

Promoting Criminal Justice Reform Through Legal Scholarship: Toward a Taxonomy

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But will our descendants judge us any less harshly for our tolerance of our contemporary analogues to slavery, . . . for a criminal law administration that would be a disgrace to any society and a substantive criminal law that is permeated with class bias . . . ?‡

It is a pleasure and an honor to commemorate the life and career of Professor Caleb Foote, preeminent criminal justice scholar and reformer, by reflecting on what his life and work might teach us about how the next generation of criminal justice scholars can contribute to the reform of our institutions of criminal justice. My own experiences—working within the criminal justice system as a public defender, studying it as a scholar, and litigating and otherwise advocating for its reform as a law professor—have persuaded me that our administration of criminal justice strays far from the ideals inscribed above many courthouse entrances. Instead of “Equal Justice Under Law” as the Supreme Court’s marble inscription promises, perhaps it might be fairer to declare, as one *New Yorker* cartoon lampoons, “Truth · Justice · Equality · Public Relations,”¹ or on occasion even “Abandon Hope All Ye Who Enter Here,” as Dante described the inscription on the entrance to hell.

While I can easily identify many pathologies in our administration of criminal justice, over the years my gimlet-eyed students have identified many others, though not necessarily the same ones, of course. As these students study their casebooks, write their own research papers, participate in clinical opportunities offered by the law school, and work at summer jobs on issues

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‡ Caleb Foote, Elizabeth Josselyn Boalt Professor of Law, Faculty Address to the Graduating Class of 1978, Boalt Hall (May 20, 1978).

1. Mischa Richter, *Truth · Justice · Equality · Public Relations*, NEW YORKER, Mar. 2, 1987, available at <http://www.cartoonbank.com>.

related to criminal justice, they often come to me for career advice, fired up—as students delightfully tend to be—about the need for change. What should they do, they want to know, if they want to work toward criminal justice reform? Those who are drawn by talent or inclination (or hopefully both) to the legal academy tend to be especially conflicted. Shouldn't they be “real” lawyers? Will the academy prove to be too much of an ivory tower that will isolate them from either understanding or confronting the pressing problems of the day? Even if they get the problems right and feel they have something to contribute, will the specialization of the academy allow them to address an audience wider than the small club of legal scholars and to speak in meaningful ways to a broader array of legal actors—lawyers, legislators, judges, policymakers, and so forth? My remarks here are undertaken as a way of answering these questions, informed both by the aspirations and achievements of Caleb Foote and by the transformation of the legal academy during his lifetime.

For better or worse, the anxieties expressed by my students are both deeper and better founded now than they were in the heyday of Caleb Foote's career in legal academia. In the 1950s and 1960s—when Caleb Foote joined the legal academy and made his seminal contributions with his widely cited work on the bail system—two related conceptions of law and legal scholarship combined to allay substantially any concerns about the irrelevance of legal scholarship to law reform.

First, law was far more widely regarded then than now as an autonomous scholarly discipline, distinct from other methodologies such as economics, history, sociology, political science, or philosophy. Leading legal scholars almost never possessed substantial training in one of these other disciplines, and they felt no need to apologize for such a lack. Understanding legal doctrine and institutions, it was thought, required its own distinctive training, and future legal scholars were culled from those who excelled in law school and perhaps briefly honed their skills as law clerks and/or lawyers in top government or private sector jobs.

Second and relatedly, what counted as success in the legal academy reflected this view of the nature of legal scholarship. Much leading legal scholarship directly addressed doctrinal and institutional reform, and such work definitely “counted” for tenure and, more generally, for standing in the legal academy, whether or not it took the form of traditional scholarly articles or books. Indeed, law review articles or scholarly books published by university presses were not the only or even the primary avenues of success in the academy, as they clearly are today. Rather, the production of casebooks and legal treatises, work for such law “improvement” organizations as the American Law Institute, and participation on government-sponsored law reform commissions heavily marked the careers of the most successful and influential scholars of the era.

Think of Sandy Kadish's criminal law casebook or the work of Yale Kamisar, Wayne LaFave, and Jerry Israel on their joint casebook, treatises, and hornbooks on criminal procedure. Indeed, these works still dominate the market for such materials in criminal law and procedure today: the Kadish book just appeared in its eighth edition,² and the main Kamisar casebook recently appeared in its eleventh edition.³ Consider Herbert Wechsler's and others' work on the Model Penal Code (MPC). The influence of the MPC in the 1960s and 1970s can be seen most strongly in the reconceptualization of mens rea in many state codes and courts, in the dominance of the MPC's formulation of the insanity defense,⁴ and in the shape of almost all of the country's death penalty schemes enacted in response to the Supreme Court's temporary abolition of capital punishment in 1972.⁵ Remember Kamisar, LaFave, and Israel's work as Reporters on the Project of the National Conference of Commissioners on Uniform State Laws to draft Uniform Rules of Criminal Procedure, or my former colleague and Dean Jim Vorenberg's work as Director of the famous Katzenbach Commission, President Johnson's Commission on Law Enforcement and Administration of Justice. Caleb Foote's own casebooks—on both criminal law⁶ and family law⁷—and his work for the Center on Juvenile and Criminal Justice in San Francisco reflect this tradition.

