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“Law &” Meets “Law as”

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BOOK REVIEWS

Austin Sarat & Patricia Ewick
The Handbook of Law and Society

Linda L. Berger, reviewer

“Law &” Meets “Law as”

The Handbook of Law and Society

Austin Sarat & Patricia Ewick, eds. (Wiley Blackwell 2015),
488 pages

Linda L. Berger, reviewer*

I. Introduction

How is a discipline built? More specifically, how does a scholarly movement based on the interdisciplinary study of law build and share knowledge and yet retain an identity of its own?

In *The Handbook of Law and Society*, editors Austin Sarat and Patricia Ewick have collected twenty-eight essays to describe the elephant we know as the “Law and Society movement.” Published fifty years after the creation of the Law and Society Association (LSA) in 1964, the *Handbook* looks back, marks the “emerging maturity” of the movement, and forecasts its future.¹ Unlike the elephant being described by blind observers who touch only its front or its back, the Law and Society movement is captured here by editors and authors familiar with its whole, present and past.

As the *Handbook* describes it, the movement became a collective body whose work could be assessed through the conferences, workshops, and other activities of the LSA and the articles published in the *Law & Society Review*. Initially, the movement brought together sociologists and law professors who described their purposes neutrally, as academic rather than political. The goal of the LSA, according to its first president, was to bring about “more rigorous and formal interdisciplinary training” in law

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¹ Patricia Ewick & Austin Sarat, *On the Emerging Maturity of Law and Society: An Introduction*, in THE HANDBOOK OF LAW AND SOCIETY i, xiii (Patricia Ewick & Austin Sarat eds., 2015) (hereinafter “HANDBOOK”).

and sociology.² The purpose of the *Review* was to respond to “a growing need on the part of social scientists and lawyers for a forum in which to carry on an interdisciplinary dialogue.”³

Similar to the LSA, the Legal Writing Institute was established (in 1984) to foster teaching and scholarship in order to improve legal communication. Like the *Review*, the disciplinary journals in our field⁴ responded to the need to build and disseminate the discipline’s knowledge base. Hearing echoes in these origin stories, I read the *Handbook* with a specific purpose in mind: How might the evolution of these related and relatively new scholarly fields inform one another?

II. The Founding of an Interdisciplinary Movement

Lawrence Friedman, one of its early leaders, summarized the Law and Society movement’s first principles as follows:

[It] describe[s] the efforts of sociologists of law, anthropologists of law, political scientists who study judicial behavior, historians who explore the role of nineteenth-century lawyers, psychologists who ask why juries behave as they do What they share is a general commitment to approach law with a vision and with methods that come from outside the discipline itself; and they share a commitment to explain legal phenomena . . . in terms of their social setting.⁵

Another long-time leader depicted the movement as having built consensus around the “widely shared view that law and society work was synonymous with law and social science with a gentle reformist edge often added.”⁶

As its target for study, the Law and Society movement would take on the difference between the “law on the books” and the “law in action.”⁷ This distinction had been recognized early in the 20th century, when, for example, “a few law professors at the University of Wisconsin, rather than honoring common law doctrine, [began to study] the law in action.”⁸ Near

2 G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819, 830–31 (1986) (quoting Richard B. Yegge, *The Law and Society Association to Date*, 1 LAW & SOC’Y REV. 3, 4 (1966)).

3 Richard D. Schwartz, *From the Editor*, 1 LAW & SOC’Y REV. 6, 6 (1966).

4 LEGAL WRITING founded in 1991, and LEGAL COMM. & RHETORIC: JALWD, founded in 2002.

5 Lawrence W. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 763 (1986).

6 Austin Sarat, *Vitality Amidst Fragmentation: On the Emergence of Postrealist Law and Society Scholarship*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 1, 8, (Austin Sarat ed., 2004).

