Presidential Address

THE LEGAL MALAISE; OR, JUSTICE OBSERVED

MARC GALANTER*

During the twenty years since the founding of the Law and Society Association, a distinctive "law and society" discourse has emerged and been institutionalized in a multidisciplinary scholarly community, which has been instrumental in producing a tremendous increase in systematic knowledge about the law in action. The growth of law and society research has accompanied other changes in the distribution of information about the legal process, including a new legal journalism and greater media coverage that make the law in action more visible to a wider audience. Current distress of legal elites about the hypertrophy of legal institutions is viewed as a reaction to the increased currency of information that discredits the received picture of the legal world. The coincidence of structural changes in law with changes in the social institutions of knowledge about law creates the possibility of a more responsive and inquiring legal process.

I. FROM SHORTAGE TO SURFEIT: CHANGING DISTRESS ABOUT THE LAW

The law and society enterprise can, I think, be characterized by its aspiration to create a second kind of learning about law and legal institutions. In contrast to the professionally-based learning that emphasizes law as an autonomous system of general rules regulating social behavior, this second kind of learning seeks explanation rather than justification, emphasizes process rather than rules, and tries to appreciate the dynamics of law as part of more inclusive patterns of social life.

This second legal learning is not very old. We are celebrating the twentieth anniversary of this Association. It

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has a prehistory of a few years, and beyond that lie various precursors and ancestors. The vision of systematic social inquiry into law might be traced back to the early years of the century. But only in our time has there been a community of scholars actively and continuously pursuing such inquiry, involved in a cumulative discourse across disciplinary boundaries.

The vision of systematic multidisciplinary social inquiry into law has been institutionalized—in this Association, in the *Law & Society Review* and a dozen other journals,[1] in a flourishing National Science Foundation program,[2] in textbooks and curricula. There is a lot of this new legal learning compared to a generation ago, but it is still small and precarious compared to the bulk and solidity of the first kind of legal learning, established in law schools and legal publishing, which permeates the institutions of legal practice.

When this Association was founded in the mid-1960s, the legal establishment was suffused with a profound satisfaction about the American legal system. American legal institutions were seen as exemplary in concept and promise, even if imperfectly realized. If flawed in practice, they had great self-corrective capabilities. The Great Society not only used law to cure our social ills, but accorded priority to extending access to legality to those who were excluded from its benefits.[3] This prescription was not merely for domestic consumption. Law American-style was thought a product worthy of export: it was not only a tool of development, but in itself a carrier of democratic values. Much law and society scholarship was devoted to discovering yawning gaps between theory and practice, pointing out weaknesses and flaws in the

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[1] The *Law & Society Review* commenced publication in 1966. English language periodicals that can be thought of as devoted to socio-legal studies include: *Judicature* (formerly the *Journal of the American Judicature Society*), 1966- ; *Journal of Legal Studies*, 1972- ; *[British] Journal of Law and Society*, 1974- ; *Justice System Journal*, 1974- ; *American Bar Foundation Research Journal*, 1976- ; *Law and Human Behavior*, 1977- ; *Contemporary Crisis: Crime, Law, Deviance*, 1977- ; *Research in Law and Sociology*, 1978- ; *Law and Policy [Quarterly]*, 1979- ; *International Journal of Sociology of Law* (formerly *International Journal of Criminology and Penology*), 1979- ; *Journal of Legal Pluralism* (formerly *African Law Studies*), 1981- ; *Australian Journal of Law and Society*, 1982- ; *Law in Context*, 1983- ; *Legal Studies Forum* (formerly *The ALSA Forum*), 1985- . These will soon be joined by the *Canadian Journal of Law and Society*.

[2] The Law and Social Sciences Program was established in 1971.

[3] The federal government's war on poverty and the federal legal services program were both launched in 1964. See Johnson (1974).

implementation of legal values,[4] and decrying the uncritical promotion of American models into very different settings.[5] We were, so to speak, a kind of loyal opposition to the ruling legalist party, brandishing our skepticism to show that programs of legal reform could be realized only if they incorporated close attention to their social context and responded to systematic assessment by detached observers.

