1-1-1999

Law after Society

Jonathan Simon

Berkeley Law

Follow this and additional works at: https://scholarship.law.berkeley.edu/facpubs

Part of the Law Commons

Recommended Citation


This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Law after Society

Jonathan Simon


I. INTRODUCTION: LAW AND SOCIETY IN TRANSITION

One of the innocences of social scientists in the 1940s, and hardly less so today, springs from the belief that there is something particularly momentous about one’s own epoch—a sort of temporal hubris, which tempts one to overstate, overpredict, change, and falsely to extrapolate what seem overwhelming contemporary trends.


For a very long time it has seemed that something important was going to happen at the intersection of law and society (or more specifically law and those discourses we have called at various times the human, social, or behavioral sciences). Many of the truly great intellects of political and social thought in this century and the last have wagered their careers on this intersection including, Jeremy Bentham’s “science of legislation” (1987); Leon Duguit’s “social law” (1921); Roscoe Pound’s “sociological jurisprudence”; and Karl Llewellyn’s “legal realism.” All looked promising. All failed to achieve really dramatic success as either academic or governmental programs.¹

Jonathan Simon is professor of law, University of Miami, Coral Gables, Florida.

¹ Bentham strove in vain to see virtually any of his ideas implemented. Duguit knew all the right people, but his views on transforming French law were largely ignored by govern-
The most recent was in the 1950s and 1960s as foundations, academics, and politicians all invested in law and society as an integral part of what Bryant Garth and Joyce Sterling (1998) call the "last stages of the social activist state." The assertion of governmental authority in vast new areas of civil life was believed by many to require the production of a new knowledge about law that was neither doctrinal nor purely theoretical. This investment has not disappeared completely. The modern law and society movement has established enduring institutions. The movement has also promoted change in legal education, judicial administration, and political discussion of law. It helped complete the realist shift of law school textbooks from cases to materials and notes. It achieved recognition in the law through the creation of significant social science functions within the court system. Its research concerning the structural failures of the legal system have become endemic to public discourse including the social pathologies of litigation, the failure of regulators to reproduce law, and the weakness of the criminal sanction.

Yet as the twentieth century ends, this venerable project of working the intersection between law and the social finds itself not only incomplete but also increasingly uncertain about its identity or future.

This review article asks about the path of interdisciplinary legal knowledge "after society," that is, after the passing of a moment when the governance of liberal societies was heavily invested in the social. By social here I mean the set of discourses and practices that have developed since the seventeenth century and that have produced "society" as a knowable target of governance (Donzelot 1979; Hacking 1990). In this sense of the social it is itself a subject of history.

As Nikolas Rose has written:

"The social," that is to say, does not represent an eternal existential sphere of human sociality. Rather, within a limited geographical and temporal field, it set the terms for the way in which human intellectual, political and moral authorities, in certain places and contexts, thought about and acted upon their collective experience. (1996a, 329)
The modern law and society movement began in a period of triumph for the social in this sense. The prestige of the social sciences was higher than at any other time. The assumption was that the methodological revolution associated with computer-aided quantitative analysis would place the social sciences on the same basis of progress as the natural sciences. Social science was also engaged in an aggressive effort to lift its prestige by shifting its relationship with government. The prewar model of social expertise was largely limited to the management of marginal populations, for example, the dependent poor, criminals, delinquents, and the insane. The knowledge produced by social science was deployed most at the local levels of government in the first three decades of the twentieth century.

After World War II, the social came to be seen as crucial to the governance of normal populations and relevant to the national government in all its capacities. The new term behavioral science caught this aspiration and was heavily promoted by both foundations and academics themselves.

Social scientists reached a high point of optimism about how they could provide the tools to achieve social and political objectives. It was therefore thought to be a priority to integrate knowledge and research on human nature and public affairs and create a unified science. (Smith 1997, 801)

The behavioral science model called for disciplinarily trained social scientists to regroup in new bodies equipped to study social institutions critical to the activist state. It was hoped that the elements of a unified human science would emerge from the concentration of experts on delimited domains like the legal system. These interdisciplinary experts would collect findings to be accumulated in general social categories with behavior (individual, organizational, collective) as its mainstay. The law and society movement in the 1960s was an exemplary form of this strategy.

Law and society has often been tagged as too liberal (Posner 1993). But the important link to the liberal state in the 1960s and 1970s was functional not ideological. The growing engagement of the federal government in reconstructing institutions deeply embedded in social structures such as local courts, police departments, state prison systems, and schools (institutions historically far below the interest of the "wise man" or "statesman" model of the lawyer as governmental expert) made social science knowledge critical to law and opened up vast new spaces for social research. Thus while many of the most capable proponents of law and society work were always deeply skeptical about the effectiveness of reformist interventions, they were also deeply dependent on them. This placed law and society in a critical but

---

5. In part, of course, the national government began to take a larger role in governing social life.
intimate relationship with "liberal legalism" (Kalman 1997), the outlook that came to dominate American law schools in the late 1960s and 1970s and that viewed law and courts as uniquely situated to lead the reform of American society.

The fate of a discourse like law and society\(^6\) belongs itself to the sociology of knowledge. Institutions matter, including academic departments, journals, funding agencies, and foundations. The production of academic, legal, political, and other career paths that traverse this intersection, and relative valorization (in economic and other terms) compared with competing pathways is surely critical to predicting the health or morbidity of a field (Garth and Sterling 1998, 415). By these lights, law and society is not going away soon.\(^7\) At the same time a great deal has changed, "some forever, not for better" in the words of the Lennon and McCartney ballad.\(^8\) Indeed, there is something of a paradox emerging. Law and society as a research and teaching community is developing a greater degree of self-consciousness (Garth and Sterling 1998, 82) at precisely the same moment that the political and epistemological conditions that supported the initial unfolding of the movement have changed dramatically.

First, the sense of confidence associated with establishing social science as a crucial grammar of power has collapsed. One clue to this transformation is the consistency with which you will find a sense of crisis and decline wherever you find the term social as a referent for a discourse or institution, including social insurance, social work, sociology, or socialism. This is also true of a whole range of liberal governmental strategies that do not name the social but rely upon it including education, penal policy, and welfare.\(^9\) Many of these enterprises have suffered from almost continuous failure from their inception. Yet failure was always balanced, indeed perhaps encouraged, by the sense that reform and success only awaited a more adequately social grasp of the problems.

As Nikolas Rose points out, it is this broad sense of possibility that now seems to be contracting:

The object "society," in the sense that began to be accorded to it in the nineteenth century (the sum of the bonds and relations between individuals and events—economic, moral, political—within a more or less bounded territory governed by its own laws) has . . . begun to lose its self-evidence, and "sociology," as the field of knowledge which ratified

---

6. As I shall call this enterprise, having reminded you of its long trail of possible precedents.
7. I can say with genuine comfort as one of the rather small segment of the U.S. labor market whose cultural capital is most thoroughly invested in it.
9. Ironically, although socialism includes the term social as its root, liberalism has been more associated with the social as a target of government and in many respects has been most badly wounded by the decline of the social (Rose 1997).
the existence of this territory, is undergoing something of an identity crisis. (1996a, 328)

Likewise, the expectations of the behavioral sciences moment have faded. A generation ago it seemed like the real action would take place in interdisciplinary projects outside the existing disciplinary structures, precisely like the law and society movement. Today the "interdisciplinary" is as much or more about the internal decomposition of the disciplines. The social science disciplines are divided into ideological and methodological camps with little commitment to common standards of objectivity or aspiration toward epistemological unity (Munger 1993; Galanter and Edwards 1997). There are some who feel that particular social sciences, especially economics, have in fact entered a period of normal science (Posner 1993). While economics often treats itself as immune from these problems (Posner 1993), it may in fact be seen as relying on a conception of the social even more reified and inaccessible because of its lack of a name.\textsuperscript{10}

The social activist state that raised the value of law and society knowledge is being dismantled and its assets reorganized in fundamental ways. The state is not withering away as a force in society\textsuperscript{11} but is shifting the logic of its interventions away from the targets and objectives defined by the social and accordingly transforming the kinds of expertise it draws on. This has placed law and society work in tension with the agendas of governments that are not only more conservative politically but also rationalize and organize their rule in ways fundamentally different from their predecessors in the 1960s and 1970s.\textsuperscript{12} Notwithstanding the continuing efforts of stalwarts to fight for more fiscal recognition of what continues to be called "behavioral" aspects of government concerns such as health and drug abuse (Levine 1998, 2), the state is no longer the same kind of interlocutor it appeared to be in the 1960s. Undermined by globalization, and captured by a rightwing populism that has made liberalism into a kind of moral deviance, the state seems less willing to listen to, let alone fund, law and society work.

But as David Riesman's quote that begins this section reminds us, it is easy to mistake the emergence of new variations for signs of deep changes in the order of things. Like modernity itself, social science and liberal governance have often reinvented themselves. In this essay I want to look more closely at the vitality of the social science roots of law and society work by reading through a contemporary effort to renew that tradition pedagogi-

\textsuperscript{10} See the sources discussed below at pp. 183-185.

\textsuperscript{11} Just consider the rough quadrupling of the prison population since the 1970s (Currie 1998).

\textsuperscript{12} Frank Munger (1993) has argued that the "sociology of law" (which can be treated as a synonym for law and society) faces a new context, "postliberalism," in contrast to the foundation period of the 1960s and 1970s.
cally. *Law and Society: Readings on the Social Study of Law* (*L & S* hereinafter) is a collection of excerpts from published research and commentary edited by Stewart Macaulay, Lawrence M. Friedman, and John Stookey and aimed primarily at college, graduate, and law school courses on law and society.

This book offers an especially salient window for three reasons. First, as a textbook, its primary function is to introduce students to the field, by literally constructing it for them out of actual pieces of research and commentary that must both model and explain the analytic moves of the discipline. Second, as a reworking for the 1990s, of a body of materials originally developed by Lawrence Friedman and Stewart Macaulay in the late 1960s (later revised in the mid 1970s), this book offers a unique opportunity for genealogical comparison. Friedman and Macaulay were law professors at the University of Wisconsin Law School when Wisconsin was forging one of the most influential models of law and society as an interdisciplinary field. Their work was an integral part of an extraordinary blossoming of interdisciplinary scholarship in the 1960s and 1970s. Third, the Wisconsin model they helped form remains a viable project a generation later, and its influence can be traced in such different approaches as those of Martha Fineman, Robert Gordon, Tom Russell, and Patricia Williams.

It is clear that relative to other clusters in the 1960s, and especially Berkeley, the Wisconsin style represented the strain of 1960s law and society most identified with mainstream social science (Garth and Sterling 1998, 446). Friedman and Macaulay tended to presume law was the "dependent variable" and saw the social as a context into which law could be fit. Although this new book represents a very significant revision and the strong influence of a new collaborator, John Stookey, it still offers a picture of law and society that one might expect to be most endangered by the shifting political and intellectual context of law and society.

Part II of this essay explores a bit more the claim that the social as a historically specific constellation of power-knowledge relationships has di-

---

13. The three original strongholds of law and society were at the University of Denver, the University of Wisconsin, and Berkeley. While each contributed distinctive strands, the case can be made that Wisconsin had the greatest influence both on the institutional life of law and society (having more LSA presidents than any other comparable group) and on its intellectual program (Garth and Sterling 1998).

14. My use of the term *power-knowledge* follows Foucault's (1977, 27) argument that relationships of power and of knowledge must be understood as mutually dependent without assuming that truth thereby becomes corrupted. Truth, in fact, is an effect of power:

Perhaps . . . we should abandon a whole tradition that allows us to imagine that knowledge can exist only where the power relations are suspended and that knowledge can develop only outside its injunctions, its demands and its interests. Perhaps we should abandon the belief that power makes mad that, by the same token, the renunciation of power is one of the conditions of knowledge. We should admit rather that power produces knowledge (and not simply by encouraging it because it serves power or by applying it because it is useful); that power and knowledge directly imply one another; that there is no power relations without the correlative constitution of a field of knowl-
minished, or at least changed significantly from its position in the 1960s and 1970s. Part III examines two editions of the Wisconsin materials that were published in 1969 and 1977 under the title *Law and the Behavioral Sciences*. This tracks the movement from just after its start through its first decade of activity. While there were signs of maturation and differentiation within the field during this period, the political and epistemological conditions that fostered the creation of the law and society movement during the 1960s endured through the late 1970s. Part IV examines *Law and Society: Readings in the Social Study of Law* as an effort to renew this pedagogic and research program in the 1990s. In contrast with the first two editions, this new book comes after a period of profound changes in the context of law and society. Part V attempts to draw some insights about the prospects of law and society in this new context.

