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Beyond Criticism

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Like any form of idealism, critical legal studies is easily dismissed as naive and impractical. Idealism has rarely found a comfortable home among American intellectuals. A generation of professors came home from World War II convinced that life was a series of urgent practical problems requiring the identification and decisive implementation of technical solutions. These hard-boiled officers had learned that high ideals were a luxury responsible leaders could ill afford and that practical activity meant working within a system to achieve the possible.[1] Positioning themselves outside the system, far from the fray, utopians were either naive pacifists or cynical traitors. While the generation that came of age in the sixties interpreted draft dodging as practical activity, it shared the assumption that "relevance" was the ultimate intellectual criterion. When members of this generation went to law school they were likely to accept their professors' message that legal practice—even legal practice in the service of social change—meant working within a system to achieve the possible. Because critical legal scholars offer no detailed prescriptions for social change by legal means, they have been greeted with suspicion even by those sympathetic to their political agenda. In the eyes of many progressive lawyers and legal scholars, critical legal scholars are dodging responsibility. Some suspect they aren't really interested in achieving social change and so don't ask hard, empirical questions about how it can be brought about.[2]

This essay explains critical legal scholars' reluctance to articulate a theory of social change and an affirmative political program in terms of on their sincerely held intellectual commitments. It

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[1] See Garry Wills, Nixon Agonistes 520-22 (1971).

[2] See Guyora Binder, Critical Legal Studies as Guerilla Warfare, 76 Geo.L.J. 101 (1987), for a review of such criticisms of critical legal studies.

outlines a theory of social change compatible with those commitments and a strategy for pursuing social change that could not only structure the political activity of these scholars, but could also provide a productive focus for their future teaching and research.

More specifically, this essay argues that critical legal studies has been misunderstood by those who see it as an attack on legal formalism by a group of instrumentalist cynics unwilling to identify their hidden (because unpopular) political agenda. The chief target of critical legal studies is not the legal formalism associated with turn of the century American legal thought, but rather the instrumentalism that has characterized American legal scholarship since the advent of the legal realist movement. Because the critics have rejected instrumentalism on both intellectual and political grounds, they have been reluctant to articulate a predictive model of society or a program for manipulating society to achieve desired ends.

Nevertheless, this essay argues that critical legal scholars have been developing an inchoate theory of the social role of law that could give rise to legal strategies for achieving social change. It argues that critical legal scholars see law less as an instrument of powerful interests than as a cultural system that structures relationships throughout society, not just those that come before courts. As a cultural system, law fosters oppression less by coercion than by offering people identities contingent upon their acceptance of oppression as defining characteristics of their very selves.

Now, a tempting, but ultimately futile, response to the oppressive role of culture is simply to engage in cultural critique in the hope that people, realizing that their identities oppress them, will reject those identities. This approach, too often adopted by leftist intellectuals in the past, is psychologically and sociologically naive. It's psychologically naive because it assumes that people will shed an identity with no readily available alternative, whereas to be without a social identity—even an oppressive one—is to be utterly powerless and vulnerable. It's sociologically naive, because it assumes that identities exist entirely in people's heads rather than being rooted in social and material contexts. Thus, people don't come to see themselves as blue collar workers or as mommies because of the idea of the factory or the idea of the family—they learn these identities in social environments that offer no others.

If critical legal studies is to have a meaningful effect on an oppressive cultural system, it must move beyond criticism. It must begin to imagine and build social situations that offer people empowered identities. And if critical legal scholars hope to influence

their students, they must start thinking about how these situations—community organizations, cooperative businesses, participatory unions, in some settings even conventional small businesses—can be fostered by lawyers. Otherwise they may leave their most appreciative students frustrated, frightened, and dispirited, stripped of the very efficacy and identity they attended law school to acquire.

I. Why Critical Legal Studies Offers No Theory And No Program

My explanation for the reluctance of critical scholars to articulate a social theory or a political program depends upon my claim that the critique of instrumentalism is their essential commitment and contribution. Because this claim will be at odds with many readers' perceptions of critical legal studies, I will begin by describing how critical legal studies is often misunderstood and how that misunderstanding inspires skepticism. Next, I will describe how I think this misunderstanding arises and why it is mistaken. Only then will I present my own interpretation of critical legal studies as a critique of instrumentalism and explain how that critique precludes critical scholars from offering proposals for reform.

A. Critical Legal Studies Misunderstood

Critical Legal Studies is conventionally portrayed as aiming its critique against legal formalism. On this view, critical legal studies is an heir to the legal realist movement of the twenties and thirties, and it continues the realists' attack against the laissez faire jurisprudence that some critical scholars have called the "classical legal consciousness."[3] The feature of classical legal consciousness that is most supposed to offend critical legal scholars is legal formalism: the idea that law is autonomous from politics, and the corollary that it serves as a neutral arena for the resolution of political disputes. Because critical legal studies denies the autonomy and neutrality of the law, it appears to support instrumentalism—the view that legal rules and decisions mechanically reflect and serve the

[3] See Duncan Kennedy, The Rise and Fall of Classical Legal Thought (1975)(unpublished manuscript on file with the University of Chicago Law Review); Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness, 3 Res. in L. & Soc. 3 (1980); Elizabeth Mensch, The History of Mainstream Legal Thought in David Kairys, ed., The Politics of Law: A Progressive Critique 18-31 (1982); Robert W. Gordon, Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920, in Gerald L. Geison, ed., Professions and Professional Ideologies in America 70 (1983).

interests of politically powerful groups.

Thus interpreted, critical legal studies is vulnerable to two objections.

The first objection is that critical legal studies is flogging a dead horse. To the extent that the realists simply attacked formalism in favor of instrumentalism, their message has been largely incorporated by mainstream legal scholarship. Most legal scholarship today is one or another form of policy analysis—articulating desirable goals for the legal system to serve, criticizing the system for failing to achieve those goals, and suggesting reforms aimed at achieving those goals. In light of the general rejection of formalism, skeptics can and do complain that critical legal scholars have nothing new to say about the nature of legal rules.

To these skeptics, the critical legal scholars seem to be calling for policy analysis instead of doing it. Thus, according to the skeptics, what leftist legal scholars could contribute would be analysis of how the legal system could better achieve goals that they advocate or interests that they think are important. Policy analysis for the proletariat would, according to these skeptics, represent a unique contribution on the part of the critical legal scholars. Instead, critical legal scholars just repeat the tired truisms of the legal realists about the instrumental function of legal institutions.