These past twenty years have been a period of immense growth in American law. There is more law—statutes, administrative rules, case law—lots more! In 1963, 14,842 pages were added to the Federal Register; in 1983, there were 57,704 pages added. The number of cases reported to the West Publishing Company for inclusion in its various series of law reports, federal and state, increased from 26,582 in 1963 to 58,644 in 1983.[6] There are lots more lawyers too. They have increased from some 296,000 in 1963 (American Bar Foundation, 1972: 5) to some 612,000 in 1983 (U.S. Department of Labor, 1985: 49). It has been a period of striking innovation by legislatures and courts, protecting new rights and devising new remedies. There have been impressive innovations in the delivery of legal services. Public interest law appeared and flourished; generally, there has been more calculated strategic use of litigation to forward group goals (Weisbrod *et al.*, 1978; Handler, 1978; O'Connor, 1980; Olson, 1984). But while there are more law and more lawyers and more litigation,[7] that robust sense of law as a potent instrument for addressing society's problems has frayed where it has not disappeared entirely. We are in an era of deregulation. The costs and

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[4] Emblematically, the lead article in Volume 1, Number 1 of the *Law & Society Review*, Carlin *et al.* (1966), was a critical analysis of civil justice for the poor. Volume 2 started off with a special issue devoted to the implementation of racial integration in schools.

[5] On the law and development movement and its vicissitudes, see Trubek and Galanter (1974); Burg (1977); Merryman (1977); Gardner (1980).

[6] Telephone interview with Mr. James Corson of West Publishing Co., who pointed out that this increase includes cases from newly created intermediate appellate courts as well as other matters like bankruptcy and military justice that were not previously reported. The same rough doubling is observable in the bulk of West's regional reporters: the volumes added in 1963 contained about 60,000 pages; those in 1983, 130,000.

[7] It should be noted that all of these hefty increases in measures of activity of the various sorts of professionals who people the legal world are *not* matched by comparable increases in "litigiousness" (i.e., by the rate of direct participation in lawsuits by ordinary citizens). Such measurements as we have of changes in citizen involvement in this period register a much more modest increase—with the singular exception of filings in federal courts. See Galanter (1983b: 37ff.).

weaknesses of law loom large; its benefits are less vivid and palpable.

Many observers are convinced that American society is suffering from a hypertrophy of its legal institutions, manifested in the presence of too many lawyers, high expenditures on legal services, too much litigation, an excessively contentious population, overregulation, an intrusive activist judiciary, excessive adversariness—all stemming from and accelerating the erosion of community and atrophy of informal self-regulatory mechanisms.

This sense of surfeit is in striking contrast to the salvos of challenge and rumors of collapse that were so audible in the Vietnam era. In 1971, while critics discerned the twilight of the system and sounded its death knell, an establishment bar group sponsored a troubled examination (Rostow, 1971) of *Is Law Dead?* That same year the editor of a book on *The Rule of Law* (Wolff, 1971: 8, 12), observing "a full scale assault on legal and political authority," described as commonplace the view that "law in the United States is in bad shape both in theory and in practice." And another editor (Lefcourt, 1971: 15) happily discerned wide agreement that "the legal system . . . is collapsing and can no longer be saved in its present form."

Such visions of legal collapse were among the casualties of Watergate. Just a few years later it was not the law's fading authority that evoked elite concern but its abundance and pervasiveness. In recent years, a considerable part of the American legal establishment—elite lawyers, judges, educators—embraced the view that although law is a good thing, we have too much of it and are threatened with an uncontrollable cumulative legalization of society. Since the mid-1970s subscribers to this "Midas touch" scenario have produced a vast literature of alarm and dismay, calling for reforms and retrenchment before the "litigation explosion" leads to a legal apocalypse.[8] The legal elite, as David Trubek (1984: 824) observes, has "stopped celebrating the law . . . and has begun to chastise the public for relying on the law and to condemn lawyers who encourage such popular vices."

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[8] This literature is described in Galanter (1983a). For some recent and characteristic examples, see Howard (1981); Cannon (1983); Kester (1984). An echoing chorus of foreign observers shares the prevalent dismay about America's excessive litigiousness, overinfluential lawyers, and what one distinguished sociologist sums up as "the delirium of due process" (Crozier, 1984: ch. 6). He finds that in America "that passion for law has been pressed . . . to the edge of madness" (Crozier, 1984: 106). The absence of any systematic empirical base for Crozier's conclusions is pointed out by Black (1984).

