1 Introduction: Sociolegal Scholarship in the Twenty-First Century

BRIEF DESCRIPTION OF LAW AND SOCIETY SCHOLARSHIP

Law and society scholarship, or sociolegal scholarship as it is typically called outside the United States, has contributed enormously to understanding how law works in complex social, cultural, economic, and political contexts. As an interdisciplinary field of inquiry, sociolegal scholarship ranges from deeply theoretical explorations to more empirically based examinations of how law operates in meaningful and dynamic ways among and between peoples, communities, societies, institutions, states, regions, spaces, times, properties, corporations, environments, texts, and material objects. Drawing on theoretical and methodological perspectives from both the social sciences and the humanities, sociolegal scholarship has expanded in recent decades to embrace an extensive array of substantive topics and fields of inquiry.[1]

Within the United States, the Law and Society Association was established in 1964 and the *Law & Society Review* was first published in 1966. The law and society movement emerged within the civil rights activism and cause-lawyering efforts of the 1960s, but its intellectual roots were in the American New Deal and the school of thought called legal realism that was concerned with exposing law as a mechanism of power (Levine 1990; Trubek 1990; Garth and Sterling 1998; Tomlins 2000; Feeley 2001; Sarat 2004:2–4, 2008; Friedman 2005). Today

[1] Law and society scholarship and sociolegal scholarship (sometimes referred to as the sociology of law) have distinct intellectual legacies. For instance, sociolegal scholarship as it developed in Britain drew more explicitly from European political and social theory, particularly within the field of sociology and to a lesser degree anthropology. In the United States, the law and society movement emerged in the 1960s and drew explicitly from the legal realism school of the 1920s and 1930s and its concern with law as a mechanism of power. Notwithstanding these differences, throughout this book the terms "law and society scholarship" and "sociolegal scholarship" are used interchangeably as umbrella terminology for a wide range of legal analysis that has expanded in recent decades to include perspectives, substantive concerns, and methodologies from across the social sciences and humanities (see Sarat 2004; Ewick 2008).

the U.S. law and society movement has a presence in social science and humanities departments of higher education institutions across the nation, and is also embraced to varying degrees within major law schools. The USA Law and Society Association has a robust national and international membership and promotes cross-discipline and cross-national research through its Collaborative Research Networks and International Research Collaboratives. The Association's journal, the *Law & Society Review*, is considered the leading publication in the field (Scheingold 2008). Smaller but arguably more cutting-edge sociolegal associations exist, or are emerging, within a number of countries such as Germany, Canada, Britain, Australia, India, Israel, China, Chile, Spain, and Mexico. Notably, the Japanese Association of the Sociology of Law was established in 1947 and is the oldest sociolegal association in existence. In addition to these formal professional organizations, there is a range of interdisciplinary scholarly communities engaged in humanistically oriented critical sociolegal scholarship, such as the Association for the Study of Law, Culture and the Humanities, whose members may identify with LatCrit theory, feminist legal theory, legal history, and critical race theory as well as a range of other theoretical orientations involving literature, narrative, or semiotics. There is also a strong social-science-oriented community of legal scholars centered around places such as the International Institute for the Sociology of Law in Onati, Spain.

The primary mission of sociolegal scholarship broadly construed is to better understand the social, cultural, political, and economic contexts in which law operates in practice, be it in the past or the present. The hope is that such knowledge will make law more widely accessible, equitable, and just. To achieve this goal, sociolegal scholars are interested in the gap between law in the books (known as doctrinal law, black letter law, or positivist law) and law in action as it plays out among and between peoples, places, histories, and institutions. Law and society scholars are critical of doctrinal law as it is typically taught in law schools because it presents a one-size-fits-all set of abstract legal principles that supposedly apply to a variety of situations and legal actors. Against this legal abstractionism, law and society scholars argue that studying doctrinal law alone does not tell the full story about how and under what conditions law is imagined, produced, formalized, enforced, reformed, or made meaningful for different political constituencies and individuals in any given community.

An example where studying doctrinal law fails to tell the full story is the field of criminal law. Law students typically study criminal law as a set of rules that establish acceptable conduct and punishments if those rules are broken. But the study of criminal law does not usually take into account or explain

how people interpret those rules, under what conditions rules may be broken, whether and by whom rules are enforced, manipulated, subverted, or resisted, and how social and political action may feed back into the legal system to define new crimes or determine that certain behaviors should no longer be considered criminal. The issue of battered woman's syndrome is a case in point. This is an example where placing the criminal act of murder in wider contexts that take into account long-term spousal abuse, conditions of gender oppression, and psychological desperation whereby some women feel they have no alternative to committing violence can provide mitigating evidence that lessens the first-degree murder charge (see Tolmie 1997, 2002). Without understanding the significance of these wider contexts, and taking account of them in determining what may be an appropriate punishment, sociolegal scholars suggest that certain women may be unjustly held accountable for acts of violence that they were not entirely responsible for because of the structural inequities built into our social systems.

