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WE CAN AND WE SHOULD: THE CASE FOR ORIGINAL RESEARCH IN LEGAL ACADEMIA

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Responding to *Yes, We Can: Embrace The Case For Plagiarism To Enhance Access To Justice*.[1]

"It is better to fail in originality than to succeed in imitation." – Herman Melville

But see "Originality is undetected plagiarism." – William Inge

I. *INTRODUCTION*

In 2020, when the world stopped, the COVID-19 pandemic sent schoolchildren home, shuttered businesses, and put many of us on lockdowns. But worse than the lockdowns was the tremendous toll it took on the lives of people who were sick and the family members of those who died in the pandemic. Thankfully, researchers all over the world worked tirelessly to create a vaccine in record time, one that by all scientific measure saved lives and prevented untold suffering. So why on earth was there a backlash, resulting in death threats for civil servants, a pharmacist intentionally destroying hundreds of doses,[2] and legions of people refusing to take it?

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[1] Rebekah Hanley, *Yes We Can: Embrace The Case For Plagiarism to Enhance Access To Justice*, 5 STETSON L. REV. F. 1, 1 (2022).

[2] David K. Li, *Pharmacist Who 'Intentionally' Destroyed 500 Covid Vaccine Doses Gets Three Years in Prison*, NBC NEWS (June 8, 2021, 3:47 PM), https://www.nbcnews.com/news/us-news/pharmacist-who-intentionally-destroyed-500-covid-vaccine-doses-gets-three-n1269944. This pharmacist admitted to destroying the vaccines because he "believed that Covid-19 vaccine was not safe for people and could harm them and change their DNA." *Id.* He ultimately served three years for this action. *Id.*

How did we go from vaccines being a standard part of a yearly checkup to a government conspiracy intended to inject us all with microchips?

The proliferation of conspiracy theories and "fake news" is dangerous—just look at the stories of anti-vaccine "advocates" who ended up dying from Covid-19 after refusing a vaccine. There are so many of these stories that Wikipedia has an entire entry on the phenomenon that links to a multitude of websites and social media feeds.[3] Of course, harmful misinformation isn't limited to vaccines—misinformation abides in some of the most integral parts of American life, like a variety of medical treatments[4] and our elections.[5] The only thing most of us can do to combat misinformation is to make informed decisions based on sound data collection and analysis. Unless, of course, we can actively contribute to that sound data collection and analysis, and in turn, help policymakers craft informed legislation.

In *Yes, We Can: Embrace The Case For Plagiarism To Enhance Access To Justice*, Rebekah Hanley advocates for the expansion of plagiarism in the legal community as a way to increase access to justice. She opined that plagiarism, as long as it doesn't misrepresent, generally does no harm but could be used ethically to make legal documents more available to people of modest means. I agree with her; most of what lawyers draft, research, and write about is highly derivative and could easily be repurposed time and again for the benefit of many people of limited means. As such, in this article, I maintain that all legal scholarship—all of it—is plagiarism; plagiarism that should be capitalized upon as Hanley suggests.

Moreover, not only do lawyers routinely use existing works in an effort not to "reinvent the wheel,"[6] but we are extremely proficient at it. We are arguably so proficient at it that we rarely stop to consider the imbalance in our work; most of us create nothing original. We can't invent new laws or create new causes of action, and even the scholarship we produce is equally as derivative as the documents attorneys utilize in practice.[7] None of what we do is "new," as the way we write, practice, and publish doesn't really encourage discoveries. Sure, many law articles might discuss a

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[3] *Deaths of Anti-Vaccine Advocates from COVID*-19, WIKIPEDIA, https://en.wikipedia.org/wiki/Deaths_of_anti-vaccine_advocates_from_COVID-19 (last visited Mar. 7, 2024).

[4] *See Why You Should Not Use Ivermectin to Treat or Prevent* Covid, U.S. FOOD & DRUG ADMIN., (Dec. 10, 2021), https://www.fda.gov/consumers/consumer-updates/why-you-should-not-use-ivermectin-treat-or-prevent-covid-19. During the height of the Covid-19 pandemic, misinformation led Americans to take the anti-parasitic drug Ivermectin based not on science, but on fearmongering. *Id.* This was so pervasive as to lead the FDA to address it in a consumer update. *Id.*

[5] *See Election Misinformation*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/election-misinformation (last visited Mar. 7, 2024) (describing the impact misinformation has on elections in America).

[6] Most lawyers can remember being taught not to "reinvent the wheel" by using templates and formbooks; even courts often promulgate their own official examples for attorneys to use in filings. As such, even the highest-ranking members of the justice system don't "reinvent the wheel."

