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SOCIOLOGY OF LAW FOR A POSTLIBERAL SOCIETY

*Frank Munger**

I. THE SOCIOLOGICAL IMAGINATION¹

C. Wright Mills wrote that the sociological imagination is liberating.² He wrote that while private lives are often experienced as a “series of traps,”³ created by impersonal forces in society—hierarchies of class, race, and gender; the power of those in authority; conflicts among nations; the rise and fall of economies—“[t]he sociological imagination enables its possessor to understand the larger historical scene in terms of its meaning for the inner life and the external career of a variety of individuals.”⁴ American studies in law and social science⁵ began in the spirit of Mills’s sociological imagination as legal realism, a movement that departed from prior intellectual traditions by “imagining” an activist, interventionist state and an instrumental role for law in managing society’s problems. Imagining law as politics and as enmeshed in society also suited the reformist impulse in American social science studies of law. Further, instrumentalism and reform were quite consistent with the twentieth-century American reception of nineteenth-century European sociological theories of modern, industrial society that probed the under-

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1. As my use of C. Wright Mills’s concept to frame this Essay suggests, I have relied extensively on the work of other scholars who have thought and written more deeply and more clearly about the promises and problems of the sociology of law. Indeed, as the footnotes to this Essay soon reveal, there is little that has not been proposed and discussed thoroughly in an extensive contemporary literature about the meaning of social science in empirical studies of legal institutions. For those interested in the discussion that has had the most influence on the direction of this Essay, I recommend a recent special issue of the *Law & Society Review* in which the impact of postmodernism and the need for political economic theory was debated at length. *Law and Society Association 1992 Presidential Address*, 26 *LAW & SOC’Y REV.* 697 (1992).

2. C. WRIGHT MILLS, *THE SOCIOLOGICAL IMAGINATION* (1959).

3. *Id.* at 2.

4. *Id.* at 3-5.

5. For much of this Essay I refer to social science studies rather than sociological studies of law. Distinctions among the social sciences have become blurred, especially in the law and society field, and I do not think it will be meaningful to limit my comments to the work of persons trained only in sociology. The illustrations I describe at greater length in part III are largely by sociologists. At other points I refer to studies of law and society, indicating a broad field in which social science and humanities play equally important parts.

pinnings of the rule of law and of the state's capacity to respond to industrialization. From these beginnings law and social science scholarship has often hewed close to Mills's mission, criticizing wrong assumptions and false claims about law's role in the ordering of everyday life. Much of the innovative work in the field springs from a problem focus—and this serves Mills's purpose—that sociology enlarges the public's vision and broadens public discussion of social issues.

Some of the qualities of the sociology of law that underlie its potential for enlarging public discourse about law are shared with many other "law and . . ." disciplines. Indeed, in recent decades the law and social science movement has become exceptionally broad and diverse. The movement has incorporated all of the behavioral sciences, and more recently the humanities. With the turn of legal scholars toward other fields of study in the humanities and social sciences, work in the law and society field has been drawn closer to the legal academy than at any time in the past. A valuable merging of perspectives has taken place as a younger generation of law school academics and law and society scholars develop shared interests in literary and cultural studies, interpret particularistic perspectives on legal process, and attempt to deconstruct a foundation of assumptions about law and the world upon which prior legal and behavioral science scholarship was built.⁶

In these comments I describe what is distinctive about social science studies of law and explain how these qualities have contributed to the enlargement of our understanding of the role of law.⁷ I note the problem-focused orientation of past studies and I pay particular attention to the role of social science as criticism. I also suggest that while the problem focus and critical stance of this work has often yielded important insights, these qualities alone fall short of accomplishing the larger task of interpretation and imagination described by Mills. In part II, I describe the origins of modern American studies of law and social science,

6. Ironically, many social scientists believe the emerging rapprochement among law, the humanities, and social science threatens to undermine the value of social science for understanding the place of law in society. Such critics take the view that much new law and society scholarship sacrifices the discipline that makes social science different and, thus, sacrifices its value to other disciplines. An essential element of that discipline is the sociological imagination—that is, the interpretation of insight about law in a larger context—and it is precisely this element that may be lost.

7. My arguments apply to many of the social sciences. While the organizers of this Symposium have singled out sociology and several other behavioral sciences for separate treatment, I see the roles of sociology and anthropology—both topics of Symposium essays—as only marginally different from those of political science and psychology—important fields not included in this Symposium. My examples are drawn mainly, but not exclusively, from sociology.

its evolution, and the field's problem orientation and criticism of liberal legal ideals.⁸ Readers already familiar with this story or who have less interest in its retelling may wish to begin with part III, which describes the movement away from these origins and the struggle to reconceptualize problems encountered by law in the modern world in broader and postliberal terms.⁹ I describe six examples of recent work in the field of sociology of law which make important contributions to action theory, theory of the state, studies of law and culture, theory of bureaucracy and subordination, understanding the postindustrial legal profession, and the evolution of legal doctrine. In part IV, I attempt to draw together what these studies tell us about how the field is changing and enriching our understanding of the role of law, representing progress toward, as C. Wright Mills urged, a more "fruitful form of . . . self-consciousness."¹⁰ The Essay concludes with a brief word about the promise and the hazards of pursuing social science studies of law with full awareness of its role in public discourse.¹¹

II. A PROBLEM-FOCUSED SOCIOLOGY OF LAW

In 1962 a small volume of essays on the sociology of law from a faculty workshop at Rutgers Law School made a case for the importance of "a renewal of interest in the Sociology of Law."¹² William Evan's introduction emphasized the importance of law for American world hegemony and domestic change. The essays are by the founders of the American sociology of law: Hans Zeisel,¹³ Fred Strodbeck,¹⁴ David Riesman,¹⁵ Talcott Parsons,¹⁶ and Harry Bredemeier,¹⁷ among others. In them the authors describe the role that law plays in supporting the order maintained in civil society.

8. See *infra* part II.

9. See *infra* part III.

10. MILLS, *supra* note 2, at 7.

11. See *infra* part V.

12. William M. Evan, *Introduction to LAW AND SOCIOLOGY: EXPLORATORY ESSAYS* (William M. Evan ed., 1962) [hereinafter *LAW AND SOCIOLOGY*].

13. Hans Zeisel, *Social Research on the Law*, in *LAW AND SOCIOLOGY*, *supra* note 12, at 124.

14. Fred L. Strodbeck, *Social Process, the Law, and Jury Functioning*, in *LAW AND SOCIOLOGY*, *supra* note 12, at 144.

15. David Riesman, *Law and Sociology: Recruitment, Training and Collegueship*, in *LAW AND SOCIOLOGY*, *supra* note 12, at 12.

16. Talcott Parsons, *The Law and Social Control*, in *LAW AND SOCIOLOGY*, *supra* note 12, at 56.

17. Harry C. Bredemeier, *Law as an Integrative Mechanism*, in *LAW AND SOCIOLOGY*, *supra* note 12, at 73.

Perhaps the most interesting of the essays is by someone whose name is not familiar to the current generation of law and society scholars. The workshop's organizer, Thomas Cowan, argued that significant differences between law and social science as intellectual disciplines meant that they had different and complementary contributions to make to understanding the role of law.¹⁸ Professor Cowan perceived two differences of particular importance: the practical dependence of the law on judgments about feelings and values in contrast to scientific judgments based on objective facts,¹⁹ and the attention paid in legal analysis to the individual case in contrast to the interest of social science in general patterns.²⁰ By 1993 the perspective of social science has changed significantly, and Professor Cowan's characterization of "legal method" seems to describe an interpretive and actor perspective that is quite compatible with the current social science of law.

Though Professor Cowan did not entirely or correctly describe its sources, tension still exists between legal scholarship and social science scholarship regarding the law. While empirical research has always offered the promise of improved understanding of the reasons for or the consequences of the legal system's decisions and actions and, thus, has always been quite compatible with enlightened law scholarship, social science brings its own framework to that task. Evan's symposium is an excellent example, for with the exception of Professor Cowan's essay, the symposium treats law as a special case of general social processes and general social organization. But the tension is deeper than this. Social science scholarship about law has often seemed to require justification or even apology.²¹ The source of the tension has sometimes been located in the "scientism" of social science,²² which seems to make its knowledge both obscure and privileged, or in its indeterminate results, as in the analysis of the effects of racial segregation on education²³ or the impact

18. Thomas A. Cowan, *What Law Can Do for Social Science*, in LAW AND SOCIOLOGY, *supra* note 12, at 91.

19. *Id.* at 103.

20. *Id.* at 113.

21. See Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986); Stewart Macaulay, *Law and the Behavioral Sciences: Is There Any There There?*, 6 LAW & POL'Y 149 (1984); Richard D. Schwartz, *The Law and Behavioral Science Program at Yale: A Sociologist's Account of Some Experiments*, 12 J. LEGAL EDUC. 91 (1955); David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

22. Macaulay, *supra* note 21, at 158.

23. Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, LAW & CONTEMP. PROBS., Autumn 1978, at 57.

of jury size on jury decisions.²⁴ But such apologies that locate the difficulties encountered by social science in the weaknesses of social science method miss the important point captured by Professor Cowan: Social science research about law and legal analysis ultimately has very different goals.

In a valuable discussion of the uses of social science in legal decisions, Richard Lempert describes numerous instances where social science studies have been invoked, much like legal precedent, without regard to the strength of the underlying body of research.²⁵ Conversely, Professor Lempert describes the ability of judges to render irrelevant relatively conclusive research on a legal issue by shifting the grounds for decision to a different principle.²⁶ In effect, social science in the legal process often becomes a tool serving a result-oriented decision.

More generally, social science often does not fit the tasks that legal decisions or policy making consider central. First, social science describes action oriented to law in terms that cut across legal categories.²⁷ The purpose of social science is to increase understanding by introducing a perspective outside the legal system's own. Roger Cotterrell states this overarching purpose most broadly: "The possibility of ultimately describing and analyzing the social reality of law, as the embodiment of knowledge that transcends partial perspectives, is the possibility of *science*."²⁸ While social science research of law varies greatly to the extent to which it employs a wholly independent perspective, ultimately, rules and policies are not its only framework.

