

IN MEMORIAM: THEODORE EISENBERG

The Board of Editors dedicates this issue of the *Cornell Law Review* to Theodore Eisenberg (1947–2014), the Henry Allen Mark Professor of Law and Adjunct Professor of Statistical Sciences at Cornell Law School. Professor Eisenberg taught at Cornell Law School for thirty-three years. In memory of his contribution to law and to Cornell Law School, we offer a number of tributes.

URSA MAJOR

Kevin M. Clermont†

I had always prided myself on being instrumental, as a member of the Faculty Appointments Committee, in getting Ted Eisenberg an offer to join Cornell Law School in 1981. So to relive that time and relieve the mourning, I dug up my first memo in support. The background is that a big item on his résumé was his 1974 *Yale Law Journal* article, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*,¹ which took a novel and radically narrow view of congressional control. Here is my memo’s opening line: “I do not think the Eisenberg article is as bad as Monaghan allegedly does.”

Today I would defend myself on the ground that Ted was only two years out of law school at the time of the article. In any event, my advocacy improved by 1996 when I wrote to Dean Russell Osgood to recommend Ted for a chair: “His interests are boundless and his energy unlimited. The result is a flood of ideas and publications. I have had the pleasure of working on a half dozen articles with him, including four this last year. He is great to work with, just so bright and resourceful. More than anyone I know, he is dedicated to scholarship.”

Incidentally, the total of my articles coauthored with Ted now comes to seventeen, with the last being the article that appears in this issue of the *Cornell Law Review*. That corpus of joint work can only hint at the gaping hole his death leaves in my intellectual life. I can-

† Robert D. Ziff Professor of Law, Cornell Law School.

¹ Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 *YALE L.J.* 498 (1974).

not count the times this spring and summer when I thought that I would like to ask Ted a question about how to proceed with my work.

Ted was such a giving colleague. He was a genuinely nice person, of course. But more amazing was how he found so many boring things to be incredibly interesting. Empirical work is so useful as to be essential, but readers find most of it arduous and rather dull. Not to Ted, though. He read the stuff for sheer pleasure, always going to the tables first to figure out what stories the naked data had to tell. He worked endlessly on other people's projects because it was fun for him.

It was not just colleagues who benefited. It was anyone around the world whose work he encountered. It was students, also from anywhere. They included my daughter, who was doing an empirical study for her senior thesis at Princeton. Her topic was the economic effects of reverse migration from Europe back to the Maghreb. He got her started with Stata. He later followed the project with terrific advice and insights. What a good guy!

His help was invaluable as well as bountiful, because he was so gifted. Relatively late in life, he became interested in statistics. He taught himself the subject. And he raised himself to a level that not only impressed his sometimes dense law school colleagues but also impressed real statisticians. It was not for nothing that he was named an adjunct professor of statistical sciences at Cornell.

That immersion in a new subject was so typical of Ted. He was a man of enthusiasms. Or a boy of enthusiasms, as they were often childlike in fervor. Everyone knows of his love for and expertise in frequent flyer programs, his embrace of the Leading Hotels of the World, his guru-like status on all matters of technology. Dropping into my office upon return from some trip literally around the world, he was subjected to a surprise attack by my firing a new computer-controlled Nerf Storm Desktop Missile Launcher at him. Never a better reaction! He truly loved the toy. Before he left my office he had ordered three launchers for his three (grown) children.

I cannot yet bring myself to dwell on my inarticulable personal loss. We had a kidding relationship, but he was a real friend. He stood by me through thick and thin, and I refer to both professional and personal trials. He lived only two houses away from me, and I loved seeing his wonderfully warm family life up close.

Ted liked to write me from around the world, anytime he came up with something new that would annoy me: some unbelievable upgrade by the airline, some incredibly posh hotel, or some other coup. Here's a sample from when he was a visiting professor at Harvard Law School for the first time, in 1984–1985. He wrote me, tongue in cheek:

Kevin—

This is a representative, randomly selected student comment. You may wish to post it.

Ted

And here is the actual student evaluation, which I post at long last:

Thank you, Professor Eisenberg, for making a course I feared taking since day one of HLS enjoyable. Really enjoyable. There were days when I thought, My god, it can't be, I like tax. Prof. Eisenberg is the best teacher I've had at HLS. An unpretentious, patient, searching attitude and a brilliant teaching style. I can't say enough in favor of this unique, witty, and motivating professor. Profs at HLS should be required to take lessons from Eisenberg on how to teach a law school class. Made a class of 150 seem like a class of 15. A great communicator. I'm not afraid of tax anymore. EISENBERG IS A GOD. HLS does not deserve him. But HLS students do.

This digression to an anonymous student evaluation makes a couple of points.

First, especially after he had founded and mastered empirical legal studies, Ted was a superstar on the world stage. He really was a citizen of the academic world. He served repeatedly as a visiting professor here—at Harvard Law School (twice), Stanford Law School, and NYU School of Law—and there—at Fondazione Collegio Carlo Alberto in Turin, University of St. Gallen in Switzerland, Haifa University, and Tel Aviv University. Ted could have gone anywhere. But he loved Cornell and Ithaca. He kept a home base here while he spread light worldwide.

Second, the brilliance of his academic reputation tended to hide his other skills. He was a very good teacher. Although he seemed to do everything so effortlessly as to seem carefree if not careless, he in fact sunk a lot of effort into the endeavor. He authored three casebooks for his courses. He genuinely liked students.

