



Walter J. Blumenthal

IN THE WINTER OF OUR DISCONTENT: Law, Anti-Law, and Social Science

Marc Galanter

University of Wisconsin School of Law, Madison, Wisconsin 53706-1399;
email: msgalant@wisc.edu

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■ **Abstract** Law and social science took shape as a field of inquiry in the third quarter of the past century, an era of expanding rights and remedies and optimism about the capacity of law, government, and social science to address intractable social problems. It put down vigorous institutional roots in organizations, publications, teaching, and research that enabled it to survive the erosion of the reformist soil that nurtured it and to adapt to a new era in which the prevailing common sense is a jaundiced view that emphasizes the weaknesses, costs, and dangers of law. A significant body of research has rebutted many of the components of the jaundiced view, but with little effect on the prevailing folklore. The legal system's distinctive susceptibility to such misreadings and misrepresentations is aggravated by a late and weak development of empirical knowledge and a lack of credible guardians of its knowledge base.

INTRODUCTION

Law and social science (LSS) (also known as socio-legal studies, law and society, empirical legal studies, and somewhat misleadingly sociology of law) is only one of several intersecting knowledges about law and its relation to society. By law I refer not to a discipline of inquiry, but to a set of practices, roles, and ideas embodied in distinctive institutions and reflected in general culture. The most prominent knowledge about law is the internal legal learning located among the professional groups that occupy and operate legal institutions (judges, lawyers, legislators, administrators, and their academic and journalistic auxiliaries). These actors carry, expound, produce, and remake a body of authoritative normative learning that regulates and instructs officials and citizens. Entwined with this internal legal learning is an emergent external learning about law and legal institutions found mainly in academic and research settings (Edelman & Galanter 2001). LSS is a prominent part of this external learning about law. It seeks explanation rather than justification. It emphasizes social structures and processes rather than rules. It rejects the notion of law as an autonomous self-contained realm; it appreciates the dynamics of law as part of more inclusive patterns of social life. Another prominent

(and sometimes overlapping) sort of external learning about law is law and economics. Other lines of scholarly work (e.g., critical race theory, feminist legal studies) lie athwart the internal/external line. All these organized and cultivated knowledges are submerged in a sea of legal culture and consciousness (Ewick & Silbey 1998), fed by streams flowing from popular culture (Mezey & Niles 2005, Jarvis & Joseph 1998), folklore (Galanter 1998, 2005a), the news and entertainment industries (Haltom & McCann 2004), and political discourse. Although one or the other of these knowledges of law may be dominant in a particular setting, they influence and interpenetrate one another (Sherwin 2000). The career of LSS is connected indirectly but importantly to the careers of these other discourses and institutions.

Although LSS can boast of distinguished ancestors and precursors, systematic social inquiry about law was envisioned only in the early years of the twentieth century, and the emergence of a community of scholars continuously and cumulatively pursuing such inquiry dates from the middle of the century. The immediate forebear of LSS was American Legal Realism, which roiled the legal academy from the late 1920s (Schlegel 1995). The realists aspired to use law to reform society by transforming professional legal knowledge, incorporating empirical inquiry, and dismantling formalism that they regarded as intellectually mistaken and inimical to the fulfillment of law's moral promise.

If the realists supplied or carried the intellectual seed, the fertile soil on which it alighted was the New Deal's expansive improvisation of legal regulation to stimulate the economy and weave a net of protections for ordinary citizens, a process that gave social science an enlarged role in the functioning of government (Simon 1999). The years after World War II saw an elaboration of legal remedies and protections that one historian has called a "legalist reformation" (Nelson 2001). Courts lowered barriers to litigation, removing procedural obstacles and projecting due process into many settings. They widened standing, dismantled immunities, and enlarged remedies (Friedman 1985). Accountability in tort was expanded by the shift to comparative negligence and the rise of new theories of liability; contract law was shorn of much of its formalism; and above all civil rights for blacks were disinterred and new rights extended to many sorts of subordinates and outsiders, from students to consumers to women to prisoners. The proliferation of new rights was accompanied by the arrival of new players on the legal stage (as in the consumer, environmental, and women's movements) and the appearance of new formats for legal services (as in legal services for the poor and public interest law firms). Dynamic minority, consumer, environmental, and women's movements institutionalized the claims of these constituencies and made them a presence on the legal scene (Epp 1998). By the mid-1960s, courts, legislatures, lawyers, and activist groups had transformed the legal landscape, enlarging opportunities for successful assertion of rights by outsiders, dependents, and subordinates against society's managers and authorities. One example of the new dispensation was school litigation. "In the first half of the twentieth century," Tyack & Benavot (1985) report, "judges largely upheld school officials in situations of conflict." It was, they conclude, "a comfortable world for those who held power and wanted to

