

# WHEN DO FACTS PERSUADE? SOME THOUGHTS ON THE MARKET FOR “EMPIRICAL LEGAL STUDIES”

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## I

### INTRODUCTION

Recently, I received the following e-mail in my inbox:

From: jchambliss

Sent: Sun 6/17/2007 3:58 PM

To: Chambliss, Elizabeth

Subject: Fw: CHECK THE DO NOT CALL LIST

>>REMINDER. . . . 8 days from today, all cell phone numbers are being released to telemarketing companies and you will start to receive sales calls. . . . . YOU WILL BE CHARGED FOR THESE CALLS

To prevent this, call the following number from your cell phone: 888-382-1222. It is the National DO NOT CALL list. It will only take a minute of your time. It blocks your number for five (5) years. You must call from the cell phone number you want to have blocked. You cannot call from a different phone number.

HELP OTHERS BY PASSING THIS ON TO ALL YOUR FRIENDS.

It takes about 20 seconds.<sup>1</sup>

Does everyone's mother send e-mails like this? Do not microwave food in plastic containers.<sup>2</sup> Reusing plastic water bottles causes cancer.<sup>3</sup> New energy-

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This Article is also available at <http://www.law.duke.edu/journals/lcp>.

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1. Email from Coleman M. Chambliss to Elizabeth Chambliss (Jun. 17, 2007, 15:58 EST) (on file with author).

2. See Urban Legends Reference Pages, Microwaving Plastic Releases Cancer-Causing Agents, <http://www.snopes.com/medical/toxins/cookplastic.asp> (last visited Feb. 19, 2008) (finding this urban legend to be false).

3. See Urban Legends Reference Pages, Reuse of Plastic Bottles, <http://www.snopes.com/medical/toxins/petbottles.asp> (last visited Feb. 19, 2008) (finding this urban legend to be false).

saving light bulbs leak dangerous amounts of mercury.<sup>4</sup> Cell-phone radiation kills bees.<sup>5</sup>

My husband responds to each such e-mail from his mother with the verdict from Snopes.<sup>6</sup> Snopes is the “the definitive Internet reference source for urban legends, folklore, myths, rumors, and misinformation.”<sup>7</sup> Snopes’s key feature is its “Urban Legend Reference Pages,” which aim to provide accurate information about rumors on a variety of topics, such as “food,” “toxins,” “politics,” “frauds and scams,” “racial rumors,” and “Hurricane Katrina.”<sup>8</sup> As to the cell-phone “Do Not Call” list, for example, Snopes says “false.”<sup>9</sup>

Like Snopes, Marc Galanter has devoted himself to combating legends, in particular legal legends such as the “jaundiced view” of the civil-justice system.<sup>10</sup> Galanter defines the jaundiced view as “a set of beliefs and prescriptions about the legal system based on the perception that people are suing each other indiscriminately about the most frivolous matters[,] . . . juries are capriciously awarding immense sums to undeserving claimants . . . [and] the resulting ‘litigation explosion’ is unraveling the social fabric and undermining the economy.”<sup>11</sup>

Armed initially with great faith in the power of social science, Galanter and other socio-legal scholars of his generation, as well as many who have followed, have tried to combat misinformation in law and policy with the findings from systematic research—as if the facts would speak for themselves.<sup>12</sup> For instance, Galanter has been challenging myths about American litigiousness for nearly twenty-five years.<sup>13</sup> He has also challenged the notion that most tort plaintiffs

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4. See Urban Legends Reference Pages, CFL Mercury, <http://www.snopes.com/medical/toxins/cfl.asp> (last visited Feb. 19, 2008) (finding this urban legend to be false).

5. See Associated Press, *Weird Bee Disappearance Ideas and Myths Abound: Cell Phones, Rapture and Einstein*, INT’L HERALD TRIB. (May 2, 2007), available at <http://www.iht.com/articles/ap/2007/05/03/healthscience/NA-SCI-US-Honeybees-Weird.php> (last visited Feb. 19, 2008) (calling the cell-phone theory “erroneous”).

6. Snopes, Urban Legends Reference Page, <http://www.snopes.com/snopes.asp> (last visited Oct. 6, 2007).

7. Snopes—Google Search, <http://www.google.com/search?source=ig&hl=en&q=snopes> (last visited Oct. 6, 2007). The name “Snopes” comes from a family of characters who appear in the works of William Faulkner. Urban Legends Reference Pages, Frequently Asked Questions, <http://www.snopes.com/info/faq.asp> (last visited Oct. 6, 2007).

8. Snopes, *supra* note 6.

9. Urban Legends Reference Pages, Cell Phone Numbers Given to Telemarketers, <http://www.snopes.com/politics/business/cell411.asp> (last visited Feb. 19, 2008).

10. See, e.g., Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998).

11. *Id.*

12. *Id.* at 722–23 (discussing the initial expectations of law-and-society researchers); Jonathan Simon, *The Wisconsin Influence on Sociological Scholarship*, 24 LAW & SOC. INQUIRY 143, 145 (1999) (noting that the law-and-society movement began during a period of “triumph” for the social sciences due to the advent of computer-assisted research); David M. Trubek, *Back to the Future: The Short Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 4, 24, 27–28 (1990) (discussing the “original understanding” of the law-and-society movement).

13. See generally Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 *passim* (1986) (focusing on products-liability litigation); Marc Galanter, *The Life and Times of the Big Six; Or,*

get windfalls.<sup>14</sup> And he has repeatedly challenged nostalgic ideas about the nature of law practice in the 1950s and 1960s.<sup>15</sup>

As Galanter observed in 1998, however, “error . . . [has] proved quite resilient.”<sup>16</sup> Notwithstanding the findings of socio-legal research, many people continue to believe that Americans are litigious, most tort plaintiffs get windfalls, and lawyers were more professional in the 1950s and 1960s.<sup>17</sup> Galanter concludes that the “jaundiced view [has] managed to sustain itself against a now-formidable mass of empirical data that shows that . . . many of its key assertions are at best exaggerated and in many cases entirely mistaken.”<sup>18</sup>

Galanter attributes the resilience of the jaundiced view of civil justice primarily to the nature of the beliefs at issue—that is, their status as “legal legends.”<sup>19</sup> He argues that legal legends are more resistant to fact-testing than other types of beliefs. “[L]egal legends . . . bear many of the accepted indicia of folklore: they occur in multiple versions, there is no single authoritative text, they are formulaic, and they are conveyed in settings detached from any practices of active testing for veracity.”<sup>20</sup>

However, Galanter also points to what might be called a jaundiced view of social science, in which empirical research is perceived as just another form of subjective knowledge:

The kind of knowledge that law and society scholars proffered has had some impact on courts and legislatures, but it has not carried the day in wider popular or political forums. We were belatedly jolted from a naïve faith that the relation of systematic social inquiry to popular belief is one of diffusion from the knowing to the unknowing. Instead we find ourselves embroiled in a contest among competing “knowledges.”<sup>21</sup>

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*the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921 *passim* (1988) (focusing on litigation in federal courts); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 *passim* (1983) (analyzing data on dispute and litigation rates to assess the claim that Americans are excessively litigious); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 *passim* (1996) [hereinafter *Real World Torts*] (focusing on the systematic distortion of data about the tort system); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 *passim* (2004) [hereinafter *Vanishing Trial*] (analyzing the diminishing number of trials in state and federal courts).

14. See Galanter, *Real World Torts*, *supra* note 13, at 1126–40 (analyzing data on punitive damages); Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1395 (1993) (stating that one goal of the article is to dispel “persistent myths about the extent and character of punitive damages”).

15. See Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549, 552 (1996) (“[D]istress about lost virtue has been a constant accompaniment of elite law practice at least since the formation of the large firm a hundred years ago.”); Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 634–37 (1994) (stating, “[w]hen it comes to lawyer-bashing, there is not much new under the sun” and providing a taxonomy of recurring anti-lawyer themes).

16. Galanter, *supra* note 10, at 722.

17. See *id.* at 720 (“[T]he jaundiced view is very much the view of ‘top people,’ including politicians, media people, business[] people, and medical people—and large sections of the legal elite.”)

18. *Id.* at 722.

19. *Id.* at 723 (distinguishing “legal legends” from “systematic social inquiry”).

20. *Id.*

21. Galanter, *supra* note 10, at 722.

Certainly there are reasons to be cynical about the quality of reported research on tort litigation. As Galanter and others have shown, the media systematically spreads distorted information about the tort system,<sup>22</sup> focusing disproportionately on cases in which individual plaintiffs sue corporate defendants<sup>23</sup>—such as the McDonald’s coffee case<sup>24</sup>—and typically exaggerating or completely misstating the facts and even the outcomes of such cases.<sup>25</sup> Meanwhile, catchy statistics—such as that the United States has seventy percent of the world’s lawyers<sup>26</sup>—are circulated and recirculated despite having “no ascertainable terrestrial origin.”<sup>27</sup>

But tort reform is not the only issue that motivates partisan research and reporting. To some extent, partisanship is an issue whenever there is a market for data—which is to say, in all policy debates.<sup>28</sup> In her recent analysis of bankruptcy research, for instance, Elizabeth Warren documents the role of the credit industry and their university beards in producing research-for-hire and in promoting its publication.<sup>29</sup> In the bankruptcy context, the iconic “fact” is that “bankruptcy costs every American family \$400 each year.”<sup>30</sup> Warren argues that the market for data threatens to render all data useless:

Journalists are hungry for “facts” to pepper their reports, lobbyists are eager to promote helpful “facts” and discredit unhelpful “facts,” and some in Congress are assembling “facts” to support foregone conclusions. Ironically, the power of this market threatens to crush serious, policy-directed, empirical work in the legal academy. Indeed, the market is creating an anti-market in which one study seems to

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22. *Id.* at 726 (analyzing media reports of “atrocious stories,” many of which are “outright fabrications”); see WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS passim* (2004) (documenting the political campaign against certain features of the American tort system and showing how this campaign is reflected in distorted media coverage).