Yet these skeptics have a second criticism of critical legal studies that reveals their own confusion. While they argue that the instrumentalist claims of the realists have been incorporated by mainstream legal scholarship and need no longer be repeated, they also argue that those claims were overly simplistic. If the legal system only represented the interests of politically powerful groups, the skeptics contend, the powerless would never win. Thus, the successes of public interest litigation, such as *Brown v. Board of Education*,[4] show that critical legal scholars are overly pessimistic.[5] The reason critical legal scholars don't engage in advocacy scholarship or policy analysis, as these skeptics understand it, is that they are rigidly dogmatic instrumentalists. Instead of assisting disadvantaged groups to influence the legal system, critical scholars simply sit around making pseudosophisticated arguments that efforts on behalf of the disadvantaged are doomed to futility.

According to this picture, critical legal studies is simply sophomoric. It rehashes conventional ideas while arrogantly demanding

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[4] 347 U.S. 483 (1954).

[5] Alvin B. Rubin, Does Law Matter? A Judge's Response to the Critical Legal Studies Movement, 37 J.Legal Educ. 307 (1987).

credit for them as novel insights. Because these ideas have been absorbed from books rather than derived from experience, they are oversimplified. As a result, they yield a picture of the world that is static, that allows critical legal scholars to take it for granted as someone else's responsibility—a world so abstract and one-dimensional that critical legal scholars cannot imagine living in it and don't bother to try.

B. Interpreting Indeterminacy

These objections to critical legal studies would be fair if its adherents were extreme instrumentalists, but they aren't. In fact, they are less enamored of instrumentalism than their detractors. These detractors see critical scholars as instrumentalist only because they incorrectly attribute some of their own instrumentalist assumptions to these scholars.

One important reason for the belief that critical scholars have continued the realist project has been the systematic misinterpretation of the controversial "indeterminacy thesis." The indeterminacy thesis is nothing more than the argument that legal doctrine does not compel results because it is "indeterminate." On any controversial issue, opposing views can each derive support from authoritative doctrinal sources. This "thesis" has been correctly understood as central to the critical scholars' attack on legal formalism, but it has been misunderstood as an expression of instrumentalism.

The motivation of critical legal scholars in presenting the indeterminacy thesis is easily misunderstood because, like the doctrinal rules it attacks, the indeterminacy thesis is itself indeterminate. Like rules, its implications vary with its social context. Coupled with a pessimistic conception of human nature it might imply that bribery, rather than legal doctrine, determines the outcome of cases. Coupled with a more cheerful one, it might suggest that justice, rather than doctrine, determines results. It can be coupled with a highly deterministic model of society, thus: "legal doctrine makes no difference because ruling class interests determine results." Alternatively, it can be coupled with a highly indeterminate model of society, thus: "legal doctrine is indeterminate because meaning is subjective and human behavior is unpredictable."

While most critical scholars share something like the latter, relatively indeterminate model of society, their detractors attribute the former, highly deterministic model of society to them. Accordingly, these skeptics have understood the indeterminacy thesis to

imply not only that legal language or "doctrine" fails to determine social context, but that, instead, social context determines legal doctrine. That one must determine the other is taken as given. In interpreting the indeterminacy thesis as an argument that social context determines the meaning and application of legal language, these detractors wrongly ascribe to critical legal studies their own view of the social world as hard, determinate, unmalleable. They similarly assume that the critical scholars share their contrasting view of language as ephemeral, manipulable, and virtually meaningless, unless referenced to the hard world of social fact.

Now, this way of looking at the world, commonly called positivism, is one that critical legal scholars have explicitly rejected. Critical scholars don't see legal language as indeterminate relative to the social context to which it refers. Rather they see legal language as indeterminate because of the indeterminacy of the social context to which it refers. The social world which legal rules attempt to govern may be described in various ways. The "facts" to which legal decision makers purport to apply legal rules are capable of infinitely varied description. The ambiguity of the social world frustrates instrumentalist efforts to explain or prescribe legal rules on the basis of their service to certain interests. Whether deployed for explanatory or prescriptive purposes, instrumental analyses are premised on the assumption that both the causes of legal rules (the activity of certain interests groups) and their consequences (for the interests of those groups) can be known. Yet critical legal scholars contest these assumptions for two reasons: the indeterminacy of causes and the indeterminacy of interests.

By arguing that cause-effect relationships are indeterminate, critical legal scholars are not suggesting that legal rules have neither causes nor effects. They are only suggesting that the effect of legal rules cannot be predicted with sufficient determinacy to guide law reform. And if the effects of legal rules cannot be predicted, those effects—even assuming they can be determined after the fact—are not likely to serve as persuasive explanations for enactment of the rules.

An example from criminal justice is useful in illustrating this conception of causal indeterminacy because it detaches the indeterminacy of causes from the indeterminacy of interests. It is relatively uncontroversial to claim that most, if not all, of us have an "interest" in reducing violent crime. The question is, do we know how to do it?

The controversy over the general deterrent effect of the threat of imprisonment is well known and need not be rehearsed. Re-

markably, though, there has been little controversy over the "special deterrent," or incapacitative effect of imprisonment. Few seriously question that this form of punishment "protects society." Yet there is no question that crime, especially violent crime—assault, extortion, rape or homicide—is committed in prison. In order to determine whether inmates commit less crime in prison then they would on the outside, we would have to know how much violent crime is committed in prison and how much crime these inmates would likely commit outside of prison. But the amount of violent crime committed in prison is notoriously difficult to determine. At the same time, the inaccuracy of predictions of dangerousness on the basis of past criminal behavior has been demonstrated.[6] Moreover, to the extent that there is a relationship between past and future violent behavior, we don't know whether the relationship exists in spite of the harsh experience of prison or because of it. Thus, even if prison succeeded in incapacitating violent criminals in the short run, it's possible that it would engender surplus recidivism in the long run.

Even assuming that imprisonment reduced violent crime by inmates over the long haul, we could not determine its overall incapacitative effect without calculating its enabling effect on others. First, some of the violence committed in prison is committed by guards—we cannot reliably know how much. Nor can we know, by contrast, how much violent crime these same guards might commit in other, less stressful, circumstances. But second, in assuming that we can remove or reduce the threat of violent crime in "free society" by removing certain individuals, we assume that the cause of crime is individual personality rather than social circumstance. If instead, some violent crime is induced by economic incentives, the removal of some individuals may simply open up opportunities for others. Or, if some crime is caused by desperate poverty, the removal of breadwinners from families and the expenditure of scarce public resources on the enormously expensive institution of imprisonment could turn out to be criminogenic. In short, we have no reason to think that imprisonment incapacitates those who will commit violent crimes in the future.

Thus, imprisonment's "effect" in protecting society quite literally cannot explain its use. Imprisonment's "perceived effect" in protecting society may explain its use, but once we acknowledge that a policy is perceived to have an effect because of assumptions

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[6] See Charles Patrick Ewing, *Schall v. Martin*: Preventive Detention and Dangerousness Through the Looking Glass, 34 Buffalo L.Rev. 173 (1985).

that may be false, an equally appealing explanation for the policy arises: the policy may be pursued in order to reinforce or "reify" these assumptions, rather than to bring about the policy's perceived effect. We may, in other words, isolate convicted criminals in order to convince ourselves that they are not a part of "society" rather than because we think that we thereby protect a society that includes criminals. Imprisonment may change "society" more by redefining its meaning than by reducing its level of violence.

