# Cultures of Facts

*By Kim Lane Scheppele*

Why is it so hard for relevant social science findings to make their way into courtrooms, either at the trial level or on appeal? From the perspective of the social scientist, Patricia Wald is the ideal judge—someone who takes empirical research seriously and wants to use it when she can. But the fact that even a sympathetic judge like Judge Wald finds this to be difficult should tell us something. Legal professionals and social scientists have different cultures of facts.

What are these different cultures? The culture of facts in law can be seen in two important and distinctive features of the American legal system, features sharply limiting the uses that can be made of social science in court: (1) judges decide one case at a time and are therefore concerned principally with the facts of the specific, individualized cases before them and (2) the American legal system has an adversarial fact-finding process, which allocates the burden of producing evidence to the contesting parties themselves. The combined effect of these two structural features of American law leaves little room for social science, which is generally organized around a different culture of facts—one with nearly opposite aspirations. There, the goal is to understand the typical case or the broader pattern in a range of cases, without always editing for normative spin.

Even with this clash of cultures, with their differences in points of emphasis, I believe that there are ways for social science to be relevant to law. In fact, in some areas of law, the use of social science evidence is routine,[1] although quantitative research has been more widely acknowledged than has qualitative research. In other areas of law, there is still a long way to go before social science evidence will be routinely accepted. In this short comment, I want to diagnose the sources of the legal aversion to social science as well as the way in which certain approaches to social science limit the utility of the resulting data in court. I also want to propose a partial cure.

## One Case at a Time

Helen Palsgraf was a cleaning woman who, on a Sunday afternoon in August 1924, was waiting with her two daughters on a platform of the Long Island Railroad for a train to Rockaway Beach. As the train before hers started to pull out of the station, two men ran to get on it. Two guards from the railroad helped them aboard, but one of the men dropped a package between the train and the platform. The package contained fireworks, which exploded. As the famous legal opinion written about this unfortunate incident reported, "[T]he shock of the explosion threw down some scales at the other platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues."[2]

The decision in the *Palsgraf* case is one of the most famous in American law. Every first-year law student reads the opinion, written by Judge Benjamin Cardozo at the height of his formidable powers. Every lawyer recalls the bizarre accident, memorialized in the rule of tort law that one is not liable to unforeseeable plaintiffs. After all, how could the employees of the railroad have known that the men were carrying fireworks that would lodge themselves between the train and platform, and that the consequent explosion would start a Rube Goldberg concatenation of events that would result in an injury to a woman standing far away? As Judge Cardozo wrote, "Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform."[3]

Taken on its face, *Palsgraf* is indeed peculiar. Such events probably never happened again in quite that way in all of human history. But many, if not most, legal cases appear entirely unique through the magnifying lens of a trial. They start with particular plaintiffs suing particular defendants about particular things gone wrong. And given the focus of judges on individual cases—what caused *that plaintiff's* injury? what could *that defendant* have done to avoid the harm?—it is not surprising that the answer lies in particular factual determinations. Mrs. Palsgraf was injured by *those men* carrying *that package,* which fell at *that moment* under *that train.*

But let's stand back a moment from the ground-level legal analysis. How else could we imagine Mrs. Palsgraf's plight? As it turns out, we have expert assistance in this matter, since Judge John T. Noonan, Jr., before his appointment to the Ninth Circuit Court of Appeals, dug into the history of *Palsgraf* and unearthed some useful context. As Noonan reports, in 1924, the year of Mrs. Palsgraf's injury, trains were in general quite dangerous. Across the United States, 6,617 people were killed by trains that year and another 143,739 people were injured. On the Long Island Railroad alone in 1924—honing the category still further

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to include only deaths and injuries to passengers "arising in connection with the operation or movement of trains," a narrow category that would have included Mrs. Palsgraf—108 passengers were killed and 3,229 were injured.[4]

While each accident no doubt had its own logic (*if only those men hadn't been carrying fireworks*), there was a logic above the individual cases as well. From year to year, these accident rates were quite stable. As social scientists typically recognize, despite the idiosyncratic quality of each case, there was something more systematic going on. The overall patterns, their stability and their predictability, seem just as real to a social scientist as the unexpected fireworks on the Long Island Railroad platform that day in August 1924 seem to a lawyer or a judge. The fireworks are irrelevant to the social scientist because it is not at that level that most social scientists are interested in understanding the social world (unless the fireworks are indicative of something else, like a publicly celebrated holiday). Similarly, the statistical incidence of accidents of a particular sort is irrelevant to the legal determination of whether this particular plaintiff was injured by this particular defendant (unless the defendant has a high rate of accidents involving this kind of plaintiff). Statistics are interesting, but hardly dispositive of the question of causation in the individual case.

