

THREE OBJECTIONS TO THE USE OF EMPIRICISM IN CRIMINAL LAW AND PROCEDURE – AND THREE ANSWERS

Tracey L. Meares*

Recent studies show that, over the past decade, judges and lawyers have begun to cite to empirical studies in their work with increasing regularity. However, the use of empiricism is still not common in many areas of the law. In this article, Tracey L. Meares draws on her background in criminal justice to highlight three major objections to the use of empiricism in criminal law and procedure: (1) much of the empirical evidence used by courts is flawed and courts are not equipped to deal with complicated social scientific data; (2) the use of empiricism decreases public acceptance in the criminal justice system, which in turn, prevents an individual from internalizing legal rules (“less information is better”); and (3) empirical information is irrelevant to the normative goals of criminal law and procedure. After fully analyzing these objections, the author presents various counter-arguments that underscore the importance of using empiricism in the creation and interpretation of criminal law and procedure.

Professor Meares dismisses the first critique as merely an objection to bad social science and argues for the use of critical review as one of the mechanisms by which courts could screen social science research. The author responds to the “less information is better” objection by attacking it on moral grounds and by demonstrating how the use of empirical evidence can lead to higher levels of legitimacy and to greater compliance with the law. Finally, the author disposes of the third objection by arguing that the use of empirical studies makes

* Professor of Law and Director of the Center for Studies in Criminal Justice, University of Chicago Law School; Research Fellow, American Bar Foundation.

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criminal justice decisions more transparent and allows us to hold decision makers accountable for their actions.

That empiricism is relevant to criminal law and criminal procedure is a point so obvious that it seems almost banal. For example, the early history of empirical sociology is inextricably tied to the study of criminal behavior.¹ One cannot study crime without a definition of the dependent variable, which law provides. Moreover, for decades, empirical social science research has also been conducted in the criminal procedure arena. Studies of plea bargaining,² policing choices,³ and jury decision making⁴ have provided important descriptive accounts of key criminal justice system components.

1. Empiricism, particularly numerical empiricism, not merely for descriptive purposes, but for the purpose of making inferential connections in topic areas, dates back to the late 1800s. Sociological methodology stems from Franklin Giddings's work in his 1901 book making causal understanding the goal of sociological work. See FRANKLIN H. GIDDINGS, *INDUCTIVE SOCIOLOGY* (1901). Also during the late nineteenth and early twentieth centuries, another research approach, which emphasized field research and deemphasized Giddings-type causal theory, was prominent. The best and last example of the survey tradition is probably ROBERT S. LYND & HELEN MERRELL LYND, *MIDDLETOWN* (1929). The Chicago School of Sociology was a hybrid of these two traditions, combining theory with survey-type work. ANDREW ABBOTT, *DEPARTMENT & DISCIPLINE: CHICAGO SOCIOLOGY AT ONE HUNDRED 204-09* (1999). The early-twentieth-century sociological work done on the social organization of urban communities by Chicago School researchers Park, Burgess, Shaw, and McKay were very much concerned with crime and delinquency. See Robert E. Park, *The City*, in *THE CITY* (Robert E. Park & Ernest W. Burgess eds., 1925); CLIFFORD R. SHAW & HENRY D. MCKAY, *JUVENILE DELINQUENCY AND URBAN AREAS* (rev. ed. 1969).

2. See, e.g., MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCE OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* (1978) (empirical study of reasons why defense attorneys, prosecutors, and judges pursue plea bargains); *PLEA-BARGAINING* (William F. McDonald & James A. Cramer eds., 1980) (containing articles discussing studies of victim participation, prosecutorial bluffing, judicial involvement, and elimination of plea bargaining); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study on Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992) (discussing the prevalence of plea-bargaining as a means to circumvent the federal sentencing guidelines); Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301 (1987) (using empirical data to argue that victim participation in plea bargaining does not lead to fewer plea bargains).

3. See, e.g., WAYNE R. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* (Frank J. Remington ed., 1965) (results of comprehensive American Bar Foundation study of police behavior cited in *Terry v. Ohio* and *Miranda v. Arizona*); GEORGE L. KELLING ET AL., *THE KANSAS CITY PREVENTIVE PATROL EXPERIMENT: A SUMMARY REPORT* (1974) (showing no effect on crime resulting from changes in level and method of police patrolling); Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984) (suggesting that a domestic violence abuser is less likely to abuse after an arrest); The New York City Police Department's "Stop & Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General (Dec. 1, 1999), available at http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html (a comprehensive empirical analysis of street stops in New York City).

4. See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966) (comprehensive study of jury behavior and decision making); GARY LAFREE, *Jurors' Responses to Victims' Behavior in Rape Trials*, in *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* 200-33 (1989) (finding that character evidence against the victim and race of the victim influence jurors' determinations of consent and guilt in rape trials); William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001) (discussing effects of racial composition on jury deliberation and sentencing outcomes in capital cases).

Although descriptive accounts of criminal justice system phenomena are relevant to criminal law and criminal procedure, such research is not necessarily critical to the normative enterprise of creating and interpreting criminal law and procedure. Consider a few of the many tough questions in this area: What does “probable cause” mean?; What does “beyond a reasonable doubt” mean?; Do *Miranda* warnings effectively protect the right to remain silent embodied in the Fifth Amendment to the Constitution? While it is quite easy to imagine the ways in which empiricism can help us to evaluate the consequences of the normative choices we make when answering these questions, it is a more difficult task to imagine how empiricism might guide what we choose in the first place. Is empiricism at all important to our normative choices? While there are some who believe that empiricism is irrelevant to the construction of rules in the criminal law and procedure arena, I believe empiricism plainly is relevant. Here, I will lay a foundation for the use of empiricism in the interpretation, indeed, the creation of criminal law and procedure by reviewing and then answering three objections to the use of empiricism. Through answering these objections, I hope to clear a path for social science tools in an area of law in which their use should be natural.

I. OBJECTION ONE: QUALITY AND COMPETENCE

Over the last few decades, numerous scholars have taken up the challenge of justifying the use of empiricism in law as a general matter.⁵ An examination of the case law demonstrates some success. Schauer and Wise’s recent study of the citation of nonlegal sources by judges and lawyers indicates a sharp increase in such citations since 1990.⁶ Yet, the penetration of the social science into legal arenas still seems shallow after

5. See, e.g., Samuel M. Fahr, *Why Lawyers Are Dissatisfied with the Social Sciences*, 1 WASHBURN L.J. 161 (1961) (discussing how social science can be valuable in the legal process); David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005 (1989) (suggesting a framework for the use of social science evidence in the legal system); Victor G. Rosenblum, *A Place for Social Science Along the Judiciary’s Constitutional Law Frontier*, 66 NW. U. L. REV. 455, 479 (1971) (urging use of social sciences “when the courts themselves formulate or invoke propositions or norms conditioned upon knowledge within the competence of the social sciences”); Peter W. Sperlich, *Social Science Evidence and the Courts: Reaching Beyond the Adversary Process*, 63 JUDICATURE 280 (1980) (advocating use of social science evidence to improve fact-finding and to provide “social facts”); Laurens Walker & John Monahan, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 478 (1986) (arguing that “social science research, when used to create a legal rule, is more analogous to ‘law’ than to ‘fact,’ and hence should be treated much as courts treat legal precedent”).

