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## Empirical Doctrine

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# EMPIRICAL DOCTRINE

*Jessie Allen*<sup>†</sup>

## ABSTRACT

We can observe and measure how legal decision makers use formal legal authorities, but there is no way to empirically test the determinative capacity of legal doctrine itself. Yet discussions of empirical studies of judicial behavior sometimes conflate judges’ attention to legal rules with legal rules determining outcomes. Doctrinal determinacy is not the same thing as legal predictability. The extent to which legal outcomes are predictable in given contexts is surely testable empirically. But the idea that doctrine’s capacity to produce or limit those outcomes can be measured empirically is fundamentally misguided. The problem is that to measure doctrinal determinacy, we would have to adopt standards of legal correctness that violate fundamental conceptual and normative aspects of the legal institution we wish to study. In practice the promise of empirical data on doctrinal determinacy makes it seem less urgent to investigate other contributions doctrinal reasoning makes to law. Doctrinal reasoning might affect decision makers in ways that contribute importantly to the legal process without determining outcomes. Trying to understand those effects is a research project to which the empirical methods of social science have much to contribute.

## CONTENTS

INTRODUCTION .....	2
I. SEEING DOCTRINAL INDETERMINACY AS AN EMPIRICAL QUESTION .....	7
II. DOCTRINAL DETERMINACY IS NOT MEASURABLE EMPIRICALLY .....	11
A. <i>Existing Empirical Studies Do Not Measure Doctrinal Determinacy</i> ...	12
1. Looking for Correlations between Judges’ Characteristics and Legal Outcomes in Large Databases of Judicial Opinions .....	13
2. Studies of Legal Authority’s Influence on Judges.....	16
3. Testing “Motivated Reasoning” in Legal Decision-Making .....	23
B. <i>No Imaginable Empirical Method Could Measure Doctrinal         Determinacy</i> .....	28
1. Imagining a Test .....	28
2. The Objection from Scientific Method .....	30

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3. Very, Very Hard Cases.....	33
III. WHY WE SHOULD CARE ABOUT THE IMPOSSIBILITY OF MEASURING LEGAL DETERMINACY EMPIRICALLY.....	43
CONCLUSION.....	48

## INTRODUCTION

*“adjective: empirical  
based on, concerned with, or verifiable by observation or  
experience rather than theory or pure logic.”*

—*Concise Oxford English Dictionary*<sup>1</sup>

For most of the last century, legal theorists ignored the work of political scientists who studied judicial decision-making. But lately legal scholars look to empiricists to validate or reevaluate conceptual theories about how law works. Empirical observations can certainly reveal whether legal decision makers pay attention to formal legal doctrine. And empirical methods can measure the predictability of legal outcomes in various contexts. But sometimes claims about the capacity of empirical legal studies appear to go further. Sometimes legal theorists suggest that, in a given jurisdiction, we could empirically test whether “there are cases, statutes, maxims, principles, canons, authorities, or statements in learned legal treatises available to justify decisions in favor of *both* parties in all or at least most litigated cases,”<sup>2</sup> or, if the available legal authorities justify uniquely correct legal outcomes in most, or at least some, cases.<sup>3</sup> This is a claim that legal scholars could

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1. *Empirical*, CONCISE OXFORD ENGLISH DICTIONARY (11th rev. ed. 2008).
  2. FREDERICK SCHAUER, THINKING LIKE A LAWYER 135 (2009) [hereinafter SCHAUER, THINKING LIKE A LAWYER].
  3. See, e.g., *id.* at 138–39 (asserting that the contention that “in looking for a legal justification for an outcome selected on other grounds, judges in complex, messy common-law systems will rarely (but not never) be disappointed” is an empirical claim); Brian Leiter, *Legal Realism, in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 271 (1999) (“[T]he real dispute [about rule determinacy in law] is not conceptual, but empirical; it concerns how often rules do or do not matter (causally) in adjudication.”); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 14 (1984) [hereinafter Singer, *Cards*] (explaining that the contention that legal rules are less determinate than traditional theorists claim is “an empirical question” whose “truth depends on specific demonstrations of how individual . . . rules fail to provide determinate resolutions of competing principles”). But cf. Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 495 (1987) (concluding that the question of indeterminacy is “partly empirical and partly conceptual”).

empirically measure “doctrinal determinacy.” This article explains why that claim is false.

It matters whether doctrinal determinacy can be measured empirically. Judges, lawyers, and the general public all act as if legal doctrine is substantively determinate and at the same time profess to know that it is not. As Keith Bybee puts it:

On the one hand, judicial decision making is portrayed . . . as a matter of legal principle and impartial reason . . . guided by a shared set of publicly stated rules and norms. On the other hand, judicial decision making is portrayed . . . as a matter of preference and politics, an activity largely driven by the personal beliefs and policy commitments that judges bring to the bench.<sup>4</sup>

If we could measure doctrinal determinacy, we could reconcile these two perennially opposing views in a compromise position that recognized some limited form of determinacy. Such a compromise is desirable because faith in some degree of doctrinal determinacy underwrites the enforcement of judicial decisions, which, after all, continue to be written in doctrinal language.

This article aims to show why it is not possible to empirically measure the sort of doctrinal determinacy that could legitimize law enforcement. That does *not* mean rejecting empirical social science research as a method for understanding legal decision-making. In particular, the degree to which legal outcomes are *predictable* in given contexts is surely observable empirically and is an important piece of information.<sup>5</sup> But doctrinal determinacy is not the same thing as legal predictability.<sup>6</sup> Legal outcomes often are predictable because of factors

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4. Keith J. Bybee, *Paying Attention to What Judges Say: New Directions in the Study of Judicial Decision Making*, 8 ANN. REV. L. SOC. SCI. 69, 70 (2012).
  5. See, e.g., Andrew D. Martin et al., *Competing Approaches to Predicting Supreme Court Decision Making*, 2 PERSP. ON POL. 761, 763 (2004) [hereinafter *Competing Approaches*] (reporting statistical model’s ability to accurately predict results of U.S. Supreme Court cases 75% of the time based on non-doctrinal factors).
  6. Indeed, if determinacy is reduced to predictability, the question of the extent of doctrine’s determinacy collapses. Oliver Wendell Holmes famously asserted that law is nothing but the prediction of what courts would do. O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897). As Brian Leiter explains, in this radically positivist view, where law is just what official decision makers say it is, every official legal outcome is necessarily correct. BRIAN LEITER, NATURALIZING JURISPRUDENCE 70 (2007) [hereinafter LEITER, NATURALIZING JURISPRUDENCE]. In such a regime, the idea of doctrinal determinacy is incoherent, because preexisting legal materials can never determine an outcome that differs from any official legal decision. Doctrine has no possible determinant role, because “a judge who asks herself what the law is turns out . . . to really be asking herself, ‘what do I think I will do?’” *Id.* See also H.L.A. HART, THE CONCEPT OF

that are not traceable to doctrine.<sup>7</sup> Predicting how a lawsuit will come out is not the same thing as demonstrating that the case *should* be decided only one way based on the available legal authorities, and that is the determinacy question. The bottom line is that empirical methods can be used to observe how judges engage with doctrine in reaching legal decisions, but there is no way to empirically measure doctrine's capacity to determine those decisions.<sup>8</sup>

The aim here is not to devalue empirical legal studies. Nor is the goal to criticize legal empiricists, who for the most part avoid conflating data on how judges go about using legal materials with evidence about the extent to which those materials produce determinate legal answers. Rather, this article aims to sweep away misguided interpretations of empirical work.

The promise of empirically observing the extent of substantive doctrinal determinacy tends to divert interest away from more promising empirical questions. So long as we remain stuck in a miasmic sense that doctrine must be *somewhat* determinate in a way that might be shown empirically, it is hard to motivate the search for other less familiar doctrinal effects. My next article will draw on some recent work in psychology to propose a way that formal legal doctrine might produce psychological and social effects that could contribute to a distinctively legal process, apart from producing determinate answers. This research is discussed briefly below.<sup>9</sup>

Much of my argument in this article is framed in opposition to assertions of Frederick Schauer, probably the foremost living proponent of law as a formal rule-based system. I take issue with Schauer's repeated suggestions that the extent of doctrinal determinacy, or indeterminacy, is an "empirical" question.<sup>10</sup> But the larger project is broadly congruent with Schauer's understanding of legal reasoning as a distinctive rule-focused social practice and has been greatly influenced

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LAW, 81–88 (1961) (describing the obligatory aspect of legal rules as distinguishing the concept of legality from predictability).

7. See *Competing Approaches*, *supra* note 5. See also Brian S. Clarke, *The Clash of Old and New Fourth Circuit Ideologies: Boyer-Liberto v. Fontainebleau Corp. and the Moderation of the Fourth Circuit*, 66 S.C. L. Rev. 927, 938, 941–46 (2015) (noting increased likelihood of employee success in workplace discrimination cases after a raft of judicial appointments by a liberal Democratic president and correctly predicting *en banc* reversal of decision for employer by panel with conservative Republican-appointed majority).
8. By "doctrine" I mean to encompass not just case law but all formal legal sources: cases, statutes, regulations, rules, maxims, principles, canons of interpretation—any conventionally recognized materials and methods of legal analysis.
9. See *infra* Part III.
10. SCHAUER, THINKING LIKE A LAWYER, *supra* note 2, at 139.

by Schauer's work. Schauer has long argued that the distinctive quality of legal reasoning is related to its rule-based nature but does not depend entirely on whether legal rules determine outcomes.<sup>11</sup> Investigating what formal doctrinal reasoning contributes to legal reasoning, even if rules never substantively determine answers, is in some ways an extension of Schauer's emphasis on the phenomenology of rule-based reasoning in law.

On a methodological level, this article aims to contribute to New Legal Realism, an approach to legal scholarship that seeks to build "a bridge between formal law and the social sciences."<sup>12</sup> The original Realists of the early twentieth century tended to dismiss formal legal methods either as trivial window dressing or a pernicious obfuscation of the political forces that really drove legal outcomes.<sup>13</sup> But self-identified New Legal Realists consider that legal forms have meaning.<sup>14</sup> Clarifying what empirical studies can and cannot show about the role of legal doctrine should help advance the New Legal Realist inquiry into "when and how formal law matters."<sup>15</sup>

There is an urgent pragmatic reason for gaining a better understanding of what formal doctrinal reasoning contributes to legal decision-making. At least in the United States, there is a pronounced shift away from adjudication based on formal doctrinal analysis toward informal settlement and alternative dispute resolution.<sup>16</sup> Identified legal

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11. *E.g.*, Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 406 n.16 (1985) [hereinafter Schauer, *Easy Cases*] ("It is quite simply a blunder to hold that, because a factor may be overridden or outbalanced by other factors, it is not a factor in the decision process.").
  12. Victoria Nourse & Gregory Shaffer, *Empiricism, Experimentalism, and Conditional Theory*, 67 SMU L. REV. 141, 143 (2014).
  13. *See, e.g.*, Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1015 (1928) ("Hence 'law' as here conceived is . . . the power of passing judgment through formal political agencies for securing social control."). *See also* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935) ("*Legal concepts* . . . are supernatural entities which do not have a verifiable existence except to the eyes of faith.").
  14. Nourse & Shaffer, *supra* note 12 at 145. *See also* Jessie Allen, *Documentary Disenfranchisement*, 86 TUL. L. REV. 389, 398 (2011) (quoting Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 125 (2009) ("[N]ew realists do not, or anyway should not, 'simply reject law's formal qualities as meaningless.'")).
  15. Nourse & Shaffer, *supra* note 12, at 145.
  16. *See* Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771 (2008) ("Of one hundred civil cases filed, trials start in fewer than two."); Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7 (2006) ("[T]here is an abundance of data that shows that trials . . . are declining precipitously.").

conflicts are increasingly resolved through mediation, arbitration, plea-bargaining, and negotiation. Part of the reason the shift toward less formal treatment of legal conflicts is deemed acceptable and thought not to destabilize the rule of law is the belief that these informal resolutions take place “in the shadow of the law.”<sup>17</sup> The idea is that the results of these non-doctrinal resolutions are constrained, or at least shaped, by a background of substantive rules, principles, and values established by applicable legal authorities. But if legality resides more in the formal practice than the substance of doctrinal reasoning, by shifting to informal, all-things-considered negotiation we are giving up the aspect of our legal institutions that constitutes legality.

Something paradoxical is happening. In the last half of the twentieth century, court dockets were surging while, at the same time, social scientists who studied judicial decision-making were bent on showing that the legal doctrines courts ostensibly applied did not actually drive legal outcomes. Today, empirical legal studies sometimes hypothesize that doctrine is involved significantly in legal decision-making. At the same time, legal claims are more likely to be resolved non-doctrinally. Ironically, at the moment of increasing consensus that formal legal authorities “matter,” we are busy dismantling the formal practices that have been the traditional mode of applying those authorities to conflicts. Once it seemed that skeptical critiques and evidence of judges’ “attitudinal” decision-making threatened formal doctrinal practice. But now it is as though increased confidence in the substantive role of legal doctrine has made formal doctrinal reasoning practices seem superfluous.

This article proceeds in three parts. Part I briefly reviews some writings by legal theorists suggesting that doctrinal indeterminacy can be measured empirically. Part II is the heart of the article—it argues the impossibility of obtaining empirical evidence of doctrinal determinacy. Part II first points out that existing empirical work does not measure doctrinal determinacy, despite suggestions to the contrary in some reports of empirical legal studies. Then I consider how we might go about empirically testing doctrinal determinacy if we could use any imaginable method. Part II concludes that even under ideal circumstances, empirical methods cannot measure doctrine’s ability to determine legal outcomes. Part III briefly considers some research and policy implications of recognizing the problems of an empirical approach to legal doctrine.