23. See Galanter, *supra* note 10, at 731 (concluding that media reports invariably portray corporations and governments as victims and individuals and their lawyers as aggressors).

24. *Liebeck v. McDonald’s Restaurants, P.T.S. Inc.*, No. CV-93-02419, 1995 WL 360309, at \*1 (N.M. Dist. Ct. Aug. 18, 1994) (recovery for third-degree burns received from scalding McDonald’s coffee).

25. See Galanter, *supra* note 10, at 731 (tracing the evolution of several cases from initial media reports into “disembodied cartoon-like tales that pivot on a single bizarre feature”); Michael McCann et al., *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113, 117 (2001) (examining how the McDonald’s coffee case became “an icon for runaway litigiousness”).

26. Galanter, *supra* note 10, at 734–37 (tracing the origins and afterlife of former Vice President Dan Quayle’s assertion in a 1991 speech that the United States has seventy percent of the world’s lawyers).

27. *Id.* at 734.

28. See generally Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 LAW & POL’Y 97, 98 (1988) (arguing that socio-legal research should strive for greater detachment from policy debates).

29. See Elizabeth Warren, *The Market for Data: The Changing Role of the Social Sciences in Shaping the Law*, 2002 WIS. L. REV. 1, 20–25 (2002) (focusing on the Credit Research Center at Georgetown University). Warren states that “the Credit Research Center, funded by the credit industry, has never produced a single piece of work at odds with a credit industry position on any subject.” *Id.* at 25.

30. *Id.* at 13.

contradict another, leaving policymakers free to ignore all data and making such scholarship not only difficult, but useless.<sup>31</sup>

Where, then, does this leave the “serious, policy-directed” researcher? Both Galanter and Warren—somewhat despairingly—turn to academics to police the boundaries of good social science and guard against pseudo-data in public-policy debates.<sup>32</sup> Warren argues that, as academics, “our collective worth is on the line.”<sup>33</sup> Yet academics are hardly immune to political or ideological wrangling. Socio-legal scholarship is plagued by infighting between law and social science, the social sciences and the humanities, and competing perspectives within social science disciplines.

For instance, social scientists have been sharply critical of the quality of empirical research that is published in law reviews. Recent criticism, ranging in tone from programmatic to scathing, points to the deficiencies of student editors,<sup>34</sup> the arrogance of law professors who ignore work in other fields,<sup>35</sup> and the need for greater quality control in empirical research in law.<sup>36</sup> Some argue that what law reviews publish is not “scholarship” at all.<sup>37</sup>

Likewise, many doctrinal law faculty are skeptical about the role of the social sciences in law and legal education. As Judge Harry Edwards (most famously) has argued: law schools’ primary mission should be to train lawyers.<sup>38</sup> Legal scholarship that applies “the social sciences and social theory to criticize legal analysis and the legal system” is “utterly specious.”<sup>39</sup> Even law professors who are not bound by the trade-school model—for instance, legal theorists at

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31. *Id.* at 3–4.

32. See Galanter, *supra* note 10, at 751 (noting that legal academics tend to be more independent of corporate interests than practitioners); Warren, *supra* note 29, at 43 (stating that academics “are the vanguard in policing the market for data”).

33. Warren, *supra* note 29, at 43.

34. See Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899, 1911–12 (2005) (criticizing Richard Sander’s research on the effects of affirmative action on black law students and the student editors of the *Stanford Law Review* for publishing it); James Lindgren, *An Author’s Manifesto*, 61 U. CHI. L. REV. 527, 527–30 (1994) (stating “student editors are grossly unsuited for the job they are faced with”).

35. See Gerald N. Rosenberg, *Across the Great Divide (Between Laws Political Science)*, 3 GREEN BAG 2d 267, 268 (2000) (“[L]egal academics routinely make absurd claims that would be rejected out of hand by any political scientist familiar with the literature in the field.”); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 252–53 (1997) (arguing that legal scholars are “oblivious” to the political-science literature on courts).

36. See Dauber, *supra* note 34, at 1910–13 (calling for reforms in law-review publishing); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 114–33 (2002) (calling for methodological training for lawyers and quality control in law-review publishing).

37. See Martha Nussbaum, *Cooking for a Job: The Law School Hiring Process*, 1 GREEN BAG 2d 253, 261 (1998) (“It is no secret that much legal scholarship is very bad.”); Rosenberg, *supra* note 35, at 272 (referring to legal scholarship as “scholarship lite”).

38. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 76 (1992).

39. *Id.*

the very top schools—tend to view law as an independent discipline with its own theories and methods, and not simply a parade ground for the social sciences.<sup>40</sup>

Thus, what is the likelihood that socio-legal scholars can speak with collective authority in popular and political debates? This article uses the occasion of reflection on Galanter's work to analyze the ingredients for authority in socio-legal research. It focuses particularly on the growing enthusiasm for Empirical Legal Studies (ELS) within law schools, and the implications of this new brand of socio-legal scholarship for the quality and authority of the field.

ELS "arguably is the next big thing in legal intellectual thought."<sup>41</sup> Since 2004, law schools have seen the emergence of the Journal for Empirical Legal Studies (JELS),<sup>42</sup> the Conference on Empirical Legal Studies (CELS),<sup>43</sup> the Society for Empirical Legal Studies (SELS),<sup>44</sup> and the ELS blog.<sup>45</sup> The number of law-review articles reporting and referencing empirical research has grown,<sup>46</sup> and top law schools are establishing special centers for empirical research.<sup>47</sup> In 2006, the American Association of Law Schools (AALS) devoted its annual

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40. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE: A THEORY OF THE CONSTITUTION* 6 (1982) (defining five archetypes of constitutional argument and stating that political scientists are "inclined to ignore the significance of constitutional argument altogether"); J.M. Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949, 952 (1996) ("[C]olonization of legal scholarship can never be entirely successful because law is at heart a professional, and not an academic, discipline.").

41. Tracy E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141, 141 (2006).

42. Journal of Empirical Legal Studies, Journal Information, <http://www.blackwellpublishing.com/society.asp?ref=1740-1453&site=1> (last visited Oct. 6, 2007).

43. The First Annual Conference for Empirical Legal Studies was held at the University of Texas School of Law in October 2006. Press Release, University of Texas School of Law, UT Hosts First Annual Conference of Empirical Legal Studies, Oct. 27–28 (Oct. 6, 2006), available at [http://www.utexas.edu/law/news/2006/100606\\_cels.html](http://www.utexas.edu/law/news/2006/100606_cels.html) (last visited Feb. 19, 2008). The Second Annual Conference for Empirical Legal Studies was held at New York University Law School in November 2007, and was "the first event organized by the newly created . . . SELS." Conference on Empirical Legal Studies 2007, About the Conference, <http://www.law.nyu.edu/CELS/> (last visited Oct. 6, 2007).

44. The SELS is "an international organization of scholars interested in empirical legal studies." Journal of Empirical Legal Studies, Journal Information, <http://www.blackwellpublishing.com/society.asp?ref=1740-1453&site=1> (last visited Oct. 7, 2007). The JELS, based at Cornell Law School, is SELS's official journal. *Id.*

45. Empirical Legal Studies, ELS Blog, <http://elsblog.org> (last visited Oct. 7, 2007). The ELS blog is produced by law faculty at Marquette University Law School, Cornell Law School, and the University of Chicago Law School. Empirical Legal Studies, What Is the ELS Blog?, <http://www.elsblog.org/about.html> (last visited Oct. 7, 2007).

46. See Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517, 519–20, 528–30 (2000) (using Table 1 and the words "*statistic! significant!*" to identify articles reporting empirical results); George, *supra* note 41, at 147 (expanding and updating Ellickson's analysis).

