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Vitality Amidst Fragmentation: On the Emergence of Postrealist Law and Society Scholarship

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In 1986 the Committee on Law and Social Science of the Social Science Research Council produced a volume entitled *Law and the Social Sciences*. This 740-page book, edited by two distinguished Yale Law Professors – Leon Lipson and Stanton Wheeler – was designed to be “a volume of assessment . . . not a collection of speculative essays and not a set of fresh research” (Lipson and Wheeler, 1986: 5). It contained 11 chapters, varied in the breadth of their coverage from the all-encompassing “Legal Systems of the World” and “Law and the Normative Order” to the more focused “Legislation” and “Lawyers.” Each was written by a leading figure in the field who was instructed to survey available research in a designated subfield, highlighting the particular contributions of social science to our understanding of various legal phenomena. *Law and the Social Sciences* played an important role in the development of law and society research, appearing as it did in a period two decades into the life of the modern law and society movement in the United States. Rereading these essays one is struck by several things: their confidence about social science, their almost complete disinterest in issues of culture and identity, their association of law with the boundaries of nation-states, and their easy transition from description to prescription. Collectively the contributions were deemed by the editors to give “ample testimony to the vitality of sociological research as it has been practiced over the last quarter of a century” (Lipson and Wheeler, 1986: 10).

As they described the field, Lipson and Wheeler (1986: 2) highlighted two dimensions that gave it its shape and center of gravity. First, they said, is “the . . . perception that law is a social phenomenon and that legal doctrine and actors are integral parts of the social landscape.” Second, they contended, is the view “that legal institutions not only are embedded in social life, but can be improved by drawing on the organized wisdom of social experience.” At the time they wrote, law and society work was fully identified with the social scientific enterprise, and the social scientific enterprise was

associated with a normative, reformist, policy orientation (Sarat and Silbey, 1988). Reflecting the continuing legacy of legal realism's optimism about the role of empirical research in the legal world (Schlegel, 1979) it was described, by the editors, as "the product of a generation of scholars – mostly social scientists and law professors – who believe that the perspectives, data, and methods of the social sciences are essential to a better understanding of law" (Lipson and Wheeler, 1986: 1).

FROM LEGAL REALISM TO LAW AND SOCIETY

The image of law and society as a field defined by the idea of enlisting social science to understand law and inform legal policy traces its lineage at least to the work of the early twentieth-century legal realists.¹ As is by now well known, realism emerged as part of the progressive response to the collapse of the nineteenth-century laissez-faire political economy. By attacking the classical conception of law with its assumptions about the independent and objective movement from preexisting rights to decisions in specific cases (Cohen, 1935; Llewellyn, 1931, 1960), realists opened the way for a vision of law as policy, a vision in which law could and should be guided by pragmatic and/or utilitarian considerations (Llewellyn, 1940).² Exposing the difference between law in the books and law in action, realists established the need to approach law making and adjudication strategically with an eye toward difficulties in implementation. Exploring the ways in which law in action, for example the law found in lower criminal courts, was often caught up in politics, realists provided the energy and urgency for reform designed to rescue the legal process and restore its integrity.³ Realism attacked "all dogmas and devices that cannot be translated into terms of actual experience" (Cohen, 1935: 822); it criticized conceptualism and the attempt by traditional legal scholars to reduce law to a set of rules and principles which they insisted both guided and constrained judges in their decisions. The boldness of that assertion prompted Holmes (1881) to write that tools other than logic were needed to understand the law. Law was a matter of history and culture and could not be treated deductively.

Realists saw the start of the twentieth century as a period of knowledge explosion and knowledge transformation (Riesman, 1941). Some saw in both the natural and emerging social sciences the triumph of rationality over tradition, inquiry over faith, and the human mind over its environment (McDougal, 1941). They took as one of their many projects the task of opening law to this explosion and transformation. They argued that the law's rationality and efficacy were ultimately dependent upon an alliance with positivist science (see Schlegel, 1980). By using the questions and methods of science to assess the consequences of legal decisions, realists claimed that an understanding of what law *could* do would help in establishing what law *should* do (Llewellyn, 1931). As Yntema put it,