preserve the status quo, but it left untouched some of the most pressing questions of social justice in public education” (pp. 364, 373–74). From the 1950s, there was a change in the amount and thrust of school litigation, holding those who ran schools to a new accountability to minorities, students, the disabled, and others who had been excluded from a voice in educational policy.

Civil rights, enlarged tort liability, the emergence of poverty law, consumerism, and environmentalism all reflected higher expectations of institutional performance by manufacturers, doctors, school authorities, and government agencies. Government responded to and promoted rising public expectations by enacting a wave of civil rights, consumer, and environmental legislation, by establishing new entitlements like Medicare, and by launching a “War on Poverty.”

These developments expressed and elevated a high optimism that law could be used not merely to protect interests and preserve rights, but to address intractable social problems. The base metal of law, it seemed to many, could be transmuted into a shining sword, an instrument that could be used by dedicated judges and officials, prodded by energetic and imaginative lawyers, to dismantle oppressive structures and find new paths to substantive justice (*Yale Law J.* 1970, Schrag 1972). The exuberant estimation of legal possibilities was matched by confidence in the capacity of the burgeoning social sciences to identify constraints and to design more efficacious interventions. Within the academy, undergoing rapid expansion to accommodate the baby boom cohorts and rising commitments to higher education, there were high hopes for transcending disciplinary compartments to achieve new synergies.

LSS flourished at the intersection of legal optimism, academic expansion, and interdisciplinary enterprise. The Law and Society Association was founded in 1964, the year that the federal government launched the War on Poverty and embarked on an ambitious program of employing legal services strategically to improve the condition of the poor (Johnson 1974). A combination of lawyers and social scientists, mainly sociologists and political scientists, the association embraced high expectations about expanding legal rights at the same time that it provided a base for critical assessment of the failure of law to fulfill its promises of equality, fairness, access, and remedy. When the association in 1966 commenced publication of the *Law & Society Review*, the first distinctively LSS journal, the lead article in the first issue was an extended assessment of “Civil Justice and the Poor” in which the authors, after cataloging the many things the law could do, reflected that

a basic limitation of the law is its inability to treat the problems of the poor as essentially collective or class phenomena. The law has been slow to recognize and remedy the collective problems of slum tenants, low-income buyers and public assistance recipients. And it has been slow to respond to the collective problems of Negroes in gaining full citizenship (Carlin et al. 1966, p. 27).

A similar combination of celebration of enlarged legal rights with critical assessment of legal practice informed the lead article in the second issue, Blumberg’s (1967) “The Practice of Law as a Confidence Game.” This much-reprinted article, which has attained canonical status (Cotterrell 1994, Seron 2006), found it ironic

that enlargement of defendants' rights was transformed into a more sophisticated apparatus for manipulating defendants into guilty pleas, a failing attributed to the Supreme Court's sociological naiveté. Carlin et al. (1966) and Blumberg (1967) expressed a central tenet of LSS in that formative time that understanding of the social was a crucial missing ingredient necessary to make law effective in realizing shared aspirations for justice and equality.

Rejecting the legalist premise that promulgating good rules would automatically produce desired social change, LSS affirmed that law is inseparably embedded in the social and political. The conviction that the connection between rules and outcomes is mediated by complex and contingent social and political processes was expressed in a critique of legalist models of reform (Scheingold 1974, Galanter 1974, Trubek & Galanter 1974, Macaulay 1979) that has remained central to LSS, inoculating it against the wrenching disillusionment that accompanied the collapse of elevated expectations of legal felicity.