6. See Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1108–10 (1997) (Schauer and Wise only do a preliminary study of citations to nonlegal sources in Supreme Court decisions, and note a marked increase since 1990); see also Paul S. Appelbaum, *The Empirical Jurisprudence of the United States Supreme Court*, 13 AM. J.L. & MED. 335, 335 (1987) (arguing that the Supreme Court “has increasingly relied upon data-based arguments”).

all of these years of arguing about it.⁷ The reasons for the reluctance of lawyers, judges, and others to embrace more empiricism, even when the adopted legal standards seem to make such an embrace inevitable, are numerous and complex. A primary objection that has been lobbed against greater use of social science in legal decision making for decades actually has two parts. Part one is that empirical evidence typically offered to the courts to help them answer tough normative criminal law and procedure questions is flawed and therefore not helpful. Part two is that courts are not capable of dealing with complicated, and sometimes conflicting, social science data. Judges are not trained to assess empirical studies, and so they may unwittingly create bad decisions.⁸

It is true that not all work relevant to the enterprise of interpreting law in the criminal justice arena is good social science,⁹ but that is not an

7. See Michael Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4 (1998) (arguing in part that greater reliance on empirical and policy analysis will help ameliorate the contemporary limitations of common-law gradualism); David L. Faigman, *Normative Constitutional Fact-Finding: Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991) (urging greater use of empiricism in constitutional decision making); Richard Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998) (calling for more empiricism in constitutional decision making).

8. For citations relevant to both parts of this objection, see Samuel M. Fahr & Ralph H. Ojemann, *The Use of Social and Behavioral Science Knowledge in Law*, 48 IOWA L. REV. 59 (1962) (suggesting that prior misuse and misinterpretation contribute to hesitance by lawyers and judges to utilize social science evidence); Andrew Greeley, *Debunking the Role of Social Scientists in Court*, 7 HUM. RTS. 34, 50 (1978) (arguing the law, especially in the area of civil rights, should not rely on social science evidence); Philip R. Lochner, *Some Limits on the Application of Social Science Research in the Legal Process*, 1973 LAW & SOC. Q. 815 (1973) (listing limitations that contribute to lack of influence of social science evidence in courts, including inexperience and ignorance by lawyers and judges, and inconsistency and uncertainty of the evidence); David M. O'Brien, *The Seduction of the Judiciary: Social Science and the Courts*, 64 JUDICATURE 8 (1980) (questioning whether judges have the ability and resources necessary to distinguish between good and bad social science evidence); Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91 (1993) (describing how partisan organizations distort social science evidence in amicus curiae briefs and questioning whether Supreme Court Justices have the ability to independently evaluate the validity of such evidence).

9. Perhaps the most famous example of questionable social science being relied on by the courts is Kenneth Clark's "doll study," cited by Chief Justice Warren in footnote eleven to *Brown v. Board of Education*, 347 U.S. 483, 494 (1954). Both the methods and the conclusions of Clark's study have been criticized in the years since *Brown*. See, e.g., ROY L. BROOKS, *INTEGRATION OR SEPARATION?* 18-24 (1996) (questioning the methodology employed in the Clark study); Sara Lawrence Lightfoot, *Families as Educators: The Forgotten People of Brown*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 3, 5-8 (Derek Bell ed., 1980) (arguing that oversimplification renders Clark's study incapable of capturing the actual complexity of classroom interaction among children); Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 161-65 (1955) (suggesting that the methods used "tricked" the children involved and questioning the conclusions drawn from the responses); Phyllis A. Katz & Sue Rosenberg Zalk, *Doll Preferences: An Index of Racial Attitudes?*, 66 J. EDUC. PSYCHOL. 663 (1974) (reproducing the "doll study" and finding no clear-cut preference for white dolls); Ernest Van den Haag, *Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69, 69 (1960) (characterizing Clark's study as "pseudoscientific"); Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, LAW & CONTEMP. PROBS., Autumn 1978, at 57, 70 (asserting that "virtually everyone who has examined the question" now recognizes that "[t]he proffered evidence was methodologically unsound"). For general reviews of post-*Brown* studies relating self-esteem and school segregation, see Edgar G. Epps, *The Impact of School Desegregation on the Self-Evaluation and Achievement Orientation of Minority Children*, LAW & CONTEMP. PROBS., Summer

objection to integrating social science with criminal justice decisions. Instead, this critique is simply an objection to bad social science. Admittedly, concerns about the quality of social science research would have more traction if judges were incapable of discerning good from bad research. Judges and lawyers, for the most part, are not trained to assess social science evidence. But the record does not point clearly to complete incapacity. There are examples that go both ways. The Supreme Court has quite famously misanalyzed empirical jury study research concerning the relationship between the quality of deliberation and jury size.¹⁰ Yet, there are numerous cases in which the Supreme Court and lower courts have indicated facility with even complex statistical research. A prominent example is the lower court's assessment of a statistical study assessing racial difference in the imposition of the death penalty in Georgia in the *McCleskey* line of cases.¹¹

Whether or not judges currently are able to handle social science research with expert ease, judges increasingly have suggested in opinions that they would *like* to see empirical work that is relevant to the issues presented to them—especially in the criminal procedure area.¹² This important development is natural and foreseeable. Modern criminal procedure emerged in a legal culture shaped by American realism and has been driven by empirical and pragmatic concerns about police practices, police-civilian encounters, crime prevention and detection, and civil liberties. Concern about these issues has led to a “balancing-of-interests” analysis that is the hallmark of deciding Fourth Amendment cases, and Fifth and Sixth Amendment cases as well.¹³

Balancing analyses lend themselves to assessment of empirical research. The Supreme Court, in deploying such analyses, often makes empirical statements. The Court strikes down rules of criminal proce-

1978, at 57, 75 (reviewing studies conducted after *Brown* and concluding that “there is no need to assume that blacks suffer from low self-esteem or low aspirations, whether they attend segregated or desegregated schools”); Nancy H. St. John, *The Effects of School Desegregation on Children: A New Look at the Research Evidence*, in RACE AND SCHOOLING IN THE CITY 84, 90–92 (Adam Yarmolinsky et al., eds., 1981) (asserting all children will benefit from more integrated schools, but stressing the need for more long term studies to identify conditions necessary for successful integration).

10. See Bernard Grofman, *The Slippery Slope: Jury Size and Jury Verdict Requirements—Legal and Social Science Approaches*, LAW & POL’Y Q. 285 (1980) (arguing against the use of social science research in jury size cases because the Supreme Court is unable to use the research well); Paul Lermack, *No Right Number? Social Science Research and the Jury-Size Case S*, 54 N.Y.U. L. REV. 951 (1979) (same).

11. While the lower courts and the Supreme Court ultimately decided not to rely on the studies, see *infra* text accompanying notes 41–49, the lower court in particular clearly demonstrated the capacity to assess the research. See *McCleskey v. Kemp*, 580 F. Supp. 338, 350–80 (N.D. Ga. 1994).

12. Recently, the Court has made much of the fact that decisions in two separate cases could depend on answers to empirical questions which were not currently available. *Wardlow v. Illinois*, 528 U.S. 119, 124–25 (1984); *Martinez v. Court of Appeal of Calif.*, 528 U.S. 152, 163–66 (2000) (Breyer, J., concurring).

13. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (discussing the prevalence of balancing in constitutional jurisprudence generally); Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 736–40 (2000) (discussing balancing in criminal procedure).

ture because they “fail to protect privacy . . . and impede effective law enforcement.”¹⁴ The Court upholds other rules because they embody a “carefully crafted balance designed to fully protect *both* the defendant’s and society’s interests.”¹⁵ These statements, while obviously empirical, are made by the Court with absolutely no attempt to assess relevant empirical evidence. Yet, the empirical foundation of these statements appears to be intended by the Court to lend authority to the decisions. It is likely that these kinds of decisions actually would be more authoritative—at least they would be more credible and legitimate¹⁶—if the Court relied on empirical research to back up empirical statements.

Still, the fact that empiricism could be useful and even produce great benefits in criminal justice decision making does not fully answer the quality and competence critics. To make my argument, I have assumed that there is at least some well done and relevant work to be utilized, but even this claim requires decision makers to distinguish the well done and useful work from that which is poorly done and less relevant.

A set of guidelines and a group of litigants more eager about empiricism could helpfully test the unstated empirical assumptions of those who argue that courts are incapable of utilizing social science to a greater extent than they currently do. In the article that originated the concept of courts relying upon social authority, John Monahan and Laurens Walker offer a set of guidelines for courts to use to assess social science research.¹⁷ Monahan and Walker point to critical review as a mechanism by which courts could evaluate social science research, and they discuss methods by which courts could assess the validity and generalizability of social science findings—including the question of research sponsorship.¹⁸ Monahan and Walker point out, moreover, that courts are unlikely to undertake these evaluations by themselves and on their own initiative. The authors suggest instead that the adversarial process itself will address some concerns about the ability of courts to adequately appraise social science research.¹⁹

Once courts, and the Supreme Court in particular, more forthrightly indicate an interest in social science relevant to criminal procedure questions, litigating parties will be quick to make arguments regarding the strengths and weaknesses of empirical research.²⁰ It also follows from my

14. *California v. Acevedo*, 500 U.S. 565, 576 (1991); *see also Illinois v. Gates*, 462 U.S. 213, 237 (1983) (rejecting *Aguilar-Spinelli* because it “cannot avoid seriously impeding the task of law enforcement”); *United States v. Watson*, 423 U.S. 411, 431 (1976) (“[A] constitutional rule permitting felony arrests only with a warrant or in exigent circumstances could severely hamper effective law enforcement.”).

15. *Moran v. Burbine*, 475 U.S. 412, 433 n.4 (1986).

16. Meares & Harcourt, *supra* note 13.

17. *See Walker & Monahan, supra* note 5, at 498–508.

18. *See id.* at 499–507.

19. *See id.* at 512.

20. *See Dorf, supra* note 7, at 56 (claiming that parties and amici will follow the lead of the Court if it begins to rely to a greater extent on policy and empirical arguments).

argument here that social scientists, and the professional organizations to which they belong, should be more involved in writing amicus briefs on issues within their competence, which would further add to the strength and validity of social science research presented to the Court.²¹ The basic point is that if perceived weakness of research is a primary block to the greater use of social science in adjudication of normative criminal justice questions, then there is an obvious strategy to adopt to clear this obstruction. The nature of the quality and competence objection is not against empiricism per se; rather, it is grounded in pessimism about the likelihood of creating optimum conditions for the use of this evidence. As conditions change—as courts become more receptive and lawyers better trained, etc.—this objection must fall away. Or, the form of the objection must change.

II. OBJECTION TWO: LESS (EMPIRICAL) KNOWLEDGE IS BETTER

While the previous objection to the greater use of empiricism in criminal law and procedure is tied to the potential weakness of research and a perceived inability of decision makers to detect critical defects, one could lodge objections to linking empiricism to normative criminal justice questions even after assuming both that the research to be relied upon by courts meets the standards of relevant academic communities and that the particular court is capable of discerning its relevance. One objection of this kind is related to the incompatibility with long-held conventions of the criminal legal process of the idiom of quantification to which empirical approaches often lead. That is, some argue that reliance on empirical evidence (I use this term in a very general sense) corrupts decision making in the criminal law arena in ways that undermine how we typically conceptualize the proper operation of the criminal justice system. While the legal scholars who have explored this argument have focused their attention primarily on the relationship between rules of evidence and probabilistic decision making,²² I will demonstrate that the distrust of quantification displayed in this research can be abstracted from this context.

In an attempt to explain the court's rejection of probabilistic evidence in the famous "Blue Bus" case,²³ Professor Charles Nesson has

21. See James R. Acker, *Social Science in Supreme Court Criminal Cases and Briefs: The Actual and Potential Contribution of Social Scientists as Amici Curiae*, 14 *LAW & HUM. BEHAV.* 25, 42 (1990).

22. See, e.g., Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 *HARV. L. REV.* 1187 (1979) [hereinafter Nesson, *Permissive Inferences*] (explaining that quantification of errors in criminal adjudication may undermine public respect for trial verdicts rendering them illegitimate); Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 *HARV. L. REV.* 1329 (1971) (arguing that the utility of mathematical methods in the legal process, even if leading to greater accuracy, conflicts with other important values in the legal process).

23. The "Blue Bus" case is a famous hypothetical in evidence that is based on *Smith v. Rapid Transit, Inc.*, 58 N.E.2d 754 (Mass. 1945). The hypothetical assumes an accident between a person

claimed that the aim of the fact-finding process in a criminal trial is not simply to establish with a high probability that an event occurred; rather, it is to generate *acceptable* verdicts by ensuring that the verdict becomes a statement about past events.²⁴ For some purposes, perception may be more important than reality; thus, verdicts that represent conclusions that certain sets of facts occurred at a high level of probability may not be acceptable verdicts.²⁵ In one illustration of this thesis, Nesson offers as an example a case involving twenty-five prisoners who are in an enclosed prison yard.²⁶ Twenty-four of the prisoners collaborate in killing a prison guard, while one hides and is not involved. If we know nothing else about the prisoners, we can be confident that if we select any one of the twenty-five prisoners at random, there is a ninety-six percent chance that the prisoner selected participated in the murder. In fact, we could go further. If “beyond a reasonable doubt” were defined specifically at a ninety-five percent probability of guilt, it is possible, relying only upon naked statistical evidence, to convict all twenty-five prisoners, *while being certain that one prisoner is innocent of the crime.*

Nesson argues that the criminal justice system seeks to produce “authoritative finality” of judgments to encourage public deference to jury verdicts.²⁷ This deference is critical because it is this deference that produces compliance with legal rules through internalization of them.²⁸ Nesson explains that people who conform their conduct to an internalized code are “upright and law-abiding citizens,” while people who act on the basis of risk calculations without internalizing the guilt of breaking rules are probably criminals.²⁹ Nesson concludes that deterrence to judgments is promoted by ensuring that decision makers rely on such a wide range of information in the context of secret deliberations that the public is unaware of precisely on what basis a verdict is reached.

