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## “Legality with a Vengeance”: Reclaiming Distribution for Sociolegal Studies

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Sandra R. Levitsky  
Jessica Garrick

Rachel Kahn Best

The law and society community has argued for decades for an expansive understanding of what counts as “law.” But a content analysis of articles published in the *Law & Society Review* from its 1966 founding to the present finds that since the 1970s, the law and society community has focused its attention on laws in which the state regulates behavior, and largely ignored laws in which the state distributes resources, goods, and services. Why did socio-legal scholars avoid studying how laws determine access to such things as health, wealth, housing, education, and food? We find that socio-legal scholarship has always used “law on the books” as a starting point for analyses (often to identify departures in “law in action”) without ever offering a programmatic vision for how law might ameliorate economic inequality. As a result, when social welfare laws on the books began disappearing, socio-legal scholarship drifted away from studying law’s role in creating, sustaining, and reinforcing economic inequality. We argue that socio-legal scholarship offers a wide range of analytical tools that could make important contributions to our understanding of social welfare provision.

**T**he law and society community has argued for decades for an expansive understanding of what counts as “law.” They have studied informal systems of normative ordering alongside formal or official law (Engel 1980, 1984; Greenhouse 1986; Merry 1988). They have tracked down law on street corners (Nielsen 2004) and

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Please direct all correspondence to Sandra R. Levitsky, Department of Sociology, University of Michigan, 4111 LSA Building, 500 S. State St., Ann Arbor, MI 48109-1382; e-mail: slevitsk@umich.edu

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in the workplace (Albiston 2010; Marshall 2003), in welfare offices (Sarat 1990) and schools (Morrill et al. 2010). But even as they persuaded themselves and the world that “law is all over” (Sarat 1990), sociolegal scholars have focused primarily on laws in which the state regulates behavior, and largely ignored laws in which the state distributes resources, goods, and services. This article asks why sociolegal scholars have placed distributive laws outside the scope of the field—despite the field’s expansive definition of what counts as “law”—and what the sociolegal perspective might add to existing understandings of social welfare provision.

Analyzing patterns over time in articles published in the Law & Society Association’s flagship journal, the *Law & Society Review (LSR)*, we find that sociolegal scholars initially studied a broad range of laws, but limited their scope over time in response to political and legal changes. In the late 1960s, as the field of law and society was taking shape, policy makers were drawing on social science in administering new social welfare laws; the courts were expanding state provision; and foundations encouraged scholars to link social science, law, and social problems. This political climate encouraged sociolegal scholars to study both regulatory and distributive law. But as the federal judiciary took a conservative turn in the early 1970s and the welfare state faced a sustained political attack from the right, sociolegal scholarship involving issues of state economic distribution dramatically declined. Sociolegal scholars turned away from the systematic study of how laws determine access to health, wealth, education, and food.

We argue that sociolegal research followed these shifts in the political environment in part because the field lacks theories of the relationship between law and social welfare. Borne out of a desire to improve existing legal structures rather than challenge or transform them (Abel 1980; Sarat and Silbey 1988), sociolegal scholarship has always used “law on the books” as a starting point for analyses (often to identify departures in “law in action”). Rarely have sociolegal scholars considered how legal ideologies, symbols, and categories shape the *absence* of laws on the books. As a result, when social welfare laws began disappearing, sociolegal scholarship drifted away from studying law’s role in creating, sustaining, and reinforcing economic inequality. We argue that sociolegal scholars should reclaim issues that have been defined as outside the scope of the field, studying distribution in addition to regulation. Sociolegal scholarship offers a wide range of analytical tools that could make important contributions to both our theoretical and empirical understanding of social welfare provision (Skrentny 2006). In particular, applying a constitutive perspective to understand how laws structure political claims and conflicts

would enrich our understanding of the state's role in creating and maintaining economic inequality.

## Defining Regulation and Distribution

Some laws regulate the behavior of individuals and organizations, and others distribute resources, goods, and services. This distinction between what we call regulatory and distributive laws has been at the heart of policy typologies for decades. Cushman (1941: 4) defined regulatory agencies as those operating through “coercion”: the Federal Trade Commission is regulatory because it “prevent[s] businessmen from indulging in unfair trade practices,” while the Reconstruction Finance Corporation is non-regulatory because it “lends government money, but places coercion on no one.” Other typologies include more categories, but they almost always distinguish between regulation and distribution, focusing on the “remoteness” of coercion (Lowi 1964, 1970)<sup>1</sup> or the distribution of “costs and benefits” (Wilson 1980). While these typologies are sometimes criticized, scholars continue to distinguish between regulation and distribution (Greenberg et al. 1977; Smith 2002; Steinberger 1980).

Despite broad agreement that laws vary in their focus on regulation and distribution, it is not always possible to draw a clear line between the two categories. Lowi (1964: 690) notes that if we think about indirect and long-term effects, most policies have both regulatory and distributive consequences:

In the long run, all governmental policies may be considered redistributive, because in the long run some people pay in taxes more than they receive in services. Or, all may be thought regulatory because, in the long run, a governmental decision on the use of resources can only displace a private decision about the same resource or at least reduce private alternatives about the resource.

A related problem is that even in the short term, many policies fall on a spectrum between regulation and distribution (Greenberg et al. 1977). For instance, when discussing health policy proposals, Skocpol (1997: xi) focuses on the extent to which such policies distribute benefits or regulate behavior:

The New Deal's Social Security legislation had promised to deliver new, federally financed benefits to states, localities, and many

<sup>1</sup> While the typology of Lowi (1964, 1970) distinguishes between distributive and redistributive policies, we refer to both simply as distributive, as they distribute state resources, goods, and services.

individual citizens; and the new benefits were to be accompanied by loose federal regulations. In contrast, the Clinton Health Security proposal surrounded its promised benefits for average Americans with tight, new regulations intended to push employers, doctors, hospitals, and insurance companies toward cost cutting.

While both policies sought to ensure access to health services, they relied on a different balance of regulation and distribution to accomplish their goals.

We recognize that regulation and distribution are not mutually exclusive, but for the purpose of mapping the field of law and society research, we classify laws as *primarily* regulatory or distributive—a classification that is reflected in scholars' treatment of laws. While regulatory laws almost always have distributive consequences down the line, they do not instruct the government to distribute resources directly. And while distributive laws may include some regulations, their primary action involves distributing resources. Thus, in the area of employment law, the Family and Medical Leave Act certainly has distributive consequences, but its primary activity is to institute requirements that employers must follow, so we classify it as regulatory. In contrast, while Social Security Disability Insurance involves some regulation of individuals' behavior, its main action is the distribution of benefits, so we classify it as distributive. While this dichotomous classification overlooks subtle distinctions between laws, it reveals an important gap in sociolegal research.