INSTITUTIONALIZATION OF LSS

Since those early days, LSS has been institutionalized in organizations (e.g., the Law and Society Association and law sections in several social science associations), a National Science Foundation program, a scattering of academic programs and research institutions, more than a dozen journals, and most recently this *Annual Review* (Friedman 2005). The success of LSS in creating a cross-disciplinary research community involving exchange and collaboration among scholars in anthropology, criminology, economics, history, law, political science, psychology, and sociology (Galanter & Edwards 1997, Silbey 2000) may owe something to the timing of its development. Looking back, I realize that I was the first editor (1972–1976) of the *Law & Society Review* to hold a law degree rather than a PhD. In those early days of LSS, a time when the prestige of social science was at its height, the social scientists occupied the high ground; we lawyers were representatives of a discipline that was deficient, and they had what was missing and admired. So even though law professors as a group enjoyed somewhat higher status, the fellowship of deviant law professors and mainstream social scientists formed an amalgam that has proved remarkably resistant to the assertion of divisive disciplinary identities. (The commendable effacement of disciplinary lines frustrated my efforts to capture recent trends in the makeup of LSS: I learned that the Law and Society Association discontinued maintaining records of members' disciplinary affiliation sometime in the late 1980s.)

LEGALIZATION AND RECOIL

The expansion of rights and remedies that encompassed LSS at its emergence was part of a great burst of legalization of American society. Regulation proliferated, extending to aspects of life previously unsupervised by the state. And whole areas of

governmental activity that were not previously thought needful of close articulation with legal principles were now subjected to judicial oversight. There was, by any measure, a great deal more law (Galanter 1992). The volume of authoritative legal material mounted steadily. The legal profession grew from some 385,933 lawyers in 1960 to over one million in 2000 (Carson 2004, p. 1). There was one lawyer for every 627 Americans in 1960; at the end of the century there was one lawyer for every 264. Spending on law increased dramatically, not only absolutely but relatively. In 1978, the receipts of law firms were something like \$0.40 of every \$100 of the gross domestic product. By 2002 they were more than \$1.60 (Galanter 2005b, pp. 1378–79). So for the last third of the twentieth century, the law business grew several times as fast as the overall economy. These figures are only for law firms. If we add in the work of government lawyers and in-house lawyers, we can estimate that law represents about 2% of the nation's product. Amid all this growth, the place of law, lawyers, and courts in public consciousness continued to expand. Popular culture was ever more saturated with law. Mezey & Niles (2005, p. 93) report that, "of the thirty-seven original dramatic shows aired by the four major [television] networks in the 2003 Fall season, thirty-one . . . had elected officials, lawyers, police officers, former police officers who are now vigilantes, or forensic officials as main characters."

Burgeoning legalization was not confined to the United States (Galanter 1992): Increasing lawyer populations, multiplication of regulation, proliferation of rights-talk, and enhanced judicial authority are widespread throughout the rich democracies and beyond. But the legalization of the United States is particularly intense. Law has become the site and idiom of debate about policy to an extent unknown elsewhere. Lawyers became "the dominant profession in American society" (Gawalt 1984, p. vii). American political institutions, Miller (1995, p. 162) observes, "have adopted lawyers' ways, lawyers' language, as well as lawyers' approaches to problem solving." They emphasize procedure and process, rules and precedents; they take a rights-focused, case-by-case incremental approach to substantive social problems. Kagan (2001) traces this reliance on law, lawyers, and courts to the decentralized American political system and the fragmentation and indeterminacy of the American legal regime.