II. THE SOCIAL ISN'T FEELING WELL

Historians of the late nineteenth century have written of the birth of the social (Donzelot 1979). While precedents go back much further, it is perhaps in this period in Europe and North America that the distinct lines in academic work, government collection of statistics, medicine, and philanthropy become dense enough that one can speak of a "social sector" (Donzelot 1979, 89). In liberal societies like the United States and France, philanthropy was in very many respects the center of this early stage.\(^{15}\) By maintaining their relative autonomy from the state (and the threat of socialism) and by casting the problems of poverty and pathology as distinctly social, the social sector came to play a critical role in re-imagining governance at the turn of the century and through World War II. After the war, the center of the social sector moved toward a new alliance of academics, private social research institutions, and the greatly expanded welfare bureaucracies of the state.\(^{16}\) For the first time the federal government took a direct and expansive role in funding and directing this new social sector. Rather than the focus on pathological personalities and bad communities that so concerned the prewar social, the postwar social was primarily concerned with organizations and institutions, the professions, occupational

\(^{15}\) Names like Jane Addams are forever intertwined with the development of both social science and social policy for this reason.

\(^{16}\) Note that when conservatives have called for a return of welfare functions to charities the assumed reference is to the nineteenth-century charities so bitingly depicted by Charles Dickens, but it might point in a more productive direction if it was thought in terms of a return to the activist charities of the twentieth century that made social research and social reform key goals.
structures, and the like. It was in this context that law and society formed a small but significant strand.

There is no better example than David Riesman, whose 1990 reflections on his work in the post–World War II era provides the epigram for this essay (Garth and Sterling 1998, 455). Riesman’s book, *The Lonely Crowd* (1950), excerpted in a cover story of *Life Magazine*, became the first sociological best-seller. Riesman’s implication (overread he later suggested) was that the traditional American character, inner directed, was being replaced by the growth of an “other-directed” society. Riesman’s work captured popular anxiety about the affluent and conformist culture of the 1950s and evidenced the centrality of sociology to understanding and leading postwar society. The success of *The Lonely Crowd* made Riesman famous to many who were not aware of his many distinguished writings, particularly in the sociology of higher education. But even less well known is the fact that Riesman migrated to sociology after already achieving the initial steps of a successful career as a legal academic. Riesman studied at Harvard Law School and clerked for Justice Louis Brandeis. He entered law teaching after the then standard brief stint with an elite law firm. But Riesman left the faculty of the University of Buffalo School of Law before tenure to pursue a career at the very heart of American sociology. Interestingly, Buffalo became a center of law and society work after Reisman’s time there. But Riesman did not particularly trade on his legal knowledge within sociology, becoming famous instead for his influential analysis of the social psychology of postwar America. Individual behavior is too volatile a medium in which to demonstrate social facts, but a career like Riesman’s is suggestive of the powerful attraction of the social sciences on law during the twentieth century.

During the 1980s and 1990s, the social as a matrix of power and knowledge has come under attack from a number of angles. From the left, the social was increasingly betrayed by a “postmaterialist” (Inglehart 1977, 1990) postwar generation more concerned with ecology, identity, authenticity, and morality than social stability or security. After a period of several decades during which even conservative political figures embraced the centrality of the social to governance (Gilbert 1972), a new right arose in the 1970s and 1980s that effectively stigmatized the postwar forms of the social that had enjoyed general acceptance by both national political parties from the Eisenhower administration through the Carter administration. Popular opinion also began to shift against the perceived failures of the federal government and its social science allies. The prestige that government social research, state planning, and corporatist relations earned with the triumph of World War II, came in the 1970s to be associated with the defeat in

---

17. As a litigator Brandeis had become famous for his artful use of social science knowledge in what became known as “Brandeis briefs.”
Vietnam, violent crime, welfare, and urban unrest. The social has also been challenged by the emergence of new technologies (the computer) and new forms of expertise (management science, operations research) that make possible new strategies for governing individuals apart from the great collectivities associated with the reign of the social (Gilbert 1972; Inglehart 1990).

The social has suffered as an epistemological center as well. Funding for large-scale social research has dried up or become dedicated to narrow technocratic objectives. During the same period a host of new discourses ranging from neoclassical economics to identity politics have arisen that bypass the social in favor of new or old objects of analysis including markets and racial communities. The prestige and other rewards associated with social science careers have lagged compared to those in other fields and professional schools. It is difficult to imagine someone following Riesman's career trajectory today. Indeed, even by the 1970s law and society scholars were moving career lines over to law to capture its rising salaries and prestige (Garth and Sterling 1998, 461).

Some have been moved by these developments to speak directly of the "death of the social" (Baudrillard 1983). I'll refrain from such a rhetorically powerful claim for three reasons. First, it would give me no pleasure. I grew up in a family steeped in both sociology and socialism. The social was a key point of valorization in practically every comparison. The social revealed the true and effective logic underlying the distorted realities of individual crimes and collective abominations; and anything good, justice, security, medicine, could be improved by simply adding the social as a prefix. The death of the social? Perish the thought! It would be like learning that my hometown had been wiped out in a catastrophic industrial accident.18

Second, no such dramatic change is necessary to explain our dilemmas. It is enough that these beliefs and institutions are problematized both by nagging failures and increasingly bold opponents. In this sense, the question is not whether or not society as such, exists (to track Margaret Thatcher's infamous dictum),19 but whether as a framework for reflection and action society can continue to support the broad array of institutions, practices, technologies, and narratives that thrived there for much of the century.

18. Such accidents may themselves be representative of our age, or what Kai Ericson (1994) has called "a new species of trouble."

19. In an interview with the magazine Woman's Own on October 31, 1987, Thatcher was quoted as saying: "There is no such thing as society. There are individual men and women, and there are families. And no Government can do anything except through people, and people must look to themselves first. It's our duty to look after ourselves and then to look after our neighbour" (Thatcher 1997, 576 n. 1). In a 1996 speech, she elaborated: "I have never minimized the importance of society, only contested the assumption that society means the state rather than other people. Conservatives do not take an extreme atomistic view of society. . . . Nor do we dispute that the bonds of society need ultimately to be guaranteed by the state" (Thatcher 1997, 576).
Third, processes that produced the social (Donzelot 1979; Hacking 1990)—the accumulation of statistics (Hacking 1990), the intensification of methods of surveillance (Foucault 1977), the mandate for governments to effectively control dense urban populations—continue to proliferate in our time. Contemporary governments remain tied to social measures of performance like unemployment, inflation, poverty, and infant mortality. The demand of government for expertise about those domains continues to be great, but the forms of expertise are shifting and the terms of its acquisition are being renegotiated.

But, ultimately, whether we view the social as dead, diminished, or simply decentered, the effects on law and society are likely to be profound. The space between law and the social sciences was a constitutive opening for the social. The emergence of the social was first and foremost a challenge to law as a master narrative of governance (Foucault 1991; Rose 1996a, 329). The social shows up in the late nineteenth century precisely as that which is not captured by the law, for example, crimes, suicides, industrial accidents. In the twentieth century, a variety of hybrids of law and the social—juvenile court, worker’s compensation, collective bargaining, and regulatory agencies—became institutionalized. The modern law and society movement, in many respects, reflects the apotheosis of the social as a rationality of government. The assumption behind the investment in law and society was that the social had become so integral to government that lawyers could only function effectively in their traditional role as advisers to and about government to the extent that they understood the social through its own discourses. The fading of the social, correspondingly, raises a host of challenges to the continuation of that project.

As the social becomes less central to the way governments frame the problems they are promising to solve, the opportunities for social science expertise suffer a double loss. First, there is less demand for this expertise in the exercise of governmental power. Second, there is less opportunity for social research on the effectiveness of law as a tool of social change. Many of the classics of the modern law and society movement studied the impact of legal reforms meant to have social effects, for example, school desegregation, antipoverty programs, foreign aid for development. A good deal of work still looks backward at the liberal reform era. While the lessons there may be valid generalizations about law and governance, they also reflect a methodological dependence on the sorts of quasi-experimental conditions (Cook and Campbell 1979) produced by liberal reforms.

Third, law is enjoying a kind of revitalization as a rationality of governance. This return to law is less a return of the adjudicatory model of law so dominant in traditional legal scholarship and more a valorization of rules as
a key to governance.\textsuperscript{20} Across a wide variety of policy zones, we see the model of private law, contract, and property, most notably, being revalorized and offered as keys to reinventing government (Osborne and Gaebler 1992; Rose 1996b). In many legal subfields, there is a movement toward rediscovering the autonomy of private law and shedding the social assumptions embedded there by much twentieth-century doctrinal work.

In some instances, we may be seeing the disappearance of branches of law that were among the most thoroughly reshaped by the emergence of the social, for example, the slow decline of labor law as a course and its replacement with a reinvented employment law. In others the trends are less clear. A generation ago Grant Gilmore (1974) could write of "the death of contract," but today contract is being rediscovered in both business and politics as the ideal solution to collective action problems of all sorts. We also see this is in the dominance of criminal law as a tool of public policy (Simon 1997). Crime was one of the first legal subjects to be colonized by social imagination (Durkheim 1933). Today, however, criminal law as an intellectual framework that emphasizes individual culpability expands to fill the space left by the disappearance of "social" problems.

But if law is, in some respects, making a comeback as an autonomous discourse, it not clear that academic legal scholarship and judicial opinions, the dominant concerns of most legal educators, is where that action will inevitably take place. The attraction of contract and criminal law may be that, separated from their social context, they appear to be relatively flexible systems of rule-based governance (contract essentially being private criminal law in its ability to command performance over a vast range of activities). But here academics and judges must compete with information-systems engineers, accountants, and finance experts, among others, as providers of rule-based governance systems (Rosen 1999).

Fourth, within what used to be called "the legal system" there are signs of what might be called "postsocial" strategies (O'Malley 1996). Terms such as community, identity, representation, risk, norms, cognition, transnationalism, and culture function as key words in both academic and governmental discourses, marking sites of investment in knowledge collection and intervention strategies. To take one example that lies at an intersection of several of these terms, social scientists in the last two decades have made fear of crime a rival subject of study to crime itself (Skogan 1990). This scholarship has helped make visible a whole axis of social life with its own dynamics and

\textsuperscript{20} Tim Hope (1997) has recently produced a brilliant and provocative book on the relationship of law and social science that may seem to contradict the claims of this paper. Hope argues that law, by which he means primarily the adjudication-centered law dear to law professors, has been rendered increasingly irrelevant by the rise of governance based on the social. I am not sure that Hope would concur with my distinction between social and post-social governance, but the form of law that I argue is being revitalized seems quite different. The idealized picture of rule by rules is not of adjudication but private self-ordering.
correlation with both crime and noncrime features of urban life. A host of new strategies for governing have now made fear of crime a target for intervention and manipulation, including both allaying and intensifying it.

Fifth, within the law and society field itself, there has been a parallel growth in what might be called postsocial research strategies (Sarat and Sibley 1988; Santos 1996; Sarat and Kearns 1998). These new sociolegal discourses operate with the categories produced by social science, including class, gender, and race, but they often refuse the analytic structure offered by the social and its corollaries. They reflect a growing engagement of sociolegal scholars with the humanities and particularly cultural studies. There is a resulting interest in legal discourses, identities, and the legal imagination, not as an ideological supplement to institutional arrangements but as a fundamental aspect of those arrangements.


The influence of the social as a rationality of government reached its peak in the leading industrial societies in the three decades following World War II. As the New Deal style of government constructed at the federal level moved down into the states, government spending on social management and reform expanded, as did direct investment in postsecondary education. As governments took active responsibility for the well-being of firms, families, neighborhoods, and institutions, knowledge about impact of legal reforms on society and the role of social processes in shaping the operation of the legal system became far more visible and important. These new practices of government called into question the “training and expertise of lawyers for governing the state” (Garth and Sterling 1998, 412).