### **Assessing the Boundaries of Sociolegal Studies**

When sociolegal scholars define law, they generally cast a wide net, including statutes passed by legislatures, rules passed by administrative agencies, and court decisions, but also “unofficial” or non-state law involving cultural norms and alternative systems of ordering. As Austin Sarat (2000: 6) famously asked, “Is there any place a law and society scholar will not go to understand law in its magnificent variety, complexity, and possibility?” It turns out there is.

Despite claims that sociolegal scholars study virtually all aspects of law, the focus of sociolegal research has been largely limited to regulatory laws (Abel 2010; Munger 1998; Seron and Silbey 2004). Absent from the field is research on tax laws that reshape the distribution of wealth and income in our society; social security laws that ensure economic security for the elderly or disabled; health laws that influence who has access to health benefits and services; credit laws that enable or constrain the ability of individuals to acquire bank loans and credit cards; or poverty laws that define who has access to state assistance. There is little sociolegal research on

economic distribution (Edelman 2004; Edelman and Stryker 2004; Stryker 2003; Swedberg 2003). The lack of scholarship on distributive laws is particularly striking given the movement's roots in the 1960s, when such laws were understood as key tools in battles against poverty, racism, sexism, and other social problems that dominated the public agenda of that decade.

How and when did distributive laws move outside the boundaries of sociolegal scholarship? And what are the consequences of ignoring the legal dimensions of state distribution? In what follows, we examine variation over time in what issues have been understood as subjects appropriate for sociolegal analysis. We combine a quantitative analysis of the articles published in the field's flagship journal, the *LSR*, with a historical study of the emergence of the field of sociolegal studies. We conclude by highlighting the important insights law and society scholars could bring to research on state distribution.

## Methods

We use the *LSR* as a lens into the state of the subfield. *LSR* is not the only outlet for sociolegal research, which also appears in other journals and in books. But as the field's flagship journal, *LSR* plays a key role in signaling the field's boundaries. Therefore, researchers often use it to track patterns in sociolegal research (Abel 2010; Gomez 2008; Munger 1998; Seron and Silbey 2004). Following this tradition, we use *LSR* as our primary data source. However, mindful of the fact that one journal may not accurately represent the state of the subfield, we collected additional data on sessions at the 2017 Law and Society Association conference.

First, we randomly sampled 50 percent of all empirical articles published in *LSR* since the journal's founding in 1967 until 2014.<sup>2</sup> As our argument relies heavily on the first few years of the law and society field, we sampled every article published from 1967 to 1972. The result is a sample of 550 articles that, when weighted to account for the oversampling of early years, is representative of all empirical articles published in *LSR* from 1967 to 2014.

We compiled information on authors' academic affiliations using web searches and examining authors' CVs. We noted

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<sup>2</sup> We excluded articles that were primarily methodological or theoretical, review articles, editors' notes, presidential addresses, and book reviews. From the remaining empirical articles, we randomly selected either the odd or even numbered articles within each volume for coding.

**Table 1.** Topics of *LSR* Articles and Authors' Affiliations

	Percent of Articles
Topics	
Social welfare/economic law	15%
Distributive law	2.6%
Author(s)' affiliation(s)	
Law school	27%
Sociology	32%
Political Science	25%
Other social science department	35%

whether articles had authors with affiliations in law, sociology, political science, and other social science disciplines.<sup>3</sup>

We coded articles' content based on their abstracts.<sup>4</sup> Reviewing the full text of a subsample of articles revealed that abstracts provided enough information about the main laws addressed by the study. After four rounds of pilot coding and codebook revision, intercoder agreement between two of the authors ranged from 90 percent to 100 percent for all variables. One of the authors then coded the entire sample of articles. Table 1 shows descriptive statistics for all variables used in the analysis.

After identifying the primary laws discussed in the article, we coded for 12 substantive areas of law: workplace, health, housing, education, taxes/budgets, welfare, other social/economic issues, environment, immigration, foreign policy/international law, criminal, and civil law. These codes were not mutually exclusive; articles can refer to multiple substantive areas. For instance, Tweedie (1989) studied access to schooling and welfare programs; we coded this article as involving both education and welfare. When articles did not refer to specific statutes, we coded based on the area or type of law they focused on. For example, an article about jury instructions in liability cases (Green 1968) was coded "1" for civil law and "0" for all other substantive areas. When coding substantive legal areas, we focused on the laws at issue, not the research site. For instance, articles about civil disputes among hospital administrators or informal dispute resolution among doctors would be coded as civil but not as health: although the disputants happened to work in the health arena, the relevant laws were not health specific. For the analyses below, we combine the first seven types of law into the broader category of *social welfare and economic laws*—those that primarily involve

<sup>3</sup> For articles with multiple authors, we coded every disciplinary affiliation associated with an author. For instance, an article coauthored by a law professor and a sociologist would be coded as both law and sociology. The "other social science" category includes economics, which was a relatively rare affiliation (12 articles in our sample).

<sup>4</sup> Early years of the *LSR* did not include abstracts; for these years, we read the articles' introductions.

human welfare (health, education, welfare, and housing) or economic issues (tax laws, budgets, labor, and workplace laws).

Next, we analyzed whether the laws were *distributive*: those laws that primarily distribute resources, benefits, and/or services, as opposed to laws that primarily regulate the behavior of people and/or organizations. For example, Chilton (1970) focused on the consequences of changes to welfare laws. We coded this article as distributive because the laws in question specify that resources will be given to poor families. In contrast, Atlas (2001) asked whether the Environmental Protection Agency was less likely to sanction polluters in minority areas than in white areas, and Levine (1994) addressed community efforts to trigger EPA protections. While the outcomes of these regulatory battles may have implications for the distribution of clean air, the Clean Air Act is primarily regulatory, and we coded both articles as not primarily focused on distributive law. In cases where a given article addressed more than one law, we coded the article as distributive if any of the laws that were the main focus of the study were primarily distributive.

