Articles

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

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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.

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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

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.