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# FROM REALISM TO CRITICAL LEGAL STUDIES: A TRUNCATED INTELLECTUAL HISTORY

Ninth Annual Roy R. Ray Lecture\*

by

G. Edward White\*\*

## INTRODUCTION: REASSESSING INFLUENCE

**I**N the 1930s a school of literary criticism surfaced that emphasized the influence certain writers had on later writers. Shakespeare, it was claimed, influenced Melville; Hawthorne influenced the early writings of Henry James, and so on. The image furthered by this critical attitude was that of a writer reading passages from previous writers and incorporating their language, their tone, their sentence structure, or their metaphors into his or her own writing. Living writers to whom the theory was applied resolutely denied being so influenced, but their denials were not taken seriously, either because of the maxim that no writer likes to admit not being wholly original and unique or because the influence could be recharacterized as unconscious.<sup>1</sup>

Influence is now perceived to be a more complex and subtle phenomenon than the 1930s scholars assumed. In particular, influence is perceived as revealing more about the persons being influenced than those doing the influencing. The world of ideas has come to be seen as in some respects a remarkably closed world, bound in by time, place, politics, economics, institutional structures, and above all the tacit presuppositions of mainstream thought in a given era. Extant ideas are received and filtered through a series of ideological structures that refashion their content and especially their implications.<sup>2</sup> From this perspective, Shakespeare does not so much influence Melville as Melville influences Shakespeare: that is, Melville, and others sharing his starting assumptions about the nature of existence and social organization, tacitly emphasize certain features of Shakespeare and

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1. See LITERARY HISTORY OF THE UNITED STATES xvii-xxiv (R. Spiller ed. 3d ed. 1963).

2. The seminal work here is T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

deemphasize others. An image of Shakespeare is created for Melville and like readers; it is this image that may be said to be influential. The process of influence, from this perspective, can be most clearly observed in writers that are not read by some subsequent generations and then "discovered" by others. What has changed, of course, is not the content or style of the original writer but the values and tastes of the successive readers; what has changed is the image.<sup>3</sup>

With this in mind, it is interesting to find, in a recent symposium on the Critical Legal Studies (CLS) movement, explicit statements that CLS has been influenced by the Realist movement of the 1930s. Both supporters and critics of CLS have posited a linkage between the two movements. David Trubek describes the Critical Legal Studies movement as "an outgrowth of American Legal Realism";<sup>4</sup> Mark Tushnet calls CLS "the direct descendant of Realism."<sup>5</sup> Philip Johnson states that one of the parents of CLS is "the American Legal Realism of 50 years ago";<sup>6</sup> Louis Schwartz claims that "the 'Realist' school of jurisprudence that flourished in the 1930s must be counted as an important earlier model for CLS."<sup>7</sup> While the obvious implication of the linkage is that the Realists have somehow influenced Critical Legal Studies scholars, the question raised in this Article is who has really influenced whom. In an essay in the same symposium<sup>8</sup> I suggested that the "self-conscious identification of Realism as a progenitor of, or an inspiration for, the CLS movement" seemed to be "a grasp at legitimacy" and was "a common enough lawyer's trick."<sup>9</sup> Those phrases sounded all right when I wrote them, but flippancy tends to cut off intellectual inquiry, and I want to take a further look at the relationship of Realism to Critical Legal Studies.

The exploration of that relationship has produced a complex intellectual history that will have to be severely truncated and oversimplified here. While I shall spend a little time sketching out that history, my primary purpose is not to add to the lore of those who regard themselves as "afficionados of the thirties and forties."<sup>10</sup> My main concern is rather to ask why, if Realism is widely perceived as something that "ran itself into the sand" as "a coherent intellectual force in American legal thought,"<sup>11</sup> the Critical Legal Studies movement, which seeks intellectual prominence, if certainly not respectability, would claim Realism as an influence; why Realism has come to

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3. Cf. White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51 (1971) (chronicling various images of Justice Holmes).

4. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 577 (1984).

5. Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 626 (1984).

6. Johnson, *Do You Sincerely Want To Be Radical*, 36 STAN. L. REV. 247, 252 (1984).

7. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 415 (1984).

8. White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649 (1984).

9. *Id.* at 650.

10. Schlegel, *Notes Towards an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 405 (1984).

11. Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459, 459 (1979).

be perceived as an intellectual dead end; and whether the same fate may await Critical Legal Studies. The exploration of those questions is necessarily historical, but history here is in the service of contemporary philosophy and politics.

There is a missing link in the evolution from Realism to Critical Legal Studies. The link is not so much missing in the sense of unrecognized, but rather in the sense of ignored or unexplained. That link is the Law and Society movement, which began in the 1960s and still exists. The link turns out to be, in my view, important for understanding the relationship of Realism to Critical Legal Studies and important to any prognostication of the future of CLS. An explanation of the importance of the Law and Society movement to the history sketched here requires some laying of groundwork.

### I. THE INTERNAL CONTRADICTIONS OF REALISM

I have previously argued that the emergence of Realism in the 1920s and thirties can be traced to the simultaneous convergence of two phenomena: the acceptance of social science theory as legitimate academic discourse and the apparent collapse of a late nineteenth-century individualist ethos in the face of the ostensibly interdependent nature of twentieth-century American society.<sup>12</sup> Legal scholars who came to call themselves Realists began with the perception that many early twentieth-century judicial decisions were "wrong." They were wrong as matters of policy in that they promoted antiquated concepts and values and ignored changed social conditions. They were wrong as exercises in logic in that they began with unexamined premises and reasoned syllogistically and artificially to conclusions. They were wrong as efforts in governance in that they refused to include relevant information, such as data about the effects of legal rules on those subject to them, and insisted upon a conception of law as an autonomous entity isolated from nonlegal phenomena. Finally, they were wrong in that they perpetuated a status quo that had fostered rank inequalities of wealth, status, and condition and was out of touch with the modern world.

This perception may have been the source of Realism, but it was not what made Realism distinctive.<sup>13</sup> The distinctive feature of Realism came in the methodologies its adherents employed to demonstrate the validity of their perception. The Realists employed two quite separate methodological approaches; the distinctiveness of the movement springs from the perception of its adherents that the approaches were complementary rather than contradictory. One approach, termed "debunking" by those employing it and revived as "deconstruction" by Critical Legal Studies scholars, subjected "wrong" opinions to a logical analysis that exposed their inconsistencies, their unsubstantiated premises, and their tendency to pass off contingent

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12. White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1013-27 (1972).

13. The same perception characterized the writings of Roscoe Pound, Joseph Bingham, Arthur Corbin, and other early twentieth-century advocates of sociological jurisprudence. See *id.* at 1000-12.

judgments as inexorable. The analytical basis for debunking, for most Realists, was Wesley Hohfeld's series of articles in the years prior to the First World War,<sup>14</sup> in which he demonstrated the capacity of legal propositions to be "flipped": that is, the sense in which every legal doctrine can be seen as a suppressed version of an alternative doctrine.<sup>15</sup> Karl Llewellyn once summarized debunking as the process of demonstrating that "in any case doubtful enough to make litigation respectable the available authoritative premises . . . are at least two, and . . . the two are mutually contradictory as applied to the case in hand."<sup>16</sup>

Much of Realist scholarship was thus devoted to exposing the incoherence of established patterns of reasoning in judicial decisions. By undermining the inexorability of such logic, the Realists hoped to reveal the "real" question in judicial decisions: why "the court select[ed] . . . one available premise rather than the other."<sup>17</sup> This was the point in Realist analysis where social science entered. The answer to the question of premise selection was, in most cases, that a given premise rested on unexamined value judgments that were simply assumed by the court to be controlling. In cases raising the question whether state hours and wages legislation violated a liberty to contract embodied in the fourteenth amendment's due process clause, two authoritative premises were present. One premise was that employers and employees had rights to define the terms of employment, and that statutory prescriptions of those terms unduly curtailed those rights. The alternative premise was that the balance of power between employers and employees in the industrial marketplace was sufficiently unequal that no such rights in employees could be said to exist: the contracts were simply coercive. Nothing in the nature of contract or liberty compelled the choice of one or the other premise: the premises were social judgments about the desirability or undesirability of protecting workers who had little bargaining power.

