Commentary

CRITICAL TRADITIONS IN LAW AND SOCIETY RESEARCH

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This paper examines the place of critical inquiry within law and society studies. It suggests that such inquiry requires a periodic reexamination of both methodological and theoretical assumptions. In terms of method, critical inquiry would emphasize the particular and intensive as opposed to the general and extensive. In terms of theory, it calls attention to the limits of state legality and invites attention to ordinary social transactions in which the law appears invisible but is nonetheless powerful. The authors argue that it is possible to be both critical and empirical.

At first glance, the conjunction of the words "critical" and "traditions" in the title of this paper seems something of a paradox: Whereas "traditions" signifies connection, stability over time, regularized practice, and continuity, "critical" suggests interpretation and challenge, distance and change. The paradox dissipates, however, in the recognition that criticism occurs within a context provided by tradition and that critique is at least partially constituted by that which it seeks to resist, reform, or revise. Critique is not fully or completely opposed to tradition; instead it suggests that while there is participation in a shared context, it is participation at a distance.

Law and society has always imagined itself to be a critical enterprise, outside of the mainstream of legal discourse, participating at a remove while offering an alternative epistemology and sociology of law (Friedman, 1986). Its focus has been decentering, concerned not with what the law *is* but with what the law *does* (Trubek, 1984).

Our claim is broad but simple: Legal institutions cannot be understood without seeing the entire social environment. At the same time that we have been insisting on bringing sociology

to law, we have done less well attending to the forces that frame our descriptions of legal institutions and their environments. We have not done very well at promoting a sociology of the sociology of law. It is to this enterprise that we will turn our attention.

In his work on feudal history, Bloch suggests that although "the artificial conception of man's activities which prompts us to carve up the creature of flesh and blood into the phantom homo oeconomicus, philosophicus, juridicus is doubtless necessary . . . [the fiction] is tolerable only if we refuse to be deceived by it" (1961: 59). As an intellectual enterprise, the law and society movement began as an effort not to be deceived. We began as critics; traditions develop, however, even among critics. Although critics first struggle to make room for a new understanding, they, in their enthusiasm, push this understanding from the margin to the center; they seek to make it *the* understanding and thus, in spite of their critical stance, they objectify and reify what was, in its origins, the product of a reformist desire. The critical bite that comes from challenging a dominant paradigm often gets lost when the new vision becomes accepted and taken for granted, and is no longer at the margins but now functions as its own center. The question we must address is whether the effort to observe the relationship between law and society can claim to retain the critical edge it showed twenty-five, seventy-five, or three hundred years ago, when the first struggles to distinguish law and society can be recorded.

The task for those who seek to preserve that critical edge is to reconstitute and reimagine the subject of socio-legal research. This requires attention to epistemology and understanding, or how we claim to know and what claiming to know can possibly mean. But these words are not simply our own. They reflect several years of intense efforts in the Amherst seminar.* These efforts and this collaboration are part of an activity that seeks to locate and examine the knowledge and tradition we call law and society. They suggest that it may be time to move our activity into places and spaces in the social environment we have not previously considered in order to reconceive the relationship between law and society.

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* The Amherst Seminar on Legal Ideology and Legal Process has been meeting in Amherst, Massachusetts since 1982. It includes John Brigham, Christine Harrington, Lynn Mather, Sally Merry, Brinkley Messick, Ron Pipkin, Adelaide Villmoare, Barbara Yngvesson as well as the authors of this paper.

I. EPISTEMOLOGICAL FOUNDATIONS

Much contemporary social theory argues forcefully, and persuasively, we think, for the indeterminism of the social world (Foucault, 1972; Derrida, 1978; Unger, 1975). The concepts, texts, and situations we both live with and observe do not exist outside the very systems of thought we construct. This, in some very simple sense, challenges our scientific claims and our ability to maintain and advance a rigorous, disciplined knowledge producing enterprise. Or does it? We worry that too much recent social theory and criticism, theory and criticism to which we are quite sympathetic, goes too far in leading, against its better instincts, to a dangerous reductionism.