This argument depends on the idea that complexity and hidden decision-making processes force the public as outsiders to defer because, as outsiders, we are unable to criticize any particular judgment with specificity and acuity. The problem with the prisoner hypothetical, then, is the clarity with which the bare statistical case presents itself. There are no ambiguities or complexities. There is simply a naked bet that any in-

driving down a dark two-lane road on which an oncoming bus is traveling. The bus is speeding down the center lane of the road. The driver sees that the oncoming vehicle is a bus, but he cannot identify it. The car driver swerves to miss and hits a tree, and the bus speeds by without stopping. The injured car driver later sues the Blue Bus Company on the basis of the fact that the company owns and operates eighty percent of the buses that run on the road where the accident occurred. The question is whether the plaintiff can win. See Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1378–79 (1985) [hereinafter Nesson, *Acceptability of Verdicts*] (describing the hypothetical).

24. Nesson, *Acceptability of Verdicts*, *supra* note 23, at 1359.

25. *Id.* at 1378.

26. See Nesson, *Permissive Inferences*, *supra* note 22, at 1192–99.

27. See Nesson, *Acceptability of Verdicts*, *supra* note 23, at 1359.

28. See *id.* at 1360–61.

29. *Id.* at 1362.

dividual, whether an insider on the jury or not, can make that any one of the twenty-five prisoners committed the crime at a ninety-six percent probability. In the prisoner case, all are aware—painfully aware—of the precise risk of convicting an innocent man, and this explicit quantification is inconsistent with a fuzzier, ambiguous definition of beyond a reasonable doubt, which Professor Nesson states is necessary in order for decision makers to achieve consensus about any particular judgment of criminal guilt and to thereby induce the public to defer to this judgment.³⁰

At base, the argument is simply this: we may compromise truth and accuracy for less knowledge of the inner workings of system machinery in order to enhance the effectiveness of the system. This is an argument about institutional costs, not moral ones. Importantly, it is an argument about preservation of the *existing* system through a trade-off of accuracy for legitimacy, where legitimacy is defined as public acceptance.

That there may be a potential trade-off between accuracy and legitimacy, broadly defined, in the administration of criminal justice is not a new idea. Constitutional guarantees of due process presuppose precisely the kind of trade-off that is implicit in Professor Nesson's example. We understand that to protect a certain vision of due process in the American criminal justice system, we will likely get less "accuracy" in certain cases. That is, we may very well be willing to tolerate more slack in our ability to separate the guilty from the innocent in order to promote individual liberty, and we understand that this trade-off may well compromise the pursuit of crime control.³¹ Some might argue that heightened constitutional requirements, such as the beyond a reasonable doubt standard, represent a preference for more accuracy rather than less in the criminal justice system. In a sense that is right—but only with respect to one type of error. By insisting on a high burden of proof and other constitutional guarantees that favor the defendant, we achieve greater accuracy in that we are less likely to convict innocent criminal defendants. However, these same rules promote *less* accuracy in that the rules increase the likelihood that criminal defendants who are guilty will be acquitted. That we choose rules that result in a high number of cases in this latter category of error compared to the number of cases in the first category is the price of written constitutional imperatives to which we cleave for moral reasons (more on this below), but also because of a

30. In making this point, Professor Nesson echoes the opinion of the Court in *In re Winship*, 397 U.S. 358 (1970). In discussing the importance of the reasonable doubt standard, the Court stated "[i]t is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.* at 364.

31. Due process guarantees do make it harder for government agents to identify, charge, prosecute, and punish criminal offenders. See generally Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 113–15 (1964). Perhaps this is a cost of crime control in the way that Packer describes it. Professor Nesson argues, and I agree, that there is a vision of effective law enforcement that depends on public deference to legitimate authorities which is not inconsistent with the provision of more due process guarantees. To the contrary, it is entirely consistent with it.

sense that they *work* as an institutional matter to achieve the stated goals of the criminal justice system, including crime control.³²

It is critical to see that Nesson's argument about ideal institutional design is a thoroughgoing empirical claim. His claim is that people will not accept criminal judgments as long they are not fully aware of how the decision makers who impose such judgments came to these conclusions and of the error rates in these judgments across time.³³ This might be true, or it might not.³⁴ Whatever the empirical reality, Nesson's argument against transparency in the criminal justice system presupposes the possibility that we *should* choose to enhance the power of the law's substantive message by ignoring real evidence of systemic problems, because we may learn that people are more likely to defer to the power of the law when they are not forced to confront evidence of these problems.

Even if one accepts Nesson's premise that concealing empirical contingency or inaccuracy in the administration of criminal law helps to uphold the legitimacy of law, one could easily reject this premise on normative grounds. One could argue that it is simply never acceptable to achieve legitimacy by ignoring facts. This is the conclusion that researchers Saks and Kidd reached in their searing criticism of Laurence Tribe's work cited above.³⁵ Or, one could take a more nuanced position and argue that the decision to promote legitimacy of legal processes by suppressing empirical information is contingent upon the intrinsic moral worth of the institutions that one is legitimating. While many might agree that Nesson's arguments have power in the example on which he relies—assessment of reasonable doubt—there are contexts that test the assumptions that underlie his argument. The death penalty and the rules the Supreme Court has adopted to govern the constitutional imposition of these sentences test the assumptions that Nesson makes on moral grounds. In any event, whether or not one agrees or disagrees with Nesson on moral grounds, an evaluation of the rules surrounding the implementation of the death penalty clearly challenges the empirical premise of Nesson's argument.

One might describe the nature of the Supreme Court's move from governance of death sentences through the scheme set out in *Furman v. Georgia*³⁶ to the scheme outlined in *Lockett v. Ohio*³⁷ as a deference-

32. Compare the discussion of the relative frequency of these two types of errors in *In re Winship*, 397 U.S. at 371–72 (Harlan, J., concurring).

33. Put another way, people will eat sausage as long as they do not really know how it is made.

34. For an empirical study of the acceptability of knowledge and errors by juries, see Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 350 (1988) (testing Nesson's thesis that explicit knowledge of error trade-offs in legal fact-finding can lead to erosion of the system's legitimacy in the eyes of the public and finding strong support for jury system despite knowledge of relatively frequent error in verdicts).

35. Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123 (1981).

36. 408 U.S. 238 (1972).

encouraging move according to the terms of Professor Nesson's theory.³⁸ Under *Furman*, the constitutionality of a death sentence depended upon whether an outside observer could discern the basis by which some defendants were selected to receive the penalty and some were not. Justice Potter Stewart wrote in *Furman* that, "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."³⁹ In contrast, the regime ensconced by *Lockett* vaunts great discretion over transparency of decision making, as it allows decision makers to consider *any factor* offered by the defendant in mitigation of his death sentence.⁴⁰ If Professor Nesson is correct, the *Lockett* scheme encourages the public to defer to the decision of juries to impose the death penalty precisely because it is not possible to verify exactly why they decided not to impose the sentence. Less information is better.

An example of the "less information is better" approach with respect to the imposition of the death penalty can be found in *McCleskey v. Kemp*.⁴¹ In *McCleskey*, as is well known today, McCleskey challenged his death sentence by claiming that his death sentence was unconstitutionally imposed.⁴² To make his case, McCleskey offered a detailed empirical study indicating that in Georgia black defendants whose victims were white received the death penalty more often than white defendants whose victims were black.⁴³ McCleskey argued that this study indicated that Georgia's capital-sentencing regime violated the Fourteenth and Eighth Amendments.⁴⁴ A majority of the Court disagreed. The Court accepted the validity of the empirical study, but declined to accept the statistical proffer to support an inference that any of the decision makers in McCleskey's case, or the state as a whole, acted with discriminatory purpose in violation of the Fourteenth Amendment.⁴⁵ The Court similarly held that the empirical study did not support McCleskey's claim that his death sentence was imposed in an arbitrary and capricious manner in violation of the Eighth Amendment, even though McCleskey could point to other similarly situated defendants who did not receive the death penalty.⁴⁶ Justice Powell, writing for the Court, stated that the nature of discretion in the American criminal justice system allows the jury to extend mercy in some cases and not others based on the particularized circumstances of the crime and the defendant.⁴⁷ An empirical study, the

37. 438 U.S. 586 (1978).

