Abstract

This essay calls for a return to the study of social policy in socio-legal studies. Relatively abandoned since the “cultural turn” in socio-legal studies, the study of social policy presents an opportunity to expand socio-legal studies in at least three important directions: a) it would allow us to conceptualize what social welfare rights mean in a context of economic austerity and welfare state retrenchment; 2) it would lead to more sophisticated understandings of the relationship between law and cultural change; and 3) it would reveal the ways in which social policy influences Americans’ legal and political consciousness.
The Patient Protection and Affordable Care Act (PPACA)—a.k.a *Obamacare*—is by many accounts the most significant reform of American health policy since Medicare and Medicaid were enacted in 1965. The legislation was the culmination of years of debate about how to fix our broken health care system. Noticeably absent from these discussions were the voices of law and society scholars. While law and society scholars have a long history of studying issues of inequality, injustice, and the relationship between law and social change, in recent decades we have remained conspicuously silent on issues relating to health care and social welfare more broadly. This essay calls for a return to the study of social policy in socio-legal studies. Relatively abandoned since the “cultural turn” in socio-legal studies, the study of social policy presents an opportunity to expand socio-legal studies in at least three important directions: a) it would allow us to conceptualize what social welfare rights mean in a context of economic austerity and welfare state retrenchment; 2) it would lead to more sophisticated understandings of the relationship between law and cultural change; and 3) it would reveal some of the ways in which social policy profoundly influences Americans’ legal and political consciousness.

The turn in socio-legal studies away from the study of social policy began in the late 1980s as a critique of so-called “gap” studies—i.e., research documenting the gaps between what policies say and what they actually do in the social world (Gould and Barclay 2012). Critics of these studies argued that socio-legal scholars who ally themselves with policymakers—who assume that existing laws could and should be made more effective—become important participants in maintaining the existing legal order. Sarat and Silbey’s “The Pull of the Policy Audience” (1988) captures this critical voice quite well. They argued that the focus in law and society research on the *failures* of official state law—those cases where policy implementation has been frustrated in some way—has missed all the ways in which law is effective, so effective,
in fact, that we no longer notice its presence in everyday life. The power of law lies in its ability to inscribe itself in the most mundane forms of day-to-day behavior: family life, education, relationships with neighbors, vendors, landlords, and employers. Critics suggested that the project of unmasking the power and politics of liberal legalism requires a shift toward the study of places where the presence of law is neither obvious nor visible (Sarat and Silbey 1988). This call for the study of law in everyday life resulted in a sharp intellectual turn in law and society away from the policies of the state and formal institutions of law to the study of legal consciousness, the cultural dimensions of legality, and an understanding of law as constitutive of social life rather than as something outside of, or imposed upon social life from legal actors above (Ewick and Silbey 1998; Marshall and Barclay 2003; Sarat and Kearns 1993).

Today, as a result, the micro-level analyses that have come to dominate the study of law and society are rarely connected to the macro-level politics that shape them. There are at least three important ways that law and society scholarship would benefit from connecting what we’ve learned about the cultural dimensions of law to the world of social policy.

First, the study of social policy affords us an opportunity to expand our understanding of social welfare rights in the United States. Law and society scholars have long documented the power of rights and rights discourse in a wide range of contexts involving civil and political rights. But few scholars have extended these analyses to the context of social welfare rights, where the claim for rights involves the creation of an economic entitlement, or a “right” that is conditional upon finite resources (Brody 1991; Detwiller 1984; Epstein 1999). As the history of the welfare rights movement has shown (Bussiere 1997; Davis 1993; Kornbluh 2007), the discursive and pragmatic power of rights are easily overwhelmed by political questions of social need. In part, this is because asserting or recognizing a right—for example, a right to health
care—does not help to resolve any of the difficult distributional dilemmas associated with that obligation: What forms of health care are we obligated to provide? What is an adequate minimal level of care? How much can society afford to pay for health care before other benefits (or “rights”) are seriously compromised? Because law and society scholars have not systematically engaged with the concept of social welfare rights beyond the case of the welfare rights movement, we haven’t considered the underlying economic and political foundations of social rights in the contemporary context—a time when economic and political forces have uprooted key foundations of the American welfare state. Today’s struggles with health care and other social welfare needs give us a perfect opportunity to do so.

The second benefit of reconnecting to social policy lies in our expanded understanding of the relationship between law and cultural change. By incorporating a constitutive perspective of law (McCann 1994) adopted by many socio-legal scholars—i.e., law as a set of meanings, discourses, and categories that shape key aspects of social life—socio-legal scholars interested in the relationship between law and social change have an opportunity to observe the ways in which law and litigation can challenge the normative frameworks Americans use for defining and interpreting social welfare problems. Socio-legal research on the public health effects of tobacco litigation offers a compelling illustration of this (Mather 1998; McCann, Haltom, and Fisher 2011).