This dismay about law is related to the law and society community in several different ways. First, in the obvious way that the Midas touch scenario, as a prominent and influential set of assertions about the legal order, invites (and provokes) our attention as a subject for study. The search for evidence relevant to controversies about the amount and cost and effects of litigation has both utilized and promoted law and social science research.[9]

The recoil from litigation augmented and transformed the pursuit of alternative or informal methods of disputing. The dispute perspective that has flourished in law and society studies[10]—with its notion that formal legal rules and institutions are one of a family of alternative arrangements for processing disputes—has become the received wisdom of those dismayed by excessive litigation.[11] Concern with mediation, community courts, and such, which derived from the enrichments of legal anthropology, and which was once embedded in discourse about access to justice, has now become harnessed to attempts to avoid adjudication and the courts. Again it is the work of the law and society community that supplies much of the conceptual basis, methodology, and data for public debate on these proposals.[12]

The law and society community not only is a supplier of concepts and data in these controversies but represents a challenge to the style of conducting them. Debate about legal policy remains a game of persuasion in which the canons of evidence are breathtakingly permissive, reflecting the tendency of mainstream legal learning to rely on casual surmise about patterns of practice and systemic effects (Shuchman, 1979;

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[9] Such as the work of the Civil Litigation Research Project (Trubek *et al.*, 1983; Grossman and Trubek, 1980-81), to name just one prominent example.

[10] Elaborated in legal anthropology and grafted onto law and society studies by the brilliant synthesis of Abel (1973a).

[11] Thus, in a recent speech Chief Justice Burger (1985: 2,6) calls for "a fresh look at the entire structure we have created to resolve disputes" and finds excessive our reliance on adversary adjudication since "that system is too costly, too painful, too destructive and too inefficient."

[12] See, for example, the work contained in Abel (1982); Tomasic and Feeley (1982); Auerbach (1983); *Justice System Journal* (1984). Compared to the public discourse in the early decades of the century about the "alternatives" of the day—small claims courts, conciliation, judicial promotion of settlement, and so forth—current debates on these matters are marked by the presence, if not the preponderance, of greater conceptual sophistication, greater historical awareness, more self-consciousness about theory and explanation, and an abundance of data collected by a variety of methods. On the earlier discourse, see Steele (1981); Harrington (1982); Auerbach (1983); Galanter (1984).

Galanter, 1983b). The presence of law and society scholarship, with its accumulation of empirical data and critical apparatus, exerts pressure toward institutionalizing norms of intellectual accountability in this discourse: global assertions about litigiousness or the excesses of the adversary system are supplemented, if not supplanted, by discussions of litigation rates or of the performance of mediation centers.[13]

But we are related to the current malaise in yet another way. The Midas touch view is more than just a set of assertions; it is an act of interpretation. It's a way of putting together many observations and theories into a story about (small l, small s) law and society. If we listen carefully, we find that we are implicated in the story.

It is a story not only about congested dockets and skyrocketing costs, but about the replacement of sturdy self-reliance by contentious self-centeredness;[14] about the loss of community and the withering of institutional self-regulation (Howard, 1981: 5; Kline, 1978; Burger, 1982: 275); about the decline in the dignity and autonomy of professionals (Rifkind, 1976; Burger, 1984); about the transformation of august constitutional restraints into a quixotic but disabling crusade for rights (Morgan, 1984; Howard, 1981); about "the erosion of the authority, integrity and clarity of the law" (Cannon, 1983: 12; cf. Kester, 1984: 5). It is, in short, a story not only about institutional overload but about moral decline.[15]

But there is more than one possible story. We too are an interpretive community.[16] From the vantage of our second

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[13] Of course, much of this attention to data is mere window dressing, but even such lip service reflects and reinforces the notion that the rules of the game require that assertions be anchored in reliable data about factual patterns.

[14] Cannon (1983: 11) remarks "the increasing tendency of Americans to define all distresses, anxieties, and wounds as legal problems. . . . Where Americans were once willing to withstand setbacks, they now turn to the courts for relief whenever things work out badly." Cf. Rosenberg (1977: 152-53).

[15] Cf. one observer's listing of "the litigiousness of an over-lawyered society" as an element of "the rot in our institutions" along with "the inability of our schools to teach; slovenliness in standards of efficiency and precision," etc. (Yankelovich, 1981: 56). A somewhat different moral decline scenario, which gives a central role to excessive legalism, is elaborated by Crozier (1984). Another outcropping of "the mood of revisionism, self-doubt and retrenchment" is explored in Cohen's (1983: 115, 119) analysis of "social control talk," which shares with "litigation explosion" lore the recoil from overextended state institutions, the withdrawal to idealized community, and the program of "dismantling . . . the soft bits which have attached themselves like leeches to the core."