The expansion of regulation and remedy and the ascendancy of lawyers were not universally cheered. Earlier, various initiatives of the New Deal and of the Warren Court had encountered pointed resistance, but the overall climate remained favorable to the continued enlargement of remedies and protections for the less advantaged. But beginning in the mid-1970s (just as LSS was becoming embedded in the academy), there was a reversal of fortunes. The prevailing critique of the legal system, that it failed to provide justice to the weak, began to give way to a sense that the nation was afflicted by "too much law" (Galanter 1994). A medical malpractice insurance crisis in 1972–1974, followed by a crisis in product liability insurance in 1974–1976, led to modest curtailment of remedies and widespread alarm. The term "tort reform" became current in 1976 amid warnings about the infirmities and the dangers of the law.

The expansion of law was identified as an ominous threat. “[C]onsumerism, environmentalism, and other forms of Naderism” and the increasing litigiousness of Americans were seen to portend “a society in which business is endlessly besieged by legal problems” (Carruth 1973, p. 157). Critics accused the courts of overreaching and constituting an “imperial judiciary” (Glazer 1975, van den Haag 1978). The recoil came from within as well as from outside the legal establishment. Chief Justice Warren Burger decried a “litigation explosion” and denounced “legal activism” by judges and lawyers. In 1976, Burger organized a conference on “The Causes of Popular Dissatisfaction with the Administration of Justice” (Pound Conf. 1976), held on the 70th anniversary of Roscoe Pound’s celebrated address on that topic. Attended by the attorney general and solicitor general, prominent judges, distinguished practitioners, and influential legal academics, the Pound Conference, as it has come to be known, was the emblematic pivot of the turn against the enlargement of remedies. Speakers emphasized the burden placed on the courts, especially federal courts, by increased caseload and ever-expanding demands for intervention to address social problems. There was a general consensus that the courts should scale back their excursions into problem solving, and that their quantitative burdens should be addressed by eliminating the diversity jurisdiction of the federal courts, by abandoning the use of the jury in civil cases, and by promoting the use of alternative dispute resolution (ADR).

By the late 1970s, expansive legal remedies were seen by a significant section of legal, political, and business elites as a systemic social problem. Laurence H. Silberman (1978), later a federal judge, asked “Will Lawyering Strangle Democratic Capitalism?” He traced how “the legal process, because of its unbridled growth, has become a cancer which threatens the vitality of our forms of capitalism and democracy” (p. 15) and detailed “the harmful impact of an ever expanding legal process on our society” (p. 44). The profligate creation of new individual rights was weakening the “intermediate institutions [families, churches, schools, corporations, labor unions, and political parties] . . . that are indispensable pillars of a pluralistic democracy” (p. 18). In addition, “litigation of all kinds [was] becoming a major structural impediment to our economy” (p. 21). Our bloated lawyer population, Silberman declared, “may confer a competitive advantage on our economic rivals in Japan and Europe” (p. 21). In this vision, rising litigation is not a parochial concern of certain industries or institutions, but a menace to public well-being. And lawyers are dangerous parasites in the national bloodstream.

THE TRIUMPH OF THE JAUNDICED VIEW

These notions became part of a familiar complex of beliefs about law, lawyers, and lawsuits that I have called the “jaundiced view,” which holds that the United States is overflowing with frivolous lawsuits by self-styled victims, inspired by greedy lawyers and encouraged by irresponsible juries and activist judges (Galanter 1998). In this litigation lottery, claimants walk away with immense and undeserved sums.

Useful business and civic activities are inhibited. The legal system has spun out of control and causes immense damage, undermining the country's economic strength and unraveling the fabric of trust that underlies civic life. Among the abundance of examples of this mindset, I choose one whose authorship (by a lawyer who a few years later was elevated to solicitor general of the United States) testifies to the respectability as well as the audacity of such fulminations.

Our mechanism for the peaceable resolution of civil disputes has transmogrified into an insatiable organism that is devouring a segment of our society and culture from the inside-out. Like the giant underground fungus discovered several years ago in Michigan, which manifests itself above the ground only in the form of an occasional mushroom, our civil justice system parasite is barely perceptible to the average person on a day-to-day basis, except for the occasional but increasingly frequent news reports of a freakish lawsuit or outlandish jury verdict. But the destructive process is nevertheless continuously at work, growing and relentlessly consuming vital resources and disabling our productive capacity (Olson 1994, p. 359).

