

Book Review

A Consumer's Guide to Law and the Social Sciences

Law and the Social Sciences. Edited by Leon Lipson and Stanton Wheeler.***
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I

Most lawyers who approach the social sciences hope to find either practical guidance for litigation and legislation or satisfaction for their curiosity about what meaning, if any, their own hive-like labors possess as part of a larger historical and cultural pattern. If on either score their expectations are those of a quick fix—a ready-made tool opening the way to innovative practice or an elegant synopsis of their place in the scheme of things—their almost certain disappointment may yield an undeserved disdain. Lawyers may indeed glean insights from the social sciences, but the efforts made at uncovering these insights must be discriminating, and they must be accompanied by an overall mentality that incorporates a genuine willingness to forswear the lawyer's conceit that law is always at the center of whatever knowledge of society and polity is worth possessing.

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In 1974, under the sponsorship of the Social Science Research Council, a committee was formed to assess the status of sociolegal research. The resulting volume is described by its editors as "the product of a generation of scholars,"¹ meaning that the contributors form a distinct cohort in the history of the field. Indeed, it is important at the outset to place this volume in the context of the development of the field of law and social science. During the nineteenth century, American legal scholarship largely assumed that law was to be found solely in the statute books and case reporters. In the first half of this century, the American legal community gave greater consideration in briefs and books alike to those elements of the social context of legal rulemaking made evident by common sense and political realism. In contrast to either of these earlier attitudes, the generation represented by this volume has emphasized empirical research combined with direct application of the theoretical advances made in a wide variety of social science disciplines. The results, as we shall see, have been of debatable importance to both the parent disciplines and mainstream legal practice, but two points of indisputable validity stand as a backdrop to the contributors' discussions. First, legal scholars (and many of their students) must now be literate in economics, legal history, and, to some extent, political philosophy if they are to maintain credibility. Second, while legal scholars must possess competence in the rhetoric of these disciplines, the uses made of them by lawyers and the direction of those disciplines themselves show greater divergence than common rhetoric might suggest. As a result, the present volume is indeed, as the editors themselves say, one of assessment—at least through the early 1980's²—but is itself in need of being assessed against the development of its attendant disciplines.

Of course, since few can be expected to study from cover to cover a volume of more than seven hundred pages of essays, a strategy of reading becomes necessary. The volume may, perhaps, be usefully approached from the perspective of a consumer, the kind of consumer who wants utilitarian results as well as broadened perspectives. Notwithstanding the usual temptation to rearrange a casebook or set of readings as though there were no sound basis for the actual organization of the book, the order of these essays is indeed of great value. As they move back and forth from the general to the particular and from the synoptic to the directional, the reader can gain a sense of where work of the past decade provides an important supplement and find suggestions for where additional ideas could lead us. A review of these essays thus provides an occasion for delineating a brief guide for the consumer of sociolegal thought.

1. LAW AND THE SOCIAL SCIENCES I (L. Lipson & S. Wheeler eds. 1986) [hereinafter cited by page number only].

2. The volume contains excellent bibliographies following each article, but almost all references are to works published no later than 1983.

II

In his reanalysis of evolutionary thought, Stephen Jay Gould has reminded us of the central importance classification plays in scientific advancement.³ Taxonomies are not, he argues, an artifact of mindless pedantry, nor need they be a thinly veiled attempt to convey a political or religious agenda. Rather they serve to suggest connections among facially disparate entities and hence underscore the commonality of processes that may be central to observable variation. Sally Falk Moore articulates a similar goal when she sets forth a typology in her essay *Legal Systems of the World*. Moore asks, in essence, where shall similarities be posited among such disparate systems? If a biologist were to group together all things with hairy legs, a category might be produced that includes all rodents, some spiders and most people—a category of some worth, perhaps, to a comedy writer, but one of uncertain value to a scientist. Similarly, we could group legal systems according to their ability to maximize economic rationality, to embrace semiautonomous domains within a single overarching mechanism of control, or to further evolutionary potential by channeling collective energy or multiplying options in the face of uncertain pressures. But how would we know if the groupings we have chosen are turning out to be like arthropods and vertebrates rather than hairy-legged creatures or things that go bump in the night?