[16] Cf. Cover (1983: 10) on the generation and coexistence of multiple worlds of legal meaning embodied in different narrative accounts that "integrate . . . the 'is,' the 'ought,' and the 'what might be'."

kind of learning about law, we may see the outlines of another story—a story of the redistribution of knowledge about law, a tale in which we are present as actors as well as tellers.

II. THE EMERGENCE OF NEW KNOWLEDGE ABOUT LAW

In the period since this Association was founded, law and society scholars have fashioned a distinctive discourse, weaving together concepts, themes, and commonplaces from our home disciplines into a common medium. Embedded in this discourse is a fund of findings and analyses tested by critical encounter with this multidisciplinary array. It is a discourse with a rich and sometimes uneasy mix of positivist and interpretivist ingredients.[17]

Without presuming to review the course of law and society scholarship over the past twenty years—a task that outruns my powers as well as the time available—and at the risk of rash overgeneralization, I would like to mention a few developments in law and society inquiry that strike me as relevant to our connection to this Midas touch scenario. Although I use the collective pronoun in describing what I think is the central tendency, I recognize that there are many exceptions. Nor do I mean to claim for law and society scholars exclusive possession of insights and viewpoints that have wide currency.

First, the focus of scrutiny has moved downward—from peak decision makers to the field level, from Supreme Court to trial court, from professionals to the law's users and customers, from comprehensive policy-making to strategic maneuver, from formal process to backstage bargaining.[18] It has moved backward from lawsuits to disputes to grievances and injuries (Miller and Sarat, 1980-81; Felstiner *et al.*, 1980-81); and forward from judgments to impacts and wider effects (Wasby, 1970; Galanter, 1981); and outward from doctrine to perceptions and symbols.[19]

This movement reveals the pervasiveness and centrality of bargaining throughout the legal world. Time and again processes of authoritative decision-making turn out in fact to revolve around negotiation. Ostensibly adjudicative processes

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[17] As exemplified, several readers have pointed out, in the present essay.

[18] Compare, for example, the shift in emphasis reflected in two well-received readers on American courts, Scigliano (1962) and Goldman and Sarat (1978).

[19] At the same time we have, with honorable exceptions, curiously mirrored the first legal learning in its focus on courts and its neglect of legislation, administrative processing, and private regulation.

decompose into negotiative ones; decision makers clothed with arbitral powers transform themselves into mediators. The negotiated outcome in the shadow of the law turns out to be the master pattern of disputing in American courts and administrative agencies.[20]

Our explorations of the law in action have enlarged the cast of characters. We accord leading roles not only to authoritative policy makers but also to the law's users and customers. Alongside spokesmen for grand legal designs, we find many actors—litigants and other disputants, regulators and street-level bureaucrats, experts and journalists, champions and mediators—with their own vantage points and responding to the exigencies of their local situations (Silbey and Bittner, 1982). They are not the law's passive subjects, but use the law selectively to pursue their visions of advantage and justice.[21]

There are not only a multiplicity of actors but a multiplicity of forums and of norms. Regulatory enterprise is not an official monopoly. There are multiple arenas of normative innovation and interpretation. Legal pluralism, it turns out, is not just a condition of some less developed societies. Under rubrics like private governments, semi-autonomous social fields, indigenous law, etc., we have learned that pluralism is very much with us (Moore, 1973; Galanter, 1981; Macaulay, forthcoming). The official law does not preside over a landscape barren of regulation, but over a thick tangle of rivals and companions. Its effects depend on the way it interacts with the various sorts of indigenous ordering that surround it. The core official institutions themselves are the scene of persisting and pervasive local variation (e.g., Jacob, 1969; Levin, 1977; Church *et al.*, 1978). The centralist view of a monolithic integrated legal order turns out not to be a description of modern law, but part of its ideology.

Study of the law in action reveals further reasons why the pronouncement and implementation of legal norms are invariably attended by indirect and unanticipated consequences. As we pursue the law in action, we find ourselves in a realm in which exalted symbols are wedded to limited resources. Costs raise thresholds to the invocation of law and attenuate its use. There is competition for scarce resources. Law as a symbolic

[20] Everyone might have a personal list of landmarks here: my own includes, among others, Macaulay (1963; 1966); Skolnick (1966); Ross (1970); Friedman and Percival (1976); Mnookin and Kornhauser (1979); and Grossman and Trubek (1980-81).