Relatedly, he was a very good lawyer. Before his academic career, he was successful as an associate at Debevoise & Plimpton. He continued to consult regularly. I know that the lawyers with whom he worked thought the world of his contributions. I collaborated with him on the big tobacco litigation.² Late in the case, we went down to Washington for an arbitration over hundreds of millions in fees. Big

² See Pamela Coyle, *Suit Aims to Ax \$575 Million Award to La. Firms in Tobacco Settlement*, NEW ORLEANS TIMES-PICAYUNE, Apr. 8, 2000, at A8, available at 2000 WLNR 1129128; Marsha Shuler, *Tobacco Fee Challenge Dropped*, THE ADVOCATE (BATON ROUGE, LA.), Feb. 15, 2002, at 1 B2 B, available at http://infoweb.newsbank.com/resources/openurl?ctx_ver=z39.88-2004&rft_dat=news/0F1B5E7698CF1CDA&rft_id=info:sid/infoweb.newsbank.com&rft_val_format=info:ofi/fmt:kev:mtx:ctx&svc_dat=AWNB&req_dat=0D0CB4F0E6B93180; cf. Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litiga-*

crowd in a big room, filled with some of the nation's most celebrated lawyers. Those on the plaintiffs' side chose him to do the cross-examination of the defendants' expert. Ted tore the witness apart, using empirical research on comparable fees, but using it to a completely focused and practical effect. He was soft-spoken and methodical, without a trace of nervousness, so that anyone would have assumed he had done this hundreds of times before. I thought highly of Ted before that day, but I held him forevermore in totally intimidating admiration.

Ted was the complete package. I miss him so much. Quite simply, I will never get over the loss.

REFLECTIONS ON TED EISENBERG

Valerie P. Hans[†]

Theodore (Ted) Eisenberg was a primal force in promoting empirical legal studies as a serious area of inquiry in law schools. In this Essay, I want to share some reflections about his illustrious career and what I learned from him as a colleague, frequent collaborator, and friend.

We first met when we were both visiting at Stanford Law School in 1987. There were many terrific talks at Stanford Law School that year, but, decades later, Ted's is the one that stands out. Trained as a traditional doctrinal legal scholar, Ted had recently begun doing empirical work on the civil justice system, and he presented his work at a Stanford faculty workshop. I didn't realize at the time just how unusual it was to present empirical research in law school workshops. Ted deserves a great deal of credit for the fact that it is more common today.

From the start and throughout his time in academia, Ted was deeply engaged in debates over the functioning and merits of the American civil litigation system. In the early 1980s, Chief Justice Warren Burger and others claimed that our legal system was in the midst of a "litigation explosion" that drained American businesses so that they were no longer competitive in the world market.¹ Burger and his

tion, and the Doctrine of Parens Patriae, 74 TUL. L. REV. 1859 (2000) (providing background of suit).

[†] Professor of Law, Cornell Law School, valerie.hans@cornell.edu.

¹ Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982); WILLIAM HALTOM & MICHAEL McCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 300 (2004) (describing the specter of a litigation crisis in the popular press and among lawmakers and judges).

fellow critics argued that meritless lawsuits by prisoners and others suing over civil rights violations were creating unmanageable burdens and clogging the courts.

Ted tested these claims. In an initial study of § 1983 prisoner petition claims—likely Ted’s first empirical research paper—he showed that the data did not support the rhetoric.² Ted’s data spoke directly to the legal debate, casting serious doubt on the claim that prisoners’ petition cases exacted a heavy and excessive burden on the courts. In subsequent articles, he confirmed this conclusion with a more elaborate analysis of the frequency and success of civil rights litigation, employing comprehensive data gathered from the Administrative Office of the United States Courts.³ Thus began an astonishingly productive career in empirical study of the law, one in which he would continue to pursue many of the issues he first raised in this early work.⁴

Ted never abandoned traditional legal analysis or teaching doctrinal classes, as his curriculum vitae and casebooks on bankruptcy, civil rights, and remedies show.⁵ He strongly believed that deep knowledge of law and legal doctrine was essential for all kinds of scholarship. But he increasingly turned his focus toward empirical study of the legal system in action, where he thought he could make unique contributions to legal debates and law reform. He examined such diverse topics as the selection bias in cases that are tried by courts, trends in products liability cases, and punitive damages.⁶ Although he taught himself statistics, over time he became increasingly

² Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982).

³ Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987). His subsequent work was financially supported not only by law schools but also by National Science Foundation Grant No. SES-8510284 and the American Bar Foundation. *See id.* at 641 n.††.

⁴ *See, e.g.*, Theodore Eisenberg, Jeffrey J. Rachlinski & Martin T. Wells, *Reconciling Experimental Incoherence with Real-World Coherence in Punitive Damages*, 54 STAN. L. REV. 1239 (2002); Valerie P. Hans & Theodore Eisenberg, *The Predictability of Juries*, 60 DEPAUL L. REV. 375 (2011); Theodore Eisenberg, Sital Kilantray & Nick Robinson, *Litigation as a Measure of Well-Being*, 62 DEPAUL L. REV. 247 (2013).

⁵ AMES, CHAFEE, AND RE ON REMEDIES: CASES AND MATERIALS (Emily Sherwin, Theodore Eisenberg & Joseph R. Re eds., 2012); BANKRUPTCY AND DEBTOR-CREDITOR LAW: CASES AND MATERIALS (Theodore Eisenberg ed., 4th ed. 2011); CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS (Theodore Eisenberg ed., 5th ed. 2004).

⁶ *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992) (selection effects); Theodore Eisenberg & James A. Henderson, *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992) (shift in products liability cases); Theodore Eisenberg & Michael Heise, *Judge-Jury Difference in Punitive Damages Awards: Who Listens to the Supreme Court?*, 8 J. EMPIRICAL LEGAL STUD. 325 (2011) (punitive damages). For a summary of Ted’s thinking on the multiple contributions of empiricism to law, see Theodore Eisenberg, *Empirical Methods and the Law*, 95 J. AM. STATISTICAL ASS’N 665 (2000).

sophisticated in the statistical techniques that he and his collaborators employed in joint work. Indeed, he would later offer research methods and statistics workshops to other law professors in the United States and around the world.

My collaborations with Ted began in 2001 when we both served on a Law and Society Association conference planning committee. At one of our committee meetings, I told him I had just begun analyzing some exciting new data I had collected with collaborators at the National Center for State Courts. The data set, designed to test explanations for hung juries, included questionnaire responses from thousands of jurors who had decided felony trials, and from judges who had presided over their trials.⁷ His eyes lit up like those of the proverbial kid in the candy store. After the committee meeting ended, Ted and I pored over the analyses for many hours, and he offered me a host of suggestions and advice.

