COMING OF AGE: Law and Society Enters an Exclusive Club

Lawrence M. Friedman
Stanford University School of Law, Stanford, California 94305; email: lmf@stanford.edu

Key Words legal culture, legal system, sociology of law, impact studies

Abstract Law and society, though not a field in itself, is the object of a growing movement that studies legal systems using tools of social science. Founded by sociologists, the movement now includes representatives of all the social sciences. It has developed strong organizations in the United States and in a number of other countries. Its adherents share a number of basic assumptions; they reject extreme ideas of legal autonomy and stress instead the dependence of law on its social context. Key components of the legal order, and thus key objects of study, are substance, procedures, structures, and legal culture. Scholars focus on the actual forces that produce law and on the impact of legal interventions. Sanctions, the peer group, and the internal moral sense are among the factors that determine actual impact. Much has been accomplished in the field, although much remains to be done, and translating findings into policy is often quite problematic.

INTRODUCTION

It was an honor to be asked to write an introduction to the first volume of an Annual Review that is devoted to work in law and society. It is a red-letter day for the field as a whole. Getting an Annual Review of its own is definitely a sign that a field is coming of age—it is a kind of rite of passage. Law and society studies have now, symbolically at least, made the transition from infancy to a seat among the elders.

But what is the field? It is not easy to give a definition or assign boundaries to law and society scholarship. Law itself, as studied in law faculties, may be a field, but it is most certainly not a discipline, and certainly not a social science. In civil-law countries, people talk about legal science, but hardly anybody in the United States, or in other common-law countries, uses the term; and nobody in the law and society business thinks of law as a science at all. Yet law can be studied scientifically or, if you will, studied rigorously. Not, however, from the inside, so to speak. Most orthodox legal scholarship asks whether some result or finding is right or wrong, legally. To most of us, this is a meaningless question, or at least a question that cannot be answered with the tools we have in our tool chest. There is nothing unusual about this situation. Sociologists of religion cannot answer questions of theology, nor do they want to. They have no way to decide which is the true
religion and which is not, and no particular interest in the question. Sociologists of medicine have never cured patients of any known disease, and sociologists of sport have never won a game of tennis. But these branches of sociology are all, of course, valid fields of inquiry.

Law and society can be compared, in a way, to area studies. Russia or the Far East are not disciplines, and there is no such thing as the science of Latin America. Rather, they are or can be objects of science—a University Center for Latin American studies (for example) might house sociologists, anthropologists, historians, economists, and others. What they have in common is an interest in a particular geographical area. They bring their own discipline to bear on issues relating to that area. Law and society studies have something of the same quality. The field brings together social scientists who are, each in their own way, and with their own skills and methods, concerned with the legal system, how it works, and what it does. They are anthropologists and psychologists and political scientists and sociologists, with a scattering of historians and economists, and people from miscellaneous other fields.

Law and society is, in short, not a discipline but the application of other disciplines to a specific social system. Hence, it borrows its assumptions, on the whole, from the other social sciences. It borrows their methods as well. Some scholars do survey research, some look at archival material, some squeeze out findings from masses of quantitative data. Some do experiments—with mock juries, for example, or with the usual guinea pigs, psychology students. Some canvas the scene to find natural or quasi-experiments. Some carefully analyze legal language and legal rhetoric. A few might travel to tropical islands to watch the elders resolve quarrels in the shade of a coconut palm. Some use game theory, regression equations, advanced statistics. Others spin out socio-legal theory, sometimes from nothing more solid than intuition. Law and society is thus a very big tent, and getting bigger all the time.

In many ways, of course, the analogy to area studies is very imperfect. Every scholar who focuses on Russia agrees, in some basic way, on what Russia is, where its borders are, and perhaps even on some basic facts and propositions. But law and society scholars have in one sense little common ground. Each country—each society, each community—has its own legal system. Presumably, sociology and economics and psychology are much the same whether taught in Canada or the Chad Republic. But a legal system begins and ends at national borders, or in some cases at the borders of states or provinces. One can study French law, Icelandic law, the law of Honduras or Vanuatu; no two are exactly alike. It is hard, or maybe impossible, to formulate general statements that cut across all these jurisdictions—statements that also apply, or might apply, to the scores and scores of extinct legal systems, to the code of Hammurabi or classical Roman law, or to the hundreds of different “law-ways” of preliterate peoples. Of course, in the modern global village, a lot of legal activity spills over national borders. And the study of almost any foreign system of law, like the study of almost any foreign language, sheds
a lot of light on one’s own legal system or language. Moreover, science demands control groups, whenever possible, and what could be a better control for your study of your own legal system, today, than to compare it to other systems, either now or in the past.