The "real" question in liberty of contract cases was, therefore, not "is there a liberty to contract in the due process clause?" but "do industrial

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14. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) was the best known of Hohfeld's works. For a collection of Hohfeld's published and unpublished materials, including *A Vital School of Jurisprudence and Law*, Hohfeld's 1914 model of a "scientific" law school, see W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (W. Cook ed. 1923).

15. See Schlegel, *supra* note 10, at 405 (analyzing Hohfeld). A frequently cited example of Realist scholarship employing the "Hohfeldian flip" is the work of Robert Hale. In three articles in the 1920s Hale argued that certain legal rights taken by established orthodoxy to be natural or absolute, such as freedom of contract or private property, could be seen as the products of a public policy that tacitly allowed some free bargainers to be coerced and some propertied persons to prevail over other nonpropertied persons. Legal rights in some, Hale concluded, produced the absence of rights in others; the tacit policy choice to prefer entrenched rights could not be seen as a simple deference to the natural order of things. Hale, *Value and Vested Rights*, 27 COLUM. L. REV. 523, 523 (1927); Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470 (1923); Hale, *Rate Making and the Revision of the Property Concept*, 22 COLUM. L. REV. 209, 212-14 (1922). A trenchant discussion of Hale appears in Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1232-39 (1985).

16. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1239 (1931).

17. *Id.*

workers in fact have no bargaining power to choose the terms of their employment?"<sup>18</sup> This question was, the Realists believed, susceptible of empirical analysis. One could, as Robert Hutchins said in 1927, ascertain "how the rules of law are working" through "practicable investigation" into their operation.<sup>19</sup> In sum, the Realists assumed that techniques existed for determining and analyzing human behavior, that meaningful generalizations could be derived from those techniques, and that the generalizations could then be reflected in policy proposals. Once one found "how the judicial system actually works [and] how it is affecting the community," Hutchins argued, one could learn how that system "may be altered to attain more readily the objects for which it has been developed."<sup>20</sup> Much later, Karl Llewellyn generalized this perceived connection between empirical investigation and law reform: "Every fact-pattern of common life . . . carries within itself its appropriate, natural rules, its right law. . . . The highest task of law-giving consists in uncovering and implementing this immanent law."<sup>21</sup>

Recognizing that the Realist impulse was basically political in that it originated with a judgment that many early twentieth-century judicial decisions represented examples of bad social policy helps to explain the simultaneous attachment of Realists to debunking and empirical research. Critiques of the logic of opinions would reveal the outmoded character of their premises; empirical research would demonstrate why the premises were outmoded. But while the fusion of debunking and social science is explicable in one sense,<sup>22</sup> it remains puzzling in another. Why didn't the Realists apply the logic of their criticism to social science research itself? Why did they assume that while arguments based on legal doctrines were necessarily value laden, arguments based on empirical observation could be value free? Why did Llewellyn, to take an example, define his concern to be with "law as a social science, a science of observation," and then assert that "one's fighting convictions [should] never [be] allowed to interfere with accurate observation?"<sup>23</sup>

To criticize the Realists for not emphasizing that "scientific" inquiry has its own ideological presuppositions is, in a sense, to impose the received wisdom of one generation on another. The social sciences, in the early twenti-

18. Cf. *supra* note 15.

19. Hutchins, Report of Acting Dean, 1926-27, Yale Law School Archives 118-19, quoted in Schlegel, *supra* note 11, at 493, 496.

20. Hutchins, Report of Dean, 1927-28, Yale Law School Archives 118, quoted in Schlegel, *supra* note 11, at 493.

21. K. LLEWELLYN, *THE COMMON LAW TRADITION* 122 (1960) (quoting L. Goldschmidt, *preface* to *Kritik des Entwurfs eines Handelsgesetzbuchs*, *Kirit. Zeitschr. f.d. ges. Rechtswissenschaft*, Vol. 4, No. 4).

22. The fusion is explicable, that is, if one assumes that social science research was an apolitical, neutral activity. Treating social science as apolitical may have had its own political ramifications: reformist academics in the 1920s may have wanted to avoid too close an identification with collectivist left movements such as Bolshevism. See generally D. FELIX, *PROTEST: SACCO-VANZETTI AND THE INTELLECTUALS* (1965).

23. Llewellyn, *Legal Tradition and Social Science Method*, in *ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES* 89, 90 (1931) (emphasis in original); see Llewellyn, *On the Good, the True, the Beautiful*, in *Law*, 9 U. CHI. L. REV. 224, 250-64 (1942).

eth century, were widely perceived of as antidotes to the soft epistemology of traditional disciplines: they were exploring facts and revealing the world as it really was. It is too much to say that no one recognized that social science, or even "pure" science, was susceptible to being organized ideologically. As traditionalist a legal scholar as Roscoe Pound argued, in 1931, that "preconceptions will creep in and will determine the choice of pure fact of fact as they determined the pure fact of law . . ."<sup>24</sup> Nevertheless the freshness of empirical social science, for Realists, principally came from its assumed freedom from the conceptualist web of value laden doctrine.

Thus the common explanations for why Realism ran into the sand as an influential intellectual movement do not take an additional, and perhaps obvious, explanatory step. Realism is typically said to have declined in influence because its debunking ultimately led to moral relativism and nihilism, and suddenly, in the shadow of the Second World War, no one wanted to endorse either of those positions; or because the empirical research called for by the Realists was either not done or resulted in trivial findings. Neither explanation is inaccurate, but the two can be combined. If one recalls that Realism started with a political perception, and that its energies were thus ultimately directed at the formation of "good" or "right" policy, the combination of deconstructionist logic and empirical research may have had a devastating effect. With the revelation that all legal doctrine was based on value premises, "objective" methodologies became necessary. But the end purpose of those methodologies was to conform doctrine to "real" life, that is, to produce "better" legal decisions. Facts (the observation that something really existed) were thus inseparable from values (the judgment that doctrines should facilitate what did exist). Discovering what was there was also discovering what was good.

It may be that those Realist legal scholars who set out to do empirical research with the idea that "better" policies would emerge from it confronted, somewhere along the way, the realization that they had skewed their observations at the outset. It may be, in other words, that such Realists sensed a fundamental contradiction between debunking and empirical social science: what I will term the fact-value dichotomy.<sup>25</sup> This might explain the remarkable collective inability of Realist empiricists to complete their research projects and the tendency of legal scholars initially enthused with social science to abandon it for other work or for silence. Of the Realist enthusiasts for empirical research that clustered at Yale and Columbia law schools in the 1920s and thirties, only one, Underhill Moore, was still identified with social science by 1940, and Moore's work was widely regarded as

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24. Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 700 (1931).

25. The "fact-value dichotomy" is a shorthand phrase for conveying the simultaneous need, in early and mid-twentieth-century reformist American elite thought, to separate value judgments from empirical observation, lest the observation be biased, and to base value judgments on empirical observation, since objective fact-finding revealed the "realities" of American culture.

ludicrous.<sup>26</sup> William O. Douglas, Walton Hamilton, Walter Dodd, Charles Clark, Wesley Sturges, and Llewellyn had each abandoned social science research, abandoned scholarship altogether, or abandoned law teaching. Their abandonment cannot be attributed to the demise of social science research generally, for it continued to flourish in other departments of universities. Social science research did not assume, however, an explicit policy orientation in the fields of economics, statistics, sociology, anthropology, and psychology. Scholars in those fields were perceived as neutral, objective experts. Law professors had never been so perceived and apparently could not think of themselves in such terms.

## II. POSTWAR CLOSURE: THE FIRST POST-REALIST MOVEMENTS

The uneasy interaction of deconstructionist logic and objective social science can also be seen as background to the growth of two movements in the 1940s whose emergence severely pinched, and ultimately co-opted, the vitality of Realism. One was the Law, Science, and Policy movement, ushered into existence by Harold Lasswell's and Myres McDougal's 1942 article, *Legal Education and Public Policy*.<sup>27</sup> Lasswell and McDougal identified law as a social science, called for "scientific thinking," which meant a "familiar[ity] with the procedures by which facts are established by planned observation," and even advocated "realism," which they defined as "access to a body of fact" through a process that "protect[s] the integrity of thought by excluding or nullifying the non-relevant."<sup>28</sup> Most of the scholarly efforts that formed the inspiration for their article were by Realists,<sup>29</sup> but Lasswell and McDougal made clear that they were not going to become bogged down in distinctions between "is" and "ought," facts and values. They urged that legal education be reoriented so that empirical research was placed in the service of democratic values:

What is needed now is to . . . [reorient] . . . every phase of law school curricula and skill training toward the achievement of clearly defined democratic values . . . .