7 White, *supra* note 2, at 830–31.

8 Stewart Macaulay, *The New Versus the Old Legal Realism: “Things Ain’t What They Used to Be,”* 2005 WIS. L. REV. 365, 367.

the same time, Eugen Ehrlich, an Austrian legal scholar known as one of the founders of the sociology of the law,⁹ formulated the concept of "the living law":

The living law is that law which is not imprisoned in rules of law, but which dominates life itself. The sources of its knowledge are above all the modern documents, and also immediate study of life itself, of commerce, of customs and usage, and of all sorts of organizations, including those which are recognized by the law, and, indeed, those which are disapproved by the law.¹⁰

Early Law and Society scholars recognized that context, and especially the beliefs and values of those in power, affects the meaning of legal rules: "The laws of China, the United States, Nazi Germany, France, and the Union of South Africa reflect the goals and policies of those who call the tune in those societies."¹¹ When the powerful change, the law changes. The significance of governmental and societal context led Friedman to conclude that "the strongest ingredient in American law, at any given time, is the present: current emotions, real economic interests, concrete political groups."¹²

Over the years, Law and Society scholarship became mainstream: "Interdisciplinary research is now the norm at elite schools; 'law and' continues to be the rage." Law faculties included social scientists, and even traditional scholars dipped into other disciplines. Ironically, this "domestication" of the movement included "the great success of a discipline not originally included in the cluster of social sciences identified by the Law and Society Association at its formation: economics."¹³

III. The Evolution of an Interdisciplinary Field

The impetus for the Law and Society movement was to understand the social context within which the law worked and to seek scientific backing for improved policy prescriptions. In its second era, the field moved to a richer understanding of the ways in which law and society construct one another. The third era, as described in the *Handbook*,

⁹ EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (1936).

¹⁰ Macaulay, *supra* note 8, at 367–68 (quoting William H. Page, *Professor Ehrlich's Czernowitz Seminar of Living Law*, reprinted in *READINGS IN JURISPRUDENCE* 825 (Jerome Hall ed., 1938)).

¹¹ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 18 (2d ed. 1985).

¹² FRIEDMAN, *supra* note 11, at 19.

¹³ White, *supra* note 2, at 840.

appears to carry the potential to be both more expansive, in moving to transnational contexts and regions, and more limited, in moving away from methodological pluralism to convergence on particular qualitative techniques.

According to one of its “origin stories,” LSA was founded when a group of legal realists challenging legal formalism joined a small group of sociologist defectors from the American Sociological Association.¹⁴ Emerging during the “last stages of the social activist state,”¹⁵ as the federal government entered many new areas of society, these scholars decided that social science was needed to produce a kind of “new knowledge about law that was neither doctrinal nor purely theoretical.” The movement had concrete results. First, it changed legal education because “[i]t helped complete the realist shift of law-school textbooks from cases to materials and notes.” Second, it affected the workings of the judicial system because “[i]t achieved recognition in the law through the creation of significant social science functions within the court system.” And finally, it affected public discussion of the law because the movement’s “research concerning the structural failures of the legal system have become endemic to public discourse including the social pathologies of litigation, the failure of regulators to reproduce law, and the weakness of the criminal sanction.”¹⁶

The recognized effects of social science on the law can be traced back as least as far as the first of the Brandeis briefs, and these effects became more pronounced in the 1960s Supreme Court led by Chief Justice Earl Warren. Under Chief Justice Warren, a series of “[h]ighly publicized rulings on issues like school desegregation, voting rights, and religious freedom made constitutional law synonymous with hot-button social issues.” Criminal-justice decisions were particularly affected. Landmark rulings “drew on sociolegal knowledge, both by direct citation and, perhaps more important, by borrowing the sociological vision of legal institutions in rationalizing its decisions.”¹⁷

As for the effects on the discipline itself, the *Handbook* editors conclude that Law and Society research constructed a more complex and nuanced understanding of law’s interrelationships and interactions with society. Three “eras” in the development of the law and society canon are sketched in the *Handbook*.¹⁸ In the first era, “law in context,” scholars

¹⁴ Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 *LAW & SOC’Y REV.* 409, 409–10 (1998).