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17. See e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (discussing how divorcing parents bargaining over the division of money and custody are influenced by what would happen if the case went to trial); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) (discussing the expectation that when parties plea bargain, they do so by relying on expected trial outcomes).

I. SEEING DOCTRINAL INDETERMINACY AS AN  
EMPIRICAL QUESTION

*“As a set of empirical claims, the Realist program can hardly now  
be condemned as largely false or celebrated as largely true.”*

—Frederick Schauer<sup>18</sup>

*“The slaying of conceptualism has been quite successful.”*

—Joseph William Singer<sup>19</sup>

Legal scholars sometimes assert that the extent of doctrinal indeterminacy in our legal system is an unanswered “empirical” question.<sup>20</sup> At first glance, this might seem like an unproblematic claim. After all, when we ask to what extent doctrine is determinate, we are asking about a state of affairs in the real world not about an imaginary society or an abstract ideal. As the Realists pointed out in the 1920s, we cannot decide a priori or as a matter of faith that legal doctrine provides definite answers to any particular legal question in any real time and place.<sup>21</sup> Just because society may think of law as a set of preexisting rules capable of determining outcomes does not necessarily mean that any such materials exist.<sup>22</sup> Observing how decision makers use legal doctrine, however, cannot measure that doctrine’s capacity to determine correct legal outcomes.

Suggestions that empirical studies might illuminate doctrinal determinacy or indeterminacy have come from theorists across the political and interpretive spectrum. For instance, in an influential late twentieth-century article explicating critical legal studies, Joseph Singer stressed that indeterminacy is an empirical question.<sup>23</sup> As he put it, “the claim that law is indeterminate . . . is an empirical claim about existing legal theories and arguments,” as opposed to “a claim that it is impossible to invent determinate theories” of law or “a claim about the

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18. SCHAUER, THINKING LIKE A LAWYER, *supra* note 2, at 147.

19. Joseph Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 475 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE: 1927–1960 (1986)).

20. See sources cited *supra* note 3.

21. See, e.g., Green, *supra* note 13, at 1014 (“The rules, for the most part . . . are still liquid.”); Cohen, *supra* note 13, at 847 (“[D]ecisions themselves are not products of logical parthenogenesis born of pre-existing legal principles but are social events with social causes and consequences.”).

22. Cf. JEROME FRANK, LAW AND THE MODERN MIND 12 note (1930) (pointing out that a flying carpet, or, “wishing rug” would be a handy mode of intercontinental transportation, but that doesn’t mean that such a thing exists).

23. Singer, *Cards*, *supra* note 3, at 10.



nature of reason or the human mind or anything like that.”<sup>24</sup> Moreover, Singer went on to suggest that doctrinal indeterminacy can—and should—be proved. He explained that doctrinal indeterminacy “is an empirical question, and its truth depends on specific demonstrations of how individual theories or rules fail to provide determinate resolution of competing principles.”<sup>25</sup>

Frederick Schauer’s approach to legal theory is often at odds with Singer’s critical perspective. But, like Singer, Schauer finds it useful, and apparently uncontroversial, to emphasize that the extent of legal determinacy or indeterminacy is an empirical matter. For instance, in his 2009 book, *Thinking Like a Lawyer*, Schauer stresses repeatedly that legal indeterminacy is “an empirical claim”<sup>26</sup> and suggests that the extent of determinacy can and should be measured empirically.<sup>27</sup>

Schauer defines the realists’ indeterminacy challenge as “the claim that there are cases, statutes, maxims, principles, canons, authorities, or statements in learned legal treatises available to justify decisions in favor of *both* parties in all or at least most litigated cases.”<sup>28</sup> In other words, “[i]f a decision for the plaintiff can be justified by reference to standard legal sources, and if a decision for the defendant can also be justified by referring to standard (albeit different) legal sources, then the law is not actually resolving the dispute.”<sup>29</sup> According to Schauer, the realists recognized that this “question was an empirical one: just how often are there legal rules, principles, and sources available to justify both of two mutually exclusive outcomes?”<sup>30</sup> Moreover, Schauer adds that because this is an empirical question, we should not expect

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24. *Id.*

25. Singer, *Cards*, *supra* note 3, at 14. Note that demonstrating how doctrinal rules fail to determine answers echoes the standard empirical method of falsifying hypotheses.

26. SCHAUER, THINKING LIKE A LAWYER, *supra* note 2, at 11. And he has been making that claim or something close to it for 25 years. See FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 194–96 (1991) [hereinafter SCHAUER, PLAYING BY THE RULES].

27. On the first point, Schauer asserts that the actual existence of a distinctive form of legal reasoning that focuses on following rules “is in the final analysis an empirical claim,” and observes, “[m]ost people can describe a unicorn, but our ability to describe a unicorn is not inconsistent with the crucial fact that there are no actual unicorns in the world.” SCHAUER, THINKING LIKE A LAWYER, *supra* note 2, at 11.

28. *Id.* at 135.

29. *Id.*

30. *Id.* at 135–36.

the answer to be the same “for all times, for all places, for all judges, and, perhaps most importantly, for all issues and for all courts.”<sup>31</sup>

In a section labeled “An Empirical Claim,” Schauer goes on to discuss some recent empirical legal studies focused on state courts and federal trial and intermediate appellate courts.<sup>32</sup> There he observes, “when we look at the conclusions of that research, we see that legal doctrine appears to play a considerably larger role in judicial decision-making than the more extreme of the Realists supposed.”<sup>33</sup> Judges’ practices in consulting doctrines and the predictability of legal outcomes are clearly phenomena that we can observe and measure empirically. But Schauer does not seem to be limiting his prescription for empirical studies to the question of how judges approach legal materials. He seems to be calling for empirical investigations of the extent to which legal materials determine outcomes.

At the end of a recent article on Realism, for example, he urges that “the full breadth of empirical approaches” be applied to examine “the divergence between real and paper rules” of judicial decision.<sup>34</sup> There he explains:

[A]ny properly designed empirical inquiry will include within its compass not only the instances in which something other than the paper rule appeared to produce a legal result, but also the instances in which the paper rule actually influenced the outcome.<sup>35</sup>

He concludes by emphasizing that “the extent to which paper rules are followed or influential is an empirical question not answerable by a selected anecdote or an unrepresentative example” and instead requires developing a testable hypothesis about the effect of law on the decisions of judges and testing of those hypotheses.<sup>36</sup> This looks like a proposal to observe and measure the ability of existing doctrine to determine legal outcomes using the experimental methods of social science. That observation and measurement is what I will argue cannot be achieved without obscuring or abandoning the distinctive normative character of legal doctrinal analysis.

If the issue were posed directly, both Singer and Schauer would likely agree that the substantive determinacy of formal doctrine (as

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31. *Id.* at 139.

32. *Id.* at 138–42.

33. *Id.* at 140.

34. Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 777 (2013) [hereinafter Schauer, *Legal Realism Untamed*].

35. *Id.*

36. *Id.* at 778.

opposed to judges' *use* of doctrine) cannot be observed without making normative judgments. Outside of Supreme Court confirmation hearings, no sophisticated legal thinker defends a version of legal reasoning in which preexisting legal authorities determine outcomes mechanically, without the involvement of some subjective judgment from the decision maker. Schauer has described a complex, contextual version of rule following that includes a role for social norms and linguistic indeterminacy.<sup>37</sup> Moreover, given Schauer's scholarly focus on the phenomenology of legal decision-making, it might make sense to read his statements about the empirical nature of determinacy claims as referring only to the question of whether and how judges actually engage with doctrine and not to the determinative capacity of the doctrine itself. That said, when Schauer repeatedly asserts the empirical nature of the Realist claim that doctrine is mostly indeterminate, follows those assertions with references to existing empirical legal studies and calls for more empirical research. It is hard *not* to read him as asserting that the determinate nature of legal doctrine is empirically observable without relying on controversial normative claims.

Part of the problem is that treating doctrinal determinacy as empirically measurable can be very appealing as a way to resolve a longstanding conceptual and moral conflict. Legal theorists live with a contradiction between the ideal of source-based rule of law (not "rule of men"<sup>38</sup>) and the recognition that legal rules do not independently supply objective legal outcomes. An empirical approach to determinacy seems to offer relief. If we could systematically measure the degree of doctrinal indeterminacy in a given situation, then we could recognize the limits of legal certainty and resolve the dissonance between these two approaches.

The political scientists who conduct empirical legal studies seem generally to be immune to this tempting resolution, probably because for the most part they simply are not thinking about law in these conceptual terms. They study how judges approach legal decision-making and develop ways of predicting legal outcomes. Nevertheless, legal empiricists sometimes make statements about their findings that could be misinterpreted as claims that empirical data counts as evidence not just of decision makers' practices but also of the determinative capacity of the legal materials that those decision makers engage. If the empiricists and theorists are not themselves confused on these points, I daresay their readers may be. Moreover, empiricists sometimes adopt methods of setting external standards of legal correctness that appear

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37. See SCHAUER, *PLAYING BY THE RULES*, *supra* note 26, at 64–68, 118 (noting "[i]t is a post-Wittgensteinian commonplace that rules do not determine their own application").

38. SCHAUER, *THINKING LIKE A LAWYER*, *supra* note 2, at 10; See *Marbury v. Madison*, 5 US 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

to *presume* at least some level of doctrinal determinacy. It is therefore worth thinking through the problems with the view that doctrinal determinacy can be observed and proved (or disproved) empirically.

## II. DOCTRINAL DETERMINACY IS NOT MEASURABLE EMPIRICALLY

*“But as to listening to what one lawyer says without asking another—I wonder at a man o’ your cleverness, Mr. Dill. It’s well known there’s always two sides, if no more; else who’d go to law, I should like to know?”*

—George Eliot, *Middlemarch* (Ch. 71)<sup>39</sup>

I want to return to Frederick Schauer’s articulation of the basic indeterminacy question: whether “there are cases, statutes, maxims, principles, canons, authorities, or statements in learned legal treatises available to justify decisions in favor of *both* parties in all or at least most litigated cases.”<sup>40</sup> Again, note that the question apparently being asked is *not* whether judges consult identifiable preexisting legal authorities in order to make legal rulings. Nor is the question whether judges believe that those authorities direct them to one or another ruling or whether their use of those materials in their decisions follows *predictable* patterns. *The determinacy question is whether the standard authorities actually do direct one ruling or another in any given case.* This is the question that is *not* illuminated by empirical legal studies. Whether judges engage in the forms of analysis Schauer identifies more broadly as *distinctively legal*—making sincere attempts to follow legal rules, treating certain sources as authoritative, respecting precedent—is an empirical question. Likewise, judges’ subjective experience of the rules’ guidance could be studied empirically, and we can certainly test the success of different methods of predicting legal outcomes and make inferences about the role of different factors in the decision-making process, including both changes in doctrine and judicial characteristics. But it is *not* an empirical question whether available legal rules actually determine uniquely correct legal outcomes; that is, it is not a question that is answerable through observation.

The basic problem is that any conceivable method for establishing legal doctrinal determinacy (as opposed to mere predictability) requires us to adopt a baseline of legal correctness. And we cannot adopt such a standard without making judgments that either violate the crucial conceptual and normative distinction between legal authority and popular consensus or forcing people to adopt individual interpretations

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39. GEORGE ELIOT, *MIDDLEMARCH* 689 (Zodiac Press 1950) (1872).

40. SCHAUER, *THINKING LIKE A LAWYER*, *supra* note 2, at 135.

of legal doctrine that are no more authoritative than the ones the researchers are trying to study.

For example, suppose a study asks 1,000 lawyers to use the legal doctrine available in a particular jurisdiction to resolve a particular legal question. If 999 of the research subjects resolve the question with the same outcome, the results might be interpreted quantitatively to show that the available authority is legally determinate. But conflating the legal decision makers' consensus with legal doctrine's capacity to determine decisions violates our understanding of the rule-based determinacy we were trying to investigate in the first place.

To avoid this problem, researchers might instead evaluate the persuasiveness of the analysis of their research subjects' analyses or simply identify what results the preexisting legal doctrine should produce, perhaps with help from experts in the doctrinal field in which the case arises. But as a prominent legal empiricist points out, it is not clear why any of those external opinions about the correct legal result would provide "a legal model test that is more authoritative and reliable" than the decision makers whose rulings are being studied.<sup>41</sup> Nevertheless, empirical legal studies, and especially legal theorists' discussions of those studies, often gloss over this crucial normative judgment.

A. *Existing Empirical Studies Do Not Measure Doctrinal Determinacy*

There are three basic kinds of empirical studies that this article will discuss: (1) analyses of judicial opinions that look for correlations between judges' decisions and various characteristics of the judges making those decisions, (2) analyses of judicial decisions that aim to measure the role of legal authorities in those decisions, and (3) experimental studies that observe subjects' resolutions of hypothetical legal problems, measure the subjects' cultural and political attitudes and observe whether and how those attitudes correlate with the subjects' decisions. Some of these studies provide evidence that decision makers' political ideology and other attitudes affect their resolutions of legal questions, and other studies emphasize that such factors appear relatively insignificant.<sup>42</sup> *None* of these studies, however, measure the

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41. Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1467 (2003).

42. The vast majority of quantitative empirical studies of U.S. Supreme Court decision-making conclude that outcomes are significantly affected by the justices' political ideology, but the findings regarding the role of ideology on lower federal courts and state courts are more mixed. *See* Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 206–215 (2012) ("Cognitive psychology therefore suggests that judges . . . may sincerely believe that their rulings are grounded in an analysis of law alone, even though their predilections influence their rulings."); FRANK B. CROSS, *DECISION MAKING IN THE*

extent to which doctrine actually determines the answers legal decision makers choose.

