

Legacies of Legal Realism: Social Science, Social Policy, and the Law

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What can social science contribute to the study of law? Can the use of social science methods enrich our understanding of law? Can and should it help us to formulate more reasoned and effective legal policy? These questions provided the basis for a symposium of leading sociolegal scholars who were brought together in April 1997 to consider the relationships among social science, social policy, and law. The purpose of this symposium was to take stock of what social science has contributed, what it might contribute, and what barriers stand in the way of using social science more effectively to make and implement social policy.

The symposium was also an opportunity to honor Stanton Wheeler, professor of law and of sociology at Yale Law School, for his long-standing leadership in sociolegal studies.¹ At the heart of Professor Wheeler's vision of law and social science is a conviction that, as law becomes more deeply implicated in societies everywhere, empirically grounded studies of law in action become more important and more consequential for generating basic knowledge of society and for informing policymakers. Social science applied to the understanding of law would be a form of enlightened critique, but also an aid to social and legal reform.

The dream of enlisting social science in efforts to understand law and inform legal policy is not new. In this century it traces its lineage at least to the work of the legal realists.² As is by now well known, realism emerged as part of a progressive response to the collapse of the nineteenth-century laissez-faire political economy. By the beginning of the twentieth century, state involvement in a variety of arenas was substantial, and "wise and far-thinking advocates of the 'status quo'" such as Theodore Roosevelt and Woodrow Wilson urged policies to accommodate the pressures of urbanization, big labor, and concentrated wealth. Careful and caring policies, they believed, would both socialize violent individualism and preserve the main features of the existing social order (Hofstadter 1955). Realists picked up these political themes and espoused "policy-oriented intervention by the state....The espousal by the Realists of a favorable response to socioeconomic legislation...was in essence a plea for a readjustment of the legal order to social developments" (Hunt 1978, 39).

By attacking the classical conception of law with its assumptions about the independent and objective movement from preexisting rights to decisions in specific cases (Cohen 1935; Llewellyn 1931b), realists opened the way for a vision of law as policy, a vision in which law could and should be guided by pragmatic and utilitarian considerations (Llewellyn 1940).³ By exposing the difference between law on the books and law in action, realists established the need to approach lawmaking and adjudication strategically with an eye toward difficulties in implementation. By exploring the ways in which law in action—for example the law found in lower criminal courts—was often caught up in politics, realists provided the energy and urgency for reform designed to rescue the legal process and restore its integrity.⁴ Realism attacked "all dogmas and devices that cannot be translated into terms of actual experience" (Cohen 1935, 822); it criticized conceptualism and the attempt by traditional legal scholars to reduce law to a set of rules and principles that they insisted both guided and constrained judges in their decisions. The boldness of that assertion prompted Holmes (1881) to write that tools other than logic were needed to understand the law. Law was a matter of history and culture and could not be treated deductively.

Nonetheless, no realist believed that legal rules and concepts were entirely irrelevant. They sought, instead, to move the focus from the words of law to legal action and the consequences of legal behaviors. Legal rules are one of the many constraints that shape legal behavior, but other factors are also important. It was here, in the realm of behavior and action, that the empirical claims of realism became prominent. Realists saw the start of the twentieth century as a period of the explosion and transformation of knowledge (Reisman 1941). Some saw in both the natural and emerging social sciences the triumph of rationality over tradition, inquiry over faith, and the human mind over its environment (McDougal 1941). They took as one of their many projects the task of opening law to this explosion and transformation. They argued that the law's rationality and efficacy ultimately depended on an alliance with positivist science (see Schlegel 1980). By using the questions and methods of science to assess the consequences of legal decisions, realists claimed that understanding what law could do would help in establishing what law should do (Llewellyn 1931a and 1931b). As Yntema (1934, 209) put it,

Ultimately, the object of the more recent movements in legal science...is to direct the constant efforts which are made to reform the legal system by objective analysis of its operation. Whether such analysis be in terms of a calculus of pleasures and pains, of the evaluation of interests, of pragmatic means and ends, of human behavior, is not so significant as that law is regarded in all these and like analyses as an instrumental procedure to achieve purposes beyond itself, defined by the conditions to which it is directed. This is the Copernican discovery of recent legal science.

Realism initiated a dialogue between law and social science by staking a claim for the relevance of phenomena beyond legal categories (Cardozo 1921; Pound 1923; Llewellyn 1925, 1940).⁵ Many realists saw in social science methodology the potential to make explicit, and thus purge, moral values in science and knowledge. Ironically, the pursuit of legal values would be better realized, they believed, through the accumulation of value-free facts. Although Dewey had rejected the idea of complete objectivity, he nonetheless insisted on the need for a scientific study of social problems and "the supremacy of method" (Dewey 1960). Others sought truly value-neutral inquiry, and they believed that what social science could make available to legal decisionmakers was an accurate and relatively undistorted portrait of social relations and processes. Social science dealt "with things, with people, with tangibles, with definite tangibles, and observable relations between definite tangibles, and not with words alone." Science would help get at the positive, determinative realities, "the tangibles which can be got at beneath the words...[and would]...check ideas, and rules and formulas by facts, to keep them close to facts" (Llewellyn 1931b, 1223). For law to be effective and legitimate, it had to confront such definite, tangible, and observable facts; to ignore the facts of social life was folly. Social science could aid decisionmaking by identifying the factors that limited the choices available to officials and, more important, by identifying the determinants of responses to those decisions. Aware of those determining conditions, the informed decisionmaker could and should adopt decisions to take account of what was or was not possible in a given situation.

The intellectual and institutional success of realism was enormous (Schlegel 1979). After World War II, the behaviorist and functionalist orientations that had been urged by the scientific realists became conventional in mainstream social science and in mainstream legal analyses and teaching. For social science, the unmasking of legal formalism and the opening of legal institutions to empirical inquiry offered, at one and the same time, fertile ground for research and the opportunity to be part of a fundamental remaking of legal thought. The possibility of influencing legal decisions and policies further allied social science and law (see Whyte 1986). Rather than challenge basic norms or attempt to revise the legal structure, realism ultimately worked to increase confidence in the law (Brigham and Harrington 1989) and to foster the belief that legal thinking informed by social knowledge could be enlisted to aid the pressing project of state intervention. Realism thus invited law and social science inquiry to speak to social policy, an invitation that many, although by no means all, of its practitioners have taken up.

From Legal Realism to Law and Society

The legacy of realism has been realized in the past three decades by the modern law and society movement. Indeed, the beginnings of the modern period of sociolegal research might be set with the formation of the Law and Society Association in 1965. Although there is, and was, more to sociolegal research than can be encapsulated by the formation of that association, its creation marked an important step forward for empirical studies of law. The Law and Society Association self-consciously articulated the value of empirical research for informing policy (see Schwartz 1965).

The emergence of the modern law and society movement coincided with one of those episodes in American legal history in which law is regarded as a beneficial tool for social improvement, in which social problems appear susceptible to legal solutions, and in which there is, or appears to be, a rather unproblematic relationship between legal justice and social justice (Trubek and Galanter 1974). Moreover, the rule of law served to distinguish the West from its adversaries in the communist world, and hence the full and equal implementation of legal ideals was, to many reformers, essential. By the mid-1960s, liberal reformers seemed once again to be winning the battle to rebuild a troubled democracy; the political forces working, albeit modestly, to expand rights and redistribute wealth and power were in ascendancy. The national government was devoting itself to using state power and legal reform for the purpose of building a Great Society. The courts, especially the Supreme Court, were out front in expanding the definition and reach of legal rights. Because law was seen as an important vehicle for social change, those legal scholars who were critical of existing social practices believed they had an ally in the legal order. Pragmatic social change was an explicit agenda of the state and an equally explicit part of the agenda of law and society research. Legality seemed a cure rather than a disease (Scheingold 1974); the aspirations and purposes of law seemed unquestionably correct. Thus, the modern law and society movement, like the realist movement before it, grew up in, and allied itself with, a period of optimism about law. The period was one in which

liberal legal scholars and their social science allies could identify with national administrations which seemed to be carrying out progressive welfare regulatory programs, expanding protection for basic constitutional rights, and employing law for a wide range of goals that were widely shared in the liberal community and could even be read as inscribed in the legal tradition itself. [Trubek and Esser 1987, 23]

This period was, of course, also a period of extraordinary optimism in the social sciences, a period of triumph for the behavioral revolution, a period of growing sophistication in the application of quantitative methods in social inquiry (see Eulau 1963).

