

# RESPONSE

## In Defense of Empirical Legal Studies

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### INTRODUCTION

The empirical legal studies movement, or ELS, is positioned to provide an important scholarly impact. As noted ELS scholar Theodore Eisenberg once put it, “[a]cross a broad range of legal issues, empirical studies can inform policymakers and the public. Legally trained social scientists have unique opportunities to enhance description and understanding of the legal system.”<sup>1</sup> By all accounts, this influence is well underway. ELS scholarship has been present in law schools since at least the 1920s<sup>2</sup> and is on the rise in recent years,<sup>3</sup> with important empirical insights gained into legal subjects such as error rates in capital

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1. Theodore Eisenberg, *Why Do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741, 1746 (2004).

2. See, e.g., JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

3. See, e.g., Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141, 142 (2006) (arguing that “ELS recently and dramatically has expanded in law reviews, at conferences, and among leading law faculties.” (internal footnotes omitted)); Michael Heise, *An Empirical Analysis of Empirical Legal Scholarship Production, 1990-2009*, 2011 U. ILL. L. REV. 1739 (2011) (reporting a significant increase in empirical legal journals from 2000 to 2009, with the 2005 to 2009 period showing a particularly notable acceleration). Lee Epstein and Gary King would likely argue that this number is even greater, since, as they note, “a large fraction of legal scholarship makes at least some claims about the world based on observation or experience.” Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 3 (2002).

punishment convictions,<sup>4</sup> civil trial declining rates,<sup>5</sup> the influence of a judge's sex on individual and collegial decision making,<sup>6</sup> and the influence of the Solicitor General on the Supreme Court's decision making,<sup>7</sup> just to name a few. These types of projects all have at least one thing in common: their systematic, empirical nature permit them to draw conclusions about legal phenomena in a way that extends well beyond individual court decisions, personal biases, and anecdotes.

Notwithstanding this appreciable influence and growth in legal scholarship, ELS continues to face detractors from within the legal academy. Most recently, the *Buffalo Law Review* published Todd Pettys's eighty-three page critique<sup>8</sup> of Lee Epstein, Christopher Parker, and Jeffrey Segal's unpublished ELS work on the presence of in-group bias in the First Amendment decision making of U.S. Supreme Court justices.<sup>9</sup> Epstein et al. have already responded to and addressed Pettys's specific comments as they relate to their article, including incorporating a number of robustness checks into their data and statistical modeling.<sup>10</sup> However,

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4. See Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209 (2004).

5. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

6. Christina L. Boyd, Lee Epstein, & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010).

7. RYAN C. BLACK & RYAN J. OWENS, *THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT* (2012).

8. Todd E. Pettys, *Free Expression, In-Group Bias, and the Court's Conservatives: A Critique of the Epstein-Parker-Segal Study*, 63 BUFF. L. REV. 1 (2015).

9. See Lee Epstein, Christopher M. Parker & Jeffrey A. Segal, *Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment*, available at <http://epstein.wustl.edu/research/InGroupBias.pdf> (last visited Feb. 2, 2015) [hereinafter Epstein et al., *In-Group Bias*].

10. Lee Epstein, Christopher M. Parker & Jeffrey A. Segal, *A Response to a Critique of Our Study on In-Group Bias* (Sept. 30, 2014), <http://epstein.wustl.edu/research/InGroupBiasResponse.pdf>.

since Pettys's critique, and many others like it<sup>11</sup>—whether appearing in writing or in other forums like faculty colloquia—present significant tension with and misunderstandings about the core underpinnings of ELS, this also provides a broader opportunity to respond in defense of the ELS movement and the principles that distinguish its work from other legal scholarship.