Second, the body of social science research, rather than the individual study, is the most important measure of "findings."²⁹ Even in a case study of a unique problem, the social scientist reaches conclusions based

24. Richard O. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643 (1975).

25. Richard Lempert, "Between Cup and Lip": *Social Science Influences on Law and Policy*, 10 LAW & POL'Y 167 (1988).

26. *Id.* at 187; see also Phoebe C. Ellsworth, *Unpleasant Facts: The Supreme Court's Response to Empirical Research on Capital Punishment*, in CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES 177 (Kenneth C. Haas & James A. Inciardi eds., 1988) [hereinafter CHALLENGING CAPITAL PUNISHMENT] (discussing how Supreme Court has dealt with empirical research regarding deterrence, discrimination, and fairness of capital juries in death penalty cases).

27. This is true even for the "constitutive" theory of law described below. This observation will seem more relevant in that context, but the point is that however reduced the scale of the sociological inquiry, it is conducted within a nonlegal framework.

28. ROGER COTTERRELL, *THE SOCIOLOGY OF LAW* 4 (2d ed. 1992).

29. C. Wright Mills wrote: "The working social scientist must always keep uppermost a full sense of the problem at hand." MILLS, *supra* note 2, at 121. Mills stressed that both background and experience are required to gain a full sense of a problem. See *id.*

on experience with other problems and situations that may reveal the possibilities and limits of what may be inferred. A body of research that has produced apparently conflicting findings may not be useful to legal practitioners or law academicians concerned about specific policies or cases. Nevertheless, conflicting research findings are valuable to social scientists because they reveal the complexities of the problem and illuminate the limits of the methods employed to examine them and draw inferences about them. Varied findings based on different perspectives, different methods, or different data confirm, rather than detract from, the value of the entire body of research. Conversely, social science knowledge can almost always be rendered irrelevant by casting a legal decision in terms that are sufficiently particularized or general enough to render irrelevant the experience accumulated in the course of social science research.

Third, some might make method a defining characteristic of social science, but I believe that the particular kinds of methods used are not very important.³⁰ Professors Lempert and Sanders note how broad the law and society field has become, with significant contributions from a wide range of empirical methodologies.³¹ What seems most important about social science observation, interpretation, and reporting is that it is a matter of discussion. Social science is not different from law in attempting to free decisions from bias or personal idiosyncrasy, but it is different in its reflexive approach to method³² and its dedication to testing ideas empirically rather than relying on logical derivations from premises.

These qualities have often put social science on a collision course with those who produce legal policy. In response to the conclusions reached by policy scholars and policy makers, purveyors of social science might say: "But there is a better explanation of what the law does or what it means than the one you have offered." In this sense, *the role of social science of law is inherently critical*.

Social science inquiry about law can be framed to challenge a little or a lot of the lawyer's view of the legal system. Some social science is fully embedded in a lawyer's formally defined system, making problematic only a narrow range of questions; thus, it is designed to provide concrete answers to empirical questions in a form in which findings are most

30. As Professor Cowan observed, social science is so broad it has no "method" at all; indeed, he concluded, that is its strength! See Cowan, *supra* note 18, at 92-93.

31. RICHARD LEMPERT & JOSEPH SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE 2 (1986).

32. This reflexive approach to method is designed to make the observer self-conscious.

easily understood and applied in the legal process.³³ Research on school desegregation, on the administration of the death penalty, or on the effects of sentencing guidelines was initially designed to play by the rules of the legal system, not to challenge the legal rules or change the questions being explored.³⁴ At the other extreme, the law can be treated as just so much grist for broad sociological theory, which may not be concerned with law on its own terms but rather with general problems of order and action, structure, and change.³⁵ Thus, social science of law has never formed a unified body of work, and to understand it one must appreciate this continuum of perspectives.

However, much of the research of the law and society movement lies between these two extremes and may be described as problem-focused. This research examines law within a framework constructed from the qualities or characteristics of actors and their settings not attended to by the legal system; it explicitly plays off the expectations or assumptions acknowledged by the legal system or within the legal culture.³⁶ This problem-focused literature has comprised the mainstream in law and society. Stewart Macaulay defended this approach against the criticisms of both critical and mainstream legal scholars who were disillusioned by the

33. For an excellent introduction to the uses of social science in the legal process, see JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* (2d ed. 1990).

34. The potential always exists for making the legal system's handling of a problem look bad, even when the research answers the very questions that courts or lawyers themselves pose. Social fact evidence on race discrimination or other effects of law may be ignored or rendered irrelevant by a court but may, nevertheless, become a powerful argument for legal change or other forms of evaluation and response. Following the Supreme Court's rejection of a long line of death penalty research, social science scholars have turned to pointed critique of the Court's insensitivity to the arbitrariness and impact of this form of punishment. See *CHALLENGING CAPITAL PUNISHMENT*, *supra* note 26.

35. For example, LEWIS A. COSER, *CONTINUITIES IN THE STUDY OF SOCIAL CONFLICT* (1967), and MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* (1954), are two books that have had some influence on studies of law and society. More recently, JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* (1990) used a concept of rights to describe the most basic orientation of social action; however, though clearly influenced by legal philosophy, the implications of this discussion for rights or law itself are not clear or of immediate importance for his task.

36. Another example is DONALD BLACK, *SOCIOLOGICAL JUSTICE* (1989), a volume that quite explicitly confronts legal academics with better sociological explanations for important actions and outcomes within the legal system. Professors Lempert and Sanders also invited those interested in the legal system to focus on the formulating and testing of limited generalizations explaining action within familiar institutional settings. See *LEMPERT & SANDERS*, *supra* note 31, at 8. Both of these volumes aspire to theory but their principal effect is to reveal surprising relationships or explanations to those readers who held comfortable presumptions about the nature and impact of law, rather than raise challenging questions for those seeking a deeper understanding of the normative or political order of society and the law's role in it.

tradition's apparent lack of effectiveness in addressing fundamental problems of inequality and justice. He accomplished this by summarizing the impact of two decades of problem-focused law and social science research on generally held perceptions of the legal system.³⁷ The research established beyond doubt that the legal system is not a level playing field. It is widely recognized that significant barriers stand in the way of equal access. Further, according to Professor Macaulay, social science research has revealed how subtle and problematic the influence of law on society can be. He referred to the "capture" of law, either by officials who are formally mere conduits but who in fact exercise discretion in their own interests, or by those who comply with the law and yet have the capacity to avoid, resist, or redirect the law.³⁸ Finally, he noted that we have learned that the legal profession, like the law itself, plays many different roles outside the courtroom.³⁹

The concrete problem focus of law and social science has been one of its greatest strengths. Three of the best examples of this research illustrate the capacity of this research to provide insight well beyond examining the influence of factors absent from the official version of the law's effectiveness. Stewart Macaulay's discovery that businesspersons pay little attention to contract law in establishing ongoing business relationships shows that there is no necessary relationship between legal rules and social norms.⁴⁰ This study strikes at the core of the assumption that

37. Macaulay, *supra* note 21, at 150-56.

38. *See id.* at 152.

39. *Id.* at 152-55. Yet, in spite of what we have learned, the paradigm for research in which the liberal legal ideal is the yardstick against which findings are measured has been severely criticized for its limitations. Professor Macaulay's defense of law and the behavioral sciences was in part a response to the declaration that the "liberal paradigm has collapsed" because repeated demonstrations that the law failed to deliver on its promises simply reinforced the belief that law plays primarily an instrumental role to the often empty ideals of the law without offering an alternative or deeper understanding. Richard L. Abel, *Taking Stock*, 14 *LAW & SOC'Y REV.* 429, 438-39 (1980). After Professor Abel, criticism of the so-called gap paradigm soon became a major theme of discussion within the field itself. *See, e.g.*, Austin Sarat, *Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition*, 9 *LEGAL STUD. F.* 23 (1985); William Whitford, *Lowered Horizons: Implementation Research in a Post-CLS World*, 1986 *WIS. L. REV.* 755. The ineffectiveness of the law has also been documented in several general studies. *See* JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978); LEMPERT & SANDERS, *supra* note 31; GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991). Such studies have provided an important type of support for first attempts to formulate a theory of the ideological role of law, *see infra* part IV, and more recently have stimulated discussion of a political economy of legal change, *see* Jonathan Simon, *"The Long Walk Home" to Politics*, 26 *LAW & SOC'Y REV.* 923 (1992).

40. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *AM. SOC. REV.* 55 (1963).

capitalism ultimately rests on the legal order for its coercive power. If businesses create their own normative order, what role does law play in civil society? The instrumental role of law is undermined even further in a second article, perhaps the most cited in all the law and society field, in which Marc Galanter traces the biasing effects of economic and social capital at every stage of the legal process.⁴¹ Legal process is so thoroughly embedded in general social organization that every aspect of litigation and legislation is “captured” by the social organization in which litigants are enmeshed. Over the course of litigation or legislation—and still more, over time—such effects are cumulative, thus explaining the collective advantage enjoyed by “Haves” over “Have-Nots.” Finally, Robert Mnookin and Lewis Kornhauser’s careful examination of strategic bargaining by divorcing couples “in the shadow of the law” demonstrates the power—and the limits of the power—of parties in a legal dispute to create their own interpretations of law and to control the effects of the law.⁴²

If Professor Cowan’s essay drew attention to differences between social science and legal research, between the descriptive and the normative, the remaining essays in the symposium describe Talcott Parsons’s “structural/functional” sociological theory. According to this theory, law is “integrative” in that it maintains the social order needed by other parts of society by resolving conflicts and reinforcing general norms.⁴³ Thus, law has an instrumental purpose and must have the capacity to change behavior in other parts of the social system. To perform this function, the law must be respected as legitimate, and this in turn requires that it be both rational and general. In other words it should be free of particularistic commitments or values that would interfere with its neutrality resolving disputes in a plural society. The legal profession, through its special training and independence, preserves the autonomy and rationality of the law. Although a theory to be tested and revised in the light of empirical research, structural/functional sociology draws heavily on the ideology of liberal legalism.⁴⁴ The principal characteris-

41. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC’Y REV.* 95 (1974).

42. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979).

43. Parsons, *supra* note 16, at 58.

44. Talcott Parsons relied on Max Weber’s sociology of law; in particular, he relied on his analysis of the relationship of the development of Western, capitalist society and the legal/rational ideal type authority. Although Weber was quite temperate about the possibilities of achieving such an order and about its effects if achieved, liberal legalism is the dominant ideology of the system itself. See TALCOTT PARSONS, *THE SOCIAL SYSTEM* (1951).

tics of the ideal type of legal rational authority are those that our legal system itself supports:⁴⁵

- (1) Legal rights count, that is, the law is instrumental;⁴⁶
- (2) Legitimate authority depends on respect for formally rational decision making;⁴⁷
- (3) Law is relatively autonomous, that is, general;⁴⁸
- (4) The legal profession contributes to the autonomy and rationality of law.⁴⁹

Law and social science has not followed the lead of structural/functional theory. To the contrary, much of the mainstream of law and society research has explicitly played off these expectations or assumptions acknowledged by the legal system or within legal culture. Yet, while structural/functional theory has seemed to be at most a foil, persuasive alternative visions of the role of law in society have been slow to evolve and to challenge or replace the liberal vision of law.

Part III describes the liberal legal ideal as no more than a tale—a myth—that has provided a starting point for law and society scholarship. Notwithstanding the prolific insight and important results of research motivated by the gap between the ideals and reality of liberal legalism—the so-called gap paradigm—the articles by Professors Macaulay,⁵⁰ Galanter,⁵¹ and Mnookin and Kornhauser⁵² also demonstrate how far the vision of law and society scholars has departed from the “liberal” vision of political economy. Recent work has taken us far beyond this particular set of problems and seeks a new understanding of the role of law that will provide a more coherent vision and starting points for new questions.

III. THE PROBLEM OF THE HOUSE THAT JACK BUILT

*This is the farmer sowing his corn
That kept the cock that crowed in the morn
That waked the priest all shaven and shorn
That married the man all tattered and torn
That kissed the maiden all forlorn*

45. David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720.

46. *Id.* at 729.

47. *Id.*

48. *Id.* at 736.

49. *Id.* at 738.

50. See Macaulay, *supra* note 40.

51. See Galanter, *supra* note 41.

52. See Mnookin & Kornhauser, *supra* note 42.

That milked the cow with the crumpled horn
That tossed the dog
That worried the cat
That killed the rat
That ate the malt
*That lived in the house that Jack built.*⁵³

The House that Jack Built is a story about the interdependence of acts of domesticity, romance, religion, and other familiar events. It is a complex story, even nuanced, but with everyday elements. It is entertaining and we tell it to our children without knowledge of its unforeseen and improbable consequences (as you are now observing). However well it amuses or serves other purposes, it is always the same, and that is its strength.

Liberal legalism is the story of the house that Jack built. Sociology of law committed itself first to legal realism's instrumental vision of law, and later to laying bare the inadequacies of legal institutions in delivering on that promise. Although closely connected with Talcott Parsons's structural/functional theory and with Weberian sociology of law, liberal legalism is not a theory; rather, it is a description of ideal practices on which law as we know it is said to depend. It is precisely those ideals that the problem-focused and critical sociolegal studies have undermined.⁵⁴ The story of liberal legalism provided the focus for research. Although the limits of the gap paradigm have been described and often criticized,⁵⁵ it left a valuable legacy of research with insights that extend beyond the narrower task of criticizing legal ideals.⁵⁶

The gap paradigm has been "exhausted"; that is, critics say it produces repetitive findings that the legal system does not live up to its ideals while it reinforces those ideals by failing to offer a coherent alternative understanding of the role of the legal system. In the thirty years since the Rutgers workshop, liberal legalism and those elements of structural/

53. A well-known children's nursery rhyme attributed to the mythical Mother Goose, circa 1755.

54. Not all have abandoned this theory, to be sure. The theory that America has experienced a rights revolution and, in turn, that the underlying problem is the breakdown in other forms of solidarity in modern society is highly Weberian in its "tragic modernism." See LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* (1990). Further, it has been argued forcefully that the legal profession maintains an important cultural core for modern law. See TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT* (1987).

55. See *supra* note 39.

56. Macaulay, *supra* note 21, at 151-52.

functional sociology supporting it have become untenable for many sociolegal scholars.

The new work of the field is embedded in our historical period. I have noted that William Evan's introduction to the 1962 symposium described a connection between the prevailing concept of law and global developments.⁵⁷ Such changes are once again extremely relevant because the impact of a new global order has shaken the authority of national states, cast cultural differences into sharp relief, and undermined the capacity of government to deal successfully with social welfare. Just as the Vietnam War and the Civil Rights Movement spelled the death of simple instrumental theories of law, so the globalization of economies and cultures has drawn into question the authority of both ideal and actual communities.

A. Action Theory: Law in Everyday Life

One of the most promising results of the anti-instrumentalist turn in sociology of law has been the renewed interest in action theory. At the center of this new development is an interest in understanding the perspective of those subject to the law. Action involving law is to be understood as guided by the experiences of the actors and the culture that informs their behavior and, in this respect, the perspective has been influenced far more by anthropology and critical sociology than by classic Weberian action theory. Action theory is significant, first, because it is grounded, consistent with the law and social science tradition, in close observation of what actually takes place. Second, action theory is not centered particularly on law at all, but rather on the sources of action, and thus exemplifies the decentering of sociolegal studies referred to earlier. Finally, action theory has shifted focus from officially defined categories of conduct to the biography and identity of actors. Thus, it has resonated powerfully with standpoint, feminist, and critical race writings about law's marginalization of disadvantaged groups.

The path to renewed interest in action theory has been a tortuous one, carried forward initially by the critical perspective of scholars rather than by any attempt to create positive theory.⁵⁸ The proclaimed exhaus-

57. See *supra* part II.

58. My description is drawn from a forthcoming book edited by Austin Sarat and Thomas Kearns, and in particular I draw on the formulation of a theory of law in everyday life put forward in a seminal chapter coauthored by the editors. Austin Sarat & Thomas Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, in *LAW IN EVERYDAY LIFE* (Austin Sarat & Thomas Kearns eds., forthcoming 1993). Professors Sarat and Kearns rely on Robert Gordon for much of their account of the early stages of development.

tion of the gap paradigm in sociology of law coincided with the establishment of Critical Legal Studies, a movement against the legitimacy and power of established forms of legal authority that attacked liberal legal ideology's instrumentalism—that law has a rationally directed and effective purpose—and its structuralism—that law operates within a continuing and necessary social structure.⁵⁹ As I described previously, much accumulated empirical research has confirmed the characterization of law that critical legal scholars shared, namely its lack of instrumental capacity and its biased distributive effects.⁶⁰

Thus, it is not surprising that an important starting point for post-instrumentalist empirical research has been actors and interaction rather than courts and formal legal institutions. On one hand, economic theory, and more generally rational actor theory, has flourished among legal scholars, virtually replacing other frameworks for policy studies. Rational actor theory has had a powerful effect on sociolegal studies as well. It not only provides models of bargaining processes applicable to empirical studies ranging from trial settlement to regulation but it also provides general models of compliance with civil and criminal law.⁶¹ Rational actor theories have thus created a new foundation for instrumental uses of law.

The turn to the “constitutive theory” of law during roughly the same time period also springs from a disillusionment with instrumental-

See Robert W. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 413 (David Kairys ed., 2d ed. 1990).

59. Professor Gordon attributes the theoretical turn against instrumentalism to the disillusionment of the 1960s generation after the Vietnam War. It should be noted, however, that the disillusionment was not limited to progressives, but was widely shared by those who believed law could provide solutions to the Great Society's problems. The disillusionment of the 1970s had the effect of weakening orthodoxy in legal academia.

60. However, the attacks on the claims of the legal system to general authority and power also were seen to apply to the “scientism” of social science studies of law. Science, it was claimed, falsely universalized what was in fact better understood as particular, equally valid if different, experiences of law, and science privileged the conclusions of social scientists above those with more direct experience, namely those who were being studied. See Susan Silbey, *A Sociological Interpretation of the Relationship Between Law and Society*, in *LAW AND THE ORDERING OF OUR LIFE TOGETHER* 1 (Richard J. Neuhaus ed., 1989). The attack on scientism has made it particularly difficult to proceed with the development of theory in the face of claims that social science has been incapable of understanding the decentered, particularized experiences that constitute the law in everyday life.

61. See COLEMAN, *supra* note 35; LEMPERT & SANDERS, *supra* note 31, at 137-79 (chapter 6); Ronet Bachman et al., *The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault*, 26 *LAW & SOC'Y REV.* 343 (1992). In particular, JACK KATZ, *SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL* (1988) has recently offered a creative alternative perspective on the criminal as a rational actor.

ism. Constitutive theory does not attempt to create a new foundation for legal instrumentalism, but rather examines the way in which law “‘legitimate[s]’ the existing [social] order.”⁶² While rational actor theory presumes that long-run efficiency motivates both legal policy and compliance, constitutive theory takes no such motive for granted, but rather empirically examines the hypothesis that law is “one of those clusters of belief . . . that convince people that all the main hierarchical relations in which they live and work are natural and necessary.”⁶³ Development of the constitutive perspective has become a core project for many engaged in sociological studies of law.⁶⁴ Constitutive theory attributes to law a cultural rather than a normative role. Law’s influence on action is not limited to conscious decisions to obey, but includes a far more powerful influence over “unselfconscious” action. Thus, Susan Silbey, one of the principal contributors to this perspective, wrote:

[W]hile the law may be a resource, a tool available for all sorts of uses, the ways in which it is put to use are constrained by . . . conventions, ways of doing things that relate to courts, lawyers, litigation, claims or rights, precedent, evidence, judgment [W]hat is done in the name of the law is constrained by a world of its own creation.⁶⁵

Robert Gordon described in even stronger terms the power of the law to provide the cultural material out of which action springs: “[I]t is just

62. Gordon, *supra* note 58, at 286.

63. *Id.* at 287. Professors Sarat and Kearns put it another way: “Law is always inseparably a part of the everyday. In this sense law’s efficacy is not in what it can get people to agree to do, but in what they will think and do unselfconsciously.” Sarat & Kearns, *supra* note 58 (manuscript at 18, on file with author). To some extent, what has been rediscovered is the theory of Eugen Ehrlich, who in the nineteenth century wrote that the living law, the law in action, was what counted. Yet Professor Ehrlich’s description, like Stewart Macaulay’s description of noncontractual relations in business, left open the question of what effect state law and living law had on each other. Ironically, the simultaneous attack on assumptions underlying legal institutions and grand theories of society under the banner “All hierarchies must fall” has liberated new instrumental capacities of law, by validating what works, including self-generated uses of law. See EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (1962).