As the preceding example illustrates, sociolegal scholars argue that law has a life beyond law texts. Hence, law must be analyzed in the wider spheres where it is interpreted by people, in turn shaping their social relations and ways of operating in the world. These arenas of legal interaction, or what is often referred to as law in action, may be within obvious settings such as parliaments, law courts, and police stations, as well as in less obvious and non-intuitive places such as schoolrooms, entertainment venues, and sports arenas (Macaulay 1987). Law and society scholars also argue that people are not passive recipients of the law, but in their everyday practices influence and shape law and legal processes. In other words, people are not static objects upon which law causally operates. People can imagine new forms of legal engagement and may resist or reframe prevailing legal norms, regulations, and categorizations. Often cited in support of this approach to law is Clifford Geertz's famous line that law is a way of "imagining the real" (Geertz 1983:184). This dynamic, reflexive, constitutive engagement between law as laid down in the books and the individuals and societies that law is meant to govern helps explain how and why law changes over time, and underscores that at any one moment in time law both reflects the status quo and is responding to accommodate shifting cultural values, norms, societal demands, and ways of being. This mutually constitutive relationship between law and society is a hallmark of contemporary sociolegal scholarship.

The idea of studying the difference between how law is presented in law books and the ways law is constituted and practiced in real life has had an enduring legacy over the past four decades. While some law and society scholars have been critical of "gap studies" from their early inception (Abel 1973;

Nelken 1981), they nonetheless remain a defining characteristic of sociolegal scholarship (Seron and Silbey 2004; Calavita 2010). Despite the enormous expansion of substantive topics in law and society scholarship over the decades, the law and society movement continues its original mission to contextualize legal processes and embrace critical perspectives that expose law's explicit and implicit relationship with political and economic power (see Abel 2010). As Mark Suchman and Elizabeth Mertz have noted, "this counter-hegemonic tendency has, if anything, strengthened in recent years, as the movement has worked to preserve or enhance its inclusiveness toward historically disadvantaged groups, critical and postmodern perspectives, and nonpositivistic agendas" (Suchman and Mertz 2010:568).

This book seeks to broaden the counter-hegemonic trend in law and society scholarship. My hope is that such a broadening will also deepen the relevance of sociolegal scholarship in multiple fields of inquiry (beyond law schools) as we advance further into the twenty-first century. What I propose is the adoption of a more expansive global perspective in law and society research so as to move beyond a state-centrist or state-framed interpretation of law. This is necessary, I suggest, to better analyze how law operates both within and beyond national jurisdictions and so opens up opportunities to discuss new forms of legality that may not neatly correlate to conventional state-based legal institutions or notions of citizenship. More pragmatically, a global sociolegal approach is essential in order to think through legal strategies that may help address the world's contemporary challenges, risks, and demands that are not bound within or contained by national jurisdictions. These challenges include such things as human trafficking, drug cartels, terrorist networks, poverty, labor exploitation, mass human migrations, climate change, declining public health, threats to food and water security, and natural resource depletion that today exist on a global scale and directly and indirectly affect every one of us, whatever local community we may live in.

In arguing for the need to embrace a global perspective with respect to sociolegal inquiry, this book differs from conventional introductory texts on law and society scholarship available in the United States. Some of these texts deal specifically with sociolegal theory as it has developed in Western thought since the nineteenth century (see Travers 2009): some are edited volumes that showcase classic and contemporary articles by leading figures in law and society scholarship (see Abel 1995; Sarat 2004; Bonsignore et al. 2005; Macaulay et al. 2007); others present discussion by one author and are explicitly designed as teaching texts for undergraduate students (Barkan 2008; Walsh and Hemmens 2010; Friedrichs 2011; Vago 2011). Whatever the precise emphasis, format, and relative quality of these texts, they revolve almost exclusively around law and

legal process in the United States and cover a range of predictable topics such as social control, lawmaking, legal administration, courts and juries, dispute resolution, capital punishment, crime, the legal profession, and so on.

