

# LAW AND THE SOCIAL SCIENCES

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There are a large number of “law-ands” around: law and philosophy, law and history, law and sociology, law and society, law and critical race theory. A partial explanation for the development of these “law-ands” is that contemplating the law by itself is pretty boring. Just as the International House of Pancakes would probably not long survive in the competitive marketplace if it just served plain, unadulterated pancakes with no syrup or other condiments, the profession of teaching law would probably (without serious salary adjustments) fail to attract bright, ambitious people if it offered only a life of writing comprehensive but unimaginative treatises and trying to describe legal rules to a bunch of students in daily lectures.

Luckily, however, teaching law involves more than articulating and relaying a set of rules to a passive audience. Those of us who do it indulge our interest in issues such as where the rules come from, what distributive effects the rules have, whether the current rules are doing what they are supposed to be doing, and how different rules would alter the way people behave in various circumstances. In order to examine these issues critically, legal academics must turn to disciplines outside of the law itself. For instance, to study the distributive impact of legal rules, we might turn to economics; to describe the effects of legal rules on race relations, we might turn to critical race theory or to sociology.

Despite the fact that all “law-ands” derive from the natural desire of legal academics to analyze and understand—rather than simply to be aware of—the rules, I want to argue that not all “law-ands” are equal. In doing so, however, I want to challenge the hierarchical distinction between interdisciplinary approaches made earlier by Bob Ellickson,<sup>1</sup> which regards law

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1. See Robert C. Ellickson, *The Market for “Law-And” Scholarship*, 21 HARV. J.L. & PUB. POL’Y 157.

and economics as qualitatively different and better than all the others because of its singularly pervasive credibility. Distinguishing between the various "law-ands" on the basis of their relative durability and appeal is not the best way to go about the task because the differences between many of these interdisciplinary approaches—namely those that incorporate social science methodologies—are quite superficial.<sup>2</sup>

A better approach to distinguishing among the various "law-ands" delineates between those that utilize social science methodology and those that do not. Law and economics is the most widespread<sup>3</sup> and unitary of the interdisciplinary approaches to law that invoke social science methodology, but it may not be the most important<sup>4</sup> or interesting. Other approaches include law and statistics (which may be the most important), law and psychology, law and positive political theory, and, of course, law and sociology.

What distinguishes these law and social science approaches from other approaches that rely, for instance, on feminism, critical race theory, or critical legal studies? The most important and fundamental distinction is that the law and social sciences seek to develop testable hypotheses, assertions about the law that are empirically refutable. In short, these approaches are unique in not assuming their own conclusions. In this way, the law and social science approaches maintain a certain amount of humility. Their proponents admit quite explicitly that, if one examines their methodologies, their theories can be proved wrong.

Another distinction between the law and social science approaches and the other "law-ands" is their neutrality. Law and the social sciences provide consequential analyses. Practitioners in these disciplines ask: "If X happens, what will be the result of having a particular law, abolishing a particular law, or amending

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2. See, e.g., JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 34 (3d ed. 1994) ("It is important not to take distinctions among the social sciences too seriously, for the degree of overlap among them is great. . . . Often, distinctions among the social sciences are purely arbitrary. . . .").

3. See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 166 (1993) (observing that "[l]aw and economics is today a permanent, institutionalized feature of American legal education" and a movement with "dominant," if not "unrivaled," influence in many fields of legal scholarship).

4. *But see id.*

a particular law? What will be the allocational consequences, for example?" All interdisciplinary approaches to the law are, of course, susceptible to corruption and the insinuation of personal values.<sup>5</sup> The scientific method inherent in law and the social sciences offers a way of attempting to transcend mere personal values by producing empirically testable hypotheses that personal values can neither prove nor conceal. I want to emphasize that I am not arguing that the law and social science approaches always succeed in producing testable hypotheses with which we can transcend simple personal values; instead, I am arguing that doing so is the unique objective of these approaches. This objective provides an indispensable criterion by which we can distinguish good and bad analyses of the law.