1. Looking for Correlations between Judges' Characteristics and Legal Outcomes in Large Databases of Judicial Opinions

Late twentieth-century empirical legal research established a role for ideology in judicial decision-making, often by comparing legal outcomes with indicators of the political preferences of the deciding judges.<sup>43</sup> Much of this research focused on the U.S. Supreme Court.<sup>44</sup> Empirical research also demonstrated significant correlations between the partisan affiliations of intermediate appellate judges and the political valence of decisions in some specific areas of the law (e.g., employment discrimination and labor cases) or in other discrete categories of cases (e.g., en banc decisions).<sup>45</sup> Regarding judicial characteristics other than partisan affiliation, researchers have found correlations between lower federal court judges' race and their patterns of ruling in voting rights and racial harassment cases.<sup>46</sup> But other recent studies,

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U.S. COURTS OF APPEALS 16–18, 24–25 (2007) (discussing his study regarding ideological effects on judicial decision-making); David Klein, *Law in Judicial Decision Making*, SSRN (forthcoming), <http://ssrn.com/abstract=2541743> [<http://perma.cc/K6TN-AGQC>] (“The pretense that judicial decision making can be accomplished purely through value-free analysis of legal materials often appears in judicial confirmation battles.”).

43. These studies often use the party of a federal judge's nominating president as a proxy for conservative or liberal ideology. See LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 71–81 (2013) (discussing various measures of judicial ideology and critiquing the presidential party measure).
44. See, e.g., Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).
45. See, e.g., Donald R. Songer & Sue Davis, *The Impact of Party and Region on Voting Decisions in the United States Courts of Appeals, 1955-1986*, 43 W. POL. Q. 317 (1990) (discussing “significant differences in the voting patterns of Democratic and Republican judges on a wide spectrum of issues”); CASS SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* 147 (2006) (“Republican appointees differ from Democratic appointees. . . . [W]e see significant differences in such areas as campaign finance legislation, affirmative action, . . . labor law, and much more.”); Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1640 (1998) (Under this theory, we can predict circuit court judicial behavior in en banc cases based on the judges' policy preferences . . . and/or their compulsion to win.”).
46. See, e.g., Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 1 (2008) (“This Article provides the first systematic evidence that judicial ideology and race are closely related to findings of

working with a data base of thousands of appellate cases that cover a wide range of doctrinal areas over a period of some seventy years, have found little correlation between appellate judges' personal and political characteristics and their patterns of decision-making in the mass of cases adjudicated.<sup>47</sup>

For instance, Frank Cross looked at 27,024 judicial votes in federal court of appeals cases and found that judges' political ideology had little impact on their votes for case outcomes.<sup>48</sup> Similarly, Epstein, Landes, and Posner's analysis of two large databases of federal court of appeals cases shows that judges appointed by Republican presidents are only slightly (4.5 percent) more likely to vote for conservative outcomes than Democratic appointees.<sup>49</sup> In civil cases Republican appointees cast votes coded conservative only 3 percent more often than Democrats.<sup>50</sup> In criminal cases the split is wider, but still more of a crack than a crevasse. Republican appointees were 6 percent more likely to vote for results that are coded conservative.<sup>51</sup> The percentage of votes coded conservative across all cases was 55 percent for judges appointed by Republican presidents and 49 percent for Democratic appointees; liberal votes were 36 percent for Republicans and 43 percent for Democrats.<sup>52</sup> In other words, both Republican and Democratic appointed judges cast conservative votes more often than they voted for liberal outcomes.

Thus studies indicate little individual partisan or ideological influence on most decisions in lower federal courts. This in itself is an interesting and useful finding and one that contravenes a simple picture of judges deliberately manipulating legal outcomes to produce political effects. One cannot conclude, however, that any time judges are *not* pursuing partisan or ideological goals, their decisions somehow are being determined by preexisting legal rules, or, for that matter, that those decisions are not driven by shared political views. Evidence that

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liability in voting rights cases."); Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 91, 91 (2012) ("[The article] finds that judges of different races reach different conclusions, with non-African American judges less likely to hold for the plaintiffs.").

47. EPSTEIN, LANDES & POSNER, *supra* note 43; CROSS, *supra* note 42.
48. CROSS, *supra* note 42, at 24. Cross used a measure of judicial ideology that incorporated both presidential and senatorial preferences. *Id.*
49. EPSTEIN, LANDES & POSNER, *supra* note 43, at 168.
50. *Id.*
51. *Id.*
52. The percentages of liberal and conservative votes for each group do not add to one hundred percent because some case outcome votes were coded "mixed" (i.e., neither liberal nor conservative). *Id.* at 159.

political differences are not the main motivating factor in most court decisions does not mean that legal doctrine is determining those decisions. Nevertheless, there is a tendency to equate evidence negating alleged partisan or ideological biases or biases driven by identifiable personal factors like race, gender, and religion with proof that decisions are caused by objective legal doctrine or to characterize the research findings in ways that seem to imply that is the case.

For instance, a study of trial judges' treatment of civil rights and prisoner suits in three federal district courts found that judges' partisan political affiliations, religion, gender, and professional background characteristics produced no significant differences in the outcomes of the cases assigned to them.<sup>53</sup> The authors are careful to point out that their study does not prove "that there are no differences" in the way judges with different backgrounds decide cases.<sup>54</sup> But they are not so cautious about the way they describe the influence of "the law."<sup>55</sup> They conclude that their results show that "[i]n the mass of cases that are filed, even civil rights and prisoner cases, the law—not the judge—dominates the outcomes."<sup>56</sup> The political scientists who made this statement surely recognize that it refers to the decision-making approach of judges, not to the determinative capacity of preexisting legal authorities. But for legal theorists grappling with concerns about the legitimacy of enforcing judicial decisions, the temptation is to read this as a claim to evidence that doctrine actually determines outcomes. Of course the study results show no such thing.

When judicial outcomes do not reflect ideological patterns, that supports an inference that judges' decisions are being driven by something other than individual ideological differences. But it does not mean (1) that this result is accomplished through a process in which judges are attending to legal doctrine, (2) that the available legal doctrine is objectively narrowing the range of possible outcomes, or (3) that doctrine could justify only the decisions actually produced and not alternative outcomes. Most important for the project here, only the first of these possibilities is even susceptible to empirical investigation.

The problem is that uniformity in judicial outcomes is not empirical evidence that those outcomes were determined by legal doctrine. The fact that decision makers tend to agree on the correct outcome might make that outcome predictable, but it does not necessarily make that outcome correct in an objective sense. And the notion of doctrinal determinacy of the sort that comes up when we talk about legitimate

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53. Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995).

54. *Id.* at 281.

55. *Id.*

56. *Id.*



law enforcement seems to require just this kind of objectivity to be meaningful.

This is fundamentally a conceptual, rather than methodological, point. Even if agreement among trained legal decision makers suggests the answer they favor is correct, using that agreement as evidence of legal correctness runs afoul of the distinction between subjective judgment and objective legal sources implicated in the very idea of doctrinal determinacy and the ideal of rule of law such determinacy is meant to support. We should not equate legal consensus or predictability with doctrinal determinacy. Doing so means adopting a view of legality contrary to the most basic understanding of law as something other than popular or professional opinion. Doctrinal determinacy (as opposed to sheer predictability) is interesting exactly because we see determinacy as a way to achieve the separation of law from opinion. So it makes no sense to prove determinacy with opinion.

## 2. Studies of Legal Authority's Influence on Judges

In some cases, researchers set out to study more directly the influence of formal legal sources on judicial outcomes. For instance, researchers look to see whether rulings in high courts that are said to change preexisting doctrine precipitate changes in lower court decision-making. Several studies track federal appellate court rulings in different doctrinal areas, looking to see whether lower courts adjust their decision-making substantively after new Supreme Court decisions in those areas.<sup>57</sup>

Again, there are (at least) two different questions at stake when we ask what role a new legal precedent plays in subsequent judicial rulings. One is the behavioral question whether judges pay attention to legal doctrine. A distinct question is whether, if judges attend to it, legal doctrine can determine or constrain legal outcomes and, if so, how. The research on courts' reactions to precedent may suggest that judges make sincere efforts to follow legal doctrine, but that does not necessarily show that doctrine actually leads judges to uniquely correct legal outcomes. Even if judges sincerely care about law and strive to follow

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57. See, e.g., Cross, *supra* note 41, at 1468–1469 (summarizing findings from a number of studies); Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 429 (2007) (“Some [lower courts] may be more likely to see their decisions as bound by higher court precedent, while others will read those decisions narrowly, leaving them substantial discretion to decide the issue before them.”); Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 534 (2002) (noting that “several variables are relevant to the compliance decision”); Donald R. Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963, 967 (1992) (discussing when and how judges feel constrained by precedent).

legal rules or justify outcomes reached in other ways on the basis of preexisting legal rules, that will only result in doctrinal determinacy if preexisting legal rules do, in fact, direct or limit correct legal outcomes. Political scientists generally are careful to keep the question of judges' motivations separate from the power of doctrine to determine outcomes. So for instance, in his study of intermediate appellate courts' responses to other courts' rulings, David E. Klein frames his hypotheses and conclusions in terms of the impact of judges' "legal goals" and "policy goals," rather than the results of ideology or doctrine.<sup>58</sup> But sometimes legal scholars or others who refer to this type of research seem to conflate evidence that judges respond to precedent with proof that precedent is objectively determinate.

The problem is that, like any legal rule, new precedents do not determine their own scope. After a new high court ruling, lower courts are left with the task of deciding whether their cases are covered by the new precedent and, if so, what result is required. As Pauline Kim points out, "[e]ven if judges share a preference for complying with legal authority, they will differ regarding how best to 'follow the law'."<sup>59</sup> Moreover, as Cross explains, a pattern of results attributed to following new precedent could be explained by social cultural shifts that are influencing both the U.S. Supreme Court and the outlook of the lower appellate courts.<sup>60</sup> For example, the area of gay rights seems to be in the midst of one such shift.

More importantly, Frank Cross articulates the central problem with interpreting the results of precedent studies as evidence that doctrine is determining or directing judicial decisions, namely, "the difficulty in independently verifying the correctness of a decision."<sup>61</sup> As Cross puts it, "an empirical test must produce some external evaluation of the validity" of that legal reasoning it tests.<sup>62</sup> In other words, to see whether some given set of legal decisions shows that legal doctrine does or does not determine legal outcomes, scholars need a "test that is more authoritative and reliable" than the decisions we are using as our sample.<sup>63</sup> But it is not clear "how any test relying on the evaluation of an external observer could be privileged over the opinion" of the decision makers in the study.<sup>64</sup>

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58. DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 138–39 (2002).

59. Kim, *supra* note 57, at 429.

60. Cross, *supra* note 41, at 1469.

61. *Id.* at 1499–1500.

62. *Id.* at 1467.

63. *Id.*

64. *Id.*

In practice, the studies of precedential effects look at bodies of case law that follow decisions to see whether subsequent trends in decision-making respond in predictable ways to the new precedents. If subsequent case law follows the predicted pattern, it suggests that judges are paying attention to legal authorities. Again, as the researchers surely realize, this is a question of judicial behavior and psychology, not an observation of the ability of precedential rules objectively to dictate outcomes in subsequent related cases. Nevertheless, researchers' reports of their methodologies and conclusions sometimes are written in terms that seem to conflate subjective judgments by the researchers or consultants, or observations of decision makers' consensus, with observations of objectively correct legal standards.

So for instance, one study of lower courts' reactions to Supreme Court decisions describes the way the researchers identified the cases that "avoided" the Supreme Court precedent, whose effect they were studying, and separated these from cases to which the precedent did not apply:

We . . . read all of the distinguishing decisions to determine whether the circuit courts were relying upon minor factual differences to avoid applying precedent or whether significant factual differences actually precluded the application of the precedent. We coded the distinguishing circuit court cases as having "followed" or "not followed" an overruling decision, or, when factual differences made the application of precedent implausible, we eliminated the citation from the analysis.<sup>65</sup>

The problem here seems to be exactly the one Cross identified. The evaluation of which factual differences are "significant," and therefore make a precedent inapplicable, and which are "minor," so that failure to refer to a precedent constitutes "avoidance," is precisely the analytic choice faced by a judge who wants to decide the new cases in accord with existing law. Here the researchers have used their own judgment to identify cases in which an obedient judge should follow the precedent whose effects they want to measure. But how can we know that their judgment is better than that of the lower court judges whose decisions they are studying? Moreover, their method, or at least their report of it, seems to presume the kind of doctrinal determinacy that they must know their experimental methods could never prove.

In another study entitled *Does Law Matter?* a researcher used "the outcome generated by sophisticated observers who objectively apply the rule to facts" to identify "the 'correct' legal outcome for the cases in

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65. Benesh & Reddick, *supra* note 57, at 541.

the study.”<sup>66</sup> Note the scare quotes around “correct,” indicating that the political scientist author recognizes the problems raised by that attribution. But those concerns seem at odds with the straightforward assertion that the standard against which judicial outcomes would be measured was obtained by “objectively” applying the legal rule in question.<sup>67</sup> To be sure, this empiricist describes his work mainly in terms of judicial psychology. The article asks at the outset: “What motivates judicial decision-making?”<sup>68</sup> At the same time, though, his analysis uses language that could easily be misunderstood to be reporting evidence of the determinative capacity of the legal authority whose effects he studied. For instance, he describes the degree of consensus among his research subjects on legal outcome as a “proxy” for “the determinacy of the law.”<sup>69</sup> Moreover, the article links its empirical observations to the work of legal theorists who “hypothesize that ideology matters most in the law’s ‘open areas,’” speculating that the experimental results “suggest that the law’s open areas may be fewer and farther between than scholars suppose.”<sup>70</sup>

Once again, the point is *not* that these studies fail to provide useful information. Indeed, they offer fascinating evidence of judges’ efforts to engage with formal legal authority and predictable patterns of that engagement. But such evidence should not be confused with observations of the extent of doctrinal determinacy, that is, that the legal authorities in question are objectively capable of justifying unique outcomes. In these studies, judicial outcomes are being measured against a standard that could never test objective doctrinal determinacy. Basically, the researchers use their own legal judgments or the consensus of their research subjects to “identify the legally best answer to a question in a case and see whether judges choose that answer.”<sup>71</sup> The observation that judicial decisions converge on or diverge from the outcomes researchers pick, therefore, can provide insights into the ways judges think about formal legal authorities and the predictability of decisions that turn to those authorities. But it cannot show that those authorities are capable or incapable of determining uniquely correct legal outcomes or even, strictly speaking, that judges’ decisions obey or disobey those authorities. To show those things, we would need a way to identify legally correct outcomes that is more legally authoritative

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66. Michael D. Gilbert, *Does Law Matter? Theory and Evidence from Single-Subject Adjudication*, 40 J. LEGAL STUD. 333, 335 (2011).

