# ESSAY

# The Law and Society Movement

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## I.

The law and society movement is the scholarly enterprise that explains or describes legal phenomena in social terms. To put it another way, it is the scholarly enterprise that examines the relationship between two types of social phenomena: those conventionally classified as "legal" and those that are classified as nonlegal. "Law and society movement" is a rather awkward term. But there is no other obvious collective label to describe the efforts of sociologists of law, anthropologists of law, political scientists who study judicial behavior, historians who explore the role of nineteenth century lawyers, psychologists who ask why juries behave as they do, and so on. People who carry on law and society research vary greatly in methods and outlook. What they share is a general commitment to approach law with a vision and with methods that come from outside the discipline itself; and they share a commitment to explain legal phenomena (though not necessarily *all* legal phenomena) in terms of their social setting.

Of course, this does not make a sociologist of law any different from all sorts of other people, including lawyers, politicians, ordinary citizens, or street-corner cynics, who sense the presence of "social forces" in the workings of the legal system. And most lawyers (even law professors) would probably find it easy to agree to some formulation (preferably vague) that asserts that political and economic events obviously bear on the making and enforcement of law. After all, everybody is aware of lobbyists and interest groups. What makes the law and society movement different,

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perhaps, is that its scholars try to be systematic about their subject; they try to achieve rigor in method or theory, and they attempt to separate normative from descriptive issues. Typically, their object of study is living law—the study of how the legal system actually operates. Do judges sentence white collar criminals to shorter or longer terms than burglars? How much do businessmen actually know about the law of contracts, and what difference does it make to them? What is the actual effect of licensing laws on the quality of professional services? The methods are usually those of the social sciences. And the data go beyond the conventional "authorities"—that is, appellate cases, statutes, treatises of law.

In this brief essay, I want to make a few comments on the history and nature of the movement, its strengths and weaknesses, and its place in the law schools.

## II.

The social study of law does not go back much more than a century. Of course, there are insights and viewpoints in older texts, in Montesquieu, or in Jhering, or for that matter in Aristotle. But the law and society movement, in the sense I use the phrase, really begins in the nineteenth century, with figures like Sir Henry Maine, who published *Ancient Law* in 1861, and Max Weber, who was one of the founding parents. The movement depends on two rather modern ideas. The first is that legal systems are essentially man-made objects—social creations, in other words. The second, which is closely related, is the idea of cultural relativity. Law varies in time and space, according to the conditions of the culture in which it is embedded.

Obviously, these two ideas contradict the bases of legitimacy of most premodern theories of law. These theories were on the whole variations on two great themes: the sacred-law theme and the natural-law theme. Both themes had in common the idea that law was, in essence, *not* man-made. In the last two centuries or so, sacred law and natural law have lost most of their magic; bits and pieces survive, of course, and are quite important in modern law; but the legitimacy of modern law is much more instrumental, pragmatic, and relativistic. The law and society movement presupposes an instrumental theory of law. And without a conception of law as essentially a human institution, a product of culture, no social science of law is thinkable.

But instrumentalism, though it may be a necessary trait of social science, is *not* a necessary trait of the thing that social science tries to study. People inside society do not always take a sociological view of their own legal system. Their ideas about law are not necessarily pragmatic, scientific, or rational. Law is a value system as well as a human instrument; and the public most definitely sees it that way.

The law and society movement relates to the legal system more or less the way the sociology of religion relates to religious life. Sociologists of religion study religion as a social phenomenon. It is no part of their business to decide whether this religion, or this dogma or belief, is true or false, moral or immoral. Religions are systems of beliefs and behaviors that rest on faith, tradition, emotions, moral postulates. They can also be studied as aspects of life in society. The same is true of legal systems. They can be studied as social phenomena, without passing judgment on their normative content.

This point easily gets lost in the shuffle. And not without some reason. Academics, whose interest in law goes beyond professional training, usually have some inner drive, some program that is strongly normative. In Europe, most law and society people started out in legal philosophy, and drifted over in the direction of social science. In the process, they never quite molted old skins. They never decisively passed out of sociological jurisprudence into the sociology of law. But between a philosophy of law that is "social" and a sociology of law, there is a world of difference.

