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# ESSAY

## Rethinking the Judicial Reception of Legislative Facts

*Ann Woolhandler\**

*Cultural influences have set up the assumptions about the mind, the body, and the universe with which we begin; pose the questions we ask; influence the facts we seek; determine the interpretation we give these facts; and direct our reaction to these interpretations and conclusions.*

— Gunnar Myrdal<sup>1</sup>

In a recent article, Professor Peggy Davis called for reforms in judicial reception of legislative facts.<sup>2</sup> Her suggestions, which follow an empirical analysis of the use of psychological parent theories in child custody disputes, echo similar proposals by Professor Kenneth Karst in 1960<sup>3</sup> and by Professors Arthur Miller and Jerome Barron in 1975<sup>4</sup> for judicial reception of legislative facts in constitutional cases.

As originally defined by Kenneth Culp Davis, legislative facts are facts that “inform[] a court’s legislative judgment on questions of law and policy.”<sup>5</sup> They contrast with adjudicative facts, which are facts about “what the parties did, what the circumstances were, what the background conditions were.”<sup>6</sup> The most commonly cited examples of

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1. G. MYRDAL, *AN AMERICAN DILEMMA* 92 (1944).

2. Davis, “*There is a Book Out. . .*”: *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1603-04 (1987). As used in this Essay, “Davis” without a preceding name or initial refers to Peggy Davis.

3. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75; cf. D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 274-84 (1977); Korn, *Law, Fact and Science in the Courts*, 66 COLUM. L. REV. 1080, 1090 (1966).

4. Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices*, 61 VA. L. REV. 1187 (1975).

5. K. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404 (1942).

6. *Id.* at 402.

legislative facts are Louis Brandeis' recitation of opinions that working women needed special protection in his brief in *Muller v. Oregon*,<sup>7</sup> and the social science appendix detailing the deleterious effects of segregation on black children in *Brown v. Board of Education*.<sup>8</sup> Discussions of the judicial reception of legislative facts implicate questions of the role of social science in law,<sup>9</sup> the scope of judicial notice,<sup>10</sup> and, more generally, the process of judicial decisionmaking.<sup>11</sup>

Because assumptions about disputable general facts are necessary to any reasoning process, the advisory committee on the Federal Rules of Evidence declined to prescribe formal rules for the reception of legislative facts when providing standards for judicial notice.<sup>12</sup> The advisory committee believed that judicial absorption of general nonlegal knowledge should not be circumscribed by "any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level."<sup>13</sup> Rather, according to the advisory committee, the process of judicial reception of legislative facts should parallel the court's methodology in determining domestic law, in which

the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present. . . . [T]he parties do no more than to assist; they control no part of the process.<sup>14</sup>

In administrative process, in contrast to judicial process, however, reception of general data to inform the agency in its lawmaking functions is regularized in notice and comment rulemaking procedures.<sup>15</sup> The regular reception of legislative facts by administrative agencies flows from the open acknowledgement of the agencies' legislative functions.

7. 208 U.S. 412, 419 (1908).

8. 347 U.S. 483, 494 n.11 (1954).

9. See N. CHANNELS, *SOCIAL SCIENCE METHODS IN LEGAL PROCESS* 5-8 (1985); see also Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 488-95 (1986); Walker & Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 559-60 (1987).

10. See, e.g., K. DAVIS, *Judicial Notice*, 55 COLUM. L. REV. 945, 982-83 (1955); see also Roberts, *Preliminary Notes Toward a Study of Judicial Notice*, 52 CORNELL L.Q. 210 (1967).

11. E.g., P. FREUND, *ON UNDERSTANDING THE SUPREME COURT* 87-91 (1949); Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637 (1966); Karst, *supra* note 3, at 78-81.

12. FED. R. EVID. 201(a) advisory committee's note.

13. *Id.*

14. *Id.* (quoting Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 270-71 (1944)).

15. 5 U.S.C. § 553 (1982).

Professors Davis, Karst, Miller, and Barron see a problem in the haphazard way in which courts receive legislative facts. They believe courts should embrace more openly their legislative functions by adopting procedures better suited to making general, prospective rules.<sup>16</sup> These reformists claim that lawyers fail to understand the importance of presenting general data to assist courts in fashioning legal rules, and that courts are insensitive to the need to seek out facts about the general effects of the legal rules they create, rather than relying on unsupported assumptions or one-sided presentations.<sup>17</sup> Their suggested remedies range from such unexceptionable proposals as increased sophistication on the part of lawyers and judges,<sup>18</sup> and judicial requests for further presentations by parties and amici,<sup>19</sup> to more ambitious goals such as adoption of formal rules of evidence,<sup>20</sup> and appointment of independent experts and scientific panels.<sup>21</sup>

Because it is difficult to argue against courts' knowing more about the effects of the legal rules they create, no one criticizes these proposals. But no one has followed them either, despite their twenty-seven year persistence. This Essay will first address why no one has followed these proposals, and then discuss why this is a good thing.

