

SYMPOSIUM

BACK TO THE FUTURE: THE SHORT, HAPPY LIFE OF
THE LAW AND SOCIETY MOVEMENT

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BACK TO THE FUTURE: THE SHORT, HAPPY LIFE OF THE LAW AND SOCIETY MOVEMENT

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The Twenty-Fifth Anniversary Meeting of the Law and Society Association: The Ice Cream Social

The family has returned to Madison, Wisconsin where it all started. The old-timers are in a mood for celebration and self-congratulation. The past presidents are serving ice cream to a huge crowd of people from all over the world. These founding fathers (the first female president is still in office and isn't yet eligible to serve ice cream) look pleased. This is a world they have made. It is full of old friends, recent students, ardent disciples, a few critics who have at least taken them seriously, and some strangers who (probably) know who they are. To each and all they scoop out free ice cream made by the University of Wisconsin and paid for by the association they struggled to create.

It is a charming scene: modest (no caviar, no champagne), friendly (with each cone a kind word or two to all), egalitarian (one scoop for each). For a moment, everyone forgets the world outside. Put aside are the scars the family members bear from the struggle to create and maintain this curious project. There have been disappointments, frustrations, no little rage. Some thought they would make brilliant careers in law and other disciplines, only to encounter hostility and indifference. Some thought they would be able to mobilize the money that is needed for empirical research, only to find that funding sources can be indifferent to scholarship that doesn't support conclusions already reached. Some thought students would be fascinated by the insights they could offer on the role of law in society, only to find that the students wanted tips on how to pick juries. Some expected to reform American society through law, only to find America wanted little reform and thought it had too much law. But at the ice cream social, all these disappointments could be put aside. The family had survived, and that was enough.

I. INTRODUCTION AND OVERVIEW¹

THIS ESSAY is a story and a polemic. The "story" is my view of the origins of the law and society movement. I wrote it—at the

invitation of the Florida State University College of Law—to celebrate the twenty-fifth anniversary of the Law and Society Association. I call it a "story" because it is more than a memoir and less than a history. The "polemic" is my effort to suggest a path the movement might take in the coming years. I call this essay a "polemic" because it is more than a prediction: it is a call for new directions.²

A. A New Object of Knowledge

My story deals with the history and fate of an idea, and the institutions constructed around it. The idea is that law is an object that can be studied by the social sciences: I call this the "law and society idea." The institutions are the Law and Society Association and other organizations set up to further the study of law as a social phenomenon. In this story there is a group I sometimes call the "law and society movement." These are the people committed to the idea and involved in the institutions.

me most of what I know about "law and society." It draws on earlier work I did with John Esser, and I acknowledge his invaluable assistance in a long project which hopefully has come to its end with the publication of this Essay. Lisa Bower, Elizabeth Chambliss, John Esser, and Lois Johnson assisted in various stages of the research.

This Article originated as the 1989 Mason Ladd Lecture at the Florida State University College of Law. Responses to the lecture by Felice Levine, Bryant Garth, Carrie Menkel-Meadow, and faculty and students at FSU helped me refine the argument. I received valuable comments on later drafts from Elizabeth Chambliss, John Esser, Dirk Hartog, Bill Felstiner, Marc Galanter, Alan Hunter, Stewart Macaulay, Austin Sarat, John Henry Schlegel, Vicki Schultz, Amy Trubek, and Louise Trubek.

I have benefited from work-in-progress by Yves Dezalay, Austin Sarat, and Susan Silbey on the history of the sociology of law in America. Their project parallels my own: I have been influenced by their ideas and stimulated by a discussion of their project at the Institute for Legal Studies' Colloquium in November 1989. Their comments and that discussion gave me additional information on the history of law and society which I have incorporated in the final text.

This Essay draws heavily on my observations as a participant in the law and society movement, and I have included "stories" from personal experience. I am indebted to my colleague Patricia Williams for showing me how personal narrative can be employed in scholarly argument. Only I am responsible for errors and omissions.

2. This Essay can be seen as the completion of a project I began with the publication of Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984) [hereinafter *Where the Action Is*]. The goal of the project was to rethink the law and society tradition in light of critical legal studies, feminism, and post-structuralist social theory. Other products of this project include Trubek & Esser, *Critical Empiricism in American Legal Studies: Paradox, Program, or Pandora's Box*, 14 LAW & SOC. INQUIRY 3 (1989); Trubek, *Max Weber's Tragic Modernism and the Study of Law in Society*, 20 LAW & SOC'Y REV. 573 (1986) [hereinafter *Max Weber's Tragic Modernism*]; Trubek, *Review Essay: Radical Theory and Programmatic Thought*, 95 AM. J. SOC. 447 (1989); and Trubek, *The Handmaiden's Revenge: On Reading and Using the Newer Sociology of Civil Procedure*, 51 LAW & CONTEMP. PROBS. 111 (1988) [hereinafter *Handmaiden's Revenge*]. Many of the themes in this Essay were originally set forth in those articles. My call for new directions rests on the analysis developed through this project and my political commitment to a more communitarian, egalitarian society free of race and gender hierarchies.

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1. This Article is dedicated to my colleagues in the Institute for Legal Studies, who taught

When I speak of the "law and society idea," I mean the reconceptualization of law in ways that make it amenable to study by the social sciences. If we think of law only as a set of rules or principles, the social sciences have little to offer legal studies. Accordingly, if law is to be examined by the social sciences, it has to be redefined. We have to think of law as a social institution, as interacting behaviors, as ritual and symbol, as a reflection of interest group politics, as a form of behavior modification, or in some other way that makes it amenable to social scientific analysis.

What I call the "law and society idea" may sound prosaic, but it was once the banner of a fighting faith. It was not easy to get people to stop thinking about law as command, rule, or doctrine and start thinking about it as system, symbol, and behavior. It took creative intellectual work to develop this idea and immense energy to form institutions committed to it. Because these efforts succeeded, the law and society idea no longer sounds radical: in some sense, we are all law and society scholars today.

This "law and society idea" is not the only way to think about the relationship between law and the social sciences. Lawyers have spoken of this relationship for a long time. Roscoe Pound first issued his call for a "sociological jurisprudence" in 1910.³ Lawyers' views about the alliance with the social disciplines have varied: some have thought that lawyers could use social science instrumentally, others that law might become a social science.⁴ The idea that law can be studied by the social sciences is just one of the "law and . . ." visions that has been mooted in this century and circulates in academic circles today. The law and society movement made this idea its project.⁵

My story recounts the origins and discusses the fate of this project. It describes the development of a new domain of social knowledge. It places law and society in context, showing the impact of legal culture and political developments on the idea and the movement.⁶

3. See Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910) (urging the grounding of legal analysis in sociology). Pound fully developed the idea of sociological jurisprudence in his article, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1-3), 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 140 (1911), 25 HARV. L. REV. 489 (1912).

4. For a discussion of these various views, see generally Laswell & MacDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203 (1943).

5. For a clear statement of this vision, see Galanter, *The Legal Malaise; Or, Justice Observed*, 19 LAW & SOC'Y REV. 537 (1985) (discussing the various methods and results of studying law in action).

6. My account, based in large measure on personal experience and conversations with colleagues, is general and provisional. The full context includes the role lawyers play in society; the nature of the legal academy, legal theory, and legal culture; and political developments. I have sketched some of these elements, but this Essay is still just a story, not the full-blown social and intellectual history of the law and society field that is needed.

B. Knowledge for Whom?

A domain of social knowledge is socially constructed, and the various knowledges that result serve the purposes and further the projects of social groups.⁷ My story is about a bunch of people who got together to create a new social discipline called "law and society." They produced some knowledge and have been able to continue doing so. The questions are: How did they succeed in defining a new domain of inquiry? What forces supported their efforts? What interests were served?

To answer these questions, one must have some idea of the structure within which this domain of knowledge exists. For this purpose, I draw on a recent article in which authors Yves Dezalay, Austin Sarat, and Susan Silbey describe the social structure of "the sociology of law" in America.⁸ They suggest that through the law schools, the legal profession exercises a dominant influence on the production of academic knowledge about law.⁹ In this argument, the authors posit that the law schools serve the interests of the profession, and the social sciences are largely "intellectual subcontractors" to legal academics.¹⁰

There is much truth to this argument. I agree that the law schools play a dominant role in shaping legitimate knowledge about law in America, and tend to reflect and protect the interests of the legal profession—particularly its elites. Therefore, in my story I use elements from the Dezalay, Sarat, and Silbey argument, and pay special attention to the relationship between the law and society "idea" and developments in legal thought and education. Some critics may think that this approach downplays the important and independent role of social scientists in constructing this domain of knowledge. I recognize this limitation. Others may think the structural account is not only an overstatement of the historical importance of the legal academy, but is also reductionist and determinist. Again, I see this danger and have tried to leave room for contingency and agency in my story of the construction of law and society as a social discipline.¹¹

These qualifications, however, do not affect my basic conclusion: from the beginning, the interests of the legal academy strongly influ-

7. See generally M. FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS* (C. Gordon ed. 1980).

8. Dezalay, Sarat & Silbey, *D'Une Demarche Contestaire A Un Savoir Meritocratique: Elements Pour Une Histoire Sociale De La Sociologie Juridique Americaine*, 78 ACTES DE LA RECHERCHE EN SCIENCES SOCIALES 79, 80-81 (1989) [hereinafter Dezalay].

9. *Id.* at 83.

10. *Id.* at 84 (quoting A. HUNT, *THE SOCIOLOGICAL MOVEMENT IN LAW* 145 (1978)).

11. In this sense, I may be departing from the stronger structuralism of the Dezalay, Sarat, and Silbey account.

enced the law and society idea. While the law and society movement succeeded in creating a new object of study and a new domain of knowledge, it did so within a "legally-constructed" domain. Thus, law and society knowledge, while different from the traditional knowledges produced in the legal academy, necessarily reflects the needs and interests of legal elites.

C. Politics

This conclusion affects my views on the political significance of the law and society idea. Initially, this idea was linked to a progressive political agenda. This agenda reflected the views and needs of the legal elites of the time, people committed to moderate reform. While law and society never thought of itself as "political," it had an implicit programmatic vision which resonated with the projects of liberal lawyers.

The movement took shape in the 1960's. People came to law and society with different motives and different politics, but by and large all were "liberals" as that term was understood at the time.¹² To be a liberal in the late 1950's and early 1960's meant favoring a stronger role for the state in the economy, moderate redistribution of income, state action to improve the lot of the disadvantaged, legal protection for the accused and mentally ill, and legal bans on racial discrimination. If you were a man and thought about the issue (which was rare), you probably wanted to improve the status of women: If you were a woman (and there were a few female scholars among the founders of law and society), you certainly did.¹³

In the early years, law and society knowledge fostered reform efforts including the civil rights movement, the War on Poverty, and the rights expansion of the Warren Court.¹⁴ Because it allied itself with a political "project" which sought, in Herbert Croly's phrase, to fulfill "the promise of American life,"¹⁵ the movement started as more than

12. This interpretation was originally suggested by William Simon of the Stanford Law School. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 778 (1986). For discussions of the relationship between law and society and "liberalism," see Galanter, *supra* note 5, at 538-42; Sarat, *Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition*, 9 LEG. STUD. FORUM 23, 26-27 (1985); White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819, 830-36 (1986).

13. Sources indicating the political climate of the United States in 1960's include D. HALBERSTAM, *THE BEST AND THE BRIGHTEST* (1969); P. NOVIK, *THAT NOBLE DREAM* (1988); TOWARD NEW HUMAN RIGHTS: THE SOCIAL POLICIES OF THE KENNEDY AND JOHNSON ADMINISTRATIONS (D. Warner ed. 1977).

14. See *infra* note 76 and accompanying text.

15. H. CROLY, *THE PROMISE OF AMERICAN LIFE* 2-7 (1909).

a purely "academic" discipline. In addition to seeking a new form of knowledge, law and society scholars were committed to uncovering various forms of inequality and injustice in American life and correcting them.

D. Legalism

Most law and society founders were liberals; some were also what I shall call "legalists." By "legalists" I mean persons having a faith in law as an instrument of progressive social change. Legalists believed that most of the "flaws" in American society could and would be corrected through legal means. They had faith in the immanent liberalism of legal institutions and equated "law" with "freedom" and "equality." They recognized that at some times and in some places the law would hamper full realization of liberal ideals, but saw such situations as anomalous, inconsistent with the fundamental spirit of the law, and correctable. In this vision they believed that with time and hard work, the inherent liberalism of the law would work itself pure. Legalists saw law as a tool to be used by liberal reformers: when liberal analysis revealed a gap between reality and legalist ideals, they believed there existed a legal way to close the gap.¹⁶

Certainly, not all law and society pioneers were legalists. Indeed, from the very beginning, law and society scholars expressed reservations about legalism, questioning assumptions about the immanent liberalism of the law and its power to change social life.¹⁷ Thus there was always tension between law and society and what I call "legalism."

But the existence of skepticism about legalism did not diminish the appeal of the liberal reform project to the law and society movement. Whether they embraced legalism or questioned it, early law and society scholars could find a place within the liberal legalist reform programs of the 1960's. The legalists in the movement would perfect the immanent rationality of the law or expand its instrumental sweep, while those who questioned these assumptions could develop their

16. Legalism was inherent in the "gap studies" characteristic of law and society scholarship. See Sarat, *supra* note 12, at 24-25. These studies exposed discrepancies between legal norms and social behavior. The implication was that better laws or more effective implementation would close the gap. *Id.* at 27-28.

17. See, e.g., L. FRIEDMAN & S. MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* (1969). The material on the limits of legal effectiveness (ch. 3) points out various barriers to liberal legalism and suggests ambivalence toward the "legalist" approach. The articles in that section analyze various individual and institutional factors which limit the impact of law on society.

skeptical insights by studying the gap between liberal reform ideals and social reality.

