

2003

# Towards a New Scholarship for Equal Justice

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## Recommended Citation

Liebman, James S. (2003) "Towards a New Scholarship for Equal Justice," *William Mitchell Law Review*: Vol. 30: Iss. 1, Article 15.  
Available at: <http://open.mitchellhamline.edu/wmlr/vol30/iss1/15>

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## TOWARDS A NEW SCHOLARSHIP FOR EQUAL JUSTICE

James S. Liebman<sup>†</sup>

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### I. INTRODUCTION

Over the last thirty years, the legal academy has turned a cold shoulder to the subject matter of this symposium: scholarship for equal justice. I am here to suggest that a thaw may be on the way.

By scholarship *for* equal justice—as distinguished from scholarship *about* that topic—I mean academic work undertaken for the purpose of improving outcomes for individuals and members of groups who have been systematically held back by their race, sex, poverty, or any other basis for rationing success that our legal system treats with suspicion. With reference to some of my own work and that of other legal academics around the country, I want to suggest the possibility of a *new* scholarship for equal justice that can satisfy this definition, and can be a powerful instrument of change, without violating academic norms favoring objectivity over advocacy. In the process, I offer some off-the-cuff thoughts about how the academy arrived at its longstanding distaste for scholarship

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for equal protection, why things may be changing, where those changes may be leading equal justice-oriented scholarship, and what kinds of serious, everyday social problems this new scholarship might help to solve.

## II. RESPECTING THE INCOMPATIBILITY OF SCHOLARSHIP AND ADVOCACY

The idea that legal scholarship may be undertaken *for* equal justice remains controversial. Indeed, for some, the idea is positively self-contradictory: scholarship requires neutrality; advocacy forbids it. The two can no more be stably blended than oil and water. Indeed, when what is being advocated is worth caring about, as equal justice certainly is, the effect on objectivity may be so great that the two perhaps should not even be mixed in the same career, no matter how zesty the academic-professional vinaigrette that otherwise might result.

The assumption of incompatibility between legal work for equal justice and scholarship has occasionally cropped up in my own legal career. During my six-year stint at the NAACP Legal Defense Fund, for example, I had lunch with a law school dean (now, ironically perhaps, a judge) who warned me that law practice in service of goals one cares about is a not-so-slow-acting poison. At some point in or around the fourth year of practice, too few objective brain cells remain to sustain an academic career.

When I later joined the Columbia faculty, my own dean counseled me to mind my scholarship first, get tenure, and only then rekindle my interest in assisting condemned prisoners and fostering educational reform. Although good advice on rationing my time, this was also a warning against giving the colleagues who would judge my tenure the wrong idea about my priorities.

The incompatibility assumption operates outside as well as inside the academy. Recently, a group of Columbia University colleagues and I published two statistical reports on the disturbing frequency and causes of judicial reversals of American death penalty verdicts.<sup>1</sup> Members of the Association of Government

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1. See James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (2000), at [http://www.law.columbia.edu/media\\_inquiries/news/2002/broken\\_system](http://www.law.columbia.edu/media_inquiries/news/2002/broken_system), reprinted in part in James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839 (2000) [hereinafter *Broken System I*]. See also James S. Liebman et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It?* (2002), at

Attorneys in Capital Litigation, along with the unidentified individuals who operate a web site called [prodeathpenalty.com](http://prodeathpenalty.com), organized a critical response to the reports, the main contention of which was that we assuredly must have slanted the study results towards high death penalty error rates because I, in the past, had represented men on death row.

Never mind that two of our six team members, including the senior statistician, *approve* of the death penalty, or that we deliberately followed the most conservative canons of social science practice.<sup>2</sup> Never mind that the main subject of the attack, the 50% to 90% rates of reversible error we found for most states over most years, were easily testable by reading the same publicly available court decisions we read and dividing the number of reversals by the number of decisions. Never mind *even* that the government lawyers asserting that “a sometime advocate for death row inmates could not possibly conduct honest studies of the death penalty” are the same people who remain confident of their own capacity to follow professional norms of honesty every day, even when doing so thwarts their advocacy goals, as well as their promises to voters to expand the use of the death penalty.

The obvious implication is that, unlike other professionals, scholars must choose between advocacy and a professional ethic of candor and accuracy. Anti-death penalty advocates harbor the same assumption, as witnessed by their occasional suggestion that we soft pedal our findings that some states conduct capital prosecutions more reliably than others and, more generally, that there are better, as well as worse, capital-punishment practices.<sup>3</sup>

I am old-fashioned enough to agree that scholarship and advocacy should not be mixed in the same project, and that a career that includes both requires a strong and strict commitment

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[http://www.law.columbia.edu/media\\_inquiries/news/2002/broken\\_system](http://www.law.columbia.edu/media_inquiries/news/2002/broken_system) [hereinafter *Broken System II*] (last visited Sept. 2, 2003).

2. For discussion of some of the methodological issues, see Brief Amicus Curiae of 42 Social Scientists Concerning the Government’s Memorandum of Law in Response to the Court’s Order of April 25, 2002, in *United States of America v. Alan Quinones et al.*, Case No. S3-00-Cr.-761 (JSR) (S.D.N.Y., filed May 31, 2002).