Ultimately, the object of the more recent movements in legal science . . . is to direct the constant efforts which are made to reform the legal system by objective analysis of its operation. Whether such analysis be in terms of a calculus of pleasures and pains, of the evaluation of interests, of pragmatic means and ends, of human behavior, is not so significant as that law is regarded in all these and like analyses as an instrumental procedure to achieve purposes beyond itself, defined by the conditions to which it is directed. This is the Copernican discovery of recent legal science. (1934: 209)

Legal realism initiated a dialogue between law and social science by staking a claim for the relevance of phenomena beyond legal categories (Cardozo, 1921; Pound, 1923; Llewellyn, 1940). Social science would help get at the positive, determinative realities, “the tangibles which can be got at beneath the words... [and would] check ideas, and rules and formulas by facts, to keep them close to facts” (Llewellyn, 1931: 1223). For law to be effective and legitimate, it had to confront such definite, tangible and observable facts; to ignore the facts of social life was folly. Social science could aid decision making by identifying the factors that limited the choices available to officials and, more importantly, by identifying the determinants of responses to those decisions. Aware of those determining conditions, the informed decision maker could and should adopt decisions to take account of what was or was not possible in a given situation.

The intellectual and institutional success of realism was enormous. After World War II, the behaviorist and functionalist orientations that had been urged by the scientific realists became conventional in mainstream social science, and in mainstream legal analyses and teaching. For social science, the unmasking of legal formalism and the opening of legal institutions to empirical inquiry offered, at one and the same time, fertile ground for research and the opportunity to be part of a fundamental remaking of legal thought. The possibility of influencing legal decisions and policies further allied social science and law. Rather than challenge basic norms or attempt to revise the legal structure, realism ultimately worked to increase confidence in the law (Brigham and Harrington, 1989) and to foster the belief that legal thinking informed by social knowledge could be enlisted to aid the pressing project of state intervention. Realism thus invited law and social science inquiry to speak to social policy, an invitation which many, though by no means all of its practitioners, took up.

The legacy of realism was realized in the last four decades of the twentieth century by the modern law and society movement (Garth and Sterling, 1998; Tomlins, 2000). Indeed, the beginnings of the modern period of sociolegal research might be set with the formation of the Law and Society Association in 1964. While there is, and was, more to sociolegal research than can be encapsulated by the formation of that Association, its creation marked an important step forward for empirical studies of law. The Law and Society Association self-consciously articulated the value of empirical research for informing policy (see Schwartz, 1965).

The emergence of the law and society movement coincided with one of those episodes in American legal history in which law is regarded as a beneficial tool for social improvement; in which social problems appear susceptible to legal solutions; and in which there is, or appears to be, a rather unproblematic relationship between legal justice and social justice (Trubek and Galanter, 1974). Moreover, the rule of law served to distinguish the West from its adversaries in the Communist world, and hence the full and equal implementation of legal ideals was, to many reformers, essential. By the mid-1960s, liberal reformers seemed once again to be winning the battle to rebuild a troubled democracy; the political forces working, albeit modestly, to expand rights and redistribute wealth and power were in ascendancy. The national government was devoting itself to the use of state power and legal reform for the purpose of building a Great Society. The courts, especially the Supreme Court, were out front in expanding the definition and reach of legal rights. Because law was seen as an important vehicle for social change, those legal scholars who were critical of existing social practices believed they had an ally in the legal order.

Pragmatic social change was an explicit agenda of the state and an equally explicit part of the agenda of law and society research. Legality seemed a cure rather than a disease (Scheingold, 1974); the aspirations and purposes of law seemed unquestionably correct.

Thus, the modern law and society movement, like the realist movement before it, grew up in, and allied itself with, a period of optimism about law. "Social science provided a new professionalizing expertise that offered ways to manage the new social agenda" (Garth and Sterling, 1998: 412). The period was one in which "liberal legal scholars and their social science allies could identify with national administrations which seemed to be carrying out progressive welfare regulatory programs, expanding protection for basic constitutional rights and employing law for a wide range of goals that were widely shared in the liberal community and could even be read as inscribed in the legal tradition itself" (Trubek and Esser, 1987: 23). This period was, of course, also a period of extraordinary optimism in the social sciences, a period of triumph for the behavioral revolution, a period of growing sophistication in the application of quantitative methods in social inquiry (cf. Eulau, 1963).