64. The argument that law constructs or constitutes action is found in all varieties of action theory. Rational action theory also makes very strong assumptions about the cultural matrix that is either imposed by or coexistent with law and that gives law its power over strategic choices. Some economists have explicitly recognized the power of social organizations to shape the matrix of “efficient” choices. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987). And a recent study of boundary disputes among cattle owners has concluded, as did Professor Macaulay, that local dispute resolution may be quite independent of the law. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

65. Susan Silbey, *Ideals and Practices in the Study of Law*, 9 *LEGAL STUD. F.* 20 (1985).

about impossible to describe any set of 'basic' social practices without describing the legal relations among the people involved—legal relations that . . . define the constitutive terms of the relationship."⁶⁶

Constitutive theory seems to share with Michel Foucault's description of cultural history a belief that culture determines the microdistribution of power, thus decentralizing—but also largely determining—the allocation of power in society.⁶⁷ Barbara Yngvesson has described the central argument of the constitutive perspective in this way.⁶⁸

In her own research Professor Yngvesson places law in a role that clearly builds on constitutive theory but offers a perspective that differs in important ways.⁶⁹ Her thesis states that law and fundamental cultural assumptions *interpenetrate*. In her study of minor cases settled before the clerk of a district court in Massachusetts, she found that "exchanges between clerk and citizen produce legal and moral frameworks that justify a decision to handle a case in a particular way . . . [and suggest how] court and community are mutually shaped."⁷⁰ Thus, the clerk's power is limited:

It is dependent on the legal construction of the clerk as both of the law and "not legal," a transitional figure linking court and community; it also hinges on the construction of the hearings as occurring "out of court" in a transitional *space* that allows the clerk and citizens to participate in producing the law while reproducing patterns of dominance at the courthouse and beyond.⁷¹

Such a description of the interaction within a matrix of perceptions that are shaped both by the community and by the court conforms closely to Pierre Bourdieu's concept of the *habitus*: a system of "lasting, transposable dispositions which, integrating past experiences, functions at every moment as a matrix of perceptions, appreciations and actions and makes possible the achievement of infinitely diversified tasks."⁷² Professor

66. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 103 (1984).

67. MICHEL FOUCAULT, *HISTOIRE DE LA SEXUALITÉ* (1984).

68. Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 YALE L.J. 1689, 1691 (1989).

69. *Id.* at 1692-93.

70. See Barbara Yngvesson, *Making Law at the Doorway: The Clerk, the Court and the Construction of Community in a New England Town*, 22 LAW & SOC'Y REV. 409, 410 (1988).

71. *Id.* at 411.

72. PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 82-83 (1977).

Bourdieu characterizes the freedom to employ such patterns in an infinite variety of ways as "regulated improvisation."⁷³

Thus, as Sarat and Kearns conclude, observation of the law as a cultural force often reveals something more complex than one-way constitution of action by law.⁷⁴ Rather, we are led to consider the interaction of the legal and the nonlegal, and the sources of unconscious and self-conscious actions.⁷⁵ Much of the research on the cultural role of law has expanded our perception of the one-way infusion of law into everyday life, accounting for the mutual construction of law by means of improvisation within and through a cultural matrix constructed in part from legal concepts. As in the examples I have described, action theory can contribute to a better understanding of, for example, the meaning of a "case" in litigation, the establishment of "authority" by a court or administrative agency, or the concept of a "right" in a neighborhood conflict or in a movement for redistribution of power.

As the action perspective continues to unfold in the law and social science fields, it holds the promise of broadening what has been a central understanding since Macaulay's work—that the role of law is qualified and limited and that the means by which an actor's perceptions are created is very important—and of bringing it into contact with similar, more theoretically informed work in the mainstream of social science. Psychologists have studied the relationship between biography and identity.⁷⁶ The relationship between structure and agency includes a large literature that law and society scholars have yet to tap, and that may provide a useful starting point for understanding the limits and possibilities for change.⁷⁷ The new action theory also resonates with the attempts

73. *Id.* at 78. Similarly, Professor Gordon's historical examination of New York commercial lawyers emphasized the creative potential of law practice even while it employed concepts drawn from existing legal culture. "[E]very legal practice—from drafting a complaint for simple debt to writing a constitution—[makes] a contribution to building a general ideological scheme or political language out of such explaining and rationalizing conceptions." Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in *PROFESSIONAL IDEOLOGIES IN AMERICA* 72 (Gilbert Geis ed., 1983).

74. See Sarat & Kearns, *supra* note 58.

75. As I have noted previously, the independent and mutual influence of everyday routines on law is quite consistent with empirical inquiry in the law and society field dating as far back as Professor Macaulay and, in fact, very strongly resembles the perspective of Eugen Ehrlich.

76. See, e.g., JEROME BRUNER, *ACTS OF MEANING* (1990).

77. In a critical review of JAMES SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS* (1990), Charles Tilly argued that a dead end has been reached by sociologists who accept the cultural determinism implicit in some postmodern concepts of identity and action. Charles Tilly, *Domination, Resistance, Compliance . . . Discourse*, 6 *SOC. F.* 593 (1991). He notes that if culture so severely limits individual action, movements for social change are impossible. *Id.* One task for law and society is to incorporate the postmodern

of feminists and critical race theorists to make the experiences of women and minorities understood, and a starting point for our conceptions of law.

Action theory, though promising, does not yet help us understand the uniqueness of different voices or the structure within which difference and distribution are related or might be changed. Finally, though the action perspective has sensitized scholars to the importance of attending to law in the most "improbable" settings,⁷⁸ where law may seem to be completely marginalized, it has not yet offered a framework that bridges different contexts.

B. *The Problematic State*

The anti-instrumental and cultural emphasis of research springing from radically decentered concepts of law has meant that in recent times the law and social science field has emphasized the study of law from the bottom up. Yet, all would agree that the state is a powerful actor. What role does the state play in the regulation of society through legislation, policy making, administration, and law enforcement? While the regulation of society by the state has always been of interest to law and society scholars, little research makes use of the large body of theory or empirical research on the welfare state or, more importantly, the attempts to devise an alternative theory to answer questions about the relationship between the internal dynamics of state authority and the relative autonomy of civil society. However, a growing body of research examines the problems and effectiveness of policy making and enforcement through administrative agencies.⁷⁹ But, while examination of the regulatory administration on its own terms is important, the broader problem of regulation by the modern state is the state itself.

emphasis on dispersal of power and meaning in order to help understand the reasons for different experiences with law and to suggest what might change them. See Patricia Ewick, *Postmodern Melancholia*, 26 LAW & SOC'Y REV. 755 (1992).

78. Austin Sarat & Thomas Kearns, *Introduction to LAW IN EVERYDAY LIFE*, *supra* note 58 (manuscript at introduction, on file with author).

79. One of the best sociological studies of implementation of law is LEON H. MAYHEW, *LAW AND EQUAL OPPORTUNITY* (1968). See also JOHN BRAITHWAITE, *CORPORATE CRIME IN THE PHARMACEUTICAL INDUSTRY* (1984); KEITH HAWKINS, *ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION* (1984); BRIDGIT M. HUTTER, *THE REASONABLE ARM OF THE LAW? THE LAW ENFORCEMENT PROCEDURES OF ENVIRONMENTAL HEALTH OFFICERS* (1988); ROBERT KAGAN, *REGULATORY JUSTICE* (1978). The recent literature on white collar crime combines sophisticated knowledge of organizations with a perception of the decentralized state. For a review of the National Institute of Justice project on white collar crime, see John Braithwaite, *Crime and the Average American*, 27 LAW & SOC'Y REV. 215 (1993).

As the variety of recent theories of the state suggests, the state is neither a given nor a constant. Neither theories that present the state as the alter ego of corporate powers⁸⁰ nor theories that argue that the state is an autonomous service provider⁸¹ adequately explain the complex and variable roles of administration in which power may be located in interest groups, at the highest level of government, or, as is often the case, at the lowest level where a significant degree of discretion is exercised.⁸²

Moreover, as is increasingly apparent on the global scene, the state is a contested and problematic category. States are changing as we watch, contested from within and without by rival loyalties based on the economic power of multinational corporations, by claimants to "national" identity, or by other groups whose primary loyalties are based on ethnicity, religion, or race. The globalization of economies and media has contributed to a shift in the centers of power from national states to other entities or groups that exist and act across national state boundaries. At the same time, states are under pressure to achieve security in the midst of international turmoil, to fragment administration to meet still more welfare priorities, and to delegate responsibility to smaller units in response to fiscal crisis. All of these transform the capacity of the state to employ positive law for its ends.

Kitty Calavita's study of the administration of the Mexican contract labor, or "*Bracero*," program by the United States Immigration and Naturalization Service (INS) from its creation in the early 1940s to its termination in the 1960s reveals the full range of dilemmas and contradictions in the fragmentation of state interests and administration characteristic of the modern welfare state.⁸³ Professor Calavita describes the abrupt

80. See, e.g., HUGH COLLINS, *MARXISM AND THE LAW* (1984); RALPH MILLIBAND, *THE STATE IN CAPITALIST SOCIETY* (1969). For a more satisfying variant, see Douglas Hay, *Property, Authority and the Criminal Law*, in *ALBION'S FATAL TREE* (Douglas Hay et al. eds., 1975).