The awareness of the utility of social science for policy can be seen clearly in the standard form of many law and society presentations, which begin with a policy problem, locate it in a general theoretical context, present an empirical study to speak to that problem, and sometimes, though not always, conclude with recommendations, suggestions, or cautions. (For a discussion of this approach, see Abel 1973; Nelken 1981; Sarat 1985.) It appears with striking clarity in some of the most widely respected, widely cited work in the field, although often social science serves legal policy by clarifying background conditions and making latent consequences manifest with little or no effort to recommend new or changed policies.

Take, for example, Abraham Blumberg's "The Practice of Law as a Confidence Game" (1967), which described the ways in which the organization of criminal courts worked to support the interests of court officials and defense attorneys to the detriment of the due process claims and rights of criminal defendants. The importance of Blumberg's work is its insistence on the reasonableness of the actors and the absence of malfeasance, malevolence, or incompetence. Read alongside a number of equally detailed studies, for example Skolnick's *Justice without Trial* (1966), Blumberg's work produced a compelling indictment of structural inequities in the criminal justice system. If Skolnick revealed the contradictions in police work born of the demand for law enforcement and peacekeeping—what he called the law and order dilemma—Blumberg demonstrated the contradictions between social organization and due process rights. The reasonable behavior of well-meaning people earning a living by working in the criminal justice system would nonetheless subvert the best intentions of the law. Moreover, it appeared that the unequal distribution of resources that seemed consistently to threaten liberal ideals not only was a product of class and status distinctions but also was created through the ordinary patterns of interaction that characterized membership and exclusion.

Blumberg begins his analysis paradoxically by identifying himself with the policy project of progressive legal reform. Early in his article, Blumberg (1967, 16) argues that

Very little sociological effort is expended to ascertain the validity and viability of important court decisions which may rest wholly on erroneous assumptions about the contextual realities of social structure. A particular decision may rest upon a legally impeccable rationale; at the same time it may be rendered nugatory or self-defeating by contingencies imposed by aspects of social reality of which lawmakers are themselves unaware.

He takes as his point of departure "important court decisions" whose logic or content he does not wish to question or interrogate. In this way, he both affiliates with and distinguishes himself from traditional doctrinal analysis; his is after all a "sociological" effort. Blumberg's work begins with the same legal act that doctrinal scholarship begins with—"important court decisions"—but Blumberg's project is quite different from doctrinal analysis. Although he wants to "ascertain the validity and viability" of court decisions, for Blumberg validity is an extension of viability; viability is understood in terms of effectiveness, that is, whether court decisions are consistent with social facts and thus have the capacity for realizing their goals.

From his sociological perspective, Blumberg worries that "important court decisions" may rest on "wholly erroneous assumptions about the contextual realities of the social structure." Sociology provides access to the reality of the determining social conditions that will influence whether "impeccable" legal reasoning is viable and therefore valid. The sociologist may be able to save the lawmaker or judge from error, to help prevent decisions that are "rendered nugatory" or that defeat themselves. Thus the sociological project involves the education of lawmakers, whose good works fail because of the contingencies imposed by "aspects of social reality" of which they are "themselves unaware." Blumberg's article (1967, 31) relies heavily on metaphors of concealment or invisibility (such as "the lack of visible end product"; "the lawyer-client confidence game...seems to conceal this fact"). These metaphors portray his research as a project of revelation, of bringing the unseen to light; while others are deceived by, or are unaware of, the true nature of the process, the sociologist can get at that which is concealed or that which is not readily visible. He worries that unless those things are taken into account, presumably by those who are responsible for making decisions, "recent Supreme Court decisions may have a long-range effect which is radically different from that intended or anticipated" (Blumberg 1967, 39). Here again, we see one of the legacies of legal realism's effort to unmask the hidden structures of law.

The use of social science to inform social policy and law is by no means limited to studies of the administration of criminal justice. It is found in research on the impact of legislation, the practices of lawyers in civil matters, and the operations of the administrative process (see Macaulay 1979; Weitzman 1985). Moreover, an interest in using social science in the service of better policy is not only embedded in many important empirical studies. It also is clearly present in commentaries on the tradition and direction of sociological research. Thus one does not have to read very closely, or very far, to find exhortative statements urging sociologists of law to heed policy. Victor Rosenblum, in his president's message to the Law and Society Association delivered in August 1970, quotes approvingly the words of one of his students (Rosenblum 1970, 3–4):

In today's world the relationship between law and social change seems to me to be the overriding problem facing any person or group concerned with the relationship between law and society....The social-scientific investigation of the variables which produce [varying degrees of legal effectiveness] carried on with the aim of formulating a general theory of the limits of effective legal action seems to be essential to the understanding of the relationship between law and social change. Such a theory should be useful to lawmakers as a guide in using law as an instrument of social policy. Another service the social scientist can and should provide the lawmaker is the pragmatic evaluation of the social consequences of specific rules of law to determine how well they achieve their ends and how they might be modified to better achieve those ends.

What was, for some, a hope in 1970—a hope of influencing legal decisionmakers—has, in the view of two more recent past presidents of the Law and Society Association, become a reality. Thus Herb Jacob (1983, 420) praises the contribution of law and society scholarship to the study of trial courts and argues that, “We can begin to inform policymakers about some of the probable nonanticipated consequences of their actions even if we cannot state with certainty the outcome of reforms.” Marc Galanter is even more confident in his assertion that law and society scholarship can and should speak to policy, arguing that the policy debate about the litigation explosion has “both utilized and promoted law and social science research” (Galanter 1985, 541). Concerning proposed reforms designed to alleviate the alleged litigation crisis, Galanter suggests that, “It is the work of the law and society community that supplies much of the conceptual basis, methodology, and data for public debate on these proposals.” He continues,

Debate about legal policy remains a game of persuasion in which the canons of evidence are breathtakingly permissive, reflecting the tendency of mainstream legal learning to rely on causal surmise about patterns of practice and systematic effects. The presence of law and society scholarship, with its accumulation of empirical data and critical apparatus, exerts pressure towards institutionalizing norms of intellectual accountability in the discourse. [Galanter 1985, 541]

This description of the elevating effects of law and society scholarship, although much less direct than Rosenblum's suggested role for sociolegal research in the policy process, is, nevertheless, an indication that the interest in the relationship among social science, social policy, and law did not die with the last gasp of Great Society liberalism, with the resulting change in the political direction of policy elites, with the accumulated evidence of repeated policy failure, or with the coming of age of a new generation of more skeptical law and society scholars. Interest in using social science in the service of social policy is as great today as ever. Everywhere people are striving to realize the rule of law and are demanding equal treatment, rational regulation, and a framework of rules within which to pursue economic liberalization.⁶ Interest in policy continues to be seen with striking regularity in the pages of the major journals of the field as scholars grapple with the long-standing questions raised by legal realism: In what ways is law a product of society, and how can knowing the answers to this question aid in the formulation of effective law and the attainment of a just society?⁷

Revisiting and Revising Existing Paradigms

Yet in the past few decades the social scientific study of law has complicated these questions. Although it is true that much law and society research is still oriented toward an effort to explain why the law is the way it is and to understand the conditions under which legal rules have an impact, or make a difference in society (Kagan 1995b), many scholars have radically reformulated the conceptual categories and the empirical focus animating their inquiries. As originally posed by the first few generations of legal realists and sociologists of law, questions concerning the relationship between law and society left unexamined the clarity and coherence of those terms. The phrase “law and society” unproblematically assigns to law a distinctive and recognizable form, independent from something called society. Similarly, the conjunction “and” assumes a more or less clear boundary demarcating the two spheres of social life. Finally, the surface question regarding the relationship between law and society instructed scholars to focus on the events and interactions that occur across or at that boundary. More recently, each of these assumptions has been challenged (see, for example, Hunt 1980; Brigham 1996; Sarat et al. 1998a). With these challenges, the original legal realist project has not been abandoned as much as it has been expanded in ways that have opened up new lines of inquiry.

