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USES AND ABUSES OF SOCIO-LEGAL STUDIES

Carrie Menkel-Meadow*

Introduction: origin stories—the field’s and mine

Many scholars have told origin stories of the socio-legal studies field, situating its beginnings in American legal realism, British law-in-context studies (Twining, 1978, 2012; Nelken, 2009), the American Sociological Association’s sociology of law subdivision (Levine, 1990; Garth and Sterling, 1998), American desires to add social science rigor to legal and political movements for social change in the 1960s (see earliest issues of the Law & Society Review, 1966–1974) and the observation by both legal and social science scholars that law’s impacts and institutions needed to be studied empirically to assess, among other things, the “gap” between the “law on the books” and the “law in action” (Pound, 1910; Friedman and Macaulay, 1969; Abel, 1973a, 2010; Macaulay, 1984; Friedman, 1986; Menkel-Meadow, 1990; Trubek, 1990; Calavita, 2016). Others have attempted to document a canon of classic works which define our field (Seron, Coutin, and Meeusen, 2013; Morrill and Mayo, 2015) or key concepts that define what we are studying: for example, Weberian “rationality” of the law (in regulatory and bureaucratic institutions; Hawkins, 1984; Ayres and Braithwaite, 1995); Durkheimian social statistics, patterning and other positivist empirically based claims (crime and divorce rates, court statistical studies and political attitude studies; e.g., Gibson, 2009); Marx-informed studies of class and power in law (e.g., Galanter, 1974); and more subtle influences of culture and everyday practices and understandings of law (e.g., Ewick and Silbey, 1998) as constituting a multiplicity of simultaneously existing systems of rules and norms, known as legal pluralism (Merry, 1988). Though economics was somewhat present at the multidisciplinary “birth” (mostly in the form of economic history; Hurst, 1964; Horwitz, 1977, 1992), more recent co-optation of socio-legal concepts and research by behavioral economics and psychologists has added some forms of empiricism to the study of the “efficiency” of laws and legal institutions (Posner, 1973, 1995; Langevoort, 1998, 2001).

Each of us who choose to work within these fields, concepts and ideas can probably remember what first drew us to the multidisciplinary study of law and legal institutions (see

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Garth and Sterling, 1998), which is how I define socio-legal studies (Sterett, 2015), or as one commentator famously put it “real law” (Calavita, 2016). Below, as illustrations, I recount some of the ways I conducted my own socio-legal research (primary research, secondary research, meta-analyses, synthetic analyses and some “mid-level” theory development in dispute resolution and negotiation). In the sections that follow I discuss a few notable examples of “good” uses of socio-legal research, in empirics, theory, policy and doctrinal treatments, and a few “abuses” or failures to properly use empirical data or other forms of socio-legal analysis.

For me, that first moment of “Durkheimian epiphany” (Menkel-Meadow, 1990) came when, as a young poverty lawyer, trained as an undergraduate in sociology by some of the leading scholars in that field at Columbia University, I was preparing for my first trial. My social scientist husband was studying regression analysis, time series and other empirical methods in the University of Michigan-Interuniversity Consortium for Political and Social Research, and I attended some of his classes (circa 1972). While preparing for trial and considering how a judge or a jury might draw conclusions from the evidence I was presenting, I read Kalven and Zeisel’s now classic empirical study of The American Jury (1966). I fell in intellectual love. How could lawyers prepare a case, any case, without understanding the patterns and dynamics of the different kinds of decision makers they might appear before. Yes, every case has its own evidence, but judges and juries bring with them the sum of their human experiences. They are located in communities, in professions, in societies and in relationships (familial, religious, workplace, friendships) that are likely to affect how they process the evidence they hear and the decisions they make in any case. How could anyone only read statutes, cases and documents, or even only interview witnesses as their legal preparation for a case? All cases are situated in ongoing systems, institutions, communities, states, localities, societies and particular legal systems. My study of sociology told me these things would influence decision making in cases and would vary in different matters, cases and locales. I was hooked. From that moment on, I worked to add social science to the rest of my own legal education (continuing in graduate sociology courses), later my practice as a poverty and civil rights lawyer, and then to my own teaching of trial advocacy, negotiation, discrimination law, civil procedure, legal ethics and the legal profession, and now international law.

From the moment I began to teach and research (and still practice) law, I always asked socio-legal (multidisciplinary, informed by different disciplines) questions:

1. With what assumptions are we working? How do we “know” what we think we know? What theories, ideas or frameworks are guiding our thinking (Mannheim’s sociology of knowledge, 1929)? Where do they come from?
2. What are the statistical/quantitative patterns in this legal issue, case, matter, process (Durkheim, 1893, 1897)?
3. Who stands to gain/lose by particular processes, substantive laws, institutions (Galanter, 1974)?
4. What human processes, besides the desires for principle (jurisprudence; Hart, 1997) and rationality (Weber, 1954), inform and affect what people actually do inside legal institutions (psychology, emotion, culture, ethics, religion) as they act individually or in social groups (structural-functionalism; Parsons, 1951; neo-institutionalism)?

1 The classic expression of this in American legal folklore is that legal realism is the study of “what the judge had for breakfast” (Frank, 1949).
5. What other fields of multidisciplinary knowledge help us understand the role of law and legal institutions embedded in social interactions? Beyond the classic constituent fields of socio-legal studies (law, sociology, political science, psychology, history, anthropology, economics), what do we now learn from game theory, decision theory, organizational development and newer methods of quantitative (e.g., artificial intelligence and mass data mining) and cultural-qualitative analysis?

So, when, as a young legal scholar, I planned my first major research project (with the same aforementioned social scientist husband) to study how overworked poverty/legal aid lawyers allocated their work priorities, without fees as a motivating factor (US legal aid lawyers are salaried employees), we designed a triangulated study of several methods (primary data collection) to understand the possibility of a variety of different factors in work allocation decisions (see Meadow and Menkel-Meadow, 1983, 1985; Menkel-Meadow, 1998). With a research grant awarded by the United States National Science Foundation, we studied two sets of legal aid lawyers (one urban, the other rural), by conducting unstructured interviews, doing observations (we and trained research assistants “trailed” each lawyer for three random days of work and recorded, not privileged content, but particular tasks undertaken) and analyzing data from time sheets filled out by the studied attorneys for one random complete week of work. Multiple data sources provided several windows on work allocation decisions, with both aggregate and statistical analysis of most common work tasks undertaken, narrative explanations (both by the subjects of the study and by “external” observers) and analysis of formal work rules, supervisory and other standards of work. Though I was advised not to conduct this kind of lengthy, labor-intensive, data-driven, co-authored and non-doctrinal research before obtaining tenure in an American law school, I did it anyway.

