

Title

Empirical Legal Studies

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Abstract

Empirical Legal Studies (ELS) is a burgeoning field of scholarly inquiry situated at the intersection of law and the social sciences. The contemporary ELS movement began in the 1990s, and was primarily the result of an interdisciplinary group of scholars working in U.S. law schools. ELS is broadly characterized by a commitment to a positivist epistemology, an emphasis on quantitative methods of inquiry, and a substantive focus on matters of legal policy. By the first decade of the 21st century, ELS had created a professional association, an annual meeting, a quarterly peer-reviewed journal, and a widely viewed weblog.

Keywords

Economics, empirical, law, legal, methodology, political science, psychology, sociology, statistics.

Body Text

Introduction

It is tempting to begin any discussion of empirical legal studies with Justice Holmes' famous line from *The Common Law*, where he notes that "(T)he life of the law has not been logic: it has been experience." Holmes' quote claims both too little and too much. On the one hand, the law is clearly much more than its operation. At the same time -- as any good historian knows -- not all experiences contribute equally to the evolution of society; the "experience" that mattered to Holmes in *The Common Law* was not comprehensive, and was in fact a different (and substantially more attenuated) version than that deemed influential by contemporary scholars.

In a similar fashion, "empirical legal studies" (ELS) is both broader and narrower than one first encountering the term is likely to realize. For those steeped in one of the traditional social sciences, it is easy to think of ELS in the confines of one's own discipline; upon seeing the broader, interdisciplinary picture of the subject, one is often struck by the scope and diversity of social scientific work on legal phenomena. In the early 21st century United States, however, the term "ELS" also comprises a well-defined movement¹ in the legal and social scientific academy. While the latter sense of the phrase is the central focus of this essay, I hope also to make clear how the movement relates to the broader meaning of the term.

Origins

In its contemporary sense, ELS refers most directly to a professional association (the Society for Empirical Legal Studies, or SELS), the primary activities of which are to publish a peer-reviewed journal (the *Journal of Empirical Legal Studies*, or *JELS*) and to host an annual conference (the Conference on Empirical Legal Studies, or CELS). ELS was not the first coordinated effort on the part of a group of scholars to address questions of the law empirically. It was preceded most recently by the law and society movement of the 1960s and 1970s (as constituted, *inter alia*, by the Law and Society Association (LSA), the *Law and Society Review* (*LSR*), and the National Science Foundation's Law and Social Sciences program), by the law and economics movement begun in the 1950s, and -- before that -- by the legal realists of late 19th and early 20th century. In challenging conventional approaches to the study of the law, and in demonstrating the value of empirical (rather than purely theoretical) analyses to that study, those influential enterprises laid the groundwork for ELS.

Existing accounts date the origins of the contemporary ELS movement to the decade of the 1990s. Suchman and Mertz, for example, note that "Harvard opened what may have been the nation's first self-proclaimed Program on Empirical Legal Studies" in 1996 (2010, 556-7), and Kritzer's review of more than a century of empirical work on the law dates the term's widespread use to "around 2000" (2009, 925). While the exact instant of the movement's origins probably can't be known, what is clear is that, beginning in the last decade of the 20th century, scholars in the social sciences and the legal academy who were investigating legal questions using empirical methods began to coalesce into a new organization.

The roots of this new movement were different in many respects from those of its predecessors. Whereas the institutionalization of law and economics was

¹ A number of scholars have described ELS as a "movement," including Kritzer (2009), Suchman and Mertz (2010), and Eisenberg (2011), and I adopt that usage here.

predominantly (and unsurprisingly) the task of economists, and the origins of law and society were largely the disciplines of sociology and criminology, ELS's founders were in a disciplinary sense more diverse, hailing from political science, psychology, economics, public policy, and a smattering of other fields. Chambliss notes that "(A)mong the eight founders of SELS, four have Ph.D.s: one in economics, one in psychology, one in education and social policy, and one in political science" (2008, 32-33). And as Eisenberg (2011) notes, in addition to their close disciplinary ties, both LSA and the American Law and Economics Association (ALEA) owe their origins at least in part to funding by external organizations: the former, to the Russell Sage and Walter E. Meyer Foundations, and the latter to the Olin Foundation. In contrast, SELS was founded without either a strong disciplinary affiliation or any external foundation support; instead, as Eisenberg (2011) details, it received initial support from law schools, especially Cornell. As a result, it lacked both the clear disciplinary and ideological orthodoxies of other similar associations.

At the same time, the ELS movement was also narrower than those organizations in other respects. It was, at least initially, almost entirely made up of faculty with appointments in elite law schools, rather than in the social and behavioral sciences. It was also -- again, initially -- almost exclusively positivist in its epistemological outlook, quantitative in its methodological approach, and policy-oriented in its substantive focus. In an influential early essay, Michael Heise (one of the founders of ELS) defined empirical legal studies as "the subset of empirical legal scholarship that uses statistical techniques and analyses" (Heise 2002, 821). Similarly, the editor's introduction to the first issue of *JELS* noted that "The central purpose of *JELS* is to add to knowledge of the legal system based on observation or empirical analysis, including experimental analysis," and that "*JELS*'s editorial board is committed to providing expert statistical evaluation of manuscripts with the goal of raising the level of statistical sophistication in empirical legal scholarship." While this emphasis has changed somewhat over time, the predominant methodological tools adopted by ELS's adherents remain quantitative (primarily statistical studies of observational data, but also laboratory and field experiments), and the central topics addressed by research appearing at CELS and in *JELS* are of a policy nature, albeit those familiar to a legal audience.