The awareness of the utility of social science for policy can be seen clearly in the standard form of many law and society presentations which begin with a policy problem; locate it in a general theoretical context; present an empirical study to speak to that problem; and sometimes, though not always, conclude with recommendations, suggestions, or cautions. (For a discussion of this approach see Abel, 1973; Nelken, 1981; Sarat, 1985.) This standard form appears with striking clarity in some of the most widely respected, widely cited work in the field, though often social science serves legal policy by clarifying background conditions and making latent consequences manifest with little or no effort to recommend new or changed policies.

While *Law and the Social Sciences* (1986) appeared at the end of this period of optimism about social science and law, it and the field it sought to represent was still under the sway of the realist legacy, a legacy that gave the field a center of gravity and a sense of boundedness. *The Blackwell Companion to Law and Society* appears at a very different moment in the development of the field, a moment in which the basic logics of governance that provided the foundation for the marriage of social science and law are undergoing dramatic transformations, a moment in which "social science generally and law and society in particular [have] declined in relative prestige" (Garth and Sterling, 1998: 414). As a result, the hold of legal realism on the law and society imagination has loosened, relaxing the pull of the normative, reformist impulse in much of law and society research and the confident embrace of social science as the dominant paradigm for work that seeks to chart the social life of law.

DECLINE OF THE SOCIAL AND THE SEARCH FOR A POSTREALIST PARADIGM

The loosened hold of legal realism on the field of law and society scholarship coincides with, if it is not precipitated by, the decline of the social as central to the logic of governance throughout the societies of the West.⁴ This decline comes after more than half a century that culminated in the "social liberal" state in the 1960s

and 1970s. During that period the liberal rationality of government associated with *laissez faire* and methodological individualism was generally reordered around the social as a terrain for positive knowledge and for effective governmental intervention. Thus social liberalism produced a powerful fusion of law, social science, and government.

Traditionally law has had an important set of relationships to the state through the complex mechanisms of sovereignty, but in the twentieth century law became not just sovereign but governmental, and its path to government was through the social. The social sciences likewise established themselves as important adjuncts to governance, in part through the mediation of law (as well as medicine, to a lesser degree), including criminology, social work, and public health, and later with every aspect of economic and general policy (Shamir, 1995). Law and society scholarship never collapsed into pure policy studies, whatever the ambitions of some, but to a great extent its critical efficacy came from its relationships with governance (Sarat and Silbey, 1988).

However, after decades in which social problems set the agenda of government, the social has come to be defined as a problem to be solved by reconfiguring government (Rose, 1999; Simon, 2000). The general decline in confidence in virtually every institution and program of reform, or knowledge gathering, attached to the social is one of the most striking features of our present situation. Social work, social insurance, social policy, social justice, once expected to be engines of building a more rational and modern society, are today seen as ineffectual and incoherent. Socialism, once taken to be a very real competitor with liberalism as a program of modern governance, has virtually disappeared from the field of contemporary politics. The social sciences, and especially sociology (the most social), which had become court sciences at the highest levels in the 1960s and 1970s, are today largely absent from national government and are experiencing their own internal drift and discontent. Law and economics has become the hegemonic knowledge paradigm and has “provided much of the learning and legitimacy for the . . . turn away from social welfare and social activism” (Garth and Sterling, 1998: 414).

The United States clearly represents the extreme case of the problematization of the social. The most florid forms of the social – for example, social insurance, public transportation and housing, public health and social medicine, as well as socialism – were never as actively embraced by American state or federal governments as they were in comparably industrialized societies in Europe, Japan, Australia, and the Americas. Moreover, in no society was the political critique of the social as successful as it was in the United States under presidents like Ronald Reagan, George H. W. Bush, Bill Clinton, and George W. Bush. It is clear, however, that the crisis of the social is being experienced globally today, not only in the formerly welfarist Western nations, but in those states now industrializing.