¹⁵ *Id.* at 409.

¹⁶ Jonathan Simon, *Law After Society*, 24 *LAW & SOC. INQUIRY* 143, 144 (1999) (reviewing *LAW AND SOCIETY:*

READINGS ON THE SOCIAL STUDY OF LAW (Stewart Macaulay et al., eds., 1995)).

¹⁷ *Id.* at 168.

¹⁸ See Ewick & Sarat, *supra* note 1, at xvi–xxi, and Calvin Morrill & Kelsey Mayo, *Charting the “Classics” in Law and Society: The Development of the Field over the Past Half-Century*, in *HANDBOOK, supra* note 1, at 18–36 (describing this evolution).

examined the ways in which the law is shaped by context. This stage relied on the assumption that the law was distinct from society and that Law and Society scholars would use what they learned to pursue liberal reforms.¹⁹

The second era, a more critical stage, was dubbed the "decentering era." In this era, Law and Society scholars recognized that "law and society are constituted by one another."²⁰ Rather than focus on what the law *does* and on formal legal institutions, as the first era was said to do, scholars paid attention in the decentering era to what the law *means* and on everyday settings.²¹

The current, very fluid, era is said to be a "global" one in which scholars concentrate their study on moving across or beyond legal concepts hemmed in by traditional and national boundaries. This shift grows out of the mutually constitutive theory of Law and Society and pays "analytic attention to processes rather than to entities, to engagements rather than encounters, to networks rather than actors."²² In more-concrete terms, what does this shift mean? According to the editors, it means that Law and Society researchers are posing questions such as how to delineate what is legal when the world no longer recognizes the national boundaries that historically defined the law, rights, and citizenship, or how to investigate whether there are universal human rights in a world marked by diverse local cultures and multiple and alternative forms of personhood.²³

IV. Models and Lessons

Among the remarkable facets of the Law and Society movement is its self-reflectiveness and its relatively rigorous self-critique. A 2014 project aimed at gathering a selective sample to mark LSA's 50th anniversary yielded seventy-three publications reviewing, reflecting on, or critiquing the field. According to editors Ewick and Sarat, the movement's evolution has been marked not by a series of paradigm shifts, but instead by a "process of expansion, diversification and accretion." In the words of another scholar, the movement has accumulated "an ongoing sedimented canon."²⁴

The editors argue that although this evolution has sometimes created the perception "that the field is boundaryless and incoherent," the actual result has been to establish enough space for "intellectual creativity, flexi-

19 Morrill & Mayo, *supra* note 18, at 19–23.

22 *Id.* at 27–29.

20 *Id.* at 23.

23 Ewick & Sarat, *supra* note 1, at xix.

21 *Id.* at 23–27.

24 *Id.* at xiv.

bility and innovation.”²⁵ For innovation to flourish, the editors suggest, disciplinary perspectives must do more than clash or be placed in “juxtaposition.” Instead, different perspectives must become a “kind of aggregation and accumulation of new questions.” Thus, rather than the logical building up from the ground of a foundation of knowledge, Law and Society has gone through “a process of serial appropriation and re-contextualization.”²⁶ For example, Law and Society scholars borrowed concepts from narrative theory and analysis, and then they studied how stories work in legal settings. In response, some Law and Society scholars moved away from strictly literary concepts to more expansive studies of human activities and discourses. Such back-and-forth processes of borrowing “ended up producing a rich body of research about narrative as something that occurs in social interaction and about social interaction as something that is constituted by narrative.”²⁷

