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Commentary

Commentary on Carroll Seron's Presidential Address: Pragmatic Policy Analysis and its Pitfalls

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In her Presidential Address, Carroll Seron (2015) admonishes law and society scholars to devote some of their time to public service, to use their research skills to assess issues of public policy. This is a good idea. Social researchers possess skills and knowledge that permit them to see things that are not readily obvious to a great many others. And tenured university professors lived a charmed life, so the imperatives of citizenship suggest that they use their skills to help make a difference. If we want to live in a better society, it is not unreasonable for us to use whatever skills we have to contribute to the endeavor. That said, I want to expand on Seron's call to service and then offer a modification about what it is we might offer. I want to examine the pitfall of engagement as she presents it, and then defines it, and suggest an alternative. But I emphasize that even if I am correct, my conclusions do not lead to a rejection of her admonition to undertake engaged scholarship. But they do suggest caution.

In setting out and illustrating her argument, Seron draws on a great many scholarly articles published in the *Review* and authored by active members of the Association. I have read and teach a number of them. They are all, I think, examples of first-rate scholarship. Many of these articles, as indeed much of the Law and Society canon, address failures to achieve rights and access to justice. This is not surprising. In a rights-bearing culture and a drastically unequal society, one is likely to find that rights are not realized. And as she says, the Association was born during the height of the Civil Rights struggle. In fact the Civil Rights Act and the Law and Society Association share the same birth year.

But the Civil Rights Act and other civil rights acts in its wake have been something of a disappointment if not a failure. So we should be leery of more of the same: more rights, more rights analysis, and more failures. Of course this is a generalization. Much good has flown from the expansion of rights over the course of American history and over the past 50 years, and as she suggests the 1965 Civil Rights Act is arguably one of the most

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successful congressional enactments in our Nation's history. But by now we have received repeated warning about the dangers or at least the limits of a preoccupation with rights, access to justice, and fidelity to the rule of law. This experience suggests that we search for the causes and correlates of so many failures, and that we consider alternative ways of thinking about issues.

One new development in the Law and Society community that Seron mentions, but does not dwell on is the comparative turn in law and society research, and what it can teach us about placing issues in perspective and context allowing us, to see old facts in new lights (see Nelken 2010). Such inquiry reveals that autocratic governments can be punctilious in scrupulous adherence to the rule of law and in complying with existing rights. So, rights and the rule of law can be transformed almost seamlessly to rule *by* law. Consider: the repressive country of Singapore (Rajah 2012, Silverstein 2008) can be so mindful of the rule of law, due process, and rights that it can be singled out—repeatedly—to host international conferences of associations of jurists, and to be the host site of the international arbitration association. But the comparative turn can also let us see beyond rights and due process. Many countries (the Nordic countries, the Netherlands, and still others)—perhaps those Law & Society members are most likely to envy—are embedded in cultures which do not emphasize rights. They have few hero judges and lawyers, and weak traditions of judicial review. They are boring administrative states. But they work.

I am hardly the first to make such observations. Among Law & Society scholars, my colleague Bob Kagan (2001) is famous for making similar claims, and for criticizing the American penchant for "adversarial legalism." One of the projects Kagan undertook in his path to the publication of *Adversarial Legalism* was to commission a set of case studies that compared the way social conflicts were addressed in the United States and a selected number of other countries (Kagan and Axelrad 2000). He did a good job of selecting policies: all addressed pressing issues of health or safety or equity. Some arose because of the desire to adopt new technologies, many addressed pressing problems both in the United States and in the second country; some arose due to an expanding sense of equity and fairness. But when Kagan compared the institutionalization of these policies—in terms of effectiveness, efficiency, and timeliness—almost always the United States came in second in the two-way races. Why? Kagan provides an elaborate and incomplete explanation; no single factor or set of factors provides a very convincing answer. It seems to rest in "legal culture." This has led more than one frustrated reader to conclude that Kagan's answer is that the United States should be

more like the Netherlands. Perhaps true, but it does not get one very far.

But there may be something else: his comparative analysis leads the reader to move away from "rights," courts, and "access to justice." A careful reading of Kagan (and others working in this comparative tradition) reveals that he focuses on institutions and institutional capacities. Good government not only depends on goodness of the governing, but strong bureaucracy, centralized accountability, responsible political parties, strong labor unions, steeply progressive taxation, commitment to primary and secondary education. And perhaps as a by-product, less preoccupation with rights.

Kagan is one of a growing number of sociolegal scholars who place the United States in comparative perspective. Another is Elliott Currie (1997), who has written extensively about America's crime problems and crime rates and placed them in comparative perspective. His robust and powerful findings: among advanced industrialized countries, crime rates decline as income inequality declines. A more egalitarian society yields many benefits, including lower crime rates. And, he might have added, more humane responses to those who do offend. All this despite far fewer "rights" for the criminally accused in those lower crime-rate countries than in the United States.