81. See, e.g., TALCOTT PARSONS, *STRUCTURE AND PROCESS IN MODERN SOCIETIES* (1960). While many might argue that the state is not a committee of the ruling class, few would argue for its autonomy. Professors Skocpol and Block argue that the state can act in the interest of the state alone. See FRED BLOCK, *REVISING STATE THEORY: ESSAYS IN POLITICS AND POSTINDUSTRIALISM* (1987); THEDA SKOCPOL, *STATES AND SOCIAL REVOLUTIONS: A COMPARATIVE ANALYSIS OF FRANCE, RUSSIA, AND CHINA* (1979). While this seems to create a sphere of autonomous action by the state, the context is quite different from the earlier structural/functional theory, which presumed that autonomy reflected a society-wide basis for public action. The state-manager theory assumes a much more limited role for autonomous action by public officials, namely self-interest.

82. See JOEL F. HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY* (1986).

83. KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S.* (1992).

initiation of the program designed to bring Mexican contract labor to the United States to meet a severe labor shortage in agriculture in the year following the United States' entry into World War II.⁸⁴ Though always at odds with the labor policies protecting U.S. workers, Congress extended the program for two decades in response to growers' alleged needs for laborers.⁸⁵ The program continued despite serious tensions between the INS and the Department of Labor, which was concerned about loss of jobs by American workers; the State Department, which found that the INS circumvented international accords with Mexico in order to retain control over the selection of laborers; and Congress itself, the oversight of which the INS constantly evaded.⁸⁶

From the case study we learn that no theory of the state fits the facts precisely, though many different theories contribute to understanding some parts of the story. One lesson of the program concerns the self-interest of the agency and the strategies it employed in carrying them out. Although the *Bracero* program benefited growers, Professor Calavita carefully examines the agency's behavior in the few situations in which agency and grower goals conflicted.⁸⁷ Where their interests diverged, Professor Calavita concludes, the agency chose to pursue its own interests.⁸⁸ This finding leads to two interesting questions: namely, under what circumstances does an agency develop a sense of self-interest apart from the interests of its principal political supporters, and by what means can an agency successfully pursue its own interests in spite of opposition?

The INS was motivated to pursue its own interests in the program because the program served more than one of its goals. The INS was well aware that the program greatly reduced the flow of illegal immigrants to the United States, an objective that the agency could not achieve through its border patrols alone.⁸⁹ Thus, supplying contract labor to growers was a program that worked in two ways, both as a steady source of labor for growers and as a remedy for a different INS program that did not work. Late in the program's history, when Congress and the Department of Labor attempted to close it down, the INS found, under other authority, ingenious administrative means of continuing the flow of

84. *Id.* at 19.

85. *Id.* at 45.

86. *Id.* at 44-45.

87. *See id.* ch. 4.

88. *Id.* at 73.

89. *Id.* at 77, 85.

labor to growers in order to postpone admitting that it could not effectively patrol the border.⁹⁰

We also learn that the state is not explained by interests alone, either by the interests of important political supporters or by the survival interest of state managers. Part of the story of the INS concerns the idiosyncratic administration of Commissioner "General" Joseph Swing between 1954 and 1962.⁹¹ Neither the political interests affected by INS policies nor Congress's general interest in investigating corruption in government explains his unusually acrimonious relations with Congress, the ongoing investigation of his alleged corrupt practices, or the repeated expressions of personal dislike for the Commissioner by other government officials.⁹² Professor Calavita concludes that the source of these tensions was in fact the success of Commissioner Swing's efforts to limit Congress's oversight and control over the day-to-day operations of the agency, reducing, among other things, opportunities for patronage appointments.⁹³ Commissioner Swing is described as a "tactician" who transformed the INS "from a crippled bureaucratic backwater to a proactive and independent agency," and who paid the price for cutting into congressional pork barrel projects and patronage.⁹⁴

Finally, we are vividly reminded that the imposition of regulation need have little to do with the consent of those who bear its full burden. Professor Calavita describes the consequences of the program for contract laborers.⁹⁵ The INS maintained the stability of the contract labor force, its principal attraction for growers, by tracking down runaway laborers and returning them to their employers, deporting activist laborers who protested their working conditions or who resisted grower discipline, and developing a system for blacklisting troublemakers so that they would not be brought into the United States under future contracts.

Caught between conflicting welfare priorities of labor and capital—between the poor and dependent on one hand and the imperative to support its own economic base on the other—the state is fragmented and self-contradictory. These conflicting priorities are delegated downward as contradictions deepen. In this instance the authority to create and reconcile policy in international relations, a labor policy, and a policy supporting needs of domestic business was delegated to separate agen-

90. *Id.* at 152-59.

91. *Id.* at 101-08.

92. *Id.*

93. *Id.* at 107.

94. *Id.*

95. *Id.* at 76-80.

cies, producing a massively incoherent overall policy toward Mexican laborers.

What we learn about the postliberal state is profound. A careful reweaving of theories based on class conflict, state managers' interests, and interpenetration of state and society is needed. Those who see the interests of powerful groups behind state policies will find much to support their theory in this study, but that explanation is not the whole story. The INS displayed adroitness in playing off the conflicting demands of other government agencies, Congress, and its political benefactors, all to its own benefit. With respect to the *Bracero* program, the agency set its own priorities and displayed great resilience in the face of direct pressure to change them. Finally, as a grower told Professor Calavita: "Employers will find some way of finding cheap labor, that's what capitalism is all about."⁹⁶ In our society regulation by the state is only one part of a much larger picture of power.

C. *Global Cultures and Everyday Justice*

Just as powerful as the global competition between economies, and far more immediate in its impact, is the direct contact between cultures made possible by worldwide media distribution. A viewer in Tona-wanda, New York can watch a live Cable News Network (CNN) interview with a tribal leader in Somalia while United Nations authorities search unsuccessfully for that same leader. A Pakistani merchant has regular access to images of police in the United States through reruns of "Hill Street Blues" or nightly news reports. Upheaval has not only occurred through buyouts, sales of cheap electronics, and guest worker or refugee migrations alone, but also through global connections that make differences in religion, race, wealth, and culture much clearer; thus, questions are raised about the nature of law, power, and authority, both within and between societies.

Understanding the place of law in different cultures may begin with insightful cross-cultural comparisons. An excellent example is the study of attitudes toward responsibility and punishment in the United States and Japan undertaken by Lee Hamilton and Joseph Sanders.⁹⁷ More than simply describing differences in the "culture" of two countries, the authors build a theory of the relationship between the interpretation of and compliance with the law by individuals and the adoption of particu-

96. *Id.* at 169-70.

97. V. LEE HAMILTON & JOSEPH SANDERS, *EVERYDAY JUSTICE: RESPONSIBILITY AND THE INDIVIDUAL IN JAPAN AND UNITED STATES* (1992).

lar legal norms and institutions for relationships between groups of actors.

Cross-cultural comparison aided their examination of the micro-macro connection. Respondents were asked for their judgments about responsibility and punishment of individuals described in vignettes about wrongdoing.⁹⁸ Professors Hamilton and Sanders found that contextual differences—that is, differences in the relationships between actors in the vignettes—influenced judgments about responsibility; they also found that these judgments were different in the two societies.⁹⁹ They argued that the cross-societal differences are in fact due to differences in the actual social relations, not merely the perceptions of social relations, in the two societies.¹⁰⁰ Societal differences in judgments—that is, “perceptions of what it is to be an actor in general and a *responsible* actor in particular”—are shaped by the differences in the distribution of relationships in each society.¹⁰¹ Thus, “culture” is taken to mean not ideas alone but a quality that is better represented by the reciprocity between ideas and social relationships.

Professors Hamilton and Sanders found that the citizenry of both the United States and Japan were sensitive to the type of wrongdoing, its context, and the role of the actor in making attributions of responsibility, though the Americans placed far more weight on an actor’s subjective state of mind, while the Japanese attributed greater importance to the wrongdoer’s role and the influence of other parties.¹⁰² While popular views of Japan depict a society in which conflict does not exist, Professors Hamilton and Sanders argue that it is more accurate to say that in Japan the individual is more of a “contextual actor.”¹⁰³ A contextual actor places greater emphasis on maintaining relationships in balance—by acknowledging responsibility and giving effect to voluntary remedies. This in turn results from the existence of a dense web of hierarchical and peer relationships that, in the perception of the Japanese, must be kept stable if they are to work at all.¹⁰⁴ Japanese society is knit together by these dense relationships, and the characteristics of the contextual actor may be found wherever social relationships follow this pattern.¹⁰⁵

98. *Id.* at 89.

99. *Id.* at 129-30.

100. *Id.* at 130.

101. *Id.* at 5.

102. *Id.* at 120.

103. *Id.* at 183.

104. *Id.* at 71.

105. *Id.* at 215; see, e.g., CAROL J. GREENHOUSE, PRAYING FOR JUSTICE: FAITH, ORDER, AND COMMUNITY IN AN AMERICAN TOWN (1986).

The significance of their findings may be that positive law is of less importance to the contextual actor than to other actors. Where an entire society is composed of contextual actors, law and the cultural order may converge, producing a legal system with little penetration or tolerance for difference. The disadvantage is the absence of remedies for persons who are not inside the web of relationships. In a society in which the contextual actor is the exception—for example, a close knit ethnic or religious community in a Western, secular society—the difference between legal system norms and the collective actor's norms may be a source of serious public conflict or a source of tension within the group of contextual actors itself.¹⁰⁶

D. Discretion and the Socially Disadvantaged

The perceived failure of the rights revolutions of the 1960s and 1970s has been explored¹⁰⁷ and has been a major factor in the development of noninstrumental theories of law.¹⁰⁸ Yet, the power of post-Weberian regulation by the welfare state is not inconsequential. The delegation of discretionary decision making to lower levels in government, together with the open texture of most decision making in democratic Western societies, reproduces and strengthens the distributive effects of existing social hierarchies.¹⁰⁹

Power is filtered downward by creating opportunities for using discretion at the lower levels of bureaucracy. Lower-level bureaucrats depend on the hierarchies within which they exist, and use discretion, unless checked or guided, to please superiors, minimize effort, or reduce external input. Thus, filtering power downward through regulatory structures does not usually work in favor of the poor, the disabled, the elderly, and other disadvantaged groups. The success of lower-level ad-

106. See GREENHOUSE, *supra* note 105, at 182-98.

107. See, e.g., HANDLER, *supra* note 39; LEMPERT & SANDERS, *supra* note 31; ROSENBERG, *supra* note 39; Galanter, *supra* note 41.