The jaundiced view flourishes most luxuriantly among corporate and governmental elites, but many elements of it have been embraced by wider publics. It has become the reigning common sense about law in America (Haltom & McCann 2004, p. 22). It is supported by a web of stories about abusive lawsuits, frivolous claims, and outrageous awards. One of the salient features of this discourse is that it is a victimization tale that depicts upstanding, beneficent corporations and governments being exploited by unscrupulous individuals and their rapacious lawyers. The master narrative is that irresponsible and opportunistic claimants, who attempt to fasten responsibility on productive organizations and secure undeserved compensation, are "the source and carriers of [a] devastating social disease" (Haltom & McCann 2004, p. 59). These stories and the discourse in which they are embedded are disseminated by a massive "campaign to impugn the legal system" (Haltom & McCann 2004, p. 223) and to delegitimize claimants and their lawyers who invoke it. This propaganda campaign is promoted by corporations and their political allies, supported by right-wing foundations and think tanks, and has enjoyed great success in resisting debunking.

In recent years, there has been a significant body of careful LSS research that has joined battle with the assertions about litigation, lawyers, and juries that festoon the jaundiced view. For example, a long tradition of research has established the conscientiousness and responsibility of juries and the modesty of their awards (Hans 2000, Vidmar 1995). But the findings of well-researched empirical studies have not put much of a dent in the folklore about juries' anticorporate bias and excessive awards. What makes the jaundiced view so resilient? Why in the area of civil justice has folklore dominated public discourse and marginalized systematic social inquiry? What confounds the reading of the legal landscape? Why does systematic empirical knowledge about law fare so poorly in public discourse? Haltom & McCann (2004) argue that the jaundiced view triumphs over its empirical critics because,

first, it resonates with enduring themes of individual responsibility and disparagement of law; and second, because its stories fit the templates and conventions of news and entertainment. Haltom & McCann fault the empirical antagonists of the jaundiced view for failing to present their findings in a compelling moral vision.

THE PREDICAMENT OF LAW

The discourse about other social institutions such as education, banking, or health care are undoubtedly infected with misinformation, but there seems to be a bedrock of facts that can be ignored only at the risk of losing credibility. Or so we would like to believe. In any event, the requirement of a modicum of deference to fact seems less rigorous in law, where endorsing and promoting fantastical views does not disqualify their proponents. What accounts for the marginalization of empirical studies in the civil justice wars? Is LSS peopled by scholars with substandard rhetorical skills or a less moral vision than empiricists who study other social institutions? Is there something about law, lawyers, and legal scholarship that makes it so susceptible to misrepresentation and misreading?

One factor that separates law from many social institutions is its derelict knowledge base. Until quite recently, what courts and litigants and lawyers were actually doing was only dimly known. In this low-information environment, misinformation flourished. For example, from the late 1960s when concern about growing product liability exposure agitated defendants and insurers, people started estimating the total number of product liability cases being filed annually. The numbers kept escalating, so that by the time of the product liability insurance crisis of the mid-1970s it was believed that the number of product liability cases had risen from 50,000 in 1963 to one million in 1975 (*Forbes* 1976, p. 57). In fact there were not one million product liability suits in the entire history of the United States to 1975 and probably fewer than 20,000 filed in that year.

It was only in the early 1980s that sizable bodies of reliable information about litigation patterns became available. The first of the Rand Institute for Civil Justice studies of jury verdicts was published in 1982 (Peterson & Priest 1982); findings from the University of Wisconsin Civil Litigation Research Project became available shortly after (Trubek et al. 1987). The National Center for State Courts (founded in 1971) published its first reliable figures on litigation in the state courts in 1986.

This flow of quantitative information was part of a wider opening of information about the legal world. The demise in 1977 of the norms forbidding lawyers to talk to reporters led to the rapid growth of a new kind of legal journalism, embodied in a new generation of trade journals (*The National Law Journal*, *The American Lawyer*, and various local counterparts) and more constant and intrusive attention from *The New York Times*, *The Wall Street Journal*, and other newspapers (Galanter & Palay 1991, pp. 68–73). Old norms of reticence fell by the wayside. Soon we knew much more about lawyers and their clients, their strategies, and their incomes.