### I. DOING ELS (WELL)

**“Empirical** /əmˈpɪrɪk(ə)l/ adjective. Based on, concerned with, or verifiable by observation or experience rather than theory or pure logic.”<sup>12</sup>

Empirical legal scholarship, as the above definition suggests, relies on objective observation and/or experience of some facet of the world.<sup>13</sup> The empirical evidence (data) resulting from this exercise can be quantitative (numerical) or qualitative (non-numerical),<sup>14</sup> and the resulting conclusions that we draw about the legal world are called *inferences*.<sup>15</sup> These data and the inferences drawn from them hold the potential to advance *scientific knowledge* of the law and legal actors, something that differs rather significantly

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11. See, e.g., C. Edwin Baker, *Viewpoint Diversity and Media Ownership*, 61 FED. COMM. L.J. 651 (2009); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1924-25 (2009); Carolyn Shapiro, *The Context of Ideology: Law, Politics, and Empirical Legal Scholarship*, 75 MO. L. REV. 79 (2010) [hereinafter Shapiro, *Context*].

12. NEW OXFORD AMERICAN DICTIONARY 568 (3d ed. 2010).

13. JANET BUTTOLPH JOHNSON & RICHARD A. JOSLYN, *POLITICAL SCIENCE RESEARCH METHODS I* (3d ed. 1995).

14. LEE EPSTEIN & ANDREW D. MARTIN, *AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH* 3 (2014). For ease of discussion, many scholars discussing ELS adopt a more narrow definition that focuses exclusively on statistical studies (i.e., quantitative). E.g., Heise, *supra* note 3, at 1741-42; Craig Allen Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession*, 30 WAKE FOREST L. REV. 347, 349 (1995). For purposes of this Response, it is not necessary to make this distinction between broader ELS that includes quantitative and qualitative and more narrow ELS focusing solely on the former.

15. Epstein & King, *supra* note 3, at 2. They define an inference as “the process of using the facts we know to learn about facts we do not know.” *Id.* at 29.

from “knowledge derived from myth, casual observation, intuition, belief, or common sense.”<sup>16</sup> This distinction is important and is something that I will return to momentarily.

Of course, not all ELS work is created equally. All ELS authors have a certain burden to meet in their empirical studies. Empirical scholarship that is not reliable—as measured through a variety of metrics—is no more likely to advance scientific knowledge than myths, common sense, or casual observation. Luckily, the metrics that help ensure good ELS work (and avoid pitfalls) have been carefully catalogued in recent scholarship and include things like utilizing measures that are both reliable and valid, accounting for alternative hypotheses, avoiding selection bias, documenting the data-generation process, and producing replicable results, just to name a few.<sup>17</sup>

Conducting quality ELS work that fulfills the above noted rules is unquestionably an onerous task. In his 1984 piece on empiricism in legal studies, David Trubek focused on two notable aspects to this exercise, both of which highlight the tension between ELS and non-ELS scholarship and thus are very relevant for the current discussion:

The first challenge is getting the right facts: We always must decide whether something we know about social life is central and representative or is merely peripheral and unusual. We must also separate what the observer wants to believe (bias) from the real facts. A second challenge is to set forth knowledge of the facts sparingly; we must reduce the information we receive about empirical reality to a comprehensible and testable set of propositions.<sup>18</sup>

Trubek’s two points dispense “best practices” for ELS scholars. At the same time, they also provide insight into why (well-conducted) ELS work can hold a monopoly in providing certain systematic, scientific details about the legal world, and they highlight the tension that exists between ELS and

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16. BUTTOLPH JOHNSON & JOSLYN, *supra* note 13, at 19.

17. See, e.g., EPSTEIN & MARTIN, *supra* note 14, at 47-49; JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 53-65 (8th ed. 2014); Epstein & King, *supra* note 3.

18. David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 *STAN. L. REV.* 575, 580 (1984).

non-ELS scholars when it comes to designing and carrying out ELS work. To see why this might be the case, further exploration of Trubek's two ELS challenges is merited.