Laws in any particular substantive area can be either distributive or regulatory. For instance, Tweedie (1989) studied the ability of social programs to provide for the collective interests of all clients, focusing on access to schools in England, Scotland, and Wales. We coded this article as distributive because the relevant laws cover the direct provision of services (education) to citizens. Other articles about education law were coded "0" for distributive focus. For instance, Reichstein and Pipkin (1968) examined the decision-making processes in suspension procedures at a university, and Morrill et al. (2010) examined students' responses to rights violations in schools. These articles do not examine access to educational resources, but rather explore the legal mobilization of rights within schools by students and administrators. Similarly, some articles on housing law had a distributive focus and others did not. Rajagukguk (1994) discussed land rights after the construction of a dam in Indonesia, arguing that the government had not provided sufficient monetary compensation for displaced landowners, and discussing an agreement allowing landowners to cultivate plots of land around the reservoir; we coded this as distributive law. In contrast, in Fitzgerald's (1975) study of litigation over predatory selling practices aimed at minority groups, the relevant laws are primarily focused on regulating behavior, and we coded this article as "0" for distributive focus.

Note that we do not view the lack of a focus on distributive law as a shortcoming of any individual study—distributive laws are not intrinsically more important than regulatory laws. Our goal is not to criticize individual studies, but to reveal a problematic tendency in the literature as a whole to neglect distribution.

To test whether the patterns we observed in *LSR* accurately represent the focus of law and society research, we also collected data on session topics at the 2017 Law and Society Association annual meeting. We coded the 251 sessions' focus on distributive law using the same definition as the *LSR* analysis.

Our two dependent variables—coverage of *social welfare/economic laws* and *distributive laws*—are dichotomous. We use logistic regression to explore how the odds that an *LSR* article discusses these types of laws change over time, with independent variables indicating each decade. Next, we ask whether these changes can be explained by controlling for authors' disciplinary affiliations.

### Studying Regulation, Neglecting Distribution

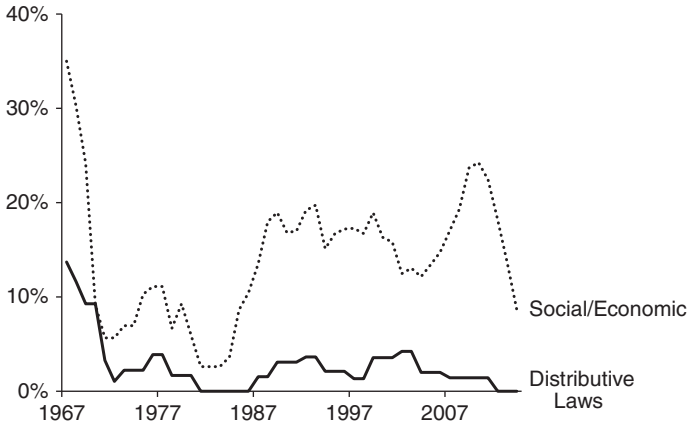
Our empirical results demonstrate that sociolegal scholarship in *LSR* has focused on a narrow range of laws (see Table 1). Most *LSR* articles over the past half century have focused on laws that regulate behavior. Fewer than three percent of articles study laws that distribute resources. The virtual absence of research on distributive laws suggests that they have been defined as outside the scope of sociolegal research.

With regard to substantive areas of law, articles on social welfare and economic laws are also rare, though not entirely absent. Fifteen percent of the articles address social welfare or economic laws. But when authors study such laws, they rarely study how they distribute resources. For instance, Milner (1987) examines health care, but looks at the decision to file medical malpractice claims. This article examines a social welfare issue, but does not analyze the distribution of resources, goods, or services. Articles that study social welfare and economic laws from a distributive perspective are especially rare. In one exception, Chilton (1970) focused on the consequences of changes to welfare laws for families—or how welfare law distributes resources. Overall, less than two percent of articles in our sample focus on social welfare or economic laws from a distributive perspective.

It was not always this way. In the late 1960s, when the field of sociolegal studies was just developing, scholars frequently studied distributive, social welfare, and economic laws. But beginning in 1970, in a remarkable shift away from the law and society community's roots, scholars stopped conceptualizing state distribution and social welfare and economic laws as subjects for sociolegal analysis (see Figure 1).

Social welfare and economic laws returned to sociolegal scholarship beginning in the mid-1980s (though never reaching their early peak), but distributive laws never rebounded. These changes over





**Figure 1. Percent of LSR Articles Studying Social Welfare/Economic and Distributive Laws, 1967–2014 (5-Year Moving Averages).**

time are statistically significant. Table 2 presents the results of logistic regressions of social welfare/economic and distributive laws. Models 1 and 3 explore changes over time using variables indicating each decade, with the 1960s as the omitted category. Compared

**Table 2. Logistic Regressions of Social Welfare/Economic and Distributive Laws in LSR Articles**

	Social Welfare/Economic		Distributive	
	1	2	3	4
Decade				
1960s (omitted)				
1970s	1.64*** (0.50)	1.59*** (0.48)	1.70* (0.77)	1.81* (0.74)
1980s	1.28** (0.48)	1.18* (0.49)	2.59* (1.11)	2.54* (1.16)
1990s	0.57 (0.42)	0.49 (0.41)	1.40* (0.70)	1.39 (0.73)
2000s	0.90* (0.43)	0.82 (0.42)	1.67* (0.76)	1.67* (0.76)
2010s	0.52 (0.48)	0.31 (0.47)	Dropped <sup>a</sup>	Dropped <sup>a</sup>
Author(s) affiliation(s)				
Law		0.17 (0.35)		0.50 (0.64)
Sociology		0.19 (0.34)		0.68 (0.56)
Political Science		1.17* (0.52)		0.031 (0.74)
Other social science		0.57 (0.35)		0.74 (0.78)
Constant	0.85* (0.35)	0.40 (0.45)	1.95*** (0.48)	2.21** (0.71)
Observations	550	550	496	496

\*\*\* $p < .001$ ; \*\* $p < .01$ ; \* $p < .05$ .

<sup>a</sup>We observed no distributive articles after 2009; therefore, the 2010s predict a value of zero on the dependent variable perfectly and cannot be included in the regressions.

Note: Robust standard errors in parentheses.

to articles published in the 1960s, articles in all subsequent decades were significantly less likely to focus on social welfare/economic and distributive laws.

To explain this change, we turn to a historical analysis of the field of sociolegal studies. We find that when law's relationship to social welfare was highly visible—in the context of an expanding welfare state, active and left-leaning judiciary, and robust economic support for the study of law and distribution—sociolegal scholars produced a rich body of research on issues of state distribution. But as law's overt relationship to social welfare receded from public view in the 1970s, sociolegal scholarship on distribution in *LSR* virtually disappeared. This turn away from distribution cannot be explained by changes in authorship affiliation or publishing norms, and should instead be attributed to the changing political context.