It's not that these kinds of projects and achievements have disappeared or are irrelevant today. Casebooks and treatises continue to be written, the ALI is still busy with Restatements and model legislation, law professors still serve on law reform commissions, and so on. However, it cannot seriously be doubted that there has been a profound shift in the conception of legal scholarship and the expectations for aspiring legal scholars. The shift in the conception of legal scholarship has entailed the interment—or at the very least the substantial undermining—of the vision of legal scholarship as an autonomous scholarly discipline.⁸ Anyone who has served on a law school's entry-level

2. SANFORD KADISH, STEPHEN SCHULHOFER & CAROL STEIKER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* (8th ed. 2007).

3. YALE KAMISAR, WAYNE LAFAVE, JEROLD ISRAEL & NANCY KING, *MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS* (11th ed. 2005).

4. This dominance dissipated after the 1982 trial of John W. Hinckley, Jr., in which Hinckley was found not guilty by reason of insanity of charges stemming from his attempted assassination of President Reagan. See KADISH, SCHULHOFER & STEIKER, *supra* note 2, at 882.

5. See Russell Dean Covey, *Exorcising Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS CONST. L.Q. 189, 208 (2004).

6. CALEB FOOTE & ROBERT LEVY, *CRIMINAL LAW: CASES & MATERIALS* (1981).

7. CALEB FOOTE, ROBERT LEVY & FRANK SANDER, *CASES & MATERIALS ON FAMILY LAW* (4th ed. 1985).

8. Although it is not my purpose here to consider the "why" of this transformation, the triumph of legal realism, in particular the flowering of the critical legal studies movement and the concomitant rise of law and economics, no doubt played a role in undermining the autonomy of legal scholarship. Additionally, changes in the demographics of those seeking positions in the legal academy may have contributed to this transformation, as opportunities declined for those

appointments committee in the past decade or so (or anyone who has undertaken to advise recent graduates seeking to enter the legal academy) knows that applicants to the legal academy are invariably asked what “methodology” they are using or plan to use to pursue their “scholarly agenda.” This question, I have no doubt, would have engendered some head scratching in the earlier era I reference – not the “agenda” question so much as the “methodology” inquiry. What methodology *aside* from law could there be for legal scholars to employ? Today, top-tier law schools increasingly are hiring entry-level faculty with advanced training in a related scholarly discipline, and even those who lack such training often identify themselves—and their work—by its connection to another discipline, whether it be economics, history, sociology, or some other field or combination of fields.

This conception of what legal scholarship *is* has had a profound impact on what legal scholars are expected to do. The publication of scholarly articles, and to a lesser extent of scholarly books, is the central requirement for obtaining an entry-level academic appointment and for promotion to tenure. Casebooks, treatises, and work on law reform commissions simply do not count (or at least they do not count nearly as much as they used to) either for these quite concrete assessments or, more abstractly, for garnering scholarly standing in the wider scholarly community. Moreover, legal scholarship tends to be judged by the standards of—and often by scholars whose training is primarily in—related scholarly fields. For example, law and economics scholarship will be judged to some extent against the metrics used to judge “pure” economics scholarship and often by economists as well as law professors; the same is true for legal history, sociology, philosophy, and so on. Thus, much more legal scholarship tends to use (or at least liberally borrow from) the specialized tools and discourses of these disciplines—tools and discourses not available to most practicing lawyers, judges, legislators, and policymakers. In addition, some of the same forces that have undermined the autonomy of legal scholarship as a scholarly discipline have undermined the expert, technocratic authority of organizations like the ALI or other law reform commissions. Hence, the work of such organizations, though it continues (and continues to be important), is both less likely to be viewed as coextensive with the work of legal scholars and also less likely to have the special authoritative weight that it had in an earlier era.

Thus, you can see why my students might feel anxious about pursuing a career in academia if they also aspire to promote law reform. Will the work that they will be expected to produce as legal scholars allow them to address issues that they think are key to law reform? If so, can their work be addressed to those outside the academy? Can it influence those in positions of power to bring about law reform? What, if anything, can they add through legal

scholarship that is distinctive—different from the contributions that lawyers or non-legal scholars make?