I then encountered a first “abuse” of socio-legal studies. The Reagan administration in the 1980s sought vigorously to defund American legal aid, and a former law school classmate of mine in the federal government sought to have me testify about my data to demonstrate that legal aid lawyers were deciding “on their own” to sue the very government that was funding them and were choosing “leftist” political issues (e.g., school desegregation, immigration, abortion, consumer law reform and other kinds of class actions) to engage in social and legal redistribution projects rather than sticking to individual case processing (evictions, divorces, hearings for government benefits, etc.). Legal aid was not completely defunded, but at the time government funding was seriously reduced and has not yet, as of this date, recovered federal funding at equivalent levels, despite several Democratic administrations since. I was able to deflect “invitations” to testify as I knew my data would be “re-interpreted” by hostile political forces, but I voluntarily suppressed publication of some of my work due to fear of its misuse.

As a young scholar, bridging law and several other disciplines, my major early work was a normative theory of legal negotiation, drawing from work in political science, diplomacy, philosophy, game theory, sociology, social and cognitive psychology, anthropology, economics, decision theory and planning theory, in fact derived from observations I had made in my early poverty law practice, later expanded to all lawyering (Menkel-Meadow, 1984). I argued from these many different disciplines that the lawyer’s default conception of scarce resources and distributive bargaining produced adversarial behaviors that in turn produced brittle, and often binary, outcomes which were often not efficient, social welfare-enhancing or appropriate for client needs. Instead, I proposed and outlined another “frame-work” (middle level theory) of conceptualization of integrative bargaining and behavior (itself derived from the early interdisciplinary work of Mary Parker Follett, 1995). This
work, which coincided with larger cultural developments—the publication of *Getting to Yes* (Fisher and Ury, 1982) and later the fall of the Berlin Wall (see: Menkel-Meadow, 2013b; Menkel-Meadow, Love, Schneider, and Moffitt, 2018)—set the ground for my life’s work as a conflict resolution scholar and practitioner.

My next Durkheimian epiphany came from *secondary analysis*. In what was, and continues to be, one of the most successful multinational socio-legal projects, Rick Abel (of UCLA) and Philip Lewis (Oxford Centre of Socio-Legal Studies) convened, over many years, a group of scholars of the legal profession to undertake a study of the legal professions in common, civil and “mixed” legal systems (18 different countries on five continents). It was finally organized into a three-volume study of *Lawyers in Society* (Abel and Lewis, 1988, 1989, 1995), and my task was to collate and analyze the data of the work of women lawyers in all countries participating in the study. I remember the “Eureka!” moment when, in completing my analysis, I noticed that women were present in some form as lawyers, judges or other legal professionals in all of the represented countries, but, when one analyzed the rank and status of particular occupations, women were always found in the least-valued or least-prestigious segment of the profession, evidencing the kind of occupational segregation being observed in most occupational sociology studies of the time (Menkel-Meadow, 1989). Today, these Durkheimian patterns of gender differences in the profession are ardently debated as scholars of the legal profession continue to report at national and gender levels of data collection (see Schultz and Shaw, 2003; Abel, Sommerlad, Hammerslev, and Schultz, 2019–2020) and debate the social meanings of gender (and now other) diversity in the legal profession.

As a scholar of negotiation behavior, I continue to be involved in this project, arguing that women legal actors still work from gendered assumptions as perceived by others and enacted by themselves (Menkel-Meadow, 2012).

In a later project of a meta-analysis of empirical work on courts and civil procedure reform (which I co-authored with Bryant Garth, 2010), we explored the “uses” and “abuses” of the “commissioning” of empirical studies by courts and other interested legal bodies (both plaintiff and defense attorneys), seeking to justify or support particular policy outcomes and civil procedure rule changes. I was a “victim” of such demands when I conducted a study of the effectiveness of a mandatory arbitration program for a federal court, which was then used to lobby in Congress for the continuation of the program by interested officials seeking to reduce dockets, even though I felt the results were not sufficiently rigorous to publish them in a peer-reviewed social science journal. As another example, when I conducted a rigorous study of multiple forms of dispute resolution in a local city, suggesting some issues with the use of mandatory mediation in landlord–tenant cases, my report was not publicly revealed by the commissioning organization which wanted to promote the continuing use of mediation (without, in my view, adequate legal protections for some litigants appearing without counsel).

I relate these stories of my own social science and law experiences, as both a scholar and a commissioned consultant, to demonstrate what the rest of this essay explores more fully—socio-legal studies are essential for true understanding of how law and legal institutions operate, as embedded in other social processes and institutions. But, even with rigorous methods and testable theories, courts, political stakeholders and advocates are able to “use” socio-legal studies for theory development, data analysis and policy initiatives, but also socio-legal research may be ill used for advocacy or, more disturbingly, not used at all, or ignored when empirical claims are at issue. In the sections which follow I provide some examples of both.
“Good” uses of socio-legal studies: verifiable patterns of socio-legal behavior—ideas, empirics and policy

The best of socio-legal interdisciplinary work provides theories, concepts, testable hypotheses and robust empirical findings to understand the interaction of laws, legal actors (judges, lawyers, policy, juries, litigants and lay people) and legal institutions with the people and other institutions that are affected by law. Socio-legal scholars can study law as the dependent variable (law as affected by other social forces, processes and institutions) or as the independent variable (how does law affect other social institutions and the “acted upon” by law; Epstein and King, 2002; Epstein and Martin, 2014). Data collected to study law and legal processes can be quantitative—large aggregate data (as in court statistics, survey data or newer forms of large scale text analysis, as in the Comparative Constitutional project and “word cloud” analysis; see e.g., Law, 2017) or smaller sets of properly (randomly) selected samples of data. Data collection can be qualitative too, as in narratives, interviews, analysis of texts, use of focus groups and other methods. Those who study law and culture are often concerned with the mutually constitutive and interactive relations of law and the social (Mezey, 2015). Those who engage in socio-legal studies may be law trained or trained in one of the relevant social sciences (political science, sociology, psychology, anthropology, economics, history) or these days in both (joint degrees are increasingly common; George, 2006). Many scholars now identify as “socio-legal scholars” as an independent, if not methodologically uniform, discipline.2 “Good” socio-legal studies have contributed new ideas or tropes about law and its enactment in social life, reported on relatively robust empirical patterns of behavior and been useful in some policy initiatives. I review a (non-systematic) sample of those here.