As a professional association, ELS began with the creation of *JELS* at Cornell University Law School, under the editorship of Professors Theodore Eisenberg, Jeffrey Rachlinski, Stewart Schwab, and Martin Wells. The first issue of *JELS* was published in 2004. Shortly thereafter, a group of organizers hosted the first CELS at the University of Texas - Austin in October, 2006. That conference drew more than two hundred participants, and was followed by annual meetings at NYU (2007) and Cornell (2008). Subsequent CELS gatherings were hosted by USC, Yale, Northwestern, Stanford, the University of Pennsylvania, and UC-Berkeley. In February of that same year, an affiliated group of scholars launched the Empirical Legal Studies Weblog. Soon after that initial conference, Eisenberg

and seven others founded SELS, an umbrella organization responsible for the administration of *JELS* and *CELS*. SELS was registered in New York as a federal 501(c)(3) organization in 2011. SELS membership is open; annual membership dues include a subscription to *JELS*.

ELS Today

In the decade or so since its creation, SELS has grown considerably in size and influence. SELS currently has nearly 500 individual members; attendance at the 2013 *CELS* was 350. Unlike other similar meetings, presentation of research at *CELS* is refereed and selective; the acceptance rate for papers submitted to the 2012 *CELS* conference was 28 percent. *JELS* is published quarterly, and is available at 3480 academic and other institutions worldwide via license, and at another 5200 institutions in the developing world via philanthropic efforts. *JELS* 2013 impact factor was 1.067; Eisenberg's analysis of the Washington and Lee Law Library Database also shows that *JELS* ranks "in the top five" among social science journals indexed, and "in the top five percent" of all refereed journals considered (2011, 1725 and Table 2). Eisenberg (2011, Table 1) also demonstrates that, at least during the first decade of the 21st century, the disciplinary affiliation of *JELS* authors was more disciplinarily diverse than either that of authors in *Law and Society Review* or the *Journal of Legal Studies*, two long-running and prominent journals with their roots in the social sciences.²

The development of ELS over the past two decades has paralleled (and, to varying degrees, propelled) a more general empirical turn among legal scholars. In 2006, the Association of American Law Schools took as the organizing theme of its annual meeting "Empirical Scholarship: What Should We Study, and How Should We Study It?" And as numerous scholars have noted, research with an empirical component is now commonplace in law reviews. In one recent example, the *Stanford Law Review* dedicated an issue to "The Empirical Revolution in Law;" in their introduction to that issue, Ho and Kramer show that the incidence of articles using the word "empirical" in that journal have risen from effectively none in the 1950s and 1960s to (on average) 60 percent of all research published there (Ho and Kramer 2013, Figure 1).

On the pedagogical front, courses on empirical methods are now a regular part of the curriculum at many law schools; a current (and very incomplete) list of major law schools offering such courses includes Chicago, Cornell, Harvard, Illinois, Northwestern, Stanford, UCLA, Vanderbilt, Washington University, and Yale. Law schools are also increasingly hiring faculty who hold both a J.D. and a Ph.D., and

² Based on the data reported in Eisenberg's (2011) Table 1, the 2004-2010 disciplinary Herfindahl index for *JELS* was 0.23; the corresponding statistics for *JLS* and *LSR* were 0.70 and 0.97, respectively.

in some instances have made prominent appointments of empirical scholars with a social science Ph.D. alone.

Disciplinary reactions to the rise of ELS -- and of empirical work on the law more generally -- have varied widely. Among conventional doctrinal legal scholars, responses have varied from enthusiasm through skepticism to outright disdain. The nature of the reactions track broadly with the degree of involvement with empirical work on the law; scholars focusing on areas of the law that are intrinsically amenable to empirical analysis (e.g., antitrust, election law, and so forth) have tended to be more receptive to such work than those working in less empirically-relevant areas (such as legal philosophy).

Among the social sciences, disciplinary reactions also generally correlated with the degree of involvement in ELS by members of that discipline. On the one hand, scholars of legal phenomena in political science, economics, and psychology -- those fields with substantial representation and involvement in the ELS community -- generally welcomed the new organization. While ELS's impact on some other fields (notably anthropology) has been minimal, perhaps the strongest reaction has been among sociologists, particularly those associated with the older "law and society" tradition of sociolegal research. As early as 2006, scholars in those areas wondered aloud whether ELS "will become a more complacent, insular, and technocratic endeavor" than the law and society movement that preceded it, and whether "the sociology of law, as we know it, may become even more marginal in the legal world than it is today" (Suchman 2006, 3; see also Suchman and Mertz 2010, 574-5). Chambliss characterized ELS as "a movement by a group of social-science- trained law professors...to build their reputations and careers by creating a market demand -- "empirical legal studies" -- and filling it" (2008, 31); this was possible because "scientism sells, especially when it is pitched by faculty from prestigious universities" (2008, 36). She recommends a policy of careful disengagement, where "epistemological, theoretical, and political debates" take place in other contexts, leaving ELS "to fight the common enemy of junk science and pseudo-research" (2008, 24).