[7] Of course, many lawyers are active legislators or judges who are involved in creating laws. While lawyers might be well suited to those objectives, we aren't essential to them. Original research, however, is well within the grasp of almost every legal scholar.

new perspective or a new argument, but we aren't really creating anything. Of course, we are confined by the realities of the academy and the practice; nevertheless, we are well suited to be more involved in original research and scholarship. And we should be.

Lawyers are in a unique position to add to the global scientific community. But a typical law review article generally contains a ton of citations and one professor's opinion on what they mean or how they should be changed—not original research. The academy would be far more effective in operating for progressive change by being an integral part of the scientific discussion. This means original research—and lawyers should be part of it. Of course, most of us don't get an education in statistics; adding that as at least an elective in a law school curriculum isn't a heavy lift. Beyond that, we are experts in language, in policy, in collecting evidence, and in interviewing people. We know how to research, to explain, and to persuade. Perhaps most uniquely, however, we know how to spot errors, see hidden pitfalls, and examine consequences that others never thought to. It is in our nature to consider the worst-case scenarios, often to the chagrin of our non-lawyer loved ones.[8]

Our expertise puts us in a unique position to be a part of original research. We are currently an untapped resource at least in part because our system of tenure does not allow credit for co-authored work. In order for us to be part of original scientific research, we would likely need to partner with our PhD counterparts at our undergraduate institutions; however valuable our contributions may be to that effort, in most cases it won't amount to much in terms of tenure. In that respect the most energetic among us, the pre-tenured, are discouraged from such partnerships.

Nevertheless, the academy should actively encourage lawyers to be part of original scholarship. Not only are we in a position to add our expertise, but our solid history of using plagiarism in our written work would also be advantageous to other fields. Because everything we say in a legal article needs to be cited, we are tremendously good at citation and building an argument. Certainly, we should do what we can to increase access to justice. But true justice involves data collection, scientific discovery, and the ability to change policy. Lawyers are in an excellent position to do all of these things, and we should capitalize on our power in legislative circles in order to make real change through original research.

II. IT'S NOT WHAT YOU KNOW, IT'S WHAT YOU CAN PROVE

My path to legal academia was not the traditional one. I did not come from a legacy family. In fact, I was a first-generation college student. I had never met a lawyer personally before I went to law school, and I had almost no idea what they did and absolutely no idea what they wrote about. After law school I was a trial court

[8] The author would like to both thank and apologize to her friends and family for their support in writing this work.

prosecutor for almost a decade before transitioning to teaching undergrad. I spent almost 14 years teaching students at a large community college, where I was a professor and a program chair. Our curriculum was based on a law school curriculum and included multiple legal writing classes, research, civil procedure, and other doctrinal subjects. Many of our students went on to become legal assistants, but many others ultimately ended up in law school.

All my students received an education in how to apply precedent, and it started on day one. I started every 101 class with the exact same lecture entitled: No One Cares What You Think. Undergraduate students tend to be a mixed bag, but many had the same reaction to that somewhat startling statement. I could see it on their faces—the shock, the surprise, even resigned disappointment at times. But then I would go on to explain that no one cares what I think or what a judge thinks—we care about what we can prove and support through caselaw—and they would soften. It was so important to me to educate them about the importance of using precedent that I wanted a way to grab their attention that they would not forget. It worked, and students years later would repeat the phrase to me, that "no one cares what they think." By then, of course, they knew how to use it correctly; not as an insult but as a pedagogical way to understand how the law works.

Another four years later I found myself transitioning to teaching law and had to start publishing—which meant reading law reviews for the first time in a long time. By then, it had been many years since my precious little exposure to legal academia in being a law review editor. Reading law review articles more recently was not exactly a revelation, but it did hit me somewhere in the "meat market"[9] process that nothing I was reading was original. I knew I was personally interested in original research, so in a couple of interviews, I inquired about the university's Institutional Review Board ("IRB").[10] I generally got shrugged shoulders and an "uh, I don't know . . . that guy over there might have used one in the nineties."

It struck me then that lawyers aren't really engaged in the kind of research that requires an IRB review, statistical analysis, or data collection. I remember thinking at the time, as I do now, "but why not?" It is through the lens of my time as a trial lawyer, an undergraduate professor, and a recent entrant into the legal academy, that I view the issues of plagiarism and original research a little bit differently from the way other legal academics do.

[9] This is a reference to the AALS hiring process, colloquially referred to as the 'meat market.' As this has been virtual since the Covid-19 pandemic, the reference doesn't quite apply in the same way as it once did, even if it still does feel like being pushed through a grinder.

