KITTY CALAVITA

Invitation to Law & Society

An Introduction to the Study of Real Law

The University of Chicago Press *Chicago and London*

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and I can depend on her to tell me of that centerpiece I missed or that analysis that was just a little off. I would be remiss though if I didn't mention another of Val's key contributions. She tries her best to make up for my appalling deficit of pop culture knowledge and has offered me entertaining tidbits and racy examples for which the reader will no doubt be especially grateful.

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Of course I literally could not have written this book without the prolific efforts of hundreds of law and society scholars over the last several decades. Some I have included in these chapters, but there are many others too numerous to cite. It is the dynamism and energetic intellectual exchange of the field that have inspired me to write this short invitation. I can only hope I do that dynamism and excitement justice in the pages that follow.

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Contents

CHAPTER ONE Introduction

Everyone has some idea what lawyers do. And most people have at least heard of criminologists. But who knows what "law and society" is? A lawyer friend of mine, a really smart guy, asks me regularly, "What exactly do you people *do*?" Once when I was at the annual meeting of the Law and Society Association, my taxi driver was making the usual idle conversation and inquired what I was in town for. I told him I was attending the Law and Society Association's annual meeting. His interest suddenly aroused, he turned to face me and asked with some urgency, "I've been wondering, when *is* the best time to plant a lawn?"

I write this as an invitation to a field that should be a household word but obviously isn't. Peter Berger's (1963) *Invitation to Sociology* is one of my favorite books, and I have shamelessly copycatted it for my title and for the concept of this book. Like Berger, I want to offer an open invitation to those who do not know this territory, by mapping out its main boundary lines and contours and explaining some of its local customs and ways of thinking. This mapping and explaining is more difficult in law and society than in some other academic territories, because its boundaries are not well marked and because it encourages immigration, drawing in people from many other realms. The population includes sociologists, historians, political scientists, anthropologists, psychologists, economists, lawyers, and criminologists, among others. Like the pluralistic legal cultures we sometimes study, our diversity is both a challenge and enriching.

First, a disclaimer. This is not meant to be a comprehensive overview or textbook introduction to law and society. I am bound to antagonize some of my colleagues in this selective sketch of the field, as I speak in the language I know best—sociology—and inevitably favor some approaches and just as inevitably neglect others. In addition to

mostly "speaking" sociology, my primary language is English. This means that besides slighting much that is of interest in political science, economics, and other fields, I include here only a tiny fraction of the excellent works written in languages other than English. I cannot possibly do justice to the whole rich terrain of our field in this small volume, and I do not intend it to be an overview of law and society's many theories and methodologies. Instead, I hope that this book's limitation will be its strength, as an accessible and concise presentation of a way of thinking about law. It is meant for undergraduate students and their professors, but it is also written for my lawyer friend who can't figure us out, for my taxi driver, and even for an occasional colleague, because it is always entertaining to see others attempt to describe what we do.

In the pages that follow, I will try to construct a picture of (some of) our ways of thinking by presenting a few of law and society's overarching themes, arranged roughly as chapters. There is some slippage and overlap among the chapters, and the divisions should not be taken too seriously. What I am after here is a composite picture, a gestalt of a way of thinking, not a comprehensive inventory. I am treating this as a conversation—albeit a one-sided one—and will keep you, the reader, in my mind's eye at all times. Partly in the interests of accessibility and a free-flowing conversation, I have sacrificed theoretical inclusiveness and instead provide many concrete examples and anecdotes from everyday life.

Peter Berger (1963, 1) started his *Invitation to Sociology* by lamenting that there are plenty of jokes about psychologists but none about sociologists—not because there is nothing funny about them but because sociology is not part of the "popular imagination." Well, law and society faces a double difficulty. When people don't confuse us with experts in the care and maintenance of grass, they are likely to think we are practicing lawyers, which is—judging from the number of lawyer jokes in circulation—the world's funniest profession. Complicating matters, some of us are *in fact* lawyers, but not the funny kind.