Whether we like it or not, the practices of governance help set the agenda for legal scholarship, whether legal scholars imagine themselves as allies or critics of the policy apparatus (Ewick, Kagan, and Sarat, 1999). Although it would take a book of its own to describe transformations in the field of legal studies associated with the decline of the social as a nexus of governing, evidence abounds that the shifting engagement between law and society scholarship and government has altered the formation and deployment of legal knowledge at all levels. Likewise, the prestige of empirical research has been tied up with the access that social and legal scholars

obtained as experimenters and expert consultants helping to administer a state engaged in interventions in problems like crime, gangs, and urban poverty. Even those discourses that have offered a more critical view of the enterprise of social policy and social research have often promoted both by exposing the gaps in action and imagination created by racism, patriarchy, and class privilege.

With the decline of the social as a logic of governance, law and society research has entered a period of freedom – freedom found in its increased alienation from, and irrelevance to, the governing ethos of the current era. Borrowing from Franklin Zimring (1993: 9), the field is experiencing the “liberating virtues of irrelevance” such that “scholars are now considering a wider and richer range of issues.” This era of freedom is marked by great energy, vitality, and success for scholarship and, at the same time, disintegration and fragmentation of existing definitions and boundaries of law and society research.

INSTITUTIONALIZATION AND FRAGMENTATION OF LAW AND SOCIETY RESEARCH

As to institutionalization, since the appearance of *Law and the Social Sciences* in 1986 law and society has continued to be a lively and important terrain for scholars. At the start of the twenty-first century, the field is well institutionalized. Evidence for this is found in the numerous scholarly associations, or sections of associations, both in the United States and abroad, which bring together researchers to encourage work on the social lives of law. Some organizations have been formed to promote legal study within disciplines, for example, the Organized Section on Courts, Law, and the Judicial Process of the American Political Science Association, and American Psychology-Law Society/Division 41 of the American Psychological Association; others, such as the Research Committee on the Sociology of Law of the International Sociological Association, the Society for the Study of Political and Legal Philosophy, the American Society for Legal History, the Association for the Study of Law, Culture, and the Humanities, and the Law and Society Association, cross disciplinary lines.

Moreover, there are now numerous high quality journals, many with a truly international readership, through which law and society scholarship is disseminated, for example, *Law & Society Review*, *Law & Policy*, *Law & Social Inquiry*, *Law & History Review*, *Law & Critique*, *Studies in Law, Politics, & Society*, and *Social and Legal Studies: An International Journal*. Academic and trade publishers now recognize the vibrancy of the field, with lively law and society lists found at presses such as Oxford University Press, Cambridge University Press, and at the university presses of Michigan, Yale, Stanford, and Chicago, as well as Dartmouth/Ashgate and Hart Publishing.

In addition, a number of research institutes conduct interdisciplinary (but largely social science) research on law. Examples include the American Bar Foundation, the Rand Institute for Civil Justice, the Centre for Socio-Legal Studies at Oxford University, the Onati International Institute for the Sociology of Law. Since 1971, the National Science Foundation, through its Program in Law and Social Science, has also supported such research; funding for interdisciplinary work on law is also now regularly part of the activities of agencies like the National Endowment for the Humanities. These institutes and funding opportunities have invigorated the work of scholars studying the complex intersections of the legal and the social.

Providing further evidence of the institutionalization of the field are the interdisciplinary programs that now exist at more than 50 colleges and universities in the United States and a large number in the United Kingdom, continental Europe, and elsewhere. These programs introduce students to the fact that law is ubiquitous, that it pervades much of our lives, and provides a forum in which the distinctive temper of a culture may find expression. They introduce them to law's role in articulating values and dealing with conflict.

While all of this gives evidence of the range and vigor of law and society study, it barely evidences the veritable explosion and transformation of the field, since the publication of *Law and the Social Sciences*. Unlike the research of the 1970s and 1980s, today's postrealist law and society research is, to name just a few things, marked by:

- 1 New generations of scholars, many of whom continue to address venerable questions about law's social lives, while others strike out in new directions addressing important questions which were not recognized two decades ago;
- 2 The development of new interdisciplinary connections within the social sciences, as well as what Clifford Geertz referred to as the "blurring of genres" between the social sciences and humanities;
- 3 Disputes about what counts as social knowledge as well as new theorizations that have drained some of the optimism about the political utility of social knowledge;
- 4 Increasing abandonment of the reformist policy orientation of scholarship in favor of the description and analysis of the processes through which law performs in various social domains;
- 5 Globalization and internationalization of both legal phenomena and of law and society as a scholarly field.