[21] This shift to the user perspective is marked by Abel (1973a) and in Cartwright *et al.* (1974-75).

system is more capacious than as a system of operating controls. Robert Penn Warren (1946: 145) has the knowledgeable Boss say:

> I'm not a lawyer. That's why I can see what the law is like. It's like a single-bed blanket on a double bed and three folks in the bed and a cold night. There ain't never enough blanket to cover the case, no matter how much pulling and hauling, and somebody is always nigh going to catch pneumonia.

Limited resources mean that law is symbolic in the sense that implementation of its principles is always partial and contingent.

Law, we discover, is symbolic in yet another sense: that it usually works not by exercise of force but by information transfer, by communication of what's expected, what forbidden, what allowable, what are the consequences of acting in certain ways. That is, law entails information about what the rules are, how they are applied, with what costs, consequences, etc. For example, when we speak of deterrence, we are talking about the effect of information about what the law is and how it is administered. Similarly, when we describe "bargaining in the shadow of the law," we refer to regulation accomplished by the flow of information rather than directly by authoritative decision. Again, "legal socialization" is accomplished by the transmission of information. In a vast number of instances the application of law is, so to speak, self-administered—people regulate their conduct (and judge the conduct of others) on the basis of their knowledge about legal standards, possibilities, and constraints.

Part of our declaration of independence from the first kind of legal learning was to challenge the explanatory power of legal doctrine. What happened, we insisted, was to be explained by factors unknown to the law on the books.[22] Although the world of the law schools remains profoundly resistant to the systematic cultivation of contextual knowledge, in an important sense the battle against the hegemony of rules has been won. Few would now maintain that the legal world can be comprehended through the study of doctrine. It is generally conceded that knowledge about how legal institutions work is not encompassed in the first kind of legal learning.[23]

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[22] An insistence inherited from the legal realists, among other forebears. See Twining (1973); Schlegel (1979).

[23] Which is not to say that the law school world has given up its deep-seated resistance to contextual perspectives. Systematic pursuit of contextual knowledge is time-consuming, and competition for scarce curricular resources

We have been liberated to discover that formal legal structures, including the rules, do count.[24] But what they count for is not something independent of their context. The meaning of a rule depends not only on its internal logic and its relation to other rules, but on the way the rule is embedded in institutions of enforcement, on the population of those who use it, on their habits, outlooks, and resources, on the state of communications among them, on what's at stake, and so forth. We have moved from studies of the "gap" (Abel, 1973a; Feeley, 1976), in which rule and context are seen as separate, to studying the matrix of conditions in which rules and other features are entwined.[25] Rather than relinquishing the rules to the first legal learning, we have enlarged the study of the rules by showing that meaning resides not only in the principles and values they express, but in how they are distributed, achieved, and changed in the course of their careers in the real world of claims, ambitions, and institutions.[26]

That world, we acknowledge, is one that changes through time and whose major forces of change lie beyond legal arrangements; serious attention to context requires us to ground our observations about legal forms in the particularities of their historical settings. Law and society scholarship has been nourished and stimulated by the development of what Gordon (1975-76: 11) calls "external legal history," whose practitioners write "about the interaction between . . . legal things and the wider society of which they are a part, in particular to explore the social context of law and its social effects."[27]

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has been intensified by the proliferation of specialized legal structures and materials. Law and society studies have been accommodated by enlarging what Gordon (1974: 1222) calls the dominant "compromise religion" of "case law realism" that admits discussion of context so long as doctrine remains the studied canon. The refusal of the law schools to be the seat of systematic cultivation of this contextual knowledge (see Schlegel, 1979) is indicated by the regular recurrence of calls for them to do so. The most visible of such recent calls is Bok (1983). For an account of its predecessors, see Stevens (1983).

[24] E.g., in sentencing (Hagan, 1974; Kleck, 1981); in providing bargaining counters (Mnookin and Kornhauser, 1979); and generally in shaping the contours for institutionalizing specific kinds of claims (Miller and Sarat, 1980-81; FitzGerald, 1983).

[25] For critical assessment of the resilience and influence of ever more subtle reincarnations of the gap model, see Sarat (1985); Gordon (1981).

[26] We appear to have exemplified Maurice Hauriou's aphorism that "a little sociology leads away from the law, but much sociology leads back to it" (quoted at Gurvich, 1947: 2).

[27] An intellectual tradition whose inception is marked by Hurst (1950); Gordon (1975-76: 45).