## I. PARADIGMS OF LEGISLATIVE AND ADJUDICATIVE FACTS

Paradigms of adjudicative and legislative facts suggest why lawyers present and courts receive legislative facts in such a willy-nilly fashion. Adjudicative facts are the stuff of ordinary litigation. The paradigm of an adjudicative fact is a description of a past, individual physical or mental phenomenon, the proof of which is in the record. The retrospective and discrete nature of the inquiry gives a sense that there is one true version of the happening,<sup>22</sup> even if the truth-finding process necessarily consists in an ad hoc assessment of probability.<sup>23</sup> Determinations that a defendant in a negligence case failed to stop at a stop sign, or

16. Davis, *supra* note 2, at 1600; Karst, *supra* note 3, at 78-81; Miller & Barron, *supra* note 4, at 1189, 1199.

17. Davis, *supra* note 2, at 1595, 1599, 1601-02; Karst, *supra* note 3, at 75-76, 91-92, 98; Miller & Barron, *supra* note 4, at 1211, 1228, 1242.

18. Davis, *supra* note 2, at 1598; Karst, *supra* note 3, at 99, 107; Miller & Barron, *supra* note 4, at 1242.

19. Davis, *supra* note 2, at 1598-1600, 1603; Karst, *supra* note 3, at 106; Miller & Barron, *supra* note 4, at 1243.

20. Davis, *supra* note 2, at 1603; Miller & Barron, *supra* note 4, at 1239-40.

21. Davis, *supra* note 2, at 1600; Miller & Barron, *supra* note 4, at 1240; *see also* P. ROSEN, *THE SUPREME COURT AND SOCIAL SCIENCE* 201-02 (1972).

22. *Cf.* J. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 191 (1898).

23. Schmalbeck, *The Trouble with Statistical Evidence*, 49 *LAW & CONTEMP. PROBS.* 221, 232 (1986); Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 *HARV. L. REV.* 1329, 1330 n.2, 1345-46 (1971).

that a defendant in a criminal prosecution shot a victim, are examples of adjudicative facts. Once the trier of fact determines these facts, it then applies pre-existing legal rules to those facts to reach a decision.<sup>24</sup> Adjudicative facts thus designate "what exists, in contrast with what should, rightfully, exist, . . . things, events, actions, conditions, as happening, existing, really taking place."<sup>25</sup> These value-neutral facts are distinguishable from laws, which attach state-enforced consequences to facts, and thus are necessarily normative.

In contrast to adjudicative facts, legislative facts do not presume a pre-existing legal norm because by definition such facts are used to create law. A paradigmatic legislative fact is one that shows the general effect a legal rule will have,<sup>26</sup> and is presented to encourage the decisionmaker to make a particular legal rule. There is less a sense that legislative facts are true or knowable because such facts are predictions, and, moreover, typically predictions about the relative importance of one factor in causing a complex phenomenon.<sup>27</sup> Examples of legislative facts include evidence that strict liability leads to efficient resource allocation, or that the death penalty does not deter crime, which is presented respectively to convince the court to adopt strict liability or strike down the death penalty.

The key difference between adjudicative and legislative facts is not the characteristics of particular versus general facts, but rather, evidence whose proof has a more established place and more predictable effect within a framework of established legal rules as distinct from evidence that is more manifestly designed to create the rules. The line between adjudicative and legislative facts is indistinct, however, because decisionmakers use even the most particularized facts to make legal rules. For instance, courts may treat adjudicative facts as exemplary of the effects of legal rules.<sup>28</sup> A court, for example, may view one indigent defendant's inability to defend himself without a court-appointed lawyer as representative of the plight of others, and conclude therefrom that due process requires court-appointment of lawyers for indigent defendants.<sup>29</sup> In addition, once the decisionmaker finds even the most in-

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24. Cf. J. THAYER, *supra* note 22, at 192-93.

25. *Id.* at 191 (definitions of fact).

26. See Karst, *supra* note 3, at 81, 98, 103.

27. See *id.* at 98. Brandeis' use of legislative facts was not to show that the facts were true, but that reasonable legislators could believe they were true. See P. FREUND, *supra* note 11, at 88; Roberts, *supra* note 10, at 228; see also E. CLEARY, MCCORMICK ON EVIDENCE § 331, at 929-30 (3d ed. 1984).

28. Karst, *supra* note 3, at 77; cf. Davis, *supra* note 2, at 1548.

29. Gideon v. Wainwright, 372 U.S. 335, 337 (1963); see also D. HOROWITZ, *supra* note 3, at 45, 266-67 (discussing the problem of courts making policy based on atypical facts of particular cases).

dividual facts, lawmaking occurs in the application of a pre-existing, general legal standard to those facts.<sup>30</sup> For example, by determining that particular statistics in a Title VII case show intentional discrimination on the part of an employer, a court makes law in that particular case by establishing the predicate for an exercise of state power.<sup>31</sup> That same determination also may have precedential effect. Nevertheless, when courts make law by applying a general standard to particular facts, the lawmaking is likely to be more interstitial and less self-conscious than when courts make law upon proof of general facts.<sup>32</sup> In the latter case, the participants will have a greater sense of creating the framework of law rather than of merely filling in the gaps.<sup>33</sup>

