Brief It Like Brandeis: The Use of Social Science and Other Non-Legal Sources in Appellate Advocacy

Thursday, May 4, 2023

Moderator:

Julia C. Shear Kushner

Speakers:

Honorable Therese M. Stewart

Professor Ellie Margolis

Leslie Ellen Shear

MCLE: **1 Hour of MCLE including 1 Hour of Legal Specialization in Appellate Law**

Conference Reference Materials

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Brief It Like Brandeis:

Using Social Science and Other Non-Legal Sources in Appellate Advocacy

Brandeis Briefs and Their Uses in Family Law

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CLA Litigation & Appellate Summit

MATERIALS: HTTP://TINY.CC/BRANDEIS

What Every Fool Knows

Instead of relying solely on arguments based on legal precedence and logic, a Brandeis Brief would be filled with facts, statistics, and data explaining why a particular regulation should be upheld as constitutional.

MATERIALS: HTTP://TINY.CC/BRANDEIS

HARVARD

LAW REVIEW.

VOL. IV. DECEMBER 15, 1890. NO. 5.

THE RIGHT TO PRIVACY.

> "It could be done only on principles of private justice, moral fitness, and public convenience, which, when applied to a new subject, make common law without a precedent; much more when received and approved by usage."
>
> WILLES, J., in Millar *v.* Taylor, 4 Burr. 2303, 2312.

THAT the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession—intangible, as well as tangible.

Thus, with the recognition of the legal value of sensations, the protection against actual bodily injury was extended to prohibit mere attempts to do such injury; that is, the putting another in

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Three Open Gates for Social Science

Courts access social science through three mechanisms: expert testimony, briefs, and judicial notice.

Ramsey and Kelly (2004-2002) *Social Science Knowledge in Family Law Cases: Judicial Gate-Keeping in the Daubert Era*

MATERIALS: HTTP://TINY.CC/BRANDEIS

Without Oath or Cross-Examination

Even in the relatively strict precincts of judicial inquiry, published research material on social and economic conditions is habitually used without entering it in evidence, without putting the author under oath or cross-examining him.

Rivera v. Division of Industrial Welfare (1968)

Drop a Footnote
Citing a Footnote?

The "Brandeis brief," which brings social statistics into the courtroom, has become a commonplace. A measure of fame now surrounds footnote 11 in *Brown v. Board of Education* (1954) … , which cites published sociological and psycho-logical studies for the proposition that racial segregation tends to retard educational and mental development. [Citation]

Rivera v. Division of Industrial Welfare (1968) FN20

MATERIALS: HTTP://TINY.CC/BRANDEIS

Adjudicative Facts:
Expert Witness in the Courtroom
Legislative Facts/Frameworks:
Social Science and Interdisciplinary References

Real Party does not offer the inter-disciplinary references as adjudicative facts. Rather, they provide an essential intellectual framework for understanding the record and the policies served by the family court's decisions.

MATERIALS: HTTP://TINY.CC/BRANDEIS

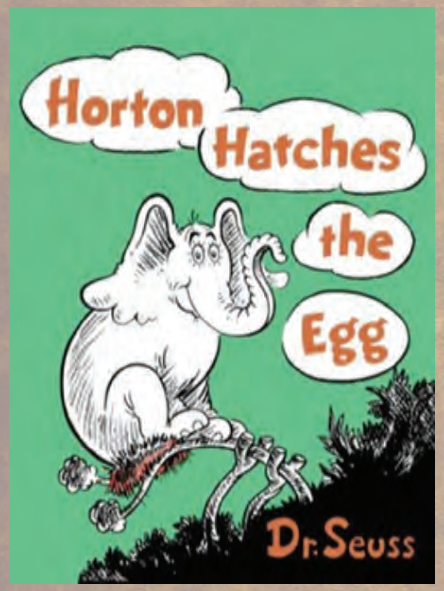
Frameworks

[Father]'s argument boils down to the contention that he must prevail because he is the "real" parent here. Alas, he fails to grasp the meaning of "real." De facto parents abound in children's literature as well as law books, and these stories have much to teach grownups about what matters. Respondents' appellate counsel wrote an amicus brief for this court on the child's behalf in *Buzzanca*, citing (at p. 49) Marjorie Williams' children's book,

…The essence of parenthood remains the same. Responsibility and care are the heart of parenthood. So long as society considers issues of parentage in the context of that responsibility and care, the core definition of family will remain unchanged. While the things of the heart cannot be controlled in the courtroom, parental care can be honored and parental responsibilities can be enforced. Two-and-one-half-year-old Jaycee already knows the lesson her storybooks tell,

"Real isn't how you are made," said the Skin Horse. "It's a thing that happens to you. When a child loves you for a long, long time, not just to play with, but REALLY loves you, then you become Real."

Marjorie Williams (1922),
The Velveteen Rabbit or How Toys Become Real



Similarly, Dr. Seuss's famous elephant, Horton (Horton Hatches the Egg (1940)), becomes a "real" parent by sitting and nurturing the egg laid and left behind by Mayzie Bird. Horton perseveres through many travails, always refusing to leave the nest and repeating "I meant what I said and I said what I meant. An elephant's faithful, one hundred per cent."

After many weeks, a baby elephant-bird hatches – nurture and nature combined. The probate court clearly recognized that nurture and commitment make families real. Guardianship has preserved Rachel and Robert's entire family.

MATERIALS: HTTP://TINY.CC/BRANDEIS

From the unpublished opinion adopting the framing…

Father appeals raising several overlapping contentions we have consolidated into two basic attacks. First, an attack on the court's exercise of discretion in awarding custody to stepfather and grandmother, which includes the court's determination stepfather and grandmother qualified as de facto parents. Second, an attack on the constitutionality of the court's order as applied. Recounting two childhood classics – Marjorie Williams's The Velveteen Rabbit or How Toys Become Real and Dr. Seuss's Horton Hatches an Egg – stepfather and grandmother urge us to affirm, because nurture and commitment, not necessarily biology, make families real, and responsibility and care fit the core definition of parenthood and family. We agree. Father has not demonstrated error. Accordingly, we affirm.

MATERIALS: HTTP://TINY.CC/BRANDEIS

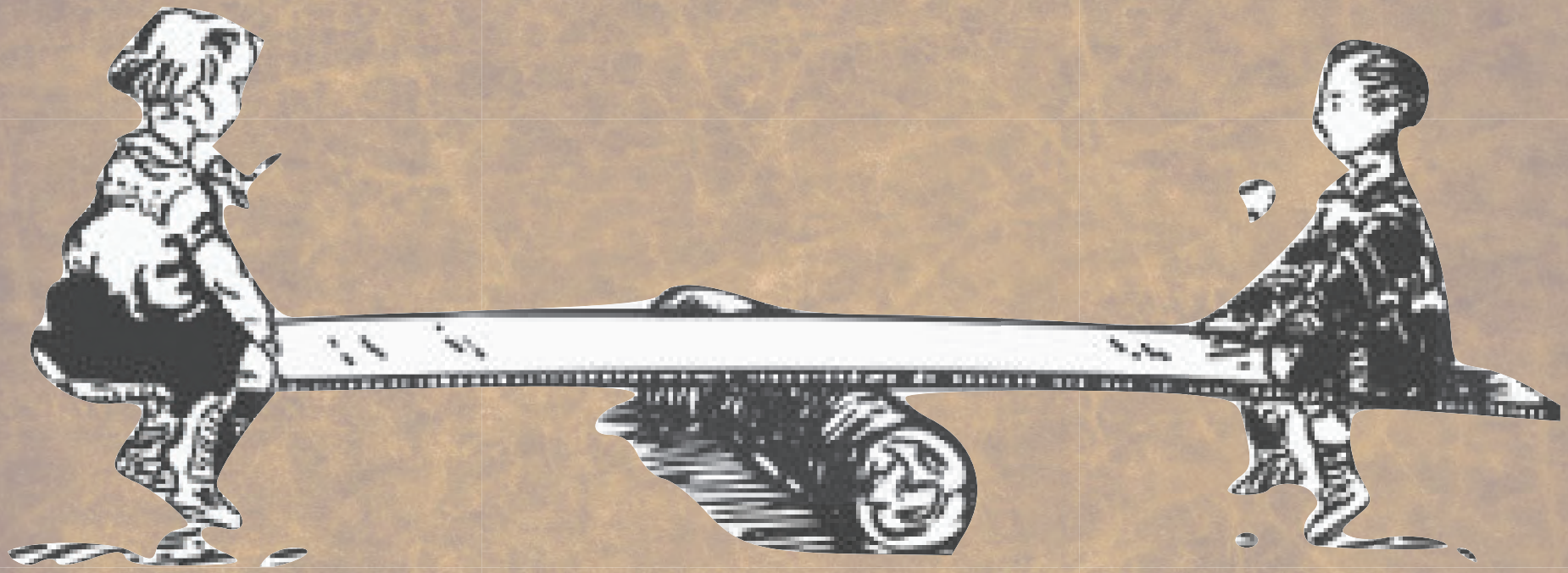
DCA4: [O]pining for a Brandeis Brief

We have available for our use no Brandeis brief or other expert testimony as to the practical effects of after-the-fact determination that a project is "public works."

Lusardi Const. Co. v. Aubry (1989)

MATERIALS: HTTP://TINY.CC/BRANDEIS

The 1970 Family Law Act



Therapeutic

Jurisprudence

MATERIALS: HTTP://TINY.CC/BRANDEIS

Brandeis Briefs in Trial Courts

Considerations of judicial economy make it impractical to require that the views of a cross-section of the relevant scientific community be presented personally by each scientist testifying in open court. [Citation] Accordingly, for this limited purpose scientists have long been permitted to speak to the courts through their published writings in scholarly treatises and journals. [Citation]

In re Jordan R. (2012)

MATERIALS: HTTP://TINY.CC/BRANDEIS

Shining Some Light on Human Experience

I contend that the use of social science in family law is as much philosophically important as it is scientifically relevant. [Citation] It identifies general social tendencies that may help legal decision makers by shining some light on human experience that may be applicable in a particular case. It is not assumed to provide a bright line point of decision-making, only a beacon of light in an otherwise potentially dimmer hallway of justice. …

MATERIALS: HTTP://TINY.CC/BRANDEIS

…In the end, I believe that judiciously applying current scientific knowledge will undoubtedly enhance our thinking, and therefore our practice. It suggests a starting point for clinical and legal considerations, from which vantage point we are urged to consider alternative explanations and differentiating substantive from statistical significance. Scientific information provides the material from which clinical wisdom, legal precedent, and experience may then be applied on behalf of all children and families.

Marsha Kline Pruett, *Social Science Research: Essays From the Family Court Review*

MATERIALS: HTTP://TINY.CC/BRANDEIS


Quips, comments or queries?
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Brief It Like Brandeis

Using Social Science and Other Non-Legal Sources in Appellate Advocacy

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Beasley School of Law

May 4, 2021

Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs, 34 U.S.F. L. Rev. 197 (2000)

Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs, 62 Mont. L. Rev. 59 (2001)

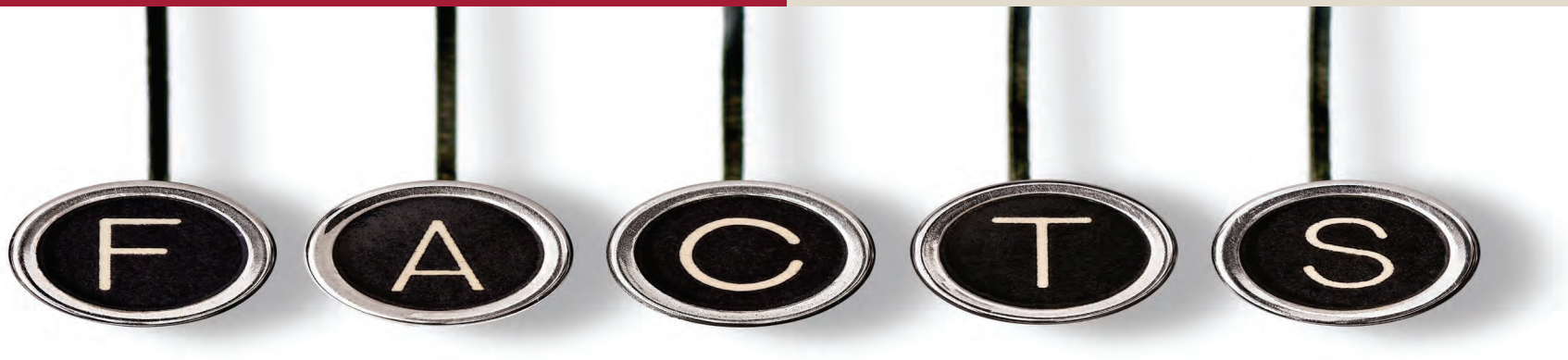

BABY, THERE'S NOTHING
HOLDING ME BACK!

Adjudicative Facts

- Who
- What
- When
- Where
- Why

Legislative Facts

- Context
- Policy
- How law applies




JUDICIAL
NOTICE

Nonlegal information can show how the law operates in the real world

What can you cite?

- Law review articles
- Empirical research
- Social or psychological theory
- Economic Theory
- Policy Analysis

Why?


2021
I DID
MY OWN
"RESEARCH"

Take charge of the context


ETHICS

When? → Policy Arguments

- Close cases
- Issues of first impression/novel theories
- Arguments about law, not fact
- New statutory interpretation
- State constitutional claims
- Marginalized or vulnerable populations

Ellie Margolis
@EllieMargolis

Crowdsourcing a question for #AppellateTwitter: in a party brief (not amicus) do you ever cite non-legal information (empirical data, economic theory, etc.) in support of your legal argument? If so, please indicate type of case (patent, civil rights, etc.) in the comments

Sometimes	**91.5%**
Never	8.5%

130 votes · Final results

2:30 PM · Apr 17, 2023 · **5,634** Views

Chris Kozak
@chriskozak19

Any case that involves science, public health, or anything the judges are likely to have unconscious biases about.

Carl Cecere @CecereCarl · 2h
In virtually any case where the issues have public import, I'll be citing the best evidence I can find showing the public import.

Raffi Melkonian @RMFifthCircuit · 1h
Sure. All kinds of statutory interpretation, if we're trying to figure out the best way to read something. How do the economics work?

Matthew Segal
@segalmr

Yes. Civil rights. All the time.

And I will add that courts rely on judgments about non-legal info all the time, and in the absence (and sometimes despite the presence) of real info, they rely on their own intuitions.

Dígame Concejal @RSGAT · 1h
I do child welfare and have cited non-lethal sources on the psychological impacts of removal on children and families, the impact of prenatal drug use on babies' health, statewide reductions in school participation during the pandemic, bus schedules and travel times, &c., &c.

Cacao byproduct @cacao_byproduct
Immigration & civil rights

Mid Age Angst @MidAgeAngst · 4h
Yes. Mental health law. And courts have included my citations to non-legal authority in their opinions.

Claudia Center @Claudia_SF
Disability rights


Temple
University
Beasley School of Law

VIRGINIA LAW WEEKLY

1948-Present.

Brandeis in Brief: The First Public Confirmation Hearing

September 26, 2018

Part Two of Confirmation Stories, *a continuing Law Weekly series*

William Fassuliotis '19
Guest Columnist

If you can remember back to the confirmation hearings for Judge Kavanaugh, before the accusations were made against him, you likely had one of two sets of thoughts. If you were sympathetic to those opposing Judge Kavanaugh, you may have seen Senate Democrats as engaging in principled opposition,

seeking as much information as possible about his time with the Starr investigation, the Bush Administration, and as a judge in order to make the case to the American people, like Ted Kennedy and other Democrats did in 1987. If you were sympathetic to those in support of Judge Kavanaugh, you might have been appalled at the histrionics and tantrums by a bunch of Senators trying to enhance their presidential prospects. Both sides weep for the future of the republic. One can be forgiven for thinking that confirmation hearings have a principled history, dating back to the founding, and only recently become debased political spectacles. This thought, however, is mistaken.

The expectations surrounding Supreme Court nominees would change forever on January 2, 1916, when Justice Joseph Rucker Lamar passed away.1 On January 28, President Woodrow Wilson, after much deliberation and lobbying (including by *The New York Times* and others to appoint former President and 1912 electoral opponent William Howard Taft), nominated a close advisor, Louis Dembitz Brandeis.

By that time, Brandeis had acquired the epithet of "The People's Lawyer." The controversy surrounding his nomination can easily be understood by what others wrote about him. To his opponents he was, as Taft wrote to a friend, "a muckraker, an emotionalist for his own purposes, a socialist, prompted by jealousy, a hypocrite, a man who has certain high ideals in his imagination, but who is utterly unscrupulous in method in reaching them…." His supporters would agree with Justice William Douglas (who would replace Justice Brandeis when he retired), that "the image of Brandeis … was one that frightened the Establishment. Brandeis was a militant crusader for social justice whoever his opponent might be. … He was dangerous because he was incorruptible."2

Brandeis invented what would become known as the "Brandeis Brief," or as he would call it, "What every fool knows." Instead of relying solely on arguments based on legal precedence and logic, a Brandeis Brief would be filled with facts, statistics, and data explaining why a particular regulation should be upheld as constitutional. This was, for its time, simply radical. He was also successful, even at the height of the Lochner era.3

At a time when the legal profession in general, and the judiciary in particular, was small-c conservative—valuing tradition, ordered liberty, and the rights of property—the above would have been enough to create a firestorm of opposition. There was another "complicating" factor: Brandeis would be the first Jewish member of the Court. Though raised in a secular household, he would embrace his Jewish faith as he became older, and would be one of the pioneers of Zionism. Few, if any, publicly opposed him on openly anti-Semitic grounds, although in private a number definitely did. Some accused Wilson of nominating Brandeis to bolster Jewish support for the upcoming election and to appease political constituencies. Sometimes subtext, sometimes text, the controversy over his nomination cannot be understood without his religion.

And so, this set the stage for the first public confirmation hearing. I should note the emphasis is on first *public* confirmation hearing—the Senate had at least one hearing on a nominee before 1916,4 and nominees were regularly referred to a committee since 1868.5 These were, however, private and closed to the public, short in duration, and, with one exception, without witness testimony. The modern confirmation hearing—public, extensive, and with testimony by proponent and opponents—

was pioneered in response to Brandeis' nomination.6 Both proponents and opponents were unsure whether the nomination would succeed, and both hoped to use the hearing to persuade undecided Senators.

The first hearing was called to order on February 9, 1916, the first of 19 days of hearings, by far the most of any justice. A subcommittee consisting of five members of the Senate Judiciary Committee heard testimony from 43 witnesses. Opponents testified that his conduct was unprofessional and unethical, his character unfit, and an advocate who would not—nay, could not—be impartial as a Justice. His supporters rebutted those allegations as unfounded attacks by the "privileged interests." The hearing discussed years of Brandeis' cases, litigation, activities, and other matters important at the time but footnotes to contemporary historians. Conspicuously absent was Brandeis himself—a nominee would not testify at his own hearing until Harlan Stone in 1925.7 On April 1, the Subcommittee voted in favor 3–2. On May 24, the Judiciary Committee would report favorably on the nomination, 10–8, on a party line. Finally, on June 1, 1916, the Senate voted to confirm Brandeis 47–22.8 Those 125 days remain the longest amount of time between a nominee's nomination and confirmation or rejection by the Senate. Justice Brandeis would stay on the court until 1939.

As a judge, Brandeis would be exactly what his supporters hoped for and critics dreaded. He would continue to be an "advocate for the people," forcefully writing for or joining opinions or dissents in favor of freedom of speech,9 a right of privacy,10 and other decisions that helped, in his view, put the "small man" on a level playing field. He was not, however, a doctrinaire liberal. He decried "the curse of bigness," and the twin evils of both big business and

big government. He was perhaps the biggest proponent of Jeffersonianism since Jefferson himself. He popularized the description of states as "laboratories of democracy,"11 and joined decisions striking down parts of the New Deal he thought centralized too much power in the hands of the federal government. He believed that business and government needed to be small enough that the common man and his neighbors could join together and have control over their own destinies.

If you have any questions, comments, ideas for future articles, please do email me. I am always interested in them. Sources used, in addition to those in the footnotes, include Jeffrey Rosen's Louis D. Brandeis: American Prophet, and A.L. Todd's Justice on Trial: The Case of Louis Brandeis.

Next time: Eisenhower, Nixon, and the Warren Court.

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1 Justice Lamar, a Taft appointee and a deservedly obscure Justice who served only five years, should only be remembered as one of three pairs of relatives to sit on the Court. He was the cousin of undoubtedly the best-named Justice to ever don the robe: Lucius Quintus Cincinnatus Lamar II, a Grover Cleveland appointee who also served only five years.

2 https://www.nytimes.com/1964/07/05/archives/louis-brandeis-dangerous-because-incorruptible-justice-on-trial-the.html

3 In *Muller v. Oregon*, the Court unanimously upheld an Oregon law limiting the work day for women in factories to 10 hours.

4 http://www.scotusblog.com/2016/03/legal-scholarship-highlight-the-evolution-of-supreme-court-confirmation-hearings/ ("Legal scholarship highlight: The evolution of Supreme Court confirmation hearings")

5 https://fas.org/sgp/crs/misc/RL33225.pdf ("Supreme Court Nominations, 1789 to 2017: Actions by the Senate, the Judiciary Committee, and the President")

6 To be clear, not every nominee had a hearing after Brandeis. The next six nominees did not. But when there were hearings, this was the first and the precedent. Sources disagree on when hearings became standard procedure. Felix Frankfurter in 1939 or John Harlan II in 1955 are commonly listed.

7 Harlan F. Stone would be the first to do so, primarily to answer questions about his actions as attorney general. The practice would not become regular until the mid-20th century. As well, there were six nominees between Brandeis and Stone who either did not have a hearing, or had one in private.

8 One of those who voted against confirmation was Senator George Sutherland of Utah, who would in 1922 join Justice Brandeis on the bench.

9 *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring).

10 *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

11 *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (Brandeis, J., dissenting).

← Letters To The Editor: 9-26-18

Confirm Kavanaugh (if the Allegations are False) →

Case No. S-126945

IN THE
SUPREME COURT OF CALIFORNIA

KRISTINE RENEE H.,
Plaintiff and Appellant,
v.
LISA ANN R.,
Defendant and Respondent.

KRISTINE RENEE H.,
Petitioner,
v.
THE SUPERIOR COURT OF
LOS ANGELES COUNTY
Respondent;

LISA ANN R.,
Real Party in Interest.

SUPREME COURT
CASE NO. S-126945

Court of Appeal
Case No. 2d Civ. B-167799

Los Angeles Superior Court
Case No. PF-001550

RESPONDENT'S ANSWER BRIEF ON THE MERITS

Appeal From a Decision By the Court of Appeal
Second Appellate District, Division Three

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION:

A. EXTENDING THE PARENT-CHILD RELATIONSHIP EQUALLY

> What is dispositive is the presumed [parent's] relationship with, and responsibility for, the child.
>
> *In re Nicholas H.* (2002) 28 Cal.4th 56, fn. 2

> One challenge faced by all children in lesbian- and gay-headed families that is not shared with the children of heterosexual parents is that of equal legal access to the parents who raised them, regardless of those parents' relationship status during the course of the child's life.
>
> Laura S. Brown, "*Relationships More Enduring*": *Implications of the Troxel Decision for Lesbian and Gay Families*, 41 Family Court Review 60-61 (2003) [Emphasis added]

Family Code §7602's promise that "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents," requires legal recognition of both Lauren's parents. When a couple chooses assisted reproduction, doctrines of intended parenthood, functional parenthood and equitable estoppel converge to require legal recognition of both parents.

Lauren Anee R.-H. was born into a two-parent family four years ago. Her two mothers have raised her since birth. Kristine's belated claim of a biology-based right to single-parenthood is contrary to law and Lauren's interests. Lisa is Lauren's parent by operation of law. The judgment recognizes that status.

Kristine and Lisa are the parties, but this is Lauren's case. Her interests, not her parents' rights, are paramount. *Prato-Morrison v. Doe* (2002) 103 Cal.App.4th 222. Lauren's interest in the integrity and permanence of her parent-child relationships require this Court's protection. Lauren's

relationship with Lisa is far more important to her than a non-existent relationship with a sperm donor. Lauren's relationship with Lisa does not jeopardize her relationship with Kristine. Lauren has two mothers.

Lauren's case, and the two related cases, will determine whether California fulfills the promise of Family Code §7602, and the mandates of the California and federal constitutions. Modern parentage law, including California's version[1] of the Uniform Parentage Act promulgated by the National Conference of Commissioners on Uniform State Laws[2] emerged following the mandate of the United States Supreme Court. to abolish the status of bastardy and ensure equal treatment of all children. National Conference of Commissioners on Uniform State Laws, "Prefatory Note," Uniform Parentage Act.

We have come a long way since the equal-protection decisions in *Levy v. Louisiana* (1968) 391 U.S. 68; *Weber v. Aetna Casualty & Surety Company* (1972) 406 U.S. 164; and *Gomez v. Perez* (1973) 409 U.S. 535. When parentage law was bastardy law, fathers formally legitimized extramarital children. Today,

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[1] This brief uses "Cal-UPA" for Family Code §7600 *et seq.* and "UPA" for the model act.

[2] The term UPA is often used erroneously to refer to all of California's parentage law, or at least the statutory provisions. Portions of the code, including §§7540-7541 antedate the codification of the common law, and have been part of our statutory scheme since the 1872 Field Code. Cal-UPA, enacted a full century later, is just one chapter of Family Code Division 12 – *Parent and Child Relationship*. California's parentage statutes begin with Chapter 1 (§§7500-7507, and also include Chapter 2 (Uniform Act on Blood Tests to Determine Paternity), and three other chapters. California's courts have always had inherent jurisdiction to determine parentage, applying common law and equitable doctrines. Almost 150 years of piecemeal parentage legislation have not nullified those independent sources of California parentage law. None of the statutes was intended to exhaustively treat all fact patterns.

parentage judgments formally recognize parent-child relationships that exist by operation of law.

To fulfill the original intent of the legislation, courts must construe parentage statutes to prevent discriminatory treatment of children's relationships. To the extent that parentage statutes do not directly address children's real-world situations, courts have extended statutes by "parity of reasoning" to ensure all children are equally protected, following the lead of this Court in *Johnson v. Calvert* (1993) 5 Cal.4th 84. Failure to do so would create a new class of bastards.

To the extent that a few appellate courts have accorded primacy to biology and/or concluded that a child may not have two same-sex parents, they have failed in their paramount duty to protect children's best interests. This Court should reject the reasoning of the First and Third Districts in *Jhordan C. v. Mary K.* (1986) 179 Cal.App.3d 386; *Curiale v. Reagan* (1990) 222 Cal.App.3d 1597; *Nancy S. v. Michelle G.* (1991) 228 Cal.App.3d 831; *West v. Superior Court* (*Lockrem*) (1997) 59 Cal.App.4th 302; *Guardianship of* Z.C.W. *and* K.G.W. (1999) 71 Cal.App.4th 524; and *Guardianship of Olivia J.* (2000) 84 Cal.App.4th 1146. Each of those cases resulted in a tragic loss for a child.

There is no *nexus* between parental marital status or domestic partnership status or gender and the child's need to have her parentage recognized. There can be no rational basis for treating Lauren differently than the law has treated children similarly situated in cases like *Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410; *Prato-Morrison v. Doe supra*; *In re Nicholas H.*, *supra*; or *In re Karen C.* (2002) 101 Cal.App.4th 932.