Of course, it is natural for scholars to be concerned with moral problems. The line between the "science" of law and the normative reasons and postulates of legal scholars can easily become indistinct. And, though it is all very well to say that the law and society movement has no normative program of its own, that it is interested only in knowledge, in fact, there *is* something of a program. The very idea of an objective, nonnormative study of law casts doubt on the notion that there are "right" or "wrong" legal answers. Everything, rather, is or can be shown to be socially contingent. But an "outside" science of law makes impossible an "inside" science of law, or a Rechtswissenschaft—that is, a discipline internal to the legal system, which derives its reasons from "legal," autonomous principles. A similar point could be made about the sociology of religion. The idea of an objective

study of religion, which examines how religions change over time and which explores the relationship between belief systems and culture, makes it harder to accept claims of supernatural authority. Cultural relativity tends to weaken the grip of absolute systems, in general. But cultural relativity, in one form or another, is at the very core of the social sciences.

In short: The law and society movement sits on a rather narrow ledge. It uses scientific method; its theories are, in principle, scientific theories; but what it studies is a loose, wriggling, changing subject matter, shot through and through with normative ideas. It is a science (or a would-be science) about something thoroughly nonscientific.

Exactly what sort of a "science" does the law and society movement generate? A lot of the work, to be sure, meets the test of scientific *method*: rigorous observation of how insurance adjusters settle claims, laboratory experiments that simulate juries, statistical analysis of arrest data. But scientific methods are not enough to make law and society a science—in at least one very tough and demanding sense: a body of universal "laws" in the mode of physics or geology. To begin with, it is striking how often scholars go back to the founding fathers, to Marx, Weber, or Durkheim. Dozens of articles every year cite these men in footnote one, and address them again in the final sections of the paper. Natural scientists do not hark back endlessly to Gregor Mendel or Lavoisier; astronomers do not revert to Kepler or Galileo. The natural sciences are fundamentally cumulative; they build on prior knowledge; they "progress," in the most literal sense of the word. Of course, they do not always move "forward"; and their development, as Thomas Kuhn and others have argued, is more complex than the naive layman realizes. Nonetheless, when all is said and done, the natural sciences do cumulate knowledge. Can the same be said about the law and society movement? In large measure, the answer is no. The work does not, in general, build or grow; it travels in cycles and circles, round and round.

Why should this be so? There are some obvious social reasons. To begin with, research itself—hard, grubby research—is less honored among scholars than "theory" or "model-building"; this tends to drain talent from the work of building up, and critically examining, a concrete body of knowledge. Also, the field is weak in replications. If there is not much prestige in em-

pirical research, there is even less prestige in replications. If Professor A publishes an analysis of the juvenile court of Jefferson County, the last thing Professor B wants to do is run *exactly* the same test in Calhoun County. She might, of course, be anxious to trump Professor A, but she will do this by designing a better (read: different) plan, and carrying it out in a way that has more (read: different) theoretical interest.

But these are only partial explanations. The real reasons run deeper; that is, they flow from the nature of the legal system itself. There is a qualitative difference between studying objects and forces in the physical world and studying legal systems. To be sure, many aspects of collective or social behavior can be studied quite rigorously. But the problem with "law" is that it cannot be unambiguously defined; it cannot be specifically marked off from the rest of the social world.

There is a lively debate over whether "law" is a universal aspect of social life. Does every society have something that can be called a legal system? The debate is not pointless; on the other hand, there is no definitive answer, nor can there be. It is simply a question of definition and of where to draw boundaries, and the answer depends on how the observer chooses to define "law" and "legal system," and for what purpose. Dozens of scholars have struggled with the concept of law. Clearly there is no objective definition of law, or any clear, physical boundary, since the point of view of the observer determines the definition. Yet there *are* social phenomena that do not share this problem. A general sociology of sexual behavior lends itself, at least potentially, to greater precision because (unless I am wrong) it is possible to describe and define some forms of the behavior in question in a fairly clear, precise, and unambiguous way. Not that law is a uniquely difficult subject; I think a universal, "scientific" sociology of education, or collective behavior in general, would be equally impossible. I suspect the same would be true for many rather general social processes and functions.