108. See Simon, *supra* note 39, at 923.

109. This result has been documented across a wide range of settings within the fragmented system of social regulation in the welfare state. The law and society field has tended to focus on several settings—alternative dispute resolution, adjudication by courts, and regulation of white collar crime or the environment have received special emphasis—but not on others that are equally important, such as the trend toward decentralization of social welfare programs and the regulation of the poor and disadvantaged. The problem focus of the field has yielded little attention to developing interpretations that link regulation, discretion, and social structure, though general sociological theory exists that might provide many starting points. Marc Galanter, *Adjudication, Litigation and Related Phenomena*, in LAW AND THE SOCIAL SCIENCES 208-22 (Leon Lipson & Stanton Wheeler eds., 1986); Barbara Yngvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC'Y REV. 219, 235-43 (1975).

ministrators also depends on managing exchanges with the "clients" of the bureaucracy: Where clients can mobilize collectively, bureaucrats may respond by negotiating more cooperative relationships.

The tension between these two processes—meeting the internal pressures of a bureaucracy and dependency on the external environment—is fruitful terrain for the exercise of "sociological imagination" about the possible relationships between the socially disadvantaged as a class and the exercise of discretion in the regulatory process. Joel Handler has recently described the post-Weberian welfare bureaucracy with all its flaws.¹¹⁰ In a creative reinterpretation of the role of discretion, Professor Handler uses research in organizational sociology, usually cited to support the conclusion that law lacks the capacity for delivering social welfare through bureaucratic administration, in an unusual way. He argues that both administrators and their welfare clients might benefit from more cooperative relationships based on negotiation and mutual problem solving.¹¹¹ The great flexibility inherent in welfare administration, together with the "reflexive" nature of the relationship between modern state administrations and their environments, creates such an opportunity, but offers no guarantees.¹¹²

Professor Handler's arguments draw on feminist and critical legal writings as well as European sociological theory for support.¹¹³ The basis for transforming regulatory relationships from hierarchy to cooperation is the creation of "morally decent trust"¹¹⁴ in which parties can be open about their motives without undermining the relationship. Trust in turn depends on the creation of "reciprocal concrete incentives" supporting the relationship.¹¹⁵ Handler describes concrete examples where such incentives have been found and trust established, followed by cooperative decision making, notwithstanding extreme differences in power.¹¹⁶ In a practical sense, the transformation process is most likely to succeed when administrators with discretion are dependent on critical resources under the control of the "environment," that is, clients of the decision maker, thus making possible routinization of mutually beneficial exchanges with those subject to the decision maker's authority.

110. JOEL F. HANDLER, *LAW AND THE SEARCH FOR COMMUNITY* (1990).

111. *Id.* at 60-61.

112. See Gunther Teubner, *After Legal Instrumentalism? Strategic Models of Post-Regulatory Law*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 299 (Gunther Teubner ed., 1986).

113. See HANDLER, *supra* note 110, at 83-85.

114. See, e.g., Annette Baier, *Trust and Antitrust*, 96 *ETHICS* 231, 259-60 (1986).

115. HANDLER, *supra* note 110, at 127-29.

116. *Id.* at 129.

The importance of Professor Handler's work lies in its recognition of the possibilities opened up by the rejection of the Weberian master narrative,¹¹⁷ as well as in its sophisticated analysis of organizational dynamics. His discussion of the welfare state's regulation of the disadvantaged and a potential communitarian strategy for reform demonstrates the opportunities for imaginative theory building that grows from, yet transcends, his problem focus. Thereby, we are offered both a more comprehensive understanding of the problem and a more powerful vision of change.

E. Contested Power: The Legal Profession

The legal profession plays a central role in Weberian theory of law. The legal profession's autonomy is a premise for Max Weber's hypothesis that law, as a neutral arbiter of conflict, enabled the rise of capitalism. Professional autonomy and power, whether based on a distinctive rationality or on some other difference, has been an important topic for research by sociologists. However, while the fields of law and sociology have studied the evolution of the bar, the rising number of lawyers, and the stratification of the profession,¹¹⁸ this work does not directly consider the question central to Weberian theory: What is the profession's role in the normative ordering of society?

James W. Hurst's far-reaching study of "law makers," focusing primarily on lawyers,¹¹⁹ has been the starting point for work that is once again addressing questions that are fundamental to Max Weber's hypothesis about social theory and the role of lawyers in society. Professor Hurst has offered one of the first and still one of the best descriptions of professional differentiation, law firm growth, the changing nature of law practice, and the diverse roles played by lawyers. The historical dimension of his description is important, because it suggested important qualifications in the Weberian thesis about the role of professional

117. For this characterization of Professor Handler's work, I have drawn on an insightful review by Richard Lempert, *Dependency in the Welfare State: Beyond the Due Process Vision*, 20 CONTEMP. SOC'Y 84 (1991).

118. See, e.g., RICHARD ABEL, *AMERICAN LAWYERS* (1989); JEROME E. CARLIN, *LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* (1962); MARC GALANTER & THOMAS PALEY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991); JAMES W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950); *LAWYERS IN SOCIETY* (Richard Abel & Phillip Lewis eds., 1989); ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* (1988); ERWIN O. SMIGEL, *THE WALL STREET LAWYER* (1964).

119. See HURST, *supra* note 118.

autonomy.¹²⁰ Professor Hurst's work demonstrated that lawyers are linked to law through their clients' interests.

John Heinz and Edward Laumann's study of the Chicago bar provides the most sophisticated analysis of the stratification of the legal profession and its implications for professional autonomy.¹²¹ The study, based on detailed interviews with a representative sample of lawyers, revealed a highly differentiated profession in which practitioners were distinguished less by the conceptual differences between areas of practice than by their clients.¹²² The chief finding of the study is that the profession is divided into two great "hemispheres," consisting on one hand of "lawyers who serve major corporations and other large organizations," and on the other of "lawyers who work for individuals and small businesses."¹²³ Fewer than forty percent of all lawyers cross this divide between clients to any degree.¹²⁴ Lawyers on the corporate-client side systematically differ from those on the individual-client side, "whether we look at the social origins of the lawyers, the prestige of the law schools they attended, their career histories and mobility, their social or political values, their networks of friends and professional associates or several other social variables."¹²⁵

To be sure, significant differences coexist within each hemisphere. For example, in the personal client hemisphere, the greatest difference in social values occurs between lawyers in personal-plight fields—for example, personal injury and criminal defense—and those in the business or wealth-oriented fields. "Nonetheless, the distinction between corporate and individual clients is a very important one, and that distinction is probably key to an understanding of the social structure of the legal profession and of that structure's consequences for the distribution of power and influence."¹²⁶

Unlike the medical profession, lawyers tend to be organized around clients' needs rather than around the conceptual bases of specific specialties. Unlike medicine, the lawyer's client defines the particular goals of the service to be performed, and as the power of the client increases, the

120. See ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* (1988); HALLIDAY, *supra* note 54; MAGALI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977); Richard L. Abel, *Toward a Political Economy of Lawyers*, 1981 WIS. L. REV. 1117.

121. JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982).

122. *Id.* at 83.

123. *Id.* at 319.

124. *Id.* at 323.

125. *Id.* at 319-20.

126. *Id.* at 321.

less the specialized knowledge of the lawyer counts in the balance of power between lawyer and client.¹²⁷ Indeed, because the wealthy or corporate client is so much more involved in defining the goals of the professional services, the more prestigious the law practice, the less "professional" it needs to be.¹²⁸ Thus, it appears that the prestige and power of corporate lawyers is determined by the dominant position of corporations in our society, not by the lawyers' superior professionalism.¹²⁹

Lawyers' dependence on clients has profound implications for the future of lawyers in the new global economy. Economic upturns and downturns always affect lawyers. However, the Chicago bar study shows that for the wealthiest and most powerful in the profession, the overall quantity of legal work, as well as the way professional services are organized, billed, or delivered, will be determined by clients.¹³⁰ In a period of economic takeovers and international capital flight, client loyalty to lawyers has been severely reduced, and the practices of elite lawyers have been the first to face radical reorganization, eliminating long-standing traditions of promotion to partnership, terms of employment, billing, and specialization.¹³¹

Max Weber's hypothesis that lawyers are in a position to contribute to the creation of a coherent normative order is drawn into doubt by Professors Heinz and Laumann's findings. Lawyers specialize according to the interests of the particular group of clients they serve. Specialization in the medical community contributes to greater interdependence. On the other hand, specialization among lawyers by client interests has not led to greater interdependence between segments of the profession, but rather to greater distance between them. The nature of a lawyer's specialized practice does not require the lawyer to form close connections with other lawyers who have different specializations; unlike specialization in medicine or engineering, lawyers' areas of expertise do not rationally interrelate. There is no rational or well-defined core to the knowledge possessed by lawyers, and, as Professors Heinz and Laumann put it, "the law is decidedly *not* a seamless web."¹³²

127. *Id.* at 338-39.

128. *Id.* at 323.

129. *Id.* at 361-62.

130. *Id.* at 365-73.

131. See GALANTER & PALEY, *supra* note 118. Professors Heinz and Laumann noted that in 1982, a decline in corporate loyalties was also apparent as many corporate clients organized their own in-house law departments to reduce legal costs and, as a result, opportunities for career mobility among elite lawyers was noticeably reduced. HEINZ & LAUMANN, *supra* note 121, at 361.

132. HEINZ & LAUMANN, *supra* note 121, at 342.

The interests of clients tend to draw lawyers in very different intellectual and even moral directions, for example, toward different definitions of justice, due process, or fairness.¹³³ Nor do bar associations, law school affiliations, or regulatory agencies give the profession coherence. Because ethnic, religious, and educational differences coincide with differences in client base, lawyers in different parts of the profession, or different "hemispheres," are all the more likely to find little in common.