My students are not the only ones who are anxious. The transformation of the legal academy has generated a number of calls to action by those who want to set the academy on a new (or perhaps back on its old) course. The most well-known of these critiques is that of former law professor Harry Edwards, who received his law degree in 1965. From his position as judge on the D.C. Circuit Court of Appeals, he wrote in the early 1990s about *The Growing Disjunction Between Legal Education and the Legal Profession*,⁹ in which he lamented that “many law schools—especially the so-called ‘elite’ ones—have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship.”¹⁰ Others have echoed and elaborated this critique, as the trends that Judge Edwards identified have become only more pronounced in the past decade.¹¹

My goal here is not to assess the merits of this critique, because that is no answer to my anxious students. Whether the transformation of the legal academy has been salutary or pernicious (and I am of the view that it has been some of both, but mostly salutary), the academy and its norms and expectations, ever evolving though they may be, are what they are. Nor can I hope to answer the question whether current legal scholarship actually succeeds in reforming the law and legal institutions. Certainly (some) judges cite law review articles, and sometimes legislatures ask law professors to testify on the basis of their published work, but who can say whether this is window dressing for whatever would have happened anyway, or whether legal scholarship indeed plays some or even a determinative role in promoting helpful social change (or derailing wrong-headed initiatives). Rather, I will try to answer my anxious students in a way that I think Caleb Foote—though I never got a chance to meet him—might approve. He wrote about bail reform only after spending many hours sitting in courtrooms and collecting data. Similarly, I will canvass some recent scholarship of successful legal scholars and try to catalog what I believe, no doubt self-servingly, to be true: that legal scholarship, even in this world of burgeoning inter-disciplinarity and disconnection between the academy and bar, has something potentially useful to offer law reform efforts, something distinct from what engaged lawyers (on the one hand) or non-legal scholars (on the other) can offer those efforts. I by

9. Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

10. *Id.* at 34.

11. See, e.g., Douglas Colbert, *Broadening Scholarship: Embracing Law Reform and Justice*, 52 J. LEGAL EDUC. 540 (2002); John S. Elson, *Why and How the Practicing Bar Must Rescue American Legal Education from the Misguided Priorities of American Legal Academia*, 64 TENN. L. REV. 1135 (1997). See generally *Symposium on the Trends in Legal Citation and Scholarship*, 71 CHI.-KENT L. REV. 743 (1996); *Symposium on Law, Knowledge, and the Academy*, 115 HARV. L. REV. 1278 (2002).

no means intend what follows to be comprehensive; I have neither the time nor the omniscience to make any such claim. Hence, my title is “*Toward a Taxonomy*.” I hope it is enough to calm, at least a little, my anxious students and to spark further discussion.

I. THE INTER-DISCIPLINARY SCHOLAR AND LAW REFORM

Contra some of the critics who have taken up Judge Edwards’ clarion call, I do not believe that the growing inter-disciplinarity or specialization of the legal academy necessarily diminishes the relevance of legal scholarship to law reform efforts. Rather, the actual *tools* of other disciplines can be tremendously helpful in answering questions central to law reform projects. Moreover, distinct from the tools of other disciplines are the *insights* that developing research in those fields produces. Legal scholars trained in or otherwise familiar with other academic fields play an invaluable role as both translators of those insights for the legal profession and proponents of reform based on those insights.

A. *Tools*

Perhaps the best example of a helpful tool from another discipline is one that derives from the nature of Caleb Foote’s own scholarship. His contributions to bail reform were built on a firm empirical foundation of careful study of the bail systems in Philadelphia and New York. The analysis of empirical data, however, has also undergone a revolution since the 1950s and 1960s, as computers have engendered new techniques of organizing and analyzing data. Today, social scientists are trained in ever more sophisticated forms of econometric analysis. These tools can offer powerful new means for finding patterns in data that would otherwise be unobservable, and thus they offer new ways to support theories of causation from patterns of correlation.

An influential example is David Baldus’ landmark study of the effects of race on capital sentencing decisions, published in book form in 1990.¹² In this study, Baldus and his co-authors used multiple-regression analysis to try to isolate racial effects from other influences on capital sentencing decisions. Baldus and his colleagues studied more than 2000 capital murder cases from Georgia in the 1970s and sought to determine what role, if any, the race of the defendant and the race of the victim played in capital decision-making. The raw data suggested a strong race-of-the-victim effect, as defendants charged with killing white victims were eleven times more likely to be sentenced to death than defendants charged with killing black victims. But the raw data also suggested a reverse race-of-the-defendant effect, as white defendants were almost twice as likely to be sentenced to death as black defendants. The Baldus

12. DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990).

study subjected the raw data to analysis under a variety of statistical models, controlling for as many as 230 non-racial variables. The study concluded that even after controlling for the most influential non-racial variables, the white race of the victim remained a very powerful determinant of death sentences—a variable almost as important as a defendant’s prior conviction for armed robbery, rape, or even murder. The study also found a small but statistically significant effect from the race of the defendant in the *opposite* direction from what the raw data suggested: black defendants were more likely than white defendants to receive the death penalty after controlling for non-racial variables. Overall, the study concluded, black defendants who killed white victims were overwhelmingly more likely to be sentenced to death than any other racial combination.