The final distinction between law and social sciences and other interdisciplinary approaches is that law and social sciences are qualitatively better at achieving any particular set of aims that one might have within the law. Regardless of what one is trying to accomplish with legal rules, the social sciences provide a superior framework simply because, done well, they communicate to people who are nonbelievers.<sup>6</sup> An audience is more likely to be persuaded by an assertion that it is free but ultimately unable to disprove empirically than by an assertion that it can reject out-of-hand as founded on unacceptable personal values.

The greater persuasiveness of objectively disprovable assertions is intuitively obvious. Suppose that you are a defense lawyer in South Carolina and that you have a black client on death row. Naturally, you would want to avert your client's execution. To do so, you are likely to attempt to challenge the legality of the white prosecutor's decision to seek the death penalty for your client.

Are you going to call Derrick Bell or perhaps someone else from the critical race theory movement in order to save your

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5. See, e.g., Jack M. Balkin, *Too Good to Be True: The Positive Economic Theory of Law*, 87 COLUM. L. REV. 1447, 1448-59 (1987) (reviewing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987)) (arguing that the authors' ostensibly descriptive economic thesis incorporates value-laden assumptions).

6. See, e.g., NOREEN L. CHANNELS, *SOCIAL SCIENCE METHODS IN THE LEGAL PROCESS* 13 (1985) (suggesting that the singular persuasiveness of social science is not lost on courts, which cite social science "to add legitimacy to [their] decision[s] and to enhance the image of the decision makers").

client from the electric chair? I think most defense attorneys would rather call upon my colleague at Cornell, Ted Eisenberg, requesting a statistical comparison of the prosecutor's decisions to seek the death penalty in cases with white defendants and in cases with black defendants.<sup>7</sup> This is simply a crude example of the point that Bob Ellickson<sup>8</sup> has made about using market tests to sort out the various interdisciplinary approaches to the law. As the defense attorney in this case, most of us would rely on the empirical mode of argument that we know is generally most persuasive.

Similarly, if you want to criticize the current state of family law as insufficiently protective of the reproductive or economic rights of women, the social sciences would probably provide a more useful platform than feminist philosophy. Radical feminists may argue that treating women as bearers and mothers of children merely perpetuates the subjugation of women by men, but of what value is this argument to you as an advocate confronting an audience that does not agree? You can develop a similar criticism of family law using economics. Take, for example, Lloyd Cohen's article in the *Journal of Legal Studies*, using an economic approach to reach a result perfectly consistent with feminist perspectives on marriage and on the exploitation of women in the marital context.<sup>9</sup> Nonbelievers can find this empirically testable argument credible because it is more than simply conclusory.

There is another way in which law and social sciences tend to be more persuasive than other interdisciplinary approaches. The social sciences require that a theory be precisely focused, thereby ensuring its relevance to those lines of inquiry to which

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7. For a recent example of Professor Eisenberg's statistical analysis of other factors that may influence the imposition of the death penalty, see Theodore Eisenberg et al., *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 *BUFF. L. REV.* 339, 341 (1996) (finding that most jurors on capital sentencing panels accept the responsibility that inheres in their role in imposing the death sentence but nevertheless doubt that most convicts who receive a capital sentence will be executed).

8. See Ellickson, *supra* note 1.

9. See Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; Or, "I Gave Him the Best Years of My Life"*, 16 *J. LEGAL STUD.* 267, 268 (1987) (observing that the present value of a wife's human capital contribution to a marriage declines faster and earlier than that of a husband's, arguing that this disparate rate of decline induces the husband to seek divorce, and examining various possible legal innovations that might ameliorate this result).

the theory by its own terms applies. Theories in law and the social sciences are, in other words, more resistant to haphazardly overbroad applications and the loss of credibility that accompanies them. This is because particular facts—rather than vague generalizations—will validate or disprove these theories; theorists in law and social sciences thus have real incentives to tailor their assertions to those facts that the theorists believe will actually bear out their analyses.

