Bill hoped that it would pay off in producing something interesting.

42. William C. Whitford, *Lowered Horizons: Implementation Research in a Post-CLS World*, 1986 WIS. L. REV. 755, 777–78.

43. See Herbert M. Kritzer, *Conclusion: “Research is a Messy Business”—An Archeology of the Craft of Sociolegal Research*, in CONDUCTING LAW AND SOCIETY RESEARCH: REFLECTIONS ON METHODS AND PRACTICES 264, 264–65 (Simon Halliday & Patrick Schmidt eds., 2009).

44. Hazel Genn, *Hazel Genn and Paths to Justice*, in CONDUCTING LAW AND SOCIETY RESEARCH: REFLECTIONS ON METHODS AND PRACTICES 227, 235 (Simon Halliday & Patrick Schmidt eds., 2009).

45. See Whitford & Macaulay, *supra* note 15. See also William C. Whitford, *ProCD v. Zeidenberg in Context*, 2004 WIS. L. REV. 821, where Whitford interviewed Matt Zeidenberg, the plaintiff in this famous case, and his lawyer. Both of Whitford’s efforts to add context to famous appellate opinions tell students something about the skill and self-interest of lawyers in the litigation process.

46. See Hillman, *supra* note 15, at 762 n.23 (“The debaters reverted to the actual spelling of Hoffman, which has an additional *n* at the end. Apparently the court simply was mistaken as to the spelling.”).

47. See Whitford & Macaulay, *supra* note 15, at 804 n.10. A footnote to our article tells us:

At a reunion dinner of the Wisconsin Law School class of 1968, Professor Whitford happened to be seated with Mr. Thomas Kubasta. Mr. Kubasta has made his career as a

Bill interviewed Joe three times over the telephone.⁴⁸ I think it fair to say that Bill liked Joe, and he found that Joe remembered a great deal about both the transaction with Red Owl and its representatives, and the case itself. Bill then tested Joe's memories against the full transcript of the trial. However, Bill knew that the trial had taken place nearly two years after the events happened. The whole process might have colored Joe's memory. Trials involve persuasion and not scientific exercises.⁴⁹ One going through pretrial, litigation, and appeals might have his memory influenced. Again and again, Joe's memory stood up to our challenges. We also had three letters from Gerry Van Hoof, Joe's lawyer, written not long after the case was decided. We knew a lot, but the problems were obvious.

We were aware that all this information tended to reflect the Hoffmanns' side of the story. What would an advocate for Red Owl say? We do report Red Owl's arguments that we found in the transcript and briefs, but it would have been useful to get behind what appeared at trial. We tried to imagine what might have explained the actions of Red Owl's representatives, and we reported some of these possibilities.⁵⁰ However, we could only go so far. Red Owl went out of business in 1967. We thought that we had struck gold, but our hopes were then dashed. A research assistant found Ed Lukowitz, the person who had represented the Red Owl Corporation in dealing with Joe. However, Lukowitz was unwilling to provide us his recollections. The Red Owl headquarters had been in Hopkins, Minnesota, near the Twin Cities. Bill went to Minneapolis and consulted what remained of the records of the company.⁵¹ He gained a few

lawyer in Wautoma, where most of the events leading up to this litigation occurred and where Joe Hoffmann then lived. In the course of conversation, Whitford told Kubasta about the case that had made Wautoma famous in contracts casebooks and expressed an interest in locating Hoffmann. Though Hoffmann left Wautoma for good in December 1961, Kubasta vowed to do what he could to find somebody in town who knew whether Hoffmann was still alive and, if so, where he lived. After considerable effort Kubasta located the one family still living in Wautoma with whom the Hoffmanns currently exchange Christmas cards. From this contact came an address in St. Joseph, Michigan, and later a telephone call from Whitford to Hoffmann. Hoffmann verified that he was indeed the plaintiff in the famous case, and agreed to be interviewed about it. All our interviews with Hoffmann have been by telephone.

Id.

