

The Blackwell Companion to Law and Society

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Profession, Science, and Culture: An Emergent Canon of Law and Society Research

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A recurring conversation over several decades among scholars from a variety of disciplines about a specific site for investigation – the law – has produced a set of perspectives that exemplifies some of the most important contemporary insights in many social science fields: that is, the “site” of social action matters to the meaning and organization of that action. Over the last decade or so, across the social sciences there has been a turn away from large-scale theory development and abstract modeling to more situated and contextualized analyses of sites of social action. While a concern for the close analysis of the sites of social action has long been a part of American social science (see e.g., Becker, Strauss, Hughes, and Greer, 1961; Gusfield, 1963), of late it has enjoyed a more widespread acceptance in the mainstream of the disciplines. Contemporary social scientists are finding ways to bridge the epistemological and theoretical paradigms that fuel their knowledge production while simultaneously creating deep chasms within each discipline. Thus the move to cultural analysis in many fields signals an effort to synthesize behavioral and structural as well as micro and macro perspectives. In its push to look closely at various formal and informal settings where legal activity – in all its guises – may unfold, the discipline of law and society is unusually well poised to make a major contribution to the theoretical development of a sociology of culture.

Tracing the canon of law and society research across a wide variety of formal and informal sites demonstrates that scholars have long documented that legality is not what it claims to be: it is both less and more; it is also raced, gendered, and unequal. What, from the standpoint of formal law and legal institutions, may be aberrant practice, is, when viewed from the ground up, routine and normal. Legality is situated and contingent on the particularities of time and place. In studying the formal institutions of law – courts, lawyers, policing, or administrative agencies, law and society scholars captured the importance of nuance, context, contingency, time,

and place. But a review of the classics demonstrates, as well, that this insight goes further. For in also studying sites beyond the formal institutions of legality, these scholars revealed that the activities of doing law occur before the law begins; that is, law is *in* society, or laced through, between, and in society's culture. These themes emerge from a review of the classical canon of law and society research and are remarkably contemporary. They demonstrate that social theory and the concepts that guide its unfolding must be anchored by an appreciation for the contingent, the local, the culturally embedded, and the margins of social action. By researching the gap between the claims of law and its practices, and importantly the space within that gap, law and society scholars have moved closer to the mainstream of contemporary scientific and humanistic inquiry.

To demonstrate our argument that law and society is currently poised to make a substantial contribution to contemporary social theory, this essay is divided into two sections. The first section maps the intellectual background and professionalization of law and society research. Briefly, this map demonstrates that early law and society scholars used the newly minted methodologies of social science to answer the legal realists' question – does law deliver on its promise; is the law on the books the same as the law in action? The contemporary discipline of law and society takes up and expands this question to look at the constitution of legal action, not merely its instrumental forms. The research develops in a more professionalized setting, that is, with the trappings of associations, journals, funded support, and academic programs. Yet upon closer scrutiny this history also shows that the professionalization of law and society has not been quite as robust as its more mainstream counterparts, in part, we argue, because of the absence of a core theoretical frame to anchor an early body of research, or explicit connection to the central theoretical problems pursued by the more central social science disciplines.

The second section offers a brief tour through the classics of law and society, our construction of a law and society canon, including the work on courts, disputing, lawyers, juries, policing, and administrative enforcement and regulation. Every discipline, to the extent it is a discipline, develops a canon, a set of standard texts, approaches, problems, examples, and stories that its members repeatedly employ or invoke, that help define the discipline. A canon is what one reads as a rite of passage into an intellectual and professional community of scholars, and what one shares as part of the experience of membership. If the study of law (and here we add the crucial supplement) *and society* is a discipline, it too must have its canons and its own sense of the canonical (Balkin and Levinson, 1996; also see Sarat, 1998). A mature discipline generates a mature canon, classic research that defines the field, provides the point of departure for interactions of the moment, referenced for support or differentiation. In this sense, a canon of texts is both the objectification of a social process and a discursive engagement that "mutates continuously" in the frictional spaces of institutional reproduction (Guillory, 1987: 498). As the moment's residue of unceasing enterprise, a canon provides, therefore, a foundation for connection and contestation across generations and across subfields, promoting new questions and new research (Sarat, 1998). Any particular work is canonical or classical to the extent that it is part of the ongoing historically sedimented yet immanently unstable referential process.

In the law and society canon we can discover the major, timely, and important contributions of this research. Law and society scholars anticipated by many decades the importance of time and context to explain social action, in this case

legality. By focusing so closely on the gap between the law on the books and the law in action, it turns out that law and society scholars opened the way for a cultural analysis of law, exploring with a variety of methodological and theoretical tools – from the social sciences and humanities – how that gap provides the space for the social construction of law and legality.¹

TRACING THE ORIGINS OF THE CANON: ANTECEDENTS AND INTELLECTUAL CURRENTS

The discipline of law and society has diverse intellectual roots. While the relationship between law and society was central to the work of Marx, Weber, and Durkheim, in the United States law and society took its initial questions from legal realism. Housed in law schools, the American legal realists began with the premise that it is not sufficient to understand the meaning and role of law only as it appears on the “books”; rather, one must study the law “in action” using the techniques of social science. American social science developed, in contrast to its European parentage, with a rigorous attention to methodology. Law and society scholarship, specifically, sought to answer the questions posed by legal realism using the pragmatic, sometimes positivist, methods of American social science. In this forging of question and method, law and society scholarship paid much less attention to the development of a social theory of law and its role in modernization and social change, the paradigmatic questions of all the social sciences (Ross, 1991).

Law and modernization

From different analytical points of departure, Marx, Weber, and Durkheim set out to explain the processes of modernization or the transition from traditional to industrial society. Each pursued the analysis of social phenomena at the broadest level, seeing law as part of the transformation of social, political, and economic institutions. Emile Durkheim, for example, argued that law had become an embodiment of the “collective conscience” in societies with advanced divisions of labor, where interdependence and reciprocity prevailed. For Durkheim, “law is the example par excellence of the social fact. It is a visible symbol of all that is essentially social” (Hunt, 1978: 65). For Weber (1947, 1954), the forms of social organization that are characteristically modern are premised upon formal legal rationality and bureaucratic administration. These particularly legal features of modern society generate pronounced, and seemingly insoluble, tensions with which most modern societies struggle: contradictions between demands for predictability and equally valued demands for substantive justice. Marx deals with law somewhat less explicitly than Weber or Durkheim, and more critically. In contributing the concept of ideology, and its relationship to both material conditions of production and state power, Marx makes a major contribution to the study of modernization. In this context, both the law as it is written and the law as it is lived or experienced may be examined as a “hybrid phenomenon of politics and ideology, or a politico-ideological artifact” (Sumner, 1979: 266). While law is only one among many ideological “weapons,” it contributes to the concealment or distortion in the formation and transformation of class relations. Thus, the study of law, it may be inferred, provides a lens for understanding how exploitative, unequal class relations are disguised and mystified.

For Durkheim, Marx, and Weber, law was the central site for mediating state and civil society, as well as the engine of modernization and social change.

The empirical study of law-in-action

In the passage from Europe to the United States, and in the development from social theory to sociological profession and practice, the understanding of the relationship between law, society, and modernity met new frontiers. The impact shaped the substantive agenda and methods of research. The social study of law became largely the province of the law school rather than the arts and science disciplines. In keeping with the interests of the legal academy and profession, law was defined primarily in terms of processes of creating and enforcing formal law, as machine rather than as a system of meaning. In this conceptual transformation, what law tells us about society is less important than what law does to society.

By adopting the lawyer's definition of their subject, social scientists limited their foci and topics of research to those of interest to the profession (Schlegel, 1995). At that moment, the question of law and modernization posed, if in different ways, by Durkheim, Weber, and Marx, was eclipsed. In the 1920s the American legal realists made the close exploration of a gap between the formal law and the law in action the central focus of their research. Thus, for example, studies of banking transactions and parking patterns were pursued with vigor to demonstrate whether law was following custom or whether practice conformed to law (Schlegel, 1995). Although scholars often produced findings about the law in action that challenged the most fundamental premises of the legal scholar, the research was not motivated by an overarching question grounded in social theory; they rarely pursued the relationship of these legal practices to the macro transformations of modern society.