3. See also Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative “Reform” of the Death Penalty?*, 63 OHIO ST. L.J. 417, 418 (2002) (cautioning that reforming current practices of capital punishment “may be analogous to replacing the electric chair with lethal injection; the reformed practice is unquestionably better . . . than the one rejected, but . . . also carries the distinct possibility that it will normalize the underlying practice and avert the very critical gaze that gave rise to the reforming impulse . . .”).

to disciplined compartmentalization. What I do want to suggest, however, is that changes are afoot in both legal scholarship and equal justice advocacy that make the two more compatible than at any time during my legal career.

### III. FADS AND FASHIONS IN LEGAL SCHOLARSHIP, 1970-2003

Despite an explosion of scholarship about equal justice, the last thirty years have not, as I have noted, been kind to scholarship *for* equal justice. Part of the reason, I think, is law scholars' attitudes towards two things: their *audience* and the *facts*.

When I was a law student in the mid-1970s, law schools were just emerging from a long period in which the presumed audience for legal scholarship was lawmakers, mainly judges but increasingly legislators and administrators.<sup>4</sup> The scholarly approach was to survey the legal landscape and identify the doctrine or policy that best explained the outcomes of relevant prior decisions, or to propose doctrinal or regulatory modifications to better accommodate existing doctrine to gradually changing conditions.<sup>5</sup> The facts or data bearing on these decisions were mainly legal facts:

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4. This period of "doctrinal legal scholarship" flourished between 1870 and 1965. See Richard A. Posner, *Legal Scholarship Today*, 45 STAN. L. REV. 1647, 1650 (1993). Also referred to as "legal modernism," this period of scholarship was "premised upon the belief in universal truths, core essences, or foundational theories," relying on the powers of legal reasoning to "penetrate the essential mysteries of the legal and social worlds, rendering them amenable to legal authority and control." Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 IND. L. REV. 353, 354 (1995). "[R]esearch was oriented toward reform and hence sought its primary audience among those people—mainly legal professionals, including other law professors, judges, legislators, and practicing lawyers—who were interested in improving law and legal institutions." Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1314 (2002) [hereinafter Posner, *Legal Scholarship Today* (2002)]. "[L]egal scholarship was not directed at law professors as such; most of it was aimed squarely at the profession at large, particularly judges and lawyers. This orientation enabled judges and lawyers to contribute to it." *Id.* at 1320.

5. The task of the legal scholar was "to extract a doctrine from a line of cases or from statutory text . . . , restate it, perhaps criticize it or seek to extend it, all the while striving for 'sensible' results in light of legal principles and common sense." Posner, *Legal Scholarship Today* (2002), *supra* note 4, at 1316. See also Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 195 (1991) (describing doctrinal scholarship as "'judicious,' . . . largely descriptive, respectful of previous authority, and faithful to existing law; . . . recommend[ing] only modest improvements in the law.>").

the black letter of common law doctrine, statute, and regulation.<sup>6</sup> Although case- and situation-specific facts were also relevant, they were mundane. Anyone with the patience to identify them could see clearly what they were.<sup>7</sup>

Clinical legal education had just been invented, and for the first time gave a small number of professors and students a chance to engage in systematic instruction and learning for equal justice while immersing themselves in “real” facts and cases. To the extent clinical teaching generated scholarly writing about the doctrines and policies being advocated, however, it was not very different from other legal scholarship.<sup>8</sup>

Things changed dramatically in the late 1970s and early 1980s.<sup>9</sup> It may be that elite legal scholars, fresh from liberal educations at top, newly meritocratic universities, law schools and judicial clerkships, got bored with a proclaimed Langdellian

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6. See Minda, *supra* note 4, at 360 (describing the norms of legal modernism, which provided that the system could dictate “logically correct answers through the application of abstract principles derived from cases . . . the system was capable of providing uniquely correct solutions or ‘right answers’ for every case brought for adjudication.”).

7. Posner, *Legal Scholarship Today* (2002), *supra* note 4, at 1320 (stating “I cannot think of a single work of English or American legal scholarship published before 1970 that would have posed the slightest difficulty of comprehension to judges and lawyers.”).

8. See *id.* at 1314. In fact, even by the late 1960s and early 1970s, a number of law professors had begun producing legal writings intended to be read by professors as opposed to practitioners and judges. *Id.*

9. See Jay P. Moran, *Postmodernism’s Misguided Place in Legal Scholarship: Chaos Theory, Deconstruction, and Some Insights From Thomas Pynchon’s Fiction*, 6 S. CAL. INTERDISC. L.J. 155, 155-57 (1997) (criticizing interdisciplinary legal studies as “an intellectual amalgam based on the traditions of economics, philosophy, sociology, literature, and other hitherto external disciplines” that at its worst has “creat[ed] a mass confusion” and has “contribut[ed] to the erosion of reasoned principles among today’s generation of law students”); Posner, *Legal Scholarship Today* (2002), *supra* note 4, at 1316 (describing “interdisciplinary scholarship” as “looking at the law from the outside, from perspectives shaped by other fields or scholarly inquiry, such as economics, political theory, moral philosophy, literary theory, Marxism, feminist theory, cultural studies, cultural anthropology, structuralism, and poststructuralism”). See also Geoffrey Miller, *A Rhetoric of Law*, 52 U. CHI. L. REV. 247, 247 (1985) (noting that “[s]tandard doctrinal analysis, which all but occupied the field a decade ago, is now retreating before the onslaught of all sorts of fancy new techniques. Strange-sounding jargon imported from other disciplines . . . is appearing in the law journals.”); Minda, *supra* note 4, at 356 (contrasting legal scholars who find the interdisciplinary approach to be confusing and to add little to the understanding of the law to other scholars who view this form of scholarship more positively, believing it has “ma[d]e law more responsive to changing values and attitudes resulting from the diversity and plurality of an increasingly multicultural world.”).