67. *Id.* at 349 (noting “[t]o develop a more objective measure of salience, each proposition in the sample was compared to the Harris Poll”).

68. *Id.* at 333.

69. *Id.* at 352.

70. *Id.* at 355.

71. Klein, *supra* note 42.

than that of the judges whose decisions are being studied, and neither the researchers' opinions nor the research subjects' consensus fits that bill.

Seeking to avoid the difficulty of providing an objective measure of substantive legal correctness, Frank Cross devised a study that relies on procedural norms.<sup>72</sup> He reviewed over 17,000 federal appellate rulings, looking to see whether patterns of affirmances conformed to the effects of legal norms of judicial deference.<sup>73</sup> Under those norms, judgments based on trial verdicts are entitled to greater deference from appellate judges than summary judgments with no fact findings. Trial judges' JNOV rulings would get the least deference of all because they overturned jury verdicts. So assuming appellate court judges disagree with the outcomes in the same percentage of all three kinds of decisions they are reviewing, they would nevertheless overturn the three types of cases at different rates, affirming judgments based on jury verdicts most frequently, summary judgments less often, and JNOVs at the lowest rates. Cross found that "the relative probability of affirmance for the three types of orders is precisely as the legal model would project it to be."<sup>74</sup> This finding surely supports the hypothesis that "law matters" in a subjective sense to the judges charged with applying it, a finding that has considerable interest in and of itself. And it shows that procedural norms influence judicial outcomes in predictable patterns—a crucial piece of information regarding the workings of the actual judicial system. But it hardly confirms that the rulings in these cases are entirely, or even mostly, determined by the law. Once again, these results support the hypothesis that judges are making an effort to abide by doctrinal rules and methods. But they do not show that doctrine determines the eventual results of those efforts.

After all, the fact that appellate judges were more hesitant to reverse the types of judgments most protected by procedural rules of deference does not mean that in those particular cases it was legally correct for the judges to defer, let alone that it would have been legally *incorrect* in those cases to overturn the trial judges' substantive rulings. Appellate deference—whether great or little—ends somewhere, and judicial outcomes that neatly track the different deferential grades do not necessarily show that judges got it right in those cases. Indeed, it might be said to show that the judges privileged the procedural rules of deference in a way that inappropriately overcame the substantive doctrine. And certainly it does not show that considering all the available doctrine, the appellate court's ruling was the only justifiable outcome.

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72. Cross, *supra* note 41, at 1500.

73. *Id.* at 1501.

74. *Id.*

Cross generally presents his data in terms of “the effects of law on judicial decision-making.”<sup>75</sup> And he acknowledges that without running into the same problem of setting up a questionable external standard of correctness, “one cannot test for whether a given court correctly applied a procedural rule.”<sup>76</sup> Yet Cross’s conclusion summing up his research is written in terms that might be confused with statements about a more normative and individualized sort of determinacy. He explains that the evidence “leaves room for the influence of ideology” but “demonstrates that beyond ideological influences, legal rules of procedure matter greatly in determining outcomes.”<sup>77</sup> Particularly because these statements follow an analysis a few pages earlier about how “radical critics of law”<sup>78</sup> have used concepts of linguistic indeterminacy to attack law’s meaning in a way that “carries indeterminacy too far,”<sup>79</sup> it is possible to mistake the subsequent references to law’s role in “determining outcomes”<sup>80</sup> as referring to the sort of determinacy that Frederick Schauer seems to be describing when he articulates the Realist question as “just how often are there legal rules, principles, and sources available to justify both of two mutually exclusive outcomes?”<sup>81</sup>

Moreover, Cross’s research is among the empirical studies cited by Schauer as supporting the conclusion that “legal doctrine appears to play a considerably larger role in judicial decision-making than the more extreme of the Realists supposed.”<sup>82</sup> To the extent Schauer means that Cross’s study supports the view that judges attend to legal rules and norms and make sincere efforts to adjust their decision-making approach to respond to their understanding of those norms, this is a valid point. The fact that appellate courts were less likely to reverse judgments based on jury verdicts than summary judgments indicates that judges respond to the levels of deference they understand to be prescribed by standards of review. But one cannot extrapolate from that result the conclusion that the available legal doctrine determined or could determine the results in those cases.

It is crucial to separate evidence of judges’ subjective experience of following legal rules and legal rules’ objective capacity to determine legal outcomes. Empiricists Lee Epstein and Jack Knight are generally

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75. CROSS, *supra* note 42, at 48.

76. *Id.*

77. *Id.* at 67.

78. *Id.* at 60.

79. *Id.*

80. *Id.* at 67.

81. SCHAUER, THINKING LIKE A LAWYER, *supra* note 2, at 136.

82. *Id.* at 140.

sensitive to these differences. In recent work, they focus explicitly on judicial motivations and aim to theorize and observe a wide range of factors that influence judicial decision-making.<sup>83</sup> Nevertheless, in discussing “how law can affect judicial decisions,” some of their language might be read to shift from describing judges’ motivations and behavior to unfounded suggestions of doctrinal determinacy.<sup>84</sup> So for instance, they assert that empirical studies “show that the choices of judges map to the dictates of precedent in a large number of cases.”<sup>85</sup> It is not entirely clear what studies they mean to reference, but it is clear that to observe that judges’ decisions “map” or follow precedential rules, one would have to identify some external standard of “the dictates of precedent” in the judicial decisions being studied, a standard more authoritative and reliable than the decisions themselves. It is equally clear that no such standard has been identified. What is more, the only way to set a standard of legal correctness is through a normative interpretation of the relevant legal doctrine (and of what doctrinal authority is relevant). In David Klein’s words, it “requires a researcher to make judgments about the content of the law in order to determine whether judges are responding to it.”<sup>86</sup> There is no objective basis from which researchers can make those judgments.

In one sense, then, it would be possible to use empirical methods to study “the types of cases in which judges are most likely to follow existing legal sources, such as precedent,” as Epstein and Knight recommend.<sup>87</sup> We could study the circumstances in which judges consciously resort to doctrine, and which types of legal authorities judges are most likely to consult and to reflect in their opinions. But we can only observe judges’ attempts to use those sources to decide outcomes, not whether the sources determine or constrain the judges’ eventual decisions. We can observe and measure judges’ attempts to apply the dictates of precedent, but not whether precedents have the capacity to dictate judicial outcomes.

The ambiguity in claiming empirical evidence that judicial decisions “map to the dictates of precedent”<sup>88</sup> is particularly potent because it comes in the context of an article explicitly recanting the authors’ earlier position that for judges “maximizing policy is of paramount, even exclusive, concern.”<sup>89</sup> The change from that previous position

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83. Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. POL. SCI. 11, 15–24 (2013).

84. *Id.* at 25.

85. *Id.*

86. Klein, *supra* note 42.

87. Epstein & Knight, *supra* note 83, at 26.

88. *Id.* at 25.

89. *Id.* at 12.

remains important, and controversial, as an argument that judges pay more attention to legal doctrine than the authors previously believed. But it should not be confused with a claim to have shown that in attending to doctrines, judges produce decisions that in fact track objective dictates of preexisting law. Epstein and Knight—and for that matter all the empirical researchers whose work is discussed here—would likely agree with this point. Nevertheless, these researchers, and others who describe their studies, sometimes use language that almost invites conflating evidence that judges are not driven primarily by ideology with proof that law, in the form of preexisting legal doctrines, is objectively determining, directing, or narrowing the outcomes those judges reach.

### 3. Testing “Motivated Reasoning” in Legal Decision-Making

The psychological theory of “motivated reasoning” posits that people will tend to find arguments and information more compelling when the arguments and information favor their preferred conclusions and less valid when the arguments and information conflict with those results.<sup>90</sup> Some judicial behavior scholars suggest that motivated reasoning could explain how judges who sincerely believe they are being directed by legal doctrines nevertheless wind up producing decisions that appear to fulfill personal policy preferences.<sup>91</sup> Like other types of judicial behavior studies, experimental tests of motivated thinking in legal reasoning have produced mixed results regarding the influence of doctrinal reasoning and political attitudes on judges’ decision-making. Because these studies are explicitly about the psychological processes of decision makers, it might seem like their conclusions would be less susceptible to the kind of misinterpretation that conflates evidence that decision makers engage with formal authorities with the idea that those authorities can—and at least sometimes do—determine legal outcomes. Again, the empiricists who conduct and report these experiments surely recognize this distinction. The problem is that, in describing their methodologies and analyzing their results, the empiricists sometimes appear to make *assumptions* about the extent of doctrinal determinacy that readers might misinterpret as empirically grounded.

One of the leading researchers of motivated reasoning in legal decision-making is Eileen Braman, whose 2009 book put the subject on the map for many legal theorists.<sup>92</sup> Braman’s work provides evidence that attitudes can influence legal reasoning in unconscious ways, even when decision makers believe that they are following neutral doctrinal

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90. Cross, *supra* note 41, at 1477.

91. EILEEN BRAMAN, LAW, POLITICS, & PERCEPTION 30 (2009).

92. *Id.*



rules.<sup>93</sup> For the purposes of this argument, however, the most interesting aspect of her work is her conclusion that the influence of those attitudes is nevertheless somehow limited by legal doctrines.<sup>94</sup>

To test whether motivated reasoning might affect the results of legal reasoning, Braman ran a series of experiments using students (including law students).<sup>95</sup> The studies confirmed that rules looked different to decision makers with different underlying cultural and political views. Depending on their policy preferences, the students in Braman's studies "saw the very same cases in systematically different ways."<sup>96</sup> Braman emphasizes, however, that nothing she found "*suggests a conscious effort to twist the law to serve one's opinions.*"<sup>97</sup> She concluded instead that "policy preferences influence legal interpretations," even when judges believe they are applying precedent to produce legally mandated results.<sup>98</sup> According to Braman, "motivated reasoning happens as decision makers choose determinative evidence, interpretations, and authority in the context of stylized norms, enabling decision makers to believe they are applying the tools of doctrinal analysis in an appropriately unbiased manner."<sup>99</sup>

Braman's main focus in this work was on distinguishing conscious political policymaking from the effects of decision makers' unconscious biases. She interprets her results to support the inference that correlations between judges' ideology and judicial outcomes are the product of unconscious motivated reasoning, not deliberate strategic choices. It is important to see, however, that nothing in Braman's work constitutes evidence that legal doctrines are substantively determining outcomes. Thus, Braman's work produces important support for the view that judges could subjectively attempt to apply legal doctrines and still produce biased results; it does not provide any evidence that legal doctrines objectively limit judges' biases. Readers of Braman's work might be confused on this point because she sometimes appears to assume that such limits exist. At one point, Braman asserts that "judges are trained to recognize specific criteria that make some legal arguments more persuasive than others."<sup>100</sup> She then explains that norms of precedent mandate that judges follow previous rulings by a court whose authority is "binding" in cases "with facts closely

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93. *Id.* at 30.

94. *Id.* at 31.

95. *Id.* at 101–109.

96. *Id.* at 109.

97. *Id.* at 110.

98. *Id.* at 30.

99. *Id.*

100. *Id.* at 31.

resembling those in pending litigation.”<sup>101</sup> She reasons, therefore, that if such authority exists, it “should act as a constraint on accuracy-seeking judges despite the availability of alternative arguments.”<sup>102</sup> She concludes that the effects of judges’ motivated thinking will be contained because they “will not extend to choices the law can not reasonably support.”<sup>103</sup>

Moreover, Braman’s description of her process in designing and carrying out her experiments sometimes seems to gloss over the extent to which her own normative judgments were involved. Describing the authority she chose to use in her experiment, Braman characterizes certain cases as “controlling.”<sup>104</sup> That description is apparently based on her own or some other expert’s legal opinion.<sup>105</sup> In other words, Braman or her advisors apparently made a judgment that certain legal authorities in her experiment *should* determine her subjects’ decisions. Sure enough, subjects who were faced with these doctrinal authorities were more likely to decide the hypothetical case contrary to their expressed personal attitudes.<sup>106</sup>

Braman concludes from this result that these decision makers were following a “constrained attitudinal” approach to decision-making, in which attending to doctrine depressed the tendency to rule according to their own policy preferences.<sup>107</sup> What Braman seems to mean by “constrained” is that the presence of particular doctrinal authorities affected the decision makers in *predictable* ways that moved them, as a group, away from their subjective point of view. Again, this is an extremely interesting result with much promise for future exploration. What it does *not* show is that the doctrinal authority Braman characterizes as “controlling” could justify a decision in favor of only one party, or that it made one result legally more correct than the alternative.<sup>108</sup>

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101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 135, 138–39.

105. She also characterizes some doctrine provided to decision makers in various ways that indicate her own view that it would be objectively legally correct to rule in the same direction as those authorities. For instance, she explains that “where there is no direct authority on point (the Third Circuit conditions), legal models of decision-making would predict a decision in defendants’ direction (against standing) *because the weight of authority goes in that direction.*” *Id.* at 121 (*italics added*).

106. *Id.* at 139–140.