Let me add a word about the definition of law. There is, as we said, no general agreement about a definition, nothing that commands a general consensus. Nor can there be. Law is not a thing in the real world that can be described with any precision. There is no such thing as a purely objective definition of law. What we call law depends on why we want to call something law. Most definitions presuppose two basic functions of the legal system: the process of making authoritative rules, and the process of enforcing or carrying out these rules. Carrying out the rules means enforcing them or dealing with disputes and conflicts about rules and rights. But every term here is a problem in itself: What is a rule, what makes a rule authoritative, what is a dispute, what does it mean to enforce a rule, and so on. None of these questions has an obvious answer. None has an answer that can possibly be valid for everybody, everywhere, and for every study.

To be sure, there is no lack of definitions of law, legal systems, or the legal order; or, perhaps we should say, no lack of attempts at definitions. Attempts at definitions do fall into a few big categories. They all seem to agree, more or less, on the notion of law as the process of making and enforcing rules (whatever that might mean). Some definitions emphasize the official or state nature of the rules and the process of enforcement. Law, in other words, is government. The penal code of Wyoming is part of the state’s legal system; the rules of an Elks club chapter, meeting in Laramie, Wyoming, is not. Black (1972) defines law as governmental social control. Social control that is not connected to some aspect of the state is thus not part of Black’s idea of law.

One may also define law in such a way as to emphasize formality or institutional organization. If the Elks club has rules and ways of enforcing them, and if the process is reasonably formal, then we can speak about the law of the Elks club. In Schwartz’s (1956) classic study of two Israeli settlements, one settlement had a judicial committee; the other lacked any specialized legal institution. Schwartz defined legal control as control carried out by “specialized functionaries who are socially delegated the task of intragroup control.” He placed his emphasis on formality and the existence of an institution. Both settlements, of course, were part of the state of Israel, and the judicial committee he described was a nonstate institution; it would no doubt fail Black’s test. But if what we want to study is the whole process of social control or social behavior, broadly defined, we will probably want to include the rules of the Elks club and almost certainly the actions of the judicial committee. If we define our goal broadly enough, we will want to include what went on in both of Schwartz’s settlements. Again, this is not an issue confined to studies of law. A social study of education can focus (quite legitimately) on schools. Schools are very important institutions, very worthy of study. But for other purposes, we might want to study education in a broader sense—including
what people learn or mislearn from television, what they get out of newspapers and books, and even how parents inculcate norms and ideas into children’s little heads.¹

From the two factors mentioned—formality and connection with a government—we can construct a nice four-box matrix. There is to begin with law that is both formal and official. Any statute of any modern country would qualify. There is also law that is official but completely or partly informal. Official actions often operate within zones of discretion and leeway. Administrative government and criminal justice are shot through with such zones. A policeman stops a driver, starts to write a ticket, listens to an argument or a sob story, and tears the ticket up; he might give the driver a mild lecture and let her drive away. The police officer’s behavior is official, but highly informal. Then there is law that is unofficial but quite formal. Most large organizations—hospitals, universities, big businesses—operate what look like miniature legal systems. They make rules, they enforce them, and they have regular procedures. A private university holds formal disciplinary proceedings when it catches a student cheating on an exam. If the student is convicted, he or she can be suspended or expelled. The student may even be entitled to a lawyer. As Macaulay (1986) has pointed out, “[m]uch of what we would call governing” is carried out by groups that are not part of the government at all, but by private individuals and organizations. Lastly, there are actions that are both informal and unofficial; most people would not consider most of these law at all. For some purposes, however, it might be useful to think of them as law, so that, say, the way a family makes and applies rules about how the children should behave could be looked at as a kind of law within the family.

LAW AND SOCIETY STUDIES: A BRIEF HISTORICAL SKETCH

The field—law and society—does not have a particularly long history as such; neither does modern social science in general. It is, of course, a kind of intellectual game to look for and find precursors here and there, as far back as one wants to go. And, of course, perceptive jurists in the early nineteenth century were hardly blind to the fact that laws did not execute themselves and that politics played a role in the passage of statutes. But systematic study really begins, essentially, in the late nineteenth century. Social theorists, including Karl Marx and Emile Durkheim, had a lot to say about the legal system. A true pioneer was Eugen Ehrlich, who investigated “living law” in the corners of the Austro-Hungarian empire where he lived.

By far the most important founding father was Max Weber. Weber had been trained as a lawyer; his brilliant and erudite explorations of legal systems,
particularly in the West, are still important sources of socio-legal theories and
still provide scholars with insights and hypotheses. Max Rheinstein edited an En-
glish edition of Weber’s writings on the sociology of law that was published in
1954 (Rheinstein 1954).