As everybody knows, the law of one country is not the same as the law of other countries, in an absolutely literal way. Law is the only social process studied in universities that completely lacks any reasonable claim to universality. French students study French law. They may also study medicine, chemistry, or economics; and what they study will not be different, in essence, from what is studied all over the Western world and beyond.

There is no unique "French" astrophysics. But French law *is* uniquely French; and the same is true of the law of every organized political community. There is, of course, a uniquely French *history*; and so too of every other country. But this only accentuates the point: Few people believe in a "science" of history—a universal, general, abstract history, above and beyond the details of particular nations. There is, to be sure, a science of anthropology—the study of cultures; and anthropologists look for ways to describe and generalize cultures, despite their great variability. There is also a science of language, independent of the multiplicity of languages. Yet the relationship of law to culture is an unsolved problem. A country like Morocco could not, by decree, suddenly transform the language spoken in the streets; and the idea that the king of Morocco could import German grammar or the Japanese verb system is ludicrous. But Morocco could drastically alter at least the *formal* aspects of its legal system; it could borrow the French Civil Code, if it wished, or a Japanese version for that matter. To be sure, the borrowed law would not necessarily "take"; but it might have *some* impact on social life, and that impact is as far as we can tell not amenable to prediction or explainable in general terms.

It is true, of course, that there are certain basic social functions that, by and large, are carried out by people and institutions usually thought of as legal. Conflict-resolution is an obvious example. Possibly, at some level of abstraction, these functions are common to all human societies. Studying these might open a door to a truly universal science of law. The trouble is that human societies differ greatly in the way they handle even "universal" functions, if there are any. The "legal system" may have nothing to do with these functions in one society and a lot to do with them in others. In some societies, marriage and divorce are legal processes; in others, couples begin and end relationships without formalities or with formalities quite different from ours. No universal "science" of law can be based on universal functions.

I make this point, paradoxically, not to bury the law and society movement, but to praise it, or, at least, to put it in its rightful (and manageable) place. When I say that there is no general science of law, I do not mean to disparage work on litigation and courts in Europe and the United States, or on procedures in juvenile courts, or on criminal justice in the early modern period, or

on village communities in Turkey. The study of some discrete part of the legal system or of some communities or group of communities can be "scientific," so long as the object of study is bounded and defined in terms of time and place. Such studies are not only possible; they are highly desirable. There is no reason why a team of scholars could not, and should not, design and carry out a study of how labor courts in West Germany, let us say, reach their decisions. The study, if properly done, will no doubt tell us a lot about the German legal system, or about labor-management problems in Germany. If it is a *very* good study, and grounded in hypotheses at least of the middle range, it might suggest some insights into labor courts in Europe in general. It might inform us, too, about the meaning of law within that whole class of societies of which Germany is a reasonable example, or about those social behaviors that cluster about the employment relationship in modern Europe, or about decisionmaking in settings like that of the labor courts.

What I exclude, then, is a kind of macrosociology of law, an experiment in grand theory that tries to sweep every little bit of legal matter into its net. To be sure, there have been some noble attempts. The best of the lot are admirable, learned, and genuinely enlightening. There is, for example, Max Weber's astonishing achievement. But even Weber's sociology of law does not aim at a universal "science" (as, for example, economists do). Weber's work is essentially a sociology of formal systems of legal thought, but with specific reference to the "rational" legal systems of modern capitalism. Weber also added insights about an amazing range of subjects: the legal profession, law and the rise of capitalism, and so on. But he avoided abstract model-building. There are no axioms or universal propositions in his work; instead there are definitions, classifications, and typologies. The propositions are, on the whole, carefully qualified and hedged; everything is deeply rooted in time and place, and in the richness of the social matrix. His sociology is concrete, historical, time-bound. Indeed, that is its value.

The point is this: People who study law socially are like the people in research institutes devoted to "areas"—Latin America or Eastern Europe. Nobody claims that Latin American Studies is a "science," or a "discipline," or even a united subject-matter. There cannot be a "theory" of Latin America or of Eastern Europe. But it is useful, for all sorts of reasons, to have an organiza-

tion, a framework, an institution in which to study Latin America or Eastern Europe. The same is true of people concerned with law and legal systems. They can learn from each other, even without a common theory or discipline. (In fact, we lack legal "area studies." There are few institutes, few formal organizations in this country to serve this purpose.)