47. See, e.g., Center for Empirical Research in the Law, Home, <http://cerl.wustl.edu/> (last visited Oct. 7, 2007) (describing the Center for Empirical Research in the Law at Washington University Law School); Empirical Legal Studies, Colloquium Series, <http://www.law.northwestern.edu/colloquium/empirical/> (last visited Oct. 7, 2007) (describing the colloquium series on empirical legal studies at Northwestern University School of Law); Empirical Research Group, Research Centers & Programs, <https://www.law.ucla.edu/home/index.asp?page=840> (last visited Oct. 7, 2007) (describing the Empirical Research Group at University of California, Los Angeles School of Law).

meeting to the topic of empirical scholarship.<sup>48</sup> The same year saw the first “ELS Ranking” of law schools.<sup>49</sup>

Socio-legal scholars outside of law schools have been attentive to this movement and many have joined it.<sup>50</sup> Beneath the surface, however, they worry about the politics of the movement and its subservience to law. Some members of the Law and Society Association (LSA)<sup>51</sup> have “wondered aloud whether ELS might simply be the sociology of law in new clothing. Or more menacingly, law and economics in sociologists’ clothing. Or more cynically, the legal professoriate in the emperor’s new clothing.”<sup>52</sup> Law faculty associated with LSA have started their own movement—poised to become a countermovement—called New Legal Realism (NLR),<sup>53</sup> which defines its core concern as “[t]ranslating respectfully” between the social sciences and law.<sup>54</sup>

In this essay, I argue, respectfully, that ELS is good for socio-legal scholarship. Although it is true that ELS brackets or ignores a number of important epistemological, theoretical, and political issues in socio-legal

48. N. William Hines, *Empirical Scholarship: What Should We Study and How Should We Study It?*, <http://www.aals.org/am2006/theme.html> (last visited Feb. 5, 2008).

49. George, *supra* note 41, at 151–57 (ranking law schools on a variety of criteria including the number of social-science Ph.D.s on the faculty, the number of joint appointments in law and social science, and number of faculty publications in peer-reviewed, interdisciplinary journals). George identifies the top law schools in empirical legal scholarship as the University of California, Berkeley, George Mason University, Northwestern University, and University of Southern California. *Id.* at 152. George also notes that the University of Chicago and Washington University in St. Louis “do not fare as well as expected.” *Id.* at 158.

50. See Marc Suchman, *Empirical Legal Studies: Sociology of Law, or Something ELS Entirely?*, 13 AMICI 1 (2006), available at [http://www.departments.bucknell.edu/soc\\_anthro/soclaw/textfiles/AMICI\\_summer06.pdf](http://www.departments.bucknell.edu/soc_anthro/soclaw/textfiles/AMICI_summer06.pdf) (reporting the “buzz” about empirical legal studies at the 2006 Law and Society Association meeting).

51. The LSA is “a group of scholars from many fields and countries, interested in the place of law in social, political, economic and cultural life.” Law and Society Association, Home Page, <http://www.lawandsociety.org/> (last visited Oct. 7, 2007). The LSA was founded at a 1964 meeting of the American Sociological Association. See Trubek, *supra* note 12, at 21 n.45. Its official journal is *Law & Society Review*. See *Law & Society Review*, Journal Information, <http://www.blackwellpublishing.com/journal.asp?ref=0023-9216&site=1> (last visited Oct. 7, 2007) (stating that the journal is published on behalf of LSA).

52. Suchman, *supra* note 50, at 1–2.

53. NLR is an informal association of scholars seeking “to develop a new set of approaches to interdisciplinary research on law.” Howard Erlanger, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse & David Wilkins, *Is it Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 339 (2005). The first use of the label is credited to a roundtable discussion held at the 1997 Annual Meeting of the LSA. *Id.* at 337 n.7. In 2004, the American Bar Foundation and the Institute for Legal Studies at the University of Wisconsin Law School held a three-day conference on NLR and published the papers in symposium editions of their respective journals. *Id.* at 337–38; see Christopher Tomlins, *In This Issue*, 31 LAW & SOC. INQUIRY 795 (2006) (“The purpose of this symposium issue is to introduce the New Legal Realism project . . .”).

54. Erlanger et al., *supra* note 53, at 336 (“Translating respectfully” between law and social science “is a challenging task” and a “core issue for New Legal Realism . . .”); see also Elizabeth Mertz, *Translating Science into Family Law: An Overview*, 56 DEPAUL L. REV. 799, 801 n.4 (2007) (“Within legal studies, the project that tackles these [translation] issues most directly is New Legal Realism. Scholars involved in Empirical Legal Studies are also concerned with creating bridges between law and social science; they are less concerned, however, with systematic consideration of translation issues.” (citations omitted)).

research, ELS has both essential ingredients for success in a professional market: that is, knowledge and power.<sup>55</sup> Its knowledge claim is based primarily on social-science research methods and is well matched to recent demands for quality control in legal scholarship. Its power comes from its association with faculty at elite law schools, who already have a privileged platform in the popular media.<sup>56</sup> Thus, ELS is well positioned to serve as a voice of authority in public-policy debates, and as a counterweight to political lobbyists in the market for data.

This is not to say that adherents of other socio-legal traditions should pack their bags and go back to Berkeley (or Wisconsin, or Amherst). The epistemological, theoretical, and political debates that have divided other groups, such as LSA, are sure to resurface and should be sustained. However, such debates should go on, insofar as is possible, outside the boundaries of the ELS brand, for instance, by way of overlapping memberships in companion (and competitor) groups, such as LSA and NLR. Indeed, so far this appears to be the strategy adopted by ELS skeptics, many of whom are associated with or participate in all three groups.

Meanwhile, the ELS brand of positivist research—which aims for “careful, dispassionate testing of . . . assumptions” about the operation of the legal system<sup>57</sup>—should be maintained in its “insular . . . technocratic”<sup>58</sup> confidence for as long as possible, to fight the common enemy of junk science and pseudo-research. Snopes, after all, is only useful because it has no popular imitators. If there were two “Snopes,” with different verdicts on the “Do Not Call” list, how would we know which to believe?

Part II of this article reviews recent criticism of empirical research in law and the related call for quality control in empirical legal scholarship. Part III shows how ELS has responded to this call and, in fact, helped engineer it, thus creating a demand for its own product. Part IV examines the media response to ELS and explains why ELS is good for socio-legal scholarship.

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55. See Elizabeth Chambliss, *Professional Responsibility: Lawyers, A Case Study*, 69 *FORDHAM L. REV.* 817, 822 (2000) (stating “the central theoretical question in the sociology of the professions is the relationship between knowledge and power” and explaining the importance of both knowledge and power in professional markets).

56. See Rosenberg, *supra* note 35, at 271 (“[L]egal academics today have become leading public intellectuals—the darlings of the media.”).

57. *Journal of Empirical Legal Studies*, Journal Information, <http://www.blackwellpublishing.com/aims.asp?ref=1740-1453&site=1> (last visited Oct. 7, 2007) (describing the aims and scope of the journal).

58. Suchman, *supra* note 50, at 3 (stating “it remains to be seen” whether ELS will exhibit a commitment to “self-critique and thoroughgoing interdisciplinarity . . . or whether instead it will become a more complacent, insular, and technocratic endeavor”).

## II

## THE JAUNDICED VIEW OF EMPIRICAL RESEARCH IN LAW

Of course, concerns about objectivity in the social sciences predate the emergence of the policy audience in the United States. As an epistemological matter, the social sciences have been wrestling with this issue from the start and are divided into two main camps.<sup>59</sup> In one camp are positivists, who maintain enough faith in the possibility of objectivity to defend its pursuit in the study of social phenomena, which they are willing to call a “science.”<sup>60</sup> In the other camp are interpretivists, who view the pursuit of objectivity as dogmatic and deluded, and who embrace instead an avowedly partial, interpretive approach to social inquiry.<sup>61</sup>

From an interpretivist standpoint, there are epistemological reasons to have a jaundiced view of social “science” claims—especially claims aimed at influencing law and policy. Interpretivists view all sensory perception as motivated (consciously or not) by ideas and therefore, to some extent, as subjective.<sup>62</sup> Yet researchers hoping to influence policy tend to play down their subjectivity:

[The policy] audience encourages sociologists of law to operate as if social behavior could be understood in terms of a tangible and determinate world of facts . . . to treat data as if it were an undistorted window on the social world, to treat the ambiguity of what we observe in an unambiguous way. Sociologists of law are invited to act as if there is a clear congruence between our representations of things and things themselves, and to accept the model of value free, detached, objective inquiry in which empirical research seeks generally valid propositional knowledge about “reality.” This is one of the prices of attempting to speak convincingly to the powerful.<sup>63</sup>

There also are methodological divisions within the social sciences—between quantitative and qualitative approaches, in particular—that animate some of the criticism of law-and-society research.<sup>64</sup> Most commentators agree that

59. For a brief review of epistemological debates within the social sciences, see Anthony Giddens & Jonathan Turner, *Introduction, in SOCIAL THEORY TODAY* 1, 1–10 (Anthony Giddens & Jonathan Turner eds., Stanford Univ. Press 1987). For a review of competing traditions in socio-legal research, see BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW* 58–90 (1997).

60. See David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 *STAN. L. REV.* 575, 580 (1984) (“Positivism is the view that statements about facts differ radically from other statements and that empirical social science can consist only of statements about facts.”). See generally 1 JEFFREY C. ALEXANDER, *THEORETICAL LOGIC IN SOCIOLOGY passim* (1982).

61. See TAMANAHA, *supra* note 59, at 61–69 (explaining the interpretive critique of positivism); Michael McCann, *Causal Versus Constitutive Explanations (or, On the Difficulty of Being So Positive . . .)*, 21 *LAW & SOC. INQUIRY* 457, 459–66 (1996) (contrasting the positivist model of causality with what he calls “constitutive” analysis). Galanter uses the term “post-modernist.” Galanter, *supra* note 10, at 751.