To the traditional legal scholars' claim that law can be explained through the close reading of texts, its own printed materials, the turn of the century law and society scholar responded that law must be understood and explained empirically, as it is practiced and implemented in various formal and informal institutional settings ("law in action"). Thus in response to the legal formalists' claim that law is a science of close reading, social scientists offered a science of close observation. The policy and professional questions posed by the realists could be answered by their colleagues across campus with their newly minted training in social scientific methods. Each of the disciplines (sociology, psychology, anthropology, political science, economics) spawned a distinct set of research methods (and sometimes unquestioned middle level theories and assumptions) that nonetheless, at bottom, shared a fundamental commitment to the key tenets of scientific method: empirical, objective, and systematic observation of human behavior. From its earliest days, social scientists used both qualitative and quantitative techniques to record observation, but in either case they emphasized the scientific foundation of the enterprise.²

If the overarching topic of the social sciences was and remains the question of modernity (Ross, 1991: 8), scholars in the United States quickly developed a tidy division of labor to ensure more pragmatic (if fragmented) handles on this big question. The legal realists' questions animated much of the research, while the social scientists' methods – both quantitative and qualitative – provided the discipline of law and society. This division of labor led to specialization by field and methods of inquiry, so that, for example, jury studies eventually became the activity of social psychologists who had been trained in small group research and simulation,

while judicial decision making became an activity of political scientists using statistical modeling techniques. Sometimes this division of labor reproduced narrow disciplinary and technical questions focused on operationalization, reliability, and validity, in which the virtues of the conceptual marriage between law and social science could be lost. Often, however, the persistent conversations across disciplinary boundaries invigorated the law and society scholarship so that the understanding of the constitutive role of law in society and culture came to predominate within law and society research. This move to a cultural/constitutive perspective developed earlier, we suggest, than in the traditional social science disciplines because of the challenge each disciplinary perspective offered to each other and because the diverse disciplinary perspectives were nonetheless all focused on the same relationship: law and society.

Professionalization of law and society

Intellectual currents are necessary but not sufficient for the development of a discipline. A discipline, as a distinct field of instruction and learning, also requires a professional home, or an institutional arrangement that ensures control over conditions of work and the development of a distinct body of knowledge. "The most strategic distinction" between professionals and other occupational incumbents "lies in legitimate, organized autonomy" (Freidson, 1970: 71) to legitimate the discretionary judgment derived from a body of abstract theories and concepts (Freidson, 2001). The prized autonomy to exercise discretionary judgment derives in large part from a distinct and protected knowledge base achieved through (1) a process of educational credentialing attached to a university, (2) the certification through licensing, and (3) the formation of a professional association that represents the interests and values of the discipline (but see Freidson, 2001).³ The relationship between the modern university and professional authority cannot be overestimated: the university legitimates both credentialing and, through research, new theory, concepts, and methods.

Echoing the professional projects of science and social science, law and society has negotiated a place in the academy, albeit at the margins, securing professional autonomy through the formation of an association, the introduction of peer review journals, sources of support for research, and academic training. As an interdisciplinary field, however, law and society never secures the same level of autonomy and status as disciplinary fields, particularly in the social sciences (see e.g., Garth and Sterling, 1998; Schlegel, 1995; Tomlins, 2000). Nonetheless, if specialization is an indicator of professional advancement, the proliferation of associations, journals, research support, and training programs document the increasing maturity of the discipline.⁴

But specialization is only one piece of the professional picture. The theoretical foundation of knowledge is more fundamental for the development of an autonomous profession (Freidson, 2001) and, in this regard, law and society is on much less firm ground. Law and society as a discipline begins with the practical observation that law is made on the streets or "in action" and, as we document below, sets out to demonstrate whether and to what extent the law lives up to its promise in all its formal (courts, regulatory agencies) or informal (dispute processing, policing) homes. Thus, at its core, law and society research is motivated by a pragmatic, perhaps unabashed ideological concern. Is it what it claims to be? Until this question

is itself made the subject of critical analysis, we suggest, law and society cannot move from the margins to the central problems addressed by the social sciences. Marx, Weber, and Durkheim grappled with law in the story of emerging modernity. But, unlike other areas of social research (e.g., organizational theory, social stratification, political sociology), their theoretical questions and the debates that derive from them did not drive the American empirical project to explain the role of law in modernization. To the extent that law and society research is not motivated by these, or other, central, organizing theoretical questions where empirical research may contribute to further development of theory and concepts, the profession grows from a less robust foundation than other specializations within the social sciences and, hence, enjoys less autonomy. As one indicator, most law and society scholars reside in various social science departments, such as political science, sociology, anthropology, or psychology rather than in departments of law and society. But, insofar as law and society scholarship can build on its canon, reframing to address the central questions (e.g., about social change and modernity, as well as power and inequality), it has the capacity to contribute important and durable insights to contemporary social theory.

THE CLASSICS OF LAW AND SOCIETY

Intellectual roots and professional organization provide the grounds for developing a canon. In canonical shorthand, the discipline of law and society studies that terrain we have already identified as the "law in action."⁵ Law in action unfolds in courtrooms between judges and lawyers, among lawyers in their private offices, behind closed doors when juries make decisions, in negotiations among bureaucrats in regulatory agencies, on the street where police officers meet citizens, or in the actions and minds of citizens themselves when they make demands of the law, or contemplate and decide that this is not a matter for law.

Law in action is imagined in opposition to law on the books, that is, the traditional doctrinal stuff of law (cases, statutes, constitutions) conventionally regarded as the lawyer's particular and professional terrain. Staking its unique claim on the opposition between law-on-the-books and law-in-action, law and society scholarship reproduced, in the terminology and topics relevant to law, a host of morally colored dualisms that characterized Western philosophy and scholarship, oppositions between ideals and practices, words and actions, concept and phenomenon, force and norm, rationality and convention/tradition. By working outside the boundaries of law's official reality, law and society scholarship identified for itself a capacious ground. At the same time, it may have – for a long while – limited its conceptual imagination. Students of law and society have historically pursued the study of law-in-action in (1) courts, (2) lawyers' offices, (3) juries, (4) regulatory agencies, (5) police work, and (6) citizens' interactions with those legal actors and agencies. We will use these categories to organize our presentation of the classics in law and society because they were often developed, presented, and interpreted through these terms and what became subfields of the discipline. Over time, however, as the discourse and exchange developed, law and society scholars began to deconstruct their own categories and terminology and began to seek out the traces of legality in spaces further removed from formal or official law, for example, in theaters, homes, and hospitals. What began as a response to legal formalism

sometimes became a narrow self-referential, disciplinary scientism. As often, or perhaps more often – this is a point of lively contestation – law and society developed by supplementing disciplinary questions, whether they derived from the legal academy or the social sciences. The continuing engagement led, we argue, to the cultural study of law that now characterizes a large part of the contemporaneously emerging law and society canon.

Reading the canon of law and society research, we noted several common themes. First, the practices and resources of law are unequally distributed and highly stratified. Studies show that social background and organizational capacity matter for access to law and the quality of legal services delivered and received. Second, what may seem aberrant malfeasance, extralegal and idiosyncratic from the standpoint of law on the books is, in practice, “normal” (Sudnow, 1965). Third, legal activities are situated and contingent on the particularities of specific times and places; for example, lawyers, much research shows, are not of one profession, one “brotherhood” (Goode, 1957); rather, lawyers’ work and identities depend on who their clients are (Heinz and Lauman, 1982), where they went to school (e.g., Landinsky, 1963), or whether they work in the city or the country (e.g., Handler, 1967; Landon, 1990). Fourth, as both institutionalized and discursive practice, law consists of historically and culturally developed activities regulating and legitimating the use of force in social groups. It is simultaneously word and deed. Its legitimacy is inseparable from its activity, including the possibility of material violence (what Habermas, 1999, refers to as its facticity).

Interestingly, and importantly, the sum of these themes is more than their individual parts. In the late twentieth century, across the mainstream social science disciplines there has been an important intellectual turn toward a more modest set of claims about the degree to which empirical findings may contribute to a general theory and set of concepts to guide understanding of modern society. It is now commonplace to couch theory and concept in time and place and to recognize the degree to which social patterns are contingent, local, culturally embedded, and emerge from negotiating the boundaries of professional and nonprofessional transactions (see e.g., Lamont and Fournier, 1992). Ironically, given its intimate contact with the legal academy and profession, the discipline of law and society stands poised to make a major contribution to this larger turn in social science theory precisely because the discipline has been discovering this point (the contingency of cultural locations and practices) for generations across multiple sites of legal encounter. What may have begun as a professional weakness (a sidestepping of the role of theory qua theory) for the discipline of law and society in the mid-twentieth century may prove to be its most important contribution to the social sciences more generally at the beginning of the twenty-first century.