At this point, then, there is no general science of law, but there are studies about an impressive range of aspects of law. The real question is not what scientific "laws" the law and society movement has discovered (none), but whether it illuminates important areas of law, or sheds light on significant social processes or problems. Here one can tick off a great many examples: studies of the way juries operate, studies of "legalization" within administrative agencies, longitudinal studies of the business of courts, studies of what no-fault divorce is doing for or against women, studies of the operation of tribal court systems, evaluations of the California determinate sentencing law. Some of these studies are extraordinarily interesting and important. Of course, the studies do not add up to a general theory. They radiate out to illuminate social processes in various aspects of law. They inform us about criminal justice, or antitrust, or dispute resolution in business. They should be judged on the basis of their utility and theoretical value—but within their particular sphere.

## III.

The studies I have referred to have a feature in common: They are studies within one "field," or one particular country, or a small group of countries. They *assume* a given social context. Comparative and historical data are of course always important. Rigorous study requires some sort of control group, or some device to imitate or simulate a control group; comparisons with other societies, or with other periods, serve roughly this kind of function. It is a weakness of, say, law and economics, that it tends to be blind to culture and context; it does not test its theories and findings, by and large, against other times and places.

Most work in the law and society movement in fact concerns recent times, and most of it concerns the Western countries. This is, then, the basic subfield. The countries in question have a number of features in common. They all have formal court systems, most of them relatively independent of the central govern-

ment. They have large public sectors, and have developed over time into some sort of regulatory welfare state. They have mixed economies; there is a vigorous private sector, but there is also regulation of business and a public or nationalized sector. They respect and guarantee extensive rights of private property; but they have also set severe limits to those rights. They have developed codes of basic rights, with special emphasis on criminal law. They allow citizens to participate in the process of making law, at least through lobbying and pressure group activity. In all of these countries, "public opinion" in some form has an influence on the making and enforcement of law. All of these countries have organized legal professions, of one type or another; and they have legal traditions that, though divisible into "civil law" or "common law" or other categories, do have a history of mutual dialogue and of social and economic interaction.

These legal systems are exposed, in a particularly naked way, to influences that flow *into* the legal system, however defined. These are certainly not "stateless" societies. Legal systems in these societies are enormous, ubiquitous, and active. They are in constant turmoil and change. Of course, there is vigorous dispute and debate about how much flows in and how much flows out of the legal sector; about the influence of class, race, wealth, and the like on the operation of the system; and even about what (if anything) it means to flow "in" and flow "out." But it seems clear that—unlike (perhaps) traditional legal systems (and perhaps authoritarian legal systems)—"public opinion" in the broadest sense, or those values, opinions, attitudes, and expectations that make up the legal culture, constitute fundamental building blocks of law.

To put it another way, the main motor force of legal change derives from concrete demands on the institutions that make up the legal system. The legal system is forced, because of its position of exposure, to make some sort of response to these demands. Demands will be heard and processed in some way; some sort of legal act will (very often) be produced. (It can, of course, be a flat refusal to change or to move.) Legal institutions also tend to *transform* demands as they handle them; that is, they change their terms, they translate them into "legal" concepts, they work on them in patterned ways. How much this alters the nature and meaning of social demands is an empirical question. In any event, the output of the legal system—laws, decisions, or-

ders, and administrative behavior—leads in turn to more social change, which affects the legal culture, influences demands on the system, and starts the cycle over again. What is appropriate to such societies, in short, is a dynamic model of law, if such a phrase is called for.