In many ways this expansion was a direct outgrowth of the legal realist project. Earlier empirical studies of law clearly demonstrated that the law lacks the uniformity, coherence, and autonomy that are often assumed. Instead, the law refers to assorted social acts, organizations, and persons, including lay as well as professional actors, and encompasses a broad range of values and objectives (Brigham 1996). Recognition of this complexity led scholars to expand the sorts of material and social practices that constitute the law. It inspired them to study not only how, why, and by whom the law is used, but also when and by whom it is not used and, for that matter, to reassess what using the law might mean (Ewick and Silbey 1998). One of the most obvious consequences of reconceptualizing the law in this way is that it renders the old law and society question incomplete. It is incomplete because it presupposes the very thing that is now understood to be problematic: how is it that law emerges out of, or is constituted within, local, concrete, and historically specific situations? If the law is now understood to be an internal feature of social situations, rather than an autonomous force acting on them, it is necessary to identify the ways in which these situations are constructed by law (Sarat and Kearns 1993).

Following from this transformation, a good deal of research has shifted away from simply tracking the causal and instrumental relationship between law and society toward tracing the presence of law in society (see Sarat et al. 1998b). Thus, law is now understood to constitute partially the very activities and persons that, previously, it was thought merely to be acting on (Garth and Sarat 1998). This insight has critical implications for understanding the relationships among social science, law, and social policy. Law is no longer seen as merely an instrument of social change or regulation. It is now conceptualized as being of a piece with larger historical and structural conditions and thus implicated in that which it would change or regulate. For instance, as a number of essays in this volume discuss, law is sometimes used by actors as a resource to accomplish ends that are extra-legal or only minimally related to the legal system. Trials are theater and narrative played to diverse audiences (Friedman, chapter 2; Mann, chapter 3); a regime of criminal punishments are entrepreneurial opportunities (Feeley, chapter 1). The law is more than a means to achieving various ends; it becomes an object of direct social action. As persons and groups invoke, evade, brandish, or celebrate the law, they enact legality. Whereas legal realism tended to see law as operating to shape social action, here it is understood to be a form of social action. Moreover, as it is enacted, the character of the law changes as it is deployed in new situations for unanticipated purposes and with novel consequences (Ewick and Silbey 1998).

The web of relationships that are now recognized as existing between and among society and law humble efforts to effect social change through social policy in any straightforward way. Policies are transformed as advocacy organizations and lawyers use the complex, slow, and costly procedures of the law strategically to increase their bargaining power (McCann 1994; Kagan 1995a, 1996). Within organizations and communities, local cultural and structural factors (such as professional cultures, organizational size, and wealth) mediate, compete with, and sometimes amplify legal norms. Research has suggested, for instance, that in some cases law is rendered irrelevant by local norms of informality (Ellickson 1991). In other contexts, professionals within organizations interpret the significance of law in such a way as to shape the day-to-day operation of the organization. These interpretations may overstate the relevance (or threat) of law or, alternatively, downplay its role, depending on organizational priorities and professional interests and perspectives (Weick 1979; Edelman, Erlanger, and Lande 1993; Heimer 1993; Vaughan, chapter 8; Shapiro, chapter 9). Of course, how social actors interpret and comprehend law in various social situations, ranging from formal organizations to families and neighborhoods, exerts a profound influence on how law might effect behavior within those settings. Moreover, to the extent that these interpretations determine levels of compliance with legal rules or shape decisions to invoke legal mechanisms, they should be understood to be shaping the character and reach of the law.

Finally, social scientists have not left unexamined or untheorized the overlap between their own activities and law and policy. Even as they deny law the autonomy it often claims for itself, recent sociolegal studies have begun to focus on the ways in which their own research is received, interpreted, and redeployed in the making of law and policy (Sarat and Silbey 1988). Knowledge is reconceived as emergent, incomplete, and contextual and, like law itself, as a resource subject to a variety of uses and interpretations.⁸ A number of essays in this volume squarely address this aspect of the social science, law, and social policy nexus (Rhode, chapter 4; Vidmar, chapter 5; Katz, chapter 6; Weisburd, chapter 7).

In light of these developments, the time seemed right to convene a symposium to speak to the growing pervasiveness of law, the controversies that surround it, and the status of social science as a tool for knowing law and for assessing its contribution to social life. The time seemed right to take up specific lines of inquiry that were fostered by Stanton Wheeler and to ask about the role of social science in examining, assessing, and aiding social policy.

The essays in this book were first presented at that symposium. They take up the role of social science in guiding and responding to social policy in two different ways. Some do so by conducting a social scientific study of a particular policy problem; others do so by writing about what it means for social science to inform social policy or about the barriers that stand in the way of a more effective partnership of social science, social policy, and law.

Essays in the first part (chapters 1 through 3) examine the role of history and larger cultural forces in shaping a particular area of legal policy and institutional development, namely the adjudication of crime and punishment. In the United States and Europe, there have been important recent changes in law's response to crime, and the essays in this part seek to explain and assess those changes. In this context, we ask whether the inequalities that are inevitably a part of social life are also inevitably a part of legal life.

The second part of the book (chapters 4 through 7) examines the success and failure of social scientists and social science in influencing legal policy. Specifically, it discusses the mechanisms through which social science is translated for public consumption and the extent to which our research shapes public debate. Particular attention is paid to the role of the news media in this process of translation. Although history and culture know their own laws, the question that animates the essays in this part is whether social science can contribute to more rational social policy.

The third, and final, part (chapters 8 and 9) takes up what we call the problem of law's ability to penetrate and reorder social relations. Social scientists have traditionally drawn attention to the gap between law on the books and law in action. More recently, research has tried to move beyond the mere documentation of the gap to ask under what conditions does or can law have a role in controlling or reordering social practices and to what effect.

Historical and Structural Analyses of Law

The first three essays in this book—the chapters by Malcolm Feeley, Lawrence Friedman, and Kenneth Mann—take up the relationships among social science, social policy, and law by examining the relationship between law and social structure. They use social science to illustrate the pushes and pulls of society on law and seek to make manifest the latent social forces that operate in the domain of legal policy. The vision that their respective studies afford us belies the promise of legal realism or the optimism of the early law and society movement. This view suggests that law is embedded in, and therefore subject to, structures that are more diverse, wide-ranging, and intractable than imagined. The “lessons” that their analyses provide include a sobering one regarding the difficulty of attempting to alter social relations and social practices through law, precisely because of the embeddedness of law in social life. Also, by revealing the broad cultural, economic, and political factors that give shape and content to law, these authors make an implicit claim regarding the crucial role of social science in any such attempt at purposive social change. To proceed without the theoretical or historical view afforded by social scientific analyses is almost certainly to fail.