This Court's decisions in *Nicholas H.* and *In re Jesusa V.* (2004) 32 Cal.4th 588 establish that biology is not paramount. Recent expansion of domestic partnership statutes to recognize that children may have two

same-sex parents should relieve the qualms of those appellate courts that applying the law to protect the children in such families will not infringe on a legislative prerogative.

Failure to provide children of same-sex couples with the same protections for their relationships enjoyed by children of heterosexual couples violates the children's substantive due-process, equal-protection and liberty-privacy rights, as well as those of their parents. *Lawrence v. Texas* (2003) 539 US 558; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307.To the extent that the statutory scheme fails to include children like Lauren, it is unconstitutional. "[T]here are times when the due-process clause of the federal Constitution precludes states from applying substantive rules of paternity law which have the effect of terminating an existing father-child relationship." *Brian C. v. Ginger K.* (2000) 77 Cal.App.4th 1198, 1200-1201.

The facts of Lauren's conception, birth and first years of life,[3] leave no doubt that Kristine and Lisa acted as a couple, with the shared intent that they both would be her parents. [Opp.Exh.[4] 20-21, 95-96, 101-102, 104-105] They acted jointly to obtain legal recognition of their parental status before her birth [Opp.Exh. 1-5. 9-10, 12-14. 21-22, 56; Pet.Exh.11] using the

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[3] For the most part, Kristine's factual account is accurate. Where salient facts are omitted or distorted, this brief will reference the record at the points where those facts bear on the argument presented. A more detailed factual history is set forth in Lisa's opposition to Kristine's writ petition. Kristine and Lisa acted in every possible way as full co-parents – from Lauren's name, to birth announcements to Lisa's assumption of full financial responsibility for her daughter. There can be no doubt about Kristine and Lisa's intent.

[4] Respondent adopts Petitioner's conventions for identifying the exhibit volumes, and cites the particular items by page number.

resulting judgment to ensure that Lauren was covered by Lisa's health insurance at birth. [Opp.Exh 56, 124-130] They presented themselves to the world, and to Lauren, as her parents for the first three years of Lauren's life, sharing parenting before and after they separated from one another. Kristine and Lisa acted in every possible way as full co-parents – from Lauren's name, to birth announcements to Lisa's assumption of full financial responsibility for her daughter. [Opp.Exh. 56-67]

Lauren and Lisa relied on Kristine's conduct encouraging and promoting Lisa as a full parent in forming their mother-daughter relationship. Lauren has an attached, attuned, and developmentally critical mother-daughter relationship with Lisa. [Opp.Exh. 57-60, 96-99, 107]

Three years later, Kristine changed her mind, cutting off Lauren's contact with Lisa. She brought an unsuccessful motion to vacate the judgment on the *sole ground* that the court had no jurisdiction to enter a *pre-birth* parentage judgment. [Opp.Exh. 18; Resp.Exh. 83-85] Kristine declared that she wanted to vacate the judgment to avoid uncertainty about its validity. She expressly denied any intention to terminate the actual relationship between Lisa and Lauren, representing that she intended to work out custody and visitation arrangements privately (while she was actually denying all access) [OppExh. 22, line 24 through p. 23, line 18]. Any such uncertainty could have been resolved by an amended stipulated judgment entered post-birth. Through her attorney, Kristine admitted that all facts and legal arguments set forth in Lisa's responsive pleadings to Kristine's motion to vacate the judgment are true and correct, and that the only issue in dispute was the validity of pre-birth parentage judgments [OppExh., 56 lines 9-18. 57, lines 21-24]. She is estopped from denying those

facts, including the shared intent that Lisa be recognized in law as a parent. She is estopped from treating Lisa as a non-parent.

In granting visitation pending appeal, family court found that both parties went to great lengths to have a child, that during their relationship, that Lisa did significant and perhaps equal parenting of Lauren and that Lauren has a deep and meaningful bond with Lisa and that it is valuable to Lauren to have two mothers, with different styles of parenting in her life. Lauren and Lisa's relationship has continued through visitation orders, pending during the appellate litigation. [Respondent/Real Party's Combined Opposition to Writ Petition and Brief 23-25]

Now Kristine claims an absolute right, as Lauren's biological mother, to be a single parent. Allowing biological parents the power to eliminate their nonbiological co-parents at any point in the child's life gravely threatens children's stability and welfare. Nonbiological parents often walk on eggshells, fearful of provoking their partners into deployment of the ultimate weapon – a challenge to their legal-parent status.

> Despite strong social pressures in LGB communities to act in the best interest of children, not all separating same-gender couples with children rise above the emotions of the moment, similar to heterosexual couples in this predicament. Some separations are acrimonious. Children become weapons. As long as the law defers to the primacy of biology over the emotional well-being and attachments of children, the offspring of lesbian and gay couples who part acrimoniously are at serious risk of loss. (Citation).
>
> Brown, *Lesbian and Gay Families..., supra* at p. 62

Kristine's post-separation self-centered legal quest for single parenthood is the antithesis of moral parenthood.

> Based on an evolving scientific understanding of children's development, the concepts of psychological

> parenthood, attachment or any social science may not in themselves be strong enough to stand up against legal arguments favoring the rights of biological parents. Perhaps we need an additional perspective. In his philosophical analysis of children's rights, David Archard draws a distinction between biological and moral parenthood. [Fn. omitted] A moral parent is committed to providing care and concern, but, beyond that, feels "a self-sacrificial affection" for the child. The mother in the Solomon story qualifies as a moral parent.
>
> ...The concept of moral parenthood (or its absence) may ... explain why it does not seem right, despite possible evidence of attachment to the contrary, to award custody to someone who has kidnapped a child, or to deny it to Holocaust parents and others who have been separated from their children through no fault of their own. Finally, the concept of moral parenthood is incompatible with notions of the child as property. It does not insist upon a specific style of nurturance or form of family. Nor does it necessarily decide difficult cases. But it does demand a view of children as persons in their own right.
>
> Arlene Skolnick, "Solomon's Children: The New Biologism, Psychological Parenthood, Attachment Theory, and the Best Interests Standard" in Mary Ann Mason, Arlene Skolnick, and Steven D. Sugarman (Eds.), *All Our Families: New Policies for a New Century*, Oxford University Press (1998) 239-240

In Lauren's case, and in the two related matters, this Court must determine how parentage law is to be applied when unmarried couples bear children using assisted reproduction. This Court should hold that the legal relationship of parent and child exists between Lauren and Lisa.

B. Policies Underlying Family-Formation Law Require Recognition of Lauren's Two Parents

This Court has used four family formation cases (*Johnson v. Calvert, supra*; *Dawn D. v. Superior Court* (*Jerry K.*) (1998) 17 Cal.4th 932, U.S. cert. denied 525 U.S. 1055; *Sharon S. v. Superior Court* (*Annette F.*) (2003) 31 Cal.4th 417; and *In re Jesusa V., supra*) to identify the core public policies underlying California family formation law. Each elevates children's interests over claims of parental rights.

Those cases identify six core public policies for family formation law.

1. promote a clear legal framework for recognizing legal parentage that increases family permanence, predictability, stability and certainty,
2. give children the economic, emotional and social security of two parents when possible,
3. recognize intentional use of ART as a form of procreative conduct giving rise to legal parent-child relationships,
4. recognize functional parenthood and assumption of parental responsibilities as giving rise to legal parent-child relationships,
5. de-emphasize the importance of genetic ties, and
6. apply parentage laws gender-neutrally.

Marcia Garrison terms this an "interpretive" approach to parentage law,

> ...cases of sexual and technological conception should be governed by similar rules because, despite mechanical differences between these two reproductive methods, there are no significant differences in the parent-child relationships that they produce. ... the interpretive approach can cabin rule-making disagreements, and that it can generate comprehensive

> parentage rules that are based on uniform policy goals and that ensure consistent treatment of parent-child relationships.
>
> Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage* 113 Harv. L. Rev. 835, 837 (2000)

Garrison explains,

> ... [A]lthough the structure and content of legal standards have changed along with social mores and perceptions of children's interests, family law has consistently preferred the interests of children and the public to those of parents and parent-claimants. Thus, while biological relationship typically determines legal relationship, courts and legislatures have at times ignored biology in order to provide the child with care and support from two parents, foster marital child rearing, or protect a child's established relationships.
>
> *Id.* at 844

In *Johnson*, this Court recognized the importance of protecting the child's interests in stability and certainty.

> [T]he interests of children, particularly at the outset of their lives, are "[un]likely to run contrary to those of adults who choose to bring them into being." (Shultz, op. cit., supra, at p. 397.) Thus, "[h]onoring the plans and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike." (Ibid.) ... a rule recognizing the intending parents as the child's legal, natural parents should best promote certainty and stability for the child.
>
> *Johnson v. Calvert, supra* at 84, 95

This Court stressed the importance of the child's ties, within the Calvert family unit over the gestational ties the child had with the surrogate (See, fn. 8). At the same time, the Court read Family Code §7613 gender- and technology-neutrally to encompass egg- and embryo-donation cases (Fn. 10).

In *Dawn* D., this court protected a child's established relationship interests by denying Family Code §7541 standing to a biological father.

This Court held that an actual relationship with the child (taking child into his home and holding child out as his own per Family Code §7611(d)) is required for standing, efforts did not suffice.

The child's need for permanence, continuity and stability also shaped the decision in *Sharon* S., a landmark same-sex-parent adoption case. This Court identified family formation law public policies of providing a clear legal framework for resolving any disputes that may arise over custody and visitation; preventing uncertainty, conflict, and protracted litigation in this area and giving children the security and advantages of two parents, including two parents of the same gender. This Court found those policies are best served by looking at intent to share parenthood.

> Unmarried couples who have brought a child into the world with the expectation that they will raise it together, and who have jointly petitioned for adoption, should be on notice that if they separate the same rules concerning custody and visitation as apply to all other parents will apply to them.
>
> (*Id.* at p. 438)

Justice Werdeger's majority opinion (at p. 426) and Justice Baxter's concurring and dissenting opinion (at p. 544), stress that family-formation "statutes are to be liberally construed with a view to effect their objects and to promote justice. Such a construction should be given as will sustain, rather than defeat, the object they have in view," citing *Department of Social Welfare v. Superior Court* (1969) 1 Cal.3d 1. Justice Baxter goes on to observe that children's interests are protected by "formalizing in law a relationship that already exists in fact between the child and the prospective parent."

Last term this Court again held that functioning family relationships may outweigh genetic ties to protect children's interests over the rights claims of genetic parents. In *Jesusa* V., both the child's biological father and

her mother's husband qualified as presumptive fathers under Family Code §7611. This Court held that evidence of biological parentage does not automatically rebut the presumptions of fatherhood based on marriage or assuming parental responsibilities.

The principles derived from these cases recognize functioning family relationships, and make children's needs a court's first priority. Use of this interpretive approach to applying California parentage law supports the validity of the stipulated judgment entered by the Superior Court prior to Lauren's birth.

Garrison (at p. 895) concludes, "Contemporary parentage law offers two general themes to guide policymaking in the area of technological conception: children's interests come first and two-parent care is generally preferable to that of one parent alone."

Recognition of Lisa's parenthood does not deprive Lauren of her biological mother, any more than it would if Lisa was Kristine's husband. Kristine and Lisa are not competitors for the single role of mother. Same-sex couples create two-parent families.

Recognition and protection of Lauren's two-parent family best serves all six of the public policies this Court has identified for family formation cases. Application of these policies gives clear answers to this Court's five questions. Using those public policies to apply existing law requires this Court to hold:

1. The judgment is valid. Parentage judgments should only be voided when essential to protect the child's interests;
2. If the judgment was invalid, the Superior Court would have subject matter jurisdiction over Lauren's parentage and the power to

recognize that, by operation of law, Lisa is one of Lauren's two legal parents.

3. Gender-neutral application of parentage law is required. The only distinction between the genders is the mechanics of biological parenthood. Since biological parenthood does not create superior rights, only a gender-neutral reading of the law is consistent with Family Code §7610, and the equal-protection guarantees of the United States and California constitutions. There is no rational basis for approaching determination of motherhood differently than determination of fatherhood.
4. Procreative conduct, including a couple's decision to use ART, is treated in law as having the same consequences as sexual reproduction. Donors of genetic material are not parents.
5. Family Code §297.5 removes any doubt about whether the Legislature intends that children may have two parents of the same gender. The statute has no other direct application to Lauren's parenthood because Kristine and Lisa formed their domestic partnership after Lauren's birth, Kristine severed it before the new legislation, and retroactive application of the statute is uncertain. Moreover, the statute contains an "opt-out" provision, and one can reasonably infer from Kristine's severance of the domestic partnership and her legal efforts to attain single-parent status, that she would exercise that provision.

C. Kristine's Arguments Are Fatally Flawed

Kristine's arguments have three fatal flaws – the conflation of adoption and parentage law, the contention that biological parenthood conveys superior rights and status, and the notion that California parentage statutes and case law should apply differently in dependency court.

First, Kristine conflates parentage actions and adoptions. B*uzzanca supra*, distinguishes the two family-formation law paradigms. Adoptions transfer parental status from one individual to another. Parentage judgments formally recognize parent-child relationships that exist by operation of law. Lauren's judgment does not transfer parenthood from Kristine to Lisa, it confirms that each is a parent.

Kristine's speculations (Petitioner's Brief 9) about why she and Lisa did not pursue a second-parent adoption are disingenuous. Parents do not adopt their own children. Lisa was already Lauren's parent, and had formalized that status through the judgment. They relied upon the validity of the judgment.

Neither paradigm for legal recognition of Lisa's parenthood would entail Kristine "giving up" Lauren. Kristine's observation that "she was adamant that she would never give up her daughter for adoption" seems histrionic. Second-parent adoption does not entail giving up parenthood, it entails adding a co-parent who will have the same rights and responsibilities.

Unmarried couples, same-sex or otherwise, who use assisted reproduction do not present any greater need for state scrutiny as a pre-condition of parenthood than do married couples who use assisted reproduction or have their children the old-fashioned way. No greater state

interest would have been served in evaluating Lisa as a potential parent, than in evaluating Kristine.

Second-parent adoption would have been a second-best alternative for Lauren, leaving her without a parent able to act on her behalf in the event of Kristine's incapacity after childbirth. Until the adoption became final, Lisa would have had no legal relationship to Lauren. Adoption is often costly, time-consuming, and intrusive into family privacy. Second-parent adoption, like stepparent adoption, makes sense when one partner brings a pre-existing child into a relationship. It should not be the only means by which same-sex couples who do not form a domestic partnership, may form families. A stipulated judgment is relatively inexpensive and speedily obtained. The state may not interpose unnecessary barriers to legal parenthood for unmarried couples who use ART.

Second, California law does not prefer biological parents over intended, functional or marital parents. Embedded in Kristine's claim that biological parenthood should be the ultimate test of legal parenthood is the contention that a child (other than by adoption or under the expansion of domestic partnership law) cannot have two mothers. This Court has avoided what Harvard Law School Professor Elizabeth Bartholet calls the "biologic bias,"

> We now place an extremely high value on the right to procreate and the related right to hold on onto our biologic product. We place no real value on the aspect of parenting that has to do solely with relationship. There is an essentially absolute right to produce a child a child, but there is no right to enter into a parenting relationship with a child who is not linked by blood – no right to adopt. Foster parents, step-parents, and others who develop nurturing relationships with children are deemed to have no right to maintain such relationships. [Fn. omitted] They and the children who may have come to depend on them are subject to the whim of the blood-linked

> parent. Such parents, in contrast, have enormous proprietary power over their children. Even in situations of serious abuse and neglect, the government is reluctant to interfere with parental rights. Children have essentially no rights and no entitlements, although the system is supposed to operate in their best interests. Everyone knows that their best interests require nurturing homes and parenting relationships, but it is painfully obvious that children have no enforceable rights to these things.
>
> We could flip this rights picture, upend this hierarchical ranking of values. We could place the highest value on children and their interests in growing up in a nurturing relationship. We could place a higher value on nurturing than on procreation, and we might choose to do so in part because it seems to serve children's interests in being parented. A less radical step would be to accord at least more significant value than we now do to the nurturing aspect of parenting.
>
> Elizabeth Bartholet, F*amily* B*onds*: A*doption*, I*nfertility and the* N*ew* W*orld of* C*hild* P*roduction*, Beacon Press (1993, 1999) 76-77

Third, in order to avoid application of this Court's holding in *Jesusa* V. to Lauren's parentage Kristine resorts to her third erroneous claim – that California's parentage law must be applied differently in dependency courts. Kristine cites no authority for this insupportable proposition.

Kristine's assertion that California's appellate courts have not preferred non-biological parents to biological parents outside dependency court is wrong (see, for example, S*teven* W. *v.* M*atthew* S. (1995) 33 Cal.App.4th 1108; D*awn* D. *v.* S*uperior* C*ourt, supra*; and M*arriage of* P*edregon* (2003) 107 Cal.App.4th 1284). A child's parentage cannot possibly turn on the accident of which type of action was first filed, or first tried.

Appellate courts regularly rely upon non-dependency parentage precedents in dependency cases and vice versa. In N*icholas* H. *supra*, for example, this Court turned to the principles of numerous non-dependency cases, including S*teven* W. *v.* M*atthew* S. *supra*; S*usan* H. *v.* J*ack* S. (1994) 30

Cal.App.4th 1435; M*ichelle* W. *v.* R*onald* W. (1985) 39 Cal.3d 354; A*doption of* K*elsey* S.(1992) 1 Cal.4th 816; and E*state of* C*ornelious* (1984) 35 Cal.3d 461.

Nor there any reason for dependency courts to employ a different legal standard for interpreting parentage law than other courts. Dependency courts can place children with non-parents, and even terminate parental rights where parental care is detrimental. They do not need to parentage determinations to ensure safety.

A court's parentage decision is "determinative for all purposes" except in criminal prosecutions for failure to provide child support under Family Code §7636. Welfare and Institutions Code §316.2 requires a dependency court to adjudicate the issue of parentage. California Rules of Court Rule 1413 implements that provision, and requires a dependency court to apply the existing body of parentage law, including Cal-UPA.

A two-tier scheme would not protect family permanence and stability. All courts must apply the same law. Since the parentage statutes in the 1872 "Field Code," courts have uniformly applied parentage law in every context in which the issue of legal parentage arises.

Statutes intended for application only to juvenile court proceedings are found in Division 2, Chapter 2 of the Welfare and Institutions Code. California's parentage law, including but not limited to Cal-UPA applies to all proceedings in California in which parentage is an issue. Dependency courts are charged with adjudicating parentage by applying California parentage law, including but not limited to the Cal-UPA. There is no reason to apply California's parentage statutes differently based solely on whether the issue of a child's legal parentage is being determined in a family court, a dependency court or some other legal setting. Once parentage has been adjudicated, that determination is binding on other civil courts.

D. ART-Conceived Children of Unmarried Couples Need Permanent, Stable Legal Parent-Child Relationships

Lauren has always had two parents, despite Kristine's post-separation campaign for single-parenthood. Many thousands of children of assisted reproduction like Lauren are born to opposite-sex and same sex unmarried couples each year, as well as to single parents.[5]

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[5] Lauren's family is not unusual.

> The last two decades have witnessed the fast fading of the traditional family as the number of American families comprised of a married couple living with their children has decreased significantly. [Fn. omitted] There are an estimated 22 million lesbian and gay Americans. [Fn. omitted]
>
> Approximately one fourth of openly gay men are fathers, while about one third of openly lesbian women are mothers. [Fn. omitted] A study by the American Bar Association ("ABA") conducted in 1988 found that between 8 and 10 million children are raised in 3 million gay and lesbian homes. [Fn. omitted] Presumably some of these babies have been born to homosexual parents as the result of artificial insemination. [Fn. omitted]
>
> The above demographic changes render those families which do not fit within the traditional legal definition of the family without legal protection. [Fn. omitted] Courts have been unwilling to recognize gay and lesbian headed households as families, thereby denying them of the protection available to households headed by heterosexual couples. [Fn. omitted] For same-sex couples who choose to have a child using artificial insemination, a narrow definition of family that refuses to recognize them as family and the non-biological partner as a parent will give no protection to the relationship between the non-biological partner and the child. [Fn. omitted]
>
> Tsippi Wray, *Lesbian Relationships And Parenthood: Models For Legal Recognition Of Nontraditional Families* 21 Hamline L. Rev. 127, 130 (1997)

The technology of assisted reproduction can be a distraction in the law, diverting us from what matters in the lives of children and their families.

> What the developing law makes clear is that, while technology may powerfully affect the process of becoming a parent, it has not strongly affected the reality of being a parent. Nor has reproductive technology significantly altered courts' assessment of what is relevant to the determination of parental rights and responsibilities. Indeed, while commentators continue to urge that the new technologies "are creating new kinds of family and social relationships...," [Fn. omitted] the evidence instead suggests that technology itself has played no substantial role in expanding the range of family forms. Families have indeed changed over the past half-century, but the changes are social, not technological.
>
> Marsha Garrison, *The Technological Family: What's New and What's Not*, 33 Fam. L.Q. 691 (1999)

Children's interests are not served by making donors of genetic material legal parents, and making intended parents strangers. *People v. Sorensen* (1968) 68 Cal.2d 280. *Jhordan C. v. Mary K. supra*, was wrongly decided and was superseded by *Johnson v. Calvert*. In concluding that the Legislature intended Family Code §7613 to be the exclusive law governing parentage of children of assisted reproduction, the First District ignored the Comment to §5 of the Uniform Act. Family Code §7613 and UPA §5 governing medical insemination were not intended to cover all ART children, as the Comment to §5 explains,

> This Act does not deal with many complex and serious legal problems raised by the practice of artificial insemination. It was though useful, however, to single out and cover in this Act at least one fact situation that occurs frequently. Further consideration of other legal aspects of artificial insemination has been urged on the National Conference of Commissioners

on Uniform State Laws and is recommended to state legislators.

Family Code §7613 was not enacted, as the B*uzzanca* court suggested, to "codify" S*orensen*. The Legislature took no action resulting from publication of S*orensen*. Almost five years later, the legislature enacted Cal-UPA in response to promulgation by The Conference of Commissioners on Uniform State Laws of the UPA. This Court's independent holding in S*orensen*, remains a separate legal basis for recognizing parentage in fact patterns falling outside §7613. B*uzzanca* expanded §7613 by parity of reasoning to encompass the full meaning of S*orensen*, rather than confining its application to medical insemination of a wife with the husband's consent.

Parentage should not turn on parental decisions to use non-medical insemination. The limitation has a discriminatory impact on lesbian families.[7] Many lesbian couples experience medical intervention as intruding

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[7] See Catherine DeLair, E*thical, Moral, Economic and Legal* B*arriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women* 4 DePaul J. Health Care L. 147, 149 (2000); Carmel B. Sella, W*hen a Mother Is a Legal Stranger to Her Child*: T*he Law's Challenge to the Lesbian Nonbiological Mother* 1 UCLA Women's L.J. 135 (1991); Kritchevsky, T*he Unmarried Woman's Right to Artificial Insemination*: A C*all for an Expanded Definition of Family*, 4 Harv. Women's L.J. 1 (1981); Emily Doskow, T*he Second Parent Trap*: P*arenting for Same-Sex Couples in a Brave New World*, 20 J. Juv. L. 1 (1999); Marcus C. Tye, L*esbian, Gay, Bisexual and Transgender Parents*: S*pecial Considerations for the Custody and Adoption Evaluator*, 41 Family Court Review 92 (2003); E. Donald Shapiro and Lisa Schultz, Single Sex Families: T*he Impact of Birth Innovations Upon Traditional Family Notions*, 24 J. Fam. L. 271, 278 (1986). See also Amy Agigian, B*aby Steps*: H*ow Lesbian Alternative Insemination Is Changing the World*, Wesleyan University Press (2004).

into what they experience as a private moment. One partner often inseminates the other. Judith Stacey ("Gay and Lesbian Families: Queer Like Us," in *All Our Families: New Policies for a New Century* 117, 120-21 (Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman eds., 1998)) observes that many lesbian AID users rely on donors located through personal networks because of exclusionary policies of physicians and sperm banks or because of the desire to "solicit sperm from a ...male relative of one woman to impregnate her partner ...to buttress their tenuous legal, symbolic, and social claims for shared parental status ..." Lesbians and gays often experience discrimination when they seek medical insemination. Medical insemination is costly, and multiple attempts may be required before a successful pregnancy. Many physicians condition insemination on execution of consent forms that do not accurately reflect the intent of lesbian couples.

No matter how strongly the drafters may have wished to encourage medical insemination, children's rights to their parents should not depend on that factor, just as the rights of children of surrogacy should not depend on whether surrogacy is a preferred methodology. After conception, the child's welfare overrides other policies, including those preferring medical to self-insemination. Parity of reasoning extends statute and precedent to serve children's interests in families like Lauren's.

Children of assisted reproduction, regardless of parental marital status, parental domestic partnership status, method of conception, or parental gender need legal recognition of their parents. That need is best met by expanding the intended parent doctrine, applying principles of equitable estoppel, requiring gender-neutral application of presumed-father statutes and recognizing stipulated judgments of parentage consistent with those doctrines.

II. Is the Judgment Establishing Parental Rights Issued September 8, 2000 Invalid? Is the Judgment Invalid Because It Was Based Upon a Stipulation? If So, Is Such Stipulated Judgment Void or Voidable?

A. Review Standard and Non-appealable Issues

Only a judgment resulting in a miscarriage of justice is voidable. (Cal. Const., art. VI, § 13.) A judgment confirming that the child's intended and statutorily-presumed parents are her actual parents is not a miscarriage of justice.

The abuse-of-discretion standard governs review of orders refusing to vacate judgments. Appellate reversal requires a clear showing of abuse of discretion, resulting in injury amounting to a manifest miscarriage of justice. The test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court. The complaining party must establish abuse of discretion, and the showing on appeal is insufficient if it presents a state of facts that simply affords an opportunity for a difference of opinion. M*arriage of* K*ing* (2000) 80 Cal.App.4th 92.

Kristine's motion to vacate was predicated upon a single theory – that the pre-birth judgment was premature. Kristine conceded that the Court would have had the power to enter the identical judgment following Lauren's birth. Kristine abandoned that theory in the Court of Appeal, and advanced an entirely new rationale. Now she revives the pre-birth issue, among a series of new issues.

> As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal; appealing parties must adhere to the theory (or theories) on which their cases were tried. This rule is based on fairness – it would be unfair, both

> to the trial court and the opposing litigants, to permit a change of theory on appeal; and it also reflects principles of *estoppel* and *waiver* [¶8:244*ff*] [Citations omitted]
>
> Eisenberg, Horvitz and Weiner, Cal. Prac. Guide: Civil Appeals & Writs (The Rutter Group 2002) ¶8:229

A party whose motion to set aside a judgment failed on one ground, cannot pursue a different basis on appeal. I*d*. at ¶8:236.1. Issues or theories not properly raised or presented in the trial court may not be asserted on appeal and will not be considered by an appellate tribunal. M*arriage of* K*ing*, *supra*.

B. The Judgment Recognizing Kristine and Lisa as Lauren's Legal Parents Is Valid.

The family court properly refused to vacate the judgment. All of the elements of a valid parentage judgment are present in the judgment.