doctrinal science that in reality seemed to be little more than vocational training for judges and legal technocrats.<sup>10</sup> Or perhaps the increasing pay differential between legal and other university professors made law teaching more attractive to academic-minded recent graduates who otherwise would have ended up in the arts and sciences.<sup>11</sup> Whatever the cause, the result was increasing disdain for professional education and infatuation with “real” university disciplines such as economics, philosophy, and literature.<sup>12</sup>

And so, for the next quarter century, law professors (myself included),<sup>13</sup> acting with the zeal of the recent convert and the dilettantish hubris of the legal profession from which they were running, made themselves into instant experts in microeconomics, political theory, and literary criticism. (I am reminded of a lawyer friend, who after litigating a donut antitrust suit, fancied himself the nation’s foremost expert on that hollow subject.)

Among the consequences of this reorientation towards the “real” academy were a *change in audience* and *diminishing interest in social and practical facts*. It is these two attributes of the legal-academic orthodoxy over the last thirty years that I think have been particularly unwelcoming to scholarship for equal justice.

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10. Cf. Posner, *Legal Scholarship Today* (2002), *supra* note 4, at 1317, 1324 (theorizing that interdisciplinary scholarship has grown largely because of the expansion of the size of the legal profession and the number of law professors since 1970 and that “[f]or a significant number of law professors to turn their back on the practitioner audience, there must be enough law professors to create a critical mass of readership”).

11. Cf. Collier, *supra* note 5, at 191 (“In recent years legal scholarship has undergone changes so fundamental as to suggest the need for a reassessment of law as an academic discipline, as a subject of study, and as an intellectual institution . . . These changes have been wrought in part by a generation of new legal scholars with professional academic training in the humanities and social sciences, and in part by others who undoubtedly would have entered such disciplines in more auspicious times.”).

12. See generally *id.* at 196-97 (illustrating the difference in legal scholarship between the former “legal modernism” and the newer “interdisciplinary” approach by comparing the titles of articles in two issues of the *Yale Law Journal*, one from the late nineteenth century, the other from the 1980s); Minda, *supra* note 4, at 367 (1995) (finding in legal scholarship during the 1970s and 1980s “at least five new jurisprudential movements—law and economics, critical legal studies, feminist legal theory, law and literature, and critical race theory” that “question[ed] the once-dominant hold of modern jurisprudence” and “challenged a number of core assumptions central to the work of [more traditional] legal scholars.”).

13. See James S. Liebman, *Desegregating Politics: “All-Out” School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1542-65, 1601-14 (1990).

Suddenly, it was not judges or legislators or, God forbid, practicing lawyers whom law professors wanted to talk to. Instead, like good academics, they wanted to talk to each other, or better yet, to “real” scholars in the “real” disciplines.

Perhaps because it was then the fashion in universities generally, or at least in the highly academicized departments to which these recent converts were attracted, the emphasis over the last three decades fell squarely on *theory*, on elegant models, and on Occam’s razor—the simplest, most stylized explanation possible for the broadest amount of behavior. For these purposes, all but the most general facts were an irrelevant distraction. On the micro-economically-minded right, the tendency was to assume away all facts save venality—“rational self-interest.” On the critically minded left, the analogous assumption was the monochromatic subordination of the disadvantaged.

My own experiences in the job market for law teachers in the mid-1980s illustrate this prejudice. Friends and classmates who had preceded me into academia strongly advised that I never answer a question posed during my capital-punishment-focused presentation by stating that the questioner’s factual premises were belied by circumstances in the death penalty world in which I had been immersed for years. Instead, the drill was to say that the facts and circumstances could not *be* otherwise than I claimed because my theory told me so.

But as centuries turn, so do scholarly fashions. And in my opinion, we are seeing the demise of the era of elegant theory. Eventually, facts have a way of intruding. Among those insistent facts are the inability of markets or existing government policies—or, for that matter, traditional equal justice advocacy—to deal very effectively with ongoing environmental degradation, revolving-door recidivism by drug offenders, failing schools for poor and minority children, chronic conviction of the innocent, abysmal conditions in overseas plants, police misconduct, sexual harassment, and many other problems that sound in (un)equal justice. Across all these contexts, there is much to the widely held public view that insufficient progress is being made in solving social problems, and that the standard solutions of the right and the left are not effective.

Even so, things are not as uniformly bad as, for example, critical theorists might predict. The underclass persists, but the African-American and Latino middle classes are expanding.