62. See PAUL FEYERABEND, *AGAINST METHOD: OUTLINE OF AN ANARCHISTIC THEORY OF KNOWLEDGE* 19 (1975) (“[S]cience knows no ‘bare facts’ at all but that the ‘facts’ enter our knowledge already viewed in a certain way and are, therefore, essentially ideational . . .”).

63. Sarat & Silbey, *supra* note 28, at 122–23 (citation omitted).

64. See Richard Posner, *The Sociology of the Sociology of Law: A View from Economics*, 2 *EUR. J. L. & ECON.* 265, 270 (1995) (defining the law-and-society movement as an “alliance of *all* the social sciences that study law—except economics.”).

“hard” social sciences with parsimonious theories that lend themselves to statistical testing, such as economics, have been more successful within academic law than disciplines that rely partly or primarily on qualitative approaches.<sup>65</sup> To some extent, this methodological division also has a political content, with qualitative approaches on the left.<sup>66</sup> Thus, Richard Posner, a leading scholar of law and economics, has criticized American sociology of law (and by association, the law-and-society movement) for being too liberal<sup>67</sup> and methodologically soft.<sup>68</sup>

By far, however, most criticism of empirical research by law professors is based on quality. Most critics take for granted the pursuit of objectivity in the social sciences and the potential usefulness of both quantitative and qualitative research. The problem, they argue, is the lack of quality control in legal scholarship:

[O]utside the law schools, pretty much everyone in the academy knows that what law professors do can't really be called “scholarship” because there are no quality standards, and (aside from a few quirky journals) there is no peer review, and that means that most everything that shows up in legal journals is badly-researched, badly-written, and badly-argued.<sup>69</sup>

Most of this critique is aimed at law reviews and the unique conventions of law-review publishing, in which student editors select articles based in part on author status<sup>70</sup> and edit them without the benefit of formal training or faculty

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65. See Balkin, *supra* note 40, at 951, 963 (stating that economics has been “wildly successful” in law schools and “throughout the university” because of the parsimony of its rational-actor model); Austin Sarat & Jonathan Simon, *Beyond Legal Realism? Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 *YALE J.L. & HUMAN.* 3, 11 n.38 (2001) (arguing that “the elite law schools are heavily invested” in positivist, quantitative approaches).

66. See Balkin, *supra* note 40, at 964 (stating that continental philosophy, comparative literature, cultural studies, and sociology “have found niches in left-wing legal scholarship”); Posner, *supra* note 64, at 274 (“[E]conomic analysis of law . . . has the reputation of being politically conservative.”). Arguably, some research objects, such as culture, presuppose both qualitative methods and a critical stance. See Sarat & Simon, *supra* note 65, at 13 (stating that “cultural studies” is by its very nature “transgressive” and “destabilizing”).

67. Posner, *supra* note 64, at 270 (stating that most well-known sociologists of law are “closely identified with the law and society movement”). According to Posner, “the sociology of law is *entirely* dominated by scholars with a left-liberal bent. So uniform are their politics, that they may unconsciously regard liberalism (in its modern, ‘welfare-state’ sense) as part of the definition of their field, disqualifying economics from contributing to it.” *Id.* at 274.

68. *Id.* at 268–69 (arguing that Max Weber was “not a systematic empiricist interested in sampling, statistical inference, experiments, or large-scale survey research” and that Weber bequeathed “a useless methodology” to the sociology of law).

69. Michael J. Madison, *The Idea of the Law Review: Scholarship, Prestige and Open Access*, 10 *LEWIS & CLARK L. REV.* 901, 909 (2006).

70. See Leah M. Christensen & Julie A. Oseid, *Navigating the Law Review Article Selection Process: An Empirical Study of Those With All the Power—Student Editors*, 59 *S.C. L. REV.* (forthcoming 2008), available at <http://ssrn.com/abstract=1002640> (survey of sixty-three law-review editors finding that “higher-ranked journals rely more heavily on author credentials than lower-ranked journals”); Jason P. Nance & Dylan J. Steinberg, *The Law Review Article Selection Process: Results from a National Study*, 71 *ALB. L. REV.* (forthcoming 2008) (manuscript at 16), available at <http://ssrn.com/abstract=988847> (survey of 191 law-review editors finding that “author prestige” is the second most influential factor in article selection, behind “interest article will generate”).

review.<sup>71</sup> Although this system arguably benefits law students,<sup>72</sup> practitioners,<sup>73</sup> and faculty,<sup>74</sup> from a scholarly perspective it has been roundly criticized by law professors and social scientists alike.<sup>75</sup> Critics call student editors “incompetents”<sup>76</sup> and legal scholarship “standardless.”<sup>77</sup> As one critic observes, “there are so many student-edited law reviews that it is not an exaggeration to say that virtually anything a law professor writes that is in English and makes some vague sense can and will be published.”<sup>78</sup>

Such criticism has only intensified as law reviews have begun publishing more specialized interdisciplinary and empirical work.<sup>79</sup> A 2002 study by two political scientists and methods specialists, Lee Epstein<sup>80</sup> and Gary King,<sup>81</sup>

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71. See Lindgren, *supra* note 34, at 527–30 (stating “student editors are grossly unsuited for the job they are faced with” and listing thirteen examples of editorial atrocities); Richard A. Posner, *Against the Law Reviews: Welcome to a World Where Inexperienced Editors Make Articles About the Wrong Topics Worse*, LEGAL AFF., Nov.–Dec. 2004, at 58, available at [http://www.legalaffairs.org/issues/November-December-2004/review\\_posner\\_novdec04.msp](http://www.legalaffairs.org/issues/November-December-2004/review_posner_novdec04.msp) (last visited Feb. 19, 2008) (stating that most students’ editorial suggestions “exacerbate the leaden, plethoric style that comes naturally to . . . law professors . . .”).

72. See James W. Harper, *Why Student-Run Law Reviews?*, 82 MINN. L. REV. 1261, 1272–73 (1998) (discussing the teaching function of law reviews); Posner, *supra* note 71, at 57 (“[T]he present system provides useful training for law students and signals the quality of particular students to prospective employers.”). *But see* Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615, 645–46 (1996) (summarizing doubts about the educational benefits of law reviews for students).

73. See Harper, *supra* note 72, at 1277 (“One of the most important roles of law reviews is developing the law . . . for students, practitioners, legislators, judges, and . . . ordinary citizens . . .” (footnote omitted)); Posting of Bill Henderson to [http://www.elsblog.org/the\\_empirical\\_legal\\_studi/2007/08/forum-post-4-wh.html](http://www.elsblog.org/the_empirical_legal_studi/2007/08/forum-post-4-wh.html) (Aug. 15, 2007, 01:00 EST) (last visited Feb. 19, 2008) (noting that articles in law reviews tend to be more accessible than those in peer-reviewed journals). *But see* Lindgren, *supra* note 34, at 533 (noting that students mainly select articles on topics of interest to “elite segments of the corporate bar and federal courts”).

74. See Lindgren, *supra* note 34, at 535 (noting that the abundance of journals and the practice of multiple submissions gives law professors “more places to publish”); Posting of Benjamin Barton to [http://www.elsblog.org/the\\_empirical\\_legal\\_studi/2007/08/forum-post-5-a-.html](http://www.elsblog.org/the_empirical_legal_studi/2007/08/forum-post-5-a-.html) (Aug. 15, 2007, 08:22 EST) (last visited Feb. 19, 2008) (noting that easy access to publication helps law professors remain productive “regardless of whether their work is relevant or even particularly good”); Henderson, *supra* note 73 (noting that law reviews invite normative analysis, which is “a source of envy” for many social scientists).

75. See, e.g., Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936) (arguing that there are two problems with law reviews: “style . . . [and] content”). For reviews of the critical literature, see Christensen & Oseid, *supra* note 70 (manuscript at 6–9, on file with author); Hibbitts, *supra* note 72, at 628–54 (identifying three waves of law-review criticism); Nance & Steinberg, *supra* note 70 (manuscript at 2–8).

76. Lindgren, *supra* note 34, at 527.

77. Dauber, *supra* note 34, at 1913.

78. Barton, *supra* note 74.

79. See Dauber, *supra* note 34, at 1912; Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1132–33 (1995) (arguing that the problems with law-review publishing are especially acute in non doctrinal scholarship).

80. Lee Epstein is the Beatrice Kuhn Professor of Law at Northwestern University School of Law, and a fellow of the American Academy of Arts and Sciences and the American Academy of Political and Social Science. Northwestern University School of Law, Faculty Profile, Lee Epstein, <http://www.law.northwestern.edu/faculty/fulltime/epstein/epstein.html> (last visited Oct. 7, 2007). When the study was published in 2002, she was the Edward Mallinckrodt Distinguished University Professor

examined ten years' worth of law-review articles with the word "empirical" in their title, as well as more targeted samples designed to identify the highest quality research,<sup>82</sup> and found "serious problems of inference and methodology . . . everywhere."<sup>83</sup> According to Epstein and King, "every single one" of the many articles they read "violates at least one of the rules [of inference in the social sciences]."<sup>84</sup>

Close on the heels of this indictment was the brouhaha over Richard Sander's study of the effects of affirmative action in law-school admissions.<sup>85</sup> Sander's study, based in part on proprietary data,<sup>86</sup> claimed that affirmative action in admissions results in a mismatch between black students and schools, leading to lower grades, lower bar-passage rates, and negative job-market outcomes for black graduates.<sup>87</sup> The chief sound bite from the study—which critics argue Sander was all too eager to trumpet<sup>88</sup>—was that eliminating affirmative action in law-school admissions would increase the number of black lawyers in the United States by 7.9%.<sup>89</sup>

Despite intense prepublication criticism of Sander's research methods by a number of his peers,<sup>90</sup> *Stanford Law Review* published the study in November of 2004, and published critical responses<sup>91</sup> along with Sander's reply<sup>92</sup> the following

of Political Science and Professor of Law at Washington University in St. Louis. Epstein & King, *supra* note 36, at 1 n.d1.