1. California is Lauren's home state under its version of the Uniform Child Custody Jurisdiction and Enforcement Act (Cal-UCCEA).

2. The Superior Court had jurisdiction over the subject matter of Lauren's parentage.

3. Each mother had standing to bring an action to determine Kristine's parentage and Lisa's parentage or non-parentage per Family Code §§7635, 7650, and under a gender-neutral reading of §7630.

4. Family Code §7633 authorizes pre-birth parentage actions. California's legislature declined to adopt the UPA provision barring pre-birth judgments. Pre-birth parentage judgments have long been accepted without question in California.

5. Parentage judgments may be based upon stipulations where they do not jeopardize the child's rights and interests.

6. Courts may rely on factual stipulations in entering parentage judgments.

7. The stipulation and judgment contained facts establishing that that Lisa is Lauren's mother by operation of law.[8]

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[8] The verified complaint and the stipulation set forth facts sufficient to support a judgment under the intended parent doctrine. Kristine and Lisa's joint parentage complaint alleged that Lauren ("UNBORN CHILD [R-H]) was conceived by artificial insemination with the shared intention that both Kristine and Lisa would be her legal parents. [OppExh.1-4] The Stipulation for Entry of Judgment included virtually identical factual stipulations, and identifying Kristine and Lisa as the intended parents of a child conceived through artificial insemination. Due to clerical error, the stipulation referred

8. The court properly exercised its supervisory function to protect Lauren through review of stipulation (including the factual representations) and meeting with the parties and counsel in chambers before signing the proposed judgment. [Opp.Ex. 56]

9. The judgment protects Lauren's interests in stability, continuity, economic support, and the protection of two parents.

10. Kristine is estopped from challenging the judgment she obtained, and from denying the legal parent-child relationship.

Pre-birth parentage determination allows the parents and child to form stable, secure and lasting attachments. Pre-birth parentage determination gives newborns health insurance benefits. Early parentage determination encourages donation of genetic-material and gestational surrogates by shielding them from parental responsibilities. It protects the intended family from the intrusions of other claimants. No public policy is served by delaying entry of a parentage judgment until after birth.

Subject matter jurisdiction attaches at the commencement of an action, not the entry of judgment. Where the Court lacks subject matter jurisdiction, the action must be dismissed. Subject matter jurisdiction must be challenged by demurrer or answer per CCP §430.10. As the plaintiff who asserted subject matter jurisdiction, Kristine cannot object on that ground.

Pre-birth parentage actions antedate Cal-UPA. An action could be maintained by an expectant mother or guardian to establish parentage in

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to a surrogate birth mother, rather than identifying Kristine as the gestational mother. [OppExh. 9-11].

Those facts would also support a parentage judgment under Family Code §7611(d) – Lisa's course of conduct in publicly holding herself out as the parent of the unborn child, and assuming full legal responsibility for her should be treated as a constructive taking the child into her home and holding it out as her own.

view of the provision that for purposes of prosecution for failure to provide, "such child *shall be deemed an existing person*." Former Civ. Code, §196a; Civ. Code, §29; former Pen. Code, §270; B*riggs v. Stroud* (1942) 52 Cal.App.2d 308, K*yne v. Kyne* (1940) 38 Cal.App.2d 122,126-128).

Civil Code §29 remains on the books as Civil Code §43.1. When California enacted the Uniform Parentage Act, it made no change in the law creating subject matter jurisdiction over the parentage of unborn children. Family Code §7630(a)(1) (Uniform Act §6) provides an action "may be brought "at any time." By contrast, an action "for the purpose of declaring the *nonexistence* of the relationship" must be brought within a reasonable time after learning the relevant facts, suggesting a public policy to protect established relationships and deter belated challenges.

Family Code §7633 derived from former Civil Code §231 (added by Stats.1921, c. 136, §1, amended by Stats.1963, c. 1413, §1.), recognizing pre-birth subject matter jurisdiction. "An action under this chapter [Cal-UPA] may be brought before the birth of the child." Judicial Council Form FL-300 includes box (2b) for cases where the action is brought concerning "a child who is not yet born." The Legislature rejected UPA §6(e)'s required pre-birth stay in favor of the existing pre-birth jurisdiction law. See F*uss v. Superior Court* (1991) 228 C.A.3d 556 (pre-birth parentage action brought under former Civil Code §7006(c)(f)[9]).

Family Code §7636 provides, "The judgment or order of the court determining the existence or nonexistence of the parent and child relationship is determinative for all purposes except for actions brought pursuant to Section 270 of the Penal Code." Family Code 7637 refers to

[9] Now Family Code §7630.

judgments requiring a parent to pay for reasonable expenses of pregnancy and confinement, and does not require that the Court wait until after the birth of the child to include such an order in the judgment.

Family Code §7613 determines parentage based on conception, not birth. Sufficient facts exist after conception and before birth to support entry of a judgment under that statute and under the intended parent doctrine.

C. Parentage Judgments That Protect the Child's Interests. Are Not Void or Voidable

> ... [F]undamental fairness requires that we preserve the finality of stipulated paternity judgments ...
>
> *Robert J. v. Leslie M.* (1997) 51 Cal.App.4th 1642, 1649

The state has a compelling interest in the finality of parentage determinations. Courts may only vacate judgments that prejudice the child's interests (unless the issuing Court lacked jurisdiction over parentage itself). Kristine does not suggest that any interest of Lauren's would be served by voiding the judgment. Instead, Kristine asserts her own interest in single-parenthood. Parents, like courts, should put children's needs first. Kristine subordinates Lauren's needs and interests to her own.

> In this case, as in any other child custody or paternity matter, the "ends of justice" are served when we fulfill our obligation to protect the best interests of the child. (*Guardianship of Claralyn S.* (1983) 148 Cal.App.3d 81, 85-86.) Reversal would deprive Ryan of financial support and sever his legal tie to the paternal grandparents who have been the primary caregivers. [Citation omitted] As a further consequence, reversal would undermine the finality of every stipulated paternity judgment obtained under the Welfare and Institutions Code, and the financial security of all similarly situated children.
>
> *Id.* at p. 1648

The Court had subject matter jurisdiction over Lauren's parentage. If the Court had found Lisa not to be a parent, there would be no argument that such a ruling was in excess of its subject matter jurisdiction. The ruling would have been appealable by Lisa as an error of law. Lisa could not have waited two years, brought a motion to vacate a judgment of non-parentage to avoid a support obligation, and then appeal from denial of that motion. If the finding of Lisa's parentage was error, it would have rendered the judgment voidable but not void.

"Generally the determination of parentage is within the broad jurisdiction of the superior court and is provided for in Civil Code section 231." I*n re Lisa* R. (1975) 13 Cal.3d 636, 643. Code of Civil Procedure §410.10 authorizes jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." There can be no question that the Superior Court of California had, and has, fundamental subject matter jurisdiction over the issue of Lauren's parentage under both statute and common law. There are no grounds for finding that the judgment is void.

This Court recently recognized the crucial role that settlement plays in California's family courts, noting that "private resolutions are preferred." M*ontenegro v*. D*iaz* (2001) 26 Cal.4th 249, 255. In practice, contested parentage trials produce only a small percentage of the parentage judgments entered.

Parents using ART, especially same-sex couples and parents using surrogacy, routinely establish parentage by stipulation. Filing a parentage action and getting a judgment entered is the only means by which unmarried parents (and married parents in some factual situations) can ensure legal recognition of parenthood.

Court scrutiny is not an essential to formalize parenthood. Declaration of Paternity per Family Code §7570 *et seq*. has become an important part of California's statutory scheme because it facilitates child-support collection without the need for parentage litigation. Hospitals are actually paid for each Declaration they collect. Courts exercise no scrutiny over the factual claims, or whether recognition of the individual named as father is in the child's interests. The resulting parentage determination is voidable, but not void, for a two-year period.

Stipulated judgments are everyday operating procedure in child-support court, where establishing parentage precedes collection of child support. Parents in dissolution actions rarely contest parentage and the Court accepts representations in pleadings that the minor children are children of the marriage. No evidence, other than the children's birthdates, is provided, and no inquiry into either the legal or biological basis for parenthood occurs. Such stipulated judgments survive collateral attack. *Garcia v. Garcia* (1957) 148 Cal.App.2d 147; *Marriage of Guardino* (1979) 95 Cal.App.3d 77; *Marriage of Hinman* (1992) 6 Cal.App.4th 711, 715-718.

Hinman explicitly rejects Kristine's argument. The appellate court held that the trial court had jurisdiction in the fundamental sense to determine whether the children were children of the marriage, where the mother's petition so-characterized the children of her prior relationship and the stipulated judgment gave the husband custody rights. *Hinman* held, citing *Peery v. Superior Court* (1985) 174 Cal.App.3d 1085, that subject matter jurisdiction would have continued even if the Court ultimately found that there were no children of the marriage. *Hinman* observes that an order that exceeds statutory authority does not constitute lack of subject matter jurisdiction in the fundamental sense, and is not vulnerable to collateral attack. See also *Adoption of Bonner* (1968) 260 Cal.App.2d 17. The Court held that mother was estopped from collaterally attacking a judgment she had participated in obtaining.

Hinman distinguished *Marriage of Goodarzirad* (1986) 185 Cal.App.3d 1020, which voided a judgment of nonparentage because it was contrary to public policy (failure to protect the children's interests, including support and inheritance rights), not because the issuing court lacked fundamental subject matter jurisdiction over parentage, custody and support. By con-

trast, the judgment confirming Lisa and Lauren's parent-child relationship is supported by public policy. H*inman* also distinguished M*arriage of* B*en-Yehoshua* (1979) 91 Cal.App.3d 259, in which a judgment was voided because Israel, not California, had jurisdiction over the children and their parentage. No jurisdiction other than California had jurisdiction over Lauren's parentage.

The Court had the power to hear the action between the parties for determination of Lauren's parentage or nonparentage. Even if the trial court's judgment was based on error, it is not subject to collateral attack. Actions of a court with jurisdiction over the parties and subject matter that exceed statutory power are sometimes termed in "excess of jurisdiction." C*onservatorship of* O'C*onnor* (1996) 48 Cal.App.4th 1076, 1087-88. An act in excess of jurisdiction is not an act in excess of fundamental subject matter jurisdiction. Such acts are "not void, *but only voidable*." Challenges are barred by "the principles of estoppel, disfavor of collateral attack or *res judicata*." I*d*.

Collateral attacks on acts in excess of jurisdiction are generally barred because the aggrieved party has adequate methods of direct attack on such judgments and failing to pursue those normal remedies is often seen as negligent. L*aw O*f*fices of S*tanley J. B*ell v*. S*hine*, B*rowne & D*iamond* (1995) 36 Cal.App.4th 1011, 1024 (quoting what is now 2 Witkin, Cal. Proc., Jurisdiction, §323). Collateral attack is only allowed when "exceptional circumstances" prevent a party from using an earlier and more appropriate attack. I*d*.

In A*doption of* M*atthew* B. (1991) 232 Cal.App.3d 1239, a surrogate mother attempted to vacate a stipulated judgment establishing paternity (and awarding the father custody), and her consent to a stepparent adoption by the intended mother (the father's wife). The father and his wife brought the baby into their home at birth. The Court refused to vacate

both the adoption consent, and the stipulated judgment that it found served the child's best interests.

Writing for the Court (at p. 1257), Justice Chin observed that the state's paramount interest in Matthew's welfare overrides its interest in 'deterring illegal conduct.' Protection of the child's welfare required liberal construction of consent statutes to protect the child's established relationships with the father and his wife. Justice Chin noted that while trial courts are not required to adopt stipulations governing parentage and custody, a court's decision as to whether to accept them is governed by the best-interests standard.

The Court noted that the surrogate assumed the risk of illegality when she entered into the contract (at p. 124). Kristine's contention that it was illegal to recognize two same-sex intended parents as legal parents directly parallels the surrogate's meritless claim.

In M*atthew* B., the surrogate also argued that the stipulated judgment was void because the father did not have standing as a presumed father under Cal-UPA. The Court held that stipulated judgments are only appealable for lack of subject matter jurisdiction and the trial court clearly had subject matter jurisdiction under Cal-UPA to determine paternity or non-paternity, based upon the stipulated facts. Mistaken identification of the father was not lack of jurisdiction affecting the judgment's finality. I*d.* at pp. 1268-1269.

The Court of Appeal further held that the surrogate's conduct estopped her from challenging the stipulated parentage judgment, for the same reasons that this Court should find Kristine is estopped,

> ... Nancy's execution of the stipulation estops her from urging this point on appeal. [Fn. omitted] Where a court has

> subject matter jurisdiction, a party's request for or consent to action beyond the court's statutory power may estop the party from complaining that the court's action exceeds its jurisdiction. (In re Griffin, supra, 67 Cal.2d at p. 347.) Whether estoppel applies "depends on the importance of the irregularity not only to the parties but to the functioning of the courts and in some instances on other considerations of public policy." (I*d.*, at p. 348.) Given Nancy's stipulation to a judgment establishing Timothy's paternity and her designation of Timothy as Matthew's natural father in numerous documents, including the birth certificate and the petition to withdraw consent, to entertain her attack on the paternity judgment would impermissibly permit her " '... to trifle with the courts.' [Citation.]" (I*bid.*) It would also contravene the public policy favoring the finality of paternity judgments, as expressed in section 7010, subdivision (a), the policy in favor of speedy determinations of paternity, and the policy that "abhors bastardy proceedings ...." [Fn. omitted] (De Weese v. Unick (1980) 102 Cal.App.3d 100, 106-107 [162 Cal.Rptr. 259].)
>
> I*d.* at p. 1269

Allowing Kristine to attack the parentage judgment years after Lauren's birth, when her psychological relationships have been cemented, would impermissibly permit her to trifle with the courts and subvert the public policies underlying parentage law. Here, unlike Matthew's case, enforcement of the judgment doesn't exclude a putative parent from Lauren's family.

In two key footnotes, Justice Chin rejected the arguments Kristine raises here. Footnote 20 explains, "The rule that waiver, consent, or estoppel cannot confer jurisdiction applies only to a trial court's lack of subject matter jurisdiction, not to acts in excess of that jurisdiction." At footnote 21, the Court applied the doctrine that parentage judgments should only be voided when they do not serve public policy and the child's best interests, citing M*arriage of Goodarzirad supra*, as an example.

Stipulated-judgment paternity cases involving two famous comedians, Charlie Chaplin and Flip Wilson, are consistent with the holdings in M*atthew* B. and H*inman*.

In B*erry v. Chaplin* (1946) 74 Cal.App.2d 652, the Second District voided a pre-birth stipulated judgment to protect the unborn child's interests. The unborn child's guardian *ad litem* and Charlie Chaplin, the putative father, had agreed to a judgment establishing Chaplin's paternity unless it was ruled out by blood tests to be conducted after the child's birth. At the time, blood tests were not conclusive evidence of parentage or nonparentage. The Second District vacated the stipulated judgment because it failed to protect the expected child's right to establish that the defendant was the father, despite unfavorable blood test evidence. The Court of Appeal held that the guardian *ad litem*, unlike an adult litigant, did not have authority to give up her ward's right to establish parentage under such circumstances.

In R*obinson v. Wilson* (1974) 44 Cal.App.3d 92, a mother brought a parentage action in which she was named guardian *ad litem* for her child against comedian Clerew "Flip" Wilson. She contended that she and Wilson had sexual intercourse. Wilson denied any sexual contact with her. The judgment provided for dismissal if the polygrapher's testimony corroborated Wilson's contention. It did. The mother tried to void the stipulated judgment, citing B*erry v. Chaplin*. She argued the judgment waived the child's right to a day in court and deprived the Court of the ability to consider all relevant evidence. The opinion distinguished and limited B*erry*, pointing to the fairness of the stipulation, the fact that the court approved the judgment after a chamber's conference, and that the polygrapher had testified and been subject to cross-examination.

The stipulation establishing Lauren's parentage was entered with similar assurances that Lauren's interests were protected. The stipulation itself contained detailed, agreed-upon facts. There were, and are, no contested facts. The Court met with the parties in chambers and had a full opportunity to inquire into the fairness of the stipulation to the expected child before accepting it. Kristine does not contend that the stipulated judgment fails to protect Lauren's interests, other than suggesting that uncertainty as to its enforceability. By virtue of the judgment, Lauren had two devoted parents from the moment of birth, enjoys the right to child support from each of them, and enjoyed the benefits of Lisa's health insurance from birth.

The judgment of parentage protects Lauren's interests. The trial court correctly denied the motion to vacate. The Court of Appeal erred in concluding that parentage judgments may not be entered by stipulation without an evidentiary hearing. By reviewing the factual stipulations presented by the parties, and meeting with the parties and counsel in chambers, the family court exercised its supervisory function to protect children's best interests at the time the judgment was entered.

At the motion to vacate, Kristine admitted that all of Lisa's factual and legal contentions were correct, with the exception of her claim that family courts lack jurisdiction to enter judgments of parentage before a child's birth. She may not raise new contentions in the appellate courts, and she is estopped from denying either the facts set forth in Lisa's pleadings, or the legal arguments Lisa advanced in opposition to the motion.

III. IF THE JUDGMENT ESTABLISHING PARENTAL RIGHTS IS INVALID, MAY THE SUPERIOR COURT NEVERTHELESS DETERMINE WHETHER LISA R. IS THE PARENT OF THE CHILD?

The Court has subject matter jurisdiction over Lisa's parentage or non-parentage. A ruling depriving Kristine of the power to seek recognition of Lisa's parenthood would also bar her from bringing an action to determine that Lisa is a non-parent. Kristine and Lisa each had standing as to bring the action under a gender-neutral reading of Family Code §7630 and as "interested persons" under Family Code §7650. California law recognizes that a child may have two parents of the same gender. Existence of a biological mother who is a legal parent does not preclude recognition of another woman as the child's other parent. California law treats intentional procreative conduct as a basis for establishing parentage and treats those who assume parental responsibilities as parents (Family Code §7611(d)) and uses the equitable estoppel doctrine as a basis for recognizing parental status.

IV. MAY FAMILY CODE SECTION 7611 BE APPLIED IN A GENDER-NEUTRAL FASHION TO DETERMINE WHETHER A PARENT-CHILD RELATIONSHIP EXISTS BETWEEN A WOMAN AND A CHILD?

The promise of Family Code §7602 and constitutional equal-protection guarantees require gender-neutral reading of paternity statutes. Family Code §7650 is in accord. The Comment to the corresponding UPA provision, §21, explains that the gendered language was used merely for simplicity, and not because the substantive law of maternity and paternity differ,

> This Section permits the declaration of the mother and child relationship where that is in dispute. Since it is not believed that cases of this nature will arise frequently, Sections 4 to 20 are written principally in terms of the ascertainment of **paternity**. While it is obvious that certain provisions in these Sections would not apply in an action to establish the mother and child relationship, the Committee decided not to burden these-already complex-provisions with references to the ascertainment of **maternity**. In any given case, a judge facing a claim for the determination of the mother and child relationship should have little difficulty deciding which portions of Sections 4 to 20 should be applied.

By fully assuming parental responsibilities, status and public identity, Lisa satisfied the requirements of Family Code §7611(d) before and after Lauren's birth. That section assigns presumptive-parent status to those who assume parental responsibilities and establish social parent-child relationships.

In *Johnson*, this Court used "parity of reasoning" and Family Code §7650 to apply paternity law to a maternity determination. B*uzzanca* used parity of reasoning, and the equitable estoppel doctrine to extend Family Code §7613 to surrogacy. I*n re Karen* C., *supra*; and I*n re Salvador* M. (2003)

111 Cal.App.4th 1353, 1357-1358 extended presumed-father statutes to maternity cases.

Failure to apply the same legal standards to determination of maternity and paternity would also violate children's and putative parents' equal-protection rights under the state and federal constitutions. There can be no rational basis, much less compelling state interests, for different standards where the purpose is not identification of a biological parent.

Parentage actions are not quests to identify the child's genetic or gestational progenitors. Parentage judgments determine who will be treated in law as the child's "natural," i.e. legal or *de jure* parent or parents. Presumed parent status governs who can be a candidate for legal recognition as the child's natural parent, as well as the relative weight of those candidacies. Biological-parent and presumed-parent status each confer standing to bring an action concerning legal parenthood. Depending upon the facts of a particular case, an adult may have either or both biological- and presumed-parent status. Neither guarantees legal-parent status.

"Natural"[10] replaced "legitimate" when Cal-UPA abolished bastardy law. This Court recognizes that the term "natural parent" in Family Code §7003 does not refer to biological parenthood. "In our view, the term "natural" as used in subdivision (1) of Civil Code section 7003 simply refers to a mother who is not an adoptive mother." *Johnson v. Calvert, supra*, at Fn. 9, A "natural" parent under Cal-UPA[11] is one whom the law recognizes as the

[10] Historically, the term "natural" described the parent-child relationship of children born out of wedlock. Bryan Garner (Ed.), B*lack's L*aw D*ictionary* (8th Ed. 2004) identifies "natural child" as an archaic usage for illegitimate child.

[11] Cal-UPA is based upon the original 1973 UPA. The Conference of Commissioners on Uniform State Laws replaced it with a revised UPA in 2000. That version, not adopted in California, replaces the ambiguous term

child's parent, rather than one whose parental status was created by adoption. Natural parents include parents whose parent-child relationship exists by operation of law, or by genetic or gestational ties.

When this Court stated, in *Johnson*, that a child may only have one natural mother, the Court was not thinking of two-parent gay and lesbian families, it was avoiding creation of three-parent families. In *Nicholas* H. and *Jesusa* V. *supra*, this Court recognized non-biological parents as "natural" parents under Cal-UPA.

After *Nicholas* H. and *Jesusa* V., gender-neutral application of parentage laws cannot be deemed impracticable. Fathers and mothers differ only in the mechanics of procreation. Because the presumed-father statutes are not evidentiary presumptions for purposes of identifying the most likely biological father, there can be no justification for differential treatment based upon gender. Courts may not recognize children's relationships with mothers using a different standard than that used for relationships with fathers. Courts may not determine the parentage of children of same-sex couples using a different standard than that used for opposite-sex couples. For example, no child-centered reason justifies not applying the marital-presumption statutes (Family Code §§7540-7541 and §§7611-7612) to mothers. These presumptions have been long-recognized as substantive rules of law rather than mere evidentiary presumptions. *Kusior v. Silver* (1960) 54 Cal.2d 603.

"natural parent" with the following provision -- "Parent-child relationship" means the legal relationship between a child and a parent of the child. The term includes the mother-child relationship and the father-child relationship."

A number of inconsistent and confusing holdings have resulted from failure to use a gender-neutral standard. In M*arriage of* M*oschetta* (1994) 25 Cal.App.4th 1218 a traditional surrogate's genetic and gestational relationship to the child trumped the claims of the father's wife. If such a traditional surrogacy case were to arise post-J*esusa* V. and post-B*uzzanca*, the father's wife should be entitled to standing and parental status under a gender-neutral reading of the marital presumptions (Family Code §7540 and §7611) and as an intended mother.

In R*obert* B. *v*. S*usan* B. (2003) 109 Cal.App.4th 1109 an embryo created from the genetic material of a married couple was implanted in the uterus of a single woman who believed it came from an anonymous donor. The birth mother's assertion that she was entitled to single-parent status failed. The father's wife sought intended-parent status, but failed to assert presumed-mother status under gender-neutral readings of either Family Code §7540 or §7611.[12] The Sixth District erroneously held that a biologically unrelated woman does not constitute an interested person under Fam. Code, §7650 and denied her standing.

Clearly that proposition is over-broad. Neither Luanne nor John Buzzanca were biologically related to little Jaycee (conceived with donor genetic material and born to a gestational surrogate), yet they had standing. Mrs. Doe was only gestationally related to the twins in P*rato-*M*orrison v*. D*oe*, but surely she should have had standing to seek legal recognition of her maternity. The phrase "interested persons" suggests a purposefully broad class. Family Code §7541 shows what the Legislature does when it intends to restrict standing.

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[12] Granting the wife standing would have triggered the §7612 balancing process.

Where there are two or more presumed parents[13], the tie is broken by the relationship which has the strongest social policy support. "If two or more presumptions arise under Section 7611 which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls." Family Code §7612(b).

This Court (I*n re* N*icholas* H. *supra* at p. 65, citing S*teven* W. *v.* M*atthew* S. *supra*, recently articulated the social policies undergirding California parentage law,

> The state has an '"interest in preserving and protecting the developed parent-child ... relationships which give young children social and emotional strength and stability." "(S*usan* H. *v.* J*ack* S. (1994) 30 Cal.App.4th 1435, 1442 [37 Cal.Rptr.2d 120], citing M*ichelle* W. *v.* R*onald* W. (1985) 39 Cal.3d 354, 363 [216 Cal.Rptr. 748, 703 P.2d 88].) The courts have repeatedly held, in applying paternity presumptions, that the extant father-child relationship is to be preserved at the cost of biological ties. (M*ichelle* W. *v.* R*onald* W., *supra*, at p. 363 [alleged biological father's abstract interest in establishing paternity not as weighty as the state's interest in familial stability and the welfare of the child]; C*omino v.* K*elley* (1994) 25 Cal.App.4th 678, 684 [30 Cal.Rptr.2d 728] [court refused to apply conclusive presumption of Evid. Code §621 to deny the child the only father she had ever known].)

Those policies apply equally to mothers and fathers.

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[13] The "conclusive" presumption (Family Code §7540) antedates the UPA, and is founded entirely on social policy grounds. It trumps the rebuttable presumptions of Cal-UPA. Arguably, Lisa should also be treated as a conclusively-presumed mother under that section, since California barred her marriage to Kristine, and left them with the less protective option of a domestic partnership. Domestic partnership only became an option on the very eve of Lauren's conception, and created no parentage rights.

V. MAY LISA R. BE DETERMINED TO BE A PARENT OF A CHILD UNDER CASES SUCH AS PEOPLE V. SORENSEN (1968) 68 CAL.2D 280 AND JOHNSON V. CALVERT (1993) 5 CAL.4TH 84 THAT CONSIDER A PERSON'S INTENTION TO CAUSE THE BIRTH OF THE CHILD?

> The law is not so insensitive as to countenance the breach of an obligation in so vital and deep a relation, undertaken, partially fulfilled, and suddenly sundered.
>
> *Clevenger v. Clevenger* (1961)189 Cal.App.2d 658, 674

Lauren is a wanted child, brought into the world through Kristine and Lisa's joint efforts and intentions.

> Planned lesbian and gay families, however, most fully realize the early Planned Parenthood goal, "every child a wanted child," and one twelve-year-old son of a lesbian recognized: "I think that if you are a child of a gay or lesbian, you have a better chance of having a really great parent. If you are a lesbian, you have to go through a lot of trouble to get a child, so that child is really wanted."
>
> Judith Stacey, "Gay and Lesbian Families: Queer Like Us" in Mary Ann Mason, Arlene Skolnick, and Steven D. Sugarman (Eds.), *All Our Families: New Policies for a New Century*, Oxford University Press (1998) 136

By contrast, sexual reproduction frequently produces unwanted children,

> Concerning biological imperatives, we should also consider what their *objects* are, and how the object of a drive is to be identified. At the very least, we should recognize that the connection between sexual intercourse and having children is something that has to be discovered by cultures and learned by each individual. An impulse to engage in sexual intercourse is not thereby a drive to have children.
>
> Kenneth D. Alpern, "Genetic Puzzles and Stork Stories: On the Meaning and Significance of Having Children in Kenneth D. Alpern (Ed.), *The Ethics of Reproductive Technology*, Oxford University Press (1992) 150

Recognition of intended parents in cases of collaborative reproduction enables families to formalize their relationships and prepare to welcome a child into their family, free of anxieties about whether their parentage will be challenged. Infants and their families can form secure, reliable, loving and unconditional attachments from the moment of birth, if not before. The doctrine protects children from the risk of being removed from the only parents they have ever known, and from conditional placements during litigation.