Legal knowledge in the form possessed and deployed by the elite of the profession, top law firm partners, judges, law professors, had long been presumed as a functional expertise for governance. While the savvy lawyer as “wise man” would remain a staple of government, it was increasingly challenged by expertise about the social terrain into which law was being deployed by a liberal activist state.21 The absence of scientific techniques within academic law faculties, and the relative deference of the traditional social science disciplines to academic law, created an opportunity that was filled by this interdisciplinary project.22

21. This began as early as the New Deal (see Shamir 1995), but intensified in the 1950s and 1960s.

22. Despite the legacy of legal realism and sociological jurisprudence in the first half of the twentieth century, the 1960s saw the triumph of a renewed legal formalism in the legal academy. Unlike the original legal science at the end of the nineteenth century, associated with Harvard’s Langdell, the new formalism of the post–World War II law school claimed a kind of sociological sophistication about legal process, although one accompanied by little
The modern law and society movement emerged in the 1960s to fill this gap in the field of knowledge and power between academic law and mainstream social science. Perhaps the most immediate sign of the vitality of this location was the formation of a number of institutions including the founding of the Law and Society Association in 1964 and the creation of the *Law and Society Review* in 1967. Another sign was the production of a first wave of teaching materials that anticipated the growth of law and society courses in law schools as well as undergraduate and graduate education.

A critical site for vitality of sociolegal program was in its ability to capture students. Between 1966 and 1973, at least seven volumes were published offering readings in the law and society field for students of various kinds and levels (including three in 1969 alone). Some, like Wilhelm Aubert's *The Sociology of Law* (1969) and Laura Nader's *Law in Culture and Society* (1969), were clearly aimed at graduate students and interested scholars. Others, like Friedman and Macaulay's *Law and the Behavioral Sciences* (1969) and Schwartz and Skolnick's *Society and the Legal Order* (1970), were aimed at a broader student audience including upper-division undergraduates, graduate students in political science or sociology, and law students. These testified to the growth and optimism of an interdisciplinary project that now thought to reproduce itself and recruit new members from the ranks of both law and social science students.

Lawrence Friedman and Stuart Macaulay published *Law and the Behavioral Sciences* in 1969 and a second edition in 1977 (*LBS I* and *LBS II* hereinafter). The two traded off teaching a course in law and society for law students and put together a set of teaching materials that became the book. They were both very active within the Wisconsin law and society group and in organizing the larger national law and society community that was forming.
In many respects the career trajectories of Friedman and Macaulay testify to what might be called the "pull of the social" on law. Friedman and Macaulay had both been educated in traditional law schools (Chicago and Stanford), but after entering teaching both quickly gravitated into the orbit of the sociological approach being promoted by Wisconsin's Willard Hurst. After a small amount of more traditional doctrinal publishing, both Friedman and Macaulay turned their attention almost fully to empirical sociolegal scholarship, Friedman mostly in legal history (of a very sociological bent) and Macaulay mostly with a contemporary focus on law in commercial life.

Both Friedman and Macaulay have had remarkably distinguished careers both within law and society as a discipline (both have served as president of the Law and Society Association) and within the academic legal community. Friedman moved from Wisconsin to Stanford during the latter school's ascent to the top ranks of American law schools. Macaulay's early article on noncontractual relations (1963) symbolized many of the hopes of the pioneer law and society generation for interdisciplinary success. It was published in one of the most prestigious sociology journals and eventually became one of the most oft-cited references in law review articles. Macaulay's success reflected, in part, the investment top sociologists were willing to make in law professors doing sociology (Garth and Sterling, 1998, 437). Williard Hurst connected Macaulay to Talcott Parsons and Robert K. Merton, the leading sociologists of their time. The latter was particularly supportive, first inviting Macaulay to participate on a conference panel organized by Merton and later encouraging submission of the conference paper for publication (Garth and Sterling 1998, 437).

Friedman and Macaulay were both lawyers, neither had a degree in social science or history, but the Wisconsin group came to be identified with a relatively prosociological view of the law and society intersection. The place of traditional legal knowledge and expertise in a new sociolegal knowledge system was a subject of significant struggle within the early law and society formation. Some like Carl Auerbach (1966/LBS I, 18) and Donald Black (1972/LBS II, 16) argued that a sociology of law should avoid entanglement with jurisprudential concepts. Instead the sociology of law should focus solely on the behavior of law and not on its normative or narrative structures. On the other side were members of the Berkeley group including Philip Selznick (1961), Jerome Skolnick (1966/LBS I, 15), and Sheldon Messinger (Carlin, Howard, and Messinger 1966/LBS I, 415). The Berkeley group argued that the sociology of law should absorb some of the normative and jurisprudential insights of traditional legal scholarship. Although sociologists, they advocated a kind of collaboration between jurisprudence and social science. Friedman and Macaulay represented a center

position in this debate. The social was the primary partner in a law and society relationship. The point of law and society scholarship was to place law "in context" or as a "dependent variable" (Garth and Sterling 1998, 437). At the same time they did not embrace the radical invitation of Black, among others, to strip legal concepts of any reality value and pursue a "purely" social description of the interactions popularly conceived of as "legal" (Black 1976).

A. Textbooks and the Disciplinary Imagination

Course materials, whether called readers, casebooks, or textbooks, play a significant role in the construction of any academic discipline or field. A relevant example is the famous sociology textbook produced by Robert Park and Ernest Burgess at the University of Chicago. Titled Introduction to the Science of Sociology, the book was the road map for a generation of students seeking to figure out what being a sociologist entailed (Janowitz 1969).25 First published in 1921, the book was revised in 1924 and dominated the teaching of American sociology for at least two decades.

As a statement of sociological theory, the book may have been less important than some of the other monographs produced by scholars of the early Chicago School, including W. I. Thomas, William Ogburn, and other books by Park and Burgess. In contrast to such works, Introduction to the Science of Society was eclectic, focused on concrete detail, and satisfied with a "loose collection of concepts" in place of a rigorously rationalized system (Janowitz 1969, vi).26 But the "green bible" as it was known, did three things crucial for the emerging field.

First, Park and Burgess collected strands of work by earlier authors, most of whom did not categorize themselves as sociologists but, rather, as philosophers, linguists, political economists, and moralists, and located them into a genealogy for a new science. Into this were woven articles by the growing Chicago School faculty and their students, including many published in the American Journal of Sociology produced by the Chicago group.

Second, they offered a grid or schema for moving within the landscape of this new field of sociology. Chapter headings in the book named specific research frontiers: "human nature," "social groups," processes of "segregation" and "isolation," "social conflict," "social interaction," "social forces," "accommodation," "assimilation." The paradox at the heart of such grids is that by dividing they unify. By segmenting a domain into a set of specified

25. It was designed for use by both undergraduates and graduates (Janowitz 1969, v).
26. Although it did follow the older model of treatise-like organization, in contrast to many contemporary textbooks.
differences, a whole is named and invested with significance. This is as true of the 1999 calendar on my desk as it is of the periodic table. One of the central functions of teaching materials is to provide just such a constitutive set of lines.

Third, for each area, Park and Burgess provided guidance as to where new scholarly effort should be applied. In a manner now out of style, the Chicago authors directly appended lists of suggested “theme” topics for students to take up. In the chapter on “social contacts,” they recommended the following theme topics among others:

Land as the basis for social contacts
Density of population, social contacts and social organization
Mobility and social types, as the gypsy, the nomad, the hobo, the pioneer, the commercial traveler, the missionary, the globe-trotter, the wandering Jew
Stability and social types, as the farmer, the home owner, the businessman
Race prejudice and primary contacts (Park and Burgess 1969, 336).

All textbooks offer some version of these three functions. As disciplines mature, however, the formation of a body of theory often separates off from the research work that produced it, allowing a more analytic presentation. Likewise, textbooks in mature fields must generally reproduce existing teaching expectations enforced by the market concerns of publishers (investing in a paradigm shift can be highly risky). Suffice it to say that whatever might be the case with more stable social science disciplines like sociology, law and society has remained a work in progress. Indeed, with relatively few dedicated law and society programs in undergraduate or graduate institutions, it remains largely a course or set of courses within the disciplinary boundaries of other fields. Each textbook produced in the field has an opportunity to reimagine it.

B. Genealogy

Like other text writers in this first wave of law and society textbooks, Friedman and Macaulay noted that the law and society movement had precedents but that conditions were changing favorably to the accomplishment of a more enduring linkage between law and social science than existed before.

There is now a good deal of emphasis on social science and empirical methods, and the trend is clearly in this direction. . . . Sociology of law, behavioral political science, anthropology of law, psychology and psy-
chiatry and law, and legal economics, have all received new infusions of persons and enthusiasm in the last generation. (LBS I, viii)

Friedman and Macaulay could list a series of precedents, mostly those of American law schools. Legal realism, and the somewhat different strain associated with Roscoe Pound's sociological jurisprudence, had attracted adherents at some of the nation's most elite law schools, including Harvard, Yale, and Columbia. Moreover, legal realist law professors had forged some of the first working alliances with professional social scientists (Schlegel 1995). The importance of social science to producing legal knowledge was partially established by realism. Law schools hired economists as the New Deal opened up new career paths for lawyers in government management of the economy. At Columbia, there was an effort in this period to reorganize the curriculum around the "functional" issues raised by social problems (Kalman 1986).

But while celebrating legal realism in the introduction, neither edition of Law and the Behavioral Sciences included any significant offering of the earlier realist writings. Realism as a program to bring law under the intellectual domination of the social had failed. Its legacy in the law schools of the 1960s and 1970s was what Robert Gordon called "case law realism" (Gordon 1974/LBS II, 4), in which, once again, appellate opinions served as the major data. Law might be about behavior, but it was judicial behavior, and judicial behavior (contra to the tradition of political science behavioral studies of courts at the same time) was about reasoning. From that perspective, legal education could focus on empirical study of appellate judicial behavior by doing what they had always done, reading cases.

Post-World War II developments appeared more promising. Yale Law School in the early 1960s created soft positions on its faculty for two sociologists, Richard Schwartz and Jerome H. Skolnick. Despite the lack of tenure lines, Schwartz and Skolnick were fully visible in the law school and had influence on both colleagues and students. Yale also appointed several entry-level law professors with a strong interest in law and social science, including David Trubeck and Richard Abel, and hired sociologist Stanton Wheeler. By the end of the decade, however, Schwartz and Skolnick had moved on to other faculties, never having been offered tenured positions, and Trubeck and Abel had been denied tenure.

The University of Chicago Law School received a large grant from the Ford Foundation to undertake an empirical study of juries. The study, headed by law professor Harry Kalven and statistician Hans Ziesel, produced

---

27. In this they differed from Schwartz and Skolnick, who included a number of excerpts from realist authors in the first substantive section of their course materials.

28. Unlike the Yale sociologists of the 1930s, who were treated more as computer technicians are in law schools today, less as colleagues than as vital service employees.
one of the most celebrated and controversial pieces of sociolegal scholarship ever (Kalven and Ziesel 1959; 1966). This was the beginning of a series of investments by major foundations in the law and society field, including Ford and Russell Sage (Garth and Sterling 1998, 418). The first wave of funded research in the 1950s and early 1960s was focused on the condition of the legal system, particularly the criminal justice system. The second wave in the late 1960s and 1970s included law and development and alternative dispute resolution. By the early 1980s, most of this large foundation funding was gone.

Friedman and Macaulay also pointed to developments that were transforming the relationship of traditional social science disciplines to law. In each discipline a somewhat different trajectory was apparent. Economics and political science had always had an interest in law. Friedman and Macaulay pointed to the involvement of many economists in the war on poverty as evidence that the politics of the Great Society (which were dying in 1977 only in retrospect) would draw economists even more closely into the study of legal phenomenon (LBS II, 6). Friedman and Macaulay turned out to be quite accurate in that assessment. Law has continued to be a significant interest to mainstream economists and more so in the 1980s and 1990s. Perhaps because of that, legal economists have not been a significant force in the law and society movement. Indeed law and economics has emerged as an autonomous field widely seen as the most successful effort of the century to establish a discourse linking the legal and the social.