Even though we have accumulated a great deal of data and insight during the past 40 years, the fund of systematic social knowledge about the working of the civil justice system is still rather scanty. Court statistics are rudimentary. For example, they do not record the detailed subject matter of cases, the characteristics of the parties, or the events in the case; information about settlements is not systematically collected; indeed, it is often shrouded in secrecy, with the support of courts. No one has seen fit to invest in the continuous collection of basic information.

The paucity of reliable systematic information about the law provides fertile soil for the kinds of flawed intuitive judgment described in the literature of cognitive psychology, which catalogs a number of factors that lead to biased inferences and judgments about uncertain events (Nisbet & Ross 1980, Loftus & Beech 1982). For example, decision makers often ignore relevant information about baseline frequencies, misattributing representativeness to data. The frequency of easily remembered events is exaggerated, leading to overestimation of risk from publicized hazards relative to less visible ones. “Vivid information, that is, concrete, sensory and personally relevant information, may have disproportionate impact on beliefs and inferences” (Nisbet & Ross 1980, p. 190). Furthermore, biased receptiveness to confirming evidence makes people excessively confident in the accuracy of their knowledge. In other words, the way our minds are built inclines us to think we know more than we do. But these cognitive imperfections, like germs, are everywhere. Why do they find such a nutritive environment in discourse about the law?

Most people, including lawyers, politicians, and corporate executives, derive much or most of their picture of the legal system from the media. But there is a pronounced tilt in media coverage of civil justice. The news media portray a world of ubiquitous litigation, outlandish claims, and successful plaintiffs winning excessive awards from beleaguered corporate defendants. For example, Garber (1998) studied newspaper coverage of verdicts in product liability cases against automobile manufacturers decided from 1985 to 1996. He found that almost three-quarters of those verdicts were in favor of the defendant, but newspapers reported just 3% of the defense verdicts and 41% of verdicts for plaintiffs. In other words, a verdict for the plaintiff is 12 times more likely to be reported than is a defense verdict. Consequently, in the reports that a conscientious and omnivorous newspaper reader would encounter, some four-fifths would have been verdicts for the plaintiff—roughly the opposite of the true percentage. Other studies have shown that the amounts won by plaintiffs in newspaper and magazine reports are 10 to 20 times as large as the run of awards (Bailis & MacCoun 1996, Chase 1995, Garber & Bower 1999). A comparable misrepresentation of litigation outcomes occurs in employment discrimination claims (Nielsen & Beim 2004). Notwithstanding occasional media efforts to debunk some of the litigation explosion legends, the regular consumer of media reports would be badly misinformed about the number of product liability and medical malpractice cases, the size of jury awards, the incidence of punitive damages, and the regularity with which corporate defendants succeed in defeating individual claimants.

If the distortions of the media are inadvertent, there are a host of professionals, consultants, and publicists who thrive by magnifying the sense of crisis and touting their ability to exorcize the menace of enhanced liability (Edelman et al. 1992). Their messages are amplified by a small industry of corporately supported think tanks, lobbyists, consultants, and grassroots groups that attempt to generate political support for reforms of the civil justice system (Deal & Doroshov 2000). Politicians and organizational entrepreneurs, in turn, echo the jaundiced view in order to cultivate financial support and garner votes. As one political operative advised his charges (Luntz 1997, p. 128):

Unlike most complex issues, the problems in our civil justice system come with a ready made villain: the lawyer . . . It's almost impossible to go too far when it comes to demonizing lawyers . . . Talk about the hidden costs of our out-of-control civil justice system. Do not get bogged down with a numbers-laden economic argument; rather, put the impact of lawsuits on the economy in human terms by telling stories about how individual consumers end up paying far too much for everyday household products, medicines, car insurance . . . all because of unreasonable lawsuits.