California law has long recognized that intended parents, rather than donors, are children's legal parents.

> Under the facts of this case, the term "father" as used in section 270 cannot be limited to the biologic or natural father as those terms are generally understood. The determinative factor is *whether the legal relationship of father and child exists*. A child conceived through heterologous artificial insemination [Fn. omitted] does not have a "natural father," as that term is commonly used. The anonymous donor of the sperm cannot be considered the "natural father," as he is no more responsible for the use made of his sperm than is the donor of blood or a kidney.
>
> P*eople v*. S*orensen*, *supra*, at p. 284 [Emphasis added]

The Second District correctly recognizes that the intended-parent doctrine provides an independent basis for establishing Lisa's maternity. The doctrine also expands Family Code §7613 by parity of reasoning to serve the principal purpose of Cal-UPA set forth in Family Code §7602.

In B*uzzanca*, the Fourth District wove statutory and equitable doctrines together to conclude that John Buzzanca was the legal father of the child he and his wife brought into the world with the assistance of genetic donors and a gestational surrogate. The Court treated his consent to a form of ART (gestational surrogacy with donor genetic material) a form of procreative

conduct. The Court held (at p. 1427) "...a deliberate procreator is as responsible as a casual inseminator." B*uzzanca* extends the artificial-insemination statute (Family Code §7613) "by parity of reasoning" to include all forms of assisted reproduction, including surrogacy. Independent of that statutory holding, it applies the common-law and equitable-estoppel doctrines of S*orensen* -- authority which antedates Cal-UPA.

This Court should apply that same parity of reasoning to extend the artificial-insemination statute to lesbian insemination, both medical and nonmedical. Alternately, this Court should treat the references to marriage and to a physician's office as waiveable, non-essential provisions of the statute, as it did with some of the technical requirements for adoption consents in S*haron* S. Once children have been conceived, no child-centered purpose is served by only bringing children of married parents or domestic partners who use medical insemination within the protection of the statute. All children of ART require equal treatment, regardless of parental marital status or the particular methodology employed in their conception.

The doctrine of equitable estoppel has been codified in Evidence Code §623, "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." The doctrine has broad application to a variety of settings. Courts must look to the elements of estoppel rather than for any particular fact pattern. See, for example, M*arriage of Cesnalis* (2003) 106 Cal.App.4th 1267. Kristine's course of conduct led Lauren to believe that Lisa is one of her parents, and led Lisa to believe that she is Lauren's legal parent, and that Kristine would treat her for all

purposes as Lauren's legal parent. Kristine is estopped from denying Lisa's legal parentage, and from treating her as a non-parent.

In cases where individuals have allowed children to rely on their assumption of parental responsibilities, California courts have applied the equitable estoppel doctrine to treat them as legal parents. *Clevenger v. Clevenger, supra*; *Marriage of Valle* (1975) 53 Cal.App.3d 837, *Marriage of Johnson* (1979) 88 Cal.App.3d 848; *Guardianship of Ethan S.* (1990) 221 Cal.App.3d 1403; *Comino v. Kelly* (1994) 25 Cal.App.4th 678; *Marriage of Freeman* (1996) 45 Cal.App.4th 1437; and *Marriage of Pedregon, supra*.

As the Fourth District recognized in *Buzzanca*, the legal parent-child relationship is an indivisible status. Application of the equitable estoppel doctrine to recognize John Buzzanca's paternity for purposes of child support opened the door for him to seek a relationship with his daughter, as the Court invited him to do at Fn. 22. The doctrine must be applied in cases where parents seek recognition of their status to protect their relationships with children as well as those in which parents seek to avoid parental responsibilities.

Buzzanca adopts the intended parent doctrine of *Johnson v. Calvert, supra* tying parenthood to the intentional procreative acts of obtaining donor genetic material, causing an embryo to be created in a laboratory, and retaining the services of a gestational surrogate.

While Kristine's intent operates as an estoppel, Lisa's intent also matters. Having departed from biology as the exclusive model of parenthood, the law *substitutes intent for sexual activity as a key to probable parental responsibility*. Intent replaces "genetic bonding"[14] as a predictor of potential

[14] The aspect of psychological attachment that can arise from recognizing genetic traits of oneself and one's family in one's child.

psychological attachment. A profound longing for parenthood leads people to undertake collaborative reproduction. The intensity of that desire is apt to motivate most intended parents to act protectively towards the children they bring into the world. One court has termed a child conceived through sexual intercourse as the "biological consequence of erotic ecstasy on a summer night." I*n re* K. (Tex. 1976) 535 S.W.2d 168. Surely parental intent is as great a safeguard of the child's welfare as lust.

In J*ohnson v. Calvert*, this Court relied heavily upon Shultz's argument in favor of intent-based parentage.

> At the outset, any suggestion that honoring adults' commitments regarding parenthood is antithetical to the interests of children seems wrongheaded. [Fn. omitted] Adults who feel that their needs, concerns and choices have been respected, adults who feel that they are resourceful and efficacious, will likely cope better with the demands of parenthood than parents who are passive or powerless. [Fn. omitted] Moreover, deliberative, articulated and acted-upon intentions regarding child rearing have great importance as indices of desirable parenting behavior. There is a correlation between choosing something and being motivated to do it consistently and well. [Fn. omitted] Where the birth of children is not intended, as is sometimes the case with ordinary coital reproduction, biological connection will not guarantee love or adequate care. [Fn. omitted] By contrast, where children are conceived and born because their parents chose to bring them into being, we at least know that if the law honors those intentions, the children will start life with parents who wanted and prepared for their advent. Of course, intentions can change; plans and promises can be broken. But then, neither biology nor conventional families ever guaranteed permanent or perfect parenting either. [Fn. omitted]
>
> As with biological ties, conventional family forms per se offer no guarantee of good parenting. If they did, the realities of current family constellations in America would already have condemned huge percentages of our children to bad parenting [Fn. omitted] wholly apart from artificial reproductive

> techniques. Family forms have greatly diversified due to divorce, blended families, single parenting, homosexual commitments and unmarried cohabitation. Many children are now raised in non-conventional settings. Evidence from these sources seems to suggest that familial arrangements based on non-biological ties can be very good settings for children, as long as they provide the physical and emotional nurturance that are the real essentials of healthy child development. [Fn. omitted]
>
> If society were to recognize intention as a basis for claiming parenthood in circumstances of artificial reproductive techniques, intention-based variations in family form would likely be better tolerated and less problematic. Legal recognition itself would alleviate some sources of instability and stigma. ... Conventional couples would make greater use of non-conventional techniques, particularly third-party assisted techniques, if they felt more certainty about protection of their expectations and reliance. Similarly, non-conventional family arrangements would likely increase unless barred by regulation.
>
> Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender-Neutrality*, 2 Wis. L. Rev. 297, 343 (1990)

Parentage law must enforce pre-conception commitments. Procreative responsibility is a necessary concomitant of procreative liberty. Children and society are not well served if persons like Kristine can cause a child to be conceived, and encourage the formation of strong and meaningful bonds and thereafter change their minds about co-parenthood. This Court must determine what responsibilities people assume when they take actions to cause the birth of a child. Kristine and Lisa took deliberate action during their domestic partnership to bring about Lauren's conception and birth. They assumed moral and legal responsibility for Lauren's care and support. They are directly responsible for her existence.

Procreative conduct carries inherent responsibilities. We take that principle for granted when people engage in sexual intercourse, even if they

utilize birth control and have no procreative intent. We must hold those who deliberately create human life to at least the same standard as casual inseminators. Procreative responsibilities cannot depend upon the particular type of reproductive conduct. There is no child-related difference between a husband's consent to his wife's use of artificial insemination and Lisa's consent to her partner's use of artificial insemination. Each course of action carries a fiduciary duty to the life which, but for the deliberate choice of an adult, would not have been created. If the law allows persons engaging in collaborative reproduction to disavow responsibility for the child or to discard the child's other parent, it invites people to casually enter into such arrangements. Parenthood, no matter how brought about, should not be taken lightly.

Parentage law must require that pre-conception assumptions of parental status and responsibilities are unconditional. Along with the benefits, collaborative reproduction carries inherent risks, including the birth of children who do not meet the expectations of the intending parents, or the loss of the intimate relationship between the adult partners. Parentage law must ensure that adults, not children, bear the consequences of those risks. Applying the intent doctrine so that parenthood is established before birth serves that goal.

Intended parents should not be permitted to set any conditions on their assumption of parental responsibility. When intended parents cause the conception of a child with the intent that they will each be parents, they should not be permitted to disaffirm their commitment to share parenthood. Consent to collaborative reproduction entails accepting responsibility for the life that is created even if one's expectations are not fulfilled.

Parentage law must continue to protect donors of genetic material and gestational surrogates from the risk of unanticipated parental responsibilities. Artificial-insemination law insulates sperm donors from parental responsibilities. No pro-social purpose would be served by treating the sperm donor as Lauren's father. The law should encourage the availability of donated genetic material for use by other persons in the exercise of their procreative liberty.

The presumption of parentage in favor of the intended parents should not be easily rebutted. The purposes of a presumption in favor of intended parents are to enable all of the adults to rely upon the expected outcome, and to ensure that the child is not placed in limbo (and therefore at risk) while adults litigate. Those goals cannot be met unless the window of time in which the issue can be raised is extremely narrow, and the burden to rebut the presumption extremely high.

Challenges to parentage must be resolved at or before birth with great alacrity. Parties should not be able to raise the issue once the child has become established in the home of the intended parents. The child must be protected from extended uncertainty about parentage, and from disruption of her normal development and bonding process.

The presumption in favor of the intended parent should only be rebutted upon a showing of detriment to the child. Any lesser standard would elevate the right of an adult to change her mind over the child's need for stability and continuity of care. This high burden, analogous to that in guardianship and termination of parental rights proceedings, will protect children and deter litigation.

The presumption in favor of the intended parents should be gender-blind, not differentiate between marital and non-marital families, and not

differentiate between same-sex and opposite-sex intended parents. These distinctions have no bearing on children's needs and thus cannot be considered in determining their parenthood.

In A*doption of* M*atthew* B., *supra*, the equitable-estoppel component of the intended-parent doctrine was applied to prevent a surrogate mother from challenging the intended father's paternity. Where cases used equitable estoppel to protect children's support rights, M*atthew* B. uses it to protect a child's psychological bond to the couple he knew as his parents.

> ... [T]he state's interest in maintaining the integrity of the family and protecting the child's welfare weighs in favor of permitting Timothy to establish paternity. (See In re Melissa G. (1989) 213 Cal.App.3d 1082, 1089 [261 Cal.Rptr. 894] [finding irrebuttable presumption unconstitutional].) By everyone's testimony, Timothy is the only father of Matthew, and the application of any contrary presumption would destroy the parent-child relationship and the bond that exists between them. Therefore, section 7005, subdivision (b), cannot constitutionally be applied to prevent Timothy from seeking to establish paternity. (See *Fuss v. Superior Court* (1991) 228 Cal.App.3d 556, 562-563 [279 Cal.Rptr. 46].)
>
> A*doption of* M*atthew* B. *supra* 232 Cal.App.3d at 1271-1273

Parentage is a unitary concept. One cannot be a parent for purposes of paying support, and not for purpose of sustaining a social and psychological relationship.[15] Although components of California parentage law were adopted variously with a focus upon support rights or relationship

[15] The Fourth District missed the mark in M*arriage of* P*edregon*, *supra* at pp. 864-865, when it said that only support, not custody, was at issue. Once parental status is adjudicated for purposes of support, a parent is a parent for all purposes. Similarly, having sought judicial recognition of their parentage primarily for psycho-social relationship purposes, Lisa and Kristine are legally responsible for Lauren's support. The state has as great an interest in protecting the psycho-social relationship aspects of the parent-child relationship as it does in protecting the child's right to support.

rights, the common law, the doctrine of parentage by estoppel and the provisions of the various statutes must be equally available to protect both sets of rights and read in harmony with one another. O*nce parentage is established for any purpose, all the incidents of parentage attach*. Family Code §7636 provides, "The judgment or order of the court determining the existence or nonexistence of the parent and child relationship is determinative *for all purposes* except for actions brought pursuant to Section 270 of the Penal Code." [Emphasis added.]

VI. What Impact, If Any, Will Family Code Section 297.5, Which Will Become Effective on January 1, 2005, Have on the Issues In this Case?

Family Code §297.5 evidences legislative intent to include recognize the "legitimacy" of children of same-sex families. Its retroactive effect is uncertain and it contains an "opt-out" provision. The statute has no direct application here. Lisa and Kristine became domestic partners after Lauren's birth. Kristine dissolved the domestic partnership, taking Lauren's case outside of the ambit of the statute.

VII. CONCLUSION

> The most tragic end result of ... unrealistic expectations about lesbian parenting is seen when the couple breaks up and the biological mother claims that she has always been the "real" parent. While second-parent adoption affords non-biological mothers some legal status to prevent getting cut completely out of their children's lives, it never gives them the inter-personal parental status with their former partner to share equally in parenting. This is a problem that our community must face more honestly than we have over these past decades.
>
> Jenifer Firestone, M*aking* B*aby*: P*lural* P*erspectives on* L*esbian* I*nsemination*] (Fall 2004) In the Family 12, 15

When Lisa and Kristine planned for Lauren's conception and birth, they dreamed of "our" baby. When Lauren was born, they raised her as "our" baby. Now Kristine asks this Court to deprive Lauren of one of her mothers because only Kristine shares genes with Lauren, so only Kristine can be her "real" mother. Biology simply does not justify the state's complicity in Kristine's selfish desires.

Four-year-old Lauren has no notion of biological consanguinity. All she knows is that she has a Mama named Lisa and a Mommy named Kristine. When California's Legislature adopted Cal-UPA to extend the parent-child relationship to every parent and child, it protected Lauren's right to grow up with the love and support of Mama Lisa and Mommy Kristine. Lauren's interest in her bonds with each of her mothers, and the permanence of those relationships, are this Court's paramount concerns. Protecting Lauren means avoiding biologic bias, and recognizing Lauren's real mother-daughter relationships as legal mother-daughter relationships.

All of the statutes and precedents necessary to make sure Lauren doesn't lose her Mama already exist in California law. This Court should

make it clear that they apply to all children and all parents, so that each small variation of facts doesn't subject some child to years of uncertainty, family stress, unnecessary litigation and depletion of economic resources that would be better invested in a college savings account.

Respectfully Submitted,
January 28, 2005

_____
Leslie Ellen Shear, CFLS

WORD COUNT

I certify that the text of this brief, exclusive of tables and word count, contains 13,912 words as calculated by Microsoft Word™.

I *declare under penalty of perjury that this declaration is true and correct and that it was executed on January* 28, 2005 *at Los Angeles, California.*

_____
Leslie Ellen Shear, CFLS

PROOF OF SERVICE BY MAIL

DATE: January 28, 2005

CASE NAME: *Kristine Renee* H. *v. Lisa Ann* R. /
Kristine Renee H. *v. Superior Court of Los Angeles County*

SUPREME COURT CASE NO.: S-126945

COURT OF APPEAL CASE NO.: 2d Civ. B-167799

LOS ANGELES SUPERIOR COURT CASE NO.: PF-001550

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Articles

Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs

By ELLIE MARGOLIS*

IT HAS LONG BEEN recognized that appellate courts must sometimes stray from the traditional role of applying previously existing law and venture into the realm of creating new law.[1] Once controversial, it is now "conventional wisdom . . . to observe that judges not only are charged to find what the law is, but must regularly make new law."[2] Courts must assume this "legislative" function in several types of cases, ranging from cases requiring the application of vague statutory or common law rules to cases that raise novel issues to which no existing rule can conceivably apply.[3] These are the cases that are most likely to reach higher-level appellate courts. In these cases, judges must move beyond the most typical forms of reasoning—rule-based and analogical reasoning—and employ other methods, such as nor-

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1. *See* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 128 (1921); Note, *Social and Economic Facts — Appraisal of Suggested Techniques for Presenting Them to the Courts*, 61 HARV. L. REV. 692, 693–94 (1948) [hereinafter *Harvard Note*].

2. JOHN W. STRONG, MCCORMICK ON EVIDENCE 331, 555 (4th ed. 1992) [hereinafter MCCORMICK ON EVIDENCE].

3. *See* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058–59 (1975).

mative and policy-based reasoning.[4] In this way, judges arrive at new rules of law of general applicability.[5]

Introduction

In determining what the law should be, judges must often look beyond the traditional sources of legal authority: cases, statutes, procedural rules, and administrative regulations. Analysis of existing rules may not clearly provide a direction for a court to take. The court may need information about the customary way of doing things in a particular community, the accuracy of a particular scientific test, the expected psychological response to a particular circumstance, or other information of a factual nature.[6] For example, in imposing a common-law duty on a psychiatrist to warn individuals threatened by a dangerous patient, the court may need general information about psychiatrists' ability to predict dangerousness in their patients.[7] In other words, the court may need information similar to the information generally available to the legislature in enacting a statute. This is not information typically contained in sources of legal authority, and it may not be part of the trial record below.[8] This does not mean, however, that judges are limited to an analysis of only those facts on the record—particularly when formulating a new legal rule.

Other sources to which judges may turn include science, empirical studies, social and psychological theory, history, and current events. When used for the purpose of developing a rule of law, these sources are commonly known as "legislative facts." As originally defined by Kenneth Culp Davis, legislative facts are those that "inform[ ]

4. *See* Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7 (1996). Edwards identifies five forms of reasoning commonly employed by judges: rule-based, analogical, policy-based, consensual normative, and narrative. *See id.* at 9–10.

5. *See Harvard Note*, *supra* note 1, at 694. The author notes that, while cases in which the court must create new law are relatively few, these cases "take on special significance, since their effect, being legislative, will not be confined to the immediate parties." *Id.*

6. *See id.* at 693.

7. *See, e.g.*, Boynton v. Burglass, 590 So. 2d 446, 449–50 (Fla. Dist. Ct. App. 1991) (refusing to impose duty to warn because psychiatry is an inexact science). The court referred to empirical studies to support its conclusion that psychiatrists cannot predict dangerousness with any degree of certainty. *See id.* There is no evidence that the appellants provided any empirical information to the contrary.

8. *See* Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955) [hereinafter Davis, *Judicial Notice*] ("[W]henever a tribunal is engaged in the creation of law or of policy, it may need to resort to . . . facts, whether or not those facts have been developed on the record.").

a court's legislative judgment on questions of law and policy."[9] They "help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take."[10] Legislative facts can play an important role in the development of a rule of law, particularly in the creation of a new rule. As the world we live in grows more complex and cases raise more novel and challenging issues, appellate courts are increasingly turning to legislative facts as a source of authority.[11]

Lawyers have presented legislative facts to appellate courts in the form of the "Brandeis brief,"[12] since before the coining of the term legislative facts. In spite of this, it appears that, in general, lawyers do not make effective use of non-legal materials in support of policy arguments in briefs. According to a study conducted by attorney-sociologist Thomas Marvell, in a representative sampling of briefs, seventy percent devoted almost no space to argument based on social facts.[13] In spite of this, the majority of attorneys whose briefs were analyzed believed it was a good idea to make policy arguments, and recognized that the court made use of social facts.[14] Marvell concluded that the reason for this was twofold: first, the attorneys were not geared toward using factual material in arguments about what the law should be; and, second, many attorneys believed they could not put factual information in their briefs if it had not been placed in evidence at trial.[15] Although Marvell's study was conducted twenty years ago, anecdotal evidence suggests that these attitudes continue to prevail among prac-

9. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404 (1942) [hereinafter Davis, *An Approach*]. Davis first coined the term "legislative facts" to distinguish them from adjudicative facts. He developed these concepts further in subsequent articles. *See infra* notes 33–38 and accompanying text.

10. Davis, *Judicial Notice*, *supra* note 8, at 952.

11. *See* Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1108 & app. (1997) (documenting increasing citation to non-legal materials in United States Supreme Court cases over a number of terms).

12. The term "Brandeis brief" is named for a brief submitted by Louis D. Brandeis, the future Associate Justice of the United States Supreme Court in the case of *Muller v. Oregon*, 208 U.S. 412 (1908). In defending the constitutionality of an Oregon statute restricting the number of hours women could work in a day, Brandeis presented all of the existing social science research on the detrimental impact of long work hours on the health of women. *See* Brief for the Defendant in Error (No. 107), *reprinted in* 16 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 63 (Philip B. Kurland & Gerhard Casper eds., 1975).

13. *See* THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS 173 (1978).

14. *See id.* at 190.

15. *See id.* at 190. Although the attorneys were unfamiliar with the concept of using facts to support arguments about the law, they were quite comfortable with the idea of using empirical data at the trial level. *See id.*

ticing attorneys.[16] This clearly raises the question of why lawyers are not better informed about the use of legislative facts to support policy arguments.

In recent years, many scholars have focused extensively on how courts make use of legislative facts.[17] These articles are primarily theoretical, and focus on the role of legislative facts in legal decision-making. They address issues of jurisprudence,[18] the scope of judicial notice,[19] the role of social science in law,[20] empirical studies of courts' use of legislative facts,[21] and use of legislative facts in amicus briefs.[22] There do not appear, however, to be any articles written from the perspective of the advocate drafting a party brief.[23] Despite the extensive treatment of legislative facts, there has been virtually no scholarly discussion of whether or how lawyers should make use of legislative facts, particularly in the context of policy arguments. Instead, lawyers are left to draw inferences from the scholarship about how they should respond to an issue. Likewise, practitioner-oriented materials which address brief-writing contain very little discussion of the use of legisla-

16. The author informally questioned several attorney friends and colleagues about this issue. Their responses were quite similar to those mentioned in the Marvell study.

17. *See, e.g.*, Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931 (1980) [hereinafter Davis, *Facts*]; Peggy Davis, "There Is a Book Out . . .": *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987); David L. Faigman, *"Normative Constitutional Fact-finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991); Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75; George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process*, 72 ST. JOHN'S L. REV. 291 (1998); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111 (1988).

18. *See, e.g.*, Karst, Woolhandler, *supra* note 17.

19. *See, e.g.*, Davis, *Judicial Notice*, *supra* note 8; E. F. Roberts, *Preliminary Notes Toward a Study of Judicial Notice*, 52 CORNELL L.Q. 210 (1967).

20. *See, e.g.*, John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986) [hereinafter Monahan & Walker, *Social Authority*]; Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987) [hereinafter Walker & Monahan, *Social Frameworks*].

21. *See, e.g.*, MARVELL, *supra* note 13, at 192 (studying state supreme court's use of empirical information); Davis, *supra* note 17, at 1547–92 (studying courts' use of psychological parent theory in custody cases); Schauer & Wise, *supra* note 11.

22. *See* Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91 (1993).

23. There are some articles that focus on the issues for amici in drafting appellate briefs, but none of these addresses whether or how this connects to the drafting of the party briefs. *See, e.g.*, Andrew P. Morris, *Private Amici Curiae and the Supreme Court's 1997–1998 Term Employment Law Jurisprudence*, 7 WM. & MARY BILL RTS J. 823 (1999); Rustad & Koenig, *supra* note 22.

tive facts to support policy arguments.[24] Finally, a review of books used in law school legal writing courses reveals no such discussion.[25]

This article grew out of my attempt as a teacher, to find scholarly support for the approach to supporting policy arguments in appellate advocacy and brief-writing that I and other colleagues have been teaching.[26] Having found none, this article explores the theoretical and practical issues involved in using non-legal materials as support for policy arguments. It is a first step in encouraging lawyers to make more effective use of these materials in the appellate brief. Starting with the premise that, for good or ill, courts are using non-legal, extra-record factual material in developing new rules of law, this article addresses the issues lawyers face in deciding when and how to use this information.

This article discusses why lawyers should be better informed about their ability to use non-legal materials in appellate briefs, and when use of non-legal materials may be particularly advantageous. Part I reviews reasons it is appropriate to introduce non-legal materials[27] at the appellate stage, particularly in support of policy arguments. It reviews both theoretical and practical concerns of which

24. *See, e.g.* STERN, ET. AL., SUPREME COURT PRACTICE 555–56 (7th ed. 1993) (noting that legislative facts do not "play a large part in most litigation" and briefly describing the Brandeis brief); ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES 277–80 (2d ed. 1989) (defining legislative facts and describing "Brandeis brief" as a tool used largely to rescue an inadequate trial record). Neither of these treatises provides any discussion of when it may be advantageous to use legislative facts, or how to do so effectively.

25. *See, e.g.*, RUGGERO J. ALDISERT, WINNING ON APPEAL (revised 1st ed. 1996) (no specific discussion of policy arguments or legislative facts); CAROLE C. BERRY, EFFECTIVE APPELLATE ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT 64 (1998) (two pages devoted to non-legal materials); LINDA HOLDEMAN EDWARDS, LEGAL WRITING—PROCESS, ANALYSIS, AND ORGANIZATION 107 (2d ed. 1999) (discussing policy-based reasoning, but no discussion of non-legal materials as support); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING 271–72 (3rd ed. 1998) (discussing the importance of policy arguments, but not how to support them); DIANA V. PRATT, LEGAL WRITING: A SYSTEMATIC APPROACH 321–24 (3d ed. 1999) (section on sources of public policy includes one paragraph on non-legal materials); HELENE S. SHAPO ET. AL., WRITING AND ANALYSIS IN THE LAW 198–202 (4th ed. 1999) (section discussing types of policy arguments, but not how to support them).

26. I have been teaching appellate advocacy for eight years, both in the first-year legal research and writing course, and in an advanced appellate advocacy course in which students brief and argue cases pending before the United States Supreme Court.

27. For clarity of discussion, I will refer to "non-legal materials" rather than "legislative facts" when discussing their use to support policy arguments. The term legislative facts encompasses a broader use of factual material than discussed in this article. *See infra* notes 103–28 and accompanying text. "Non-legal material" refers to factual or theoretical information that is not part of the trial record. This information can come from disciplines such as science, sociology, statistics, economics, and psychology. It can also include current events, such as information contained in newspaper articles.

lawyers should be aware in constructing appellate arguments, and suggests that lawyers may have an ethical obligation to include non-legal information in support of certain policy arguments. Part II identifies the primary types of cases in which courts are called upon to create new rules of law. It discusses the importance of policy in these cases and shows how non-legal information plays an important role in courts' policy determinations. Part III addresses some of the concerns raised when individuals trained as lawyers make use of materials created by non-legal disciplines they may not understand, such as the social sciences. This final part also addresses lawyers' ethical obligations when making use of non-legal information, as well as the courts' role in assessing information provided in the party briefs. The article concludes by calling for further scholarship to explore the uses of non-legal information in appellate briefs and to address more specifically how this material can be taught in our law schools.