. . . .

. . . The student needs to clarify his moral values . . . ; he needs to orient himself in past trends and future probabilities; finally, he needs to acquire the scientific knowledge and skills necessary to implement objectives . . . .<sup>30</sup>

Lasswell and McDougal were equally clear about the reason for their reorientation of the relationship between value orientation and empirical research:

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26. On Moore see Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFFALO L. REV. 195 (1980).

27. Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1942).

28. *Id.* at 204, 212, 214, 229, 231.

29. Lasswell and McDougal cited works by Hohfeld, Clark, Douglas, Jerome Frank, Herman Oliphant, and Llewellyn as inspiration for their article. See *id.* at 203-04 nn.1 & 2.

30. *Id.* at 207, 212.



It should need no re-emphasis here that . . . democratic values have been on the wane in recent years. The dominant trends of world politics have been away from the symbols and practices of a free society and toward the slogans, doctrines and structures of despotism. . . .

. . . .  
 . . . [A] legitimate aim of education is to seek to promote the major values of a democratic society and to reduce the number of moral mavericks who do not share democratic preferences.<sup>31</sup>

A "clarification of values"<sup>32</sup> was thus the first step in Lasswell's and McDougal's program for training policymakers. One clarified and identified one's value preferences before doing any empirical research; one then sought to implement values through what Lasswell and McDougal called "trend-thinking" and "scientific thinking."<sup>33</sup> Those terms turned out to be fancy ways of suggesting that before one implemented one's values one should try to identify "the shape of things to come regardless of preference" and to "guide . . . judgment by what is scientifically known and knowable about the causal variables that condition the democratic variables."<sup>34</sup>

Lasswell's and McDougal's move evaded two difficulties in which the Realists had found themselves. First, no one could accuse Law, Science, and Policy advocates of being moral relativists or soft on totalitarianism. Lasswell, who was identified in the article as the Director of War Communications Research for the Library of Congress, and McDougal, who informed his public that he had taken leave from the Yale faculty "to become General Counsel of the Office of Foreign Relief and Rehabilitation Operations in the State Department,"<sup>35</sup> identified their proposals as part of the war effort. "The war period," they announced, "is a propitious moment to retool our system of legal education. . . . War is the time to retool our educational processes in the hope of making them fit instruments for their future job."<sup>36</sup> It was "self-congratulatory falsehood to [claim] that recent catastrophes have come upon us like bolts from the blue";<sup>37</sup> the program of Law, Science, and Policy would be ready for the next totalitarian cycle.<sup>38</sup>

Second, Lasswell and McDougal refused to linger over the dialectics of the fact-value dichotomy. They did not consider the possibility that the dogmatism of antiquated rules might also be reflected in newer rules derived from contemporaneous empirical observation. The question of whether facts overwhelmed values or values overwhelmed facts they resolved summarily. Their advice to law students at the value "clarification stage" is instructive:

Clarification of values . . . must for effective training be distinguished from the traditional, logical, *derivation* of values by philosophers. Such derivation . . . is a notorious blind alley. Divorced from operational

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31. *Id.*

32. *Id.* at 212.

33. *Id.* at 213, 214.

34. *Id.*

35. *Id.* at 203.

36. *Id.* at 211.

37. *Id.*

38. *Id.*

rules, it quickly becomes a futile quest for a meaningless *why*, perpetually culminating in "some inevitably circular and infinitely regressive logical justification" for ambiguous preferences. From any relatively specific statements of social goal . . . can be elaborated an infinite series of normative propositions of ever increasing generality; conversely, normative statements of high-level abstraction can be manipulated to support any specific social goal. Prospective lawyers should be exposed, by way of warning . . . , to the work of representative specialists in derivation; relatively little time should be required, however, to teach them how to handle, and how to achieve emotional freedom from, [it].<sup>39</sup>

The solution to the fact-value dichotomy, then, was to ignore it: one dismissed infinite logical regressions and took a stand. Having taken a stand, one implemented one's values by empirical research that confirmed them.

Law, Science, and Policy, despite the prolificity and mutual supportiveness of its adherents, has never gained widespread support in legal academic culture,<sup>40</sup> partly, as one observer has noted, because "it seems to be wearisome, or too pretentious, or unpalatable,"<sup>41</sup> and partly because its adherents' repeated cataloguing of "values" and "goals" relevant to policymaking have appeared to some observers as assertions or laundry lists. Nevertheless the arrival of the movement, with all its fanfare, was a clear signal that the Realists' belief in the coexistence of value premise deconstruction and objective empirical research had backed them into a corner.

The other movement pinching Realism in the 1940s was more subtle, more effective, and gained a far wider acceptability. This movement was Process Jurisprudence, which began with Lon Fuller's critique of Realism in the 1930s and forties,<sup>42</sup> expanded to become a fullblown political science theory in the 1930s, prescribing carefully defined roles for courts, legislatures, and administrative agencies,<sup>43</sup> survived attacks by substantive rights theorists in the 1960s, and is still very much a part of mainstream academic thought, notwithstanding the problematic nature of its normative assumptions. I will not attempt a detailed sketch of Process Jurisprudence here, having done that in other places<sup>44</sup> and not wanting to sidetrack the progres-

39. *Id.* at 213 (emphasis in original).

40. Bruce Ackerman, in his recent work *RECONSTRUCTING AMERICAN LAW* (1984), called Lasswell and McDougal "brave scholars," and their efforts "heroic," but noted that "the [Law, Science, and Policy] school utterly failed to establish itself as a conversational presence in ongoing professional interchange." *Id.* at 40, 41. Although Ackerman's comments seem largely accurate, the influence of Law, Science, and Policy on public international law has been considerable. For one reaction from a public international law scholar see Moore, *Prologomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662, 663-64 (1968). Moore's point of view has been recently reinforced in Tipson, *The Lasswell-McDougal Public Enterprise*, 14 VA. J. INT'L L. 535, 535-37 (1974). Nonetheless, it seems fair to say that the Law, Science, and Policy movement's initial goal, to replace Realism as the dominant domestic jurisprudence of American law schools, has not come to fruition.

41. W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 386 (1973).

42. L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940); Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 381-95 (1946).

43. H. HART & A. SACKS, *THE LEGAL PROCESS* (1958).

44. See G. WHITE, *THE AMERICAN JUDICIAL TRADITION* 230-96 (1978); White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 279-94 (1973).

sion of this history unduly. I merely want to point out the basic strategy of confession and avoidance that Process Jurisprudence theorists adopted toward Realism.

Despite the Realists' difficulties, they had made two contributions to American jurisprudence that by the 1940s had come to be regarded as settled propositions. The first was that judges, in declaring legal rules, made law in the sense that the rules were not logically necessary and reflected policy judgments; the second was that law could not be a static entity, and that its progressive development rested on its rules being responsive to current social conditions. By the 1940s it was no longer possible for judges to ground decisions on appeals to law as a disembodied entity or as a bundle of settled precedents. Universal or static conceptions of law were thus no longer perceived as genuine constraints on judges.