Courts

Whereas legal scholars study judges’ appellate decisions to identify the legal rules in force at any particular moment, students of law and society began by studying judges’ backgrounds and patterns of decision making. Other law and society scholars reacted to what they saw as an overly behaviorist model and studied day-to-day interactions with lawyers, plaintiffs, defendants, and other court personnel to describe the courts. In both studies of judicial behavior and local courts, this field of law and society inquiry began by addressing questions that plagued jurisprudential

and constitutional scholars for centuries: how consistent and predictable is judicial decision making and how can we justify nonelected powerful decision makers in a representative democracy? The field developed, however, to produce complex organizational and cultural accounts of the work of courts in the constitution of communities and the role of the judiciary in governance.

Growing out of a behavioral approach that takes "the behavior of individuals or groups of individuals as the primary unit of analysis" (Ulmer, 1961: 1), a large body of research developed early in the 1950s and 1960s that explained judicial activity at the appellate level as a function of judges' background and political ideology (Peltason, 1955; Schubert, 1965; Schmidhauser, 1960). The groundwork for the behavioral model of courts that later developed into richly textured analyses of court organization and culture was laid in several classic studies by C. Herman Pritchett on the Roosevelt (1948) and Vinson courts ([1954] 1966), and in Walter Murphy's synthetic statement in *Elements of Judicial Strategy* (1964). In effect, Pritchett and Murphy brought legal realism to political science. In the formalist account, judges mechanically decide cases by following the precedents of prior cases, *stare decisis* (but see Levi, 1949: 4–5). By following precedent, justices eschew their own policy preferences and honor the rule of law. By studying dissenting opinions, Pritchett showed that the willingness of justices to sublimate policy preferences varied historically. Over the decades, scholars of judicial decision making have generally confirmed Pritchett's hypothesis that justices were "motivated by their own preferences," rather than by transparent law (Pritchett, 1948: xiii). In *The Elements of Judicial Strategy*, Murphy elaborated and extended Pritchett's insight and suggested that the Supreme Court operates in a context not unlike that of elected officials, where justices strategically negotiate their positions on what cases to hear, which opinions to join, and what arguments to make in light of their expectations of what other justices and institutions would do.

The next generation of law and society students reacted to these studies of judicial decision making by turning their attention to the work of local courts. Blumberg's (1967) "The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession," a study of criminal case decision making in a local court, is emblematic of a movement out of appellate courts to examinations of litigation in trial courts. In turning to the local level, Blumberg shows that the overwhelming majority of criminal cases are plea bargained, rather than tried; further, the work of the local court is more about efficiency and speed than about fairness and due process of law (also see Packer, 1968). In mapping his argument, Blumberg describes the organizational structure of the local court and the way in which this "organization" in fact encompasses the work of the judge as well as that of the local prosecutor, the clerk's office, probation, and defendant's counsel to form a bureaucratic "sieve" for the expeditious disposition of cases through negotiated pleas. He concludes that the day-to-day work of local courts is more akin to a rational, efficient bureaucratic system than it is to a procedurally fair, if slow, model of deliberative (judicial-like) decision making guided by doctrinal rules and procedural constraints. To study only the lofty reaches of appellate decision making, Blumberg implicitly claims, is to miss the main event in local courts where most of the work of law takes place.

In *The Process is the Punishment*, Feeley (1977) followed Blumberg's lead with close observation in the lower court trenches, but challenged the claim that these courts are bureaucratically organized, open systems where court players seek to ensure efficient outcomes. Feeley displayed the ways in which efforts to do "good,"

that is, to ensure substantive justice, are regularly compromised. This supposedly transparent and open system is fraught with politics, especially through elections and patronage appointments. Despite strong impulses for flexibility and commitments to substantive justice, pretrial costs shape the entire process, such that the process is the punishment (p. 291). Capturing a central tenet of much law and society research, Feeley intones Hand's observation, "Thou shalt not ration justice" (cited p. 291), only to report that in the most numerous courts in the nation, handling the major share of all legal business, in fact, one finds systematically rationed justice.

Jacob's (1965) work dispels similar myths about local civil courts. He demonstrates, for example, that the quality of justice depends on the quality of legal services and its availability to the public, that the quality of legal services available to a citizen is a function of that citizen's wealth and his or her ability to pay, that the American Bar Association (while willing to promulgate rules of ethics) is equally if not more concerned with protecting its members' interests, and finally that solo lawyers who work on the margins of the profession often engage in unethical practices (1965: 66; also see Carlin, 1962).

Galanter's seminal article, "Why the 'Haves' Come out Ahead: Speculation on the Limits of Legal Change" (1974), synthesized the work on civil courts up to the early 1970s and pushed it an important step further. Galanter developed a model of the cumulative effects of disadvantage between those he terms "one-shot" and "repeat" players in the civil courts. The sources of disadvantage are familiar from earlier studies; differences in knowledge of the system, experience, resources, and social access will impact the kind and quality of justice. The "repeaters," the large organizational clients of the civil courts, will come out ahead of the lone, individual "one-shot" players, Galanter hypothesizes. Galanter's hypothesis lays the foundation for a large body of research on courts and disputing, including the Civil Litigation Research Project (CLRP, Trubek, Sarat, Felstiner, Kritzer, and Grossman, 1983; see *Law & Society Review*, 1980-81) and the longitudinal study of case outcomes in the United States, in other countries, and comparatively across nation states (*Law & Society Review*, 1994).

Contemporary studies of courts remain largely the province of political science, even within law and society. While a much more elaborated and sophisticated model of judicial decision making continues to inform some scholars (Lee Epstein, 1998; Epstein, Segal, Spaeth, and Walker, 1996), others have built on the study of court cultures to understand the construction of constituencies (Eisenstein, Flemming, and Nardulli, 1988; Flemming, Nardulli, and Eisenstein, 1992; Nardulli, Eisenstein, and Flemming, 1988). Nonetheless, the contributions of this research go beyond political science; as we shall demonstrate below, findings from the study of courts complement findings from studies of other legal institutions and challenge the claims of the legal academy to special expertise and authority. Courts are, these findings make clear, highly stratified institutions – the kind of civil or criminal justice that you receive depends on what you have and the kind of lawyer you can get (Casper, 1972). Moreover, the court studies demonstrate that the "haves" come out ahead, not because of malfeasance or incompetence, but because courts are complex social institutions embedded in networks of relationships which both enable and constrain the courts' work. What may, at first glance, seem a social aberration from the standpoint of appellate case law is in fact normal practice: efficiency trumps effectiveness, administration of justice trumps adjudication, these findings show

(Heydebrand and Seron, 1990). Courts are not only, or even mainly, about abstract legal precedent or reasoned judgment (Levi, 1949).

Across a wide body of research at various tiers, law and society studies show that the work of courts is locally shaped and culturally entwined in place and setting. Idiosyncratic and particularistic practices develop among teams or work groups and between and among judges, lawyers, and court personnel to shape the disposition of legal matters, the constitution of subjects and communities, as well as the quality of justice and the meaning of the rule of law (Jacob and Eisenstein, 1991). By closely observing the intersection of actors, organization, and history, the research on courts moved beyond more narrow disciplinary interests in sharpening methodological tools and honing concepts through those tools to study, for example, the contemporary work of constitutional courts to shape individual subjectivities as well as societies. At the same time, by consistently focusing on litigation and the work of courts, this research developed an appreciation for particularity and local variation within what might seem like general organizational and representational practices.

Disputing

The body of work that gave distinctive shape and substance to the field of law and society began by looking outside of courts, or any other formal institution of law. In a truly groundbreaking study, *The Cheyenne Way* (1941), Llewellyn and Hoebel claimed that the place to begin research is the "trouble case," places where the taken for granted modes of social interaction break down. Building on the concept of the "trouble case", disputing establishes a central premise of the discipline of law and society: studying law must begin *before* law, or legal norms, emerge. In *The Cheyenne Way*, Hoebel and Llewellyn threw out the lawyer's understanding of law as organized social control and violence and replaced it with a notion of law as a system of normative regulation with four basic functions: disposition of "trouble cases"; preventive channeling, orientation, and expectations to avoid conflict; allocation of authority; and "net drive" providing incentive, direction, and harmonization of activity. In effect, Llewellyn and Hoebel collected under the rubric of law several, but not all, basic social functions. This way of viewing law challenged a claim for the preeminence of courts as the central site for legal production and organization. Also, in articulating this "discovery" of *law in society*, the discipline of law and society began to develop parallel sites for research that were not limited to the legal realist's agenda.