As with economics, anthropology had made law a central concern from the start. There had also been successful collaborations with law professors, most famously Karl Llewellyn and E. Adamson Hoebel in The Cheyenne Way. What was changing in the 1960s was the awakening of interest in industrial and postindustrial societies as reflected in the work of scholars like Paul Bohannan (1965), Laura Nader (Nader and Yngvesson 1974), and Sally Falk Moore (1969).

The case of political science was quite different. There, law, especially constitutional law, had once been the dominant concern. But this "institutional" political science was going out of fashion in the 1950s, 1960s, and 1970s, in favor of a focus on political "behavior" and quantitative methods (LBS II, 6). Political scientists came to law and society, then, in part as refugees from subdisciplinary downward mobility (Garth and Sterling 1998, 427).

Criminology is in many respects a predecessor to law and society as an interdisciplinary project at the intersection of law and the human and social sciences. But with the dominance of positivist criminology in the United States from the early years of the century on, the study of individual delinquent behavior and its determinants replaced classical criminology's interest in legal institutions. Links between the administration of justice, social
work, and positivist criminology were developed intensively during the first half of the twentieth century, but much of that proceeded without attention from academic lawyers, appellate judges, and national government. In the 1960s, however, criminologists began to shift their attention back to the processes of criminal justice, making law far more relevant. Labeling theory, for example, which became one of the most important theoretical perspectives in this period, highlighted the role of law in channeling delinquents into criminal lifestyles.

American sociology had never shared the interest in the sociology of law of the classic European theorists like Durkheim and Weber. The social order interests of the prewar Chicago School scholars fed instead into criminology. But starting in the 1950s and 1960s, encounters with the civil rights movement and, later, opposition to the war in Vietnam brought many sociologists into contact with legal institutions.

As the title of the Friedman and Macaulay reader suggested, the social sciences in this period were being reimagined under the rubric of the behavioral sciences. The term owed as much to foundation program officers and academic entrepreneurs as to any theoretical developments. The behavioral sciences ideal expressly advertised the promise of practical applications from social science work. It also signaled the prominence of individual-level behavior to the governance of liberal societies (and thus distinguished American social science from links between social science and socialism in Europe and elsewhere).

The emphasis on behavior appeared to place the focus on the individual, but under the influence of Talcott Parson's "theory of action," sociology also emphasized the explanation of individual behavior in its own way. The social, in this framework, was just another kind of system, comparable to biological and electronic systems. By studying systems, sociologists could work in the framework of individual action without abandoning the claim to an autonomous social logic. Moreover, social institutions like law could be treated as subsystems, as semi-autonomous systems that could be studied in terms of their own operation, as well as functional operators in the larger social system.

29. Sheldon and Eleanor Glueck were an important exception. He received a tenured appointment at Harvard Law School and she a research position. Their studies of delinquent careers were in many respects anticipatory of the dominant criminology of the 1980s and since, but at the same time they had little influence on criminology or ultimately law (Lamb and Sampson 1991).

30. Like many others drawn to the sociology of law in this period, both Friedman and Macaulay were influenced by Parsons's theoretical concerns, but not in particularly strong way. The titles of the sections, e.g., chap. 5, "The Legal System as a Social System: Intra-System Considerations," invoked Parsonian terms, but the authors had made little effort to fit the diverse empirical findings into Parsons's famously complex analysis.
The interaction of individual actors, that is, takes place under such conditions that it is possible to treat such processes of interaction as a system in the scientific sense and subject it to the same order of theoretical analysis which has been successfully applied to other types of systems in other science. (Parsons 1951, 3)

C. Grids

Friedman and Macaulay chose to organize the field into five subheadings. Together these suggested four distinct enterprises within law and society: redescribing legal institutions as social institutions; studying the impact of law on society; studying the influence of society on law; and producing a general theory of law in society.

1. Redescribing Legal Institutions as Social Institutions

David Trubek (1990, 5) has argued that, the great task for the first wave of modern law and society scholars was to show that a realm of objects existed in law that could be usefully studied empirically. Sociologist Philip Selznick referred to this as the “missionary” stage of law and society work (LBS II, 2). Selznick suggested in this early essay that the legal realists had already achieved the missionary function and that the stage was set in the sixties for real advances in the sociology of law. A generation later, however, it remains part of the work of almost any piece of law and society work to demonstrate the existence of the law and society perspective. In the 1960s, it seemed as if descriptive sociology would help undermine the authority of the conventional law school representations of law by placing the elements of that representation into a social context. The more central the phenomena to the idealize representation promoted by academic lawyers, the more effective the disorienting power of recontextualization.

In both editions of Law and the Behavioral Sciences, this missionary function of law and society work was showcased in the first substantive chapter of each book titled “The Descriptive Aspect of Law and Society.” In the introduction to the 1977 edition, the authors described the law and society project as “an attempt to build a new paradigm or picture of the way the legal system actually works in the United States” (LBS II, 29). A potent example was the criminal defense lawyer, perhaps the key player in the con-

31. I can use as an example my own dissertation study of parole revocation in California (Simon 1993). One reading of the book is a classic gap story. Legally, parole supervision is about surpluses of authority, but in reality it’s about massive deficits of power.

ventional paradigm of law and one very much at the center of national attention in the early 1960s as the Supreme Court expanded the right to counsel in a series of cases. Abraham Blumberg's "The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession" (1967/LBS I and II), published in the very first issue of the Law and Society Review in 1967, directly attacked the view that the primary role of the defense lawyer in criminal court was to maximize the outcome for her client. Defense lawyers had more powerful bonds with the courtroom "working group" (judges, prosecutors) than they had with their clients and thus had powerful incentives to cooperate in making the flow of the court's business efficient. For the defense lawyer this meant primarily convincing her client to accept a guilty plea, a situation Blumberg famously compared to a con game.

Criminal law is a unique form of private practice since it really only appears to be private practice. Actually it is bureaucratic practice, because of the legal practitioner's enmeshment in the authority, discipline, and perspectives of the court organization. Private practice, supposedly, in a professional sense, involves the maintenance of an organized, disciplined body of knowledge and learning; the individual practitioners are imbued with a spirit of autonomy and service, the earning of a livelihood being incidental. In the sense that the lawyer in the criminal court serves as a double agent, serving higher organizational rather than professional ends, he may be deemed to be engaged in bureaucratic rather than private practice. To some extent the lawyer-client "confidence game," in addition to its other functions, serves to conceal this fact. (LBS I, 133)

This not only threw the conventional legal paradigm into radical disorientation, but it also suggested perverse consequences from following the pathways for reform suggested by the law school paradigm. Indeed, the Warren Court's seemingly libertarian empowerment of defense lawyering in cases such as Gideon could be seen as "augmenting the existing organizational arrangements" (Blumberg, in LBS I, 140, emphasis in original).

Another icon of the traditional law paradigm was the centrality of contract terms to private business relations. Contracts was perhaps the single most ideologically charged course in the entire first-year law school curriculum in its depiction of social interaction as the bargaining of individual agents. No other course offered such a potentially comprehensive picture of human relations. In a sense, contract law was itself kind of theory of law and society, a rival model to the empirical variant being promoted by the law

---

33. The image of the lawyer as advocate is at the center of first-year course portrayals of lawyering, and the criminal defense lawyer is the purest example of advocate. This ideological primacy, however, does not translate into actual performance. Criminal defense is not a prime career track for most law students, especially at more elite schools.

and society movement. Stewart Macaulay's "Non-Contractual Relations in Business: A Preliminary Study" (1963/LBS I and II) took on the assumption that legal terms in business contracts governed the performance expectations and dispute resolution strategies of business people. Examining relations among Wisconsin industrial firms and their suppliers and customers, Macaulay found that disputes were resolved with little reference to contract terms. Social networks, custom, and a sense of relational interest had greater weight.

2. The Impact of Law on Society

A second classification common to almost all the first-wave books was the theme of law's capacity to influence social change. Friedman and Macaulay titled chapter 3 "Interchanges between the Legal System and Other Social Systems: On the Impact of Law on Society." Many in the law and society movement early on were wary of studying the impact of law as too much of a service function to traditional legal knowledge. In this view, empirical research becomes a kind of social accounting that tells you whether the law's investment in one or another kind of technique is paying off in changing behavior. At the same time, few could miss the significance that the 1960s wave of legal reforms had as natural quasi-experiments in the capacity of law to effect social change.

Not surprisingly, the work selected by Friedman and Macaulay tended to spill beyond bounds of evaluation studies to problematize the basic conditions and definitions of legal effectiveness. Charles Hamilton's (1965/LBS II, 478) article on voting rights, for example, showed that progress in enforcing voting rights in any particular state had a lot to do with the judicial style of the federal judge involved. Some, like Alabama's famous Judge Frank M. Johnson, aggressively enforced voting rights with rapid orders placing voters directly on the rolls to prevent administrative delay from denying the right to vote. Others could use their tremendous power over the course of litigation to keep reform gradual or even resist it altogether. Can voting rights change voting? It depends in part on the style of judging.

Joseph Gusfield's (1967/LBS II, 503) article on deviants and legal sanctions suggested that law's seeking to control deviants, like drinkers or drug users, reflected value conflicts within society over the symbolic meaning of deviance rather than instrumental measures to intended to transform deviant behavior. Prohibitionist legislation on drugs and alcohol succeeded in

35. The Berkeley law and society group, including Selznick and Skolnick, sought to incorporate a greater jurisprudential component in sociology (Garth and Sterling 1998, 459–60).

part by redefining deviants as criminals, even if it did not change their behavior.

Thus, like chapter 2, chapter 3 was in large part a demonstration of the dominance of social context over law rather than a statement of law's capacity. In that sense it continued the explicit critique of the law school model of legal action.

3. The Influence of Society on Law

The third classification reversed the causal relationship between Law and society and thematized the social determinants of legal behavior across a wide domain. At the most general, this inquiry examined the social conditions under which formal legal systems come into operation at all, as against informal but effectively regulatory norms. This problem was examined by Richard Schwartz's (1954/LBS 1, 509) famous article on the development of legal processes in two different kinds of Israeli communities presented empirical evidence on the differential development of formal legal norms under different economic structures. The kvutzə, organized along rigorously collectivist lines, tended to develop informal norms enforced by general observation and social disapproval. The Moshav, which was organized along more individualistic lines, made such informal norms difficult to discover and enforce. Formal legal procedures arose to address the need for social control. Schwartz's study operates simultaneously as general social theory linking economic structure to the formation of legal forms, and empirical study of specific communities. It is one of the most powerful examples of the case study as theory-building instrument, with all the strength and vulnerabilities that brings.

The question of social context, at least during the behavioral sciences moment, was profoundly a question of power. Who governs? asked political theorist Robert Dahl in a study of how community power really worked in a medium-sized city (1961). Dahl found that New Haven's governance ultimately reflected a wide variety of groups in a pluralist bargaining process that was neither wide open nor exclusive. Others, perhaps sociologist C. Wright Mills most famously, saw a power elite at work in most American institutions.37 For many social scientists in the 1960s, the Progressive Era (1875–1925) represented a key precedent for the kinds of social reforms being promoted by the social activist state. Lawrence Friedman and Jack Ladinsky's classic study (1967) of the transformation of the law of employer's liability for workplace injuries at the turn of the last century is an example (LBS II, 629). The collapse of the Fellow Servant rule and its replacement by workmen's compensation reflected a shifting consensus

among a broad set of social actors. The enactment of workers' compensation, when it came, reflected not a general defeat for business but the emergence of a consensus representing the larger and more advanced firms to adopt a more predictable and efficient regime of compensation through insurance. What looks like the purposeful hand of elites is often the dead hand of inertia, creating its "lag" between changes in economic organization and the regime of legal rights and responsibilities. Without suggesting that power inequalities are not relevant, Friedman and Ladinsky suggest that legal change will rarely simply mirror deeper structures of social change. Because litigation and statutory reform both require sustained action over time by lots of different agents, the legal forms at any time will largely be determined by features of the legal system itself, which provide the strongest kinds of signals and incentives to the participants.