38. See Nesson, *Permissive Inferences*, *supra* note 22, at 1195 n.21 (offering with approval the jurisprudential evolution from *Furman* to *Lockett* as an example of the promotion of jury secrecy).

39. 408 U.S. at 309.

40. 438 U.S. at 604-05.

41. 481 U.S. 279 (1987).

42. *Id.* at 286.

43. See *id.* at 311. The now famous study is known as the Baldus study.

44. See *id.*

45. See *id.* at 312-13.

46. See *id.*

47. See *id.* at 311.

Court reasoned, cannot possibly capture the myriad factors relied upon by a jury deciding whether to impose the death penalty when “individual jurors bring to their deliberations qualities of human nature and varieties of human experience the range of which is unknown and perhaps unknowable.”⁴⁸ There is a remarkable parallel between this sentence and those that immediately follow and the argument offered by Professor Nesson. Preservation of the unknowable through the privileging of discretion is a good—or at least *right*—thing to do in the dispensing of criminal justice.⁴⁹

According to the *McCleskey* Court, discretion and all of the unknowables attendant to it are integral to the capacity of the American criminal justice system to provide individualized justice.⁵⁰ Commitment to this principle means that even rigorous, generalizable empirical studies must give way to preserve our existing system because such studies center on averages rather than particular cases. And we must commit to this principle, claimed the *McCleskey* Court.⁵¹ The Court asserts that the consequences of failing to commit put the preservation of the existing system at serious risk.⁵² It is worth quoting the opinion extensively:

Two additional concerns inform our decision in this case. . . . McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. . . . If we accepted McCleskey’s claim that racial bias had impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since McCleskey’s claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys or judges. Also, there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could—at least in theory—be based upon any arbitrary variable, such as the defendant’s facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decision making. As these examples illustrate,

48. *See id.* (quoting *Peters v. Kiff*, 407 U.S. 493, 503 (1972)).

49. Contrast this position to Justice Thomas’s, who has suggested that a mandatory death penalty scheme would be more fair than the scheme promoted by *Lockett*. *See Graham v. Collins*, 506 U.S. 461, 485–87 (1993) (Thomas, J., concurring).

50. 481 U.S. at 303–08.

51. *Id.*

52. *Id.* at 314–16.

there is no limiting principle to the type of challenge brought by McCleskey. The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not “plac[e] totally unrealistic conditions on its use.”⁵³

In the text above, the Court states forthrightly the theoretical fear named by Professor Nesson. The Court’s acceptance of McCleskey’s empirical argument would undermine the criminal justice system as we know it.

But is the *McCleskey* Court correct? Would reliance on the kind of statistical evidence proffered by McCleskey undermine the criminal justice system? Or, to couch the question in Professor Nesson’s terms, would the public no longer accept verdicts produced by the system because the “errors,” read racial disparities, in the imposition of sentencing judgments were demonstrated in bold relief? If so, and if preservation of the system as it exists is necessary to achieve compliance with the law, then must the Court reject a standard for judging infirmities that depends on such stark evidence for the institutional reasons Justice Powell offers? The last question is a decidedly normative one, but placed in pragmatic context, one can see how its answer depends on the resolution of Professor Nesson’s hypothesis—an assertedly empirical claim. Obtaining a completely definitive answer to the hypothesis is extremely difficult, but there are intriguing data suggesting that at least part of the Nesson thesis is correct. Acceptance of the death penalty appears to be related to the kind of information people have about error rates in the imposition of the penalty.

While support for the death penalty has remained remarkably stable over time,⁵⁴ there is evidence that as people become more aware about the way in which the penalty is implemented, support for capital punishment softens. In March of 2000, a Gallup poll revealed the lowest level of support for the death penalty in twenty years—only fifty-eight percent of Gallup respondents registered support for the penalty in contrast to seventy-six percent of respondents registering support in 1994.⁵⁵ What accounts for the change? The answer seems to be more information—specifically more information about systemic errors. While the downward trend appears to be connected to striking “case studies”—one Illinois death row inmate, Anthony Porter, was released two days before

53. *Id.* at 314–19.

54. See Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans’ Views on the Death Penalty at the Turn of the Century*, in *THE MODERN MACHINERY OF DEATH: THE FUTURE OF CAPITAL PUNISHMENT IN AMERICA* (Stephen P. Garvey ed., 2001) (forthcoming 2002).

55. See Ken Armstrong & Steve Mills, *Death Penalty Support Erodes; Many Back Life Term as an Alternative*, CHI. TRIB., Mar. 7, 2000, at A1.

a scheduled execution⁵⁶—it is apparent that the public's willingness to consider distributional factors that can be uniquely informed by generalizable empirical work is another reason for the downward trend in support. A Chicago Tribune Poll conducted in February of 2000 demonstrated that sixty-two percent of respondents favored restrictions on the death penalty in absence of certain restrictions and procedural protections.⁵⁷ The poll data demonstrate forcefully that people care a great deal about *who* and *how* questions with respect to the death penalty—issues at the heart of the *McCleskey* case. The poll data, moreover, are suggestive of the Nesson thesis. To the extent that the unknowables of discretion are revealed, the public is less willing to support a component of the criminal justice system to which they claim commitment—the death penalty.⁵⁸

There is, however, a second part of Nesson's argument. His claim is that without public acceptance of jury verdicts, there will not be widespread internalization of legal rules. To generalize, diminished support for the criminal justice system leads to diminished respect for the law and less compliance. Of course, I do not begin to claim here that lower levels of support for the death penalty will lead to higher crime. Nonetheless, more general data is available to assess Nesson's second claim regarding the connection between system legitimacy and compliance with the law. Social psychologists have shown that voluntary compliance with the law is associated with perceptions of legitimacy of government and government actors. By pointing to normative bases for compliance rather than instrumental ones, these researchers have connected voluntary compliance with the law to the fact that individuals believe the law is "just" or because they believe that the authority enforcing the law has the right to do so.⁵⁹ These factors are considered normative because individuals respond to them differently from the way they respond to rewards and punishments. In contrast to the individual who complies with the law because she is responding to externally imposed punishments, the individual who complies for normative reasons does so because she feels an *internal* obligation.⁶⁰ It is "[t]he suggest[ion] that citizens will voluntarily

56. See Gross & Ellsworth, *supra* note 54, at 35–36. The emergence of publicized case studies of death penalty shortcomings creates a "new script" which has "made salient issues that used to be ignored, and has changed some beliefs related to death penalty attitudes." *Id.*

57. See Armstrong & Mills, *supra* note 55, at A1.

58. Thus the data appear to confirm the so-called Marshall hypothesis. Writing in *Furman*, Justice Thurgood Marshall argued that public supporters of the death penalty are largely uninformed about the effects and conditions of the actual imposition of the death penalty. He then argued that as the public becomes more informed, support for the penalty will weaken so that only people who support death sentences out of a strong commitment to retributivism will continue to support it. *Furman v. Geosna*, 408 U.S. 238, 360–69 (1971). Both parts of this thesis have been empirically supported in systematic studies. See Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171, 195 (confirming both aspects of the hypothesis).

59. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3–4 (1990).

60. See *id.* at 24.

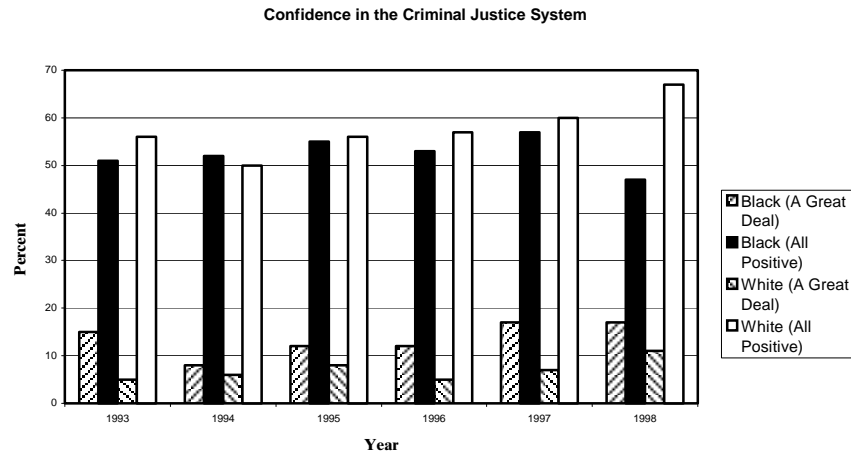
act against their self-interest [that] is the key to the social value of normative influences.”⁶¹

The research I have just mentioned confirms Professor Nesson’s hypothesis regarding the important connection between perceptions of government legitimacy and compliance with rules, but the primary contribution of Nesson’s work was to demonstrate the importance of preserving the unknowable black box nature of the system in order to support legitimacy. We could make progress towards testing this contribution by demonstrating that more information about the distribution of sentences along racial lines will lead to less support for the criminal justice system generally in the way that more information about the distribution of the death penalty has apparently led to less support for capital sentences. Importantly, less support for particular aspects of the criminal justice system does *not* necessarily lead to lower levels of perceived system legitimacy.⁶²

Psychologist Tom Tyler has shown that people’s feelings of obligation to obey the police and the courts are generally quite high, even when those surveyed register widespread dissatisfaction with the law and with legal authorities.⁶³ In fact, the work of social psychologists implies a con-

61. *Id.*

62. Public opinion data on this point is intriguing. Gallup has for several years asked respondents about their level of confidence in selected institutions, including the criminal justice system. Similar percentages of whites and blacks register either a great deal of support, or quite a lot of confidence in the criminal justice system. Blacks, however, register the most intense support. See Fig. 2. Graph based on polls of confidence in the criminal justice system conducted by Gallup and found in the Roper Center for Public Opinion Research database. (3/93, 3/94, 4/95, 5/96, 7/97, and 7/98).



63. See Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 871 (1997); Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847, 861 (1998) (finding that “dissatisfaction with the performance of legal authorities does not lessen compliance with the law”); Tom R. Tyler, *The Psychol-*

clusion that is at odds with the Nesson thesis. To the extent that empiricism improves the transparency of the system or enables individuals to better hold criminal justice system actors more accountable, legitimacy of the system may well *increase*.⁶⁴

Thus, if institutional concerns motivated the *McCleskey* Court to reject the defendant's empirical study, the Court may well have made the wrong choice. The social psychological research reviewed above suggests that a commitment to the introduction of more, rather than less, empirical information into the process of assessing the implementation of punishment in the criminal justice system likely could lead to higher levels of perceived system legitimacy, which in turn could lead to more compliance with legal rules and decisions.

Of course, the *McCleskey* decision can be criticized on other grounds. At the heart of the decision is a conclusion that a choice can be made to preserve the existing criminal justice system with reference to purely instrumental concerns. Moral arguments that are independent of consequential concerns may compel a different conclusion.

III. OBJECTION THREE: EMPIRICAL INFORMATION IS IRRELEVANT

Issues of morality lead to the third objection to empiricism in criminal law and procedure. Objectors in this camp can assume that the relevant empiricism meets scientific standards and has something to do with the normative question being asked. Nonetheless, these objectors claim that empiricism, however it is done, is irrelevant to the answers we look for in creating and interpreting criminal law and procedure. They argue that because the values pursued in the criminal justice system are normative, they ought not be analyzed through social science methods. George A. Fletcher, for example, has said that the "field of criminal theory should be thought of more as a humanist inquiry than as a social science. The questions that concern us are not empirical."⁶⁵ Professor Fletcher goes on to say that of course it is important to know how the criminal law works. But he concludes that such descriptive enterprises are not at the heart of the theory, which is concerned with moral and political philosophy. Moral philosophy, he argues, is integral to issues of individual guilt and punishment, while political philosophy deals with collective blaming and state punishment.⁶⁶

ogy of Public Dissatisfaction with Government, in TRUST IN GOVERNMENT (Elizabeth Theiss-Morse & John Hibbing eds., 1995).

64. See Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 408-15 (2000) (drawing on social psychology and providing examples of "norm-based" criminal justice policy through which legitimacy could be enhanced through improvement in accountability and transparency).

65. George P. Fletcher, *The Nature and Function of Criminal Theory*, 88 CAL. L. REV. 687, 689 (2000).

66. See *id.* at 690.

What would Fletcher have to say about the work of Paul H. Robinson and John M. Darley, who have investigated whether the moral intuitions of ordinary people match up with those of the criminal law theorists who penned the Model Penal Code (the Code) with respect to tough criminal law questions? Robinson and Darley demonstrate fairly convincing gaps between the Code and the subjects of the experiment.⁶⁷ While an empirically attentive criminal law scholar would say this work matters (or at least would attempt to explain the extent to which the study achieves its goal),⁶⁸ one guesses that a scholar like George P. Fletcher would say this data is just irrelevant to the making of criminal law.⁶⁹

In a similar vein, some scholars who think about constitutional rights are skeptical of the role of empiricism in the articulation of rights. A great deal of this skepticism is born of the disagreement of these scholars with the balancing analysis that the Supreme Court has adopted in much of its constitutional jurisprudence—especially concerning criminal procedure questions. For example, the Supreme Court has described constitutional criminal procedure as an assessment of the relevant balance between liberty and order.⁷⁰ Because the aforementioned theorists believe that quantification of the protected interests such as privacy and liberty is almost impossible, they are especially skeptical of those who try to think about assessing a relevant balance between liberty and order for purposes of the Fourth Amendment, or the Fifth and Sixth Amendments, through some measure of liberty and of order.⁷¹ They believe, moreover, that any attempt to quantify these interests and hold them commensurate with safety in a balancing analysis will inevitably fail to adequately protect the valued constitutional interest. Laurence Tribe, for example, has argued, “in that kind of calculus, the costs will always seem weightier than the benefits. The benefits will be elusive, intangible

67. See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995).

68. See Dan M. Kahan, *Lay Perceptions of Justice vs. Criminal Law Doctrine: A False Dichotomy?*, 28 HOFSTRA L. REV. 793, 793 (2000); Christopher Slobogin, *Is Justice Just Us? Using Social Science to Inform Substantive Criminal Law*, 87 J. CRIM. L. & CRIMINOLOGY 315 (1996) (book review).