81. Gary King is the David Florence Professor of Government at Harvard University, and the Director of the Institute for Quantitative Social Science. Harvard University, Faculty Profiles, Gary King, <http://gking.harvard.edu/> (last visited Oct. 7, 2007).

82. See Epstein & King, *supra* note 36, at 15–17 (describing their methods).

83. *Id.* at 15.

84. *Id.* at 17.

85. Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004). Sander is Professor of Law at University of California, Los Angeles School of Law (UCLA Law). UCLA Law Professors, Richard Sander, <http://www.law.ucla.edu/home/index.asp?page=678> (last visited Oct. 7, 2007).

86. Sander's study was based in part on unpublished data from the "After the JD" (AJD) study, on which he is a co-principal investigator. Sander, *supra* note 85, at 456. AJD is a longitudinal study of law graduates' careers, based on a national sample of lawyers who entered practice in 2000. See RONIT DINOVIETZ, ET AL., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 13 (2004), available at <http://www.abf-sociolegal.org/ajd.pdf>.

87. Sander, *supra* note 85, at 371–72 (summarizing his main findings).

88. See Dauber, *supra* note 34, at 1911 (noting that Sander presented his findings on a Fox News program and "told one reporter that he found all the attention 'gratifying'").

89. Sander, *supra* note 85, at 473 (estimations presented at table 8.2); Richard H. Sander, *House of Cards for Black Law Students*, L.A. TIMES, Dec. 20, 2004, at B11 ("My research suggests that, in a race-blind system . . . the number of new, certified black lawyers each year would rise about [seven percent].").

90. See Dauber, *supra* note 34, at 1912; Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963, 1995–96 (2005) (referring to a prepublication exchange with David Chambers, Timothy T. Clydesdale, William C. Kidder, and Richard O. Lempert).

91. See Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005) ("[T]his response refutes the claim that affirmative action has reduced the number of black lawyers."); David Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1857 (2005) (stating that Sander's conclusions "rest on a series of statistical errors, oversights, and implausible assumptions"); Dauber, *supra* note 34, at 1903 (stating that "Sander has no

May. The fiercest critique, by Michele Landis Dauber, rebuked the law review, along with Sander, for publishing the study without requiring Sander to make his data available.<sup>93</sup> According to Dauber, Sander's study never would have made it through peer review in a social-science journal and the law review should have held back.<sup>94</sup> Instead, they forced Sander's peers to perform peer review in public, in time-consuming detail,<sup>95</sup> and too late to stop the sensational sound bite from becoming a political tool.<sup>96</sup> Dauber wrote,

It is certainly the case that had Sander's article been subject to peer review, the dispute over his methods that is now playing out in public would have been conducted in the editorial process, and if Sander's article had survived peer review we would be having a discussion of affirmative action rather than methodology. . . . Controversies like this one are the inevitable result of legal publishing conventions that eschew peer review even for work that requires technical expertise for its evaluation.<sup>97</sup>

Dauber and other critics of law-review publishing are united in their chief suggestion for improvement, specifically to increase the role of law faculty in selecting and editing manuscripts. Dauber, for instance, calls for "reforms aimed at moving legal publishing towards a system of peer review, at least for methodologically sophisticated work."<sup>98</sup> Epstein and King likewise call for faculty to be included on law-review editorial boards, and for at least one blind review by an expert before any article is accepted by the board.<sup>99</sup> In the case of empirical work, critics also call for better documentation of data.<sup>100</sup>

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evidence whatever" for his claims regarding the job market); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915, 1918–19 (2005) (stating that Sander offers only "a single piece of evidence [that] does not come anywhere close to proving" his central claim that grades are more important than law-school rank in determining black graduates' employment outcomes).

92. See Sander, *supra* note 90, at 1964 (calling the critiques "surprisingly toothless" and suggesting they were politically motivated). Sander writes, "[M]any of my most sympathetic readers predicted a fierce reaction from what they often called the 'affirmative action establishment.'" *Id.*

93. Dauber, *supra* note 34, at 1908 ("Access to data supporting research results is a central feature of free scientific inquiry, and even if Sander chose to disregard this principle, the editors of the Law Review should have upheld it . . ."); see Sander, *supra* note 92, at 1978, 1984 (calling Dauber's critique "by far the fiercest of the four," and acknowledging that the AJD data had not been made publicly available).

94. See Dauber, *supra* note 34, at 1908.

95. *Id.* at 1913–14 ("Responding to the errors in Sander's article has occupied an enormous amount of time and attention from social scientists that might have been more profitably spent, a calculation certainly not lost on those scientists themselves.").

96. *Id.* at 1914 ("[I]t is imperative that the legal academy devise a way to close the barn door ex ante, and not ex post, on work as poorly vetted as this.").

97. *Id.* at 1912.

98. *Id.* at 1913; see also James Lindgren, *Reforming the American Law Review*, 47 STAN. L. REV. 1123, 1124–28 (1995) (laying out three different strategies for increasing faculty involvement).

99. Epstein & King, *supra* note 36, at 128–29.

100. See Dauber, *supra* note 34, at 1908 ("There is no good reason to treat empirical sources like those relied upon by Sander any differently than textual, historical, or other sources . . ."); Epstein & King, *supra* note 36, at 132 (recommending documentation of empirical data "at a minimum" and, ideally, public archiving of data).

Epstein and King also call for methodological training for law faculty,<sup>101</sup> law-review editors, and other students;<sup>102</sup> and for increased law-school investment in computers, statistical software, and software consulting.<sup>103</sup> They claim that “opportunities for quickly and significantly improving the research infrastructure in law schools are substantial,” and that law schools potentially could “leapfrog” other producers of socio-legal research.<sup>104</sup> As they write,

Law schools, at least from our vantage point, appear highly organized, efficient, well funded, and most seem collegial and congenial. . . . If law schools heed even some of our recommendations, not only might they be able to correct the unfortunate state in which empirical legal research now finds itself, but they also may be able leapfrog other academic disciplines—even ones that have been doing superior empirical work but are nonetheless not as unified around a clearly identifiable community.<sup>105</sup>

Epstein and King’s article elicited “charged responses”<sup>106</sup> from legal scholars, who call their critique “unremitting and excessive”<sup>107</sup> and complain that they violate their own standards by failing to include “some comparative evaluation of the methodological practices” of social scientists.<sup>108</sup> One response notes that “Epstein and King’s prescriptions are contested even in their own discipline” of political science.<sup>109</sup> “There simply are not ‘Rules of Inference’ in the sense of universally agreed-upon methods of empirical analysis.”<sup>110</sup>

There also are practical obstacles to implementing Epstein and King’s research vision for law schools, such as internal division within schools,<sup>111</sup> a lack of genuine interest by faculty,<sup>112</sup> and the legal profession’s commitment to its existing “economy of prestige.”<sup>113</sup> This economy, which is closely tied to law-

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101. Epstein & King, *supra* note 36, at 119–21 (recommending that law faculty attend training institutes, audit methods courses, and collaborate with social scientists). Epstein personally has been active in conducting methods seminars and workshops for law faculty. *See, e.g.*, The Weidenbaum Center on the Economy, Government and Public Policy, [http://wc.wustl.edu/eitm\\_seminar.html](http://wc.wustl.edu/eitm_seminar.html) (last visited Jan. 12, 2008) (listing Epstein as an instructor).

102. Epstein & King, *supra* note 36, at 116 (suggesting that a course in quantitative and qualitative research methods be required of students on law review “and probably for all others as well”).

103. *Id.* at 122.

104. *Id.* at 115.

105. *Id.* at 116.

106. Gregory Mitchell, *Empirical Legal Scholarship as Scientific Dialogue*, 83 N.C. L. REV. 167, 170 n.10 (2004) (reviewing responses to the article).

107. Frank Cross et al., *Above the Rules: A Response to Epstein and King*, 69 U. CHI. L. REV. 135, 135 (2002).

108. Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169, 184 (2002).

109. Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 154 (2002).

110. *Id.*

111. *See* Edwards, *supra* note 38, at 35–38; Posner, *supra* note 79, at 1135–38 (discussing the tension between doctrinal and non-doctrinal scholarship in academic law).

112. *See* Balkin, *supra* note 40, at 969 (“[L]aw professors have always given lip service to the importance of empiricism. . . . [but] they actually do not really want to do any empirical research.”).

