

Book Review
Compte rendu

The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada

by Daved Muttart
Toronto: University of Toronto Press

Reviewed by Dwight Newman*

Daved Muttart's recent book is simultaneously a contribution to an emerging body of empirical legal scholarship¹ and an attempt to develop what Muttart sees as the implications of such work for jurisprudential theory more broadly. His introduction is framed in terms of the latter purpose, one of facing up to the so-called "empirical gap"; Muttart's concern is that the traditional jurisprudential accounts of

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¹ Examples within the Canadian literature include: the recent award-winning piece by James Stribopoulos and Moin A. Yahya, "Does a Judge's Party of Appointment or Gender Matter to Case Outcomes? An Empirical Study of the Court of Appeal for Ontario" (2007) 45 Osgoode Hall L.J. 315; Ian Greene *et al.*, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: Lorimer, 1998); various statistical studies over the past two decades by Peter McCormick; my own annual series in the *Saskatchewan Law Review* on the judgments of the Saskatchewan Court of Appeal; and Rebecca Johnson and Marie-Claire Belleau's SSHRC-funded project on "Dissent, Concurrence, and Other Judicial Opinions: Reason(s) and Passion in the Production of Law." There is a much broader range of American empirical legal scholarship, from the seminal work of Sheldon Goldman (see e.g. "Voting Behavior on the United States Courts of Appeals, 1961-1964" (1966) 10 American Political Science Review 374) and George L. Priest and Benjamin Klein ("The Selection of Disputes for Litigation" (1984) 13 J. Legal Stud. 1) to a burgeoning literature in recent years that includes such works as Theodore W. Ruger *et al.*, "The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking" (2004) 104 Columbia L. Rev. 1150; Cass R. Sunstein, David Schkade and Lisa Michelle Ellman, "Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation" (2004) 90 Va. L. Rev. 301; and the provocative Stephen J. Choi and G. Mitu Gulati, "A Tournament of Judges?" (2004) 92 Cal. L. Rev. 299. Other important developments in the international legal academic context include the publication of the *Journal of Empirical Legal Studies*, commenced in 2004, the formation of the Society for Empirical Legal Studies (SELS), and the establishment of the highly successful Annual Conferences on Empirical Legal Studies, co-organized by the law schools at Cornell, New York University, and the University of Texas.

those like H.L.A. Hart² and Ronald Dworkin³ make empirical claims about the nature of law based on small and unrepresentative samples of the case law⁴ and thus remain subject to empirical testing that has not previously been conducted. Muttart now seeks to “begin the process of putting these theories to the test.”⁵

In this review, I want to probe more deeply into Muttart’s main claim in this regard and how empirical legal scholarship might or might not have implications for jurisprudential theory. Let us set aside an initial worry of arrogance in the book’s subtitle purporting to offer a “comprehensive study” of the Supreme Court. Let us set aside also some of the petty points one might make about the book – matters like the ironic presence of empirical errors in some of Muttart’s simple introductory description,⁶ the presence of slight temporal inconsistencies in the working over of a doctoral dissertation into the book,⁷ or its overlooking of other literature that undermines its somewhat overstated claims to uniqueness in seeking to offer empirical insight on how judges make decisions.⁸ Let us turn to the main claim at issue, this being that Muttart’s efforts at empirical analysis yield important implications for deciding between different jurisprudential accounts of the nature of law.

² H.L.A. Hart, *The Concept of Law*, rev. edn. (Oxford: Clarendon Press, 1994).

³ Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978); Ronald Dworkin, *Law’s Empire* (Cambridge: Belknap Press, 1986).

⁴ Daved Muttart, *The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada* (Toronto: University of Toronto Press, 2007) at 3-4.

⁵ Muttart, *supra* note 4 at 31.

⁶ See e.g. his claim, based on outdated research, that “[a]pplications for leave to appeal are initially vetted by the [Supreme] Court’s clerks” in *ibid.* at 21. The bulk of work on leave to appeal applications is now, of course, carried out by permanent Court staff and not by the clerks. As a slightly different concern, one might mention the stating without any empirical evidence, contrary to Muttart’s supposed aspirations, of controversial empirical claims; see e.g. *ibid.* at 7 (“The judge’s reasons for judgment may show each step of the judge’s reasoning process as he moved towards his decision. *More commonly the judge has already reached his decision before writing his reasons.* In this case, his reasons merely justify his decision and may only obliquely elucidate the steps the judge took in arriving at his conclusion” [emphasis added]).