The answer, of course, has more to do with our theories and purposes than with what is positivistically so. If, for example, we want to ask how it is possible for law to develop in the absence of centralized control, then (with great care for easily accepted stereotypes) we may wish to link the systems of stateless societies in Africa or the Americas with contemporary institutions of international law—and even attempt to see if some practical suggestions might flow from such a linkage. If we want to think about how alternative dispute resolution mechanisms can operate without balkanizing an otherwise unified legal system, we may wish to group together the implicit psychology of an African moot,⁴ the informality of a Jewish Conciliation Board of New York,⁵ and the factors that make Judge Wapner's audience accept his decisions as legitimate.⁶ In any case, if purpose guides typologies and if typologies reveal the biases that inform their construction, rethinking taxonomic schemes provides an opportunity for theory formation and an instrument for criticizing existing theories. As an example, consider the role of the "primitive" in our legal thinking.

3. See generally S. GOULD, *THE FLAMINGO'S SMILE* 155-66, 199-211 (1985).

4. See Gibbs, *The Kpelle Moot: A Therapeutic Model for the Informal Settlement of Disputes*, 33 *AFRICA* 1 (1963).

5. J. YAFFE, *SO SUE ME! THE STORY OF A COMMUNITY COURT* (1972).

6. See H. LEVIN, *THE PEOPLE'S COURT: HOW TO TELL IT TO THE JUDGE* (1985) (from cases adjudicated by Judge Joseph A. Wapner).

Throughout western legal thought—as in religion, morality, science, and politics—the primitive stands as both a test and a supposed proof of our most basic assumptions.⁷ At various times we have perceived primitive society and primitive law as the stripped-down essence of fundamental humanity, as the revealed failings of a species desperately in need of limiting institutions, or as the testing ground for the clash of contradictory forces working their historic way to our current social forms. In legal studies, primitive societies have variously been used to argue that evolution occurs as much in social and legal forms as in biological populations⁸ or that economic rationality must govern all human actions if it governs even those of nonliterate communities.⁹ But placing so-called primitive law at one end of a continuum and ourselves at the other—even when it is to show how they form a single spectrum—misses the very nature of variation and historical uncertainty.

Like post-Darwinian biologists, Moore grasps this fact quite clearly and is trenchant in her criticism of essentialist schemes of every sort. Moreover, she discusses how many contemporary social scientists continue to display a kind of misplaced essentialism in their theoretical ideas even when they highlight such elements as the structure of meaning in a given society. She is thus able to show, for example, that Roberto Unger's typology of customary, bureaucratic, and legal orders presupposes a particular kind of tension between the real and ideal in each category, a tension dictated far more by his concept of what is essential to legal forms than by a demonstration that this is indeed the predominant axis around which law and society are organized.¹⁰ Similarly, she criticizes the universalism implicit in the work of Donald Black,¹¹ Phillippe Nonet and Philip Selznick,¹² whose stress on governmental forms as determinative of legal forms is posited at so general a level that it is difficult to pinpoint the actual mechanisms that are said to produce even the ideal types they perceive in the world.

Moore is also well aware that biological evolution is a seductive model for systemic legal change. After all, if humanity's way of conceptualizing experience in the absence of intuition is not itself embraced in our ways of ordering activities and relating them to one another, why should society and culture not respond to evolutionary forces? In the legal realm, such evolutionary thought

7. See generally S. DIAMOND, *IN SEARCH OF THE PRIMITIVE: A CRITIQUE OF CIVILIZATION* (1974); G. STOCKING, *VICTORIAN ANTHROPOLOGY* (1987); M. TORGOVNICK, *GONE PRIMITIVE: SAVAGE INTELLECTS, MODERN LIVES* (1990); THE WILD MAN WITHIN: AN IMAGE IN WESTERN THOUGHT FROM THE RENAISSANCE TO ROMANTICISM (E. Dudley & M. Novak eds. 1972).

8. The central work in this tradition is H. MAINE, *ANCIENT LAW* (1864). See generally P. STEIN, *LEGAL EVOLUTION: THE STORY OF AN IDEA* (1980); A. WATSON, *THE EVOLUTION OF LAW* (1985); Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985).