The hung jury database would eventually become the source of two of our articles together. In the first, we analyzed the evidence and other case factors that best predicted jury verdicts, and compared the decisions of jurors with the judges presiding over their trials.⁸ We found that the strength of evidence was the most important determinant of verdicts, and that judges and jurors overlapped substantially, although judges were more likely to convict on the same evidence. In a second article, we used the database to examine the impact of a defendant's criminal record on verdicts, finding a significant negative effect in cases with equivocal evidence.⁹ These projects, like subsequent ones, offered wonderful collaborative opportunities to identify the central and most significant questions from a legal standpoint and to discuss the data analyses that would shed light on these questions. What is more, like so much of Ted's work, they spoke directly to legal issues. The articles contributed to debates over the soundness of ju-

⁷ For an overview of the research, see PAULA L. HANNAFORD-AGOR, VALERIE P. HANS, NICOLE L. MOTT & G. THOMAS MUNSTERMAN, ARE HUNG JURIES A PROBLEM? (2002), available at <http://www.ncsc-jurystudies.org/What-We-Do/~~/media/Microsites/Files/CJS/What%20We%20Do/Are%20Hung%20Juries%20A%20Problem.ashx>; Valerie P. Hans, Paula L. Hannaford-Agor, Nicole L. Mott & G. Thomas Munsterman, *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 33 (2003).

⁸ Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Waters, G. Thomas Munsterman, Stewart J. Schwab & Martin T. Wells, *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven & Zeisel's The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171 (2005). As one of the editors of the *Journal of Empirical Legal Studies*, Ted shepherded another related article through the editorial process: Stephen P. Garvey, Paula Hannaford-Agor, Valerie P. Hans, Nicole L. Mott, G. Thomas Munsterman & Martin T. Wells, *Juror First Votes in Criminal Trials*, 1 J. EMPIRICAL LEGAL STUD. 371 (2004).

⁹ Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353 (2009).

ries and the advisability of informing factfinders about a defendant's criminal past.

A long-standing passion of Ted's was research on the death penalty. His research with Cornell colleagues revealed the "deadly confusion" produced by convoluted jury instructions in death penalty cases, and generated important empirical discoveries about the role of race, religion, and geography in capital jury decisions.¹⁰ Ted and I teamed up with others to study the operation of the death penalty in Delaware. The complex project has spanned many years, but we will soon publish our third article based on this research.¹¹ Ted's insights about the legally appropriate questions and his gift for analysis have left indelible marks on the project. Nonetheless, I've wished many times that I could run down to his office to get his feedback on the latest analyses.

I greatly appreciated Ted's statistical craft and his wizardry with tables and figures. But what I valued most was his unerring good sense regarding what questions to ask about data. Asking the appropriate and legally relevant questions was one of the reasons that he thought it was so critically important for the field of empirical legal studies to have a strong presence in law schools. Deep familiarity with legal rules and legal doctrine was, in Ted's mind, crucially important to doing good empirical work about law; that was an advantage that law professors could bring to the table.¹²

An important part of Ted's legacy is the work he did to expand and strengthen the empirical legal studies community. He thought it important to bring scholars from law and diverse disciplines together, ensuring that law-trained scholars became conversant in empirical research, and empirical researchers understood the relevant law. Hence he played a major role in creating the interdisciplinary Conference on Empirical Legal Studies, regularly hosted by law schools, and in forming the Society for Empirical Legal Studies. The *Journal of*

¹⁰ Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993) (documenting confusion from jury instructions); Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277 (2001) (assessing role of juror race and religion); John Blume, Theodore Eisenberg & Martin T. Wells, *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165 (2004) (finding geographical patterns).

¹¹ Sheri L. Johnson, John Blume, Theodore Eisenberg, Valerie P. Hans & Martin T. Wells, *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925 (2012); Caisa E. Royer, Amelia C. Hritz, Valerie P. Hans, Theodore Eisenberg, Martin T. Wells, John H. Blume & Sheri L. Johnson, *Victim Gender and the Death Penalty*, 82 UMKC L. REV. 429 (2014); Valerie P. Hans, John H. Blume, Theodore Eisenberg, Amelia C. Hritz, Sheri L. Johnson, Caisa E. Royer & Martin T. Wells, *The Death Penalty: Should the Judge or Jury Decide Who Dies?* (accepted pending revisions, J. EMPIRICAL LEGAL STUD.).

¹² Theodore Eisenberg, *The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns*, 2011 U. ILL. L. REV. 1713 (2011).

Empirical Legal Studies, which he founded, regularly publishes work by scholars across the academic spectrum. His numerous research collaborations reinforced the aims of his institution-building.

Ted threw himself energetically and wholeheartedly into his all-too-brief life. He identified important questions in law and learned whatever he could from statistics and the social and physical sciences to be able to address these questions through empirical research. Ted relished using these data to show powerful people, whether in law or in business or in medicine, that their assumptions and claims were often just completely wrong.¹³ He made all of us better, as scholars and as people, and had a great time doing it. Ted, thanks for the inspiration, the guidance, the excitement, and the joy of being your colleague, collaborator, and friend.

FOLLOWING DATA AND A GIANT: REMEMBERING TED EISENBERG

Michael Heise†

Those who knew and worked with Ted invariably have a story that frames their relation to—and now, sadly, memory of—him. Mine involves a single, brief, and seemingly innocuous e-mail exchange from the mid-1980s. Almost thirty years ago, while in the latter stages of law and graduate school, I had the temerity to e-mail Professor Eisenberg with a question. I was aware at the time that I might be stretching the limits of scholarly protocol by imposing my question without invitation. After all, Ted and I had never met. I wasn't even one of Ted's Cornell Law students. Moreover, Ted was already one of the leading scholars in what was then the nascent field of empirical legal studies. In stark contrast, I was merely an unknown student following my scholarly interests and inadvertently and instinctively stumbling into a new field that would come to shape my professional life. Notwithstanding the literally thousands of reasons not to bother Ted with a question that had vexed me for too long, I latched on to the single reason why my decision to approach him made some plausible sense: I knew Ted could help me. What I did not know, however, was that my question would initiate a conversation and collaboration with Ted that would last decades and profoundly influence my career.