The law and society mentality is broader than the specific themes I introduce here. And some of these themes are mutually contradictory and represent conflicting visions of the field. But, just as all creatures are greater than the sum of their parts, there is a law and society perspective that transcends its sometimes self-contradictory

themes. One way to get at this perspective is to contrast it to how people ordinarily think about law. I do not want to oversimplify here because people have many different views of law. As we will see later, the same people think of law differently according to whether they are getting a parking ticket, suing a neighbor, negotiating a divorce, or being sworn in as a witness to a crime. But most people tend to hold up some idealized version of law as the general principle, and individual experiences that deviate from that version are thought of as, well, deviations. Law in the abstract somehow manages to remain above the fray, while concrete, everyday experiences with law—either our own or those of others we might hear about—are local perversions chalked up to human fallibilities and foibles. This view of law was brought home to me powerfully the other day on my commute to work. A bumper sticker on a pickup truck read, "Obey gravity. It's the law." I cannot be sure, but I think the point was to underscore the inevitability and black-and-white nature of law, in a sarcastic jab at moral relativists. Like gravity, law is Law.

Even when we are cynical about the law, this cynicism seems not to tarnish the abstract ideal of "The Real Law"—the magisterial, unperverted, gravity-like sort. Consider jury service. If you have ever served in a jury pool or on a jury, you might have been aghast at the shortcomings of some of your peers who might, in your view, be less than intellectually equipped to wrestle with the complex issues being presented (and they no doubt were at the same time scrutinizing you). But, if you are like me, it is hard not to feel a certain awe for the majesty of the process and the aura it projects. The Law—with a capital L—in this idealized version resides in a realm beyond the failings of its human participants and survives all manner of contaminating experiences.

Law and society turns this conventional view on its head. "Real law" is law as it is lived in society, and the abstract ideal is itself a human artifact. Many interesting questions follow. How does real law actually operate? How are law and everyday life intertwined? Where does law as abstraction come from, and what purposes does it serve? What can we learn from the disparity between abstract law and real law? And, why is the idealized version of law so resilient even in the face of extensive contrary experience?

Law and society also turns on its head the jurisprudential view of law usually associated with jurists and often taught in law school.

This view approaches law as a more or less coherent set of principles and rules that relate to each other according to a particular logic or dynamic. The object of study in jurisprudence is this internal logic and the rules and principles that circulate within it. According to this approach, law comprises a self-contained system that, with some notable exceptions, works like a syllogism, with abstract principles and legal precedents combined with the concrete facts of the issue at hand leading deductively to legal outcomes. While this model has been updated recently to allow for the intervention of practical considerations in judicial decision making and some concessions to social context, this lawyerly view of law still dominates law school training and jurisprudential thought. That's why U.S. Supreme Court Chief Justice John Roberts (2005, A10) could say at his Senate confirmation hearing in 2005: "Judges are like umpires. Umpires don't make the rules, they apply them. . . . If I am confirmed . . . I will fully and fairly analyze the legal arguments that are presented." Despite the famous quote long ago by one of America's most noted jurists, Oliver Wendell Holmes (1881, 1), that "the life of the law has not been logic: it has been experience," the view of law as a closed system of rules and principles that fit together logically has proven just as resilient in many legal circles as the layperson's idealization.

So, jurisprudence is mostly devoted to examining what takes place inside the box of legal logic. Law and society takes exactly the opposite approach—it examines the influence on law of forces *outside* the box. If the issue is free speech rights in the United States, jurisprudence might catalog judicial decisions pertaining to the First Amendment and trace the logical relationship between these precedents and some present case. Instead, a law and society scholar might probe the historical origins of the American notion of free speech and expose the political (i.e., extralegal, "outside the box") nature of First Amendment judicial decision making. David Kairys (1998), for example, shows us that the common assumption that a free speech right emerged full blown from the First Amendment is a myth; that the right we associate with the First Amendment today was the product of political activism in the first part of the twentieth century, especially by labor unions; that since then it has been alternately expanded and retrenched according to political pressure and ideological climate; and, last but by no means least, that Americans' myths about the origins and scope

of our free speech right have powerful impacts on our assumptions about the exceptional quality of American democracy. So, judicial decision making on issues of free speech—in fact, the very concept of free speech—is the product of social and political context. And our entrenched mythical abstractions about free speech, while factually inaccurate, have profound sociopolitical effects. The broader law and society point here is that law, far from a closed system of logic, is tightly interconnected with society.