107. *Id.* at 140.

108. *Id.* at 150.

The fact that a recent precedent is seen by most legal interpreters as mandating similar outcomes in new cases that they identify as similar cannot prove that the legal doctrine incorporating that precedent actually determines, or *should* determine, those outcomes. More than three out of four (77 percent) of Braman’s research subjects who decided the hypothetical case in the jurisdiction with the “controlling” precedent referred to that case in their reasoning.<sup>109</sup> But subjects who decided an outcome contrary to the result in the precedent were just as likely to refer to it as those who “followed” the case.<sup>110</sup> Among those who provided this explanation, thirty-eight “cited reasons to follow the case; [thirteen] participants noted reasons to distinguish it.”<sup>111</sup> In other words, the fact that decision makers regarded a case as important to engage and sincerely attempted to apply its doctrine did not mean the precedent actually controlled the outcomes.

A more recent study, designed somewhat differently than Braman’s, produced some very interesting results regarding motivated reasoning in legal decision-making.<sup>112</sup> The study ran experiments in which subjects were asked to resolve statutory interpretation problems.<sup>113</sup> The study included over 200 currently sitting judges along with comparable numbers of lawyers and law students, as well as over 800 members of the general public.<sup>114</sup> With this research design, the authors were able to compare the responses of the different groups. They found that while the statutory analyses of law students and lay persons reflected their cultural values, judges and lawyers were apparently not influenced by their cultural attitudes when they were engaged in formal legal decision-making.<sup>115</sup> The authors hypothesize that this result is due to a form of “professional training and experience” among lawyers and judges, who have developed “habits of mind resistant to identity-protective cognition when performing the types of reasoning tasks characteristic of

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109. *Id.* at 149.

110. *Id.* at 150.

111. *Id.*

112. See generally Dan M. Kahan et al., “*Ideology*” or “*Situation Sense*”? *An Experimental Investigation of Motivated Reasoning and Professional Judgment* (Yale Law Sch. Cultural Cognition Project, Working Paper No. 63, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2590054](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2590054) [<http://perma.cc/SW2A-XMNH>] (studying “whether political predispositions influence judicial decisionmaking”).

113. *Id.* at 21.

114. *Id.* at 17.

115. *Id.* at 42. Interestingly, the judges and lawyers were subject to motivated reasoning similar to that of the other research subjects when they were asked to make decisions that did not involve formal legal reasoning. *Id.*

their profession—but not otherwise.”<sup>116</sup> This is an empirical finding of extraordinary potential for developing an understanding of the moral psychology of judicial decision-making. And again the empirical researchers are very clear that what they are studying are psychological effects in judges, not the determinative properties of the legal authorities they consult.<sup>117</sup> In describing the design of their study, however, the authors mention some normative judgments they made regarding the legal authorities they used in their study that seem to assume that those authorities have the kind of power to substantively determine, or at least narrow the range of, correct legal answers.<sup>118</sup> Once again, including these sorts of speculative assumptions about doctrine’s substantive determinacy tends to muddy the descriptions of study’s actual empirical results.

The researchers asked their subjects to apply a statute prohibiting littering to resolve a motion to dismiss in two different versions of a hypothetical lawsuit.<sup>119</sup> According to the researchers, the facts of the two different versions “varied in a manner that had no analytical bearing on how the statutory ambiguity should be resolved but that was expected nevertheless to invest the outcome with a cultural meaning or resonance” that would trigger motivated reasoning.<sup>120</sup> In other words, the researchers made an evaluative judgment that the formal legal authority they used in their experiment had the power to set limits on what is or is not relevant to its analysis and application to a legal conflict. That evaluation, in turn, implies a belief in substantive determinacy or at least substantive constraint. The problem is that when this assumption is followed by the report that legally trained research subjects’ analyses of both versions of the problem converged on the same outcomes, that observation might be interpreted as bearing out the authors’ assumption of doctrinal determinacy. The experimental results *do* support the inference that judges and lawyers are less

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116. *Id.*

117. *Id.* at 17.

118. *Id.* at 21.

119. *Id.*

120. *Id.* Interestingly, a real case from which the researchers’ hypothetical may have been drawn, involving plastic water jugs left by aid workers for use by undocumented immigrants in the Arizona desert, produced a split result. *United States v. Millis*, 621 F.3d 914 (9th Cir. 2010). The panel majority, Judge Thomas and Judge McKeown, both appointed by President Clinton, reversed an aid worker’s conviction, holding that the statutory term “garbage” was, in this context, “sufficiently ambiguous that the rule of lenity should apply.” *Id.* at 918. Judge Bybee, who was appointed by President George W. Bush, dissented. *Id.* Judge Bybee, , explained that in his view “the rule of lenity does not apply here because leaving plastic bottles in a wildlife refuge is littering under any ordinary, common meaning of the word.” *Id.* at 919 (Bybee, J., dissenting).

influenced than lay persons by individual cultural differences when they engage in statutory interpretation. That in itself is a fascinating and important result. But the consensus reached by the judges and lawyers in this experiment does *not* show that the statute the researchers chose somehow objectively determined those results.

*B. No Imaginable Empirical Method Could Measure Doctrinal Determinacy*

Perhaps doctrinal determinacy could be established despite the fact that previous empirical studies have failed to do so. Galileo didn't have a telescope powerful enough to observe the astronomical movements he predicted, and Einstein didn't have a supercollider; yet their theories about the nature of the universe were still amenable to empirical corroboration once those devices were invented. Can we imagine an empirical study that could measure the extent to which legal doctrines determine legal outcomes in a given context? Remember Frederick Schauer's question: "just how often are there legal rules, principles, and sources available to justify both of two mutually exclusive outcomes?"<sup>121</sup> How might we seek to answer that question empirically if we could employ any imaginable methods and resources?

1. Imagining a Test

I have argued that the consensus of research subjects in existing studies is not an appropriate measure of determinacy. But suppose we could give a very large group of decision makers the same legal problems and have them all decide the legal outcomes using all the conventionally recognized authority of a particular jurisdiction. And suppose that all, or almost all, the decision makers reached the same result. Would that not show that the available doctrine determined the answers for those cases? A threshold question is a harbinger of conceptual problems to come: Who would the ideal research subjects be? A cross section of the population? Or a selection of legal professionals—judges and lawyers? Of lawyers who specialize in the area of law at issue?<sup>122</sup> We are trying to test the effects of doctrine on a community of legal decision makers, but are we interested in the community that is subject to the doctrinal authority we are testing or the professional community that interprets that doctrine?

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121. SCHAUER, THINKING LIKE A LAWYER, *supra* note 2, at 136.

122. We might want to further subdivide them—separating judges from lawyers and perhaps separating the lawyers according to their different types of practices, theorizing that they might have different approaches to the doctrine. Of course, if that turned out to be the case, it would seem to support the indeterminacy of doctrine—or would it? Perhaps we would see predictable differences along the lines of a legal interpreter's legal experience as part of the structure of our legal system—an "official" part that should count toward determinacy, not against it.

If the reason we are testing doctrinal determinacy has to do with the legitimacy of enforcing legal decisions, it would seem we need the agreement of the people who are subject to legal enforcement, which argues for using a representative sample of the general public. As Martha Minow and Robert Post observe, “[w]e ought to determine the law’s legitimacy at least in part from the perspective of those who suffer its coercion.”<sup>123</sup> On the other hand, we understand the application of legal authorities to be a specialized practice that demands skills, experience, and knowledge acquired through professional education and practice. That argues for using only legal professionals as the test subjects.

A second methodological issue with substantive implications is the way the research subjects would access the available doctrine. Suppose the study tested judges and lawyers, would they be asked to do all their own research? Or would they hear arguments for both sides, and if so, who would choose and present the doctrinal arguments? A judge? A litigator? A run of the mill litigator or a brilliant one? What if only Clarence Darrow could convince the experimental subjects that both outcomes are doctrinally possible, would that count?

For the moment, pass over these complexities. Assume that the study can use any of these methods, or all of them. After all we are imagining the best possible empirical experiment, unhampered by resource limits and logistical problems. *Whatever* group we choose, however constituted, however large, and however they access the legal doctrine, problems will persist that will make it impossible to design an empirical experiment that could measure doctrinal determinacy. There are three problems with translating empirical observations of predictable decision-making into evidence of the extent of doctrinal determinacy: First, the doctrine may not be what is really producing the result; second, the doctrinal result may not be correct; and third, the doctrinal result may not be unique.

The problem is definitional and normative: our empirical test has substituted agreement among doctrinal interpreters for doctrinal determinacy. Predicating the determinacy of legal rules on consensus observation conflicts with our understanding of the normative nature of legal decision-making. It seems to me that even under ideal conditions, even virtual unanimity among a large group of decision makers that existing legal rules dictate a certain outcome cannot be used to show doctrinal determinacy—at least not if the reason for testing determinacy is concern about the legitimacy of enforcing legal decisions.

The concept of doctrinal determinacy we are testing entails that there are correct and incorrect answers to legal questions. Even if a

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123. Martha Minow & Robert Post, Opinion, *Trust in the Legal System Must be Regained*, BOS. GLOBE (Dec. 9, 2014), <https://www.bostonglobe.com/opinion/2014/12/09/after-michael-brown-eric-garner-trust-legal-system-must-regained/ySfGQ3UrhSuWFi1hVH0z2K/story.html> [http://perma.cc/JU74-R476].

majority are convinced that the available legal authorities support only one outcome, how do we know that they are correct? Note that even if we were somehow able to observe directly our subjects' thoughts, that would not help us prove doctrinal determinacy. Neural imaging techniques allow researchers to see different areas of the brain "light up" under different types of stimulation. In the future, we might be able to capture visual signs of thoughts and the causal stimuli of thoughts, in effect becoming mind readers of both conscious and unconscious mental activity. Even if we could read minds, however, we would not be able to confirm that the legal outcomes in those minds were the result of doctrinal determinacy. We might be able to show that a decision maker considered the doctrine in forming her answer. But we would not be able to rule out the possibility that some other person with more ingenuity, more time and energy, or a greater incentive could come up with a plausible account of how the available doctrine could support a different answer and, presumably, light up her brain in different ways.

## 2. The Objection from Scientific Method

A dedicated empiricist might say that the last point just shows a lack of understanding as to how empirical science works. Of course researchers can only observe what is there—the results of whatever processes they choose to make the subject of the research. And if the parameters change, it is always possible that the results will change. So the fact that you can always imagine the possibility that the results could come out differently under different circumstances does not devalue the observed results. Those are simply other situations to be tested. The whole point of taking an empirical approach is that researchers are looking to see what the results really are under some given set of circumstances. If it is important to you how Clarence Darrow or Ronald Dworkin's Hercules would respond to the legal problem you are posing, go out and get them—or the closest thing to them—and give them the test.<sup>124</sup> If you think that cash incentives matter, offer a million dollars to the lawyer who can come up with a plausible argument for one side or the other. But if you are not testing those subjects or those circumstances, it is not fair to invalidate the evidence you obtain from the empirical tests you do run with metaphysical musing about the road not taken.

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124. Darrow and Hercules are, respectively, historical and fictional icons of legal acumen. Clarence Seward Darrow (1857–1938), one of the most famous trial lawyers of all time, was particularly noted for the persuasiveness of his closing arguments, some of which lasted for many hours. As his obituary put it, he "spent his life fighting for 'lost' causes, most of which he won." *Clarence Darrow is Dead in Chicago*, N.Y. TIMES, Mar. 14, 1938, at 15. Hercules is the ideal embodiment of judicial interpretation as imagined by the influential legal philosopher, Ronald Dworkin. RONALD DWORIN, LAW'S EMPIRE 239 (1986).

The empiricist's frustrated response just shows the limits of empiricism when it comes to understanding legal doctrine and the link between determinacy and law's legitimacy. To the extent that we consider legal doctrine determinate, that determinacy exists *in opposition to* consensus or at least independent of it. As the Fourth Circuit put it in a decision upholding marriage equality, "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."<sup>125</sup> Of course the individuals who constitute that majority would not agree that their preferred outcome *infringes* anyone's rights; they have a different view of where rights begin and end. The point is that our basic, admittedly aspirational, view of rights and the determinate legal answers they entail constitutes those rights and answers as at least somewhat independent of majority opinion—exactly to the extent that they are determinate. Therefore, relying on majority consensus to set the benchmark by which we measure the determinacy of some body of legal authority violates the core idea of doctrinal determinacy that we want to test.

The problem here is that the object of the study is defined by conceptual and normative commitments that prevent, or should prevent, acceptance of the empirical results as definitive. Once you make consensus the standard for legal authority, you are back in the territory of the government of men. In one sense, it is absurdly obvious that we can never occupy any other territory. But the overarching point is that we cannot *both* make subjective judgment the standard of our empirical proof of legal determinacy *and* claim that legal decision-making is legitimated by the objective empirical proof of its doctrinal determinacy.

The empiricist might respond that again I have misunderstood the way empirical science works. After all, we often test some real thing's objective characteristics by testing its *effect* on human subjects. We test drugs' healing capacities by testing their effects on representative samples of the population we wish to cure. Just because we have substituted the evidence of a drug's effect on people for a direct physical analysis of the drug does not mean we are not testing the drug's objective properties. We are just doing it through our study of the drug's effects on people. Why can we not likewise test legal doctrine's determinacy by testing its effect on decision makers?

If every person who takes a drug gets well, and every person who takes a sugar pill dies, there is an extremely strong correlation between taking the drug and getting well—enough to support the inference that the drug has the capacity to produce a healing outcome and to start prescribing it. Even if it turns out, in subsequent research or clinical use, that some people who take the drug die anyway, that does not mean the drug is generally ineffective. By analogy, why should the empirical test of doctrine not work the same way? After hundreds of

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125. *Bostic v. Schaefer*, 760 F.3d 352, 379 (4th Cir. 2014) (quoting *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736–37 (1964)).



legal decision makers all conclude that the available doctrine justifies a decision in favor of only one party in a particular dispute, why should it matter that a few subsequent decision makers conclude that there are valid arguments for the other side?