¹³ See, e.g., Nathan Koppel, *Empirical Holy War: Cornell Law Prof Takes on Chamber of Commerce*, WALL ST. J. L. BLOG (Sept. 24, 2009, 4:51 PM), <http://blogs.wsj.com/law/2009/09/24/empirical-holy-war-cornell-law-prof-takes-on-us-chamber-of-commerce/>.

† Professor, Cornell Law School.

I vividly recall spending more than a week doing my best to craft an intelligent five-sentence missive that involved some small, arcane, technical data and coding question of little consequence at the time to anyone but me. I recall with great clarity that Ted responded to me the next day.

Ted's e-mail reply to me evidences part of Ted's essence and core. The reply, like Ted, was straightforward, unadorned, to the point, on the mark, incredibly helpful, and genuinely encouraging. It also conveyed Ted's infectious enthusiasm about empirical legal research's critical—yet sometimes mind-numbing—details. And if deftly and lucidly answering my specific question was not enough, Ted closed his response with an observation that has guided my scholarly career ever since. Ted, in what seemed to me like an almost passing gesture, encouraged me to continue to “trust and follow the data, wherever they might lead you.” He went on to note that “quality data, careful methods, and an appropriate research design will invariably yield an interesting paper.” The key, Ted repeated for emphasis, was to “simply follow the data.”

Ted's response hints at his raw intellectual firepower. Where I saw confusion and found myself momentarily adrift amid a technically complex sea, Ted saw patterns and creative solutions. Indeed, his explanation made me wonder why I had missed what was so obvious to him. Ironically, although comfortably among the world's foremost legal empiricists, Ted's statistical prowess was largely self-taught.

Ted's response also illustrates his pure commitment to the life of the mind. His intellectual gifts were rivaled only by his scholarly range, work ethic, and curiosity about how things—specifically, legal things and systems—actually function. Ted was a scholar's scholar and one who invariably elicited the best from those fortunate enough to find themselves anywhere in his vicinity. Even as one of Cornell Law School's more senior faculty members when he died, Ted continued to be one of the most prolific. His scholarly productivity contributed to his enormous intellectual impact and influence. Having worked closely with Ted since the inception of the *Journal of Empirical Legal Studies* (*JELS*) more than one decade ago, I understand well how the journal palpably reflects the dominant strains of Ted's scholarly career and personality. While the unambiguous driving force behind *JELS* and its creation, Ted steadfastly refused the traditional “Editor-in-Chief” title that he so richly deserved. Instead, Ted insisted that the masthead list him as one of the journal's “Co-Editors.”¹ Ted found pretension—far too common in the academic world—humor-

¹ At the editorial board's unanimous insistence, effective volume 11, issue 2 (2014), the *Journal of Empirical Legal Studies* masthead was modified to list Ted as “Founding Editor.”

ous. His interest was in working on, discovering, and developing works of intellectual merit. Period. When it came to academic and scholarly matters, especially *JELS*, nothing else mattered. Ted was a purist.

Moreover, Ted's admonition to simply "follow the data" makes clear that, even when knee-deep in the statistical and technical weeds, he never lost sight of the big picture or an interesting research question. Patterns displayed in figures and tables fascinated Ted. When analyzing a paper he immediately went straight to the key presentation of results. For Ted, a paper's results—their presentation and what lies beneath them—unlocked a story. At bottom, Ted was a connoisseur of good data; he honored and respected them. He also heeded his own sage advice and followed data wherever they led him. Ted always approached his research projects with an open mind; in fact, he embraced unexpected or contrary results. He steadfastly sought only illumination and, although often unattainable, a glimpse of what is true in an increasingly complex world.

Finally, that someone in Ted's position even bothered to take the time to respond to a question from an anonymous student left a deep impression that I have carried with me ever since. That is to say, *that Ted's reply e-mail exists at all* demonstrates his willingness to reach out, his instinct to help others sight-unseen and at no personal benefit. That Ted chose to respond to my question evidences his graciousness of heart and generosity of spirit. In Ted I found a scholarly mentor and someone willing to help me hone my craft and develop my work. While Ted was kind enough to refer to me as a colleague, I always knew that I gained far more than I could possibly hope to contribute to our ongoing conversations and scholarly collaborations. Ted graciously allowed me into his scholarly (and family) orbit, and I continuously learned from him. Indeed, much of whatever I may have accomplished—or will accomplish—as a scholar bears Ted's imprint. My debt to Ted is enormous.

Emboldened by Ted's response to that first e-mail from long ago—but not wanting to overstay my welcome in Ted's orbit—I periodically e-mailed him with questions and sought him out at various conferences throughout my years as a student and into my early years as a law professor. After Ted helped recruit me onto the Cornell Law School faculty I had the privilege of taking my questions to him in person, where we carried on our conversations and collaborations until his tragic passing. As a practicing legal empiricist, I cannot overstate the benefit of having Ted Eisenberg "down the hall" as a colleague. As a friend, I treasured that our conversations broadened to include our families, travel, and other, often mundane details of our lives. It is difficult to fully appreciate Ted's contribution to others,

JELS, and Cornell Law School. His work and generous personality profoundly changed the law school, influenced legal scholarship, and benefitted generations of scholars. Ted was an intellectual giant in the empirical legal studies field. He was also an extraordinarily fine and decent person. Ted is sorely missed and will not be replaced.