If we cannot predict how a legal institution will change society we can have even less confidence in predictions of how it will affect anyone's interests. Because instrumentalism explains or prescribes legal decisions in terms of their service to particular interests, its explanatory and normative efficacy depends upon the determinacy of those interests. Yet critical legal scholarship suggests that interests are context-dependent at best; at worst, they are simply invented.

What do I mean by saying these interests are context-dependent? Consider a typical legal ethics problem facing a "public interest" lawyer: A religious zealot is required by a public employer to work on her Sabbath. She requests a different shift and is refused. If she refuses to work on the Sabbath she'll be fired. Her church hires an attorney to sue the employer on the employee's behalf for religious discrimination. The public employer offers to settle the claim by reinstating the worker in a different shift that will not require her to work on her Sabbath. The church wants the attorney to take the case to court in hopes of winning a landmark decision. The lawyer is torn between her obligation zealously to represent the "interest" of her client and her "public" responsibility to advance the "interest" of all similarly situated persons.[7]

But how does the lawyer know what her client's interest is? Surely the worker wants to retain her job, but she may do that simply by agreeing to work on the Sabbath. Thus the worker's reason for trying to force a change in her employer's policies is religious. Who is the proper custodian or definer of this religious interest, the worshipper or her church? Is the interest one of maximizing her personal fidelity to the rules of her religion (by not working on the Sabbath), of maximizing fidelity to those rules among her religious community (by winning rights for all members), or of maximizing personal fidelity to the will of that community (by acquiescing in their decision to litigate)? Who decides

[7] This example is based on a teaching problem developed by Paul Spiegelman.

which of these "interests" embodies the client's religious values, the client or the church? Do the answers to these questions depend upon the particular religion?

The point of this example is not to suggest what the lawyer should determine the client's interest to be, but to show that a lawyer cannot identify this client's interest without making her own choice of religious and political values. Focusing narrowly on the client's individual interests may do violence to a client's primary identification with others. Yet identifying a group interest involves a lawyer in the inevitably political enterprise of defining relations within a group. Thus, the notion of "interest" simply has little purchase on a person motivated by fidelity to an ideal, a relationship, or a community. Its application to such a person is a process of inventing rather than realizing an individual personality.

This indeterminacy of interests, when combined with the causal indeterminacy of the social world, has devastating consequences for instrumentalism. Let us imagine that we are law reformers influenced by instrumentalism. If we view ourselves as advocates for the powerless, while assuming that legal decisions are determined by the gravity of powerful interests arrayed on each side, how will we proceed? We will have to identify an arena of struggle where the power is sufficiently balanced, so that our involvement will make a difference. Yet the indeterminacy of the supposedly hard world of interests and social forces will quintuply frustrate us. We won't be able to identify an opportune struggle to join unless we can determine how powerful all its participants are. Even if we could make this determination, we wouldn't be able to identify the interests of the powerful participants. If we could do this much, we still couldn't predict how a change in the law would affect those interests and, accordingly, we wouldn't be able to predict whether, and how vigorously, each powerful participant might support or oppose the change. If, notwithstanding these barriers to planning, we succeeded in changing the law, we still wouldn't know how that change would affect the social circumstances of our clients. And if we did, that wouldn't tell us whether or not the change served their "interests."

Thus, reformers do not inhabit a sufficiently determinate world to enable them to act instrumentally. If they eliminate some strategies on the basis of predictions that those strategies will fail, they may needlessly restrain themselves; if they justify action on the basis of predictions of instrumental success, they may lose commitment at the first sign of failure. But only on the assumption of such instrumentalist motivation must the critique of interests

generate despair and inaction. In fact, the critical scholars' objection to instrumentalism is precisely that it restrains action. Approaching critical legal scholarship with instrumentalist assumptions, some have read it to reject reformist action as unrealistic and impractical. But I prefer to read such scholarship as the rejection of an overly cynical "realism" and a pseudosophisticated instrumentalism as the proper criteria for evaluating action. Instead, critical legal studies calls for the replacement of realism with idealism as the basis for action.

C. Critical Legal Scholarship As A Critique Of Instrumentalism

According to this idealist interpretation of critical legal studies, the indeterminacy thesis has a much broader scope than its detractors have assumed. It applies not only to legal doctrine, but to almost any description of social life. The realists saw legal doctrine as an empty shell, inadvertently determined by social context; they sought only, by means of policy analysis, to make that contextual determination overt and self-conscious. Critical scholars, like most modern legal scholars, have so internalized the realist characterization of doctrine that they equate legal doctrine with the policy analysis that the realists advocated. But this means that their persistence in pointing out the indeterminacy of doctrine now has a different significance. Unlike the realists, critical legal scholars do not treat legal doctrine as a special or even a distinct case among forms of social knowledge, uniquely lacking in truth or determinacy. Instead, they treat it as a typical instance of the use of social science methods to promote policy ends; so that its indeterminacy simply exemplifies the indeterminacy and value-laden quality of the social knowledge on which it is based.

Accordingly, much influential critical legal scholarship is properly seen as a critique of legal realism rather than a recapitulation of it. In *The Metaphysics of American Law*, Gary Peller made this rejection of realism explicit, while making clear that it by no means entailed a return to formalism.[8] Instead, he argued that realism perpetuated the basic flaw of formalism: its commitment to determinacy. Instead of seeing the social world as determined by law, realism insisted that legal decisions are and should be determined by their social context. Instead of subordinating facts to rules, Peller argued, legal realism subordinated rules to facts. Each involved the same structure and the same firm faith in the ability

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[8] 73 Calif.L.Rev. 1151 (1985).

of experts to know and control the social world. In the "deconstructive" cultural criticism of Foucalt and Derrida, Peller finds an elegant device for equating the legal analysis embraced by legal formalists with the policy analysis embraced by legal realists; both are simply "discourses" or "disciplines"—practices of observation, classification, argument, and judgment which do not simply describe human beings, but also shape them. To be studied by a discipline or recognized as a participant in a discourse is to be offered an identity. Accordingly, these concepts seemed to encompass both the formal legal analysis and instrumental policy analysis that critical legal scholars had already persuasively linked.