[10] An IRB, or Institutional Review Board, is integral to original academic research. These boards are comprised of independent evaluators, typically PhDs in the field, who "are charged with providing an independent evaluation that proposed research is ethically acceptable, checking clinical investigators' potential biases, and evaluating compliance with regulations and laws designed to protect human subjects." Christine Grady, *Institutional Review Boards*, 148 CHEST. 1148, 1148 (2015).

Lawyers are not scientists. We study theory, writing, and analysis, but we do not study statistics and we do not publish in scientific journals. What we are good at—as Hanley points out in her article—is plagiarism. She writes: "[i]n the end, students and faculty research, reflect, develop, and place into context original—but necessarily derivative—arguments. When they memorialize their thinking in writing, they carefully cite the resources they rely on and quote any language they borrow."[11] While Hanley takes care to point out what lawyers do create, she appropriately characterizes it as "original ideas, informed by [the work of others]."[12] What other work? Other law review articles also heavily reliant on cites. Or other cases, that are decided not by the authors, but by judges who interpret laws.

Here I will build upon Hanley's analysis and, in addition, argue that all legal scholarship is, in essence, plagiarism. Hanley describes several of her experiences in clerking, practicing law, and as a legal writing professor. Each one of these occupations encouraged using someone else's work so as not to "reinvent the wheel." In fact, I have used that phrase at every legal job I've ever had and have told it to every legal writing class I've ever taught. Most specifically, I repeat it every spring when we're writing a federal brief. Not only do I tell my students to look at examples that I provide, but I often direct them to the Federal Circuit court websites, where many courts have created their own brief templates and examples—a ready-made and court-approved invitation to plagiarize.

Every American law student gets some sort of education in IRAC format—spotting Issues, listing Rules, and Applying the law to the facts to get to a Conclusion. It's the basic building block of legal analysis, and we see it in office memos, briefs to a court, and court decisions. Yes, we might come up with our own unique way to say something, or we may decide to emphasize one argument over another. But that's about the extent of what we create as lawyers. Everything else, including the very basis of legal analysis itself, is built on what someone else said, did, wrote, or argued. You cannot make a legal argument without precedent. You cannot introduce evidence without reading and applying the rules. You cannot write a law review article without first determining whether the topic's been written on.

Hanley also reiterates something she wrote many years ago that essentially expands the definition of plagiarism: "[t]here's no rule for how many words you can borrow from a source before you need quotation marks because borrowed language calls for quotes, period. A writer who tries to alter a quote just enough to avoid using quotation marks is plagiarizing."[13] In that light, plagiarism includes paraphrasing, rephrasing, and restating. If a lawyer's job is to apply the law to the facts, isn't it all paraphrasing, rephrasing, and restating? If every time we need to make a legal

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[11] Hanley, *supra* note 1, at 2.
[12] *Id.*
[13] *Id.* at 1 n.2 (quoting Rebekah Hanley, *Notes on Quotes: When and How to Borrow Language*, OR. STATE BAR BULL. 1, 2 (Feb./Mar. 2011), https://www.osbar.org/publications/bulletin/11febmar/legalwriter.html).

argument we not only cite to but paraphrase legal authority, isn't the vast majority of what we write essentially, under this definition, plagiarism?

What else do we write as legal advocates besides that which comes from another source? I suppose that judicial opinions are at least partially original; certainly, they rely on precedent, but they also add something new, in that a court must make a determination on its own. Fundamentally, our recitation of facts is original, but only in part; the facts we write either come from a court proceeding, another document, or an interview with our client. While we can certainly use our own unique voice to craft a statement of fact, the substance of that statement is not original to our writing.

The vast majority of us are taught that legal writing involves the application of law to fact. We see this in legal writing classes and in final exams for doctrinal classes, as well as on the bar exam. If we are not writing the law and we are not really writing the facts, what else is there? If we are left solely with judicial opinion writing as being the only truly original legal writing that exists, then the vast majority of what the profession produces is truly plagiarism.

What we do is, by nature, completely derivative. While it is certainly worthwhile, it has a limited application to our own sphere. No other research and writing discipline exists in such a silo. If a researcher in psychology, for instance, wants to discuss the impact of a medication on a certain disorder, they might research in medical journals, pharmaceutical journals, chemistry journals, or a wide variety of other publications. They are not as confined to a single discipline as we are; when we write, nearly all we look up and rely on is the law.