Socio-legal “tropes” or “memes”3

In considering what makes a “field” of intellectual study, we ask what questions does a field answer, and what knowledge do we gain by using the field’s methods (Menkel-Meadow, 2007)? Socio-legal studies has already contributed some important ideas and tropes to the study of law that go beyond the arid formalism of jurisprudence (what is law, not what does law do) or doctrinal studies of law (what is the law).4 Originally organized around the meme (first articulated by Roscoe Pound, 1910) that there were significant “gaps” between the law “on the books” and the “law in action,” many socio-legal studies have been designed to demonstrate the law’s actual operation or lack of efficacy (ignoring or desuetude [nonuse], distortion; Feeley, 1993; Edelman, 2016) or how formal law morphs into less formal forms

2 The international meeting of the Law and Society Association in Toronto in 2018 had 2,400 registered attendees.
3 I use “meme” here to connote a culturally repeated “idea”—in the case of socio-legal studies, more often “verified” in some quasi-scientific way. For the origins of the word meme, see Richard Dawkins (1976).
4 In earlier articles, I have asked what are the tropes, ideas or memes of law? What ideas or contributions to human knowledge come from the study of law alone? Even classic ideas of “due process,” “equal protection” and “fairness” are derived from political philosophy and politics. “Ideas” of tort, contract, property—classic elements of law in both common law and civil law systems—are patterns of rules developed over time that permit social ordering and, like some forms of science, are subject to change as conditions change and more study reveals the need for different patterns, but in modern times it is often the observations of socio-legal studies that provide the evidence that rules should change or evolve (see Menkel-Meadow, 2001, 2007).
or social norms in practice (consider all the recent studies of race-based policing and criminal law in the United States, e.g., Richardson, 2015, 2017) or, as some socio-legal scholars have called it, “the color of law”—the social and legal construction of race and ethnicity through discriminatory or changing classifications (Mezey, 2003; Calavita, 2016).

Conventional uses of socio-legal methods include statistical measurements of legal phenomena to document how the law and its institutions do, in fact, operate (consider, as discussed below, the studies of racial disparities in the death penalty: Baldus, Woodworth, and Pulaski, 1990; the location and status of legal professionals: Abel and Lewis, 1988–1989; the impacts of different kinds of dispute processing on case management: Ali, 2018; Creutzfeldt, 2018; how lawyers and their clients interact and make decisions: Sarat and Felstiner, 1997; Kritzer, 2015; and variations in judicial and administrative decision making; Ramji-Nogales, Schoenholtz, and Schrag, 2011). Some other kinds of studies use a variety of data sources (aggregate data, semi-structured interviews, participant observations [or ethnomethodology in sociological terms]) to weave more intricate and interpretative explanations for the operation of law and legal institutions (see, e.g., Dezalay and Garth, 1996, on international arbitration and the legal and social construction of a transnational order; Utz, 1969, on regional variations in criminal justice plea bargaining and sentencing; Edelman, 2016, on the internalization and co-optation of civil rights laws in workplaces).

In addition to descriptions of how the law actually operates or is used by legal actors or those acted upon, socio-legal studies has also developed particular tropes or propositions (see Black, 1976, for an early effort to actually catalogue the propositions of socio-legal studies). The findings of Allan Lind and Tom Tyler (1988) in multiple studies of how lay people evaluate their experience of different structures in legal dispute resolution have emerged as a robust theory of procedural justice. People who use different kinds of legal processes (adversarial hearings vs. inquisitorial ones, mediation, arbitration, adjudication) rate their satisfaction with such processes by how fairly they are treated and how much “voice” they have, irrespective of outcome. This idea of procedural justice is one of the strongest replicated findings in socio-legal studies, now applied to the myriad new ways of resolving disputes (e.g., with alternative dispute resolution formats, ombuds, online dispute resolution and hybrid forms of dispute resolution; Menkel-Meadow, 2019). Recent studies suggest that the role of substantive outcome satisfaction, rather than only process satisfaction, may be variable by context (e.g., prison grievances; Jennies and Calavita, 2018), demonstrating how rigorous replication in different settings can provide more rigorous analysis of classic tropes.

The study of dispute resolution itself (Abel, 1973b; Nader and Todd, 1978; Gulliver, 1979) is one of the major interdisciplinary field constructions of socio-legal studies. Moving away from doctrinal studies of legal cases, legal anthropologists, then sociologists, psychologists and political scientists, began to look deeper into how “cases” are developed, from the now classic notion of “naming” (recognition of a wrong), “blaming” (attribution to someone) and “claiming” (formal attempt to get redress) (Felstiner, Abel, and Sarat, 1980–1981), to which I and others have added “reframing” for how lawyers and mediators might transform understandings of what disputes are really about (Menkel-Meadow, 1985). Other scholars now study the social construction of disputes, both the formal and the informal ways they are resolved (or not), and argue about whether a certain amount of disputing is healthy for a society to produce social change and to avoid the pacification or depoliticization of societies that seek to eliminate or reduce too much their conflict to produce false “harmony” (Nader, 1990).

Other broad memes produced by socio-legal theorizing include the idea of legal pluralism—the notion that multiple sets of norms or rules may exist in the same place at any one
The concepts elucidated by socio-legal scholars should also be seen in their intellectual competition with other multidisciplinary fields (see “misuses” section below). Just after the founding of the Law and Society Association in 1964, the field of law and economics erupted onto the intellectual scene with writings by Richard Posner (1973) and others, arguing that a single trope “efficiency” to “maximize wealth” could be used to analyze the efficacy of all law. Law and economics turned out to be far more successful in its intellectual and law-policy project and captured not only intellectual capital, but also lawmakers authority, through appointments of lawyer-scholars to the judicial bench (Judges Posner, Easterbrook [Chicago school] and others) who could interpret and “make” the law with their tropes, and ideas. Does the fact that law and economics so “efficiently” reduced its theoretical claims to a very few tropes (such as efficiency and wealth maximization) account for its greater acceptability, as a doctrinal matter, than the more diffuse (and sometimes contradictory) findings and teachings of socio-legal studies?

