

Teaching Social Science in Law: An Alternative to "Law and Society"

John Monahan and Laurens Walker

Lawrence Friedman, writing in 1974, described the teaching of social science as "one of those fancy, prestigious things that rich law schools indulge in."¹ While that may have been an accurate description of the state of the field in the mid-1970s, events have overtaken it. In the mid-1980s, over 200 law professors at almost 100 different law schools list themselves as teachers of law and social science.² We have been among this group for the past five years, and in this brief article we recount our experience and the pedagogic conclusions we have derived from it.

Orientation

The orientation to teaching social science that comes most naturally to many law teachers derives from the "law and society" movement. Depending upon the disciplinary tastes of the instructor, this is sometimes referred to as "the sociology of law," the "psychology of law," or "legal anthropology." Whatever perspective is chosen, courses in this tradition focus on how "law" as a social system develops and changes as it interacts with other social systems in a culture.³ The law and society approach to the teaching of social science in law schools has a long and distinguished history. It has unquestionably enriched the curriculum of a number of leading law schools. Yet it has always suffered from a serious problem: when run up the curricular flagpole, relatively few law students have saluted. As Friedman has stated, if law students "had wanted to do research, they would have gone on for a PhD in some scholarly subject. They have explicitly rejected this route, and they tend to be somewhat impatient with law and social science. It has rather meager financial returns, and its aims and style are not to their taste."⁴

John Monahan is Professor of Law, University of Virginia School of Law.

Laurens Walker is T. Munford Boyd Professor of Law, University of Virginia School of Law.

This article is the edited text of a presentation prepared for the AALS Workshop on the Role of Social Science in Legal Scholarship and Legal Education, November 1-3, 1984.

1. Lawrence Friedman, *The Future of Law and Social Sciences Research*, 52 N. Car. L. Rev. 1068 (1974).
2. Association of American Law Schools, *Directory of Law Teachers 1984-85* (1984). We exclude economics and psychiatry from our definition of "social science" because separate courses in these two disciplines are often offered in law schools.
3. See Lawrence Friedman & Stewart Macaulay, *Law and the Behavioral Sciences*, 2d ed. (Indianapolis, 1977).
4. Friedman, *supra* note 4, at 1070.

© 1985 by the Association of American Law Schools. Cite as 35 J. Legal Educ. 478 (1985).

Partly in response to this problem of student disinterest, and partly from a belief that there were interesting and important intellectual questions upon which the law and society approach had not touched, we have experimented with a different focus to our teaching in the area. At first tentatively, and then more boldly, we began to orient our instruction toward the uses to which social science had been put—and the potential uses to which it might be put—in resolving actual legal controversies. We came to call our orientation “social science in law.”

This social science in law approach diverges from the law and society tradition in taking the “inside” perspective of the legal practitioner and the judge rather than that of the social science observer. It views social science as an analytic tool in the law, familiarity with which may heighten the lawyer’s professional effectiveness and sharpen the legal scholar’s insights. It is frankly “applied,” asking what social science and social scientists have to contribute to the law, rather than using law as grist for the mill of more general social theory.

Our experience with this orientation has been rewarding both in terms of student response and in terms of our own scholarly interests. We have gone from attracting about one percent of the law student body per year with law and society offerings to enrolling over fifteen percent of the first year class in a one-semester “Social Science in Law” elective. And we have in the process discovered enough unexplored intellectual puzzles to keep our academic “In” baskets perpetually overflowing.

We believe that there is ample room in the law school curriculum for both “law and society” and “social science in law” courses. The priority we give to the social science in law approach implies no disparagement of the law and society tradition. Indeed, our experience has been that exposure to social science concepts in the context of their application to specifically “legal” problems whets the appetite of those students potentially interested in more generic issues of the relationship between law and society. It thus broadens the market for the latter type of offering. Given the ready availability of materials describing “law and society” we take the remainder of this article to sketch the pedagogical contours of adopting the social science in law perspective.⁵

Organization

Since some use has been made of at least one of the social sciences in virtually every substantive area of law, the options for structuring a course are limitless. Two come most quickly to mind. A course could be organized around the conventional categories of legal education (e.g., social science applied to constitutional law, social science applied to civil procedure), or it could be organized according to the historical segmentation of the social

5. We have developed this approach in a recent Foundation Press casebook, John Monahan & Laurens Walker, *Social Science in Law: Cases and Materials* (Mineola, N.Y., 1985) and in a forthcoming article, John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 000 U. Pa. L. Rev. 000 (forthcoming, 1986). See also Wallace D. Loh, *Social Research in the Judicial Process: Cases, Readings, and Text* (New York, 1984).

sciences (e.g., sociology applied to law, psychology applied to law). We have found neither of these divisions to be conducive to integrating the range of social science applications with the legal process. Instead, through many trials and much error, we have settled upon a more functional scheme, one that roughly parallels the sequence in which any social science discipline is brought to bear on a substantive legal issue.