E. *The Decline of Liberalism*

Today it all seems different. Liberalism as we understood it has waned: conservative pundits and politicians have turned "liberalism" into a dirty word. And doubts about legalism have spread: In part because of the work of the law and society movement, we no longer necessarily see law as the embodiment of reason or as a powerful tool for the good. These doubts have influenced the law and society movement which, like the nation as a whole, has come to doubt both law and reform.

The emergence of these doubts raises a new set of questions about the law and society project, and the alliance between lawyers and the social sciences on which this enterprise rests. These questions may be answered by the following analogy. Matthew Arnold once suggested that nations go through periods of expansion and concentration.¹⁸ In periods of expansion, citizens are open to new ideas and ready to tackle new challenges. In periods of concentration, however, citizens look to their past for sources of stability and common values.¹⁹

In this sense, the story of the law and society movement is the history of an enterprise which was born in an era of expansion, but has come of age in a period of concentration. Lawyers and social scientists started working together in an epoch in which they both believed that their work contributed to the liberal project of social reform though legal means. If that project no longer exists, what is the basis for the alliance?

F. *Plan of the Essay*

That is the issue this Essay addresses. As the Association celebrates its silver anniversary, the law and society movement is reexamining its purpose and rethinking its institutional strategy. The problems it faces come not from a shortage of answers, but rather from a plethora of contradictory and incompatible ones. Numerous prophets can chart paths for the coming years, but these various paths will point in divergent directions. What direction should the movement take?

To answer this question, we have to start by going back to the roots of law and society. We have to understand the intellectual context in

which the movement arose and presently functions, as well as the complex motives that led to its creation. In Part II, I describe that context, showing how legal thought moved toward the idea of the social scientific study of law. In Part III, I speculate on the motives of various actors who formed the movement and describe the "original understanding" which held this diverse group together. Part IV traces the gradual development and refinement of the law and society idea as problems with the original understanding became clear and a new vision emerged to replace it. In Part V, I set the stage for a polemical argument about law and society's future by describing the current context of legal studies and the constraints and possibilities it contains. Finally, in Part VI, I set forth my views on the future of the movement.

Dreams of Youth: Lawyers and Architects

When I was in college, I admired Frank Lloyd Wright and wanted to become an architect. I was attracted to the idea of designing grand structures of great symbolic power—as well as to the image of the architect as hero. I liked Vitruvius' formula for a good building: firmness, commodity, delight. Alas, I seemed to have little talent for drawing and design, and no aptitude for math and engineering. But then I discovered the Law, and that seemed an attractive second best. I told people I wanted to become a lawyer because lawyers were "social architects." I took a course at the Wisconsin Law School on law in society. Produced by legal realists Willard Hurst, Lloyd Garrison, Carl Auerbach, and Sam Mermin, the course convinced me that law was the place for a frustrated architect who couldn't draw.²⁰ Lawyers, I learned, designed institutions, not buildings. Like architects, they used science—albeit social science, not physics and mechanics—to design. They drew on a symbolic tradition, although theirs was a tradition of ideals, not images. The institutions they designed offered firmness, commodity, and even a little delight: Like good buildings, legal institutions would create order, facilitate social and economic development, and adorn the Republic. The lawyer, like the architect, was a sort of hero: he (there were few "she's" then in law or architecture) would advance the interests of all.

I found out that administrative agencies were the true solution for complex social problems. I ran back to the the Wisconsin Student Senate and proposed an administrative agency for some campus problem. No one paid any attention.

18. M. ARNOLD, *The Function of Criticism at the Present Time*, in *ESSAYS IN CRITICISM* 17 (1st ser. 1895).

19. *Id.*

20. See generally C. AUERBACH, L. GARRISON, S. MERMIN & W. HURST, *THE LEGAL PROCESS: AN INTRODUCTION TO DECISION-MAKING BY JUDICIAL, LEGISLATIVE, EXECUTIVE, AND ADMINISTRATIVE AGENCIES* (1961).

II. LEGAL STUDIES IN AMERICAN SOCIETY: FROM CLASSICAL LEGAL THOUGHT TO IMPERIAL LAW

Law and society emerged within the general context of legal studies in the United States. Certainly, law and society pioneers had to struggle to gain acceptance for the "law and society idea." They were, after all, creating a new object of knowledge, a task requiring them to challenge much in the intellectual tradition fostered by the law schools of their time. While the law and society story can be viewed as a rupture in legal thought, it can also be seen as the continuation of trends that go back at least to the Legal Realist epoch. This legal tradition helped shape the new object and domain of knowledge that resulted from the founders' efforts. Thus, before we turn to the story of the law and society idea and movement, we must look at the context in which it was formed. In this section, I analyze the general role of law and legal thought in America and trace two traditions of legal thought which affected law and society: Legal Realism, and a form of post-Realist thought I call "Imperial Law." Law and society may have been the offspring of Legal Realism, but it was born in the age of Imperial Law.

A. Law, Legal Studies, and the Academy in American Life

1. Lawyers in Society

Let us begin by looking at the broadest aspect of American legal studies—the role of law in American society. Legal studies are shaped by the role law and lawyers play in our social, economic, and political lives. When we examine the literature on this question, we find two accounts: we might call them the lawyers' story and the critical scholars' story. While these accounts overlap, they can be separated.²¹ By

21. My analysis of the legal profession's "official" and "critical" stories is inspired by the work of sociologist Pierre Bourdieu, who uses the relational analysis of the "field" of law critically to examine the legal profession. Bourdieu, *Toward a Reflexive Sociology*, 7 Soc. THEORY 28 (1989) [hereinafter *Reflexive Sociology*]. Bourdieu's concept of "field" is a dynamic relational network. The constant struggle within the field to reconfigure the forces and to seek new positions within its hierarchy defines the "habitus," or the practices, understandings, and customs specific to that field. *Id.* at 38-39. He sees the juridical field (including lawyers, academics, court personnel, etc.) as held together by the "magnetic" forces of universality, perceived competence, autonomy, objectivity, and neutrality: These forces are perpetuated by the actors within the juridical field and accepted by actors outside the field. Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 805, 808 (1987) [hereinafter *The Force of Law*]. The activities within the field are directed toward creating and representing the autonomy and neutrality of law and lawyers to lay people. *Id.* at 844. Thus, an account of the legal profession and its relationship to the legal academy and the law and society movement should connect

"the lawyers' story," I mean that account of the societal role of law and the legal profession that is prevalent in legal elite circles. The critical scholars' story reflects on that account and seeks to explain it by yet another view.

The lawyers' story is that the law has served as a mediating force in American society.²² From their beginnings, American social and legal thought have recognized the issues of social, racial, and ethnic division and stratification. Professional accounts of law, and to a lesser degree, popular understandings, have portrayed the law as a mediating force in a society otherwise riven by divisiveness and conflict.

The ways in which law and the legal profession preserve their autonomy from factions, classes, or racial groups have been explained in very different accounts. Robert Gordon has identified three: (1) The Whig-Federalist notion of the law as the embodiment of civic virtue, and the lawyer as the equivalent of the Tocquevillian aristocrat; (2) the nineteenth century Classical Liberal account of the law as a neutral mechanism creating spheres of autonomy and restrictions on power; and (3) the Progressive notion of law as a technical steering mechanism. As different as these versions of the idea of law as a public profession may be, they all contain the core notion that law is a neutral force in a divided society, and lawyers the servants of the general good, rather than agents of faction.²³

The critical scholars' story does not differ completely from the lawyers' story.²⁴ The critical scholars recognize that people once thought of the law as a mediating force in society, but they question whether it was neutral.²⁵ Whereas the lawyers' story treats neutrality or mediation as fact, the critical scholars see it as ideology. They assert that the lawyers portray themselves as servants of the public, while actually

both the official and critical stories. For historical descriptions which refer to both accounts, see, e.g., J. AUERBACH, *UNEQUAL JUSTICE* (1976); Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (G. Geison ed. 1983).

22. This view of law can be seen clearly in the official version of "professionalism" literature. For a description of that tradition, see Gordon, *The Independence of Lawyers*, 68 B.U.L. REV. 1 (1988).

23. Each account of professional autonomy centers on a different version of the notion of lawyers' neutrality. The Whig-Federalist lawyer was credited with the neutrality of a statesman, for the "gentleman-lawyer" was especially capable of prescribing the contours of the law for the good of the republic. The Classical Liberal lawyer's neutrality derived from the disinterestedness with which the lawyer dispatched the mediating role; the lawyer simply clarified the boundaries between the individual and the state, whether in practice or rational law reform. Neutrality was also the hallmark of the Progressive lawyer, whose technical expertise in the neutral domain of policy science qualified the lawyer in the name of efficiency. Gordon, *supra* note 21, *passim*.

24. See generally J. AUERBACH, *supra* note 21.

25. M. LARSON, *THE RISE OF PROFESSIONALISM* 168-71 (1977).

behaving as agents of dominant groups. In this account, the idea of neutrality is a mask, not a description.

My view is that the neutrality of law is more myth than reality, but that the existence of this myth sometimes makes a difference. No one can deny the force of the critical account: lawyers *have* tended to represent and speak for dominant interests in American society; the law *does* tend to reflect the interests of the powerful. But American law is complex and contradictory. The very need to present the law as neutral creates the possibility that the interests of the weak and unorganized will at times find expression in legal doctrine and secure protection by legal institutions. Thus moral entrepreneurs can seize the ideology of neutrality and can employ the idea of the "public interest" to champion unpopular causes and challenge power.²⁶

2. *The Legal Academy and the Legal Profession*

What role do the law schools and the profession play in preserving the myth of legal neutrality? And how does this role affect legal scholarship in general, and law and society work in particular? Given my view that the legal academy influenced the "law and society idea," we have to understand academic law before we can fully understand the law and society movement in legal studies.²⁷ To gain this understanding, we must examine the restraints and opportunities in the context of academic law.

(a) *Professional Hegemony*

Unquestionably, the legal academy reflects the interests of the legal profession, particularly its elites. And since these elites are themselves closely allied to the dominant groups in American society, the law schools tend to defend the status quo. To this extent, I agree with the hypotheses of Dezalay, Sarat, and Silbey.²⁸ But because law and lawyers play complex and contradictory roles in American society, and the relationship between professional power and academic knowledge is multi-dimensional and reciprocal, academic law is not merely a mirror of the legal elite's visions or simply a mask for their self-interest or

26. Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW & SOC'Y REV. 529, 529-69 (1977).

27. I recognize that many law and society scholars do not work in law schools, and many reject lawyers' professional paradigms. Nonetheless, law schools (and thus indirectly, the legal profession) exercise a strong influence on law and society work: academic legal culture forms the context within which socio-legal work in the United States has emerged and is sustained.

28. Dezalay, *supra* note 8, at 85-86.

the interests of their powerful clients:²⁹ counter-hegemonic ideas can arise.

(b) *Objectivism*

Academic law in America has a strong commitment to objectivism. Objectivism has a substantive and an epistemological dimension. Substantively, it is the belief that behind the rules, statutes, and doctrines of the legal system lies either a moral order (a rationally defensible scheme of human association) or a realistic accommodation to the constraints and limits of human existence.³⁰ Epistemologically, objectivism is the faith that legal institutions have available to them modes of knowing and deciding that are independent of the interests of any group, class, race, or faction.³¹

Both aspects of objectivism affect legal scholarship's self-understanding. Since legal scholarship is part of the process which reveals the objective substance of the law, it must present itself as *objective knowledge*. Thus, legal scholarship supports the myth of legal neutrality: its presentation of law and legal solutions as the outcome of an objective science (or a neutral technique) strengthens the law's claim to be a mediating force.

The foundations for objectivism in legal studies have varied over the years; as our culture changes, these foundations must be redescribed.³² The law schools thus devise new ways to describe and justify the law as natural or neutral, and maintain the image of neutrality by suppressing critical scholarship that might challenge the professional story.³³ My story of the law and society idea illustrates this process.

(c) *Room for Maneuver*

While this structural account accurately describes the context of legal studies, if taken too seriously it could lead us to conclude that all

29. Cf. *The Force of Law*, *supra* note 21, at 843-44 (positing that law and legal doctrines reflect the ethical and political inclinations of those who apply them).

30. R. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 2 (1986).

31. Singer, *Legal Realism Now* (Book Review), 76 CALIF. L. REV. 465, 503-04 (1988).

32. Gary Peller points out that successive challenges to the foundations of objectivity in legal thought have simply redescribed—not dismantled—the claim to objectivity. The Legal Realists challenged the formalists' foundation of "law from first principles" by asserting instead that they could achieve objectivity through policy science. See Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1152-1209, 1216-19, 1225-26 (1985). Post-Realist thinkers (e.g., Law and Economics, Legal Process) claim that law can be made objective through neutral goals and uncontroversial processes. See Singer, *supra* note 31, at 518-28.

33. Law schools do not suppress in some conscious or overt manner; rather, they simply monopolize the field of legitimate knowledge about law by controlling all forms of legal studies. Since law schools themselves are usually controlled by people who accept the official story, critical challenges—if they emerge at all—are marginalized and weakened. And as Bourdieu points out, struggles within the "field" of legal scholarship serve to legitimate the social force of the field itself. *The Force of Law*, *supra* note 21, at 852.

scholarship about law will celebrate the status quo and emphasize the interests of the legal profession and the elite groups with which it is allied. But we know this is not the case: even if critical thought is often marginalized in legal studies, it exists.

There are several reasons why the structural account fails to explain fully what occurs. First, it suggests that the law schools are completely dependent on the profession, so that professional interests, including interests in the production of a legitimating ideology, will always dominate. In fact, law schools and the legal profession exist in a relationship of reciprocal interdependence. Granted, the law schools do depend heavily on the profession,³⁴ but the academy is also important for the profession. Academic knowledge is the basis for lawyers' claims to exclusive competence, status, and income: the schools produce the legitimating knowledges and certifications necessary to maintain these claims. To accomplish this task, the law schools must be seen as independent of the profession and part of the university. To the extent—and it is limited—that universities encourage autonomous and critical thought, legal academics interested in a critical approach to law and practice can find "space" and support for their ventures.