In the United States, there was a flurry of interest, and some research, in the
1920s and 1930s; but it soon petered out. Real progress, and a genuine law and
society movement, really came into being only after the Second World War (on the
history and nature of the movement, see Garth & Sterling 1998, Friedman 1986).
The prime movers were not law professors but sociologists. Soon, of course, some
law professors did join in. The little band of scholars founded a Law and Society
Association in 1964 and incorporated it in the state of Colorado; its first president
was Robert Yegge of the University of Denver Law School. The association began
publishing a journal, the Law and Society Review, in 1966. It holds annual meetings;
at first these meetings were adjuncts of other professional meetings (sociology, for
example), but since 1975 it has held meetings on its own. These have become quite
large: Today, typically, more than 1000 scholars from all sorts of disciplines attend.
Scores of papers are presented. Some subgroups have their own organizations: law
and economics, for example. Groups of political scientists who study courts get
their papers to political science associations and peddle their wares.

There are law and society associations in other countries as well. The Japanese
society is particularly large and has a history going back even further than the Law
and Society Association. Canada, Great Britain, and Germany have or had their
own associations. There are also journals published abroad—the Zeitschrift für
Rechtssoziology in Germany and Sociologia del Diritto in Italy, for example. The
Law and Society Association is, in one regard, unique. It is not formally a national
association. Most members are from the United States, but almost a quarter of
the members are not. Non-Americans have served on the board of trustees and
are well represented at the annual meetings. Nonetheless, this is primarily an
American institution, although it has a certain international flavor and is eager
to have more. The meetings are ordinarily in the United States, but a few have
taken place outside the boundaries as well—in Vancouver, British Columbia, and
also in Amsterdam, Glasgow, and Budapest. The European meetings have had
a cosponsor: the Research Committee on the Sociology of Law, an organ of the
International Sociological Association. This body is formally international. It,
also, holds annual meetings (much smaller than those of the Law and Society
Association). Despite its name, most of its members are not sociologists: They are
law and society scholars from a variety of disciplines and institutions, including
law faculties.5

---

5There are now other journals as well, particularly Law and Social Inquiry, published by
the American Bar Foundation (and formerly called the American Bar Foundation Research
Journal). In 2004, a Journal of Empirical Legal Studies was launched.

3I am the current (2005) president of this organization.
BASIC ASSUMPTIONS

As we said, every social science is represented in the law and society movement (including history). Are there any beliefs, assumptions, axioms, or points of view that everyone in the movement shares? Probably not. But there are some core ideas or notions that would command, I believe, if not unanimous agreement, at least something close to consensus.

To begin with, people in the field have to make some sort of assumption about the autonomy of the legal system. More accurately, about the lack of autonomy. An autonomous system is a system that operates under its own rules, that grows, changes, and develops according to its own inner program. Living things, in this sense, have a great deal of autonomy. They have genetic programs that govern the way they grow and the way they live. A mouse is programmed to become a mouse, a flatworm is programmed to become a flatworm. Of course, no system is totally autonomous. The mouse and the flatworm do not automatically grow from a fertilized cell into a full-grown mouse or flatworm. They need, like every living thing, some sort of food or way of making food. An organism must, in short, take in material from the outside world. But the genetic program itself is, in essence, fully autonomous.

No social scientist who studies law thinks the legal system is as autonomous as the genetic program of the flatworm. It would mean that culture, the economy, politics, tradition, and social norms would have little or no effect on the way the system functions. That seems obviously wrong. There are, to be sure, many law and society scholars who feel that law is at least somewhat autonomous, or that it is partly or mostly self-referential. Probably most law and society scholars are willing to concede at least a little bit of autonomy. How much is a difficult question. There might be a slightly different answer for every society or community. In any event, I think most scholars who work in the field feel that the legal system is basically not autonomous, that it always bears the deep imprint of the society in which it is imbedded. Whether this is so or not is essentially an empirical question (but not an easy one to answer with any sort of rigor). Some scholars argue that it makes little or no sense even to talk about law and society as if they were separate entities. They are so enmeshed that they “constitute” each other. Such concepts as marriage, property, contract, and crime are legal concepts, but they also lie at the very core of social life. Relationships such as parent and child, husband and wife, boss and worker, landlord and tenant are both legal statuses and part of the very warp and woof of everyday life (Gordon 1984, p. 103).

There are a few propositions or assumptions that almost all law and society scholars seem to share, propositions or assumptions that are basic to their thought and research. Conventional legal scholarship is obsessed with rules, codes, procedures, and decisions. It pays very little attention to actual impact, or it more or less assumes away the whole issue of impact. But to law and society scholars, impact is always an empirical question. Whether some rule or decision makes a difference,
and what difference it makes, is a matter for investigation and research. This is the case whether we are talking about overtime parking regulations, rules of tort or contract, or the Supreme Court’s abortion decision.