The Baldus study has had a dramatic life both in the legal academy and the wider legal world. In the legal academy, the Baldus study has been influential along a number of dimensions. First, it preceded and was generative of a larger movement to forge collaboration between law professors and social scientists to study empirically the administration of capital punishment in America. The “Capital Jury Project” (CJP)—a consortium of university-based researchers from a variety of disciplines and geographic regions who collaborate on empirical studies of capital decision-making by jurors—was initiated in 1990, the same year as the publication of the Baldus study in book form. As Baldus himself stated five years into CJP’s research agenda, “Social science research is relevant to death penalty decision-making because these institutions purport to be rational, principled, and guided by facts. And when the facts are in dispute, the basic idea is that the side with the better evidence should carry the day.”¹³ Additionally, the Baldus study’s influence has extended beyond steering the study of capital punishment along empirical lines. It also was generative of broader critiques of racial discrimination in the criminal justice system writ large¹⁴ and of the use of intent-based standards of discrimination both within and outside of the criminal justice arena.¹⁵

At the same time, the Baldus study played an important role in the realm of litigation and legislation. It formed the centerpiece of the challenge brought by death-row inmate Warren McCleskey to the constitutionality of Georgia’s administration of capital punishment.¹⁶ Although McCleskey’s claim narrowly failed in the Supreme Court (5-4), that failure precipitated proposed legislation in both state and federal legislatures to address the problem of racial

13. David C. Baldus, *The Death Penalty Dialogue Between Law and Social Science*, 70 *IND. L.J.* 1033, 1033 (1995).

14. *E.g.*, DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 132-57 (1999).

15. *E.g.*, Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 *CORNELL L. REV.* 1151 (1991); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 *GEO. L.J.* 279 (1997).

16. *See* *McCleskey v. Kemp*, 481 U.S. 279 (1987).

discrimination in capital sentencing.¹⁷ Indeed, the author of *McCleskey* himself would have voted to overrule it only a few years later; when his biographer asked him upon his retirement if there were any votes that he would change, Justice Powell, the author of the bare majority opinion, responded, “Yes, *McCleskey v. Kemp*.”¹⁸

Empirical studies that support important new claims about how the criminal justice system works (or does not) are central to the mission of both the legal academy and the broader legal world. However, the use of empirical tools by legal scholars can serve equally important ends when they challenge faulty claims to “expert” knowledge. This ability to *debunk* under-supported, false, or misleading empirical claims that are presented in highly technical form can make indispensable contributions to both the world of legal scholarship and the world of law reform. To continue with the death penalty theme, a recent spate of empirical studies claims to have identified a strong deterrent effect from the use of capital punishment.¹⁹ Immediately, another spate of scholarly articles—several of which were authored or co-authored by law professors—challenged the design and/or conclusions of the new studies. Sociologist Richard Berk focused on the disproportionate influence of the extreme or “outlier” values that all came from the State of Texas, without which the deterrent effect completely evaporated.²⁰ Criminologist and law professor Jeffrey Fagan criticized the new studies for failing to control sufficiently for other important factors that influence homicide rates, such as clearance rates for homicide or the availability of life without parole as a sentence for murder.²¹ And economist and law professor John Donohue co-authored a paper demonstrating that even small changes in study design led to dramatically different results, undermining the reliability of the deterrence findings.²²

These challenges are important not only in the scholarly world as the

17. Kentucky became the first and only state to pass a “Racial Justice Act” in 1998. See Alex Lesman, *State Responses to the Specter of Racial Discrimination in Capital Proceedings: The Kentucky Racial Justice Act and the New Jersey Supreme Court’s Proportionality Review Project*, 13 J.L. & POL’Y 359 (2005).

18. David Von Drehle, *Retired Justice Changes Stand on Death Penalty; Powell Is Said to Favor Ending Executions*, WASH. POST, June 10, 1994, at A1 (based on an interview with John C. Jeffries, Jr., Justice Powell’s biographer).

19. E.g., Hashem Dezhbakhsh, Paul Rubin & Joanna M. Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003) (claiming that each execution deters on average eighteen murders). See generally Robert Weisberg, *The Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny*, 1 ANN. REV. OF L. & SOC. SCI. 151 (2005) (reviewing recent studies finding and contesting deterrent effect of capital punishment).

20. Richard Berk, *New Claims About Executions and General Deterrence: Déjà Vu All Over Again?*, 2 J. EMPIRICAL LEG. STUD. 303, 328 (2005).

21. Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255, 260-61, 269, 273 (2006).

22. John J. Donohue & Justin Wolfers, *The Ethics and Empirics of Capital Punishment: Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794 (2005).

necessary friction that hones the design of persuasive empirical studies, but in the world of policy-making as well. Jeffrey Fagan testified before the New York State Legislature in the hearings that were held after the State's highest court struck down New York's death penalty on state constitutional grounds in 2004.²³ After these hearings, the Legislature refused to reauthorize the death penalty in New York, despite the fact that the constitutional defect was technical and easily remediable.²⁴ I myself testified last year before the Massachusetts Legislature during hearings regarding an attempt to reintroduce capital punishment into the Commonwealth through former Governor Mitt Romney's so-called "foolproof" death penalty plan, and the scholarly critiques of the recent deterrence claims formed the centerpiece of my testimony.²⁵ This choice reflects my own assessment, based on discussions with anti-death penalty activists and past experiences testifying in the Massachusetts Legislature about which issues are of greatest concern to state legislators.²⁶