One of the key arenas in which this argument was made was in the critics' transformation of legal history. This revision began with Morton Horwitz's *The Transformation of American Law.*[9] While this study of antebellum jurisprudence may seem to have little to do with twentieth century legal realism, it demonstrated that by the middle of the nineteenth century the jurisprudence of natural law had been replaced by the sort of instrumentalist and positivist jurisprudence that the realist scholars favored. By arguing that this instrumentalist regime served the interests of a merchant and industrial elite, Horwitz challenged the assumptions of realists that this style of jurisprudence was necessarily more democratic than a jurisprudence of natural rights. Other critical scholars, most prominently Duncan Kennedy and Robert Gordon, have extended the attack on realism implicit in Horwitz's work by questioning some of the instrumentalist premises implicit in his method. Thus, Gordon has questioned the possibility of explaining doctrinal change in terms of elite interests, when legal doctrine and legal thought are partly constitutive of those interests.[10] Kennedy, in the meantime, has severely complicated our notion of doctrinal change by presenting liberal legal doctrine as a contradictory framework embracing positivism and natural rights, instrumentalism and formalism. In this context, the selection of one or another pole by a legal decision maker deploys, but does not alter, the doctrinal framework.[11] Because doctrinal frameworks are so malleable, Kennedy and Gordon are inclined to say that doctrine expresses, articulates, even constitutes conflicting interests, but does not

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[9] Morton J. Horwitz, The Transformation of American Law, 1780-1860 (1977).

[10] Robert W. Gordon, Critical Legal Histories, 36 Stan.L.Rev. 57 (1984).

[11] Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv.L.Rev. 1685 (1976); Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 Buffalo L.Rev. 205 (1979).

serve them.

Other critical scholars have stressed the malleability of the notion of interest itself as a barrier to doctrinal determinacy. Writing about decision criteria that call for the balancing or representing of interests, Al Katz argues that the concept of interest disguises but does not resolve the tension between "natural rights" and "popular sovereignty" in liberal jurisprudence. Moreover, the interests balanced or represented are products of the techniques by which they are measured or observed. Accordingly, the modern decision maker's practices of balancing and representing may be characterized as disciplines that constrain the identities of individuals and groups in the process of recognizing their "interests." The realist's incorporation of these social scientific techniques into legal doctrine insured that doctrine could remain no more determinate than policy analysis.[12]

Several critical scholars have used the indeterminacy of interests as a basis for attacking the policy analysis that dominates post-realist legal scholarship. Most such scholarship explores three models of social choice: the adversary process, the electoral process, and the market. These models all involve attempts to reconstruct the normative certainty on which formalism rested without adopting its naive assumption of social consensus. Each of them rests on an image of society as a competition among antagonists. Nevertheless, each of these models identifies normative truth as the fairly compiled aggregate of the subjective preferences or "interests" of these antagonists. Thus, even though adjudication, efficiency, and majority rule might reach different results, each rests on the same assumptions and each makes a similar claim to truth. Post-realist legal scholarship focuses on three issues: 1. Which of these models should be employed for the resolution of a particular controversy; 2. How these models can be reconciled; 3. How the decision making process modeled by each can be made more fair. Critical legal scholars, by contrast, reject the notion that the interests of individuals and groups develop independently of the processes which aggregate them. Accordingly, they are convinced that no mere combination of the adversary process, the electoral process, and the market can automatically produce legitimate social choice.

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[12] Al Katz, Studies in Boundary Theory: Three Essays in Adjudication and Politics, 28 Buffalo L.Rev. 383 (1979); Al Katz, Balancing, 7 In the Public Interest 18 (1987); Al Katz, Mythologies of Political Representation (1983)(unpublished manuscript on file with the University of Chicago Law Review).

William Simon's work on the adversary process undermines the notion of interests in the context of representing individuals and groups. In *The Ideology of Advocacy*, he argued that lawyers cannot represent their clients without attributing to them "interests" that are recognized by the legal system as legitimate and realizable.[13] In this way lawyers—poverty lawyers especially—can socialize and co-opt their clients in the very process of zealous representation. They needn't feel bad about this because the "ideology of advocacy" reassures them that truth is the outcome of the adversary process. At the same time, this conception of truth allows their opponents to abdicate moral responsibility for the reprehensible causes they advance. The adversarial ethic allows lawyers for both the poor and the rich to act on the basis of "interests" manufactured by the legal system itself, rather than their own values.

Critical legal scholars have similarly attacked economic analysis of law, on the grounds that it mistakenly treats individual economic preferences as independent of legal rules. Thus, their objection is not so much to the substitution of efficiency for justice as a criterion of adjudication, but to the belief that the two criteria can be separated at all. Where economic analysts of law have urged that courts should allocate resources to those who value them more in order to escape transaction costs, Edwin Baker, Mark Kelman, and Duncan Kennedy have argued that how much each party to a dispute values a resource depends heavily on whether or not they already possess it and may depend even more on what else they possess. Thus, resources cannot be distributed on the basis of calculations of allocative efficiency because such calculations always depend on prior assumptions about the distribution of resources. Accordingly, the critics argue, questions of allocative efficiency can never be separated from questions of distributive justice. Moreover, they conclude, this is just one way in which the supposedly hard world of social scientific "fact"—the utility of resources—turns out to be dependent on the concededly indeterminate world of legal doctrine.[14]

Critical scholars have similarly objected to scholarship that in-

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[13] William H. Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis.L.Rev. 29 (1978).

[14] C. Edwin Baker, The Ideology of the Economic Analysis of Law, 5 Phil. & Pub.Aff. 3 (1975); Mark Kelman, Consumption Theory, Production Theory, and Ideology in the Coase Theorem, 52 S.Cal.L.Rev. 669 (1979); Duncan Kennedy, Cost Benefit Analysis of Entitlement Problems: A Critique, 33 Stan.L.Rev. 387 (1981).

vokes political science in an effort to reconcile adjudication with majoritarian decision making. By treating voter preferences as given, such scholarship is able to treat the problem of democratic decision making as a matter of aggregating those preferences, without exploring how they are arrived at. By contrast, critic Richard Parker has argued that even a judicially supervised electoral process cannot represent the "interests" of the poor because poverty precludes people from formulating and pursuing their own political goals.[15]

D. The Critique Of Instrumental Reformism

There is little point in improving the ability of the market, the electoral process, and the adversary system to represent interests if those interests are constituted in the very process of representation. Accordingly, the critical scholars' anti-instrumentalism is aimed not only against these institutions, but also against liberal reforms designed to improve them. This is one of the major reasons that progressive lawyers and legal scholars have seen critical legal scholars as counterproductive kibitzers, whose corrosive and enervating skepticism discourages themselves and anyone else from engaging in progressive advocacy. Yet that has not been the intention of such criticism. To understand how such criticism could be consistent with a desire to inspire rather than discourage political activity, we have to put it in the context of the wider critique of instrumentalism.