### **The 1960s: Expanding State Provision and Sociolegal Research on State Distribution**

The contemporary law and society movement emerged in the 1960s as a critique of the limitations of formal legal doctrine. The expansion of the American welfare state, an active and left-leaning judiciary, and research support from foundations encouraged sociolegal scholars to focus on state distribution.

In the late 1950s and early 1960s, a loose network of law professors and social scientists sought to capitalize on the rising prestige of the social sciences to challenge the principles of liberal legalism (Garth and Sterling 1998). The legal academy had long embraced the ideology of liberal legalism and the theoretical distinction between law and politics on which that ideology rests. Drawing heavily on the principles of free market economics and the Enlightenment, liberal legalism views the resolution of political questions—about the distribution of property, for example, or the definition of public welfare—as appropriately settled through the institutional arrangements of liberalism: separation of powers, checks and balances, and democratic forms of government (Sarat and Silbey 1988; Singer 2006). These institutional arrangements limit the role of government to that of a monitor—structuring, but rarely interfering with, the free play of private interests. Liberal legalism sees the tasks of government—and the courts in particular—as both limited and distinct from politics, simply “a matter of technically proficient administration” (Sarat and Silbey 1988: 100).

In the 1960s, sociolegal scholars joined a dramatic shift in government philosophy, as the country entered a period of welfare state expansion associated with President Johnson's Great Society programs—an ambitious attempt to combat such wide-ranging problems as poverty, racism, and urban unrest. Key to this

expansion of the American welfare state was a faith in social science and policy analysis as tools for improving the efficiency and effectiveness of government (Allison 2008; McCool 1995).

The 1960s were also a time of tremendous expansion in judicial responsibility, when courts became involved with issues of social welfare once considered unfit for adjudication: welfare administration, prison administration, mental hospital administration, education and employment, automotive safety, and natural resources management (Horowitz 1977). Although the courts' judicial review function had traditionally involved forbidding action on the part of other branches of government, judicial action in the 1960s required other branches of government to expend public resources of such magnitude that they influenced the setting of public priorities (Horowitz 1977). Courts forced school districts to bus children across cities to achieve racial balance, required states and localities to provide free defense lawyers for poor criminal defendants, and expanded the rights of welfare clients (Kagan 2001).

Finally, foundations—namely, the Russell Sage Foundation, the Walter E. Meyer Research Institute of Law, the Social Science Research Council, and the Ford Foundation—invested in projects and scholarly communities to bring sociological expertise to law, and to bring social science-informed law to the activist state (Garth and Sterling 1998; Trubek 1990). Sociolegal scholars also participated in reform movements and social welfare policy expansions, from the civil rights movement to the War on Poverty, from the rights expansion of the Warren Court (Bussiere 1997; Davis 1993; Nadasen 2005) to the creation of the Office of Economic Opportunity legal services and the Mobilization for Youth (Munger 2004).

Thus, in the 1960s, policy makers were drawing on social science in administering new social welfare laws; the courts were expanding state provision; and foundations encouraged scholars to link social science, law, and social problems. These were fertile conditions for research on distributive laws, and the emerging law and society field took up the charge. The Law and Society Association was founded by a group of law professors and social scientists in 1964, and its flagship journal, the *LSR*, began publishing in 1966.

Early law and society research emphasized “impact studies” designed to assess the efficacy of laws, and, implicitly, to demonstrate the utility of the social sciences in governance (Garth and Sterling 1998; Sarat 1985). These studies eventually took on a familiar form: they identified the objective of a particular law, presented data demonstrating that its impact differs from what legislators or judges anticipated, and then concluded with recommendations for bridging the gap between the ideal and the lived reality of law (Gould and Barclay 2012). The “gap” study became law and society's entry card to the legal academy and the

policy-making arena. As Austin Sarat observed, “The more gaps between what laws say and what laws do that law and society scholars could identify, the more they could claim to have something important and independent to say in the world of legal scholarship” (1985: 25).

This early work studied both regulatory and distributive laws and emphasized the substantive areas of social welfare and economic law. In the *LSR*'s first few years, more than a quarter of articles focused on social welfare and economic laws and about one-eighth discussed distributive laws (see Figure 2). The journal published articles on public school desegregation (Cohen 1967; Heyman 1967), the legal needs of the poor (Sykes 1969), and urban renewal programs (Lindquist and Barresi 1970). Community Action Programs, Head Start, and other programs associated with the War on Poverty were all considered important subjects for sociolegal analysis (Hannon 1969).

### **The 1970s: The Declining Legitimacy of the Welfare State and a Turn away from Research on Distributive Law**

If the judicial branch briefly seemed receptive to the possibilities of achieving progressive social reform through law, that optimism gave way in the face of a conservative backlash. The defeat in Vietnam, high rates of violent crime, urban unrest, a failed War on Poverty, and the resignation of a twice-elected President diminished the prestige of government social research and state intervention (Aaron 1978; DeLeon 2008; Featherman and Vinovskis 2001). The 1970s began a period of nearly four decades of conservative appointments to the federal courts, as well as the enactment of constraints on the political activities of the Legal Services Corporation. An increasingly influential conservative discourse encouraged Americans to believe that inequality is the product of individual choices not social structures, and that government is the problem, not the solution (Somers and Block 2005). Critiques of the power of the courts to facilitate social change became more pointed (Gabel and Kennedy 1984; Horowitz 1977; Scheingold 1974; Tushnet 1984). Judicial victories for the left became more elusive, culminating in the Supreme Court's explicit refusal to recognize a right to welfare<sup>5</sup>, housing<sup>6</sup> or any other socioeconomic

<sup>5</sup> The Supreme Court noted in *Shapiro v. Thompson* (1969) that as a matter of constitutional law, “[p]ublic assistance benefits are a ‘privilege’ and not a ‘right.’” In *Dandridge v. Williams* (1970), the Supreme Court held that the Constitution contains no affirmative state obligations to care for the poor.

<sup>6</sup> The Supreme Court held in *Lindsey v. Normet* (1972:74) that “assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial functions.”

right short of a guarantee against interference with property rights and a limited right to education (Albisa 2011).

Importantly, the American welfare state did not decrease in size. The key change was in its public legitimacy—the extent to which the public, judiciary, and researchers took for granted that government could and should expand state distribution. Compared to social provision in other countries, the American welfare system is more “submerged” (Mettler 2011) or “hidden” (Howard 1997), often operating through tax expenditures and public-private partnerships rather than through direct spending. The invisibility of the state’s role encouraged the decline in public support for the welfare state (Klein 2003; Morgan and Campbell 2011; Prasad 2016).