In addition, two “breakaways” from the (US) Law and Society Association in the 1990s fragmented the multidisciplinary unity of the field. From the positivist, data-driven side, the Journal of Empirical Legal Studies was founded to publish only data-driven and empirical articles, and a group that formed around it (including Ted Eisenberg, 2011, Lee Epstein and others) began annual meetings to share empirical work and to train law professors in empirical methods.5 At the time, whether colonial and post-colonial legal systems, international legal orders, indigenous normative systems, formal legal federalism (national, state, provincial, local) or informal (e.g., workplace, religious, familial, peer [think teenager policing here!]) norms operating simultaneously with more formal rule systems. Socio-legal scholars now argue about whether multiple normative systems provide too much law or social control, or too much fragmentation for a unified understanding or enforcement (such as in the international legal order), or whether instead it offers points of resistance and multiple authorities to appeal to, or provides denser sets of regulatory regimes (Halliday and Shaffer, 2015). The socio-legal approach to legal pluralism has now spawned the larger field of globalization, focusing on both legal forms of globalization and social and economic interactions across borders (Menkel-Meadow, 2011).

The study of law in a social context has also produced ideas about how non-legal actors perceive and relate to law, through ideas of legal consciousness, legal ideology and the subfield of law and culture. Ewick and Silbey’s (1998) study of “the common place of law” uses different data sources to explore how ordinary citizens stand “before,” “with” or “against” the law, using both formal and informal normative orders. Like their study, I remember beginning a study of such informal ordering when my local movie theatre in Washington, DC announced ticket sales in advance for such blockbusters as the Harry Potter movies. Large groups of people began queuing weeks in advance, sleeping on the pavement to be able to buy tickets for the first showing of such films. As I began observations on a daily basis, it was clear the group had developed its own informal norms, enforced by the group with no formal police or legal action, such as bathroom breaks allowed without losing one’s place, no substitutions of individuals in the queue, shared food and garbage runs, and cleared space for nearby shops. Repeatedly, over several years of release of these films, orderly young people created rules and policed themselves to act appropriately so that no formal police would be called. Rules so “enacted” seemed to carry over from one episode to another.

5 An earlier effort to train law professors in social science methods, at the University of Denver in the early years of LSA, did not have much impact in the field or in drawing more law professors into rigorous empirical work (Garth and Sterling, 1998). More recently, LSA has run graduate seminars and other one-day programs for socio-legal “instruction” before the annual meetings of the society.
about the same time, another group began holding its own meetings and formed the Law, Humanities and Culture Association\(^6\) to foster more narrative and humanities-based studies of law, including law and literature, popular culture and post-modernist approaches to the study of legal phenomena, and focused more on “external” interpretations and studies of the law, rather than those from within traditional legal interpretative traditions.

More recently, the sciences of cognitive and social psychology have produced a body of empirical work on cognitive errors in human reasoning, a great challenge to conventional notions of legal rationality and formalism (see, e.g., Kahneman and Tversky, 1974; Kahneman, 2013). This work has led to powerful studies of how such cognitive errors interact with legal phenomena, exploring implicit biases in all legal reasoning, behavior and decision making, now with special attention to, among others, racial and gender biases among judges, lawyers, police and other decision makers (Lawrence, 1987; Greenwald and Krieger, 2006; Jolls and Sunstein, 2006).

Modern socio-legal scholars (who also contributed a number of the founders of critical legal studies (CLS) in the United States and elsewhere in the 1970s and 1980s; Kelman, 1987; Trubek and Esser, 1989) have been especially concerned about who makes, interprets and enforces the law, including political theories of participation, critical race and feminist theories of exclusion in lawmaking and legal institutions, and what the social structure of knowledge and epistemology means for how the field develops its knowledge base and conceptualizes its studies (see, e.g., Menkel-Meadow and Diamond, 1991). CLS scholars (along with some socio-legal scholars), developed the “critique of rights” which challenged the notion that legal rights were at all effective in producing justice and reducing inequality. As all legal argumentation and doctrine could use legal ambiguity to provide arguments and decisions “on either side,” the law itself was hopelessly (and politically) indeterminate (Kennedy, 1998). How much critical theory actually looks at empirical data is one of the continuing issues of intellectual contention (Munger and Seron, 1984).

**Empirical findings: patterns of socio-legal behavior**

If Durkheimian epiphanies mean anything it is the social science of seeing patterns of “social facts” emerging from rigorous empirical analysis. Our field is full of such studies, and I will review just a few here, each from different “constituent” disciplines, using different methods, to contrast with the “misuses” or “lack of use” discussed below.

Beginning with the first issue of the *Law & Society Review* (and before that from the constituent fields), articles and books and monographs have described, analyzed and evaluated the interaction of law, legal actors and legal institutions with and within society. Classic findings have produced data on the legal needs of ordinary citizens (Genn, 1999; Sandefur, 2014); the operation of criminal and civil justice systems (Utz, 1969; CLRP, Trubek, Grossman, Felstiner, Kritzer, and Sarat, 1983; Feeley, 1993); how people perceive their encounters with legal institutions, and when they actually use them (Merry, 1990); whether there are patterns in judicial decision making (associated with political party [Epstein and Knight, 1998;
Epstein, Landes, and Posner, 2013], gender or other factors); and how everyone in the legal system processes information and makes decisions (Korobkin and Ulen, 2000; Guthrie, Rachlinski, and Wistrich, 2007), among other things. Where legal scholars have focused on doctrinal developments and often argue for law reform, often without any reference to empirical data (the last part of most law review articles), socio-legal scholars have been especially good at focusing on non-uniform impacts of law (various forms of patterning by race, class, gender and other characteristics), the contextual conditions that may be necessary for legal policies to be effective (Handler, 1986) and observations of the “unintended consequences” of the operation of laws and legal institutions.