The first is to avoid personal bias in scholarship. This is something that ELS and non-ELS researchers alike must be wary of. In the ELS world, this is known as *selection bias*—i.e., “[a] systematic tendency on the part of the sampling procedure to exclude one kind of person or another from the sample.”<sup>19</sup> In non-ELS scholarship, many authors are primarily focused on advancing and persuading others of their personal view (i.e., bias) on some aspect of the legal world. Goldsmith and Vermeule put it like this: “Doctrinal, interpretative, and normative legal scholarship seeks to persuade, which means that the lawyer’s style is often largely rhetorical.”<sup>20</sup> Inherently, those so inclined to this mode of scholarship are likely “to note only phenomena that reinforce their beliefs while ignoring or dismissing those that do not.”<sup>21</sup> Just as with selection bias in ELS work, then, conclusions yielding from persuasion-based, non-ELS work are almost assuredly not representative of nor generalizable to the legal phenomenon of interest. As Ho and Quinn argue, “Anecdotalism is unlikely to take us far.”<sup>22</sup> The point is that, as noted above, drawing conclusions from biased observation from sources like casual observation, personal belief or myths is quite distinct from developing scientific knowledge.<sup>23</sup> However, ELS (done well) permits this.

The second of Trubek's challenges is just as important and just as likely to be opposed by non-ELS scholars. At the heart of ELS data collection and measurement is taking complexities about the legal world and simplifying them through measurement. No matter how well it is done by ELS

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19. DAVID FREEDMAN, ROBERT PISANI & ROGER PURVES, *STATISTICS 335* (4th ed. 2007).

20. Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 155 (2002).

21. BUTTOLPH JOHNSON & JOSLYN, *supra* note 13, at 20.

22. Daniel E. Ho & Kevin M. Quinn, *The Role of Theory and Evidence in Media Regulation and Law: A Response to Baker and a Defense of Empirical Legal Studies*, 61 FED. COMM. L.J. 673, 698 (2008).

23. BUTTOLPH JOHNSON & JOSLYN, *supra* note 13, at 19.

scholars, the very nature of simplification and abstraction in data work can be an open invitation for criticism. We have probably all heard something like this in a law school faculty colloquium: “When I clerked for Judge X, he never did things the way you describe in your statistical analysis” or “ELS work classifies a complex ninety-page opinion in one line of a spreadsheet. You are missing important nuances about the law.”<sup>24</sup> Abelson makes the more general point that “[c]ritics are often freewheeling in their invention of counterexplanations: It could be this, it may be that, it’s merely such-and-so. Some types of counterexplanations are so vague as to be untestable—which gives the critic a substantial debating advantage.”<sup>25</sup>

In an effort to head off this sort of attack, how do we simplify the complex *well*? Epstein and King argue that “[t]he key is that we abstract the right dimensions for our purposes, and that we measure enough dimensions of each subject to capture all the parts that are essential to our research question.”<sup>26</sup> In aid of this, empiricists advise that measurements be both reliable (i.e., repeatedly reproducible) and valid (i.e., capture the intended concept).<sup>27</sup>

Given this discussion, let’s return to Pettys’s response to the Epstein et al. study. In it, Pettys criticizes the *validity* of the authors’ measurement of speaker ideology. He says:

[I]n earlier versions of their paper the authors revealed that they regarded “racist communication” and “racist behavior” as things that qualify a speaker for membership in conservative justices’

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24. This latter hypothetical criticism closely follows the words of Edwards & Livermore, *supra* note 11, at 1925, who note that “These topical or political measures used to describe cases will necessarily simplify a court’s holding and reduce what may be a complex and nuanced decision into an often uninformative binary.”

25. ROBERT P. ABELSON, *STATISTICS AS PRINCIPLED ARGUMENT* 14 (1995). Ho and Quinn argue that the critique of their ELS work on communications law is along these lines: “Baker’s argument effectively reduces to: you’ve missed something, yet I won’t tell you exactly what it is, because it’s not measurable.” Ho & Quinn, *supra* note 22, at 705.

