The Impact of Institutional Structures and Power on Law and Society: Is It Time for Reawakening?

Joan Brockman

Lynn Mather as President of the Law and Society Association: A Canadian Perspective

I was very pleased to see Mather address the issue of assumptions of universality that might exist in the Law and Society Association (LSA), especially as she notes the "unusual year" of planning a joint meeting with the Canadian Law and Society Association (CLSA). Many of us can tell stories (some rather amusing) about assumptions of universality by citizens of the United States.[1] Some of us have experienced it by sending articles to the *Law & Society Review*.[2] But what I would like to focus on is Mather's role in reaching out to the CLSA.

I have to confess I was initially a bit dubious about the proposed joint meeting in Vancouver, British Columbia.[3] Many of

I would like to thank my colleagues Wendy Chan, Dorothy Chunn, Margaret Jackson, and Robert Menzies for taking time, on very short notice, to comment on an earlier version of this commentary. Address correspondence to Joan Brockman, School of Criminology, Simon Fraser University, Burnaby BC V5A 1S6, Canada; e-mail: brockman@sfu.ca.

[1] Given Mather's discussion of the "assumption of universality," it was rather ironic that we were initially asked to have our comments in "by the Monday before Thanksgiving." Since the request was right after Canadian Thanksgiving, I knew it wasn't Canadian Thanksgiving. I tried to find U.S. Thanksgiving on my calendar, and was surprised it was not there. After looking at calendars from three previous years I deciphered the pattern—the last Thursday in November. At that point, I recalled once having known this, but what surprised me the most was that I actually had a calendar that did not identify U.S. Thanksgiving, like all my previous calendars. I did receive an apology for the "cultural imperialism of the Thanksgiving reference."

[2] I've tried this only once. I received one lengthy glowing review, one short negative review, and a very brief one that said, "This study would be of greater interest to a Canadian than [an] American audience. . . . If space is plentiful I suggest you submit the manuscript to a Canadian reviewer for more detailed comments."

[3] Although a member of the LSA since 1989, before this I had attended only three LSA conferences—the ones in Amsterdam, Toronto, and Glasgow.

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my doubts were erased when Mather drove up to Quebec City in May 2001, during our annual conference, to meet with members of the CLSA regarding the planning of the 2002 conference. Despite the fact that her organization was seven to eight times larger than ours and had an office with staff (unlike the CLSA), she started from the assumption that we were on equal footing. Mather and Lou Knafla, the president of the CLSA, appointed a 16-member program committee, with six academics from the United States, five from Canada, one from each of South Korea, Japan, and Australia.[4] Valerie Hans and I were asked to act as program chairs.

Mather also had the foresight to realize that we might work better as a group if we actually met face-to-face. She raised funds from the John Sloan Dickey Center to bring us together at the Minary Center in New Hampshire. Due to the terrorist events of September 11, our September 14–15 meeting had to be cancelled. Undeterred, Mather (with the assistance of Rod MacDonald and Jean-Francois Gaudreault-DesBiens, two committee members from McGill) arranged for us to meet in Montreal in mid-October. Not only did we receive John Sloan Dickey's quotation about "ill-founded premises" in advance of the meeting (see Mather 2003:263 for the quotation), but Mather read it to us again in her opening comments at our planning meeting.

Above all, Mather is a good listener, and her disarming manner and charm won us over. She has gone a long way in taking the United States out of the LSA.[5] On a personal level, Mather's ability to reach out to Canadians and others was unprecedented and very much appreciated.

The Impact of Institutional Structures and Power on Law and Society

I was intrigued by Mather's reference to the article by Campbell and Wiles (1976) that describes law and society in Britain as bifurcating into the "sociology of law" and "sociolegal studies," whereas the phrases are "indistinguishable to most Americans" (Mather 2003:272), and her discussion of the creation of LSA as a response to a wider political environment as well as an

[4] Diane Kirkby, from La Trobe University, Melbourne, Australia, was appointed by Lou Knafla as one of the CLSA representatives.

[5] As conscious as Mather's outreach is, she still slips into some of those assumptions of universality that she is trying to displace. In writing this piece I couldn't resist commenting to her about one of them: "It's not going to come as any surprise to Australians or Canadians that our courts cite U.S. decisions. What would really make this an event worth mentioning is if you could find a U.S. Supreme Court decision that cited an Australian or Canadian case."