THANK YOU, TED

Robert A. Hillman†

Ted Eisenberg was my friend for more than forty years. We first met in 1974 when we were both associates at the Debevoise & Plimpton law firm in New York City. Ted and Lisa and Betsy and I became good friends almost immediately and, along with other young couples from the firm, enjoyed exploring all that New York City had to offer. Ted and I also shared the excitement of being young lawyers at a great firm, but our endeavors were not limited to legal work. We were also mainstays of the Debevoise softball and basketball teams (if I don't say so myself!). Those were great years and we reluctantly said goodbye to Ted and Lisa when I left law practice to start a teaching career. But it was our good fortune when we all ended up together in Ithaca in 1982.

Because Ted's brilliance and academic success are so well known, I want to devote my few pages to elaborate on what a wonderful friend he was. In short, Ted's friendship, support, and loyalty were unconditional. Here are a few examples. When I told him I was leaving Debevoise to start a teaching career and mentioned a dispute I was having with my landlord about recovering my security deposit (a sizeable sum at the time, at least for me), Ted volunteered to represent me in dealing with the landlord. I knew my interests were in good hands because Ted was a great lawyer with endless energy and a tenacious devotion to his clients. To say that Ted tolerated no nonsense from the landlord puts it mildly. After a back and forth with the landlord, which included Ted's demand for immediate payment and accrued interest and his announcement of his intention to commence legal proceedings (and to collect legal fees) and to file an ethics complaint with the Real Estate Board of New York, I received a full refund from the landlord. I should add that the merits of the dispute were overwhelmingly in my favor (really), but many New York City landlords, at least at that time, were known for taking advantage of their tenants and I never would have recovered the deposit without Ted's efforts.

† Edwin H. Woodruff Professor of Law, Cornell Law School.

Ted's support continued in many ways at Cornell, including reading my manuscripts, discussing ideas for papers, and lending me use of his software and special computer for an empirical project. (Lisa and Ted also baked a special welcome cake for Betsy and me upon our arrival in Ithaca one year after they had arrived.)

In the early 1990s I foolishly agreed to be the associate dean of the law school, which included putting together the curriculum and the class schedule. Dealing with my colleagues was not always easy. One told me, "Bob, it will kill me to have to teach at 10:00 a.m." But Ted was far and away the easiest faculty member to deal with. In fact, his opening comment to me each year was "What do you want me to teach?" And he meant it! Recently (long after my escape from being associate dean), for example, he volunteered to teach contracts because Cornell Law was shorthanded in that subject.

Ted and I also were teammates again, this time on the law school's summer softball team. Ted was one of the leaders of the team and teammates didn't even mind when games were delayed while we helped put Ted's arm back into his shoulder (Ted had an old separated shoulder injury that would recur from time to time).

Perhaps the following best sums up Ted's wonderful friendship. Just this past year when my daughter Jessica published her first book on musical theater, Ted, an avid musical theater fan himself, purchased her book (he wouldn't take a complimentary copy), brought it to the law school, and walked down the halls and enthusiastically showed it to whomever he saw. Perhaps, though, Ted was just trying to make amends to Jessica. In 1975, Betsy and I were meeting Ted and Lisa at the beach on Long Island and we brought Jessica, who was eleven months old. Ted said something to her along the lines of "gitchy goo" and then made a funny face, upon which Jessica started to cry and didn't stop for about three hours. (Ted had a wonderful sense of humor and he never hesitated to laugh at himself. He loved when I told people the story of Jessica and Ted at the beach!) But Ted's showing off Jessica's book was typical of him: he was the consummate family man who loved to chat about the activities of his family, but he also took great joy in hearing about and supporting his friends' children's endeavors. Along those lines, Ted didn't hesitate to hire faculty children during the summer, including my other daughter, Heather, if he heard that they were looking for a job.

Ted was an inspiration to me professionally and personally and I will sorely miss him. But I am abundantly grateful that Ted was my friend for all these years. So, thank you, Ted, for everything.

OUR FRIEND TED

Geoffrey P. Miller†

Ted Eisenberg was a wonderful colleague, a loyal friend, and a loving husband, father, and grandfather. His generous spirit and zest for life left an indelible impression. A tireless advocate for empirical legal studies, he contributed—perhaps more than anyone—to that discipline’s remarkable growth and success.

One of Ted’s endearing qualities was his complete lack of pretension. In spite of his enormous achievements, he retained a childlike enthusiasm for empirical studies. He never saw a data set he didn’t like. For an empirical methods class taught while he was visiting at NYU, he combined two of his passions—data and chocolate—by having his class rate a different chocolate store each week and then asking them to analyze the aggregate data. I sat in on that class—a memorable experience. Ted would enthusiastically program Stata, with the results projected to a screen. When he entered something wrong, as he often did, being a better analyst than typist, he would happily go back and fix the error, vividly demonstrating that everyone makes mistakes in this sort of work. His students loved it.

Much of Ted’s best work was completed in planes or airports. He was a frequent and joyful traveler. If he was stuck in an airport with a cancelled flight, he didn’t gripe and moan. He simply pulled out his tiny computer and worked on data. One of his unbreakable rules was never to check his luggage. He could and did travel around the world with all of his possessions in the overhead compartment.

Ted’s fundamental intellectual commitment was to data, pure and simple. My first article with Ted was a survey of class action attorney fees.¹ Our interest in writing the paper had nothing to do with politics: we just wanted to collect and analyze the data. Coincidentally, however, the study appeared just as the Class Action Fairness Act was pending in Congress. Our paper demonstrated that, contrary to the claims of the proponents of this legislation, there was no crisis in class action litigation, no evidence of abuse, and no real basis for concern; on the contrary, class action judgments and class counsel fees had remained constant for the preceding ten years.² Because of the timing of publication, our study was picked up by major news organizations. In an impressive display of journalistic zeal, the *New York*

† Stuyvesant Comfort Professor of Law, New York University.

¹ Theodore Eisenberg & Geoffrey P. Miller, *Attorney’s Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27 (2004).

² See *id.* at 77.

Times blazoned an account of our study across its entire first business page, accented with full color pictures of both authors.³ Displaying equal but opposite impartiality, the *Wall Street Journal* buried a mention of the research somewhere in its back pages.