But first let us reemphasize our sympathy for the indeterminist position. This position suggests that

> each move to fix meaning fails because no essential or necessary meaning adheres to either the expressions [we use] or the things they signify . . . . The search for such meaning leads back to contingent social practices rather than to objective "reality." These social practices embody contingent choices concerning how to organize the thick texture of the world. . . . What gets called "knowledge" is the . . . effect of social power institutionalized in [socially constructed] . . . representational conventions (Peller, 1985: 1168–70).

In *Philosophy and the Mirror of Nature*, Richard Rorty (1979) writes in a similar vein, describing recent philosophical developments from the point of view of what he calls an anti-Cartesian and post-Kantian revolution. Put simply, he argues that we must abandon the notion of knowledge as an accurate representation of some externally existing reality. He suggests that we cease imagining constraints on what can count as knowledge, since justification is "a social phenomenon, rather than a transaction between 'the knowing subject' and 'reality' " (Rorty, 1979: 9). Rorty reminds us that "investigations of the foundations of knowledge or morality or language or society may be simply apologetics, attempts to externalize a . . . contemporary language-game, social practice, or self-image" (ibid., pp. 9–10). The search for rationality and objectivity, he claims, is a self-deceptive effort to universalize the discourse of particular cultures. Thus Rorty tries to edify rather than systematize to help "readers, or society as a whole, break free of outworn vocabularies and attitudes, rather than . . . provide 'grounding' for the intuitions and customs of the present" (ibid., p. 12).

Of course, much of this argument is familiar. Every undergraduate sociology major has read versions of it in Berger and Luckmann (1966), Mannheim (1936), Gouldner (1979), or Gus-

field (1981), among others. However, these readings have a crucial emphasis that is often understated if not totally ignored in current discourse. Because the world is socially constructed does not mean that the world is not consequential. While it may be impossible to separate ourselves from our subjects (hence the earlier suggestion of a distance not a separation), it is equally impossible to demonstrate or know fully that from which we are separate. But in our rush to maintain a critical edge by challenging accepted paradigms and in our inability to separate the world from consciousness, we do not want to argue that there is no world separate from consciousness. This is an old problem.

From Zeno to Hume, skeptics have had to come to terms with a world whose consequences they encounter but whose existence they cannot demonstrate. One is reminded of a story in which Boswell was bemoaning his inability to refute Berkeley's ingenious sophistry and the apparent necessity for axiomatic, nondemonstrable first principles. Johnson responded by kicking a stone so hard that he himself bounced off it, saying, as he did, "I refute it thus."

Once created, the social world becomes something like that stone: wholly out there, not easily moved, and something we bounce off all the time. Laws may be human creations and thus apparently malleable, contradictory, and indeterminant, subject to interpretation and reformation. But to the defendant who goes to jail, the law is certainly less malleable and less subject to reinterpretation and more like something one bounces against. We butt up against the law all the time. Law creates the difference between marrying and just living together, not a very large difference, some might say, until you try to walk away. Because of court decisions black people lose their jobs and white persons are put in their place, and people are executed instead of spending their lives in prison.

Just as critics may give in to an unfortunate temptation to equate empirical science with positivism and determinism and then to condemn all empirical science in order to eschew any association with positivism and determinism (for a further treatment see Trubek, 1984), defenders of the faith in science may lose more than they realize if they dismiss critics like Rorty as people who deny that there is a "there" out there, as naive philosophical radicals, or as nihilists. The critics are none of these.

Surely the import of contemporary theory is not that there is no "there" out there but rather that our ability to know what is there is limited. If there are no determinative ways to know

the world separate from our socially created representational systems, then what matters most is what counts as knowledge, what styles of work are welcomed and supported, what styles are rejected, and what gloss must be put on our work to satisfy those upon whose material largess we are most dependent. It matters whether what counts as knowledge is created in professional discourse or in supermarkets and whether it is created by men or by women.