⁷ For example, in some places, cases from 2004 are discussed as forthcoming matters of interest (see e.g. *ibid.* at 232n.) while elsewhere there is discussion of case outcomes from 2005 (e.g. *ibid.* at 184).

⁸ The matter is arguably, at least implicitly, a subject of much of the empirical legal scholarship that has been developing over recent decades. Moreover, there have also been serious qualitative attempts to assess empirically matters such as the influence of prior decisions on current judicial decision-making: see e.g. Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada* (Vancouver: UBC Press, 2006) (carrying out an extended comparative analysis of the influence of

There are at least two distinct aspects to this claim. First, within Muttart's claim is an assumption that jurisprudential theories like those of Hart and Dworkin make and/or should make descriptive claims that are subject to empirical verification or refutation. Second, the bulk of Muttart's book is concerned to set out the empirical evidence, which he argues shows, fundamentally, a shift underway within the Supreme Court's jurisprudence, away from bright-line rules and toward open standards, away from fact-dependent reasoning and toward policy-oriented jurisprudence, and away from formal legal reasoning and toward both contextual interpretation and doctrinal reconciliation.⁹ These claims, he adds rapidly, are truer of the Supreme Court itself than of lower courts, where formal legal reasoning retains pride of place.¹⁰

The first assumption, then, involves a particular interpretation of the jurisprudential work of Hart, Dworkin, and others. Muttart maintains that jurisprudential scholars concerned with the nature of law are committed to making empirically testable claims. To take up for the moment just one of Muttart's examples, he cites the implication of Hart's work that Muttart calls "Hart's contention that law is characterized by an expanding core of settled meaning."¹¹ He then takes Hart to task for not "ventur[ing] the attempt" to test this claim "[d]espite the fact that systematic investigation was available to test" it.¹² Indeed, Muttart goes on to imply underhandedness, as he chastises Hart for citing only seventeen cases in *The Concept of Law* and Dworkin for citing only fifty-one in *Law's Empire*, these cited cases apparently "chosen to buttress the authors' conclusions."¹³ (Of course, Muttart's claim at that point ironically cites only two jurisprudential scholars and, although asserting that "[t]hese small samples are typical of jurisprudential writing,"¹⁴ offers no statistical proof of this latter claim.)

Muttart offers a broader interpretation of Hart and Dworkin in which he seeks to characterize the kinds of claims he sees them as making about the law and then to test these against broad claims arising from his quantitative survey. He expositis Hart's account as one of a core of easy cases arising from an area of settled meaning within the law and of a penumbra of hard cases leaving room for a range of other

extant doctrine on judicial review on federalism grounds).

⁹ Muttart, *supra* note 4 at 15-16.

¹⁰ *Ibid.* at 16.

¹¹ *Ibid.* at 29

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

considerations, including a judge's policy-making.¹⁵ Muttart suggests that a quantitative analysis supports the view that the majority of cases are uncontroversial, but he suggests that an increasing incidence of overruling and increasing instances of close calls undermine the view of a gradually expanding core to be expected within Hart's theory as the law "works itself pure."¹⁶

Muttart exposit Dworkin's account in terms of the famous but simplistic "chain novel" description, suggesting that, although it makes room for significant moral interpretation of the holistic body of law, it should predict few instances of overruling, few close calls, and little "hard distinguishing," with Dworkin's account committed to the thesis that each legal problem has one right answer.¹⁷ Muttart finds more formal legal reasoning than he claims one would expect based on Dworkin's theory, as well as significant disagreement that he suggests contradicts the "one right answer" thesis.¹⁸

Some of Muttart's jurisprudential analysis is unfortunately flawed in relatively simpler ways from the outset,¹⁹ which I wish to outline specifically in relation to his attack on Dworkin. Consider, for example, Muttart's statement in his concluding passage that "[a]lthough it is canvassing an increasing variety of sources and evinces a greater concern that its jurisprudence be coherent overall, the Court is, with very few exceptions, ruling in accord with principles recognized by the prevailing legal rules. It is not ruling in accordance with the moral principles of individual judges. Contrary to Dworkin's prescription, its Justices are not behaving like Hercules on Mount Olympus."²⁰ The passage presents a common but erroneous reading of Dworkin, who never suggests that individual judges ought to rule in accordance with their individual moral principles but who suggests that they ought to rule in accordance with the best interpretation they can offer of the legal system as a whole, taking into account both fit with prior legal materials and objectively discernible moral principles. For the Supreme Court to seek overall coherence and accord with prevailing legal

¹⁵ *Ibid.* at 114-15.