To Ted's amusement, all sorts of lobbyists and interest groups contacted us after the *Times* story appeared. They all wanted to know one piece of information: who were we working for? They couldn't fathom the idea that researchers could perform a study for no purpose other than curiosity about the results. When we informed them that no one had commissioned the work, it was obvious that they merely took this as confirmation that something nefarious was at work.

Ted had his competitive side. He delighted in skewering his intellectual adversaries, especially when their attempts to refute his results were based on elementary misunderstandings of statistics. Ted also had a finely honed wit. After the incident with the *New York Times*, I teased him about the story layout, which had placed my photograph above his, making it seem almost as if I were standing on his head. Ted's instant comeback: "on the shoulders of a giant."

Ted was indeed a giant—a scholar who, in a quiet but effective way, spearheaded the growth of the most important innovation in legal studies of the past half century; a researcher of extraordinary scope and imagination; a prolific writer with a nearly Erdős-like portfolio of coauthors; a beloved teacher, colleague, and friend; a truly admirable human being.

We miss him terribly, but we celebrate his life as one greatly and fully lived.

REMEMBERING A MENTOR

Jeffrey J. Rachlinski†

It is an embarrassing open secret at Cornell Law School that I have been imitating Ted Eisenberg for twenty years. It is not so much the fact of it as the degree that is embarrassing. As one example, several years ago, Ted and I were in the Ithaca Airport waiting to board the same flight. I told him, "I know where you are sitting—and we are in the same seat." He asked how that could be and whether we needed to get the attention of the gate agent. I replied, "I have been

³ Jonathan D. Glater, *Study Disputes View of Costly Surge in Class-Action Suits*, N.Y. TIMES, Jan. 14, 2004, at C1.

† Professor of Law, Cornell Law School.

studying your habits for many years and I know that you are in row 8, because it is an exit row that gives you more room for your laptop, because you always work on airplanes.” I continued, “You are in seat D, because you are left-handed and in order to work more easily, you want to be able to stick your elbow out into the aisle as you type.” I informed him that I had adopted the same pattern, but because I am right-handed, I would occupy 8C—functionally the same seat. We sat across from each other many times thereafter, as I imitated his taste in conferences as well.

Ted’s way of thinking about law captured my attention and admiration from the very first summer I spent at Cornell. I remember Ted proudly entering the faculty lounge in August 1994 to announce what he viewed as a major triumph. Along with Kevin Clermont, he had set up a website (this was during the early days of the Internet) on which one could query the entire data set from the Administrative Office of the United States Courts.¹ His site allowed users to obtain a wide range of statistics, such as plaintiff win rates, subdivided up by case type, geographic region, and so on. His site had thus made available a mountain of data that would have previously taken an army of graduate students months to compile. He was, of course, roundly mocked (in a lighthearted way) by our colleagues for thinking that anyone would want such information. But I was amazed. I knew that I had found both a home in Cornell and a mentor in Ted. And of course, with the dozens of papers that data set later produced, Ted had the last laugh.²

I did not choose Ted as a role model in an effort to mimic his success. No reasonable person would hope to be as influential in his field as Ted has been. He changed the paradigm under which legal scholarship functions. The journal he founded (the *Journal of Empirical Legal Studies*) will influence scholars for decades to come. As of volume 11, we now rightly list him as the founding editor. When people are reading volume 20 or 40 or 80, he will still be the founding editor. His efforts spawned a legion of followers and created a revolution in how we think about law that will reverberate for decades. He was an inspiration, but following in his footsteps seemed an impossible standard and a sure path to frustration.

No, the reason to imitate Ted is not because of his success, but because he achieved his success without pretense, with such enthusi-

¹ Theodore Eisenberg & Kevin M. Clermont, JUDICIAL STATISTICAL INQUIRY, <http://legal1.cit.cornell.edu:8090/> (last visited Oct. 2, 2014).

² See Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455, 1456–58 (2003) (listing numerous studies employing the Administrative Office of the U.S. Courts data).

asm, and without losing sight of what is truly important in this world. I remember that in the first few years after I came to Cornell, I asked Ted to comment on a conference paper being given on a Saturday in February. He declined, citing his need to be with his kids at a ski race at the Greek Peak Ski Club. I recall being annoyed that he did not even consider it, putting something that seemed trivial to me above a professional undertaking. I later had kids of my own and came to both understand and appreciate his choice. Indeed, it was not really ever a choice. Lisa, Kate, Annie, and Tommy always came first for Ted. I eventually came to understand that someone who can be that influential while putting those who love him and need him before his own ambition is someone to respect and to imitate.

Ted often told of how great skiing was for his family. He talked of how they would travel together and spend time together doing something fun and active, even as his kids became adults. That has led me to push my kids harder than I might have into the sport. Indeed, even as Ted was unknowingly facing his last ski season, I finally got my kids to join the Greek Peak Ski Club. Ted might have warned me a bit more about how expensive ski racing is, but I knew full well how much time and effort it took from watching him. I knew it would eat into time spent writing and doing research, but as Ted knew, time spent with one's family is never wasted. And supporting one's children as they develop a passion for something is often one's highest calling.

I learned of Ted's passing, ironically, while skiing with my three boys at Whiteface Mountain. Stewart Schwab called me as I watched them pretending to ski like the Olympians who once competed there (with me far behind them, only hoping to stay within sight to pick them up, should they need it). The news drained my day of any joy, of course, but for my kids—and in a way for Ted, who would have savored an outing like that—I kept my grief hidden behind my goggles.

Just this past March, I took my oldest son, Christopher, to a state-wide ski race. He had earned a place in this particular competition though a remarkable effort the week before in a local race. A photographer took photos of the racers as they competed and posted them on a website for the race. Ted had kept a photo of one of his kids in a ski race in his office—poised in a determined stance, engaging in a difficult and risky move around a gate while sporting a wide grin. After my son's race, I saw the same photo on the website, of my own son rounding a gate, with the same grin his face. That photo is worth more to me than any of the law review articles that gather dust in the recesses of my office. Ted would have understood that better than anyone.