Laura Nader, trained in anthropology and one of the group who organized the Law and Society Association and journal, built on the work of Llewellyn and Hoebel as well as post-World War II anthropologists such as Gulliver, Evans-Pritchard, Gibbs, Radcliffe Brown, and Bohannon, to champion the concept of dispute as the building block for a sociocultural study of law. Through the lens of the dispute process it is possible, she argued, to develop a social theory that explains the relationship between social control and social change. Equally, Nader (1978) argued for contextualized ethnographies of courts, if appropriate, but where disputing remained the organizing construct. This body of work begins, then, with the premise that disputes are windows on society, openings in the social fabric, or moments of exploration in which the collectivity is challenged, transformed, or repaired.

Anthropologists were not, however, alone in noticing that much law-like activity took place outside of the formal institutions of law, or in noting the virtue of

studying trouble and dispute. In the second most widely cited paper in the law and society canon, Stewart Macaulay, a professor of law at the University of Wisconsin, published in the *American Sociological Review* (1963) a study of the "noncontractual" relations among automobile manufacturers and their franchisees. Although the relationships between manufacturers and dealers are entirely legalized, Macaulay observed that disagreements and disputes between them were handled through informal discussion and negotiation, rather than by invoking the provisions and remedies of the contracts that legally obligated the parties. Macaulay also discovered that the binding business agreements were frequently made without knowledge of the relevant rules of contract law and that, in many cases, the contracts might be invalid according to those rules, were they challenged in court. But they were rarely challenged because businessmen routinely sought to avoid the law, lawyers, and the courts in conducting their affairs. The desire to continue relationships and norms of decency underwrote a panoply of informal, "man-to-man" discussions in lieu of professional hermeneutical readings of contractual language, a set of findings that supported Merton's (1968) middle-range theory of norms and their role in social relations.

In the 1970s a series of papers further developed the notion of dispute and disputing (Felstiner, 1974, 1975; Abel, 1973; Danzig and Lowy, 1975). The claim that disputes, and their resolution, do not occur only in courts of law, or even in the close "shadow of the law" (Mnookin and Kornhauser, 1979) laid the foundation for this large-scale, systematic survey of citizens' disputing experience, where respondents were asked about their reliance on a range of formal and informal institutions associated with disputing. The Civil Litigation Research Project (CLRP), a collaboration organized out of the University of Wisconsin, and funded by the US Department of Justice, began with the assumption that it is possible to use "disputes as a link between [the study of] law and society" (Trubek, 1980-81: 496). Important findings and resilient models emerged from this research, perhaps the largest and most ambitious attempt to use the concept of dispute to organize empirical work on law. First, despite popular representations to the contrary, results supported Macaulay's qualitative findings of two decades earlier. Even when citizens have grievances and complaints, they prefer to avoid the law or the use of third parties to resolve the dispute. Most Americans do not pursue grievance through law; they "lump" their losses rather than litigate (Felstiner, Abel, and Sarat, 1980-81). Second, and importantly, the subject of disputes (i.e., whether it is a commercial, family, or civil rights issue) matters and is modeled by a distinctly shaped pyramid (Miller and Sarat, 1980-81). Third, despite some important challenges to the dispute processing paradigm (Engel, 1980; Kidder, 1980-81), a "life history perspective" of disputing proved fruitful in redefining the concept of dispute and formulating the disputing pyramid as the model of how citizens "mobilize" the law.

Thus a large body of law and society literature has looked at the genesis of legal action from a variety of perspectives and with a range of methods: from studies of the legal needs of the general public (Curran, 1977), to variations in legal use by social class and race (Carlin, 1962; Black and Reiss, 1967; Silberman, 1985; Caplowitz, 1974), and community organization (Merry, 1990; Yngvesson, 1993). What was sometimes begun as part of a policy agenda, to make more law more accessible, to determine whether equal justice prevailed, led to fundamental rethinking of the law in action paradigm, including significant internal struggles about method and politics (Silbey and Sarat, 1987; Sarat and Silbey, 1988; *Legal Studies*

Forum, 1985; Trubek and Esser, 1989). What started out as no more than "a general set of orientations" crystallized into a major perspective and direction for research, analogous one might say to the physicists' search for elementary particles through ambitious experiments and giant, international collaborations.

The project and the dispute concept was not, however, without active criticism and revision; its ambition seemed to direct attention to its limitations. Some anthropologists, for example, argued that the focus on trouble and the management of trouble was distracting attention from the far more general pattern of acquiescence and normative integration in social life. They worried that the dispute perspective condemned social science, again as the legal profession had traditionally done, to studying the tip of the iceberg; as a result, the claim of social science knowledge to challenge or enhance knowledge within the legal field would be limited. Other scholars criticized the concept for its boundless quality. They worried that following the life history of disputes, if taken to its logical extent, would undermine social scientific aspirations by dissolving law into all of social relations (Kidder, 1980-81), at the same time farther and farther away from the institutions of the official law. Law and society would no longer have a subject, and thus no particular or distinctive professional claim.

As sociolegal scholarship has moved to include a wider range of methods and approaches, such as those associated with the humanities, this same worry is repeated. We see this, however, not as a loss of focus on the legal but rather as an opportunity to connect with and contribute to contemporary social theory. The disputing research, like much contemporary scholarship, sought to model and test theories connecting micro and macro social phenomenon. Joining anthropological theory and methods to legal concerns enabled the observations of the systematic construction of the material that becomes the stuff of official law; at the same time, this happy marriage encouraged anthropologists to see how much of everyday life and normativity was saturated with law, providing additional concepts with which to understand cultural and social phenomenon. We now turn to the actors who perform central roles in the transformation of disputes from normative conflicts to legal cases.

Lawyers

The legal scholar begins with the premises that all attorneys are part of a common and shared professional enterprise and that the role of the academic community is to serve the profession by first educating each generation of lawyers concerning the technical rules of legal doctrine and procedure, and second by developing a common set of ethical standards for professional practice. Early law and society scholars borrowed concepts from a long-standing sociological tradition to explain the factors that distinguish a profession such as law from other occupations. Parsons (1949) had posited that the growth of the professions is one of the most important characteristics of the twentieth century and, further, that a profession may be distinguished from other occupations by its commitment to serve the public interest; by its organization into small collegial communities, and by its commitment to the self-regulation of entry, education, and retention of members.

Two early classics pursued these Parsonian questions by looking at how the profession of law is practiced in solo settings (Carlin, 1962) and in large firms (Smigel, 1969). Carlin's study, *Lawyers on their Own*, paints a portrait of the solo

practitioner that is far removed from the lofty reaches of legal scholars' claims to universalistic value orientations. The solo lawyer's calling to serve individual clients is not a rewarding or professionally gratifying one, Carlin found. For example, he shows that solo lawyers are forced to engage in quite aggressive tactics to get clients in the door – practices that may be marginal, if not unethical (see Carlin, 1962). Solo lawyers may find themselves in competition with others for an individual client's various needs such as a house closing, simple will, or contract. For the solo lawyer, Carlin claimed, the norm of collegiality may be more myth than practice as they report lonely, isolated-work lives. Indeed, a solo lawyer's lot may be so precarious that he (and it was all men) is forced to supplement his legal practice with other forms of work in order to make a living. Finally, Carlin demonstrated, solo lawyers tended to be the sons of immigrants, many of whom worked their way through proprietary night law schools.⁶

Smigel's (1969) study of the legal elite, *Wall Street Lawyers*, paints a very different picture of legal practice. Wall Street lawyers worked in large firms and served institutional clients. Yet all firms are not the same. Smigel identified two tiers among Wall Street firms, the "white shoe" (WASP) firms that tend to handle corporate securities, and the ethnic firms composed of newly arrived, upwardly mobile and Ivy League educated Catholics and Jews that tended to do corporate litigation. Wall Street lawyers go to school together, but there is an ethno-religious division of labor in their work lives, Smigel finds. Complementing the Parsonian paradigm, Smigel also reported that, despite the size of the Wall Street firms, they were by no means Weberian bureaucracies with rules, hierarchies, and specializations. Rather, his findings showed that the organization of the Wall Street firm of the late 1950s echoed the profession's ideal of collegiality: lawyers are generalists, educated in all facets of the law; associates, almost all male, are mentored by partners who, in turn, make decisions collectively about matters of policy and candidacy for partnership.