Critical theorists especially are telling us that not only are meaning and knowledge a product of social power, but that this is a process that is not entirely knowable. There are great silences and omissions; many voices are unheard, not well understood, and even subjugated. Indeed, a strong claim is made for indeterminancy because, it is argued, the social world may be uncontrolled, not simply uncontrollable. Even if we succeed in opening our vision to recognize and include subjugated knowledge, this should not then blind us to the inevitability of a hard-fought struggle between dominant and dominated discourses.

We have been describing, somewhat elliptically, three basic positions. The first says that there is a physical and social world ordered by rules and norms that are knowable and independent of human intervention. This is the science in social science. The second builds upon the first but notices the interaction of observer and the world; it says that the world out there is known as well as constructed through collective human action. Finally there is a third, postmodern or poststructural position that celebrates the infinite openness attached to a radically constructivist vision. It suggests the insufficiency of locating, and possibly predicting, action or knowledge based upon groups, classes, genders, or institutions because the categories and locations are themselves problematic. Indeed, the poststructural innovation deconstructs the last universal institution—language—and highlights the nonreferential, contradictory, and indeterminant character of language itself.

II. THE EMERGENCE OF LAW AND SOCIETY

This brief comment on some modern critical thought brings us to an unsettling conclusion or, better, to an unsettling beginning. To maintain a critical distance from our present project, we would be compelled to demonstrate regularly the indeterminancy of our analysis of indeterminancy. Given this conclusion, is it nonetheless possible to extract some instruction about how to proceed? We think so. We hear two relatively clear messages. First, we are asked to notice the location and

historicity of the communities within which social construction takes place (Foucault, 1980), for example, to notice the institutional locations of law and society research; second, we are urged to guard against turning these bounded observations of law into universals. This approach urges attention to the specific situations, institutions, and struggles out of which the field of law and society emerged. Law and society research has roots far deeper and older than the American realists, origins that lie within the modern conception of law itself.

The distinction between law and society derives from European political struggles in which the distinction between civil society and the state was postulated and then used to keep the state in its place (Locke, [1690] 1960). For medieval Europeans the merger of law and society was an excuse for hierarchical oppression, so they tried to separate the two. For Americans, the rule of law is linked to these notions of the separation of law from state and society. Because it suggests rationalized ordering, law is viewed as something at once state produced but yet able to control the state (Hayek, 1960). While in the European context law carries the burden of being part of a hierarchy, in the American context the sense of hierarchy and oppression is absent. Instead there is a persistent notion of external and neutral regulation, and as a result we carry the burden of demonstrating that law and hierarchy have a relationship.

The immediate forebearers of the law and society movement, the legal realists, challenged contemporary social and political elites, yet they never challenged the predominant faith in law. Instead they sought to mobilize legal authority for particular political projects, following quite consistently the liberal tradition they inherited. Rather than waning, confidence in law was high (Peller, 1985). Thus as an heir of the realists, the law and society movement, while proclaiming itself the carrier of a new vision, evolved within a tradition that was largely hopeful about law and the possibilities for social change and reform through law (Sarat, 1985).

In some ways the major emphasis and innovation of the law and society movement was not so much an interest in the social forces that produced law, although certainly there was some of this, but rather an interest in how law operated upon social phenomena. With a self-consciously empirical commitment, itself a predictable move within the mainstream intellectual currents of the late nineteenth and early twentieth centuries, scholars explored the consequences and implementation of law and found, much to their surprise, the ineffectiveness of

law—the gap between the law on the books and the law in action.

The law and society field proclaimed itself a counter-hegemony; it stood, we were told, at the margins. But, some might ask, at the margins of what? Surely we were not marginal in efforts to combine scientific method and administration that became so central a part of political science and sociology in the 1960s and 1970s and has become today so important a part of economics. If we were marginal, it was only within law schools. The claim to a position outside mainstream legal thought is, however, a very narrow and particular claim; law and society is neither intellectually marginal nor culturally deviant. While we thought we were producing a new understanding of law, the bite was never all that critical because we never tried to undo liberal claims about the relationship between law and society. If there was a distinction between law and society and mainstream legal scholarship, it was not in the observation that law was not autonomous but in the degree of emphasis each placed upon different sides of the divide. If the law schools overestimated the determinacy of law, the law and society movement underestimated its consequences (Abel, 1973).