Judges always have made predictions about the general effects of legal rules when deciding cases, such as the deterrent effect of punishment.<sup>34</sup> Louis Brandeis began presenting general facts,<sup>35</sup> which Kenneth Culp Davis later renamed "legislative facts" because the Realists frankly recognized the courts' lawmaking function.<sup>36</sup> After all, it only makes sense to provide courts with data to assist in their lawmaking function if one sees courts as having such a function, as distinguished from a function of discovering law that is dictated by text, precedent, and principle.<sup>37</sup>

Legislative facts, moreover, when defined as predictions about the effects of legal rules, are necessarily of greater significance when one embraces the instrumental view of law that grew out of the Realist era, that a good legal rule is one that causes a desirable social end.<sup>38</sup> A logi-

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30. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 114 (1924); see also O. HOLMES, *THE COMMON LAW* 126 (1881); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 553-54 (1965).

31. See L. JAFFE, *supra* note 30, at 552.

32. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113-14 (1921).

33. The logical collapse of the distinction between legislative and adjudicative facts at the law-application phase has led to some dissatisfaction with the distinction, see Monahan & Walker, *supra* note 9, at 484 n.25, and to creation of a third category of background or social framework evidence. See Walker & Monahan, *supra* note 9, at 570; see also Davis, *supra* note 2, at 1547. Professors Monahan and Walker define social framework evidence as the use of general conclusions from social science research in determining factual issues in a specific case. The evidence could be seen as an attempt to create ad hoc presumptions. See *infra* text accompanying notes 56-64.

34. See Roberts, *supra* note 10, at 236 (indicating that "judicial notice is the art of thinking as practiced within the legal system" (emphasis in original)).

35. The Brandeis brief was not entirely a Brandeis innovation. See *Munn v. Illinois*, 94 U.S. 113, 130-31 (1876).

36. See Monahan & Walker, *supra* note 9, at 483. Legal realism was a reaction to the late nineteenth-century formalist view that legal decisions would be deduced logically from general principles. The Realists focused instead on what actually transpired in the courts, and on the effects of legal decisions. See W. REISMAN & A. SCHREIBER, *JURISPRUDENCE* 434-83 (1987).

37. See K. Davis, *supra* note 5, at 407.

38. See Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 952, 958

cal doctrinal application of this pragmatic view of law, as Professor Alexander Aleinikoff recently pointed out, is balancing.<sup>39</sup> In an age of pragmatic balancing, one would ask for a change in a legal rule by showing empirically that the rule will not advance the end it was supposed to, or that it will hurt other ends to a greater extent than was previously assumed, and that another rule better advances social ends. Professor Karst's call in 1960 for increased sophistication in the judicial reception of legislative facts was an explicit defense of balancing against more categorical approaches to constitutional law.<sup>40</sup> Pragmatic balancing is now so commonly accepted that Professors Miller, Barron, and Davis did not explicitly defend it, but took it for granted in their calls for reform in the reception of legislative facts.<sup>41</sup>

## II. UNPREDICTABILITY: LAWMAKING

If pragmatic balancing were the only game in town, one would expect lawyers to present legislative facts more frequently, and courts to have heeded the perennial calls for more sensitivity in receiving such facts. One reason this has not happened is that pragmatism is not yet the only game in town. Lawyers have yet to view themselves as lobbyists or judges to view themselves as legislators. Rather, lawyers and judges continue to see the judicial process as one in which text, precedent, and principle still play a significant role. To the extent that non-pragmatic reasoning informs judicial decisionmaking, legislative factfinding is less important.<sup>42</sup>

(1987); Pound, *The Need of a Sociological Jurisprudence, Chairman's Address*, 31 A.B.A. REP. 911, 917-21, 925-26 (1907).

39. Aleinikoff, *supra* note 38, at 958. Professor Aleinikoff defines a "balancing opinion" in the context of constitutional interpretation as "a judicial opinion that analyzes a constitutional question by identifying interests implicated by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests." *Id.* at 945.

40. Karst, *supra* note 3, at 77-81; see also Alfange, *supra* note 11, at 644 (arguing against judicial absolutism in urging courts to consider legislative facts).

41. Professor Davis calls for courts to take a more critical look at psychological parent theories as predictors of a child's best interests, so that the predictions can be weighed against the biological parents' constitutionally based interests in raising their children. Davis, *supra* note 2, at 1589, 1602. The courts, she recommends, should supplement expert psychological evidence "with close examination of the social function served by a tradition of assigning responsibility on the basis of biological parentage (and the social costs of diluting the effect of that assignment), and recognize that scientific consensus concerning the expert's causal judgment may be lacking or temporary." *Id.* at 1602. Professors Miller and Barron state that:

the function of briefs and argument in formative Supreme Court decisions is not to inform the Court as to what rule of "law" in any traditional sense the Court is compelled to apply.

Rather, it is to offer some empirical data or law-policy hypothesis which counsel anticipate the Court already has a predisposition to accept.

Miller & Barron, *supra* note 4, at 1208.