9. See, e.g., Posner, *A Theory of Primitive Society, with Special Reference to Law*, 23 J.L. & ECON. 1 (1980).

10. Pp. 46-49 (referring to R. UNGER, *LAW IN MODERN SOCIETY* (1976)).

11. D. BLACK, *THE BEHAVIOR OF LAW* (1976).

12. P. NONET & P. SELZNICK, *LAW AND SOCIETY IN TRANSITION* (1978).

gives rise to propositions like that contained in Richard D. Schwartz's essay on *Law and Normative Order*: "Law represents a response to the evolutionary decline of normative consensus in complex societies."¹³ Note how this assumes, rather stereotypically, a high degree of consensus in less complex societies and a very tenuous consensus in complex societies.

Here, too, a generation gap may have opened up between scholars who investigate the possibility of cultural evolution. For if one is to be serious about sociological evolution one must ask whether there are processes in society comparable to those of genetic drift, mutation, or genetic flow in biological populations that propel the process of selection and adaptation, or whether "evolution" is here only meant as a metaphor for growth, change, and development of any sort.¹⁴ Schwartz himself had done much to prompt this issue with his study of two Israeli settlements: the *moshav*, which possesses some private property and uses a lawlike institution to govern its affairs, and the *kibbutz*, which has only communal property and uses gossip and social pressure to perform law's work.¹⁵ But until it can be shown that population growth and institution building really are like biological forces, an analogy between legal and biological evolution will remain dubious to many social scientists.

If evolution is not, however, a wholly appropriate model, the question would seem to remain, as Schwartz suggests, in what ways shared norms can be encouraged in the face of subcultural diversity. Here, more recent work in philosophy and sociolinguistics suggests that relatively few symbols and concepts need be shared to maintain reasonably peaceful social relations.¹⁶ It is at least a serious question for research and theory, then, whether passing acquaintance is not preferable to "normative order" in complex democracies. One would then ask whether the ambiguities of jurors' decisions help by their substantive indefiniteness to maintain social cohesion, or whether indeterminacy in the law—regardless of its political implications—forges commonality by *not* joining issues too precisely.¹⁷ Schwartz's suggestions as to how law can even out power differentials and articulate common goals are well taken, however, and indicate that, far from being solely a device for resolving differences, law often serves as a vehicle for creating a sense that all the aspects of one's culture cohere in an orderly way.

13. P. 63.

14. See, e.g., Blankenburg, *The Poverty of Evolutionism: A Critique of Tuebner's Case for "Reflexive Law"*, 18 *LAW & SOC'Y REV.* 273 (1984).

15. Schwartz, *Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements*, 63 *YALE L.J.* 471 (1954); see also Schwartz, *Law in the Kibbutz: A Response to Professor Shapiro*, 10 *LAW & SOC'Y REV.* 439 (1976).

16. See, e.g., D. DAVIDSON, *ESSAYS ON ACTIONS AND EVENTS* (1980); Rorty, *The Contingency of Language*, London Rev. Books, Apr. 17, 1986, at 3, col. 1.

17. Legal indeterminacy has become one of the canons of the Critical Legal Studies movement. See generally *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairys ed. 1982); *Legal Studies Symposium*, 36 *STAN. L. REV.* 1 (1984); Kennedy & Klare, *Bibliography of Critical Legal Studies*, 94 *YALE L.J.* 461 (1984). But cf. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 *U. CHI. L. REV.* 462 (1987).

Perhaps the greatest challenge for social science and law posed in recent years comes from the conjuncture of law and economics. Economics used to be called the dismal science: it should, perhaps, more rightly be denominated the dismal *social* science. Economics is a social science precisely because it is at base a set of interpretations concerning the behavior of communities. But notwithstanding Edmund W. Kitch's pleas to the contrary in his essay *Law and the Economic Order*, economics retains a certain dismal quality by presuming aspects of rationality that are not culturally informed and by positing concretized abstractions that do not adequately account for the more indeterminate nature of social and historical circumstances. No one can detract from the impact economics has had on law in the years since Kitch's review was written, but his warnings remain prescient even if the underlying sociology of knowledge that has prompted lawyers to turn to economics remains to be written.