Marxist sociology, enjoying a real growth in the 1960s and 1970s generally, also entered the debate on this terrain. Elliot Currie (1971/LBS II, 649) responded to Friedman and Ladinsky, arguing that their analysis ignored the aspects of the same legal change story that suggests elite power over law. What looks like a shifting consensus might be interpreted as the effective veto that business interests hold over law even under conditions of democratic forms and rule of law norms.

Friedman and Macaulay (LBS II, 676) also excerpted Theodore Lowi's (1967) article on "Interest Group Liberalism," in which he rehearsed the major arguments of his justly famous book The End of Liberalism (1969). Lowi's analysis pointed to something different, though related to, the dynamics described in consensus and conflict models of change. The rise of modern interest groups had transformed the assumptions of the old political divides. While the contentious bargaining behavior of such groups was reassuring to many liberal political scientists during the middle of the twentieth century, Lowi pointed to their collectivist character as groups. This reconfiguration of political interests along actuarial lines emerged with the New Deal and has been largely naturalized in the concept of pluralism celebrated in much 1960s post-World War II political science. This new "public philosophy" presumed that behind such organized interests uniform mass interests existed that could be effectively represented. Lowi was by no means sanguine about these developments. The construction of political subjectivity around interests groups in this sense had fundamentally altered American democracy, replacing classic partisan and left-right differences with an array of links between administrative agencies and organized client groups capable of operating with little accountability.

Lowi's work pointed up a paradox of social science and liberal governance visible by the late 1960s. While late-twentieth-century liberalism assumed a kind of social vision (groups rather than individuals) its relationship with the sociological imagination was far more problematic.
The massive federal ambitions in poverty, racial justice, and education during this decade were clearly dependent on claims of expertise about human behavior and its management, claims which the social sciences were well placed to meet. But this social rationality of rule was at the same time endangered by social science methods that tended to expose failures and lack of uniformity within social groups and conflicts in multiple social roles.38

4. Toward a General Theory of Law and Social Change

The final chapter of both editions of *Law and the Behavioral Sciences* was titled "Culture, History, and Society." Today the invocation of culture and history in the 1990s signals a shift away from the social to a focus on localness and variation in opposition to general theories. In both 1969 and 1977, the referent was to almost the opposite, that is, toward a "macroscopic" sociology of law (LBS II, 980), the formation through cross-cultural and historical reflection of general laws of legal evolution. This was part of the low-key but consistent influence of the behavioral sciences model in the book. Subheadings seek to mark out generalizable categories of findings. Cross-cultural and comparative work was critical to the plausibility of this model. Unless compelling case studies about social and legal change in the United States could meaningfully be sorted with similarly compelling case studies of Italian or Japanese social and legal change, the behavioral sciences project had little promise of being anything more than American studies.

Friedman and Macaulay offered modernization as the closest thing to a master narrative of comparative law and society in the 1960s and 1970s. The chapter was introduced by the writing of Max Weber, whose reflections on the culture, history, society story, the editors described as a "good jumping off point" for further work. An assortment of comparative case studies and theoretical analyses of relationship of social system to legal system followed.

D. Programs: Colonizing Law

Textbooks are rarely meant to be reports on the state of research in a field. The primary purpose of teaching helps organize the selection process. Articles may be selected because they illustrate key theoretical questions, methodological problems, or even wrong turns. Yet among their functions is

38. My book *Poor Discipline* (1993) tells a version of this story in the context of the correctional system. The California Department of Correction's research unit during this period drew its staff heavily from Berkeley's Criminology School, which had a number of extraordinary social scientists on its faculty. The results, documented in the department's own published reports, largely reflected the inability of corrections to change behavior.

HeinOnline -- 24 Law & Soc. Inquiry 167 1999
modeling the kind of research projects that those being initiated into the field should look to in imagining their own possibilities and opportunities. Research work can attach itself to all kinds of opportunities. Erving Goffman worked as a basketball “instructor” at a state mental asylum to conduct the research for his classic *Asylums* (1961). John Irwin (1980) did participant observation of California prisons in the 1950s through the 1970s as a youthful felon and then later as a professional sociologist working in a variety of capacities in corrections system that sought academic validation and support.

Course materials and readers canonize not only authors and scholarship but also strategies for producing authoritative knowledge and the relationships with power that producing and distributing that knowledge requires. Friedman and Macaulay point to a number of such strategies. Most of these reflect the continuing power of the social in governance. Some of them point toward signs of what we can now recognize as the diminishing influence of the social.

1. **A Sociological Constitution**

   Few things could have better exemplified the prospects for law and society in the 1960s than the Supreme Court under Chief Justice Earl Warren. Highly publicized rulings on issues like school desegregation, voting rights, and religious freedom made constitutional law synonymous with hot-button social issues. No part of that jurisprudence is more reflective of the pull of the social than the series of landmark opinions on criminal justice in that decade. These famous decisions, including *Gideon v. Wainright* (372 U.S. 335 [1963]), requiring access to counsel for the indigent, *Miranda v. Arizona* (384 U.S. 436 [1966]), requiring police warnings to suspects of their right against self-incrimination prior to police interrogation, and *Mapp v. Ohio* (367 U.S. 643 [1961]), excluding evidence gathered by the police in violation of the Fourth Amendment, drew on sociolegal knowledge, both by direct citation and, perhaps more important, by borrowing the sociological vision of legal institutions in rationalizing its decisions. For example, Wayne LaFave’s (1965/LBS II, 85) study of arrests, conducted in the 1950s as part of the American Bar Foundation’s study of the criminal justice system, was an early example of the constellation of forces coming together among

---

39. Perhaps the most famous “sociological” opinions were those dealing with school desegregation, especially *Brown v. Board of Education*, 349 U.S. 294 (1954). Constitutional scholars differ as to how dependent the legal holdings of those cases were on sociological reasoning (see Ely 1998 for summary of the debate and view that Brown, at least, represents no real departure from legal reasoning). My not-yet-fully-educated opinion is that the criminal procedure decisions represent the most significant and most enduring commitment to a sociological rationale within constitutional jurisprudence. I hope to explore and defend that view in a future article.
foundations, academics, and the legal profession to produce sociolegal studies. LaFave's book was cited in three opinions of the Warren Court including *Miranda* and *Terry v. Ohio*.  

Other Supreme Court decisions cited to no particular scholarship but presumed a source of social knowledge. For example, the pivotal case of *United States v. Katz* (389 U.S. 347 [1967]) defined the legal standard for whether a person has a "constitutionally protected reasonable expectation of privacy" under the Fourth Amendment's ban on unreasonable searches and seizures (1967, 369, Harlan, J. concurring). In *Katz* the petitioner's conversation from a public telephone was intercepted by the government using a microphone located outside the phone booth. Previous precedent implied that an actual trespass onto private property was a necessary but not sufficient condition. In *Katz* the Court established that Fourth Amendment was triggered by reason of a socially recognized privacy interest. Legal analysis would turn not simply on positive law, but on the complex webs of norms, customs, and expectations that shape social order.

Supreme Court decisions suggesting the importance of empirical knowledge about the operation of the criminal justice system also inspired a new wave of empirical research on police, lawyers, bail bondsmen, and other players in the system. The rapid constitutionalization of criminal procedure in this period, helped cast discretion as a central subject of research (Walker 1993). *Discretion* had already become a term of art applied to the New Deal regulatory agencies (Davis 1969). The expansion of federal reform efforts over state criminal justice processes dramatically lowered the threshold of visible and problematic discretion from formal administrative action or inaction to the informal decision making by police, correctional officers and others.

The civil rights movement and the federal war on poverty it helped generate in the mid-1960s, also figured prominently in law and society work. These movements had the effect of making judicial decision making a more visible public problem than at any time before the New Deal's face off with the Supreme Court in the 1930s. With so much riding on the wisdom of judges, the 1960s Supreme Court invited a critical assessment of judicial background and fairness. This stimulated a new generation of political science research on court decision making.

2. **Being Interdisciplinary**

We are all interdisciplinary now! might be a slogan for academic law in the 1990s. But Jack Balkin (1996) argues that this consensus is a highly

---

misleading one that disguises the cruder battle for ideological living space within the inherently limited imagination of the actual consumers of legal discourse (see also Balkin 1998). Most interdisciplinary work, on Balkin's account, is better seen as part of the colonization of law by another alien discipline. According to Balkin this can take a variety of forms.

First, one might try to solve problems determined by and through the norms of legal scholarship by means of information from other disciplines. . . . A second form of interdisciplinary work would involve treating legal materials as though they were the sorts of materials studied in other disciplines. . . . A third approach would try to solve problems determined by some other discipline by applying the other discipline's methods to an aspect of the legal system or to materials that happen to be legal materials. . . . A fourth approach would attempt to create a space for an entirely new discipline with new questions and new assumptions by merging and marrying the questions and assumptions of different disciplines. (1996, 958–59)

In the introduction to Law and the Behavioral Sciences (1977), Friedman and Macaulay freely identified themselves as colonizers of law. Invoking Thomas Kuhn's (1962) Structure of Scientific Revolutions, they suggested that conventional legal analysis was a dominant paradigm that had established a "normal science" of law. The task of law and society work was to overthrow this paradigm: first, by revealing the work of the conventional paradigm in shaping the understanding of law held by both the public and many participants; second, by identifying the gaps (or anomalies in Kuhn's sense) between the legal world as described by the prevailing legal paradigm and the world as described by empirical research; third, by producing an alternative paradigm for producing legal knowledge. Unlike the legal realists in the 1920s and 1930s, the law and society movement in the 1960s and 1970s was not fighting for internal domination but for a place at the table. Aggression, perhaps, but the kind engaged in by underdogs and thus largely waged with the weapons of the weak (Scott 1985).41

Chapter 2, with its exemplary demonstrations of moving to the social context of law, offered the strongest effort to cast such a new paradigm. Scholarship like Macaulay's relational contracts piece or Wayne LaFave's arrest book modelled a path for law-school-based scholars to produce social knowledge about law without undertaking the ambitious survey projects of the realists (the cost of which remained very high in the 1960s but much less so today).42 Here the fact that it was already "low-tech" by the contem-

41. Indeed, hostility toward academic lawyers was tempered by considerable interest in sharing in their privileges and epistemological prestige.
42. For the extraordinary efforts by both lawyers and social scientists to pull off some of the more ambitious realist empirical projects see Schlegel 1995, 124.
porary standards of sociology and political science (and becoming more so) was not a disadvantage. Even more than law and economics, law and society could offer very low barriers to entry. Law professor Joseph Goldstein (1960), for example, just had to follow his own inclinations to take walks at night in New Haven to come into contact with people who had authoritative data (the police). In this sense law and society offered a new accumulation strategy for knowledge and power. Revealing gaps in the conventional assumptions about the operation of laws and the legal system produced legal knowledge and pressure for both reform and further research on the actual operation of the law.

3. The Politics of the Social

One of the advantages of focusing on the social rather than simply liberalism as the platform for law and society is that it makes the complexity of the relationship between the two more visible. Liberalism, both legal and political, fed directly into law and society as the power cycle of a power-knowledge circuit. But scholarship in both editions of Law and the Behavioral Sciences shows that law and society work also involved many of the topics that became central concerns of the conservative movement in the United States during the 1980s and 1990s. One of the most important lines of attack against the liberal social activist state since the 1970s has come from economists and the rediscovery of markets as a superior producer of social order. As early as the 1969 first edition, Friedman and Macaulay recognized the centrality of bargaining processes as one of the central findings of law and society research. Both editions included an excerpt from Buchanan and Tullock's seminal book The Calculus of Consent. Buchanan and Tullock offered a priori analysis of incentive structures in legislative bodies that demonstrated the propensity of law in such settings to be captured by special interests. If the body of law and society scholars was politically left of center, it also shared a profound skepticism about the capacity of positive law to work and especially about the ease of legislating social change.