69. To be clear, I have no idea whether George P. Fletcher believes that particular study by Robinson and Darley is irrelevant to criminal law. My point is that one who thinks that defining criminal law is a humanistic enterprise is likely to conclude that the Code drafters need not attend much, if at all, to the predilections of the public on any issue and tough ones especially.

70. *Kansas v. Hendrick*, 521 U.S. 346 (1997).

71. Examples are numerous. See, e.g., Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199 (1993) (advocating formalism out of a concern that the Court's pragmatic balancing systematically tilts against protection of individual interests); Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 436–37 (1987) (analyzing the core holdings of *Miranda* without reference to law enforcement interests); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 121 (1988) (implying that the contours of the Fifth Amendment are to be determined absent a balancing of law enforcement interests).

and diffuse.”⁷² Thus, many in this camp reject cost-benefit analyses in criminal procedure and the empiricism that seems to accompany such analyses.⁷³

FIGURE 1

A figure illustrates the intuition.

Evidence	Notion of Rights	
	Instrumental	Deontological
Social Science Empiricism	×	
Normative Analysis		×

This figure suggests that those who conceive of constitutional rights in instrumental terms ought to be very open to empiricism that is relevant to those rights in order to determine their scope. In keeping with this, Bernard Harcourt and I have advocated the use of more empiricism in constitutional criminal procedure cases in part because of the conception of a constitutional right in this area that we believe is appropriate:

Defining the scope of a criminal procedural right as a process of detecting the appropriate balance between societal interests in safety, on the one hand, and freedom from unnecessary government intrusions, on the other, envisions rights as flexible and contextual, as accommodating of changes in political and social climate, and as political and instrumental.⁷⁴

On the other hand, eminent theorists such as Ronald Dworkin have rejected precisely this conception of a constitutional right. Dworkin has quite famously called individual rights “political trumps” not subject to be balanced against numerous other interests and claims.⁷⁵ Balancing analyses imply that relevant interests must be measured against one an-

72. Laurence H. Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 157 (1984).

73. See, e.g., Albert W. Alschuler, “Close Enough for Government Work”: *The Exclusionary Rule After Leon*, 1984 SUP. CT. REV. 309; Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather Than an “Empirical Proposition”*, 16 CREIGHTON L. REV. 565 (1983).

74. Meares & Harcourt, *supra* note 13, at 744–45. I want to emphasize here that Bernard Harcourt and I do not promote a purely instrumental approach to the articulation of rights in criminal procedure, as *Transparent Adjudication* and our separate work elsewhere make clear. Our position acknowledges the validity of the spectrum of analyses from the upper left-hand box to the lower right-hand box in Figure 1.

75. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977). The quote in full is: “Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.” *Id.*

other in some way. This measurement process, in turn, suggests or even welcomes the possibility of empirical research. The trump metaphor for rights rejects these comparisons and implies a reasoning about rights in ways that disavow the relevance of empirical evidence.⁷⁶

Figure 1 is not confined to reasoning about constitutional criminal procedure. With respect to reasoning about the criminal law we can see how one who believes that the point of criminal law is to deter prohibited behavior should obviously welcome empirical evidence that justifies her choice of rules in instrumental terms.⁷⁷ In contrast, a committed retributivist can assert the importance of charging and punishing a murderer even if that person is the last person living in a particular community so that the notion of deterrence, and empirical evidence relevant to deterrence, is completely irrelevant.⁷⁸

The task is to explain to those committed residents of the lower right-hand quadrant of my figure why they ought to welcome empiricism in criminal law and procedure decision making. Their arguments do not make much room for this evidence, but I can offer an instrumental reason why this group ought to be more supportive of empiricism in criminal justice decision making. Empiricism will make criminal justice decisions—constitutional criminal procedure decisions in particular—more transparent. Adjudication that expressly and openly discusses the normative judgments at the core of constitutional criminal procedure is transparent. Reference to relevant social science and empirical data creates transparency because these references ground factual assertions. As a result, interpretive choices are more clearly reflected. Increased attention to empirical evidence will not guarantee the *right* answers in criminal procedure cases, but use of empirical evidence will produce a *clearer* picture of the existing constitutional landscape and spotlight the normative judgments at the heart of criminal procedure cases. Given that the court already has committed to a form of constitutional adjudication that is congenial to empiricism—balancing—foes of this form of determining constitutional rights ought to advocate empiricism in order to better hold the Court accountable and open to their criticism.⁷⁹

76. See Ronald Dworkin, *Social Sciences and Constitutional Rights—the Consequences of Uncertainty*, 6 J.L. & EDUC. 3, 4–5 (1977) (explaining the importance of interpretative judgments in constitutional decision making in a way that distinguishes the relevance of social science from this enterprise).

77. Bentham has summarized the purpose of criminal punishment in utilitarian terms. He says punishment ought not to be inflicted where punishment is (1) groundless (no mischief to prevent); (2) inefficacious (where it cannot prevent mischief); (3) too expensive (where mischief produced is greater than would otherwise be prevented); (4) where it is needless (where punishment is not necessary to prevent mischief). See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 171 (1848).

78. I refer here to Kant's famous example. See IMMANUEL KANT, THE PHILOSOPHY OF LAW 1994–98 (W. Hastie trans., 1887).

79. For a more extensive treatment of how empiricism can promote greater transparency of Court decisions and greater accountability of the Court to critics, see Meares & Harcourt, *supra* note 13, at 735.

For example, in *United States v. Leon*,⁸⁰ the question was whether evidence obtained in a search of the defendant's home by police officers, who relied on a search warrant that ultimately was found to be invalid, should be excluded. The Court chose to resolve the question by "weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence."⁸¹ The benefit of admitting such information is primarily that it brings to the court's attention inherently trustworthy evidence that supports the conviction of a criminal offender. Such convictions promote the maintenance of order. The costs, of course, are bound up in the reasons for having and enforcing the exclusionary rule—preservation of the integrity of the judicial forum and deterrence of police misconduct. The *Leon* Court emphasized the goal of deterring police misconduct, and ultimately ruled that the exclusion of evidence in these cases would not advance that goal.

In reaching its conclusion, the Court relied on social science studies. Justice White, writing for the majority, pointed to nascent research on the effect of the exclusionary rule on the disposition of felony arrests, and he noted that the operation of the exclusionary rule appeared to result in the nonprosecution or nonconviction of only a small percentage of individuals. But he emphasized that, "the small percentages with which [the researchers] deal mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures."⁸² Justice White then concluded that the potential for large numbers of felons to go free militated against application of the exclusionary rule where there was no basis—and where the Court had been offered none—"for believing that exclusion of evidence . . . will have a significant deterring effect on the issuing judge or magistrate."⁸³ Justices Brennan and Marshall in dissent emphasized concern for the integrity of the judicial forum as the primary reason to reject a good faith exception to the exclusionary rule. The dissenters also pointed to empirical evidence—the same studies relied upon by the majority⁸⁴—to argue that the costs of the exclusionary rule were "quite low."⁸⁵ By point-

80. 468 U.S. 897 (1984).