Chapter 1 describes the emergence of transportation to the colonies as a criminal sanction adopted by European states beginning in the seventeenth century. Feeley rejects the characterization of transportation as having been adopted as an alternative to the ghastly executions that were the principal sanction of the premodern period. According to him, such a narrative of progressive social change is refuted by the simple fact that the number of executions declined precipitously well before the widespread or routine use of transportation. Thus, rather than displacing execution in the state’s arsenal of criminal sanctions, transportation represented an independent innovation in social control, one introduced and practiced by private entrepreneurs who not only received a subsidy from the state for transporting criminals, but then sold exiled convicts’ labor in the colonies.

Although the practice of transportation might well have been more humane than execution, it was also more efficient, effective, and profitable. As a result, transportation could be used more routinely, more frequently, and more widely. It thus extended the reach of social control to persons and behaviors that were otherwise likely to escape any sanction at all.

Feeley uses this historical examination of an innovation in punishment policy as a lens through which to examine a contemporary innovation, namely the trend toward the privatization of criminal justice in the United States. Recently privatization has included entrepreneurial involvement in the management of prisons, the provision of low-security custodial programs for juveniles and shallow-end offenders, and the development and implementation of new technologies of surveillance and control. As was true of transportation, Feeley claims that the efficiency and effectiveness of these contemporary practices have expanded the reach of the state’s control over citizens.

In tracing the implicit collaboration between free market activities and criminal justice, Feeley rejects the picture of the venality or power of private economic interests capturing the state. The conclusion he draws is that legal institutions and practices are shaped not merely by legal ideas (such as notions of proper punishment) but also by organizational and political imperatives playing out a certain logic. Thus governments have political incentives to control crime, maintain order, and appear to punish wrongdoing and rebellion, while doing all of this in the most economical way possible. In fact, Feeley shows that the adoption of any policy—such as the implementation of a new type of punishment—implicates many actors with varying motives. In the case of transportation, the profit motive of entrepreneurs converged with the interests of the state in finding an effective and fiscally plausible way of handling a mounting crisis of law and order. Even the families of convicted offenders collaborated in the development of transportation, because they willingly arranged for the removal of loved ones in order to avoid harsher penalties. This picture presents an additional lesson for understanding the limits of law to effect social life: the difficulty of addressing the complex web of interests, motives, practices, and relationships that produce and sustain social arrangements, including law. In short, law and structures of legality operate in different spheres and for different purposes, and they represent different things to different groups. As such, they defy both easy explanation and easy alteration.

In chapter 2, Lawrence Friedman addresses the public meanings of the criminal trial from a historical perspective. Likening the trial to theater—full of human drama, suspense, roles, scripts, and staging—he attributes to the trial profound didactic functions. The plot and its resolution, as enacted in the trial, announce before a rapt audience social values and norms (at least in the sensational trials that dominate the media). In this way, the records of criminal trials stand as informative archives of social and cultural history.

In his analysis, Friedman acknowledges however, as do Feeley and Mann, the complex and subtle ways in which law and other social arrangements are related. Law, in the form of criminal trials, does not simply broadcast lessons regarding moral boundaries to a waiting public. Extra-legal values and norms insinuate themselves into the law, informing and changing it, even as law informs and changes the social world.

This situation of mutual effect is possible because the trial is not just theater; it is interactive theater played to more than one audience. In particular, the jury is distinguished from the public by virtue of the fact that it is empowered not only to watch the developing drama but also to write the ending and thus determine what the exact “moral of the story” will be. Moreover, because jury deliberations are secret and not subject to review or held to standards of rationality, they become the channel through which extra-legal considerations, conflicting values, or irrelevant considerations are incorporated into law and through which they can subvert the explicit goals of legal rules and policy.

Friedman points out that, when considered against the trial as spectacle, this discretionary power of the jury is ironic.

The great trials are as public a display, as theatrical a social event, as is possible in this society. Yet the power of the trials to change norms and rules is vested in a secret body: the jury. And the actual work of modifying law, of chipping away at doctrine, of subtly altering patterns, takes place in an arena that, up to now, the media cannot penetrate at all.

The implications of this insight for understanding the possibilities and limitations of policy interventions through law are clear. Whenever purposive legal change is sought through criminal prosecution (or civil law suits), this effort can never circumvent or eliminate the power of the public, in general, or the jury, in particular, to reject, alter, ignore, or interpret, and thus change, the law. In this regard, Friedman notes that

One thing is clear: the rules are not made only in the usual way: by fiat or enactment. Some of them are developed in the course of dramas of high visibility; others by underground evolutions, changes in direction...; they grow and develop beneath the surface, so to speak, until they burst out during such high, hot episodes as criminal trials.

In chapter 3, Kenneth Mann focuses not on the high drama of notorious trials, but on the day-to-day workings of criminal law. His essay provides a sophisticated inquiry into the extra-legal causes of legal inequality that, he suggests, permeate the everyday world of law. Despite the best efforts to design fair processes and eliminate the bias of decisionmakers, legal institutions inevitably reflect and incorporate wider social inequality.

By presenting a witness-by-witness, blow-by-blow account of a particular criminal adjudication in Israel, Mann demonstrates how the efforts of competing lawyers to bring out seemingly small factual details can change the perception of what occurred between the alleged victim and the alleged perpetrator and, hence, about where responsibility should be placed. Second, Mann shows just how difficult and costly the lawyers’ job of “constructing the facts” actually is: “Proving factual reality is, relative to other goods and services in society, a high-cost endeavor.” And that costliness, Mann reminds us, is a constant threat to legal equality.

In his analysis, Mann suggests that one source of inequality derives from the fact that “most trials are conducted with resources insufficient for exploiting fact-finding procedures.” Within those constraints, defendants’ lawyers, who bear the burden of constructing “an exculpatory image,” as Mann puts it, will vary in their energy, commitment, ability, and available time and resources. Richer defendants, who can afford better lawyers and more of their time, are likely to do better in this regard than those who depend on government-funded legal services. Ironically, defendants entitled to government-funded legal services may be less disadvantaged than slightly better-off defendants who must rely on the low end of the private market for attorneys.

By demonstrating how material resources affect the possibilities of justice, Mann poses one of the most crucial questions for sociolegal studies: How do different institutional arrangements and procedures magnify (or reduce) the almost inevitable disparities in parties’ ability to influence the construction of legal facts and the realization of justice? In posing this question, moreover, Mann addresses the larger issue raised by both Feeley and Friedman: In what ways are law and the operation of the legal system captives of larger structural conditions?

Barriers to Influence

In the chapters by Feeley, Friedman, and Mann, social science remains outside the frame of analysis. It is what they practice, as they collect, examine, and interpret historical data, but social science, as a social and cultural enterprise in its own right, is not part of their object of study. The four chapters in the next part of this volume, in contrast, focus their analytic gaze squarely on the role of social science as they seek to understand the relationship between law and social policy.

These chapters remind us that in the past thirty years, social science has indeed become deeply embedded in the processes of legal policymaking, particularly in the United States.⁹ Comparing the American legal system with that of England, Atiyah and Summers (1987, 404) write that, “The dominant general theory of law in America” can now be characterized by the term “instrumentalism,” which “conceives of law essentially as a pragmatic instrument of social improvement” rather than as a received set of authoritative legal rules and principles. An instrumentalist view of law leads policymakers to be concerned about the actual empirical consequences of current or proposed rules and institutions. Accordingly, legislatures, courts, and administrative agencies have become increasingly open, or eager to appear to be open, to considering sociolegal research and to building requirements for empirical assessment into the policymaking and policy-evaluation process.