26. Epstein & King, *supra* note 3, at 81.

27. See, e.g., MONAHAN & WALKER, *supra* note 17, at 61; Epstein & King, *supra* note 3.

ideological in-group. . . . In my own judgment, the authors' linkage between racism and conservative justices' ideological in-group is quite stunning.<sup>28</sup>

Does the fact that Pettys, in his "own judgment," finds this coding to be "stunning" make it an invalid measure? Of course not. Instead, we must assess the validity of the measure—i.e., whether it captures the intended concepts of the speakers' ideologies, the justices' ideologies, and their intersection—from an objective standpoint.

To do this, we must examine how Epstein et al. determined whether any speaker is assigned to a justice's in-group. As their paper clarifies, membership in an in-group is determined by whether there is an overlap in (1) the justice's ideology, and (2) the speaker's ideology.<sup>29</sup> When both the speaker and the justice are liberal or both the speaker and the justice are conservative, the two can be grouped together, thus making that speaker in the justice's in-group.<sup>30</sup> When their ideologies do not line up—i.e., when one is liberal and the other is conservative—then there is no in-group membership.<sup>31</sup>

The next piece to this puzzle is to assess how each of these two key concepts were themselves measured. The first of these, the ideology of the justice, is measured using the Segal-Cover scores, a measurement that ranges continuously from 0 (most conservative) to 1 (most liberal).<sup>32</sup> For further simplification of what constitutes an in-group within the paper, the Epstein et al. discussion frequently further informally breaks down this measurement to simply

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28. Pettys, *supra* note 8, at 78-79. It is worth noting that the "racism" language that Pettys refers to was in an old version of this (still unpublished) Epstein et al. paper. The updated language refers to pro-life advocates. While Pettys criticism may depend on the presence of the "racism" description, the response that I detail below on assessing the validity of this measure does not.

29. See Epstein et al., *In-Group Bias*, *supra* note 9, at 6-7.

30. See *id.*

31. *Id.*

32. See Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559 (1989). As Epstein et al. note, their results are robust to an alternative specification of ideology known as the Martin-Quinn score. Epstein et al., *In-Group Bias*, *supra* note 9, at n.14.

conservative (i.e., all justices ranging in ideology value from 0 to 0.5) and liberal (i.e., all justices ranging in ideology value from 0.5 to 1).<sup>33</sup> The second, the ideology of the speaker, is a fixed, dichotomous variable measuring whether the speaker in each observation is liberal (coded as 1) or conservative (coded as 0) as determined by the subject of their speech.<sup>34</sup>

In each case, these measures are abstractions from the complex. Justice Scalia is measured as a conservative justice and so is Justice Thomas. Their voting behavior on the Court may be similar but it is not, of course, identical.<sup>35</sup> A racist speaker, a pro-life speaker, and an anti-gay rights speaker all get classified as conservative speakers. Some might be radically conservative and others only moderately conservative, but when we identify their underlying views and statements regarding legal concepts like the Equal Protection and Due Process Clauses, each certainly falls to the right on a left-right spectrum measuring speaker ideologies. Of note, this measurement is consistent with a large body of ELS work classifying *things* and *people* dichotomously as either liberal or conservative.<sup>36</sup> While some

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33. Epstein et al., *In-Group Bias*, *supra* note 9, at 8-14.

34. *Id.* at 10.

35. Interestingly, the Segal-Cover scores, which are highly regarded measures of justice ideology coded from pre-confirmation newspaper coverage of nominees' positions, also code Justices Souter and Stevens as conservative. Segal & Cover, *supra* note 32, at 560. Pettys is apparently fine with this, noting that "the Segal-Cover scores on which the study's authors relied provide a plausible basis for carrying out that task." Pettys, *supra* note 8, at 81. As Court watchers know, these justices were anything but conservative during their time on the Court. But this has not served as an indictment of these scores. Rather, many recognize that most of the justices' Segal-Cover scores have been very informative, and those scores assigned to Souter and Stevens simply represent the media's missing and/or inaccurate information about these nominees from the time that the coded information was published (i.e., before confirmation).

