

**Can Hidden Factual Assumption Help to Predict and Affect Legal Society? A Response to  
"Unacknowledged Factual Assumptions and Doctrinal Change" by Suzanna Sherry**

Professor Sherry hypothesizes in her article that a change in the unacknowledged or hidden factual assumptions found in the minds of those who apply legal doctrine are likely an overarching reason for unexplained doctrinal change. Sherry further argues that bringing these hidden factual assumptions to light can play a crucial role in molding predictions on the way future implementation of doctrine will likely change as well as provide a sense of why the shift has occurred. It seems clear that Professor Sherry believes that by allowing scholars to explore doctrinal shifts, expose these hidden assumptions, and verify whether or not the assumptions are correct will ultimately lead to a more effective tool for affecting doctrinal formation and transformation.

In proving up this hypothesis, Professor Sherry uses two main classes of case law to explore. First, Professor Sherry looks at the doctrine determining anti-discrimination law and assumptions about invidious intent. Her basic premise is that hidden changes in the belief that society is most likely motivated by invidious intent in performing a particular action has created a change in the way anti-discrimination doctrine has been implemented. More specifically, Professor Sherry believes that over time the judiciary has likely taken on the hidden factual assumption that government action determined based on race is not likely to be laced with invidious intent. This in comparison to the former assumption that invidious intent was the most likely motive behind racial decision-making explains the difference in treatment of strict scrutiny used in these cases.

Next, Sherry describes some procedural shifts that have taken place over the years. First there is a discussion of the doctrinal shift from a system resistant to summary judgment to one where the

judiciary counts it as an integral part of the Federal Rules. Sherry attributes the change in usage of summary judgment on a changing hidden assumption based on the perception of the percentage of meritless vs. meritorious cases available. Next, Sherry moves to a theory that heightened pleading standards came about based on the hidden factual assumption that a high number of cases are not meritorious.

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The logic behind Professor Sherry's thesis is not a major issue in determining the usefulness of exposing hidden factual assumption in predicting and affecting legal doctrine. In fact, Professor Sherry's arguments are quite compelling. It does appear that there is something unacknowledged that is creating a shift in the way that doctrine is utilized. However, this theory is not without hardship. Even if Sherry's hypothesis is taken as true, many obstacles must be overcome before such hypothesis will be useful in predicting and effecting legal doctrine. The most glaring obstacle/assumption behind Sherry's thesis is that scholars will be able to discern the factual assumptions that are driving the change in doctrinal treatment. One can only predict and effect doctrinal change <sup>if</sup> ~~he~~ understands the hidden factual assumptions that ~~are~~ <sup>are understood</sup> at play. *(if you are creating the rhetorical construct, please don't let it be I think)*

How do scholars decide what hidden factual assumptions are at issue in doctrinal shift? This task appears to be one of great difficulty. Professor Sherry's article provides hidden assumptions that she believes have caused a shift in doctrinal treatment cases involving discrimination and case dismissal, but fails to provide guidance on how those hidden assumptions can be pin-pointed. It seems as though Sherry has very easily decided that doctrinal change in discrimination cases has been affected by a hidden understanding of the judiciary upon the likelihood that invidious discrimination is a motive for actions that end in discrimination. She further suggests that the hidden assumption that there are a high percentage of non-meritorious lawsuits has affected case dismissal doctrine. Sherry makes these broad

conclusions without providing any background on how those conclusions were made. Many questions *reached*

must be asked when trying to determine a proper hidden assumption. Are hidden factual assumptions the main determinant of doctrinal shift, or is it likely that there are other factors at play? Could the identification of such factors change the factual assumptions determined to be causing the doctrinal shift? Understanding that hidden assumptions exist may be an easy task, but it is only the tip of the iceberg. Understanding what hidden assumptions are at play is crucial to predicting and affecting change, and will require much more work.