These perspectives have crystallized in the course of twenty years of research that has enormously expanded our knowledge of the world of American law. We know immensely more about litigation—about aggregate patterns, about plea bargaining, about settlement, about litigants' strategies, about lawyers' maneuvers. We know more about courts and judges—about their working routines, about their decision-making, about their variability. We know more about the world of law practice—about the work of lawyers, about the organization of law firms, about the structure and politics of the bar. We know more about the making of regulatory policy, about the politics of implementation, about the impact of legal regulation.

Law and society research has contributed to this richer and more detailed picture of law in American society. But we have not been alone. During the past decade we have seen the emergence of more detailed, intrusive, investigative reporting about law. This includes a change in the scope and tenor of reporting about law in general publications like *The New York Times*, *The Wall Street Journal*, the news weeklies, etc. It is particularly prominent in the emergence of a new kind of "trade" press within the legal world: the *National Law Journal*, *The American Lawyer*, *Legal Times*, and some local counterparts (Powell, 1985). This new journalism enriches and elaborates our picture of the reality with which we deal. We can know immeasurably more about asbestos litigation, about the status struggles of the bankruptcy judges, and about the breakup of law firms than all but a few insiders or dedicated students could have known a few years back.

There is not only more coverage of law, but there has been a pronounced change in the scope and character of that coverage. Although criminal justice remains the favorite topic, there is more attention to the rest of the legal world.[28] Although the individual "case" remains the typical vehicle, there are more use of systemic knowledge to inform case accounts and more attempts to portray "the system" synthetically. There is much greater penetration into backstage areas, previously off-limits—e.g., revealing the deployment policies of police and prosecutors, analyzing the strategems of litigants, interviewing jurors about jury deliberations, detailing the politics (and political economy) of law practice. Departures

[28] The same enhanced interest in law and lawyers surfaces in the popular media, where TV series and feature films revolving around lawyers and civil cases—*The Paper Chase*, *The Associates*, *Kramer versus Kramer*, *Divorce Wars*, *The Verdict*—have joined the perennially popular criminal process.

from "the law on the books" are not portrayed as aberrations, or isolated pathological incidents, but as institutionalized and routine. Like law and society scholars, the new legal journalists look beyond the rules to examine their administration and evasion and impact. And like us, they display the discretion, malleability, and variability of the "law in action."

Scholarship and journalism converge to project a kind of "legal realism for everyone."[29] Now it is not only insiders who can see the admixture of politics, bargaining, and improvisation in the legal process. This "legal realism for everyone" reflects as well as reports changes in the character of the legal world. The core legal activities are more accessible—as dramatized by open meeting laws, the Freedom of Information Act, and courtroom television. Law practice has lost much of its genteel, cloistered quality; it is unabashedly more like a business. Law firms, as one lawyer put it, are "more like businesses and less like clubs" (Rottenberg, 1979: 124). Billable hours, mergers, profit centers, and marketing strategies for increasingly specialized services have become familiar features of the world of big time (and not so big time) lawyering.[30] Lawyers use the media more openly for advertising, public relations, and managing client exposure—and they themselves are more open to observation.

The new openness of the law world is exemplified by the turnabout in the willingness of prosecutors and police officials to discuss enforcement policies. When I first became interested in such matters in the 1960s, inquiries to officials about priorities and how they were set were met with adamant refusals to acknowledge the existence of such policy-making. "We enforce all the laws; we don't decide which laws to enforce" was the stock reply. Now police chiefs and prosecutors may be found justifying their enforcement priorities to the public on television.

This opening up is no less evident in the very heartland of dignified reserve—elite law practice. One need only compare the reticence of the Wall Street lawyers studied by Smigel

[29] Of course, "everyone" is an exaggeration, for it still takes considerable cognitive resources to utilize this richer information. My point is that the opportunity to acquire such information is far more widely distributed than it was a few decades ago.

[30] On the changing character of law practice, see Galanter (1983a); Nelson (1981). To the extent that recent changes amount to public acknowledgment of a commercialism that was already there, this acknowledgment itself marks a major change.

(1964) in the late 1950s with the plethora of information about clients, finances, and operations now available in the legal press—or compiled in the new legal directories. A sense of the change is epitomized in the observation of a journalist (Hoffman, 1982: 340) who wrote two books about elite New York lawyers, contrasting research in the early 1980s with research ten years before:

> What a difference a decade makes! In contrast to the author's research for *Lions in the Street*, no law firm slammed the door in his face, no lawyer stonewalled.