36. See e.g., Boyd et al., *supra* note 6, at 395-97, 401-04; Sue Davis et al., *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 129, 132 (1993); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998). Along the lines of Pettys, other scholars have criticized this type of measurement for its oversimplification. E.g., Shapiro, *Context*, *supra* note 11, at 91 (arguing that "A binary, liberal-versus-conservative coding system masks all kinds of subtleties: some cases are more liberal (or more conservative) than others.").



information about degrees of conservatism or liberalism gets lost in these measures, they do *validly* capture speaker ideology. Conservative speakers of all varieties will be coded as conservative speakers, and the diverse set of liberal speakers, from eco-terrorists, to war protesters, to affirmative action proponents, will all be coded as liberal speakers.

As empirical methods advance over time, it may one day be possible to more precisely measure speakers' ideologies on a continuous scale rather than through a dichotomous measure. After all, it was not that long ago that Segal and Cover first released their continuous measure of justice ideology. The introduction of a continuous speaker ideology variable, should it ever happen, will not likely serve to indict the Epstein et al. measure but rather will refine our ability to empirically capture the complex. Ultimately, "[a]ll measurement schemes are susceptible to the critique of oversimplification."<sup>37</sup> By assessing measure reliability and validity, though, scholarship can "set forth knowledge of the facts sparingly"<sup>38</sup> and simplify the complicated in ways that can hopefully convince even the most ardent of doctrinal and normative legal scholars of the merits of ELS work.<sup>39</sup>

## II. ELS TODAY

The opportunities for legal scholars to conduct ELS research are greater today than ever before. Much of this revolves around data availability and accessibility that permits scholars to test their theories without having to collect much or any new data on the subject—a prospect that

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37. EPSTEIN & MARTIN, *supra* note 14, at 47.

38. Trubek, *supra* note 18, at 580.

39. There will always be readers who will not be convinced by the measures and data used no matter how much due diligence ELS researchers do in simplifying the complex. Related to Trubek's first point on bias, these are readers who know the outcome that they want and simply will not believe any other outcome. In their mind, the data are always going to have problems, the coding is never going to represent reality, there will always be exceptions that do not fit the coding rule, etc. Ultimately, the reason that these readers remain unbelievers may well have to do with their own biases rather than the merits of the ELS work at hand.

undoubtedly served as a barrier of entry for previous would-be ELS researchers given the time, expense, and difficulty of collecting good, original data.<sup>40</sup>

Table 1 provides a list of many useful ELS databases that are available online for scholarly use. The list is meant to be a sample rather than exhaustive—there are surely many others that are also of equal quality and value.<sup>41</sup> Each of these databases represents a treasure trove of usefulness to scholars, both past and future.

Data Set	Contents (& Archival Location)
Supreme Court Database (AKA “Spaeth Data”)	Coding of each case heard and justice vote recorded from the 1946-2013 terms of the U.S. Supreme Court. Updated yearly. ( <a href="http://scdb.wustl.edu">http://scdb.wustl.edu</a> )
U.S. Courts of Appeals Database and Updates (AKA “Songer Data”)	1925-2002 random sample of published decisions, with voting coded at the case and individual judge level. ( <a href="http://artsandsciences.sc.edu/poli/juri/appct.htm">http://artsandsciences.sc.edu/poli/juri/appct.htm</a> )
Federal Court Cases: Integrated Data Bases	Filing and termination data on federal trial and appellate court terminated and pending civil and criminal cases. ( <a href="http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/72">http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/72</a> )
U.S. Sentencing Commission Data	Individual offender-level sentences, 2002-2013. ( <a href="http://www.ussc.gov/research-and-publications/commission-datafiles">http://www.ussc.gov/research-and-publications/commission-datafiles</a> )
NBER Patent Data Project	U.S. Patent data for 1976-2006. ( <a href="https://sites.google.com/site/patentdataprotect/Home">https://sites.google.com/site/patentdataprotect/Home</a> )
EEOC Litigation Project	Sample of EEOC-brought litigation (e.g., motions, consent decrees, case events, case outcomes) in the federal district courts from 1997-2006. ( <a href="http://eeoclitigation.wustl.edu">http://eeoclitigation.wustl.edu</a> )
UCLA-LoPucki Bankruptcy Research Database	Updated monthly, these data include approximately two hundred variables on all bankruptcies filed by large, public companies. ( <a href="http://lopucki.law.ucla.edu">http://lopucki.law.ucla.edu</a> )