Additionally, the legal profession is not unified; it is divided along lines of income, status, and affiliation with client base.³⁵ While power within the profession correlates with the power of the clients lawyers serve, that power is not total and the correlation is not perfect. Legal educators can form alliances with, and seek support from, deviant groups within the profession. The existence of professional counter-cultures may support counterhegemonic enclaves within the legal academy.³⁶

34. While this point seems obvious, a few words on the relationship are in order. Unlike law schools in many countries, American law schools are committed almost exclusively to training people for the practice of law. Students enter law school only after having made a decision to enter the profession. Within a year after they enter the schools, many have begun working in part-time law jobs; there they get messages directly from their employers about what is needed for professional success. This guidance, plus the bar exam, shapes student demand for education. Further, the law schools are financially dependent on the profession. Few universities provide real support to their law schools, so that the school's financial base depends on tuition—which students allocate with a view towards professional career advancement—and donations—which alumni give to maintain a supply of graduates and the production of forms of symbolic capital that promote their interests. For a general discussion of legal education, its nature and constraints, see R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850's TO THE 1980's* (1983).

35. See J. HEINZ & E. LAUMANN, *THE CHICAGO LAWYERS* (1982); M. LARSON, *supra* note 25, at 175; R. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* (1988); Ladinsky, *Careers of Lawyers, Law Practice and Legal Institutions*, 28 AM. SOC. REV. 52 (1963); Ladinsky, *The Social Profile of the Metropolitan Bar: A Statistical Survey in Detroit*, 43 MICH. ST. B.J. 12 (1964).

36. The recent conference on The New Public Interest Law, co-sponsored by the New Col-

This structural position of the legal academy provides some "room for maneuver."³⁷ The legal academy can be a base for critical thought, and the breeding ground for projects which challenge the status quo. Of course, nothing guarantees that opportunities will be seized, but something about the motivation to enter law in the first place, and then to opt for a career in academic law, encourages the legal professoriate to challenge the status quo. Few careers in America hold out much promise for those who have what Roberto Unger calls "the transformative vocation."³⁸ And while law often disappoints those who enter it with such aspirations, *faute de mieux* they continue to turn to the law. As a result, academic legal studies have attracted small cadres of people who champion social justice, seek reform, and embrace a critical vision of American society. And the law schools have not completely deprived such folks of opportunities for transformative thought and action.

B. *Movements in Legal Thought: From Legal Realism to Imperial Law*

These aspects of the legal academy are visible in the history of the movements in legal thought that led to, and supported, the initial development of the law and society idea. In this section, I will emphasize two critical movements in legal thought that preceded law and society: Legal Realism, and a form of post-Realist legal consciousness I call "Imperial Law." Law and society may have been the offspring of Legal Realism, but it was born in the age of Imperial Law.

lege and the Conference for Critical Legal Studies and held in San Francisco on January 7-8, 1990, is an example of such an alliance. Law professors and law students joined community activists and public interest lawyers to discuss new strategies for legal activism in practice and education in the 1990's.

Bourdieu recognizes the force of counter-hegemonic groups within the field. Although his own study of the juridical field has exposed a "division of juridical labor" which characterizes the stratification of the legal profession, *The Force of Law*, *supra* note 21, at 808, Bourdieu also recognizes that dominated groups always exert a certain force within a social field. "[T]o belong to a field means by definition that one is capable of producing effects in it (if only to elicit reactions of exclusion on the part of those who occupy the dominant positions), thus of putting certain forces into motion." *Reflexive Sociology*, *supra* note 21, at 36.

37. I borrow this phrase from Rosemary Coombe's article, *Room for Maneuver: Toward a Theory of Practice in Critical Legal Studies*, 14 LAW & SOC. INQUIRY 69, 121 (1989). Coombe analyzes the development of practice theory in law, anthropology, and social theory. Practice theory resurrects human agency in the critical analysis of structures. Coombe rejects the structure-subjectivity polarity, asserting that structure can be at once constraining and enabling, constitutive but not determining. *Id.* at 71, 90-92. For further application of the method of "transcending structuralism," see *infra* notes 57-61 and accompanying text.

38. R. UNGER, *SOCIAL THEORY: ITS SITUATION AND TASKS* 11-12, 26-35 (1987).

1. Legal Realism

It is pretty well accepted that Legal Realism set the stage for the development of the law and society movement. But what was Legal Realism, and what legacy did it leave to its progeny? This story has been told elsewhere at great length; here I merely want to summarize an account developed by numerous scholars.³⁹

(a) The Classical Tradition

The first thing to look at is classical legal thought, the tradition against which the Realists wrote. The classical tradition had served as a legitimating ideology for the legal elite in the late nineteenth and early twentieth centuries, and contained a powerful account of legal neutrality. A main feature of Realism was the effort to complete the critique of classical legal thought initiated by Holmes and Pound. Realism was as much a rejection of an earlier tradition as it was a full-blown theory of law.

Classical legal thought was objectivist in both senses of the term. It pictured the legal order as the embodiment of ordered liberty. It also described legal thought and scholarship as a neutral science capable of deducing fundamental and non-problematic principles from authoritative sources and applying them dispassionately to the resolution of social conflict. The Realists rejected this classical account of legal reasoning and scholarship as arid formalism, and unmasked its ideological commitment to an extreme form of individualism and *laissez faire*.

The collapse of nineteenth century legal science under the onslaught of Realist analysis was exhilarating. But it also was threatening, even to those who participated gleefully in the process of "deconstruction."⁴⁰ Attacked for undermining the foundations of the law, and

39. I have based the discussion in this section on the following sources: L. KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986); Boyle, *The Politics of Reason*, 133 U. PA. L. REV. 685 (1985); Gordon, *supra* note 21; Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW* 18 (D. Kairys ed. 1982); Peller, *supra* note 32; Singer, *supra* note 31.

40. Legal Realist thought embodied two contradictory strands, one critical (deconstructive) and one scientific (constructive). Kalman identifies these as positive and negative aspects of the "functionist" approach. L. KALMAN, *supra* note 39, at 3.

Realists challenged the legitimacy of formalist doctrine by exposing the contingency of judicial decision-making, the indeterminacy of rules, and the circularity of legal reasoning itself. The implications of their criticisms were profound. Faced with the fundamental indeterminacy of law, the apparent impossibility of objective legal reasoning, and the (probable) awareness that such ideas could undermine the power and prestige of the legal academy, the profession, and its institutions, many Realists retreated into the safe harbor of legal objectivity. Rather than focus on the contingent and inherently political nature of legal representations of the social world,

thus its authority, the Realists sought a new grounding for legal decision-making and scholarship.

(b) Social Science

One of the answers Realists found for the "legitimation crisis" they had engendered was social science. There was an intimate relationship between the very name of this jurisprudential school—Realism—and the belief in social science. Realists thought social science was the key to *reality*. They believed that social science methods would open the path to three kinds of fundamental knowledge: Knowledge of the *real* reasons underlying judicial decisions, knowledge of the *real* social issues with which the law must deal, and knowledge of the *real* constraints and possibilities which would dictate neutral solutions to these issues.⁴¹

Thus, Realism was Janus-faced—at the same time a critical practice and a legitimating ideology. Critical Realism can be seen as one of the causes of the collapse of older ideas of legal science, and constructive or scientific Realism as the source of new ones. While the Realists critiqued American society and denounced much in American law, they also constructed the elements of a new, legitimating orthodoxy. This orthodoxy was based on the redefinition of "science" in the old term "legal science." In this new vision, law would become a *social* science. It would have the power and objectivity of social science as then understood.

This reconceptualization does not mean, however, that the Realists ever did much social science or that their commitment to social science was deep and abiding. The story of the Realists' relationship with social science is a mixed one, at best. Some got lost in the pursuit of empirical minutia, while others lost confidence that social science would produce the results busy legal reformers needed.⁴² Indeed, one observer has concluded that the real heritage of Legal Realism was to

Realists sought to stabilize the uncertainty they had exposed with a new source for legal representations—an empirically knowable "reality." Thus, the Realists urged a new form of legal science which would account for "facts," "consequences," and "actual conditions" and provide the rationality, predictability, and objectivity that formalism lacked. See R. STEVENS, *supra* note 34; Boyle, *supra* note 39; Peller, *supra* note 32; Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459, 460 (1979); White, *supra* note 12, at 821-24.

41. See, e.g., Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 815, 833, 842-47 (1935); Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1244-46, 1250 (1931). See generally L. KALMAN, *supra* note 39; Schlegel, *supra* note 40.

42. Schlegel, *supra* note 40, at 569-86; White, *supra* note 12, at 824.

legitimate a kind of *ad hoc*, particularistic policy discourse that was actually hostile to systematic social science.⁴³

I don't think the Realists ever fully grasped what later emerged as the "law and society idea." Certainly, they encouraged an alliance between law and the social sciences, but they were lawyers first and foremost. The Realists were more interested in *using* social science than in redefining law as an object social scientists could *study*.

(c) *Legitimation of the Activist State*

Realism did, however, bring about a change in legal discourse: It demolished the classical tradition, which rested on a faith in abstract principles, conceptual structures, deductive reasoning, and limited government. Freed from these conceptual limitations, Realist-trained lawyers were able to participate in the construction and defense of the affirmative state ushered in by the New Deal. In the age of the activist state, this change made it possible for lawyers to continue to represent themselves as neutral actors in society.

The lawyers who shaped the affirmative state and redefined the old idea of law as a mediating force had to reconstruct the idea of legal neutrality. In the nineteenth century, objectivism had first been linked to the elite lawyers' superior ability to grasp the principles of civic virtue, and later to the deductive methods of classical conceptual jurisprudence.⁴⁴ The activist state ushered in during the 1930's demanded a new account of objectivism consistent with both the commitment to affirmative intervention in economic and social life, and the modernist culture of the twentieth century: neither civic virtue nor classical formalism would serve this purpose.

The Realists found one answer in the idea of objective knowledge of society, and thus in social science. The idea that law could be grounded on objective social knowledge provided by the social sciences, therefore, became essential to the Realists' rhetoric, even if the production of such knowledge was not an essential part of their practice. In this fashion, Realism put social science on the agenda of the American legal academy.

2. *Imperial Law*

While Realism opened the closed world of law to the social sciences, the "law and society idea" did not take shape until after Realism had

waned. Only in the late 1950's and early 1960's was the real work of reconceptualizing law as an object for social scientific study carried out, and key law and society institutions founded.⁴⁵ This was the age of Imperial Law.

(a) *Law as an Instrument of Social Change*

Why call this post-Realist era in legal thought "Imperial"? I use this term because in this period, many in the legal elite believed the law could and should be actively used to shape society. This activist legal consciousness formed the context in which law and society took shape.

The post-war period was a time in which lawyers thought they could devise relatively unproblematic systems of social governance and transformation. The legal culture of the time encouraged them to believe in law as a powerful instrument to change society and—at the same time—as a repository of standards and principles for the governance of social life. They felt that they knew or could easily learn how society should be organized. If something was wrong somewhere in the world, the jurists of the Imperial Age of American law were ready to fix it.

Imperial legal scholars saw the law as the embodiment of reason and thought that through the law more rational forms of social life could be created. Law was "univocal": behind the welter of competing precedents and rules, scholars could discern fundamental principles which would provide normative guidance. Law was also powerful: it was separate from the sources of inequality and domination which hampered the realization of liberal ideals in society and was available for the egalitarian transformation of such systems. Whether they were concerned with using law to eradicate poverty, end racial discrimination, or modernize "underdeveloped" countries, Im-

45. The Law and Society Association, which traces its beginnings to an August 1964 meeting of the American Sociological Association, was formally incorporated on November 17, 1964. In 1965, the Russell Sage Foundation committed funds for *The Law and Society Review*, which appeared in its current format and design in 1966. See comments of then LSA President, Robert B. Yegge, in 1 *LAW & SOC'Y REV.* 3-4 (1966).

During the 1960's, the Russell Sage Foundation facilitated the incorporation of the social sciences into the law curriculum with grants to the law schools at Berkeley, Northwestern, Wisconsin, and Yale. R. STEVENS, *supra* note 34, at 226 n.68. The Walter E. Meyer Institute, the American Bar Foundation, and the National Science Foundation (where the Law and Social Sciences Program was established in 1971) also provided funding for work in law and social sciences. *Id.* at 286 n.62.

43. B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 5 (1984).

44. Gordon, *supra* note 21, at 98; Gordon, *supra* note 22, at 11-30; Grey, *Langdell's Orthodoxy*, 45 *U. PITT. L. REV.* 1, 32, 35-38 (1983).

perial jurists seemed confident in their mission and sure of their power.⁴⁶

(b) *Continuation of the Idea of Legal Neutrality*

In the sense described above, Imperial law continued the tradition of law as a mediating force and the idea of the legal profession as a separate estate charged with guarding a higher normative vision. Imperial legal scholars picked up this idea where the Legal Realists had left it. They shared the Realists' faith in the activist state. They took seriously the Realists' view that objective science was necessary for full realization of the activist ideal. And they fostered a series of those alliances with the social sciences for which Realists had merely called—or with which they had toyed. From the point of view of the Imperial jurists, social science knowledge was necessary so they could better understand the law's operation and implement its objectives.

(c) *Contradictions in Imperial Legal Culture*

While my metaphor of an Imperial Law makes it sound strong and self-confident, I suspect that the truth is more complex. I think that if we were to look more closely at the legal thought of the early 1960's, we would be able to see two contradictory ideas in play. The first was the idea of the higher morality of law: the notion that contained in the legal tradition itself were standards and criteria for the evaluation and transformation of society. This idea drew heavily on the higher law tradition of American constitutionalism, although it was not restricted to constitutional doctrines. It was a sort of secular natural law, based on a view that the formative acts of the Republic and the workings of the common law process had in some mystical way generated a self-contained set of norms and more general principles which could be deployed by jurists to define proper conduct in all spheres of social life.⁴⁷

Juxtaposed to this idea, which saw law as a plenitude or a self-contained system of normative guidance, were doubts about law's internal coherence and sufficiency which had been created by the Legal Realists' critique of classical legal doctrine. My Imperial jurists, were, after all, the heirs of Realism. And if, as the Realists had argued, legal

doctrine was contradictory and indeterminate—containing not one but several possible normative visions—how could the higher law ideal make any sense? If lawyers wanted to shape new social arrangements in the name of law, how could they ground their new visions if they could not derive a coherent set of principles from law itself?