In sum, the distinction between lawyers for different types of clients is so complete that lawyers have little cohesion as a profession. If the power of the profession is controlled by clients, and not grounded independently in the status of lawyers as professionals, then the legal profession, and to a great extent the legal order, is structured by the interests of clients. Therefore, lawyers as a profession are not likely to have an autonomous or coherent effect on the social order.

F. The Critique of Rights and the Social Vision of Judges

The new emphasis on actors' perspectives has been applied most frequently in studies of the role of law in informal settings and to actions of those not in official positions. But the act of interpretation that is the focus of most traditional legal scholarship—the judicial decision—is also an important, special case that may be studied through empirical research designed to test theories about interpretation, as Kim Scheppele has demonstrated. In a highly original study of common-law rule making and interpretation, Professor Scheppele analyzed a pool of cases selected from West's *Decennial Digest* on the common law of nondisclosure in order to examine the power of two theories that explain the application and interpretation of legal rules.¹³⁴ These two theories are first, that rules promote the long-run maximization of wealth by rewarding investment in information; and second, that rules promote equality of outcome by protecting the unfortunate against unforeseen disaster.¹³⁵ Her criteria for evaluating each theory were first, the theory must predict the actual outcomes; and second, the theory must correspond to the judges' interpretations of the situations upon which they rule.¹³⁶

133. Professor Carlin found that lawyers in different professional strata had profoundly different views of professional ethics. JEROME E. CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR* 168-69 (1966).

134. KIM L. SCHEPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* 161 (1988).

135. *Id.* at 119.

136. *Id.* at 178.

The law and economics movement has helped many legal academics regain a sense of intellectual power. It has allowed them to analyze legal decisions and policy in the face of overwhelming evidence suggesting that the legal process is fully permeated by society and that decisions by courts are not directed by abstract rules, but are influenced by the probable effects of a decision. Further, microeconomic theory has been appealing to law academicians because of its focus on individual decision making, and its rational-actor premises accord well with presumptions underlying the common law and the intuitive approach to motive and responsibility employed by many legal academicians.

A central thesis of both law and economics is that efficiency is not only good policy, but that it has also been the intuitive framework for common-law rule making by judges. Economic theory provides an alternative framework for believing in the consistency, neutrality, and rationality of law even if legal decisions are not logically derived from legal rules. Instead, decisions are derived from economic theory, providing one possible alternative to the critique-of-rights radical indeterminacy hypothesis.¹³⁷

Professor Scheppele constructed a second, contractarian theory with a different social vision, one derived from the philosophy of John Rawls and similar theories of rights.¹³⁸ According to her contractarian theory, judges will use "rules that would have been chosen by rational individuals who do not know their own narrow self-interest in the particular case but who are deciding in advance the rules under which they would consent to be governed."¹³⁹ For example, "[a]ll parties will be protected against catastrophic losses caused by secrets."¹⁴⁰ The rules implied by contractarian theory are thus not based on a universal theory of human behavior, as rules based on microeconomics often seem to be, but rather may be viewed as culturally specific, as implied by their derivation from contemporary Anglo-American political philosophy.

137. The law and economics movement coincided roughly with the critique of rights by the critical legal studies movement. The focus of both intellectual perspectives is the way legal rules are applied in decision making. The critique of rights held that judicial decisions and policy are radically indeterminate and result-oriented. Legal method is so indeterminate that rights can be legitimately interpreted in any way that context, in particular political interest, requires. Therefore, legal rights cannot protect the politically disadvantaged. The critique of rights, because it proclaims a radical indeterminacy, does not entail any particular explanation of the decisions made by judges.

138. SCHEPPELE, *supra* note 134, at 65-66, 68.

139. *Id.* at 84.

140. *Id.*

Professor Scheppele tested the two theories by making systematic, as opposed to anecdotal, comparisons.¹⁴¹ While Professor Scheppele used illustrative cases to support her arguments, she also created a method for generalizing the different patterns of judicial interpretation by reducing a wide assortment of cases to typical scenarios.¹⁴² Her innovative method leaves questions that will have to be addressed in future research. For example, one might wonder whether her sample was representative of all relevant cases and whether or not there are ways to strengthen the inference that contractarian theory is the "best" based on all relevant decisions. Nevertheless, she has opened the door to a more powerful general understanding of judicial decisions by suggesting that such decisions are amenable to study by means of social science research. Importantly, her work shows that interpretation and decision making by judges may be understood in terms of the same culturally defined process of interpretation and action that underlies the actions of ordinary citizens.

Finally, one might ask about the appropriateness of Professor Scheppele's second criterion for determining the success of a theory—namely, whether the theory describes the explanations given by judges.¹⁴³ After all, the test of a theory is often said to be its power to predict outcomes, not its accurate depiction of causes. However, interpretive theories of behavior are not about the outcome of actions alone, but about the elements of the decision-making process, which, when varied, produce different outcomes. Thus, an interpretive theory, such as Professor Scheppele's contractarian theory, is not a theory about the relationship between key facts and typical outcomes, but about perceiving and evaluating how these activities relate to what a judge—or other actor—decided to do, regardless of the actual effect of the decision. The construct perceived by the actor is what the theory is about. Thus, Professor Scheppele understood that to follow any vision of the law—contractarian or economic—the jurist must "see" the relevant elements of that vision. The jurist is, in fact, in the same position as the ordinary citizen. What gives law its force, Eugen Ehrlich observed, is not the power of its sanctions but the power to suggest appropriate behavior.¹⁴⁴ While other fac-

141. In his review of Professor Scheppele's research, Michael Saks noted that one of the strengths of social science method is that it requires testing a theory by applying it to a wide range of cases, rather than by applying it only to a carefully selected set of illustrative cases. Michael J. Saks, *Uncovering the Secrets of the Common Law*, 24 *LAW & SOC'Y REV.* 1277 (1990).

142. SCHEPPELE, *supra* note 134, at 5-12.

143. The question was suggested by Michael Saks in his valuable review of Professor Scheppele's book. Saks, *supra* note 141, at 1289-90.

144. EHRLICH, *supra* note 63, at 41.

tors, including habits derived from legal norms, may affect action in ways that are not consciously directed, Professor Scheppele's theories explicitly concern the important elements of conscious decision making.¹⁴⁵

In the next part of this Essay, I discuss what is meant by "theory," and I suggest why theory is needed to understand the problems that motivate the studies I have just described. I contend that these studies are moving toward a desirable goal.

IV. RECONSTRUCTING SOCIOLOGY OF LAW

Good theory, like wisdom, helps us decide what questions to ask next. Theory, in this sense, is a measure of the underlying problem that concerns us and drives the research forward, not merely the generalization that fits the data best.¹⁴⁶ The key to theory is understanding, not simply describing, the problems of the social order that we deem to be important; for this task, theory must be ambitious.

Theory, as I use it here, is an explanation, an attempt to answer a question about why things are as they are or why events happen in a certain way. It plays an important part in social science research. First, it is an explicit statement of starting points, assembled in part to describe what is assumed to be known about a problem and to indicate which of many possible questions is being addressed. Second, it shows how research reflects a particular perspective—including the particular problem, a statement of why certain things were attended to in the research and not others, expectations regarding what would be observed, and assumptions that will guide interpretation. To have mastered "method" and "theory" as a social scientist, C. Wright Mills concluded, "is to have become a self-conscious thinker . . . aware of the assumptions and implications of whatever he is about."¹⁴⁷

The problem focus of much sociology of law has worked in ways that have isolated the field from the mainstream of sociological theory. However, I believe that the situation is changing for two reasons. First, interest in general theory is increasing because law itself is a form of

145. As James Coleman wrote: "All case law is based on a theory of action. For example, in modern Western law, both Continental law and English common law, is based on the concept of purposeful individuals with rights and interests who are responsible for their actions." James S. Coleman, *Social Theory, Social Research, and a Theory of Action*, 91 AM. J. SOC. 1309, 1313 (1986).

146. Thus, Mills also insisted that "[t]he intellectual craftsman will try to do his work in awareness of its assumptions and implications, not the least of which are its moral and political meaning for the society in which he works and for his role within society." MILLS, *supra* note 2, at 77.

147. *Id.* at 121.

authority in decline; hence, we understand its limits as a force shaping the social order. Second, much of the work in the field implicitly concerns *social* problems, not legal problems, and thus requires a persuasive understanding of society, not the legal system alone.

The studies described in the preceding section demonstrate not only how far the current understanding of law departs from the liberal ideal—the one that Jack built—but also that there is a foundation for what I have called theory. This theory can begin from four starting points that correspond to the four qualities that characterized the liberal legal ideal.

1. *Decentering the production of law.* Sociolegal studies have shifted away from examination of the impact of law to examination of the production of law.¹⁴⁸ Law is given its content and meaning by actors with biography, in settings that have a history and thus a social organization and patterns of their own. The formal decisions of courts, higher courts in particular, have little relevance for most of the production of law. Sociolegal studies have increasingly found actors creating the law out of what they believe to be the law and out of strategic choices made in furtherance of their personal interests. Action giving content to law occurs in law offices, in judicial chambers, at the moment of awareness of a legal grievance, through negotiating the meaning of events, or negotiating the next steps to be taken by citizen and official. Official meanings of law are often influenced by the interpretations, rhetorical forces, and moral relevance created in all of these interactions. Conversely, the “impact” of law on ordinary citizens occurs at such points of contact and depends critically on the responses that ordinary citizens fashion from their own experiences. This insight about impact requires an understanding of the multiple interpretive frameworks employed by actors in everyday situations.

Further, awareness of the decentralization of power in society—however hegemonic or biased its distributive impact—has become a focal insight of social science. Michel Foucault’s popularity among American scholars reflects the acceptance of his insight that power is everywhere not because it affects everything, but because it emanates from everywhere.¹⁴⁹ Power is inherent in “techniques of discipline” shared across many different settings in society. Much of the recent work in sociolegal studies reflects an acceptance of this vision of the decentralization of power. According to Professor Foucault, the state itself links together an

148. A similar point is made by Susan Silbey and Austin Sarat. Susan S. Silbey & Austin Sarat, *Critical Traditions in Law and Society Research*, 21 *LAW & SOC’Y REV.* 165 (1987).