This picture suggests some general themes that might guide research, or at least ways to arrange and order what has been done into a more or less coherent scheme. It suggests, in other words, ways in which to define the field of law and society studies, and points toward a few meaningful boundaries. The work done so far falls into a few broad classes. To begin with, there are studies dealing with the production or shaping of law within a given society: how concrete events, situations, expectations, thoughts, and actions impinge on "legal" institutions and change their behavior. Where do demands on the legal system come from? What causes them? What forms do they take? Next, there are studies of the operation of the legal system itself, its internal workings, and studies of the transformation process—what happens to raw demands and raw "fact situations" when they get into the hands of legal professionals. Research on judicial decisionmaking has run into something of a dead end; but perhaps this problem is only temporary. There seems to be growing interest in legislative and administrative decisionmaking. There is also a good deal of interest in the legal profession as such. Lawyers, after all, do much of the work of translating lay demands into legal forms.

Then there is study of the *impact* of law. This is a difficult area. It includes the problem of *communication* within the legal system. After all, a norm or order is useless, unless it reaches some audience; if nobody hears the message, no impact is possible. Beyond that is the study of impact itself. This includes the tangled question of deterrence, the effect of rewards and punishments on behavior. In recent years, there have been literally hundreds of studies and reports on deterrence. The hard questions are still open: *who* gets deterred, and when, and how much, and why? Everybody concedes, or should concede, that impact is more than a matter of rewards and punishments. People are influenced by social roles; by family, friends, and neighbors; by religion and tradition; by ideas of right and wrong; by a mysterious something called legitimacy. How these feelings and motives arise, and what effect they have on impact, is a difficult, underde-

veloped field. Here, too, it is appropriate to study the symbolic and expressive meanings of legal institutions and legal language. These meanings may ultimately affect the behavior of members of society. Finally, there is the study of feedback. Feedback is a specific form of impact; it is the way responses and behaviors curve back and affect the system itself.

All this is merely by way of suggesting a general framework—some way of organizing work done within the law and society movement. The framework does not override the particulars. The sociology of family law, the history of tort law, the anthropology of crime and punishment—these all, no doubt, stand on their own two feet. Perhaps everything will coalesce into one grand theory—some day. I tend to be skeptical. But never is an awfully long time.

## IV.

Despite the lack of general theory, then, this is a promising field and a movement that can credit itself with solid accomplishment. It has its own journals, it produces strong work, it has a future. I turn now to a less sanguine side of the story. The law and society movement has been trying to shoehorn its way into law schools for more than 60 years. How far has it gotten? Where does it stand as of now? What has it achieved? And where does it seem to be going?

To be frank, the study of law and society, by whatever name, is something of a stepchild in the law school world. The *Yale Law Journal* held a symposium on "Legal Scholarship: Its Nature and Purposes," in February 1981. This symposium included all sorts of schools, philosophies, and trends; the law and society movement was conspicuously absent. There was, to be sure, an excellent essay on legal history, and some attention to law and economics. But the rest of the social sciences got only casual and occasional mention. The symposium left out anything smacking of the (general) sociology of law or related fields. No leading figure in the movement presented a paper; the movement could claim one commentator at most. There is much more life in the field *outside* the law schools. The membership of the Law and Society Association (to take one rough indicator) consists chiefly of social scientists, who outnumber law professors by over two to one.

The neglect in the law schools calls for some explanation.

Whatever can be said about (or against) legal scholarship, there is certainly a lot of it. There are something on the order of 200 law reviews, and they all fill up their pages. In the main, they get filled with what is left of orthodox legal scholarship. The rest reflects whatever is bubbling and fermenting in the law schools. Law and economics generates some excitement; so do critical legal studies, in various versions; a huge number of pages gets taken up by constitutional theology (if I may call it that) and the endless search for the magic bullet in fourteenth amendment cases. Law and the social sciences (other than economics) do not make much of a dent. I once found this surprising. I thought the social sciences would revolutionize legal scholarship and training. But the law school world changes much less than I hoped; and, when it does change, it moves in directions I did not expect.

It was probably naive to think otherwise. In hindsight, it is clear why the law and society movement, in teaching and research, could never hope to "capture" the law schools. To begin with, empirical research is hard work, and lots of it; it is also non-library research, and many law teachers are afraid of it; it calls for skills that most law teachers do not have; if it is at all elaborate, it is team research, and law teachers are not used to this kind of effort; often it requires hustling grant money from foundations or government agencies, and law teachers simply do not know how to do that. The whole thrust of legal education goes against the grain of law and society. Law school tries to empty the mind of all "extraneous" matter, the better to develop legal skills. The finest products of this process, of course, end up as teachers. Once they have emptied themselves of the extraneous, it is hard to reverse the process; and mostly they never try.

