From the Editor

The articles in this issue of the *Review* offer some unusual insights about the costs, obstacles, and opportunities encountered in sociolegal research. Sociolegal scholarship recognizes and regularly attempts to remove the blinders from doctrinal legal analysis, but it often neglects the blinders that arise from the familiar analytic approaches of its own traditions. Traditional doctrinal legal analysis is criticized for relying on untested assumptions about human behavior, equating law on the books with law in action, and attending only to the public face of law. But there are also limitations in the methodological approaches used in standard empirical analysis, and they too can profoundly distort our images of sociolegal phenomena. The articles in this issue show how careful and skeptical analysis of imperfect data can reduce these distortions and increase our knowledge about legal phenomena.

In the first article, Douglas Smith and Ray Paternoster present new empirical findings that raise serious questions about labeling theory. Labeling theorists argue that youthful delinquency is amplified by formal court action, that sanctions increase deviance by reducing access and commitment to legitimate activity. Previous empirical tests have produced conflicting outcomes, some of which appear to provide support for labeling theory. Researchers attempting to measure the effect of labeling have typically faced a major methodological obstacle: court action is generally more likely for the more serious cases of delinquency. Traditional analytic approaches have produced results consistent with labeling theory, but the labeling effects were confounded with the preexisting selection patterns. Using recent advances in the analysis of sample selection biases, Smith and Paternoster find that an apparent labeling effect disappears when various controls for the selection bias are introduced. Their work offers important evidence that many of the previously identified labeling effects may be statistical artifacts.

In their study of published and unpublished court opinions, Peter Siegelman and John Donohue examine the consequences of another form of selection bias. The partially public nature of the legal system has been one of its attractions for the social scientist. Karl Llewellyn's famous invitiation to study the legal record of judicial opinions awaiting the behavioral scientist at minimal cost is particularly enticing in the current climate of readily available computer access through LEXIS and WESTLAW. These attractions have not gone unnoticed by the research community. Research using LEXIS-based samples of trial and appellate court decisions ap-

LAW & SOCIETY REVIEW, Volume 24, Number 5 (1990)

https://doi.org/10.1017/S002392160002956X Published online by Cambridge University Press

pears regularly in the journals as well as in submissions to the *Review*. But, as Siegelman and Donohue show in this issue, the easily accessed published record is not merely incomplete. It also grossly misrepresents the population of cases formally decided by trial courts.

In their study of employment discrimination cases in federal trial courts, Siegelman and Donohue found that decisions in only 10 to 20 percent of the cases were published, and that published and unpublished cases differed in crucial ways (e.g., the basis for the discrimination claim, the amount in controversy). For the researcher seeking to describe court response to discrimination suits, published cases thus present a biased view of formal court response. Of course, even a sample of cases that includes the unpublished decisions will omit claims that generate no formal court decisions. Thus, we can extend Siegelman and Donohue's point that published decisions form only the tip of the claims iceberg. For conclusions about how courts affect the decisions of potential litigants to assert legal claims, the base of the iceberg stands even further below the water line visible in the public record.

For Burton Atkins, selection of cases for publication is a substantive issue rather than a methodological obstacle. He suggests that the pattern of decisions reached by appellate courts as well as their content provide potential litigants with valuable information that may be distorted if a significant portion of decisions are unpublished. Because English judges have no formal control over publication decisions, their opinions must provide signals to the commercial reporters about which cases warrant publication. Atkins compares the published and unpublished cases of the English Court of Appeal to reveal how precedent is communicated to lower courts and to the legal community as a whole.

Finally, Cassia Spohn's examination of sentencing decisions by black and white judges has both substantive and methodological implications. The tension between equal treatment and discretionary decisionmaking in the justice system has produced a substantial body of research on the role played by such extralegal characteristics as race and gender. In general, the research has focused on the attributes of the individual being sentenced. In studies of death penalty decisions, researchers have also considered the race of the victim. Few studies have examined attributes of the decisionmaker. One explanation for this omission is that most decisionmakers have been white males, so there has been little variation to examine. A more interesting reason why characteristics of decisionmakers have received so little attention is the intellectually problematic assumption that discrimination is exclusively the province of the dominant race or sex.

Spohn took advantage of the growing number of black judges in Detroit to test the effects of race of judge on sentencing decisions. She found few differences attributable to the race of the

https://doi.org/10.1017/S002392160002956X Published online by Cambridge University Press

judge, but both white and black judges sentenced substantially more black than white offenders to prison when controls were included for thirteen other case attributes. The meaning of these results is an important puzzle for future sentencing research and for all studies of discrimination. One interpretation of the results is that both white and black judges discriminate against black defendants. If they do, racial bias by majority group members is not the only basis for discrimination, and the goal of equal treatment may require more than simply greater representation of minorities in powerful decisionmaking roles. An alternative interpretation of these data is that they omit or imperfectly measure important case attributes that affect sentences and are correlated with defendant race. If the results can be explained by a poorly specified model, then many previous studies of sentencing which find race of defendant effects have probably suffered from the same limitations and previous findings of discrimination are equally problematic.

We recognized early on in the sociolegal enterprise that law is not static. Sociolegal research, too, changes and evolves. We have an admittedly imperfect paradigm for increasing our understanding of sociolegal phenomena, and although we have learned a great deal from it, a vast array of questions remains. Blinders are appropriate only if we are willing to ignore the weaknesses of the images we construct and to be content with a narrow vision of law and legal institutions.

Shari S. Diamond

https://doi.org/10.1017/S002392160002956X Published online by Cambridge University Press