Plagiarism is so ingrained in the discipline that our two major research engines now allow us to draft documents using the help of artificial intelligence.[14] Why not? If all we do is rely on what other people have written, shouldn't a robot in fact be better at legal analysis than a human? Yes, as of now we still have issues with the recency of data available to a chat bot,[15] and some of what they write sounds like it's been translated back and forth between multiple languages. But it is naive to think that it will not get better over time.[16] So what do lawyers do when our jobs are

[14] *Legal Research AI*, VILL. UNIV. CHARLES WIDGER SCH. OF L. (Feb. 21, 2024, 12:22 PM), https://libguides.law.villanova.edu/legaltechnology/ai. Both LexisNexis and Westlaw are launching their AI platforms this year. *Id.* While their full capabilities are yet unknown, many scholars believe they will become very popular as they become more accurate.

[15] ChatGPT, for example, only contains legal precedent through 2021. It isn't really recent enough to be terribly helpful from a research perspective. *See* Dhanashree, *7 ChatGPT Prompts for Legal Professionals in 2024*, NANONETS (Jan. 18, 2024), https://nanonets.com/blog/chat-gpt-for-legal-professionals/.

[16] I would be remiss not to mention the apprehensive argument that many in our profession have made about the potential of AI to change our jobs or take them over entirely. Some have even argued we may become obsolete. *See* Steve Lohr, *AI Is Coming for Lawyers, Again*, N.Y. TIMES (Apr. 10, 2023), https://www.nytimes.com/2023/04/10/technology/ai-is-coming-for-lawyers-again.html. Should these doomsday prophecies come true, the profession would be in a far better place to survive were we integral to original research across the country.

essentially outsourced to computer chips? In other disciplines, this is not an issue. Certainly, other disciplines will use AI to write or research for them, but other disciplines are first creating things from scratch. An individual researcher might be able to outsource putting pen to paper as it were, but they won't be able to outsource data collection, statistical analysis, or statistical interpretation.

III. THE COMBINED VALUE OF ORIGINAL RESEARCH AND LEGAL TRAINING

Yes, for decades the "hard research" has been left to the social scientists, the statisticians, and the post docs, while the legal academics have stayed opining about precedence. A better approach combines the talents of each group to create well-rounded, analytical scholarship.

A. We Can Fully Analyze the Consequences of Original Research

When I wrote an article for a law review publication last year, it struck me how many social science studies I added to it. It was important to me to shore up the reasons why I was writing on police accountability and mental health, and part of that determination included a discussion on the social science behind sending clinicians to 911 calls instead of law enforcement. I'm certainly not the only person who does this; I have seen many other law review articles make reference to social science studies. What I have not seen is the converse; in the research I've done in social science fields, I do not often see academics citing our precedents in their work. Occasionally, I might see a little statutory analysis, but it's not often. Admittedly, that makes some sense. Social science researchers may want to change policy, but they aren't experts at it. And they aren't trying to persuade anyone with results of a study, because they attempt to be as unbiased as possible as to not alter the results they achieve. Collaboration with a legal expert would allow researchers a full circle analysis of their results including persuasive arguments using those results to change policy. Persuasion aside, a social science paper that also includes a predictive legal analysis might be a bit more compelling to legislators and policymakers who are already used to taking advice from lawyers. Not for nothing, there is a reason why so many legislators have been to law school, but comparatively few of them have any experience in social science research.

Collaboration between academics in various fields would take advantage of this built-in preference for legal analysis, and we are squandering this advantage by not encouraging collaboration. Moreover, how much more valuable might a social study be if it included a legal analysis as to whether and how policy might be changed as a result? If the argument to embrace plagiarism in the law is to increase access to justice, why can't we use that same concept to change policy and enact legislation? It seems to me like many times a PhD will author a study that is then debated directly

by legislators as to whether it is important and whether it should affect their vote. Injecting that study with legal analysis before it is even published gives it an edge up in the legislative process and might field off potential objections.

Nevertheless, involving legal academics at the beginning of a research project may benefit the research itself. Lawyers are trained to analyze clearly, with detail, and to build logical arguments. Our involvement in original research would be helpful with an IRB—not only do we have analytical skills, but our training in oral advocacy makes us well-suited to defend a proposition or answer tough questions. We might also see liability issues with a particular study proposal that others might not think of and stem some instances of falsification.[17] We can add substantive value to original research in ways that are unique to our education and training.