Marc Galanter's lengthy review of research on litigation states unequivocally that: "The most striking research findings about adjudication in contemporary industrial societies can be summed up in the observation that full-blown adjudication is rare, expensive, and avoided assiduously."¹⁸ Such research demonstrates, for example, that we were more litigious in earlier periods of our history than we are now, that even for those who begin modest law suits one-quarter simply drop out, and that many groups (particularly businesses) avoid litigation because of its impact on their image as reliable trading partners.¹⁹ These findings also demonstrate that disputants actually operate within a wide range of socially embedded choices and contexts: although litigation has become more elaborate it has itself spawned greater movement toward mediation and negotiation, and although the promise of victory in a civil action becomes financially more attractive, the allure of compromise in the face of rising costs becomes more compelling.

At the same time, Galanter hints at a broader cultural context to litigation when he says that: "The courts join in proliferating symbols of entitlement, enlivening consciousness of rights and heightening our expectations of vindication."²⁰ Indeed, the idea is quite dominant in our culture that if one has acted in a certain way one is "entitled" to what flows from that behavior: if one is a good spouse, or worker, or person it is not fair if one does not receive the things that religion, morality, and the family as a miniature state have, in the fashion of a social contract, promised in return. The shock to those involved

18. P. 182. See generally C. GREENHOUSE, *PRAYING FOR JUSTICE: FAITH, ORDER, AND COMMUNITY IN AN AMERICAN TOWN* (1986); Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

19. See generally Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507 (1977); Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); S. MACAULAY, *AN EMPIRICAL VIEW OF CONTRACT* (University of Wisconsin Law School, Disputes Processing Research Program Working Paper No. 1984-8, 1984).

20. P. 229.

in family law proceedings or small claims disputes that their cultural sense of entitlement is not supported at law is often profound. Divorce lawyers, for example, tell me that it is their educated, middle-class clients who have trouble with the idea of no-fault divorce: poorer clients have no expectation that the courts will speak to their sense of need or fairness or felt injury, whereas middle-class clients expect emotional vindication and recognition of their just due based on how their spouse has acted. As Lloyd Fallers said, the litigant's quest for "the advantages of the narrow legalism of the forum while claiming the sanction of moral holism"²¹ needs to be understood more fully in the American context. For example, is it true in our broader cultural life that to apologize is to show that one is indeed liable for recompense and that where once apology may have canceled a certain debt to the other the courts have become the repository of a Christian sense of blame and social obligation that neither church nor community can any longer enforce through gossip, scandal, and reinclusion? If so, litigation in its moral components and historic development is only an element of a much larger cultural pattern to which law is inextricably bound.

One clue to how people conceive of fairness, justice, and moral vindication in a society is in the way they speak—the way in which disparate elements of experience are embraced by a set of organizing categories. Few of the contributors to this volume mention the relation of language to law, in part because much of the interesting work in this field has come since the volume was composed.²² David R. Mayhew's essay on *Legislation* is one of the few to suggest that congressional styles of discourse and their attendant "cognitive grooves" are not merely labels for advertising one's own position on an issue but shape the terms of discussion that will follow. It is the great power of courts to use words in such a way as to suggest relationships that others will have to consider if they are to engage in the conversation.²³ Recent studies have shown that women's styles of speech may make them appear less credible as witnesses²⁴ and that conceptual mistranslation may be at the heart of some minority litigants' legal difficulties.²⁵ But until lawyers fully appreciate that language is not only a tool they use but a cultural artifact that subtly channels

21. P. 215 (quoting L. FALLERS, *LAW WITHOUT PRECEDENT: LEGAL IDEAS IN ACTION IN THE COURTS OF COLONIAL BUSOGA* 28 (1969)).

22. See, e.g., Conley & O'Barr, *Hearing the Hidden Agenda: The Ethnographic Investigation of Procedure*, 51 *LAW & CONTEMP. PROBS.* 181 (1988); Danet, *Language in the Legal Process*, 14 *LAW & SOC'Y REV.* 445 (1980); Sarat & Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 *LAW & SOC'Y REV.* 737 (1988); Stone, *From a Language Perspective*, 90 *YALE L.J.* 1149 (1981); and references cited *infra* notes 24-25.