42. For discussions of alternatives to pragmatism, see R. DWORIN, *LAW'S EMPIRE* (1986);

Even when pragmatism plays a significant role in judicial decision-making, however, the effect of a particular showing of legislative fact on a decision is inherently unpredictable. Because legislative facts are used to create legal rules, proof of legislative facts cannot have a predetermined effect under existing legal rules. Lawyers regularly present certain types of evidence, whether general or particular, when that evidence has an established place in a pre-existing legal framework. Thus, the more a particular kind of fact resembles an adjudicative fact—*i.e.*, one whose proof will have particular consequences because there are pre-existing legal rules that make it significant—the more likely it is that attorneys will present such facts and courts will become adept at handling them. But the concept of legislative fact assumes that the legal rules are not formulated in advance, since the evidence is presented to assist the court in its normative function of making up such rules. Once an attorney proves legislative facts, moreover, these facts are balanced against the other social harms and benefits that the legal rule is shown or presumed to produce.<sup>43</sup> The pragmatic jurisprudence that encourages showings of legislative fact thus also makes the effect of any particular showing unpredictable; while there may be agreement that the law is instrumental, there is no agreement as to the ends it should be instrumental in producing or how such ends should be weighed against one other.<sup>44</sup>

The reformists acknowledge that showings of legislative facts can change a legal rule only to the extent that “values” do not continue to support the rule.<sup>45</sup> The reformists feel compelled to regulate judicial reception of legislative facts, however, because they overstate the importance that provable legislative facts may have in judicial decisions.<sup>46</sup>

Aleinikoff, *supra* note 38, at 944, 988, 995, 1002-03; and Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986). Critiques of balancing generally encompass both ad hoc and definitional balancing. See Aleinikoff, *supra* note 38, at 948; Regan, *supra*, at 1153 n.106. Definitional balancing establishes a principle of general application. See M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.03 (1984).

43. See Aleinikoff, *supra* note 38, at 977 (asserting that balancing transforms any interest implicated by a constitutional case into a constitutional interest).

44. See Karst, *supra* note 3, at 85.

45. Karst, *supra* note 3, at 84-89, 92; see also Korn, *supra* note 3, at 1091, 1095-96.

46. *E.g.*, Karst, *supra* note 3, at 89 (stating that “[w]hatever the weight of the presumption of constitutionality in a particular case, the legislative facts must make up the rest of the balance”). Professor Hazard has stated aptly:

I believe that most, if not all, questions of legal principle can be reduced to a series of constituent questions of fact. The task of doing so is laborious, and not all questions of fact so formulated are susceptible of investigation yielding reliable results. In any event, the process of reduction entails retraction of the generality and therefore the practical interest of the propositions under consideration. Indeed, when the process of reduction has advanced far enough to make the question scientifically meaningful, it usually results in making the proposition trivial for any immediate legal purpose.



Professors Davis, Karst, Miller, and Barron do this not only because they overemphasize pragmatic balancing, but also because they fail to appreciate how changeable the support for a legal rule will be even if courts thoroughly embrace pragmatism. Other effects, presumed or proved, may be called upon to outweigh a particular showing of legislative fact.<sup>47</sup>

This is not to deny, however, that showings of legislative facts may be important to particular cases. But there is no special need to adopt formal procedures for the judicial reception of legislative facts. Recommendations for solicitation of amici curiae and appointment of independent experts and scientific panels are aimed at giving courts a more balanced presentation to alleviate the effects of one-sided presentations that result from imbalances in litigation resources. But when lawyers perceive that a particular showing will affect the outcome in a case, they tend to make such a showing, which courts tend to receive. If the court relies on an imbalanced presentation in one case, attorneys with sufficient resources and sophistication are likely to respond in later cases with counter-presentations. Explicit judicial reliance on imbalanced information thus creates its own incentive for correction by showing attorneys what kinds of facts just might make a difference to the court. One cannot necessarily say that these presentations will change the prior legal rule, or that their effect might not have been different if presented before an earlier rule crystallized. But one can say that it is unlikely that over time a contestable scientific or social scientific study that is made the explicit basis of a court decision will remain unchallenged.<sup>48</sup>

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Hazard, *Limitations on the Uses of Behavioral Science in the Law*, 19 CASE W. RES. 71, 76 (1967).

47. This is shown by the Supreme Court's decision in *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987), which upheld Georgia's death penalty in the teeth of a showing of intentional racial discrimination in its administration. Whether one calls the study that was presented in *McCleskey* legislative or adjudicative fact, one would expect it to have a good chance at making a difference in the outcome because the antidiscrimination principle is one of the few overarching principles of American constitutional law. See Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6 (1976). To the extent the Court accepted the study as showing discrimination, see *infra* note 64, however, the showing was outweighed by majoritarian preferences for retribution and assumed deterrence, and the need for discretion in administering the criminal justice system. *McCleskey*, 107 S. Ct. at 1769-70, 1775, 1777. Throwing "discretion" into the balance has a certain irony. Jurors themselves are allowed to weigh individual factors, including, as it turns out, the race of defendant and victim, in an ad hoc process that brings the ultimate coercive power of the state to bear on the defendant, thus mirroring the court's own ad hoc lawmaking in which intentional racial discrimination is just another factor to consider.