I. Reasons to Use Non-Legal Materials in Appellate Briefs

As long as appellate courts decide cases and write opinions that rely upon non-legal materials, lawyers should learn to use these materials effectively. There are no procedural bars to introducing factual material at the appellate stage for purposes of determining what the law should be. Often cases raising novel legal theories are disposed of pre-trial, through dismissals or summary judgments, and do not have fully developed factual records.[28] Courts developing new legal rules are clearly turning to non-legal information for support, often finding it on their own if counsel does not provide it to them.[29] Lawyers are missing a golden opportunity for advocacy by allowing judges alone to

28. For example, cases requiring the recognition of a new cause of action are likely to be rejected by the trial court for failing to state a cognizable claim. *See, e.g.*, Bergen Commercial Bank v. Sisler, 723 A.2d 944, 960 (N.J. 1999) (reversing grant of summary judgment because, as matter of first impression, employee's claim of age discrimination based on youth was cognizable); Blumenreich v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 722 A.2d 598 (N.J. Super. 1999) (reversing grant of summary judgment because, as a matter of first impression, pollution clause in insurance policy did not include lead paint poisoning).

29. *See, e.g.*, Swidler & Berlin v. United States, 524 U.S. 399 (1998) (holding that, except in testamentary cases, the attorney-client privilege survives the death of the client). The Court, while noting that there is little empirical evidence on the impact of a posthumous exception to the attorney-client privilege, cites three conflicting studies. *See id.* at 410 n.4. None of these studies was cited by Petitioner in its brief. *See* Brief for Petitioners, Swidler & Berlin v. United States, 524 U.S. 399 (1998) (No. 97-1192); Reply Brief for Petitioners, Swidler & Berlin v. United States of America, 524 U.S. 399 (1998) (No. 97-1192). The United States only cited the one study that supported its position. *See* Brief for United States at 40, Swidler & Berlin v. United States, 524 U.S. 399 (1998) (No. 97-1192) (citing Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989)).

research non-legal materials and draw their own connections, often unsupported, between the legal arguments presented and the factual information thought to be supportive of the judge's conclusion. It is particularly important for lawyers to do this when making policy arguments, for which non-legal information may often provide the best support. For all of these reasons, lawyers not only can, but should use non-legal information in support of arguments in appellate briefs.

A. Nothing Prohibits the Introduction of Non-Legal Material at the Appellate Stage

The most obvious reason that lawyers should make use of non-legal materials in appellate briefs is that there is no good reason not to. There are no procedural or evidentiary rules that prevent a lawyer from citing factual information. Indeed, it has been done since the early twentieth century, when Louis Brandeis submitted his brief in *Muller v. Oregon*.[30] Because the use of legislative facts is in no way prohibited, it should be considered a tool in a lawyer's arsenal which, like all such tools, should be used to advocate a client's position when appropriate.[31]

The court recognizes legislative facts through a device called "judicial notice." Judicial notice allows a judge to consider a fact that has not passed through the hurdles presented by evidentiary rules and the adversary process.[32] Professor Davis first elaborated on the nature of legislative facts in an article critiquing the Model Code of Evidence provisions on judicial notice, prepared by the American Law Institute.[33] He used the term "legislative facts" to distinguish them from "adjudicative facts"—facts about "what the parties did, what the circumstances were, what the background conditions were,"[34]—in other words, the facts that normally go to a jury in a trial.[35]

Professor Davis believed the Model Code was unsound because it did not recognize any distinction between facts about the parties and facts bearing on law and policy, and as a result, the judicial notice

30. *See Muller*, 208 U.S. 412 (1908); *see also supra* note 12.

31. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 1 (1999) (requiring a lawyer to act "with zeal in advocacy upon the client's behalf").

32. *See* MCCORMICK ON EVIDENCE, *supra* note 2, 548–51.

33. *See* Davis, *Judicial Notice*, *supra* note 8, at 946. Professor Davis was addressing the Uniform Rules of Evidence proposed by the Commissioners on Uniform State Laws as well as the Model Code. His critique of both was identical, and for ease of discussion the author refers only to the Model Code.

34. Davis, *An Approach*, *supra* note 9, at 402.

35. *See* Davis, *Judicial Notice*, *supra* note 8, at 952.

provisions were unduly restrictive.[36] In particular, Professor Davis protested the limitation of judicial notice to facts that were indisputable or found in sources of indisputable accuracy.[37] Judges faced with making law and deciding policy must consider facts of a general, and therefore often disputable, nature. It is both unrealistic and harmful to the lawmaking process to limit the realm of facts available to judges in deciding these cases.[38]

This view prevailed when Federal Rule of Evidence section 201 was enacted in 1975.[39] The advisory committee specifically notes that "[n]o rule deals with judicial notice of 'legislative' facts."[40] Relying heavily on Professor Davis's writings, the advisory committee believed that judicial access to legislative facts should not be restricted by "any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level."[41] Rather, the committee believed that judicial use of legislative facts should be governed by judicial methods of determining domestic law, in which

> the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present.[42]

Thus, the advisory committee made clear that they did not believe any formal restraint on the judicial notice of legislative facts was appropriate.

A number of scholars have criticized this complete lack of rules regarding judicial reception of legislative facts, and have proposed a variety of reforms.[43] Most of these scholars begin with the premise that in determining a new rule of law, courts need "to be informed on matters far beyond the facts of the particular case."[44] Their concern is

36. *See id.* at 946.

37. *See id.* at 948 (citing MODEL CODE OF EVIDENCE Rule 804 (2), (3)).

38. *See id.* at 949.

39. *See* FED. R. EVID. 201.

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

41. *Id.*

42. *Id.* (quoting Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 270 (1944)).

43. *See* Davis, *Judicial Notice*, *supra* note 8; Davis, *supra* note 17; Karst, *supra* note 17; Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices*, 61 VA. L. REV. 1187 (1975); Monahan & Walker, *Social Authority*, *supra* note 20.

44. Karst, *supra* note 17, at 77.

that when courts use legislative facts, "their legal enshrinement is casual and unselfconscious, and their assessment often superficial and skewed by litigation imbalances."[45] These scholars also express concern that lawyers do not understand the importance of presenting legislative facts in support of proposed legal rules, and that judges rely on their own assumptions, rather than looking for facts about the effects of the legal rules they create.[46]

In response to these problems, these scholars have proposed a number of potential reforms. The simplest of the reforms focus on educating lawyers and judges about the importance of legislative facts.[47] More formal proposals include encouraging judges to request factual briefs from parties and amici, allowing parties to respond to the legislative facts, appointing experts,[48] and providing a framework for the courts to assess the validity of empirical data.[49] In addition, some have suggested the trial is really the better forum, and that, if necessary, courts should remand so that a more complete record is developed.[50] Professor Peggy Davis has suggested the adoption of rules governing the admissibility of legislative facts.[51] To date, none of these suggestions has been formally adopted, leaving the use of legislative facts unrestricted.[52]

Thus, there is no procedural bar to introducing non-legal material in support of appellate arguments, even when it has not been introduced in the trial court proceedings. This leaves advocates with the

45. Davis, *supra* note 17, at 1542; *see also* Karst, *supra* note 17, at 84–86; Monahan & Walker, *Social Authority*, *supra* note 20, at 485.

46. *See* Davis, *Facts*, *supra* note 17, at 940; Davis, *supra* note 17, at 1600–02; Karst, *supra* note 17, at 83–84; Miller & Barron, *supra* note 43, at 1211, 1228.

47. *See* Karst, *supra* note 17, at 99; Miller & Barron, *supra* note 43, at 1242; *see also* George R. Currie, *Appellate Courts Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation*, 1960 WIS. L. REV. 39, 53 (1960).

48. *See* Davis, *Facts*, *supra* note 17, at 940; Davis, *supra* note 17, at 1598–1600; Karst, *supra* note 17, at 106–08. The authors suggest that an independent, court-appointed expert, or resident panel might provide better advice to the court than would expert testimony presented at trial.

49. *See* Monahan & Walker, *Social Authority*, *supra* note 20, at 499–508.

50. *See* Davis, *Facts*, *supra* note 17, at 940; Karst, *supra* note 17, at 98; *see also* John Frazier Jackson, *The Brandeis Brief—Too Little, Too Late: The Trial Court as a Forum for Presenting Legislative Facts*, 17 AM. J. TRIAL ADVOC. 1, 2 (1993).

51. *See* Davis, *supra* note 17, at 1600.

52. For speculations on the reasons for the continued resistance to formalizing the judicial reception of legislative facts, see Woolhandler, *supra* note 17, at 121–25 (suggesting that such an open embrace of the courts' legislative function would undermine its legitimacy); *see also* Dean M. Hashimoto, *Science as Mythology in Constitutional Law*, 76 OR. L. REV. 111, 114–15 (1997) (asserting that courts' use of legislative fact is primarily rhetorical, and therefore not conducive to regulation).

obligation to use non-legal materials when they would help the client. Appellate lawyers are expected to use all the tools at their disposal in constructing an argument that best represents their clients' positions.[53] In constructing their arguments, lawyers should view non-legal materials as one of those tools. There is no reason not to, and failing to do so may violate the ethical obligation of zealous advocacy.[54]

B. Courts Will Use Non-Legal Materials Even if the Lawyers Do Not Provide the Materials

Another pragmatic reason lawyers should be encouraged to cite non-legal materials in briefs is that, whether or not they appear in the briefs, judges are likely to seek out and rely on legislative facts when formulating a new legal rule of general application. Lawyers should not opt out of this important part of the decision-making process. In the same way that a lawyer should want to present a relevant case in a brief, so that the court understands the lawyer's "take" on it and how it fits into the theory of the case, a lawyer should want to present relevant non-legal material for the same purpose.

Kenneth Karst asserted that when faced with rendering decisions which require knowledge of legislative facts, courts most often either assume the answer or conduct their own research to ascertain these facts.[55] Anecdotal evidence and empirical research seem to bear this out. Wisconsin Supreme Court Justice George Currie documented many instances in which the appellate court sought out and took judicial notice of legislative facts, whether or not the parties provided them.[56] In his extensive study of appellate court decision-making, Thomas Marvell found that only a quarter of the social facts cited in

53. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 1 (1999) (requiring a lawyer to act "with zeal in advocacy upon the client's behalf"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 cmt. 1 (1999) ("The advocate has a duty to use legal procedure for the fullest benefit of the client's cause. . . . The law, both procedural and substantive, establishes the limits within which an advocate may proceed.").

54. The suggestion that lawyers have an ethical obligation to use non-legal materials raises a host of other questions: Can failure to cite relevant non-legal material expose counsel to liability for malpractice? Does opposing counsel have an obligation to point out the invalidity of cited material? Is there then an obligation under Model Rule of Professional Conduct 3.3(3) to disclose adverse information? Answering these questions is beyond the scope of this piece, but will be addressed in a future article.

55. *See* Karst, *supra* note 17, at 84, 95; *see also* Jackson, *supra* note 50, at 5 "[I]f given few settled facts, appellate courts will either build doctrines out of thin air or find other facts to support their conclusions, and this process is often completed without the benefit of the input or knowledge of the parties." *Id.*

56. *See* Currie, *supra* note 47, at 44–49.

opinions had been provided by counsel.[57] This suggests that in the remaining seventy-five percent of the time, judges seek out this information on their own and lawyers are left out of an important part of the decision-making process.[58] All of these scholars agree that the system would be better served if lawyers took a more prominent role in addressing the use of legislative facts in a given case.[59]

Recent studies show there has been a marked increase in courts' citation to non-legal material in support of their opinions.[60] Concerns about how courts use, or misuse this information have been voiced as the use of the information has increased.[61] Professor David Faigman, reviewing the United States Supreme Court's use of empirical research in its constitutional decision-making, found that the Court's use of this information was inconsistent—using it accurately, misconstruing it, dismissing it altogether, or reasoning around it, depending on the case.[62] Many legal scholars have commented that judges only use empirical evidence when that evidence supports the decision that

57. *See* MARVELL, *supra* note 13, at 174. Marvell's study included a number of state supreme courts and federal circuit courts. In addition to reviewing opinions, briefs, and oral arguments, Marvell conducted interviews of judges, law clerks, and appellate lawyers. *See id.* at 6.

58. Amicus briefs are also a common method by which modern courts are provided with non-legal information relevant to the creation of a new legal rule. *See* Rustad & Koenig, *supra* note 22, at 94. The use of amicus briefs for this purpose is the subject of much interesting and contentious discussion, in which the author does not intend to engage. The sole focus of this article is the use of non-legal information in party briefs to support policy arguments made in the context of a full legal argument.

59. *See* Currie, *supra* note 47 at 53; Jackson, *supra* note 50, at 5; Karst, *supra* note 17, at 95; MARVELL, *supra* note 13, at 176.

60. *See* Schauer & Wise, *supra* note 11, at 1108. The authors counted citations to non-legal materials in United States Supreme Court opinions for the 1950, 1960, 1970, 1975, 1980, 1985, 1990, 1991, 1992, 1993, 1994, and 1995 Terms. The analysis showed a substantial increase in citation of non-legal sources starting in 1991. Their research also showed similar increases in other appellate courts. The study counted citations to "history, political science, economics, and other non-legal academic journals, to newspapers and popular periodicals, to dictionaries and encyclopedias, to books of history, politics, and the like, and occasionally to poetry, plays, and literature." *Id.* at n.92.

61. Several scholars have expressed concern over a court's ability to accurately assess empirical research from other disciplines. *See, e.g.*, Monahan & Walker, *Social Authority*, *supra* note 20, at 499 (providing a specific set of criteria for courts to use in evaluating scientific research); Rustad & Koenig, *supra* note 22, at 99, 158–60 (calling for court-appointed experts or other mechanisms to aid courts in assessing information).

62. *See* Faigman, *supra* note 17, at 548–50. Faigman posits that the reason for this inconsistency is the tension between "objective" empirical evidence, and the normative principles, which typically drive constitutional decision-making. He ultimately concludes that, in spite of the difficulties, facts play an important role in guiding the Court's constitutional decision-making. *See id.* at 550.

the judge already favors on other grounds.[63] While there are many legitimate questions about courts' use of non-legal materials, they do not negate the fact that courts are using, and will continue to use non-legal information in support of decisions.

Consideration of how courts use non-legal information and what this means for jurisprudence is an important endeavor.[64] Lawyers should not stand aside, however, waiting for scholars and lawmakers to resolve the issues and come up with a systematized use of non-legal information, if that is even possible or desirable.[65] If anything, current information about the judicial use of non-legal material should impel lawyers to take a more active role. Uncertainty in an area of jurisprudence leaves room for advocacy, and there is plenty of room for advocacy with the use of non-legal information to support policy arguments.

If a judge is going to make an assumption based on his or her own personal knowledge, information supplied in a brief may reinforce that assumption, or may help counteract an unthinking assumption. If a judge conducts independent research, the attorney runs the risk that the judge might not look for sources the attorney might consider relevant and consistent with his theory of the case. Although non-legal information will rarely prove dispositive of a case, it may well provide a restraining influence.[66] A court is unlikely to make a decision that flies directly in the face of substantial empirical research or

63. *See, e.g.*, Constance Lindman, Note, *Sources of Judicial Distrust of Social Science Evidence: A Comparison of Social Science and Jurisprudence*, 64 IND. L. J. 755, 756 (1989) (quoting Kerr, Social Science and the U.S. Supreme Court, *in* THE IMPACT OF SOCIAL PSYCHOLOGY ON PROCEDURAL JUSTICE 56, 64–65 (M. Kaplan ed. 1986)); Donald N. Bersoff & David J. Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research*, 2 U. CHI. L. SCH. ROUNDTABLE 279, 293 (1995).

64. Indeed, the bulk of the scholarship on courts' use of non-legal material falls into this category. *See supra* notes 17–22.

65. Whether use of non-legal materials should be more carefully regulated depends, in large part, on the view one takes of how these materials should be used by the courts. This in itself is a subject of great debate. *See, e.g.*, Faigman, *supra* note 17, at 543–44 (suggesting that legislative facts serve an interpretive function in constitutional lawmaking); Hashimoto, *supra* note 52, at 114–15 (suggesting that legislative facts serve a rhetorical function); Rachal N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655 (1988) (suggesting that legislative facts serve an evidentiary function in lawmaking); Woolhandler, *supra* note 17, at 121 ("Formalizing the process for judicial reception of legislative facts will increase the hegemony of pragmatic balancing at the expense of other processes of judicial reasoning.").

66. *See* Faigman, *supra* note 17, at 548–49. Faigman's article focuses on the use of empirical information in constitutional cases. *See id.* His reasoning could easily be applied to the use of non-legal information in any case which requires the court to make new law.

established social theories.[67] Consistent misuse of non-legal information can serve to undermine a court's legitimacy, the court may appear irrational, and its decisions may be considered unpersuasive.[68] At a minimum, providing non-legal material in a brief allows an attorney to try and impose that restraining influence.

An appellate attorney would be considered remiss in failing to discuss a case, or other source of legal authority, which, though not directly binding on the court, has a clear potential to influence the court's reasoning.[69] Even if the attorney knows the court is aware of the case, the attorney should discuss how the case fits into the particular argument and overall theory of the appeal.[70] Attorneys should think of using non-legal information in much the same way. Even if the court seeks out the information itself, or is provided information through an amicus brief, the lawyer should still want to explain how non-legal sources inform the policy in support of the lawyer's argument.

In many ways, the descriptions of courts' use of non-legal information sound much like descriptions of a court's use of legal authority which is not directly binding on the outcome of the case.[71] Professor Faigman places the Supreme Court's use of empirical evidence in four categories: (1) the Court conforms its findings to the available factual information; (2) the Court claims to follow the research, but misapplies the findings in framing its conclusions; (3) the Court advances its own conception of the issue, misunderstanding or finding the factual information inconclusive; and (4) the Court dismisses the importance of a particular fact for its conclusion and relies on some alternate ground or authority.[72] In the same way, courts' use

67. *See id.* at 604–05.

68. *See id.* at 604.

69. *See* STERN ET AL., *supra* note 24, at 318–19; *see also* Canel & Hale, Ltd. v. Tobin, 710 N.E.2d 861, 869 (Ill. App. Ct. 1999) (finding that failure to cite cases from other states on issues of first impression did not preclude court's consideration of issues, but suggesting that such citation would have been useful).

70. *See* STERN ET AL., *supra* note 24, at 317 (indicating the need for a lawyer to go beyond case citation and provide an explanation of how case supports argument); *see also* IRVING YOUNGER, PERSUASIVE WRITING 56 (1990) (pointing out that a citation without explanation will not be persuasive if the judge sees the case differently than the attorney).

71. I am not here suggesting that legislative facts should be formally treated as authority, although some scholars have suggested that. *See* Monahan & Walker, *Social Authority*, *supra* note 20, at 478 (providing an in-depth discussion of the ways in which social science research "is more analogous to law than to fact"). I am merely outlining some of the parallels in order to suggest that lawyers should view the use of non-legal information as similar to that of non-binding legal authority for the purposes of making policy arguments.

72. *See* Faigman, *supra* note 17, at 550.

of persuasive authority can be inconsistent and result-oriented.[73] In evaluating persuasive authority, a court may follow it in developing a new rule, claim to follow persuasive authority, but misapply the reasoning of the authority, advance its own conception of an issue, avoiding persuasive authority, or finding it irrelevant, distinguish the reasoning of persuasive authority and rely instead on other grounds.[74]

Ultimately, a lawyer has no control over how the court will make use of persuasive authority, but this does not mean that the lawyer should not try to make use of such authority, and to place it in the brief in the context of the lawyer's theory of the case, using the authority as a tool of advocacy in advancing a client's position.[75] In the same manner, the lawyer should use potentially persuasive non-legal authority to support arguments in the brief, regardless of whether the court will obtain the information independently, and regardless of whether the court will rely on the information in the way that the lawyer suggests. Of course, the lawyer should have an understanding of how the court will, or is likely to use non-legal information, in the same way that a lawyer should always try and assess a court's judicial temperament and approach to legal authority.[76] This may or may not be possible but, regardless, as long as courts are using non-legal material to support the creation of new legal rules, lawyers should take an active role in presenting that material to the court.

C. Non-Legal Materials Are Often the Best Support for Policy-Based Arguments

In addition to the pragmatic reasons discussed above for including non-legal materials in appellate briefs, there is a more substantive reason. In cases which require the formulation of a new legal rule, policy-based reasoning is extremely important,[77] and the appellate

73. *See* STERN ET AL., *supra* note 24, at 316 ("supreme courts . . . have great adeptness in distinguishing, avoiding, or even ignoring cases which might lead to conclusions they deem unfair or unwise").

74. *See* Michael J. Saks, *Judicial Attention to the Way the World Works*, 75 IOWA L. REV. 1011, 1013 (1990) (pointing out that courts "are capable of being careless and casual with legal authority as well as with other kinds of authority").

75. *See* STERN ET AL., *supra* note 24, at 317. Stern points out that even if the meaning of a case (or other source of authority) seems self-evident, the lawyer should always provide the court with an explanation of how the authority supports the conclusion she wants the court to adopt. *See id.*

76. *See* GIRVAN PECK, WRITING PERSUASIVE BRIEFS 75–78 (1984).

77. *See* CARDOZO, *supra* note 1, at 72 (To address novel questions of law, judges must turn to "public policy, the good of the collective body."). Cardozo's view has firmly taken root in modern jurisprudence. *See also* Ruggero J. Aldisert, *The Brennan Legacy: The Art of*

lawyer should present policy arguments as effectively as possible to the court.[78] Non-legal materials can often be the best, and sometimes the only support for these policy arguments. Indeed, non-legal materials serve a unique function in supporting policy arguments that is different from other uses of legislative facts. Because of this, the appellate court is the appropriate forum to use them. In order the fully explain this, this section first explores the nature of policy arguments in appellate briefs, then defines the term "legislative facts" more precisely, and finally reviews the particular use of non-legal material in support of policy arguments, as distinguished from other uses.

Policy-based reasoning involves an assessment of whether a proposed legal rule will benefit society, or advance a particular social goal.[79] In making this determination, courts are required to identify a desirable result, and then consider whether the operation of the proposed rule will encourage that result, as well as discourage undesirable results.[80] Because a new rule will likely be of general applicability, courts must consider how a proposed rule will work for future litigants, as well as for society as a whole.[81] Assessing the general effect a legal rule will have is, by definition, a future-oriented enterprise.

A policy argument, then, is an attempt to persuade a court to adopt a rule for reasons of public policy—an argument formulated around the elements of policy-based reasoning.[82] In constructing this argument, a lawyer would first try to convince the court that the goal she advocates is a desirable one, both for her client and for society as a whole, and then show the court how the proposed rule would serve to achieve that goal.[83] This, again, is a future-oriented argument about

Judging, 32 LOY. L.A. L. REV. 673, 677 (1999) (The basis of modern jurisprudence is that "[j]udges should consider the effect of their judicial decisions on society and social welfare, rather than adhering solely to a mechanical jurisprudence of legal conceptions.").

78. I am not suggesting, however, that policy-based reasoning is the only reasoning process judges employ when engaged in rule making. Even when the court is assuming a legislative function, judges and lawyers still view the court as an adjudicative body in which "text, precedent, and principle still play a significant role." Woolhandler, *supra* note 17, at 116. *See also* Hashimoto, *supra* note 52, at 130–31. Most judicial decisions are a product of a variety of forms of reasoning (rule-based, normative, etc.) woven together. *See* EDWARDS, *supra* note 25, at 4–8. While policy arguments can be very important and useful, conventional legal arguments still have the greatest impact. *See* Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 41–42 (1998).

79. *See* EDWARDS, *supra* note 25, at 10.

80. *See id.*

81. *See id.*

82. *See* PECK, *supra* note 76, at 78–81.

83. *See* Woolhandler, *supra* note 17, at 114.

the effect a legal rule will have, presented to encourage the legal decision-maker to adopt that rule.[84]

The type of policy argument described above differs somewhat from the type of policy arguments typically taught in law school, and typically exercised by practicing attorneys. The more common policy argument involves identifying the underlying policy of an existing rule and showing how that policy applies to a client's situation.[85] The underlying policy of a statute is generally gleaned from legislative history, and the underlying policy of a case is generally gleaned from the court's reasoning (including possible references to legislative facts).[86] It is not surprising that this is the more common understanding of policy arguments, since it is much more likely that a lawyer will be advocating the application of an existing rule than proposing that the court adopt a new rule.[87]

These two types of policy arguments are really just opposite sides of the same coin. In the second, more common type of policy analysis, lawyers and judges are merely making use of the policy underlying a rule previously adopted by the court. In adopting that rule in the first place, however, the court must, at some point, have engaged in the first type of policy-based reasoning. Thus, while lawyers are typically taught to ascertain a court's policy-based reasoning and apply it to a new situation, they are not typically taught how to construct that analysis when it cannot be found in a source of legal authority. Even though cases necessitating this form of argument are rare, when a case requiring the adoption of a new legal rule does arise, a lawyer should be prepared to argue it effectively.

84. *See id.*

85. Most of the legal writing textbooks cover this type of policy argument. *See, e.g.*, EDWARDS, *supra* note 25, at 107; NEUMANN, JR., *supra* note 25, at 131; PRATT, *supra* note 25, at 325; SHAPO ET. AL., *supra* note 25, at 44. The distinction drawn here between legal issues involving previously expressed policy and novel issues with no direct source of policy is somewhat artificial. Cases raising issues in which there are no relevant rules and sources of policy will be extremely rare. I make this distinction largely for the purpose of focusing the discussion.

86. *See* PRATT, *supra* note 25, at 321–24.

87. *See* Davis, *Judicial Notice*, *supra* note 8, at 952 "In the great mass of cases decided by courts and by agencies, the legislative element is either absent, unimportant, or interstitial, because in most cases the applicable law and policy have been previously established." *Id. S ee also* CARDOZO, *supra* note 1, at 164. Most cases fall into two categories, those in which the "law and its application alike are plain," and those in which the "rule of law is certain and the application alone doubtful." *Id.* This leaves only a small number in which the court must develop a new rule. *See id.*

A good policy argument, like any good argument presented in a brief, should be well-supported by authority.[88] Traditional sources of authority may not provide adequate support for policy, however. The lawyer crafting a policy argument must be aware of the sources the court considers in developing a new legal rule. In determining desirable social policy, the court may go beyond common law and statutory sources and rely on other disciplines such as sociology, economics, and political science.[89] Professor Edwards identifies several components of policy-based reasoning: "aesthetic principles, scientific models, social organization, economic analysis, efficiency concerns, political realities and predictable psychological reactions."[90] All of these components require reliance on non-legal, factual information—legislative fact.

Indeed, one definition of "legislative fact" echoes closely the definition of a policy argument: "A paradigmatic legislative fact is one that shows the general effect a legal rule will have, and is presented to encourage the decisionmaker to make a particular legal rule."[91] Policy arguments are predictions of the effect a legal rule will have, and factual information provides the basis for that prediction. For example, in a case in which the court is asked to impose tort liability on a mother for injury to a child caused by the mother's negligent conduct during pregnancy,[92] the mother may argue that a duty to a fetus would be unduly intrusive because it would affect every moment of a woman's life, even before pregnancy (the policy argument). As support, she may provide medical information (legislative fact) about the many ways a woman's conduct before and during pregnancy, such as diet, physical activity and choice of work, could affect the health of a fetus.[93] If medical information supports the contention that the mother's health even before pregnancy can affect the health of the

88. *See* ALDISERT, *supra* note 25, at 206–07 ("[C]ommon law tradition demands authority to support propositions asserted in the brief.").