113. *See* Madison, *supra* note 69, at 905 (arguing that the current system of law-review publishing is at the center of a symbolic “economy of prestige” involving law professors, lawyers, law students, law schools, and universities).

review publishing, provides little incentive for law faculty to invest in costly, time-consuming research.<sup>114</sup>

Legal academics feel about empiricism the way that most men feel about housework: [t]hey are extremely glad that someone else does it. Moreover, despite their statements of the high regard they place upon it, they are neither going to start doing it themselves nor do they particularly want to pay for it.<sup>115</sup>

As a marketing strategy, however, the call for quality control is a winner. Epstein's and King's portrayal of the sorry state of empirical research in law, coupled with decades of criticism of law-review publishing generally, was the perfect setup for a professional move by those with a superior quality claim, such as credentialed social scientists who teach at elite law schools. Part III explains how ELS has taken advantage of this opening, and analyzes the current boundaries of ELS's market niche.

### III

#### ELS RESPONDS

Within the academic market, ELS is a movement by a group of social-science-trained law professors at Cornell University, New York University, University of Texas, and elsewhere, to build their reputations and careers by creating a market demand—"empirical legal studies"—and filling it. Like all professional groups, they claim special competence in some important task (in this case, quantitative and statistical methods), and they build and protect demand for their services in the name of quality control. It is the same strategy practicing lawyers use when they police the unauthorized practice of law.<sup>116</sup>

#### A. The "Empirical" Brand

The ELS brand is organized around the term "empirical," with its hard-nosed connotations of complexity and precision. Its brand of Empirical, with a capital "E," refers primarily to research methods—specifically quantitative, statistical, and experimental methods.<sup>117</sup> (This is in contrast to the generic definition of empirical, meaning "based on observation or experience."<sup>118</sup>) For instance, the Empirical Research Group (ERG) at University of California, Los

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114. See Richard Lempert, *Empirical Research for Public Policy: With Examples from Family Law and Advice on Securing Funding* 17 (Univ. of Mich. Law School & Public Law and Legal Theory Working Paper Series, Working Paper No. 95, June 2007), available at <http://ssrn.com/abstract=1000700> (noting the dangers of empirical research for untenured law professors' careers).

115. Balkin, *supra* note 40, at 968.

116. See Chambliss, *supra* note 55, at 823 (discussing the legal profession's justification for its monopoly over law practice).

117. See Epstein & King, *supra* note 36, at 2 ("[T]he word 'empirical' has come to take on a particularly narrow meaning [in the legal academic community]—one associated purely with 'statistical techniques and analyses,' or quantitative data.").

118. Merriam-Webster's Online Dictionary, <http://www.m-w.com/dictionary/empirical> (last visited Oct. 14, 2007) (defining "empirical").

Angeles describes itself as “a methodology-oriented research center . . . [that] specializes in the design and execution of quantitative research in law and public policy, and enables the law faculty to include robust empirical analysis in their legal scholarship.”<sup>119</sup> Likewise, the Center for Empirical Research in the Law (CERL) at Washington University in St. Louis says that it studies law and legal institutions “using quantitative research methods.”<sup>120</sup> The official slogan of the ELS blog is: “Bringing Methods to Our Madness.”<sup>121</sup>

Implicit in this focus on method, but also sometimes explicit, is a strong commitment to positivist social science. For instance, Tracey George, creator of the ELS Ranking, observes that “ELS scholars . . . take a primarily positive approach [to empirical research] and utilize the scientific method to evaluate the relevant evidence.”<sup>122</sup> A recent article by Gregory Mitchell proposes to “mak[e] empirical legal scholarship more scientific” by having law reviews adopt disclosure requirements “designed to foster critical review and replication of empirical legal research.”<sup>123</sup> Mitchell argues that “objectivity in science arises from the publication of empirical claims in reproducible terms”<sup>124</sup> and articulates a positivist, “aperspectival” definition of objectivity.<sup>125</sup>

Like Epstein and King, many of the law professors most closely associated with the ELS brand are political scientists,<sup>126</sup> which may turn out to be important in future contests over the ELS research agenda. Among the eight founders of SELS,<sup>127</sup> four have Ph.D.s: one in economics,<sup>128</sup> one in psychology,<sup>129</sup> one in

119. Empirical Research Group, Research Centers & Programs, <https://www.law.ucla.edu/home/index.asp?page=840> (last visited Oct. 14, 2007).

120. The Center for Empirical Research in the Law, About the Center, <http://cerl.wustl.edu/about.php> (last visited Oct. 14, 2007).

121. Empirical Legal Studies, ELS Blog, [http://www.elsblog.org/the\\_empirical\\_legal\\_studi/](http://www.elsblog.org/the_empirical_legal_studi/) (last visited Oct. 14, 2007).

122. George, *supra* note 41, at 146.

123. Mitchell, *supra* note 106, at 167. Mitchell argues that disclosure rules are more feasible and would be more effective than peer review. *Id.* at 172–78.

124. *Id.* at 179.

125. *Id.* at 181 (“[T]he essence of [this] aperspectival objectivity is communicability, narrowing the range of genuine knowledge to coincide with that of public knowledge.”) (quoting Lorraine Daston, *Objectivity and the Escape from Perspective*, 22 SOC. STUD. SCI. 597, 600 (1992)).

126. For instance, Joseph W. Doherty, Director of ERG at University of California, Los Angeles School of Law, holds a Ph.D. in political science from University of California, Los Angeles. UCLA Law, Contacts, Empirical Research Group, <https://www.law.ucla.edu/home/index.asp?page=1808> (last visited Oct. 14, 2007). Andrew D. Martin, Director of CERL at Washington University in St. Louis, holds a Ph.D. in political science from Washington University in St. Louis. Washington University in St. Louis, Andrew D. Martin: Introduction, <http://adm.wustl.edu/> (last visited Oct. 14, 2007).

127. The SELS Founding Board of Directors are: Jennifer Arlen (New York University Law School), Bernard Black (University of Texas Law School), Shari Seidman Diamond (Northwestern University Law School), Theodore Eisenberg (Cornell Law School), Dame Hazel Genn (University College London), Michael Heise (Cornell Law School), Matthew McCubbins (University of Southern California Law School), Geoffrey Miller (New York University Law School), and Roberta Romano (Yale Law School). Journal of Empirical Legal Studies, Journal Information, <http://www.blackwellpublishing.com/society.asp?ref=1740-1453> (last visited Oct. 14, 2007).

128. New York University, Faculty Profiles, Jennifer Arlen, <http://its.law.nyu.edu/faculty/profiles/index.cfm?fuseaction=cv.main&personID=20658> (last visited Oct. 14, 2007).

education and social policy,<sup>130</sup> and one in political science.<sup>131</sup> For now, however, brand competition appears to be aimed primarily at other law professors, particularly amateur empiricists, who do not have Ph.D.s or formal methodological training and who may be guided more by instrumental than scientific concerns. As Epstein and King write,

One source of the problem [with empirical research in law] almost certainly lies in the training law professors receive, and the general approach to scholarship that results. While a Ph.D. is taught to subject his or her favored hypothesis to every conceivable test and data source, seeking out all possible evidence against his or her theory, an attorney is taught to amass all the evidence for his or her hypothesis and distract attention from anything that might be seen as contradictory information. An attorney who treats a client like a hypothesis would be disbarred; a Ph.D. who advocates a hypothesis like a client would be ignored.<sup>132</sup>

Most topics on the ELS research agenda come from legal doctrine. The Program for the 2007 Conference on Empirical Legal Studies read like the course offerings at an elite but traditional law school. On the first morning, session titles included Civil Litigation, Criminal I, Corporate I, Intellectual Property, and Bankruptcy I.<sup>133</sup> Later in the day were sessions on Contracts, Securities I, Taxation I, and Torts I.<sup>134</sup> Altogether there were six Corporate panels, four panels on Courts and Judges, and three on Law and Politics.<sup>135</sup> There also were three methods panels (Experimental I and II, and Empirical Analysis) and two informal sessions on research methods at the end of the conference.<sup>136</sup> There was one panel on Race and Sex on day two.<sup>137</sup>

Thus, the emerging Empirical brand of socio-legal scholarship is based on positivist, quantitative research into questions posed by legal doctrine, with a focus on corporate law, political theory, research methodology, and courts. It holds itself out as providing rigor in place of amateur, armchair empiricism, and as advancing objective knowledge in place of “assumptions” and “distorted impressions.”<sup>138</sup> In other words, it strives to be the socio-legal version of Snopes. Its official journal, JELS, describes itself as follows:

The *Journal of Empirical Legal Studies (JELS)* is a peer-edited, peer-refereed, interdisciplinary journal that publishes high-quality, empirically-oriented [sic] articles of interest to scholars in a diverse range of law and law-related fields . . . .

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129. Northwestern Law School, Faculty, Shari Seidman Diamond, Curriculum Vitae, <http://www.law.northwestern.edu/faculty/fulltime/diamond/diamonShCV.pdf>.

130. Cornell Law School, Faculty, Michael Heise, Biography Page, <http://www.lawschool.cornell.edu/faculty/bio.cfm?id=30> (last visited Oct. 14, 2007).

131. University of California, San Diego, Matthew D. McCubbins, <http://polisci.ucsd.edu/faculty/mccubbins.htm> (last visited Oct. 14, 2007).