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academic one (as discussed by Garth & Sterling 1998). It led me to reflect on the nature of law and society research and teaching issues, and whether there are sufficient changes in societies today to anticipate another shift in focus.

Campbell and Wiles distinguish between sociolegal studies, which has been "denigrated [by the sociology of law] as antitheoretical, concerned with social engineering through the existing legal order, and not with explaining the order or transcending it by critique," and the sociology of law, which has been "chastized [by sociolegal studies] as abstract theoreticians, whose speculations were divorced from reality and lacked practical relevance" (1976:549). Sociolegal studies has accepted the legal order as unproblematic and worked to improve it (handmaidens of the law and social order), whereas the sociology of law has questioned the nature of social (including legal) order and tried to understand how laws have emerged—both the official and unofficial versions (1976:553–54).

One year earlier, Cain expressed concern that the sociology of law might separate too early from its sociological roots (as British criminology had done) and lose some of its ideas and theory, "which alone could give it coherence and direction" (1975:61). Cain, an obvious sociology of law type, suggested that studying "rich man's law" (e.g., property and company law) is much more likely to shed light on why the poor are poor than examining welfare law, legal aid, and so on, although she recognizes a need for both (1975:62–63).

According to Campbell and Wiles, social science in Britain before the 1960s was more oriented to sociolegal studies than to the sociology of law (1976:555). During the 1960s and 1970s, the sociology of law emerged, as did the "new criminologies," which studied "deviance" rather than "crime" and focused on the "integral relationship between controller and controlled, and of the normative context of the infractions (legal or otherwise)" (1976:562). The expansion of the number of law schools and law students during this same time resulted in innovative courses considering "law in context" (1976:566). Law teachers sought out assistance and sometimes "technical expertise" to enhance their understanding of law and to improve or reform its content (1976:566–67). Sociolegal studies, with its policy orientation, was more likely to attract funding, and two of the first projects funded by a body established to promote law and society research were "to establish a program of research into the provisions of legal services and to offer law teachers grounding in social science methods" (1976:569). According to Campbell and Wiles, the Centre for Socio-Legal Studies, established in Oxford in 1972, "bore an uncanny similarity to the old criminology"

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(1976:570).[6] The authors conclude that sociolegal studies must "turn towards theories and explanations, if its reformist goals are not to degenerate into piecemeal changes that have unknown, unpredicted and unintended consequences" (1976:574). In the long term, "the contemporary divide [between sociolegal studies and the sociology of law], which is so marked just now, ought to disappear" (1976:574).

Mather concludes that most Americans do not differentiate between *sociology of law* and *sociolegal studies* (2003). This is illustrated in the work of Sarat et al. (1998), where the authors use the phrases *law and society* and *sociolegal studies* interchangeably but also discuss research that could easily fall in the sociology of law category (also see Ewick, Kagan, & Sarat 1999; Garth & Sarat 1997). This is not to say that there have not been tensions or shifts in emphasis on the study of law and society in the United States. Garth and Sterling (1998), in examining the history of the LSA, show that there was a division between two disciplines—law and social science—similar to the one that existed in England. The bright radicals of the 1960s, many from legal families, were drawn to sociology because of the conservative nature of law. Law schools' reaction was to hire sociologists as faculty members, thereby bringing the study of law back to the law schools. "Once absorption took place, however, law schools tended again to look formalistic and inhospitable to these interdisciplinary incursions" (Garth & Sterling 1998:413).

Garth and Sterling also link the development of law and society with economic and political events in their larger social context. The law and society area of study started in the days of the activist welfare state and played a role in constructing and providing it with legitimacy (1998:414). However, more recently the competing movement of law and economics has taken the political driver's seat as the state has moved away from social welfare to a more economic and corporatist model. According to Garth and Sterling, "Just as bright and ambitious people were drawn to social science in the 1950s, [by the mid to late 1970s] many were drawn to economics in an era when inflation and the state were considered the great enemies of progress" (1998:465).[7] This change was summarized by

[6] Today, its Web site states that "[S]ocio-legal research involves interdisciplinary research drawing on law and social science methodologies and perspectives, and taking empirical and/or theoretical approaches" (Centre for Socio-Legal Studies 2002). Nothing on the Web site would indicate that its orientation has changed. Dingwall suggests that policy-driven research dominates in the United Kingdom, and that "there is not much else" (2002:31).