Social scientists of a statistical bent often dismiss as "anecdata" the sort of experience that Helen Palsgraf had, while lawyers and judges often distrust the statistics that social scientists provide because the statistics can't ever be said to be "true" in a particular case.[5] Just as the case of Helen Palsgraf may not be typical (the social science concern), the statistics may predict in general but not in any specific instance (the legal concern). Nonetheless, the statistical backdrop makes it harder to argue that each accident taken alone is really as bizarre as it sounds. To the judge or the lawyer, accidents are possible because each case is unique. But to the social scientist, one could have "law without accidents" because from the bird's-eye view of the patterns, very little is truly unpredictable when taken in the aggregate.[6]

And this is not just a point about the gap between statistical accounts and qualitative descriptions. Social scientists of a more qualitative and historical bent would see the *Palsgraf* case as part of a long history in which the railroad industry imposed substantial costs on the broader society, costs that were never added to the ledgers of the railroads. Most train accidents were not litigated. Those that were shared the fate of Mrs. Palsgraf's: each case was taken on its own facts as an isolated, freak occurrence, and the broader consequence, in which death and injury became a normal byproduct of running the railroad, was disregarded. If judges could see—if not through statistics, then perhaps through the social history of the railroad industry—just how dangerous trains were and how much death and destruction they left in their path, they may have been less inclined to think that Mrs. Palsgraf's problem was that those two men carried fireworks onto the platform that day.

Either way, via statistical records or social history, Mrs. Palsgraf's particular case could have been framed either as the freak occurrence it was seen as at the time or as one incident in a larger pattern of injury. The use of social science to frame particular events as part of larger patterns is one possible application of social science to law.[7]

## Your Truth, My Truth

Two years ago, my husband and I were robbed at gunpoint taking cash out of an ATM. The police showed us mug shots of everyone in their database who fit the robber's description (race, sex, height, weight, and age). Independently, we picked the same picture from the 60 or so we were shown.

The next morning, I called the bank and asked that they check the hidden camera for pictures. The bank manager found photographs of us being robbed, with good images, she said, of the robber. She forwarded them to the police. Eventually, the police arrested the man whose picture we had selected from their photo spread. But they were not particularly interested in the bank photos; no one at the police station could tell me whether anyone had ever looked at them.

As it turns out, the prosecutors were totally uninterested in the bank photos as well. They and the defense lawyer concentrated entirely on the eyewitness testimony of my husband and me, picking over tiny inconsistencies, trying to find some gap, either between our recollections or over time. We went through three preliminary hearings and a lineup to test the solidity and consistency of our eyewitness accounts. All the while, the bank photos sat in the files. No one we talked to wanted to look at them.

As every social scientist who has looked at the data knows, however, eyewitness testimony is notoriously unreliable.[8] When I tried to explain this to the police and the various assistant district attorneys (ADAs) assigned to our case, they all feigned interest (professors get at least some deference before being dismissed), but they informed me politely that eyewitness testimony would be more persuasive to a judge or jury than any other form of evidence.

Finally, the ADA who took our case to trial got hold of the bank photos the morning that the trial began, but I suspect only because I told him that I would turn into a very reluctant witness unless he could confirm that someone had looked at the pictures and at the defendant to see if they matched. But why weren't the bank photos considered from the start to be better than our eyewitness accounts?

Incredibly to nonlawyers, there is no rule in American legal practice that requires that all of the evidence, or even the best form of evidence, be presented at trial.[9] Instead, American legal practice relies on what Jerome Frank famously called the "fight theory," as opposed to the "truth theory."[10] Each side presents what, in its self-interested judgment, it thinks will give it the best chance of winning, and each side tries to unsettle the account presented by the other side in the most effective way it can. Both in the original presentation and in the counterattack, counsel are primarily performing for the judge and/or jury with only folk wisdom to guide them in the sense of where truth lies.