From the mid-1960s through the early 1980s, when modern law and society scholarship began to take shape, there was a rough consensus about the methods and purposes of that research. Definitions and descriptions of the field abounded. Here are but a few: Lawrence Friedman (1986: 764) argued that "The law and society movement sits on a rather narrow ledge. It uses scientific method; its theories are, in principle, scientific theories; but what it studies is a loose, wriggling, changing subject matter, shot through and through with normative ideas. It is a science . . . about something thoroughly nonscientific." Frank Munger (1998: 24) suggested that law and society research is unified by "its dedication to testing ideas empirically rather than relying on logical derivations from premises." Felice Levine said that law and society work involves:

the social study of law, legal processes, legal systems, normative ordering, law-related behaviors, and what is endemically legal in society. However broad in scope it is meant to embrace the study of law as a social phenomena, not the use of social science in or by law. . . . To see sociolegal work as science does not require a belief in a universal theory or universal laws or belief in the view that science is value free and not embedded in social life. Optimally, like other areas of social science inquiry law and society work must be both synthetic and flexible. (1990: 23)

These definitions suggest that there has never been a single style of law and society work or a litmus test for membership in the community, yet they highlight a rough

consensus of the kind reflected in Lipson and Wheeler (1986), a consensus made possible by a widely shared view that law and society work was synonymous with law and social science with a gentle reformist edge often added. In the postrealist era that is emerging today, law and society research appears eclectic and noncumulative. It is neither organized around a single central insight nor an agreed-upon paradigm. "Law and society scholars," Robert Ellickson (1995: 118) contends, "have been handicapped because they do not agree on, and often don't show much interest in, developing basic theoretical building blocks."

Moreover, "social science" no longer occupies the virtually unchallenged position it once held, and social science itself no longer means what it once did. As demonstrated in the chapters that follow, in the postrealist era there is an abundant variety in the styles of research done under the rubric of law and society, and disagreement on what empirical means or whether law and society is synonymous with law and social science. While social science still is by far a predominant, and critically important, mode of inquiry, increasingly prevalent talk about interpretation, narrative, and identity seems suspiciously like the language of the humanities.

With particularity, multiplicity, and ambiguity as central virtues of postrealist law and society research, it should hardly come as a surprise when they precipitate a crisis of self-understanding in a community traditionally thought of in terms of its allegiance to social science. Just as a blurring of genres has occurred throughout the human sciences, so too feminism, studies of race and nationalism, and work in queer theory, to name just a few, have raised questions about the taken-for-granted identification of law and society with social science. The emergence of scholarship that emphasizes law's roles in shaping and responding to personal, group, and national identities has played a large part in opening up the boundaries of the field.

Where once legal doctrine would never be spoken about, today space is made for that work. Literary and humanistic perspectives have made some inroads. Work on the impact of the global and the postcolonial, as well as post-Marxist approaches and deconstruction, are found side by side with quantitative analysis. The traditions of law and society scholarship are, as they should be, up for grabs as new scholars redefine the field. With growth has come greater inclusiveness, but also fragmentation. With every gain in inclusiveness there will be an appropriate, though unsettling, increase in uncertainty about what law and society scholarship is and what law and society scholars do. One measure of the progress of this field is uneasiness about what its boundaries are, what is orthodox and what is heresy.

In addition, while realist legal studies almost always operate within a political body, usually the nation, with its exclusions made up not just of political borders but also of the nation's racial, cultural, and linguistic embodiments, the emerging postrealist law and society scholarship represented in this book increasingly confronts an array of breaches in this imaginary order in the form of globalization, identity politics, and/or the risk society for which the old realist paradigm seems inappropriate. Today then while law and society research and scholarship is vibrant and vital, the field is experiencing a period of pluralization and fragmentation. There is no longer a clear center of gravity nor a reasonably clear set of boundaries. Important scholarship proliferates under the banner of law and society even as that designation loses its distinctiveness. Evidence of both the vitality of the field and of its fragmentation is well represented in chapters of this book.