My concern with these texts as a whole is that they are overwhelmingly parochial. They typically present U.S. law as if it is the only legal system operating in the world and, moreover, one that does so in a geopolitical silo unaffected by international affairs or events external to its national borders such as war, immigration, or climate change. One consequence of this parochialism is that these introductory law and society texts rarely – if at all – mention the comparative, international, and global dimensions of sociolegal scholarship. If they do, it is usually tagged on as a final section or chapter (i.e., Sarat 2004; Travers 2009). Against this parochial trend, one recent law and society textbook explicitly seeks a global approach (Friedman et al. 2011). Unfortunately, this book presents this approach rather simplistically by expanding the "geographical area" to include comparisons between the United States and other countries dealing with conventional sociolegal topics such as the legal profession or dispute resolution. Here, too, research exploring the forces of globalization on national legal systems is relegated to a final section of the volume rather than being foregrounded as a central theme informing subsequent chapters.

In contrast to the provincialism of much sociolegal research in the United States (especially as reflected in introductory law and society texts), there is a growing body of legal research that appreciates that all law, even at local community levels, should be read through a lens that takes into account the increasing forces of globalizing cultural, political, and economic interactions. Notable among these scholars are legal anthropologists who for many years have been actively involved in exploring the concept of legal pluralism and showing the global dimensions of legal interaction within colonial and postcolonial regimes (see Moore 1992; Benda-Beckmann et al. 2009a; Griffiths 2002; Merry 2006, 2007). Beyond this small group of ethnographically oriented scholars, however, the turn toward a global sociolegal perspective has been slow to materialize. Mainstream U.S. law and society scholarship is primarily fixed on a state-centered approach, reflecting perhaps the disciplinary constraints of sociology and political science representing the intellectual training of the majority of USA Law and Society Association members. Whatever the reason, much sociolegal research in the United States lags behind other fields of inquiry in its dogged resistance to think beyond the nation. Revealingly, Lawrence Friedman, a figure long associated with the U.S. law and society movement, wrote as late as 2002 that "the globalization of law is a topic that has entered the consciousness of legal scholars only recently. This is not mere fashion – it is a response to real processes and events" (Friedman 2002:23).

This book is a modest attempt to present recent sociolegal scholarship that approaches law from a global perspective, even when explicitly examining national or subnational legal processes. It is not intended – as some of the aforementioned introductory texts do – to present the major approaches in law and society research and include a canon of "classic" articles that everyone should read. Nor is it intended to dismiss any existing sociolegal texts that are all valuable in various ways and on which this book necessarily builds. Rather, I seek to highlight some emerging ideas about law that bring into question the taken-for-granted assumptions that endure in much sociolegal research. My hope is to (1) problematize the dominance of Euro-American legalism;[2] (2) highlight the need to embrace (rather than resist) legal pluralism and alternative conceptualizations of what constitutes law, justice, and rights; and (3) at the same time encourage emerging conversations among scholars and legal practitioners in the global North and global South about law that may be applicable to dealing with the complex, ambiguous, and pressing global challenges of our contemporary moment.[3] In short, this book is not intended as a summary of new directions within sociolegal scholarship, but rather as an urging for a rethinking of some of the basic assumptions about what constitutes law in a global world, in an effort to ensure that law and society research remains significant and relevant in the coming decades.

THE BOOK'S THREE OBJECTIVES

The first objective of this book is to move sociolegal conversations beyond the taken-for-granted frame of the nation-state and push the reader to think more

[2] I use the term "Euro-American" as shorthand to refer to European, Anglo, and American legal systems, or what is commonly thought of as Western law. There are, of course, substantive differences between these jurisdictions, and it is important to appreciate that the "West" is no more homogenous than the "East" as an identifying category. That being said, Euro-American legal systems share common cultural values that emerged in the Enlightenment and substantiate an understanding of law based on individualism and an individual's capacity to possess property, express identity, and claim rights (see Collier et al. 1996).

[3] I use the terms "global North" and "global South" to designate the vast disparities of resources and relative international power between the wealthy developed countries (the north) and poorer and less-developed countries (the south). This is an artificial distinction and does not correlate geographically to northern and southern hemispheres. Nor should the global south be thought of as exclusively consisting of poor, undemocratic, and undeveloped nations, given that within any one country there may be vast disparities of relative wealth and opportunity. Hence the global south perspective more accurately represents poor and marginalized people living within first- and third-world countries. That being said, the north-south divide loosely correlates to countries described as high-income and advanced economies and low-income and developing economies by the World Bank and International Monetary Fund, and corresponds to levels of wealth and poverty as monitored by the UN Human Development Index.