The problem is that there is a crucial difference between law and drugs. The difference is that in a drug trial we are not asking what the drug's effects *should be*. There is no question whether the drug's ability to cure an illness is the right outcome. We have no doubt that as between curing and not curing humans exposed to the drug, curing is the better result. If many people who take the drug get well and others do not, it would make no sense to ask which of those people had the "right" response to the drug. The empirical study of legal doctrine is different. Law is normative; drugs are not.<sup>126</sup>

When people apply legal doctrine to a problem, they are trying to get the right legal answer. The very question whether doctrine is determinate presumes that if doctrine does determine a result, then that is the correct legal result. If 1,000 people take a drug and 999 are cured, it is possible that they were cured by something else (that is why we have to talk in terms of correlation not cause), but there is no possibility that the people who took the drug and were cured got the wrong result and should have died. In contrast, if 999 of our legal research subjects decide that the preexisting applicable doctrine requires that the plaintiff win and one person argues that on the preexisting doctrine the defendant should win, we could be convinced that the decision for the defendant is the right, or the real, effect of the doctrine and that the 999 decisions for the plaintiff may be wrong, or at least not uniquely right. Moreover, that possibility is part of what makes legal results legitimate.

This seems to suggest that the answer is to develop a qualitative standard of legal correctness to use in empirical tests of doctrinal determinacy. After all, if law is about justification and reason and about not just getting answers but persuading others that those answers are correct, it makes sense that we would need to evaluate the correctness of doctrinal reasoning in some qualitative manner. We could use qualitative standards to decide which of the 1,000 decisions are correct. But this again raises the questions of where to find those external qualitative standards and why that source is more authoritative than the opinions of our test subjects. This is the problem faced (though not always discussed) by current legal empirical scholars examining judicial

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126. Nevertheless, drugs are sometimes used as a metaphor for the way legal rules are supposed to work, generally when the writer is committed to a view of legal doctrine as objectively determinate. *See, e.g.*, Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001) ("Obviously, binding authority is very powerful medicine. A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it. Judges of the inferior courts may voice their criticisms, but follow it they must.").

responses to precedential change. To show that judges are actually following the “legal model” in the decisions they study, they need to establish what results the legal model dictates in those cases. But accepting our own, or some experts’, view of the correct answers means adopting a legal standard that has no claim to authority greater than, or even equal to, that of the judges whose decisions we are testing.<sup>127</sup>

3. Very, Very Hard Cases

*“Easy’s gettin’ harder every day.”*

—*Iris DeMent*<sup>128</sup>

Another objection to the argument that doctrinal determinacy is not empirically observable might be said to come from common sense, in particular the experience that many legal questions are easy to resolve. Are there at least some legal questions where the correct application of legal doctrine is so obvious, and so obviously one-sided, that we can see that doctrine *does* determine their outcomes? What about the radar gun that catches someone driving eighty miles per hour in a fifty-five miles per hour zone or the tax return postmarked April 16 or the even easier cases where the driver is going forty-five miles per hour and the return was mailed on April 10? These are the cases you would never expect to find on a law school exam, and, upon finding one, the wise law student would read the question over again, knowing he must have missed some doctrinal wrinkle that would make the question capable of spreading a curve. In real life, these cases rarely make it out of the law office because lawyers advise their prospective clients that the argument against them is too much of a slam dunk to make litigation worthwhile. To say nothing of the cases that are so easy they never make it *into* the law office because everybody knows what the lawyer’s advice would be. Can we not at least observe doctrinal determinacy in these cases, and if so, why can we not quantify its presence? Could we not, in principle, count those easy cases in a given jurisdiction at a particular point in time and consider their number relative to the total number of cases a proportional measure of doctrinal determinacy?<sup>129</sup>

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127. Cf. Cross, *supra* note 41, at 1467 (“Still, one could reasonably question how any test relying on the evaluation of an external observer could be privileged over the opinion of the judge who decided the case.”).

128. IRIS DEMENT, *Easy’s Getting’ Harder Every Day, on MY LIFE* (Warner Bros. Records Inc. 1994).

129. In fact, this is what I imagined Schauer had in mind when I read his observation that

the empirical assessment that the Realists have urged may in fact turn out for some courts and some issues and some types of law to be less inconsistent with traditional view of law than most of the

The answer turns on the difference between predictability and doctrinal determinacy. Easy cases are predictable.<sup>130</sup> But that does not mean they are determined by law in the sense that there “are cases, statutes, maxims, principles, canons, authorities, or statements in learned legal treatises available to justify decisions in favor of” only *one* of the “parties in all or at least most litigated cases.”<sup>131</sup> Even legal questions in which a single, clearly articulated source of law seems both uniquely salient and readily applicable to the situation at hand are still not necessarily answered by that legal rule. There is no logical—or distinctively legal—reason why the apparently most salient legal rule has to control the outcome or be applied in the way most legal interpreters would apply it. Measuring doctrinal determinacy by counting easy cases assumes that it is doctrine that makes the difference between hard and easy cases. But, to date, nobody has been able to articulate any formal criteria for identifying easy cases. So we fall back on “the sense of the community or the intuitions of . . . ‘first-rate lawyers’” to identify when a case is easy.<sup>132</sup>

Undeniably, we experience some legal cases as easy to resolve. We answer them immediately with a single, obvious legal rule that seems to cover the situation. The problem is that when we pause to think deeply about the question and to look into the available doctrine with the idea that we might find an alternative answer, the easiness begins to evaporate. Often this transformation happens because a client has a reason to want to draw the opposite legal conclusion and the resources to employ a lawyer to try. When the client and the lawyer have the motivation, the time, and the money, an easy case can become very,

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early Realists imagined. It may well be, for example, that the principal determinant of judicial decisions on questions of statutory interpretation is the ordinary meaning of the words of the relevant statute, and that the chief determinant on questions of contract law in appellate cases is the traditional rules and principles and doctrines of contract law. . . .

SCHAUER, THINKING LIKE A LAWYER, *supra* note 2, at 142.

130. See Schauer, *Easy Cases*, *supra* note 11, at 416 (“[A]n easy case . . . one in which a clearly applicable rule noncontroversially generates an answer to the question at hand.”).

131. SCHAUER, THINKING LIKE A LAWYER, *supra* note 2, at 135. See Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOODE HALL L.J. 353, 357–58 (1986) (“[C]an any *formal* criteria be offered, or are we ultimately left to decidedly *informal* norms . . . ?”).

132. Levinson, *supra* note 131, at 357. Note the divergence of these two standards. One is a collective, consensus, group social phenomenon, identifiable by its very normalcy, its middle of the packness, its average, regular, mainstream middling quality. The other is a standard of individualistic excellence, a matter of distinction and separation from the pack, a question of turning to the highest level of enlightened, elite professional judgment available.

very hard. Importantly, a legal outcome supported by this kind of very, very hard reasoning is not disfavored in any legal sense.

Understanding how easy cases turn very, very hard with thought, time, and money explains how legal doctrine's indeterminacy fits with our general social ability to grasp and follow rules despite the acknowledged indeterminacy of language and why general rule coherence cannot legitimate enforcing legal decisions. Like it or not, we are stuck with the attributes of language because language is law's medium. As Wai Chee Dimock observes, "law is a linguistic artifact, dependent on words and haunted by that dependency."<sup>133</sup> Many legal theorists dismiss as trivial legal indeterminacy based on general linguistic indeterminacy.<sup>134</sup> They point out that, as Wittgenstein stressed, this kind of linguistic indeterminacy does not render language unintelligible. We can still understand one another. According to Wittgenstein, the meaning of rules, including legal rules, is intelligible with reference to a social context or a community of language users.<sup>135</sup> The application of any preexisting language rule to a previously untried situation can be understood through our understanding of the whole way of life of the community in which we are speaking.<sup>136</sup> Thus Wittgenstein did not view reliance on community agreement as a problem for language usage or for our capacity to understand and behave according to rules. To the contrary, it is our ability to reference community approval, according

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133. Wai Chee Dimock, *Rules of Law, Laws of Science*, 13 YALE J.L. & HUMAN. 203, 224 (2001).
134. Frederick Schauer acknowledges that the "open texture of language . . . produces open texture in law." Frederick Schauer, *On the Open Texture of Law*, 87 GRAZER PHILOSOPHISCHE STUDIEN 197 (2013). It was HLA Hart who famously called legal rules open textured. HART, *supra* note 6, at 121 He considers this fact insignificant for doctrine's general capacity to determine legal outcomes, as does Brian Leiter who, like H.L.A. Hart, points out that this kind of "common sense" general language indeterminacy "resides 'at the margin of rules'" of all kinds. Leiter, *supra* note 3, at 64 (quoting H.L.A. HART, *THE CONCEPT OF LAW*, 132 (1961)). Leiter and Schauer, along with many others, conclude that because open texture is endemic to all language, it is not particularly significant for law. *Id.*, at 62; SCHAUER, *THINKING LIKE A LAWYER*, *supra* note 2, at 162–63.
135. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 1–5 (G.E.M. Anscombe ed., trans., 2d ed. 1963).
136. *Id.*; SAUL A. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* 2–6 (1982). Since Fuller wrote, a further powerful critique of objective language based on an exegesis of Wittgenstein's work was developed by Saul Kripke. Kripke showed that preexisting language rules of any kind cannot logically determine the outcomes of problems the rules have never previously been used to decide. Even expressions of the basic mathematical rule of addition cannot determine a logically correct answer for a new problem *solely on the basis of the preexisting language rule* itself. Instead the application of any rule in a situation in which the rule has not been previously applied depends ultimately on the approval of a community of language users.

to Wittgenstein, that makes it possible for us to “follow” any rule to a conclusion we have not reached before.

The community agreement basis of language meaning is still a problem for legal rules, however, to the extent that the legitimacy of enforcing those rules depends on their determinacy. Legal rules are used to resolve, temporarily at least, disagreements between individuals and groups in a community. So when disagreements about the application of legal rules break out, it is no answer to say ‘this is what the community agrees it means’ because, by hypothesis, a lawsuit is a *disagreement* about the rule’s meaning or its application to the situation at hand. Moreover, disagreements about the meaning of legal doctrine often mirror existing political divisions in “the community.” Of course there are often disagreements and differences of opinion regarding the meaning of other sorts of rules. So why is this a special problem for legal rules? We come back to the problem of enforcement and legal decision-making as a trigger for government coercion. In the judicial context, we have a situation where the conflict between meanings *must* be resolved and, once resolved, will be enforced, if necessary, by violence. General language indeterminacy is a special problem for law, then, because of its interaction with adjudication’s commitment to resolving disputed meanings and to enforcing that resolution with threats and violence.

Moreover, there are serious problems with defining the community that could determine legal meaning. Here, the methodological problem with choosing research subjects resurfaces in a more substantive form. On the one hand, if the community to whom we appeal for legal understanding is the society at large, it is unclear how that can confer authoritative doctrinal meaning. Legal authorities are defined, at least partly, by their separation from the general background norms of the community in which they will be enforced. A legal decision comes from a conventionally designated decision maker’s interaction with some officially recognized legal authority. Part of what makes a decision legal is that it is arrived at through methods designed to produce outcomes that are different from the results produced by the decision maker’s ordinary approach. As Schauer puts it, “every one of the dominant characteristics of legal reasoning and legal argument can be seen as a route toward reaching a decision *other than* the best all-things-considered decision for the matter at hand.”<sup>137</sup> So it cannot be that the correctness of a legal decision ultimately depends on the same kind of general community approval that the decision maker would use in nonlegal interpretations of language rules.<sup>138</sup>

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137. SCHAUER, THINKING LIKE A LAWYER, *supra* note 2, at 7.

138. There is a difference, of course, between what most people think the right thing to do is and what most people think the law says is the right thing to do. But recent work on motivated thinking, including the studies

The lack of objective, acontextual linguistic meaning is not a problem for ordinary social interaction because we act, as Wittgenstein says, impulsively, provisionally, without stopping to think and without hesitating to question the meaning: “When I obey a rule, I do not choose. I obey the rule *blindly*.”<sup>139</sup> The fact that communication is understandable despite linguistic indeterminacy does not necessarily make linguistic indeterminacy legally unproblematic or unimportant. Our whole notion of the application of legal rules, is built on a kind of hesitation before making a choice one way or another.<sup>140</sup> If we are asking whether something is or is not a violation of law we are already stopping to think; we are pausing to ask questions about meaning. In that sense, even before formal decision-making, law is about interrupting the ordinary process of social communication and action. You might even say that law is that interruption. In fact, you could see law as a set of obstacles or roadblocks, set up in one’s course of affairs—points at which one stops, looks about, and says ‘now what may I do’? What must I do? What must I avoid doing? And the warrant for asking these interrupting questions is the notion of some external authority, some source other than oneself, or the opinion of one’s usual associates or the community at large, that might justify one response over another.

So when we engage in doctrinal reasoning to justify a particular legal result, we are doing something quite different from, perhaps the opposite of, blindly following rules. So it seems that easy cases remain easy only because we approach them differently—blindly—from cases we perceive as hard. And turning that hesitating, qualifying, deep thinking approach on an easy case can transform it into a very, very hard case.

Legal arguments for the very, very hard flipside of easy cases were being made and taken seriously long before the realists’ skeptical twentieth-century critique.<sup>141</sup> For instance, in 1794 the Supreme Court of Pennsylvania heard a habeas claim by “Magdalen and Zare, two

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discussed in the last section, suggests that decision makers are not capable of neatly separating these subjective beliefs about the right outcome in a dispute from their interpretations of the rules that they engage to reach a decision. *See supra* Part 2.