A second proposition, closely linked to the first, is that the impact of some rule or other form of legal behavior depends almost entirely on events, situations, or configurations from outside, that is, from society itself. If Mexican cab drivers break traffic rules and rules about how much to charge customers more often than Finnish cab drivers, if more couples in Iceland have children without bothering to get married than do couples in Greece or Iran, the reasons have probably little or nothing to do with differences in the traffic laws, or laws about cabs or marriages in these countries. They have to do, above all, with aspects of Mexican, Finnish, Icelandic, Greek, and Iranian society. Of course, levels of enforcement of laws, methods of enforcement, and incentives and deterrents make a real difference in the level of compliance; it is not purely a matter of configurations in local society. But levels of enforcement and the like are themselves matters that always bear the imprint of their society.

A third proposition is this: Any major change in society will surely lead to some sort of legal reaction. Wars, plagues, earthquakes, the invention of computers, the so-called sexual revolution, the rise of fundamentalism, everything that goes on leaves its mark on some part of the legal system, or all of it. Many lay people think of legal systems as slow, or conservative, or affected by inertia or drag, or as harboring archaic features. What they really mean is that they disapprove of something the system is doing. If something seems archaic or behind the times, this merely means that some concrete interest group is fighting (successfully) to keep it from changing. Many people who have some vague idea about the common-law doctrine of precedent imagine that the common law, in particular, worships the past; they may imagine it is a kind of museum of ancient legal forms and practices. But this is a myth. Law is an intensely practical affair. It has no sentimental attachment to the past. In fact, it prunes away quite ruthlessly anything that does not serve the present. If something survives for centuries, it is because it is useful right now. The jury, the mortgage, and the trust all have medieval roots. But their utility is anything but medieval, and they are, after all, lonely survivors. The rest of medieval law is gone with the wind. The people who ultimately call the shots in the legal system are the people with power and influence, and they too are hardly sentimentalists.

Despite this, I have to be careful not to fall into the trap of assuming that legal systems always work, that because they fit their societies, they are all equally efficient and adaptive. This may be true, as a matter of theory and at some exalted level of abstraction. After all, somebody benefits even from a corrupt, bureaucratic system, a system tied up in miles of red tape and roundly disliked by the general public. Structural impediments (from some point of view) in the legal system correspond to structural impediments in the society at large. An autocratic society, a viciously corrupt and brutal society, will have a viciously corrupt and brutal legal system. It works, but not for the society as a whole.
Moreover, even if the legal system is incredibly plastic, it would be wrong to say that legal tradition never matters. The common law was neatly adapted to a feudal system, then neatly adapted to capitalism, and then to the modern welfare state, but it adapted in its own inimitable style. The English language is so totally different from the language of *Beowulf* that a modern American cannot read *Beowulf* at all, even with a dictionary. But English is still English and not Chinese.

The discussion thus far has already implied the fourth proposition. A particular type of society produces a particular type of legal system. The legal system of the United States is geared to a welfare-regulatory state, more or less democratic. A tribe in the Amazon jungle will have an entirely different system. The legal system of the United States is also extremely different from the legal system of medieval England. Legal tradition, as I said, makes some difference. But how much? There are enormous similarities in the legal systems of all developed modern countries. Each one is, of course, unique, and the study of what makes each of them unique is of great sociological interest (see, for example, the work of Blankenburg 1997, Feldman & Bayer 1999). Still, the legal systems of modern Japan, France, England, or Norway are much more like each other than any of these systems is like its own remote ancestor. Neither the Tokugawa Shogun nor Edward II nor Charlemagne would recognize most of what goes on in the legal world of today. There is, I have argued, a modern legal culture that all these countries share (Friedman 1994). Lawyers in these countries can talk to each other quite intelligibly about the rights of shareholders, copyrighting computer software, antitrust law, air traffic control, and a whole host of other issues. Ordinary people can talk about divorce and custody, health insurance and old age pensions, and all sorts of matters that are legal but also of everyday interest and would be total gibberish to an ancestor who somehow came back to life.

**ON LEGAL BEHAVIOR**

Law and society studies are, of course, studies of human behavior. Each branch—psychology of law, anthropology of law, sociology of law, and so on—works on the basis of certain assumptions about human behavior. Human behavior is complex and mysterious; each science slices off a different part of the whole to focus on.

In principle, the work of economists should be at the heart of the law and society enterprise. It is impossible to fathom modern societies without paying some attention to money, markets, and economic behavior. Yet, in fact, few economists are members of the Law and Society Association, and few identify as law and society scholars. There are some very notable exceptions. Why is the movement

---

4In the case of Japan, there was, of course, a sharp break in the middle of the nineteenth century; but even without importing European law, Japan today would undoubtedly have a modern legal system, one way or another.
unattractive to economics? Not because no economist is interested in the legal system; actually, many of them are. But economists, historically, have tended to stand somewhat apart from other social scientists. This situation is very unfortunate. Why it is so is another question. I choose to dodge it for now.