A Legal Imperialist Faces the Younger Generation

Shortly after I left the Yale Law School in 1961, I took a job with the Agency for International Development (AID), working as a lawyer in the "Alliance for Progress." This was the heyday of America's liberal empire. AID was charged with assisting the "development" of the Third World: quite unself-consciously we imagined that this meant making Third World nations more like the United States. We were charged with the exciting mission of exporting democratic capitalism, American technology, and efficient government to countries which were too poor or benighted to grasp the possibilities of this superior form of civilization. As lawyers, our job was to expedite the operation of America's civilizing mission. We were hard-headed pragmatists, dedicated to getting things done in a cumbersome bureaucratic maze. We helped arrange the financing and construction of dams and steel mills, and created legal structures for transmissions of American know-how. With our help, experts from America's universities came to Latin America to teach Brazilians, Colombians, and Bolivians how to produce better eggs and more butter. Many AID lawyers of that day thought of ourselves as an elite: we were smarter than the development experts whose work we facilitated, more pragmatic than the foreign officials and lawyers with whom we worked, and more committed to liberal values than the governments we were assisting.

Looking at the vast range of programs that AID produced to promote "development," we felt something was missing: no one was actively "developing" the rule of law. This omission seemed to be serious, but was easily remedied. We devised grand programs to re-educate Third World lawyers, who—we felt—had failed to understand the mix of pragmatic instrumentalism and liberal idealism that had been the staple of our legal education. By exporting the educational techniques of the American law school—socratic method, social science, and all—we would strengthen legal institutions just as AID agricultural technicians were transforming small, yellow eggs into large, white ones. We struggled nobly, but our efforts were disappointing. Some Third World lawyers took our money but rejected our lessons. Others accepted the message that law should become more instrumental, but saw no reason why it should also be liberal: they became willing technocratic servants of despotic regimes. Finally, someone wrote up the history of these failed

46. For an assessment of the goals of law and development studies and a discussion of the liberal legal paradigm, see Trubek & Galanter, *Scholars in Self-Estrangement*, 1974 Wis. L. REV. 1062, 1078-80 (1974).

47. Roberto Unger calls this idea one of a "legal order." R. UNGER, *LAW IN MODERN SOCIETY* 52-54 (1976). See also *Where the Action Is*, *supra* note 2, at 577-79 (discussing the critique of the idea of legal order).

efforts: he called the book *Legal Imperialism*.⁴⁸ It recounted our overbearing efforts to export American legal culture and reported our frustrations when idealistic plans went awry.

In the early 1980's, my daughter, who was studying the history of United States intervention in Latin America, read the book. Asked what she thought of my exploits, she said: "Daddy, you were a schmuck."

III. THE CREATION OF THE LAW AND SOCIETY IDEA

This part of the Article deals with the formation of the law and society idea. In it, I use an "ideal-typical" analysis to model some of the varied perspectives and motives of those who joined together in the movement. Then I sketch a vision of law and its study which emerged from this interaction: this version was the first law and society idea to appear, and I dub it "the original understanding." Finally, I speculate on what caused the movement initially to define the law and society domain as it did.

A. Varied Perspectives

I have spoken of the "law and society movement" as if it were a unified group of people sharing common views and goals. This artifact of the narrative is misleading, for there have always been many different currents of thought about law, society, and social science in the movement. The people who worked to create the law and society idea came from very different starting points and had very different goals for the enterprise.

Without a full-scale social and intellectual history, one can only speculate on the various strands that made up the "movement" I have been describing. To give some sense of the diversity, and to explain how very different groups found some common ground, I have constructed five imaginary "ideal-typical" actors whose perspectives stand for separate parts of the curious alliance that is the law and society movement. On the social science side there are three "actors": I call these the True Scientist, the Social Problem Solver, and the Technician. On the law side, there are two: The Imperial Jurist and the Skeptical Pragmatist.⁴⁹

48. J. GARDNER, *LEGAL IMPERIALISM* (1980).

49. The "ideal-typical actors" in this section are heuristic models, not real people. The law and society movement contains people with very different epistemologies, politics, professional roles and loyalties, disciplinary affiliations, and career aspirations. Moreover, the preceding characteristics all may change over time. Combining all these variables would generate a plethora

I have used male pronouns in this section for simplicity and historical accuracy. While Laura Nader was active in the very early days of the law and society movement, the pioneers were predominantly male.

1. The True Scientist

The True Scientist believes that society obeys natural laws. He searches for the underlying forces that govern the behavior of groups and individuals. He sees the natural sciences as the model for social science. He believes that "theory" is a statement of empirically observed regularities. Whether he favors "grand" or "middle-range" theory, the True Scientist aspires to produce a body of certifiable knowledge which will hold true for all time and all places. To be certifiable as scientific, this knowledge must be supported by empirical evidence which meets the evidentiary standards of the social science community.

The True Scientist wants to study law because it is an important domain of society—like the family, religion, or the military. He wants to study all domains of social existence that laypersons and lawyers think of as "the law." But the Scientist may not be primarily interested in "the law" or "legal studies" as such, and will redefine "legal" phenomena in terms drawn from social science theory. Thus for the Scientist, behaviors drawn from the world of law are seen as examples of the operation of categories like "rule-oriented behavior," "social control," "strategic bargaining," and so on.

People who had these perspectives and motives in the 1950's and 1960's could see law and the legal system as an attractive domain for social inquiry. Law was clearly important in our society, yet it was

of theoretically possible "positions" on law, social knowledge, and politics. The models in this section simplify this complexity by putting together five typical "clusters" which then generate typical "motivations." I then use this model to explain why diverse "actors" might have reached tacit agreement on the original definition of the law and society "idea" for a new domain of knowledge. I have drawn these models from my own observations over twenty-five years of work as a law and society scholar, and also base them on the critical work I did in several previous articles. See *supra* note 2 and the sources cited therein.

The use of ideal types, which abstract from actual historical events and generate heuristic models that can be used for analysis and as tools for detailed histories and biographies, is common in the social sciences. See generally T. BURGER, *MAX WEBER'S THEORY OF CONCEPT FORMATION: HISTORY, LAWS, AND IDEAL TYPES* (1976). Since few concrete individual law and society scholars ever fit exactly into any one of these "types" (and if they did, they rarely stayed there throughout a career), it would be unfair and misleading to cite specific authors and works as illustrations of each type. For some illustrative material on different visions of law and society, see Black, *The Boundaries of Legal Sociology*, 81 *YALE L.J.* 1086 (1972); Friedman, *The Law and Society Movement*, 38 *STAN. L. REV.* 763 (1986); Galanter, *supra* note 5; Selznick, *The Sociology of Law*, in *SOCIOLOGY TODAY* 115 (1959); Whitford, *Lowered Horizons: Implementation Research in a Post-CLS World*, 1986 *WIS. L. REV.* 755 (1986).

virtually unexplored territory for social researchers. Law schools dominated legal studies, but had shown little interest in social science. And when aroused, the schools' interest, if it went beyond rhetoric, was primarily instrumental. For the True Scientists, the discovery of law as a domain for social inquiry had the same appeal as the unearthing of an unknown ancient civilization would have for archaeologists.

2. *The Social Problem Solver*

Some social scientists who participated in the early years of the law and society movement were attracted by the use of social science to "solve" social problems. They felt that phenomena like crime, racism, poverty, and "underdevelopment" were "problems" susceptible to rational analysis and solution. Social science, for example, would "prove" that racial discrimination was irrational and would help create programs that would lead to its elimination. Social Problem Solvers were Scientists—they believed in the goal of certifiable knowledge—but they were Scientists with a social mission. They were attracted to the law because an alliance with it would give them access to centers of power and opportunities to participate in social reform programs.

3. *The Technician*

Most social scientists sought a body of certifiable knowledge worth developing for its own sake: Some also sought an opportunity to put this knowledge to work for reform effects in which they believed. But at least a few among the social science pioneers saw themselves primarily as technicians with skills that an expanded field of legal studies would need. As social science discovered the new domain of behavior in law, and law began to seek more reliable knowledge of social conditions, opinions, and trends, a new set of technical skills was needed. Survey researchers, statisticians, and other experts could find employment in the new domain being created by law and society: These were the Technicians.

4. *The Imperial Jurist*

Post-Realist Imperial Jurists were attracted to social science. Some thought social science might supplement legal doctrine, providing an answer to the normative crisis created by Realism's deconstruction of classical legal thought. If legal doctrines were indeterminate, or even contradictory, perhaps social science would serve as a useful supplement for legal thought, providing maps that legal reformers could follow in their efforts to reshape society through law. Social science

would tell us what was natural and necessary in social life. A jurist of this persuasion would be attracted to the vision of the law and society project promoted by the True Scientists.

While some Imperial Jurists may have believed that social science could reveal a natural order and provide a new foundation for law, most probably thought of the alliance with social science in more instrumental terms. In this approach, law needed social science more as a scout than as a guru. Social science would not tell law what to do, but would instead help it understand its powers and limits, and provide information on the effects of its interventions.⁵⁰

5. *The Skeptical Pragmatist*

Imperial Jurists sought certainty and instrumental power through social science. They shared the motivations of the Scientists and the Social Problem Solvers, and employed willing Technicians. But some of the lawyers who forged this alliance with social science had more modest goals. The Skeptical Pragmatists, like the Imperial Jurists, were thoroughly post-Realist. They were skeptical about legal doctrine, which they recognized as contradictory and indeterminate, but had no grand illusions about social science. They saw it as a useful way of understanding the legal process. They embraced social science without believing it would provide a new foundation for legal studies, resolve legitimation problems, or better arm lawyers to transform the world. Empirical knowledge was simply considered more useful than doctrinal learning.⁵¹

B. *The Law and Society Idea*

Given these diverse perspectives and motives, it seems amazing that the law and society movement could ever agree on anything. Yet it did, at least enough to hold together for twenty-five years, produce a substantial body of scholarship, and even influence legal education and policy. One explanation is that everyone—albeit for different reasons—had a stake in the new domain of knowledge that was being

50. For some in the Imperial Age, the merger of law and social science was a marriage of convenience. Some lawyers looked to social science for a certainty they knew no longer could be found in legal doctrine, while some social scientists sought in the law access which, they felt, was denied them in their own right. For these people, the alliance was a way to get something they couldn't secure on their own. Like royal mistresses in earlier times, social scientists may have thought that by an alliance with law they could exercise power behind the scenes. Like nineteenth century parvenus who married into aristocratic families, lawyers may have imagined that an alliance with the social sciences would give them intellectual certainty and cultural legitimacy.

51. For a more detailed description of this approach, see *Where the Action Is*, *supra* note 2, at 618-19.

constructed. And all were willing to give assent, if only tacitly, to a set of general notions about the enterprise.

1. *The Domain*

Everyone agreed that law could and should be studied as a social phenomenon. They saw that law could be thought of in the terms and vocabularies used by the social sciences. Judicial decisions could be analyzed as strategic action to realize political goals, rather than as exercises in deductive logic. Trials could be seen not as exercises in forensic skill or dispassionate searches for objective truth, but as examples of small-group dynamics. Litigation could be studied as a form of social conflict, using insights from games theory and cognitive psychology. Implementation could be thought of not as a problem of fostering obedience to orders, but rather as negotiation among groups with different resources and powers and conflicting goals.

2. *The Original Understanding*

Out of this shared commitment to the creation of a new domain of knowledge came an understanding that had wide currency in the early years. The original understanding represents the first incarnation of the law and society idea. It had five elements:

(a) *Systemicity*: Society is a system. It contains interacting elements made up of the behaviors of individuals and groups. These behaviors obey regular laws. "Law" is both a separate system in itself and part of a larger social system or set of systems.

(b) *Objectivism*: Objective knowledge of the "laws" governing the operation of the legal system, its component parts, and its relationship with other systems can be produced through application of methods common to all sciences, natural and social.

(c) *Disengagement*: To develop this objective knowledge, a new set of scholarly institutions, disengaged from the production of legal doctrine, the education of legal professionals, and the goals of any group or faction in society, is desirable.

(d) *Univocality*: The law itself, including higher law sources like the Constitution, contains a univocal set of normative standards available for social criticism and reconstruction.

(e) *Progressivism*: The combined insights of an objective body of social knowledge and the "higher" law immanent within legal doctrine would provide support and guidance for the liberal reform projects of the time, particularly the full implementation of the Warren Court reforms, Civil Rights legislation, and Great Society programs.

This "original understanding" formed a set of tacit agreements and background conventions that helped the movement cohere. It served as a way of explaining and legitimating the law and society idea in its earliest phases. It influenced the research programs that were developed in the early period and the institutions created to embody the alliance and carry out those programs.

While it is important to appreciate this understanding and the role it played, we must be equally clear on what it is *not*. The original understanding does not describe the views of all the people who made up the movement. Nor is it a condensation of the assumptions underlying the best work done by law and society scholars in the early years. With hindsight, we can see that the more lasting products of the movement—like Stewart Macaulay's *Non-Contractual Relations in Business*⁵² and Marc Galanter's classic *Why the "Haves" Come Out Ahead*⁵³—rejected one or more of these assumptions. It would be a mistake to confuse what I have called the "original understanding" with the "law and society idea" as we understand it today.

C. *Motives—The Shadow of Law and Policy*

Why did the movement accept, at least tacitly, the assumptions contained in the original understanding? There were, I suspect, a very complex set of motivations. Remember that the founders had to legitimate a new enterprise. They had to secure resources needed to build a discipline that had no formal home in the academy or elsewhere. They had to get law schools to embrace a new way of thinking about law which posed a challenge to the traditional knowledges the schools had fostered for over a century. They had to get social science departments to accept a subject of scholarship they had long ceded to the law schools. They had to find resources for research projects which no university was equipped to support.