For those interested in discerning and describing the process of disciplinary knowledge building, the *Handbook* offers rich exemplars, especially the foundational chapter 2, which takes a carefully nuanced approach to identifying the Law and Society “canon.”²⁸ Similarly, in the chapter called *Mapping a Cultural Studies of Law*, Naomi Mezey sets forth an impressive analysis that results from “map[ping] the terrain of a set of scholarly approaches that could be called a cultural analysis of law.”²⁹ Cultural analyses borrow from “cultural and literary theory, anthropology, history, sociology, and philosophy,” and they take as their “object of study a set of cultural practices.”³⁰ Mezey sets out three “routes” that have been effectively traversed by cultural-studies scholars: narration, identity, and visuality.³¹

In the chapter on *The Constitution of Identity: Law and Race*, Osagie Obasogie explores the benefits of the blended form of scholarship that, as the editors suggested, moves beyond the juxtaposition of clashing disciplines to the aggregation and accumulation of new questions. His model, he explains, “attempts to transcend the field’s limited perspective on race by developing methodological approaches that blend empirical methods with critical race theory.” Obasogie describes his use of qualitative methods to ask how blind people understand race, followed by his use of

25 *Id.* at xiv–xv.

26 *Id.* at xv.

27 *Id.* at xvi.

28 Morrill & Mayo, *supra* note 18.

29 Naomi Mezey, *Mapping a Cultural Studies of Law*, in HANDBOOK, *supra* note 1, at 39.

30 *Id.*

31 *Id.* at 43–53.

the resulting data to criticize law and public policies that are based on the assumption that race matters because it is visually apparent. Obasogie’s chapter provides useful models of critical review of the movement’s scholarship as well.³²

Other chapters in the *Handbook* might serve as models for delving into a series of questions that are as fundamental for the discipline of legal communication as they are for the Law and Society movement: what is “law,” how do we determine what law means, what should we study when we study law, and how do we do things with law? In *Domains of Policy: Law and Society Research on the Family*, Annie Bunting explains ways in which socio-legal authors approach family-law study, often beginning with the destabilizing question aimed at upsetting preconceptions: what constitutes a family, a parent, a childhood, a spouse?³³ In the chapter on antidiscrimination law, Donna Young espouses a comparative view to overcome the limitations of the U.S. approach to equality and antidiscrimination.³⁴ In the chapter on immigration law, Leisy Abrego examines immigrants’ lived experiences and points out that because immigrants do not fit neatly into the binary language categories of “documented” or “undocumented,” both real-life consequences and enforcement practices may vary in unexpected ways.³⁵

V. Curious Omissions and “Law as”

Indexing is an inexact guide to coverage. But I found myself wondering why the index for the *Handbook* contained no entries for topics, theories, methods, and disciplines that I find central to the study of what law is, how we understand law’s meaning, and how law works. There were, for example, no entries for rhetoric, metaphor, narrative, language, or discourse.³⁶

Based only on the *Handbook*, today’s Law and Society movement appears to pay scant attention to the humanistic discipline of rhetoric. This appearance may inaccurately reflect the movement in action. Marianne Constable, a Professor of Rhetoric at Berkeley, is, for example, a

32 Osagie K. Obasogie, *The Constitution of Identity: Law and Race*, in HANDBOOK, *supra* note 1, at 339–49.

33 Annie Bunting, *Domains of Policy: Law and Society Research on the Family*, in HANDBOOK, *supra* note 1, at 199–209.

34 Donna E. Young, *Domains of Policy: Law and Society Perspectives on Antidiscrimination Law*, in HANDBOOK, *supra* note 1, at 212–26.