Echoing these trends, issues of social welfare and economic law and state distribution virtually disappeared from sociolegal study. The legal academy once again focused on legal doctrine rather than substantive social welfare outcomes. The conservative backlash against civil and poverty rights made progressive poverty scholarship unwelcome among policy makers and discouraged new research projects (Munger 2004). Focused back on the legal system, sociolegal studies turned its attention to appellate and trial courts, juries, the handling of scientific evidence and expert witnesses, punitive damages, and on the legal profession.

Published research on state economic distribution dramatically declined after 1970 and never returned to previous levels. Our sample includes zero *LSR* articles about distributive laws from 1971 to 1974—the period in which the Supreme Court, newly staffed with four Nixon appointees, issued a series of decisions that eliminated any possibility of recognizing a robust set of social and economic rights in the United States (Sunstein 2006). The percent of articles in *LSR* studying distributive laws never exceeded four percent throughout the next four decades. Articles about social welfare and economic laws also dropped precipitously, from 30 percent in the late 1960s to 8 percent in the 1970s (see Figure 2).

We wondered if these trends could be explained by changes in authors’ professional affiliations, including a shift in the center of gravity of the law and society field into law schools (Garth and Sterling 1998). Models 2 and 4 (Table 2) add measures of authors with affiliations to law schools, sociology departments, political science departments, and other social science disciplines. No disciplinary affiliation is significantly associated with distributive articles. Political scientists were significantly less likely than other *LSR* authors to focus on social welfare or economic laws (see Table 2, model 2), but their authorship cannot explain the changes in the field. The relationships between decade and coverage of distribution or social and economic laws remain virtually

unchanged when we control for authors' affiliations in models 2 and 4.

We also considered whether our findings are an artifact of changing publishing norms: could law and society scholars be publishing research on distribution in journals other than *LSR*? An analysis of conference sessions at the 2017 Law and Society Association annual conference finds that this is not the case. Of 251 sessions, under a third (31.5 percent) focused on social/economic issues, and only 8 percent focused on distributive laws. While this is higher than the percent of *LSR* articles focusing on distributive law, it is still a small minority of sessions.

It is important to emphasize here that the drop in studies of economic policy and state economic distribution does not reflect disinterest among sociolegal scholars in issues of economic inequality. Sociolegal scholars since the 1960s have continued to be motivated by issues of stratification and unequal access to resources. However, this research rarely discusses the direct role of law in creating and/or ameliorating inequality, focusing instead on inequalities in access to law and evaluating regulatory responses to inequality (Chen and Cummings 2012; Gordon 2005; Jimenez et al. 2013; Sandefur 2008, 2009; Sarat 1990; Seron 2016; Voss and Bloemraad 2011; White 1990). Nor does the shift reflect a lack of political engagement. Scholars continue to call for policy-relevant sociolegal research (Calavita 2002; Handler 1992; Lempert 2013; Merry 1995; Munger 2001; Sarat and Silbey 1988; Seron 2016). And there are important exceptions to the rule that sociolegal scholars rarely study distributive laws (e.g., Friedman 2009; Gustafson 2011; Haglund and Stryker 2015; Harris 2016; Hartog 2012; Munger 2003, 2004; Sterett 2003). But since the 1960s, the field of law and society as a whole has pivoted away from the study of law and economic distribution.

Why would the sharp decline in legislative and judicial support for social welfare laws lead to a parallel decline in sociolegal scholarship on issues of state economic distribution? We argue that scholars dropped the study of distribution because the law and society movement rests on a critique of liberal legalism rather than a theory about the relationship between law and social welfare. The gap studies on which the field of law and society made its name identified instances of law's injustice and ineffectiveness, but always implied that both could be corrected with better knowledge of how laws worked in the real world (Abel 1980; Sarat and Silbey 1988). "While we thought we were producing a new understanding of law," Susan Silbey and Austin Sarat reflected in 1987, "the bite was never all that critical because we never tried to undo liberal claims about the relationship between law and society" (1987: 171). Thus, on the topic of poverty, law and society

scholars have studied the way in which the legal capacities and experiences of law differ between the poor and the nonpoor (e.g., Carlin et al. 1966; Gilliom 2001; Levine and Preston 1970; Sarat 1990), but few sociolegal scholars have explored the law's role in the persistence of poverty (Munger 2004), or the responsibility of law in creating cultural categories of "deservingness" with regard to state provision (Best 2012; Steensland 2007). Few sociolegal scholars have asked why the United States has a comparatively hidden welfare state (Gordon 1994; Handler 2004; Handler and Hasenfeld 1997; Katz 1986; Levitsky 2014) and no national health insurance (Quadagno 2005). Because the point of departure for sociolegal scholars has been to improve the implementation of existing law, rather than transform legal structures, they have rarely asked questions that challenge the liberal democratic legal norms that frame the perspective of policy makers and legal elites (Sarat and Silbey 1988).

Basing their identity as a movement on a critique of the legal academy and liberal legalism, sociolegal scholars have never articulated a programmatic theory with regard to issues of economic distribution (Munger 2004; Sarat 1985). It has always been clear, in other words, what sociolegal studies were *against*; rarely have sociolegal scholars articulated what they are *for*. In the absence of such a theory, sociolegal scholars had no response when the courts denied the jurisprudential existence of socioeconomic rights. When the courts refused in the late 1960s and early 1970s to accept issues of housing, health, or welfare as needs that the state is obligated to protect, they declared those issues to be *nonlegal*—or in the parlance of liberal legalism, *political* rather than *legal*—and sociolegal scholars never contested that characterization.

### **The Cultural Turn Brings Back Social Welfare and Economics but Not Distribution**

There has been some resistance to these trends in sociolegal studies: critical legal studies, feminist legal studies, and critical race theory have sought to challenge the foundations of existing legal arrangements. But surprisingly, one of the most transformative movements to expand the focus of sociolegal inquiry—the "cultural turn" in law and society—had the unintended effect of intensifying the exclusion of distributive law from sociolegal studies.