Prestige is a factor, too. Law schools (they are not alone in this) tend to exalt "theory" over applied research. Empirical research has an applied air to it, compared to "legal theory." The law and society movement stresses the importance of what is happening in society, as opposed to exclusive attention to what is "inside" the system. This means, first of all, that one has to know something about the surrounding society—things lawyers are unlikely to know, in any systematic way.

The law and society people, on the whole, tend to emphasize behavior (and attitudes as they affect or reflect behavior). Legal scholars find this emphasis uncomfortable, even threatening. To them, law is norms, or language, or ideology, or rhetoric, or

"consciousness," or discourse—anything but behavior. Behavior is suspect, for the reasons mentioned. Of course, the emphasis on behavior, like its opposite, can be carried to extremes. The students of behavior and the scholars of formal norms do make feeble or gingerly gestures of accommodation toward each other. This bridges the gap only slightly.

In the second place, the emphasis on political and economic behavior implies less reverence for the causal force of purely *intellectual* forces—the role of legal thinkers, formal doctrine, philosophy and theory of law; the role of abstract *ideas*, rather than concrete interests and behaviors. But many professors are themselves intellectuals; they are drawn to theory, to the playful or serious treatment of ideas. The stock in trade of intellectuals is the life of the mind. Those legal scholars who dominate writing in the leading journals are men and women who are fond of books, essays, and discussions; they are at home in the milieu of argument and logic; grubby facts of day to day life attract them less than the grandness of theory; they are looking for universal truth, and they do not expect to find it among the nuts and bolts of some particular place and time. Thus the keenest minds in legal education tend to find appealing precisely those aspects of legal life, and those law school tendencies, in which the law and society movement is least interested. Also, to attack the primacy of *intellectual* forces in the history and functioning of legal systems is to attack intellectuals themselves as an interest group. It downgrades their importance and the importance of their work. Nobody likes that, of course.

The law and society movement inside American law schools got seriously underway in the 1920s and 1930s. One trait of this early phase was the idea—or fallacy—that social science techniques could solve actual legal problems. This attitude was only natural. Lawyers are inveterate problem-solvers; the legal system in general is a problem-solving system. This does not mean that it actually solves problems, in the sense that a mathematician does. It only means that trials, appeals, legislative debates, and so on must produce answers, right or wrong, to the questions and issues raised. Science or philosophy can dismiss a problem as currently insoluble; the law cannot. A judge, faced with conflicting "authorities," does not abandon the case. Clients pay lawyers for answers, not for philosophical speculations and doubts.

Partly for this reason, perhaps, movements to replace "traditional" legal research with something better or more elaborate tend to be better or more elaborate problem-solving methods. This, for example, is true of most (not all) writing on law and economics. The premise is not merely that economics sheds light on what the the legal system is or does, but that it provides a way of deciding what the best legal rule is for certain classes of cases. Constitutional theory holds out a similar promise. There is the endless search for the key to constitutional problems: what due process or equal protection really means or should mean, what methods and techniques produce "correct" results. The current left wing of legal scholarship does not, in the main, adopt a problem-solving approach. Yet, in a way, it accepts the premises of the scholarship it attacks. There is a delight in trashing or unmasking the assumptions of law and economics, or "liberal legalism." But the left tends to show great impatience with "mere empiricism," and its program is to expose ideology, not to show how anything actually works. (This is, I believe, its greatest weakness; yet many people find this trait, to the contrary, extremely seductive.)

The law and society movement has abandoned *most* of its problem-solving emphasis. What it has is, first of all, a hunger to describe and explain, more or less divorced from problem-solving in its crudest sense. But the function of law school is to teach a trade, which means in turn to teach people how to ferret out answers. Thus an approach that rejects this function fits poorly inside the law school, at least in terms of law school ideology. It may also be true that students who are attracted to legal education are activists and problem-solvers, and they have had quite enough sociology in college for their tastes. Most law professors, at least in this regard, tend to be rather like their students. The exceptions are the intellectuals who reject the law and society approach for other reasons.