Another conservative theme well represented in both editions of Law and the Behavioral Sciences was deterrence. The great crime surge in America took shape in virtually the same years that law and society movement was being launched. When Barry Goldwater made crime in the streets a campaign issue in 1964, the bulk of criminologists still thought talk of a crime wave was largely imaginary. This was the decade of maximum investment in rehabilitative penology and the beginnings of the war on poverty in the community. The potential to dramatically reduce crime seemed within reach. Three years later, when President Lyndon Johnson appointed a special commission to study crime and the administration of justice, the crime wave was undeniable and a liberal administration scrambled to head off a
major issue for the right. The resulting report was in many respects a high-water mark for the influence of social science on public policy of a liberal sort. Many members of the law and society research community were involved in the production of the report including Rita James Simon, Albert Reiss, Donald Black, Lloyd Ohlin, and Alfred Blumstein.

Although the report of the commission (President’s Commission 1967) was tremendously influential in some respects, it was too late to neutralize the crime issue. The rapid increase in arrests for violent crime during the 1960s and 1970s became a central factor in the growing disillusionment of large segments of the voting public with the liberal state. Conservatives argued successfully that efforts to reform the criminal process had unduly weakened sanctions against crime and sent an encouraging signal to offenders. The first edition of Law and the Behavioral Sciences was published the same year that Richard Nixon took office as president after winning a close election largely by invoking fear of crime and a breakdown in respect for law and order.

In the 1977 edition, deterrence and the criminal law predominated a models in the section on law’s influence, accounting for 16 of the 33 pieces excerpted (up from 11 of 32 in 1969). This may have reflected the rising concern over criminal violence in the United States from the late 1960s on (although much of the deterrence literature sampled focused on nonviolent and even noncriminal rules). Other work reflected on governmental regulation of business and the influence of Supreme Court decisions on civil liberties and civil rights. Conservative academics like Gordon Tullock offered not only a moral defense of deterrence but also a strong critique of liberal social policy as undermining deterrence (Tullock 1974, LBS II, 295).

E. Summary

Politically the prestige of the social sciences reached its peak at the end of the 1960s. Major federal commissions appointed by President Johnson to plan government policy on race relations (the Kerner Commission) and crime (the Commission on Crime and the Administration of Justice) were stocked with social scientists, including many law and society figures. The 1970s witnessed a growing sense of public doubt about governmental social reform and social science expertise. Optimism about the rapid development of social sciences along natural science lines stalled. The rigidities of Par-

43. Deterrence represented a point of intersection with another constellation of power-knowledge that had gained prominence in post–World War II science and government, namely nuclear deterrence theory and the need to model and empirically test the dynamics of strategic behavior in international relations. This literature was itself too distant from the actual subject of law to be readily used (although the 1977 edition included a short excerpt from Thomas Schelling’s Arms and Influence [1966] [LBS II, 176]).
sonian theory in sociology and behaviorism in political science relaxed somewhat but had not yet been displaced by the pervasive questioning of the scientific project that has since emerged.

The federal government continued its activism under President Nixon, but it declined under Ford and Carter. Even the Supreme Court, which included more conservative justices appointed by Nixon and Ford, continued to intervene in state law and justice systems. Indeed, areas like abortion rights and prison conditions, ignored by the Warren Court, came into play during the 1970s. And school desegregation, associated with the Warren Court, was the subject of many important formulations in this decade.

The early 1970s was in retrospect a turning point for the influence of the social as a rationality for government in the United States. One event that may have both causal and emblematic relevance was the Watergate crisis, which began unfolding in 1973. Initially the crisis and its result seemed a striking victory for both the left and for legal liberalism in particular. The massive publicity attending the Watergate crisis highlighted the law as a central force in society. In response there was a huge increase in applications to law school in the mid-1970s (Kalman 1997, 61). However, the Watergate crisis represented law in its most traditional guise, as rule, as prosecutor, and as judge (Leon Jaworski, Archibald Cox, John Sirica). Indeed, as a political-legal event it seemed to be a triumph for judicial virtues over both the legislative and executive. Some in Congress benefited from the elevated attention given to the House Judiciary Committee, but precisely because of its quasi-judicial role in conducting impeachment hearings. The presidency as well fell under the shadow of the law, now in the sense of judicially enforceable rules. The president is always under oath in the expectations enforced by the national media if not the courts. These changes have permanently effected the federal government, as is shown by the recurring wave of scandals that have beset both Congress and the presidency. In the age of Newt Gingrich and Bill Clinton, an investigation of the country’s top leadership has become a veritable branch of government.

The elimination of Richard Nixon was a defeat for the social in two senses. It eliminated a president who represented the tradition of social conservatism. He even liked sociologists, bringing Daniel Moynihan, a member of the Johnson administration’s domestic policy leadership, into his administration. He proposed bold reforms of the welfare state, some that might have neutralized the racialization of the welfare issue that Ronald Reagan exploited in his election to the presidency or prevented the more recent elimination of poor relief as a federal entitlement. Second, Watergate highlighted the classic model of law as judicial reasoning against sovereign prerogative.

44. A key distinction from his new right successors like Ronald Reagan.
By reinscribing the role of lawyers and the reach of judicial norms, Watergate may have set back the influence of the social and law and society work on American legal and political culture. The great missionary work of the first generation of modern law and society studies in the 1960s was precisely to show how much the lawyer was just another loosely bound operator in a social system with lots of inputs in addition to "the law." But the lessons of Watergate seemed to be that even the most explicitly political branches of government could be held under the gaze a permanent judicial retrospection.

Yale law professor Alexander Bickel, in an article for Commentary magazine published in January of 1974, shrewdly observed this revalorization of law. The morals being drawn from Watergate in the 1970s, warned Bickel, pointed toward a profoundly unrealistic picture of law.

The lesson to be drawn was that the law is sacred, rising above all causes:

and no violation of it is excusable, none. A rededication to law and order on all sides, by all factions, was called for. The President indeed had been long calling for it. Watergate, we were left to infer, was actually a vindication of the President's long-held position, and a reproach to that huge body of liberal opinion which had tolerated lawlessness, and ended by infecting even the righteous with it. (Bickel 1974/LBS II, 218)

For Bickel the populism and moralism of the liberal Warren Court had set the stage for Nixon's law-and-order state. Precisely because law's authority was increasingly grounded in its ability to reform society, it invited a moral response likely to overwhelm the technical channels in which lawyers might contain it. Bickel hoped for a demoralization of law (which has never come), but was prescient in seeing that the gathering political storms of the early 1970s would push American government back toward a highly formalistic and mythic picture of law, a model of legality freed of the social and its entanglements.

V. LAW AND SOCIETY, 1981–

_Law and Society: Readings in the Social Study of Law (L&S hereinafter)_ might be read as a third edition of _Law and the Behavioral Sciences_. This new volume contains many of the now-classic pieces excerpted in the earlier volumes. It also retains the framework of chapters (although with some modification). Perhaps most important, the book explicitly embraces a continuity of faith (with the earlier volumes) in the model of the scientific analysis of law in a social context context. At the same time, the new book
reflects the important transformations in the political and epistemological context of law and society research. To an impressive extent the editors succeed in capturing these transformations and weaving them into their vision of law and society as a progressive and progressing project. It is perhaps an inevitable blind spot of that strategy that the editors refrain from explicitly exploring the possibilities for change in the model of scientific analysis latent in the book's content.

The newest and youngest member of the editorial team, John Stookey, took on the task of identifying new material for this volume. In Stookey, Friedman and Macaulay have a colleague who embodies the hopes of their pioneer generation of law and society scholars for the kind of educational background that would be encouraged by the successful launching of an interdisciplinary project. Stookey trained as a political scientist in the empirical study of judicial behavior under one of the giants of that subfield, Sidney Ulmer, and brings considerably more expertise in quantitative methods than Friedman or Macaulay received. After joining the political science faculty at Arizona State University, Stookey did a one-year fellowship at Stanford, in large part to prepare for future research on trial courts by working with Friedman, a leading scholar of that field. Somewhat surprisingly to himself, Stookey returned to Stanford in 1988 to complete a law degree. Even more surprisingly, after graduating and a brief return to full-time teaching, Stookey left academia to pursue a growing interest in white-collar defense, joining a leading Phoenix law firm.

Individual life courses are too complex and contingent to yield real insights about the shape of social fields. David Riesman may have moved from academic law to academic sociology for particularistic reasons. Likewise, John Stookey's move from academic political science to the practice of law reflected personal interest and not a pessimistic judgment about law and society research (he had tenure). But that said, we can at least begin reflecting on the broader currents of fields through the choices that savvy individuals make in navigating them. Stookey's departure from academic law and society work reminds us that learning to see law in its social context may not produce a permanent and general change in law's imagination. That somebody as deeply embedded in a social science paradigm as Stookey could choose to focus on law from a practitioner's angle over the scientific vision suggests that we need more complicated metaphors than Kuhn's model of scientific revolution.

45. Although both were able to collaborate with others more expert in quantitative methods, including, in Macaulay's case, his spouse, Jacqueline Macaulay.
A. Genealogy

There is a different tone to the introduction of this new volume that seems to reflect the new times as much as the additional author. There is no longer an aspiration to shake the basic paradigm of legal analysis. The editors are more circumspect regarding the limited interest in empirical research in law schools. Indeed this volume is published by a social-science-rather than law-school-oriented publisher. There is also a sense of greater competition with alternatives. In the 1960s and 1970s, empirical research seemed to be the obvious alternative to doctrinal analysis. Since then, however, a range of alternatives have presented themselves including law and economics, formal modeling, law and literature, critical legal studies, feminist jurisprudence, critical race theory, cultural studies, and postmodern approaches.

While serious theoretical differences existed within the law and society community in the 1970s, there was broad sense of commonality. As Austin Sarat has recently written:

From the mid-1960s through the early 1980s, when modern law and society scholarship began to take shape, there was a rough consensus in the Association about the methods and purposes of that research. This is not to say that there has ever been a single style of law and society work or a litmus test for membership in the community, quite to the contrary. But consensus was made possible by a widely shared view that law and society work was synonymous with law and social science with a gentle reformist edge often added. (Sarat 1998, 2)

Today that consensus is frayed. Law and economics, which has been by far the most successful social science program in penetrating legal education, sets itself apart. "Many of its practitioners tend to feel that the other social sciences are weaklings, that they lack a good, solid theory to give them backbone, and that they display liberal political bias or worse" (L&S, pp. 16–17). From the other side, the empirical tradition in law and society seems to be challenged by those who emphasize interpretation and highlight the problems of neutrality in observation. The book promises to return to these criticisms at various points but not to integrate in work done from this interpretive and "self-conscious style of examining legal phenomena" (L&S, p. 16).

Law and Society: Readings, then, is a self-conscious effort to restate a vision of interdisciplinary project close to the original Wisconsin school approach, albeit one freed from the terminology of Parsonian sociology and the behavioral sciences. More than the earlier books, it seeks to clarify the relationship of past research precedents to the present research enterprise and to define boundaries to that enterprise. It is here that it is most tempt-
ing to reedit and imagine different ways of imagining the relationship of the social science roots of law and society in the present. But it is also here that Friedman, Macaulay, and Stookey's understanding of the social science project is most useful in thinking through the implications of that strategy in an era after the social and its sciences have themselves become problematized.

B. Grids

Perhaps the most important and consequential choice made by Macaulay, Friedman, and Stookey was to retain the same framework used in the two editions of *Law and the Behavioral Sciences*. The rationale was largely pedagogic, but the choice reaffirms the social as the horizon for analyzing the legal. The chapter titles and subheadings have been recast to eliminate the now-dated-sounding language of the behavioral sciences moment. Where before the first substantive chapter was "The Descriptive Aspects of Law in Society," the chapter is now titled "The Legal System in Operation." As before, the content is a series of compelling case studies of laws and legal institutions. The introduction to the 1977 edition had suggested that this chapter represented the most concentrated effort at paradigm shifting. The readings were designed to make visible and ultimately undermine the understanding of law and the legal system promoted within legal institutions and by related institutions that rely on it for social control. This remains a defining feature of the law and society program for the 1990s as conceived by Macaulay, Friedman, and Stookey.