Set in this context, such criticism of liberal reform movements appears to follow one of two paths. One such path is exemplified by Alan Freeman's *Legitimizing Racial Discrimination Through Antidiscrimination Law*[16] and Karl Klare's *Judicial Deradicalization of the Wagner Act.*[17] These pieces criticize decisional law (antidiscrimination law since *Brown*) and legislation (the NLRA) that are commonly thought to be major achievements of progressive politics. They criticize these products of progressive politics as ineffectual because, while they made minor adjustments to provide the appearance of protection for persons of color and working people, these legal changes have, in practice, left the decision making

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[15] Richard Davies Parker, The Past of Constitutional Theory—And Its Future, 42 Ohio St.L.J. 223, 239-46 (1981).

[16] Alan David Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn.L.Rev. 1049 (1978).

[17] Karl E. Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941, 62 Minn.L.Rev. 265 (1978).

institution of the market intact. Now the main point most readers find in these articles is that it is the market that chiefly oppresses the poor, whose ranks include substantial numbers of workers and persons of color. Most readers go on to assume that such Marxist scholarship takes the institution of a market as a given, until the gears of history bring about the overthrow of capitalism, and that, in the meantime, struggles for civil rights or collective bargaining are futile and misdirected.

In fact, however, these pieces celebrate the political struggles that brought about these liberal reforms. What they lament is the exhaustion of such political movements as a result of their embodiment in institutions, specifically in adjustments to the ground rules for bargaining within a market. According to Klare and Freeman, these movements did not fail because they accepted the institution of the market; to the contrary, they challenged the institution of the market by embodying a form of association and decision making inconsistent with it. These movements were contained by the market, however, when their struggles were embodied in rules administered by others who did not share the struggles of these people and would not hear their voices. The labor movement was the setting for collective participation in political decision making about the meaning and shape of work; labor law reduced it to a common economic interest. The civil rights movement was a forum for passion, participation, interracial understanding, solidarity and sacrifice; it was entire communities coalescing and rising in resistance. Civil rights law eventually reduced it to a right to governmental indifference. Civil rights law now treats racism as an unfortunate consumer preference on the part of individuals rather than the systematic exclusion from society and politics of a vital community. In short, these articles do not urge contempt for the labor and civil rights movements as irrelevant because they did not pursue world revolution against capitalism. They celebrate these movements as forms of association and decision making that were, in and of themselves, good and sufficient alternatives to instrumentalism.

This perspective is perhaps a little clearer in a second pattern of critique of liberal reformism. This pattern, exemplified by William Simon's *Legality, Bureaucracy and Class in the Welfare System*[18] and Derrick Bell's *Serving Two Masters*,[19] directs critical at-

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[18] William H. Simon, Legality, Bureaucracy, and Class in the Welfare System, 92 Yale L.J. 1198 (1983).

[19] Derrick A. Bell, Jr., Serving Two Masters: Integration Ideals and Client Interests in

tention at the strategic decisions made by liberal reformist lawyers on the basis of distorting assumptions about their client groups' "interests." In each case the lawyers are criticized not so much for interfering with a situation better left alone but for allowing abstract conceptions of their clients' interests to blind them to their clients' potential to contribute to the process of social change.

Accordingly, Derrick Bell has argued that integrationist lawyers failed to recognize one black community's desire for quality neighborhood schools over which they could exert some control and which could serve as vehicles of opportunity for black educators. The result was that these lawyers were so busy pursuing their client's interests that they ignored their desires. They also failed to learn from their clients to the detriment of the lawyers' own political vision. Finally, they squandered an opportunity to mobilize an aroused community to define its own goals, not only in the litigation process, but also in the administration of its own schools.

William Simon has revealed a related problem encountered by poverty lawyers endeavoring to render welfare bureaucracies more generous and less degrading by formalizing their decision making procedures. It could hardly have surprised anyone that the result was to make the welfare bureaucracy more bureaucratic. But what lawyers had failed to consider was the impact of bureaucratization on welfare workers and on the future possibilities for welfare recipients to influence those workers. Removing the discretion of welfare workers degraded their work and destroyed opportunities for caring people to pursue civic vocations, even as it destroyed opportunities for arbitrariness, condescension, and discrimination. It dehumanized welfare recipients' contact with the welfare bureaucracy, which perpetuated the dehumanization of welfare recipients in a new, more impersonal form. It sometimes created new forms of personal degradation as well, substituting inflexible skepticism for invasive curiosity. While recipients "received" new rights to constrain agency behavior, they found that they could not avail themselves of these rights without the indulgence of other poverty professionals—lawyers. Thus poverty lawyers solved the problem of welfare worker abuse of welfare recipients by disempowering welfare workers instead of by empowering welfare recipients. As a result, they foreclosed the possibility that they would have found in such a transformed relationship with welfare workers a political resource rather than a liability. By assuming that the interests of

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School Desegregation Litigation, 85 Yale L.J. 470 (1976).

recipients and workers were opposed, poverty lawyers ignored the possibility that those interests could evolve and converge as a result of political activity. And by taking for granted that the recipients' interests were ones that could be pursued without the recipients' participation, poverty lawyers ignored the possibility that welfare recipients might have a noneconomic interest in political participation and control over their circumstances.

These four critical assessments of legal strategies for liberal reform hardly suggest contempt for popular movements for social change. Instead they suggest serious misgivings about the desirability of social reforms planned, directed, and institutionalized by experts. Thus, the problem with the civil rights movement, the welfare reform movement, and the labor movement was not their failure to attack capitalism. Critical scholars don't see the world in such simple, determinate terms. There is no single cause or single accurate description of oppression in the world, and accordingly, there is lots of valuable work to be done. The problem with these reform movements was that they made too many assumptions about the problem to be solved and involved too few people in the decision making process. In short, they were not sufficiently democratic. Critical legal scholars have the same misgivings about ambitiously radical programs for social change that they have about liberal reformist programs. If they are planned and conducted by experts based on fixed assumptions about the "interests" of the oppressed, they are as undemocratic and misguided as the movements for liberal reform.

This caveat is made explicit in Edwin Baker's *The Process of Change and the Liberty Theory of the First Amendment*.[20] Here Baker identifies instrumentalism as the separation of means and ends. Arguing that the distinction is artificial and cannot be maintained, he attacks the notion that the end of progressive social change justifies violent or coercive means. Baker's chief purpose is to argue that even the radical change to a collectivist or communal society is compatible with, even requires, strict protection of individual freedom of opinion. While many critical scholars would disagree with some of Baker's specific conclusions, the article's reasoning reveals why critical legal scholars seem to have so much trouble articulating a program for social change. It is not so much that they are afraid to come out and admit that they are Marxist or socialist; it is that they remain convinced that programs for so-

[20] C. Edwin Baker, The Process of Change and the Liberty Theory of the First Amendment, 55 S.Cal.L.Rev. 293 (1981).

cial change devised by experts are likely to be intellectually dishonest in conception and undemocratic, as well as ineffective, in execution.