Achievement gaps remain, but pockets of school improvement can be found. Sexual harassment and racial profiling are pervasive, but some companies and police departments have developed credible responses. The scourges of drug addiction and over-incarceration continue, but some tough-love rehabilitation programs, operating in or as alternatives to prison, have shown success.<sup>14</sup>

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14. For evidence of progress on these and other seemingly intractable problems, see ARCHON FUNG ET AL., CAN WE PUT AN END TO SWEATSHOPS? (2001) (advocating a system of third-party supervised self-monitoring of overseas working conditions by corporations operating global supply chains); Joshua Cohen & Charles F. Sabel, *Sovereignty and Solidarity: EU and US, in Governing Work and Welfare in a New Economy: European and American Experiments* 691, 694-95 (Jonathan Zeitlin & David Trubeck eds., forthcoming 2003), available at [http://web.mit.edu/polisci/research/cohen/sovereignty\\_and\\_solidarity\\_EU\\_and\\_US.pdf](http://web.mit.edu/polisci/research/cohen/sovereignty_and_solidarity_EU_and_US.pdf) (last visited Sept. 2, 2003); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Experimentalist Government*, 53 VAND. L. REV. 831 (2000) (discussing recent innovations in the use of court-monitored treatment plans for drug-addicted offenders); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) (describing recent innovations in administrative practice that involve collaboration among former adversaries and between them and government officials); Brandon Garrett, *Remediating Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41 (2001) (advocating a system of monitored information collection, sharing, and comparison among police departments as a means of combating racial profiling); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001) (championing the systematic use of performance monitoring and benchmarking as regulatory tools in the environment and other areas); James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703 (2003) [hereinafter Liebman & Sabel, *NCLB*] (claiming that the No Child Left Behind Act is part of a national "new accountability" movement for school reform that potentially could supplant *Brown v. Board of Education* as the model for institutional reform and achievement of effective education); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997) (exploring the uses of community-based planning and monitoring as a method of managing police discretion); Charles F. Sabel & William Simon, *Destabilization Rights: How the New Public Law Succeeds*, \_\_ HARV. L. REV. \_\_ (2004) (forthcoming) (describing an evolution in public law remedies from injunctive command-and-control regulation towards experimentalist remedies that permit collaboration, flexibility, and ongoing learning); Ann-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347 (2001) (describing the use of transgovernmental regulatory networks to help solve important public problems); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (advocating a multitiered and interactive "regulatory" framework for use by trial courts in managing the compliance process in employment discrimination lawsuits); Louise Trubek & Maya Das, *Achieving Equality and Health: Health Care Governance in Transition*, 30 AM. J.L. & MED. (2003) (forthcoming); Note, *After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement*, 116 HARV. L. REV. 1774 (2003) (proposing that administrative enforcement of Title VI be used to

In the face of these stubborn and unpredictable facts, cracks in the elegant-theory orthodoxy have appeared. Law-and-economists who were content in the past with the bare assumption of rational self-interest now find it necessary to supplement that assumption with explanations such as path dependency, heuristic bias, and an unruly gaggle of other circumstances that may cause people to deviate from the quickest path to the most self-serving result.<sup>15</sup>

Critical theory has likewise come to see that outcomes cannot be predicted entirely along simple class, gender, or racial lines, and has turned to more complex explanations. An example is “intersectionality theory,” which explains outcomes as the result of the intersection of disparate influences at which a particular group of, for instance, poor and female but white, or middle-class and male but African-American people are situated.<sup>16</sup>

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establish an experimentalist regime for improving the protection of the civil rights of minorities affected by federally funded programs).

15. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1541-45 (1996); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998); Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 743-45 (2000); Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175 (1997). For cautions and criticism, see, for example, Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907, 1971-77 (2002); Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603 (2000).

16. See, e.g., Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003 (1995) (applying intersectionality theory in the context of domestic violence); Kimberle Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1297 (1991); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 710-14 (2001) (discussing how courts have responded to the idea of intersectionality).

Many on the left have also lost faith in federal judges as the best hope for the oppressed. As a substitute, they invoke the American Legal Process School’s faith in markets that are moderately regulated by federal legislators and administrators. See, e.g., CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 7-12 (1996); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 3-23 (1999); William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 717-23 (1987); William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 738-91 (1991); Ronald J. Krotoszynski, Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*, 77 WASH. U. L.Q. 993, 1006-08 (1999);

More generally, I detect two (for me, welcome) suspicions that have recently gotten abroad in the legal academy: that the facts matter, and that what is most interesting is not behavior and outcomes that follow predictable paths, but rather the odd and unexpected deviations from those tendencies. If I am right, we should expect to see less energy being expended on proof that people transact and vote according to their venal interests, that members of vulnerable groups are inexorably dragged down by discrimination and disabilities, and that the market or public administration always, or never, works. Instead, I see a growing recognition that the most noteworthy progress (or regress) occurs in situations where a surprising capacity for cooperation and public-mindedness surfaces (or, on the contrary, where there seems to be a perverse attraction to self-defeating parochialism), or where people or groups that should not succeed *do*, while the beneficiaries of tried-and-true programs do *not* fare as well as predicted. More and more, I expect legal scholars to ask whether these exceptional situations are the rule. And more and more, I expect them to find that the intensely observed facts of these apparently anomalous situations reveal a variety of individually limited—but in the aggregate, potentially powerful—“micro-rules” about how serious public problems can be solved.