The founders had to convince law schools either to support the new science or at least to tolerate its existence elsewhere in the university. Since there was no agency ready to provide adequate financial support for an autonomous "discipline" of law and society, their product was often tailored to meet the needs of government agencies and foundations which had policy goals that might be served by law and society knowledge.⁵⁴ Because this tactical maneuvering shaped the movement

52. 28 AM. SOC. REV. 55 (1963).

53. 9 LAW & SOC'Y REV. 95 (1974).

54. No one should underestimate the importance of funding agencies and their policy goals in the creation of the law and society movement. The Russell Sage Foundation played a central

in its early years, we might say that it was formed in the shadow of law and policy.

The original understanding makes sense if seen in this context. Objectivism and progressivism appeal to both law schools and policy-makers. At the same time, disengagement and systemicity appeal to the universities and the parent disciplines of the social science participants in the movement. Univocality gave the social scientists a standpoint from which they could measure legal "impact," while assuring the lawyers that law was the central phenomenon in this new domain of inquiry.

These "institutional" motives were strengthened by the interests of specific actors who joined the movement. The interests of True Scientists and Technicians in redefining and reorienting the study of law along these lines should be obvious. But Social Problem Solvers, Imperial Jurists, and Skeptical Pragmatists shared this vision as well. All saw that objective knowledge about how social life is organized and how social institutions work would further their somewhat different projects. The claim that law and society knowledge was objective legitimated the policy solutions of Problem Solvers and Jurists. It also gave Skeptical Pragmatists a weapon in their struggle against the doctrinal tradition in the law schools and a grounding for their efforts to reform legal education.

A lawyer decides legal education is the enemy of law and society and is rewarded for his pains

From 1966-73 I taught at Yale Law School. I worked with many law and society stalwarts to create a true center of interdisciplinary research on law as a social phenomenon. I reached the conclusion that the "law and society idea" and legal education as then practiced were incompatible enterprises. I began to preach the need for a truly independent center or department of legal studies that could pursue this idea. The Dean of Yale Law School, known as a champion of

role by supporting the Association, several university centers, fellowships for advanced training, and specific studies. See *supra* note 45. But other foundations, and government agencies later, were also important. Much of the support was motivated by policy concerns, not disciplinary ideals. Without these "soft-money" sources, there simply would not have been a law and society movement. See Trubek, *A Strategy for Legal Studies: Getting Bok to Work*, 33 J. LEGAL EDUC. 586, 591 (1983). Needless to say, this basic fact shaped research programs and self-descriptions of the enterprise. Dezalay, Sarat, and Silbey have argued that foundation support helps explain why law and society scholarship has tended to focus on short-term policy goals and to tacitly accept as legitimate the basic institutions of American society. Dezalay, *supra* note 8. See also Sarat & Silbey, *The Pull of the Policy Audience*, 10 LAW & POL'Y 97 (1988) [hereinafter *Policy Audience*].

social science in law, rejected the idea out-of-hand. When Yale did not give me—or any of my generation of assistant professors—tenure, I took this idea "on the road" as I searched for a job. Few of the people at the schools I visited understood or sympathized with my analysis of the tension between legal education and a social science of law: Some actively opposed it. I was amazed to learn that the most passionate opponents were social scientists working in and around some of the law schools where I sought jobs. They had spent years trying to convince the law schools that social science was both necessary and desirable for legal education. They saw me not as an ally but an enemy.

IV. CRITIQUES OF THE ORIGINAL LAW AND SOCIETY UNDERSTANDING

The original law and society understanding was flawed at its inception, for it rested on contradictory premises about the nature of both law and social science. These contradictions were not fully apparent at the time, but have become clearer in recent years. As a result, some scholars in the law and society tradition have begun to distance themselves from the original understanding and to construct elements of an alternative vision of the socio-legal enterprise. Many still hold on to the original faith, but its heyday has passed.

In this part of the Article, I shall outline some of the main critiques of the original understanding and sketch the alternative visions of law, society, and social knowledge they imply. While these alternative visions are still inchoate, they offer new directions as the movement looks ahead.

A. Society as a System

The law and society movement is largely responsible for bringing the idea of "society as a system" into modern American legal thought. The notion that society must be seen as an interdependent set of elements, with law as one of these elements, represented a major advance in legal thought.⁵⁵ The original understanding of systematicity, though, has been criticized and revised.

55. LAW AND THE BEHAVIORAL SCIENCES is organized around this systems idea. L. FRIEDMAN & S. MACAULAY, *supra* note 17. The "interchanges" of the legal system and other social systems are presented through material discussing the impact of law on society, the impact of society on law, and the legal system as a social system itself. See also L. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* (1975).

This understanding was formed at a time when the social sciences in America were under the influence of structural-functionalism.⁵⁶ This school's view of the social system contained two key ideas that have been questioned: social integration and functional necessity. For the structural-functionalists, society is a tightly integrated system of inter-related elements or structures. These structures exist because they perform functions: One can explain various structures, including those of ideas, by discovering their function. To this extent, functional analysis is a useful and unavoidable form of social thought.

But under the sway of objectivist notions, scholars suggested that observed functions may also be objectively necessary. The 1950's and 1960's necessitarian strain in systems thinking allowed this body of thought to be easily transformed from a set of analytic statements into justifications for existing institutional arrangements in American society.

Critics, however, have brought both pillars of the analytic structure into question. Scholars have challenged this notion of a tight societal integration, asserting that various aspects of society are tied together in a looser and more tenuous way.⁵⁷ The critics have further questioned the functional necessity of existing structures. They have replaced functional analysis with geneological investigations which show that social structures and legal institutions are shaped by purpose and interest, not by the invisible hand of objective necessity.⁵⁸ These investigations do not give up on the effort to situate legal doctrines, ideas, and institutions within a broader framework of social explanation. Nor do they abandon functionalism completely. Rather, they relax necessitarian assumptions and thus allow analysts to question the objective necessity of particular arrangements which have developed in any given society.⁵⁹

56. See generally TOWARD A GENERAL THEORY OF ACTION (T. Parsons & E. Shils eds. 1951); A. GOULDNER, THE COMING CRISIS OF WESTERN SOCIOLOGY (1970) (containing an overview of Talcott Parson's ideology); C. MULLINS, THEORIES AND THEORY GROUPS IN CONTEMPORARY AMERICAN SOCIOLOGY 66-67 (1973) (stating that structural functionalism was the majority view in sociology from 1951-68); INTRODUCTION TO NEOFUNCTIONALISM (J. Alexander ed. 1985) (tracing the growth and "vulgarization" of Parsonianism from the 1940's to the 1970's).

57. For an analysis of emerging scholarship that rejects a determinist understanding of social structures and advances "practice theory," see Coombe, *supra* note 37.

58. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 70-71 (1984).

59. Roberto Unger has written a sweeping and comprehensive critique of objectivist/necessitarian modes of social analysis. See R. UNGER, SOCIAL THEORY: ITS SITUATION AND ITS TASK (1987) [hereinafter SOCIAL THEORY]. Unger has also given us examples of "post-systems" analysis in law. This illustration is clearly seen in his appraisal of the history of contract and property rights in the West. Where conventional systems accounts start with the idea of the market as a system and explain the history of property and contract as responses to the functional imperatives of a market, Unger sees the particular regimes which emerged as politically determined

A good example of legal post-functionalist systems thinking can be seen in recent feminist critiques of law. These analyses use structural explanations of male domination as both analytical and critical tools. Feminists have highlighted ways in which bodies of legal doctrine and systems of legal thought constitute and maintain patriarchal relationships where women are subordinated to (and defined by) men. This account includes a notion of structure (or system): patriarchy or male domination is conceived of as a patterned structure made up of inter-related elements. This idea of "structure" or system is loosened and relativized, especially in the work of recent, explicitly post-structuralist feminist critics.⁶⁰ Post-structuralist feminists recognize structure while denying that it reflects objective necessity or manifests normative validity.⁶¹

Contemporary feminists and other critical thinkers may still speak of social "structure" and "system," just as law and society scholars did in the early days. Such terms as they are used today, though, do not refer to something determined by objective laws, validated by functional necessity, or unalterable.⁶² Instead of using the term "system" in the way astronomers might, today's critical thinkers have more in mind its usage in the phrase "it's hard to beat the system." They don't think of themselves as detached scientists charting the "system," but rather as street-smart actors looking for ways to beat it.

B. Objectivism: The Idea of a Positive Social Science

The original understanding of systematicity was connected to an objectivist epistemology. Society was perceived as an object, like the so-

compromises among competing groups and interests. The institutions which functionalists ascribe to historically recognized objective necessities appear, in this account, as contradiction-laden structures which mature as they ratify particular constellations of power and interest. See R. UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 195-207 (1987).

60. Teresa de Lauretis and Joan W. Scott have written persuasively on the need for feminist scholarship to go beyond the limits of structuralism. See, e.g., FEMINIST STUDIES/CRITICAL STUDIES (T. de Lauretis ed. 1986); Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD. 33 (1988). For application of this approach to law, see Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990). See also Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989).

61. See, e.g., C. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

62. For a discussion of the ideas and critiques of structural and post-structural feminism, see Schultz, *Room to Maneuver (f)or a Room of One's Own? Practice Theory and Feminist Practice*, 14 LAW & SOC. INQUIRY 123, 127-134 (1989). Cf. Coombe, *supra* note 37, at 90, 111 (asserting that structures and systems have independent existences only inasmuch as they are analytic tools which render certain actions intelligible).

lar system, with invariant relationships and determinate regularities. In this context, social science could be imagined as a neutral technique to grasp the regularities that govern the operations of this object. Thus, the original law and society understanding employed a concept of science and scientific method that was modeled on prevailing views of how natural science worked.

It is no surprise that law and society initially accepted a positivist notion of social science.⁶³ This view of social knowledge was widespread in the social sciences in the 1950's and 1960's. Moreover, it was attractive to the legal academic culture. Post-Realist legal thought can be seen as a series of evasions, efforts to deny the normative crisis generated by Realism's deconstructive onslaughts. As Joseph Singer has pointed out, most post-Realist scholars sought some substitute for the normative authority of the lost doctrinal tradition.⁶⁴ Where legal process theorists offered neutral procedures as the answer, law and society promised objective knowledge produced by a positive science of society.

Positive science, like procedure, answers the question of normative thought by evading it. If society were a system obeying objective laws, and if positive science could identify those laws and unearth the social policies that were consistent with them, then policy formation would once again be grounded on a neutral and objective basis. While the idea of a positive science of society seems to us one of the most problematic features of the original understanding, it may have seemed particularly attractive to the lawyers of the Imperial epoch.

In recent years, many critics have questioned the positivist account of objectivity in social knowledge.⁶⁵ Some have sought to develop an alternative view, which I shall call "discursivity."⁶⁶ This view of the social disciplines starts with the recognition that social knowledge does not mirror an objective reality that is somehow "out there," but is instead part of the process through which social relations are formed and reformed. The understanding of social science as a discurs-

63. For a discussion of positivism in law and society, see Trubek & Esser, *supra* note 2 (discussing the continued hold of this mode of thought on the movement); Max Weber's *Tragic Modernism*, *supra* note 2 (a critique of positivism); *Where the Action Is*, *supra* note 2 (discussing positivism in law and society studies).

64. Singer, *supra* note 31, at 518-28.

65. For a general discussion of objectivism, see R. UNGER, *supra* note 38. See also Trubek & Esser, *supra* note 2, at 12-13.

66. I take the term "discursivity" from E. LACLAU & C. MOUFFE, *HEGEMONY AND SOCIAL-IST STRATEGY* 2-5 (1985). For a discussion of discursivity in law and society research, see *Handmaiden's Revenge*, *supra* note 2, at 133.

sive practice has begun to influence the social disciplines and to enter into the thinking of some law and society scholars.⁶⁷

To embrace discursivity is to recognize that social life is a network of relations invested with differentials of power. These relationships are constituted linguistically (or "discursively"): the very concepts we use to describe and explain society contribute to the constitution of social relations. As a result, we cannot separate our studies and understandings of social life from social life itself: as social "scientists," we cannot detach ourselves and our knowledges from society in the way astronomers separate themselves from the solar system. It follows that when we construct an account of society, we do not simply mirror social relations, but rather contribute either to their reproduction or transformation.

The recognition of discursivity changes our whole understanding of the relationship between law and the social disciplines. If social knowledge is discursive, it cannot produce unproblematic maps of social relations or uncontested, factually-based answers to questions of social policy. This recognition means that whatever social science *can* do for law, it *cannot* offer the objectivist grounding for legal policy for which Imperial jurists may have hoped. If legal culture accepts the critique of objectivism and the concept of discursive social knowledge, the original understanding will be drawn into question, and the nature and purpose of the alliance between law and the social disciplines will have to be reexamined.

C. Disengagement from Law and Politics

The third feature of the original understanding was the idea that law and society as a scholarly project should be disengaged from both legal doctrine and politics. At least *some* of the founders saw a need to make law and society an autonomous enterprise, disengaged from both the traditional pursuit of legal knowledge and direct programmatic involvement. This double disengagement was needed to carry out the original law and society research program: the application of the methods of positive science to the study of both society and law as systems.

Disengagement from law was also needed because studying "law" at the time meant the examination of doctrine and the interpretation of rules and texts. Law and society sought to constitute a different kind of "law" as the object of study—law as system and behavior would join law as doctrine and idea as legitimate objects for study. To

67. See Trubek & Esser, *supra* note 2, at 22-23.

accomplish this task, the movement had to disengage from academic law as then practiced. Disengagement from politics, at least provisionally, was also needed. Having adopted an objectivist concept of social knowledge, law and society needed to present itself as independent from and neutral towards any particular group interest or social vision. It sought knowledge of social laws and regularities which—it was thought—were independent of values and programs.

For those who accept discursivity, however, disengagement is both undesirable and ultimately impossible. If social knowledge constitutes rather than mirrors social relations, its producers have a responsibility for the social impact of the knowledges they construct. Moreover, in this view, social knowledge is inherently programmatic: if we are to understand society, we must imagine how it might be transformed.⁶⁸ Thus, it makes no sense to speak of the production of knowledge independent of projects that either reproduce or transform social life.