[7] An example of how economics defines problems and their solutions is seen in the recent success of economics over sociology in pay equity cases. Nelson's explanation for the triumph of economic theory, over the competing sociological theory, is because economists' explanations "resonated with a powerful ideology about markets and the gendered nature of occupational choice" (2001:36). The problem is that economists, not sociologists, presently have the power.

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Galanter in 1999: "We have seen a 20-year barrage of attacks on rules and devices that give some clout to 'have nots' and nothing that impairs in the slightest the capacity of corporate entities to use the legal system either defensively or offensively" (1999:1116).

Calavita outlines three types of law and society research in the United States. First, she discusses policy-driven research, which, as she suggests, has its drawbacks because "[a]nswering that siren call can sometimes jeopardize the integrity of our research by allowing policymakers and bureaucrats to shape the questions we ask, as well as the range of politically acceptable answers" (2002:8). Calavita clearly illustrates this by quoting from a policy-driven criminologist who explained why he does not expose the criminogenic consequences of the war on drugs: "We can't recommend legalizing drugs. . . . We might as well recommend sharing the wealth" (2002:8).[8] Those interested in social justice, or engaged research (the second type), might recommend both. Engaged research asks the more fundamental tough questions about the relationship between law and society (2002:9–10). Corporate and state funders are often either disinterested in or hostile to such questions. Public intellectualism, the third type of research, involves asking social justice questions in the public domain and engaging in the political or democratic process to see those changes come about (2002:11).[9]

While there are a number of approaches to law and society in Canada,[10] the one I am most familiar with is its struggle to thrive,

[8] I think Calavita and others would recognize the benefits of some policy research. See Seron's response to Calavita (2002:25–26). Edelman distinguishes between sociolegal policy research, which is used to legitimate policy choices, and that which is used to "inform policy debates by challenging institutional notions of rationality that lead policy analysts to focus on individual deviants rather than on systemic perils" (2002:2).

[9] Simon (2002) provides some excellent examples of law and society public intellectuals—Eastman in *Work-Accidents and the Law* (1910) and Skolnick in *Justice Without Trial* (1966). Skapska reminds us of the various roles the public intellectual can play—"the publicly engaged, the political opportunist, the fellow traveler, and the by-stander"—and points out some of the problems with this third approach (2002:45).

[10] For example, in the 1986 inaugural issue of the *Canadian Journal of Law and Society*, John Hagan, a sociologist at the Faculty of Law, University of Toronto, defines two streams of "new" or "post-doctrinal" legal scholarship. He categorizes "law and behavioural science, socio-legal studies, law and sociology, law and economics, and law and society" as "empirical behavioural science" and contrasts them with "normative interpretative legal studies," as represented by the critical legal studies movement in U.S. law schools (1986:36). The former strive to be value-neutral, while the latter are concerned with justification or criticism (1986:36). Another example is Neil Sargent (1991), professor at the Department of Law at Carleton University in Ottawa (a social science degree-granting program, not a professional law school which grants degrees recognized for the purposes of becoming a lawyer), who talks about the difficulties of "doing legal studies" outside of a law school because of "the 'drag' of the professional law school, which appears to exercise a natural monopoly over the intellectual terrain of law" (1991:16). Law schools are seen as "consciously attempting to colonize new fields of knowledge related to law and legal

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and then later survive, in the School of Criminology[11] at Simon Fraser University. Chunn, Boyd, and Menzies suggest that "criminology in Canada and other western countries has been defined by the conservative, depoliticized, androcentric, state-oriented nature of both its scholarship and its practice. 'Real' crime is synonymous with 'street crime' as set out in the criminal law—interpersonal violence, offences against property and so-called morality crimes" (2002:10; also see Lynch 2000). The study of crime by criminal justice technicians (who work for the state on preventing crime or catching criminals through, for example, assisting the police to develop better car-baits for potential car thieves, etc.) is even further removed from the study of criminology by criminologists or law and society academics who question how deviance and crime come to be defined and enforced against one class and not another (also see Snider 2000 on the death of the sociology of corporate crime). As Chunn, Boyd, and Menzies write, "[t]he upper-strata, mostly 'white' men who run corporations and state agencies—and whose decision-making often generates or ignores extensive serious economic and physical harms—falls far beyond the parameters of criminal definition" (2002:10), and therefore out of the purview of criminology. Menzies, Chunn, and Boyd suggest that "by every possible measure—money wasted, property destroyed, lives ruined, people killed—the affluent are more dangerous than the poor" (2001:13).