132. Epstein & King, *supra* note 36, at 7 (footnote omitted).

133. New York University School of Law, Conference on Empirical Legal Studies 2007, <http://www.law.nyu.edu/cels/CURRENTConferenceProgram.Nov1.PrintVersion.html> (last visited Jan. 12, 2008).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Journal of Empirical Legal Studies, Journal Information, *supra* note 57.

Recognizing that many legal and policy debates hinge on assumptions about the operation of the legal system, the *Journal* seeks to encourage and promote the careful, dispassionate testing of these assumptions. . . .

There is currently a gap in the legal and social science literature that has often left scholars, lawyers, and policymakers without basic knowledge of legal systems or with false or distorted impressions. . . .

The time is ripe for empirical studies of the legal system. With the explosion in information technology, data sources on the legal system are improving in quality and accessibility. Compared with just a few years ago, researchers today can easily access original data sets. For example . . . academic researchers can obtain data ranging from the RAND studies of jury verdicts in California and Chicago, to the Wisconsin Civil Litigation Research Project's data, to the Federal Judicial Center's archives of all federal court cases. A major goal of *JELS* is to make these and other worldwide data sets more widely known and used.<sup>139</sup>

## B. Academic Skepticism

By positioning itself so clearly on the positivist, quantitative, legal side of the socio-legal field, ELS faces inevitable skepticism from interpretivists, qualitative researchers, and scholars from other academic disciplines—particularly scholars outside of the relatively well-endowed world of top law schools.<sup>140</sup> As ELS proponents themselves acknowledge, “[e]mpirical analysis of the legal system has a . . . spotty . . . tradition”<sup>141</sup> and many law professors lack the tools and training to conduct high-quality research.<sup>142</sup> Socio-legal scholars outside of law schools may be inclined to include ELS in that stereotype.

The epistemological critique is the least worrisome for those concerned with establishing authority in public-policy debates because the epistemological critique tends to lead to detachment from the policy audience altogether. For instance, in their classic article, “The Pull of the Policy Audience,” Austin Sarat and Susan Silbey criticize “[s]cientism” in socio-legal studies and urge socio-legal scholars to abandon scientism in favor of “participation . . . in the construction of narratives about social life.”<sup>143</sup> This means, they argue, turning away from the policy audience and “leav[ing] the state behind [to] go to the periphery, to small towns, to rural places, to working class neighborhoods and

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139. *Id.*

140. ELS is heavily subsidized by its law school hosts, particularly Cornell University Law School, which hosts the journal, and will host the Third Annual Conference for Empirical Legal Studies in 2008. Society for Empirical Legal Studies, Association/Society, <http://www.blackwellpublishing.com/society.asp?ref=1740-1453&site=1> (last visited Feb. 4, 2008); see Cornell Law, Projects and Publications, <http://www.lawschool.cornell.edu/research/index.cfm> (last visited Feb. 4, 2008). Membership in SELS is inexpensive—only \$60 per year for Americans, and is required for registration for the conference. See *id.* Membership in LSA, by contrast, costs two to three times as much. See Law & Society Association, Homepage, <http://www.lawandsociety.org/> (follow “Join/Renew/Contribute” hyperlink) (last visited Feb. 19, 2008) (listing membership rates for different income levels).

141. Journal of Empirical Legal Studies, Journal Information, *supra* note 57.

142. See *supra* note 36 and accompanying text.

143. Sarat & Silbey, *supra* note 28, at 141.

look at the way that people in those places . . . construct their own universe of legal values and behaviors.”<sup>144</sup>

This is an important agenda from a political and scholarly perspective, but it is not incompatible with—or necessarily subversive of—policy research.<sup>145</sup> Some socio-legal scholars may appreciate the critique of positivist social science but still find practical and political value in rigorous policy research.<sup>146</sup> Thus, the epistemological critique ultimately leads to a question of professional vocation. Is it better to work at the margins, in a long-term project to reconstitute legal culture, or to tackle narrow questions, framed by others, in hope of immediate impact?

Methodological divisions are also unlikely to subvert ELS’s popular authority, although they may be a source of academic tension and limit ELS’s interdisciplinary appeal. Although ELS’s official position—as stated in the description of its journal—is that it welcomes “both experimental and nonexperimental data analysis” and is “open to empirical work from any disciplinary or ideological approach,” ELS nevertheless comes across as a place (reserved) for methods jocks. The description of JELS mentions “statistics,” “information technology,” and “worldwide data sets,” but not interviews, ethnography, textual analysis, or other qualitative approaches.<sup>147</sup> ELS’s methods seminars also focus almost exclusively on quantitative approaches.

Such signals, on the heels of Epstein’s and King’s critique, may irritate socio-legal scholars who do other sorts of empirical work, including pioneers in the field. For instance, Stewart Macaulay, a founding father of the law-and-society movement and author of perhaps the single most famous law-and-

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144. *Id.* at 141–42.

145. See Paul Schiff Berman, *Telling a Less Suspicious Story: Notes Toward a Non-Skeptical Approach to Legal/Cultural Analysis*, 13 *YALE J.L. & HUMAN.* 95, 124–125 (2001) (criticizing the “hermeneutics of suspicion” in socio-legal research). “[T]here is nothing about [the] call to study law as a cultural system rather than as a set of policy prescriptions that requires us to study law from the perspective of disbelief. Indeed . . . studying any cultural practice (whether literature or religion or law) from a perspective of belief—as long as it is not completely uncritical belief—may ultimately be more fruitful.” *Id.* at 124.

146. See Tamanaha, *supra* note 59, at 54 (“[W]e can use the terms true, false, and fact without enclosing them in quotation marks . . .”); Trubek, *supra* note 60, at 580–82 (defending a pragmatic approach to socio-legal research). “Many who defend the search for facts and the use of ‘empirical’ methods in legal scholarship . . . would claim that their interest in factual inquiry derives from practical concerns, not from an epistemological commitment to positivism . . . For these scholars, factual inquiry in legal studies is necessary because law cannot be defined other than by the difference it makes . . .” *Id.* at 580–81.

147. *Journal of Empirical Legal Studies*, *Journal Information*, *supra* note 57.

society study,<sup>148</sup> complains that Epstein and King “criticize[] the kind of empirical research that I have done for over forty years.”<sup>149</sup>

Moreover, to the extent that one embraces the pragmatic aims of policy research, ELS’s emphasis on methodological rigor, particularly the replication of results,<sup>150</sup> may be at odds with the needs of timeliness and access to data. As Macaulay notes, “[o]ften we are faced with a choice between doing nothing and relying on assumed facts or publishing a study that other scholars cannot precisely replicate.”<sup>151</sup> Or, as one blogger put it, “if it’s worth doing, it’s worth doing badly.”<sup>152</sup>

These tradeoffs, however, are more a concern for ELS than for its skeptics. In the academic market, ELS should take care not to make methodology a fetish—or a cudgel—and look for ways to engage public-policy research based on qualitative approaches. In the popular market, however, ELS’s emphasis on fancy quantitative approaches, like its embrace of positivism, is sensible. As Part IV asserts, scientism sells, especially when it is pitched by faculty from prestigious universities. Indeed, this is precisely the market that Galanter and Warren call upon academics to police.

The final division, between the “socio” and the “legal,” as it were, is potentially the most problematic for ELS’s authority, especially insofar as it plays out as a contest between law professors from competing disciplines or theoretical traditions. There already have been efforts by LSA leaders at the University of Michigan Law School<sup>153</sup> and the University of Wisconsin Law School<sup>154</sup> to reiterate the importance of theory in the design and analysis of socio-legal research. As Richard O. Lempert, the current President of LSA,

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148. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 55 (1963) (examining the extent to which businesses use legal conventions to make and enforce agreements). The study was based on “a nonrandom sample of lawyers and businesspeople . . . [and] Macaulay made no attempt to ensure that this sample was [a] representative [one].” Russell Korobkin, *Empirical Scholarship in Contract Law: Possibilities and Pitfalls*, 2002 U. ILL. L. REV. 1033, 1052–53 (2002).

149. Stewart Macaulay, *Contracts, New Legal Realism, and Improving the Navigation of the Yellow Submarine*, 80 TUL. L. REV. 1161, 1185 n.99 (2006).

150. Journal of Empirical Legal Studies, Journal Information, *supra* note 57 (stating that “JELS papers should clearly document their data sources and methodology so that all researchers can access, replicate, and criticize the analysis and results.”).

151. *Id.*; see also Warren, *supra* note 29, at 36 (discussing the time and resources required to “turn square corners” and “track down tiny anomalies” in the data, and the seeming futility of such efforts in light of partisan political critique).

152. Posting of Christopher Zorn to [http://www.elsblog.org/the\\_empirical\\_legal\\_studi/2007/08/forum-post-3-me.html](http://www.elsblog.org/the_empirical_legal_studi/2007/08/forum-post-3-me.html) (Aug. 14, 2007, 15:51 EST) (last visited Feb. 19, 2008).

153. See Lempert, *supra* note 114, at 2–3 (emphasizing the importance of theory in interpreting empirical results). Richard Lempert is the Eric Stein Distinguished University Professor of Law and Sociology at the University of Michigan Law School. University of Michigan, Law School Faculty & Staff, [http://cgi2.www.law.umich.edu/\\_FacultyBioPage/facultybiopagenew.asp?ID=159](http://cgi2.www.law.umich.edu/_FacultyBioPage/facultybiopagenew.asp?ID=159) (last visited Feb. 4, 2008). His emphasis on theory is directed explicitly at “younger legal scholars” who are increasingly likely to “attempt[] empirical projects.” Lempert, *supra* note 114, at 15.