B. We Can Communicate Results Clearly

If we come from the assumption that much of the substance of legal writing is plagiarism, then most of what we teach and analyze in legal writing courses is form. Teaching the form of legal writing is important; for us, the substance of the law is what it is—we can argue for a particular outcome, but we can rarely change it. We simply use the substance of the law as best we can on our clients' behalf. Because of this, we are one of but a few professions that in a way values form over substance. It's not that substance is more important than form; on the contrary, perfecting the form of legal writing is crucial so that we may be clearly understood in the language that most of us have taken years to learn. There are many reasons why legal writing is, in essence, boring. I tell my students every year that legal writing is rote,[18] and for those with a background in literature or poetry it can be very difficult to simplify their writing, especially if they are used to embellishment.[19] Certainly, most practitioners need to make their theories and arguments accessible not only to busy judges, but to jurors who likely have no experience with the legal system. To this end,

[17] While the rate of data falsification varies, a recent example lends some clarity to this discussion. In July of 2023, the president of Stanford University resigned after an investigation found twelve of his research reports had been falsified. Ayana Archie, *Stanford President Resigns After Fallout from Falsified Data in His Research,* NPR (July 20, 2023, 6:36 PM), https://www.npr.org/2023/07/19/1188828810/stanford-university-president-resigns. A law firm hired by the board convened a scientific panel that determined his role in the falsification. *Id.* One would think that had a lawyer been involved from the outset, perhaps the falsification would not have occurred.

[18] For many years, I have suggested students give a draft of a memo to a younger person who has no knowledge of the legal system, like a sibling or friend. If that person can understand the basic argument you're making, you're on the right track.

[19] There is agreement among legal writing professors on the importance of simplifying legal writing. In writing this article, I learned about a practice instituted by Dean Mullins, an Associate Dean for Assessment and Professional Engagement and a Professor of Legal Research and Writing at Stetson University College of Law. Dean Mullins requires her law students to limit their sentences to twenty-three words or less.

many of us are taught to write in the same formulaic manner, so that any manner of person can understand what we are saying.

But valuing correct form in legal writing is important from an access to justice perspective as well—most schools teach pragmatic legal writing, in that we are taught to write clearly so that we are easily understood. Arguably, access to justice is not just about finance, but about lawyers being the gatekeepers to a secret language in a hidden world where litigants sometimes do not understand what is happening in the cases that shape their lives. Hanley highlighted the justice gap through statistics:

> Recent research revealed that while approximately four out of five Californians facing child custody issues sought legal help, only about half with that need secured legal assistance. People facing employment law issues were much less likely to seek assistance, and only twenty-six percent of those who sought help received legal representation. Most importantly, of the potential litigants who consulted legal aid organizations, fewer than one in five secured professional representation in court.[20]

Aside from the financial barriers to justice, there are so many barriers to success in court; literacy, language, and documentation issues can all affect a litigant's understanding of the process.

Anyone who's worked in the legal profession for more than five minutes gets the question, "Do I need a lawyer for this?" quickly followed by "Who do you recommend?" Many of us have gotten even more in-depth questions[21] from people who simply do not understand the system, which includes most Americans. The lack of understanding regarding our system of justice that characterizes the American people as a whole is underscored by the literacy rates of inmates in America. "According to the Correctional Education Association and other statistical data, the illiteracy for adult inmates is estimated at 75 percent."[22] Even among the literate, however, few really understand anything about the law. In *Do People Know the Law? Empirical Evidence about Legal Knowledge and Its Implications for Compliance,* Benjamin van Rooij analyzes how much non-lawyers know about the system.[23]

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[20] Hanley, *supra* note 1, at 6 (citing THE STATE BAR OF CAL., 2019 CALIFORNIA JUSTICE GAP SURVEY TECHNICAL REPORT 14 (2019), https://www.calbar.ca.gov/Portals/0/documents/accessJustice/California-Justice-Gap-Survey-Technical-Report.pdf).

[21] I cannot count on both hands the number of times a student had approached me and had not fully understood what had happened to them in the court system. These were largely educated people who knew they'd been to court but didn't know specifically what they went for or what the result was. Some had criminal records but didn't know what their convictions were for or how many they had. Others assumed that because a criminal charge was old that it had "gone away." Still others received family court pleadings and did not understand what they were facing even after reading them in their entirety.

[22] Emily Herrick, *Prison Literacy Connection*, 16 CORRECTIONS COMPENDIUM 5, 5 (1991).

[23] Benjamin van Rooji, *Do People Know the Law? Empirical Evidence about Legal Knowledge and Its Implications for Compliance,* 32 CAMBRIDGE HANDBOOK OF COMPLIANCE 467, 467 (2021).

According to van Rooij, "ignorance and misunderstanding of the law is common across" legal sectors like criminal justice, family affairs, and health care.[24] Further, the law can be so complicated that even experienced scholars sometimes get it wrong where the law is concerned.[25]

Yes, as Hanley argues, embracing plagiarism in the legal profession can save time and money, but it can also help with barriers to access beyond both. The use of templates, for example, can increase the clarity of our writing. A well drafted and clearly written template can potentially help hundreds of litigants understand their cases. Boilerplate language is not only a time saver, but consistency in using it can increase understanding of it. And many courts promulgate their own "self-service" forms—a litigant using one is, essentially, plagiarism, but the kind that we already value.