139. WITTEGENSTEIN, *supra* note 135, at 85.

140. As Desmond Manderson writes, a legal outcome “might be obvious. But it cannot be made without a moment of reflection.” Desmond Manderson, *Modernism, Polarity, and the Rule of Law*, 24 *YALE J.L. & HUMAN.* 475, 480 (2012).

141. As Brian Tamanaha has shown, the legal realists of the twentieth century were hardly the first to recognize doctrine’s potential to generate different legal outcomes. BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE* 67–90 (2010).

negro women, committed as the absconding slaves of Mrs. Chambre.”<sup>142</sup> The plaintiffs claimed their liberty under the Pennsylvania Act of 1780 for the gradual abolition of slavery, which freed any slaves brought from abroad to Pennsylvania who were “retained in this state longer than six months.”<sup>143</sup> Apparently aware of the statute, the white widow who brought Magdalen and Zare from St. Domingo to Philadelphia was careful to take them to New Jersey after five months and three weeks.<sup>144</sup> The plaintiffs’ lawyer pointed out, however, that their stay in Pennsylvania had exceeded six *lunar* months.<sup>145</sup> He contended that “even if the computation by calendar months were more usual at common law, a different construction would be adopted in favour of liberty, and to prevent an evasion of the most honourable statute in the *Pennsylvania* code.”<sup>146</sup>

At the time, this was most likely an easy case. It was likely *predictable* that the court would rule, as it did unanimously, that the statute’s time frame should be understood as calendar months, and the women remanded back into the service of Mrs. Chambre.<sup>147</sup> But that result was not determined by the statute’s “six months” rule. As a matter of preexisting legal rules and principles, the court might have chosen to construe the statute to incorporate the liberty right conferred by the Pennsylvania Constitution, or the judges might have found that the statute’s application in this case violated that right and was therefore invalid. Such a result would have been quite unpredictable. It would have been a very hard result to justify but entirely legally valid.

Nor do very, very hard cases necessarily involve high-minded arguments about liberty and equality or any overtly political principle. Consider *In re Fordham*,<sup>148</sup> a 1996 decision that tells the story of an easy case turned hard by resources of time, money, and ingenuity and offers a real-world example of how empirical approaches to doctrinal determinacy obscure and distort law’s normativity. The opinion rules that Laurence Fordham, then a partner in a Boston firm, violated the Massachusetts Professional Code of Conduct by charging excessive fees.<sup>149</sup> The client Fordham was found to have overcharged was Laurence Clark, a repairman who came to Fordham’s house to work on an alarm system. While there, Clark mentioned to Fordham’s wife that

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142. *Commonwealth v. Chambre*, 4 Dall. 143, 143 (Pa. 1794).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 144.

147. *Id.*

148. *In re Fordham*, 668 N.E.2d 816 (Mass. 1996).

149. *Id.* at 818.

Clark's son, Timothy, had been arrested for driving under the influence, and she suggested that he talk with her husband about the case.<sup>150</sup> By the time the Clarks consulted Fordham, they had been to three other lawyers, all of them criminal attorneys experienced in the defense of DUIs in that jurisdiction.<sup>151</sup> The three experienced criminal lawyers all offered to take Timothy Clark's case for flat fees ranging from \$3,000 to \$10,000, and they all advised him to plead guilty and accept placement in an alcohol rehabilitation program, which he did not want to do.<sup>152</sup>

A glance at the facts that led to Timothy Clark's arrest makes clear why the criminal attorneys advised him to take a plea. When Clark was stopped by police, his license already had been suspended for multiple speeding violations.<sup>153</sup> He was driving erratically, going fifty-five miles per hour in a thirty-five miles per hour zone, having just cut through a parking lot.<sup>154</sup> His speech was slurred, his breath smelled of alcohol, he was unsteady on his feet, and he was unable to walk a straight line or recite the alphabet.<sup>155</sup> Two breathalyzer tests yielded readings of 0.10 and 0.12, both above the statutory limit.<sup>156</sup> The *piece de resistance* was an open quart bottle of vodka in his car; it was half empty.<sup>157</sup> To the experienced DUI lawyers, this looked like an easy case, as I daresay it would to most of us. There was a single, salient legal rule—thou shalt not drive drunk with a suspended license—and plenty of evidence that Timothy Clark was caught doing exactly that. It looked like the kind of case that should never make it into court because the right outcome was so obvious: If Clark went to trial, he would lose.

Laurence Fordham had never represented anyone charged with a crime, let alone a DUI, but he was an experienced civil litigator.<sup>158</sup> He took Clark's case—and won.<sup>159</sup> In the process he filed four motions and billed over 200 hours—153 hours of his own time and 74 for junior

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150. *Id.* at 818–19.

151. *Id.* at 818, 823.

152. *Id.* at 818; Petition for Writ of Certiorari at 4–5, *Fordham v. Mass. Bar Counsel*, 519 U.S. 1149 (1996) (No. 96-946).

153. Petition for Writ of Certiorari, *supra* note 152, at 3.

154. *Id.*

155. *Id.* at 3–4.

156. *Id.* at 4; *In re Fordham*, 668 N.E.2d at 818.

157. *In re Fordham*, 668 N.E.2d at 818; Petition for Writ of Certiorari, *supra* note 152, at 4.

158. *In re Fordham*, 668 N.E.2d at 819.

159. *Id.*



associates—for a grand total of over \$50,000.<sup>160</sup> Two of Fordham’s motions were successful.<sup>161</sup> One got the charge of driving on a suspended license dismissed because Clark had not received notice of the suspension.<sup>162</sup> The second was a suppression motion challenging the breathalyzer results, using a plain meaning argument that (like so many plain meaning arguments) looks simultaneously brilliant and laughable. A Massachusetts statute required that multiple breathalyzer results be within 0.02 of each other to be admissible.<sup>163</sup> Fordham argued that 0.10 and 0.12 were not “within” a range of 0.02.<sup>164</sup> The judge bought it.<sup>165</sup>

Ultimately, Fordham convinced the trial judge to acquit his client on the DUI charge. After the bench trial Clark paid a \$50 fine for speeding and \$50 costs for driving an unregistered vehicle, and he walked away.<sup>166</sup> The remaining problem, of course, was that he now owed his attorney \$50,000. Although a bar hearing commission declined to sanction Fordham, on appeal four judges of the Massachusetts high court held that Fordham had violated the rules of professional ethics by charging excessive fees.<sup>167</sup>

To justify sanctioning Fordham, the court’s decision draws on the opinions of four lawyers who testified as experts at Fordham’s ethics hearing.<sup>168</sup> Effectively, the court runs something like an empirical test of doctrinal determinacy, using the expert opinions as a baseline of the easiness or hardness of Clark’s case, and so of the appropriateness of Fordham’s fee for defending Clark. The bar counsel’s experts agreed with the criminal attorneys who had counseled Clark to plead guilty that “the issues presented in the case were not particularly difficult, nor novel” and “[t]he degree of skill required to defend a case such as this . . . was not that high.”<sup>169</sup> In other words, this was an easy, doctrinally determined case.

The experts further agreed that the usual time a lawyer would spend on a case like this would be about twenty to forty hours, and the court reports this along with the consensus that the case presented no

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160. *Id.*

161. *Id.*

162. Petition for Writ of Certiorari, *supra* note 152, at 6.

163. 501 MASS. CODE REGS. 2.56(2) (1994).

164. *In re Fordham*, 668 N.E.2d at 819.

165. *Id.*

166. Petition for Writ of Certiorari, *supra* note 152, at 6. .

167. *In re Fordham*, 668 N.E.2d at 818.

168. *Id.* at 821–22.

169. *Id.* at 821 (quoting experts’ testimony).

unusual facts or legal issues.<sup>170</sup> Fordham's experts, of course, characterized the case as "extremely tough" for Clark, and "an almost impossible situation in terms of prevailing on the trier of fact" without the suppression of the breathalyzer results.<sup>171</sup> But the court emphasizes that even Fordham's own experts admitted that the facts of the DUI case were not unusual and the legal issues "pretty standard."<sup>172</sup> The opinion basically holds that the case's "normal circumstances" and standard legal issues create a ceiling for the amount of time and effort an attorney could reasonably spend on this easy case—even if the extra time spent changed the expected outcome.<sup>173</sup>

The opinion justifies sanctioning Fordham by accepting the majority expert consensus that his approach to his client's case was out of proportion to a fixed, objective level of difficulty presented by the facts of the case in light of the available doctrine.<sup>174</sup> Quantitatively, the results are four to one that the case is easy (or seven to one, if you count the three criminal attorneys the Clarks consulted before they hired Fordham).<sup>175</sup> Qualitatively, Fordham's treatment of the case as very hard is invalidated by his own admission that he had never tried a criminal case and the fact that all seven of the attorneys who saw the case as easy are acknowledged experts in the doctrinal areas typically involved in DUI cases. Based on these empirical results, the court concludes that Fordham's fees were "clearly excessive" because he billed for an incredibly hard case (for acquittal) when in fact this was an easy case (for conviction).<sup>176</sup>

In so doing the court implicitly denies that the doctrine applicable to Timothy Clark's case could legitimately produce more than one possible result. What makes this decision so peculiar is Fordham's concrete demonstration that a different legal decision maker could reach a

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170. *Id.* at 821–22.

171. *Id.* at 822 (quoting experts' testimony).

172. *Id.* (quoting expert's testimony).

173. *Id.* It is possible that Clark would have been better off with a DUI conviction than \$50,000 in debt. There is an argument that, whatever the result, Fordham's bill was outrageously out of sync with the modest means of his clients and that they did not, and could not have, understood what they were getting themselves into when they hired Fordham. The case is full of twisted issues of class and status. Besides the implication that Fordham took advantage of his unsophisticated working class clients, the court may have been offended by what they regarded as the spectacle of an elite civil litigator amusing himself in state criminal court—slumming, like a socialite in a dive bar. The court's ethics opinion never says anything like this, but it bubbles up between the lines.

174. *Id.*

175. *Id.* at 822–23.

176. *Id.* at 822–23, 825.

different outcome based on the available doctrine. To seven experienced DUI lawyers, Clark's case looked like an easy case for conviction, but Fordham persuaded one other legal decision maker that there were "cases, statutes, maxims, principles, canons, authorities, or statements in learned legal treatises available to justify decisions in favor of *both* parties . . . ."<sup>177</sup> The person he persuaded just happened to be the criminal court judge.

Maybe Fordham was a brilliant lawyer, or maybe he was lucky. Certainly he had a much richer resource base from which to operate than is generally available to lawyers who defend DUI cases. Billing by the hour, he and his associates had time to read, think, draft, and think again about the various arguments and claims they could make deploying different selections and combinations of the available legal doctrine in what turned out to be four heavily briefed pretrial motions and a bench trial. In the process, Fordham (or possibly one of his junior colleagues) came up with a way to make an easy case very, very hard.

Perhaps the high court judges who sanctioned Fordham thought his successful defense of Clark was just plain wrong. Because they were not reviewing the criminal court ruling, they could hardly say as much, but they may have simply believed that the law applicable to Clark's case was not *really* indeterminate. They may have thought that what *really* happened here was that a foxy attorney with the kind of resources available to only a tiny fraction of potential litigants (and far beyond his client's modest means) poured all those resources into finding a way to *avoid* what was the only outcome actually justified by the available doctrine. This big-shot litigator might have intimidated or snowed a credulous criminal court judge, but he was not going to get away with that kind of nonsense at the state's highest appellate court, described on its website as "the oldest appellate court in continuous existence in the Western Hemisphere."<sup>178</sup>

Whatever its rationale, the opinion effectively holds that the available legal doctrine determined a conviction in the underlying DUI case on the basis of empirical evidence. Fordham was sanctioned for seeing (and winning) this as a very, very hard case when in fact it was an easy (and unwinnable) case. That result exemplifies what is wrong with an empirical approach to doctrinal determinacy. The court relies on expert consensus to make a normative judgment about the case but presents it as empirical observation of the objective nature of the case. In so doing, the court both obscures the normative nature of its decision and denies the characteristic normative value of law as a source of regulation, protection, and duties whose definitions are not dependent on social consensus or professional expertise.

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177. SCHAUER, THINKING LIKE A LAWYER, *supra* note 2, at 135.

178. *About the Supreme Judicial Court*, MASS. COURT SYS., [www.mass.gov/courts-info/sjc/about/](http://www.mass.gov/courts-info/sjc/about/) [<http://perma.cc/B28A-SPZ5>] (last visited Oct. 3, 2015).

But notice that the opposite result would be troubling as well. In fact, Fordham's case demonstrates what is so threatening institutionally about the idea that doctrine may be indeterminate even in easy cases. For if the available doctrine in Clark's DUI case could justify a win for either the defendant or the state, those results were certainly not equally available to all DUI defendants. Fordham's expensive defense of Clark highlights the role of economic power in accessing the full legal value, as it were, of the available legal authorities. Indeed, anyone who has ever worked in Big Law would recognize Fordham's approach as ordinary industrial-strength corporate litigation practice, even if it was highly unusual for a "standard operating under the influence case."<sup>179</sup>

Of course it would be naive to deny that in the real world criminal justice outcomes are affected by how much money a defendant has to spend.<sup>180</sup> But it is one thing to think that resource differentials occasionally or even regularly distort justice. It is something else entirely if the legal system is constructed so that legal authority's full legitimate potential can be systematically mined in direct proportion to a party's economic power. After all, Fordham didn't come up with his winning doctrinal strategy in a sudden stroke of genius. The ethical problem of Fordham's fees only surfaced because Fordham's interpretation of the available doctrine took a lot of time to develop, the kind of time most DUI attorneys do not have, because their clients, like the working class Clarks, cannot afford to pay for it. By sanctioning Fordham for excessive fees, the court marginalized the impact of wealth on justice that Fordham's successful defense demonstrates. The stark calculation—\$5,000 to lose, \$50,000 to win—is made to look like a freakish outlier created by unprofessional conduct, rather than the normal course of justice in a system whose doctrinal resources are fully available only to those who have the capital it takes to unearth them.