Advocates of Process Jurisprudence took the above propositions as a given and sought to fashion new sets of constraints on judicial lawmaking. One set focused on the nature of judicial reasoning: process theorists insisted that judges engaged in "reasoned elaboration" of the results they reached by invoking legal principles of sufficient neutrality and generality to "transcend" immediate results. In constitutional adjudication judges should invoke and articulate "neutral principles"; in statutory interpretation they should identify and follow the purposes of the relevant statutes; in common law decisionmaking they should articulate the principles and policies embodied in common law rules. These exercises would insure that judicial decisionmaking would be subject to intellectual constraints. Failure to engage in appropriately "principled" adjudication would result in opinions being subject to academic criticism and a consequent loss of stature.<sup>45</sup>

The other set of constraints was institutional. Process theorists developed a model of political science in which the leading lawmaking institutions in American society were assigned functional roles. Administrative agencies "found facts" and developed "expertise" in specific areas of the economy; legislatures made policy by weighing the competing demands of interests and reaching compromise solutions through the process of democratic politics; courts identified and articulated legal principles, some of which justified judicial lawmaking, others of which envisaged judicial deference to more expert or more democratic lawmaking bodies. So defined, the legal process insured responsiveness to changing social conditions through the democracy of legislatures and the expertise of agencies and erected safeguards against irresponsible or insular judicial rulemaking. The process could even be said to have an "inner morality," since the requirements of reasoned elaboration and institutional competence insured that lawmaking would be fair, democratic, and accountable.<sup>46</sup> The model thus solved, for its adherents, the problems of

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45. For contemporary examples see Hart, *The Time Chart of the Justices*, 73 HARV. L. REV. 84, 98-99 (1959); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 10-20 (1959).

46. The most representative statement of the institutional competence theory is H. HART & A. SACKS, *supra* note 43. For a claim that properly functioning processes had an "inner morality" see L. FULLER, *THE MORALITY OF LAW* 33-91 (1963).

judicial unresponsiveness and unchecked judicial power, and had the added attraction of being faithful to democratic values.

Law, Science, and Policy and Process Jurisprudence were jurisprudential movements predicated on the existence of a deep consensus among Americans about values and institutional roles. They were in that sense products of a period in American history in which the "end of ideology"<sup>47</sup> was announced, conformity and solidarity were regarded as virtues, and social ferment was assumed to have receded. No sooner was this assumed consensus in place than the civil rights movement began to erode it. That movement suggested that a group of Americans had been existing well outside the majoritarian democratic mainstream; that the rights of those Americans to be treated fairly and equally overrode institutional considerations such as deference to legislative policy; that renewed attention to the civil rights of minorities had not come through democratic processes, but through the recognition of the substantive validity of minority claims; that judicial deference to administrative expertise or to legislative representativeness would have retarded the recognition of minority rights; and that neutral principles of constitutional adjudication were not much help in protecting minorities against discrimination. The interaction of Process Jurisprudence with the civil rights movement of the 1960s, and the emergence of the Warren Court as a visible defender of minority rights, sparked an intellectual debate about the meaning and efficacy of reasoned elaboration and principled adjudication.<sup>48</sup>

My interest here is not with that debate, however, but with another, lesser known development in the 1960s. Recall the two principal features of Realism: deconstruction of judicial opinions and calls for empirical research. Process Jurisprudence and the Law, Science, and Policy movement had sought to fuse those efforts in a reconstructed theory of law and legal institutions. Under the Law, Science, and Policy version of that theory, deconstruction would begin with open statements of value orientation, and empirical research would be enlisted in the reformulation of doctrine that followed from such statements. Under the Process Jurisprudence version, deconstruction became subsumed in the ideals of reasoned elaboration and principled adjudication, in which normative assumptions were grounded in appeals to principles or policies extrinsic to the court invoking the appeal; empirical research became subsumed in the theory of institutional competence and the idea of deference to administrative rules or policies based on expertise.

The result was to produce two closed jurisprudential systems: one system in which the proper functioning of legal institutions guaranteed progressive and democratic results and another system in which that functioning guaranteed responsive and enlightened policies. The attacks on neutral principles theory generated by the civil rights movement were a protest against the first closed system. A protest against the second closed system was less visi-

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47. Cf. D. BELL, *THE END OF IDEOLOGY* (1960).

48. For the details see White, *supra* note 44, at 294-98.

ble and influential in legal academic life in the 1960s, but it emerged with the Law and Society movement. The governing assumption of the Law and Society movement can be said to have been that Law, Science, and Policy or Process Jurisprudence had obfuscated a central inquiry of the Realists: whether the "law on the books" was the equivalent of the "law in action." Was the implementation of democratic values prescribed by Law, Science, and Policy actually taking place? Were the expert judgments of agencies truly based on the detached empirical observation of social conditions? Was there a gap between the claims of lawmakers that they were responsive to social needs and their actual responses to those needs?

### III. THE MISSING LINK: FROM LAW AND SOCIETY TO CRITICAL LEGAL STUDIES

The formation of the Law and Society Association in 1964 and the appearance two years later of the *Law and Society Review* marked the official emergence of the Law and Society movement. The movement was initially originated by sociologists as well as law professors, and its first endeavors reflected that fact. The aims of the movement were described exclusively in neutral, academic terms: no political dimension was suggested. The first president of the Law and Society Association called for "more rigorous and formal interdisciplinary training" in law and sociology,<sup>49</sup> and the initial edition of the *Law and Society Review* described its appearance as a response to "a growing need on the part of social scientists and lawyers for a forum in which to carry on an interdisciplinary dialogue."<sup>50</sup> The *Review* sought, its editor suggested, to create "a professional cadre who are able to move freely from their original disciplinary base into the related fields."<sup>51</sup>

This tone was typical of academic discourse throughout the 1950s and most of the 1960s: rarely were intellectual movements described in ideological terms. The orientation of the movement becomes clear, however, on a further perusal of the first volume of the *Law and Society Review*. In the second issue Richard Schwartz, the editor, in referring to a recently published book by sociologist Jerome Skolnick, described the work as "enlighten[ing] us on the process by which law on the books is transformed (or distorted) into law in action."<sup>52</sup> The key word in that sentence was "distorted." Schwartz went on to describe examples of unanticipated consequences of legal policies, such as "drug addiction increasing because of efforts at enforcement, public defender systems enhancing conviction rates, [and] Draconian divorce codes generating perjury."<sup>53</sup> Schwartz's point was that empirical research often revealed the dysfunctional effects of legal rules and policies or the hidden purposes of a rule or policy that had been justified

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49. Yegge, *The Law and Society Association to Date*, L. & SOC'Y REV., Nov. 1966, at 3, 4.

50. Schwartz, *From the Editor . . .*, L. & SOC'Y REV., Nov. 1966, at 6.

51. *Id.* at 7.

52. Schwartz, *Personnel and Progress in Sociological Research*, L. & SOC'Y REV., June 1967, at 4.

53. *Id.* at 6.

on different grounds. The first article to appear in the *Law and Society Review* had, in fact, taken Schwartz's logic one step further. In a report in "Civil Justice and the Poor"<sup>54</sup> three sociologists based at Berkeley had argued that "the law is not a neutral instrument, but rather that it is oriented in favor of those groups or classes in society having the power to bend the legal order to their advantage."<sup>55</sup> "[T]oday as in the past," the authors maintained, "the law primarily serves to protect and enhance the rights and interests of property holders and those in positions of wealth and authority."<sup>56</sup>

If one views the emergence of the Law and Society movement in the context of both Realism and the efforts to co-opt Realist insights in the 1940s and fifties, the movement's initial emphasis appears as an effort to return to a "purer" strand of Realist research. The Realists had, of course, sounded a call for studies of the transformation of law on the books to law in action, and they had suggested that such studies would reveal a gap between "paper rules" and the realities of implementative practice. Both the Law, Science, and Policy movement and Process Jurisprudence had, however, suggested that if such a gap existed, it could be corrected either by an adjustment of value orientation (such as "caring more" about the rights of the poor) or by an adjustment of the processes through which law was made (to make those processes more consistent with the purposes of the rules themselves). The Law and Society movement's return to "pure" Realism suggested that these adjustments were naive or unworkable. Its suggestion that law was not neutral but rather facilitative of the interests of the wealthy and powerful flew directly in the face of claims that the reconstituted postwar legal order of processes and policies was democratic, egalitarian, and dispassionate.

The Law and Society movement, aided by foundation support,<sup>57</sup> made significant inroads in some academic institutions in the 1960s and seventies. Notable were Berkeley, where a Center for the Study of Law and Society was established; Wisconsin, which began a program in sociology and law and funded a Law and Society section in the *Wisconsin Law Review*; Northwestern, which had instituted a joint Ph.D.-J.D. program in law and the social sciences in 1964; and Denver, which in the same year began a program in the administration of justice. All of these programs benefited from the perceived crisis brought about by the apparently dramatic rise in criminal behavior and violence in the early 1960s. The programs may be said to represent the first concentration of interdisciplinary research at American law schools since the 1930s. Social scientists had joined the Columbia and Yale faculties at that time, but in the years after the Second World War interdisciplinary work had almost disappeared, notwithstanding the Law, Science,

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54. Carlin, Howard & Messinger, *Civil Justice and the Poor: Issues for Sociological Research*, L. & SOC'Y REV., Nov. 1966, at 9.