Economics has achieved a great deal of success, made a lot of progress, and gotten itself invited to sit at the tables of power. The federal government has a Council of Economic Advisers; there is no Council of Social Science Advisers. There is no formal body to give advice on crime, delinquency, family life, or, indeed, on noneconomic issues involving markets, money, and risks. Economists even have a kind of ersatz Nobel Prize. No other social science gets this kind of high-class treatment. It is hard not to be at least a little bit jealous.

How did economics achieve all this success? Economists would say: because it is a real science and because they get results. Economics became a science, basically, by doing what all science must do: Economists chose a slice of life and tried to study it with absolute rigor. In doing so, they pruned away almost everything that would interfere with the formal and even mathematical beauty of the field. Essentially, economists tend to ignore most human motives. They have placed rational, self-interested behavior, maximizing behavior, at the core of their work. Rational self-interest is not all there is, and everybody knows this, including economists. Recent work in behavioral economics has, to be sure, chipped away at some of the edges of the basic assumption. Still, for most economists, rational, self-interested behavior is the default position. The result is a structure that other social scientists have often admired, and even copied, because of its clarity and rigor. This has been notably true of some forms of political science. Even in sociology, economics can cast a long shadow.

No other social science has had the same success in trying to get agreement on a set of basic, fundamental propositions. If economics is Euclid, nobody has invented a satisfying non-Euclidean sociology or psychology. Yet, implicitly, some work (in anthropology, for example) does seem to start from a different angle and use a different default position. It puts at the core of human behavior custom, norms, habits, and traditions; rational self-interest is then the exception, not the rule.

This may seem an exaggerated, unrealistic, or even delusional way of looking at the world. It may seem particularly silly in the United States (as compared to the Trobriand Islands). But consider the behavior of most people, ordinary people, on a typical day in a typical place, even in a modern society, far removed from any of the jungles and islands of classical anthropology. A person gets up in the morning, gets dressed, takes a shower, brushes teeth, eats, talks, interacts with family and friends, goes to work, has lunch, plays, has fun, makes love, goes to sleep. The ways these are done vary enormously from society to society, in every possible way; almost none of it is reckoned, planned, or calculated. Most of it follows familiar ruts and grooves. Most of it is unthinking, habitual, and responsive to hidden and unconscious cues. Of course, I am talking about people,

---

5This, of course, might make it quite rational and even efficient; but that is another issue.
not stock exchanges or business firms. But even for businesses, a lot of what goes on can probably be explained not solely in terms of efficiency or rational self-interest, but in terms of habit, custom, and norms. This was, for example, the message of Macaulay’s (1963) famous article on the behavior of Wisconsin businessmen. Indeed, these habits, customs, and norms form the template within which rational maximizing can and must take place. In any event, the motives underlying business behavior are complex; purely instrumental reasons are part of the picture, but certainly not all of it (see Gunningham et al. 2004). Markets, as Edelman (2004) has pointed out, are themselves cultural, and they are also political in the sense that “economic institutions are often the outcome of political contests and power struggles” (p. 192). Of course, the market ruthlessly prunes away firms and businesses that do not compete effectively, but this, too, takes place within a framework that cannot be explained solely in market terms. To be sure, it cannot be explained solely in nonmarket terms either.

Free choice itself is culturally determined, and is often an illusion. When I buy a pair of shoes, I think of the purchase as entirely my own decision. And part of it is: the color, for example, and the price range. But I never stop to ask why I, an American male, will wear pants and not a dress or a toga, why orange or purple are not acceptable colors for shirts or shoes, why one cut or style is fashionable and another will strike me (and everybody else) as hopelessly out of date, why sandals are acceptable in some situations and not in others. In some ways, people are like animals born and raised in zoos; they are not aware that their world of cages and enclosures is highly artificial, that their range of behavior is limited by conditions they did not create for themselves. There is, to be sure, a sphere of active and deliberate choice in all our lives; and it is an important sphere (Friedman 1990). Nor is there any reason to assume that the sphere of choice is the same in all societies. It is certainly bigger in democratic societies than in autocratic societies, bigger in modern societies than in traditional societies. But in all societies it is strictly limited, and in ways that most people are not conscious of. Very few people, after all, are trained anthropologists or sociologists. They are ignorant of how fashion, custom, and habit act as unseen puppet masters, pulling the strings.