Even today this difference persists between what might be the emerging new orthodoxy of critical legal studies and law and society research. For advocates of critical legal studies, law is a central cultural and social institution; their paradigm suggests too strong an influence of law on social behavior and too large a role for law in the construction of the social world. In contrast the law and society tradition often provides too small a role for law in constituting social life. By looking at hard cases in the administration of law, we were drawn all too frequently to instances when law failed. Law in its daily life was basically not analyzed. We looked at the ways in which consumer protection laws were enforced (Silbey, 1981, 1984a; Silbey and Bittner, 1982), but we did not look at the ways in which the buying and selling of goods took account of and accounted for its legal regulation (Silbey, 1984b). We looked at violations of law but not at instances of law-abidingness.

Earlier we said that we butt up against the law all the time. We misspoke. We do not trip on the law. In the ways in which we have been studying law, we hardly ever encounter it; however, others trip over it all the time. The law has a very different presence in our lives and the lives of the less privileged. The work of the Law and Society Association has contributed to demonstrating and explicating this inequality. But in the formulation of our subject, we nevertheless discuss it as if it

were a universal: "The law." We know that the law does not work for us in the same ways it does for people in Jamaica Plain or the Hopi Indians. Why, therefore, do we talk about "the law." Because we have been busy problematizing the relationship between law and society, we neglected to make problematic the idea of law itself. We looked for the connections between law and society as if the two were separate and singular. They are not. "The law" is a fiction, but laws are real. Similarly, "society" is a fiction. We invent these fictions. We cannot escape them. As scholars and critics we must work hard to distance ourselves from them.

Our tradition invests law and society with the very reifying rigidity that we imagine ourselves to be overturning. Law and society scholarship has not been simply concerned with the autonomy of law or the lack thereof; it advances a discourse of universality, elides its own sources, denies its own history and location, and speaks as if there were no perspectives.

III. CONCLUSION

We end, as we began, with a paradoxical statement: Criticism arises from both a greater commitment to and a greater distance from one's tradition. To be critical bespeaks a desire to be faithful to a tradition by refusing to accept its imperfections. This requires an unwillingness to rest content with primary orienting norms and a willingness to invert what is central so that the marginal, invisible, or unheard becomes a voice and a focus. However, fidelity also requires more than unmasking and debunking; it demands a willingness to construct anew.

It might sound like we are praising critical legal studies, and, to a degree, we are. These critics remind us of our own critical impulses. We need, however, to keep these impulses alive by directing our energies to law as it is found not just in legal doctrine or in the routine but difficult problems of legal implementation. We need likewise to resist the temptation to give in to depression and sadness. Because our work has undermined a technocratic or reformist confidence in law, we are liberated to see our subject with fewer illusions and greater clarity. We must be both critical and empirical.

For those of us in the law and society tradition, this means that we pay special attention to ways of proceeding. From the science in law and social science, we get an insistence on generalization and understanding in its largest exploratory sense. A critic's inversion of this leads to research that is intensive

rather than extensive and that sees things in their singularity rather than assimilating them to general categories. Such an inversion emphasizes particularity and specificity, something that might be called the "authenticity of dailiness." The turn to the particular and the idiosyncratic celebrates varying forms of law. It means an awareness that the rule of law is itself a particular kind of fiction. With this awareness, it becomes possible to understand the remarkable growth and power of the ethnography of American law (Greenhouse, 1982; Engel, 1983; Merry, 1979). It is indeed truly radical in a legal order that proclaims its fidelity to the rule of law that scholars go to the periphery—to small towns, to rural places, to working class neighborhoods—to look at the way people in these places come to terms with and often resist the penetration of official legal norms as they construct their own local universe of legal values and behavior. This is only possible in a post-Vietnam, post-Watergate, post-law and society America, where our highest legal aspirations have been sullied and where there is indeed a clear picture of the inefficacy of many attempts at central legal control. We need to stop trying quite so hard to come to terms with that ineffectiveness and to start studying what legal life is like in the vast interstices of law.