23. See, e.g., Rosen, *Continuing the Conversation: Creationism, the Religion Clauses, and the Politics of Culture*, 1988 *SUP. CT. REV.* 61.

24. W. O'BARR, *LINGUISTIC EVIDENCE: LANGUAGE, POWER AND STRATEGY IN THE COURTROOM* (1982); Conley & O'Barr, *Rules Versus Relationships in Small Claims Disputes*, in *CONFLICT TALK: SOCIOLINGUISTIC INVESTIGATIONS OF ARGUMENTS IN CONVERSATIONS* 178 (A. Grimshaw ed. 1990).

25. See J. GUMPERZ, *DISCOURSE STRATEGIES* (1982); *LANGUAGE AND SOCIAL IDENTITY* (J. Gumperz ed. 1982); Woo, *The People v. Fumiko Kimura: But Which People?*, 17 *INT'L J. SOC. L.* 403 (1989).

matters to which they have not attended, the full impact of these linguistic insights will not come home to bear on the legal profession.²⁶

If it is true, as Galanter argues, that we have shifted the workload of the courts from civil to criminal matters, then we should expect social science to have produced significant results in the criminal law domain. Jeffrey L. Jowell, in his *Implementation and Enforcement of Law*, gives a brief overview of the institutions of enforcement, but Jack Gibbs' essay on *Punishment and Deterrence* provides a more extended discussion of what social science has to say about deterrence and punishment. Gibbs argues that in the 1970's the rehabilitation model gave way to one of retribution, but not because of any research findings on the effectiveness of one over the other. Indeed, no such persuasive findings exist. Émile Durkheim's argument that punitive systems correlate with a high degree of consensus and similarity of social tasks and Marx's theory that punitive systems reflect class dominance are too broadly sketched to get us back to the particularities of individual systems. Neither deterrence nor retribution doctrines can supply policy directions, Gibbs argues, because the range of variables is so vast as to preclude unassailable conclusions. But of course, that high a degree of scientific expectation has always misconceived the nature of social science's potential contribution.

One key to understanding what social science can do may lie in the quotation from Ludwig Wittgenstein that forms one of the headnotes to Galanter's chapter: "Is it even always an advantage to replace an indistinct picture by a sharp one? Isn't the indistinct one often exactly what we need?"²⁷ If human relationships are more like a cloud than a crystal, then one will fail to capture the nature of momentary forms unless one captures the processes by which their indistinct design serves to make new combinations possible and existing relationships capable of being grasped. To get into the world of those we seek to deter, to see the way they relate concept to action, could, if done in the light of clearly considered theories, at least suggest how a cultural system informs even a community of violence. The result, as in all sociolegal research, may not be a clear program for action, but it can go very far toward understanding the systemic repercussions that need to be considered when policies are brought down to the local level.

The essays by Richard L. Abel on *Lawyers*, Stewart Macaulay on *Private Government*, and Austin D. Sarat on *Access to Justice* form a coherent package, notwithstanding significant differences in emphasis. Abel starts from the position that occupations reflect the struggle for power among contending status groups and that their systems of training and ways of mystifying the essential serve primarily to sustain their control of the market for their services. Most law firms know that a student is perfectly ready to be hired full-time after a

26. See pp. 275-80 (discussion of how language affects styles of legislation).

27. P. 151 (quoting L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 71 (G. Simpson trans. 1958)).

couple of years of law school, just as most third-year students know that law school is two years squeezed into three. But Abel's perspective is that of the school of Critical Legal Studies and thus carries certain additional implications. In a careful analysis of the history of the American legal profession, he argues that the legal profession has not simply responded to the forces of the marketplace but, rather, has increasingly sought to control the market for its corporate clients, only to find that lawyers have had to surrender any residual professional ethos of their own to these very corporations in order to maintain the economic well-being of their firms. Meanwhile, law students are led to believe that they learned nothing before they arrived at law school, that all knowledge worth possessing is contained within the four corners of the law school, and that if only they appreciate that a legal education will finally teach them "how to think" this knowledge will indeed be theirs. The result is an individual recapitulation of an institutional imperative, the creation of a shared—but not really independent—professional identity which, simply because it is shared, takes on the air of objective truth.