Our style of writing, including plagiarism, can both increase access to justice and access to hard data. If we are trained in clarity, then when that clarity is used repeatedly, our clients and the public can better understand the system. And when that clarity is applied to the explanation of an original research study, society can better understand the results. Many of us have heard, often in law school orientation, that people "look to the lawyers in the room" for a variety of reasons. In a collaboration between lawyers and social scientists, who's the best suited to take the podium to report on the conclusions to a groundbreaking study? The ones who've been trained to do so.

We can also lend our talents in predictive writing to original research reports. If it's difficult for a layperson to understand legal documents, it's even more difficult to understand the ramifications of a scientific study. Legal writers are in an excellent position to add clarity and good organization to papers, and in turn, to the media's interpretation of the results.

C. We Can Bridge the Gap Between Originality and Reliance on Precedent

There is value in a system where original research not only discovers something new but relies on past precedent in interpreting the discovery. Lawyers can bridge the gap between discovery and interpretation through our use of precedent. Most scholarly articles in the social sciences do rely on other studies, or at least reference them. Lawyers are well suited to not only find reference studies but be able to read and understand them in light of our new research. Our research skills

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[24] *Id.*

[25] Tami Abdollah, *Study: Federal Magistrates, Prosecutors Misunderstand Bail Law, Jailing People Who Should Go Free,* USA TODAY (Dec. 7, 2022, 10:00 AM), https://www.usatoday.com/story/news/politics/2022/12/07/federal-judges-misapply-bail-law-illegally-jail-arrestees-study-says/10798949002/. A two-year study by the University of Chicago's Law School's Federal Criminal Justice Clinic found that the Bail Reform Act of 1984 had been "wildly misunderstood" by judges, prosecutors, public defenders, and probation officers. *Id.*

are incredibly strong, and we are typically comfortable researching both in the law and in academic journals. Many of us do point to social science research in our law review articles and are at least comfortable reading them; but we are also very good at analyzing prior works. We know how to synthesize; we might be able to lend value to original research by looking at what others have done and comparing our methods and our analysis. Not only that, but we could add value to original research on the front end; we can foresee liability and we can critically examine previous works and analyze them for our benefit in crafting study parameters before data collection begins.[26]

This is not to say that lawyers are powerhouses for empirical research—far from it. Training in empirical methods is not part of the traditional law school experience as it is in doctoral programs; lawyers are trained in the derivative art of legal writing and analysis, and rarely consider statistical or empirical analysis. Learning empirical methods is difficult and time consuming, and our colleagues in PhD programs spend years learning the sophisticated methodology. Nevertheless, this lack of formal exposure doesn't stop lawyers from using empirical data in legal arguments, even if we use it poorly. In her article *Confronting Supreme Court Fact Finding*, Allison Orr Larsen argues that the judicial system misuses data based on a fundamental misunderstanding of how empirical studies should be utilized.[27] To illustrate this, she relies on, among other things, a Supreme Court decision where Justice Kennedy relied on a factual assertion that he said "could not be measured by reliable data but which 'seemed unexceptionable,'" even though actual data exists to the contrary.[28] Further, she argued that the court relied heavily on data that seemed to spring from nowhere. She found that a majority of the most significant Supreme Court decisions used data that was found "in house," or by judicial clerks instead of litigants or amici.[29]

Supporting the involvement of legal academics in original research would not only add value to the academy but to the practice of law. When courts rely not on the facts presented by counsel but on "in house" sources, how reliable is their analysis? What are the parameters of what the Supreme Court is allowed to consider, and shouldn't they be reviewing data that is more peer reviewed and less "unexceptionable?" A robust acceptance and widespread usage of peer reviewed data

[26] Most lawyers are always thinking about liability—even if we aren't well versed in statistic methods, many of us are able to see issues of confidentiality, for example, and head them off at the pass.
[27] *See* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1262–63, 1300 (2012).
[28] *See id.* at 1257 (quoting Gonzales v. Carhart, 550 U.S. 124, 159 (2007)). Larsen describes Kennedy as relying on the "fact" that "many women come to regret their abortions later in their lives," which seemed "unexceptionable" to him in 2007. *Id.* at 1257 & n.9. In fact, empirical research shows exactly the opposite. *See, e.g.*, Laura Kurtzman, *Five Years After Abortion, Nearly All Women Say It Was The Right Decision, Study Finds*, UCSF NEWS, (Jan. 13, 2020) https://www.ucsf.edu/news/2020/01/416421/five-years-after-abortion-nearly-all-women-say-it-was-right-decision-study.
[29] *See* Larsen, *supra* note 27, at 1262.

in the bar and on the bench would encourage lawyers to rely more on provable and peer reviewed facts than on argument. This in turn may lead to more logical decision making and more cohesive results in court.