48. Professor Davis raises a problem of systemic resource imbalance in contests between the state and biological parents over custody and termination of parental rights. Her own study seems to show, however, that biological parents with sufficient resources eventually aired opposing viewpoints in the courts. See Davis, *supra* note 2, at 1590.

## III. UNPREDICTABILITY: FACTFINDING

Thus far this Essay has been directed only to the judicial reaction to legislative facts once these facts have been proved. Much of the writing on legislative facts similarly treats the overtly normative process of lawmaking as analytically distinct from factfinding, which is supposed to be value-neutral. The commentators thus sharply distinguish fact and value, and assume that it is the "value" component of legal rules that limits the effects of showings of legislative facts.<sup>49</sup> Professors John Monahan and Laurens Walker have stated: "The principal similarity between social science and fact is that both are positive—both concern the way the world *is*, with no necessary implications for the way the world *ought* to be."<sup>50</sup> Such claims that legislative facts are value-neutral, and that decisionmakers can accurately find them with appropriate procedures, underlie the supposed legitimacy of the reformist proposals.<sup>51</sup> But, as Gunnar Myrdal's observation highlights,<sup>52</sup> the factfinding process is itself value-driven, both when experts and courts find the facts. The normative component of factfinding is heightened for legislative factfinding, which adds unpredictability to the effects of a showing of legislative fact even before the lawmaking phase.

Claims for value-neutrality of legislative facts are belied by the very nature of a legislative fact.<sup>53</sup> A legislative fact provides evidence of the importance of one particular factor in causing a complex phenomenon. The scientist or social scientist asks a question and interprets data based on a pre-existing hypothesis about causation; this is true even for the hard sciences and especially true for the soft sciences, which typically serve as the source for legislative facts.<sup>54</sup> Courts in turn have their own theories of causation that affect their evaluation of the evidence.

One's beliefs about causation are closely tied to one's beliefs about desirable effects. For example, if one sees a racially integrated society as a desirable end, one may also view the current segregated society as

49. See Karst, *supra* note 3, at 85. Karst nonetheless concedes that social scientists have axes to grind, which implies that social science data are not value-neutral. *Id.* at 105.

50. Walker & Monahan, *supra* note 9, at 585 (emphasis added); Monahan & Walker, *supra* note 9, at 489 (emphasis in original).

51. See Karst, *supra* note 3, at 75-76; Miller & Barron, *supra* note 4, at 1228, 1235-36. Professor Davis' proposals rely more on a fairness rationale. See *infra* note 78 and accompanying text.

52. See *supra* text accompanying note 1.

53. See E. CLEARY, *supra* note 27, § 331, at 930.

54. See T. KUHN, *THE ESSENTIAL TENSION* 327-39 (1977); see also R. LEVINS & R. LEWONTIN, *THE DIALECTICAL BIOLOGIST* 4-5 (1985) (indicating that "nothing evokes as much hostility among intellectuals as the suggestion that social forces influence or even dictate either the scientific method or the facts and theories of science"); S. GOULD, *THE MISMEASURE OF MAN* 22 (1981) (stating that "some topics are invested with enormous social importance but blessed with very little reliable information. When the ratio of data to social impact is so low, a history of scientific attitudes may be very little more than an oblique record of social change").

resulting from forces other than individual merit. A view that racial integration is undesirable frequently accompanies a view that individual merit is a strong causative factor in the current segregation of society.<sup>55</sup>

Pre-existing views about the causes of desirable and undesirable effects govern social scientists' development of legislative facts, such as Kenneth Clark's showing that segregation harms black children's self-esteem<sup>56</sup> and David Baldus' study that racial discrimination plays a part in the imposition of the death sentence.<sup>57</sup> In addition, courts have their own views of desirable effects and their causes, which affect the courts' perceptions of the probative value of these showings. When a judge's view of causation systematically differs from our own, we call it bias. When statutes and the common law incorporate background assumptions about causation into formal rules for the reception of evidence, we call them presumptions. Writers on evidence routinely recognize that presumptions may reflect judicially accepted views of probability (*i.e.*, causation) as well as policies about who should bear the risks of uncertainty (*i.e.*, choices of desirable effects).<sup>58</sup> Views about causation and desirable effects, however, tend to be intertwined.<sup>59</sup>

Every factfinder has his own set of presumptions that affect his factfinding.<sup>60</sup> This is true of all kinds of facts, which lawyers obviously understand when they worry about which judges and jurors will decide their cases. Decisionmakers may find it inherently easier to reject legislative facts than adjudicative facts, however, since legislative facts are predictive rather than retrospective. Because the decisionmaker uses legislative facts to make legal rules, moreover, fewer formal presumptions are likely to govern reception of legislative facts or to mitigate the decisionmaker's personal presumptions. Of course, if legislative facts merely reinforce pre-existing presumptions, as they did in *Brown v.*

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55. See Brest, *supra* note 47, at 7-8; Fallon & Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 12-26; Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 731-35 (1986) (describing prohibitory, corrective, and distributive conceptions of racial justice). Individual merit may be seen as consisting of choices the individual has made or innate ability. See S. GOULD, *supra* note 54, at 20.

