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Commentary

Commentary on Carroll Seron's Presidential Address: Taking Policy Seriously

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> The law and society movement has abandoned most of its problem-solving emphasis. What it has is, first of all, a hunger to describe and explain, more or less divorced from problem-solving in its crudest sense.
> Lawrence Friedman, The Law and Society Movement, 1986
>
> Your emphasis on the theoretical, nonpractical orientation of law-and-society surprises me. I think most people looking at a program for an annual law-and-society meeting… would get the impression that the movement is concerned with practical policy…
> William Simon, commenting on Friedman's essay (quoted in Friedman 1986)

The Law & Society Association was formed at a time of vibrant movements to challenge race and gender inequality. Fifty years on, these movements are long past—although Black Lives Matter suggests that this may start to change—but the problems remain and in some respects have deepened. President Carroll Seron, in her presidential address, calls on Law & Society scholars to recognize that a key driver of growing inequality and criminal injustice is *public policy*. That is, the problems are the product not of too little state effort but of active effort by the state, carried out via deliberate policy. Professor Seron calls on us to study the role of law in these policies, and to advocate for policy change on the basis of our research. Her call squarely addresses a long-standing division in the Law & Society Association, captured by the epigrams above, between those who favor focusing our research on advancing knowledge and those who want to address practical policy problems and recommend reforms.

I am grateful for being given the honor and opportunity to respond, especially as I have a foot in both of these camps. I would

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like to use this opportunity to suggest that we can better bridge the gap between advancing knowledge and addressing policy problems if we learn some lessons from a newer generation of policy studies that have much in common with Law & Society scholarship. These newer studies, like Law & Society scholarship, seek to understand policies within their broader social context; like many Law & Society studies, they are historically informed and comparatively framed. Like much Law & Society scholarship, these newer studies focus on how public policies are shaped by, and work to deepen, economic and racial inequalities. Still, the new policy studies are ahead of our interdisciplinary field in one key way: they have a richer conception of the state and its policies. In fact, they show that the state and its policies have been remade in recent decades in ways that have directly contributed to the growth of inequality. These observations have direct and important implications for Law & Society scholarship. Law & Society scholarship would benefit from deeper engagement with this new body of scholarship. At the same time, as Seron suggests, Law & Society scholarship can offer the newer policy studies a better understanding of how law in action shapes policy in action. A first step is to situate our studies of law in action within the context of the richer conceptualization of the state and policy found in these new policy studies. In my brief remarks, I suggest how this might be done.

What Law & Society Can Learn From the New Policy Studies

A common theme across many of the new policy-focused studies is that the character of policy and policy making in the modern state has shifted from the patterns of an earlier era in ways that contribute to inequality. The scope and scale of policy are considerably greater, the policy universe is more fragmented and complex, policies are more dependent on private actors for their implementation, and policies and their applications are more shaped by specialized scientific or technical knowledge. Law, in the form of statutory authorizations, administrative regulations and interpretations, and judicial or quasi-judicial decisions, is employed nearly everywhere in this new world of public policy. If the haves come out ahead in law (Galanter 1974), they surely do as well in the new world of public policy, for many of the same reasons: the institutional structure of this new world of policy lends advantages to the haves, especially those that are organized to "play for rules" over the long term. In fact, the character of the contemporary state increases the influence of powerful organized interests. It increases their influence particularly through the use of law and

law-like modes of action. And it continues to embody a deep and tragic compromise on racial discrimination.

Several observations of the new policy studies are particularly relevant for our interdisciplinary field. One is that much policy, from its deep structure to its particular rules, has been shaped by race-framed conflict, particularly deliberate racial discrimination and the compromised efforts to end it. Thus, Katznelson's (2005, 2013) important studies have revealed that the New Deal's most basic policies were made possible by, and held captive to, the votes of racist southern members of Congress. Their influence led to policies, among them Social Security, the GI Bill, protections for union organizing, and so forth, that built a middle class and deliberately kept black Americans out of it. One of Katznelson's more striking observations is that the legal tools deployed by New Deal policies established nationally administered, mandatory benefits for the sorts of jobs held by whites and discretionary benefits administered by local or state officials for the sort of jobs held by African Americans. The deep structure of these programs, and the New Deal's compromise on racial discrimination, has cast a long legacy that continues to shape when, where, and to whom government programs are generously beneficial versus stingy and punitive (Frymer 2004; Soss 1999; Soss, Fording, and Schram 2011). The legacy of these policies is also deeply felt in the contrast between affluent suburbs and concentrated urban poverty and crime, and in the racially biased policing that has grown in this context (Epp et al. 2014; Weaver and Lerman 2014).