#### IV. A NEW SCHOLARSHIP FOR EQUAL JUSTICE

If trends in legal scholarship go in the direction that I am suggesting, they could have three important effects on scholarship for equal justice. First, a growing recognition of the poverty of theory by itself and of the richness of idiosyncratic practice may help inaugurate an era of scholarship that (i) is more attentive to the facts of everyday and innovative practice, (ii) is aimed at a broader audience, and (iii) permits a closer relationship between teaching and research. Second, when applied to the topic of equal justice, this new systematic search for exceptional reforms that work better than expected for disadvantaged groups may suggest changes in our *conception* of equal justice. Third, taken together, this new form of scholarship and the new conceptions of equal justice it implies may invigorate and promote engagement in scholarship *for* equal justice.

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Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985).

A. *The Importance of Facts, Audience, and the Connection Between Teaching and Research*

1. *Matters of Fact and Practice*

By way of acknowledging my personal stake in the predictions I am making, let me use some of my own recent work to illustrate the wide range of facts—especially facts about professional and reform practices—and the ways of investigating those practical facts that I believe are becoming a bigger part of legal scholarship.<sup>17</sup>

As I mentioned, over the last few years, Columbia colleagues and I have conducted empirical studies of the fate, in state and federal appeals courts, of 6000 capital verdicts imposed in the thirty-four capital states and 1004 capital counties between 1973 and 1995.<sup>18</sup> Among the questions we asked in trying to determine what does and does not work in the current administration of the death penalty were: how many of those death verdicts were found by appellate courts to be seriously flawed and reversed? (68%.)<sup>19</sup> Who did the reversing? (90% by elected state judges; over half of the remainder by federal panels on which Republican appointees predominated.)<sup>20</sup> What part of the verdicts were found wanting? (About half reversed the guilt finding of aggravated capital murder, the other half reversed the death sentence.)<sup>21</sup> Why were death verdicts reversed? (Mainly because of violations that risk undermining the reliability of the verdict—incompetent defense lawyers, prosecutorial suppression of exculpatory evidence, misinstruction of jurors; almost never grounds—such as exclusionary rule violations—that do not bear very much on reliability.)<sup>22</sup> What happened when the reversed cases were retried? (For state post-conviction reversals, where we collected data, over 80% ended with outcomes less than death, and 9% ended in acquittals.)<sup>23</sup> What are the implications for the surviving victims of

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17. See *supra* note 14.

18. See *Broken System I*, *supra* note 1; *Broken System II*, *supra* note 1. For a concise presentation of our findings, see Andrew Gelman, James Liebman & Valerie West, *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States* (June 11, 2003) (forthcoming).

19. Gelman et al., *supra* note 18, at 2-4.

20. *Id.* at 6-7.

21. *Id.* at 4-6.

22. *Id.*

23. *Id.* at 6.

the homicides involved and for the public? (Frustration, given that the average outcome of a death verdict is its reversal on appeal and the substitution, at retrial, of a term of years, and given that this process typically lasts a decade or more.)<sup>24</sup> Why is there so much error? (Regression analyses indicate that political pressures to increase the use of the death penalty—particularly in response to high rates of violent crime affecting white as opposed to African-American victims, and particularly in states in which it is easy for voters to punish judges for unpopular decisions—substantially increase the probability that any death verdict that is imposed will be seriously flawed.)<sup>25</sup> Are there solutions? (Possibly, via a variety of substantive and procedural rules that ensure at each stage of the process, from investigation and charging through trial and appeal, that the penalty is reserved for offenders who can be shown by comparative criteria and data drawn from the state's own death-sentencing practices to be the worst of the worst.)<sup>26</sup> Are there jurisdictions worth emulating? (Again, possibly. Examples may include Colorado, Connecticut, and New York.)<sup>27</sup>

Another group of colleagues and I have recently been observing the operation and results of school reforms of a particular, and we think promising, type at the classroom, school, district, and state levels on the east side of Manhattan in New York, and in various parts of Kentucky, North Carolina, and Texas.<sup>28</sup> These reforms involve groups of teachers, principals, staff developers, and others in a self-conscious process of planning the content and measuring the results of each student's, teacher's, school's and district's particular set of learning and teaching practices. Those observations then become the basis for revised

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24. *Broken System II*, *supra* note 1, at 70-81.

25. Gelman et al., *supra* note 18, at 15-21.

26. See, e.g., *id.* at 21-24; James S. Liebman, *An Effective Death Penalty? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411 (2001); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030 (2000); Kenneth Williams, *The Death Penalty: Can it be Fixed?*, 51 CATH. U. L. REV. 1177 (2002).

27. *Broken System II*, *supra* note 1, at 304-05.

28. See Liebman & Sabel, *NCLB*, *supra* note 14 (discussed *supra* note 14); see also James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: the Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE \_\_ (forthcoming 2003-2004) [hereinafter *A Public Laboratory Dewey Barely Imagined*] (describing how a combination of movements towards standards, changing goals of desegregation and school finance litigation, and state and federal legislation have converged to create a promising experimentalist framework for school reform).

plans, improved measures of success, additional observations, further revision, and so on until, over time, there arises a known set of “better” (if never “best”) practices for use in recurring circumstances.