56. See *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954).

57. See *McCleskey v. Kemp*, 107 S. Ct. 1756, 1763-64 (1987).

58. See, e.g., E. CLEARY, *supra* note 27, § 343, at 968-69.

59. Cf. Curtis, discussion following Freund, *Review of Facts in Constitutional Cases*, in SUPREME COURT AND SUPREME LAW 52 (E. Cahn 2d ed. 1971).

60. L. JAFFE, *supra* note 30, at 552 (stating that "[t]he process of inference from evidence to fact is based on 'reasoning,' on the application of the finder's theory of experience. . . . The expert accumulating experience evolves theories of probability. These are not rules of law but they are rules, and insofar as the law holds that they are sufficient to validate a finding the law in a sense adopts them as rules of law" (emphasis omitted)); Tribe, *supra* note 23, at 1347-50 (discussing subjective probabilities); Finkelstein & Fairley, *A Bayesian Approach to Identification Evidence*, 83 HARV. L. REV. 489, 505 (1970) (same).

*Board of Education*,<sup>61</sup> the reception of legislative facts is likely to be sympathetic and unremarkable.<sup>62</sup> The evaluation of the statistical evidence of racial bias in *McCleskey v. Kemp*<sup>63</sup> shows the fate of legislative facts that seek to undermine pre-existing legal and personal presumptions that discrimination is not an important causative factor in the disproportionate racial effects of the death penalty.<sup>64</sup>

The normative component of legislative factfinding enhances the unpredictability of the effects of showings of legislative facts, even before the facts that are found are thrown into the pragmatic balance of lawmaking. This unpredictability discourages attorneys from presenting legislative facts, which in turn discourages courts from formalizing procedures for their reception.

#### IV. THE UNDERSIDE OF KNOWING MORE

It may be argued that courts should regularize the process for reception of legislative facts even if the relationship of a showing of legislative fact to outcome is tenuous. There is, however, an underside to regularizing the process of judicial reception. Formalizing the process for judicial reception of legislative facts will increase the hegemony of pragmatic balancing at the expense of other processes of judicial reasoning. Increasing the influence of pragmatic balancing in judicial decisionmaking will make the judicial process look more like the legislative and administrative processes, and will undermine the legitimacy of the courts.

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61. 347 U.S. 483 (1954).

62. Cahn, *Jurisprudence*, 30 N.Y.U. L. Rev. 150, 159-60 (1955); see also Freund, *supra* note 59, at 49 (presumption of constitutionality indulged more comfortably by court if buttressed by some evidence).

63. 107 S. Ct. 1756 (1987).

64. The majority concluded that the statistical showing failed to prove discrimination against *McCleskey*. *Id.* at 1766-69. The decision thus manifests overarching questions about the evaluation of statistical evidence of discrimination that flow from different views of the causes of the plight of blacks in American society (*i.e.*, discrimination versus individual merit). In a garden variety Title VII case, the trial judge's views about causation typically manifest themselves in questions about whether to accept the plaintiff's statistics, which the defendant will claim do not take into account a sufficient number of factors. With enough factors, the defendant will claim that he can show that his decisions were the product of merit and not discrimination. The Reagan administration has taken this argument to the extreme: statistics can never show discrimination because discrimination only exists as a discrete, aberrational phenomenon. Under this view, the general racial disparities in American society ultimately derive from merit (or other factors with which we should not concern ourselves), and therefore statistics can never take into account all the relevant factors. The Supreme Court effectively adopted this position in death penalty litigation. See *id.* at 1767-68; Van den Haag, *Comment on John Kaplan's "Administering Capital Punishment,"* 36 U. FLA. L. REV. 193, 199 (1984) (stating that "[g]uilt is personal. That someone else, 'equally' guilty, got away with murder, be it because of some random factor, or because of discrimination, intended or unintended, does not make the murderer to be sentenced less guilty").

The reformists maintain that courts should embrace more openly their legislative functions.<sup>65</sup> Because courts inevitably make law, the argument goes, courts should use decisionmaking processes that are appropriate for making general, prospective rules.<sup>66</sup> That is, courts should institutionalize the reception of information about the general, prospective effects of their decisions, including the effects on unrepresented or underrepresented parties. Although the reformists fail to say so, their reforms would make courts look more like administrative agencies, which combine rulemaking and adjudication, and for which the processes for reception of legislative facts already are in place.

The reformists must address questions of legitimacy that are raised by the open embrace of legislative functions by the courts,<sup>67</sup> since many people already attack courts for arrogating legislative powers. The reformists claim that regularizing judicial reception of legislative facts would enhance legitimacy, because courts would make "better" decisions.<sup>68</sup> Their claim for better judicial decisions has a substantive and procedural component. The reformists claim judicial decisions will be better substantively because decisions will be more "accurate," which will enhance their legitimacy.<sup>69</sup> They claim decisions will be better procedurally because viewpoints of a wider variety of persons who will be affected by the legal rules will come to the courts' attention. The reformists' arguments parallel claims for legitimacy of administrative process through expertise and interest representation.