III. AFTER THE KNOWLEDGE EXPLOSION

The last twenty years have witnessed an explosion of information about law. We hear a lot more about it. There is much more information readily available. Much that was previously concealed is now out in the open. As in the case of the much-heralded "sexual revolution," the discourse and the availability of information about law have changed even faster and more dramatically than behavior.

As this richer stream of information circulates ever more widely, the law becomes more accessible and familiar (in both senses) and loses its remote and transcendent character. Its contingency, discretion, and malleability are visible to a wider audience. Institutions like plea bargaining which earlier generations saw as marginal and remediable imperfections—if they were seen at all—are increasingly regarded as integral features of the legal world. As wider sections of the public develop a realistic appreciation of the law in action, law will no longer be regarded as a closed realm accessible only to experts and capable of being judged only by its incumbents.

The prolific increase and wider diffusion of social knowledge about law suggest another reading of elite distress about our legal condition. Much of what is exposed in this new knowledge about law elicits nods of recognition from legal professionals, but at the same time its portrayal of the legal world is unsettling. If legal action is attended by indirect effects that cannot be predicted from the principles that animate it, can law be a sphere of learned expertise? To posit the centrality of bargaining characterizes lawyers less as masters of a body of recondite knowledge than as brokers and middlemen. The indeterminacy and variability of legal decision-making suggest that judges are not the high priests of

an exalted science but fallible "*bricoleurs*."[31] If happenings in the legal world are actuated by a mix of bargaining and strategem, commitment and crusading, self-interest and ignorance, hierarchy and power that resembles the spheres of activity it purports to regulate, professional claims of autonomy and authority are severely compromised.[32]

It is not only the wider diffusion of these perspectives but their location and organization that subvert the intellectual moorings of the higher reaches of the profession. In the old regime of restricted information about the law in action, the legal order could be perceived in terms of its esteemed "frontstage" qualities—as formal, autonomous, rule-determined, certain, professional, learned, apolitical, and so forth. Everyone knew that it was not exactly that way in his own corner, but knowledge of local deviations did not challenge the received picture of the system as a whole.[33] In the absence of an alternative set of organizing concepts, flaws and irregularities could be acknowledged without relinquishing the received model of what the legal world was fundamentally like. Confronted with such blemishes and complexities, the observer could (as Jerome Frank [1963: 198] said of Morris Cohn) "shut his eyes to the usualness of what he desired to think the unusual."

But the institutionalization of the systematic and cumulative study of the law in action makes this response unavailable. It multiplies the amount of learning that departs

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[31] I borrow this obscure but useful term from Garvey (1971), who in turn takes it from Lévi-Strauss. It refers to one who engages in "a process of fabricating 'make-do' solutions to problems as they arise, using a limited and often severely limited store of doctrines, materials, and tools—the way a household handyman must respond to a novel 'fix-it' task, relying only on his ingenuity and a small kit bag of mending tools" (Garvey, 1971: 5). Cf. the complaint of an eminent American jurist (Rifkind, 1976: 98) that: "[O]ur courts have become the handymen of society. The American public today perceives courts as jacks-of-all-trades, available to furnish the answer to whatever may trouble us." If law is about everything and judges are "jacks-of-all-trades," can law really be a well-demarcated realm separate from both politics and the marketplace, in which rewards are justified by proficiency in some distinctive body of techniques and skills?

[32] One tempting response is to portray this untidy, malleable quality as a new condition that can be blamed on an influx of newcomers—on new lawyers who have swollen the ranks, on those who would make law serve new interests, on litigants bringing frivolous cases, on legislators burdening the courts with unsuitable cases. This view that the law has been invaded by the wrong sorts of cases echoes the elite conviction, recounted by Auerbach (1976), during the early decades of this century that the law was endangered by the influx of the wrong sorts of people.

[33] For a sketch of the paradigm that informs conventional mainstream scholarly and professional thought about law, see Trubek and Galanter (1974: 1070 ff.); Galanter (1977).

from the received picture of what law is like.[34] It supplies categories and theories for weaving together the local knowledge now accessible in such profusion. It gives currency and authority to narratives and commonplaces that cannot be comfortably absorbed in mainstream legal thought, which is now beset by competing (and themselves multiple and incomplete) articulations of the legal world.[35] Not only is so much more "out in the open," but it is *openly* out in the open, requiring to be "taken into account."[36] Legal elites, themselves awash in information that discredits the received picture of the legal world, must address more informed, "cynical," and critical publics without the armor of science or the mantle of altruistic professionalism.