40. See, e.g., Heise, *supra* note 3, at 1747.

41. The list contents likely over represent databases produced by political scientists, something that surely reflects my training and research.

Judicial Elections Data Initiative: U.S. State Courts	Election results from U.S. state courts of last resort from 1990 to 2010, with more limited data available on intermediate appellate courts and general jurisdiction trial courts. ( <a href="http://jedi.wustl.edu/data.php">http://jedi.wustl.edu/data.php</a> )
State Supreme Court Data Project	Data on state supreme court decisions for 1995-1998 organized at both the court level and the justice level. ( <a href="http://www.ruf.rice.edu/~pbrace/statecourt/index.html">http://www.ruf.rice.edu/~pbrace/statecourt/index.html</a> )
Judicial Elections Data Initiative: Bolivia Dataset	2011 Bolivia judicial election results. ( <a href="http://jedi.wustl.edu/data-bolivia-dataset.php">http://jedi.wustl.edu/data-bolivia-dataset.php</a> )
Judicial Common Space Scores	Ideology scores for Federal Article III judges and justices. ( <a href="http://epstein.wustl.edu/research/JCS.html">http://epstein.wustl.edu/research/JCS.html</a> ) & ( <a href="http://cLboyd.net/ideology">http://cLboyd.net/ideology</a> )
Segal-Cover Scores	Perceived ideology and qualifications scores for U.S. Supreme Court justices, 1937-2012. ( <a href="http://www.stonybrook.edu/commcms/polisci/jsegal/QualTable.pdf">http://www.stonybrook.edu/commcms/polisci/jsegal/QualTable.pdf</a> )
Martin-Quinn Scores	Ideology scores for U.S. Supreme Court justices, 1937-2013. ( <a href="http://mqscores.berkeley.edu">http://mqscores.berkeley.edu</a> )
International Criminal Tribunals Database	Individual trial data on International Criminal Tribunals for the Former Yugoslavia and Rwanda and the Special Court for Sierra Leone. ( <a href="http://www.psci.unt.edu/~meernik/International%20Criminal%20Tribunals%20Website.htm">http://www.psci.unt.edu/~meernik/International%20Criminal%20Tribunals%20Website.htm</a> )
Lower Federal Court Confirmation Database	Lower federal court judicial nominations data, 1977-2004. ( <a href="http://cdp.binghamton.edu/lfcd.htm">http://cdp.binghamton.edu/lfcd.htm</a> )
The U.S. Supreme Court Amicus Curiae Database	1946-2001 term amicus curiae briefs filed in U.S. Supreme Court orally argued cases. ( <a href="http://www.psci.unt.edu/~pmcollins/data.htm">http://www.psci.unt.edu/~pmcollins/data.htm</a> )
High Courts Judicial Database	Coded decisions from national high courts in Australia, Canada, India, Namibia, Philippines, South Africa, Tanzania, United Kingdom, United States, Zambia, and Zimbabwe. ( <a href="http://artsandsciences.sc.edu/poli/juri/highcts.htm">http://artsandsciences.sc.edu/poli/juri/highcts.htm</a> )