The foregoing is not meant to suggest that quantitative analysis is the only "tool" or methodology that can yield insights relevant to criminal justice reform. However, quantitative analysis does so in an unusually direct manner and thus probably has the greatest currency outside of the academy. This obvious relevance and heightened cachet may account for why empirical analysis is sometimes exempted from critiques of inter-disciplinarity. Nonetheless, other methodologies also can be employed in ways clearly relevant to current law reform efforts. Two recent examples include legal historian James Whitman's compelling account of how American punishment practices have diverged sharply from those of Europe²⁷ and Jonathan Simon's critique of the politics of crime policy.²⁸ Whitman's work not only won praise in the scholarly community,²⁹ it also was cited by Justice Anthony Kennedy in

23. *Deterrence and the Death Penalty: A Critical Review of the New Evidence: Hearings before the H. Standing Comm. on Codes, the H. Standing Comm. on Judiciary, and the H. Standing Comm. on Corr.*, 2005 Leg. (N.Y. 2005) (statement of Jeffrey Fagan on the future of capital punishment in New York on January 21, 2005).

24. Patrick D. Healey, *Death Penalty is Blocked by Democrats*, N.Y. TIMES, Apr. 13, 2005, at B1.

25. *An Act Reinstating Capital Punishment in the Commonwealth: Hearing on H. No. 1511 Before the J. Comm. on the Judiciary*, 2007 Leg., 185th Sess. (Ma. 2007) (statement of Carol S. Steiker on Oct. 23, 2007).

26. Another recent example of what I mean by "debunking" empirical work—and one that addresses criminal justice outside of the death penalty context—is Bernard Harcourt's devastating empirical critique of the so-called "broken windows" theory of policing that was based on Wesley Skogan's 1990 empirical study. See BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING, 59-78 (2001).

27. JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003).

28. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE POLITICS OF CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

29. HARSH JUSTICE was awarded the 2004 Distinguished Book Award of the Division of International Criminology of the American Society of Criminology.

his dramatic address to the American Bar Association in 2003,³⁰ calling for reform of the criminal justice system, and in the ABA's report and recommendations in response to that speech.³¹ Simon's book, too, has received wide acclaim in the scholarly community, and it, too, has crossed over into the wider world of policy debate, in the form of an op-ed published this past summer in the Los Angeles Times.³² These examples are but the tip of the iceberg, meant to be recent and suggestive rather than comprehensive. Yet they demonstrate that interdisciplinary scholarship—drawing upon methodologies as diverse as econometric analysis, history, and sociology—can be highly relevant to current law reform projects.

This defense of the relevance of inter-disciplinarity is fairly subject to two possible objections from my anxious or skeptical student. First, such a student might ask, "How can I hope to do any of this—craft a valid empirical study or recognize and debunk a faulty one, write a compelling history, or offer a sociological critique—without advanced training in some social scientific method, such as through a post-graduate degree in economics, statistics, history, or sociology (as indeed is the case, in some form or another, for all of the authors cited above)?" One answer, which may be of little comfort, is that such degrees are tremendously helpful if one wishes to make contributions along the lines of those described above. Another answer, sketched in the next section, is that interdisciplinary work is not the only way to make important contributions. A third answer is that it is becoming more common for law professors without advanced training to partner with scholars from other fields. Some recent examples of such partnerships in quantitative analysis include Rachel Barkow's empirical work on state sentencing guidelines³³ and Nancy King's study on habeas litigation in federal district courts in the decade since habeas reform.³⁴ Each law professor lacks an advanced degree other than a J.D., and each partnered with one or more co-authors who do hold such degrees. A recent example of a non-quantitative partnership is that of law professor Dan Kahan, who partnered with a psychologist, a sociologist, and a

30. Justice Anthony Kennedy, Speech at the American Bar Association Annual Meeting (August, 9 2003).

31. JUSTICE KENNEDY COMM'N, A.B.A., REPORT WITH RECOMMENDATIONS TO THE A.B.A. HOUSE OF DELEGATES 4 (2004) (quoting Justice Kennedy's speech to the A.B.A. on August 9, 2003 at its annual meeting in San Francisco). The four sets of recommendations included in this report were approved by the A.B.A. House of Delegates on August 9, 2004, exactly one year after Justice Kennedy's address; they now constitute official policy of the Association.

32. Jonathan Simon, *Addicted to Prisons*, L.A. TIMES, Aug. 1, 2007, at A19.

33. Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing*, 84 TEX. L. REV. 1973 (2006). Kathleen O'Neill has a Ph.D. in Political Economy & Government.

34. Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, *Habeas Litigation in the U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996*, Aug. 21, 2007, available at www.ncjrs.gov and www.law.vanderbilt.edu. Fred Cheesman and Brian Ostrom, researchers at the National Center for State Courts, both have Ph.D.'s in quantitative analysis.

professor of communications in a single publication.³⁵

Even granting the possibility that law professors might be able to produce (or co-produce) respectable interdisciplinary work, my hypothetical student might fairly pose a second question about what distinctive contribution law professors can make to such efforts. Why not just leave this work to the economists, historians, and sociologists? Here it is worth recognizing that even if “law” is not an autonomous scholarly discipline, lawyers do in fact know some things that other people do not. The legal education and experience (often extensive) of law professors gives them an ability to understand the complexities of legal doctrines and institutions that scholars from other disciplines lack. This ability makes legal scholars indispensable in framing research questions and designing research studies, because they are uniquely situated to choose the right questions and to consider what data is necessary to produce reliable answers.

Consider two examples. First, social psychologists and other social scientists have done decades worth of studies of jury deliberations, focusing on various aspects of small-group dynamics. But it took two law professors, Harry Kalven, Jr. and Hans Zeisel, to design *the* most influential jury study of the twentieth century by asking trial judges who presided over jury trials how they would have decided the cases before them.³⁶ Kalven and Zeisel realized that the most important question was not how, or even how well (or badly), juries decide cases, but rather *how juries compare to judges*.³⁷ Second, consider a recent empirical study that hypothesizes that the reason for the apparently longer sentences received by criminal defendants represented by court-appointed counsel as opposed to retained counsel is that “marginally indigent” defendants choose to scrape together resources to retain counsel only when they are innocent.³⁸ In discussing the study’s design with a group of lawyers and economists, it was the lawyers who immediately honed in on footnote 23—the failure of the study to control either for the defendants’ pre-trial incarceration or their prior records, which are both known to lawyers to have substantial influence on sentencing outcomes.³⁹ These are only two of many

35. Dan M. Kahan, Paul Slovic, Donald Braman & John Gastil, *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071 (2006) (reviewing CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005)).

36. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

37. *See id.* at 9-10. I am indebted to Frank Zimring for pointing out this excellent example at the Caleb Foote symposium in March 2007.

38. Morris B. Hoffman, Paul H. Rubin & Joanna M. Shepherd, *An Empirical Study of Public Defender Effectiveness: Self-Selection by the “Marginally Indigent,”* 3 OHIO ST. J. CRIM. L. 223, 230 (2005); *see also* Morris B. Hoffman, Op-Ed., *Free-Market Justice*, N.Y. TIMES, Jan. 8, 2007, at A19.

39. Hoffman et al., *infra* note 37, at 227 n.23 (noting that the data used for the study did not contain information about the defendants’ bail status or their prior felony record). However, it must be noted that one of the three researchers on the study is a lawyer—Morris Hoffman is a Colorado state trial court judge.

examples that demonstrate that lawyers have contributions to make to the design of inquiries across a wide variety of disciplines.

B. Insights

Even when legal scholars are not directly applying the tools of other disciplines, their training in another field allows them both to translate emerging insights of that field for lawyers and legal scholars and to consider how legal doctrine and institutions should respond to these insights. This role may sometimes be more accessible to legal scholars, because to serve as a helpful “translator,” it is not necessary to be trained in applying the tools of another discipline, but simply to have some greater knowledge of non-legal information, often but not necessarily derived from another scholarly discipline that affects law or legal institutions.

A good example of applying the insights of another field to law is Stephen Morse’s work applying psychological insights to issues of criminal responsibility. Morse is a psychologist as well as a lawyer; he both obtained a Ph.D. and worked as a psychology professor before moving to legal scholarship. His experience as a research psychologist has allowed him to consider how emerging scientific understandings of the psychological and neurological underpinnings of human behavior relate to central questions in the criminal law, such as the proper function of juvenile court,⁴⁰ the scope of the insanity defense,⁴¹ the desirability of a “diminished capacity” defense,⁴² the relationship of addiction to criminal responsibility,⁴³ and the behavioral prerequisites for punishment generally.⁴⁴

On the other hand, there are also examples of legal scholars successfully translating insights from other fields without the benefit of advanced training. Orin Kerr’s work on cybercrime has introduced a generation of scholars⁴⁵ and law students⁴⁶ to the implications the structure of cyberspace has for criminal regulation. And the work of Tracey Meares has consistently sought to bring insights from sociology and from the social sciences more generally to bear on issues relating to criminal justice. For example, she has sought to revive the insights of early Chicago School sociologists Clifford Shaw and Henry McKay

40. See, e.g., Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15 (1997).

41. See, e.g., Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777 (1985).

42. See, e.g., Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984).

43. See, e.g., Stephen J. Morse, *The Impact of Behavioral Genetics on the Criminal Law: Addiction, Genetics, and Criminal Responsibility*, 69 LAW & CONTEMP. PROBS. 165 (2006).

44. See, e.g., Stephen J. Morse, *Criminal Responsibility and the Disappearing Person*, 28 CARDOZO L. REV. 2545 (2007).

45. See Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531 (2005); Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357 (2003).