55. *Id.* at 12 (footnotes omitted).

56. *Id.*

57. The Russell Sage Foundation and the Walter E. Meyer Research Institute of Law supported early Law and Society research projects. See Yegge, *President's Report*, L. & SOC'Y REV., June 1967, at 7.

and Policy movement's program. With the infusion of sociologists and psychologists into law faculties in the 1960s, however, a new pattern of interdisciplinary emphasis was established that has not yet abated.

Of the various institutional centers of the Law and Society movement, Wisconsin, for a variety of reasons, has turned out to be the most influential. Wisconsin had to its advantage a long state tradition of assumed compatibility between empirical research and progressive policymaking, stretching back to the early days of the twentieth century. It also, partly because of that tradition, had closer interdisciplinary cooperation than many other universities, and by the late 1960s had assembled a cluster of persons such as Stewart Macaulay, Jack Ladinsky, Lawrence Friedman, and Robert Rabin, to name only some, who had an abiding interest in the relationship of law to other disciplines. By the end of the 1960s this group of persons had begun to produce a body of scholarship whose emphasis could fairly be described as that reflected in the initial volume of the *Law and Society Review*. Friedman and Macaulay, in particular, had universalized the theory that legal rules reflected the needs and interests of powerful elites.<sup>58</sup> As Friedman put it in *A History of American Law*, which appeared in 1973:

This is a *social* history of American law. I have tried to fight free of jargon, legal and sociological; but I have surrendered myself wholeheartedly to some of the central insights of social science. . . .

. . . The laws of China, the United States, Nazi Germany, France, and the Union of South Africa reflect the goals and policies of those who call the tune in those societies. Often, when we call law "archaic," we mean that the power system of its society is morally out of tune. But change the power system, and the law too will change. The basic premise of this book is that . . . the strongest ingredient in American law, at any given time, is the present: current emotions, real economic interests, concrete political groups.<sup>59</sup>

In the preface to his *History* Friedman acknowledged the contributions of Wisconsin, where, he said, "[t]here was an atmosphere of ferment that centered about studies in legal history and in law and the social sciences."<sup>60</sup> But Wisconsin is as important, in this history, for what happened there shortly after the publication of Friedman's book, at the very moment, one might have thought, when the core ideas of the Law and Society movement were about to expand beyond a relatively narrow base of empirically minded law professors and social scientists to the legal academic profession at large. Friedman's book was in a sense an effort in that vein; it presented history as the continuous playing out of a thesis about law and power. In 1977, however, as Friedman's work was settling into the general consciousness of law

58. See, e.g., S. MACAULAY, *LAW AND THE BALANCE OF POWER: AUTOMOBILE MANUFACTURERS AND THEIR DEALERS* (1966); Friedman, *Legal Culture and Social Development*, *L. & SOC'Y REV.*, Aug. 1969, at 29; Friedman, *Legal Rules and the Process of Social Change*, 19 *STAN. L. REV.* 786 (1967); Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *AM. SOC. REV.* 55 (1963).

59. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 10, 14 (1973) (emphasis in original).

60. *Id.* at 11.

professors and historians, three events occurred, each of them associated with Wisconsin, that signified an alteration in the intellectual atmosphere of elite legal academic culture, an alteration that was to have negative effects on the influence of the Law and Society movement.

The first two events took place in scholarly literature, and represented efforts on the part of younger scholars who had been part of the Law and Society circle to distinguish themselves from the movement. In a book review of Friedman's *A History of American Law* in the *Wisconsin Law Review*, Mark Tushnet called Friedman's approach "the last great work of the 1950's."<sup>61</sup> Friedman's perspective, Tushnet claimed, ignored "the influence of autonomy on the legal order" and "the ideological functions of the legal order . . . [in] persuading both oppressor and oppressed that their conditions or existence are just."<sup>62</sup> Tushnet's point was that the Law and Society tradition from which Friedman's *History* had emerged had too reflexively treated law as molded by society and had thus wrongly characterized gaps between law on the books and law in action as indications of archaic or unresponsive legal rules. Rules often functioned, Tushnet maintained, to legitimate a calculated unresponsiveness on the part of the legal order. "Material benefits," Tushnet asserted, "have never been equally distributed in American society, and the law serves as a partial explanation, to those who receive less, of why they do."<sup>63</sup> Friedman's *History*, in short, "ignore[d] the ideological functions of law."<sup>64</sup>

Tushnet's review was accompanied by an article in the *Law and Society Review* by David Trubek, another Wisconsin law professor, that called for a "new realism" in the study of law in society.<sup>65</sup> The new realism, for Trubek, consisted of a combination of empirical research and "critical social thought."<sup>66</sup> Trubek outlined an "agenda of critical social inquiry":

Our program must be concerned with an analysis of the tension between ideals and reality in the legal order, and of the relations between law and society. . . . It must be concerned with the gap between the ideals of the law and its reality, between law in the books and law in action, without falling into the belief either that all such gaps are inevitable or that any is merely accidental.<sup>67</sup>

Two features of Trubek's formulation deserve comment. The first is his effort to stress continuity between critical social thought, the Law and Society movement, and Realism by wrapping his agenda in certain evocative phrases. Critical social thought was a "new realism"; its focus was the traditional Realist and Law and Society inquiry into "the gap between . . . law in

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61. Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law,"* 1977 WIS. L. REV. 81, 82.

62. *Id.* at 83.

63. *Id.* at 94.

64. *Id.*

65. Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 L. & SOC'Y REV. 529, 540-45 (1977).

66. *Id.* at 566.

67. *Id.* at 566-67.



the books and law in action";<sup>68</sup> it was a perspective in "the basic tradition of the law and society movement";<sup>69</sup> there was "nothing 'new' about the realism [he was] describ[ing]";<sup>70</sup> critical social thought was what Realists and Law and Society people "have been doing all along."<sup>71</sup> Trubek's evocation of continuity can be said to represent the first effort of Critical Legal Studies to identify itself with the Realist movement.

The second striking feature of Trubek's proposal was its flipping of the normative consequences of discovery of a gap between legal rules as articulated and as implemented. Friedman had suggested that while such a gap had regularly existed, it was reparable in either of two ways: through a closer analysis of what purposes the rules "really" served, in which case the rules could be shown to be doing quite a good job of furthering the interests of powerful elites; or through a kind of benign resignation, reflected in Friedman's comment that if the legal system was not working in one sector, another sector would emerge in which the gap between ideals and practice was narrower.<sup>72</sup> Trubek suggested, to the contrary, that gaps were never reparable in those terms because the gaps were never accidental or inevitable, and that merely documenting the existence of gaps in an "objective" manner was not enough;<sup>73</sup> the scholar had to recognize "the necessity of normative inquiry"<sup>74</sup> and the responsibility for "transcending" legal structures whose purpose was to perpetuate gaps.<sup>75</sup>

The latter emphasis of Trubek's proposal signified an abandonment of the Realist assumption, shared by the Law and Society movement, that empirical research could be conducted from an objective perspective. While Trubek wished to retain the empirical emphasis of earlier movements, he was quick to equate objective empiricism with "positivism" and to suggest that to rest on a finding that gaps existed was to legitimate the gaps.<sup>76</sup> The association of empirical research with positivism thus made two implicit suggestions, which later work in Critical Legal Studies was to make explicit. The first suggestion was that empirical research legitimated the status quo by implying that the "facts" of the research were somehow inevitably "there" as part of the permanent "reality" of American culture. The second, related, suggestion was that a scholar could not separate ideology from methodology in empirical, or any, research: to be politically reformist and methodologically neutral was a contradiction in terms. In making the second suggestion Trubek had resurrected the fact-value dichotomy again, this time communicating it in the evocative word "positivism."

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68. *Id.* at 567.