Lauren Edelman’s recent work (law and sociology; 2016) on the “endogeneity” of law in the co-optation of civil rights laws within workplaces and organizations is one example. Following on from earlier work by Kristin Bumiller (1988; on what actually happens to those who claim discrimination) and her father’s legacy from political science (Murray Edelman, 1971, on “symbolic politics”), Edelman uses multiple data sets to provide both description and analysis of how equal employment opportunity officers and internal human relations departments bring law “inside” their organizations and thereby blunt the effectiveness of external regulation and litigation (where her empirical study of court decisions demonstrates that courts “defer” to companies’ arguments of compliance through internal policies, even as the individual and aggregate stories of continuing discrimination are ignored or discounted; e.g., see Wal Mart Stores v. Dukes, 2011).

Similarly, decades of work on the empirics of prosecution, policing, conviction, sentencing and incarceration, from sociology, legal analysis and political science, describe how formal rules are ignored or manipulated to produce great disparities in stops, arrests, charges, convictions and incarceration (see, e.g., Provine, 2007, on disparities in cocaine arrests and charges). Many empirical studies of plea bargaining and incarceration (Alexander, 2010; Forman, 2017) also document that behaviors of all those with responsibility for criminal law enforcement (police, lawyers and judges) fail to comport with legal rules or non-racially motivated law enforcement. Many socio-legal studies document similar discriminatory patterns in housing, voting, employment and education (see summaries in Seron, 2016; Munger and Seron, 2017).

The socio-legal study of regulation and compliance (e.g., Hawkins, 1984; sociology, economics) also documents how regulation actually happens where some of the regulated comply with formal laws, others resist (including with bribery), and yet others internalize good practices and become “self-regulators” (Ayres and Braithwaite, 1995). Related to law enforcement and compliance are empirical studies of variations in legal mobilization, whether through group and collective actions or through individual uses of legal claim making opportunities (see, e.g., McCann, 1992).

Over decades of work, Elizabeth Loftus (psychology; 1996) has used experimental methods (laboratory studies) to demonstrate the inaccuracy of memories and much formal legal testimony. Legal anthropologists have also used intensive texts from courtrooms (and mediation sessions; see Greatbach and Dingwall, 1989) as data for linguistic analysis that demonstrates the actual power dynamics of courtroom communication (Conley and O’Barr, 2005). These studies use different, rigorous forms of empirical methods to cast doubt on the claims by many that the Anglo-American adversarial trial system and its formal evidence rules (or its alternatives) are best at producing both truth and justice. Others have focused on presentation of evidence and arguments as scripts, jury decision making, using laboratory and simulation studies of group decision making (Bennett and Feldman, 2014) or observations of actual juries (Hans and Vidmar, 1991; Diamond, Vidman, Rose, Ellis, and Murphy, 2003) to report on patterns of jury behavior; some of these may actually have policy impacts, as has the Arizona jury study (Diamond, 2007).
Well-constructed empirical studies in both laboratory and other simulated settings are now challenging the seemingly robust findings of economists and psychologists on elements of prospect theory, particularly “the endowment effect” (Plott and Zeiler, 2007; Klass and Zeiler, 2013), noting that earlier empirics supporting a theory of “ownership” distortions in bargaining behavior may, in fact, be more susceptible to contextual variation. (This is a particularly interesting finding to me as I have used endowment effect simulations in my negotiation classes for decades and found them far more variable than earlier research would suggest. I should have kept better continuous data sets myself!)

This is very far from an exhaustive set of examples of empirical studies drawn from a variety of disciplines that have combined with law to study law and legal institutions, but it hopefully demonstrates the rich contributions to our field from a variety of theoretical and methodological perspectives. Whether we have a true “canon” or not (let others argue about that; for me, canons are always changing in any field that keeps up-to-date with new developments), we do have a field—a field which is focused on understanding not only what law is, but what it can and cannot do. And so, I turn to socio-legal studies and policy.

Uses of socio-legal studies in policy

For readers of this handbook, from a variety of different countries and legal cultures, the question of the role of socio-legal studies in affecting policy is quite variable. In my own experience, although I have participated in many studies solicited by government agencies and courts (some pure research, others evaluative or goal-oriented), the use of empirical studies to actually affect policy has been quite limited or misused (see final section below). Within the socio-legal tradition, the United Kingdom and many European countries, as well as Australia and New Zealand, have asked social scientists to study and advise about legal phenomena (see, e.g., Genn, 2009) or to actually use findings from studies to make changes in policy (see Ali, 2018).

Within the American socio-legal field there has long been a healthy debate about whether socio-legal scholars should “feel the pull of the policy audience” (Sarat and Silbey, 1988) or should actively engage in policy-guided research. Though Sarat and Silbey cautioned against distortions by interested government officials of our “purer” scientific questions, Carroll Seron (2016), in her presidential address to the Law and Society Association, eloquently argued for the importance of engaged socio-legal research in policy, citing such examples as discrimination in housing, voting and policing, the efficacy of representation for indigent clients, regulation and mobilization, and the study of access to justice, as well as access to legal jobs, for the promotion of such enshrined democratic legal values as equality, fairness and justice. The quality of our health, education, housing, employment and environment depends on accurate assessment of what can be regulated by law and what cannot. Despite the ongoing debates in American socio-legal scholarship, the fact is socio-legal and empirical studies have been used in legal cases and in rule-setting and other policy making.

For American legal scholars, the first big bang moment in the use of social science in law was the development of the “Brandeis brief,” a brief using social science data (and actually written by a feminist advocate, Josephine Goldmark)7 in the case of Mueller v. Oregon (1908), which presented

7 Josephine Goldmark was Attorney (later Supreme Court Justice) Louis Brandeis’s sister in law. She wrote the brief with feminist reformer Florence Kelley (Chused and Williams, 2016, 960). Notably, this brief also presented “foreign” (non-American) data and legislation, illustrating continuing issues around the use of “foreign” materials in American legal decision making (see Jackson, 2010).
data on the health effects of long days of work for women, in an effort (quite controversial among feminists today) to have the Supreme Court sustain limited working hours (the 10-hour day) as part of labor reforms. The law was sustained and ushered in an era of contest about how much states and the federal government could regulate labor and other economic and social issues (in brutal legal contests about regulation in an era of the ascendancy of capitalism set against the Depression of the 1930s).

The era of the Depression and the New Deal is often credited as both the founding and peak of the use of social science in policy making and legal realist scholarship (Schlegel, 1995; Twining, 2012). Many of the early legal realist scholars (mostly from Yale and Columbia law schools) moved into the Roosevelt government and argued for regulation and legislation (in securities, banking, corporate regulation, labor and social welfare) based on social science studies. In this period, empirical data were also marshaled for law reform (criminal law) and court procedural reform (Menkel-Meadow and Garth, 2010).