46. See ORIN S. KERR, *COMPUTER CRIME LAW* (2006) (casebook).

in order to displace the inappropriate “deterrence-worship” that she views as dominating contemporary drug policy.⁴⁷ She has also defended the greater use of empirical methods in judicial decision-making.⁴⁸ Moreover, she and two co-authors are seeking to bring to bear the “tremendous outpouring of research in economics, psychology, sociology, and other disciplines concerning how institutions, incentives, and rules actually affect behavior” on “the education of criminal lawyers” in order to better equip them “to deal with the pressing questions of criminal justice policy.”⁴⁹

II. THE FORMER PRACTITIONER AND LAW REFORM

Is the mastery of some other discipline the only way to make substantial scholarly contributions? Many law students interested in academic careers want to work in the criminal justice system before entering the academy, and this still proves to be a more common route than Ph.D. programs for emerging law professors in the fields of criminal law and procedure. Is the only option for these professors to play catch up, and fast? No, there is much in recent scholarship that suggests that formerly embedded practitioners can make unique contributions when they bring their grounded knowledge of institutions and institutional actors to their engagement with current scholarly debates.

A. Questioning Reform Priorities

It is often difficult, when embedded in a particular institutional role, to question certain orthodoxies or priorities of the institution—difficult not only because of fears of being perceived as disloyal or other adverse consequences, but also because these orthodoxies are reinforced by supervisors and peers and may help institutional actors to rationalize and perform their roles. Once freed from these constraints of role, however, former practitioners may find that their inside experiences yield valuable insights unavailable to most of those who remain embedded.

Consider two recent examples, one from the prosecutorial side and one from the criminal defense side. Former prosecutor Dan Richman’s work on the balance of powers between prosecutors and law enforcement agents⁵⁰ and

47. Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 192 (1998) (citing CLIFFORD R. SHAW & HENRY D. MCKAY, *JUVENILE DELINQUENCY IN URBAN AREAS* (1969)).

48. Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure – And Three Answers*, 2002 U. ILL. L. REV. 851; Bernard E. Harcourt & Tracey L. Meares, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733 (2000).

49. Tracey L. Meares, Neal Katyal & Dan M. Kahan, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1171-72 (2004). These co-authors have recently published a casebook following the agenda set out in this article: DAN M. KAHAN, NEAL K. KATYAL, TRACEY LOUISE MEARES, *CRIMINAL LAW CASES AND MATERIALS* (2007).

50. See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103

between federal and state law enforcement agencies⁵¹ is a good example of a formerly embedded practitioner using his deep knowledge of how institutional actors interact to address questions of institutional design. Richman's novel contribution is his argument that questions of institutional design can be more influential in shaping criminal justice policy, and even in protecting civil liberties, than adjustments to substantive or constitutional law, which tend to be the primary focus of most criminal justice reformers. It is true that Richman also applies insights from political theory, behavioral law and economics, and cognitive psychology, but these theoretical literatures are used to illuminate his close and extended observations of how federal law enforcement happens "on the ground."

On the defense side, I offer as an example my own work, with my brother and frequent co-author Jordan Steiker, about capital punishment. We are both former law clerks for Justice Thurgood Marshall, who made capital cases on the Supreme Court's docket a priority for his clerks. Thus, we both devoted a year to working intensively on death penalty issues in his chambers. I then worked as a public defender for four years, while Jordan worked on substantial capital defense litigation through the clinic at the University of Texas School of Law. In our scholarship, we have tried to draw upon the insights that we developed as practicing lawyers and abolitionist advocates in order to critically evaluate some of the unquestioned commitments of the abolitionist movement. For example, we asked whether abolitionists should embrace capital punishment "reform" in light of the possibility that some reforms might work to "entrench" or "legitimate" current death penalty practices.⁵² In addition, we questioned the widespread strategy of focusing on innocence as a tool for promoting abolition of the death penalty.⁵³ Our critiques draw upon the work of sociologists that address the problem of "legitimation," from Max Weber through the Frankfurt school and beyond. But we engage with theory primarily in order to provide a vocabulary for the dangers that we identify, rather than to make some novel theoretical intervention.

These two examples share not only the practice experience of the authors, but also the attempt to use the deep institutional knowledge that grows out of such experience in order to critique current reform priorities. Note that in both cases the reform priorities that are critiqued were not only—or even primarily—generated by scholars. Rather, the critiques are leveled at the

COLUM. L. REV. 749 (2003).

51. See Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377 (2006); Daniel Richman, "Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369 (2001).

52. See Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417, 421-25 (2002).

53. See Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attractions and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587 (2005).

reform priorities that are evident *in the legal institutions themselves*. Scholars who leave such institutions are freed to use both the distance and the theoretical tools of the academy to critique the very paths that they recently trod as embedded practitioners.

B. Critiquing Institutions from the Inside

As the foregoing suggests, the claim to institutional experience can be a powerful force for scholars when they critique institutions of which they have first-hand knowledge. This force can operate not only to shape ongoing reform efforts, but also to call into question aspects of existing institutions that are taken for granted or considered settled as a matter of current policy. Such questioning of established institutional practices is most powerful when it comes from scholars who deployed or benefited as institutional actors from the practices they now critique from the academy. In criminal justice, we see this phenomenon frequently when former prosecutors call for changes in structures that they helped to implement in their prosecutorial roles.