Since the collapse of the New Deal order, the state seems increasingly hollow and weak. A second observation of the new policy studies, however, is that the contemporary state, even in its weakened form, remains a remarkably active policy maker. Recent decades have seen a surge of activist state policy making that has transformed the state and reshaped state-society relations (King and Lieberman 2008, 2009; Pierson and Skocpol 2007). A quick list of the major U.S. (federal) policies of past 50 years would have to include many that are studied by Law & Society scholars, among them major rights and regulatory statutes: the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Housing Act of 1968, the Clean Air Act, the Clean Water Act, the Occupational Safety and Health Act, the Consumer Protection Act, the Sentencing Reform Act, and the Americans with Disabilities Act. But such a list should also include more hidden, esoteric policies like the tax incentives favoring deferral of income to retirement accounts, the tax subsidy for home mortgages, declining enforcement of NLRB rules against union-busting activities, and the roll-back of New Deal rules governing financial markets (Hacker and Pierson 2010). Further, the latter list should include

deliberate decisions to block policy change aimed at addressing pressing problems. While we usually think of policies as those that are adopted, scholars from Crenson (1971) to Hacker and Pierson (2010) have argued that decisions not to adopt a new law or regulation in the face of an obvious problem may be thought of as a deliberate policy as well. Hacker and Pierson (2010) show that in the context of rapid economic and technological change, as in the past few decades, efforts to block policy change aimed at addressing the social harms of these economic shifts contribute to "policy drift" that adds up to real change in the import and impact of public policy, often in ways that contribute to inequality. A simple example is the repeated decision, over many years, to not raise the federal minimum wage.

It is striking that the former list of activist policies—the one that, with one or two exceptions consists of equality-enhancing policies—is the focus of Law & Society scholarship; the latter consists mainly of equality-reducing policies, and, while these policies are the subject of the new policy studies, Law & Society scholars have not much focused on them. Instead, Law & Society scholarship has focused on understanding why ostensibly equality-enhancing policies have often been undermined in practice. Law & Society scholars ignore these latter policies to our field's detriment, as they are a major element of the contemporary legal universe, are less often undermined in practice, and arguably their consequences have important implications for the effectiveness of the equality-enhancing policies. For example, the often-hidden policies on the second list subsidize organized interests that have fought hard in legal forums to limit the reach of many equality-enhancing policies.

A third important observation of the newer policy studies is that the surge in policy making has remade the state into a sprawling, multilayered, many-faceted mosaic with overlapping, and sometimes competing, policy regimes, governing units and agencies, and an even greater array of different formal policies that are often layered one upon the other (Hacker 2002; Hacker and Pierson 2014; King and Lieberman 2008; Mettler 2011; Pierson and Skocpol 2007). Put simply, the contemporary state is not one entity but a complex and messy amalgam. The layering, complexity and institutional conflict documented in recent studies go considerably beyond the traditional observation that the American state is divided by the separation of powers and federalism. The result is tension or conflict between individual officials, agencies, and policies and between legislatures and executives and the national government and the states. Some of this is nothing new, but the scope and scale of public policies adopted in the past half-century has expanded the scope and scale of conflict. As Kagan (2001) and Orren and Skowronek (2004) have observed, this

tension and conflict both serve to diminish legislative policy adoption while opening opportunities for policy change in more-hidden venues. Examples include strategic litigation campaigns to force the Environmental Protection Agency to regulate greenhouse gases (Nolette 2014), state officials' use of administrative law to make it harder to register to vote (and even to vote at all) (Kousser 2015), and deployment of local policies and managerial decisions to punish and exclude immigrants (Provine et al. 2016). Strategic uses of law are at the center of these conflicts—and the "haves" are far better positioned than others to take advantage of these opportunities.

Fourth, while European and Canadian policies commonly rely on bureaucratic agencies to carry out their directives, U.S. policies often rely on, and sometimes subsidize, implementation by actors in civil society. This may take the form of authorization of private litigation as an enforcement tool (Farhang 2010) or public subsidy of private activity, including both direct subsidy and forgiveness of taxes (Hacker 2002; Mettler 2011). Within these broad types is an amazing array of different policy mechanisms governing private enforcement and public subsidy. Thus, public programs are carried out by myriad social-service organizations—in the private sector. Environmental standards are enforced by private environmental groups. Powerful but largely hidden policy regimes subsidize the retirement plans and investments of the upper middle class and above (Mettler 2011). In each of these areas, much of the enforcement and implementation is done by nongovernmental organizations. Again, *law* is a key tool that shapes these state-society interactions and also a key tool used by these nongovernmental organizations as they carry out public policy.