Interdisciplinary approaches to the law that do not rely on social sciences do not benefit from this self-discipline. Consider critical race theory's arguments on the merit system. Critical race scholars like Richard Delgado argue explicitly for quotas in law school faculty hiring.<sup>10</sup> Is there any basis for attacking law school hiring practices, however, or are these arguments misdirected efforts that may well undermine the movement's arguments in more relevant areas? There may be empirically verifiable examples of racially biased hiring practices among some law school faculties somewhere, but data from the annual reports of the Association of American Law Schools (AALS) belie the assumption that minority applicants are less likely than white applicants to secure a job teaching law. From 1991 to 1994, between one-fifth and one-fourth of newly hired law teachers were minorities.<sup>11</sup> Moreover, minority applicants who had themselves listed in the AALS Faculty Appointments Register were much more likely than white applicants to obtain teaching jobs. Over twenty percent of the minority applicants listed in the Register for the 1991-1992 academic year found jobs, whereas fewer than thirteen percent of nonminority applicants for the same period did.<sup>12</sup> The success of minority applicants in the formal recruiting process during this period was not offset, as one might suspect, by white applicants' greater success outside of that process—in the so-called "old boys'

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10. See, e.g., Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357, 1369-78 (1992) (advocating the substitution of diversity for merit as a criterion in law school faculty hiring); see also Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (1990) (advocating affirmative action in law schools).

11. See Richard A. White, *The Gender and Minority Composition of New Law Teachers and AALS Faculty Appointments Register Candidates*, 44 J. LEGAL EDUC. 424, 425 (1994). White also notes that minority applicants have been even more successful in securing assistant and associate professorships. See *id.* at 426.

12. See *id.* at 429, tbl.4. Minorities were more successful than nonminorities in being recruited off of the Register in the preceding and following years, as well. See *id.*

network." In fact, the percentage of successful minority applicants hired outside the formal AALS recruiting process was greater than the percentage of successful nonminority applicants.<sup>13</sup>

This evidence of the success of minority applicants in finding jobs teaching law does not, of course, demonstrate that the critical race theorists like Richard Delgado are wrong when they assert that there is widespread racism in society or that hiring quotas may be a desirable remedy for it. The evidence does suggest, however, that law school faculties may not be biased against minorities in hiring new law teachers and thus that the arguments often deployed by critical race theorists to support quotas may not be credibly deployed in this particular area. The advantage of a social science theory about merit and hiring practices as opposed to a critical race theory about the same thing is that the former does not invite dubious and hence potentially counterproductive generalizations from one area of employment to another. In general, the more precise focus of well-articulated theories in law and social sciences renders them more tenable and persuasive than theories from other "law-ands" exactly because these social science theories have an explicit relevance to the areas to which their proponents seek to apply them.

Regardless of your political agenda, if you want to lead a richer intellectual life, understand the genesis and effects of legal rules, and persuade others to support legal interpretations or reforms, relying on economics or some other social science methodology is a good way to go. Naturally, law and economics—like other law and social sciences—has its detractors. For example, Tony Kronman, the Dean of Yale Law School, has written a book about the legal profession in which he explicitly argues that the ascendancy of law and economics has contributed to pathological conditions in current legal education and practice.<sup>14</sup> Kronman's argument, however, does not attack the proposition that law and social sciences are uniquely useful and instructive approaches among the panoply of modern "law-ands." Instead, Kronman's argument seems to

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13. *See id.* at 433.

14. *See* KRONMAN, *supra* note 3, at 225-381.

emphasize that no single interdisciplinary approach can be appropriate for every analysis of the law. We might formulate the best normative view of the role of the lawyer if we considered philosophy extensively and disregarded economics entirely. I gladly concede this possibility. It is exactly because law and economics is not the best approach for every field of inquiry that I have argued that the qualitative distinction among "law-ands" must not simply track the arbitrary lines between various social science disciplines. Law and economics is not better than law and psychology simply because proponents of powerful theories often align themselves within the law and economics movement. We should question, rather than reinforce, the pervasiveness of law and economics as the primary interdisciplinary approach to the law. On this, Dean Kronman and I agree.

Although law and economics is not the best interdisciplinary approach for every field of legal inquiry and thus may be considered unduly pervasive, I have tried to argue that, for most purposes of legal analysis, some form of law and social science provides the best approach. The nature of the scientific method, upon which each law-and-social-science theory is based, simply ensures a qualitative advantage over other "law-ands" for the specific purpose of analyzing legal rules. Because they are empirically disprovable, value-neutral, and factually relevant, the well-articulated theories in law and social sciences are the most persuasive and informative of the interdisciplinary approaches to the law.