If one allows the gender question to be raised one may ask: is law a variation on a male fraternity, that is, a closed company of men? In her pioneering study, Cynthia Fuchs Epstein (1998) examined the work lives of those women who achieved the pedigrees of elite legal education and sought to break into Smigel's Wall Street firms. Deviants from the gender norms of their generation, these women used the legal language of fairness and equality to gain entry to the fraternity, but tended to find themselves relegated to specialties that are stereotypically feminine, such as trusts and wills and estates.⁷

In their classic study, *Chicago Lawyers*, Heinz and Laumann (1982) build on these in-depth ethnographies of various domains of practice to explain the stratification and network within the profession at large. Beginning with the classic question in social stratification (to what degree does background impact upward mobility?), Heinz and Laumann explain the organization and social networks of the legal profession in a large city (also see Landinsky, 1963). Based on a survey of a random sample of Chicago lawyers, they conclude that the legal profession may be best understood as two "hemispheres" organized around client bases of one-shot individuals or repeat player organizations (Galanter, 1974). If one knows whether an attorney serves individuals or organizational clients, Heinz and Laumann argue, one may predict the social background of the incumbent's father, where the incumbent went to law school, the incumbent's social network for getting more clients, and the social status of the incumbent in the eyes of his peers.⁸ In many respects, Heinz and

Laumann's larger, more systematic, and quantitative study of the profession lends support to Carlin's picture of the precarious solo practitioner, Smigel's portrait of the comforts enjoyed by the elite men of the profession, and Cynthia Fuchs Epstein's description of the ways in which women are often all but ignored or required to work in stereotypically feminine areas of specialization.⁹

Despite the law and society scholar's ambition to challenge the normative claims of the legal scholar, there was a more fundamental tendency to leave the institutional pillars of the profession unexamined. As the social sciences in the United States took a more critical, neo-Marxist turn in the late 1960s, the sociology of professions developed new conceptual models to explain the relationship between social class and the "professional project" (Larson, 1977) as well as the deprofessionalization or proletarianization of professional labor (Haug, 1973, 1975; Oppenheimer, 1973).¹⁰ This sociological work, particularly that of Larson (1977), laid the foundation for a large-scale, comparative study of the legal profession (Abel and Lewis, 1989) that, in many respects, returns the study of lawyers to the intellectual roots of the social sciences, or the role of lawyers in modernization. Together, this body of work documents the ways in which the profession is laced with structural inequalities, the ways in which the legal scholar's claim to what would be idiosyncratic is found to be normal practice, and the ways in which a professional's background (gender, geographical location, father's occupation) shapes opportunities and outcomes for mobility.

Building on the early twentieth-century Chicago School of sociology, Everett Hughes and his students, particularly Freidson (1970), Becker, Strauss, Hughes, and Greer (1961), and Strauss (1961) had offered an important methodological challenge to large-scale survey research, such as Heinz and Laumann's study through the use of a close, systematic, and inductive method to study professionals at work. Through their grounded examination of professional labor, they demonstrate the ways in which a legitimate autonomy to exercise discretionary judgment unfolds in practice. While much of this research examines the medical profession and the relationship between doctors and a support team of nurses and other staff, these scholars document the ways in which hierarchy, status, and position are constituted and interpreted in and through practice (also see Abbott, 1981). Recent law and society studies of the legal profession take as their starting point the blending of the traditional and the interpretive bent; that is, there is a recognition of the need to anchor the interpretation of lawyers' practice in the context of the rules, work settings, and institutional constraints that are specific to the profession of law. To take but one contemporary example, Mather, McEwen, and Maiman (2001) document the ways in which socialization, identity, and communities of practice create spaces for divorce lawyers to shape a culture of professional labor.

Juries

Various described as the bulwark of true democracy (DeTocqueville, 1938) or as a vestigial organ of the body politic (Griswold, 1973), juries are seldom used in American courts.¹¹ Nonetheless, Llewellyn (1969) argued in his introductory lectures for first year law students that the imagining or assumption of decision making by a jury of lay people lies at the heart of the legal process, animating and explaining the rules of evidence and the entire trial process. Because of its central, yet ambiguous, role, the civil and criminal jury has long been a subject of debate concerning its

ability to provide competent, fair, and equitable decisions. This age-old debate within jurisprudence has turned on questions of fundamental values and normative judgment, the relationship between law and democratic participation.

The student of law and society expands the normative and philosophical questions about the jury to inquire about how juries actually behave. For example, confronted with a similar case or fact pattern, do juries behave differently from judges? What is the process of decision making within a jury? And, further, in that process do gender and social background matter? Does size make a difference? Echoing studies of courts and lawyers, the student of law and society examines the jury empirically.

In 1952, researchers at the University of Chicago Law School began the first systematic study of the American jury system with a grant from the Ford Foundation. The research became known as the Chicago Jury Project, and it marked one of the first postrealist efforts to study empirically the legal system. The Chicago Jury Project produced three books: *The American Jury* (Kalven and Zeisel, 1966), *Delay in Court* (Zeisel, Kalven, and Bucholz, 1959) and *The Jury and the Defense of Insanity* (Simon, 1967).

Kalven and Zeisel (1966) examined whether and to what extent juries depart from judges in deciding criminal cases where the fact patterns of the cases are the same. They enlisted 55 judges to complete questionnaires about their proposed verdict in a criminal trial prior to learning the jury's verdict. After comparing the judges' verdicts to the decisions reached by juries, the authors found that there is a small proportion of criminal cases where the judge's and jury's decision depart, and that "there is no category [of criminal cases] in which the jury is totally at war with the law" (p. 76). Also, their findings revealed that as a general rule juries are competent and do understand the facts. Thus their findings lend support to the claim that a jury of one's peers may understand the facts of a case and, on balance, come to decisions that are in conformity with legal precedent. If jurors do understand the facts as presented, why do juries reach different conclusions from judges in some instances? At a general level their findings suggest that jurors' decisions rest on a somewhat closer, more individualistic evaluation of the circumstances surrounding a particular case. For example, in contrast to a judge, jurors may be willing to acquit if they find police or prosecutorial practices highly improper (p. 319).

Simon (1967) examined the jury's ability to weigh the insanity defense, and specifically the Durham rule adopted in the District of Columbia in 1954. At its core, the Durham rule establishes that a criminal defendant may be excused from prosecution if his or her act was the result of mental disease or defect. In the aftermath of the adoption of this rule, findings suggest that more criminal defendants are acquitted than before, but that jurors feel somewhat constrained by the black or white framework of the legal rules. Her findings show that jurors would prefer to find defendants guilty and to commit them to an institution that both punishes and treats – an option that is not available to them under the rule. Simon brings a strong sociological eye to her study and also examines the impact of social status and gender on jury decision making: while she finds some evidence that jurors of lower social status are somewhat more likely to favor the defendant than their higher status counterparts; that "housewives" are somewhat more likely to be punitive than other members of the jury, and that the foreman is somewhat more likely to be a person of higher social status, there is "no consistent evidence that the opinions of jurors in higher socioeconomic statuses carried more weight than the opinions of lower status jurors" (p. 118).¹²

Despite their groundbreaking results, Kalven and Zeisel were concerned that perhaps they had, like much legal research before them, studied the wrong thing, the tip of the jury iceberg, that is, the cases where juries and judges disagree. Perhaps they should have focused on the more than three-fourths of all jury activity where there was agreement between the professional and lay judgment; perhaps they should study the deliberation process rather than the outcome. Thus, in 1954, with support of judges in Wichita, Kansas, participating attorneys, and strict control over the process and anonymity of the participants, Kalven and Zeisel made audio recordings of six jury deliberations. Public notice eventually brought Congressional notice and in 1955 the Subcommittee on Internal Security of the Senate Committee on the Judiciary held hearings on researchers' access to jury deliberations. Because the project observed actual jury deliberations, Congress decided that it had infringed privacy rights and the sanctity of the jury. In 1964, Congress passed legislation prohibiting recording of federal jury deliberations, and most states followed suit.