There are additional reasons to question disengagement today. The original rationale for it was both practical and epistemological. As we come to question its epistemological foundations, so should we interrogate its practical bases. These were founded in a perceived need to insulate a fledgling enterprise from the older doctrinal tradition in the law. Perhaps such protectionism was needed in the days when law and society was an infant industry. But much has changed since 1964. The law and society movement has taken hold in the academy. And legal academic culture has changed radically: the doctrinal tradition has crumbled, and eclectic policy science has become the norm, not the exception. We are all legal realists today.⁶⁹

D. Law as a Univocal Source of Normative Guidance

I have suggested that Imperial lawyers looked to science for normative guidance. Paradoxically, many law and society scholars viewed law as an unproblematic source of normative inspiration. Remember that a staple product of the early law and society movement was the gap study, a research project that took some understanding of the law as a normative starting point and then measured its impact or "penetration."⁷⁰

68. Roberto Unger has argued that it is impossible to divorce social knowledge from visions of how society should be organized. From this premise he concludes that "programmatic thought," or the reimagination of society, is an essential part of the social disciplines. See generally *SOCIAL THEORY*, *supra* note 59. For a summary of Unger's views, see Trubek, *Review Essay: Radical Theory and Programmatic Thought*, 95 AM. J. SOC. 447 (1989).

69. See Tushnet, *Post-Realist Legal Scholarship*, 1980 WIS. L. REV. 1383 (1980).

70. Sarat, *Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition*, 9 LEGAL STUD. F. 23, 24-30 (1985). See also Friedman, *Legal Culture and Social Development*, 4 LAW & SOC'Y REV. 29, 43 (1969).

This tendency to accept the law as a clear source of legitimate authority can be seen with stark clarity in the work of some "law and development" scholars. The law and development movement was a sort of export branch of Imperial legal culture. In the 1960's, American legal academics, encouraged by massive grants from foundations and government agencies, turned to the study of the role of law in Third World "development." Some law and society scholars participated in the law and development effort.⁷¹

The law and development movement took the value of modern law to be self evident. "Modern law" usually meant the codes or new statutory enactments which third world governments had imported from other, presumably more advanced, nations. Usually, these codes or statutes set forth norms that had little relation to everyday life in the countries of Africa, Asia, and Latin America. Law and development scholars assumed that adoption and implementation of these (often imported) modern laws marked development or progress.⁷² And they treated as a "problem" the fact that social relations in Third World countries did not conform to these newly enacted norms. This equation of legal standards with progress, and the definition of non-compliance as a problem, led these scholars to spend a considerable amount of time thinking about how we could develop a way to measure—and thus increase—the "penetration" of so-called modern law.⁷³

Compressed in that single word are a whole set of assumptions and attitudes that have come under attack. Critics have challenged the fol-

71. The law and development movement was created by legal reformers and legal academics, but it attracted law and society scholars as well. For a description and critique of the law and development movement from a law and society perspective, see Trubek & Galanter, *supra* note 46. The opportunity to develop theories about the role of law in social and economic development and to advise governments about the best way to restructure their legal systems attracted many American legal academics. See J. GARDNER, *supra* note 48. Some of the pioneers of the law and society movement wrote on law and development. See, e.g., M. GALANTER, *THE MODERNIZATION OF LAW IN MODERNIZATION* (1966); Friedman, *supra* note 70; Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1 (1972). Several of the "founders" participated in "law and development" projects: Stewart Macaulay, for example, spent a year in Chile working with the International Legal Center (ILC), a Ford Foundation offshoot set up to support "legal development"; Marc Galanter worked in India and with the ILC; I tried to "modernize" Brazilian legal education and chaired an ILC Committee on Law and Development Research which included Galanter, Macaulay, and Friedman. Law and development projects at major United States universities attracted law and society scholars: Richard Abel, William Felstiner, and I helped run the Yale Law School's Program in Law and Modernization, funded by the Agency for International Development (AID); Laura Nader, Marc Galanter, Barbara Yngvesson, and Donald Black all participated in that program; Lawrence Friedman helped direct a major "law and development" research project, also AID-funded, at Stanford Law School.

72. Cf. M. GALANTER, *supra* note 71. For a critical reassessment of the idea of legal development, see Trubek & Galanter, *supra* note 46.

73. Friedman, *supra* note 70, at 43.

lowing assumptions: that any body of law contains a single set of principles or rules whose impact can be unproblematically measured; that law emanates from some central source and then is implanted in society; that modern law (whatever that is) is normatively desirable or historically inevitable; and, finally, that the social scientific task of measuring "penetration" is a progressive task. It does not require much sophisticated feminist analysis to see how the use of the term "penetration" crystalized the hegemonizing, dominating, and patriarchal nature of imperial legal culture in the 1960's.

One of the most significant developments in American legal culture has been the questioning of the whole idea that law contains a univocal set of normative standards, whether of an explicit statutory or vaguer higher law nature, which can serve as an unproblematic guideline for social criticism and transformation. It is important to understand that Imperial Legal scholars from the very beginning must have understood—at some level—the questionable nature of this notion. The law and society movement, like all Post-Realist movements in legal thought, was an effort to evade the corrosive effect of Legal Realism's demolition of ideas of univocality and higher law. But this recognition was suppressed, and to some degree evaded, when the original law and society understanding was constructed in the 1960's.

In recent years, substantial bodies of scholarship, including critical legal studies, feminist critiques of law, and critical race theory, have brought to light the complex and contradictory nature of legal doctrine, thus undermining the idea of univocality.⁷⁴ These studies show that legal doctrine contains alternative normative strands which suggest very different social visions. Moreover, this newer scholarship has often directly reversed the Imperial Age practice of criticizing society using legal principles as standards; thus, for example, much of feminist analysis employs normative models of gender equality and difference to critique legal ideas and institutions which support and express patriarchal values and relationships.⁷⁵

74. For an excellent introduction to this form of analysis, see Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U.L. REV. 195 (1987). See also R. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). This mode of analysis was not unknown to the founders of law and society. See Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, The Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1056-69 (1966).

75. Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 85 COLUM. L. REV. 1118 (1986); Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 LAW & SOC. INQUIRY 289 (1989); Minow, *Supreme Court, October 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

E. *The Progressive Nature of Law and Society Knowledge*

The architects of the law and society movement wanted to create a field or discipline that was disengaged from politics. Yet they were confident that this project would contribute to the progressive political agenda that they and other academic liberals of the Imperial Age favored. Of all the contradictions of the original law and society understanding, this idea that liberal values would be automatically fostered by a neutral science of law in society seems to be the most perplexing. Yet it was a central, albeit unarticulated, premise of a significant portion of the the work produced in the formative period of the law and society movement.

The Imperial Age was dominated by three major reform impulses that took hold within the American establishment: (1) the rights explosion led by the Warren Court; (2) the civil rights efforts of the Kennedy and Johnson Administrations; and (3) the War on Poverty and other Great Society programs designed to increase economic opportunity. A review of the early volumes of the *Law and Society Review* confirms the extent to which the research conducted and the results reported were thought to advance the liberal legal agenda of the day. The contents of these issues can be reduced to two basic categories: Writings designed to establish law and society as an authoritative discourse grounded in objective methods and the existence of basic and universal regularities in society; and writings which used the newly won authority and voice of law and society scholarship to identify obstacles, barriers, and resistances to a liberal political agenda which, although never explicitly thematized or justified, was accepted as desirable and realizable.⁷⁶

76. A systematic review of the first five volumes of the *Law and Society Review* reveals the following. Five articles take decisions of the Warren Court as normative standards and seek to advance the values they appear to enshrine by some form of "gap study"; e.g., Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15 (1967). Six articles deal explicitly with Great Society Programs, deploying "scientific" knowledge in ways that are clearly designed to foster or improve activities such as legal services to the poor, welfare, and urban renewal; e.g., Hannon, *The Leadership Problem in the Legal Services Program*, 4 LAW & SOC'Y REV. 235 (1969). A third set of studies in these first five volumes deals with other projects on the liberal agenda of the time, such as reforming the insanity defense and child custody adjudication; e.g., Arens, *The Durham Rule in Action: Judicial Psychiatry and Psychiatric Justice*, 1 LAW & SOC'Y REV. 41 (1967); Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication: An Effort to Rely on Social Science Data in Formulating Legal Policies*, 4 LAW & SOC'Y REV. 167 (1969). The remaining articles in these early volumes can be grouped into three basic categories: (1) methodological essays designed to disseminate standard sociological methods to law and society scholars, thus ensuring the scientificity of the work the movement aspired to produce; e.g., Lempert, *Strategies of Research Design in the Legal Impact Study: The Control of Plausible Rival Hypotheses*, 1 LAW & SOC'Y REV. 111

Needless to say, events in law and politics have overtaken this naive equation of neutral, objective science with progressive politics. In the legal academy a competing academic project—law and economics—has arisen. This movement, presented as an objective social science, rests on a more conservative political agenda. Law and economics' efforts have proven more successful in legal culture than the more hesitant efforts of law and society scholars to merge science and progressive politics. In the world of national politics, the liberal coalition has collapsed and liberal self-confidence has been sapped. We have learned that many of the bold pronouncements and commitments of the 1960's were largely symbolic. Many were never implemented, despite the countless gap studies. Law and society scholars began to learn that it takes more than a study to close the gap between promise and fulfillment in American life.

Confronting Contradiction: Denouncing the System While Working Within It

At a recent conference on civil rights, we heard social scientists describe the worsening condition of blacks and other minorities in the United States, and legal scholars denounce the courts for eviscerating many of the statutes and constitutional precedents that had come out of the civil rights struggles of the 1960's. Some suggested that racism is structurally necessary for the maintenance of the status quo in the United States and that the law was being reshaped to preserve the inner structure of racism while preserving the appearance of equality for all—no one demurred. Yet even those who saw racism as structural and the law as available to preserve racism, argued for continued efforts in the courts and the legislatures to enhance equality.

Musing on this, I recalled the words of an Asian-American legal scholar who was a participant in this conference. Mari Matsuda wrote: "[The] . . . message . . . that legal ideals are manipulable and that law serves to legitimate existing maldistributions of wealth and power . . . rings true for anyone who has experienced life in non-white America."⁷⁷ But she also said that "[t]he dissonance of

*combining deep criticism of law with an aspirational vision of law is part of the experience of people of color."*⁷⁸

V. POST-IMPERIAL LEGAL CULTURE

We now live in a Post-Imperial Age. The main difference between the legal culture of our day and the epoch in which the law and society idea took shape and the "original understanding" was formed is not the disappearance of all the ideas that dominated legal culture in the Imperial Era, but the fact that they are no longer hegemonic.⁷⁹

In this part of the Essay, I shall describe developments in academic legal culture which could prefigure a change in legal consciousness. As the power of Imperial legal culture has waned, new ways of thinking about law have become possible.⁸⁰ As a result, we can speak of an emerging "countervision." This countervision, though, has not led to a new "understanding," let alone generated a new "paradigm." It is still more the rejection of prevailing ideas from the Imperial Age than an alternative conceptualization of law, society, and scholarship.⁸¹ Nonetheless, it could be a starting point.

78. *Id.* at 333.

79. To be sure, there are many voices in the contemporary legal academy who seem to champion some revised version of the Imperial idea. One can see elements of that vision in B. ACKERMAN, *supra* note 43, which calls for a new alliance between law and social science. Traces of the idea may also be found in the program the new Dean of Harvard Law School has outlined for that institution. See Carter, *At Harvard Law, A New Era Dawns*, 11 Nat'l L.J., Aug. 7, 1989, at 1, col. 1.

80. One could see Imperial legal culture as an intellectual project that is beginning to collapse under its own weight. It was really an effort to hold on to an Enlightenment notion of Reason as a directive force in social life at a time when the foundations of that idea were already crumbling. Mid-century American jurists engaged in several efforts to reconstitute the idea of law as objective Reason in the face of critical onslaughts. See Boyle, *supra* note 39; Peller, *supra* note 32; Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REF. 561 (1988); Singer, *supra* note 31. In the original law and society understanding we can see the traces of one such effort. It united two different notions of objective reason in the hope that the flaws of each would be cured by the strengths of the other. Late 19th century American legal thought had founded its legitimacy on the immanent reason of legal doctrine itself: this foundation was undermined by the Realist critique. To reconstitute the authority of legal scholarship, the Imperial Jurists turned to science to buttress law's claims to objectivity. They knew, though, that science was not sufficient, because they saw science as incapable of generating normative conclusions. This paradox is that of the Imperial Jurists' version of the law-social science alliance, and why I have called this project a "marriage of convenience." It proposed to wed a higher law tradition in which no one really believed and a practice of positive science many realized could not generate final answers.

81. This countervision can be found in numerous sources. It is present in some of the critical work being done by law and society scholars, as well in the work of scholars who identify with movements such as feminist jurisprudence, critical legal studies, and critical race theory. For a discussion of critical studies by law and society, see Trubek & Esser, *supra* note 2, and *Handmaiden's Revenge*, *supra* note 2.

(1966); (2) programmatic essays which seek to establish law and society as a field by discussing the questions it should address, the concepts it should use, and the objects it should study; e.g., Handler, *Field Research Strategies in Urban Legal Studies*, 5 LAW & SOC'Y REV. 345 (1971); and (3) anthropological studies which use cross-cultural research to support the idea of universal laws and regularities governing the relationship of "legal" institutions and society; e.g., Count-Van Manen, *A Deviant Case of Deviance: Singapore*, 5 LAW & SOC'Y REV. 389 (1971); Massell, *Law as an Instrument of Revolutionary Change in a Traditional Milieu: The Case of Soviet Central Asia*, 2 LAW & SOC'Y REV. 179 (1968).

77. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 327 (1987).