But we can go farther. Because not only are law and society interconnected; they are not really separate entities at all. From the law and society perspective, law is everywhere, not just in Supreme Court pronouncements or congressional statutes. Every aspect of our lives is permeated with law, from the moment we rise in the morning from our certified mattresses (mine newly purchased, under a ten-year warranty, and certified by the U.S. Consumer Product Safety Commission, the U.S. Fire Administration, and the Sleep Products Safety Council, and accompanied by stern warnings not to remove the label "under penalty of law"); to our fair-trade coffee and NAFTA (North American Free Trade Agreement) grapefruit; to our ride to school in the car-pool lane on state-regulated highways; to our copyrighted textbooks, and so on, for the rest of the day. But, in the form of legal consciousness, law is also found in less obvious places like the mental reasoning we engage in when we are pondering what to do about our neighbor's noisy dog. Law so infuses daily life, is so much part of the mundane machinery that makes social life possible, that "law" and "society" are almost redundant. Far from magisterial or above-the-fray, law is marked by all the frailties and hubris of humankind.

I just finished reading a book on the imperfect nature of medical science. Surgeon and essayist Dr. Atul Gawande introduces his provocative volume with a personal anecdote that I quote at some length because it is both powerful and pertinent to our study of law. He writes (2002, 3–5):

> I was once on trauma duty when a young man about twenty years old was rolled in, shot in the buttock. His pulse, blood pressure, and breathing were all normal. . . . I found the entrance wound in his right cheek, a neat, red, half-inch hole. I could find no exit wound. No other injuries were evident. . . . [But] when I

threaded a urinary catheter into him, bright red blood flowed from his bladder . . . The conclusion was obvious. The blood meant that the bullet had gone inside him, through his rectum and his bladder . . . Major blood vessels, his kidney, other sections of bowel may have been hit as well. He needed surgery, I said, and we had to go now. He saw the look in my eyes, the nurses already packing him up to move, and he nodded . . . putting himself in our hands . . .

In the operating room, the anesthesiologist put him under. We made a fast, deep slash down the middle of his abdomen, from his rib cage to his pubis. We grabbed retractors and pulled him open. And what we found inside was . . . nothing. No blood. No hole in the bladder. No hole in the rectum. No bullet. We peeked under the drapes at the urine coming out of the catheter. It was normal now, clear yellow. It didn't have even a tinge of blood anymore. . . . All of this was odd, to say the least. After almost an hour more of fruitless searching, however, there seemed nothing to do for him but sew him up. A couple days later we got yet another abdominal X ray. This one revealed a bullet lodged inside the right upper quadrant of his abdomen. We had no explanation for any of this—how a half-inch-long lead bullet had gotten from his buttock to his upper belly without injuring anything, why it hadn't appeared on the previous X rays, or where the blood we had seen had come from. Having already done more harm than the bullet had, however, we finally left it and the young man alone. . . . Except for our gash, he turned out fine.

Medicine is, I have found, a strange and in many ways disturbing business. The stakes are high, the liberties taken tremendous. We drug people, put needles and tubes into them, manipulate their chemistry, biology, and physics, lay them unconscious and open their bodies up to the world. We do so out of an abiding confidence in our know-how as a profession. What you find when you get in close, however—close enough to see the furrowed brows, the doubts and missteps, the failures as well as the successes—is how messy, uncertain, and also surprising medicine turns out to be.

The thing that still startles me is how fundamentally human an endeavor it is. Usually, when we think about medicine and its remarkable abilities, what comes to mind is the science and all it has given us to fight sickness and misery: the tests, the machines, the drugs, the procedures. And without question, these are at the center

> of virtually everything medicine achieves. But we rarely see how it all actually works. You have a cough that won't go away—and then? It's not science you call upon but a doctor. A doctor with good days and bad days. A doctor with a weird laugh and a bad haircut. A doctor with three other patients to see and, inevitably, gaps in what he knows and skills he's still trying to learn.

A Supreme Court intern told a colleague of mine (Brigham 1987, 4) that once he had been "behind the scenes" at the Court, he "could never teach constitutional law with a 'straight face' again. This insider argued that the reality of the Chief Justice wearing his slippers inside the Court demystified the Constitution." A little like Dr. Gawande who routinely sees the weird laughs and bad haircuts of the real doctors who put flesh and blood on the abstraction of "medicine," this budding law and society scholar had peered behind the curtains and seen The Wizard of Law at the controls in his slippers.

