

## Empirical Scholarship and Commercial Law

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### *Empirical work in commercial law*

Writers continue to lament the absence of empirical work by law professors (see e.g. Elizabeth Warren, “The Market for Data: The Changing Role of Social Sciences in Shaping the Law” (2002) *Wis. L.Rev.* 1, citing to a large number of scholars who have echoed Peter Schuck’s plea in 1989 for more empirical research. See Peter Schuck, “Why Don’t Law Professors Do More Empirical Research? (1989) 39 *J. Legal Educ.* 323). Jay Westbrook in “Empirical Research in Consumer Bankruptcy” 80 *Tex. L. Rev.* 2123 comments that: “Ever since the Realist movement captured American law schools, empirical research has been the senior scholar of the legal academy, revered but rarely seen in the building.” Russell Korobkin, writing in 2002 (see below) about contract law, notes that “there is extremely little empirical scholarship being produced in the legal academy today”.

Empirical work in commercial law ranges from large scale quantitative analysis that is usually associated with law and economic analysis, through qualitative studies, “case studies” (e.g. *Hadley v Baxendale*), and experimental work, for example, the use of negotiating experiments. Historical analysis will often include empirical data. A valuable overview of empirical research in contract law is Russell Korobkin’s “Empirical Scholarship in Contract Law: Possibilities and Pitfalls” (2002) *University of Illinois L. Rev.* 1033. This article includes an appendix with a list of law review articles from 1985-2000 that apply empirical analysis to contract doctrine.

US analysis in contract and commercial law has often focused on the “gap” between the law in books and the law in action, most famously articulated in Stewart Macaulay’s article “Non-Contractual Relations in Business: A Preliminary Study,” 28 *American Sociological Rev.* 1-19 (1963) and the Wisconsin school’s argument that appellate doctrine reflects atypical situations, and that such doctrine is often insignificant in its impact (although potentially influential as ideology).

Well-known recent studies of contracting practices and norms include those of Lisa Bernstein, “Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions 99 *Mich. L. Rev.* 1724 and “Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms” 144 *U. Penn. L.Rev.* 1765 (1996).

These studies are linked to the analysis of the role of social norms and understandings in market transactions (see e.g. work on economic sociology and relational contracting that provide interpretive frameworks for understanding contract law and norms. M. Granovetter and R. Swedberg (eds.), (1999) *The Sociology of Economic Life* (1992); H. Collins, *Regulating Contracts*. (OUP,1999) ) and also to a normative debate about the role of the formal legal system in following/not-following/incorporating customary norms and implicit understandings in contract law. Thus the “new formalism” in contract law finds support for its approach to interpretation of contracts in some of

Bernstein's findings. See for a general overview Stewart Macaulay, "Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein," 94 Nw. U. L. Rev. 775-804 (2000).

Debates over the role of secured credit in North America continued for many years before there was any attempt at empirical analysis. Examples of empirical work here are the research of Ronald Mann who reflected on the role of secured credit based partly on interviews with small business bank lending officers. See "The Role of Secured Credit in Small-Business Lending" (1997) 86 Georgetown Law Journal 3; see also Ronald Mann, "Explaining the Pattern of Secured Credit" (1997) 110 Harv. L. Rev. 625 and "Secured Credit and Software Financing" (1999) 85 Cornell L. Rev. 134.

The absence of empirical research in secured transactions and the statutory focus of much commercial law may have resulted in overlooking important issues and patterns e.g. the role of guarantees. Until relatively recently guarantees received little academic interest in the US whereas outside of the US the role of guarantees in small business lending received greater interest by socio-legal scholars. See for example B. Fehlberg, *Sexually Transmitted Debt* (OUP, 1997).

### *Objectives of research*

Empirical analysis by lawyers and lawyer/economists is often linked to policy prescriptions for policy makers (judges, legislators). Researchers want to draw correlations or cause/effect conclusions between different variables. In some research however we might be interested in meaning—how individuals make sense of the world—providing a "thick" description of social life (see C. Geertz, "Thick description: towards an interpretive theory of culture" in *The Interpretation of Cultures: Selected Essays of Clifford Geertz* (1973)). Here "the research is presented as a resource for readers to extend their understanding of themselves and other people in the same way as they draw on and learn from... plays, films, television documentaries and so on" (R. Gomm, *Social Research Methodology: a Critical Introduction* (Palgrave: 2004)). A sociologist might view empirical analysis as part of developing an understanding of how organizations and institutions work ---which may not have immediate policy implications.

### *Empirical research as critique: the politics of commercial law*

Empirical analysis of commercial law often has a shock value. It questions the significance of appellate doctrine to the real world; undermines the picture of contract litigation in contracts casebooks (see e.g. M. Galanter "Contract in Court; or almost everything you may or may not want to know about contract litigation" (2001) Wisc. L. Rev. 577 (the picture presented in casebooks as an arena where David vanquishes Goliath)): problematizes broad functionalist views of commercial law as "serving commercial needs"; questions the organization of casebooks around statutes rather than commercial reality; provides a critique of judicial reasoning that often appeals to "commercial reality" as a normative basis for judgment; and probes the "real" role of lawyers in commercial and consumer transactions. It is thus a necessary though not sufficient part of theorizing the role of commercial law in society.