48. Whitford took written notes as he talked with Hoffmann, and Whitford translated his notes immediately after the conversation as he typed them. Joe and Shirley Hoffmann came to the University of Wisconsin Law School, and Whitford interviewed them before a large group of first-year students who had studied *Hoffman v. Red Owl*. Interview by William Whitford with Joseph and Shirley Hoffmann, available at <http://law.wisc.edu/media/item/whitford-final-w.mp4>.

49. Cf. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (Quid Pro Quo Books 2012) (originally published in 1930). Llewellyn says: "One thing is clear: the raw events as they happened are not before judge or jury; there has been a straining process. The plaintiff's lawyer has, with an eye to legal relevance, and with an eye to winning, done some selection." *Id.* at 31.

50. Professor Scott had done some of this work. See Scott, *Myth of Precontractual Reliance*, *supra* note 15.

51. Whitford & Macaulay, *supra* note 15, at 844 n.250.

scraps of information but nowhere near an inside story of why company officials treated Joe Hoffmann as they did long ago.

As we wrote our text, we tried to keep in mind our speculations about what Red Owl's officials might have said had they been around for us to have asked them. We faced a problem that often challenges historians: You are limited by the evidence that you can turn up. And then you must interpret what you have as best you can.⁵² We did offer a view of what our research revealed:

It is hard to establish "the facts" involved in a complex transaction that occurred over forty years ago. As we move from the appellate opinion to the edited transcript that was before the court, we get both more answers and more questions. When we look at the full transcript and interview one of the parties, we learn more but we still must create a story that makes sense. There still are gaps and conflicting points of view. Anyone trying to tell the story necessarily must select what she chooses to report and give emphasis to what she sees as important. . . .⁵³

We may never be able to establish conclusively everything that happened in several small Wisconsin towns in the mid-1960s. Nonetheless, good research can help us get closer to a truthful understanding of what we need to know to debate intelligently whether *Hoffman v. Red Owl Stores* presented a reasonable circumstance for liability for precontractual reliance.⁵⁴

As we go forward in a new legal realism, we will have to work hard to deal with how we gain the facts that we need. Law professors are trained to look at both sides and to know how to make the case for and against various propositions. As Professor Lawless argues in his article for this Symposium, lawyers know a great deal about the quaint native customs of those in the legal system.⁵⁵ This knowledge can focus empirical work on explanations that are more plausible than might be suggested by an outsider. Of course, legal scholars, particularly those with little experience practicing law, could be wrong about the actual operations of the legal system, and their conventional wisdom might send researchers in the wrong direction. Professional knowledge, thus, can help greatly, but, as is true of everything else, researchers must handle it with care.

52. For an example, see Inga Markovits, *Last Days*, 80 CALIF. L. REV. 55, 55 n.† (1992), where she interviews East German legal officials in East Berlin in the last weeks before reunification. She notes:

It is likely that some people with whom I spoke will disagree with my interpretation of the events and their role in them. Such disagreement would not invalidate either their or my effort to discover the truth. After forty years of antagonism, Easterners and Westerners can be expected to see the world with different eyes.

Id. This last sentence is very important.

53. Whitford & Macaulay, *supra* note 15, at 848.

54. *Id.* at 850.

55. Robert Lawless, *What Legal Empiricists Do Best*, 87 TEMP. L. REV. 711 (2015).

Moreover, Elizabeth Mertz studied what goes on in contracts classrooms by analyzing recordings made at eight schools.⁵⁶ She stressed that, as compared to those in any social science field, law professors seldom worry about the accuracy of their factual assumptions. Indeed, we are quick to use our intuition to fashion plausible hypothetical cases to test the limits of what courts have said. This may serve a purpose in teaching. However, we need far more than intuition and imagination when we try to understand how the law is delivered. We have to get outside of the doors to the law schools and look at what is going on. Today, many law professors know enough to recognize the threats to the validity of the results of a study of law as delivered. An increasing number can even do first-rate social science. As I've said, Bill's career and writing offers a fine model for anyone in our profession to follow. He uses both quantitative and qualitative approaches, but he looks at what he is told with skepticism. He puts the cards face up on the table so readers can make their own judgments about how far to rely on his findings. If more law professors in the future follow his practice, law schools will be both more practical and more theoretical—in short, better.

56. ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* 12–15 (2007).