While one might have predicted that the divide in criminology between criminal justice technicians and law and society academics would have disappeared at the School of Criminology, as Campbell and Wiles predicted the divide between sociology of law and sociolegal studies would disappear, the divide at the moment appears to be widening. As corporations and the state become more active in controlling research funding (see for example, Tudiver 1999; Turk 2000), the power goes to those who take a criminal justice perspective. Moore (2002) provides a concrete example of how this happens. For her doctoral dissertation at the University of Toronto, she was interested in exploring "the question of desire in the context of mandated substance abuse treatment in penal settings" (2002:38). That is, she wanted to

institutions which until recently have been viewed by legal academics as the province of sociologists, criminologists and political scientists" (1991:14).

[11] The link between law and society and criminology has existed for some time. In the first issue of the *Journal of Human Justice*, devoted to "Critical Criminology in Canada," Reasons (1989) begins by discussing the law and society movement in Canada and then moves on to textbooks on the sociology of law, before discussing the "new criminologies."

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conduct a qualitative study of how probationers and parolees were "programmed" to develop the right "desires."[12] Although she was sufficiently aware to couch her proposal in the relevant psychological and clinical literature and language, her proposal, phone calls, and e-mail to Correctional Service of Canada went unanswered (2002:40). Given the control the psychology professions have over Correctional Service, Moore concludes that they are only interested in research that contributes to their "goals of developing cognitively-based, etiological theories of crime that are empirically provable through positivistic, psychological discourses" (2002:43). She then revamped her proposal to conduct a survey ("with ticky boxes and code sheets"), left out the references to "critical (law and society) scholars," concentrated on the traditional psychological literature, and offered to present her findings to probation and parole officers. By "donning a disciplinary disguise" and "creating a dummy research project" (her own "acts of resistance"), she managed to conduct her research (2002:44).

Until recently, there appeared to be room for both law and society and criminal justice approaches to criminology at Simon Fraser University. However, today the criminal justice technicians have assumed power at the expense of the law and society academics.[13] The corporate model of efficient, market-driven education has led to a catering to the criminal justice system and a silencing of its critics.[14] This short diversion into academic politics draws attention to the impact that external forces (government and corporate power) can have on the academic world, but also leads one to ask whether there are any signs of a reawakening from the social and political arenas.

Are the Times Changing?

With so little time to research and write this short commentary, one might ask why I have bothered trying to sketch out limited

[12] Note that Moore views her proposal as contributing to "contemporary dialogues in both Law and Society scholarship as well as criminology" (2002:40).

[13] Some of this tension is illustrated by a common question asked of law and society graduate students at their defense: "What does your thesis have to do with criminology?" This is probably equivalent to asking criminal justice graduate students why they should be given an academic degree for a study that is better suited for the Criminal Justice Institute (an institute that trains police officers, probation officers, and other criminal justice practitioners).

[14] It is somewhat ironic that with a quarter of the faculty completely alienated from the decisionmaking process, a recent External Review Committee could conclude in an unpublished report that we now have a "collegial model of decision-making," and that somehow collegiality has actually improved from the past. Apparently, the well-balanced approach of our last director of the School of Criminology was viewed as noncollegial in contrast to the present approach, which simply ignores the law and society academics and disperses them to newly created peripheral committees, so they have virtually no say in the decisionmaking process.

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historical events surrounding law and society in three different countries. Admittedly, this is a very incomplete sketch, and a great injustice has been done to both what I have excluded and what I have included. However, history may provide us with some insights to the future.

In his presidential address of 2000, Frank Munger was somewhat optimistic about social activism through law and society. He wrote, "[a]s our field goes global, I see a reawakening of the earlier interest in justice and equality, and in power, class, race, ethnicity and religion" (2001:8).[15] A year later, Calavita asked, "How do we bridge the apparent divide between agency and structure; daily practice and the institutional; resistance and power?" (2002:6). In 2002, Mather suggested ways to use the institutional structures of law and society to increase "cross-national sociolegal dialogues over gender, race, poverty, and violence" (2003:272). While some academics think that Munger[16] and others are far too optimistic about the role of law and society, it may be that this global awakening, combined with other recent activities, will be sufficient for the pendulum to swing in the other direction.