From the mid-1950s, when the data were collected, until the late 1990s, only two jury deliberations have been recorded since Kalven and Zeisel's initial attempt (Hans and Vidmar, 1991). Thus the extensive body of jury research that developed following this early project was conducted largely by social psychologists interested in small group dynamics who could draw upon their discipline's tradition of experimental simulations as well as surveys (posttrial and judicial). The themes to emerge from this research are by now familiar. Research on jury deliberations has focused on leadership roles, discussion content, participation, and to the extent possible in simulations, the structure of deliberations including the role of social status, gender, and sequence of participation. The research has served well the social scientists' interests in developing methodological sophistication and a program of normal, iterative scientific study. Pursuing the legal profession's agenda, the studies have also shown that juries – perhaps the most democratic pillar of the law – perform their duties in a manner that complements the more fundamental claims of the law: jurors take their responsibilities for rational deliberation seriously; they consider issues of social circumstance as well as legal doctrine, and do so in a manner that is fair and reasonable.

Currently, there is a study underway in Arizona that will allow scholars once again to study actual jury deliberations. With the opportunity to study 50 actual transcripts of jury deliberations in cases that raise a variety of legal issues at a range of monetary stakes, this groundbreaking work may push the boundaries of research on juries, providing a foundation to join research on juries to a wider range of literature in law, as well as culture. With the ability to observe and transcribe the jury deliberations, it may be possible to analyze how juror's processes of "reading" and "making" facts as well as their legal consciousness and understandings of the law shape deliberation and outcome (Diamond et al., 2003).

Policing

Whereas the modern legal profession and its various off-shoots developed its own research agenda in the academy, policing did not participate in this core project of professionalization (Bittner, 1990: 311–13). Police were studied as part of general sociological and criminological inquiry about deviance, crime, and social control. Social movements of the 1960s, particularly the civil rights movement, laid the foundation for research on policing. As Bittner (1990) explains, the civil rights

movement exposed middle-class college students to something they had never experienced, the surveillance practices of the police; equally, the civil rights movement gave people "from the wrong side of the track" a voice to demand examination of surveillance by police that had long been a part of their daily routines. In the 1960s the police became a centerpiece of "embattled" public debate (Bittner, 1990: 312); with abundant resources for social science investigation (p. 313), an agenda of critical study emerged, though one that was not designed or launched by the police themselves.

Skolnick (1966), Reiss (Reiss, 1971; Black and Reiss, 1967), and Bittner (1970, 1990) conducted seminal studies of policing and, in the process, laid the foundation for an important line of law and society research. Policing, these scholars demonstrate, operates in a context of enormous social and cultural ambiguity. In the popular imagination, police work is "tainted" because, in the eyes of citizens, its fundamental charge is to ensure social control and social order, to do society's dirty work in areas that most would prefer to forget is a problem – among racial and ethnic minorities, the young, and the poor (Bittner, 1970). Tainted police work was, however, frequently subject to judicial review and oversight as courts stepped into the fray through decisions that sought to define the boundaries of appropriate police practices. When the courts discovered the police's use of a heavy hand to ensure social order, a large gap between constitutional rights and police practices, decisions followed – especially in the wake of 1960s protest – to establish "legal restraints" by protecting civil liberties and to insure consistency between the law on the books and law in action (Skolnick, 1966).¹³

Beyond the more abstracted social ambiguities about the public's expectations of officers' roles and responsibilities, and the ambiguity between what the law books required and the police delivered, there are very particular ambiguities for police "on-the-street," when an officer is called to the scene. As Black and Reiss (1967) explain, a call comes in and a curtain is raised on a "social stage for face-to-face encounters." But each dimension of that stage is "ambiguous," from the setting to the social status of the actors to the plot that will unfold (p. 8). Will it be a plot that involves "family trouble," "a man with a complaint," or a "B & E [breaking and entering] report"? Each of these encounters has the potential to raise "matters involving subtle human conflicts and profound legal and moral questions" (Bittner, 1970: 9).

Against this backdrop, police develop their own informal norms or "hidden principles" (Skolnick, 1966) of work. For example, officers operate in a potentially dangerous environment but, unlike the soldier in battle, the danger is highly episodic (Black and Reiss, 1967) and may, in fact, take only about a third of any officer's time (Bittner, 1970). Or, in doing the work to control society's nuisances – the prostitute or even the traffic violator – police see such activities as "affronts" to their competence (Skolnick, 1966: 111). The police are, however, also called on to perform like social workers or "problem solvers" (Bittner, 1970) and carry, as well, a certain authority, not unlike a community's schoolteacher (Skolnick, 1966). Thus, when confronted with the citizen who does not take that authority seriously, "policemen seem more hostile or authoritarian, or more likely to ridicule citizens of both races when the citizens are agitated than when they are calm or detached" (Black and Reiss, 1967: 35).

At the end of the day and on the street alone or with a partner, as each of these students of policing demonstrates, in perhaps their most important actions – encounters with citizens – police officers' work takes place on a stage "where

departmental control is minimal" and sometimes nonexistent (Black and Reiss, 1967: 10), and where law seems quite distant. Although proceeding from different vantage points, these authors demonstrate that, like their counterparts carrying out administrative regulation (see next subsection below), at its core, police enjoy enormous discretion. While rules can be placed "on the books" to limit and guide police action "on the street," "no matter how far we descend on the hierarchy of more and more detailed formal instructions, there will always remain a step further down to go, and no measure of effort will ever succeed in eliminating, or even in meaningfully curtailing, the area of discretionary freedom of the agent whose duty is to fit rules to cases" (Bittner, 1970: 4).

Studies of policing share themes with other arenas of law and society research, yet also bring new and important insights about society's relationship to law. Policing, like judging, is anchored by a cultural expectation that a commitment to social order is balanced by a commitment to legality. Like other aspects of legal practice, this commitment to legality is something other than literal fidelity to law on the books because here, like elsewhere, there is a persistent gap. Even though the most important "*role of the police*" is to serve "*as a mechanism for the distribution of non-negotiable coercive force employed in accordance with the dictates of an intuitive grasp of situational exigencies*" (Bittner, 1970: 46; italics in original), these officers of the law are nonetheless called to balance this responsibility with that of "legality." But the social context of this balancing act by police is anchored by paradoxical, and perhaps unique, social dynamics. Policing takes place "on the street" where it is seen by the public, yet largely unobserved or unsupervised by other legal actors. For citizens, their most typical encounter with the law is through the police (Skogan, 1994). Yet for legal elites, authorities, writers, and commentators on the law, police are remote, overlooked, and sometimes embarrassing stepchildren of the legal system. They do the dirty work of the legal system, cleaning up social messes, deploying situated force, dispensing the violence inherent in all law, yet they are routinely regarded as outside the law. The discretionary authority of policing coupled with the impact of the "situational exigencies" of the moment, including the highly differential experiences of policing by race and ethnicity, renders policing a much less idealized activity of law than judging or, perhaps, lawyering. It is against this discretionary backdrop of "situational exigencies" that internal cultural norms and socially situated orientations among the police unfold. Police see themselves as good "craftsmen," engaged in discretionary routines to ensure social order; thus there is little tolerance for those who they believe misunderstand the police, seek to limit their discretion – including courts – or undervalue the day-to-day dangers of their work lives (Skolnick, 1966). Perhaps because of the overwhelming situatedness of policing, and the essential connection between policing and legal authority, as well as the very marked features of the subculture of policing, research on the police has produced some of the most enduring insights about the importance of contingency and context for legal culture.

Administrative law and regulation

Echoing findings from policing, discretion emerges as the centerpiece for understanding administration law enforcement and regulation. Since the 1880s, a good part of American law has been devoted to the regulation of routine business practice. From some perspectives, this type of regulation is an extension of the

public order, policing functions that are a central feature of any state and that were deployed in the early republic to create the normative framework and capital for both commerce and the state (Hurst, 1964). With the establishment of the Interstate Commerce Commission in 1881, created to regulate the monopolistic policies of the railroad industry, the United States invented a form of quasi-executive-legislative-judicial agency that would simultaneously develop expertise to oversee, through investigation and quasi-judicial deliberation, matters relevant to congressionally regulated aspects of social life. This hybrid legal form has taken on special significance in American history, politics, and law, however, because this late nineteenth-century regulation came about as part of a continuing contest about the prerogatives of capital and the possibilities as well as the shape of the modern (welfare) state.