## 2. *Audience*

The intended audience for my work has changed along with its method. Instead of heavily footnoted, technically encoded articles written for a small group of specialists whose own theorizing is the raw material for mine, much of my recent work has been aimed at, and written to be accessible to, the professionals and policy makers who are the subject of my studies and proposals, and even the wider public. Web access and media dissemination have become important adjuncts to scholarly publication. Public presentations at civic and community forums, in legislative hearings, and in and through the media have supplemented scholarly colloquia and conferences. Validation and criticism by skilled practitioners are valued along with those by faculty colleagues.

## 3. *Research Collaboration Between Teachers and Students*

These changes have contributed in turn to new forms of teaching, or more accurately, of research collaboration with law students. Collecting and analyzing data, observing institutional and legal practices, interviewing practitioners, and conducting case studies of the development and progress of reform are all things law students can learn or already know how to do as well as and in some cases better than I. Law students helped draft the form we used to collect information on our 6000 capital cases, collected much of that data, and, working with graduate students, did a good bit of the statistical analysis and coauthored our statistical reports. Law students likewise conducted numerous interviews in Kentucky, North Carolina, and Texas and wrote impressive case studies of the school reforms there that my colleague Chuck Sabel and I have used extensively in our writing on the subject.

Institutionalizing this process, Professor Sabel and I co-teach a research course we call “New Forms of Public Interest Advocacy,” which combines an advanced seminar in the theory and practice of law reform with intensive research-and-writing projects that have generated fascinating student studies of, for example: innovations in the process of providing lawyers for indigent criminal

defendants; the design and implementation of self-rule by the Maori people of New Zealand, which in turn is influencing public administration throughout that country; collaborative public and private management of the ecosystem on the Mexico, Arizona, and New Mexico border; the organization and use of parent and community activism as a means of achieving accountable public school outcomes in Kentucky; and the like. The idea here is that, instead of imparting doctrine or skills we already have mastered to students who have not, we are learning along with them. Instead of passive receptors of information or apprentices, students are key collaborators.

*B. Exceptions that Work*

The changes I am forecasting are not only in the focus and methods of legal research and in their interaction with law teaching. The changes may also extend to the ideas and legal concepts that research and teaching generate. Consider as an example the concept of equal justice itself.

Abstractly, the idea of equal justice is that all people deserve the same opportunities and access to the same resources that are entailed by their membership in the community.<sup>29</sup> Applying this abstraction in practice, however, inevitably requires that we identify the opportunities and resources individuals deserve based in part on what others, who in some sense are similarly situated, already *have*. But this begs the vexing question of, who *is* similarly situated? Whose endowments identify the opportunities and resources, and even more problematically, the precise *level* of advantage, that everyone deserves to have?

Traditionally, this question has been answered by first identifying a group of people—say, middle class whites—who are substantially more advantaged than the client group—say, poor African-Americans. The situation of the favored group then has been used as the standard by which to measure the constitutionally required level of attainment by the disfavored group. But

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29. See, e.g., C. Edwin Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1030-48 (1980); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 430 (1960); Paul Brest, *The Supreme Court, 1975 Term: Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7, 34-36, 42 (1976); Kenneth L. Karst, *The Supreme Court, 1976 Term: Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5-6 (1977).

identifying the appropriately favored group, as well as creating a framework for analyzing the advantages available to that group which the client population deserves to attain, and then meeting the high mark that analysis sets, has proved extremely difficult both in law and in practice.

The new approach to legal scholarship I have been sketching here suggests a different, more tractable principle, or comparative starting point, for equal justice analysis and action. That principle can be stated as follows: When it comes to opportunities and resources that are an essential building block of freedom and happiness and over whose distribution the state exercises substantial control, an explanation is owed if people who otherwise are *just like you* systematically attain better outcomes than you do.

This basis for challenging disparities between two individuals or groups may seem confusing or perverse. For the disadvantaged, the whole point of equality is to be like those who are “better off,” not like members of your own, disfavored group. Confusion recedes, however, if one conceives of equal justice not as an ideal end state, but as a requirement of steady progress towards that state. From this perspective, the most powerful argument for the position that the world does not have to be as unequal as it is, is the existence of a group that is in all ways like the disadvantaged client group except that, as a result of reasonable public policies or action, the comparison group suffers less inequality.

Consider, for example, a school full of poor African-American pupils whose average scores on the state’s test for educational progress fall below the barest level of educational proficiency. Or consider a school with a mixed population that overall does rather well on the same test but whose Latino students mostly fail it. In the past, orders to bring the averages of the poor and minority children up to those of middle-class white children have succumbed to a plea of ignorance and hopelessness by school officials. In effect (if not always in quite these forthright terms), the plea goes something like this:

If ordered to improve outcomes for all groups of students, we will fail. When ordered to do so in the past, other schools and districts *have* failed. No one really knows how to improve outcomes for all groups or whether it is even possible to do so. Conditions beyond educators’ control, such as family and neighborhood influences, personal

choices, and oppositional behavior, consistently frustrate the achievement of that goal.<sup>30</sup>