One of the major tasks that sociolegal research has set for itself is to examine empirically many of these assumptions about the legal system that have been learned from schools, parents, the media, and organized interests in society. (*L&S*, p. 23)

1. **Legal Institutions as Social Institutions**

*Law and Society: Readings* begins the chapter on the legal system by invoking neither law nor society but popular culture. Lawrence Friedman's essay on law and popular culture (1989/*L&S*, p. 20) reminds us that it is not primarily as litigants that people learn about the legal system but as consumers of media portrayals of the law. Friedman finds the representations of law in the media even more distorting of the empirical reality of law than the traditional myths of doctrinal legal knowledge. But by acknowledging the significance of the popular legal imagination, Friedman problematizes the assumptions about knowledge and power that informed the behavioral sciences moment. The 1960s picture of empirical research as outside of law
and thus capable of mapping it, is confounded by the degree to which empirical data, or at least empirical claims, now play a role in constructing the legal system. Stephen Daniel's article on the politics of tort civil justice reform (1989/L&S, p. 21), for example, documents the manipulative use of aggregate statistical data on jury awards to win approval for limiting legislation.

2. The Impact of Society on Law

As if to further emphasize the priority of the social over the legal, the new book places the chapter "Where Does Law Come from: The Impact of Society on Law" ahead of the chapter on law's impact on society. As before, the question of who governs is important but with an added concern for what might be called the truth effects of knowledge as well. The battle over law is not simply between social classes or interest groups but over cultural values. Thus Robert Hayden's article on the insurance crisis of the mid-1980s (Hayden 1991/L&S, p. 236) examines the popular anecdotes of civil juries run amok that seemed to be driving political demands for reform of the civil justice system in the 1980s. The dominance of these anecdotes was not a result of an absence of empirical information but, rather, of the artful deployment of information (including statistical data) by the insurance industry and their fit with dominant American values of individual responsibility and autonomy.

3. The Impact of Law on Society

The collapse of the liberal reform agenda that once drove federal policy and federal courts in particular has transformed the kinds of issues that law and society research takes up. The most influential study of the power of the Supreme Court to produce social effects in recent years, Gerald Rosenberg's The Hollow Hope (1991/L&S, p. 574), focuses almost entirely on the impact of decisions made by the Warren and early Burger courts. While this may reflect the usefulness of some historical distance in examining institutional reform, it also may reflect the different kind of activism deployed by conservative Court majorities. It is one thing to study the impact of Gideon or Brown; they establish new demands on official behavior in ways that can be measured at least in part. The shift from the reform-oriented jurisprudence of the Warren and early Burger courts to the retrenchment of the later Burger and the Rehnquist courts has altered the possibilities open to political scientists and others studying the Court.

46. Candor requires me to cite my own review (Simon 1994).
The more conservative Court of the last 25 years has been just as activist in reversing precedents and seeking to reformulate law, but its holdings are far less inviting of traditional impact analysis. Instead of implying dramatic changes in social practice, these cases tend to reinforce existing social practices. The nature of the claims made by a case like Brown II are open to direct (and, for the Court, largely devastating) analysis by Rosenberg, showing how few schools were actually integrated prior to congressional intervention in 1965. One could also imagine studying whether Milliken v. Bradley (418 U.S. 717 [1974]), which held that desegregation orders cannot cross district lines without a showing of a parallel violations. Did Milliken reinforce trends toward suburbanization and the disinvestment of whites from the economic and political base of great cities? Such a question is harder in every sense, that is, harder to operationalize, harder to collect data on, and harder to draw dramatic conclusions from. This is also true in the criminal procedure area where, rather than reverse Warren Era precedents, the Supreme Court has loosened the rigors of appellate law on the trial courts of the land. While the Court continues to pay adherence to the notion that the limits of the Fourth Amendment must be applied with respect to the reasonable expectations of privacy society recognizes, they generally offer no serious effort to interpret the social.

Even among the Supreme Court’s liberal academic critics, it is history rather than sociology that has provided the most compelling category for interpretation (Kalman 1997). This is a marked contrast with the 1970s, when a variety of promising liberal constitutional strategies placed their analytic emphasis on the social in spelling out the individual rights necessary to operate democratic societies. Indeed the whole trade between sociology and history has moved greatly since the 1960s and 1970s when the exchange went mainly in the direction of sociological methods into history. Today the full gamut of historiographical strategies and problems are moving into sociological studies.

C. Programs

In one of his jazz raps about American politics and its vicissitudes, recording artist Gill Scott Herron remarked, sardonically, “John Foster Dulles ain’t nothing but the name of an airport now.” One could say something similar about the behavioral sciences now. The name remains on a few buildings and a few journals, but despite continued efforts to invoke and re-invoke the term, there is little sense that it defines an ongoing enterprise. Instead, it functions, intentionally or not, in a largely nostalgic register. This is not disproved, in my view, by the endurance of the term in the
context of the federal research administration discourse or the reemergence in that quintessentially nostalgic discourse, jurisprudence.47

For law and society scholars and teachers coming into the field professionally in the 1960s, 1970s, and early 1980s, the behavioral sciences provided a subtle but pervasive picture of what interdisciplinary work was about. In fact it would take a careful analysis to see just how much it organized the ambitions and strategies of scholars. It was embraced enthusiastically by foundations heavily involved in sponsoring the growth of law and society work. It surely influenced the “spin” of proposals for funding research. The social sciences are no longer the self-evident place to go for effective models or research strategies for students of law and society. There is a much more open-ended traffic with humanities disciplines including literature, semiotics, and cultural studies. This is true even for many with disciplinary training in sociology, political science, or anthropology.

Changes in American law school hiring have also affected the law and society field. In the 1960s, the self-understanding of the law and society movement was set off against the doctrinal focus of research in academic law. The top law schools increasingly operate on a graduate model in hiring. Their faculty increasingly includes graduates of academic programs with Ph.D. degrees in economics, political science, history, sociology, and philosophy. To an extent this has brought interdisciplinary interests into the very heart of law teaching, but in the same measure it has blurred the lines between academic law as a discipline and interdisciplinary movements seeking to transform law.

At the same time, law and society’s claim to the status of outsider to jurisprudence has lost its clarity. This is a result both of the increasingly reflexive roles of social science discourse within law and the competition from alternative outsiders, represented recently by feminist jurisprudence and critical race scholarship. Once, outside meant outside the courtroom. Today, outside is as likely to refer to the views of historically oppressed social groups; thus, it is a view from inside but from subjects outside the dominant sources of legal authority. The possibilities of constructing effective flows of research between those two outsides have only begun to be pursued.48

The passing of the social activist state of the 1960s and 1970s has not ended the efforts of social movements to make their mark in legal reforms. What it has done is shift the target of such efforts and the kinds of reforms that are promoted. For example, one of the most widely noted recent reforms has targeted police and prosecution policies toward domestic violence

47. Sunstein 1996. These authors and others have recently invoked the phrase behavioral science. I see this work as representing a very different constellation of forces and possibilities than the behavioral sciences moment in the 1960s and 1970s. Indeed I see it as a fundamentally postsocial science.
48. A prime example of this potential is colleague Frank Valdez’s extraordinary article.
cases. Historically, police were reluctant to make arrests in domestic violence situations. That began to change in the 1970s and 1980s. Macaulay, Friedman, and Stookey include a study by Sarah Fenstermaker Berk and Donilene R. Loseke (1981/L&S, p. 28) analyzing arrest outcomes in domestic violence calls in Santa Barbara. They found that certain circumstances—including the willingness of the victim to sign a warrant, alcohol use by the alleged abuser, and allegations of violence—significantly raised the likelihood of arrests. There the collection of data was actually part of an effort, funded by the federal government (through the now-defunct Law Enforcement Assistance Administration). A widely publicized study in Minneapolis several years later (Lawrence Sherman and Richard Berk 1984) suggested that a mandatory arrest policy might suppress future acts of domestic violence by arrestees. On the basis of the latter study many states and cities have altered their laws to facilitate and even require arrest in domestic violence situations.

Another feminist reform initiative beginning in the 1970s and continuing into the 1980s was aimed at traditional rape law doctrines that imposed special burdens on rape victims and special difficulties in prosecuting rape cases. Julie Homey and Cassia Spohn (1991/L&S, p. 522) examined whether various reforms in rape law increased the likelihood of rape victims making reports, of prosecutors seeking indictments, and of convictions and incarcerations. The authors gathered statistics on police reports and case processing in six jurisdictions with various degrees of reform. While reports of rapes went up in the jurisdiction with the most dramatic change, the percentage of reports resulting in indictments, the percentage of indictments resulting in convictions, and the percentage of convictions resulting in incarceration failed to change. In other jurisdictions with less dramatic changes there was even less evidence of change. Discretion by criminal justice agents, in the view of the authors, undermined the effects of legal change.

Like the legal reforms of the 1960s, the feminist-led reforms of the 1980s and 1990s both draw upon and create opportunities to produce law and society research. In contrast to the era of the social activist state, however, the initiatives are more likely to take place at the state and local level and more likely to rely on existing governmental processes, for example, local criminal justice agencies.

The federal social reform initiative in law that has enjoyed the most vital growth since the 1960s is the war on crime. The Law and the Behavior Sciences (1977) was published just before the beginning of the longest and steepest growth in imprisonment in U.S., and probably world, history. Today more than four times as many Americans are behind bars as were in

---

49. Indeed, it is not too much of an exaggeration to suggest that the social reform state has not so much died as mutated into the criminal justice state.
1977 (Maguire and Pastore 1998, 489). This punishment juggernaut (Gordon 1990) has prompted a great deal of research. Perhaps the most noteworthy is that of the U.S. Sentencing Commission, which has institutionalized research and policymaking in a way that many of the 1960s era law and society participants might well have hoped for.50

But with some exceptions, the research dividend from the war on crime has changed a great deal since the height of the Law Enforcement Assistance Administration era in the 1970s, when a large amount of basic research into various aspects of delinquency, crime, and crime control was funded. The new climate for funded research is affected by the increasingly politicized nature of legal issues and the populist pressure for politicians to signal their identification with popular beliefs regardless of their soundness. Wes Skogan (1990), for example, has recently noted that the dearth of research on the relationship between racism and fear of crime reflects the federal government's unwillingness to fund research that might be controversial.

The objectives of the research the government does fund today are increasingly technocratic (Heydebrand and Serron 1991). The primary target of such research is focused neither on law nor society, but on the system itself and its internal processes and functions.51 Take for example a recent call for proposals from the National Institute of Corrections seeking agencies or organizations to research and update a manual and guidelines for health care delivery to prisons:

Meeting the health care needs of an increasing prison population remains a major concern and continuing management challenge to correctional administrations. With escalating health care costs and the need to provide medical services for more inmates over a longer period, many correctional institutions are experiencing increased litigation over the adequacy of medical service delivery systems. The management of prison health care services into the twenty-first century will compel an even more direct involvement by prison administrators than any prior period in correctional history. Emerging technologies and treatment protocols combined with changing standards of care, burdensome litigation and surging liabilities require great cooperative management efforts between administrators and health service providers.53
The expanding criminal justice sector of the state, in this sense, will have continuing and growing needs for research and expertise but in a form less likely to facilitate the kind of critical research on organizations that law and society scholars traditionally produced.

While the justice system is moving research from what might be described as a scientific ethos to what is surely a technocratic one, the politics and policies of crime and punishment have become far more populist in nature. Indeed, Sentencing Commission recommendations for changes in federal sentencing have been rejected when they are perceived as out of step with popular demands for punitiveness. Innovations in sentencing law are more likely to come from the victims' rights movement than from academics. Increasing demands for vengeance as the primary purpose of punishment throw much of the rationale for empirical research out.

VI. LAW AFTER SOCIETY

The social may not be dead, but a certain understanding of society, as a determinate and relatively autonomous system of forces with its own regularities and dynamics, has been undermined. Rather than society, the state today increasingly governs through a variety of intermediate forms, firms, neighborhoods, and families. This reconfiguration of power, which has been described as "governing at a distance" (Rose and Miller 1992) and "indirect regulation" (Lessig 1998), tends to disinvest the social. A series of new sites have emerged that can be said to operate between the individual and the social, but in fact have become an object of knowledge and a subject of power quite apart from either the individual or society. These new topics, norms, community, identity, risk, transnationalism, cyberspace/information systems, and institutions, belong to the social but tend to blur the idea of society.