Similarly John Langbein's (1978, 1979) comparisons of the American system of criminal justice with medieval practices (1978) and with German practices (1979) are convincing in their conclusions that American courts fail not because there are not enough public defenders or prosecutors or judges, but because our system of justice, preoccupied as it is with fairness and rights, has created an unworkable mess. We have created a Rolls Royce of a system when we would have done better to build a Toyoto Corolla. The former is beyond the reach of all but the few, and the result is the coercive underhanded alternative of plea bargaining. In contrast, a Corolla-like system in other countries can be and is operated more or less as designed, and the better results on just about any dimension one can imagine.

One more example. For many readers of this Comment, the single most dramatic social dislocation of their lives was the Great Recession of 2008. Vast numbers were thrown out of jobs and lost their homes and savings, and life for all of us suddenly appeared much more precarious. Since then, the United States and most of other affected countries have sprung back. If they have not returned to the normalcy of the precrisis days, most are no longer balanced on the precipice. The autopsies of this crisis are still on-going, but it is clear that they will tell us that institutions matter. Financial institutions were out of control. Regulatory

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agencies had seen their authority whittled away over the previous decades, and they were outmatched by fast moving developments in banking and finance. They were unprepared to deal with the crisis. Indeed, they were not players on the field as the crisis slowly built up to catastrophic proportions. It was as if the National Hurricane Center had been disbanded just before hurricane season. Yet law-in-action—our topic—created these institutions. Law created financial institutions and regulatory agencies alike. It granted them authority. It defined their scope of activities. It authorized their actions. And legal actors—legislators, administrators, judges, lawyers—oversaw these activities down to the last detail.

In retrospect what we see is a colossal failure of law. Law creates, defines, and authorizes institutions, as well as conveys rights duties, and access to justice (Feeley 1976). Yet, the canon in Law and Society research tends to focus on the latter concerns at the expense of the former. Long ago, Laura Nader (1967) urged anthropologists to "study up," but from all I can tell her admonition fell on deaf ears. I renew her call, and suggest that at least some considerable portion of our collective effort should be directed at studying up, examining the legal structures of big institutions, asking what their functions are, how their authority matches these functions, and what might be done to align function with authority. Whatever the case, the core issues are not easily reducible to rights or access to justice.

Let me switch to still another example of institutional failure of law, the incident in Ferguson, Missouri in 2014. Following the tragic death of Michael Brown, as details about the incident and the city of Ferguson unfolded, it became clear that his death, as anger-provoking at it was, was also something of the straw that broke the camel's back. It was the latest and most deadly racial humiliation in a city filled with them. Accounts that emerged reveal that Ferguson has long been run in the tradition of a Plantation. Residents of the town, two thirds of them black, have long been exploited by city officials (almost all white), who used a variety of institutional devices to extract money in the form of fines to cover city expenses (including their salaries). The death of Mr. Brown was not only a failure of police protocol and training, but of deeper institutional design. The city itself was organized as an exploitative entity, taking from the have-nots and giving to the haves, from blacks to whites. But it was not the city alone. The city is a creature of the state, and the state permits, indeed perhaps encourages, city officials to organize and act as officials in Ferguson did. It represents a failure of politics, a failure of government, a failure of institutions, a failure law. Only after this, does it represent a failure of rights and a failure of access to justice. Further, the problem is not Ferguson's alone. Municipal finance in Ferguson is not much different than it is in any number of

other towns and cities in Missouri, and no doubt a great many other communities across the United States. Of course the incident that made Ferguson infamous reflected a failure to honor rights and duties, but it also constituted a failure of law to define and construct responsible institutions. This may be the hidden cause of the raw results of the incident at Ferguson.

One would hope that a team of sociolegal scholars would seize on Ferguson to describe the anatomy of the incident and locate it in institutional context. And in so doing, I would hope they would move beyond the time line of the activities of Michael Brown and Officer Wilson, police-citizen interactions, and access to justice issues, and spend some time examining the institutional structure of the city, the sources of municipal financing, state laws that authorize such activities, and an examination of how local government in the state is organized and financed. There are many parts to the puzzle, and whoever assembles them all would perform an important civic service.

I have strayed far from Professor Seron's Presidential address, and so now want to return to it. She admonishes Law and Society scholars to be responsive to requests to address issues of public policy. I agree. We should. But in her examples she seems to take the problems as defined by those requesting the work at face value. I'm not sure that this is always—or ever—a good idea. As scholars, as publically committed scholars, we occupy a precious position that is available to very few people. We are free to define our work and report what we find. And we should insist on the need to define problems as we—not someone else—see them. Indeed, as a scholarly community this is our greatest strength. We can both define the issue and set out proposals to solve the problem. So, when someone comes knocking to ask us to help answer their questions, we should be prepared to rephrase the problem, saying in effect, "You think the problem is X, let me suggest that it is Y. Let me show you why." This is perhaps the greatest contribution academic scholars of law and society might make to the assessment of social policy.

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