Here I offer two sets of examples, each of former federal prosecutors. The first set includes prosecutors who have challenged the disparate racial impact of the criminal justice system, especially with regard to the “war on drugs.” In articles that both appeared in 1995, David Sklansky and Paul Butler offered different racial critiques of federal law enforcement. Sklansky focused on the crack/powder disparity built into the mandatory federal sentencing regime; his article began: “Thousands of federal prisoners, including a few I helped prosecute, are currently serving long mandatory sentences for trafficking in crack cocaine. Nine out of ten of them are black.”⁵⁴ Sklansky went on to criticize equal protection doctrine for failing to take into account evidence of at least unconscious racism on the part of Congress, the enormity of the racial disparity in crack sentencing, and the special problems posed by racial bias in the distribution of criminal punishment.

Butler’s article began in a similarly autobiographical manner, adding the gravitas of his own race to his experience as a prosecutor:

I was a Special Assistant United States Attorney in the District of Columbia in 1990. I prosecuted people accused of misdemeanor crimes, mainly the drug and gun cases that overwhelm the local courts of most American cities. As a federal prosecutor, I represented the United States of America and used that power to put people, mainly African-American men, in prison. I am also an African-American man.⁵⁵

Butler’s critique, unlike Sklansky’s, was not targeted at constitutional

54. David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1283 (1995).

55. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 678 (1995).

doctrine, but instead addressed the black community directly. Butler urged African-American jurors to use their power to nullify in order to acquit African-American defendants charged with non-violent crimes. Such action, explained Butler, would not be purely destructive or anarchic; rather, he hoped that it would lead to “the implementation of certain noncriminal ways of addressing antisocial conduct.”⁵⁶

A very different set of insider critiques has emerged from white collar and corporate prosecutors. Samuel Buell and Lisa Griffin both served in this capacity: Buell prosecuted Enron defendants Jeffrey Skilling and Kenneth Lay, among others, and Griffin worked on white collar and corporate cases in her five years as a federal prosecutor in Chicago. Buell’s critiques largely address the substantive criminal law with the aim of bringing prosecutions within the corporate context into better alignment with moral judgments about blameworthiness.⁵⁷ Griffin’s critique is procedurally focused, discussing the unexamined consequences of the recent increased use of deferred prosecution agreements, by which prosecutors agree to forego or defer entity liability in favor of individual liability in return for corporate cooperation in criminal investigations. Griffin is especially concerned with the threats posed both to corporate employees’ Fifth Amendment privilege against self-incrimination and to corporate incentives for self-regulation.⁵⁸

What these four prosecutorial critiques share—aside from demonstrating that prosecutors’ hearts seem to soften (or maybe only their heads?) when they enter academia—is the use of hard-won insider knowledge about how complex institutions work in order to challenge some aspect of “business as usual.” This is an especially powerful role that formerly embedded academics can play, given the moral authority that they can assert from having personally deployed the very practices they now hold up for scrutiny and criticism.

CONCLUSION

So, to my anxious or skeptical students I conclude:

The foregoing is not meant to be exhaustive along any dimension. I am sure that there are other ways that legal scholarship can—and does—contribute to the reform of criminal justice beyond the paths sketched above. And even within the categories that I have identified, I offer but an example or two, though many more examples easily leap to mind. I offer this outline as an

56. *Id.* at 680.

57. *See, e.g.,* Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006); Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971 (2006). Buell also has begun to address reforms to the procedural regime employed in prosecutions in the corporate setting. *See* Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613 (2007).

58. *See* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311 (2007).

introduction and a preliminary bibliography—a place to begin rather than end an investigation into the relationship between the academy and legal reform.

However, one thing emerges with clarity from this preliminary investigation: the transformation of the legal academy since Caleb Foote's youth has made certain kinds of participation in law reform more peripheral to academic careers than in prior days. Perhaps some of you, my anxious students, will be glad to learn that casebooks, treatises, and work on Restatements are less commonly the route to scholarly pre-eminence than before. Perhaps you'll be disappointed to find that it is probably less likely that, by virtue of your being a legal scholar, the President or Governor or Mayor will knock on your door asking you to head an important law reform commission, and certainly less likely that you'll be able to proffer that work as the basis for tenure (rather than a leave of absence), and similarly less likely that the report of such a commission will be regarded by the legal world as the product of distinctive expertise that you possess above all others. However, it is more likely that you will read and engage in intellectual exchange with a wider and more diverse group of scholars. You may even find yourself attending academic conferences outside of law schools, or co-authoring articles and books with scholars from other disciplines. In such partnerships, it is no disqualification, but rather an asset, that you may bring with you insights from the practice of criminal law. The brief catalog offered above of the works of recent scholars demonstrates that the work that you can do through these exchanges and with these insights offers important contributions to legal reform that "real" lawyers will or should use—thus allowing you to keep faith with rather than depart from the tradition in which Caleb Foote did his most important work.