89. *See* EDWARDS, *supra* note 25, at 25 (citing CARDOZO, *supra* note 1).

90. EDWARDS, *supra* note 25, at 25.

91. Woolhandler, *supra* note 17, at 114 (citations omitted); *see also* Karst, *supra* note 17, at 81 (discussing the need for judges to have information about the probable effects of their decisions). Although this may be the quintessential definition of legislative fact, the term is used more broadly, to encompass other uses of non-legal materials. *See infra* notes 103–28 and accompanying text.

92. *See* Chenault v. Huie, 989 S.W.2d 474, 478 (Tex. App. 1999) (affirming summary judgment for mother where child's conservator sued mother for damages caused to child by mother's drug use during pregnancy).

93. *See id.* at 477. *Chenault* provides the perfect example of why this information would have to be provided at the appellate level in a brief. The plaintiff's claim was dismissed by summary judgment, so no factual record was developed. *See id.* at 475. For the mother to

fetus, the policy argument will be much more persuasive than the same assertion without any factual support.[94]

A prediction about the future operation of a rule, if there is any support at all, is of necessity a prediction based in fact. A legal rule cannot answer questions such as: How will this rule promote the health or safety of a community? How will this interpretation of a statute serve to eliminate the problem the statute is designed to address? How much will individual liberties be restricted if this statute is found to be constitutional? All of these are questions of fact.[95] For this reason, non-legal information is the best, and often the only, support for a policy argument. Indeed, this suggests that if a lawyer cannot find a factual basis to support an asserted policy argument in a brief, she should rethink the persuasive value of the argument.

It is also the predictive nature of the policy argument that makes the appellate brief the appropriate medium in which to cite non-legal material. The purpose of the policy argument is to persuade the court to adopt (or refuse to adopt) a new legal rule, and facts are used to help the court determine the content of the law. Because it will be the appellate court, not the trial court, that ultimately makes the decision about the content of the law,[96] it is not only appropriate, but logical, to introduce non-legal material in support of policy arguments at the appellate stage.

Ultimately, of course, factual information alone cannot provide the answer to what legal rule should be adopted. Because policy arguments are predictions, they are, by their nature, disputable.[97] In addition, non-legal materials do not provide the answer to the first step in a policy analysis—the identification of a desirable goal.[98] Facts alone cannot dictate which effects are desirable, or whether one effect out-

base a policy argument on medical information, such information would have to be provided to the court of appeals.

94. In *Chenault*, the court found just this type of information highly persuasive. *See id.* at 476–77. Based on the information before it, the court found that to develop a workable standard of care would require such an extensive analysis of scientific and medical data that the legislature, rather than the court should address the issue. *See id.* at 478.

95. *See* Karst, *supra* note 17, at 84. If a judge doesn't receive factual information to answer such questions, "he assumes the answers based on his own experience and education." *Id.*

96. *See* Monahan & Walker, *Social Authority*, *supra* note 20, at 496–97 (suggesting that, if social information is viewed as authority rather than fact, the brief is the most appropriate forum for presenting it to the court).

97. *See* Woolhandler, *supra* note 17, at 123.

98. *See id.*

weighs another one.[99] Determining the desirable goal is a normative judgment, not a factual one.[100] In the end, a court adopting a new legal rule will have to rely on moral and legal principles.[101] Non-legal materials can help appellate judges be better informed about the implications of those principles, but they cannot replace them.

Used in this way, as support for policy arguments, non-legal materials are a small subset of legislative facts as they are contemplated by the scholars. Many of the calls for greater regulation of legislative facts[102] are based on different assumptions of the role legislative facts play in judicial lawmaking. While many of the scholars recognize that legislative facts are used in multiple ways,[103] they rarely suggest that legislative facts should be treated differently because of their use.

One common use of legislative facts is to provide a background against which to measure the adjudicative facts of a case.[104] For example, in a case involving an individual with post-traumatic stress syndrome, a court might consider psychological data about the syndrome in order to assess the person's actions.[105] In one study, Peggy Davis found that courts commonly use psychological parent theory[106] as background information in child custody cases.[107] In some of these cases, the courts took judicial notice of the theory without any presentation of expert testimony or challenge from the parties.[108] Used in

99. *See id.*

100. *See* Hashimoto, *supra* note 52, at 130.

101. *See id.* at 130–31.

102. *See supra* notes 43–52 and accompanying text.

103. *See, e.g.*, Davis, *Facts*, *supra* note 17, at 932 (describing six different scales on which legislative facts can fall); Davis, *supra* note 17, at 1547 (identifying four different ways the psychological parent theory was used by courts); Faigman, *supra* note 17, at 553 (dividing legislative facts into two categories for purposes of constitutional decision-making).

104. *See* Walker & Monahan, *Social Frameworks*, *supra* note 20, at 559 (stating that "general research results are used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case").

105. *See, e.g.*, Roling v. Daily, 596 N.W.2d 72, 76 (Iowa 1999) (allowing general evidence of post-traumatic stress disorder in order to assess emotional damages to plaintiff in car accident).

106. Simplified greatly, this theory suggests that psychological bonds should play a greater role than biological ties in determining a child's best interest. *See* Davis, *supra* note 17, at 1542–45 (citations omitted).

107. *See id.* at 1549.

108. *See id.* Peggy Davis suggests that this use of psychological theory, which is informal and occasionally unconscious, is inappropriate, and that the use of the theory at trial should be more regularized. *See id.* While Davis raises valid concerns, this use of non-legal material is very different from the use of such material in support of policy arguments outlined above.

this way, the non-legal information seems to perform an adjudicative function, but is still considered to be legislative fact.[109]

Walker and Monahan suggest that social science used for the purpose of setting a background context for understanding adjudicative facts should really be separated into a third category of fact, called "social framework."[110] They propose a series of procedures to improve the use of social framework evidence in trials.[111] Whether called social framework or legislative fact, it is clear that non-legal information introduced for the purpose of assessing adjudicative facts should be presented to the trial court, and not on appeal. Social science used in this way does not, or at least not directly,[112] influence the court's selection of a rule of law. Instead, social framework evidence influences a judge or jury's view of the facts. The use of legislative facts for this purpose is very different than their use to support policy arguments, outlined above. This different use suggests that context should govern the way courts and lawyers make use of non-legal information.[113]

Another use of legislative fact occurs primarily in constitutional adjudication. The court (usually the United States Supreme Court) uses legislative facts under a particular constitutional provision in order to determine the constitutionality of a state's action. The original Brandeis brief falls into this category. In *Muller*,[114] the Court was asked to determine the constitutionality of an Oregon statute limiting the number of hours per day women could work.[115] In his brief on behalf of the state, Brandeis presented extensive social science research to demonstrate that the state had a rational basis for restricting women's work hours for the sake of public safety, health, morals, or welfare.[116] This is probably the most common conception of the use of legislative facts.[117] In Due Process and Equal Protection challenges to state action, the court commonly reviews or speculates on the reasons for the

109. *See id.* at 1548 (citations omitted).

110. Walker & Monahan, *Social Frameworks*, *supra* note 20, at 560, 569–570 (studies introduced as background incorporate elements of both adjudicative and legislative fact, and should be thought of as a separate category).

111. *See id.* at 583–98 (ranging from how the information should be presented to the court, to how the jury should be instructed).

112. *See* Davis, *supra* note 17, at 1562.

113. *See* Saks, *supra* note 74, at 1018–26, 1030–31 (identifying three categories of uses for non-legal materials and suggesting that they should be treated differently by courts, according to their function).

114. Muller v. Oregon, 208 U.S. 412 (1908).

115. *See id.* at 416–17.

116. *See id.* at 416 (quoting an abstract from Brandeis' brief).

117. *See* Faigman, *supra* note 17, at 553.

state's action. This type of review is different than the future-oriented policy analysis discussed above. In these cases, the state has already identified a desired goal and taken action to achieve that goal. The court must look back to determine whether the goal is valid, and whether the method the state chose to achieve the goal is appropriate. Professor David Faigman, another scholar who has proposed further subdivision of legislative fact, calls facts used for this purpose "constitutional review" facts.[118]

This use of legislative facts is an outgrowth of the pragmatic balancing advocated by the Legal Realist movement of the early twentieth century.[119] Use of the balancing test in constitutional adjudication "has become widespread, if not dominant, over the last four decades."[120] It is this view of lawmaking which scholars like Professor Kenneth Karst have when they suggest that legislative facts would better serve the process by being introduced at the trial level.[121] Karst posits that the Supreme Court cannot do a proper job of balancing when faced with an inadequate record of legislative facts, and that development of these facts at trial would optimize the Court's ability to balance interests.[122]

The rationale behind suggestions that trial courts are the better forum for introducing legislative facts is that when the record is established at trial, fact-finding can be more controlled, the parties will have a more active role, the facts will be tested, and judges will be less

118. *Id.* Faigman divides legislative facts into two categories: "constitutional-rule" facts and "constitutional-review" facts. Constitutional-rule facts are an interpretive device, along with other sources of authority such as text, original intent and precedent, to aid in establishing the meaning of the Constitution. Constitutional-review facts provide the Court with information against which to measure a state's action. Although Faigman's analysis is limited to the use of legislative facts in constitutional adjudication, this subdivision of legislative facts could apply more broadly to other kinds of cases.

119. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 955–60 (1987).

120. *Id.* at 943–44. Professor Aleinikoff defines a decision in which the Court employs constitutional balancing as "a judicial opinion that analyzes a constitutional question by identifying interests implicated by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests." *Id.* at 945.

121. *See* Karst, *supra* note 17, at 81; *see also* Woolhandler, *supra* note 17, at 116–17 (suggesting that scholars who propose greater regulation of legislative facts elevate pragmatic balancing at the expense of other forms of legal decision-making).

122. *See* Karst, *supra* note 17, at 95, 100–03 (discussing the inadequacy of Brandeis briefs and expressing a preference for expert testimony at trial); *see also* Jackson, *supra* note 50, at 2–3 (arguing that the trial court is the superior forum in which to present legislative evidence).

likely to seek out information on their own.[123] Given a settled trial record, appellate judges will be obligated to deal with the facts more directly than if the facts were presented in a brief.[124] Providing information through a brief is a second-best solution, to be employed primarily by appellate lawyers stuck with an inadequate trial record.[125]

While it may often be advantageous to establish legislative facts as part of the trial record, particularly when the court is engaged in reviewing the legitimacy of a state's action, there are flaws in this logic. First, this view assumes that courts place pragmatic balancing over other forms of legal reasoning, and that with the full factual record before it, a court will find the "right" decision inevitable.[126] This is not the case, as courts continue to use a variety of methods for decision-making.[127] Second, the scholars who promote fuller records at trial suggest that appellate courts will be obligated to give deference to the lower court's finding of fact, and thus be forced to consider the legislative facts more fully. Studies of appellate courts' use of legislative facts do not support this conclusion.[128] Thus, while development of legislative facts at trial may create a more complete record, and allow for more testing of the validity of the evidence, there is no guarantee that the appellate court will be more influenced by facts in the trial record than by facts in the brief.

Of the multiple uses of legislative facts, using them as support for policy arguments is least problematic at the appellate level. The appellate court facing a novel issue of law is more likely to turn to policy to inform its decision, and non-legal materials are a natural source to support policy arguments. In addition, non-legal information can serve a rhetorical function, establishing legitimacy for new legal rules by relying on modern society's trust in scientific findings.[129] The brief-

123. *See* Jackson, *supra* note 50, at 3, 41. Jackson came to this conclusion after reviewing several cases in which legislative facts were established extensively at trial. Among the cases he reviewed were *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), and *United States v. Virginia (VMI)*, 976 F.2d 890 (4th Cir. 1992).

124. *See* Jackson, *supra* note 50, at 5.

125. *See id.* at 41; *see also* STERN ET AL., *supra* note 24, at 279 ("I suspect that the Brandeis brief technique is often employed by lawyers newly brought in on appeal, after it is too late to introduce the facts into the trial court record.").

126. *See* Woolhandler, *supra* note 17, at 116–18.

127. *See supra* notes 97–101 and accompanying text.

128. *See* Faigman, *supra* note 17, at 550. Indeed, in both of the cases Jackson reviews, discussed *supra* note 50, the appellate courts reversed the decisions of the trial courts, even though those decisions were primarily based in the findings of legislative fact. *See* Jackson, *supra* note 50, at 16–18, 25.

129. *See* Hashimoto, *supra* note 52, at 115–16 (suggesting that the Supreme Court's use of scientific information is primarily rhetorical, rather than evidentiary or interpretive).

writer's job is to employ rhetoric—the tools of persuasion—in order to persuade the court of a particular outcome.[130] If non-legal materials assist in this endeavor, lawyers should employ them.

Some might balk at this instrumentalist view of the use of non-legal materials. It is important to remember, however, that the lawyer's job is to be an advocate, within the bounds of professional ethics.[131] It is the court's job to account for any disparity between party resources, to assure that relevant legislative facts are adequately developed, and to ascertain the accuracy of non-legal materials contained in the briefs.[132] As previously stated, much of the legal scholarship on legislative facts focuses on the role of the court.[133] Lawyers should be educated about the multiple uses of non-legal materials and use them accordingly. In terms of the use of non-legal materials to support policy arguments, lawyers should be more alert to the types of cases in which these arguments can play a pivotal role. An increased awareness, along with an understanding of how to introduce these materials, will improve the quality and persuasiveness of appellate briefs.

II. Types of Cases in Which Policy Is Most Important

While policy can play a role in almost any case, it is particularly important in cases which require a court to resolve a novel issue and develop a new rule of law. These cases fall into three main categories—common law cases of first impression, constitutional cases raising novel applications of constitutional provisions, and cases requiring statutory interpretation. A key reason for the importance of policy, even in cases requiring the application of positive law (i.e., statutes and constitutions), is the ubiquity of the common law method in American legal decision-making.[134] Courts employing the common

130. *See* ALDISERT, *supra* note 25, at 17; *see also* Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85 (1994) (applying classical rhetoric theory to the presentation of a legal argument).

131. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 1 (1999) (requiring a lawyer to act "with zeal in advocacy upon the client's behalf"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 cmt. 1 (1999) ("The advocate has a duty to use legal procedure for the fullest benefit of the client's cause. . . . The law, both procedural and substantive, establishes the limits within which an advocate may proceed.").

132. *See* Davis, *Facts*, *supra* note 17, at 940.

133. *See supra* notes 17–22.

134. *See* Dorf, *supra* note 78, at 26–33 (the common law method pervades the Supreme Court's interpretation of the Constitution and statutes); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 5 (1998) (the Supreme Court's methodology in interpreting statutes "bears significant traces of the common law form");

law method turn to sources other than constitutions, statutes, and case precedent to decide novel legal issues. A brief overview of common law decision-making is therefore in order, before explaining its operation in each of the three categories.

The common law tradition, in which issues are resolved on a case-by-case basis, is premised on the understanding that law evolves over time, rather than being derived from an authoritative source, such as a statute or constitution.[135] "The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars."[136] As new cases arise, courts reason by analogy to previous cases, building on precedent to develop a body of rules that govern the cases before them as well as guiding future conduct.[137] This system creates stability, while allowing flexibility as society changes and new issues arise. Indeed, Oliver Wendell Holmes, in the leading account of the common law method, claimed that the genius of the common law is its ability to adapt doctrine to changes in social circumstance.[138]

Using the common law method, a court faced with a case must first decide whether an existing rule (precedent) can be applied to the factual situation before it.[139] Occasionally, before a rule can be applied, it needs to be reformulated—modified in some way to apply to new circumstances.[140] In a smaller, but significant portion of cases, no clear rule applies, and there is a gap in the law that must be filled in order to resolve the case.[141] It is in filling these gaps that the common law judge assumes the role of the legislator and creates law.[142] While judges can turn to existing legal principle to fill the gap, "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the

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Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 239 (1999) ("At the state level, the common law largely continues to provide the framework within which statutory work is done.") (citations omitted). For a comprehensive overview of the common law method, see RICHARD B. CAPPALLI, THE AMERICAN COMMON LAW METHOD (1997).

135. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (asserting that the primary model for understanding constitutional interpretation is the common law approach).

136. CARDOZO, *supra* note 1, at 22–23.

137. *See id.* at 19–21.

138. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1–38 (Little Brown & Co. 1990) (1881).

139. *See* CARDOZO, *supra* note 1, at 19.

140. *See id.* at 23–28.

141. *See id.* at 69, 165–66.

142. *See id.*

prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed."[143] The common law method, then, allows the courts to resort to sources other than text to resolve novel issues of law.

Judges employing the common law method most obviously and legitimately make law and policy.[144] Gaps also arise in constitutional and statutory cases, when general language does not obviously apply to particular situations.[145] Courts applying the common law method in these cases may also turn to sources other than text. It is in performing their legislative role that courts most often turn to policy. For this reason, when courts employ the common law method to decide novel issues of law, policy plays a particularly important role.

A. Common Law Cases of First Impression

Cases raising novel issues which no court in the jurisdiction (and perhaps the nation) has addressed, and which no statute or constitutional provision governs, present the clearest case for the importance of policy arguments. When statutes and case law fail to address a novel issue, common law courts can fashion a common law solution, creating law where none existed.[146] In pure cases of first impression, courts are not constrained by precedent—they do not have to decide whether they can justify overruling, modifying, or extending an existing rule. Cases of first impression illustrate a gap in the legal landscape, which is much larger than a gap created by an ambiguous statute or general constitutional provision[147]—a gap which the courts must fill.

Cardozo suggested that, of all the available methods for filling the gap, such as tradition, logic, and consistency,[148] the overriding method should be the "method of sociology," which places its emphasis on the social welfare.[149] Social welfare is described as "public pol-

143. HOLMES, *supra* note 138, at 1. Modern lawyers should be wary of relying on judges' intuitions about public policy and instead take a more active role in providing the court with concrete policy arguments about the effects of the proposed rule, or "gap-filler." *See supra* notes 55–68 and accompanying text.

144. *See* CARDOZO, *supra* note 1, at 20–21; HOLMES, *supra* note 138, at 35; ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 116 (1921).

145. *See* CARDOZO, *supra* note 1, at 69–71.

146. *See* Dorf, *supra* note 78, at 32.

147. *See* CARDOZO, *supra* note 1, at 71.

148. *See id.* at 75.

149. *See id.* at 75–76.

icy, the good of the collective body," which could be "expediency or prudence," or could mean "the social gain that is wrought by adherence to the standards of right conduct, which find expression in the mores of the community."[150] In other words, "the final cause of law is the welfare of society,"[151] and in fashioning new rules, the court must place the public good above all other considerations.[152]

The view that when the court is not constrained by precedent or statute it should turn to public policy and social welfare in developing new rules of law has firmly taken root in modern jurisprudence.[153] Judith S. Kaye, Chief Judge of the New York Court of Appeals, confirms that today's state court judges, in filling the gaps, "are frequently left to choose among competing policies."[154] Thus, in common law cases of first impression, policy can play a crucial role in influencing a court's decision. Attorneys making policy arguments must make them effectively, which means supporting those arguments with non-legal materials where appropriate.

Because there is virtually no federal common law,[155] common law cases of first impression will appear primarily in the state courts.[156] Common law still plays an important role in state courts, even though modern law is governed primarily by statutes, at both the federal and state level.[157] A key area in which state courts are faced with common

150. *Id.* at 71–72.

151. *Id.* at 66.

152. *See id.* at 67.

153. *See* ALDISERT, *supra* note 25, at 677. There are, of course, many constraints on a court's ability to make policy under the common law. Since courts do not render advisory opinions, they are limited to resolving only the dispute immediately before them. Appellate courts adhere faithfully to precedent when it exists, and decisions require the consensus of several judges. These factors all operate to maintain stability and prevent the court from acting like a true legislature. *See* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 5–6 (1995).

154. Kaye, *supra* note 153, at 10.

155. *See, e.g.*, Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640–42 (1981).

> [A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.

156. *See* Kaye, *supra* note 153, at 6 ("Even in today's legal landscape, dominated by statutes, the common-law process remains the core element in state court decisionmaking.").

157. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982) ("In [the last 50 to 80 years] we have gone from a legal system dominated by the common law . . . to one in which statutes . . . have become the primary source of law.").

law cases of first impression is establishing tort liability.[158] State courts are frequently called upon to balance policy considerations in determining whether to establish new causes of action.[159] Recently, state appellate courts have been asked, as issues of first impression: whether a husband states a cause of action for emotional distress against his wife's paramour;[160] whether comparative negligence applies to a client's claim of legal malpractice;[161] whether a custodial passenger in a motor vehicle may be held liable for damages resulting from injuries suffered by the infant plaintiff;[162] and whether plaintiffs in an asbestos case were entitled to a presumption that, if they had been given an adequate warning about the product, they would have followed it.[163] State courts also shape the common law by refusing to recognize new torts.[164] In all of these cases, policy plays an important role.

Common law also plays a role in important "gateway" issues such as standing, choice of law, and admissibility of evidence at common law.[165] These cases "are decided every day by state courts as a matter of pure policy."[166] For example, a Pennsylvania appellate court recently decided as a matter of first impression that a former same-sex domestic partner had standing to seek visitation of the child born to her partner during their relationship.[167] In a similar case, the Massachusetts Supreme Judicial Court found that the trial court had equity jurisdiction to grant visitation between the former same-sex partner and

158. *See* Kaye, *supra* note 153, at 6.

159. *See id.* at 7.

160. *See* C.M. v. J.M., 726 A.2d 998 (N.J. Super. Ct. Ch. Div. 1999) (finding husband stated cause of action against wife's paramour where he discovered that the paramour was the actual father of children the husband believed were his).

161. *See* Clark v. Rowe, 701 N.E.2d 624 (Mass. 1998) (comparative negligence does apply in claim of legal malpractice claim because it is an action in tort, as well as in contract).

162. *See* Rider v. Speaker, 692 N.Y.S. 2d 920 (N.Y. Sup. 1999) (holding that passenger/babysitter may be held liable for infant's injuries because of custodial relationship).

163. *See* Coward v. Owens-Corning, 729 A.2d 614, 617 (Pa. Super. 1999) (concluding that plaintiffs entitled to presumption that warning would have been followed where warnings are required to make product non-defective).

164. *See, e.g.*, Witthoeft v. Kiskaddon, 733 A.2d 623 (Pa. 1999) (refusing to hold that physician may be held liable for injuries suffered by a third party in an automobile accident caused by physician's patient).

165. *See* Kaye, *supra* note 153, at 8 (citations omitted).

166. *Id.*

167. *See* J.A.L. v. E.P.H., 682 A.2d 1314, 1322 (Pa. Super. 1996) (holding that mother's former domestic partner had standing to seek partial custody because she stood in loco parentis to child).

the child born during the relationship.[168] In both of these cases, policy played an important role, and both courts relied on non-legal information about the increasing numbers of "non-traditional" families in support of their decisions.[169]

These are but a few examples of the many common law cases of first impression that come before state appellate courts every day.[170] In many of these cases, courts explicitly balance considerations of public welfare in fashioning solutions.[171] Even where considerations of public policy are implicit, it is clear that policy plays a pivotal role in the resolution of these cases. Appellate lawyers must be attuned to common law cases where policy plays a role, and make effective policy arguments in their appellate briefs.

B. Statutory Interpretation Cases

Because of the proliferation of statutes in the legal landscape,[172] it is particularly important for lawyers to understand the role policy can play in statutory interpretation cases. While courts' statutory opinions must inevitably be anchored in statutory language, when that language is general or open-ended the application of the language to a concrete situation makes new law in much the same way common law cases of first impression do.[173] The common law method informs state and federal courts' statutory interpretation practices,[174] making room for the same kind of policy-based reasoning courts employ in common law cases.

168. *See* E.N.O. v. L.M.M., 711 N.E.2d 886, 890–92 (Mass. 1999) (finding that trial court had equity jurisdiction to grant visitation rights to child's de facto parent, despite no legal relationship).

169. *See id.* at 891 (citing JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD 12–13 (1996)); *J.A.L.*, 682 A.2d at 1320 & n.3 (citations omitted) (commenting on the "wide spectrum of arrangements filling the role of the traditional nuclear family" and citing a number of sources).

170. *See* Kaye, *supra* note 153, at 6–8.

171. *See id.*

172. *See* CALABRESI, *supra* note 157.

173. *See* Dorf, *supra* note 78, at 28. Statutory cases in which the language is dispositive will rarely rise to the higher level appellate courts. For example, the United States Supreme Court often takes statutory interpretation cases to resolve a split among the circuits, suggesting that the statute was easily capable of more than one interpretation. Thus, appellate courts often need to resort to tools other than statutory text in determining statutes' meanings. *See* Schacter, *supra* note 134, at 20 & n.63.

174. *See* Kaye, *supra* note 153, at 18–34 (discussing how state courts fill gaps in statutes using common law method); Dorf, *supra* note 78, at 26–32 (asserting pervasiveness of common law method in all Supreme Court adjudication, including statutory cases).

The proper method courts should apply in determining the meaning of statutes has been a subject of great debate and discussion over the last twenty years. This debate has occurred in the courts[175] and among scholars.[176] There are many different approaches judges can take when interpreting the words of a statute and applying them to new situations. Among the interpretive methodologies identified by scholars are textualism, purposivism, intentionalism, and dynamic statutory interpretation.[177] Recent scholarship has suggested, however, that the common law method plays a greater role in statutory interpretation than do any of these other methods.[178]

Professor Dorf cites the Supreme Court's opinion in *Oncale v. Sundowner Offshore Services, Inc.*[179] as an example of an opinion that purports to be based primarily in text, but really reflects a common law approach.[180] In *Oncale*, the Court found Title VII does not bar a claim of sexual harassment in which the harasser is of the same gender as the harassee.[181] The actual text of Title VII makes it unlawful for an employer to "discriminate because of . . . sex."[182] While the Court started its analysis with the statutory text, in arriving at its conclusion, the Court relied on earlier cases that recognized male-on-fe-

175. At the Supreme Court, Justice Scalia has spearheaded the debate, arguing that statutes should be interpreted based only on statutory language, without resort to legislative history or other interpretive devices. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 29–30 (1997); *see also* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 227 (1994) (noting that, since 1986, the Court's practice has "reflected the influence of the new textualism" propounded by Justice Scalia).

176. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321 (1990) ("In the last decade, statutory interpretation has reemerged as an important topic of academic theory and discussion."). Another source of the growth in scholarship on statutory interpretation is the law and literature movement, which has suggested that methods of literary criticism be applied to the interpretation of legal texts. *See, e.g.*, Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059, 1065 (1999) (describing branch of law and literature which focuses on literary theory to interpret texts).

177. For a concise overview of all these terms and an explanation of how they work, see Peter Strauss, *supra* note 134, at 227–29.

178. *See* Dorf, *supra* note 78, at 28–31 (suggesting that "even textualist opinions in statutory cases exhibit common law properties"); Schacter, *supra* note 134, at 5 (arguing that the Supreme Court's methodology in statutory cases "bears significant traces of the common law form because it draws from an array of *judicially*-created sources to delineate the range of plausible textual meanings and then to select from among them.").

179. 523 U.S. 75 (1998).

180. For Professor Dorf's analysis, see Dorf, *supra* note 78, at 30.

181. *See Oncale*, 523 U.S. at 82.