The increased realization that there is a politics of commercial law should stimulate further empirical work on the role of private law making and the political dynamics of law development through such institutions as the American Law Institute and uniformity bodies such as the NCCUSL. (see e.g. Iain Ramsay, “The Politics of Commercial Law” (2001) *Wisconsin L.J.* 565; David Snyder, “Private Lawmaking” (2003) *Ohio State L.J.* 371).

### *Empiricism, Globalization and commercial law*

Commercial law is very much on the globalization agenda. Here one may include such topics as the development of secured credit regimes, corporate and individual bankruptcy, rules on software licences and intellectual property etc. Issues such as the contribution of the role of secured credit to economic development are important research topics (see e.g. T. Halliday, “Crossing Oceans, Spanning Continents: Exporting Edelman to Global Lawmaking and Market Building” (2004) *Law and Society Review* 213). An overview in 1999 of empirical studies in commercial law and development concluded, for example, that the relevance of secured lending law to economic development is “subject to debate”. (See Kevin Davis and Michael Trebilcock, “What Role do Legal Institutions Play in Development?” (IMF, 1999) available at <http://www.imf.org/external/pubs/ft/seminar/1999/reforms/index.htm> ). There is much opportunity for comparative empirical research on commercial and contract law that could be used to reflect on the basis of our own practices and develop more general theories about the nature of commercial law practices.

### *Methodological Issues*

My recent work has involved modest quantitative and qualitative analysis. Governments often are a source of quantitative data. And some government data is produced using very rigorous social science methodologies. However, government departments or agencies may often collect data for purposes unrelated to research needs and the data may not be easily usable. It is also necessary to probe the basis and robustness of classifications used in government statistics. Having said that they are often an important source of data. Developing one’s own database from records such as court documents is a painstaking process.

In the area of commercial and consumer law much important information is held by private institutions such as credit companies. These data could shed empirical light on markets but are often proprietary and unavailable to researchers. Some economists and business school researchers have obtained aggregate data from credit card companies. One useful source of data is company filings with the SEC and in the credit area, filings in relation to securitization of credit card receivables. Agencies such as Moody’s and the Nielsen report may also have useful information but it may be costly to access.

It is possible now to do sophisticated analyses with statistical packages such as SPSS that would have been time consuming twenty years ago. It is wise however to consult a social scientist or statistician as to the role and limits of tests of significance,

standard deviations and so on. A very helpful introduction to this area is David Freedman, Robert Pisani and Roger Purves *Statistics* (3d. ed 1998).

A variety of research techniques are evident in current work in commercial law including the use of structured and semi-structured interviews [see, for example, Jean Braucher, “Lawyers and Consumer Bankruptcy: One Code, Many Cultures” 67 Am. Bankr. L.J. 501 (1993)]. Semi-structured interviews may be useful for interviewing commercial actors and professionals involved in commercial transactions. They are recommended for professional and elite interviewing and where those involved may play an active role in the interview.

Semi-structured interviews allow an interviewer not only to obtain some standardized information but also to probe and expand on issues. They permit individuals to answer more on their own terms. Normally one would tape record such interviews for subsequent analysis. I have found that taping does not usually inhibit interviewees and is essential for having an objective record of the interview.

Semi-structured interviews might be combined with quantitative analysis. In my work on consumer bankruptcy I found that information from bankruptcy files provided a check for information provided in interviews with bankruptcy trustees. Given the importance of understanding the context and qualitative content of a semi-structured interview it is best for the researcher (rather than a trained interviewer) to conduct the research. Although qualitative research seldom involves statistically random samples, and may often use “snowball sampling”, a researcher should attempt to include a sample that is not biased towards particular perspectives (e.g. the large rather than the small firm). As one text notes it is important to avoid the tendency to MARSBARS (Methods are Resembling Saloon Bar Sociology, R. Pahl, quoted in Tim May, *Social Research: Issues, Methods, and Process* (2001) at 132).

There are computer packages available for analyzing qualitative data that will assist in identifying themes and categories. There is a danger here in believing that these programmes can do the necessary analysis. They are an aid but usually a lot of time must be spent “mulling over” the transcripts before attempting to write up their meaning. One possible approach here is through grounded theory developed by Glaser and Strauss [see Anselm Strauss and Juliet Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (2d. ed 1998)] where the authors describe how researchers might generate analysis and theoretical explanation from careful “interplay between researchers and data. It is both science and art” (id. At 13). The facts rarely speak for themselves and one must develop an interpretive framework. A useful example here is Stewart Macaulay’s study “Lawyers and Consumer Protection Laws” (1979) 14 Law and Society Review 115, where he fits his interviews with lawyers within micro- and macro- theorizing about the role of law and lawyers in a liberal capitalist society.

There are ethical issues involved in empirical research. In Canada (and I assume the US) research proposals to grant agencies that involve human subjects must have approval of the relevant ethics committee at the applicant’s institution. Researchers must ensure that they have the informed consent from participants in the research. Researchers will be required to provide samples of the letters or other communications that will be used to contact research subjects. These should describe the researchers, the purpose of the research, the potential outcomes of the research, the use to which the data will be put

as well as how the data will be stored. Research that involves deception such as researchers posing as customers will usually require further justification.