There are at least three elements that make identifying underlying hidden assumptions difficult. First, identifying the hidden factual assumptions will require scholars to leave themselves and take on the minds of the decision-makers affecting the doctrinal shift. Second, factors outside the realm of hidden factual assumptions are likely playing a role in doctrinal shifts. These external factors, once acknowledged, might suggest contrary hidden assumptions. Third, no two cases are alike. The fact variations in each case could make it difficult to accurately pin-point the correct hidden factual assumptions. Because of the nature of the mankind, society and the law, the art of identifying the correct hidden factual assumptions will be more like painting an exact replica of De Vinci's Mona Lisa than sculpting a pinch pot. *Red*

The first obstacle in obtaining the proper hidden assumption is that humans are independent free thinkers. Oscar Wilde once wrote that "society exists only as a mental concept; in the real world there are only individuals." In order to understand the assumptions that are at play in doctrinal shift, it is imperative for scholars to get into the shoes of the actual decision-makers. It might be extremely difficult to understand the thoughts and perceptions of a person or people without infusing the scholar's own thoughts and assumptions. Professor Sherry has not given psychological evidence that members of the judiciary have diverging assumptions. Instead, it seems most likely that Sherry based her identification of the probable hidden factual assumptions on her own perception of societal change

regarding these assumptions. Additionally, Professor Sherry details just how pervasive unconscious thought can be. She does this by noting that unconscious discrimination exists, and that the “prejudice is so deeply buried that it is invisible even to those who harbor it – they sincerely believe themselves to be unbiased.” If one is to harness the knowledge behind hidden factual assumptions, there would be a requirement on scholars to see the unseen in a particular member of the judiciary with which they likely have no personal connection. Furthermore, the scholar would need to be convincing enough to assist the judiciary to see that they are blind to an issue and help to restore their sight. Finding a light switch in the dark is hard enough even when you know it exists. Trying to convince a decision-maker that the light switch exists is another level of complexity entirely.

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Second, there are many factors that might play a role in doctrinal shift other than hidden factual assumptions. Shifts might occur or at least be affected by changes in goal and or policy as well as political leanings. As the members of the judiciary are all independent free thinkers, the extent of weight that each of these outside factors play in doctrinal shift is likely to vary based on each judge. Doctrinal shift may be ascribed to a changing judiciary make-up. Each judge is likely to have his or her own view of the weight each external factor should have on the doctrinal shift. This will likely make defining the proper hidden factual assumptions allusive. For instance, if one member of the judiciary is highly persuaded by politics, and affects doctrinal shift based upon that viewpoint, a scholar might make an inference of hidden assumption that is inaccurate, if the judge’s political leaning is not accounted for. Determining correlations in an effort to identify the proper hidden factual assumptions will likely be inaccurate without somehow taking the variable values of each decision-maker into account.

Lastly, and perhaps the strongest obstacle towards understanding the hidden factual assumptions causing doctrinal change, is the variety in facts among cases. No two cases are exactly alike. In order to find the hidden factual assumptions underlying different doctrinal treatment, it

appears that Professor Sherry has grouped cases based on common facts, observed a doctrinal shift, and pondered what might have changed in the minds of the judiciary. For example, Sherry hypothesizes that doctrinal shift in discrimination cases logically shows that a change in the perception of discrimination in society is at play. Based on the facts of individual cases, alternative groupings might be available that tend to provide other correlations (or lack of correlations) and thus different factual assumptions. For instance, two hypothetical discrimination cases X and Y exist, where the hidden factual assumption is identified as having to do with discrimination in general. However, upon further investigation, one might argue that X and Y should be grouped separately based on discrimination cases that are facially discriminatory. In case X the discriminatory action was not on the face discriminatory. However, in case Y, the discriminatory action was on its face discriminatory. This change in grouping classification might tend to show that the hidden factual assumption has more to do with the court's understanding that facially discriminatory actions have a strong likelihood of invidious intent, whereas the court assumes that discriminatory actions that are not facially discriminatory are not likely motivated with invidious discriminatory intent. The volume of cases and the multitude of variations among those cases will cause a grouping granularity concern when determining which cases and what facts should be used to identify hidden factual assumptions.

*See*

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Professor Sherry believes that discovering hidden factual assumptions based on doctrinal shift is akin to understanding tectonic plates by experiencing an earthquake. However, true understanding of fault lines and tectonic plates was only possible after the proper exploration tools became available. While Sherry's overarching hypothesis may be correct, the true ability to predict and affect the legal environment will not occur without the development of tools to more accurately identify the actual hidden assumptions at issue.

*This is very fine work. Well thought out + argued. I have little constructive criticism to offer. The one thought is that the paper suffers from some repetitiveness. Make your point confidently + move the argument forward. Doing so will produce a tighter + more readable work. It will also force you to think through the paper's progression rather than letting the argument just meander, as it sometimes does. That said, this is a great 1st start*

*IBH*