182. 42 U.S.C. § 2000e-2(a) (1994).

male sexual harassment as a form of discrimination,[183] as well as other cases dealing with a member of one group discriminating against another member of the same group.[184] Thus, while statutory text played a large role, the Court also gave substantial weight to previous cases, building on them to arrive at its conclusion.[185] This process of drawing on precedent to arrive at a conclusion is the common law method.

In a recent empirical study of the Supreme Court's statutory cases, Professor Jane Schacter concluded that the best term to describe the Court's approach in statutory interpretation cases is "common law originalism."[186] The Court is "originalist" because it "uses statutory language as an interpretive anchor and focal point."[187] At the same time, the court employs the common law method by drawing on sources other than statutory text and the traditional tools of statutory interpretation.[188] In particular, Professor Schacter found that the Court cited to secondary sources such as books, law review articles, and policy reports (statistics) in over half of the majority opinions.[189]

The Court's reliance on non-legal materials is not surprising in light of Professor Schacter's most significant finding: in seventy-three percent of the cases studied, the Court invoked policy norms that were grounded in neither the statutory text nor the legislative history.[190] This is the strongest indication of the Court's use of the common law method. The Court used policy norms in one of two ways. First, the opinions suggested that a particular reading of the statute would lead to desirable or adverse policy consequences.[191] More specifically, the opinions would assert that a particular interpretation would undermine values such as federalism, certainty, efficiency, or predictability, even though none of those values were indicated in the

183. *See Oncale*, 523 U.S. at 78 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)).

184. *See Oncale*, 523 U.S. at 78 (citing Castaneda v. Partida, 430 U.S. 482 (1977); Johnson v. Transp. Agency, Santa Clara County, 480 U.S. 616 (1987)).

185. *See* Dorf, *supra* note 78, at 30–31.

186. Schacter, *supra* note 134, at 19. Schacter's study was based on an analysis of all cases from the Court's 1996 Term, which included any substantial discussion of the meaning of a federal statute. *See id.* at 10.

187. *Id.* at 5.

188. *See id.* In the study, Professor Schacter analyzed the cases for nine different interpretive resources: 1) the statutory language; 2) legislative history; 3) other statutes or other sections of the statute at issue; 4) judicial opinions; 5) canons of construction; 6) administrative material; secondary sources (including law review and newspaper articles, treatises, other books, and policy reports); 8) dictionaries; and 9) miscellaneous. *See id.* at 11–12.

189. *See id.* at 27 & 18 tbl.1.

190. *See id.* at 21; *see also id.* at 12.

191. *See id.* at 21.

statute.[192] Second, the opinions asserted that a particular statutory reading would lead to certain policy consequences; the opinions then argued Congress could not have intended that outcome.[193] Essentially, the Court identified the policy against which to measure congressional intent, rather than trying to actually discern that intent. The Court engaged in judicial policy-making much the way a common law court would have.[194]

Thus, policy-based reasoning of the exact nature that calls upon non-legal factual material for support[195] plays an important role in statutory interpretation by the Supreme Court, and presumably lower federal courts as well. Policy also plays an important role in statutory interpretation in the state courts, which tend to embrace the common law method even more openly than did the federal courts.[196] In part, this is probably because state courts are courts of general jurisdiction, while federal courts may only have jurisdiction over a dispute because the United States Constitution is implicated or a federal statute exists.[197]

Because state courts employ the common law method more openly, they tend to move more fluidly between statutory and common law principles.[198] Chief Judge Kaye openly acknowledges that when the meaning of a statute is in dispute, the court employs the common law process of "discerning and applying the purpose of the

192. *See id.* at 21–23. As an example, Professor Schacter points to *Walters v. Metropolitan Educ. Enters., Inc.*, in which the Court found that, in determining whether an employer had sufficient employees to be covered by Title VII, a payroll based method for counting was fair, and alternative methods would require a complex and expensive factual inquiry. *See Walters*, 519 U.S. 202, 207–08 (1997). The opinion was driven by the policy concern of efficiency, even though no such concern is indicated by the statute. *See* Schacter, *supra* note 134, at 21.

193. *See* Schacter, *supra* note 134, at 24–25. For example, in *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 128 (1997), the Court considered whether disability determinations under the Longshore and Harbor Workers' Compensation Act ("LWHCA") should be delayed until a worker's loss of earning capacity could be ascertained. Justice Souter's majority opinion found that such a delay would have too many practical problems, and that Congress could not have intended this result. *See id.* at 129.

194. *See id.* at 25.

195. *See supra* notes 79–96 and accompanying text.

196. *See* Kaye, *supra* note 153, at 20.

197. *See* Kaye, *supra* note 153 at 20 n.111 (citing 28 U.S.C. § 1331) (1988) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 899 (1986) ("[S]tate courts . . . can fill any gap, as long as no directive to the contrary exists. Federal judges by contrast . . . can fill in a gap only if some enactment permits them to do so. . . .").

198. *See* Kaye, *supra* note 153, at 25.

law."[199] This is particularly true because state statutes are rarely accompanied by extensive legislative history, leaving the court with nothing other than often unclear or vague statutory language.[200] Common law courts faced with interpreting vague or general statutory language "have no choice but to 'make law' in circumstances where neither the statutory text nor the 'legislative will' provides a single clear answer."[201]

As in common law cases, a court exercising its law-making function within the context of interpreting a statute must often resort to policy. Since state courts can openly make policy when the legislature has not addressed an issue, the same courts should be able to make policy when the legislature has spoken generally, but has not provided clear guidance to the court.[202] Where the legislature has indicated it intends for something to be done about a particular issue, but not what that something is, the court must assume its common law role and fill that gap.[203]

This is particularly true in cases in which the courts are asked to apply a legislatively-created right or duty to facts clearly not contemplated by the legislature.[204] In a high-profile example, the New York Court of Appeals was asked to interpret the term "family member" in the non-eviction provisions of the New York City rent control statute to include the same-sex lover of the deceased tenant.[205] In finding that "family member" could be defined in this way, a plurality of the court found that there was no indication of the legislature's intent on the issue and employed a broad policy-based definition of family.[206]

Policy-based reasoning, then, can play an extremely important role in statutory interpretation cases, both at the federal and state level. While appellate lawyers writing briefs in statutory interpretation cases should continue to make arguments based on statutory language and legislative intent, they should not overlook the importance of policy arguments. Lawyers should not be afraid to go beyond policies explicitly stated by the legislature. Sound policy arguments grounded in legislative fact can have a profound influence on the courts.

199. *Id.* at 25.
200. *See id.* at 29–30.
201. *Id.* at 33–34.
202. *See* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 286 (1989).
203. *See id.*
204. *See* Kaye, *supra* note 153, at 31.
205. *See* Braschi v. Stahl Assocs., 543 N.E.2d 49, 54–55 (N.Y. 1989).
206. *See id.*

C. Constitutional Cases

Like statutes, constitutions are a source of positive law—a collection of written policies setting out governmental obligations and individual rights. As they do in statutory cases, courts interpreting constitutions are bound to some degree by what the constitutions say. In practice, however, constitutional text plays a small role compared to evolving understandings of constitutional principles.[207] As a result, judicial interpretation of constitutional provisions has even more similarities to the common law method than judicial interpretation of statutes.[208] The role the common law method plays suggests that in constitutional cases of first impression, as in the other categories discussed above, policy arguments can play an important role.

Even more than statutes, constitutional provisions tend to be open-ended and general.[209] The United States Constitution was drafted in 1787, and has been amended twenty-six times since then.[210] The world we live in today is very different than the world of the Framers, and constitutional text is very like "a remote ancestor who came over on the Mayflower."[211] An elaborate body of case law has developed which plays a greater role in modern understanding of what the Constitution requires than does the actual text.[212] Indeed, most of the major changes in American constitutional law have occurred without any specific textual amendment.[213] These changes have occurred gradually, as a result of changes in judicial decisions and in society at large.[214] In other words, changes in constitutional doctrine occurred

207. *See* Strauss, *supra* note 135, at 877. Professor Strauss focuses on interpretation of the United States Constitution and contends that, while there are times that constitutional "text is decisive . . . some constitutional provisions are interpreted in ways that are difficult to reconcile with the text," and some constitutional principles are enforced even though they have no clear textual source. *Id.* at 880–81 (citations omitted).

208. *See id.* at 889–90.

209. *See* Dorf, *supra* note 78, at 32.

210. *See* Strauss, *supra* note 135, at 877; *see also* U.S. CONST. and amendments.

211. Dorf, *supra* note 78, at 27 (quoting Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 234 (1980)).

212. *See* Strauss, *supra* note 135, at 877.

213. *See id.* at 884. Examples of these changes include:

> "the rise and fall of a constitutional freedom of contract; the great twentieth-century growth in the power of the executive (especially in foreign affairs) and the federal government generally; the civil rights era that began in the mid-twentieth century; the reformation of the criminal justice system . . . ; and the movement toward gender equality in the last few decades."

Id. Professor Strauss notes that the expansion of the congressional commerce power and the enforcement of gender equality are particularly notable in that textual amendments to bring about this change were rejected, "but the change occurred anyway." *Id.*

214. *See id.* at 905.

through the common law method, rather than as a result of constitutional amendment.

Several indicators support the proposition that the Court employs the common law method in constitutional cases. Major changes in constitutional principles occurred after old doctrines proved unstable on their own terms, or after changes in society rendered old doctrines inapplicable or wrong.[215] A classic example of the Court changing constitutional doctrine as a result of changing societal norms is *Brown v. Board of Education*,[216] in which the Court overruled its previous decision in *Plessy v. Ferguson*,[217] and held that segregation in the public schools violated the Equal Protection Clause of the Fourteenth Amendment.[218] Notably, the Court relied on empirical studies to support its finding that segregation of African-Americans "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[219]

Changes in constitutional doctrine are generally based on earlier decisions as well as on considerations of public policy and social justice,[220] echoing the way changes are effected in the common law method. The common law method has also played an important role in the development of new constitutional rights.[221] For example, the right to abortion was derived largely from cases establishing the right to contraception, which in turn was derived from cases involving a right to educate one's child.[222] *Roe v. Wade*[223] is another case in which the Court relied on non-legal information—in this case medical science—to establish a new constitutional rule.[224] Thus, in two of the most significant (and controversial) cases of this century, the Court relied at least in part on policy and non-legal information to develop important constitutional rules. While not all constitutional cases will be of the same magnitude, lawyers should remain aware of the importance of policy arguments in federal constitutional cases.

215. *See id.*

216. 347 U.S. 483 (1954).

217. 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

218. *See Brown*, 347 U.S. at 495.

219. *Id.* at 494.

220. *See* Strauss, *supra* note 135, at 905–06.

221. *See* Dorf, *supra* note 78, at 29–30.

222. *See id.* (citing Roe v. Wade, 410 U.S. 113, 152 (1973) (citing Griswold v. Connecticut, 381 U.S. 479, 481 (1965); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); and Meyer v. Nebraska, 262 U.S. 390 (1923)).

223. 410 U.S. 113 (1973).

224. *See id.* at 163.

State courts ruling on novel issues under state constitutions rely on social policy even more openly than do the federal courts.[225] This is especially important, as state courts increasingly afford greater protection to individual rights under their state constitutions than the federal Constitution prescribes.[226] Unlike federal courts, state courts are not as bound by constitutional text, because state courts can always create a common law remedy to a problem, while federal courts "must decide either that a constitutional right has been violated or that it has not."[227] As a result, state courts move more fluidly between the common law and state constitutional law, often using both as alternative grounds for the protection of individual rights.[228]

The state courts have an advantage in constitutional adjudication because they can experiment by fashioning a common-law remedy and monitor its progress before resting that same remedy on constitutional grounds.[229] For example, the New Jersey Supreme Court established the right to free speech on private property under the state constitution only after two decades of "experimentation" in applying common law free speech principles to similar situations, thus shifting a common law right to firmer constitutional grounds.[230]

Because of this interplay between state constitutionalism and state common law, and because a lawyer bringing a constitutional claim in state court may find herself with a common law resolution, policy once again plays a heightened role in state constitutional cases. The state court's concern for public policy and the social good in

225. *See* Kaye, *supra* note 153, at 11–18. Chief Judge Kaye asserts that "state courts effectively make law, and do so by reference to social policy, not only when deciding traditionally common law cases but also when faced with cases that involve difficult questions of constitutional . . . interpretation." *Id.* at 11. In *State v. Jewett*, 500 A.2d 233 (Vt. 1985), the Vermont Supreme Court explicitly called on lawyers to provide "economic and sociological materials" when briefing state constitutional claims. *Id.* at 237.

226. *See* Kaye, *supra* note 153, at 13; *see also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548–50 (1986) (arguing that state courts can and should protect individual rights to greater degree than do federal courts).

227. Kaye, *supra* note 153, at 17; *see also* Dorf, *supra* note 78, at 32.

228. *See* Kaye, *supra* note 153, at 15.

229. *See id.* at 17–18. Professor Dorf suggests that the federal courts ought to engage in more experimentation, or "provisional adjudication," and proposes a series of reforms that would encourage this practice. Currently, however, the federal courts do not tend to take this approach. *See* Dorf, *supra* note 78, at 60–79.

230. *See* Kaye, *supra* note 153, at 17 (citing New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 770–84 (N.J. 1994) (holding on state constitutional grounds that speech is protected in shopping centers); and State v. Shack, 277 A.2d 369, 372 (N.J. 1971) (resting their decision on "more satisfactory" common law free speech grounds)).

novel common law cases echoes in novel constitutional cases.[231] Lawyers should learn to be aware of this interplay and make effective use of policy in cases which have both common-law and constitutional overtones.

Thus, novel cases which highlight gaps in the law, whether those gaps be in the common law, statutes, or constitutions, are cases in which courts turn to social welfare and policy.[232] While precedent, statutory and constitutional text, and traditional tools of legal decision-making play a role, courts also need "the legislator's wisdom"[233] to fill the gaps. Legislator's wisdom includes factual information to assist predicting the consequences of a new rule. Lawyers handling cases which involve gaps in the law must take an active role in providing that information to the courts.

III. Fear of Misuse and Ethical Considerations

A commonly expressed fear about the use of non-legal information introduced at the appellate level is its potential for misuse.[234] Scholars have criticized judges' misuse of social science research,[235] and expressed doubts about lawyers' skill in making use of such information.[236] Non-legal information itself may be the product of biased, advocacy-driven research.[237] In spite of these reservations, the use of non-legal information is too valuable to give up, and there are a number of safeguards to mitigate the danger.

The fear of misuse falls into two broad categories. The first is that judges and lawyers lack the competence to evaluate scientific and social science research and will not use it appropriately. "Few judges [or lawyers] are trained in statistics, demography, psychoanalysis, cognitive psychology, or whatever the relevant social science material may be."[238] Judges and lawyers may not have the ability to detect flaws in

231. *See* Kaye, *supra* note 153, at 17.

232. *See* CARDOZO, *supra* note 1, at 71.

233. *Id.* at 115.

234. *See, e.g.*, Davis, *supra* note 17, at 1542 (suggesting that judges' unrestricted use of legislative facts is problematic); Rustad & Koenig, *supra* note 22, at 94 (noting that "the Court is in danger of being misled by presentations of social science findings that are distorted for partisan purposes").

235. *See* Bersoff & Glass, *supra* note 63, at 293; Faigman, *supra* note 17, at 604.

236. *See* RICHARD NEELY, JUDICIAL JEOPARDY: WHEN BUSINESS COLLIDES WITH THE COURTS 148–49 (1986) (suggesting that most lawyers in business law firms have neither the skill nor information to prepare effective Brandeis briefs).

237. *See* Louis B. Schwartz, *Justice, Expediency, and Beauty*, 136 U. PA. L. REV. 141, 149–50 (1987) (describing the "manipulability" of sociological data).

238. Saks, *supra* note 74, at 1026.

research methodology, or distinguish valid studies from invalid ones.[239] Lawyers are trained to use information in the manner most advantageous to the client, while social scientists are trained to test hypotheses in a disinterested manner.[240] As a result, judges and lawyers may mischaracterize sociological data, or stretch a research conclusion far beyond its legitimate limit.[241]

The second fear of misuse comes from distrust of the non-legal materials themselves. Not all non-legal material is equally reliable. Scientific and social science studies can range from those which are thorough and competently executed to those which are poorly designed and incompetently executed.[242] Researchers can manipulate data, or even doctor results in order to support desired results, and attribute anomalous findings to occasional defects in the techniques employed.[243] Some research studies might be preliminary, not designed or intended to be used to predict the effect of a legal rule. On the other end of the spectrum, studies may be financed by partisan advocacy groups, with findings crafted to advance the purposes of the funding source.[244]

These fears are all justified. Social science and other types of non-legal material do have the potential for misuse. The solution, however, cannot be to reject the use of this valuable resource. First, because research suggests courts are using this resource with greater frequency, it is unlikely they will revert back.[245] Second, and more importantly, there is no reason to believe that judicial decisions will be better for ignoring available information and failing to consider the real-world implications of a legal rule.[246] Decisions made based on an absence of information cannot be better than those based on imperfectly understood information.[247] In addition, it is rare that a court

239. *See* Monahan & Walker, *Social Authority*, *supra* note 20, at 509.

240. *See* Rustad & Koenig, *supra* note 22, at 117–19.

241. *See* Bersoff & Glass, *supra* note 63, at 293; Faigman, *supra* note 17, at 550.

242. *See* Saks, *supra* note 74, at 1016; *see also* Monahan & Walker, *Social Authority*, *supra* note 20, at 498–508 (suggesting criteria by which courts can evaluate research studies to determine their scientific worth).

243. *See* Schwartz, *supra* note 237, at 149–50 (citing STEVEN JAY GOULD, THE MISMEASURE OF MAN 85 (1981)). Professor Schwartz contends that social science undermines judicial decision-making by the: "(i) fallibility of economics and other social sciences (often combined with illusory certainty based on statistics and graphs); and (ii) the logical impossibility that a social science conclusion . . . could dictate a judicial conclusion . . . ." *Id.* at 143.

244. *See* Rustad & Koenig, *supra* note 22, at 143.

245. *See supra* notes 55–60 and accompanying text.

246. *See* Saks, *supra* note 74, at 1015.

247. *See id.* at 1028.

will render a decision based solely on non-legal information. Precedent, principle, and text continue to play a prominent role in legal decision-making.[248]

There are several safeguards which prevent extreme misuse of non-legal information in appellate briefs and opinions. First, lawyers and judges can acquire sufficient knowledge of research methods to make basic judgments about most research studies.[249] In addition, lawyers have an ethical obligation not to perpetrate a fraud on the court.[250] A lawyer cannot knowingly make a legal argument based on a false representation of law.[251] Because non-legal materials perform the same function in supporting a policy argument as do cases and statutes in supporting a legal argument, this general ethical prohibition should apply. Lawyers should not openly and knowingly misrepresent non-legal material such as statistical findings or economic theories in the context of making an argument in a brief. This should curb the most egregious misuses of non-legal materials.

There is no doubt, however, that within the bounds of these ethical proscriptions, lawyers advocating on behalf of their clients will stretch the use of non-legal materials to their limits; it is the nature of the adversary system.[252] The advocate's job is to present information in a light most favorable to the client; it is expected that this presentation will be biased.[253] Ultimately it is up to the court to evaluate the information proffered in support of an argument, and to determine its reliability and persuasive value.

A court's role in evaluating non-legal information is really no different than its role in evaluating other sources of authority provided in a brief.[254] Just as a court would not necessarily rely on the characterization of case law in a brief without reading the case and conducting "extra-record" research, the court should not rely on the

248. *See supra* notes 97–101 and accompanying text.

249. *See* Monahan & Walker, *Social Authority*, *supra* note 20, at 511 n.119 (pointing out that "law professors, lawyers, and judges have, for a long time, learned and used technical vocabularies which have developed outside the law").

250. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1999). This Rule provides, in relevant part, that: "[a] lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; . . . or (4) offer evidence that the lawyer knows to be false." *Id.*

251. *See id.* at cmt. 3.

252. *See, e.g.*, Michael J. Saks, *Improving APA Science Translation Amicus Briefs*, 17 LAW & HUM. BEHAV. 235, 237–38 (1993).

253. *See id.*

254. *See* Saks, *supra* note 74, at 1023.

characterization of sociological data without evaluating the source.[255] It is the court's obligation to "get it right" even if the parties have not.[256] Even so, courts might be careless,[257] or might arrive at the "wrong answer" even after significant effort,[258] or might intentionally misuse non-legal information to justify an end.[259]

That the use of non-legal materials in appellate briefs is "messy" and subject to abuse is not a reason to avoid using them. The same reasoning could be used to avoid use of almost any source of authority. Yet a lawyer's job is not to shy away from using authority, but to embrace it, search for it diligently,[260] and use it effectively in constructing arguments. A competent lawyer should be aware of ethical constraints and potential for misuse, but should not let these concerns prevent her from making effective use of non-legal materials as authority in a brief.

Conclusion

Non-legal materials in support of policy arguments can be a powerful tool for argument in an appellate brief. Lawyers should be aware of this possibility and make effective use of such materials where appropriate. Professor Dorf suggests that the Supreme Court needs to lead the way by relying more openly on empirical and policy analysis in its opinions, encouraging lead counsel to follow suit.[261] While this would be an important step, lawyers should not forgo the use of a powerful tool of persuasion while waiting for the courts to take the lead. Lawyers should take an active role in using non-legal materials as authority in appellate briefs, and law schools should take a more active role in educating prospective lawyers about effectively use non-legal authority.

This article has taken a first step in identifying the issues lawyers and students should be aware of when formulating arguments and

255. *See id.* Several scholars have proposed methods for courts to use in evaluating scientific and social science research. *See, e.g.*, Monahan & Walker, *Social Authority*, *supra* note 20, at 499 (proposing four criteria by which to evaluate research).

256. Saks, *supra* note 74, at 1028.

257. *See id.* at 1013.

258. *See id.* at 1029. Professor Saks reviews several ways in which errors of this nature can be corrected: "Higher courts can review the issue. Commentators may criticize the court. The legislature can supplant the court's rule. The court can even overrule itself on a later occasion." *Id.*

259. *See* Bersoff & Glass, *supra* note 63, at 293; Faigman, *supra* note 17, at 549.

260. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1999) (requiring lawyers to act with reasonable diligence in representing a client).

261. *See* Dorf, *supra* note 78, at 56.

drafting briefs that include policy arguments. Further scholarship is needed to address more specifically how and in what context the uses of non-legal information can be taught. The ethical obligation to use non-legal materials must be more thoroughly addressed. Legal research and writing teachers need to think about how effective policy arguments should be structured, and how to effectively search for non-legal materials. More attention should be devoted to what kinds of non-legal materials are most useful in different kinds of cases. It is time to turn more attention to this increasingly important part of modern legal decision-making.

Case No. [redacted]
(San Francisco County Super. Ct. No. [redacted]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION 2

K[redacted] G. PETITIONER,

V.

THE SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN FRANCISCO, RESPONDENT,

J[redacted] J.,
REAL PARTY IN INTEREST.

REAL PARTY'S OPPOSITION TO MOTION TO STRIKE

From Orders of the Los Angeles County Superior Court Hon. Marjorie Slabach, Judge Pro Tem

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Real Party's Opposition to Petitioner's Motion to Strike the "Brandeis Brief" Portions of his Preliminary Opposition to the Petition

Real Party in Interest J [redacted] J. submits this opposition to Petitioner K [redacted] G.'s October 14, 2020 motion to strike the "Brandeis brief" portions of J [redacted]'s preliminary opposition to Ka [redacted]'s writ petition. In effect, this opposition is a Brandeis brief about Brandeis briefs.

Introduction

"Courts access social science through three mechanisms: expert testimony, briefs, and judicial notice." (Ramsey and Kelly (2004-2002) *Social Science Knowledge in Family Law Cases: Judicial Gate-Keeping in the Daubert Era* 59 U. Miami L. Rev. 1, 12)

J [redacted]'s citations to interdisciplinary scholarly publications are not offered as evidence or adjudicative facts. Rather, J [redacted]'s preliminary memorandum is a Brandeis brief[1], using interdisciplinary scholarly

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[1] During his days as a practicing lawyer, Supreme Court Justice Louis Brandeis pioneered the practice of citing non-adjudicative social and scientific references in appellate briefs. The first "Brandeis Brief" was accepted by the Supreme Court in *Muller v. Oregon* (1908) 208 U.S. 412.

In his biography of Justice Brandeis, Jeffrey Rosen observes,

> Brandeis famously invented the Brandeis brief—a comprehensive collection of empirical studies designed to persuade judges about the importance of facts on the

references to provide the conceptual framework for the appellate court's understanding of the proceedings below[2] including the informal therapeutic jurisprudence procedures, the nature of the evaluations ordered by stipulation of the parents, and the findings of the family court.

K[redacted]'s motion erroneously assumes that appellate courts may only consider social science information when presented

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> ground. The Brandeis brief transformed civil rights litigation—and inspired both Thurgood Marshall and Ruth Bader Ginsburg in their arguments for equal rights for African Americans and women—by introducing the idea that constitutional decisions should be informed by facts and evidence rather than purely deductive analysis. (Brandeis himself once declared that his own "Brandeis brief" should have been called "What Every Fool Knows"; he believed that "nobody can form a judgment that is worth having without a fairly detailed and intimate knowledge of the facts.")

Rosen (2016) *Louis D. Brandeis: American Prophet (Jewish Lives*) (Yale University Press Kindle Edition, Loc. 130.

Brandeis was also the first justice to cite a law review article in an opinion. Just as Brandeis had used all sorts of non-case materials in his Muller brief, so he utilized them in his Court opinions as well and continued the campaign begun many years earlier, to teach judges—in this case his colleagues on the Supreme Court—the facts of modern industrial life. (Urofsky, (2009) *Louis D. Brandeis: A Life* (Knopf Doubleday Publishing Group) Kindle Edition, Loc. 9043).

[2] At this stage of the proceeding, the appellate record consists of Petitioner's Exhibits (erroneously labeled "Appendix to the Petition for Writ of Supersedeas") and Real Party's Preliminary Exhibits (submitted in support of his preliminary opposition invited by this court's October 1, 2020 orders and *Palma* notice).

through expert testimony. But "[e]ven in the relatively strict precincts of judicial inquiry, published research material on social and economic conditions is habitually used without entering it in evidence, without putting the author under oath or cross-examining him. [FN20]. (*Rivera v. Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 589)

Expert witness testimony falls in the category of "adjudicative facts." Jurisprudential scholars, including those cited below, distinguish between adjudicative facts and social science references as "legislative facts," or "frameworks" for understanding the evidence and proceedings. J [redacted] does not offer the interdisciplinary references as adjudicative facts. Rather, they provide an essential intellectual framework for understanding the record and the policies served by the family court's decisions.

This opposition to K [redacted]'s motion to strike will address:

- Misrepresentation of the procedural status of the case in K 's [redacted];
- California case law approving the use of Brandeis briefs;
- The roles that Brandeis briefs play in appellate cases including the difference between "adjudicative," "legislative," and "framing" uses of social science information;
- The need for non-adjudicative interdisciplinary references as a framework to understand the record in this case
- The intersection between the therapeutic jurisprudence objectives of California's 1969 Family Law Act, the therapeutic jurisprudence practices that the parties chose for this matter, and the importance of the interdisciplinary legal/social science authorities cited in J's Brandeis [redacted]f to the Court's understanding of the record.