But suppose a law scholar or group of law students (or anyone else for that matter) identifies comparable schools in the state—ones with roughly the same populations—where poor and minority children perform substantially *better* on the tests. Suppose the observer then asks why the first school full of failing African American pupils, and the second school with a mainly proficient student body but failing Latino students, are not performing as well as comparable schools elsewhere in the state? Suppose the scholar's or students' data inspire legal activists, legislators, administrators, the courts, or the public to *demand* to know why these disparities exist? Suppose these queries pose the further question whether the less successful schools should be obliged, even *legally obliged*, to meet the standard set by the other similar but more successful schools? Note, finally, how the pressure to provide answers to these questions is exponentially increased by the questioners' presumptive proof, drawn from the actual experience of the school system itself, that the conditions needed for kids to reach an important benchmark level of performance are within the control of school officials. At that point, the plea of ignorance that stymied earlier equal justice initiatives rings hollow.

Once legal or other researchers identify the performance measures, comparison groups, and disparate success rates needed to expose, and put in question, these most egregious inequalities (most egregious because they are demonstrably avoidable), that information prompts still other reform-provoking questions: Why

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30. For different versions of this conclusion, see, e.g., *Missouri v. Jenkins*, 505 U.S. 70, 87-102 (1995) (permitting a school district operating under a desegregation order to establish compliance, notwithstanding continuing racial disparities in student outcomes, by linking those disparities to conditions the Court considered to be beyond school officials' control); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977) (absolving school boards of responsibility for continuing racial disparities that are not the result of the board's conduct of its business); Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827, 844-54 (1998) (discussing the failure of a succession of school funding equity and other remedial orders to overcome economic and racial disparities in student outcomes in New Jersey's public schools). See also *Freeman v. Pitts*, 503 U.S. 467, 496 (1992) (concluding that demographic changes sometimes cause racial imbalance in a school district that is not attributable to school officials and thus is not actionable under the Constitution); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 243 (1991) (finding that the residential and resulting school segregation in the Oklahoma City School District was the result of private decision making and economics, not state action).

don't school district and state officials themselves systematically identify schools that succeed best with particular populations? Why don't they require less-effective schools to develop plans to match the better results and to revise and try again if they fall short? Why don't officials prod the better-performing schools to reveal how they succeeded, and to provide peer assistance to less successful schools? These questions, in turn, lead to another: Are there legal and institutional arrangements that serve to systematize these experiments, comparisons, information exchanges, and upwardly ratcheting standards?

Notice that the conception of equal justice these questions imply does not put policy makers and judges in the impossible, and strategically counterproductive, situation of having to identify *the* constitutionally "deserved" level of a benefit or opportunity, or the Archimedean population whose situation defines that level. Instead, this "continuous improvement" conception of equal justice treats the best levels recently attained by the most similar population to be the *minimum* level that is *provisionally* deserved, until the target institutions' best efforts to match that minimum level *exceed* it—thus creating a higher, but still provisional, legal benchmark. Nor need there be only one benchmark at a time. If, for example, even generally effective schools must improve not only on average but for each of their populations (including poor, minority, limited English proficiency, and special needs students), then all schools will be evaluated against a variety of benchmarks, creating multiple incentives to slowly but surely improve the outcomes of all their students along a path marked by ever more and challenging, but always demonstrably attainable, milestones.

This vision of poor and minority children on a highway to educational heaven may seem like pie in the sky. Or it may seem like another effete cogitation *about*, but not useful *for*, equal justice. But it isn't. The institutional architecture I just described in fact exists in schools and districts in New York City, North Carolina, Kentucky, and Texas—and to an extent at the state level in the latter three states—with encouraging results for poor and minority children.<sup>31</sup> Even more surprising, the hypothesized comparative basis for challenging disparities among public schools is in fact codified in President Bush's No Child Left Behind Act, complete with racial and economic coding of results and the setting of

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31. See *A Public Laboratory Dewey Barely Imagined*, *supra* note 28.

benchmarks for all public schools in the nation.<sup>32</sup>

If reforms of this sort continue to take hold, many more questions will cry out for scholarly attention. What triggers these innovations in places where they have occurred, and why haven't their successes made the reforms wildly, as opposed to only moderately, contagious? How can institutional architects fill gaps in incipient structures, including some Grand-Canyon-sized gaps in the No Child Left Behind Act?<sup>33</sup> What kinds of community, administrative, and judicial enforcement mechanisms are available if outcomes do not improve over time? What similar approaches might succeed in other contexts, such as welfare, criminal justice, employment discrimination, fair labor standards, and community development?

### C. *Invigorating Scholarship for Equal Justice*

My final hopeful prediction is that this new form of scholarship, and the conception of equal justice it implies, may invigorate and spread the practice of scholarship *for equal justice*. This hope arises in part because this new approach to legal scholarship may be able to supply what I have argued above are two missing but critically important ingredients of successful efforts to achieve equal justice.<sup>34</sup> First, this fresh scholarly approach helps provide a better understanding of what works when for which subpopulations. Second, the approach aims to identify governance structures that institutionalize the search for what works. Governance structures can accomplish this goal by (i) assuring front-line *flexibility* to experiment and to revise and experiment again based on the results of the first experiment, while (ii) endowing public actors and constituencies with real *accountability* for the trajectory of those results and (iii) providing enough *transparency* and *coordination* to enable similar actors in different places to learn from each other.