Supreme Court Citation Network Data	Citation metrics from majority opinions in the U.S. Reports from 1754 to 2002. ( <a href="http://jhflower.ucsd.edu/judicial.htm">http://jhflower.ucsd.edu/judicial.htm</a> )
Biographical Directory of Federal Judges	Confirmation and background variables on all Federal Article III judges and justices, 1789 to present. ( <a href="http://www.fjc.gov/history/home.nsf/page/judges.html">http://www.fjc.gov/history/home.nsf/page/judges.html</a> )
The Supreme Court Opinion Writing Database	Data on U.S. Supreme Court justices' internal memos and opinion drafts circulated during the Burger Court. ( <a href="http://supremecourttopinions.wustl.edu">http://supremecourttopinions.wustl.edu</a> )
Empirical Study of Religious Liberty Decisions Study Data	Establishment and Free Exercise Clause lower federal court cases, 1986-2005. ( <a href="http://courseweb.stthomas.edu/gcsisk/religion.study.data/cover.html">http://courseweb.stthomas.edu/gcsisk/religion.study.data/cover.html</a> )

Table 1: Selected ELS Data Available Online

Additional comment on one of these databases, the Supreme Court Database, is warranted—both because of its remarkable scope and modern accessibility, and because it is the subject of attack in Pettys's recent work appearing in the pages of the *Buffalo Law Review*.<sup>42</sup> Harold Spaeth's Supreme Court Database began in the 1980s<sup>43</sup> and has been available for download online for years. Only recently, however, have the data been fully accessible to a broad range of interested parties, including non-empirical scholars and laypeople via the web form linked above in Table 1.<sup>44</sup> The coding rules are documented in great detail online, thereby satisfying the

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42. Pettys, *supra* note 8.

43. Harold J. Spaeth & Jeffrey A. Segal, *The U.S. Supreme Court Judicial Data Base: Providing New Insights into the Court*, 83 JUDICATURE 228, 228 (2000).

44. Because of its accessibility to non-empiricists, I use the data in an undergraduate course on the Supreme Court. The same could easily be done in a law school class. Most of the students in my classes have little to no empirical research experience, but with the database, these students are easily able to analyze a range of research questions on the Court—from “how often do justices write dissents?” to “how does Justice Ginsburg vote in taxation cases?” to “how has the Court's treatment of the U.S. as a petitioner changed over time?”

ELS call for data to have well-defined coding schemes and utilize codebooks.<sup>45</sup>

In political science alone, the reliance on the Supreme Court Database for empirical projects on the Court has been significant. Benesh notes that between 1991-2000, nearly eighty-five percent of the empirical, data-driven studies on the Supreme Court appearing in the top two political science journals utilized the Supreme Court database.<sup>46</sup> These numbers are surely higher today, particularly when one includes law journals in the calculation of database use.

Despite its popularity of use in scholarship, a handful of recent studies have criticized the Supreme Court database. For example, Shapiro debates the database's coding of the "issue" variable. Within the database, "A case's issue characterizes it from a public policy standpoint based on the Court's own statements of what the case is about."<sup>47</sup> The "decision direction" variable (e.g., conservative or liberal or unidentified) is then coded within the baseline of the coded issue. The essence of Shapiro's argument is that rather than identifying a singular "issue" based on public policy considerations, a preferable coding scheme would be to identify the series of "subissues" in a case and then code "decision direction" for each.<sup>48</sup> When this is done, she says, many cases ultimately have "mixed" overall decision directions rather than "liberal" or "conservative."<sup>49</sup> There is nothing wrong with Shapiro's more nuanced approach, assuming coders can objectively and consistently carry it out,<sup>50</sup> but it is capturing something distinct from Spaeth's

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45. EPSTEIN & MARTIN, *supra* note 14, at 97-112.

46. Sara C. Benesh, *Harold J. Spaeth: The Supreme Court Computer*, in *THE PIONEERS OF JUDICIAL BEHAVIOR* 116, 131 (Nancy Maveety ed., 2006).

47. Spaeth & Segal, *supra* note 43, at 233.

48. Shapiro, *Context*, *supra* note 11, at 98-102.

49. *See id.*

50. Shapiro also admits that "the more nuanced and detailed a coding regime for case law, the more likely it is to involve subjective determinations." Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 *HASTINGS L.J.* 477, 528 (2009).