Fact-finding, therefore, is considered part of the adversarial process and is both practically and ideally left to the contesting parties in American law.[11] In most cases, judges hear only what the parties bring them. This limits judges' field of vision to the


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context that the parties themselves find most relevant, as both Donald Horowitz and Lon Fuller have famously noted.[12] As a normative matter, the practice of limiting factual presentation has strong defenders, not least Supreme Court Justice Antonin Scalia, who, while he was on the D.C. Circuit, wrote: "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."[13]

As a result, information that does not clearly benefit a particular side or is ambiguous in its normative leanings may not be introduced at all, even if it would be helpful for the determination of what happened in the specific case. In the ATM robbery, the prosecution wanted to emphasize that two eyewitnesses had identified the same person, on the mistaken view that this was the most reliable evidence; and the defense surely had no interest in making much of the bank photos if they showed the defendant engaged in a robbery.

Here again, the culture of social science and the culture of law pull in very different directions. First, social scientists want to know the best evidence available, and much of research methodology is designed to figure out just what the most reliable evidence would be on any given question. Moreover, social science findings, once the data are collected, are almost always of the "on the one hand, on the other hand" sort. Particularly good social science (at least to social scientists) presents both evidence and counterevidence for the theory being tested. And there is always counterevidence. It would be a violation of the most basic norms of social science if a researcher went out and only collected the evidence that supported the case she or he wanted to make in the first place. Even (perhaps particularly) in qualitative and exploratory research, nuance and complexity are valued over findings that unambiguously favor one side. But even though research that produces one-sided results with no deviant cases is suspect in social science, it is normal and even ideal in law.

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Take one of the clearest social science findings that we have—that eyewitness identifications are often wrong, and that the confidence of the witness is often statistically unrelated to the level of accuracy of the account.[14] Which side would introduce this social science evidence in a court case, allowing the fact finder to assess the reliability of an eyewitness account? In our robbery case, it would seem at first glance that the defense would find this evidence most beneficial. But would the defense *necessarily* benefit? Eyewitness testimony is not *necessarily* flawed. If the social science gambit is unpredictable, why would the defense start down this road? And if the prosecution had the eyewitness testimony on its side in the first place, why should it bother to upset common wisdom about such testimony's reliability? Though it might have been relevant for a judge or a jury to know about the limitations of eyewitness testimony in general so that they would feel some obligation to look beyond it to other evidence, it was in neither side's interest to bring up those limitations in this case.

## What Is to Be Done?

So far, I have tried to show that two elements of social science research that make social scientists particularly proud of their accomplishments—that it looks beyond particular cases to general patterns and that it often has nuanced findings that are likely to provide some comfort to both sides of a fight—make such research less useful in the individualized and adversarial system of truth-finding built into the structure of American legal practice. If lawyers have to prove what happened in individual cases using evidence that is as one-sidedly beneficial to their case as possible, then much of social science isn't for them.

But it doesn't follow from this that social science is useless to judges, who are charged with coming up with the truth of the matter in the end. Judge Wald noted that she would be interested in considering social science evidence if it were relevant and if the consideration of such evidence didn't compromise the adversarial process. So how can judges make the use of relevant social science findings consistent with the structure of American law? This question has different answers, depending on whether the judge hears the case at trial or on appeal.

Though the power is rarely used, trial judges (at least in the federal courts) technically have the capacity to call witnesses, including their own experts.[15] But they are typically reluctant to do so, because judges often don't know where to turn for reliable expertise that doesn't come with its own ax for the grinding. Also, experts are expensive, and cash-strapped courts typically have to pay the costs of court-called experts. As a result, almost all experts are called by the contesting parties themselves—and come with their relevance already determined by the boost they can give to the side that pays them.

The professionalism of judges and social scientists, however, creates certain compatibilities that can strengthen the responsible conduct of each. If the social science professional associations, or some other comparable independent professional body, were to keep lists of experts in specific fields willing to provide balanced information on the state of research in particular areas for introduction at trial, then judges would have some place to turn for reliable advice not already filtered by the interests of parties. Instead of being automatically branded as a "plaintiff's expert" or a "defendant's expert," social scientists who agreed to be on such lists would be able to maintain their own credibility by providing evenhanded testimony. This doesn't mean that the information such experts provide benefits neither side; it does mean that the expert will provide information that fairly reflects the weight of the literature on the question at issue.