More controversially, social science studies played a role (it is contested how much of a role) in the landmark case of *Brown v. Board of Education of Topeka* (1954) in which the Supreme Court ordered desegregation of American schools and formally ushered in the era of (successful) civil rights litigation in the Supreme Court (Heise, 2005; Barnes and Chemerinsky, 2018). Footnote 11 of the decision in *Brown* discussed the studies of social psychologists Kenneth and Mamie Clark, the “doll test,” which demonstrated that black children preferred white dolls and thought black dolls were inferior (used to argue that “separate but equal” legal doctrine and school segregation produced feelings of inferiority and, thus, violated the Equal Protection clause of the Constitution in the provision of public education). Though the methods of the study were often criticized in scholarship, the Supreme Court did not evaluate or comment on the formal “validity” of the studies. And—see below—it is interesting to note how, several decades later, the Supreme Court chose to ignore or not fully credit far more rigorous data on racial disparities in the death penalty (*McCleskey v. Kemp*, 1987).

Empirical studies can be commissioned to study a particular policy question (Wheeler, 1988), such as when I have been asked to study the effectiveness of court mediation and arbitration processes by comparing them with litigation, or to study the satisfaction of users with particular dispute resolution processes within organizations (e.g., the World Bank, the UN and the International Red Cross, for whom I have done such studies [unpublished]; but, see Creutzfeldt, 2018, for a published comparative study of one form of dispute resolution [ombuds], and Hazel Genn, 2010, for mediation in the UK). Alternatively, researchers may choose to study a legal phenomenon, such as whether changed pleading rules (such as those now demanded in civil rights cases in the United States) have had an effect on case filings and outcomes (Hannon, 2008), and such studies may ultimately affect rule drafting or legal change.

In the United States, socio-legal scholars have been asked to study such questions as whether civilians should be involved in reviewing policing decisions; what processes should

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8 There actually were many civil rights cases before *Brown*; a few were successful, but most were not, and the *Brown* decision continues to be evaluated as not terribly successful in actually desegregating schools (see Rosenberg, 1991).

9 Since that time, there has been much discussion about whether courts should apply the *Daubert* doctrine (prejudicial screening of all scientific expert-presented evidence) to social science evidence in courts (such as in employment discrimination contexts (Renaker, 1996).
be used in different regulatory matters; what effects media might have on legal decision making (consider “the CSI” effect—jurors demanding more technical and forensic evidence after many years of TV shows exaggerating the validity of such evidence; see Goehner, Lofaro, and Novak, 2004; Kopacki, 2013); what legal interventions are most effective for compliance with regulations (e.g., health and safety); and what policies are most effective in social welfare, family law and immigration policies (Sarat and Ewick, 2015). In other cases, lawyers seek out social scientists as expert witnesses (as in statistical evidence for employment discrimination and public health cases) or to marshal data arguments for modern “Brandeis briefs.” Unlike in many legal systems where the judge appoints a single expert to advise the court, American adversarialism (Kagan, 2003) has produced the “battle of competing experts” in many court and administrative proceedings, including health and medical science, gun forensics, accident mapping and a variety (less common) of social science questions. So, in some cases, empiricism is alive and well in our trials (even if trials are exceedingly rare these days—less than 2% of all cases filed in our federal court system result in trial [Galanter, 2004], though experts are still deposed in pre-trial discovery and have their reports considered in legal rulings and motions).

From its roots in trying to understand the lasting inequalities and imperfections in legal systems, the socio-legal field has been studying, for decades now, whether law can affect social change (Rosenberg, 1991; Epp, 2009), and lawyers and social movements have been efficacious in policy change and injustice correction (Cummings, 2018; Menkel-Meadow, 1998). This work has often (erroneously) assumed that social change advocated for by social movements will almost always be in one “progressive” direction (Southworth, 2008) or that progressive social change can only occur within a “sympathetic” democratic constitutional regime (see, to the contrary, Chua, 2014). The story of law and lawyers and those who resist the law in furtherance of broader goals of justice continues to unfold and be studied, especially in recent years, as contests between “progressive, liberal internationalists” and modern, anti-immigration nationalists have intensified, as evidenced by the UK’s Brexit and the United States’ conservative elections and anti-migration values spreading throughout the Western world. Socio-legal scholars in criminal, immigration, race and policing studies are, as I write this, designing studies to measure the actions and effectiveness of lawyers and other activists seeking to resist these developments.

Whether socio-legal studies is primarily an academic field or an “applied” one—as are urban planning, decision science and traditional law study—remains an ongoing (if, to me, arid) debate (Dagan, Kreitner, and Kricheli-Katz, 2018). As socio-legal studies, at least in the United States, was born of concerns for how to use social science to advance social justice (see Garth and Sterling, 1998), it seems appropriate to continue to see it being used effectively and rigorously. Now we turn to when that does not happen.

“Misuses” (or lack of use) of socio-legal studies

From the time of my first Durkheimian epiphany as a law student, I began to be hypersensitive to how often judges made empirical claims and statements in their opinions without any reference to empirical data. Others took note of this in a variety of textbooks and articles (see, e.g., Loh, 1984; Heise, 2002; Epstein and Martin, 2014; Monahan and Walker, 2014) designed to teach law students, lawyers and judges how to do, and understand the significance of, empirical research. Others have criticized whatever use the Supreme Court has made of empirical data in constitutional decision making or challenged
the very notion that empirical data are important for judicial decision making (see, e.g., Zick, 2003; Edwards and Livermore, 2009).

In what has been the biggest rejection of rigorous social science in the courts thus far, the United States Supreme Court in 1987 rejected data from years of detailed study of the disparities in the use of the death penalty. In *McCleskey v. Kemp*, the Supreme Court refused to credit the decades of work done by David Baldus and his colleagues to document racial differences in death penalty punishment rates. In the case, a Georgia African-American man challenging his death penalty conviction asserted it was a “cruel and unusual punishment” (under the 8th Amendment) and a denial of “equal protection” (under the 14th Amendment of the US Constitution), where data robustly demonstrated that black men convicted of killing white victims were more than four times more likely to receive the death penalty than those convicted of killing black victims. Other racial disparities in death penalty sentencing had been demonstrated with high degrees of significance, but the court concluded that none of this met the constitutional standards of requiring “proof” of actual intent (rather than disparate treatment inferred from data) of discrimination (Ellsworth, 2012; Barnes and Chemerinsky, 2018). For a different approach, in Canada, see Perryman (2018). And, more recently, much of the litigation in constitutional same-sex marriage cases in the United States presented social science evidence about family relationships and childrearing (see, e.g., Hull, 2017).