II. Towards A Critical Theory Of Social Change

The political and intellectual poverty of instrumentalism explains the critical scholars' reluctance to offer a theory of society and a political program for changing it, but it doesn't really absolve them of the obligation to do so. After all, identifying oneself as a leftist intellectual means accepting a responsibility to understand society and work for change. Luckily, critical legal studies is capable of developing a model of society and a program for changing it that are compatible with the critique of instrumentalism. But it won't be easy.

A. The Difficulty

Unless critical legal scholars see their society as predictably and systematically dealing injustice, it is hard to see why they think radical change is necessary. Thus the critics' posture as leftist intellectuals requires that they explain, notwithstanding the indeterminacy thesis, how the society enforces injustice. The difficulty faced by critical legal studies is that the indeterminacy thesis rules out simple coercion as an explanation.

Western Marxists have sought to explain the persistence of capitalism in noninstrumentalist terms by making use of the concept of ideology: perhaps the victims of injustice are lulled into submission by false beliefs. One of the most promising strategies has targeted instrumentalism itself as a misleading belief system. According to this analysis, the mass media co-opt workers by offering them attractively advertised consumer goods of little value. The celebration of consumption not only persuades workers that they are better off than they are, it also portrays work in instrumental terms—as a market transaction, work for consumer goods, rather than an arena for personal expression and political participation. Instrumentalist ideology induces workers to mistake the exercise of consumer choice for real freedom.[21]

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[21] See Jürgen Habermas, Toward a Rational Society: Student Protest, Science, and Politics 81-122 (1971); Max Horkheimer & Theodore W. Adorno, The Cultural Industry: Enlightenment as Mass-Deception, Dialectic of Enlightenment 120-67 (1972); Herbert Marcuse, Repressive Tolerance, in Robert Paul Wolff, Barrington Moore, Jr., and Herbert Marcuse, A Critique of Pure Tolerance 81-117 (1969).

The difficulty with this solution is that if the indeterminacy thesis rules out simple coercion as an explanation for the persistence of injustice, it also rules out ideology. If ideas are indeterminate, people are much less likely to be constrained or imprisoned by ideas alone. Indeed a major point of much critical legal scholarship is that many of the premises of liberalism have liberating as well as oppressive connotations. It is much harder to claim that the oppressed are "fooled" by ideology if you are reluctant to say that any ideas are determinately "false."

A second problem with a purely intellectual explanation for the persistence of injustice is the impoverished practice of politics it suggests. If acquiescence in injustice were simply an intellectual mistake, it could be corrected by sufficiently clever criticism. Activist lawyers are often hostile to critical legal scholars to the extent that these scholars seem bent on this pointless and decadent pursuit. In attempting to develop a noninstrumentalist explanation for the stability of an unjust society, critical legal scholars must avoid a hopelessly naive idealism.

B. Instrumentalism As A Culture

Critical legal scholars can escape this unhappy dilemma if they develop a cultural model of society. Unlike instrumentalist and idealist models, a cultural model would enable critical legal scholars to explain the stability of an unjust society without fudging the indeterminacy thesis. According to this approach there is nothing necessary about the structure of social and economic life. Nevertheless, that structure has consequences for the formation of associative relationships which in turn have consequences for the formation of character. By character I mean not just habitual behavior, but the basic value commitments in terms of which people identify themselves—those values that people are committed to because they have invested their sense of self in them. Associations affect those value commitments because they provide contexts in which people can be recognized and identified by others as individuals defined by particular character traits. Because such traits or values are built into people's self-conceptions and are reinforced by their social relationships, they have a much stronger hold than any ideology. A stable culture exists when the identities encouraged by the structure of social life direct people to behave in ways that reproduce that structure. Critical legal studies can be understood to have an explanation of the stability of injustice in modern capitalist society that does not rest simply on power or ideology, if we understand the instrumentalism that critical legal

studies primarily attacks to be a culture rather than simply an ideology.

What are the values that inform instrumental culture? Instrumentalism is a culture of calculating individuals and impersonal social forces. Its participants believe in the separability of means and ends, with its corollary that the ends can be defined in advance of the processes that realize them. They are planners and resume builders, looking past every experience to its consequences. Individually, they pride themselves on choosing their own ends; collectively, they stockpile those resources that can serve any end. The financial, technological, and military capacity of such a society is maximized, regardless of the consequences for particular communities or natural environments.

How can I describe such a culture as stable? What persists is the composition of the culture by calculating individuals and impersonal social forces. In a world constantly altered by acquisitive and exploitative drives, people's opportunities to commit themselves to a value, a person, a community, or a way of life become increasingly limited. These limited opportunities make it increasingly hard for people to identify themselves with their commitments and increasingly necessary for them to identify themselves in terms of their value in a market. It is not the idea of instrumentalism that makes people see themselves as rational self-interest maximizers. It is the embodiment of this idea in the structures of everyday life—employment markets, factories, schools, singles bars, supermarkets, bureaucracies—that prevents people from developing any alternative conception of self.

Psychiatrist Jessica Benjamin has recently offered a portrait of instrumentalism as a stable culture in this sense, with roots in, and consequences for, childhood and later personality development.[22] Benjamin argues that the privatization of child rearing and the structure of the labor market determines that most children will be reared predominantly by one full-time parent. If childrearing is carried on by one parent, however, the parent-child relationship becomes the exhaustive social context for the articulation and development of that parent's identity. Since an infant cannot carry that burden, the nurturing parent's sense of identity tends to weaken and dissolve. The child, developing its own sense of identity primarily in relation to one parent whose sense of identity is itself perilously dependent upon the child, quickly learns that it

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[22] Jessica Benjamin, The Bonds of Love: Rational Violence and Erotic Domination, 6 Feminist Stud. 144 (1980).

cannot make assertive demands on others without risking the other's disintegration. The result, argues Benjamin, is that the child is faced with a dilemma: identifying herself in terms of frustrated desire, or identifying herself in terms of those needs that are met by others without being defined or asserted by oneself.

The first alternative, characterized by isolation from and hostility towards others, is the choice made most often by young males, according to Benjamin. Benjamin associates this pattern of identity development with instrumental rationality. Instead of learning from others, the instrumentally rational person regulates himself and views others as either impediments to or implements for the realization of desire. This posture toward the world is "rational" only in the sense that it is consistent and unsentimental. Yet it is irrational because it is premised on the illusion that one can identify one's own desires in isolation from others, in other words, that one's preferences are a given. Proceeding on the basis of such an illusion, people plan their lives in advance of experience, seeking rewards and accomplishments rather than relationships and experiences. The efforts of social scientists and policy analysts to "plan" social life on the basis of aggregations of fixed individual "interests" are only manifestations of "male" rationality writ large. A world of such isolated people—the world of the workplace and the marketplace—is not a world in which one can form associations that lead to a social identity. Nor is it a world in which one can engage in politics—the collective definition of the good—regardless of one's own desires. Thus, one of the destructive consequences of developing an instrumental identity is that it limits the opportunities of everyone else to develop their identities in association with others. In this way, instrumental rationality reproduces itself in the public world of work and commerce.