There are several ways that such expertise could be used in courts. Experts could actually testify at trial. They would then fit into the adversarial process by being cross-examinable by both



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sides. Experts who testified at trial could tie social science findings more specifically to the case at hand, thereby giving the one-case-at-a-time courts some context and perspective for their judgments. Under the Federal Rules of Evidence, which govern the presentation of evidence in the federal courts (most state systems now have similar rules), experts can use their substantial background knowledge to assess the facts of particular cases as witnesses. For example, experts may comment on the evidence presented in the case under consideration and assess whether the damage at issue could reasonably have been caused in the way that the plaintiff or defendant says. This level of expertise links the general knowledge of the expert with the fact-specific nature of case adjudication.

Social scientists could also be influential through their published works, without in-person appearances, since published research is available—like any publicly available legal material—to judges and the parties.[16] In order for judges and parties to be able to read and assess professional literatures outside their fields, there would probably need to be more systematic education of judges and lawyers,[17] as well as more accessible writing by social scientists (one of the important recommendations Judge Wald makes). Depending on how such writing was used—for determining the facts of a specific case or for providing social context for a decision—social science scholarship could be used either at trial or on appeal. At trial, the hearsay quality of such work could be overcome if a reasonably qualified expert testified that such material serves as reliable authority or (in cases where the findings were not contested) if the judge took judicial notice of the work.

In general, however, introducing social science evidence on appeal is more difficult than bringing it in at the trial level. In American legal practice, fact-finding in a specific case is the sole province of trial courts; appeals courts cannot unsettle case-specific factual determinations on their own initiative. If an appeals court needs a fact relevant to the determination of the case that is not in the record, then the proper procedure is to remand the case back to the trial court for a determination of the necessary facts. So raising new facts on appeal raises red flags to appeals judges.

There is one exception to this rule. "Legislative facts" (general background information on a specific issue)[18] may come to an appeals court through amicus curiae briefs. Usually such briefs are organized by the parties to the case at hand, and they state on their cover pages which party they are supporting in their analysis. It is the rare brief that supports no side in particular.[19]

But judges in appeals courts may solicit amicus briefs from those whose main loyalty is not to the parties but to the fair representation of social scientific knowledge. Still, since there is no easy way for the parties to challenge such a brief at this stage (because the time for cross-examination is over), judges may be reluctant to use the powers they have to gather evidence outside the existing record. They may, however, be willing to give permission to professional organizations to file amicus briefs upon their own initiation. Social science professional organizations—like the American Political Science Association, the American Sociological Association, the American Psychological Association, and others—could provide a useful service by offering unbiased amicus briefs as a routine matter and taking the initiative to file informative, nonpartisan briefs in cases where social science literatures may provide useful context.[20]

There is one more model for the use of scientific information by courts. In the 1990s, tens of thousands of suits against Dow Corning for injuries alleged to be caused by their silicone breast implants were consolidated in the courtroom of a federal judge in Alabama. After settlement talks broke down and the case turned to litigation, Judge Samuel Pointer appointed an interdisciplinary panel of scientific experts to determine whether there was any reliable scientific basis for the plaintiffs' claims. This panel had been requested by the plaintiffs, and its job was to sort through the experts called on both sides, as well as to review the available scientific literature. Two years and $800,000 later, the panel reported that the weight of the evidence failed to connect the plaintiffs' injuries to the defendant's product. Frustratingly to many who advocate the use of scientific information in courts, many state court judges faced with these lawsuits in other jurisdictions have failed to acknowledge the results of the scientific panel.[21] It may take some time before such scientific panels are universally accepted and before social science gets the same chance at this as natural scientists have gotten.

Despite all of these suggestions, a question remains: who would pay for all of this? Expert witnesses are often rewarded handsomely for their services; frequent filers of amicus briefs are often professional lobbying groups playing to a paying constituency outside the courts. The special commissioning of litigation-relevant studies is also expensive. But social scientists might think of the provision of social science information for use in the determination of legal disputes as something akin to the *pro bono* work expected of professionals in other fields.[22] After all, many of us teach useful literatures in our classes; contributing through testimony, working on an amicus brief, or publishing useful literature reviews often involves using what we already know to educate an audience beyond our students and colleagues.