I am grateful to Ted for many things. I could not meaningfully compile what I have learned about statistics and law from him. I will

think of him whenever I run ordered logit rather than ANOVA on Likert-scale data. I will think of him whenever a new volume of the *Journal of Empirical Legal Studies* lands on my desk. And I will think of him whenever I stop and stare at that photo of my son skiing. Ted's wisdom made me a better scholar—and, more importantly, a better person.

It is hard to believe I will never again glance up as he breezes into my office to discuss an article, a statistical technique, or a new frequent flyer program. It is hard to believe I will never again enjoy a “chance” meeting with him at a conference, on the beach in Tel Aviv, or in a favored restaurant in Turin. It is hard to believe that I will never again look over to see him working away across the aisle in seat 8D with a familiar grin on his face. I will miss him.

TED, GREAT SCHOLAR AND FRIEND

Stewart J. Schwab†

Ted Eisenberg was a great legal scholar and a central member of the Cornell Law School faculty for more than thirty years. His heart-attack death in February 2014 was so sad, and its suddenness a great shock because Ted had tremendous energy and many projects in the works. It is altogether fitting that the *Law Review* dedicates this issue to his memory, an issue that contains his final article in these pages.

Ted was my colleague and friend for my entire academic career. Indeed, Ted was the first person from Cornell Law School I ever met, when he was recruiting faculty applicants in Washington in 1982. My wife, Norma, and I still remember that recruiting dinner back in Ithaca, hosted by Ted and his wife, Lisa. We sat down to dinner and soon heard a giant crash from the ceiling above as the chandelier lights shook. “Don’t worry about that,” Ted said. “That is just our daughter Kate throwing her typewriter out of her crib.” What toddler takes a typewriter to her crib, but the daughter of two writers? We thought, “This is a place where we and our rambunctious bunch can fit in.”

Ted was always so proud of his family. He liked to point out that Lisa as a writer had far more readers than he did. He often gave copies of Lisa’s Scholastic Press *Chicken Jokes and Puzzles* book at parties. And he delighted in the flourishing lives of his children. Kate, a medical doctor in Rochester with her husband, Aaron, and Ted’s two grandkids, Dylan and Ollie. Annie, whom Ted and all of us are so proud to have as a graduate of Cornell Law School, and whom Ted

† Professor of Law and former Dean, Cornell Law School.

loved to visit in Morocco while she was in the Peace Corps there. Tommy, a graduate of Swarthmore College, where Ted and Lisa met years before, and now in a PhD economics program here at Cornell.

Among Ted's great qualities were his loyalty and generosity. Our families were intertwined. We did not have extended family in Ithaca, so Ted and Lisa became a surrogate uncle and aunt for our kids, always interested in their lives and accomplishments. In the early years of child-raising, Norma and Lisa spoke almost every day about good and insane moments. Just ten days before his death, Ted and Lisa took our daughter Weatherly out to dinner in New Delhi, India, where she has been living and Ted was teaching a week-long clinic on empirical legal studies.

Ted was a wide-ranging scholar. After important early articles in federal courts, civil rights, and bankruptcy, he turned to a new methodology and pioneered the modern field of empirical legal studies. He was a master of letting the data speak and hearing their interesting stories. He reveled in his moniker "grandfather of empirical legal studies," which he earned even before the birth of grandchildren Dylan and Ollie.

Ted had a unique ability to see how data could inform legal questions. I was taught that firsthand at a lunch conversation long ago, which turned into a law review article within a week and was later cited by the Supreme Court. In late April 1988, Ted and I were having lunch at an Indian restaurant in Collegetown. We were chatting about a recent Supreme Court decision, *Patterson v. McLean Credit Union*,¹ calling for reargument in a case about § 1981, an important but little-known civil rights statute. Rearguments occur rarely enough to cause gossip about what the Court is thinking. In this case, a worker had complained of racial harassment. Rather than sue under the modern Title VII statute passed in 1964, she sued under 42 U.S.C. § 1981, originally enacted shortly after the Civil War. The question before the Supreme Court was whether § 1981, like Title VII, covered harassment. After the first oral argument, however, the Court ordered reargument on the broader question of whether the Court should overrule its twelve-year-old decision that § 1981 covered private actors at all. Four Justices dissented from the order to reargue, emphasizing that § 1981's application to private discrimination had become—in Justice Stevens's phrase in the earlier case—"an important part of the fabric of our law."²

Legislative history and interpretation of First and Second Reconstruction civil rights statutes is standard fare for law professors (of

¹ 485 U.S. 617 (1988).

² *Runyon v. McCrary*, 427 U.S. 160, 190 (1976) (Stevens, J., concurring).

which Ted in his early scholarship was a master).³ It is harder for most to see how data can inform the issues. Ted and I had recently received a National Science Foundation grant to send research assistants into the records office of three federal courthouses to create a database of civil rights cases. Ted immediately saw that this database could inform whether § 1981 was indeed an important part of our law, as Justice Stevens asserted. How many § 1981 cases there were, and whether they overlapped with Title VII employment cases, were questions this database could uniquely answer. Ted sprang into action. If we were to contribute to the Supreme Court decision, we needed to publish something quickly, ideally before the reargument. We went to the *Cornell Law Review* editors (predecessors of the group who are creating this great tribute to Ted), and asked if they could publish an article in time for the Supreme Court reargument in October. If we could produce a draft within a week—and it had to be short—they could have it in print by September. The result was perhaps my favorite article I coauthored with Ted, and certainly the quickest from idea to print. The nine-page *The Importance of Section 1983*⁴ was even cited by the Supreme Court in its *Patterson* opinion, albeit by the dissent.⁵

The point of this anecdote is not mainly to reminisce about a scholarly project with a dear friend a quarter-century ago. Rather, it illustrates several of Ted's academic skills; foremost, it shows his ability to see how data can inform important, sometimes technical legal debates. It also reminds me how fun it was to work with Ted. Finally, it shows his ability to get things done without fanfare.