149. See COTTERRELL, *supra* note 28, at 297-99 (discussing theories of Professor Michel Foucault).

overall strategy from the micropowers implicit in such techniques; thus, its own power is inseparable from the manner in which it is exercised in the many different settings over which it presides.¹⁵⁰

2. *Fragmentation of law.* The “real story” of what law does has been found increasingly in widely dispersed and varied settings; these include not only the sites of the fragmented administration of the welfare state, but also the occasions preceding and ancillary to formal legal proceedings in which the law is infused into action and conflict resolution is set on its course. As we know from Max Weber’s sociology, the law created and guarded by professionals and applied in legal proceedings is absent. Instead, we are shown law that is not law: Law that is implicit in unselfconscious acts, law that is inchoate until interpreted by those who act with respect to it, law that is a factor in strategic choice rather than a rule that is obeyed, and law that is increasingly particularized as discretion or de facto law making diffuses throughout a very large state.¹⁵¹

3. *Law is not autonomous.* A founding insight inherited by sociolegal studies from legal realism is law’s lack of political autonomy. It is a staple of instruction in law schools to engage in the analysis of interests behind the law. Yet, such observations are often framed by an assumption that the ideal type, which requires autonomy, is achieved sufficiently well to prove the distinctiveness of law¹⁵² and for the law to be considered a valuable political achievement.¹⁵³ But in the past decade both social scientists and legal scholars have proceeded much further in their examination of the general cultural roots of law.¹⁵⁴ These studies have changed our view of what is “normal” production of law. Theories about how rules of law are selected and given content have been a subject of intense interest.¹⁵⁵ At another level sociolegal studies have long estab-

150. *Id.*

151. Susan Shapiro, *Comment*, in PIERRE BOURDIEU & JAMES S. COLEMAN, *SOCIAL THEORY FOR A CHANGING SOCIETY* 19 (1991).

152. *See, e.g.*, PHILIPPE NONET, *ADMINISTRATIVE JUSTICE: ADVOCACY AND CHANGE IN A GOVERNMENT AGENCY* (1978); Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 *MINN. L. REV.* 265 (1978).

153. This thesis has been argued forcefully even by radical historian E.P. Thompson. In the conclusion of his study of class warfare and repression in eighteenth-century England, Thompson argues that liberal legalism then and now represents a significant, if limited, achievement that often blunts the power of a ruling class and renders its administration of the laws more egalitarian. E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975).

154. As I describe below, there has been a shift from studying the impact of law to studying the production of law. *See infra* part IV. The observation is derived from an important work by Susan Silbey and Austin Sarat. *See* Silbey & Sarat, *supra* note 148, at 165.

155. *See, e.g.*, ELLICKSON, *supra* note 64; RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986); SCHEPPELE, *supra* note 134. But an even longer tradition exists among

lished the "capture" of the legal process by those who must enforce it or obey it.

4. *Questioning the power of the legal profession.* Evidence has accumulated showing the great impact of economic change on lawyers. As powerful institutions of the government and the economy require new services, the legal profession in the United States has evolved to serve them. At the same time the profession is highly stratified and differentiated in its work. The picture is of a profession that is both adaptable and integrated into the social organization of clients, not an autonomous, self-directed, and independent elite. Yet, lawyers' ubiquitous presence and ability to interpret legal needs give them power at the focal points of economic and social decision. Thus, the decentered perspective on law does not wholly undermine the power of lawyers; rather, discussion of the power and cultural role of lawyers appears to be of continuing importance and interest.

All of these accumulated findings raise an important question: What lies beyond the narrow liberal legalism upon which sociolegal studies have relied in support of its criticism of the law? Less emphasis has been placed on attempting to understand these important findings in a more general way than on continuing to deconstruct the formally liberal state and to attack instrumental theory of law. Having demonstrated the law's lack of instrumental force, the decentralization of its power, and the dependence of law on the initiative of local actors, are we in an even less satisfactory position to explain the unequal distribution of power in the economy and other institutions of society?

Europeans have considered post-Weberian law more explicitly. The modern equivalents of structural/functional theory and of Max Weber's action theory present sophisticated descriptions of modern law at a very abstract level. Gunther Teubner has described two crises of law in the modern welfare state.¹⁵⁶ First, he described modern law's inability to provide general norms suitable for reinforcing authority in the highly varied contexts in which authority is exercised in public and private life.¹⁵⁷ Second, he described the crisis of illegitimacy resulting from the cumulative effects of successful demands for particularized forms of welfare.¹⁵⁸ Professor Teubner's theory leads to the conclusion that the legal system

historians. See JAMES W. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* (1967); Lawrence Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

156. Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239 (1983).

157. *Id.*

158. *Id.*

is occupied with responding to its own needs—that is, the “autopoiesis” of law—and with exchanges with other parts of society in which law is provided to other institutions on *their* terms—that is, “reflexive” law. These developments in European sociology have been largely unnoticed by American sociolegal scholarship and do not relate particularly well to the distinctive concerns of American sociolegal studies with illegitimate and arbitrary authority or with issues of race, gender, or class.

Modern sociology of law studies in the United States have seldom been directed toward development of wider perspectives and general theory—that is, toward understanding law in *society*. Pretheoretical empirical generalizations about barriers to access to the legal system, about the part law plays in dispute resolution, or about the legal profession offered powerful insights, but little in the way of a general understanding of law’s role. However, the recent work described in the preceding part¹⁵⁹ has contributed to the development of more general perspectives on law and its role that might replace the classic nineteenth-century formulations that describe and justify much of the liberal political content of the ideal typical system against which these partial understandings play.

We might view the problem-focused sociology of law as moving slowly toward a general theory of the role of law in society. The movement is bracketed by two extreme views. Carrying on in the classical Durkheimian and utilitarian traditions is Don Black’s *The Behavior of Law*, an example of Durkheimian functionalism.¹⁶⁰ At the other boundary is James Coleman’s *Foundations of Social Theory*,¹⁶¹ an immensely rich attempt to construct a general social theory based on the paradigm of the rational actor strategically bounded by rights to resources and rights to act. Between Professor Black’s structural theory, which denies the relevance of actors’ interpretations or intentions, and Professor Coleman’s theory, which derives much of society from rational and strategic choices, there is a vast terrain for thought. There is still important work to be done concerning the sources and significance of human behavior that places emphasis on how actors interpret their circumstances and

159. See *supra* part III.

160. It is not accurate to describe Don Black as purely an expression of Emile Durkheim, because Professor Durkheim’s own work incorporated the dynamic qualities of society in his description of the interaction between the division of labor and the development of normative order. Professor Black’s highly mechanical associations between social structure and the “quantity” of law are, in fact, a series of exceptionally clearly formulated arguments about why law is dependent on social organization and not on the intentions of actors; thus, he confronts quite deliberately the rationalism of lawyers and the idealism of structural/functional sociology.

161. See COLEMAN, *supra* note 35.

evaluate their options, while simultaneously recognizing the power of history and biography to shape action independent of intention.

It is this middle ground, where collective and individual trajectories of social actors intersect, that I foresee opportunities to develop satisfactory general understandings of the role of law based on the evolving work on "constitutive" theory, theory of the state, the contextual actor, reformation of bureaucracies, the postindustrial legal profession, the interpretation of law, and many other points of creative research activity.

V. CONCLUSION: PERSONAL POLITICS AND SOCIAL SCIENCE

I suggested at the beginning that social science should have a mission—namely, liberation by providing fellow humans with a deep and accurate understanding of their present situation so that they might change it.

Theory is an attempt to understand. We need theory on a scale equal to the immense challenges in modern society with which we are concerned. I foresee two problems.

First, our best insights, the interests that draw us to particular topics—and especially our data—do not necessarily address the problems that move our moral and political concerns. I mean to say that the best research need not directly serve our political goals. This may be a dilemma for scholars drawn to the law and society field in part because of their commitment to working on significant social problems.¹⁶² The recent work by sociologists that I have described is not all of a piece, and should not be. It reflects the different interests and different insights of scholars working toward different objectives. While I have tried to place recent law and society research in a contemporary framework that explains to me what much of it has been about, its value lies in its capacity to make us think more deeply about society, not in the particular perspectives or particular problems it identifies.

Second, the impulse for social change among scholars most concerned about that issue, together with the decentered perspective on law, has produced a tendency to assume the standpoint of the disadvantaged.

162. In an earlier essay, I wrote about the relationship between research and values: Theory need be neither value free nor universal. Its importance lies elsewhere. Theory is an attempt to formulate our understanding of the world as precisely as possible, understandings that are guided by values and are always incomplete and provisional explanations whose utility may be altered through additional experience with a changing world or which may be superseded at any moment by changing our minds about which questions ought to be answered.

Frank Munger, *Afterword: Studying Litigation and Social Change*, 24 *LAW & SOC'Y REV.* 595, 614 (1990).

Resistance from below, different voices, authentic narratives, and constitutive legal culture are part of a growing sociology of law for the disempowered. The great risk of such a sociology as presently configured is that it may assume a "reality" that prevents change. Those of us who find these theoretical and methodological moves valuable must acknowledge and own up to the theory behind our research—not attribute it to the subjects of our research. For example, the risk of attributing "authenticity" to narrative, often the vehicle for voices of the disempowered, is that narrative is merely a method, under the control—as much as any medium of communication is under the control—of the person who uses it as a medium. Further, as I have already said, if the goal is to understand why law has distributive effects, then we must move beyond the interpretations of actors in our research.

Finally, I have been personally drawn to the work of sociologist William Julius Wilson because I am impressed by his theory that tries again to connect class and culture and that explains an individual's fate in terms of the kinds of communities we create for that individual to live in.¹⁶³ Racial disadvantage, he argued, is in large part an effect of the economic class structure, which in turn is reinforced by the actions of public agencies and their policies. Professor Wilson urged us to look at public institutions and collective action by the society as well as at the experience and actions of individuals. The impulse for reform is a good and critical one. It requires both honest inquiry and as grand a theory as the sociological imagination can put forward.

163. WILLIAM J. WILSON, *THE DECLINING SIGNIFICANCE OF RACE* (1978); WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987).