OVERVIEW OF BOOK

The work represented in *The Blackwell Companion to Law and Society* reflects the new facts of an emerging postrealist era. Whereas 15 years ago one could survey the field in 11 chapters, today it takes almost three times that number to even begin to do justice to the work being done under the law and society banner. And while then only three women and one international scholar were charged with the task of “canonizing” their subfield, in this book 19 women and nine international scholars are included as authors. The authors whose work is represented in this book represent different generations of law and society scholars as well as various theoretical, methodological, and political commitments – from positivism to interpretivism, from the new institutionalism to cultural studies.

The book is organized into six major sections. The first takes up and deepens the intellectual genealogy of the field begun in these pages. The second explores the complex connections of law and culture. The third examines the basic “subjects” of law and society, the institutional locations for doing what everyone would acknowledge to be legal work. The fourth moves from institutions to explore the domains of policy to which law and society scholarship has been addressed. The fifth examines the various ways in which law may be said to matter in social life. The sixth and last decenters the association of law and the nation-state, and it contains chapters that describe the past, present, and future of law in a global era.

While this organization provides but one idiosyncratic mapping of law and society scholarship, many themes recur from section to section and chapter to chapter. Among them several seem most important in marking the possibility of postrealist law and society scholarship, namely, law’s constitutive role in shaping social life; the complexity of institutional processes, as well as the importance of law in everyday life; the ways legal institutions are transformed as well as the ways in which they resist change; the increased importance of global and international processes in national and local legality; the significance of new media and technologies in defining, portraying, and communicating about law; the intersections of law and identity; and law’s role in both encouraging and responding to social consensus and social conflict.

A book like *The Blackwell Companion to Law and Society* demonstrates that it is hard to say with confidence just what constitutes or defines law and society research and, at the same time, particularly important to engage in that effort. Doing so will not in itself alleviate the confusion or uncertainty of the present moment, or chart the way forward toward a postrealist paradigm. Nor will doing so restore consensus in the face of fragmentation. But engagement with the diversity of styles of work reviewed in these pages should leave no doubt about the vitality and importance of law and society scholarship in this emerging postrealist era.

Notes

- 1 This argument is developed in Sarat and Silbey (1988).
- 2 Legal realism was by no means, however, a unified or singular intellectual movement. At one and the same time, the label legal realist has been applied to people like Felix Cohen

- (1935), who took what Gary Peller (1985: 1222) later categorized as a deconstructive approach, a radical skepticism which challenged the claims of logical coherence and necessity in legal reasoning, and to others who embraced and believed in science and technique. Moreover, realism embodied three distinct political perspectives. It included a critical oppositional strand which sought to undermine the law's ability to provide legitimacy for political and economic elites by exposing the contradictions of classical legal formalism and the hypocrisy of legal authority. Realism also included a strand of scientific naturalism whose proponents attempted to advance a more enlightened, rational, and efficient social order by using the methods and insights of the empirical sciences to understand a wide range of human, political, and social phenomena. Among these scientific realists there were divisions between the pragmatic followers of Dewey and James and those realists who pursued a more positivistic version of empirical science. Finally, legal realism was a practical political effort which did not merely support or legitimate political elites but some of whose members were themselves the officials designing, making, and enforcing reform policies
- 3 Not all stands of realist inquiry were, however, equally confident that law could or should be rescued, or that its integrity could or should be restored. The deconstructivist strand, which came to be viewed, by mainstream legal scholars, as dangerously relativistic and nihilistic, tried to reorient legal thought by emphasizing its indeterminacy, contingency and contradiction. According to Peller, "This deconstructive, debunking strand of realism seemed inconsistent with any liberal notion of a rule of law distinct from politics, or indeed any mode of rational thought distinct from ideology. . . This approach emphasized contingency and open-ended possibilities as it exposed the exercises of social power behind what appeared to be the neutral work of reason" (Peller, 1985: 1223).
 - 4 For an elaboration of the argument developed in this section see Sarat and Simon (2003).

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