Ted was easy to coauthor with, which explains why he had nearly fifty. He left rhetorical flourishes and the positioning of commas to his coauthors. Ted loved the number crunching and was proud that throughout his career he remained a hands-on researcher who personally cleaned up data and performed the other tedious tasks often done by graduate students in other fields. He liked to do the gritty empirical work, and often warned that much misunderstanding, and perhaps even mischief, was done by people who feared or disdained the grubbier aspects of an empirical project. On the other hand, Ted was always interested in the substantive results from an empirical project, rather than whether the fanciest statistical technique was used.

Ted's and my approaches to reading empirical articles differed dramatically. Mine is the more typical method. I approach an article

³ See, e.g., Theodore Eisenberg, *Section 1983: Doctrinal Foundation and an Empirical Study*, 67 CORNELL L. REV. 482 (1982); Theodore Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499 (1980).

⁴ Theodore Eisenberg & Stewart Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596 (1988).

⁵ *Patterson v. McLean Credit Union*, 491 U.S. 164, 211 (1989) (Brennan, J., concurring in part and dissenting in part).

from its edges, dipping a toe in. I first examine the star footnote to see who is thanked, then skim the other footnotes to see who is cited, worrying especially whether my work has been ignored. Then I go to the introduction before flipping to the conclusion. Finally I brave the article itself. Ted, by contrast, dove right in. He would immediately turn to Table 3 or whatever display presented the central results. Look at the significance of this ρ , he might exclaim. Wow! Ted was truly excited by pure data and the statistical techniques that could reveal their stories. He did not need the prose and often scoffed if an article contained a long-winded modelling section.

Ted was the driving force in the creation of the *Journal of Empirical Legal Studies*. Part of his reason for travelling to conferences around the world was to promote the new journal, stay connected with scholars, and encourage new authors to engage in this methodology. He was extremely hands-on in the editing process, often re-running regressions and demonstrating alternate techniques to authors to improve their arguments. Ted never took star billing with *JELS*, and was simply one of six editors of the journal. His generosity and collegiality have made possible the success of *JELS* and the flourishing of the Society for Empirical Legal Studies.

Ted also did great teaching service for the law school. He authored casebooks on bankruptcy and civil rights. For many years he taught the basic tax course when the school greatly needed it. For a while we needed more teachers in constitutional law, and Ted again stepped in. Most recently, for the last few years Ted has taught contract law. Indeed, he was scheduled to again teach half the first-year class contract law in the fall.

Ted died just a few months before I ended my decade as dean. As I rejoin the faculty as a full-time teacher and scholar, I am planning to get back to empirical studies myself. I was very much looking forward to working closely again with Ted, learning from him as his coauthor, having lunch conversations turn into published articles, and, with Norma, joining him and Lisa on some of their travels. I am sad that this will not happen, but am grateful for our many years together.

TED EISENBERG, THE *EXPERIMENTAL* SCHOLAR

Stephen C. Yeazell†

Others have justly celebrated the ease with which Ted worked with others, his interest in law in the real world, the effortless speed with which he worked, and his generosity of spirit. And we have of course celebrated Ted as an empirical scholar of law. There remains an aspect of Ted yet unexplored—a story of Ted not as an empirical scholar but as an *experimental* one; it is also, so far as I know, Ted's closest brush with criminality.

Ted and Lisa, yet unblessed with offspring, were living in Los Angeles, Ted teaching at UCLA, Lisa at work on what was to become the first of a series of amazingly successful riddle books. Because they were in Los Angeles, they needed a car, and they acquired a used German vehicle—a BMW, I think. Because it was used, they bought from the dealer an extended warranty.

While they were out on a weekend jaunt, the water pump failed, and the car was towed back to the dealership. The dealer replaced the water pump, and all should have been well—except the dealer took the position that the warranty was an obligation not of the dealership, but of the insurer, and that until Ted persuaded that insurer to pay, the dealer was holding on to the car.

Ted briefly fumed, but then, doubtless realizing an opportunity to test law in action, he moved swiftly. He first confirmed with colleagues at UCLA that nothing in the warranty agreement supported the dealer's interpretation. He then consulted experts in secured transactions and criminal law and came away with the opinions that *were he able to take possession of the car without breaching the peace* (no cut padlocks, no assaulted security guards), he would not be guilty of any crime. (A cautious lawyer would note that some have questioned the analysis offered by Ted's colleagues, though the same cautious lawyer would also observe that they included some renowned experts on secured transactions—thus allowing Ted to claim that he had reasonably relied on advice of counsel.) The speed with which Ted acted and his collaboration with others would, of course, become hallmarks of his later work.

Armed with this information, Ted began his legal experiment: he staked out the dealership and located his car, parked in an open lot behind neither gate nor other barrier; he also ascertained there was no security guard.

† David G. Price & Dallas P. Price Professor of Law Emeritus, UCLA School of Law.

So—on a dark and moonless night (I may have imagined that detail, but it seems to fit) Ted stationed himself behind a tree, ascertained that the lot was unattended, then strode briskly across the street, took the spare key out of his pocket, and drove off, five blocks to his driveway.

Two days later he received a phone call from the very irritated owner of the dealership. Ted calmly read to him the citations to the Uniform Commercial Code and California Penal Code and said he looked forward to chatting with the dealer's lawyer. That chat never came, but something else did: about a month later a fence appeared around the dealer's parking lot. I have always thought of that fence as a fine example of Ted's venture into legal experimentation.

Likely because he did not wish to expose his growing family to the risks of further experiments of this sort, Ted subsided into the comparatively safe world of empiricism. Think, though, as we celebrate his achievements in that world, of another, parallel universe, in which Ted leaps out of the shadows, wreaking justice on the wrongdoers of the world, armed only with a sense of righteousness and the relevant sections of the Uniform Commercial Code: it's something to contemplate. And contemplate the fence around the West Los Angeles car dealership: talk about making a difference in the world!