For social science to be of best use to courts, it has to be available to the judges in forms that clearly bear on the issues before them. Judge Wald's essay reveals how a thoughtful and intelligent judge already knows a great deal and would love to know more about what social scientists do. As professionals also interested in "getting it right," social scientists should see Judge Wald's interest in the subject as a hopeful sign. While it would take some time to work out the formats and contexts in which social science analyses would be useful to judges, receptive social scientists and judges could begin the dialogue now about how such collaborations could bridge the differences between the two cultures of facts.

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## Notes

1 The introduction of survey evidence is routine in cases involving trademark confusion (where one competitor claims that another's trademark is so similar that customers will think that the two are connected) and in cases charging obscenity (where the relevant legal rule specifies that a particular usage must offend community standards). Statistical comparisons were also standard fare in gender and race discrimination cases as long as disparate impact rather than intentional discrimination was the legal standard. For these examples and others, see Herzberger 1993.
2 *Palsgraf v. Long Island Railroad Co.* 1928, at 341.
3 *Palsgraf* 1928, at 343.
4 Noonan 1976, 129–30.
5 Cartwright 1983.
6 Scheppele 1991.
7 Walker and Monahan 1987 note that using social science evidence like this amounts to finding a "social framework" for law. Examples? In one case, a defendant successfully appealed his sentence, arguing that the court below should have considered statistics showing that people in his category had lower recidivism rates than did others similarly convicted. See *State v. Davis* 1984 (per curiam). In many others, "syndrome evidence" is used to compare a particular victim's or defendant's conduct after an alleged offense with the conduct of others who have been subjected to the same kind of abusive treatment.
8 Loftus 1979. Eyewitness identification of alleged criminals is plagued with such problems that the Department of Justice has issued a report to federal prosecutors warning them of the dangers, warnings that are themselves based on a substantial body of social science evidence. See Technical Working Group for Eyewitness Evidence 1999. For a critique, see Judges 2000.
9 There is in evidence law something called the "best evidence" rule, but it is narrowly limited to the production of "writings" where they are central to a case. See Federal Rules of Evidence 1001–1008.
10 Frank 1949.
11 Damaška 1997.
12 Horowitz 1977; Fuller 1978.
13 *Carducci v. Regan* 1983, at 177.
14 Loftus 1979, 100–1.
15 In Federal Rules of Evidence, Rule 706 explicitly states, "The court . . . may appoint expert witnesses of its own selection."
16 This is one method advocated by Monahan and Walker 1986.
17 Epstein and King 2002.
18 The distinction between "adjudicative facts" and "legislative facts" was originally made by Davis 1942. Adjudicative facts are the facts of specific cases (e.g., was the


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defendant the robber? did the package contain fireworks?). Legislative facts do not vary case by case and are instead the useful background that a legislature might take into account in framing policy (e.g., eyewitness testimony is less reliable than contemporaneous photographs; railroads became safer over time).

19 As Rustad and Koenig 1993 have shown, even amicus briefs that purport to rely entirely on social science evidence can twist that evidence to support the position of the brief writers. Rustad and Koenig examined amicus briefs in a series of major cases dealing with punitive damages, an area where there has been an unusually large number of grand-scale empirical studies that all show that punitive damages are rarely awarded and, when awarded, are typically small. Rustad and Koenig found that those who advocated capping or overturning punitive damage awards reported the studies selectively and used techniques in reporting that involved, for example, recalculating the numbers to report means (sensitive to high-value outliers) instead of medians (which showed more modest typical increases over time). Sometimes brief writers would leave out altogether the small base numbers on which the alarming statistics were calculated. An increase from one to two instances may be a 100 percent increase, but it would probably be a mistake to think that this was significant enough to rethink policy.

20 In fact, the American Psychological Association (APA) has already become quite active in putting psychological research before courts. But such efforts came in for criticism when the APA filed an amicus brief supporting the use of expert testimony about battered women's syndrome in *Hawthorne v. State* 1982. Because battered women's syndrome was developed for clinical purposes and was never validated as an indicator of the reliability of an account of a past event that the trauma might signal, many have criticized its appropriateness for use at trial. See Etlinger 1995; Hoeffel 2001.

21 For a detailed report of this case, see Walker and Monahan 2000.

22 Alternatively, social scientists could support the proposal Davis 1986 made to establish something like the Congressional Research Service for the Supreme Court. Since I believe that the lower courts are even more in need of such services than the Supreme Court, I think that a research service for the federal judiciary more generally would have even more impact.


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