Fifth, although the state and policy regimes fragmented and layered, it is often possible to identify clear shifts or points of transition that set a policy regime on a new course (Barnes and Burke 2014; Hacker 2002). Adoption of the Civil Rights Act of 1964—or, more broadly, the process of strategy and compromise that led to the crucial decision to enforce its prohibitions mainly via private lawsuits—was such a moment (Farhang 2010). The period of experimentation with traffic stops as a crime-fighting tool, culminating in the Justice Department's training program for Operation Pipeline (using traffic stops to catch drug couriers) was another (Epp et al. 2014). Looking further back, the legislative compromise that kept jobs done mainly by black workers outside of the scope of Social Security benefits, and the compromise that restricted home loans mainly to white veterans, were crucial turning points that set the stage for much of the course of social and economic change in these areas (Katznelson 2005). Put simply, if we look for the conditions that shape law in action only in microlevel interactions among individuals, or in meso-level

organizational practices, we miss the key turning points in the design of policy regimes that have cascading effects through these other levels.

Sixth, "policies create politics," as an important book by Law & Society scholars Barnes and Burke (2014) reminds us. That is, policies inspire both mobilization (to get the benefits of a new program) and counter-mobilization (to stem a threat posed by a new regulation). By bestowing benefits to some activities or some classes of people, policies foster the creation of organizations to capitalize on those benefits. Policies also may restructure the terms or the shape of political conflict. These insights date to classic studies by Schattschneider (1935) (1942), but they have been revived and powerfully applied in a number of the new policy studies (Barnes and Burke 2014; Campbell 2003; Mettler 2011; Patashnik 2008; Pierson 1993; Soss 1999). A core observation of many of these studies is that, while some policies of the New Deal and Great Society fostered mobilization and organization by people with low or moderate economic means, the policies of the past generation have shifted the balance heavily toward mobilization by the upper-middle class and, especially, the wealthy (see, e.g., Hacker 2002; Hacker and Pierson 2010; Mettler 2011).

Finally, many of the recent policy-focused studies reveal extensive effort by powerful organized interests to shape public policies and their implementation. As Hacker and Pierson (2014) observe, organized interests devote massive resources to efforts aimed at reshaping public policy in esoteric policy-making venues. These organizations have long time horizons, work strategically to change the rules in ways that favor their interests, have the capacity to develop and deploy expert knowledge, and have the resources necessary to do all of the above on a large scale over time. These are precisely the characteristics of "repeat players" in Galanter's (1974) classic analysis. What is new, or newly described, by recent policy studies is how organized interests play for rules not only in legal venues but in every available venue, from courts to administrative agencies, from local city commissions to the national Congress, and from local grassroots organizing to national advertising campaigns (see, e.g., Skocpol and Williamson 2012).

The new policy studies, in sum, show how the state and its policy systems have changed in recent decades in ways that benefit the haves, particularly as represented by large organized interests. These studies identify how top-down engineering of policy, in the form of statutes, administrative regulations and judicial decisions, give institutional advantage to these interests. This body of research adds considerably to the Law & Society field's focus on bottom-up processes. So, here I express a small dissent to one aspect of Seron's presidential address: although "policies

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deliver unintended consequences," as she says, it is equally true that sometimes policies deliver intended consequences—and a considerable portion of growing inequality is the direct consequence of deliberate policy.

In turn, as Seron persuasively shows, Law & Society scholarship may enrich these studies of policy and the state with our field's better-developed conception of law-in-action. This conception is attentive to the ways that law's meaning comes as much from a bottom-up process of normative interpretation of the rules as a top-down engineering of the rules and to how these bottom-up processes often generate a taken-for-granted interpretation that is shaped by powerful interests and institutionalized processes. Thus, it is simply not true, as any number of excellent studies in our field can attest, that the engineering of a policy at its outset always determines how it works out in practice. As Seron observes, Law & Society studies put "society" back in the picture—and it is there that many individual and organizational actors, drawing on competing norms and the resources and constraints offered by overlapping institutional orders, struggle to shape the construction of policy, and law, in action. This construction is considerably more than mere "implementation" of public policy, as this process was once called. It is a process that goes in unexpected directions, that empowers some actors in unpredictable ways and disempowers others, that is used by organized interests to reframe claims and identities—and, still, a considerable portion of this messy interaction is not easily reducible to deliberate interest or strategy in response to policy design. Law & Society scholarship is at its best in analyzing this messy process, in showing how much of the law is shaped in action, on the ground, in highly variable ways.