A. *The Emergent Countervision*

Where the Imperial Jurists thought law could be easily and consciously deployed as the instrument of a unified and transformative will, some today see law as fragile, contradictory, fragmentary, and dispersed. Where Imperial legal culture was objectivist, positing that scholarship could point toward a "correct" answer to legal questions, the countervision accepts discursivity and recognizes that scholarship is an arena of struggle in which various visions compete. Where Imperial lawyers saw clear distinctions between law and society, knowledge and politics, an authoritative normative tradition and (sometimes) recalcitrant social structures, those who embrace the countervision blur these distinctions, recognize contradiction, and seek to cope with a complex and contradictory situation.

1. *Law as Fragile*

As the result of over two decades of gap studies, impact studies, and implementation research, we have come to doubt the independent power of law to reshape social arrangements. The law and society movement has helped us see the fragility of law's grasp on social life.⁸² Laws are rarely clearcut, so that while "law" may be thought of as the command of the sovereign, it is often damn hard to figure out just what the sovereign wants! More importantly, the resistances to messages encoded in law are often incredibly powerful. Even when new laws seem relatively clear, those who work with these laws on a day-to-day basis find the message diluted, if not reversed, by interpretative struggles, outright denial, and avoidance. It is this sense of fragility that gives the Post-Imperial Jurist her sense of marginality.

2. *A Contradictory, Multi-vocal, Normative Tradition*

It turns out that the sovereign more often than not speaks with a forked tongue. While the Critical Legal Studies movement has done

82. Thus one of the most important aspects of the emergent countervision rests on the recognition of law's marginality. Where the Imperial scholars saw law as a central and controlling force in society—a force which was at the same time a repository of Reason and a source of Will—many contemporary legal scholars have recognized the precarious hold that law has on social relations. Much of the credit for this realization can be given to law and society scholarship. Ironically, the recognition of marginality is itself a result of the "gap study" project, one which documented the pervasive and substantial distance between legal pronouncement and social behavior. See *supra* note 76 and the sources cited therein. What started as an effort to strengthen law as hegemonic Will became the source of doubts about law's ability to shape social relations and of insights into law's dependence on complex networks of social relationships.

more than anyone to document and explain the normative contradictions embedded in most complex bodies of legal doctrine, many Post-Imperial lawyers understand—at some level—that there are always competing precedents, alternative interpretations, and radically different social visions in our legal tradition. At least since Duncan Kennedy demonstrated how private law doctrine oscillates between rules and standards, formality and informality, and individualist and altruist visions of law and society, we have been forced to recognize the complex and contradictory nature of American law.⁸³

The reasons given for this fact, and the ideas people have about what to do with or about it, are varied. Some, longing for an imagined past in which law was univocal, might seek newer and better interpretive methods which would fix legal meaning once and for all. But others revel in the openness and play which contradiction permits. For those of this persuasion, the fluidity of law is not a problem to be solved, but an opportunity to be seized. Thus, for example, Roberto Unger and others in the Critical Legal Studies tradition find in this situation opportunities for radical scholarship and practice. They call for "deviationist" doctrinal work in which alternative readings of the legal tradition are to be produced in an effort to further alternative moral visions and political projects.⁸⁴

3. *Legal Culture as Fragmentary*

The more that post-modernist ideas advance within legal culture, the more we begin to see law not as a set of determinate commands, or even as contradictory-yet-structured sets of rules, principles, and visions, but rather as a series of fragments which are deployed though a wide range of localized processes or practices. It is no accident that legal culture is beginning to pay attention to what anthropologists call "practice theory," a body of thought that sees culture as bits and pieces of myth, metaphor, and idea which are deployed in moments of practice.⁸⁵ This anthropological vision fits very well with the contem-

83. Kennedy, *supra* note 74, *passim*. See also R. UNGER, *supra* note 30; Gordon, *supra* note 74.

84. R. UNGER, *supra* note 30, at 15-22; Gordon, *supra* note 74, at 198-201. Other more resolutely post-modern legal scholars want to keep any fixity at bay by simply deconstructing all interpretations. See, e.g., Kennedy, *A Rotation in Contemporary Legal Scholarship*, in CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE 353 (Joerges & Trubek eds. 1989); Kennedy, *Spring Break*, 63 TEX. L. REV. 1377 (1985); Kennedy, *The Turn to Interpretation*, 58 S. CAL. L. REV. 251 (1985).

85. For an application of practice theory to legal studies, see Coombe, *supra* note 37, at 111-21.

porary jurists' understanding of the phenomenology of legal decision-making.⁸⁶

4. *Law and Legal Ideology Dispersed in Society*

Imperial Jurists saw law as powerful, univocal, and ultimately coherent. At the same time, they imagined law as a unified system made up of a hierarchy of constitutional norms, statutory rules, judicial interpretations, and common law principles. The law, in short, was the law. Not only has Post-Imperial legal culture questioned law's power, univocality, and coherence, it also has come to see law as dispersed throughout social life.⁸⁷ We see this view in the notion of law as ideology, now a major subject for investigation by law and society scholars.⁸⁸ When we conceive of law as ideology, we understand that law may affect social life not by the imposition of a transformative Will, but by reinforcing widely-held notions of what is possible or imaginable. Law as ideology is not necessarily just on the books or in "action": it is everywhere in social life where action is imagined or not imagined, taken or not taken.

The view of law as "dispersed" reframes the question of the power of law. If the law reflects and reinforces ideologies that emanate from many sources, then it may not be a powerful tool to change society—as the Imperial Jurists imagined—but may rather have a powerful grip on society.

The question of whether law is a straitjacket, or just another complex and contradictory arena for struggle, depends on how we see

86. See Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986). Practice theory has much in common with the concept of "bricolage" used by critical legal scholars to describe the complexity and multiplicity of legal activity while acknowledging its indeterminacy. (Roughly translated, a *bricoleur* is a handyman, artisan, or do-it-yourselfer.) The concept, appropriated from structural anthropology, see C. LEVI-STRAUSS, *THE SAVAGE MIND* (1966), describes the creation of social reality as shaped by both subjective intent and the constraints of circumstance. Boyle, *supra* note 39, at 780 n.270. Duncan Kennedy uses the concept of "bricolage" to describe the view that there is no internal coherence or logic to legal ideology; that multiple, institutionally specific structures within legal doctrine exist, but none are determinate. See Kennedy, *Critical Legal Studies in the Work of the Amherst Seminar 10-11* (1987) (unpublished manuscript, on file with author). The ways in which legal actors work within the system and put together available materials as *bricoleurs* can be understood through an account of the specific local practices and discourses which both constrain and free the actor. See Kennedy, *Freedom & Constraint*, *supra*. Cf. Coombe, *supra* note 37, at 71, 119 (positing that specific local practices must be examined in a broader societal context that includes genealogical accounts of the local production of knowledge).

87. I do not simply refer to ideas like Eugen Ehrlich's famous "living law," the idea of a local and customary law more powerful than statutes and codes. E. EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (1936). These ideas have been with us for a long time, although the law and society movement did a lot to bring Ehrlich's insights into mainstream American legal culture.

88. A recent issue of the *Law and Society Review* was devoted to this topic. See *Special Issue: Law and Ideology*, 22 LAW & SOC'Y REV. (1988).

power and ideology. While from some perspectives the ideological view of law makes it seem like a solid bulwark for the status quo, the law seems open and manipulable from others. This latter view is the message of "practice theory." If law, albeit ideological, is neither unified nor structured, and if our legal culture is a series of fragments whose significance is determined through multiple, often low level, and frequently local practices of interpretation and decision, then attention naturally turns to the many sites and moments of practice, and the opportunities for transformative action they provide.

5. *Law and Legal Scholarship as Arenas of Struggle*

The idea that both law and legal scholarship are "arenas of struggle" appears in the literatures of Post-Imperial legal culture and is a central feature of the emerging countervision. Even if they have abandoned the Imperial epoch's vision of law as a univocal source of progressive values and a privileged instrument for social change, those who embrace this vision have not given up on law as a site for transformative action. These anti-Imperial Scholars still believe that law makes a difference and that struggles in and about the law are worthwhile. But they have no illusions that the law contains immanent principles of freedom and equality which can and will be worked pure, thus guaranteeing emancipation. On the contrary, they expect and often find in the law strands of the same racism, sexism, and elitism that they are struggling against in social life.⁸⁹ Yet at the same time, many do not see in the law a rigid structure of oppression, hierarchy, and domination. Because the law is fragile, contradictory, fragmented, and dispersed, it guarantees nothing. But, by the same token, nothing is impossible. Victories in law do not necessarily lead to changes elsewhere, but they are victories all the same.

6. *Living in the Contradiction*

Those who see law as fragile, contradictory, fragmentary, and dispersed have blurred the clean lines between law and society that marked Imperial legal culture and influenced the original understanding. Further, they have obscured the distinction between the construction of social knowledge and the transformation of society. Some may see these people as confused and muddle-headed, but I do not. The emerging countervision is a way of living with, and taking advantage

89. D. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); C. MACKINNON, *FEMINISM UNMODIFIED* (1987); Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 (1989) (minority feminist scholarship).

of, a series of contradictions that exist in our culture. We live in a society that believes in law and whose legal tradition contains many progressive values. We live in a society that believes in the power of knowledge and the authority of scholarship. At the same time, ours is a society in which hierarchies of class, race, and gender persist and influence the operations of the law and the production of scholarship. For those scholars who embrace progressive values and grasp the contradictions in our society, there is room for maneuver. Legal doctrine can be deployed for normative argument, legal studies can foster progressive visions, legal victories can advance worthy causes. But everything is partial, tentative, and limited. Imperial Jurists might denounce this stance as hesitant and confused, but then look what a mess they have left us!

B. *Post-Imperial Academic Projects in Law*

Anyone who surveys the current legal academic scene must note the degree to which competing moral and social visions animate academic law. These visions underlie and energize the competing schools that have emerged in the normative vacuum created by the decline of the hegemony of Imperial legal culture. Whereas legal scholarship once seemed all of a piece, numerous self-proclaimed movements in legal thought today are organized more or less as "projects," much as the law and society movement is organized.

One of the reasons that I call the current movement in legal culture "Post-Imperial" is that it has allowed the emergence of varied projects of this kind. A complete catalogue would require an article in itself. Some are familiar: law and economics, critical legal studies, and feminist jurisprudence are well known. However, even these movements are far from unified; within each there are competing tendencies and divergent strands. Moreover, there are other emerging groups, such as the critical race theory movement founded in 1989.⁹⁰ This proliferation of scholarly projects gives contemporary academic law its sense of vitality and movement.⁹¹

90. The Critical Race Theory Workshop, a thriving project which originated at the University of Wisconsin (July 1989), brings together new work of minority legal scholars in the critical tradition. These scholars seek to develop a medium for people of color to think, write, and challenge from their experiences of racism and the politics of exclusion.

91. They also have caused alarm in the bar. Lawyers have expressed concern over the "academization" of the law schools. They may fear either that the new movements are irrelevant—because they employ sophisticated forms of academic discourse from economics to post-structuralism unfamiliar to practitioners—or too relevant because at least some challenge the role of law and lawyers in our society. See Middleton, *Legal Scholarship: Is It Irrelevant?*, 11 Nat'l L.J., Jan. 9, 1989, at 1, col. 2.

The Law and Society Association was the first of these "academic projects" in the law. It sought to create a new object for legal scholarship and to employ new methods in the study of law. It sought authority within the legal field on the explicit grounds of the objectivity of science and the utility of its knowledges. But at the same time, it gained added legitimacy because of its tacit alliance with those who furthered the progressive legal reform agendas of the Imperial Age: the civil rights movement, the War on Poverty, the Warren Court's rights revolution.

The current academic scene presents challenges to the law and society movement and requires it to rethink the rationale for its activities. To the extent that law and society scholarship rests on objectivist claims, it is challenged by movements in legal studies like law and economics. The latter movement has taken on the mantle of science and objectivism, while tacitly giving support to neo-conservative ideas that are currently much in vogue in American culture. This form of legal scholarship finds support from elite lawyers, conservative university administrators, and New Right publicists and foundations. Perhaps as a result of its double commitment to objectivism and conservative views on society, law and economics has had more success colonizing the legal academy than the law and society movement ever did.

On the other hand, critical legal studies, feminist jurisprudence, and critical race theory have seized the flag of progressive politics. These movements combine an explicit commitment to a more radical social vision with sophisticated use of social theory. They have analysed and critiqued the role of law in American society, seeking to show how the law works to preserve race, class, and gender hierarchies.⁹²

Social Scientists Reflect on Law Schools

Recently, I organized a session for the Law and Social Science Section of the Association of American Law Schools. The topic was "Can Social Scientists Survive in Law Schools?" The panel included social scientists who teach in major law schools and have championed the use of social science in legal education and scholarship. I asked each to talk about their own experiences in law schools: I expected most to be upbeat but some to be critical. To my surprise, no one told a really favorable story. All agreed that social scientists could "survive" in the legal academy, but only by a series of adaptive measures that threatened to undermine the original

92. The progressive movements are more marginal than law and economics, but they have found support from a variety of people, including law students, public-interest lawyers, and people in social movements.

purpose of the alliance of law and social science. They suggested that if social scientists could demonstrate mastery of traditional doctrinal fields and provide information useful to lawyers in practice, they would be successful law teachers. But these social scientists agreed that it was much harder to introduce critical insights about law drawn from the social disciplines or to get students to think critically and holistically about the role of law in society. One panelist—who has taught in a major law school for 25 years—said the real question was whether social science could “prosper” in the law school.

One member of the audience recounted an unsuccessful effort to teach the anthropology of law to JD students. After a class in which they had discussed forms of dispute resolution in an African tribe, a student said to her: “Look, professor, I know I’m never going to represent the Nuer, so why I should learn about them?” Most of us felt a shock of recognition: we each could tell similar stories. We thought: that student’s narrow vision contains the whole history of law and society in law schools. We sympathized with the professor. But a few wondered: Why do we care about the Nuer?

VI. LAW AND SOCIETY: BACK TO THE FUTURE?

Perhaps the original law and society understanding is fading, but the “law and society idea” remains. The movement has succeeded in reconceptualizing law as a domain for social inquiry. More people are using the social disciplines in the study of law than ever before. As a result, the Law and Society Association has grown and has inspired similar enterprises in other countries.