IV. WE CAN, AND WE SHOULD: HERE'S HOW

The biggest impediment to this approach is logistics; how does the academy go from decades and decades of plagiaristic law review articles to jumping in with both feet to completing original research?

A. Start Small and Trust the Process

I have said many times that going to law school comes with the added advantage of never having to do math again. That's facetious, of course, but a lot of lawyers simply aren't schooled in either the advanced math or statistics that's necessary for original research. That being said, not all original research has to be extensively statistically analyzed. For years, my undergraduate program required a course in research methods, and I was of the opinion that it was inappropriate for sophomore level students. Nevertheless, my students were consistently able to create a survey, disseminated to roughly 200 participants, and at least run some sort of analysis based on percentages of the answers they received. It might not have been the most scientific project, but it was a start—and if college sophomores can manage it, so can legal academics.

There is precedent for this in the legal field, if not directly in legal academia. The Bureau of Justice Statistics,[30] for instance, has promulgated study upon study involving corrections, policing, and other areas of the criminal justice system.[31] Legal academics frequently cite the bureau's research on juvenile justice and prison reform, and it keeps a running repository of all the surveys that it disseminates. Not all original research has to reinvent wheels; it wouldn't be too difficult for legal academics to use the studies that are available on the bureau website and apply them in localities that they want to research. Not only that, but the bureau's website also contains a large section on data analysis tools that can be used to "readily analyze data, view selected charts, and create custom charts . . . ."[32]

[30] BUREAU OF JUSTICE STATISTICS, https://bjs.ojp.gov/ (last visited Mar. 7, 2024).
[31] The majority of the data on the BJS's website is produced by PhDs and Bureau statisticians. A search through their recent publications did not confirm any involvement by JD's, which begs the question: why not? Wouldn't a governmental body intimately involved with studying and improving the criminal justice system be benefited by the input of attorneys who've actually worked in the system? *See id.*
[32] BUREAU OF JUSTICE STATISTICS, *All Data Analysis Tools*, https://bjs.ojp.gov/data/data-analysis-tools (last visited Mar. 7, 2024).

For the next level researchers in our ranks, why not learn more about statistical research? Maybe peruse *The Complete Idiot's Guide to Statistics*[33] or *Statistics for Dummies*.[34] Beyond that, most of us work inside a larger university and can take classes for free. Not only would many of us be well served by taking an introductory statistics class, but we might also benefit from being in a classroom as a student again. As terrifying as it might be to try blending in with the coeds, it might do us good to be on the other side of the podium, remembering what it was like to be out of our depth.[35]

B. Bring In the Ringers

When I taught research methods, I would often bring in a PhD to give a guest lecture on statistical analysis. Certainly, that could be an approach in the legal academy as well. Lawyers are perfectly able to create surveys and collect data on our own, and bringing in an expert on statistical analysis just for that portion of a research paper would not be out of the question.[36]

Most of us are attached to a larger undergraduate institution, where there are always new faculty members looking to collaborate and others who are simply interested in helping colleagues out. In a previous position of mine, for instance, I had met with professors in the Sociology department who had contributed to a municipal program that sent mental health clinicians to a triaged number of 911 calls in lieu of the police. They were not only extremely interested in collaborating with me but noted that the one thing their program lacked was legal input; no one from the law school or any other legal counsel had been involved in the years-long process. This model is increasing in popularity across the country, and every such program would benefit from the input of a lawyer, as might other programs in criminal justice, sociology, psychology, and other social sciences.

Moreover, it wouldn't be a terribly heavy lift for law schools to add an elective on statistical analysis. Depending on institutional rules, a PhD could be brought in to teach that one class for interested students. Otherwise, it might behoove a law

[33] ROBERT A. DONNELLY, JR., THE COMPLETE IDIOT'S GUIDE TO STATISTICS (Alpha Publishing 2d ed. 2007).

[34] DEBORAH RUMSEY, STATISTICS FOR DUMMIES (Wiley Press 2d ed. 2016). The author is a PhD who teaches statistics at the Ohio State University. *Deborah Rumsey*, OHIO STATE UNIV., https://stat.osu.edu/people/rumsey-johnson.1 (last visited Mar. 9, 2024).