This is true for legal behavior as much as for any other form of behavior. Sociologists, for example, should be able to tell us a lot about why people react to rules in particular ways, and even which kinds of norms, rules, and procedures they find emotionally or otherwise satisfying, as well as which kinds of norms, rules, and procedures particular kinds of society are likely to adopt. Criminologists, I think, can tell us more about crime—about why armed robbers rob, and how armed robbers think (see Wright & Decker 1997)—than formal models can. This is because they are more willing than most economists to talk to people, snoop around their lives, and sniff out their attitudes and motives. But my purpose here is not to trash economics. There are, as I said, first-rate economists who are part of the law and society movement, and their work, and the work of other empirical and behavioral economists, has been of enormous value. My purpose is rather to argue for more collaboration. All the social sciences that are interested in legal
behavior—in human behavior—should work together and learn from each other. They have, after all, a common enemy: orthodox legal scholarship and its cavalier blindness to real-world concerns. Perhaps another common enemy is the ordinary public, which is woefully uninformed, and even misinformed, about issues of policy and law.

PAST AND FUTURE

On the whole, our field, law and society studies, has shown and continues to show a lot of vitality. It has grown tremendously in the past 40 years. As we said, the number of members of the Law and Society Association keeps increasing, and the volume of law and society work in the United States and elsewhere has increased as well. Most of the work has been done, and will continue to be done, by social scientists, but professors at a number of law schools have been major figures in the field. Canada, the United Kingdom, and Australia have respectable movements of their own, and scholars in these countries have been more and more willing to put their own systems under the microscope of the social sciences. In continental Europe, there are or have been important centers of scholarship: Germany, Italy, the low countries, Spain, Poland, and Scandinavia. Scholars such as the late Vilhelm Aubert (Norway), Adam Podgorecki (Poland), and Renato Treves (Italy) were catalytic scholars in their countries. In Asia, Japanese scholars have taken the lead in the field, but there has also been work in India, Hong Kong, Taiwan, and Korea, among other countries.

There are, however, all sorts of blank spots on the map. We can talk about growth spurts, but we must remember, too, that the work started more or less from a zero base. How far has the movement gotten? In some ways, not very far. Every country has a legal system, but not every country has a law and society movement. Most of the world has little or nothing to show for itself in this field. Law and society work seems to be a luxury good that Third World countries, for the most part, cannot afford. The work is critical and skeptical, and it has a hard time in autocratic countries. Even in richer and more hospitable countries, young scholars can find the prospects of building a career in the field somewhat daunting. Looking and measuring, and other kinds of empirical work, are costly and time-consuming. Nor is this work particularly valued in many law schools, compared with more orthodox kinds of scholarship. In the social sciences, looking and measuring are, on the contrary, at the very heart of these endeavors; but even here, law and society studies seem somehow outside the mainstream.

I am not overwhelmingly optimistic about the future of law and society studies in the law schools and law faculties. In most of these, law and society studies are probably doomed to be at best a frill. After all, in common-law countries, the main job of law schools and law faculties, quite naturally, is to train men and women for the professional practice of law. Some law schools, to be sure, were particularly hospitable to law and society studies: Denver, Northwestern, Wisconsin, and
Berkeley. At Wisconsin, J. Willard Hurst was an especially powerful influence. His field was American legal history, but not conventional legal history; rather, it was legal history that stressed the importance of the economic and political context. In civil-law countries, the faculties are obsessed with legal science, a pursuit that to some of us seems about as scientific as astrology or phrenology. In any event, career patterns and prestige structures in European and Asian universities seem to leave little room for empirical research on the legal system. In some countries, the field seems to be stagnant or even moving backward.

Despite the gaps and obstacles, we can and should celebrate the solid and rigorous work that scholars are doing. The contents of this volume make this point clear. Of course, as in all fields, there are trends and fashions. An interest in poverty rises and falls. Alternative dispute resolution comes to the fore, then fades a bit. Neglected subjects, like gender discrimination, burst on the scene and demand their share of attention. Some topics seem perennial: juries, the police, the legal profession, courts and how they behave. Trends and fashions, in part, reflect what is happening in society at large. If privacy and surveillance become social issues, scholars will pick up on that fact and turn their attention to it. In part, trends are responses to intellectual fads. In part, they are like fashions generally, that is, they pop up for mysterious reasons, then die back in an equally mysterious way.

There have been hundreds, perhaps thousands, of studies that we can classify as law and society studies. (Some of the authors of these studies would be surprised to be classified this way.) The existing studies deal with a huge range of subjects. Analytically, any legal system consists of substance (the actual rules, formal and informal, official and unofficial, that are in effect), procedures (ways of settling disputes, passing laws, appealing cases, and so on), structures (the bony skeleton of the legal system: organization of courts and administrative agencies, composition of legislatures), and legal culture. This last is a much disputed term. I have defined it, and used it, to mean attitudes, expectations, and opinions about law (Friedman 1975). Other scholars have had their own definitions. Whatever you want to call it, legal culture in the sense of values and attitudes is vitally important. Think of the law as a kind of machine. The machine has a structure. It also has a program of outputs. And it has directions: how to turn it on and off, how to make it run smoothly, and so on. But the decision, whether to turn it on or off, how to use it, whether to fix it or smash it with a hammer, depends on the decisions of actual people—the workers and bosses in the factory. And their attitudes, values, and opinions are what make them decide what to do. It would be hard to deny that culture in this sense is a crucial element in any legal system. Every person has his or her own legal culture, and perhaps no two are the same. But there are undoubtedly measurable patterns as well—the legal culture of men as opposed to women, of Chinese people as opposed to South Africans, of cab drivers as opposed to programmers, young people as opposed to old. All this is a legitimate, though difficult, area of study. The volume of work is, alas, not large.