This kind of entrepreneurship can flourish because, unlike scientific and technical fields, the law does not have a creditable set of custodians of its knowledge base. The world of law practice is agonistic and the lawyer's relation to truth is instrumental. As Campos (1998) puts it, "Lawyers make claims not because they believe them to be true, but because they believe them to be legally efficacious. If they happen to be true, then all the better." For centuries, the popular imagination has associated lawyers with operating in a theater of deceit, sharp practice, and gamesmanship, where the imperatives of truthfulness and personal morality are suspended or diluted (Galanter 2005a). It is difficult, if not impossible in the present climate of antilawyerism, for lawyers to avoid being discounted as partisans and hired guns who are in the advocacy business rather than the truth business.

Judges are credited with the requisite detachment, impartiality, and devotion to the public interest. But for many reasons, we cannot imagine them serving as effective guardians of empirical knowledge about the legal system. Their role commits them to be reactive, to respond only to individual cases, and to privilege text over context.

LSS IN THE LAW SCHOOLS

To nourish and project a body of empirically based knowledge of the law has been an aspiration of some legal academics since the days of the early legal realists (Schlegel 1995). But that ambition has not been taken to the bosom of the legal academy, whose ambivalence to empirical inquiry recalls an exchange recounted by Phillipa Strum in her biography of Louis Brandeis:

Brandeis recalled having told [Justice Oliver Wendell] Holmes “that if he really wants to ‘improve his mind’ (as he always speaks of it), the way to do it is not to read more philosophic books . . . but to get some sense of the world of fact. And he asked me to map out some reading—he became much interested—and I told him that I’d . . . get some books, that books could carry him only so far, and that he should get some exhibits from life. I suggested the textile industry, and told him in vacation time he is near Lawrence and Lowell and he should go there and look about . . .” (Strum 1984, pp. 309–10).

Holmes reported this to his correspondent, Sir Frederick Pollack, and confided:

“I hate facts. I always say the chief end of man is to form general propositions—adding that no general propositions is worth a damn . . . I have little doubt that it would be good for my immortal soul to plunge into them [facts] . . . but I shrink from the bore” (Strum 1984, p. 310).

Like Holmes, the legal academy has followed the enchantments of text rather than the Brandeisian imperative of disciplined examination of context. Although legal academics have established their independence of the profession, taken in the aggregate they continue to mirror the intellectual styles of both judges and lawyers. Like judges, they privilege legal doctrine and justification. Like lawyers, they place “more value on the inventive, the new, the clever, the winning argument,” and critical deconstruction of opposing arguments than on the collaborative process of “describing, explaining and exploring” the legal world (Carrillo 2005, p. 5). The reluctance of the law schools to be the seat of systematic cultivation of this contextual knowledge is indicated by the regular recurrence of calls for them to do so.

For all the hesitation, empirical research remains an aspiration, if not a high priority, of many law schools. Several changes in the law school world have encouraged LSS. The contraction of the required curriculum has opened pedagogic space; interdisciplinary courses in 30 leading law schools increased from 56 in 1960 to 812 in 2000 (Witte 2005, p. 444). The ascendancy of instrumentalism in legal discourse (Tamanaha 2006) has made LSS more salient. As legal scholarship has become more open to consequentialist and contextual arguments, the legal mainstream has been redefined to include much discourse and scholarship that would once have been regarded as nonlegal. There has been a palpable infiltration of empirical perspectives. LSS work is published in law reviews as mainstream legal scholarship. Significant numbers of law teachers hold degrees in one of the social sciences, and they are particularly numerous in high-prestige schools (George 2006); ambitious centers of interdisciplinary study sprout in many locations. That LSS is attractive to, if not exactly part of, the legal academic mainstream was marked by the adoption of empirical research as the theme of the 2006 Annual Meeting of the Association of American Law Schools.