### III. WHY WE SHOULD CARE ABOUT THE IMPOSSIBILITY OF MEASURING LEGAL DETERMINACY EMPIRICALLY

In the early decades of the last century, it was the Legal Realists who made a point of insisting that the belief that legal doctrines decided legal outcomes was at least partly an empirical matter. In the last half of the twentieth century, social scientists took up the realist challenge. These researchers' studies of judicial decision-making showed that legal outcomes correlated with non-doctrinal political and personal factors, at least in some courts in some types of cases. Many political scientists and some legal theorists concluded that these results vindicated a

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179. *In re Fordham*, 688 N.E. 2d at 821. What does seem odd is the ratio of partner to associate hours.

180. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 120–21 (1974).

critique of doctrinal reasoning as nothing but an illusory cover up, a judicial shell game used to distract from courts' use of decision-making power to advance political agendas and re-inscribe personal biases in law. Some scholars, however observed that not all judicial outcomes correlated with judges' ostensible attitudes and that there was reason to consider that formal law "matters" to the process of judicial decision-making. Recently researchers have designed a number of empirical studies with the express goal of understanding to what extent and how legal decision makers attended to formal legal doctrine in the process of making their decisions.

The problem is that empiricists studying the role of legal doctrine in decision-making and, more often, legal theorists referencing their work, discuss the results of this research in ways that appear to conflate two very different aspects of what it means to say that formal legal doctrine "matters" to legal decisions. While it is possible to observe and collect data about judges' engagement with preexisting legal doctrine and to predict legal outcomes based on estimates of how judges will react to changes in legal authorities, it is *not* possible to empirically test the extent to which any given set of legal authorities can determine legal outcomes.

We need to disentangle two different ways of understanding the proposition that "law matters" in judicial decision-making. One way to understand this statement is as a descriptive proposition about judges' behavior that is susceptible to empirical study. The other way is as a claim about the capacity of preexisting authorities to determine uniquely correct legal outcomes or ranges of outcomes. No matter how closely the second seems to follow from the first, it is always a normative claim. When we talk about judges' practices and whether judges really use doctrinal analysis in forming their opinions, we sometimes blend subjective motivations with objective results. But it is one thing to talk about—and to test empirically—judges' attempts to engage with legal doctrine in ways that fulfill the culturally and politically prescribed judicial roles of finding and following applicable law. It is something else to discuss whether applicable preexisting legal authorities can be identified objectively and, once identified, can be read to prescribe legal outcomes.

Moreover, as the Fordham case shows, this distinction holds even for "easy" cases where one finds a broad consensus on the correct legal doctrinal result. One way to understand the Fordham court's ruling would be to say it confused *predictability* and *determinacy*. The case against Clark was a predictable loser, but its outcome was not doctrinally determined; with luck and resources, it turned out that there were more available doctrinal possibilities than easily met the legal eye. In a recent article, Victoria Nourse and Gregory Shaffer warn that legal scholars should "resist the impulse to subsume law within other scholarly disciplines" and in particular, not lose sight of "law's normativity

as a powerful factor.<sup>181</sup> In a sense, the conflation of predictability and doctrinal determinacy in empirical legal analysis is an example of the problem Nourse and Shaffer identify.

I do not mean to deny the value of predictability and the need to understand doctrine's role in it. These are things that can be studied empirically. To practice law we need to know the predictability of decision makers' reactions to a given legal conflict. Indeed, those predictions are one of the main things that clients come to lawyers to find out. And a lack of predictability in legal outcomes creates its own legitimacy problems. Among other things, unpredictable law enforcement punishes people who had no way to conform their behavior to avoid losses. So if we can understand how decision makers' reactions to legal doctrine affect that predictability, that is something worth knowing. But Fordham demonstrates that, perhaps oddly, legitimate legal enforcement also depends in part on *unpredictability*—the unpredictability that comes with knowing that a legal decision maker's mind is open to the possibility that an unexpected outcome based on an unanticipated doctrinal analysis might be correct.<sup>182</sup> To say that the predictable doctrinal results *are* the law is to deny this crucial aspect of law.

The Fordham case also reminds us that empirical studies that compare outcomes reached by decision makers who are all working under the same conditions are profoundly unrealistic models of how legal questions are actually decided. The fact is that in our legal system there are enormous differences in the resources that are poured into influencing decision makers to find one or another result in a given legal conflict. Besides differences of money and time, different motivations, efforts, skills, ingenuity, and invention contribute to the search for legal outcomes. To take away these differences would be to create a qualitatively different legal system. These resource differences can change our view of the available doctrine. If Fordham's client had been the son of a millionaire, would Fordham still have been sanctioned?

The Fordham court's ruling obscures the implications of resource disparities for the legitimacy of DUI prosecutions and perhaps more broadly for the availability of justice. Ordinarily we think of these resource differences and their effects only as a source of injustice. But considering the problem of indeterminacy in this light shows that they are also the hallmark of legal potential—a potential for re-envisioning what is legally possible in a given situation that can be tapped if we are willing to devote sufficient resources to that problem. If the inability to fully access those resources is a source of injustice in our legal system today, it is, paradoxically, a source of future justice—a legal fount of

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181. Nourse & Shaffer, *supra* note 12, at 145.

182. PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW*, 17 (1998).

potential rights.<sup>183</sup> The Fordham court's empirical approach to doctrinal determinacy denies that dynamic doctrinal potential. That approach obscures the legitimacy problems generated by the combination of indeterminate legal doctrine and variable economic power but also the potential of indeterminate law for achieving justice.

Recognizing that doctrinal determinacy is not empirically testable moves the legitimacy worries brought on by indeterminacy back to the forefront. Those renewed concerns, in turn, open up the search for other distinctively legal characteristics that might ground legitimate law enforcement. Generally, we assume that to the extent legal reasoning is distinct from ordinary decision-making and a legitimate basis for government enforcement, it must entail some kind of substantive determinacy. But formal legal reasoning and, in particular, the subjective experience of following rules might still contribute to a distinctive mode of decision-making that is significantly different from ordinary individual all-things-considered reasoning even if legal doctrine is indeterminate. It might be that the distinctive legality of doctrinal reasoning resides in its form not its substance. This move seems to offer a more genuine possibility of escaping the formalist/realist divide than a continued focus on assessing levels and areas of determinacy and indeterminacy in legal decision-making.

The possibility that formal doctrinal reasoning matters, not because it produces some measurable level of substantive determinacy but because of its effects on decision makers, might change our view of an ongoing shift away from formal adjudication. Legal decision-making through adjudication based on doctrinal reasoning is on the wane, at least in the United States.<sup>184</sup> The numbers of cases brought through full-fledged formal trial in courts today is a tiny fraction of cases filed—something like one in one hundred overall for civil cases.<sup>185</sup> Most civil cases settle out of court, and most criminal charges are resolved through plea bargains.<sup>186</sup> Cases that do go through court proceedings receive less formal treatment—most courts of appeals allow oral argument in only a handful of cases, and the vast majority of appellate court decisions are now labeled nonprecedential.<sup>187</sup> Many conflicts that we recognize as having legal dimensions are now handled nondoctrinally through

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183. George Taylor makes a related point when he writes, “[l]aw often focuses on day-to-day needs and neglects a larger vision or goal for itself. Imagination . . . has the ability to redress that imbalance and attend law’s prospective, aspirational role.” George H. Taylor, *Law and Creativity, in ON PHILOSOPHY IN AMERICAN LAW* 81, 84 (Francis J. Mootz III ed., Cambridge Univ. Press 2009).

184. Galanter, *supra* note 180, at 106; Resnik, *supra* note 16, at 773–74.

185. Resnik, *supra* note 16, at 774.

186. *Id.*

187. *Id.* at 79p6.

informal means of dispute resolution. Even cases involving politically charged issues and the assertion of civil rights are much more likely to go to arbitration and mediation and be resolved without formal doctrinal reasoning or doctrinal justification.

This shift away from formal doctrinal *practices* tends to be justified by a rather hazy notion that *substantive* doctrinal determinacy sets some background limits on informal results. Continued confusion between evidence that doctrine matters to decision makers and evidence that doctrine determines substantively correct legal answers tends to support this view. Somewhat paradoxically then, the idea that substantive doctrinal determinacy might be measured empirically undergirds the dismantling of formal doctrinal reasoning. The shift toward informal legality—via arbitration, shrink wrap contracts, mediation, settlement, plea bargaining—is said not to endanger the rule of law because decisions made through these alternative methods unfold “in the shadow of the law.” In this view, formal doctrinal practices are dispensable as long as the substantive shadow of doctrine protects the legality of informal approaches to legal problems. But what if it turns out that law’s shadow has a recognizable shape only through formal practices and the actual real time process of human interaction with formal materials?

What if the importance of legal doctrine in legal decisions is not substantive determinacy, but psychological and social effects on decision makers—effects that might come about partly, or even entirely, from the formal *practice* of doctrinal reasoning? If so, the legitimacy of our legal system is not necessarily undermined by doctrinal indeterminacy because doctrine may serve other legitimating functions. Those functions, however, may disappear with the abandonment of formal practices.

Rather than substantively determining legal outcomes, reading, thinking, and writing in legal doctrinal forms may lead decision makers to go about their work in ways that are different from their ordinary all things considered approach and so render their decisions distinctively legal. Perhaps the process of reading formal legal authorities and making formal doctrinal arguments about what those authorities require facilitates legal decision makers’ bracketing their ordinary subjective perspectives, thus aiding impartiality. This is the type of doctrinal effect that would be empirically testable.

Support for the possibility and testability of such an effect comes from recent studies conducted on the psychological effects of reading different forms of literature.<sup>188</sup> Their results show that after reading

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188. David Comer Kidd & Emanuele Castano, *Reading Literary Fiction Improves Theory of Mind*, 342 *SCIENCE* 377, 377 (2013) (describing a series of experiments to see whether reading different types of material correlated with the ability to perform certain cognitive tasks). *See also* P. Matthijs Bal & Martijn Veltkamp, *How Does Fiction Reading Influence*



literary fiction, rather than popular fiction or nonfiction, individuals performed better on tests of what psychologists call “theory of mind.”<sup>189</sup> The texts employed in this research varied widely in subject matter and were each just a few paragraphs long. The researchers therefore conclude that “it is unlikely that people learned much more about others by reading any of the short texts.”<sup>190</sup> Instead, they theorize that the effects they observed are due to the *formal* qualities of the texts. Rather than exposure to any substantive content, they theorize that the observed differences were due to literary fiction’s “systematic use of phonological, grammatical, and semantic stylistic devices” that enlist readers in the project of creatively developing fictional characters.<sup>191</sup>

Here is evidence that the experience of reading a certain type of material can produce a change in a reader’s understanding or judgment on account of the structure of what is read. Likewise, doing doctrinal analysis might prime a shift in readers’ minds. And that shift might cause changes in judicial decision makers’ outlooks. If there are demonstrable effects on the cognitive abilities and habits of readers and writers of formal legal doctrine, such effects could be viewed as adding rule of law legitimacy to the extent that they facilitate legal decision makers’ looking outside their own usual perspectives—the sine qua non of legal decision-making.

## CONCLUSION

Empirical social science can help us understand what motivates legal decision makers and, more specifically, how decision makers interact with and are affected by formal legal doctrine. In principle, at least, we can observe and measure the effects of legal decision makers’ engagement with legal authorities. But empirical studies can never tell us whether legal doctrines are determinate in the sense of providing evidence that preexisting legal rules actually mandate certain results. To have explanatory power, empirical studies of legal determinacy would have to identify a standard of legal correctness, which necessarily conflates some individual or group’s view of what the law says with the potential of existing doctrine. The upshot is that any empirical test of doctrinal determinacy would need to use some standard based on quantitative or qualitative evidence of individuals’ understanding about what the doctrine directs. Either of these choices violates the core conceptual and normative understanding of legal reasoning as

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*Empathy? An Experimental Investigation on the Role of Emotional Transportation*, 8 PUB. LIBR. SCI. ONE 1 (2013) (finding that reading fiction can impact the reader’s empathy levels).

189. Kidd, *supra* note 188, at 377.

190. *Id.* at 380.

191. *Id.* at 377.

something *other than* the best all-things-considered decisions of any individual or group.

The idea that empirical studies can be used to measure the extent of doctrinal (in)determinacy bolsters an assumption that doctrines can and do provide determinate answers, at least in easy cases. That assumption, in turn, can be used to justify dispensing with the actual practice of formal doctrinal reasoning. This is an odd result. We rely more and more on informal adherence to doctrines that are presumed to somehow set substantive boundaries instead of requiring the formal reasoning practices that might actually be the source of distinctively legal decisions. If it turns out that doctrinal reasoning's significance is more a matter of the effects its formal practice produces in decision makers than the production of substantive answers, then we have less reason to be confident that anything we would recognize as rule of law is preserved when legal disputes are resolved by informal non-doctrinal processes.

Rejecting the possibility of empirically testing the extent of doctrinal determinacy does not mean rejecting empirical legal studies. But it does renew concerns about how to understand legal reasoning as a distinctive process. Those concerns, in turn, open up the search for ways, other than determining substantive answers, that traditional legal forms might ground legitimate law enforcement. This suggests some possible new directions for empirical legal research aimed at understanding how formal doctrinal reasoning affects decision makers,. In particular, empirical methods might be useful in seeking to understand if there are ways that formal legal reasoning, especially the subjective experience of interpreting and applying legal doctrine, influence decision makers to shift away from their ordinary individual all-things-considered reasoning, without determining substantive outcomes.