“issue” variable.<sup>51</sup> While Pettys refers to debates like these as “problems that reportedly trouble the database”<sup>52</sup> and bases a number of pages of his discussion of the Epstein et al. piece on the topic, his and/or Shapiro’s opinions on the level of analysis that the “issue” and “decision direction” variables should be coded compared to what Spaeth does in the data amount to something far from incendiary.

None of this is to say that the Supreme Court Database, like all data created by others, does not have its limitations. It does. However, because the data include citations to the source opinions, the data can be fully coded and recoded by those interested in applying their own rules or adapting the data in alternative ways. Indeed, Spaeth, the database’s original architect, “has always had as a major goal that other scholars be able to replicate any of the work he has done or, indeed, change the coding as they see fit.”<sup>53</sup> As such, responsible and careful researchers should be well positioned to intelligently use the data.

In addition to the large number of publicly available ELS datasets like the Supreme Court database and the others listed in Table 1, it is often also more feasible today than in the past for ELS scholars to collect their own original data. For example, in my own empirical research area, federal district courts, I can electronically collect and code docket sheets, complaints, motions, orders, and opinions for cases in all ninety-four courts in my samples of interest.<sup>54</sup> Just ten or fifteen years ago, such a research design would require trips to many courthouses or archival facilities and a lot of quarters for making copies.

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51. The Supreme Court database separately captures the legal provision(s) in a case, with multiple per case frequently coded. Relevant to Shapiro, though, “decision direction” is not coded based on these legal provisions. *See, e.g.*, Spaeth & Segal, *supra* note 43, at 233.

52. Pettys, *supra* note 8, at 75.

53. Benesh, *supra* note 46, at 138.

54. *See, e.g.*, Christina L. Boyd, David A. Hoffman, Zoran Obradovic, & Kosta Ristovski, *Building a Taxonomy of Litigation: Clusters of Causes of Action in Federal Complaints*, 10 J. EMPIRICAL LEGAL STUD. 253 (2013); Christina L. Boyd & David A. Hoffman, *Disputing Limited Liability*, 104 NW. U. L. REV. 853 (2010); Christina L. Boyd, *She’ll Settle It?*, 1 J. LAW & COURTS 193 (2013).

## CONCLUSION

This piece begins and ends on the same note: ELS scholarship holds great potential for influencing the legal world. Empirical methods are not the only way to study and research the law, but they do provide an invaluable way. “Empirical scholarship speaks directly to those who are most profoundly involved in our legal institutions, by furnishing the profession with a compass in our sometimes foggy legal waters.”<sup>55</sup>

But the onus is on ELS scholars to convince others—from non-ELS colleagues, to judges, to policy makers, and beyond—to pay heed to our research. This can be aided by following good practices in the design and implementation of our ELS work,<sup>56</sup> effectively communicating our empirical results to non-ELS audiences,<sup>57</sup> having conversations with our colleagues about ELS’ quests for things like inferences and scientific knowledge, and patiently explaining to those colleagues how ELS measurement often rests on the art of simplifying the complex. We can also help our cause by taking opportunities to coauthor with others who hold complementary legal or social science expertise to us and even training judges, our students, and ourselves how to use, interpret, and appreciate data.<sup>58</sup> As Clermont and Eisenberg once put it so eloquently, “[d]ata are good”<sup>59</sup> and so is ELS.

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55. Nard, *supra* note 14, at 349.

56. *See supra* Part II.

57. *See, e.g.*, Lee Epstein, Andrew D. Martin, & Christina L. Boyd, *On the Effective Communication of the Results of Empirical Studies, Part II*, 60 VAND. L. REV. 801 (2007); Lee Epstein, Andrew D. Martin, & Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811 (2006).

58. *See* EPSTEIN & MARTIN, *supra* note 14.

59. Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 154 (2002).