flexibly and critically with respect to the enormous legal issues and scales of risk confronting all communities and societies irrespective of whether they are legally contained within national jurisdictions or not. These are issues such as environmental degradation and threats to global health, abuse and defense of human rights, as well as the impact resulting from the movement of peoples attributable to wars, poverty, epidemics, and natural disasters. These pressing contemporary issues require new approaches to legality that transcend nation-states and their bounded geographical territories. According to Rafael Domingo, a Spanish jurist and legal theorist, in his book titled *A New Global Law*:

> The indispensable pluralism of a global society clashes with the nation-state's pretense of exclusivity. Numerous declarations of the universality of human rights and various historical milestones such as the birth of the EU or the establishment of international tribunals call into question the reach and future of the concept of sovereignty, in spite of certain cosmopolitan efforts to reconceptualize it. Rather, an open society requires new mechanisms for articulating and meeting the needs of civil societies, needs that cannot always be met via the bureaucratic structures of sovereign power, which are ultimately based on obsolete doctrine. (Domingo 2010:66; see also Onuma 2010)

Unfortunately, to date, much of the small but growing body of scholarship on law and globalization continues to adopt a state-centered approach. This approach supports a traditional comparative methodology that explores and contrasts how law operates in different countries around the world (e.g., Nelken 2002; Halliday et al. 2007). In other words, almost all of the existing sociolegal literature frames discussion about law and globalization through sites of national and international law and organizations (see Halliday and Osinky 2006; for a notable exception, see Berman 2005). For instance, some scholars explore the impact of international legal institutions on national legal professions and judiciary (Sarat and Scheingold 2001; Dezalay and Garth 2002, 2010, 2011; Bierman and Hitt 2007). Other scholars examine how international legal institutions such as the International Monetary Fund (IMF), World Bank, and the United Nations impact national legal systems (Halliday and Carruthers 2009). Still other scholars are interested in the rising legal and economic power of countries such as Brazil, Russia, India, China, and South Africa (BRICS). A substantial amount of this research is concerned with global trade, commercial integration and arbitration, private informal networks amongst legal practitioners and corporate entities, and the regulatory basis of what is known as *lex mercatoria* or mercantile law (see Dezalay and Garth 1998; Braithwaite and Drahos 2000; Appelbaum et al. 2001; Flood

2002; Wolf 2004). A prevailing assumption in this kind of sociolegal research (at least research emanating within the United States) is that nation-states still operate primarily as sovereign legal units that negotiate and collaborate with, and possibly adapt and make concessions to, other nations.

In 1996, Susan Silbey, then president of the US Law and Society Association, gave a presidential address titled "'Let Them Eat Cake': Globalization, Postmodern Colonialism, and the Possibilities of Justice" (Silbey 1997). This address ushered in, at least in my mind, a new era of critical sociolegal scholarship that bravely exposed the decentering of the regulatory state and its complicity in the emerging power of global corporate capitalism with respect to the rest of the world. Unfortunately, this remarkable speech, which was published the following year in the *Law & Society Review*, did not launch a broad wave of critical new thinking. As a result, to this day, relatively few sociolegal scholars problematize the concept of state sovereignty; explore the intermediary role played by NGOs and corporate actors in shaping global, international, national, and local legal instruments; examine the impact of regional forms of collective legal authority such as the African Union, European Union, or Association of Southeast Asian Nations (ASEAN); engage with emerging legal concepts such as universal jurisdiction; examine the transnational legal challenges presented by environmental degradation, climate change, and mass movements of people across borders and regions; or discuss how non-state legal institutions as promulgated through global justice movements such as the World Social Forum may be destabilizing conventional international/national legal terrains. Let me be clear – I am not saying that academic work is not being done with respect to these topics of legal globalization, only that it is has a limited presence within mainstream law and society scholarship as presented at professional meetings and published in leading sociolegal journals in the field.[4]

In contrast to a state-centered approach, this book stresses the legal relations between and within local, regional, national, international, transnational, and global legal arenas, and emphasizes that the lines of demarcation between these sites and scales are dynamic and porous. What is argued is that there is an urgent need to decenter the nation-state in an effort to reveal global legal interconnections between peoples, places, cultures, ideologies, religions, economies, and political systems. Importantly, decentering the nation-state

[4] There are, of course, notable exceptions such as Santos (1995); Boyle and Preves (2000); Klug (2002); Slaughter (2002); Maurer (2004); Merry (2006); Coutin (2007); Walby (2007); Barbour and Pavlich (2010); Benda-Beckmann et al. (2009a, 2009b); Halliday (2009); and Yngvesson (2010).