Nonetheless, the movement faces difficult choices. The tacit union of objectivist knowledge and progressive politics has come unstuck. No clear alternative has emerged. Efforts to rethink the original understanding have given law and society scholarship some of its recent energy, but the critical effort seems to have reached a sticking point. Even the boldest voices within the movement hesitate to abandon objectivism fully and embrace discursivity. Even more radical law and society scholars hesitate to forge alliances with progressive movements in academic law: the power of old paradigms and old alliances seems strong. There is a fear of going too far. In this part I shall comment on the revisionary effort, analyze the “sticking point,” and suggest one path the movement might take.

A. Vitality

It is important at the start to recognize that the movement remains active and vital. Something holds it together and generates continued investments of scholarly energy in the enterprise. Viewed in the light

of the resistance which law and society has encountered, and the disappointments it has experienced, this continued energy and persistent investment is a sign of hope.

Of course, energy and continued investment do not necessarily prove the movement has a future. They could reflect nostalgia for a past in which the movement was smaller and there were fewer doubts about the purpose of the enterprise.⁹³ They could be the result of fear of the future and a desperate search for community.⁹⁴

Yet the law and society movement and its Association seem to be something more than a club for veterans of past academic wars or a *salon des refuses*. The pioneers did accomplish something lasting. It is no small achievement to have constituted a new object of inquiry in legal studies, legitimating exploration of law as structure, system, and behavior. It was a major accomplishment to open legal studies to professional social scientists. And it was no mean feat for a basically liberal movement of social science intellectuals to gain a foothold in the generally anti-intellectual and often politically conservative environment of the American law school. There was, indeed, a lot to celebrate at the twenty-fifth anniversary party.

B. Tentative Steps at Revision: “Critical Empiricism”

Nostalgia, however, is not enough. The movement must go forward, and that means challenging the past as well as celebrating it. This work is well underway: law and society scholars have already begun to rethink the original understanding and develop new ways to continue fruitful investigations of law as a social phenomenon. Lawyers and social scientists are rethinking their own practices and discovering new reasons to work together. This Essay, which culminates a series of studies of this nature, is such an effort.⁹⁵ But the most sustained collective endeavor of this type is the project carried out largely by scholars associated with the Amherst Seminar on Legal Process

93. As the opening story suggests, nostalgia is an important aspect of the law and society movement. In part, it may simply reflect the aging process: almost all the pioneers of law and society are still active, but many are now in their 50's and 60's and naturally want to look back with satisfaction on their past efforts.

94. One of the few things that all law and society scholars have in common is the feeling that they are marginal *somewhere else*. While law has been accepted as a legitimate object of study in many social disciplines, the practitioners of these sub-specialties (e.g., anthropology of law, history of law, public law, psychology of law, sociology of law) are rarely treated as central actors in their parent disciplines. At the same time, the small group of law and society devotees in law schools find themselves caught between the narrow professionalism that has always hindered their progress, and the adepts of the newer academic projects which seem to be gaining converts and attracting the younger generation.

95. See *supra* note 2 and sources cited therein.

and Legal Ideology: John Esser and I have dubbed this effort "critical empiricism."⁹⁶

The "critical empiricists" have challenged major aspects of the original understanding. They recognize the discursive nature of socio-legal knowledge, question the use of law as a standard for normative critique, and show how law and society research has at times legitimated dubious policies. But this partial critique of the original understanding reflects some hesitations, and the project is marked by some contradictions.

The first contradiction is between a recognition of discursivity and an apparent desire for disengagement. One can find the same people arguing that social knowledge constructs the world and that law and society scholarship should become even more disengaged from policy concerns than it is now.⁹⁷ The second contradiction is between the appropriation of post-structuralist ideas like anthropological "practice theory" and the continued search for structural causes and systemic explanations. Thus, one can find in the work of the Amherst Seminar both the view that legal and social life are constructed through numerous local and *ad hoc* practices or processes,⁹⁸ and a faith that socio-legal knowledge can unearth the deep "structural" or material causes of behavior.⁹⁹

In addition to these intellectual tensions, the critical scholars in the law and society movement are ambivalent about the relationship between their project and critical movements in the legal academy. The law and society movement has paid attention to critical legal studies, feminist jurisprudence, and critical race theory. Work from these traditions is cited, and people associated with these movements participate in the work of the Law and Society Association. At the same time, some law and society scholars have distanced themselves from the radical movements in legal studies: this distancing is most clearly apparent in the stance many take toward Critical Legal Studies.¹⁰⁰

96. Trubek & Esser, *supra* note 2, at 4.

97. This can be seen in the work of Austin Sarat and Susan Silbey. Compare Sarat & Silbey, *Critical Traditions in Law and Society Research*, 21 LAW & SOC'Y REV. 165 (1987) (asserting that true understanding will come about only through involvement with and study of new social environments) with *Policy Audience*, *supra* note 54 (arguing for an increased distancing from social policy). Henrick Hartog has drawn attention to this conflict in the work of the Amherst group. See Hartog, *The End(s) of Critical Empiricism*, 14 LAW & SOC. INQUIRY 53, 56 (1989).

98. Harrington & Yngvesson, *Interpretive Sociolegal Research*, 15 LAW & SOC. INQUIRY 135 (1990).

99. Brigham & Harrington, *Realism and Its Consequences: An Inquiry into Contemporary Sociological Research*, 17 INT'L J. SOC. L. 41, 55-57 (1989). See also HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* (1985).

100. For a discussion of the ambivalent relationship between the critical empiricists and CLS, see Trubek & Esser, *supra* note 2, at 31-34.

C. *The Sticking Point: Objectivism and Disciplinary Competence*

While some critical empiricists are ready to jettison some of the elements of the original understanding altogether, many have hesitated to abandon fully three ideas: (1) that social structures are governed by regular laws; (2) that some form of certifiable knowledge of society is possible; and (3) that law and society work should be disengaged from moral aspirations and political commitment.

Behind these hesitations I think we can find a single sticking point—namely the unwillingness to abandon *some form* of objectivism. What explains this reluctance? It seems to me that this sticking point has emerged because objectivism has been the main argument supporting social science's claim to authority within the legal field. Law and society scholars have invested a lot in the claim that they can provide certifiable knowledge that legal scholarship needs but that lawyers cannot get on their own. This epistemological faith legitimates social science within legal discourse and gives social scientists a claim to exclusive jurisdiction over a legally relevant area of knowledge.

Having fought so hard to constitute an object of legitimate legal knowledge to which only they can speak, law and society scholars are loath to give it up. The movement has succeeded in changing legal culture to the point where the legal academy accepts the importance of studying law as a system or a reflection of social structure, as purposive instrument, or as patterned behavior. And the movement has secured support for the view that those with professional social science credentials (and a few self-taught lawyers allowed into the club on sufferance) have privileged access to these new domains of legal knowledge. Because the social scientists' claims were based on the certifiable nature of the knowledge they would produce, abandoning objectivism might be giving up professional jurisdiction.¹⁰¹

This fear is not idle. Law and society's success in constituting new objects of inquiry is fragile: legal culture is constantly pulled back toward doctrine and policy and away from structure and behavior. I think the critical empiricists know that it is possible to retain the newly constructed objects of legal knowledge while abandoning objectivism. But they may fear that the law schools will not accept this divorce of systemicity and objectivism, so that if they express doubts about objectivism, they will undermine legal interest in the new objects of study.

101. For a discussion of how professions construct claims to exclusive jurisdiction over areas of knowledge or practice, see generally A. ABBOT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* (1988).

These fears, and the hesitations they may explain, are not unfounded. But there is an irony and a danger to the continued search for grounded knowledge. Objectivism and the idea of disengagement which seems to accompany it are two-edged swords for the law and society movement. They may seem to be a way to preserve the social scientist's exclusive jurisdiction over the newer objects of knowledge, but it is unclear that this strategy will work. Law and society scholars will find themselves confronting law and economics which also rests its claim on objectivism and has simpler, more agreeable stories to tell lawyers. On the other hand, objectivism and disengagement will segregate law and society from the progressive academic projects in law. Adepts of these movements all accept the importance of studying law as structure and behavior, but most see social knowledge as discursive and scorn disengagement.¹⁰²

D. *Back to the Future?*

What I have called the original law and society "understanding" is losing its grip. It is no longer the exclusive, nor even the dominant, vision within the movement. There is no reason why a new understanding cannot be developed and the movement's role in legal studies redefined for the 1990's and beyond. The law and society idea can be reconstructed, law and society scholars' claims to competence in legal studies redefined, and the Association and other support institutions reoriented accordingly.

One path that could be taken would turn the movement more systematically towards critical evaluation of the role of law in American society and the development of projects and programs that would empower the disadvantaged in our society and place us on a trajectory

102. Because epistemological issues are related to questions of professional and institutional competence, they overlap with some of the institutional questions which divide the movement. Many scholars believe that if law and society scholarship is to secure more authority in American culture, it must clarify its audience and secure its academic base. But there is no agreement on how this security could be accomplished or what paths are likely to work. Some see the law schools as the logical base, and the legal profession as the primary audience. Others reject this approach, arguing that law and society scholars can survive within the law schools only by accepting the role of a technical handmaiden in the administration of justice, or even by "going native" and becoming quasi-lawyers. Disillusioned with legal education and the narrow professionalism of law students and most law faculties, they have suggested that the movement find its base in interdisciplinary centers or departments of legal studies. Granted, this idea is attractive. But while there has been some movement in this direction, it is unlikely that many colleges or universities will provide the needed support, because they remain unclear about what kinds of students such centers would train and uncertain that the scholarship produced in such venues would command respect within the legal field. Those who try to chart the movement's institutional future find themselves between a rock and a hard place.

towards more fundamental social change.¹⁰³ Such a move would facilitate closer relations between the law and society movement and lawyers and legal scholars who are working in this direction.¹⁰⁴ It would restore the original alliance between law and society scholarship and progressive politics.

1. *Reversing Field*

I would find such a move welcome. But for this alliance to occur, it would be necessary to complete the revision of the original understanding begun by the critical empiricists. To accomplish that, we should "reverse field"—that is, go back to the original understanding and complete the revision of its elements. This reconstruction would preserve the original object of inquiry which law and society created and would maintain social science's claim to competence—although not to a sphere of exclusive jurisdiction—in the legal field. But the reconstruction would configure the objects in ways that are more compatible with the emerging legal countervision, thus facilitating an alliance between progressive social thinkers in law and like-minded folks in law and society. Reversing field, in this sense, means making five basic moves.

(a) *From Closed to Open Systems*

The basic idea that both law and society should be thought of as systems is an enduring insight onto which we should hold. But we first have to transform our understanding of what a "system" is by recognizing the open and potentially malleable nature of social systems.

(b) *From Positive to Discursive Science*

Some think that the very label "science" is a trap and should be jettisoned. It implies an epistemological rupture between specialized and ordinary knowledge. This label carries with it the aura of objectivism and determinist laws of social life. Sometimes I worry about such matters, but most of the time I do not. (A rose by any other

103. These objectives would parallel the aspirations of the "new" public interest law. See L. Trubek, *Critical Lawyering: An Outline of the "New" Public Interest Law*, Center for Public Representation Policy Paper, Jan. 1990 (available from the Center for Public Representation, Madison, WI).

104. Moves toward an alliance between law and society and critical academic movements (e.g., feminist legal theory, critical legal studies, critical race theory) are already underway, suggesting that the path suggested may be adopted. Of course, I do not expect swift or dramatic change. The movement will continue to be, as it has been in the past, eclectic and tolerant of many voices; the Association, as it should, will remain open to all who want to affiliate.

name, etc.) I recognize that many of the techniques and methods that we have developed in our quest for objectivity are useful and important even for those who recognize the socially constructed nature of the knowledges we produce: not making it up; not taking one event as evidence of a trend; demanding intersubjective validation, etc. I want to hold onto much of the tradition of empirical study of law and think the law and society movement is worth preserving for that reason alone. I just want us to explicitly acknowledge the responsibility we have for the knowledge we chose to produce and the uses to which it is put.

(c) From Disengagement to Social Responsibility

I want us to stop thinking of ourselves as white-coated experts who command a specialized and purer knowledge which we produce for no end except the truth, and to recognize that we are moral and political actors engaged in a process of social transformation and struggle. I want us to acknowledge our visions and commitments openly and to bear the individual and collective responsibility such acknowledgement entails.

(d) From Legal Hegemony to Moral Democracy

I want the movement to abandon its naive faith in law as a source of normative guidance. I want us to recognize that social visions are the source of our deepest personal identity and meaning, and that as citizens and scholars we must struggle to realize those visions we individually and collectively accept. I would like to see normative debate become an open and central aspect of our collective interactions.

(e) From Tacit to Open Commitment

It is my view that law and society has always been a transformative political project. It has identified with the dispossessed and the marginal in American life. It has recognized that America harbors racism, sexism, and elitism. It has favored civil rights, supported efforts to eradicate poverty, and challenged patriarchal relationships. It has tried, at times, to speak for those marginal groups and interests in our society who lack a voice in the "higher" culture of law and social science. I want us to continue this advocacy, but forcefully and more openly. I want us to continue to speak out, but to do so in a more assertive and different voice.

2. Conclusion

When it started, law and society presented itself as pursuing objective knowledge while also seeking to support progressive reforms in

the law. When the movement's message was progressive, it spoke to many in the law. But when the movement moved away from the liberal agenda and continued the search for objective knowledge for its own sake, its voice became abstract and disembodied. It lost its appeal to many of the bolder minds in law and the social sciences. We began to talk about the Nuer in a vacuum. Today, we have a chance to redefine our role and recreate the alliance with progressive groups in both the academy and the society. There is renewed interest in issues of racism, sexism, and poverty in American society. There is a resurgence of hope for the pursuit of social change in the law. There is talk of a "new" public interest law. These are things about which the law and society movement has traditionally spoken. It is time to go back to the future.