The second alternative, characterized by passive dependence on others, is, according to Benjamin, the choice most often made by young females. This choice reflects an unwillingness to risk isolation either by subjecting the nurturing parent to insatiable demands or by withdrawing into the angry solipsism of instrumental rationality. The problem is that companionship is purchased at the price of an identity of one's own. People who adopt this approach may never develop the ability to differentiate their own needs, desires, or purposes from those of others. As a result, they are easily channeled into the "nurturing" role of full-time childrearing which weakens their sense of independent identity still further. Seeking the protection of a partner whom they will never challenge or change, they become vehicles for the reproduction of instrumen-

tal rationality in their spouses as well as in the next generation.

Instrumentalism flourishes where socially stunted selves combine to form the impersonal forces that inhibit the social development of personal identity.

III. Changing Instrumental Culture: A Political Program

A. The Transformative Possibilities Of Culture

The compelling feature of this sort of cultural explanation of the stability of injustice is that it actually encourages action to a greater extent than the instrumentalist explanations traditionally advanced by "scientific" Marxists. If injustice is overdetermined by an immense imbalance of power that an activist could not realistically hope to change, resistance seems pointless. By contrast, cultural explanations proceed from the premise that the persistence of injustice is contingent, a disequilibrium dependent on a delicate combination of forces all working together, mutually reinforcing one another.

Thus, for children to learn instrumental rationality, they have to be raised predominantly by parents too weak to engage with their children without depending utterly upon them. In turn, the parents must have been raised to be either instrumentally rational or passively dependent, and the weakness and isolation they experienced in childhood must continue into adult life because of the structure of work, child care, and commerce. Children must be primarily exposed to one parent and the responses of both parents to this disabling situation must be gendered. This complex web of mutually reinforcing but nevertheless contingent circumstances creates opportunities for meaningful social action, because to alter one of these circumstances weakens all the others.

Yet constructive social change cannot be brought about simply by undermining the structures that hold instrumental culture together. It must never be forgotten that these structures are strong and durable because they offer people social identities—as homemakers, bureaucrats, consumers. The awful implication is that it is people's very psyches that institutional structures hold together and that it is these psyches that, in turn, hold instrumental culture together. The great harm in institutions like the market, the bureaucracy, or the nuclear family is not simply the unjust distribution of resources they enforce, but the impoverished personal identities they foster. Yet an oppressive or impoverished identity is better than none at all; so that the harm generated by institutions cannot be eliminated simply by eliminating the institutions

themselves.[23]

The problem is not to eliminate impoverished personal identities, but to foster the development of richer ones. And that, unfortunately, will involve more than dismantling the fragile, contingent, but nevertheless oppressive cultures of instrumentalism. It will also involve building new cultures in which people can develop their identities through interaction and dialogue rather than self-repression and mutual manipulation. Moreover, the building of cultures of mutual recognition cannot be done on paper. Critical legal scholars must aim at the development of alternative identities that are not premised on the acceptance of oppression, while realizing that identities are socially constituted, not imagined. As a result, even though culture is rooted in self-perceptions, it cannot be altered without changing social structure. On the other hand, the discovery of the fragility of instrumental culture reveals that even modest, highly localized changes, can make a real difference. Accordingly the task for critical legal research must now be to investigate what kinds of associations foster strong social identities and how lawyers can create or enable such associations.

B. A Research Program

Some of this research has already begun, both inside and outside of critical legal studies. Much of this research focuses on the potential of participation in decision making for the development of personal identity. One issue that critical legal scholars are beginning to explore is the potential for nurturing civic identity within the interstices of the administrative state. At the most sanguine extreme are Errol Meidinger's explorations of the cultural setting of regulation. People support institutions, argues Meidinger, because of their self-perceptions. In other words, they adhere to roles because of their psychological commitments to fulfill the images that others have of them and in terms of which others recognize them. These roles—which may require altruistic behavior or even heroic self-sacrifice—are as important as self-interest in the sustenance of institutions; indeed, argues Meidinger, they generally shape people's perceptions of what their interests are. One of the consequences that is revealed by Meidinger's research is that in the close working relationships engendered by the process of en-

23. See Isabel Marcus, Locked In and Locked Out: Divorce Reform and Women's Legal Identity, 37 Buff. L. Rev. (forthcoming 1988.), for an illustration of this point with respect to the institution of marriage.

vironmental regulation, ostensible adversaries crave and ultimately develop mutual respect. This suggests to Meidinger that citizen participation in environmental decision making, even without control, is likely to engender a sense of civic responsibility in corporate and government bureaucrats, by influencing their self-perceptions.[24]

Less optimistically, William Simon sees professionals as the only people in modern society who identify themselves with the pursuit of a common good and who routinely inspire trust and respect. Thus where Meidinger sees a civic and altruistic self-definition as inherent in any relationship, Simon limits it to those who have been exposed to extensive education and who have been given decision making discretion in their work. Nevertheless, he sees the professionalization of administrative bureaucracies as a change that would render them more democratically responsive to their workers. In so doing it would strengthen the civic identity of these workers and thus give them a psychological stake in being more democratically responsive to the people they serve.[25]

A much less sanguine view of the administrative state is offered by Steven Wineman, a radical social worker. From his perspective, the problem with welfare bureaucracies of the sort explored by Simon is not too few professionals, but too many. Wineman prescribes an even more radical decentralization of social services in order to extend the respect and discretion accorded professionals to people in the society who don't ordinarily receive it. Arguing that providing emotional support or therapy involves undertaking political responsibility, he calls for the proliferation of non-profit community associations through which the indigent could provide such services to one another. Another function of such associations could be to enable the poor collectively to administer the public resources devoted to sustaining them. According to Wineman, the experience of participating in political decision making is more important to the development of civic identity than is professional education. Whether Wineman's or Simon's empirical assumptions are more accurate is a question for future research.[26]

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[24] Errol Meidinger, Regulatory Culture and Democratic Theory (1987)(unpublished manuscript on file with the University of Chicago Law Review); Errol Meidinger, Regulatory Culture: A Theoretical Outline, 9 L. & Pol'y 355 (1987); Errol Meidinger, On Explaining the Development of 'Emissions Trading' in U.S. Air Pollution Regulation, 7 L. & Pol'y 447 (1985).

[25] See Simon, 92 Yale L.J. 1198 (cited in note 18).

[26] Steven Wineman, The Politics of Human Services: Radical Alternatives to the Welfare State (1984).