69. *Id.* at 568.

70. *Id.*

71. *Id.*

72. "The legal system always 'works'; it always functions. . . . If the courts, for example, are hidebound and ineffective, that merely means some other agency has taken over what courts might otherwise do." L. FRIEDMAN, *supra* note 59, at 14.

73. Trubek, *supra* note 65, at 567.

74. *Id.*

75. *Id.*

76. *Id.*

Of all the issues that were to demarcate Critical Legal Studies from the Law and Society movement, the association of objective empiricism with positivism was the most explosive and the most clearly joined. As critical theorists came to suggest that by ignoring ideology and autonomy and by not conducting research from an openly normative and critical perspective, reformist scholars were reinforcing the status quo, some members of the Law and Society movement balked, refusing to accept such a characterization of their work. The eventual result was a fragmentation of the Law and Society movement.<sup>77</sup>

In 1977 another development also facilitated the fragmentation of Law and Society. By that year elite law schools had tenured four persons whose ideological stance was leftist but whose scholarship had not been empirically oriented in the Law and Society tradition. The individuals were Morton Horwitz, Duncan Kennedy, and Roberto Unger, all on the Harvard faculty, and Tushnet, who had gained tenure at Wisconsin. The scholarly emphasis of the four had been historical and philosophical, and their methodology had been qualitative and even doctrinal, though not in a traditional sense. While Horwitz's *Transformation of American Law*<sup>78</sup> identified powerful elites whose interests, he argued, had been furthered by changing common law rules, he neither made an empirical effort to particularize the members of those elites nor suggested that their presence was inevitable or accidental. Moreover, his methodology focused on the normative assumptions and content of doctrine, seeking thereby to identify a consciousness embodied in legal rules. Kennedy's, Unger's, and Tushnet's work, although diverse, was similarly interested in legal doctrine, legal consciousness, and the ideological structures in which legal rules were embedded.<sup>79</sup>

The tenuring of those individuals was itself an implicit recognition of the worth of their scholarship by elite law schools, but it had other consequences as well. The presence of Horwitz, Kennedy, Tushnet, and Unger as "accepted" law professors, when coupled with the existence of other tenured academics who were politically left and sympathetic to the Law and Society movement, stimulated an effort to create, as one CLS insider has termed it, "an alliance" between "senior law and society teachers" and "a newly tenured group of Harvard people."<sup>80</sup> The intermediaries facilitating this alli-

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77. See *infra* note 84.

78. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 253-54 (1977).

79. See, e.g., R. UNGER, *KNOWLEDGE AND POLITICS* (1975); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Tushnet, *The American Law of Slavery, 1810-1860*, 10 L. & SOC'Y REV. 119 (1975).

80. 2 *Lizard* 3 (1985). The *Lizard* is a mimeographed newsletter occasionally distributed around the time of the annual meeting of the Association of American Law Schools. Its contributors are anonymous. The *Lizard's* staff has described itself as "an emanation of a small faction within the critical legal studies movement, sometimes referred to as the True Left." 1 *Lizard* 3 (1984). The editors of *Lizard* claim that it "does not conform to the general attitude of the membership [of the Conference on Critical Legal Studies], which is far more responsible and boring." *Id.* My claim that the remarks quoted in this sentence are those of an insider should thus be taken in context, although Johnson, *supra* note 6, at 286 n.103, has identified Duncan Kennedy as one of the *Lizard's* editors. The *Lizard* also has a tendency to delight in

ance were Trubek and Tushnet of the Wisconsin faculty and Richard Abel, who had been a law student at Yale with Kennedy and Tushnet in the late sixties and early seventies. The initial vehicle for the alliance was a conference, held in Madison in May 1977, to which selected Law and Society and critical scholars were invited. The organizing committee for that conference included Trubek, Kennedy, Horwitz, Unger, Tushnet, Abel, two additional Wisconsin faculty members, Macaulay and Tom Heller, and Rand Rosenblatt, a member of the faculty of Rutgers Law School at Camden. The list of invitees included such Law and Society types as Marc Galanter, from Wisconsin, and Phillippe Nonet and Jerome Selznick, both from Berkeley. The list also included a group of "ex-students of the Harvard profs," such as Robert Gordon, Karl Klare, William Simon, Mark Kelman, and Peter Gabel, who "were either already in or about to enter law teaching."<sup>81</sup>

As histories of the Critical Legal Studies movement have suggested, the alliance between Law and Society scholars and the newer critical theorists failed to come off. According to one version, "the senior law and society types either didn't show up or left in dismay at the political radical rhetoric of most participants";<sup>82</sup> according to another, "the attack on social science at the first meeting . . . was so strong that it [engendered a] bitter, fifties-like denunciation" and a resigned estrangement from two Law and Society scholars.<sup>83</sup> The result has been that to the extent there are wings in the current Critical Legal Studies movement, they are represented by other than senior Law and Society scholars. Only Abel and Trubek currently retain a foothold in both CLS and the Law and Society movement, and the latter movement includes members committed to "positivist" empirical research and unsympathetic to critical theory.<sup>84</sup>

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the vivid overstatement; its characterizations of the meaning of events may reflect that tendency.

81. 2 *Lizard* 3 (1985); Schlegel, *supra* note 10, at 394-96.

82. 2 *Lizard* 3 (1985).

83. Schlegel, *supra* note 10, at 408.

84. A recent issue of the *Law and Society Review* provides a starting point for analysis of the current condition of the Law and Society movement. In his presidential address to the Law and Society Association in June 1984, Marc Galanter sought to characterize "[t]he law and society enterprise." Galanter, *The Legal Malaise; or, Justice Observed*, 19 *L. & Soc'y Rev.* 537, 537 (1985). The synopsis of Galanter's remarks was as follows:

During the twenty years since the founding of the Law and Society Association, a distinctive "law and society" discourse has emerged and been institutionalized in a multidisciplinary scholarly community, which has been instrumental in producing a tremendous increase in systematic knowledge about the law in action. The growth of law and society research has accompanied other changes in the distribution of information about the legal process, including a new legal journalism and greater media coverage that make the law in action more visible to a wider audience. Current distress of legal elites about the hypertrophy of legal institutions is viewed as a reaction to the increased currency of information that discredits the perceived picture of the legal world. The coincidence of structural changes in law with changes in the social institutions of knowledge about law creates the possibility of a more responsive and inquiring legal process.

*Id.* The vocabulary employed in this synopsis is strikingly evocative. The Law and Society movement is characterized as employing a "distinctive . . . discourse." That discourse has been "institutionalized" and spread to a "multidisciplinary scholarly community." The conse-

## IV. THE EMERGENCE OF CRITICAL LEGAL STUDIES

The separation of Critical Legal Studies from the Law and Society movement invites a further look at the intellectual origins of critical theory, for it is clear, notwithstanding the linkage between Law and Society and Critical Legal Studies, that other factors played a part in generating the attack on "positivist" social science that fostered the split. Important among those factors were the critical Marxist scholarship of continental academics<sup>85</sup> and the New Left ideas<sup>86</sup> that had gained currency in American academic circles in the 1960s. The contributions of continentalist theorists have been catalogued as "the indeterminacy of social circumstances, . . . the impossibility of deriving intelligible laws of historical change, economic or otherwise," and the significance of "alienation, ideology, historical contingency, and the role of human agency in history."<sup>87</sup> In particular, the continentalists seem to have convinced many critical theorists that systems of ideology and struc-

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quence of the discourse's spreading is a "tremendous increase in systematic knowledge," and the knowledge is about that familiar Realist topic, "the law in action." Law and Society research can be viewed as part of an information explosion that has had the effect of "mak[ing] the law in action more visible."

The "[c]urrent distress of legal elites" about the dysfunctional character of legal institutions can be traced to that information explosion. The information has served to "discredit . . . the received picture of the legal world." The consequence has been changes in both the structure of law and "the social institutions of knowledge about law." The changes augur the promise of a new and "inquiring legal process."