A good part of the early law and society scholarship focused directly on the work of the various administrative agencies that emerged at the end of the nineteenth and beginning of the twentieth centuries as part of the attempt to describe the relationship between the law-on-the-books and the law-in-action. Taking the moral aspirations of the rule of law quite seriously (as effort to limit official power by a system of rules, Dicey, 1915), a desire to reduce the arbitrariness of power (Selznick, 1969), and accountability for the use of force (Davis, 1972a), observers declared the regulation of business for the common good to be a failure. A consensus developed among scholars that things never quite work as they ought when legislation is translated into administrative action. Much effort was devoted to understanding how agencies mandated to serve the public become ineffective and indolent (Bernstein, 1955; Edelman, 1964; Shapiro, 1968; Kolko, 1965; Orren, 1974).

Various explanations were suggested to explain why public regulatory agencies seem to serve the interests they were designed to regulate and control. The explanations ranged from analyses of the symbolic nature of the legislative process that produces inconsistent mandates (Edelman, 1964), to analyses of the segmented structure of a system that encourages a division of the commonweal among interested parties to the exclusion of the unorganized public (Lowi, 1969).

Taking a closer look inside the agencies, researchers demonstrated that discretion is unavoidable and necessary to meet statutory goals (Davis, 1972a; Kadish and Kadish, 1973; Lipsky, 1980). Although statutes set theoretical limits to official action, they cannot determine how things are done within those limits. By choosing among courses of action and inaction (Davis, 1972b: 91), individual law enforcement officers become agents of clarification and elaboration of their own authorizing mandates (Jowell, 1975: 14). Bureaucrats – public and private administrators – become lawmakers “freely” creating what Ross (1970) referred to as a third aspect of law beyond written rules or courtroom practices. This law in action arises in the course of applying the formal rules of law in both private settings and public bureaucracies. It is the working out of authorizing norms through organizational settings. In the process of working out mandates, organizations modify the goals they were designed to serve. Members of organizations temper internal and environmental pressures to ensure the survival of the organization and, implicitly, the survival of the organization’s goals. Public bureaucracies implement policy within special constraints, and often fail to provide mandated services. Agents in “street level” bureaucracies are expected to interact with clients regularly, but their work environments are pressured and stressful. Resources are limited. Mandates are too frequently ambiguous or conflicting. The clients are the lifeblood of the

organization, but they are not the primary reference group for decision making or accountability. As a result, it is difficult to assess or reward job performance. Agents cope with these stresses by developing routines and simplifications that economize on resources. They invent definitions of effectiveness that their procedures are able to meet (Silbey, 1980–81: 851). They mobilize whatever legal rule, statute, or procedure will accomplish the substantive goal, even if it is not part of the agency's authorizing mandate (Silbey and Bittner, 1982). In so doing, they may alter the concept of their job, redefine their clientele, and effectively displace the organization's stated mandate.

In response to the discovery of discretion, policy analysts argued for more formal control through rulemaking to confine, structure, and review administrative and law enforcement discretion. But, here again, law and society scholars observed unintended consequences. Kagan suggested that with demands for greater control of discretion came changes in the style of government regulators. In *Going by the Book*, Bardach and Kagan described this shift "away from a traditional enforcement style that relied heavily on persuasion, warnings, and informal negotiations, and towards a legalistic style that stresses strict application of legal regulations and prompt impositions of heavier legal sanctions for all detected violations" (Bardach and Kagan, 1980: 1). The new legalistic style, Bardach and Kagan described, was not adopted uniformly across all agencies or jurisdictions; indeed, administrative law enforcement has been notably pluralistic, with scholarship on regulation since these early classical studies being occupied in tracking the relationship between styles of regulation and outcomes.

The progeny of these early efforts is enormous, but the focus has, with several notable exceptions, been influenced by the policy agenda, that is, keeping organizational routines consistent with formal legal mandates (Sarat and Silbey, 1988). Defining, measuring, and assessing the forms and degrees of compliance with regulatory mandates has become a research industry in itself and over the decades this activity has become more and more technical and, some suggest, accurate and effective. In this regard, law and society research pursued the legal academy's agenda, allying itself with the instrumental agenda of policy and legal elites. Nonetheless, some research in this field has, like other subfields of law and society research, also devoted attention to issues of inequality and power, tracing the ways in which routine administration privileges repeat players and organizational actors, by documenting the salience of professional and situational constraints (Silbey, 1980–81; Ewick, 1985).

Recently, however, researchers from diverse perspectives seem to have reached consensus that organizational culture is a key variable influencing the dynamics of compliance and the probability of sustainable improvement in administrative regulation.¹⁴ Several terms, such as "regulatory culture," "regulatory style," "governing style," or "regulatory context," are currently used to refer to characteristic features of politics, science, and the law that purportedly describe or explain – it is not clear which – variations among jurisdictions, agencies, and even nations (Epp, 2001; Vogel, 1986). Although these terms are often deployed within a traditional policy framework, this move in studies of regulatory enforcement and administration invites us to look inside the corporate subjects of regulation rather than simply at their outputs and thus to introduce a more cultural and constitutive perspective to studies of regulatory administration. At this point, the traditional studies of administrative regulation join with research pursued from a more critical, Foucauldian

perspective, to look at the law from the vantage point of the subjects rather than the agents of law enforcement.

Thus, in the field of administrative law and regulation, the jurisprudential interest in questions of discretion married with theoretical interests in power to forge a more complex analysis of the modern state. Moving beyond narrow interests in compliance by the regulated, or control of administrative regulation, contemporary law and society scholars are also observing ways in which aspects of law – not merely its promulgation and rule making but its distinctively interpretive activities – are resources in the process in state building.

CONCLUSION

Reflecting developments in the social sciences at large, law and society research is at a crossroads. Based on our review of the “canon-in-progress,” we see three competing paradigms at work in law and society scholarship that seem to be of a piece with the central debates in the social sciences over the course of the twentieth century: (1) research that uses scientific methods for public policy as in the realist tradition, (2) the development of a general theory of law with testable hypotheses, and (3) a closely textured sociological understanding of culture.

First, in each of the subfields of law and society, some researchers build on a tradition to study the “gap” between law on the books and law in action. To be sure, methods and conceptual lenses have become much more sophisticated; nonetheless, the themes and frameworks build from a legal realist foundation. As we suggest, there is a healthy debate among students of the courts that continues to study the role of judging building on a behaviorist model; or, as we also demonstrate, there are those who continue to examine whether incentives for compliance and effective regulation deliver on their promise.

Second, the discipline of law and society, like the social sciences more generally, continues to develop grand theories of society and processes of modernization and, based on theory, derive testable hypotheses. In the discipline of law and society, Donald Black’s *The Behavior of Law* (1976) exemplifies this paradigm. Black contends that it is time to abandon the normative underpinning of much law and society research (including, one presumes, some of his own work on policing) to develop a “theory of law.” Black begins with the premise that “it is possible to formulate propositions that explain the quantity and style of law in every setting” (p. 6). Conceptualizing social control as the “normative aspect of social life” that may take the form of law or, possibly, other variables of social life, such as “etiquette, custom, ethics, bureaucracy and the treatment of mental illness” (p. 105) Black argues, for example, “social control is a quantifiable variable” (p. 105). If social control has multiple indicators and is quantifiable, then, it follows, “*law varies inversely with other social control*” (p. 107). Black’s work represents an important attempt to develop a theory of law, and one that has been tested empirically by many of his students and collaborators (Morrill, 1995; Baumgartner, 1988; Cooney, 1998; Tucker, 1999).

Third, the law and society literature has discovered law everywhere, not only in courtrooms, prisons, and law offices, but in hospitals, bedrooms, schoolrooms, in theaters, and films and novels, and certainly on the streets and in police stations

and paddy wagons. And there are times when the law and society scholar maps the places where law ought to be but is not. For law and society scholarship, then, "the law is all over" (Sarat, 1990). By relying on this insight – that the law is where it does not appear to be – law and society scholarship has been exploring the cultural life of law through an entirely different set of concepts and themes than those that organized the generative studies of the gap between law on the books and law in action. Rather than focus on what law does, it has moved on to study what law means by studying law, for example, as consciousness, representational and discursive practices, or as part of the constitution of identity, gender, and governmentality.