In sum, both the processes of top-down engineering and bottom-up interpretation contribute to the growth of inequality. It is more important than ever to study law in action—but it makes less and less sense to do so without attention to the particular policy regime that gives the law its structure and shapes the incentives for its mobilization.

How Law & Society Scholarship Can Incorporate Policy Studies

Policy studies are unlikely to appeal to all branches of the diverse Law & Society field but for those who, like me, see the value of incorporating policy into our studies of the law in action, it may be helpful to consider specific steps to this end. What follows are some brief, preliminary, and incomplete suggestions.

First, rather than assuming that a microlevel or local-level setting is unique in itself, researchers should strive to clarify the higher-level policies that form the official framework for that microlevel or local level. Although not every microlevel setting is shaped by policies, many are, and missing the policy context risks misunderstanding the incentives and constraints that shape microlevel law-in-action.

Second, Law & Society scholars should rediscover the state and its officials as agents of change. The state is not, or not just, the brooding presence that our studies too often note only in the abstract. It is a complex array of particular agencies and particular groups of officials. These agencies and officials act strategically and shape state–society relations. For example, a number of excellent studies have revealed active efforts by government officials to foster networks among private lawyers and private litigation to push for change in policy or enforce it (Banaszak 2009; Mulroy 2012; NeJaime 2012; Teles 2009; Woods and Barclay 2008). Law & Society scholars should study government *lawyers* in particular. These lawyers play a key role in drafting policies, interpreting their requirements, and working out problems in their implementation. A marvelous study by Yoav Dotan on government lawyers in Israel reveals the depth of insight into the law-in-action that may be gained from such study. Similar studies of other key actors within the state likewise reveal the coalition-building, the norm-generating and—interpreting, the organization-infrastructure-building efforts—in a word, the *active politics*—of official activity in developing and carrying out state policy (see, e.g., Carpenter 2001).

Third, we should keep our eye on *organized interests* and their interactions with the state. A key lesson of recent policy studies is that the structure of much contemporary public policy fosters organized collective action in the private sector. Another key lesson is that the distended state is the subject of sophisticated campaigns, by highly organized interests, to influence policy. In both ways, organized interests are a key part of where the action is (e.g., Hacker and Pierson 2014). They are influenced by the legal tools deployed in public policies; they, in turn, try to influence public policy via law and legal strategies. A focus on deliberate strategy, however, should be supplemented by the Law & Society field's recognition of the powerful role played by taken-for-granted assumptions, or institutionalized norms, in shaping deliberate strategies. The new policy studies have their own conception of constraint on deliberate choice: it is the rules and policy structures inherited from the past. The upshot is that constraint is little more than the congealing of the effects of past deliberate choices. Law & Society scholarship has convincingly shown that

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taken-for-granted assumptions about what is possible, right and effective shape deliberate choice.

A number of important Law & Society studies do just what I have described, and so those, like me, who want to better incorporate policy into our research have good models to follow. They include studies by Edelman, Uggen, and Erlanger (1999) on legal endogeneity in the construction of employment civil rights law, Feeley and Rubin's (1998) magisterial study of prison reform, McCann's (1987) classic study of public interest liberalism, Kagan's (2001) landmark analysis of adversarial legalism, Seron, Pereira and Kovath's (2004) still-timely study of judging police misconduct, Barnes and Burke's (2014) remarkable new book on injury compensation policies and the politics they foster, and Kritzer's (2015) comprehensive analysis of judicial elections and their effects and Garry Gray and Susan Silbey's (2014) revision of regulation from organizational actors' perspective.

Conclusion

Perhaps the most provocative aspect of Carroll Seron's Presidential Address is her call to "get back in the game of advocacy" of policy reform. Using Law & Society research as a basis for recommending reforms is as old as the Association, of course, but in recent years, it has come in for much criticism. Reform-oriented commentary has come to be seen almost as unscholarly. It is criticized for being conceptually limited, too closely tied to the narrow tools of conventional policy analysis, or too much influenced by the interests of particular official actors. Professor Seron's address challenges those assumptions and calls us back to the Association's aspirational roots.

With Professor Seron, I hope that my brief survey of recent policy-oriented scholarship has suggested that it is increasingly possible to conduct studies of policy and law-in-action that both advance understanding and lead to recommendations for reform. Study of policy in the broad area of political sociology is now theoretically sophisticated, empirically based in the richest sense of that term, and sharply critical. This growing body of scholarship reveals the policy roots of key problems and, in doing so, identifies meaningful policy reforms. Greater engagement with these studies would enrich our interdisciplinary field.

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