154. See Erlanger et al., *supra* note 53, at 336–39, and accompanying text (discussing NLR); Tomlins, *supra* note 53, at 795 (discussing NLR); Mertz, *supra* note 54, 801 n.4, and accompanying text (discussing NLR).

cautioned in a recent working paper, “[n]othing is so helpful as good empirical research and nothing can be so bad as poor research that becomes influential.”<sup>155</sup> Conceivably, law faculty associated with more critical socio-legal traditions could make ELS a target.

So far, however, theoretical criticism has been relatively gentle, which is understandable, given that many critics themselves participate in ELS.<sup>156</sup> The gentle approach also may be a testament to the relative methodological rigor of ELS, compared to other research by law faculty, and its initial success in academic and popular markets. So far, no one has come right out and said “mindless empiricism” in print.

Clearly, however, this is one subtext of the NLR movement. In the introduction to the Wisconsin symposium on NLR, the authors emphasize the need to “remain skeptical about the impact of formal law,” and to “reach outside of the boundaries of formal legal processes and institutions altogether to examine other forms of regulation and ordering.”<sup>157</sup> They stress the importance of conducting “bottom-up” and well as “top-down” research, and the importance of considering “a wide range of socio-economic classes and interests.”<sup>158</sup> Such statements can be read as a caution to approaches, such as ELS, that focus primarily on formal law and power topics such as corporations and courts.

The authors also caution against arrogance in interdisciplinary work—a charge that is more often aimed at law professors than at scholars from other fields.<sup>159</sup> They open by quoting Epstein and King as to the different scholarly orientations of “Ph.D.s” and “attorneys,” in which Ph.D.s are taught to be self-critical in a way that attorneys are not.<sup>160</sup> This is followed by several references to the need for caution and respect in translating between disciplines:

Too often scholars in one discipline simply assume that they can pick up an article from another and understand enough of it to use it in their own work; but, it is possible that their own disciplinary training limits their ability to grasp the intended import of the article’s findings. An important initial step in overcoming this difficulty is for scholars to communicate more cautiously across these disciplinary divides, in order to make each other aware of divergent assumptions, epistemologies, or goals.<sup>161</sup>

But although parts of this description arguably implicate ELS, and seem designed to do so, the authors do not explicitly single out ELS for critique. On the contrary, if there is one thing that, for better or worse, characterizes NLR—as well as the broader law-and-society tradition from which it springs—it is a

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155. See Lempert, *supra* note 114, at 3.

156. Lempert presented his arguments about the importance of theory at one of the methods panels at the 2007 ELS conference. See Lempert, *supra* note 114, at 15; New York University School of Law, Conference on Empirical Legal Studies 2007, <http://www.law.nyu.edu/cels/CURRENTConferenceProgram.Nov1.PrintVersion.html> (last visited Feb. 4, 2008) (Empirical Methods Panels).

157. Erlanger et al., *supra* note 53, at 339–40.

158. *Id.* at 339.

159. See Cross, *supra* note 35, at 252–53; Rosenberg, *supra* note 35, at 268.

160. Erlanger et al., *supra* note 53, at 336 (quoting Epstein & King, *supra* note 36, at 9).

161. *Id.* at 341.

Big Tent approach. The authors propose an “expansive and open-minded”<sup>162</sup> approach to socio-legal research that is attentive both to “the institutions and decision-makers at the ‘top’”<sup>163</sup> as well as to “the kind of insights that . . . marginalized perspectives can give.”<sup>164</sup> It pitches the virtues of “legal optimism” as well as “skepticism”—which “need not imply a nihilist surrender to pure critique.”<sup>165</sup> In other words, there is room for everyone:

The issue of the implications flowing from the politics of social science research is a very difficult and complicated question around which there are likely to be many different positions, even among new legal realist scholars. It is likely to be an ongoing subject of debate, and there is certainly room under the expansive roof of New Legal Realism for multiple points of view on this topic. One point of likely agreement, however, is that the problem extends across all of the social sciences; no field or method is above questioning in this regard, and many would feel that engaging in this kind of questioning is itself an important signal of rigor in any social science discipline.<sup>166</sup>

Thus, future relations between ELS and other socio-legal groups are, in large part, up to ELS. Will ELS journal editors and conference organizers accept qualitative and theoretical papers? Can ELS engage social theory while maintaining a law-centered, policy focus? Will law faculty invest in scholarship outside of the existing economy of prestige?

In the meantime, this is an important interdisciplinary conversation to maintain. ELS represents a new brand of socio-legal scholarship that has the potential for significant market success. Its leaders have started a difficult—and some would say long overdue—conversation about the standards for empirical research in law schools, and in the process have improved the status of socio-legal research more generally. Thus, ELS is a promising platform for “serious, policy-directed” research.<sup>167</sup> Socio-legal scholars from outside of law schools who want to speak to the policy audience should engage ELS and use its momentum to promote the quality of such research.

#### IV

##### CONCLUSION: NOTHING SUCCEEDS LIKE SUCCESS

For many years, LSA has been the leading brand of socio-legal scholarship, both in the United States and abroad. LSA has profoundly shaped two generations of socio-legal scholars.<sup>168</sup> The LSA annual meeting in Berlin in 2007 was its largest ever, drawing 2,377 participants from seventy-one countries.<sup>169</sup> But for all its success as an academic and professional association, LSA has had

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162. *Id.* at 339.

163. *Id.* at 340.

164. *Id.* at 341.

165. *Id.* at 345.

166. Erlanger et al., *supra* note 53, at 343.

167. Warren, *supra* note 29, at 3–4.

168. The author has been a member of LSA since 1985 and currently serves as Secretary of LSA.

169. Socio-Legal Studies Association, International Socio-Legal Meeting: Berlin 2007, <http://www.kent.ac.uk/nslsa/content/view/168/139> (last visited Feb. 4, 2008).

relatively little direct influence on U.S. policy, as Galanter laments, and relatively little status as a brand of scholarship within law schools. Instead, LSA has worked at the margins of legal and popular debate.

Now, ELS has emerged as a powerful brand in the legal and popular markets. Theodore Eisenberg, a Cornell law professor and founding editor of JELS, notes that “in its first year of operation” JELS generated “much elite media interest,”<sup>170</sup> including a front-page *New York Times* story about a conference on civil trials.<sup>171</sup> JELS articles also have been cited or referenced in other “[h]igh-end media entities”<sup>172</sup> such as the *Wall Street Journal*,<sup>173</sup> the *Atlantic Monthly*,<sup>174</sup> the *Economist*,<sup>175</sup> the *Financial Times*,<sup>176</sup> and the *Congressional Quarterly*.<sup>177</sup>

Such popularity is worth protecting, not by muting or abandoning criticism, but by recognizing the importance of brands in popular and political markets, and the importance of academic alliances in support of bold brands. Of course, no research is free from instrumental and partisan goals. Thanks in part to the Legal Realists, we are all partisans now. But that does not mean that all research is equally partisan—or rigorous and well-theorized. “Serious, policy-directed” researchers should seize the opening created by ELS and use the platform that it offers to promote high-quality policy research.

This is not to say that socio-legal scholars will succeed in bringing social theory to the service of public policy, or even in bringing the findings of high-quality research to popular attention. Policy-makers may be as adept at ignoring ELS as they are at ignoring LSA. No one knows this better than Galanter, who has been publishing socio-legal scholarship since 1974.<sup>178</sup> But a good pragmatist takes what he can get and hopes for the best. Galanter published his most recent study, about the vanishing trial, in JELS<sup>179</sup>—and made the front page of the *New York Times*.<sup>180</sup>

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170. Theodore Eisenberg, *Why Do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741, 1743 (2004).

171. *Id.* at 1743; Jonathan D. Glater, *Study Disputes View of Costly Surge in Class-Action Suits*, N.Y. TIMES, Jan. 14, 2004, at C1.

172. Glater, *supra* note 171, at C1.

173. Jess Bravin, *Death Penalty Imposed Less Often in US South-Study*, DOW JONES INT’L NEWS, Feb. 14, 2004.

174. *The Facts of Death*, ATLANTIC MONTHLY, May 1, 2004, at 46.

175. *How Bad Was Andersen?*, ECONOMIST, Dec. 6, 2003.

176. Paul Koster, *Europe’s Auditors Should Give Us the Bad News*, FIN. TIMES (London), Jan. 19, 2004, at 13.

177. Seth Stern, *Lawsuits, Lagging Economy Linked in Tort Reform Push*, CONG. Q. WKLY., May 29, 2004, at 1270.

178. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974); Marc Galanter, Curriculum Vitae, <http://www.maregalanter.net/cv.htm> (last visited Feb. 5, 2008).

179. Galanter, *Vanishing Trial*, *supra* note 13, at 459.

180. Adam Liptak, *U.S. Suits Multiply, But Fewer Ever Get to Trial, Study Says*, N.Y. TIMES, Dec. 14, 2003, at A1.