There is another rather important use of the term culture. People talk about Japanese culture or American culture to mean long-term, persistent, traditional
traits and habits—culture in an anthropological sense. Are there also long-term, persistent, traditional legal traits and habits? In one sense, the answer seems obvious: There are common-law countries, and civil-law countries, and sometimes the twain seem never to meet. Some scholars—James Whitman comes to mind—have tried to show that legal tradition has had a lasting effect on behavior and thought in, say, France, Germany, and the United States (Whitman 2000, 2003). There are also notions—much disputed—that some peoples are more litigious or claims-conscious, and that others are more disposed to harmony and conciliation. Americans are supposed to be the big, bad litigators, and the Japanese occupy the opposite pole. Kagan (2001) has argued that the United States is rather different from other countries of the West in its devotion to what he has called adversarial legalism. But there is also scholarly skepticism about American litigiousness, and the idea that there is a litigation explosion in America rests on fairly shaky empirical grounds. Some scholars, too, have been skeptical about the Japanese end of this cultural continuum (see, for example, Haley 1978). Perhaps legal systems today are, in a way, pretty much the same, and yet, at the same time, quite different, depending on the lens through which you look. But this is also true of human beings in general: all basically alike—arms, legs, brains, power of speech, genetic makeup—yet each one a distinct and unique individual.

Much of the research concerns itself with a simple and elementary question: How do legal institutions actually work? What do the police really do? How do courts actually decide cases? What is life like inside the Food and Drug Administration? In court cases, do the “haves” come out ahead, and if they do, why is this so (Galanter 1974)? There is also work on how law in the broadest sense gets made. If we start from the premise that social forces mold and shape the legal order, for the most part, we still have to ask the more interesting questions: which social forces, and how do they do the job? These are the underlying issues in studies, for example, of interest groups and lobbying, or of the work of public interest lawyers, or of what led California to adopt a no-fault divorce statute (Jacob 1988), or of how scandals, incidents, and horrifying crimes lead to changes in the criminal justice system.

Equally important is the study of impact. One of the main sins of conventional legal scholarship is that it neglects this matter almost entirely. The law student studies cases but is never asked: Did it make any difference? Did behavior change? What actually happened after the Supreme Court decided Brown v. Board of Education? Has a plague of malpractice suits really made doctors practice defensive medicine? There are surprisingly few studies of the effect of laws and decisions on society in general, or on some audience in particular. The question, at the most general level, is this: What factors monitor, control, and shape the actual impact of some legal intervention? A legislature passes a law. What happens next, if anything? The answer clearly depends on a whole cluster of factors. One of these factors is sanctions: rewards and punishments. This is probably the most densely researched impact issue. Especially rich is the literature on deterrence. Deterrence studies are impact studies in criminal justice. They examine whether ratcheting up punishment, or putting more muscle into enforcement, has an effect on levels of
compliance. Common sense tells us that it does, but if so, how much? For example, do tough sanctions have an effect on the number of people who drive under the influence (Ross 1982)? The deterrent effect, if any, of the death penalty has been a particularly salient issue, an issue that people feel passionately about, one way or another. Does capital punishment deter crime—does it have an impact above and beyond, say, life imprisonment (see, for example, Archer et al. 1983)? Some studies say yes; some say no.

There is no question that human beings do react to the carrot and the stick. However, people are not blindly mechanical cost-benefit machines. The effect of the peer group has not received very much systematic study, but it is surely powerful. What our friends, family, coworkers, and other people think has an effect on what we do. Schwartz (1956), in his study of the two Israeli settlements, argued that informal sanctions—peer sanctions—in small, tight communities have enormous strength. Hagan et al. (1979) argued that strong, informal controls constitute one reason why women commit fewer crimes than men. The moral sense—conscience and the sense of legitimacy, the feeling that we ought to obey the law (see Tyler 1990, Friedman 1975)—is also a significant cluster of motives that surely affect how people behave. Here, too, a lot remains to be done.

I mentioned hundreds, perhaps thousands of studies: What, on the whole, have they accomplished? Not much, in one sense: no sweeping general laws, no breakthrough that would make somebody’s heart pound, no magic discoveries that change the face of the earth. But in another sense a great deal has been accomplished. Small insights, careful studies of particular institutions—there is no reason to look down on these. If two researchers show that there really is plea bargaining in England, despite official denials (Baldwin & McConville 1979), that is no small thing. If a team examines what effect a California tort case had on how psychiatrists and social workers thought and acted, that, too, is important (Givelber et al. 1984). In general, law and society scholars have been like archaeologists, digging patiently into the soil, uncovering bits and pieces of pottery, exposing fragments of buried cities.