Questions like this are empirical. They are best answered by social experimentation rather than academic speculation. There is a growing literature that carefully assesses the experience of actual experiments in small scale participatory democracy. One notable example, Jane Mansbridge's *Beyond Adversary Democracy*, compares a New England town meeting with decision making in a worker-managed crisis intervention center.[27] Mansbridge is cautiously optimistic about both the extent and psycho-social effects of participation in these settings. Another useful example, James Miller's *"Democracy is in the Streets"* assesses the experience of the Students for a Democratic Society in trying to live by their ideal of participatory decision making.[28] One important conclusion that Miller reaches is that the effort to mount a national antiwar movement undermined not only the organization's decision making process, but its sense of community as well. The rapid expansion of the organization and its growing dependence on national events and a manipulative newsmedia rendered the organization unstable and, ultimately, ephemeral. It may be exciting to join with thousands of others to affect national policy, but if such movements cannot sustain lasting identities for their members, they do less to change society than smaller cooperative enterprises of longer duration and more modest ambition. Mass movements, inviting strategic thinking and hierarchical organization, are themselves a part of instrumental culture. Like most instrumental projects, they are organized too much around the solution of problems and too little around the sustenance of social life.

Critical legal scholars have been predominantly engaged in a critique of ideas. If this critique is reformulated as a critique of culture, it represents the beginnings of a social theory to explain the persistence of distributive inequality and personal alienation. Implicit in this model of society is a distinctive vision of progressive social change involving the development of small, localized, fairly stable and durable settings for the social development of personal identity. If critical legal scholars are to take themselves seriously as social theorists—not to mention political actors—they must test this vision empirically. In short, critical legal scholars have an intellectual as well as a political obligation to foster the sorts of transformative associations their implicit theory of social change envisions. Here is where the context of critical legal schol-

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[27] Jane J. Mansbridge, Beyond Adversary Democracy (1980).

[28] James Miller, "Democracy Is In the Streets": From Port Huron to the Siege of Chicago (1987).

ars in a professional school may become an asset, rather than the embarrassment or inconvenience it has sometimes seemed.

C. An Educational Program

Instrumental culture teaches that changing the structure of society is not a practical goal because it's not in the interest of anyone with enough power to achieve it. At the same time, instrumental culture offers privileged critics of society an identity as "intellectuals." Accepting this identity, critical legal scholars have been all too willing to act as if they have nothing to say to future lawyers of any practical relevance. They act this way for three reasons, none of which turn out to be consistent with their beliefs.

First, critical legal scholars feel precluded from proposing practical recommendations for improving society by their own critique of instrumentalism. Second, seeing professional students as self-interested careerists, critical scholars doubt that their students aspire to change society. Third, they lapse into the assumption that even if their students wanted to change society, they couldn't do it by practicing law.

None of these assumptions are warranted. We have seen that the critical scholars' analysis of instrumental culture suggests a strategy for transforming society. Moreover, if they are to test their understanding of that culture, they have to assess the efficacy of this strategy in practice. In this they are fortunate in having students, the bulk of whom aspire to careers, not in scholarship, but in practical affairs.

Critical scholars should take an interest in these careers. Their own arguments attack the distinction between citizenship and self-interest that distances critical scholars from their students. Their own research suggests that professionals are capable of developing civic identities particularly if they have ongoing association with people that expect this of them. To civically ambitious students, critical legal studies could offer, if not a blueprint for a changed society, designs for experiments in social change. In conceiving of their practice as experimentation, students could embrace their work without discarding their posture as critical thinkers. And if critical legal scholars viewed their students' careers as experiments in social change, anticipating and following these careers would be central to their research programs.

A critical legal studies perspective undermines the distinction between lawyer and activist as well. Most of us envision activists as outlaws in the tradition of the great social movements of the sixties. These volatile and charismatic movements frequently engen-

dered the kind of personal transformation and collective identification that critical legal scholars are interested in fostering. Yet we've seen that associations must be smaller, stabler and more durable than these movements if they are to sustain the collective identities of the people who identify with them.

That is where lawyers come in. If associations are to establish the organizational frameworks and protect the resources that will enable them to endure, they need the help of lawyers. I want to distinguish this position from the traditional argument of political organizers that mass movements need an institutional framework to facilitate planning. Institutions are collectivities established by a higher authority for a specific purpose. Because the institution exists for a purpose not defined by its members, it must be hierarchically organized. By contrast, we are interested in enabling and preserving associations established and governed by their members. Such associations need no recognition from a higher authority in order to exist, but legal recognition and regulation by the state may reassure an association's members that it will retain its identity, financial solvency, and political form over time.

Lawyers can play a role in fostering relations of association by organizing or representing participatory unions; worker owned or managed businesses; community organizations and land trusts; religious organizations; indigenous tribes; neighborhood schools, clinics, or day care centers; or new political parties. In some contexts, they may even advance this project in the course of representing or serving agencies of the state. Gerald Frug has suggested that municipalities, once established as independent associations, may yet again become democratic settings for the development of collective identity, despite their status as agencies of the state.[29] Again, critical legal scholars may learn what works and what doesn't by inspiring their students with such an experimental program and then learning from them. The result would be that critical legal studies would then offer lawyers an educational and vocational identity capable of being sustained longer than three years and beyond the ivy covered battlements of the academy.

D. A Concluding Paradox: Ending Instrumentalism As An End

Before congratulating ourselves on moving beyond criticism, there is one final question we must face. If critical legal scholars propose action aimed at undermining instrumental culture and fos-

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[29] Gerald E. Frug, The City as a Legal Concept, 93 Harv.L.Rev. 1057 (1980).

tering community, haven't they fallen back into the very instrumentalism they abhor by proposing instrumental action? My first response to this conundrum is that critical legal scholars criticize instrumental culture and seek its dissolution; that is hardly the same thing as foreswearing instrumental activity. Second, their approach is noninstrumentalist in the sense that they do not aspire to implement a utopian society planned in advance. Instead, they have a vision of what it would take to improve the capacity of some people to define themselves socially and act politically in the near future. They're partly motivated by the sense that these changes would improve prospects for a more just society at some indefinite point in the future; but, they're also motivated by a commitment to the contemporary values of community and participatory democracy for individuals, irrespective of their long term effects on the structure of society. What Critical Legal Studies rightly deplores about our culture is not our willingness to pursue goals but our inability to be inspired by ideals.

Certainly, when I offer political participation and personal growth as goals guiding action, I invite critical legal scholars to act instrumentally. This I concede, while insisting that in doing so they would act outside of and against instrumental culture, repressing the impulse to plan our collective self-discovery. Instrumentalism is the culture we live in and that lives in and through us; but we are, nevertheless, capable of fashioning and living a different culture. To abhor the culture we act in is not to abjure all action. We can criticize instrumentalism and nevertheless move beyond criticism.