For several years I taught a law and society seminar in a law school and, after introducing some of the classic works of the field and having papers presented by some of the leading American socio-legal scholars, asked students to read critically some major American decisions which relied on empirical statements about the world, but which did not examine any empirical data at all. Judges instead relied on their own “experiential” data and unsystematic personal observations rather than on rigorously and scientifically collected empirical data. Students were then asked to design a research plan for how to actually study the phenomenon at issue, to conduct a literature review of what empirical work had already been done on that question, and then to either (1) attempt a small-scale study of the phenomenon under review or (2) rewrite the opinion with proper references to existing empirical studies. This seminar’s purpose was for students to understand the role of empiricism in law and critically examine legal judgments, opinions and decisions for the rest of their lives and to notice when data are absent, ignored or misapplied.

Some have criticized the methodological weaknesses of much of what passes for empirical legal research (Epstein and King, 2002) and have urged that all law students and judges need to be better versed and educated in rigorous assessments of data analysis. This is extremely important for many reasons, but particularly because, as I have alluded to above, many of us have been “pulled by the policy audience’s” request to “create” studies to “prove” predetermined desired policy goals, as in requests to justify various forms of legal process (e.g., mediation or litigation) or procedural rule reform (both criminal and civil), and especially with regard to desires to increase efficiency and reduce costs of some legal process without sufficient attention to other values (see Menkel-Meadow, Love, Schneider, and Moffitt, 2018, Ch. 14). Others accuse (rightly in some instances) some social scientist legal

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10 One of the current projects of the socio-legal studies field is to “rewrite” leading judicial opinions in a variety of fields, but including the perspectives of empirical data and also the inputs of previously “excluded” groups, e.g., women, minorities, etc. (see Moran, 2010; Menkel-Meadow and Diamond, 1991; Hunter, Chapter 19, this volume).
(forensic) experts of being “bought” (or, worse, “whores”) for particular “sides” of litigation and policy debates (see, e.g., Kousser, 1984).

More significant are the difficult epistemological issues of different standards of “proof” in the physical and social sciences and legal standards. Many expert witnesses and scholars have commented on the mismatch of the “beyond a reasonable doubt” standard in criminal law (in prediction testimony for example), and even the “preponderance of the evidence” standard in many civil matters does not square with the probabilistic standards of claims (depending on relative confidence levels) that can be made from empirical studies (see, e.g., Robbennolt, 2002; Greiner, 2008; Haack, 2014). Causal analysis in the social sciences does not match up with the legal standards for causation in any of its domains (torts, discrimination, environmental and epidemiological harm), and so empiricists and experts are disappointed they are not fully credited in legal proceedings, and lawyers and judges are often frustrated at their inability to use empirical research in a dispositive way.11

At the same time, there is the concern that socio-legal (and all social science data studies, as well as the newer forms of “algorithmic” logic with deep data mining), coding and quantification may tend to assimilate in coding boxes and classifications that which is not really uniform. I recall my own experience in listening excitedly to an early classic study of socio-legal studies at an LSA meeting (Susan Silbey and Sally Merry’s classificatory study of mediators, 1986) and being influenced by their conceptualization of “settlers” (task-oriented agreement-seeking mediators) versus those who were more “therapeutic” and interpersonal in their orientations. Many decades later, as an experienced mediator of hundreds of matters, I find this classification system an artifact of simplistic conceptualization and the need to “codify” and reduce a great variety of mediator orientations, moves, techniques, goals and behaviors into simple, binary categories. As a mediator, I use many tools, techniques, goals and behaviors, and these depend greatly on context, the kind of matter, what is at stake, the parties, whether they have lawyers, and their many kinds of needs—I, and most of my mediator colleagues, do not fit neatly into these “either/or” boxes. I had similar reactions (in print) to the coding of so-called “similar” case types and courts in the RAND studies (Kakalik, Dunworth, Hill, McCaffrey, Oshiro, Pace, and Vaiana, 1996) of the effectiveness of ADR in the federal courts (Menkel-Meadow, 1997). As a practicing lawyer, I had litigated in both the Eastern District of Pennsylvania and the Central District of California, and these courts had very dissimilar caseloads and local legal cultures. From my having been inside both of these court systems, the comparisons in the large aggregated study of case treatments seemed inapposite to me.

Too much reliance on aggregate data for “predictive” models is also a potential misuse of empirical data in the legal system. Virginia Eubanks studied the use of algorithms and mass data sets to diagnose and predict who is likely to be neglecting and abusing children, failing to cooperate with electronic welfare and health benefit information requests, and eligible for housing benefits and assistance for homeless populations (Eubanks, 2018). This important work flags the epistemological, as well as methodological, differences in the algorithmic “predictive” thinking of our new age of artificial intelligence decision making, as contrasted to the legal standards of due process and individual adjudication “after,” not “before,” the facts have been “proven.” Recently, the United States Supreme Court refused to grant review (certiorari) of a claim that it was a denial of due process to use algorithmic predictive models for risk assessment in criminal law sentencing (see Loomis v. Wisconsin, cert denied

11 These are depressing times for some of us empiricists, as many in the United States continue to deny the empirics of climate science!
June 26, 2017). Thus, judicial decision making can be problematic from both “too little” and “too much” data—depending how data are used and what legal standards are applied.

As I have come to be skeptical of judicial decisions that make empirical claims without empirical data and support, I now find myself sometimes equally skeptical of the empirical claims made in socio-legal studies that codify and classify phenomena, behaviors and people which I know are far more complex and context variable than empirical “measurements” permit in many studies. Thus, after many decades in the field, I often find that what is being described with data sets, both large and small (e.g., many claims about ADR or litigation generically), doesn’t ring true to me in situations where I have been a participant or witness to the phenomena described. This has heightened my own respect for more nuanced ethnomethodological and participant observer studies, with longer narratives and descriptions and fewer grander, more general claims. In other areas in which I work, such as gender differences in negotiation behavior, both aggregate and smaller case studies remain inconclusive, largely because different design research in so many different contexts have produced such variable findings (see Menkel-Meadow, 2012, and Hollander-Blumoff, Chapter 12, this volume)—context really matters, and some things we study are highly interactive.