Legal scholars should be especially good at devising these

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32. See 20 U.S.C.A. § 6311 (2002); see also *id.* at § 6501 (defining the Act's purpose as "ensur[ing] that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments.").

33. See Liebman & Sabel, *NCLB*, *supra* note 14, at 1730-31.

34. See *supra* note 14 (citing sources that exemplify both of these attributes of the new scholarship for equal justice).

structures, or at least discovering them in operation and fleshing them out. After all, it is the essence of law and lawyering to arrange transactions and organizational structures to facilitate innovation, accountability and coordination. Granted, the model legal actors here—negotiators, deal makers, institution builders—are not the litigators whom scholars for equal justice have usually thought of as the subjects and beneficiaries of their research. But the work of these new model actors is nonetheless quintessentially legal.

The switch in focus from enforcing rights to solving problems, and from litigation to institutional architecture, also helps neutralize the professional and ethical tensions that legal scholars for equal justice face. A law review article that gussies up an argument designed for a partisan legal brief raises objectivity questions that proposing solutions—or administrative structures for systematically identifying solutions—may not pose. The evaluative criterion that applies to a brief as a piece of advocacy is potentially quite different from the criteria that apply to an article as a piece of scholarship. Rather than looking at whether or not an adversarial argument will cause a court to rule as the lawyer and client want, one examines whether the scholarly argument is sound and logical, whether it identifies and grants what is due to the strongest alternative view, whether it will lead to socially advantageous results, and whether it increases the sum total of human knowledge. Because these latter academic criteria are quite similar to the standards problem-solvers in the field might use to evaluate potential remedies for long-festered inequalities and injustices—especially when competing remedies are systematically evaluated based on comparisons of actual results—the risk of incompatibility between scholarship and equal justice activism subsides.

There is at least one other advantage of this new approach to legal scholarship. By enabling law professors to blend teaching and scholarship more seamlessly through genuine research collaboration with students, the new scholarship helps avoid the zero-sum competition between teaching and research that for so long has penalized law professors who make it a priority to train students to be effective advocates for equal justice.

As this last point implies, I believe that engaging law students in the close observation of the professional activity I call “institutional architecture” is good training. It exposes law students to creative practice and practitioners, and it exposes law students *for equal justice* to a model of legal activism that usefully augments

the litigation model that for so long has dominated the clinical legal education to which these students gravitate. If I am right that in the future much of the progress in attaining equal justice is likely to occur through creative institutional architecture, this newly collaborative scholarship for equal justice could become a crucial training ground for a new generation of equal justice activists.

#### V. CONCLUSION

Some of what I have proposed here may sound perilously like the precious theorizing from which I have tried to distance myself. But in order to engage in the new equal-justice scholarship, legal scholars need nothing more “highfalutin” than a pragmatic willingness to study actual legal practices that seem to improve outcomes for some part of the target population under some identifiable set of institutional, regulatory, doctrinal, or contractual circumstances. And the value of the enterprise, both as scholarship and in promoting equal justice, turns on the answers to down-to-earth questions, such as whether generating practical, fact-intensive information about what works, when, and why is an important part of the current equal justice agenda; whether doing so in a manner useful for equal justice is within the capacity of legal scholars; whether this new fact-based and practice-focused approach to scholarship can help cure the academy of its longstanding allergy to matters of fact and practice; and whether, if so, the new scholarship is likely to be more favorably regarded in the legal academy than past scholarship for equal justice.

Because I believe the answer to these questions is yes, I intend these remarks as an enticing invitation for scholars and students to experiment with the new scholarship for equal justice. But be warned. By academic standards, at least, this is dirty work, hot work. It is “pots boiling and pans frying in the kitchen” kind of work, “wrenches under the hood” kind of work, not brandy snifters in the drawing room. There are facts to soil your hands with—the messy reality of what actually happens, unruly data, on-site observation, interviews, web-site research, and all the tricky interpretive questions such information poses.

And there is heat to be *taken*. Because of these interpretive questions, you will be an inviting target for armchair criticism from more sedentary colleagues. Yet, unlike many theorists, you will also be operating in a field where you actually can be *proven* wrong, or at least *passé*, in the event that the data come to show that the

practices you thought were successes were not, or that new successes have superseded the ones you identified. Worse still, when you stick your neck out into the public arena with data susceptible to these criticisms, you will surely be goring someone's prize ox—maybe someone who prefers liberty or community over equal justice, or who shares your equal justice goals but stands by the old, one-size-fits-all remedies that your methods call into question, or, finally, who shares your respect for experimentation but believes her experiment is better than the one your data singles out.

None of this is nearly as comfortable as a well-insulated drawing room. But it has its compensations of the “proof is in the pudding” sort. If you are right, no matter what the criticism may have been, the events themselves will be your best defender. And if you are wrong and proven so, it may at least be because something else worked better for equal justice, or perhaps because the challenge issued by your “no pudding tops this” conclusion prodded someone to find a pudding that does.

In any event, if you agree with me that the real scholarly and equal justice action is now in the messy, bustling kitchen, and if you think you can stand the heat, there are plenty of pots to be stirred.