A. Norms

A recent current of sociolegal work focuses on norms as a site for research and intervention (Sunstein 1996; Lessig 1995, 1998; Kahan and Meares forthcoming). Norms of course have a long association with the discourses of the social sciences. But this school focuses on specific norms, like those associated with gang behavior or insider trading, and analyzes how regulatory objectives can be most effectively achieved by building on norms and parallel forms of nonstate regulation (Lessig 1998). Dubbed the "New Chicago School" in one important programmatic article (Lessig 1998), a big part of this work is the critique of a more traditional 1960s law and economics with its emphasis on individual responses to specific incentives or sanc-
tions. By emphasizing norms as a determinative context in which individuals receive and respond to incentives, the norm scholars open the analysis up to the social. But at the same time, they embrace the rational-actor model. Norms, social meaning, and the built environment describe a grid of constraints around an individual.

This scholarship appears in some respects to be a return to the model of law and the behavioral sciences. Where the old Chicago School was vaguely libertarian (although not uncomfortable with military dictatorship) the new Chicago School, like law and society, looks to state intervention as moving force behind scholarship and subject to improvement (Lessig 1998, 661). This scholarship also uses the term behavior, without apparent irony, to denote the main target of regulatory intervention and scholarly inquiry (Sunstein 1997; Lessig 1998, 662). The norm scholars also share with the early law and society scholarship an emphasis on the relative weakness of law in comparison with the regulatory power outside of law (presumably "in" the social). Indeed, Stewart Macaulay is cited as a key precedent for the priority of norms over law (Lessig 1998, 673).

But in important respects, norm scholarship presents a path for law after society. The early law and society movement identified with the social over the legal. Law was the dependent variable. It was being put in its social context. The new Chicago School takes law to be the distinctive subject of its expertise. Law, understood as the commands of the sovereign, can be exercised more effectively through knowledge of the web of norms, meanings, and force fields in which the individual subjects of behavior are embedded.

While the new Chicago School distinguishes itself from the old one by its enthusiasm for governance, it is governance through a distinctively post-social rationality. The liberal social activist state that early law and society responded to (Garth and Sterling 1998) approached the task of governing through the social. It was a “Great Society” that federal policy sought to establish in the Johnson administration. Through welfare, the war on poverty, and dozens of other initiatives, a direct relationship between families, communities, and the federal government was established that bypassed both traditional local government structures. In short, these power-knowledge relationships highlighted the state in its relationship to society as a whole. The new norm approach diverges in two ways. First, it emphasizes “governing at a distance” (Rose and Miller 1992) or “indirect regulation” (Lessig 1998), so that the role of the state is often disguised behind other actors. Second, these strategies operate on subjects not so much in their

---

54. Lessig 1998, 662, acknowledges there may be more to it than that, but the more is not essential to the behavioral project.
55. As Lessig points out (1998, 690) this raises fundamental questions about democratic accountability.
“social” roles as they were understood in an era of the social activist state (primarily defined by labor or its absence) but in other kinds of relationships, including the family, the church, the neighborhood, and the firm.

B. Community

As governments move away from the social they have increasingly invested community as the proper target of power. This has been particularly true of the governments of the center left, like those of President Clinton in the United States and Prime Minister Tony Blair in Great Britain, that have followed new right governments that made attacks on both the idea of state activism and society. As these governments that have sought to rearticulate a vision of regulatory activism that does not depend on or restimulate the social, they have turned to community. Community incorporates many of the elements of the social (families, ethnicities, and occupational groups) without laying claim to the precarious totality of the social (Rose 1996a, 331).

Not surprisingly, the community has emerged as a preferred target for a whole range of new public and private strategies including community policing, charter schools, and the new urbanism. These new legal and governmental projects do not mark a return to laissez faire individualism (although they often mimic neoliberal rhetoric). Instead, they promise to operate in the complex middle ground between individuals and societies.

C. Identity

Government has always been conducted in part through the construction of identities. Rule is only really effective when it becomes internalized into expectations on which both governors and governed can rely. A long tradition of social science work has gone into understanding the ideologies and "false consciousness" thought to affect class consciousness (Gramsci 1971; Gabel 1975). Likewise, movements of resistance and liberation have often depended on forging new identities for victim groups. Within the social study of law, the analysis of these ideological structures has been a strong if not dominant approach.

While these classic processes continue, the reconfiguration of power and knowledge today has placed identity in play in new ways. First, while

---

56. Think of the way the social activist state created rights based on social citizenship. See Abraham 1996.
57. Indeed, Margaret Thatcher responded to criticism of her remarks by claiming precisely this territory and accusing her critics of clinging to the statist and collectivist idea of society promoted by both socialism and postwar liberalism.
classic strategies of governing through identity sought to naturalize identity, that is, reinforce the appearance of permanence and causal efficacy to the meaning of race, or gender, or even class, an emerging set of strategies starts off from the contingent nature of identity and brings its strategic manipulation into conscious light. This includes radical efforts such as queer theory and politics but also far more conventional settings such as those families returning to more active involvement with organized religion because of its benefits for family, or those who discipline themselves to become Martha Stewart–like homemakers. Second, while classic social-control strategies aimed at transforming or normalizing deviant subjectivities, many contemporary strategies, including correctional boot camps and drug treatment programs, explicitly target short-range behavioral self-management as a goal independent of any normalization.

D. Risk

Another postsocial construct is the emergence of risk as a domain of reflection and action (Heimer 1985; Ewald 1986; Reichman 1986). For a long time, risk was an adjunct to the social. Indeed, as a governmental rationality, the social was primarily concerned with internalizing the risks of modern society to societywide systems of compensation, for example, national health insurance, unemployment insurance, and old age pensions (Ewald 1986; Simon 1987; Beck 1992). But increasingly, risk has begun to emerge as that which escapes and perhaps even defies the reality of the social (Beck 1992). On the macrolevel, certain kinds of risk that receive a growing portion of public attention, like pollution, high-technology disasters, and diseases such as AIDS, appear to outstrip the ability of any single society to control them (Ericson and Haggerty 1997). On the microlevel, important institutions like prisons and hospitals find it more effective to organize risk management internal to the system and without recognizing social externalities (Simon 1988; Feeley and Simon 1992; 1994).

E. Transnationalism

Another site of postsocial innovation is in the emergence of networks of communications and trade that both extend beyond the boundaries of societies and penetrate into their component parts, disaggregating regions, demographic segments, and individuals (Santos 1995).
F. Cyberspace/Information Systems

Perhaps the most compelling example of the kind of emerging network that organizes people in a way that simultaneously escapes the boundaries of particular societies and creates new linkages within them is the Internet, the global system of interconnecting computers and phone lines that now supports electronic mail, user groups, and a vast array of Web sites where information is published and products and services marketed. The Internet poses challenges for existing regulatory strategies by destabilizing both the location of action (what jurisdiction is it in) and the identity of the persons engaging it (Froomkin 1996).

G. Institutions

The study of institutions was once a common locus for political science, law, and economics. The rise of the postwar social activist state and its increased investment in social science corresponded to a decline in interest in institutions. Political scientists, for example, made the study of political behavior the center of their analysis. The study of institutions, like the Supreme Court or Congress, came to considered unscientific unless translated into behavioral terms. The early law and society movement, particularly the Wisconsin school, exemplified this social strategy. One of the significant developments in social science during the 1980s was revitalization of institutionalism in political science, sociology, economics, and law. The new institutionalism, is unified less by methodology (where it is actually quite diverse) and more by a commitment to decenter the social and take institutions seriously. In part, this has meant a rediscovery of law on the model of rules as is evidenced by the recent popularity of game theoretic approaches in jurisprudence. But there are rich possibilities of studying legal practice, discourse, and, of course, institutions, in the same ways.

VII. CONCLUSION: RING THE BELLS THAT STILL CAN RING

Ring the bells that still can ring.
Forget your perfect offering.
There is a crack in everything.
That's how the light gets in.59

58. One of the marks of the Berkeley school was its focus on institutions.
59. From Leonard Cohen's ballad "Anthem" on the album The Future (1992 Columbia Records). This is the most uplifting song on an album full of dark but brilliant insights about the present. Cohen is a poet willing to stake out his embrace of the modern world in light of
For the moment the transformations that this essay has described are works in progress. The social and the political and intellectual strategies associated with the rise of the social are unlikely to disappear overnight, but they have become more difficult to put into play and less predictable in their outcomes. The sound remains most effective as a context for critical deconstruction of prevailing ideologies, but it is an increasingly obsolete formation for imagining and evaluating strategies of intervention.

Too often the changes in the position of the social are misrecognized today by those who think that law and society has failed because it is too liberal or too methodologically soft (Posner 1993). This has led in recent years to a growing sense of tension within the law and society movement between those who want to solidify its scientific basis and those who seem to be abandoning science in favor of political agendas. It is understandable that many in the pioneer generation of law and society see the focus on producing quantitative data about the legal system as what gave the movement meaning. After all, the 1960s was a period of tremendous prestige associated with the analysis of statistical data. Quantitative methods, facilitated by new computer technologies, revolutionized work in the disciplines like sociology and political science. Indeed, part of what made law and society look like an “opportunity” in the 1960s was precisely the penetration of such studies into a legal field largely shadowed by the prestige of academic law, which was almost completely a nonquantitative discipline.

But with exceptions, the most influential work in law and society, including much of that sampled in Law and Society: Readings are efforts to tell stories about the law, not discover “rules” of social behavior. The craft of producing such stories raises profound issues of interpretive strategy, but methodological questions, especially the crude one of whether to count or not, cannot usefully capture the complexity of those interpretive strategies. While quantitative data is often critical to telling a compelling story, it is rarely if ever sufficient. Indeed, some of the most interesting quantitative analyses end up using the numbers to raise the same kinds of questions that qualitative scholars are left puzzling at the end of their works. The ability of each to pull out critical insights from their study has little to do with whether they were counting.60 In a recent essay on the relationship between law and society and law and economics, Mark Galanter and Mark Alan Edwards (1997, 384) have argued that they share a commitment to explanation as opposed to interpretation. But as Herbert Kritzer (1994, 1996) has forcefully documented, even the most quantitative research projects are embedded in problems of interpretation and narrative construction.

---

60. Which is not to say that what they were counting isn’t absolutely critical.
But if the central argument of this essay, that is, that the transformation of law and society has more to do with the changing place of the social, is correct, then this methodological face-off may be a mistake. From this perspective the growing penumbra of nonsocial science work within the law and society movement, whether postmodern, cultural studies, and identity-politics-oriented scholarship, is not an assault on the traditional empirical project, but a key to reconstructing it for an age where the pathways of both knowledge and power have been fundamentally altered.

Quantitative work, has in fact, gotten far easier to do than it was in the 1960s for two reasons. First, easy to use personal-computer-based software packages that allow virtually anyone with computer skills to perform multivariate analysis (required reading) are widely available. Second, the growing body of aggregated data produced by the government and made readily available over the Internet makes it possible to rather cheaply perform quantitative analysis. But the kind of empirical studies collected in both *Law and the Behavioral Sciences* and *Law and Society: Readings* are just as hard to do as they were in the 1960s and in some important respects far harder. It is to the credit of much of the quantitative work in the law and society field, including that collected in this book, that it rarely relies on either government-produced or commercially generated data but often produces original data shaped to answer specific research questions. The real challenges that face that kind of work are mapping the new structures of interaction produced by the kinds of postsocial governance increasingly present today. Perhaps the real contribution of the new law and society work that is not collected here is precisely in undertaking this mapping. In that sense, it may serve not as the death of empirical work but as a bridge for empirical research to cross to a postsocial future.

REFERENCES


Kahan, Dan and Tracey Meares. Forthcoming. Law and (Norms of) Order in the Inner-City. Law and Society Review.


192 LAW AND SOCIAL INQUIRY


Pound, Roscoe. 1922. An Introduction to the Philosophy of Law. New Haven, Conn.: Yale University Press.


Rosen, Robert. 1999. The Big 5 Become MDPs: Opportunities for Tax Executives. Draft manuscript.