LSS AFTER THE TURN

LSS faces a setting very different from that of its formative years. The era when high expectations of legal problem solving met soaring optimism about social science expired by the mid-1970s, under the weight of Vietnam, Watergate, and a general collapse of confidence in government (Lipset & Schneider 1987). The thrust for access to justice was replaced by worry about too much law, and expansion of remedies gave way to contraction via tort reform, mandated diversion to ADR, and deregulation. Boundless confidence in law was replaced by relentless recitation of its weaknesses and costs. Although legalization continues apace (Crews 2005), law, lawyers, and regulation are out of favor; privatization and reliance on markets are preferred.

Important streams of LSS research resist the contracting of legal remedies, the hollowing out of law by privatization and ADR, the restriction of access by mandatory arbitration, and the shift from adjudicative to managerial modes of governance. Although such generalizations are rightfully suspect, it is my impression that, in this antinomian era, the tenor of much LSS work has shifted counter-cyclically from skeptical assessment of law's limited efficacy to appreciation of its uneven accomplishments. Or perhaps the detached skepticism that stood in sharp contrast to the enthusiasm of an earlier day now, in a setting of passionate attacks on law and lawyers, appears supportive.

LSS has put down institutional roots that have enabled it to survive the erosion of the reformist soil that nurtured it. It has become less programmatic and more diverse; it has enlarged its intellectual repertoire, for example to include both rational actor and cultural studies approaches, and it has expanded its perspective from national to global.

The legal world that LSS addresses is increasingly populated by large corporate organizations rather than by natural persons (Galanter 2005b). Organizations purchase an increasing portion of legal services. They are more proficient players of the legal game. Enjoying the advantages of repeat players, they win more and lose less in courts and other forums. Nevertheless, they often consider themselves victims (Lande 1998) and campaign to diminish public controls.

LSS is a point of resistance not only to the corporately sponsored common sense about the legal system but also to the growing dominance of corporations in the legal arena. LSS encounters corporate actors in the university setting as well. As the sweep of LSS broadens and the tactical potential of empirical data rises, the incentive and opportunity to produce knowledge to support corporate positions are enlarged. Warren (2002) describes how a credit industry-supported, university-based research center, enjoying the imprimatur of a major university, promoted the Bankruptcy Reform Act of 2005 by producing legendary claims based on proprietary data that could not be examined by independent researchers. Warren describes how the presence of these compromised data led to an antimarket in data in which the presence of bad data leads to dismissal of good data as mutually canceling. A more subtle infiltration of research is the Exxon Corporation's seeding of the research of independent scholars in the hope of producing literature

that would be useful ammunition for advocacy. Exxon promoted and supported extensive research on punitive damages by prominent scholars who were encouraged to place their results in refereed publications (Zaremba 2003, Freudenburg 2005). The findings of this research were later deployed in advocacy aimed at curtailing punitive damage awards (Brief as *Amici Curiae* 2001, Brief as *Amici Curiae* 2002), like the one facing the corporate sponsor in the Exxon Valdez oil spill case. The amicus briefs submitted on behalf of “certain leading business corporations” did not mention that Exxon had funded the research but simply drew attention to “recent social science research demonstrating that jurors are generally incapable of performing the tasks the law assigns to them in punitive damage cases” (Zaremba 2003, p. A20). Thus, we get a kind of counter-Brandeis brief in which an abundance of evidence about real juries in their real-world institutional setting is ignored in favor of laboratory simulations of questionable applicability (Vidmar 2004, Sharkey 2003).

Half a century on, LSS faces perils that its founders could hardly have anticipated because they are the perils of success in a setting very different from the one in which LSS arose. Can the diversity and detachment of the remarkable LSS research community survive the embrace of the law schools? Will the clusters and networks of social scientists outside the law schools—on whom falls the task of producing the next generation of researchers—remain robust in the face of the funding advantage of law schools? Will the competitive norms of legal discourse corrode the ethos of disinterested explanation that has been the hallmark of LSS?

Interest in empirical study of law is rising at the same time that universities are increasingly penetrated by corporations. We have seen the first traces of production of LSS knowledge as part of corporate campaigns in the legal arena. With the decline of public support for appointments and research, will a critical and independent LSS be able to resist the blandishments of corporate sponsorship and the inevitable deformation of the research agenda?

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