The cultural turn is commonly traced to the Amherst Seminar on Legal Ideology and Legal Process, which sought to link an empirical approach with critical theoretical reflection and to keep some distance between the agendas of policy makers and the legal academy. This group of scholars put forward a scathing critique of

the failure of law and society research to question existing legal arrangements: sociologists of law who ally themselves with policy makers, they argued, “become important participants in maintaining the existing legal order” (Sarat and Silbey 1988: 134). This powerful critique could have encouraged research on the role of law in creating and sustaining social and economic inequality even as the legal basis for economic rights was unraveling. However, the resulting “cultural turn” went in the other direction, shifting its focus from “state” law toward law in everyday life. The power of law, these scholars argued, lies in its ability to inscribe itself in the most mundane, the most hidden forms of day-to-day behavior: family life, education, relationships with neighbors, vendors, landlords, and employers (Albiston 2005; Hull 2001; Marshall 2003; McCann 1994; Nielsen 2004; Sarat 1990; Sarat and Silbey 1988). The project of unmasking the power and politics of law requires attention to places where the law is hardest to differentiate from the social norms by which people structure their everyday lives.

In the 1990s, the law and society academy witnessed a sharp turn away from the rules 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). While this literature has been criticized on a number of different grounds (see, e.g., Rosenberg 1996; Silbey 2005), its decentering of law fundamentally transformed the field. The shift from an understanding of law as a set of rules, regulations, and official decisions to a view of law as a set of cultural symbols, logics, and everyday practices has transformed how we observe, interpret, and talk about the relationship between law and society.

In the late 1980s, following the cultural turn in sociolegal scholarship, some scholars returned to the study of social welfare and economic laws, but not from a distributive perspective. The change was fairly dramatic: from the 1970s through the mid-1980s, only seven percent of *LSR* articles dealt with any social welfare or economic policy area. Since 1986, 18 percent have done so (see Figure 2). However, unlike 1960s-era *LSR* research, these articles lack an explicit focus on distribution. In studies related to welfare, education, and health care, researchers focused on legal reasoning, disputing, and bargaining in these settings, not on the laws governing the distribution of benefits. For example, Milner (1987) studied the right to refuse treatment. This article focuses on legal disputes in health care, rather than laws governing who has access to health care, or public funding of health care. Similarly, May and Stengel (1990) explored patients’ decisions to



litigate medical malpractice cases, and in a study of the Hawaii Housing authority, Lempert (1989) studied the eviction board's decision to prosecute cases informally. Sociolegal scholars remained reluctant to study distribution.

## **Building a Theory of Law and Social Welfare**

The fact that law and society researchers have turned away from distribution does not mean that no one is studying it; scholars in political science and sociology have devoted considerable attention to explaining patterns in the growth and retrenchment in welfare states and tracking the determinants of social policy (for reviews, see Amenta et al. 2001; Korpi 2003; Prasad 2016; Quadagno 1987). If these studies adequately considered the role of law, sociolegal scholars' neglect of distribution would be merely a question of the scholarly division of labor. But in fact, research on the welfare state is missing exactly the insights sociolegal research could provide.

Typical narratives about the birth and development of the American welfare state characterize the courts as repeatedly thwarting progressive legislative reforms designed to combat the deep socioeconomic inequities brought about by industrialization—"an obstruction, a brake, an inertial force, a structural impediment, an ideological hindrance, and exceptionalist constitutional barrier to the development of a modern regulatory and administrative welfare state in the United States" (Novak 2002: 251). This characterization is empirically inaccurate—American courts were not overwhelmingly obstructionist, and law was in fact a wellspring of legal ideas and institutions that were fundamental to the expansion of the American welfare state (Novak 2002; Willrich 2003).

But more importantly, glossing over law's creative role in building the American welfare state limits our understanding of political institutions. Many of the central concepts in research on the welfare state, such as "policy feedback" or "state capacity," either fail to consider the law at all (as if the state's power and authority were not, at their core, fundamentally legal), or more commonly, they treat the law and legal institutions simplistically as obstacles to welfare state growth and development (Skrentny 2006). But we cannot fully comprehend the concept of "state capacity," for example, without analyzing how state and other social actors interact with the courts to influence the implementation of state policies (Pedriana and Stryker 2004). We cannot understand concepts such as "path dependence" or "policy feedback" without assessing the impact of legal ideologies and court decisions at one point in time in shaping the capacities, interests,

and beliefs of political actors and the mass public at future points in time (Pedriana and Stryker 1997).

While research on policy feedback effects has taken an interpretive turn in the past decade, it has yet to consider the constitutive power of law. Most research on policy feedback effects has examined policy's effects on state capacities and the ways in which new policies create, build upon, or undercut administrative arrangements (Pierson 1993, 1994). More recent research has explored policy's effects on the political capacities of social groups, such as the effects of policies on identities or political goals (Campbell 2003; Martin 2008; Mettler 2005; Schneider and Ingram 1997; Soss 2005). In this latter view, policies can have interpretive effects on the mass public by providing information and sources of meaning (Pierson 1993; Steensland 2007). Public policies define membership, assign status or standing in the political community, and communicate to beneficiaries cues about their worth as citizens (Mettler and Soss 2004; Soss 2005). The "cognitive cues" citizens receive from social policies affect their attitudes toward government and their levels of political participation (Mettler 2005; Soss 2002). Missing from this literature, however, is any consideration of the ways in which legal ideologies, categories, and symbols shape the views of social actors.

As Skrentny (2006) and others (Novak 2002; Stryker 2003) have observed, the constitutive power of law is itself a path-dependence or policy-feedback effect, as political actors are always imbricated in a prior discourse and set of meanings structured by law. Ironically, while the cultural turn in sociolegal scholarship shifted sociolegal attention away from the state and toward everyday life, the constitutive perspective can offer key insights into the politics of state distribution today. Constitutivists view law as a powerful set of interpretive tools that shape social action. Legal symbols and categories act as cognitive lenses through which individuals and social groups come to understand the social world, making some dimensions of social life seem natural, normal, and coherent (Pedriana 2006). Our society answers questions of who gets what and how much, for example, with rules about property and contract, with labels such as "corporate person," "employee," or "bankruptcy," and with dichotomies such as insured/uninsured, exempt/non-exempt, and permanent/contingent (Edelman and Stryker 2004). Attached to each of those concepts are the systems of legal rules that distribute resources, but because law often reifies or masks the role of the state in structuring distribution (Edelman and Stryker 2004), these systems of rules—and their distributive consequences—often appear "natural" or apolitical. The naturalization or masking of state power in social welfare

provision diminishes public support of the welfare state (Hacker 2002; Mettler 2011). When the state's role in distribution is not visible, Americans tend to believe that they are far more independent of government than they in fact really are (Mettler 2011) and that social inequalities are the product of individual failings or market forces rather than state policy outcomes (Somers 2008; Somers and Block 2005). These perceptions create the impression the government imposes an unfair tax burden on Americans without providing much in return and erode popular support for public provision (Hacker 2002; Mettler 2011). While welfare state scholars have examined particular laws as examples of submerged politics (Hacker 2002; Mettler 2011), they are not attuned to the role of law in constituting the categories that structure economic distribution. This is a particular strength of sociolegal scholarship.