Yet most academic sociolegal scholars do not conduct research that is quite so applied. Their relationship to the legal policy process typically is more indirect; they seek, through their research, to illuminate the dynamics of legal processes, to discern general tendencies, and to illuminate unexamined assumptions and biases underlying legal rules and processes.¹⁰ Sometimes these studies are read by legislative staff members, administrators, and lawyers on the lookout for new insights. Often they are not. It probably can be said, however, that academic sociolegal studies have played a significant role in legitimating the use of theory and empirical evidence in debates concerning legal policy and institutional reform and, indeed, in enabling well-founded research findings sometimes to prevail, if properly mobilized, over untested assertions.

Chapters 4 through 7 reflect the assumption that social scientific evidence not only should but, based on our recent history, plausibly might be expected to influence legal policymaking. Based on that set of assumptions, they explore, in different ways, factors that limit sociolegal scholars’ influence on the law.

Deborah Rhode, in chapter 4, acknowledges the formative role of the news media in shaping public and elite images regarding law, in this case tort litigation, often in ways that neglect and upstage the more systematic research conducted by sociolegal scholars. Journalists, Rhode claims, frame their coverage of legal cases in accordance with the constraints of their market and craft. Reported events must be newsworthy (meaning interesting or extreme). Stories must be generated under tight deadlines and with limited resources. As a consequence, the picture of the legal system that is generated as a result of this process tends to be biased, incomplete, and typically sensational.

Most important, this picture, Rhode asserts, no matter how extreme and empirically indefensible, cannot be simply dismissed as biased or distorted. The media do not just reflect some underlying reality, but, in their depictions, they may actually reshape the legal world they claim to be merely representing. By drawing on the sensational, the media generate public sentiments and produce preferences, intentions, and motives that, in turn, can influence legal behaviors and decisions.

In her critique of the media's role in representing the legal system, Rhode traces the complicity of legal academics and sociolegal scholars who, all too frequently, defer to (or remain oblivious to) the media's depictions and their cultural and political implications. Constraints of the academic craft mean that most scholars have neither the time, incentive, nor ability to present accurate and intelligible accounts of the legal system to the general public. Nonetheless, by not actively participating in the responsible dissemination of knowledge about the legal world, academics conspire in producing the misapprehensions and distrust of the public in relation to the law that are generated by the media's fixation on atrocity stories and extreme examples of abuse of the legal process. Rhode suggests, as a possible corrective to this situation, a dual strategy whereby the press become a more sophisticated consumer of information and research about the legal system and the law. Similarly, she argues, legal academics must become more sophisticated participants in public discussions.

Neil Vidmar, in chapter 5, also examines depictions of the law and the significance of these depictions in public discourse and policy efforts. Turning to the debates over the litigation crisis and tort reform, Vidmar analyzes the ways in which depictions of the system by interest groups and politicians all too often displace the careful mapping by sociolegal scholars in the policy debate. He illustrates this displacement using the growing body of research concerning medical malpractice litigation to puncture the politically generated stereotypes concerning the existence of a litigation crisis, an explosion of frivolous lawsuits, and an irresponsible jury system.

Vidmar begins his analysis by considering the so-called "gap" between the aspirations of law and its enactment (Sarat 1985). The particular gap that is perceived to exist in the case of medical malpractice, he argues, is in part manufactured by the various interest groups involved directly or indirectly in litigation and in legislative debates. Law is known and enacted in a highly politicized arena, where formidable economic and professional interests can manufacture a "crisis" and generate legal changes. Once again, as in Feeley's research, we see that a multiplicity of actors—both legal and nonlegal—shape legal policy.

Vidmar jumps into this political arena armed with an array of relevant studies. In so doing he takes up the challenge that Rhode defines for social scientists. Vidmar examines a number of the most frequently heard and damning criticisms of medical malpractice, offering us, not a picture of a gap, but what he calls a "map" of the legal terrain or an accurate reckoning of how legal decisions are made and legal processes enacted. By examining the role of the jury and the character of settlements, Vidmar dispels, or corrects, many of the most widely held misapprehensions regarding medical malpractice. Reviewing social science data regarding issues such as the magnitude of compensatory awards, pain and suffering awards, and punitive awards, Vidmar concludes that juries, on balance, are neither irresponsible nor inclined to hand out excessive awards. Similarly, in regard to the settlement process, he concludes that the tort system is relatively effective in winnowing out cases without merit. Indeed, the most recurrent finding by sociolegal scholars, Vidmar notes, is that the American tort system systematically undercompensates seriously injured persons.

Vidmar concludes his assessment of the tort system by considering, as did Rhode, the role of sociolegal scholarship. He notes that although empirical sociolegal research cannot resolve the disputes over value that revolve around controversial legal policies—such as whether the tort system should emphasize prompt, economical, and widespread compensation, or punishment and deterrence of negligent behavior—sociolegal research, by accurately and dispassionately mapping the performance of legal institutions “can set terms around which the dialogue must center and focus policymakers on the real issues.” Despite some failures in this regard, he notes some successes, and he urges the production of the kind of “maps” that have been produced in other areas of the law. He cautions scholars not to be discouraged by “spectacular failures, like the rejection or evasion of social science findings about the death penalty.” He holds out hope that although the influence of social science may not be complete, immediate, or easily detected, it can and should shape the policy debate.

If social science is to influence policy and to overcome barriers to that influence, social scientists must be able to communicate clearly and be clear about the meaning of the core concepts of their research. Unfortunately, such clarity is rarely achieved. Jack Katz, in chapter 6, examines the efforts of sociolegal scholars to address issues of inequality in the legal system.¹¹ He provides an insightful history and analysis of social scientists’ engagement with the problem of inequality—or “bias” as it is often termed—in the operation of legal institutions. Katz notes that researchers have asked whether legal processes are biased against a widening array of social groups—the poor, racial and ethnic minorities, women, gays and lesbians, immigrants—and in a widening array of institutional settings, from police cars and lower courts to the location of hazardous waste storage sites and the offices of institutions governed by antidiscrimination law, from schools and bank lending departments to apartment complexes and car dealers. Moreover, Katz observes, the focus of studies of bias has expanded conceptually. Beginning with a definition of bias as the expression of (1) individual psychological prejudice on the part of police or judges or employers, researchers have also conceptualized bias as (2) unequal organizational or institutional outcomes (such as higher imprisonment rates for African American defendants), regardless of whether there is or is not evidence of prejudice on the part of decisionmakers in the relevant institutions, and as (3) unequal patterns of pressures on decisionmakers, as when victims of securities fraud by upper-class businessmen ask enforcement officials not to prosecute (which would inhibit the victim’s hopes of getting restitution), while victims of street crime demand prosecution of jobless assailants.

Katz goes on to analyze the different methodological and interpretive problems that have impeded efforts to document each kind of bias. For example, societal successes in banning discrimination and stigmatizing overt manifestations of bias have made public officials and employers much more circumspect about what they say, and hence it is much more difficult for researchers to document the incidence of personal prejudice in decisionmaking institutions. In research concerning unequal organizational outcomes, Katz observes, well-documented racially disparate capital punishment of black men in southern states helped to produce U.S. Supreme Court opinions that banned capital punishment for rape and that mandated closer statutory and judicial controls of prosecutorial and jury discretion in murder cases. But it then became methodologically much more difficult to establish what role race played in capital cases—as David Weisburd’s chapter in this volume further demonstrates. Increasingly, the search for bias has been pushed to earlier, less formal steps in the legal process. Thus although research has indicated that white-collar offenders are sentenced just as heavily as street criminals, that does not settle the matter, Katz argues. The researcher must also study the pretrial screening of cases, which, it turns out, is biased toward middle- and upper-class offenders, so that only a particularly egregious subset of that group reaches the sentencing stage.