81. *Id.* at 907.

82. *Id.* at 908 n.6.

83. *Id.* at 916.

84. Both the majority and dissent relied upon FLOYD F. FEENEY ET AL., NATIONAL INSTITUTE OF JUSTICE ARRESTS WITHOUT CONVICTIONS: HOW OFTEN THEY OCCUR AND WHY (1983); NAT'L INST. OF JUSTICE, THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA (1982); U.S. GEN. ACCOUNTING OFFICE, REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES: IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS (1979); Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611; Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 A.B.F. RES. J. 585.

85. *Leon*, 468 U.S. at 950. "Contrary to the claims of the rule's critics that exclusion leads to 'the release of countless guilty criminals,' these studies have demonstrated that federal and state prosecu-

ing to evidence suggesting that the costs of the exclusionary rule were quite low, the dissenters were in a better position to highlight the importance of their preferred justification for the rule—preservation of the judicial forum—which is a rationale that does not depend on the effectiveness of the exclusionary rule as a deterrent to unconstitutional law enforcement conduct.

I raise *Leon* as an example, without offering my views of whether the majority or the dissent made the stronger case. My goal in this essay is to demonstrate that the use of empiricism will not inevitably favor one conclusion over another or one ideological predisposition over another. What is important to attend to is the *form* of the Court's inquiry in *Leon* and its ready acceptance of relevant "social authority" to inform and guide its balancing analysis.

While it is perhaps easiest to see the relevance of empiricism as a strategy of critique in criminal procedure, it is important to see that this research is also relevant in the criminal law area. The notion of provocation is one of the mechanisms used in the criminal law to perform the hard work of grading the level of the defendant's culpability in a homicide case. This key concept provides a particularly poignant example of how empiricism can be used for critical purposes. English scholar Jonathan Herring has pointed out that there are three instances in which a defendant's characteristics could be considered in determining whether, as a legal matter, provocation is present to mitigate the defendant's punishment for a homicide: (1) "whether the defendant was provoked to lose self control"; (2) to determine "the gravity of the provocation to the reasonable person"; and (3) to assess the level of self control to be expected of a reasonable person.⁸⁶ Empirical research is obviously key to thinking about the first two stages of the provocation inquiry. Large scale, generalizable, statistical research seems an especially nice fit with the analysis at stage two. Yet, in moving from stage two to the normative question embodied in stage three, one must ask whether evidence indicating that a defendant's inability to exercise self control in a particular situation is normal, in other words, typical, and whether it necessarily means that the defendant should receive a mitigated sentence. The drafters of the ALI's Model Penal Code decided, for the most part, that the answer to this question is yes.

The Model Penal Code provides for mitigation of murder to manslaughter when the defendant has committed a homicide under "the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse."⁸⁷ This definition in and of itself does not necessarily mean that empirical research about behavioral norms is

tors very rarely drop cases because of potential search and seizure problems." *Id.* (citations omitted) The dissenters go on to point out the extremely small percentages mentioned by the majority. *Id.*

86. Jonathan Herring, *Provocation and Ethnicity*, 1996 CRIM. L. REV. 490, 490.

87. MODEL PENAL CODE § 210.3 (1980).

the key to assessing the defendant's culpability. Reasonableness can be determined in a less behaviorist manner.⁸⁸ It is nonetheless clear that the Model Penal Code drafters intended for the manslaughter provision to emphasize an excuse-based approach centered on assessing the defendant's lack of self control.⁸⁹ Under the Code, typicality of behavior—the likelihood that most people would become inflamed if they stood in the defendant's shoes—supports a finding of excuse from liability. While a determination of typicality clearly can be empirically tested, the theory that underlies this notion of provocation is not based upon any hypothesis about human behavior.⁹⁰ Instead the promoters of the Model Penal Code's excuse-based approach to provocation simply relied upon “‘common-sense generalizations’ about ‘human nature.’”⁹¹

While the Model Penal Code offers a mechanistic conception of provocation, one can also think about this problem in purely formal terms—this was the common-law approach.⁹² At the other end of the spectrum from a notion of provocation grounded in purely formal terms is the idea that provocation is inimical to the purest aims of equal treatment in criminal law because of the heat-of-passion partial defense inevitably leads to unequal treatment of men and women.⁹³ There are many positions between these two poles. Importantly, these between-pole perspectives, as well as the poles themselves, depend a great deal on empirical realities of behavior. Certainly if a standard is designed in a way that claims to conform to “normal” behavior, as the Model Penal Code does, then decision makers ought to be open and eager to learn whether the behavioral assumptions of the standard are true. If a theory does not depend so much on what people actually do, but instead on what we believe that people ought to aspire to do, then empirical evidence should make the aspirational exclamation that much more clear. And, as was the case

88. See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 306–12, 373–74 (1996) (advocating an assessment of provocation that depends upon evaluating whether the defendant's angry response is morally appropriate rather than determining simply whether the defendant lost control as a mechanistic matter).

89. See Joshua Dressler, *When “Heterosexual” Men Kill “Homosexual” Men: Reflections on Provocation Law, Sexual Advances, and the “Reasonable Man” Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 746 & n.107 (1995) (concluding that the Model Penal Code takes a decidedly excuse-based approach to manslaughter mitigation); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1339 (1997) [hereinafter Nourse, *Passion's Progress*] (discussing the centrality of the self-control theory to the notion of the partial excuse that underlies manslaughter).

90. See Nourse, *Passion's Progress*, *supra* note 89, at 1369.

91. *Id.*

92. The “nineteenth century four” categorize adequate provocation as a legal matter. The four categories are: adultery, mutual combat, false arrest, and violent assault. See Donna Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 80 (1992) (discussing the “nineteenth century four”).

93. See, e.g., Susan Estrich, *Don't Be Surprised If O.J. Gets Off Easy*, USA TODAY, June 23, 1994, at A11 (claiming that it may have once been reasonable not to expect men to control their behavior, but “it isn't reasonable anymore”); Nourse, *Passion's Progress*, *supra* note 89, at 1339 (criticizing the defense, but stopping short of abolition).

with constitutional adjudication in this area, to the extent that there are disagreements between behaviorists and those who take a more philosophical approach, those disagreements will be more transparently highlighted in legal decision making against the background of empirical information.

IV. CONCLUSION

While it is difficult to disagree with the conclusion that empiricism is valuable to assess the consequences of criminal law and procedural rules, I have sought to demonstrate here that empiricism is also relevant to the normative choices we make regarding these rules. It turns out that many of the objections typically lodged against more empiricism in criminal justice decision making are themselves empirically contingent. Moreover, the primary objection that declares empiricism irrelevant to the enterprise of articulating criminal law and procedure still leaves room for such research.

As I close, I want to make clear that I do not believe that choices about criminal law and procedure can be made in any value-free way—quite the contrary. Nothing about my advocacy of the greater use of empiricism suggests that more empiricism will make it easier to make hard choices. In answering the third objection in this essay, I intended to show that even those who believe that the choices we make are wholly deontological should welcome empiricism in the criminal law and procedure realm because it is my belief that courts, litigants, and political actors who often pursue a more consequentialist path can be better criticized and held to account for their decisions by their more purely “normative” colleagues if the consequentialists are forced to document their arguments in empirical terms. This is an argument that even moral philosophers should welcome.