In this vision of the history of the twenty years of the Law and Society movement, Law-and-Society-style research is pictured as an important causative factor in fomenting distress about law and legal institutions and in increasing the hope of a more responsive legal process. The original goals of the movement remain intact and to some extent have been achieved. The vehicle for this achievement, "systematic knowledge," has taken on an objective quality: it is a currency of information, tangible and real like other currencies. This development is so even though the knowledge emerged with the institutionalization of a discourse. A theoretical approach to research has thus evolved, in the vision, into something real: knowledge about how the "law in action" "works." The paragraph thus appears to be an archetypal example of the positivization of an academic theory. In this vein, it is no accident that eight pages later in the article Galanter notes that Law and Society discourse "is a discourse with a rich and sometimes uneasy mix of positivist and interpretivist ingredients" exemplified, as "several readers have pointed out," by his own essay. *Id.* at 543 & n.17.

The invitation Galanter makes in his article, written for a group of peers, is to close ranks around the positivistic vision of the Law and Society movement. Yet at the same time Galanter is well aware that the relationship between scholarly interpretation and positivism is uneasy. I believe that uneasiness to be the central source of potential fragmentation in the current Law and Society movement.

85. Examples would be Theodor Adorno, Jurgen Habermans, Max Horkheimer, and Herbert Marcuse, who were associated with the Frankfurt Institute for Social Research from the 1950s through the 1970s, and, more recently, Michael Foucault and Jacques Derrida, French linguistic philosophers. On the Frankfurt school theorists see G. FRIEDMAN, *THE POLITICAL PHILOSOPHY OF THE FRANKFURT SCHOOL* (1981). On Derrida and Foucault see Heller, *Structuralism and Critique*, 36 *STAN. L. REV.* 127 (1984); Peller, *supra* note 15.

86. The phrase "New Left ideas" is difficult to particularize much further. Here it refers to the revived interest in the views of radical theorists such as Antonio Gramsci, George Lukacs, and Jean-Paul Sartre, that took place in the 1960s, an interest that was reinforced by the political examples of Fidel Castro's Cuba and Mao Tse-Tung's China. Two sources with widely different perspectives on the New Left are A. GOULDNER, *THE TWO MARXISMS* (1980) and W. O'NEILL, *COMING APART: AN INFORMAL HISTORY OF AMERICA IN THE 1960'S* (1971).

87. Schlegel, *supra* note 10, at 393-94 n.9.

tures of language and discourse, including law, play a significant role in making contingent and indeterminate value judgments appear to be universal and fundamental propositions. They have directed attention to the tacit presuppositions of ideological systems and structures, and suggested that those presuppositions be "unpacked" to reveal their contingent nature.

The memory of 1960s New Left politics, for this same group of scholars, appears to have been recast as historical evidence of a protest against the attempted legitimization of a contingent set of assumptions. As the memory goes, the leadership community that escalated and justified the Vietnam War conceived that war in terms that reflected historically contingent assumptions: while the Vietnam leadership "knew" that the struggle in Southeast Asia was between the free world and the Communist bloc, that division was wholly their creation. The ideology of the war effort, however, functioned to legitimate that conceptualization and to justify committing American soldiers to fight against the Vietcong and the North Vietnamese. The ideology also served to rationalize the deaths of those Americans killed in the fighting as having died fighting for their country. To protest groups in the 1960s, many of whose members were directly affected by the war effort, the leadership's assumptions seemed wrongheaded and their power to conscript unwilling draftees seemed morally dubious.<sup>88</sup> While New Left politics were not limited to protests against the war effort, the apparently naked use of an alien ideological system to determine whether young people lived or died had a galvanizing effect. Both commentators on Critical Legal Studies and members of the movement have noted that most of its principals "came to maturity during the late sixties or early seventies," and "[m]ost began teaching during these years . . . often after a stint in legal services or some other reform-oriented post, as well as participation in the antiwar movement."<sup>89</sup>

One might push the 1960s antiwar experience one step further in explaining the excitement generated by continental critical theory for several members of CLS. The continental theorists suggested that the material conditions in a society, while not unimportant factors in any causal explanations of human conduct, could not be separated from the total ideological gestalt of a culture. Data, in their perspective, were inevitably filtered and given significance by ideological structures. The recast memory of Vietnam may well appear relevant to this insight. One of the dominant characteristics of the Vietnam war leadership was its continual skewing and even falsification of relevant data about the war: statistics were used to demonstrate the validity of the leadership's assumptions and to convey a finite sense that the war effort was succeeding when that conclusion required a rather perverse definition of success. The Vietnam War effort was, in short, an ideological exercise in which empirical data was regularly enlisted in the service of the dominant ideology.

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88. This is, of course, a bare-bones summary of a complicated process. For more detail see White, *supra* note 8, at 668-70.

89. Schlegel, *supra* note 10, at 406; see also Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 257 (1981).

## CONCLUSION: THE FUTURE INFLUENCE OF CRITICAL LEGAL STUDIES

Thus a combination of factors internal to and external to American academic life in the 1970s helped define an environment favorable to the emergence of the Critical Legal Studies movement: in that sense CLS is not simply a reincarnation of Realism or the Law and Society movement. But if CLS is unique, it is also part of a continuing intellectual history, the history of twentieth-century American legal scholarship. Where does Critical Legal Studies fit in that history? What place will the movement be occupying (or have occupied) in the year 2000?

If we look at the ideological map of current legal scholarship, it is clear that we have come very far from the consensus of the 1950s, when Law, Science, and Policy and Process Jurisprudence closed ranks to produce broad agreement on what "good" scholarship was and what ideological purposes it served. We now find on the map, reading from right to left, the Law and Economics movement; reconstructed substantive rights theory, with its emphasis on "principles" and, depending on one's political point of view, libertarian or contractarian "rights";<sup>90</sup> so-called mainstream scholarship, a blend of an older analytical tradition, emphasizing doctrinal exegesis and the assumptions of unreconstructed Law, Science, and Policy or Process Jurisprudence; the unreconstructed Law and Society movement, whose practitioners, with a handful of exceptions, now distinguish themselves from Critical Legal Studies as well as from mainstream scholarship;<sup>91</sup> and Critical Legal Studies. No one of these groups can be said to be dominant, but the intellectual energy of elite law schools seems concentrated more in Law and Economics and in Critical Legal Studies than in the other movements. It seems fair to say, in fact, that mainstream scholarship and the Law and Society movement are currently on the defensive and that substantive rights theory is still in the gestation stage.

Critical Legal Studies thus can be said to be currently in a position of visibility and perhaps even prominence, but at the same time to occupy an extreme and perhaps a marginal position on the ideological spectrum. Here the historical links to the Law and Society movement and to Realism are suggestive. The Realists began as academic rebels whose claims were perceived by mainstream scholars as anywhere from infuriating to lunatic, but, despite attacks by previous reformers such as Pound, the Realists penetrated the consciousness of academics, so that by the 1940s only the relativist and nihilist underpinnings of Realism had to be sloughed off, and those under the perhaps unique pressure of a war against Nazis. Domesticated Realism, in the form of process theory and Law, Science, and Policy, may have betrayed

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90. Thus certain substantive rights theorists, such as Bruce Ackerman, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980), Ronald Dworkin, *TAKING RIGHTS SERIOUSLY* (1977), and John Rawls, *A THEORY OF JUSTICE* (1971), would be contractarian, and others, such as Robert Nozick, *ANARCHY, STATE, AND UTOPIA* (1974), Richard Epstein, and David A.J. Richards would be libertarian. The distinction reflects an emphasis on the primacy of deep beliefs in equality (the contractarians) or autonomy (the libertarians).

91. See *supra* note 84.

the original Realist impulse, but it was hardly anything like the early twentieth-century conceptualism the Realists sought to dismantle.

Similarly, the Law and Society movement, initially a collection of voices crying in a wilderness, has had its own form of domestication. Interdisciplinary research is now the norm at elite schools; "law and" continues to be the rage. Not only do law faculties have their more than token social scientist faculty members, "traditionalist" scholars regularly do work that involves exploration into other disciplines. One of the ironies of the domestication of the Law and Society movement, in fact, is the great success of a discipline not originally included in the cluster of social sciences identified by the Law and Society Association at its formation: economics. It is ironic that the economists were left out originally; it is also ironic that their stock has dramatically risen as the Law and Society movement has been placed on the defensive. The explanation of the ironies is easy enough: Law and Economics has been, from its modern renaissance in 1960, both ideological and right-wing.<sup>92</sup> It has staked its prominence on welfare models of a free-market kind, and those models have become politically resonant. It has also not gotten bogged down in the fact-value dialectic: when its practitioners encounter thorny complexities in the process of designing their models, they label them externalities and put them aside. Contemporary normative Law and Economics is an almost perfect mirror of Langdellian conceptualism: when an outcome is inefficient, just as when a case did not fit a principle, it is rejected as "wrong."

