The Blackwell Companion to Law and Society

Edited by

Austin Sarat

Blackwell Publishing

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For my son Benjamin, my sweet prince.

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Preface

The invitation to put together a one volume "companion" to a field as diverse as "law and society" was, as one could readily imagine, both exciting and daunting. Taking up this invitation provided a wonderful opportunity to survey the field, and to renew my acquaintance with the range of work being done in it and the wonderful scholars doing that work. Editing this volume was a re-education in itself. But the very range and diversity of scholarship posed a substantial challenge. What to include? What not to include? How to represent the breadth of theories, methods, and perspectives found in the law and society community?

These were formidable challenges. Despite the hard choices, inevitable omissions, and shades of emphasis, I am satisfied that *The Blackwell Companion to Law and Society* does a reasonable job in providing a guide to the field. Indeed the more than 30 essays in this volume may well constitute the best introduction to the field currently available. While working from a common template, all the authors interpreted their directions in their own ways. Readers will recognize a common format while also appreciating the various ways that format has been adapted. Taken together the essays collected here trace the evolution and history of the field, chart the present state of knowledge produced in law and society, and point to fruitful directions for further inquiry.

As surely as it highlights the diversity and fragmentation of the field of law and society scholarship, a compilation of research such as this inevitably tends toward "canonization" of a particular map of knowledge, a particular set of problems, and a particular set of texts. That is unavoidable and, to some extent, beneficial. Canonization helps us recognize what we share. It also provides a fruitful terrain of conflict and contestation. While having one's work canonized means having the pleasure of seeing one's name in lights, it carries with it the need to endure slings and arrows slung and shot by those seeking to advance new paradigms or just prove their academic mettle. A canon also might be thought of as a staple of shared knowledge, the things all of us must know if we are to be literate as law and society scholars,

the things we need to read regardless of our particular subfield or research specialization.

While canons are about quality, they are also about work that defines who we are by identifying common concerns, concerns that go to the heart of problems and issues that recur in many, if not all, of the subfields that comprise law and society scholarship. Canons make demands on us as readers, requiring us to read beyond the limits of our most narrowly defined expertise, requiring us to remain familiar with theories and methods beyond those with which we are most comfortable.

As an advocate for disciplinization (a truly ugly word), I am drawn to Jack Balkin and Sanford Levinson's claim that "Every discipline, because it is a discipline, has a canon, a set of standard texts, approaches, problems, examples, or stories that its members repeatedly employ or invoke, and which help define the discipline as a discipline. If the study of law," they say, "is a discipline, it too must have its canons and its own sense of the canonical" (see ch. 3, p.31). For me a discipline is less a set of shared methods or theories (by that definition there would indeed be very few disciplines) than a set of shared conversations, or shared communities of readers. For each of us the canon establishes the minimum grammar with which we must be familiar if we are to talk law and society and to have our talk recognized by others. In this sense the canon provides one of the sets of horizontal linkages that define a discipline, setting off one set of intellectual inquiries from another. While the boundaries of the canon, like the boundaries of a grammar, are shifting, fluid, and contested, without a canon there can be little intelligible conversation.

But canons also provide a vertical or historical connection, a way for one generation to speak to another. Like the good parent who must – or so the books say – provide ways of being in the world for their children, both as a source of stability but also as the fuel of rebellion, so too a discipline that wants to take seriously its obligations to younger scholars must not shy away from the complex task of canonization. While having a hollow core may look like a way of being open, it is, I think, really a way of avoiding one generation's responsibility to another. If we cannot identify the faces that adorn our own Mount Rushmore, we cannot hope to earn the loyalties of those who will come after us, those who we would like to speak to us and about us in an unnamed future. Indeed, as Balkin and Levinson argue, "there is no better way to understand a discipline – its underlying assumptions, its current concerns and anxieties – than to study what its members think is canonical . . . The study of canons and canonicity is the key to the secrets of the culture and its characteristic modes of thought."

Of course, canons and canonization also generate arguments about what is in and who is out. Listing the canon or candidates for canonization is always perilous, not only because it hurts the feelings of those not named and leads to blaming of the list makers, but because canons cannot be legislated or brought into being merely through naming and claiming. They exist as social facts, as empirical documentable phenomena in our syllabi, our footnotes, our stock of stories, the shared consciousness and taken-for-granted sense of who we are. But so too do the disagreements about the canon. Those disagreements are often healthy even when they are unpleasant.

What is honored by canonization may make us feel marginal if it seems distant from what we do or know. What is criticized as being unworthy of canonization may make us angry if it seems to embody the theories or methods that we deploy in our

work. But contests over the canon keep the canon fresh; they renew it by requiring those who would defend this or that set of inclusions and exclusions to make explicit the questions or insights they see as defining the field. In so doing history becomes memory, the past becomes present. The taken-for-granted is renewed and reinvigorated as it is made explicit

The Blackwell Companion to Law and Society represents one document in the continuing articulation and contestation of the field called law and society. Because it is produced at a time of both a great vitality and great fragmentation in the field, what it canonizes will for some seem just right and, for others, will seem unduly tilted in this direction or that. However any reader receives it, I hope this book provides a way station, a temporary touchstone, honoring the contributions of law and society scholarship and fueling its further development.

I am grateful to the contributors for taking on the challenging work of field assessment. I am also grateful to Susan Rabinowitz, who proposed that I undertake this project and was very helpful in its earliest stages of development, and to Ken Provencher who saw it through to production. Thanks to Greg Call, Dean of the Faculty at Amherst College for his generous financial support and my colleagues in Amherst College's Department of Law, Jurisprudence, and Social Thought for providing a rich intellectual environment in which to work. Thanks especially to Stephanie, Lauren, Emily, and Benjamin for being the best of all companions.

Austin Sarat
July, 2003

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

Austin Sarat

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 sociolegal 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.