### A. *Expertise*

When the reformists claim that legitimacy will come from the increased accuracy of judicial decisions, they are claiming that science can neutrally answer legal questions.<sup>70</sup> With processes for the courts to educate themselves about the general effects of legal rules in place, facts rather than discretion will determine the outcome of cases. New Dealers sometimes made similar claims in response to criticisms of the delega-

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65. Davis, *supra* note 2, at 1600; Karst, *supra* note 3, at 78-80; Miller & Barron, *supra* note 4, at 1189-90, 1243.

66. Davis, *supra* note 2, at 1599-1600; Miller & Barron, *supra* note 4, at 1201-02, 1232-38, 1245; cf. B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 20 (1983) (call for statements of fact that relate individual conflicts to systematic structural tensions of social life).

67. See D. HOROWITZ, *supra* note 3, at 298 (while calling for improvements in courts' ability to deal with general categories transcending individual cases, noting that such innovations may erode the distinctive contribution of courts to social order).

68. Karst, *supra* note 3, at 111-12; see also P. ROSEN, *supra* note 21, at 229.

69. Karst, *supra* note 3, at 75-76, 111; Miller & Barron, *supra* note 4, at 1228, 1230.

70. See Karst, *supra* note 3, at 92; Miller & Barron, *supra* note 4, at 1238-39; see also N. CHANNELS, *supra* note 9, at 13 (indicating that "[a]s courts and administrative agencies become more familiar with social science methodology and findings, issues will increasingly be seen as empirical questions, answerable by quantitative data").

tion of broad discretion to administrative agencies.<sup>71</sup> According to some New Dealers, administrative discretion was more apparent than real because the specialized knowledge of the administrator would guide the agency towards achieving its goal.<sup>72</sup> The legislative fact reformists similarly believe that expertise will limit judicial discretion. Professors Miller and Barron maintain that if the Supreme Court adopted their suggestions for more complete presentations of legislative facts, "the Court would cede some of its present freedom in determining, as Chief Justice Warren once said, what is best for the American people."<sup>73</sup> Professor Karst similarly stated that,

Emphasis on the legislative facts points a way out of the difficulties—presumed or real—raised by the call for neutrality. If such neutral principles do exist, and if we are to derive our decisions from them, then it takes no argument to show that a court will do a better job of deciding if it has been adequately informed as to the factual links between the challenged governmental action and the neutral principles involved.<sup>74</sup>

The claims for legitimacy through the greater accuracy that more formalized reception of legislative facts is thought to entail ultimately fail just as similar claims for legitimacy through expertise failed in the context of administrative agencies. The reason lies in the nature of legislative facts. Legislative facts are predictions about the effects of legal rules and are by their nature disputable. The creation and reception of legislative facts will be governed by pre-existing presumptions about desirable effects and their causes.<sup>75</sup> Legislative facts, moreover, cannot neutrally provide answers to legal questions because by definition legislative facts are used to make the rules that pose the questions. Although legislative facts provide information for the pragmatic balancing of desirable effects, these "facts" cannot tell us what effects are desirable, or how to weigh them. Similarly, claims that the expertise of administrative agencies limited their discretion failed with the decline in the belief that the public interest served by the agency was objectively ascertainable.<sup>76</sup> The reformists' claims that regularized reception of legislative facts will lead to better substantive decisions ultimately fails

71. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1678 (1975).

72. *Id.*

73. Miller & Barron, *supra* note 4, at 1243.

74. Karst, *supra* note 3, at 111. Professor Davis' proposals seem less grounded in a theory that science has answers, although she criticizes some courts for failure to analyze "the empirical research or theories of child development to which one might turn to determine the 'correctness' of the [conflicting experts'] views." Davis, *supra* note 2, at 1557.

75. To the extent there is consensus about such effects and their causes, formal procedures for reception of legislative facts are insignificant. To the extent there is no such agreement, the legislative facts will not provide "answers" of compelling legitimacy.

76. Stewart, *supra* note 71, at 1678, 1683.

because of the reformists' own inability to tell us what is a good decision.<sup>77</sup>

### B. Interest Representation

If the reformist proposals cannot supply legitimacy through expertise, they must rely on claims that judicial decisions will derive legitimacy from procedural fairness. Professor Davis' proposals rely on this rationale.<sup>78</sup> All the reformists, however, rely on a notion that, because courts make law for parties other than the litigants, courts need to develop techniques for obtaining the views of, or effects on, the unrepresented or underrepresented.<sup>79</sup> Thus if legislative facts cannot necessarily guarantee substantively more accurate results, courts will at least have considered all the alternative viewpoints about the effects of their rules.<sup>80</sup>

Similarly, the interest representation model for administrative law seeks legitimacy, in the absence of agreement about desirable ends, by recreating a political process for resolution of problems by enhancing representation of affected interests.<sup>81</sup> The interest representation model arose in response to the recognition that neither legislative directives nor expertise controlled an agency's discretion. Since neither legislation nor knowledge dictated substantive outcomes, courts sought to encourage agencies to make fairer decisions by expanding intervention and standing rights, and by requiring agencies to consider all relevant viewpoints.<sup>82</sup> Similarly, a justification for reforms in judicial reception of legislative facts is that previously formulated rules do not dictate substantive outcomes. Given the inevitability of judicial discretion, fairer decisions will result if courts receive various viewpoints as to the effects of the legal rules they create.<sup>83</sup>

Reforming judicial procedures to encourage consideration of all viewpoints is fine if we view pragmatic balancing as the best way for

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77. See Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 620-21 (1985).