Partly because the intensity and incidence of conscious bias have declined or been driven underground and partly because the analysis and moral interpretation of various kinds of inequalities have become more complicated, the social scientific search for bias, Katz concludes, has become “increasingly sophisticated” and “labyrinthine,” while “its findings have become increasingly ambiguous in their policy implications.” The simple demonology of earlier studies of bias is no longer viable. Thus Katz concludes that researchers interested in legal inequality must acknowledge “a more complex view of the distribution of morality in society” and must study legal and employment processes in all their social complexity and causal origins, if they are to interpret adequately the incidence and etiology of inequality.

David Weisburd, in chapter 7, nicely exemplifies the complexities in proving bias that Katz mentions and the barriers to effective influence that social researchers face, even when their research is solicited by legal officials. Those complexities are greatest, this chapter suggests, when social science analyses are invoked to help resolve specific legal cases or policy issues. One of the most dramatic uses of social science in court stemmed from research conducted by David Baldus and his colleagues on homicide cases in Georgia in the 1970s. Reviewing 2,000 Georgia murder cases, Baldus and his colleagues found evidence that prosecutors were more likely to seek the death penalty in cases in which black or white defendants had slain white victims than in cases in which the homicide victim was black. The disparities persisted when the researchers controlled for the number of statutory “aggravating factors” (Baldus et al. 1983).¹² Nevertheless, the U.S. Supreme Court ruled, in a five to four decision, that the statistical evidence fell short of proving that the state had acted with unconstitutionally discriminatory purpose in the case at hand (*McCleskey v. Kemp*, 481 US 279 [1987]).

Weisburd’s essay concerns yet another effort to use social scientific analysis to test the fairness of capital punishment, this time in the courts of New Jersey. The New Jersey legislature mandated appellate review of death sentences, instructing the state supreme court to determine whether the sentence imposed is “disproportionate to the penalty imposed in similar cases.” The New Jersey supreme court then appointed Professor Baldus as special master to produce a database of relevant cases and a method for determining proportionality in particular cases. Weisburd carefully describes the methodological challenges faced by Baldus and his successors. The special master’s analysis of prior cases indicated that blacks convicted of murder were slightly more likely than whites to have received a death sentence, as were defendants of either race who had killed white as opposed to black persons. Yet, as in *McCleskey*, the state’s analysts criticized the results, arguing that the measures were inadequate and that the results were statistically unreliable. In a series of cases, the New Jersey supreme court grappled seriously with a progressively more sophisticated series of statistical debates, carefully described by Weisburd. But in each case, the court declined to find the proportionality analysis submitted by the special master to be sufficiently reliable to support a conclusion that the death sentence should be reversed on grounds of disproportionality or on grounds of “race-based disparities in sentencing.”

The problem, Weisburd explains, was that the number of cases in the database was small (only thirty-nine death sentence cases) and hence the special master’s statistical model for determining whether the offender in any particular case was equally culpable as others who had been sentenced to die generated results with wide “confidence intervals” or margins of error. Weisburd says that the special master used the best available social science methods to deal with the small-sample problem and the instability of the outcomes produced by the model. Yet what is good for social science may not be good enough for law. The statistical method still failed to meet the normative or policy standard that the court insisted on. Before the court would rule that police, prosecutors, and juries had acted unconstitutionally, the data would have to show that racial considerations had played a convincing or “relentless” role.

Weisburd’s New Jersey story seems to reaffirm Katz’s conclusion that the methodological and conceptual problems involved in the establishment of bias have become increasingly complex, so that research often yields ambiguous results. But Weisburd’s analysis does not mean that social scientists have little to contribute to the search for equal justice. In the New Jersey capital punishment setting, social scientists were given an extraordinarily ambitious assignment: to build a predictive model, based on many variables and relatively few cases, that would determine the fairness of the sentence in a particular case. Moreover, the legal debate concerning capital punishment and race is politically explosive, bearing some resemblance in that respect to the highly politicized arena of tort reform discussed by Rhode and Vidmar. In those realms, empirical research is perhaps least likely to influence legal policy, as contending interest groups draw conflicting normative conclusions from the same empirical findings or invoke distorted accounts of social science studies.

More often, social scientific studies are intended not to determine case decisions or policy changes, but rather to provide political or legal policymakers with data or analyses that can inform their normative debates and choices. In many areas of legal policy, moreover, decisionmakers are eager for useful information or are eager to appear eager. In a complex society, findings of inequality, although surely important, often are not in themselves policy-determinative but rather are weighed against other values. In addition, as Katz's analysis reminds us, Weisburd's New Jersey story occurred after years of close legal and journalistic oversight that sharply diminished the most extreme manifestations of racial bias, thus making the proof of bias much more difficult to obtain. In other institutional spheres, systematic research into the often subtle ways in which social and economic inequalities affect legal processes is likely to remain both meaningful from a policy standpoint and central to the agenda of sociolegal studies.

Law and the Reordering of Social Relations

A recurrent set of questions in sociolegal studies revolve around the capacity of law to penetrate, influence, and change established social patterns and practices. Those questions have become increasingly salient as governments have become more ambitious, promulgating sweeping constitutional rights and regulatory programs that prohibit or demand sharp reductions in pollution, racial and gender discrimination, product-related risks, police brutality, securities fraud, and so on. When and why, sociolegal scholars have asked, do such ambitious laws and regulatory programs induce the desired behavioral changes? When and why do they instead lead only to symbolic responses or, at the other extreme, have large effects that are unanticipated and undesirable? How do interactions between regulatory officials and regulated entities, or between complainants and regulated entities, transform the meaning, the application, and the legitimacy of regulatory rules? How do changes in the political or economic context affect the implementation of regulations and the vindication of legal rights? Answering these questions may, in some instances, inform policymakers in ways that allow them to devise strategies to close the gap between law on the books and law in action.

Addressing such questions, many sociolegal scholars have turned to field research, conducting detailed case studies of regulatory enforcement in fields ranging from consumer fraud (Silbey 1984) and securities law (Shapiro 1984) to workplace safety (Kelman 1981), industrial pollution (Hawkins 1984; Shover et al. 1984), and quality of care in nursing homes (Braithwaite 1993). Other scholars have examined the dynamics of compliance, evasion, and adaptation to legal obligations in governmental agencies such as police departments (Skolnick 1966), welfare administrations (Mashaw 1971), and school districts (Kirp 1982). The chapters in this volume by Diane Vaughan and Susan Shapiro represent and extend this research tradition. Both employ the difficult, but rewarding, research strategy of probing deeply into the culture and practices of regulated organizations to determine the import and limits of external legal influences.

In chapter 8, Diane Vaughan emphasizes that if it is to be effective, regulation often must go beyond a legalistic "command and control" approach, backed by the threat of penalties. Regulated organizations, she notes, are not unified, profit-maximizing monoliths, responsive only to the threat of immediate sanctions imposed by law or the market. She tells us that deviant behavior in complex organizations arises from the interaction of such external legal pressures with the motives and perceptions of individuals within the organization and the interorganizational culture and structures that affect those motives and perceptions. Consequently, legal interventions must be attentive to the context-specific structural and cultural dynamics of organizational life, and sociological scholars, to aid that process, must do the "boundary work" of examining both the macro- and micro-level dynamics of organizational behavior.

Vaughan illustrates her point by discussing the tragic 1986 decision by the National Aeronautics and Space Administration (NASA) to launch the ill-fated space shuttle Challenger. The dominant explanation has been that NASA's managers, desperate to maximize the agency's political and budgetary position by maintaining a frequent launch schedule, overrode objections by engineers in the contracting aerospace company concerning the hazards of launching in unprecedentedly cold weather. But Vaughan's examination of archival records suggests that the launch decision violated no safety-oriented regulations and that the dominant opinion of the engineers, after completing the prescribed safety checks and discussions, was that it was safe to fly. The fatal decision, Vaughan tells us, was made because of an institutionalized practice, built up over a sequence of successful flights, of accepting incrementally larger risks as "normal."