The unmasking of the state in economic distribution used to be familiar ground for legal realists prior to the emergence of the law and society movement. From the 1890s through the 1930s, progressive legal realists<sup>7</sup> sought to illuminate how law shaped the distribution of wealth and power in the United States, demystifying the idea of a *laissez-faire* economy by demonstrating that the "private" economic sphere was created through state coercion and regulation (Fried 2001; Kelley 1905; Singer 1988). The distribution of wealth, these scholars argued, is not simply a product of hard work, but of a system of legal rights and obligations. Homeless people lack a place to live not because of lazy dispositions but because someone has invoked and enforced the rules of property to evict them.<sup>8</sup> Economic inequality is not a natural or inevitable state of affairs, but the product of legal rules.

While the legal realists directed their critique at tort law, contract law, and other substantive legal areas, their treatment of property law best illustrates the potential contribution of sociolegal scholars to understanding economic distribution today. Property here refers to all those things that are needed for human life: a place to live, the means to thrive—food to eat, clothing to wear—and those material goods that make life enjoyable and meaningful (Singer 2000: 27). Private property not only describes all of our possessions, but also our right to shield those

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<sup>7</sup> The scholars identified with the legal realist tradition were a strikingly disparate group and hence generalizations about this work should be made with great caution (Twining 1973) Following Singer (1988), we use the term primarily to refer to the work of Felix Cohen, Morris Cohen, Leon Green, Robert Hale, John Dewey, Oliver Wendell Holmes, Walter Cook, Wesley Hohfeld, and Roscoe Pound. A group of female scholars, including Florence Kelley, Ida B. Wells-Barnett, and Sophonisba Breckinridge, simultaneously explored empirical connections between law and social welfare (Sterett 2015).

<sup>8</sup> For a contemporary example of this argument, see Desmond (2016).

possessions from others (Underkuffler-Freund 1996). The conventional view of private property under liberal legalism is that private property exists outside and independent of the state, a protected sphere of individual freedom in which no one, not even the government, can intrude (Singer 1988). From this perspective, any state intervention in matters of private property is seen as an encroachment on individual freedom.

Legal realists challenged this conventional wisdom by arguing that all property rights are in fact delegations of power from the state.<sup>9</sup> The state defines the rules by which we buy or inherit or receive property. The state enforces the rights of owners to exclude nonowners from their property. The state determines the relative bargaining power of the parties and, to a large extent, the terms of the bargain (Cohen 1927: 12). Understood in this way, the state's intervention in matters of private property is in fact a powerful act of state redistribution.

Property rights embody how a society has chosen to allocate finite and critical goods. They are, as Underkuffler-Freund (1996: 1046) observed, "collective, enforced, even violent decisions about who shall enjoy the privileges and resources of this society." Property rights involve those things that we need for human life, and granting a property right to one person simultaneously denies that right to others. In a society of relative affluence, Underkuffler-Freund notes, we sometimes forget the connection between property claims and survival, but for millions, that struggle is very real. Robert Hale (1923: 472) illustrated this vividly nearly a century ago with the example of someone who wants to eat but cannot afford to buy food. There is no law against eating in the abstract, Hale observed, but "there is a law which forbids him to eat any of the food which actually exists in the community—and that law is the law of property." Law makes the difference between the availability of food and an entitlement to eat it. As Amartya Sen (1981: 165–66) put it much more recently, starvation deaths reflect "legality with a vengeance."

The categories that law provides for understanding distribution, then, have profound effects on both political actors and the mass public in how they view solutions to social welfare problems. Whether one sees something like water as private property or a human right shapes what citizens expect—or demand—of the government, and what government actors feel obligated to provide.

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<sup>9</sup> The idea that property is the creation of the state was perhaps most famously articulated by Jeremy Bentham: "Property and law are born and must die together. Before the laws there was no property; take away the laws, all property ceases" (1962) [1843].

Consider, for example, the recent case of the Detroit water shutoff campaign. In the summer of 2013, the City of Detroit filed the largest municipal bankruptcy in U.S. history. The city's water department was \$6 billion in debt at the time, and approximately \$90 million of that debt could be traced to uncollected bills. In March 2014, the city began an aggressive campaign to collect unpaid bills from individual consumers, terminating water to more than 27,000 households. Advocates for Detroit residents quickly initiated a lawsuit against the City of Detroit.<sup>10</sup> The bankruptcy judge found the plaintiffs' constitutional claims to be deficient as a matter of law. Ruling that there is no "right or law" to guaranteed water service, the judge noted that halting the shutoffs would jeopardize water department revenues at a time when Detroit was struggling to emerge from bankruptcy.<sup>11</sup> Citizen groups next sent an open letter to the United Nations (UN), asking for intervention. UN representatives deemed the failure to provide financial assistance for those who cannot afford to pay for water a human rights violation. They said in a statement that made headlines around the world: "When there is genuine inability to pay, human rights simply forbids disconnection."<sup>12</sup> The UN statement and ensuing publicity embarrassed the city but did not change the course of water distribution in Detroit. The City restructured its payment assistance plan, but water service disconnections continued: the City has now terminated water service to more than 50,000 households, and the more fundamental issues of water affordability remain unresolved (Murthy 2016).

How do we explain the denial of water access in a region that enjoys the greatest freshwater supply in the world? Why is there is no right to water in the United States? Why does lack of access to water disproportionately affect marginalized communities? Traditional explanations, including path dependence, policy feedback, and the politics of race provide the first steps in answering such questions. The politics of water distribution in Detroit have structural roots in the 1950s, when Detroit's water department dramatically expanded its water infrastructure in anticipation of increasing population growth in the region. To

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<sup>10</sup> *Lyda et al. v. City of Detroit*, Case No. 2:15-cv-10038-BAF-RSW (U.S. District Court, Eastern District of Michigan).