35 Leisy J. Abrego, *Immigration Law and Immigrants’ Lived Experiences*, in HANDBOOK, *supra* note 1, at 258–71.

36 There are entries for “narration—see also cultural studies of law” and “language and culture of law.” Although interpretive practices and language discussions occur throughout the *Handbook*, their omission from the index indicates that these are not seen as central to the theory or methods of the movement.

leading Law and Society scholar.³⁷ Early in the *Handbook*, the editors describe the movement's spread as now encompassing "all species of social science disciplines, as well as *several* humanistic fields," and they write that the original concentration on empirical study "has [been] enlarged to include interpretive and hermeneutic analysis of texts and culture."³⁸

What would be the loss if rhetoric and its siblings fail to engage the law and society movement in action? By rhetoric, I mean the study and practice that center on the effects of our use of language and symbols to communicate. In particular, I mean rhetoric as "the art of thought called for where scientific or mathematical forms of thought won't work, where we live in necessary uncertainty?"³⁹ The value of bringing rhetoric into conversations about law and society—that is, the reason for studying what happens when individual human beings use particular words and images to communicate with particular audiences in particular situations—is that rhetorical practice accommodates "law in context," "law as" constitutive of community, and the destabilization of established boundaries, the evolutionary eras described in the *Handbook*.

Like most "law &" scholarship, the scholarship of "law as rhetoric" relies on bringing the vantage point of an "other" discipline to the researcher's understanding, exploration, and criticism of the law. For law as rhetoric, this agreed starting point encompasses not only the insight that human imagination begins by "making the familiar strange"⁴⁰ but also the belief that human thought becomes wider and deeper by engaging in dialogic argument. What we assume to be natural and inevitable can become the subject of study only when we view it from another perspective, or from the outside in and the inside out.⁴¹ Such de-familiarization occurs when, for example, we look at the law and its contexts (including its subjects and its protagonists) from the standpoint of other disciplines or from the perspective of travelers from other regions.

For example, take the dialogic rhetoric discussed by Michael Billig in *Arguing as Thinking*.⁴² Billig conceives of human thinking as funda-

37 See Marianne Constable at <http://rhetoric.berkeley.edu/faculty-profile/marianne-constable-1>.

38 Ewick & Sarat, *supra* note 1, at ix.

39 James Boyd White, *A Symposium: The Theology of the Practice of Law, February 14, 2002 Roundtable Discussion*, 53 MERCER L. REV. 1087, 1089 (2002).

40 See ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 14 (2002). It is evident that Law and Society scholars recognize this. For example, in the chapter on Definitional Disputes, Susan Sterett explores the tension between viewing law as authority and law as field and points out that feminist and critical-race scholars have shown that things look different from different standpoints. Susan M. Sterett, *What is Law and Society?: Definitional Disputes*, in HANDBOOK, *supra* note 1, at 3, 4–5.

41 This concept comes from bell hooks, FEMINIST THEORY: FROM MARGIN TO CENTER, at preface (1984).

42 MICHAEL BILLIG, ARGUING AND THINKING: A RHETORICAL APPROACH TO SOCIAL PSYCHOLOGY (2d ed. 1996).

mentally argumentative, or two-sided: "Humans do not converse because they have inner thoughts to express, but they have thoughts to express because they converse." Dialogue offers the power to open up thinking by providing an argumentative heuristic that moves through recursive rounds of discussion, justification and criticism, always considering the argumentative context (or, in other words, taking into account not only what is said, but also what is being argued against).

In the end, without explicit mention of rhetorical theory or analysis, the *Handbook* echoes the arguments of rhetoricians when it discusses the value of its new vision of interdisciplinarity: "[D]isciplines [should be used to] correct each other's absurdities. The more we confront others' ways of knowing, the more we confront the deficiencies in our own."⁴³ And again, as Osagie Obasogie writes, the goal of bringing together the strengths of one discipline with the methods of another is not to supplement one or to defend the other, but instead "the goal is for an interpenetrative engagement that encourages new ways to think about and measure race [and other issues] so as to effectively capture and respond to the many racial [and other] challenges that we face . . ."⁴⁴

Conversation, confrontation, engagement. Perhaps this is how these related fields might eventually begin to inform one another, through the conversation, confrontation, and engagement that encourage both fields to discover new ways to think and respond to the issues and challenges we all face.

⁴³ Ewick & Sarat, *supra* note 1, at xv.

⁴⁴ *Id.* at 348.