The Challenger explosion, Vaughan points out, occurred even though NASA had established a regulatory system and decision structure that called for repeated analyses and critiques by knowledgeable engineers at each step of the prelaunch process. Moreover, this professionalized internal attention to safety was reinforced by the external political and legal environment, which presumably would impose huge costs on both NASA and the contractors in the event of a disaster. So why were the fatal flaws not detected or sufficiently emphasized? Vaughan's analysis points, among other factors, to (1) the false assurance that NASA engineers and managers drew from their faithful adherence to the safety procedures called for by the regulations and (2) their own working culture, which emphasized the inevitability of a certain degree of "satisficing" in adapting engineering theory to real-world conditions and the need for definitive scientific evidence (rather than mere engineering intuition) as a basis for changing existing procedures. One important lesson, Vaughan observes, "is that the potential deterrent impact of sanctions" can easily be nullified when "behavior that is considered objectively deviant to outsiders is considered normal and legitimate within an organization."

In one sense, the Challenger story conveys a discouraging message about law's capacity to prevent organizational error and misbehavior. But NASA's regulatory task, we ought to remember, is extraordinarily demanding: to produce absolute perfection in a complex process that extends the boundaries of engineering and organizational coordination and in which even small deviations can lead to disaster. In other, more mundane settings, where the operative goal is gradual progress in reducing the incidence of harmful acts, sociolegal scholars have shown that law often has been reasonably effective. By modifying organizational incentives and norms, regulation—to mention just a few examples—has reduced emissions of most major air and water pollutants, cut the mortality rate in coal mines (Lewis-Beck and Alford 1980), and curtailed smoking in transportation, restaurants, and offices (Kagan and Skolnick 1993). Using the tools of litigation, lawyers have stimulated significant improvements in southern prison conditions (Feeley 1996) and effective efforts in many police departments to curtail dangerous, brutal, and intrusive police practices (Orfield 1987; Skolnick and Fyfe 1993; Walker 1993). That is not to say that law always, or perhaps even usually, succeeds in such ambitious efforts; much depends, as Vaughan reminds us, on a variety of legal and contextual factors (Kagan 1994). Studies both of law's successes and of law's failures, however, converge in supporting Vaughan's central conclusion: law most efficiently and reliably affects complex organizations when it creates mechanisms that directly affect intraorganizational cultures and priorities.¹³

If Vaughan's chapter nicely represents the sociolegal literature that investigates the obstacles that law faces in building safeguards against organizational failure or misconduct, Susan Shapiro's chapter represents the tradition that explores the consequences of regulatory law when regulated entities (as they usually do) vary widely in size, risk of legal surveillance, and resources for compliance. The legal rules whose impact is traced in her study of 128 Illinois law firms are aimed at lawyers as service providers. Just as explicit governmental regulations governing used car dealers, banks, and corporate pension funds codify norms designed to protect consumers, the American Bar Association Code of Professional Responsibility seeks to protect lawyers' customers (and the integrity of legal processes) by ensuring that a lawyer will not take cases from clients whose interests conflict with the interests of other clients represented by the same lawyer or by others in the firm.

At first blush, one might ask whether hard-driving, profit-seeking law firms take these ethical rules seriously. As firms get larger, Shapiro's research shows, the number of potential conflicts among clients grows exponentially and the more burdensome it is to detect them. At the same time, like many other rules of the modern regulatory state, the rules extend far beyond precluding harmful acts; they are prophylactic and extraordinarily cautious, seeking to prevent conflicts that might result in harm to a client's interests under circumstances in which the client's attorney also violates other, more immediate duties of loyalty. Moreover, as in the case of many other regulatory regimes, violations of the rules often are difficult to detect. Yet apart from a handful of small Illinois firms (whom Shapiro classifies as "ostriches," since they simply hope the problem will go away), Shapiro finds that law firms do take these regulations seriously. Some smaller firms whom she labels "elephants" rely only on the memory of senior partners to detect conflicts. But most invest an extraordinary amount of time and money in creating archival and (as they grow larger) computerized databases and review systems.

The bar's ethical injunctions have teeth, Shapiro shows, partly because a law firm's adversaries can petition courts to disqualify a law firm on grounds of a conflict of interest and because lawyers can be sued for malpractice if they fail to detect and disclose conflicts. Fighting disqualification motions and malpractice suits is very costly and may hurt the firm's reputation. In addition, Shapiro finds that legal malpractice insurance companies, especially a mutual company created by large law firms themselves, pressure firms to adopt ever more elaborate "conflict-detecting" systems. This comports with sociolegal studies of other regulatory regimes, which suggest that law gains its greatest potency in shaping business behavior when it stimulates the creation of intraorganizational "shadow-regulators" who are charged with buffering the organization from "trouble" with regulatory agencies or the courts (Bardach and Kagan 1982).

Indeed, one of the most interesting aspects of Shapiro's study is how passively the lawyers seem to accept the regulatory regime. In large firms whose conflict-detecting systems are so advanced that Shapiro labels them "cybersurveillance" or "technoblitz," certain senior partners spend more time watching out for potential conflicts of interest than they do on "client work," and "on a complex case with many coparties, it may cost more to do a conflicts search than the client will be billed in fees." This, together with parallel findings in some other studies, suggests that even beyond the economic risks that motivate enterprises to comply with the law, legal compliance systems in organizations often take on a life of their own, institutionalizing new values in the entity's day-to-day operations (Edelman, Abraham, and Erlanger 1992). At least in countries with a strong cultural commitment to the rule of law, Shapiro's chapter implies, law usually can affect organizational norms and behavior, although those effects typically are more elusive with respect to small, less "visible," and less well-endowed entities (see also Kagan and Axelrad 1997).

Conclusions

The relationship among social science, social policy, and the law is nothing if it is not complex, contingent, and variable. As a result, the lessons that can be drawn from this collection of essays are, of course, multiple. Sometimes our work identifies where policy fails and helps us to understand why; sometimes it shows what works and points the way for a greater investment in those things. Yet always what social science offers to law is a broadening of perspective and a deepened awareness of the latent forces that constrain legal policy and the latent consequences that accompany any legal decision. This broadening of perspective comes at a cost to both law and social science. Law has to act in the world and act with whatever information it has, however, partial, incomplete, or biased. The cost to social science is that its power as critique may be diminished as it seeks influence and that it may lend an appearance of rationality and legitimacy to a process that is itself deeply political. And, as the essays suggest, social science information competes with anecdote, horror story, and myth for the attention of policymakers. What we offer is complexity and often increased uncertainty. This is hardly the stuff to win friends when decisions have to be made and sides have to be taken.

The essays collected in this volume remind us that, as Susan Silbey (1997, 233) points out, we must pursue social science knowledge of law "because without that theoretically informed analysis of the social organization of power and law...critical questions of justice cannot be answered."

Notes

1. Stanton Wheeler is Ford Foundation Professor of Law and the Social Sciences at Yale Law School and Master of Morse College of Yale University. He was educated at Pomona College and the University of Washington and is the author or editor of ten books including *Controlling Delinquents*, *Crimes of the Middle Class*, *Social History and Social Policy*, and *Sitting in Judgment: The Sentencing of White Collar Criminals*. He is widely recognized as the “father” of an entire generation of law and society scholars, several of whose work is represented in this volume.