These responses, both within and outside of the legal academy, are in many respects unsurprising. In addition to their conceptual distance from empirical work, doctrinal scholars in law schools are also the least likely to have the training (or the inclination to seek it) critically to evaluate empirical work. In the social sciences, the absence of any substantial "critical turn" in the fields of psychology, economics, or political science leaves little cause for epistemological disagreement with members of the ELS community. In contrast, sociologists of law and members of the law and society community have embraced that turn, and as a result are deeply -- and sometimes irredeemably -- skeptical about ELS's central tenets of positivism, quantification, and policy emphasis.

The Future of ELS

The institutionalization of ELS into the contemporary legal and social science academies is largely complete. In addition to the growth of SELS itself, empirical work on legal phenomena of the sort undertaken by ELS members constitutes large and in some cases dominant bodies of research on the law in economics, political science, psychology, and other fields. Empirical scholars are also increasingly integrated into legal education; conversely, legal academics with an empirical bent are finding an increasing willingness to collaborate on the part of scholars in the social sciences.

Research by members of the ELS community has also been notable for its impact. An early review by Eisenberg (2004) noted that ELS research received significant attention from mainstream media; for example, by the time of publication of its first issue, research findings appearing in *JELS* had been featured in the *New York Times*, the *Economist*, the *Financial Times*, the *Wall Street Journal*, and the *International Herald Tribune*. The movement has also had a visible impact in legal education. Beyond offering courses in empirical methods, ELS adherents have called for -- and in some cases prompted -- changes to the ways in which legal publications are edited (encouraging the adoption either of a system of peer review or of mandatory data disclosure and replication for empirical work appearing in student-edited law reviews).

The popular attention to and increasing emphasis of empirical work in law schools has in turn contributed to the growing use of quantitative data and analytics in the legal services industry, particularly among large U.S. law firms. It has also influenced the development of private-sector companies that provide analytical and empirical expertise to actors in the legal industry, including law firms, in-house legal departments, and law schools. While some of these changes undoubtedly reflect the larger move toward greater and more sophisticated use of data in business, their development in the notoriously slow-to-adapt legal services industry was arguably fostered by the visibility of quantitative, empirical research on legal issues, and on the increased exposure of young attorneys to such research during law school.

Beyond its intended impacts, ELS has also prompted developments in the larger field of social scientific work on law. One of these is the creation of what its adherents term "New Legal Realism" (NLR), which has been variously characterized as a parallel movement (Eisenberg 2011; Lempert 2013), a counterpoint (Suchman and Mertz 2010), or a competitor (Chambliss 2008, 24) to ELS. To the extent that it possesses a coherent outlook, NLR exalts "law in action," "bottom-up" approaches to the study of law, and interdisciplinarity. In part because of the hegemonic influence of the older sociological "law and society" tradition upon it, NLR is also infused with a progressive political agenda that distinguishes it from ELS. No similar countermovements have yet been observed

in economics, psychology, political science, or the other social sciences to which ELS bears a connection.

ELS itself has also evolved, at least partly in response to the issues raised by its critics. While the research presented at CELS and published in *JELS* is still predominantly positivist, quantitative, and policy-focused, its institutionalization has allowed the movement and its adherents to become broader and more self-reflective. The fraction of work employing qualitative and mixed methods that appears in *JELS* has increased since the journal's creation; while maintaining its disciplinary diversity, current issues also exhibit a wider range of methodological approaches. In recent years the movement's leaders have also welcomed critical reflection; for example, the aforementioned *Stanford Law Review* special issue is comprised of a series of essays by prominent non-ELS scholars responding to and critiquing bodies of work presented at the 2012 CELS.

At the same time, the central tenets of the movement remain fundamentally unchanged. The movement's greater acceptance of qualitative and historical methods is consistent with its continuing dedication to a positivist (rather than relativist/constructivist) epistemology. And the movement so far shows no particular inclination to try to "escape the pull of the policy audience" (Suchman and Mertz 2010, 575). This is also somewhat unsurprising; as Chambliss (2008) notes, the intersection of ELS's three central characteristics make it particularly well positioned to inform and contribute to policy making.

Going forward, a number of larger societal phenomena point to the continued viability and growth of ELS. In particular, the ever-increasing availability of digital data on sociolegal phenomena, the growing power of computers to visualize and analyze those data, and the rising prominence of legal academics in government and policy circles would all seem to be consistent with the ELS mandate. So too does the increasing demand for evidence-based and data-driven decision making in the public and private sectors. Together with the increasing demand for empirical research in the legal academy, these trends augur the ongoing vibrancy of ELS as a scholarly endeavor.

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Cross-References

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