Spreading the word about our work is something of a problem. What we do and what we find is not usually sensational enough to make the headlines. An even bigger problem is getting people in power—or people, period—to listen to what we say. Unfortunately, many issues that are the subjects of our research are also issues about which people have already made up their minds. They already know, or think they know, whether pornography causes sex crimes or whether tort cases are driving businesses to the wall. With regard to some issues, the people who count hear what we have to say, but it has no effect on policy, for both good and bad reasons. For example, McCleskey v. Kemp (1987), a death penalty case from Georgia, went to the United States Supreme Court on a race discrimination issue. The defense relied on the so-called Baldus study (Baldus et al. 1983). The Baldus study suggested that, in Georgia, killers whose victims were white were far more likely to be sentenced to death than those whose victims were black. This meant, said the defense, that McCleskey’s death sentence was fatally flawed.
A bare majority of the Supreme Court turned this argument aside. Georgia later put McCleskey to death.

Was the Supreme Court wrong? That, of course, depends on policy considerations, on political and social judgments. The Baldus study could address the facts, the data. It could pose a problem. But it could not resolve the issue. At least the Supreme Court took the Baldus study seriously. An intelligent and honest policy maker would want to consider the data and conclusions that law and society scholars can provide. But policy is policy. Ideally it should be based on sound foundations: facts, data, knowledge. Still, data and facts are tools; they never dictate an answer. And law and society scholars, above all, should be skeptical about how many “intelligent and honest policy makers” there really are in the government. The “intelligent and honest policy maker” is probably always a rare beast—if the phrase means someone who makes decisions solely on the basis of “merit,” and not on political considerations or who exists in some rarefied world where his or her own norms and values play no part in decisions, consciously or unconsciously.

Of course, in close cases, data do make a difference. And people do change their minds. Perhaps not about deeply held beliefs, but surely about marginal issues where their attitudes are close to the edge. Here the field can make a contribution. A modest one, to be sure. But the same can be said for the other social sciences—the established ones, the ones that have had their own Annual Reviews for quite a while. In any event, it is a great day for us to be admitted as full members of the club of Annual Reviews. A great honor. But, on the whole, I think we deserve it.

The Annual Review of Law and Social Science is online at http://lawsocsci.annualreviews.org

LITERATURE CITED


CONTENTS

COMING OF AGE: LAW AND SOCIETY ENTERS AN EXCLUSIVE CLUB, Lawrence M. Friedman 1

THE COMPARATIVE STUDY OF CRIMINAL PUNISHMENT, James Q. Whitman 17

ECONOMIC THEORIES OF SETTLEMENT BARGAINING, Andrew F. Daughety and Jennifer F. Reinganum 35

LAW AND CORPORATE GOVERNANCE, Neil Fligstein and Jennifer Choo 61

TRANSNATIONAL HUMAN RIGHTS: EXPLORING THE PERSISTENCE AND GLOBALIZATION OF HUMAN RIGHTS, Heinz Klug 85

EXPERT EVIDENCE AFTER DAUBERT, Michael J. Saks and David L. Faigman 105

PLEA BARGAINING AND THE ECLIPSE OF THE JURY, Bruce P. Smith 131

THE DEATH PENALTY MEETS SOCIAL SCIENCE: DETERRENCE AND JURY BEHAVIOR UNDER NEW SCRUTINY, Robert Weisberg 151

VOICE, CONTROL, AND BELONGING: THE DOUBLE-EDGED SWORD OF PROCEDURAL FAIRNESS, Robert J. MacCoun 171

LAW, RACE, AND EDUCATION IN THE UNITED STATES, Samuel R. Lucas and Marcel Paret 203

LAW FACTS, Arthur L. Stinchcombe 233

REAL JURIES, Shari Seidman Diamond and Mary R. Rose 255

FEMINISM, FAIRNESS, AND WELFARE: AN INVITATION TO FEMINIST LAW AND ECONOMICS, Gillian K. Hadfield 285

CRIMINAL DISENFRANCHISEMENT, Christopher Uggen, Angela Behrens, and Jeff Manza 307

AFTER LEGAL CONSCIOUSNESS, Susan S. Silbey 323

WHY LAW, ECONOMICS, AND ORGANIZATION? Oliver E. Williamson 369

REVERSAL OF FORTUNE: THE RESURGENCE OF INDIVIDUAL RISK ASSESSMENT IN CRIMINAL JUSTICE, Jonathan Simon 397

INDEX

Subject Index 423