Abel is the only contributor to this volume even to mention Critical Legal Studies. He accepts the view that Critical Legal Studies stands on a higher moral plane than other forms of analysis, and his final sentence sounds more like a moral judgment than a prediction when he says: "Although the ideal of professionalism undoubtedly will survive as an ever more anachronistic warrant of legitimacy, the profession as an economic, social, and political institution is moribund."²⁸ He does not refer to the debate stirred by the remarks made a few years ago by Derek Bok, the former dean of Harvard Law School and president of the University, who suggested that it was not in the nation's interest for so many of the best and brightest to go into law since it is essentially a nonproductive endeavor.²⁹ Nor does Abel place the legal professions among others to show how and why Americans have come to depend so much on experts.

Abel's arguments about the legal profession are placed in relief by Macaulay's assertion that private governments—by which he means organizations that establish and impose their own rules—mimic those of the state government only to a limited degree. Whether it is a trade association, a corporation's security operation, or a university disciplinary proceeding, such private systems often rely on lawyers to help them keep state intrusion at a distance. Macaulay questions Moore's argument that semiautonomous social fields are terribly successful at fending off concerted state involvement, and he rejects those broad-scale Marxist arguments that draw too sharp a distinction between public and private institutions. Still, he makes some fascinating

28. P. 418.

29. *Harvard's Bok Urges Changing "Expensive, Inefficient" Legal System, Seeks Law-School Curriculum Reform*, Chron. Higher Educ., May 4, 1983, at 8, col. 1.

remarks that fit with those made earlier by Galanter³⁰ about the tendency of law to leave matters sufficiently ambiguous that the very process of engaging in multiple interpretations can serve to hold a complex society together. He does not, however, note that it may be at the level of procedure that the common link among multiple interpreters exists, or that a common narrative style—a way of relating facts to one another and drawing a moral from them—links even those who seem otherwise to be at loggerheads. Yet he is able to show, through examples as widespread as clandestine housing activities in Brazil and the hiring of women at American universities, that law does not reside in separable domains of the public and the private but in a zone of common influence and interpenetration.³¹

Austin Sarat takes up the theme of shared procedures when he argues that “[d]ue process not popular sovereignty is the governing ethos” in the United States,³² that access to this process becomes the central issue for much political argument, and that when those who are relatively disadvantaged engage in disputes over access, “critique turns into affirmation, and threats to legal legitimacy turn into support.”³³ Indeed, studies of small claims courts³⁴ and the portrayal of justice in the popular media³⁵ show that in a great many cases Americans want to have their day in court, to be heard and considered more than to achieve a specified result. However, as social scientists learn more about when and why people go to lawyers and courts, they will have to look beyond the law to the cultural repertoire through which the style of a people’s actions fits with their broader sense of an orderly life.

The final two essays in the book take us more directly into the use of social science in legal proceedings. Phoebe C. Ellsworth and Julius G. Getman’s essay *Social Science in Legal Decision-Making* offers a careful analysis of how and why social science expertise tends to play a considerable role in criminal proceedings and child custody but a rather slight one in labor law. The authors rightly note that the tension between aggregate data and individual circumstance often renders sociological data suspect to the law even though “social scientists have not introduced probabilistic thinking into the legal system but have made the probabilities explicit.”³⁶ This came through quite clearly in the Supreme Court’s 1987 decision in *McCleskey v. Kemp*,³⁷ in which Justice Powell,

30. Pp. 474-75.

31. Macaulay is also critical of the neo-evolutionary ideas of both Teubner and Klare who suggest that the next stage of law is for self-regulation itself to become regulated. See pp. 492-502.

32. P. 527.

33. P. 529.

34. Merry & Silbey, *What Do Plaintiffs Want?: Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151 (1984); O’Barr & Conley, *Lay Expectations of the Civil Justice System*, 22 LAW & SOC’Y REV. 137 (1988); Tyler, *What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103 (1988).

35. See Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527; *Symposium: Popular Legal Culture*, 98 YALE L.J. 1545 (1989).