should not be interpreted as disempowering or marginalizing the nation-state. Rather, as noted by Franz von Benda-Beckmann and his colleagues, "states and their varying populations are enmeshed in horizontal and vertical legal relationships that crosscut one another both within and beyond territorial borders.... Such processes allow for new forms of governance that challenge the law's hegemony (as pronounced by states) through establishing alternative legalities of power" (Benda-Beckmann et al. 2009b:23). In light of such observations, a fundamental assumption underscoring this book is that it is not possible to take the geopolitical boundaries of the nation-state as given, nor view states as discrete and autonomous legal units operating within international, transnational, and global domains.

The second objective of this book is to push readers to think more flexibly and critically with respect to the production and meaning of legal knowledge and legal norms at the substate level. Hence related to the first goal to engage with legal processes *beyond* the nation-state is the renewed need to critically engage with legal processes *below* the federal level. I emphatically stress that embracing a global legal perspective does not mean that states and their domestic legalities are less important in the twenty-first century. On the contrary, the state remains a central feature of contemporary sociolegal research. The difference is that today the modernist myth of states being sovereign and self-contained within a Westphalian international system is no longer credible (Falk 1998). Similarly, the myth that a state represents one legal system and contains within it a singular cultural interpretation of law is no longer tenable.

In re-examining the production of domestic national legalities in a heightened era of globalization, it is essential to acknowledge that monocultural societies no longer exist (if in fact they ever did). There is not a pre-given "society" through which law operates, because societies are always in the process of becoming (Pavlich 2011). Today we are witnessing a rising presence of multicultural communities around the world, particularly in Europe and North America. These culturally rich subnational and transnational communities with distinctly different norms and values – and often with considerable social networks and economic links to peoples and places in Latin America, Africa, Asia, and the Middle East – present possibilities of new legal knowledge emerging within Western national boundaries. We can already see this in some legal settings such as UK family courts paying greater attention to Shari'a law (see Chapter 2), or the use of the culture defense within U.S. and other national law courts, which makes concessions to people from different cultural, religious, and legal systems. That the culture defense can be used in

biased ways, favoring the values of certain cultural groups such as, for example, Asian Americans over African Americans, is beyond the scope of this discussion (see Roberts 1999:6–7; Renteln 2004; Cotterrell 2006:99–108; Foblets and Renteln 2009; Connolly 2010). My point is that whether the accommodation of alternative, perhaps non-Western, legal norms and cultural values is embraced or resisted, the taken-for-granted assumption in much sociolegal research that a national legal system maps onto a homogenous "society" is no longer acceptable.

This brings me to the third objective of this book, which is reflected in its title *Laws and Societies*.[5] In urging sociolegal scholars to engage with complex legal processes *beyond nations* and in problematizing how legal knowledge is constituted *within nations*, my third goal is to demonstrate the necessity to see these multiple arenas of legal activity as intrinsically related, mutually constituted, and always in dynamic interaction. Laws at the global/transnational level, laws at the federal/state level, and laws at the domestic/local level should all be viewed as elements of an interconnected and unfolding global legal system. In this interconnected realm, William Twining notes, "it is illuminating to conceive of law as a species of *institutionalised social practice* that is *oriented to ordering relations* between *subjects* at one or more *levels* of relations and of ordering" (Twining 2009:116).

In calling for a pluralizing of laws and societies, most sociolegal scholars would say "of course" and have no problem conceptually with this idea. That being said, much law and society scholarship remains bogged down in an anachronistic world view that is increasingly out of step with contemporary global geopolitical realities. Much law and society scholarship continues to take as pre-given entities "law" and "society" and seeks to illuminate what kind of law and what kind of society is present at any one moment in time. Much law and society scholarship ignores a legal "thickening" or what is often referred to as legal pluralism within and between and across countries, institutions, cultures, religions, actors, and various sites, scales, and spheres of legal engagement (for notable exceptions see Merry 2006, 2007; Barzilai 2008). These complex and interconnected geopolitical realities cannot be adequately analyzed through a conventional law and society approach that takes law and society as preexisting analytical frames. As George Pavlich has asked, "If neither law nor society is cast as fixed objects, whose essence can be determined, the character of early forms of study in the law and

[5] Here, and in many other ways besides, I am indebted to Peter Fitzpatrick. The title of my book plays off and builds upon Fitzpatrick's essay "Law and Societies" (1984) and his subsequent groundbreaking work; see Fitzpatrick 1992, 2001.