[35] Perhaps it could also be viewed as "service to the university" in tenure packages, but we might have to offer to TA, which includes a host of downsides.

[36] Research through self-reporting surveys, however, should only be the start. This kind of data is only minimally helpful as it necessarily biased. *See* Philip Brenner & John DeLamater, *Lies, Damned Lies, and Survey Self-Reports? Identity as a Cause of Measurement Bias*, 79 SOC. PSYCH. Q., 333, 348–49 (2016). Nevertheless, surveys like those created by the Bureau of Justice Statistics and the National Crime Victimization survey remain popular with academics and politicians. A paradigm switch not only allowing but encouraging legal academics to be involved in original research would be even more effective.

school to allow a law student to take a statistics class within the greater university for credit towards their law degree. Many universities do have cross disciplinary programs, and the logistical models for those programs could also be applied to increase the presence of lawyers in original research. Finally, The ABA could also pass judgment on allowing law credit for such a cross disciplinary course. It would seem that such a course, if made an elective, would be a logical part of a law school curriculum, even if it isn't a required course.

A university model that values collaboration across disciplines could benefit the entire university in terms not only of adding to the academy, but for marketing and admissions purposes. Of course, we aren't marketers, but I can see a university department creating a campaign based on "being part of the team" where students might value such a collaborative model. Undergraduates often don't have a clear idea of a career path, and exposure to such collaborative projects might be attractive to their indecision.

C. Add Precise Value Only Lawyers Can Bring

As legal academics, we represent a large, untapped source of expertise in social science research. Not only are we in a good position to offer support in the original research itself and in writing up the results, but our analytical abilities would be well suited to a presentation before an IRB. We are all very used to following rules and applying standards, and an IRB proposal requires both of those at a high level. And as our discipline requires a certain amount of ethical plagiarism, or at least tolerates it, we are excellent at sourcing support for any argument we make.

There could also be a distinct benefit for us in terms of interacting with the media. Many law professors enjoyed a career in the practice before we began teaching, and many of us also had cases that exposed us to media scrutiny. While court cases certainly get reported on in the media, sometimes original research studies do as well. The same oral advocacy skills that make us valuable in front of an IRB also make us valuable in front of a camera. Not only do most of us have some level of poise and the ability to answer questions on the fly, the ethical rules that constrain us also teach us the values of confidentiality and competence. We know what to say when—and are generally not afraid to say it.

D. Make it Worth Our While

Realistically, if legal academics are going to be involved in original research, much of the time it will be through the process of collaboration with PhD's. It is crucial that law schools encourage these sorts of collaborations, not only through funding them, but allowing the tenure review process to consider co-authored works. When I transitioned into teaching law full time, it shocked me how many different and seemingly scholarly works wouldn't count for tenure, but that other shorter and

presumably less important works would be counted. I'll admit, I still don't understand why original research doesn't count for tenure if it's co-authored with someone. Certainly, it adds something to academic dialogue that a law review article never will. It doesn't seem unreasonable to at least allow partial credit toward tenure for a co-authored work in light of the value it has to society.

To that end, perhaps schools could consider a tiered approach to tenure. Perhaps all co-authored works could count for one-half of an article authored alone. Certainly, it takes a lot longer to complete original research—that might also be reflected in law school tenure. I would argue that the time and effort in an original study might be given *more* credit than a law review article. Inasmuch as it might be difficult to get legal academics on board with the idea of original research, it's certainly an uphill battle if none of it counts for tenure.

Further, it wouldn't be out of the question for universities to review tenure for their undergraduate professors as well. In the spirit of "what's good for the goose is good for the gander," the benefits should run both ways. Undergraduate professors should also be given credit for collaborations with law professors, whether on a social science piece or traditional law review article.[37] In any event, there are lots of benefits to society, the academy, and the greater university of these co-produced articles, and that should be reflected in the tenure process.

V. CONCLUSION

So many of us went to law school because we wanted to make a difference in our worlds—and that's central to the premise of Hanley's article. We can and should be using our work to increase access to justice, precisely because the derivative nature of our work can be beneficial for many even with little new effort on our part. But beyond that, we need to be involved more in original academic research. Law review articles will always remain the primary form of scholarship for legal academics, but academia and society would both greatly benefit from our inclusion in empirical research. Lawyers should be on the forefront of progress, and that should include examination and interpretation of hard data, particularly in social science fields. The more we contribute to original research, the more relevant we stay, and the more we really can do to benefit our students, our universities, and our world.

[37] While it might not be the norm, I can imagine a universe wherein a social scientist might weigh in on topics like patent law, health law, or criminal law. Perhaps getting a different perspective would be beneficial for everyone.