At some level, law and medicine are fundamentally different. After all, medicine *has* provided us with "ways to fight sickness and misery." To cite just one example, over the last four decades enormous strides have been made in curing cancer; many of those afflicted with the disease now live healthy lives where they once would have died of it. In contrast, we have arguably made little progress in fighting crime and are no closer to a cure for the injustices of the legal system than we were four decades ago. Medicine—its theory and its practice—is affected and shaped by sociocultural forces and human fallibility, but at its core it is oriented toward physiological realities. Instead, law is a social construction through and through. This means that its limitations are the mirror image of society itself and are not only—or even mainly—about missing knowledge or skills not yet learned.

In other ways though, Dr. Gawande's depiction of medicine applies to law as well. Both law and medicine enjoy almost mythic status. Like the confidence that doctors have in their own know-how and that patients bestow on them as they allow themselves to be drugged, intubated, and sliced open, law too benefits from and demands complete authority. The policeman who stops me for speeding will find that I am as compliant and submissive as a patient awaiting surgery. And there is an eerie, graphic similarity between the patient strapped to

a gurney for an operation meant to save her life and the death row prisoner in the execution chamber ready for his lethal injection. In both cases, we tend to put blind faith in the fundamental legitimacy of the enterprise.

The aura of infallibility and authority that surrounds both medicine and law seems to survive compelling evidence to the contrary and even blistering critique. There are probably no two professions that can elicit more passionate attacks than that of lawyer and doctor. At your next social gathering, tell a story about some incompetent doctor, miscarriage of justice, or greedy lawyer, and you are bound to hear a chorus of amens, followed by more stories. But the myths and auras of law and medicine mysteriously endure. And, for all the horror stories we share with each other, we rarely examine in any systematic way what those stories add up to, what their common elements are, or why they persist. The field of law and society is exciting precisely because it does this and more, probing "how it all actually works."

Here is a brief preview of what follows. The next chapter provides a glimpse of research about the links between the kinds of law in a society and the social, economic, and cultural contours of that society. There is disagreement among scholars about what those links consist of and how definitive they are. But the broader, formative idea in law and society scholarship is that law—far from an autonomous entity residing somewhere above the fray of society—coincides with the shape of society and is part and parcel of its fray. Chapter 3 takes up the related idea that law is not just shaped to the everyday life of a society, but permeates it, even at times and in places where it may not at first glance appear to be. As we'll see, the probing law and society scholar turns up law in some unlikely places, such as in our speech patterns and, even more unlikely, in a squirrel stuck in a chimney in small-town Nebraska. Chapter 4 describes research that documents one important aspect of this interpenetration of law and society, having to do with race. Providing a brief synopsis of what is called Critical Race Theory, this chapter traces the kaleidoscopic color of law across many venues, from early pseudo-scientific theories of immigrant inferiority to contemporary criminal justice profiling. After that, chapter 5 turns to a discussion of legal pluralism, which focuses on the fact that in any given social location there are almost always multiple legal systems operating simultaneously. Sometimes they nest comfortably

inside each other like those Russian dolls of decreasing size that stack neatly together; sometimes, they are an awkward fit; and, in a few rare cases cracks are exposed between the layers so that some groups and institutions fall out of accountability altogether. In chapter 6, I engage a favorite theme of mine, and a canonical concern for law and society scholarship: the gap between the law-on-the-books and the law-in-action. Noting that the law as it is written and advertised to the public is often quite different from the way it looks in practice, law and society scholars have long had an interest in studying that gap. It is not only a powerful lens for understanding the various dimensions and stages of *law;* like a broken promise, it reveals a lot too about the institutions or other social entities that made the promise and cannot or will not deliver on it. The final substantive chapter wrestles with the question of law's role in social change. There we will encounter scholarship that interrogates the limits of law to advance real change, as well as works that highlight law's progressive potential. Returning to the theme of chapter 2 that societies get the types of legal forms and laws that they "deserve" (and vice versa), we will see the challenges of trying to upend entrenched social arrangements using the lever of law.