36. P. 592.

37. 481 U.S. 279 (1987).

writing for the majority, accepted the validity of the data showing that Blacks are disproportionately given the death penalty but argued that such discrimination had not been shown in the instant case.³⁸ Powell went on to suggest that if sociological findings were allowed to support the challenge in this case, Eighth Amendment attacks based on every conceivable social indicator could bring the criminal justice system to a halt.³⁹ As the authors of the very study involved in *McCleskey* have pointed out, however, only relevant field studies would be admissible, and most evidence on indicators other than race does not lead to the conclusion that the system is fundamentally unfair.⁴⁰

Social science findings have, nevertheless, played a role in the formulation of parole guidelines⁴¹ and, in more recent years, the selection of jurors,⁴² the admissibility of evidence based on cognitive tests and psychosocial profiles,⁴³ and the relevance of an accused's cultural background to the understanding of his allegedly criminal act.⁴⁴ By contrast, labor law has benefited very little from such research. The authors attribute this to many reasons, including the fact that behavioral assumptions are not as fully publicized in labor as in criminal cases, that the criminal system is perceived as a failure needing help from wherever it appears promising, and that facts must often take a backseat to policy in the field of labor relations. To these reasons one might add that those involved in labor relations usually assume they know what labor behavior is like, that labor and management in fact share a great deal in their view of what actually occurs in the workplace, and that institutions like the NLRB have succeeded in convincing those parties and lawyers who come before them that they will not necessarily suffer for accepting the dominant cultural myth about what relationships in the workplace are really like. In our intensely individualistic society, we constantly turn to experts to address the circumstances of our psychological and even moral stature, hence their great presence in criminal and family matters. We question expert opinion concerning collective action

38. *Id.* at 292.

39. *Id.* at 314-19.

40. J. MONAHAN & L. WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 245 (2d ed. 1990) (quoting Baldus, Woodworth & Pulaski, *Law and Statistics in Conflict: Reflections on McCleskey v. Kemp*, in *HANDBOOK OF PSYCHOLOGY AND LAW* (D. Kagehiro and W. Laufer eds. in press)).

41. See, e.g., Carroll, Wiener, Coates, Galegher & Alibrio, *Evaluation, Diagnosis, and Prediction in Parole Decision Making*, 17 *LAW & SOC'Y REV.* 199 (1982); Messinger, Berecochea, Rauma & Berk, *The Foundations of Parole in California*, 19 *LAW & SOC'Y REV.* 69 (1985).

42. See McConahay, Mullin & Frederick, *The Uses of Social Science in Trials with Political and Racial Overtones: The Trial of Joan Little*, 41 *LAW & CONTEMP. PROBS.* 205 (1977).

43. See, e.g., E. LOFTUS, *EYEWITNESS TESTIMONY* (1979); Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 *UCLA L. REV.* 273 (1989); materials on witnesses and psychological profiles in J. MONAHAN & L. WALKER, *supra* note 40, at 320-91, 423-44. This latter publication contains an excellent selection of materials that help to update and extend the issues addressed in the book under review. Another indispensable aid to an understanding of the whole field is R. LEMPERS & J. SANDERS, *AN INVITATION TO LAW AND SOCIAL SCIENCE* (1986).

44. Note, *Cultural Defense: One Person's Culture is Another's Crime*, 9 *LOY. L.A. INT'L & COMP. L.J.* 751 (1987); Note, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 *GA. J. INT'L & COMP. L.* 335 (1986); Note, *The Cultural Defense in the Criminal Law*, 99 *HARV. L. REV.* 1293 (1986); and Woo, *supra* note 25.

because so much of our culture pulls us away from the collective to the individual: we deprive assassins of the significance of their social acts by rendering them personally insane, and we distance ourselves from communal strife by positing racial violence as interpersonal conflict. It may be necessary, therefore, for social scientists who wish to have an impact on labor law to find a way of describing the individual harm suffered in the workplace by litigants as the direct result of the relations between categories of social actors rather than as the result of interpersonal differences—a rhetoric that must avoid implications of “class” differences if it is not to be condemned as socially divisive.