<sup>11</sup> *Lyda vs. City of Detroit* (U.S. District Court, Eastern District of Michigan). Supplemental Opinion Clarifying the Court's Bench Opinion Denying Plaintiffs' Motion for a Temporary Restraining Order and Granting Defendant's Motion to Dismiss; and Opinion Denying Plaintiffs' (1) Motions for Reconsideration; and (2) Motion to File a Second Amended Complaint (Nov. 19, 2014).

<sup>12</sup> <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15188&LangID=E>.

finance the expansion, the City took on substantial debt (Kornberg 2016). But the population projections on which the expansion was based were never realized and the dilemma of how to pay for and maintain an overbuilt water system in the face of declining population presented a financial dilemma that structured virtually all questions of water distribution in the decades that followed. Racial politics and the distribution of political power also played a role: Detroit's water system serviced both the majority black urban center and its primarily white suburbs, and as the economics of the city worsened, white leaders in the suburbs began to assert increasingly racialized complaints to protect white constituents from rate hikes (Kornberg 2016). Eventually suburban leaders won state legislation mandating that utilities calculate water rates based on "actual costs" of water service, thereby avoiding economic responsibility for rising poverty in Detroit and the legacy costs of its water infrastructure.

These conventional analyses help explain the economic, demographic, and sociopolitical dimensions of Detroit's water distribution crisis, but they miss the constitutive role of law and legal ideology—in particular, the ways in which law structures the discourse and meanings around water distribution. There is no legal right to drinking water in the United States—this is a jurisprudential fact (Davis 2016; Murthy 2016). But the legal ideology and court decisions on which that fact is based have had profound implications for how policy elites and the public understand water distribution. The constitutive power of law—the capacity to make the commodification of water seem natural and normal, and to eclipse the possibility of other forms of distribution—is itself a powerful policy feedback effect. In the absence of any consideration of law, we can neither fully explain how Detroit's bankruptcy fell on the backs of the city's most vulnerable population, nor what paths Detroit could have taken to secure access to clean drinking water for all of its residents. How did the legal category of *water service* (a commodity) come to eclipse the principle of *water access* (a human right) in the state's political discourse? How have state laws contributed to political choices to prioritize *assistance* with water bills (a form of state "charity") rather than *affordability* programs (a form of redistribution requiring a restructuring of rates based on household income) (Murthy 2016)? Why do our civil rights laws fail to protect marginalized communities from the unequal effects of rising water costs or water service terminations (Davis 2016)? Why do international human rights norms fail to resonate with American citizens confronted with dramatic inequalities in access to clean drinking water? Sociolegal scholars have available a powerful set

of analytical tools to answer these questions, but to do so, they must reclaim distributive laws as appropriate subjects for analysis.

### **Articulating a Theory of a Just Society**

To treat legal rules of distribution as political objects—to consider them in the full light of social ethics and public policy concerns—is to analyze “law in action” not against “law on the books,” but against some vision of a just society. It is here that the lack of a theory about law and social welfare is particularly evident in sociolegal studies, for by studying only those issues that courts have identified as justiciable, and by focusing on the implementation and adjudication of existing laws, sociolegal scholars have failed to imagine what laws could be. Since the demise of the welfare rights movement, sociolegal scholars have not systematically engaged with the difficult normative dilemmas associated with recognizing an economic entitlement, or a “right” that is conditional upon finite resources. Which values should we promote when we make collective decisions about distribution? How should we ensure that all of our society’s members have the basic necessities of life? And how do we do so in the context of a deeply institutionalized capitalist system that commodifies social relationships and makes it difficult to even imagine making claims on any basis other than one rooted in the market? If, for example, we were to recognize a right to health care in the United States, what forms of health care would we be 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?

Such questions are typically answered through normative argument: debating competing social visions about morality and policy. Reasonable people can and do have very different ideas about what constitutes a just society (Singer 1988). But such arguments are limited by our political imaginations—what we know, what we are familiar with, and what we assume about the world (Levitsky 2008). The policies produced by legislatures and the decisions rendered by courts offer particular interpretations of problems and solutions which we tuck away in our repertoire of symbols, stories, meanings, and norms for future use. Later, when called upon to imagine a solution to a new social problem, we draw on these tools in shaping our strategies of action (Sewell 1992; Swidler 1986). The task of the scholarly community is, in part, to expand the political imagination. The point of studying social systems of distribution is not only to understand how they articulate and reinforce each other, but also to envision how they

can be rearticulated to produce something new. This is the task now for sociolegal scholars.

## Conclusion

While the law and society community has grown from a support group for disenfranchised scholars to a “big tent” inclusive of all methods, disciplinary approaches, and schools of thought (Erlanger 2005), it has yet to fully accept distributive law as a legitimate area of study. As Felice Levine (1990) observed in her Presidential Address on the 25th anniversary of the Law & Society Association’s (LSA) founding, “The issue of how we conceptualize law...speaks to the very heart of what we are and can be.” If law were really just about regulation, criminal justice, civil and political rights, and the legal profession, we could rest content on this 50th anniversary of the LSA with how much the law and society community has accomplished over the past half century. But all of our theory points to a more expansive definition of law, one that ought to include aspects of state provision as well. Principles of state economic distribution in the United States often rest on shakier constitutional foundations than principles of civil justice, but that should not mark their study as inappropriate for sociolegal analysis. The tools we have long wielded to demystify, critique, and politicize other aspects of liberal legalism are equally capable of bringing to life those distributional questions long relegated by liberal legalism to the sphere of politics. As Susan Silbey and Austin Sarat (1987) once observed, to be critical paradoxically bespeaks a desire to be faithful to a tradition by refusing to accept its imperfections. Such fidelity requires “more than unmasking and debunking; it demands a willingness to construct anew” (Silbey and Sarat 1987: 172). Constructing a theory of law’s relationship to social welfare promises to open up vast new areas for sociolegal inquiry at a time when questions of economic security and inequality have never been more pressing.

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**Sandra Levitsky** is an Associate Professor at the University of Michigan. She holds a Ph.D. in Sociology from the University of Wisconsin and a J.D. from the University of Minnesota. Her research focuses on American social policy, political mobilization, and the relationship between law and social change.

**Rachel Best** is an Assistant Professor of Sociology at the University of Michigan. She studies political responses to social problems, focusing on inequalities created by advocacy and culture. Her forthcoming book argues that when Americans come together to fight social problems, we focus our largest efforts on diseases. Fighting one disease at a time has unintended consequences for health policy.

**Jessica Garrick** is a doctoral candidate in the Department of Sociology at the University of Michigan. She studies the social roots of institutional change, largely in the context of labor law and the labor movement.