78. Since Professor Davis is somewhat agnostic about the merits of psychological parent theories that are the focus of her study, her call for reform relies on the claim that it would be fairer to present opposing viewpoints. Davis, *supra* note 2, at 1549, 1553-54, 1603.

79. Davis, *supra* note 2, at 1598-1602; Karst, *supra* note 3, at 106, 111; see Miller & Barron, *supra* note 4, at 1199-1200; see also Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1294, 1302 (1976) (fact inquiry in public law litigation not historical and adjudicative but predictive and legislative).

80. Miller & Barron, *supra* note 4, at 1240-42, 1244 (stating that "[t]he Justices should do their best to inform themselves about all relevant data concerning a given issue of great public interest").

81. Stewart, *supra* note 71, at 1760.

82. *Id.* at 1723, 1757.

83. See *supra* note 79 and accompanying text.

courts to make decisions, and wish to encourage courts to do more pragmatic balancing by enhancing the procedures for evaluating empirical causation. But, as Professor Richard Stewart has observed in the context of administrative process, formalizing judicial mechanisms for consideration of all affected interests will accentuate the polycentric and unique qualities of each decision.<sup>84</sup> Professor Karst's litany of questions that he believes would illuminate constitutional decisions<sup>85</sup> bears this out.<sup>86</sup> For example, Professor Karst believes the court's decision as to whether Detroit's enforcement of a criminal antismoke ordinance violated the commerce clause would be illuminated by legislative fact presentations on the following issues:

What is the danger to the inhabitants of Detroit from air pollution? What losses of health and property have resulted, before and after the adoption and enforcement of the ordinance? What dangers would result if Detroit were to exempt from the ordinance those sources of smoke which are impossible to eliminate without adding substantially to the cost of interstate commerce? Is other equipment available which would permit Huron to comply with the ordinance? How much would it cost Huron to comply? How many other federally licensed vessels which operate in Detroit are equipped with the same kind of boiler?<sup>87</sup>

Professor Stewart has questioned the ability of an interest representation model to legitimate administrative process.<sup>88</sup> The interest representation model is even less capable of legitimating judicial process because the political branches have a much stronger claim that they can determine the majority's desires.<sup>89</sup> Even if courts can be seen as reweighing the legislative balance to assure representation of under-represented interests, these interests are likely to receive better protection from principles and precedent rather than ad hoc balancing of the effects of legal rules.<sup>90</sup> If courts simply sought legitimacy through duplication of the legislative process, they ultimately would put themselves out of business.

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84. Stewart, *supra* note 71, at 1777, 1785, 1788-89; cf. D. HOROWITZ, *supra* note 3, at 284 (social science may introduce "complexities that shake the judge's confidence in imposed solutions"); Levin, *Education, Life Chances, and the Courts: The Role of Social Science Evidence*, 39 LAW & CONTEMP. PROBS. 217, 237-39 (1975) (use of social science by both sides may redefine issues; for example, the case for school desegregation may be seen as hinging on improvement in student test scores); Tribe, *supra* note 23, at 1366 (mathematical proof may tend to shift focus to issues that lend themselves to mathematical treatment).

85. Karst, *supra* note 3, at 82-83, 85, 98.

86. Although it can be argued that ad hoc balancing is the best way to decide the best interests of children in child custody disputes, Professor Davis seeks to derive generalizable results from her study.

87. Karst, *supra* note 3, at 98. Professor Regan has suggested alternatives to pragmatic balancing in dormant commerce clause cases. Regan, *supra* note 42, at 1092-93.

88. See Stewart, *supra* note 71, at 1789-90.

89. Cf. P. FREUND, *supra* note 11, at 91 (indicating that "[p]erhaps the right place for non-legal experts in constitutional law is in the legislative process").

90. See Aleinikoff, *supra* note 38, at 984-86; Regan, *supra* note 42, at 1161-66.



## VI. CONCLUSION

One cannot argue against courts knowing more about the effects of their legal rules without sounding like a fundamentalist. I am not arguing, however, for judicial ignorance but rather against procedures that would increase the sway of a particular method of decisionmaking that makes the judicial process more like administrative and legislative processes. The current, haphazard method of receiving legislative facts, which creates its own incentives for counter-presentations over time, is preferable to a more rationalized approach to judicial reception of legislative facts that holds no promise of encouraging principled decisionmaking.