The acceptability of social research, of course, depends as well on the extent to which it can associate itself with that other powerful legitimizing source in our society: science. Although Shari Seidman Diamond’s fine essay on *Methods for the Empirical Study of Law* does not claim that such research need meet the criteria of the pure sciences to have great value, her review does come to the unsettling conclusion that every form of quantitative analysis used by the social sciences has some flaw. Unidentified causes lurk in the most rigorous analyses, tests may create the very factors they are meant to discern, and measurements that have an air of extraordinary precision may mask crucial uncertainties. The result, however, should not be despair or disdain any more than it should be the avoidance of generalizations based on partial investigation. To the contrary, what such limitations reveal is how much we must come back to refining our theories about how law and social action, mediated by ordinary discourse, create a highly textured entity into which the practitioner must move with great sensitivity to the systemic repercussions that will result.

III

In assessing the value of sociolegal studies, then, one does well to remember that law is preeminently an artifact of culture: it is influenced by and constitutive of the way in which the members of a society comprehend their actions towards one another and infuse those actions with an air of immanent and superordinate worth. When a social scientist attempts to comprehend the ways in which such a community of meaning is integrated and moves through time, she cannot afford to grant privileged status to any particular aspect of culture in general. Instead, she must seek out the themes and emphases that any given culture has played up and pose questions of connectedness relevant to that culture’s situation. The fact that there can, for example, be an anthropology or sociology or psychology of anything does not mean that one must give in to reductionism or universalism in order to say anything. It means, rather, that these are fields whose very strength lies in their assumption that the various aspects of a culture all have some bearing on one another; it is this systemic orientation that can lead us to see connections we had not imagined and hence potential repercussions we had not foreseen.

This means, however, that law may be quite central or quite secondary depending on the issue; one must follow the connections wherever they lead, even if this means that ultimately law occupies only a corner of the larger problem. If, for example, one wishes to understand how Americans assess a process as fair or unfair, the legal manifestation of this may only be meaningful if the way in which we structure multiple opinions in our political, sports, and religious schemes of legitimacy is adequately understood. Law may matter, but until the resonances among numerous domains have been sought out, the centrality of any given institution cannot be presumed.

The lesson for sociolegal studies is thus twofold: first, that application is not the test of an explanation's total worth and, second, that if one domain is presumptively privileged over another, there is considerable risk of distorting the investigation. The disappointment many judges and practitioners find with social science data is partly attributable to the former; the paucity of sociolegal studies' contributions to their home disciplines is substantially attributable to the latter. Courts and lawyers may find a particular social science technique or argument useful and may, in classic American litigation fashion, use it as a basis for, or supplement to, a momentary result. But because its true utility is as a heuristic device, as a mode of analysis that leads one to see connections, exaggerating isolated features of sociolegal research can only lead to skepticism and rejection when it fails to produce consistently believable results. It *will* fail in this regard because the nature of the thing it studies only allows of perfect steadiness if its very dynamism is denied.

Similarly, good social theory is unlikely to emerge from the context of a law school environment because if one begins and ends with law as the critical feature of a cultural issue, the nature of the connections involved will almost always be distorted. In studying American manifestations of intent, fair compensation, credibility, or intersubjectivity, it would be a major error not to consider their manifestations in the law; but it would be no less crucial an error to assume that the law is the best place to work on these issues. The failure of law professors who work in the social sciences to produce theoretical contributions to their attendant disciplines is not due to the fact that lawyers work in an applied area that cannot be expected to further its pure science—rather like engineers who should not be faulted for failing to advance fundamental physics or doctors the state of evolutionary theory. Legal scholars purport to be doing basic research yet distort that—as pure research—each time they presuppose the centrality of law. The sociology of legal knowledge—including everything from professional training and expectations to the absence of peer review publications—plays a role in this pattern. The result, however, should not be a diminution of respect for the legal scholar's practical thought or an increase in lawyers' "Ph.D. envy." Rather, it should yield a clearer sense of the way labor has come to be divided between law scholar and social scientist and should encourage greater freedom for each, as *university* faculty, to follow

leads, even if they render their own discipline momentarily secondary. Only then may a more realistic set of research objectives be formulated and more realistic uses be made of social science in the lawyer's office and in the courts themselves.

Ultimately, the essays in this volume show both the prospects and the institutional barriers to the fullest understanding by law and social science of one another's capabilities. As the very existence of this volume suggests, however, it is possible that, if we start at home by understanding the social context of our own production of knowledge, we will come to appreciate our mutual concerns and potential in a way that will benefit both theory and practice.