Moore reminds us of Foucault's description of resistance as one of the "unanticipated consequences of public execution" (2002:39). Are there any "public executions" to look to today that might provoke resistance? I would suggest a number of them: (1) war and the increasing possibility of more war; (2) an escalating violation of civil liberties in the name of security; (3) corporate corruption; (4) accountants' malfeasance; (5) corporate executive greed;[17] and (6) the outrageous growing disparity in wages between the controllers of capital and the workers (disparity, not poverty, is the greater producer of crime). None of these phenomena are new.[18]

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[15] I do not know why he did not include gender, but I add gender to this list.

[16] For example, according to Nelson, three recent trends in the courts implicate law in social inequality: (1) restraint on affirmative action and equal employment opportunity; (2) the shift of legal resources from individual to business clients; and (3) a dramatic rise in incarceration, especially of African American men (2001:34–35).

[17] In 2001, the average salary for 140 Enron executives was $5.3 million. "The $744-million total compensation figure includes more than $54-million in so-called 'stay bonuses' paid to senior executives [in November 2001] to dissuade them from fleeing the company for at least three months as its fortunes and its stock plummeted" (*The Globe and Mail* 2002). It was also estimated that employees were looking at a maximum severance of $13,500 each (*The Globe and Mail* 2002). Between 1980 and 2002, the average working wage in the United States increased 66%, compared to the average CEO pay, which increased 1,996% (Rawls 2002). To spell this out in more graphic details, "[a]n indicted ex-CEO of Tyco International . . . made $62.4 million [in 2001] in salary, bonus and stock. The average worker would have to toil until 4449 to earn that much, and a minimum-wage employee would have to work until 7827" (Rawls 2002).

[18] For example, Sutherland tells of criticisms aimed at William M. Wood, president of American Woolen Company in the mid-1930s for receiving a salary and bonus of $1million

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Are there any indications on the barometer that resistance may be in the offing? Again, I think there are signs. One indication that this might be so, according to Galanter's barometer, is that corporations and corporate executives are once again becoming the target of political cartoons, similar to the ones that flourished in the 1910s and 1920s (1999:119). While the vast majority of Canadians and Americans probably view the "moron" comment as both rude and inappropriate, it has resulted in numerous cartoons and jokes directed at both the Prime Minister and the President from around the world.[19] Web sites are sites for resistance by organized groups and individuals, and they are changing the political and academic landscape (Mather 2003:265).

Although some sociologists are writing eulogies for corporate crime (e.g., Snider 1999, 2000), recent events (Enron, WorldCom, Tyco) may help revive the dead.[20] Mather cites various cause lawyering suits and the World Health Organization's Tobacco-Free Initiative as a possible means to "awaken public outrage, strengthen public policies, and redress injuries" (WHO Web site, cited by Mather 2003:271). Rather than assisting policymakers with legal solutions to current executive misbehavior, Edelman suggests that sociolegal scholars might better "provide insights into the broader organizational and institutional dimensions of the problem" (2002:2).

Given the "public hanging" indicators in society, this may be the opportune time to take a more critical look at our social institutions, particularly corporations and government, and their crimes and misconduct. Universities, which are now being driven by the corporate agendas of multinational corporations, are also implicated. As with public hangings in England, recent events may result in resistance and public demand that we reexamine "rich man's law" in order to curb some of the excesses of corporations, governments, and universities. It may be time for a reawakening.

a year plus perks when the company had not paid dividends for years. He was replaced by a man who cut pensions to former employees, but left the president's salary at $373,000, while the corporation lost millions (Sutherland 1983:160). Sutherland also conducts an interesting analysis of the crimes of power and light corporations defrauding consumers and investors (1983, Ch. 13), which may have current relevance.

[19] In November 2002, the Prime Minister of Canada, in response to allegations that one of his close aides described the President of the United States as "a moron," stated that the President was "a friend, and not a moron at all." One need only plug the word *moron* into a Google search to see Web sites such as http://www.presidentmoron.com. Also see http://www.justmorons.com for both jokes and commentary.

[20] For a scathing examination of the impact of corporations on democracy, see Glasbeek (2002).

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