Finally, the law and society tradition, in its effort to understand the contribution of legal institutions to social process, focuses primarily upon the law. To invert this aspect, attention needs to be paid to social processes themselves, no matter what their geographical location. The risk has to be taken and the courage has to be mustered to immerse ourselves in the study of social transactions and social processes. If we take as our subject the constitutive effect of law we cannot be content with literary theory applied to legal doctrine. We must instead study families, schools, work places, social movements, and, yes, even professional associations to present a broad picture in which law may seem at first glance virtually invisible. We will find in these efforts instances that both confirm and contradict the dominant discourse; we will also find instances that will require us to reimagine the discourse in a different way. We would then understand law not as something removed from social life, occasionally operating upon and struggling to regulate and shape social forms, but as fused with and thus inseparable from all the activities of living and knowing. We would, as critics, hear new voices and move our tradition to encapsulate them so that in the next two decades of our association's life, our own critical efforts might themselves become the orthodoxy that a

new generation would have the temerity to try to save from its own self-deception.

REFERENCES

ABEL, Richard (1973) "Law Books and Books about Law," 26 *Stanford Law Review* 175.

BERGER, Peter, and Thomas LUCKMANN (1966) *The Social Construction of Reality*. Garden City, NY: Doubleday.

BLOCH, Marc (1961) *Feudal Society*. Chicago: University of Chicago Press.

DERRIDA, Jacques (1978) "Structure, Sign and Play in the Discourse of the Human Sciences," in J. Derrida, *Writing and Difference*. Chicago: University of Chicago Press, 278.

ENGEL, David (1983) "Cases, Conflict and Accommodation: Patterns of Legal Interaction in an American Community," 1983 *American Bar Foundation Research Journal* 803.

FOUCAULT, Michel (1980) *Power/Knowledge*. New York: Pantheon Books.

———— (1972) *The Archaeology of Knowledge*. New York: Pantheon Books.

FRIEDMAN Lawrence (1986) "The Law and Society Movement," 38 *Stanford Law Review* 763.

GOULDNER, Alvin (1979) *The Future of Intellectuals and the Rise of the New Class*. New York: Seabury Press.

GREENHOUSE, Carol J. (1982) "Looking at Culture, Looking for Rules," 17 *Man* 58.

GUSFIELD, Joseph (1981) *The Culture of Public Problems: Drinking-Driving and the Symbolic Order*. Chicago: University of Chicago Press.

HAYEK, Friedrich (1960) *The Constitution of Liberty*. Chicago: University of Chicago Press.

LOCKE, John (1960) *Two Treatises of Government*, ed. P. Laslett. Cambridge: Cambridge University Press.

MANNHEIM, Karl (1936) *Ideology and Utopia*. New York: Harcourt Brace.

MERRY, Sally Engle (1979) "Going to Court: Strategies of Dispute Management in an American Urban Neighborhood," 13 *Law & Society Review* 891.

PELLER, Gary (1985) "The Metaphysics of Law," 73 *California Law Review* 1151.

RORTY, Richard (1979) *Philosophy and the Mirror of Nature*. Princeton: Princeton University Press.

SARAT, Austin (1985) "Legal Effectiveness and Social Studies of Law," 9 *Legal Studies Forum* 23.

SILBEY, Susan S. (1984a) "The Consequences of Responsive Regulation," in J. Thomas and K. Hawkins (eds.), *Enforcing Regulation*. Boston, Kluwer Nijhof.

———— (1984b) "Who Speaks for the Consumer?" 1984 *American Bar Foundation Research Journal* 429.

———— (1981) "Case Processing: Consumer Protection in an Attorney General's Office," 15 *Law & Society Review* 849.

SILBEY, Susan S., and Egon Bittner (1982) "The Availability of Law," 4 *Law and Policy Quarterly* 399.

UNGER, Roberto (1975) *Knowledge and Politics*. New York: Free Press.

TRUBEK, David (1984) "Where the Action Is: Critical Legal Studies and Empiricism," 36 *Stanford Law Review* 575.