Between the 1950s and 1995, smokers and the families of deceased smokers had filed over 700 product liability lawsuits against the tobacco industry (Mather 1998). The tobacco industry won all but one lawsuit. One of the many reasons for the tobacco industry’s remarkable success in court is the powerful “individual responsibility” defense used by the tobacco industry (a defense still used today by gun manufacturers and fast food companies embroiled in similar
public health legal campaigns) (McCann, Haltom, and Fisher 2011). The industry consistently and successfully argued that plaintiffs assume the risk of smoking *with full knowledge of its health effects* and therefore cannot reasonably sue tobacco companies after they get sick. This ideology of personal responsibility is powerfully persuasive not only to judges and juries in the United States, but also the press and the mass public, and it became one of the primary obstacles to tobacco policy reform (McCann, Haltom, and Fisher 2011).

Socio-legal analyses of the anti-tobacco litigation campaign suggest that one of the most valuable resources produced by anti-tobacco litigation for health reformers was information about the lies and misrepresentations used by tobacco companies to mislead the public about the effects of smoking (Mather 1998). Presented with compelling evidence of deliberate deception involving serious health risks, the public debate shifted over time from discussions of individual responsibility to perjury, fraud, and conspiracy—and eventually to corporate (rather than individual) responsibility (McCann, Haltom, and Fisher 2011). In this context, Mississippi Attorney General Michael Moore filed a lawsuit in 1994 on behalf of his state against tobacco companies to recover Medicaid and other costs associated with caring for sick smokers. Moore’s logic was simple: “[T]he tobacco companies are as liable for the health care costs of treating injured smokers as, say, an oil company is for cleaning up after a spill” (Hansen 1997, p. 51) The genius of the argument lay in its upending of the individual responsibility defense: This time, Moore explained, “the industry cannot claim that a smoker knew full well what risks he took each time he lit up. The state of Mississippi never smoked a cigarette. Yet it has paid the medical expenses of thousands of individual smokers who did” (Moore 1997, p. 53) The “public costs” argument was relatively untested as a legal theory at the time, but in the context of growing public outrage over the alleged criminality of tobacco companies as well as concerns
about the risks to nonsmokers posed by second hand smoke, 40 state attorneys general joined the
lawsuit, and negotiations for the first “global” tobacco settlement began.

Herein lies a relatively understudied dimension of the relationship between law and
cultural change: the capacity of laws and litigation to shape how citizens understand the
responsibilities of family, market, and state for safeguarding social welfare. The tobacco cases
helped to transform the public narrative about tobacco from a private problem of individual
assumption of risk into a public problem of collective health and health care costs. When the
public views social welfare problems as matters of individual behavior, support for state
intervention remains low. To the extent that law or litigation helps to politicize such behaviors—
and to reveal the structural and political dimensions of practices long considered natural and
normal—it promises to be an important driver of social policy reform. Social welfare issues
provide an important arena for observing these dimensions of cultural transformation.

Finally, a third benefit of linking the cultural analyses of law to contemporary debates
about social policy is to expand our understandings of how policies shape the political and legal
consciousness of ordinary citizens. Public policies communicate to beneficiaries cues about their
worth as citizens and their privileges and rights as members of the polity (Mettler and Soss 2004;
Soss 2005). They can send messages to the broader public about group characteristics, making
some groups appear trustworthy or devious, morally virtuous or morally repugnant, and this can
potentially affect citizens’ ideas about which groups are deserving or undeserving of government
assistance (Schneider and Ingram 1993; Schneider and Ingram 1997). The design of social
policies—how they are administered, how generous they are—can not only influence how
citizens value the policies themselves, but also how they value state intervention more generally
(Campbell 2011). Finally, the policies produced by legislatures and the decisions rendered by
courts offer particular interpretations of problems and solutions which, once stamped with the legitimacy of the state, we view as important and tuck away in our repertoire of symbols, stories, meanings, and norms for future use (Sewell 1992; Swidler 1986). Later, when called upon to imagine a solution to a new social problem, we draw on these tools in shaping our strategies of action.

For those law and society scholars interested in how, and under what conditions, individuals view law as useful or relevant for solving the problems in their everyday lives, and for those law and society scholars interested in understanding the power of laws to shape things like identities, efficacy, and social meaning or to facilitate processes of social change, social policies should be considered a key subject for analysis. Returning to the study of policy does not necessarily mean a return to the study of law in action versus law on the books. Instead we can build on what we know about the cultural dimensions of law to achieve a much richer, much more sophisticated understanding of the power of social policy to transform the world around us.
REFERENCES