¹⁶ *Ibid.* at 114.

¹⁷ *Ibid.* at 115-17.

¹⁸ *Ibid.* at 117-19.

¹⁹ One might further discuss the unfortunately limited direct engagement with the principal jurisprudential texts, evident for instance in Muttart's mistaken citation of Dworkin's rules-principles account to *Law's Empire*, *supra* note 3, rather than to *Taking Rights Seriously*, *supra* note 3, as well as in the omission of important later texts like Ronald Dworkin, "Hart's Postscript and the Character of Political Philosophy" (2004) 24 Oxford J.Legal Stud. 1.

²⁰ Muttart, *supra* note 4 at 192.

principles is precisely part of Dworkin's normative prescription. So far as Dworkin is engaged in description, the fact that there are ongoing disagreements is not a disproof of his theory but a central part of what his theory seeks to explain. Dworkin suggests that there can be disagreements about the law precisely because of the complicated task at hand, so Muttart's claims at empirically challenging Dworkin's account are, in some senses, at cross-purposes to Dworkin's argument.

It is on these latter points about the scope of description and prescription that yet further concerns might arise. Dworkin's account has a significantly normative character in that it seeks in large part to prescribe how a judge should approach a case. Although Dworkin's "right answer thesis" is certainly subject to challenges, particularly those arising from the possibility of incommensurable choices before the judge, it is not genuinely subject to a challenge based on the fact that judges continue to disagree. Saying that there is a right answer is entirely distinguishable from claiming that a right answer is easily discernible. Muttart seems to be trying to impose on jurisprudential scholars a task they never chose to undertake, demanding from them narrow empirical claims when they offer broader descriptive and prescriptive paradigms.

Whatever our doubts about the jurisprudential assumption underlying Muttart's argument, let us turn, second, to his book's significant corpus of statistically-based argument. Muttart is forthright in saying that he claims to offer a credible first effort even if there are methodological criticisms to be made,²¹ and this point is fair. That said, empirical studies of the courts will need to develop in their methodological rigour if they are to be as convincing as they can be. At one stage, Muttart challenges a past study by Sujit Choudhry and Claire Hunter, which had claimed that there was no discernible trend in government success in cases where section 1 of the *Charter* was engaged, so there was no discernible trend on at least one dimension of "judicial activism."²² Muttart claims that by adding further data and then grouping the data into five-year groups rather than single-year analysis, one can find a clear downward trend in the government win rate, suggesting increasing judicial activism.²³ However, no explanation is given of why one should group the data in this manner, other than for the fact that it then appears to support an interesting conclusion – just as one might equally wonder why Choudhry and

²¹ *Ibid.* at 186.

²² *Ibid.* at 159-62, discussing Sujit Choudhry and Claire E. Hunter, "Measuring Judicial Activism on the Supreme Court of Canada" (2003) 48 McGill L.J. 525.

²³ Muttart, *supra* note 4 at 161-62.

Hunter did not explain why looking at matters on a year-by-year basis was the appropriate approach. Until scholars using empirical approaches can offer further explanation of why their methodologies are appropriate, they will not be entirely persuasive, for they are too subject to the charge of data mining.

Of course, quantitative analyses are certainly no worse in this respect than qualitative analyses, and they offer the possibility of at least some form of increased rigour. Muttart has collected a significant mass of data that is suggestive of some interesting conclusions about trends in the Supreme Court, and suggestive as well of the ongoing presence of formal legal reasoning, a point not often studied at length by jurisprudential scholars who gravitate toward more controversial questions. Muttart concludes, in the end, that traditional legal positivism still has much to tell us about legal decision-making, despite some instances of (and even some trends toward) pragmatic and principle-based reasoning.²⁴ This is a valuable reminder flowing from an innovative study that, despite its faults, offers provocative material that should become part of the body of data considered by those seeking to understand Canadian law at a broader level.

²⁴ *Ibid.* at 191.