I do not mean to say, of course, that there is no "practical" value in understanding the psychology of juries, or the effect of the sexual revolution on family law, or the way in which obstetricians adjust to malpractice law. There is a vast and crucial difference between "answers" and relevant insight. It simply has to be true that policymaking is better off when it is based on a sophisticated understanding of the way the legal system actually works and *why* it works that way—better, more just, and, yes, more effi-

cient than policymaking based on neo-Langdellian logic or on some purely abstract "theory" or "model," hatched in a book-lined office and full of "simplifying assumptions."

Law and society people thus have a valuable product to sell; but they tend to be somewhat more self-effacing—skeptical perhaps—than some of their colleagues. They almost never make the claim, which economists now make routinely, that a lawyer who knows their skill is a better lawyer than one who does not. Historically, of course, this claim is absurd for *any* social science; it is absurd in terms of dollars and cents. Fortunes in antitrust law and other fields have been made by lawyers who could not tell a demand curve from a shipworm. Legal economists have a tendency to claim too much; they are notoriously imperial. Inflated claims and ambitions also are characteristics of constitutional theology—and the work of orthodox legal scholars as well. On the other hand, the claims made by economists may turn out to be true after all. This will happen if lawyers come to believe in the claims, and if judges and administrators actually *use* economics to solve legal problems.

Other social sciences, alas, are not in the happy position of economics and have no prospects of getting there. To be sure, they have a foot, or at least a toe, in the door of some law schools. Prestigious law schools offer courses in sociology, history, or philosophy of law; or in psychology or anthropology of law. But everybody knows that these are elegant frills, like thick rugs in the dean's office; they have nothing to do with "real" legal education. A school can do without these frills, in a crunch. Indeed, being a frill is precisely what makes these courses valuable, even essential, to an elite law school. After all, *every* school has a course in torts; offering torts does not discriminate between elites and proletariat; a course in legal anthropology does.

The marginality of the social sciences is a trifle obscured because these subjects, in general, are becoming undeniably more useful to law—for example in complex litigation. Demographic analysis plays a role in litigation over sex discrimination. Psychiatrists and psychologists get drawn into child custody cases; sociologists and psychologists help out in choosing juries. All this, however, is peripheral to the law and society movement, just as forensic medicine is peripheral to the sociology of medicine. A good lawyer may have to know something about sociology, or psychology, or statistics in certain types of cases; other good law-

yers have to know something about ballistics, or stress factors in bridge building, or computer science, or the history and structure of the perfume industry. Social science *in* law is not social science *of* law, or even close.**

In the foreseeable future, it seems likely that the present situation will not change very much. That is, the law and society movement will remain outside the law schools, pressing its nose against the glass, mildly jealous of the success of its step-sister, economics, most definitely a wallflower at the ball. Should anybody care? Is enough going on in the university as a whole,

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** My colleague William Simon made the following comments on an earlier draft of this essay. I did not change my mind (or my text), but his point of view is valuable, and I present it in full in his words:

> Your account of the marginality of law-and-society ignores what seems to me a critical political dimension. Law-and-society has always been associated with the Progressive-New Deal tradition of the regulatory welfare state. This association has a lot of dimensions. One is the attack on formalism in legal thought which, as Duncan Kennedy has argued, has been linked with center left politics. Another is the aspiration to produce policy-relevant studies concerning the efficacy of the various activities of the regulatory welfare state. Your emphasis on the theoretical, nonpractical orientation of law-and-society surprises me. I think most people looking at a program for an annual law-and-society meeting or the table of contents to *Law and the Behavioral Sciences* would get the impression that the movement is intensely concerned with practical policy, and that the practical policy matters with which it is concerned are those relevant to the effectuation of the traditional center liberal program. Thus, one factor involved in the marginalization of the movement is the collapse of the New Deal tradition and the cutbacks in regulation and welfare programs.
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> This fact doesn't explain why L and S wasn't more prominent before the 1980s. Two lines of explanation seem relevant here. One is the survival of the formalist doctrinal tradition in legal education. The other is the increasing preeminence of the corporate firm career path for students at the elite law schools and the failure (or refusal) of L and S to produce research relevant to this type of practice. L and S clearly has produced a lot of research that's relevant to practice. If you're going to be a p.i. lawyer, you'll get a lot more information of practical value out of Ross's *Settled Out of Court* than you will out of Calabresi's *The Cost of Accidents*. The problem is that most elite law students are not going to be p.i. lawyers, nor are they going to assume any of the public regulatory, welfare, or criminal law roles to which the L and S stuff is most relevant.
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> If the elite schools had evolved the way some of the realists wanted them to, toward training people for elite public service positions, if the dominant model had become Wisconsin under Hurst, rather than Harvard under Hart, the fate of L and S would have been quite different. Perhaps it's hard to imagine that the alternative could have happened. If it is, it must be because of the anomalous absence of an elite public service corps in America, though one would have thought that the development of one would have been within the realm of possibility during the New Deal.
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> In any event, it seems to me that the real political role of L and S has to be found in institutions that are preparing people for public service or community practice. This probably means writing off most of the elite schools, but at schools like CUNY that are focused on public service, there may be promising opportunities.

among political scientists, sociologists, and others, so that we can ignore the backwardness of law schools?

Unfortunately not. It is true that law and society people are more common outside law schools than inside. But their position is nowhere very strong. People who study the legal system seem to be marginal, wherever they are. Sociology of law, studies of judicial systems in political science, anthropology of law, psychology and law—all of these, alas, are not in the "mainstream" of their disciplines; they are not "where the action is." Mainstreams are of course mere matters of convention or definition. They change course very quickly. Still, there are no signs that this is about to happen. Indeed, the trend may be heading the other way: Studies of public law and judicial behavior are on the verge of extinction in some departments of political science. And there is no *financial* base. Billions of dollars are spent in this country on research of all sorts. Precious little flows into law and society work. There is a well-run program inside the National Science Foundation; the money it spends per year on research would not sustain high-energy physics for one day. Law and society scholars are beggars fighting for a handful of coins. When an *investment* is so terribly small, it is hard to get new recruits; and the output too will be small.

This rather weak position reinforces, if it does not add to, what appears to be a substantive weakness in the field itself. To many observers, the work done so far amounts to very little: an incoherent or inconclusive jumble of case studies. There is (it seems) no foundation; some work merely proves the obvious, some is poorly designed; there are no axioms, no "laws" of legal behavior; nothing cumulates. The studies are at times interesting and are sporadically useful. But there is no "science": Nothing adds up. Law and economics offers hard science; CLS offers high culture and the joy of trashing. The law and society movement seems to have nothing to sell but a kind of autumnal skepticism. The central message seems to be: It all depends. Grand theories do appear from time to time, but they have no survival power; they are nibbled to death by case studies. There is no central core. And, to be sure, there is some truth to these complaints—though only if the standard of legal "science" is a universal, timeless, and impossible one.

In any event, these are some of the reasons why the law and society movement has not found a home in the law schools, how-

ever much it deserves one. As a consequence, the law school world is seriously impoverished. Law and society studies are not essential ingredients to make a successful lawyer; but I do not see how one can grasp the meaning of law within society except from the vantage point of social science. "Law" is a massive, vital presence in the United States. It is too important to be left to the lawyers—or even to the realm of pure thought.

Basically, the law and society movement has made, and can make, a major contribution, just by insisting on its way of looking at law, together with its box of tools to use in carrying out the work and its simple but powerful ideas for arranging and explaining the work. Its angle is a kind of deliberate detachment: separating *study* of law from the values that are part of its substance. It is certainly true that no research design or interpretation of results can ever be totally "value free." Questions asked are always asked for a reason; in a sense, too, all measurement is lightly or heavily scented with the values of those whose hands are on the switch. But the best of the work is at least aware of these limitations; the best scholars try to *approach* objectivity. And at its best, the law and society movement holds up to the law a mirror and a yardstick; it stands for clarity, honesty, and rigor in the study of legal institutions. How many of its rivals can seriously make that claim?