I have suggested elsewhere that domestication is a possible fate of Critical Legal Studies.<sup>93</sup> But what is the feature of the movement most likely to be absorbed into mainstream consciousness and thus domesticated? Here a recapitulation of the linear progression from Realism to Critical Legal Studies is appropriate. The distinctive feature of Realism, I have argued, was the Realists' disinclination to regard the simultaneous pursuit of debunking and empirical social science research as a contradictory enterprise. Empirical research, in their view, was somehow objective and thus immune from deconstructionist analysis. The Law and Society movement, while not deconstructionist, may be said to have held at its origins the deconstructionists' view that empirical inquiry was an objective enterprise: empirical data contained their own inherent truth, which could then be used as a corrective to subjectivist rules and policies.

This very issue—whether empirical research was somehow exempt from the fact-value complexities that invade other areas of intellectual discourse—

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92. Of course Law and Economics, while it cannot avoid being ideological, could be left wing or centrist as well, as has economic theory in past generations. Since 1960, however, the Law and Economics movement in American law schools has been dominated by welfare economics and public choice theorists, both of which are opposed to governmental distributions of economic benefits and burdens when the capitalist market offers an alternative distribution. Given the commitment of centrist and leftist policies to governmental intervention in the market since the 1930s, this stance among Law and Economics theorists can fairly be characterized as New Right or reactionary, depending on how one feels about it.

93. White, *supra* note 8, at 650-51. My phrase "absorption and conversion" in that article is the equivalent of "domestication" here.

prompted the split between unreconstructed Law and Society theorists and advocates of Critical Legal Studies. The critique of empirical research as "positivist" has been a technique by which critical theorists have suggested that no immunity can exist: all research is necessarily value-laden and political, and to pretend that some is not is to advance claims of neutrality that serve to reinforce the status quo.

At this point the linear relationship between Realism, the Law and Society movement, and Critical Legal Studies becomes severed, and Critical Legal Studies appears as the heir to only one phase of the Realist movement, its deconstructionist phase. The insight of critical theorists that all research is value laden, especially in the less overt sense of being shaped by tacit agreements about its "proper" agenda and direction, is both the single most radical feature of the Critical Legal Studies movement and, because of its radical implications, the feature others will be most anxious to domesticate.

Nonempiricist Critical Legal Studies scholarship has up to this point channeled its energy into two modes. One mode has been deconstruction: the exposure of fundamental contradictions in mainstream doctrines and policies. The other mode has been "transformative" political appeals, beginning with the claim that since the very premises on which mainstream rules and policies have been erected are contingent and self-contradictory, "things could be otherwise." I think that the first mode has made a genuine contribution to twentieth-century intellectual discourse; that it has been wrongly characterized by both supporters and opponents as "trashing"; that it may well be domesticated as "hermeneutics" or some other "fancy" methodological approach; and that it is likely to endure for some time. I think that the second mode cannot be domesticated and may therefore be at once the least vulnerable and the least potentially influential strand of contemporary critical theory. Finally, I think that the question of whether the two modes can be separated is fundamental to an assessment of the future influence of CLS. The remainder of this Article elaborates on these thoughts.

The first mode raises a series of scholarly inquiries that need not be undertaken with the purpose of demonstrating that mainstream scholarship is a self-contradictory enterprise. The idea that ideology takes several forms, from the more explicit forms of policy and principles to the less explicit forms of boundary theory and paradigmatic research designs, is a liberating one. It helps us understand not only why balancing in the first amendment can be seen as contingent or flawed, but why cultural conditions and academic structures define certain questions as relevant and others as marginal or beyond dispute at certain times. Above all, it exposes all scholarship, policymaking, or rule declaration as imprisoned by time and place and thus incapable of being universalized. It prevents any discipline from a claim of either being value free or of searching for truth. It makes history, linguistic analysis, and philosophy more than mere esoterica, and it strips the hardness from the hard and even the harder sciences. It has the potential to transform scholarly inquiry and even conceptions of what knowledge and education are.



But one need not believe in political revolution to endorse the perhaps revolutionary intellectual contribution described above. That is the problem advocates of critical theory face in summoning up the Realists as their progenitor. Critical theorists are not merely carrying out the Realists' unfinished programs. They have gone well beyond Realism, but in ways that do not necessarily require the political radicalism they espouse. Just as we were once "all Realists," in the domesticated sense, we may at some point become "all crits." Then, by definition, radicalism and transformative politics of the kind envisaged by critical theorists will not be possible.

But any total domestication of the Critical Legal Studies movement seems to rest on an assumption that the political messages of the movement are capable of being separated from the methodological messages. My experience up to this point, and my intuitions about the future, incline me to suggest that such a separation is not easy and may not be possible. A movement whose first premise is that law is inseparable from politics is hardly likely to cooperate in any such separation, and the politicization of one segment of a law school may have a ripple effect. Efforts on the part of faculty or students to agree with CLS theory but disagree with CLS politics may come to appear, both to those making such efforts and to others, as schizoid. By asking other faculty and students to take stands on issues, critical theorists may be contributing to the emergence of an attitude among most persons engaged in academic law that scholarship (or teaching) is politics, and politics is scholarship.

If one assumes that separation of the two modes of critical theory is difficult at best, critical theory can be seen as a profoundly destabilizing force in American legal education and, eventually, in American legal culture. In a number of respects critical theory undermines the basic argument implicitly made by law professors to justify their stature: that they "know the law." If law is inseparable from politics and knowledge contingent and culturally determined, "knowing the law" becomes close to synonymous with having the current political power. Even if one does not want to transform legal education by throwing out all the reactionary guardians of the hierarchy and replacing them with persons with the proper political consciousness and experience,<sup>94</sup> one may have to concede that political transformations have become possible when the basic grounds justifying deference to statured persons in a profession have been shaken. In a universe populated by students as well as faculty, with a certain degree of intragenerational conflict, attacks on the legitimacy of the elders are necessarily destabilizing.

If the threat of destabilization is taken seriously, a backlash against critical theory may occur. The paradox of the backlash may be that the same tactics employed by opponents of Critical Legal Studies—politicization of scholarship and teaching, agendas and strategies in appointments and other internal matters, and attribution of "lunatic fringe" views to one's political enemies—are those allegedly employed by the critical theorists themselves.

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94. Cf. D. KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY* (1983).

If this scenario comes to pass, the "crits" will in a sense have won even if they lose individual battles: they will have transformed the discourse of legal academic life. Furthermore, if a generation of law students experiences that transformed discourse, it requires little imagination to anticipate their entering the profession with a view that law is indeed inseparable from politics.

The nightmarish vision embedded in this scenario, to those in legal academics who deeply believe that law is above or beyond or outside politics, may precipitate efforts to domesticate the critical theory movement. Such efforts have already surfaced. One such effort might be represented in the claim that critical theory provides "an interesting angle on my work"; another by efforts to merge the more "civil" or "acceptable" critical theorists into traditionalist academic power roles, such as chairs of significant committees; another by the simple act of purging the less acceptable members of CLS by tenure denials so that others will "get the message." All these domestication strategies may result in the harnessing of critical theory in ways comparable to the harnessing of the Realists.

But so long as the dramatic dissolution of the fact-value dichotomy, first perpetrated in legal scholarship by the CLS movement, takes hold, I venture to suggest that twentieth-century American legal theory will not likely be the same again. The tacit alliance between empiricism and neutrality will be shattered; the contradiction between value orientation and objective research will be exposed. With the breakup of the fact-value dichotomy, ideology may come to be seen as the dominant force in academic life, and claims to neutrality in scholarship or teaching put decisively on the defensive. If that scenario comes to pass, the 1970s may one day appear to be as important an intellectual watershed for American law and legal thought as Langdell's 1870s.

