

## Editor’s Introduction

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In this issue, *Law & Social Inquiry* presents yet another of its “From the Trenches and Towers” exchanges, in which we encourage legal scholars and practitioners to discuss problems that bridge the realms of legal theory, law practice, and the empirical study of law and society. Previous “Trenches and Towers” features have focused on issues such as plea bargaining and legal ethics from multiple perspectives. The exchange in this issue centers on a proposal making “The Case for an In-Depth Study of the American Law Institute” by Alex Elson, member of the Illinois Bar and a Life Member of the American Law Institute.<sup>1</sup> Probably unbeknownst to the majority of the American public, the American Law Institute (“ALI”) has arguably been enormously influential in the development of law in the United States. It has had impact both through its work systematizing and summarizing the development of common law doctrines by courts—substantial publications known as the “Restatements,” frequently cited and used by courts—and through its proposals for model legislation or uniform laws, which have often been widely adopted in whole or part by state legislatures. In light of the considerable influence the ALI has had, and is continuing to have, on both legislation and on courts’ decisions, Elson expresses concern about charges that the ALI has become unduly politicized—subject to pressure from well-funded and organized interest groups. Elson calls for empirical study of the ALI in order to shed more light on this important question.

Four commentators respond to Elson’s proposal. Geoffrey Hazard, the current director of the ALI, defends the decision of the ALI Council not to

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1. We would like to express our appreciation to Jack Heinz (American Bar Foundation, Northwestern University Law School), for his help in initiating, planning and soliciting parts of this “Trenches and Towers” exchange.

conduct an empirical study of the Institute, arguing that the fundamental issue raised by Elson—that of the basic integrity of the American Law Institute as an institution—is one “that does not admit of a ‘scientific’ answer, including an answer mediated through social science.” Professor Nicholas Zeppos, of the Vanderbilt University School of Law, provides a similarly pessimistic response to Mr. Elson’s article, although for somewhat different reasons. In Zeppos’ opinion, whether “the ALI eventually responds to Elson’s plea is to a large extent irrelevant,” because ultimately the ALI, like legislatures, is fundamentally responsive to external forces. Zeppos points especially to changes in the “dominant public and scholarly discourse” since the early days of the ALI that have shaken “public trust in legislatures and expertise”—as well as to shifts in the structure of the legal profession itself.<sup>2</sup> Zeppos proposes that in time such external forces will be the primary source of pressure for ALI accountability, rather than internal critique and study.

The remaining two commentators provide somewhat more optimistic assessments of the potential benefits of the study Elson proposes. Professor Marshall Shapo of Northwestern University Law School, also a member of the ALI for many years, writes approvingly of Elson’s proposal, voicing concern about the Institute’s ability to “have it both ways on politically weighty matters” by claiming that it is “interpreting or reporting” the law in a relatively detached manner when it also “increasingly views itself as making law.” Shapo proposes a number of ways in which the ALI could provide information to researchers that would permit the Institute to “conduct more of its business in the sunlight.” Professor Herbert Kritzer, a political scientist at the University of Wisconsin at Madison with an established track record of empirical work in the law-and-society tradition, reflects on framing appropriate research questions and designing studies to address the issues raised by Elson. In his response, Elson reiterates his call for an independent empirical study to guide the Institute in assessing its current situation, concluding finally that despite its possible problems, “it is crucial to preserve the ALI.”

Interestingly, our previous “Trenches and Towers” exchange, centering on legal ethics, also included a call for further empirical work on the legal profession in order to guide future reform efforts (see “From the Trenches and Towers,” *The Kaye Scholer Affair*; Vol. 23, No. 2). Here again some of our commentators highlight the potentially fruitful role of “on-the-ground” studies of institutional dynamics in assessing the current situation and contributions of the ALI. This discussion has developed still further the kinds

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2. Although Zeppos seems to attribute much of this shift to law-and-economics scholarship, his own text is rife with citations to scholarship from the law-and-society tradition, which has shed much light on the “interestedness” of parts of the legal process and profession. And one would be remiss to neglect the impact of critical scholarship from the legal academy and social theory, which has done much to cast doubt on the “disinterested” or genuinely representative character of many aspects of the U.S. legal system.

of questions and problems that will arise in any attempt to bring together the “nitty-gritty” concerns of legal practice and legal institutions with empirical sociolegal research; there is much work to be done in translating the approaches and issues of two such disparate enterprises, and there will be points at which translation is difficult or impossible. Social science may be able to address some issues, but not others; legal practitioners may find some of the nuances of empirical studies to be interesting and valuable but others to be seemingly arcane or beyond the scope of their inquiries. The exchange conducted here, bringing together an experienced attorney, the director of the ALI, a legal academic, and an established empirical researcher from the law-and-society community, has been one step toward such a translation. We hope that it is just the opening to an ongoing conversation.