The first question to arise in the legal process often is, "Has a violation of the law occurred?" In a segment of the course titled "The Occurrence of Legal Acts" we consider the relevance of social science to questions of whether a constitutional or statutory provision (e.g., the Lanham Trademark Act) has been violated. Assuming a violation has occurred, the next question typically is, "Who committed the violation?" A segment titled "The Identity of Legal Actors" deals with the application of social science to the task of identifying who committed the legal act at issue (e.g., Fourth Amendment implications of statistical "drug courier profiles"). Many laws are concerned with issues in addition to the physical occurrence of an act and the identity of the actor. They further specify that the person violating the law must have done so with a specified purpose or intent. In a segment titled "The State of Mind of Legal Actors" we treat the use of social science in establishing the mental state with which violations of the civil or criminal law are committed (e.g., Title VII "disparate treatment" cases).

Once it has been determined that a violation of the law has occurred, who committed the violation, and that the requisite state of mind was present, the question of what should then be done is presented. A segment titled "Legal Sanctions and Remedies" considers the application of social science to devising an appropriate disposition for different types of legal cases (e.g., child custody disputes). Finally, a set of legal procedures provides the framework for resolving each of the above questions. In a segment titled "Legal Procedure" we focus upon how social science can inform decision-makers for selecting among the various procedural options open to them (e.g., jury size).

Goals

Since one could not possibly do justice to all of the legal or social science questions raised in such a broad survey, some format for selecting among them is essential to prevent the course from degenerating into dilettantism. We have answered the question, "What do we want students to get out of the course?" by adopting as our objective for each segment the analysis of four subtopics, each a part of the larger involvement of social science in law: (1) substantive law, meaning the legal rules that make the involvement relevant; (2) legal method, referring to the process of managing the involvement; (3) social science findings, meaning the applicable research results; and (4) social science method, referring to the techniques of carrying out and analyzing that research. These objectives can be restated as an analytic or heuristic framework within which social science in law is viewed as a matrix or table consisting, on one dimension, of issues that are primarily "social science" in nature compared to issues that are primarily "legal" and, on the other dimension, of issues that focus on "substantive"

matters compared to issues that focus on “methodological” ones. The matrix could be diagrammed as follows:

	<u>Law</u>	<u>Social Science</u>
<u>Substance</u>	Substantive Law	Social Science Findings
<u>Method</u>	Legal Method	Social Science Method

Issues pertaining to the nature of a legal doctrine under consideration (e.g., why is social science relevant to the legal determination of obscenity or segregation?) are considered as questions of *Substantive Law*. Issues regarding the means by which courts apprise themselves of social science information (e.g., should a study have been introduced at trial rather than on appeal?) are treated as questions of *Legal Method*. The results of social science research pertinent to a given legal issue (e.g., does the death penalty deter crime?) are viewed as questions of *Social Science Findings*. Finally, the methods of data collection and analysis that generated the social science findings (e.g., did the studies eliminate all rival hypotheses that could account for the results?) are considered as questions of *Social Science Method*.

Special Problems

Two issues so pervade the area of social science in law that we have found it efficient to separate them from the rest for special treatment before beginning the substantive part of the course.

The first issue is jurisprudential. In our experience it is impossible to adequately appreciate the contributions that social science is making to the American legal system—and the limits of those contributions—without some preliminary exposure to the jurisprudential foundations of the use of social science in law. Therefore, we begin our course with a brief consideration of the development and ramifications of Legal Realism as the movement that gave legitimacy to empirical inquiry as one component in the legislative and judicial process of creating law.

The second issue is methodological. Most law students, as Friedman pointed out, are by disposition or by choice “word smiths,” not “number crunchers.” We are convinced that the bulk of applications of social science to the law require only a basic understanding of methodology and statistics. But they do require that. Without a working knowledge of “how to think like a social scientist,” the student will be unprepared to evaluate the substantive applications of social science to the law that are the meat of the course. Our own experience with students at the University of Virginia School of Law has been remarkably consistent from year to year: a third of the students have had one or two methodology or statistics courses in college, a third have an extensive undergraduate or a graduate education that focused on empirical issues, and the remaining third have somehow managed to avoid anything more quantitatively rigorous than arithmetic.

Confronted with this range of student backgrounds, we quickly came to the conclusion that the only way to keep the focus of the course on social science in law, rather than on statistics—a very worthy goal, but not our goal⁶—was to aim low: to inculcate only the primer-level knowledge of methodology and statistics necessary to comprehend the cases and materials that followed, and no more. This, we found, could be done in two or three weeks of concentrated effort, just prior to beginning the substantive part of the course.

Conclusion

We have described an approach to teaching social science and law that centers on the applications of social science to the legal system, as an alternative to law and society courses that are more removed from the everyday workings of the law. These two options, we have stressed, are complementary rather than antagonistic. Ultimately, a well-rounded law school curriculum would include not only specialized courses of both orientations, but would have social science materials incorporated as a central component of such “standard” law school fare as civil and criminal procedure, evidence, and constitutional law. As Derek Bok has recently observed, “we ignore the social sciences at our peril”⁷ in legal education. Every effort to dispel empirical ignorance should be welcomed.

6. See David Kaye, *Thinking Like a Statistician*, 34 *J. Legal Educ.* 97 (1984).

7. Derek Bok, *A Flawed System of Law Practice and Training*, 33 *J. Legal Educ.* 570 (1983).