Peter Berger (1963, 19) wrote that if you are the kind of person who likes to look behind closed doors and, by implication, cannot resist snooping into your friend's personal effects while house-sitting, then you have the right aptitude for sociology. People who are drawn to law and society might also be curious about their friends' hidden lives and what they might find by snooping around their houses. But our curiosity is aroused even further by questions like why snooping is considered wrong in the first place, and what unwritten code it violates in our society and why. And if snooping in a friend's house might reveal some dicey secrets about her personal life, snooping around a society's written and unwritten laws to expose the secrets behind their public mythology reaps rewards that are in equal measure subversive and thrilling.

CHAPTER TWO Types of Society, Types of Law

Two middle-aged friends of mine are deeply in love and want to get married. But there is one issue that has caused tears and recriminations, and that is the dreaded prenuptial contract. Their love is blinding in its intensity, but now they have to imagine what happens in case they get divorced; they feel their love in their very souls and in the chemistry between them, but now they must enter into a business contract. Their intellect tells them a prenup is a reasonable thing to do. The angst it produces underscores the tension between romance and the ultimately more seductive reason.

The prenup and the stress it is causing my friends reminds me of Max Weber's (1954) theory that in modern capitalist societies, rationality permeates all realms of human activity, displacing tradition, religion, emotion, and other such forces as a primary motivator for human behavior. It's the clash between romance and rationality that makes the prenup so stressful. Suffice it to say, my friends are going ahead with the prenup.

For Weber, as reason and calculation increasingly motivate all human activity with the advent of modern society, law too becomes more rational. What he meant by this is that modern law is driven by logic and human calculation, rather than by irrational forces like oracles, tradition, or emotion. In the process of rationalization, law also becomes more functionally insulated from other institutions, such as religion or politics, and is therefore more "autonomous."

None of this is a coincidence. Instead, for Weber (1958), rationalization emerged with Calvinism—specifically, the Calvinist principle of predestination. Imagine for a moment that you are a Calvinist who believes you are predestined by God from before birth to be a chosen one or to be damned for eternity. If chosen, you will spend your life on earth blessed and live an afterlife at the hand of God; if not, you will

have a miserable life and, worse, a miserable Eternity. In Weber's view, this late sixteenth and early seventeenth-century Calvinist idea of predestination produced an intolerable level of anxiety. In part to alleviate the anxiety, Calvinists searched for signs of being chosen. In looking for signs, they produced the very signs of the chosen life—hard work and the accumulation of wealth—they were looking for. This hard work, accumulation of wealth, and frugal lifestyle that were taken as signs (presumably subliminally, since God kept his decisions to himself) were compatible with the emergence of capitalism, and all of the above were accompanied and facilitated by a calculating, reasoning mentality. So, there is an "elective affinity," to use Weber's term, between Calvinism, capitalism, and rationality. As rationality became the organizing principle of modern society, law too was rationalized. The broader point is that, for Weber, the nature of law and the nature of society evolve in tandem through elective affinity.

The idea that different types of society produce, or at least coincide with, different types of law is a foundational element of the law and society framework but is at odds with commonly held notions of law's transcendence. Modern Western views of law as transcendent can be traced back to Plato and Aristotle and then to St. Thomas Aquinas, who, despite their considerable differences and the fourteen centuries separating Aquinas from the Greek philosophers, all argued that law ideally reflects some universal morality, some divine natural order. Hence, the concept of "natural law," and, as on the bumper sticker I mentioned a few pages ago, law's kinship with other natural phenomena like gravity. Aristotle wrote in *Politics*, "He who bids the law rule may be deemed to bid God and reason" (2000, 140). For both Aristotle and Plato, since law is ideally the tangible expression of morality arrived at through reason, the whole ensemble is God-given, universal, and natural. Obedience to just law is the highest virtue and is indispensable to a just social order. St. Thomas Aquinas also believed that law—to the extent that it is law and not simply an unjust command—is a creation of God. Later surfacing in John Locke's influential ideas about inalienable human rights, the natural law approach is hard-pressed to explain the enormous variation in legal systems historically and cross-culturally—unless we're willing to take the convenient but dubious position that the Western legal system is natural and all others are arbitrary cultural constructions.