Yes, ultimately, I still believe that all methods and different studies tell us something, but our field has not engaged in enough rigorous replication studies and iterated testing of findings.

One notable “misuse” of socio-legal studies has, for me, been the “co-optation” of early socio-legal research (e.g., group decision making as in jury studies, “non-rational” factors in decision making, empirical studies of legal behavior) by law and economics scholars who now claim a new field of “behavioral economics” (Jolls, Sunstein, and Thaler, 1998; Ulen, 2013). After decades of classical economics “assumptions” about human behavior (and of “maximizing utilities”), in the late 1990s, law and economics scholars and social and cognitive psychologists began to realize that not all “men” (I use that word deliberately) reasoned exactly the same way, under all conditions, and that—aha!—decision making about legal and other matters might vary with context (see also Klass and Zeiler, 2013). Much of the work of behavioral economics has been extremely useful for the study of law, legal actors and legal institutions in many settings (e.g., plea bargaining; negotiating; legal decision making; resource allocation; incentive structures for legal compliance, including its use in many policy settings; risk analysis; regulatory policy [Sunstein, 2011]; environmental law; labor relations; and contracting generally), but the failure to read, cite and properly give attribution to those socio-legal scholars (particularly sociologists, psychologists and anthropologists) who have harvested these concepts—often with extensive data—is academically shameful. This appropriation of concepts and decades of empirical work sadly demonstrates the failure to integrate a truly multidisciplinary field—we still all seem to work within silos.
as we study the law from outside of doctrine. Legal economists seem to think that they have invented empiricism in law.\(^{15}\)

**Implications: the limits of disciplinary thinking and a call for rigorous multidisciplinarity**

From where will the Durkheimian epiphanies of the future come? This volume contains a set of many examples of law and … disciplines. Examples are drawn from research being conducted all over the world now, not just in Anglo-American spheres of influence (or intellectual colonialisms?). Theory, methods, data and sources of interpretation are diversifying as our socio-legal field moves from studies of legal pluralism to actual migration of thought and globalization. As this volume attests, there is so much interesting work being done, it is hard to keep up with it all.

The expansion of studies of law and … to so many new sites, with so many new kinds of data (major data sources from modern technology capture; Eubanks, 2018) and new lenses of interpretation, presents some challenges (e.g., Barnes, 2016) — some old, some new:

1. Does our field have (need) a canon? What are the key propositions of knowledge that characterize what we know about how law functions in society and how social forces structure law and legal institutions? What new concepts or tropes are we studying/should we be studying—for example, mixed “identity” and classifications (Mezey, 2003), “adjectival” constitutionalism, subnational and supranational legal systems (e.g., Shari’a law)?
2. Do we have clearly accepted methods (social science reliability, validity and causality standards, other measures of reliability)?
3. How much replication/cumulation of knowledge do we have/desire? (Should we be emulating the physical sciences, or do we have our own ways of evaluating knowledge production?)
4. How much should we commit ourselves to policy research? (Are we an applied science? How does this vary from legal culture to legal culture?)
5. Is the field committed to particular social/political/legal values (social justice, equality, democracy), or can it be a “neutral” or objective field of study?\(^{16}\)
6. With what sense of ethics and responsibilities should we approach those we study? Beyond the now required institutional review boards for study of human subjects in most major universities (Schrag, 2010), what else do we owe those we study—beyond consent, explanations of our work and assistance in solving the problems we see (lack of housing, racialized policing, “crimmigration” or injustice; Menkel-Meadow, 2009)?\(^{17}\)
7. With so many new comparative, global and diverse studies of socio-legal phenomena, what are our comparators? How do studies in legal regimes (constitutional, authoritarian), processes (litigation, alternatives to litigation, criminal, civil, administrative) and

\(^{15}\) There have always been a few economists within the sociolegal community in the United States, beginning with Willard Hurst and Morton Horwitz’s economic histories. James Heckman at the American Bar Foundation (and a Nobel Economics prize winner) has long used extensive empirical data in his studies of school desegregation and the impacts of many social and economic reforms (Heckman and Krueger, 2003).

\(^{16}\) Anyone who knows the feminist, critical race and post-modern critiques of knowledge in the “post-canon” era knows there is no such thing as “neutral” knowledge, though our ethics of research provide some standards of aspiring to “objective” measures (see Harding, 1991; Moran, 2010).

\(^{17}\) For an important effort to delineate an ethics code for data scientists, programmers and system engineers of new computer/electronic/data system designers, see Eubanks, 2018, 212–213.
actors (lawyers, judges, police, tribunal officials) explain when so much of this is now hybridized, and nothing is a pure “ideal type”?

I will not belabor here the arguments I have made in many places (see, e.g., Menkel-Meadow, 2007) that essential to any modern legal education should be rigorous training in the constituent social sciences that comprise, affect and influence law, and the evaluation of its impacts. As our knowledge about law and legal institutions and their efficacy increases by study of more sites of norms and rules (internally and from “below”), as well as from outside (top–down for policy initiatives) and through the lenses of many more multidisciplinary fields (including hybrid fields such as urban planning, decision theory, artificial intelligence, cultural studies), no modern lawyer, judge, government official or bureaucrat should only study or know the “doctrine” of law, without understanding something about how that doctrine will (or will not) be used. Nor should they assume their “experiential” knowledge is superior to independent empirical findings. For those “outside” of the law (or the acted upon), it is even more imperative to know how the law on the books is still so far from the law (or justice) in action. In so many areas of legal and social policy, we need all the data and help we can get to learn what is happening on the ground and what policy or advocacy interventions work or do not work—consider current issues of worldwide migration; labor displacement and loss; “crimmigration”; ongoing discrimination and inequality on grounds of race, ethnicity, gender and class; human rights violations and enforcement; whether “rights” and legal movements are effective in producing more social change; and how the use of technology will alter our legal and social relations, perhaps forever. I look forward to many more studies, using many different methods, to expose the newest forms of Durkheimian epiphanies that should illuminate what the law promises us and when it fails.

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