Upon closer examination, this "discovery" of a sociology of legal culture in fact stands on the shoulders of Philip Selznick's seminal work. The turn toward a neo-institutional, cultural lens was at the core of Selznick's research on organizations, law, and industrial sociology. In focusing on the institution, Selznick develops a lens and a bridge between ideals and values (Kagan, Kryger, and Winston, 2002): a focus on institution encompasses a place for theoretical frame, methodological direction, and normative reflection. Law, and legality, is a particularly apt institution for social science inquiry because it embodies a "mainstay of cultural identity" as well as "the bridge between justice and community" (Selznick, 1992: 435). For the student of law or legality, the task then is to "explore the meaning of legality itself... the quality of legality and the gradations within it" in all its many obvious, hidden, and emerging sites (Selznick, 1959: 124; 1961).

Today, a sociology of culture focuses on the relations of identity and consciousness, social construction and constitutive labyrinths, an indeterminacy marked by historicity, and the unfolding of power in its myriad forms and sites. These themes complement research in law and society that uncovered the hierarchies of a law that was expected to be equal, the normalcy of what should have been unexpected, the ways in which legality is contingent on time and place, and yet the recurring power of law as an institution of society. The emergence of a canon indebted to Selznick's close intellectual, theoretical, and political reading of the institutions of law marks both a longstanding conversation and a new beginning.

Notes

- 1 Following Ewick and Silbey (1998), we use the word legality to refer to the meanings, sources of authority, and cultural practices that are recognized as legal, regardless of who employs them or for what ends. Legality is an analytic term rather than a socially approved state of affairs. In this rendering, people may invoke and enact legality in ways neither approved nor acknowledged by law.
- 2 Scientific studies of social life emerged with diverse forms of observation and interpretation. Nonetheless, an aspiration for a science of society, beginning with the work of Auguste Comte in the 1830s and 1840s, shared with legal scholarship of the late eighteenth to nineteenth centuries a positivistic bent. In law, as in social science generally, positivism refers to a philosophical position that maintains that valid knowledge consists solely of replicable observations of empirical phenomena; speculations about deep causes, meanings, or essences is not part of scientific knowledge. In this positivist view, we can know only what we can observe, and what we can observe is all that exists. In Western legal systems and jurisprudence of the last two hundred years, legal positivism

has been the dominant orientation of the profession and academy. From the positivist perspective, law consists only of the rules promulgated by official authorities empowered to make binding rules (e.g., legislatures, regulatory agencies, judges).

These rules of law... constitute the law, the data which it is the lawyer's task to analyze and order. In this sense law is a "given" – part of the data of experience. If it can be recognized as existing according to certain observational tests it can be analyzed. The tests by which legal positivism recognizes the existence of law or particular laws are thus analogous to those by which a scientist might recognize the presence of a particular chemical. (Cotterrell, 1992: 10)

The positivist conception enacts modern rationalism that in the law culminates in efforts to create comprehensive systems of logically ordered and conceptually coherent doctrines, celebrated as legal reasoning and critiqued as legalistic reasoning.

In social science, however, positivism was never the entire methodological orientation. For example, much of the Chicago School of sociology used qualitative methodologies of observation or techniques developed in anthropology for which the observer's interpretive skills and the subjective meanings of the actors remained central commitments. Nonetheless, these qualitative, interpretive social scientists also couched their work in the commitment to systematic, scientific observation (see e.g., Dorothy Ross's discussion of W. I. Thomas's work in Ross, 1991: 347–57). After World War II, with more sophisticated statistical techniques in place and the first inklings of the role that modern computers could play, the push toward large-scale and more positivistic research was given new emphasis (Converse, 1987). Social scientific research required large teams of scholars and expensive data-gathering techniques. The emergence of nonprofit organizations and foundations during the Progressive Era played an important role in the development of these new scientific studies of society.

- 3 The classic professions are the law, medicine, university teaching, and ministry. These professions were, however, refashioned in light of the rise of modern science and, with it, the modern university, particularly in the United States (Larson, 1977). In this turn, the ministry becomes a less central player in the contemporary story of professional powers (also see Freidson, 1986).
- 4 In addition to the Law and Society Association, there are such specialized sociolegal studies associations as the American Psychology–Law Society (APLS), the American Society for Legal History (ASLH), the American Society of Criminology (ASC), the American Sociology Association Section on the Sociology of Law, the Association for Political and Legal Anthropology (PoLAR), the Australian and New Zealand Society of Criminology (ANZSOC), the Australian and New Zealand Law and History Society, the Canadian Law and Society Association, the Commission on Folk Law and Legal Pluralism, the European Community Studies Association (ECSA), the International Political Science Association Research Committee on Comparative Judicial Studies, the International Sociological Association Research Committee on Sociology of Law (RCSL), the Israeli Association for Law and Society (ILSA), Réseau Européen Droit et Société (European Network on Law and Society), the Research Committee on Comparative Judicial Studies of the International Political Science Association, the Socio-Legal Studies Association (SLSA), the Society for the Study of Social Problems (SSSP), the Vereniging voor de Sociaal-wetenschappelijke bestudering van het Rech (VSR; Dutch and Belgian Law and Society Association, and Vereinigung für Rechtssoziologie. In the area of publications, scholars may submit their work to *Law & Society Review*, or a variety of other peer review journals, including *Law and Social Inquiry*, etc. While Russell Sage no longer supports sociolegal research, that mantle has been taken up by the National Science Foundation, the American Bar Foundation, and the Soros Foundation, among others. Today, there are PhD programs at the University of California, Irvine, University

- of California, Berkeley, New York University, and Arizona State University. Thus notable institutional steps have been taken to ensure the professional autonomy of law and society as a discipline.
- 5 Importantly, shorthand terms and jargon are important building blocks of professional communities: those who "know" are distinguished from the unschooled. Learning the terms of a discipline is an important part of a young professional's socialization or rite of passage into the discipline (Becker, Strauss, Hughes, and Greer, 1961). Our discussion of the professional development of the discipline of law and society in this section emphasizes the formal, structural constraints required to build a modern, scholarly community. Informal rituals of socialization, including the learning of jargon, to distinguish insiders from outsiders is equally important. For a study of the socialization of law students, see Stover (1989).
 - 6 Carlin's study was replicated by Handler (1967) in a small, mid-western city. Handler does not find as precarious a professional existence for lawyers as does Carlin in urban settings. More recently, portions of Carlin's study was replicated by Van Hoy (1997), also in Chicago.
 - 7 Of course, the world of large firm practice is quite different today. See, e.g., Hagan and Kay (1995) and Epstein, Seron, Oglesky, and Saute (1999).
 - 8 Four percent of the respondents to the first study of Chicago lawyers were women; the authors did not examine the career trajectory of these respondents.
 - 9 For a replication of the Heinz and Laumann study in a rural setting, see Landon (1990).
 - 10 Beginning in the late 1960s there was a discovery, or a rediscovery, of the work of Marx in the United States that was in large measure fueled by the political activism of the day. Beginning in the late 1970s, the questions posed by Critical Theory and the Frankfurt School shaped a new generation of legal scholars and led to the Critical Legal Studies (CLS) movement (Munger and Seron, 1984; Trubek and Esser, 1989). A long, contested, and interesting debate ensued; it is, perhaps, ultimately impossible to sort out the timing and directionality of the influence. The point is that Marxian social theory became central to the discipline of law and society, but again it was reintroduced in large measure through hot debates in law schools.
 - 11 Less than 10% of cases go to trial and of those few are heard before juries.
 - 12 Across many studies, women, people of low status occupations, and minorities have been found to participate less than their white, male, high status counterparts (Strodtbeck and Mann, 1956; Strodtbeck, James, and Hawkins, 1957; James, 1959; Hawkins, 1961; Nemeth, Endicott, and Wachtler, 1976; Kirchmeyer, 1993).
 - 13 For example, *Miranda v. Arizona* (1961), *Mapp v. Ohio* (1966). In a hallowed tradition of looking beyond the "law on the books," research demonstrates even in the wake of Supreme Court decisions, policing is "situational" and contextual: race, ethnicity and age matter in one's experience of the police (Bittner, 1970; also see Decker, 1981; Huang and Vaughn, 1996; Tuch and Weitzer, 1997).
 - 14 This neo-institutionalist framework represents a return to the work of Selznick, a point we take up in the conclusion.

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