We seem to be heading toward a society in which law will be stripped of its ability to bedazzle us with symbols of legitimacy and with Potemkin Villages of enforcement. Many worry that law will falter without its mystique. But legitimacy may not require that we be fooled (assuming that we cannot be "fooled" with this greater information). Institutions known realistically are capable of eliciting acceptance and respect. Like schools and hospitals, legal institutions may be appreciated as imperfect but useful.

In such a demystified—or submystified—world, law and society scholarship would face the challenge of devising new ways of measuring the performance of legal institutions and new ways of redesigning those institutions to facilitate interchange with a more alert public. We should complement our burgeoning studies of legal institutions with research about what law means in people's lives; what gives it its hold, its

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[34] Contributors to this discordant discourse are liberated from the debilitating illusion that their perceptions are deviant. Cf. Matza (1964: 50-52).

[35] I include here both "law and economics" and critical legal studies, as well as law and society studies.

[36] Katz (1981: 32-34) describes:

> the curious case where everybody knows something, and everybody knows that everybody knows, and yet communication of that piece of information will have an effect nevertheless.
>
> . . . because it forces people to *take account* of the fact that the others know. Prior to publication an actor may act *as if* only he knew—because he does not have to acknowledge that the others know as well. (Note that this is the very opposite of the case of pluralistic ignorance where each person believes that he is the only one who knows. In the present case, all know that the others know. But in both cases one acts as if the others think differently.)
>
> When news of the broken norm is published, however, one can no longer act as if the others do not know. In this "public" situation, where the norm-violator has to take account of his audience, he must decide whether to retreat into consonance, or publicly declare that he is *committed* to the violation, that is, to some new norm.

influence, its attraction; why it repels or frightens; whether it is dependent upon illusions about its character. The list of questions is endless.

Do I make too much of the current malaise by reading it as a portent of change? Complaints about the law—about congested courts, unbearable delay, high fees, unscrupulous lawyers, excessive litigation, arrogant judges, ineffectual remedies—have recurred with some regularity throughout American history. The changes that I have recounted seem dramatic from close up. But do they really portend a major reorganization of our legal life? "Crises" and "reforms" have come and gone. Why should this be any different? The future is obscure, and the history of attempts to fathom it is cautionary. Undoubtedly, much in the legal world is destined to go on much as it has before. But at the risk of grandiosity, I suggest that what is different about this "crisis" is that structural changes are accompanied by a change in the social institutions of knowledge about law. The resilience of the old paradigm is diminished; rival ways of understanding the legal world have emerged and been institutionalized; and there has been a modest enlargement of our ability to design and monitor reforms on the basis of tested knowledge about the law in action. We can imagine that the second kind of legal learning might flourish in conjunction with a more responsive and more inquiring legal process.

The second kind of learning about law and its functioning in society does not stand outside of the legal process any more than does the first. As our "law in context" perspective suggests, as part of the context, we are in fact part of the law. We are not only citizen consumers but producers whose work, in the aggregate, influences the legal world. As with all other actors, the world is resistant to our designs, and our actions spawn unintended consequences. Even if we prefer to state our personal goals in terms of intellectual accomplishments rather than policy impact, what we do has an impact on the way the law functions and the kind of society it functions in. As we look ahead to our next twenty years, we can wonder whether law and society studies will play a central role in guiding the transformation of law, if indeed such a transformation occurs. So, until we celebrate our fortieth anniversary in 2004, let me leave you with a story:

> There was a king who was devoted to his pet monkey. One day, he called his closest advisors to his chamber and requested that they teach the monkey to speak. When they objected that they could not do it because it

was impossible, he ordered them beheaded. Other wise men were summoned to an audience with the king. To each he made the same request. Each answered that it couldn't be done. The king ordered each of them beheaded.

Finally, the local rabbi was called before the king. When the king made his now expected request, the rabbi replied that he would do it—but the king must understand that it was a very delicate process and would require twenty years. The king, pleased at last to find someone who would undertake the task, granted him the twenty years on the condition he start immediately.

When the rabbi returned home that evening, his friends reproved him for his foolishness in agreeing to such a futile undertaking, which was ultimately doomed to expose him to the king's wrath. But the rabbi was unfazed by this criticism: not at all, he said. In twenty years, so many things can happen: maybe the king will be overthrown. Or maybe he will die. Or I might die. Or the monkey might die. Or, perhaps, the monkey will learn to speak.

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