2. Much of the following analysis is taken from Sarat and Silbey (1988).

3. Legal realism was by no means, however, a unified or singular intellectual movement. At one and the same time, the label legal realist has been applied to people like Felix Cohen (1935), who took what Gary Peller (1985) later categorized as a deconstructive approach—a radical skepticism that challenged the claims of logical coherence and necessity in legal reasoning—and to others like Karl Llewellyn (1930) who embraced and believed in science and technique. Moreover, realism embodied three distinct political perspectives. It included a critical oppositional strand that sought to undermine the law’s ability to provide legitimacy for political and economic elites by exposing the contradictions of classical legal formalism and the hypocrisy of legal authority. Realism also included a strand of scientific naturalism whose proponents attempted to advance a more enlightened, rational, and efficient social order by using the methods and insights of the empirical sciences to understand a wide range of human, political, and social phenomena. Among these scientific realists, there were divisions between the pragmatic followers of Dewey and James and those realists who pursued a more positivistic version of empirical science. Finally, legal realism was a practical political effort that did more than merely support or legitimate political elites; some of its members were themselves the officials designing, making, and enforcing reform policies.

4. Not all strands of realist inquiry were, however, equally confident that law could, or should, be rescued or that its integrity could, or should, be restored. The deconstructivist strand, which came to be viewed by mainstream legal scholars as dangerously relativistic and nihilistic, tried to reorient legal thought by emphasizing its indeterminacy, contingency, and contradiction. According to Peller, “This deconstructive, debunking strand of realism seemed inconsistent with any liberal notion of a rule of law distinct from politics, or indeed any mode of rational thought distinct from ideology...This approach emphasized contingency and open-ended possibilities as it exposed the exercises of social power behind what appeared to be the neutral work of reason” (Peller 1985, 1223).

5. By pointing to the scientific impulse in realism, however, we do not want to suggest that only one model of empirical social science was available for adoption by those who pursued a more “constructivist” approach. Institutionalists of such varied stripes as Walton Hamilton, William Douglas, Rexford Tugwell, John Commons, and A. A. Berle attacked the metaphysics and psychological abstractions of classical economics and organization theory, producing detailed descriptive histories and analyses of organizational behavior and legal doctrine (Hamilton and Wright 1926; Commons 1924). Making space for this style of realism, only a small number of scholars went so far as to embrace a full-fledged operationalism, that is, defining concepts in terms of a set of physical operations, observable actions external to and removed from the human mind, and “probably half of the active social scientists of the period accepted the outlines of [a] broader [less stringent] quantitative behaviorism” (Purcell 1973, 39). The work of the largest majority of social scientists was even more generally particularist and functional without sharing the tenet of the most extreme objectivism of some. Particularism meant specificity and attention to detail; it eschewed generalization and categorization. If a concept was to be valid and meaningful, it had to refer directly to an individual concrete thing. Functionalism meant that those details—specific facts, cases, and things—were to be understood in terms of their social and economic consequences; it denied the possibility of a further standard for determining the worth of anything (Purcell 1973, 42). Many of the social scientists who shared a generally functionalist approach, and who participated in the spread of scientific naturalism in the 1920s and 1930s, nonetheless criticized what they considered to be its excesses: too extreme a “concern with measurement and an abuse of statistical techniques” (Purcell 1973, 39; see also Hamilton 1931; Ogburn 1934). There was a strong pragmatic impulse; fact finding was to be related to practical problem solving, according to Merriam and Berle (Karl 1969). Dewey “argued that the quantitative behaviorists distorted the scientific method in their desire to reduce social science to purely ‘factual’ data” (Purcell 1973, 40; see also Dewey 1931).

6. Yet at the same time, law has come to seem more vexed and vexing. As the O. J. Simpson trial showed, the more we see of law, the less we like it. Legal legitimacy is more strained, the closer we come to the triumph of liberal legality.

7. To the extent some sociologists of law continue to orient themselves to social policy, they are likely to be led, like the realists, to try to establish credibility with that audience by claiming that they offer a posture of “deliberate detachment” (Friedman 1986, 780). This is not to say that interest in policy is the only force encouraging sociologists of law to adhere to, or to adopt, the posture and canons of normal science; there are certainly others. Nonetheless, it is worthwhile noting the powerful effect of that interest in encouraging sociologists of law to characterize their empirical work in the language of science (see Dror 1975). It encourages sociologists of law to operate as if social behavior could be understood in terms of a tangible and determinate world of facts (see Rein and White 1977; Rich 1977), to treat data as if they were an undistorted window on the social world, to treat the ambiguity of what we observe in an unambiguous way. Sociologists of law are invited to act as if there were a clear congruence between our representations of things and the things themselves and to accept the model of value-free, detached, objective inquiry in which empirical research seeks generally valid

propositional knowledge about “reality.” This is one of the results of attempting to speak convincingly to the powerful (see Trubek 1984; Black 1976).

8. At the same time as we refine our theories and develop more sophisticated methods of social investigation, the status of value-neutral inquiry in the academy is viewed with greater skepticism and is under greater scrutiny than ever before (see, for example, Sarat 1994).

9. In the 1960s, social scientists conducted studies of police practices, criminal courts, and race relations for the Kerner Commission and the National Commission on Violence appointed by President Lyndon Johnson. Since then, policy-oriented sociolegal research has been systematically supported by the National Institute of Justice, the National Sentencing Commission, the National Research Council, the American Bar Foundation, and the Rand Corporation Institute for Civil Justice. Congress and several presidents have instructed regulatory agencies to conduct cost-benefit analysis of proposed regulations. The Justice Department schedules recurrent crime “victimization” studies, based on surveys of household experience. Court administrators, drawing on social science methodologies, study the determinants of delay in court and the effects of experimental changes in pretrial policies. Law review articles arguing legal policy issues routinely cite sociolegal research. Psychologists advise lawyers on jury selection. The New Jersey Supreme Court, David Weisburd’s chapter in this volume tells us, appointed a sociolegal scholar as a special master to construct a database and statistical model to help guide the court’s decisionmaking in capital punishment cases.

10. Chapters 1, 2, and 3 in this volume are good examples of this tendency.

11. The normatively freighted relationship between law and inequality has long been an important, perhaps a paramount, focus of sociolegal research. (This emphasis may be partially responsible for the development of a lively scholarly counterstream, the law and economics movement, in which the relationship between law and economic efficiency has been the primary focus.) But in the pages of the *Law & Society Review* and in the conference rooms of the Law and Society Association, sociolegal scholars have presented studies examining whether police officers treat white and minority complainants and suspects differently (Reiss 1971), whether African Americans convicted of crime receive heavier sentences than whites with comparable offenses and prior records (Spohn et al. 1981–82), whether white-collar defendants get lighter sentences than lower-class offenders (Weisburd et al. 1991), whether “the haves come out ahead” in lower courts (Galanter 1974) and state supreme courts (Wheeler et al. 1987), and the consequences of police officers’ tendency to forgo arrest more often in spousal abuse cases than in other kinds of assaults (Sherman 1992).

12. To use Katz’s terminology, lawyers for Warren McCleskey, a black man sentenced to die for killing a white police officer in an Atlanta suburb, argued before the U.S. Supreme Court that these racially disparate outcomes provided evidence of psychological prejudice, perhaps unconscious, in the charging process, thereby showing that the death penalty was arbitrarily and hence unconstitutionally applied. By a five to four majority, the court rejected McCleskey’s argument, reasoning that the statistical evidence fell short of proving that “the decisionmakers in McCleskey’s case acted with discriminatory purpose” (McCleskey v. Kemp, 481 U.S. 279 [1987]).

13. Today, the most interesting regulatory policymaking and enforcement programs in the United States and abroad build on this insight, providing incentives for intra-agency, intracorporation, or industrywide self-regulation, auditing, and disclosure (Gunningham and Rees 1997).

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