I. Like the petition itself, K[redacted]'s motion materially misrepresents the procedural status of the case.

Without citation to the record before this court K [redacted]'s motion almost completely misrepresents the procedural status of the case. The motion states,

> This is an appeal from orders issued on September 10, 2020, when the trial court issued a Statement of Decision granting Father's request for orders regarding custody. No written order has been issued, but the orders contained therein go into effect immediately. The evidence considered at the trial is contained in Petitioner's Exhibits.

[Pet.Mot.4]

The first thing every appellate lawyer learns is that if it is not in the record, it didn't happen. (*Protect Our Water v. County of Merced* (2003) 110 Cal.App. 4th 362, 364.) Bearing that principle in mind, we examine this paragraph procedural fact by procedural fact with citation to the record.

- *"This is an appeal…"* This is an extraordinary writ proceeding, not an appeal.
- *"… granting Father's request for orders regarding custody."* There appears to be no RFO re custody filed by either parent. The statement of decision's "Procedural Background" section accurately describes the voluntary informal conferences, agreements and stipulations leading up to the evidentiary hearing. [PEX150, 15[redacted] K informally requested an evidentiary hearing on specific issues, J[redacted] agreed to that request and the family court accepted the stipulation of the parents and set an evidentiary hearing on the details of the children's transition from K [redacted]'s temporary custody to J [redacted]'s temporary custody. [PEX92-98]
- *"The evidence considered at trial…"* There was no trial, there was an evidentiary hearing on the details of the plan to transfer the children to their father's custody set on K [redacted]'s informal request. [PEX 90-93, 154; RPEX] "An evidentiary hearing on custody issues was held in this matter on July 29. August 6 and

August 7, 2020, the Honorable Marjorie Slabach, Judge Pro Tem, presiding." To be fair, the statement of decision occasionally uses the word "trial" interchangeably with the word "hearing."

- *"…is contained in Petitioner's Exhibits."* Both parties have submitted exhibits. Petitioner's exhibits are significantly incomplete.

Clearly this is an extraordinary writ proceeding not an appeal. The difference matters as the burdens for extraordinary writ relief are high. John has not fully briefed the case, nor has he had the opportunity to martial documents and provide a complete record.

However, J[redacted]'s exhibits do include the email correspondence between court and counsel documenting the nature of the evidentiary hearing from which K[redacted] brings [redacted]aordinary writ petition. [PEX92-98]

The statement of decision under review arises from prejudgment proceedings – specifically from an evidentiary hearing conducted by stipulation of the parents at K[redacted]'s informal request. Judge Slabach memorialized that stipulation by email on July 21, 2020,

> In our CMC discussion this afternoon we agreed that a hearing would be calendared on either July 29 or 30 using ZOOM as a distanced process. We agreed that a formal RFO was not required; that, instead, Mr. Emley would prepare a written statement/outline of issues and concerns that need to be resolved regarding the proposed therapeutic intervention suggested by Dr. Bailey and Davis, and that the written statement would be emailed to Ms.
> Nugent by Monday July 27 at noon. Ms. Nugent would then have the opportunity to respond to that statement of issues by the end of the day on Tuesday, July 28 or Wednesday July 29 depending upon which date is available for Mr.
> Emley (who will let us know as soon as possible).

[PEX92]

After separation, these parents and their counsel chose to address issues of custody and visitation through informal, non- adversary processes. This began with their 2017 stipulation to temporary custody and support orders. [PEX/7-8] Thereafter they stipulated to appointment of Marjorie Slabach as a private judge.

Following appointment of the private judge, the parties and counsel willingly participated in an informal therapeutic jurisprudence process that produced a series of stipulations, augmented by memoranda of understanding and emails that J [redacted]'s preliminary opposition sets forth in considerable detail with record citation.

Because the parties agreed to informal proceedings following a non-adversary therapeutic jurisprudential model, the interdisciplinary scholarship cited in J [redacted]'s preliminary opposition provides a valuable frame for this court's understanding of the proceedings below.

II. California law recognizes the value of Brandeis briefs.

California's appellate courts have recognized the role and value of Brandeis briefs in trial and appellate courts.

> The 'Brandeis brief,' which brings social statistics into the courtroom, has become a commonplace. A measure of fame now surrounds footnote 11 in *Brown v. Board of Education* (1954) 347 U.S. 483, 494, 74 S.Ct. 686, 98 L.Ed. 873, which cites published sociological and psychological studies for the proposition that racial segregation tends to retard educational and mental development. [Citation]

Rivera v. Division of Industrial Welfare, supr, 265 Cal.App.2d at p. 590 FN20

One California appellate opinion bemoans the absence of both Brandeis briefing and expert testimony, "We have available for our use no Brandeis brief or other expert testimony as to the practical effects of after-the-fact determination that a project is "public works." (*Lusardi Const. Co. v. Aubry* (1989) 231 Cal.App.3d 1167, 259 Cal.Rptr. 250, 255, *review granted and opinion superseded* (1989) 265 Cal.Rptr. 111, and *rev'd* (on other grounds) *sub nom. Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th [redacted]) J 's Brandeis brief provides the scholarly background for understanding the practical effects of the family court's decision.

Similarly, California trial courts may consider non-evidentiary scholarship along with evidence. (*In re Jordan R.* (2012) 205 Cal.App.4th 111, 123 (affirming juvenile dependency court's use of published writings in scholarly treatises and journals discussing the use of polygraphs),

> Considerations of judicial economy make it impractical to require that the views of a cross-section of the relevant scientific community be presented personally by each scientist testifying in open court. [Citation] "Accordingly, for this limited purpose scientists have long been permitted to speak to the courts through their published writings in scholarly treatises and journals." [Citation]

In [redacted] and [redacted]'s case there was no need for either parent to present general expert testimony in the family court about the nonadversary therapeutic jurisprudence approach or interventions in cases where children resist or refuse time in the care of one of their parents. The court and the parents' experienced certified family law specialist

counsel were likely quite familiar with this field of practice.[3] The parents, with counsel, voluntarily participated in informal judicially- supervised case conferences, psycho-educational interventions, and therapy focused on those matters. The sole issue before the family court at the hearing was the details of the plan to work with Transitioning Families program to transfer the children to their father's temporary sole custody.

No California statute or rule of court prohibits the use of Brandeis briefs. Hence there is no basis in law to strike the interdisciplinary book and journal references from K [redacted]n's preliminary writ opposition.

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[3] It is reasonable to infer that the professionals were all well-familiar with the literature on resist/refuse dynamics. The petition notes at FN1 that Judge Slabach serves on the governing board of Overcoming Barriers, the nonprofit group that put on the psycho- educational family camp for addressing resist/refuse issued that A.J. and J.J. attended (by stipulation) with their parents. Mr. Emley is also likely to have a fair degree of expertise on resist/refuse interventions and non-adversary family law processes. Mr. Emley and Ms. Shear sat together on the board of directors of the California Chapter of the Association of Family Conciliation Courts (AFCC) from approximately 1999 to 2003. Mr. Emley is a past-president of the organization. Mr.
Emley served on conference planning committees and gave presentations at conferences. AFCC publishes Family Court Review, the interdisciplinary peer-reviewed journal that published many of the references in J 's Brandeis brief. [redacted]topics of nonadversary resolution of child custody disputes and resist/refuse issues are featured in presentations at virtually every AFCC California conference.

> The most obvious reason that lawyers should make use of non-legal materials in appellate briefs is that there is no good reason not to. There are no procedural or evidentiary rules that prevent a lawyer from citing factual information. Indeed, it has been done since the early twentieth century, when Louis Brandeis submitted his brief in *Muller v. Oregon*.[30] Because the use of legislative facts is in no way prohibited, it should be considered a tool in a lawyer's arsenal which, like all such tools, should be used to advocate a client's position when appropriate.

Margolis (2000) *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs* 34 U.S.F. L. Rev. 197, 203

III. The role of Brandeis briefs in appellate courts.

There is a rich and extensive body of jurisprudence devoted to the role of Brandeis briefs in appellate advocacy.

In *Social Science Knowledge in Family Law Cases: Judicial Gate-Keeping in the Daubert Era*, supra, Ramsey and Kelly address the role of social science materials in family law appellate briefs and arguments,

> "The Brandeis brief contained materials that had not been presented at trial; even today there is no procedural bar to including new social science materials in an appellate brief or argument, so long as the material presented is at the general level of law formation." [FN] Whether attorneys obtain the best result for their clients by waiting until the appellate stage to present social science or other non-legal materials is an issue debated by advocates. One scholar argues that such information is best introduced at the appellate level in a brief, where the lawyer may use social science research to justify a particular policy choice. [FN] She thinks that appellate courts are more likely than trial

> courts to incorporate these materials into their decision making. [FN]"

Ramsey and Kelly, supra, *Social Science Knowledge in Family Law Cases: Judicial Gate-Keeping in the Daubert Era* 59 U. Miami L. Rev. at p. 24

"Social science evidence, regardless of how it is provided to the court, is important in how it is used once it comes to the court's attention.. There are three key ways in which social science is employed--as legislative fact, adjudicative fact, and social framework." (Rublin (2011) *The Role of Social Science in Judicial Decision Making: How Gay Rights Advocates Can Learn from Integration and Capital Punishment Case Law*, 19 Duke J. Gender L. & Pol'y 179, 185) Rublin adopted Monahan and Walker's classifications of adjudicative facts, legislative facts and social frameworks,

> The exponential growth of social science research dealing with questions of relevance to the law and the increasing practice of courts in incorporating that research into legal decisions combine to make the development of a coherent scheme for the judicial management of social science information a priority for courts and scholars.[FN] There is longstanding agreement that one legitimate use of social science is to assist in the creation and modification of legal rules of general applicability. Legislative fact has been the rubric that has subsumed this use of research for over 50 years. Given the elasticity and lack of direction inherent in this concept, it is unlikely to hold sway much longer. A second accepted use of social science is to provide adjudicative facts for resolving disputes specific to the parties before a court. The law here is much more settled. Finally, there is a trend rapidly gaining credibility in American courts to use social science in a third way, as a social framework providing a general empirical context within which to determine specific facts at issue in a case. Procedures for the judicial management of this new use of

> social science must blend existing or proposed procedures for the management of both the law-making and fact-finding uses of research.

Monahan and Walker (2007) *A Judge's' Guide to Using Social Science,* 43 Court Review: The Journal of the American Judges Association 156, 163

Rublin (at p. 220) explains the value of social science references in appellate briefing.

> As the case law shows, social science may be employed to accomplish myriad goals--by judges to support a given line of reasoning or decision and by litigants and amici to lend credibility to their arguments and cast doubt on their opponents' arguments. Social science can also reveal that extant rules are antiquated and inapplicable to present-day social realities.

In relating the history of modern American family law, Grossberg notes that "continued reliance on social science in the analysis and application of family law also marked the era. Psychological and clinical studies as well as the empiricist reverence for statistics as a way of knowing about family life have been influential in family law from around 1900." He continues,

> In custody law itself the psychological authority most frequently cited by the appellate courts in the middle of the era was the 1973 book, Beyond the Best Interests of the Child by law professor Joseph Goldstein, child analyst Anna Freud, and psychiatrist Albert Solnit. The authors created the concept of the 'psychological parent': the one individual, not necessarily the biological parent, with whom the child was most closely attached. In their opinion this person should have total and, if necessary, exclusive custodial rights, including the power to refuse visitation to non- custodial parents. This book became the centerpiece of many custody decisions by encouraging legal expressions of 'psychological parenthood' that stressed the importance of continuity and stability in caretakers and led jurists to frown

> upon joint and divided child custody arrangements. .[FN] For instance, lawyers for the foster parents in *Smith v Organization of Foster Families for Equality and Reform* relied on the book and Goldstein filed a brief on their behalf with the Supreme Court.[FN]

Grossberg (2001) "How to Give the Present A Past? Family Law in the United States, 1950-2000," in Katz, Eekleaar, and Mclean eds. *Cross Currents: Anglo-American Family Law, 1950- 2000* (Oxford University Press, Oxford, England)17-19

California's Supreme Court was part of this trend, citing *Beyond the Best Interests of the Child* in *In re B.G.* (1974) 11 Cal.3d 679, 693, FN18 and *Guardianship of Philip B.* (1983) 139 Cal.App.3d 407, 419.

Contemporary custody jurisprudence, as illustrated by the references in J [redacted]'s preliminary opposition, has rejected this view, recognizing that children benefit from multiple relationships with caregivers. See, for example, Arredondo & Edwards ((2000) *Attachment, Bonding, and Reciprocal Connectedness Limitations of Attachment Theory in the Juvenile and Family Court,* 2 J. of the Center for Families, Children and the Courts 109 (https://www.courts.ca.gov/documents/jourvol2.pdf) The fact that California's Judicial Council published a scholarly journal focused on the interdisciplinary issues facing family courts speaks to the importance of the Brandeis brief approach.

More recently, the California Supreme Court cited a variety of social science and interdisciplinary references throughout *In re Marriage Cases.* [Six consolidated appeals.] (2008) 43 Cal.4th 757.

Stephani, in *Therapeutic Jurisprudence in the Appellate Arena: Judicial Notice and the Potential of the Legislative Fact Remand* (2000) 24 Seattle U. L. Rev. 509, 511–512, addresses the value of social science

briefing at

the appellate level as part of therapeutic jurisprudence. J [redacted]'s preliminary opposition cites interdisciplinary references to explain the operation of the non-adversary therapeutic jurisprudential procedures and interventions that he and K [redacted] agreed to use up until K[redacted]'s request for an evidentiary hearing to determine the details of a plan that she had generally agreed should be adopted. Stephani argues (at p. 518),

> … that appellate briefs remain the appropriate means through which empirical data used to support TJ-inspired propositions are presented. Although the opportunity to present empirical data supporting one's legal argument through the accredited mechanism of expert witnesses is tantalizing for advocates who have recently come into possession of "hard" evidence as part of their tactical arsenals, the introduction of nonlegal materials, such as social science data, is particularly suited to supporting policy-based arguments in the appellate arena.

IV. Non-adjudicative interdisciplinary references provide an essential framework to understand the family court's proceedings.

[redacted] and [redacted] elected a therapeutic jurisprudential, non-adversary process to address the children's resist/refuse behavior and restore the "close and loving" relationships [redacted] and J [redacted] enjoyed with J[redacted] before he and K [redacted]n separated. J [redacted]eliminary writ opposition draws on interdisciplinary books and journals that will give this court the necessary framework to understand both the processes by which Judge Slabach, who J and K [redacted] had selected as a private judge, worked with these parents to reach

agreements and stipulations and the nature of the orders that resulted from that process. Without that framework, the record presented here might make little sense, and an appellate court might have viewed these proceedings as K [redacted]'s petition paints them.

The references J [redacted] cites come from books and journals at the intersection of family law and social science. The authors are researchers, family law mental health professionals, and family law bench officers. This body of professional literature exists to enable family courts to best serve the needs of children and their families. It is equally valuable when it provides a framework for an appellate court to understand what the family court was doing and why. Those references are as suitable for citation to appellate courts as are law review articles discussing interdisciplinary issues.

In a collection of articles from of AFCC's Family Court Review entitled *Social Science Research: Essays From the Family Court Review*, guest editor Marsha Kline Pruett describes the importance of work at the intersection of social science research and family court practice,

> Family Court Review (FCR) is the cutting edge source for the latest information, innovations and controversies in family law. One facet of its value is its interdisciplinary nature, providing articles and commentaries from judges, attorneys and mental health professionals, and striving through its content and delivery to be of value to each profession. Another valuable facet is the journal's blend of analyses of current issues, intervention descriptions, considerations of policy implications and presentations of research. In this special issue, we focus on research as a bridge to practice and policy. Eleven articles are showcased following an introduction on how social science research can—and cannot— contribute to family law practice and policy. We begin with a caution about applying

psychological research in the family law context too directly and quickly, without reflecting upon the limitations inherent in the cross-pollination of social science and practice. '

The relationship between social science research and family law is well established, a marriage of considerable longevity, despite being fraught with complexity. Since Louis Brandeis first introduced it in court over a century ago, evidence drawn from social science research has played an important role in the legal field in general, and in litigation in particular (Mitchell, Walker and Monahan, 2011). However, science and the social frameworks that surround it rest on certain general propositions about causation or the prevalence of certain behaviors in the population (Mitchell et al., 2011). Thus, research's authority turns on its capacity to show that statistically speaking—in the world of probabilities— certain behaviors or outcomes are connected beyond chance occurrence. Aggregate data, however, produce information that is different from, and for purposes of evidentiary law perhaps inferior to (Mitchell et al., 2011), case-specific evidence. And here's where the trouble starts: aggregate findings get (mis)applied to a specific case by "logical" extension that is not always logical, especially when interpreted by avid but misinformed consumers of research.

…

I contend that the use of social science in family law is as much philosophically important as it is scientifically relevant (Smith, 2011). It identifies general social tendencies that may help legal decision makers by shining some light on human experience that may be applicable in a particular case. It is not assumed to provide a bright line point of decision-making, only a beacon of light in an otherwise potentially dimmer hallway of justice. In the end, I believe that judiciously applying current scientific knowledge will undoubtedly enhance our thinking, and therefore our practice. It suggests a starting point for clinical and legal considerations, from which vantage point we are urged to consider alternative explanations and differentiating substantive from statistical significance. Scientific information provides the material from which clinical wisdom, legal precedent, and experience may then be applied on behalf of all children and families.

Pruett, Ed. (2013) *Social Science Research: Essays From the Family Court Review* (Association of Family and Conciliation Courts) 5-6

V. The 1969 Family Law Act brought therapeutic jurisprudence and non-adversary processes to the family courts it created.

In 1966 The Governor's Commission on the Family, released a report recommending a revolutionary reinvention of family law, creation of specialized family courts within the superior court, adoption of no-fault divorce, procedures designed to reduce the adversarial aspects of divorce litigation, and the integration of mental health services within the family courts. (Governor's Commission on the Family (1966) *Final Report*[4]) They proposed adoption of legislation that became California's Family Law Act of 1969, and later became the heart of California's separate Family Code. We owe our 21st century family law courts to the vision of the commissioners.. The Commissioners observed (at p. 6),

> If the goal of the law is--as we believe it must be--to further the stability of the family, then the process of dissolving a marriage must be carried out in such a setting and in such a manner that the Court can fully inquire into the problems before it, and can bring to bear professional resources to ameliorate them. In short, the law cannot operate blindly; it must be able to act with an eye to the whole family situation, not just that of two parties. It must be able to take account of the total impact of the marital

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[4] Counsel has collected the materials cited in this section of the motion, along with a selection of legislative materials and journal articles about the 1969 Family Law Act, in a Dropbox folder originally created for another project. For the convenience of the Court and counsel, she provides this link to those authorities – https://tinyurl.com/CANoFault.

> breakdown: upon the spouses, upon their children, and upon society as a whole.

The Commissioners went on (at p. 7)

> …[T]he the Commission has taken as its principal duty the development of a system of judicial procedure which will deal with the troubles of a family in a comprehensive way, and which will insofar as possible reduce the friction and destructive hostility which are engendered by the present adversary process and the concept of fault as a determinant of divorce and its consequences.

Later (at p. 10) the Commissioners tell us,

> In domestic relations matters no less than in any others, we believe, society is entitled to the integrity and objectivity of the judicial process--but it is also entitled to a process aimed at providing help for families in trouble and employing the resources of the community to that end. The competent handling of family problems requires that the judge have particular specialized skills, and the Commission believes it vital to the proper functioning of the envisaged system _ that the judge have an appointment of sufficient length to enable him to develop these skills.

The informal, child-focused, consensual process that J [redacted] and K [redacted] chose here, facilitated by a retired bench officer likely chosen for those specialized skills, fulfils the promise of the Family Law Act.

The Commissioners' vision included the recognition that judicial expertise and mental health expertise would both be needed. The report recommended (at p. 10) that family courts have professional = staffs trained in the behavioral sciences – what we now know as Family Court Services – to "to help them respond to the divorce experience with the least possible damage to all parties concerned."

On the eve of adoption of the Family Law Act, Professor Herma Hill Kay wrote,

> The idea of a family court has been discussed for many years. Such a court, it is said, should have integrated jurisdiction over all legal problems that involve the members of a family; be presided over by a specialist judge assisted by a professional staff trained in the social and behavioral sciences; and employ its special resources and those of the community to intervene therapeutically in the lives of the people who come before it.

Kay (1968) *A Family Court: The California Proposal* 56 Cal. L. Rev. 1205

Today family courts not only offer in-house behavioral science services, they also develop court-connected behavioral science resources in their communities. That too, was anticipated by the Commissioners,

> We believe, further, that the serious problems -which divorce presents are problems for the whole community, and that the community must develop its means to meet them. We therefore recommend that the court be empowered to utilize community agencies and personnel in the counseling process, and that it be enabled to employ psychiatric, psychological and other specialists to consult with its professional staff and to assist in the development of community resources.

The references in J [redacted]'s preliminary opposition provide the proper framework for understanding how, in this case, the parents chose "a process aimed at providing help for families in trouble and employing the resources of the community to that end. That is precisely what the Legislature had in mind, when it adopted the Family Law Act. Without the framework of those references, the petition, and the supporting exhibits submitted by both parties,

create a confused picture about what actually happened in the family court and how it culminated in the temporary child custody orders that the petition asks this court to review.

VI. Conclusion.

This court will determine the weight to give the secondary sources that - has cited. Denial of the motion to strike preserves that role for this court. - , s preliminary opposition includes those references to provide scaffolding for this court's review of the family court's therapeutic jurisprudence processes and decisions.

In her 1968 review of the proposed Family Law Act, Professor Kay observed that "the California proposal reaffirms the commitment of the family court to the therapeutic principle." (Kay, supra, A *Family Court: The California Proposal* 56 Cal. L. Rev. at p. 1244. She went on to say (at p. 1247),

> ... [T]he California plan ultimately depends for its success on the possibility of creating a comfortable working relationship among judges, lawyers, the court's professional staff, family members, and the general community, that will permit the court to work with families in a nonadversary and constructive fashion.'

– petition and supporting memoranda fail to provide the therapeutic, non adversary contextual information necessary to understand the ruling challenges. The references in S Brandeis brief offer an essential framework for this court's review of what happened in a 21st century family court committed to the therapeutic principle embodied in the 1969 Family Law Act,

> The utilization of social science demonstrates that courts go beyond strict application of case law to consider extra- judicial factors when making their decisions. In other words, the citation of social science illustrates that judges do not decide a case only on the facts in front of them but instead take into account larger societal issues and "facts" from the world outside of law. Judges "must constantly import from disciplines around the law in order to stay up-to-date"[6] because the social context in which the law is applied is not static and evolves over time. Because a given case can have repercussions beyond its particular facts, it is important for judges to consider how the rule they adopt may influence society. It is therefore imperative to examine the interplay of social science, the courts, and societal trends in order to discern how they influence each other.

Rublin, supra., *The Role of Social Science in Judicial Decision Making…* 19 Duke J. Gender L. & Pol'y at p. 180

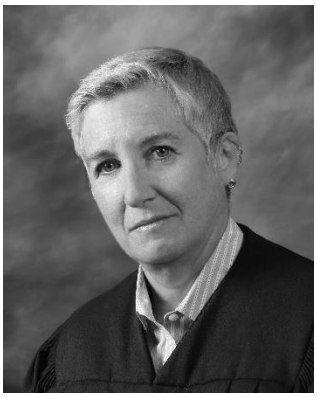
J asks this Court to promptly deny the motion to strike, consider the references provided in his preliminary opposition, afford K the five e s she requested to respond to J 's fiiing, and quickly move to the merits of the petition and opposition. Every day that goes by deprives the children of the benefit of the therapeutic intervention they need.

Respectfully Submitted,

Leslie Ellen Shear, CFLS, CALS, IAFL
Limited scope appellate counsel for Real Party J J

Ellie Margolis is a Professor of Law at Temple University, Beasley School of law. She is a published expert on appellate brief writing and advocacy. She writes about the effect of technology on legal research and written communication. Her scholarship is widely cited in legal writing textbooks, law review articles, and judicial decisions.

Before joining the Temple faculty, Professor Margolis taught at Vermont Law School, where she was Assistant Director of the Legal Writing Program. She also had a Skadden Fellowship to practice public interest law at Cambridge and Somerville Legal Services, where she represented clients on matters involving receipt of public benefits and unemployment.



Presiding Justice Stewart was appointed to the First Appellate District in June 2014 by Governor Edmund G. Brown, Jr. She served as an Associate Justice in Division Two until 2022, when she was appointed Presiding Justice of Division Two by Governor Gavin Newsom.

Before joining the Court, Justice Stewart served for 12 years as the Chief Deputy City Attorney for the City and County of San Francisco where she oversaw the City's diverse litigation practice. In that capacity, she managed, under the City Attorney, a law office of about 300 employees, including about 200 attorneys. During her tenure as Chief Deputy, she also litigated a number of groundbreaking cases on behalf of the City, including *In re Marriage Cases* and *Perry v. Brown*.

Justice Stewart began her career as an associate at the San Francisco law firm of Howard, Rice, Nemerovski, Canady, Falk & Rabkin, where she litigated a wide range of business cases at the trial and appellate level. She spent the first 20 years of her career at Howard, Rice, becoming a partner in 1988.

Justice Stewart also served on the Board and ultimately as President of the Bar Association of San Francisco in the 1990s, co-founding the School-To-College program, which mentors San Francisco youth with the goal of enabling them to obtain a college education. She has served as well on the Board of Directors of the Legal Aid Society-Employment Law Center, Bay Area Lawyers for Individual Freedom, the Historical Society of the U.S. District Court for the Northern District of California, the American Bar Association's Sexual Orientation and Gender Identity Commission, the Northern District of California Delegation to the Ninth Circuit, and various Bar Association of San Francisco and California State Bar Committees. From 2007 through 2009, she served on the Public Information and Education Task Force of the Judicial Council's Commission on Impartial Courts.

The professional and community activities Justice Stewart has engaged in since joining the bench include serving as an adjunct professor co-teaching with Ninth Circuit Judge Marsha Berzon a Constitutional Cases seminar at U.C. Law School San Francisco (formerly Hastings Law School); a member of the CJER Appellate Practice Curriculum Committee and chair of its Appellate Justice Orientation and Appellate Justice Institute workgroups; faculty for various CJER judicial education programs; co-chair of the California Judges Association's LGBT Judges Committee; a liaison for the First Appellate District to the American Bar Association's Judicial Intern Opportunity Program; a liaison for the First Appellate District to the Bar Association of San Francisco Appellate Practice Committee. Justice Stewart has also been a speaker at events sponsored by the California Judges Association, the Litigation Section of the American Bar Association, the California Academy of Appellate Lawyers, the National Women Lawyers Association, the Bar Association of San Francisco and the Alameda County Bar Association.

Justice Stewart received her B.A. with distinction from Cornell University in 1978 and graduated Order of the Coif from U.C. Berkeley School of Law in 1981. She clerked for Judge Phyllis A. Kravitch on the Eleventh Circuit from 1981 to 1982. Justice Stewart is a third generation San Franciscan and lives with her wife Carole Scagnetti in San Francisco. Their daughter, Natasha, is a public relations professional and independent filmmaker.