Articles

"Critical Empricism" and American Critical Legal Studies: Paradox, Program, or Pandora's Box?*

*By David M. Trubek & John Esser**

> "It is our aspiration, and my insistence, that it is possible to be both critical and empirical". (Susan Silbey, Address at Plenary Session on Critical Traditions in Law and Society, Research, Law and Society Association, Chicago, Illinois, June 1986)

A. Introduction: Assessing "Critical Empiricism"

What should we make of Susan Silbey's call for socio-legal scholarship that is both critical and empirical? Do we think the law and society movement can and should develop a critique of the legal order? Can empirical research contribute to such a critique? Does the idea of a "critical sociology of law" make any sense at all?[1]

For some, critical empiricism is a contradiction in terms. If you equate empiricism with a value free search for objective knowledge, it is hard to see what could be critical about a sociology of law. From this point of view, Silbey is proposing a paradox, not a program. For others, the idea of a critical sociology of law seems attractive but unrealistic. Looking at the past history of law and society scholarship, they might conclude that this field is so tied to the state and the legal profession that it is structurally incapable of developing a critical practice.

We do not share these concerns. We see the ideal of a critical sociology of law as desirable and feasible. We support those who have raised the banner of "critical empiricism" in the law and society movement. This phrase condenses many ideas: doubts about prior practices, in which empiricists have taken law too much at face value; hopes for new

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* David Trubek, LL.B. (Yale), Professor of Law Emeritus at University of Wisconsin. Email: dmtrubek@wisc.edu. Dr. John Esser, Professor in the Sociology & Anthropology Department at Wagner College. Email: jesser@wagner.edu

[1] We use the terms "law and society", "socio-legal studies", "sociology of law" interchangeably.

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directions, in which they will interrogate legal values and question legal institutions; faith that critical practices will strengthen, not weaken the admittedly fragile law and society movement in this country. We share these doubts, hopes and faith. But we also recognize that the call for critical empiricism raises philosophical issues, requires the elaboration of a research program, and poses practical questions for the movement. Before one can say if critical empiricism is a paradox, program or Pandora's Box, these matters must be analyzed. The purpose of this essay is to deal with such questions.

The method we have chosen is a critical review of the work of a group of scholars associated with the Seminar on Legal Process and Legal Ideology that meets regularly in Amherst, Massachusetts. Drawn from many disciplines and institutions, the Amherst Seminar is committed to the ideal of a critical sociology of law. Its work illustrates the project of "critical empiricism" and reflects some of its dilemmas. By concentrating on the Seminar, we can illuminate the project we hope to explain and foster. There are costs to this strategy: chief among them are the exclusion of other voices who have called for a critical approach in law and society. But its virtues outweigh the costs. The Amherst project is one of the few collective efforts to reconstruct law and society research, and is notable for that fact alone. Further, given the diversity of the Amherst group, which draws on many disciplines and perspectives, and the range of work they have produced, a review of their scholarship serves well to illustrate the complexity and richness of the newer critical work in this field.

B. The Crises in Law and Society Studies

The call for critical empiricism is just one manifestation of a crisis in the law and society movement in the United States. Just as this movement seems to be reaching maturity, it has been seized with doubts about its purpose, accomplishments and future. These doubts have unleashed a substantial "autumnal" literature that looks back on the past to assess results, criticize errors, evaluate future prospects.[2] These accounts are remarkably diverse.[3]

[2] We found the following especially useful: Richard Abel, *Redirecting Social Studies of Law*, 14 LAW & SOCIETY REVIEW 805 (1980); Lawrence M. Friedman, *The Law and Society Movement*, 38 STANFORD LAW REVIEW 763 (1986); Marc Galanter, *The Legal Malaise; Or, Justice Observed*, 19 LAW & SOCIETY REVIEW 537 (1985); Stewart Macaulay, *Law and the Behavioral Sciences: Is There any There There*, 6 LAW AND POLICY 149 (1984); Austin Sarat, *Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition*, 9 LEGAL STUDIES FORUM 23-31 (1985) and *Id.*, *The Litigation Explosion, Access to Justice and Court Reforms: Examining the Critical Assumptions*, 37 RUTGERS LAW REVIEW 319-336 (1985); and William Whitford, *Lowered Horizons: Implementation Research in a Post-CLS World,* 1985 WISCONSIN LAW REVIEW 755-779 (1986). We have also drawn on Edward G. White's recent analysis of the relationship between the Law and Society movement and CLS, Edward G. White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SOUTHWESTERN LAW JOURNAL 819 (1986).

[3] Some argue for a purer, more adequately funded objective social science of law (Friedman, *supra,* note 2); some declare a limited victory and counsel lowered horizons and continued muddling through (Whitford, *supra,* note 2); others predict a dawn of a new age when the value of the special brand of knowledge which has come out of

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What explains the disquiet? The Law and Society Association is about to celebrate its 25th Anniversary. From many viewpoints, the field seems to be flourishing. There are several quality journals, a number of active centers of law and society research, a growing body of literature. Law and society movements are being formed in many countries. Why is this a time for self criticism, rather than self-congratulation?

There seem to be three sets of concerns in the literature and surrounding discussion. First, a fear that the movement is losing intellectual vitality. Law and society was once a vanguard movement in legal thought. Law and society scholars critiqued the pretensions of mainstream legal scholarship, imbibed heady ideas from many fields of knowledge, charted new academic paths. Today, some fear the movement is becoming an intellectual backwater, drawing on outmoded ideas about law and social inquiry and cut off from strong currents of thought in legal and social theory.

The disquiet also reflects political concerns: some fear that law and society work has lost its "critical edge" in a political sense, becoming little more than the handmaiden of policy makers. No one pretends that the law and society movement ever had an explicit political agenda. But because it was founded in the heyday of liberal reform and the Warren Court, when law was being used to enfranchise the poor and expand civil rights, the law and society movement took shape in a period when research on law was easily linked to progressive politics. With the disintegration of the liberal reform project and the pull-back of the Supreme Court, this alliance of legal sociology and progressive politics has come unstuck.

A third source of disquiet is recognition that the movement's support base is fragile. While the movement has secured a beachhead, the support some hoped for has not materialized. The movement envisioned three principal bases: university social science departments, law schools, and government. Law and society scholars would develop theories that could guide public policy; government would seek assistance from the academy. Law schools would see the need for social science theory and empirical study, and develop close links with social science departments. While all this has occurred, none of the "legs" of this triangle have developed quite the way the founders might have wished. Law and society scholars have been able to get jobs in social science departments, but they have often felt marginal within their disciplines and departments. While the law schools have begun to accept the need for empirical research, this move has been slow and sporadic. Even the law schools who accept this idea often think it is enough to hire one social scientist to fill all their needs. Moreover, law and society is threatened by the rapid

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the empirical epoch will finally be recognized by the academy and the legal profession (Galanter, *supra,* note 2); while a few raise the cry for a "critical empiricism" (Austin Sarat and Susan S. Silbey, *The Pull of the Policy Audience*, Unpublished Manuscript, 97 et seq (1987); David M. Trubek, *Where the Action Is: Critical Legal Studies of Empiricism*, 36 STANFORD LAW REVIEW 575 (1984) and David M. Trubek, *Review Essay: Max Weber's Tragic Modernism and the Study of Law in Society*, 20 LAW & SOCIETY REVIEW 573 (1986).

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rise of other movements in legal thought. Law and economics, a later movement, has been much more warmly received by law school faculties and offers an alternative way for them to incorporate social science into law. At the same time, feminist thought and critical legal studies have raised questions about "conventional" social science and are displacing law and society as vanguard movements. Finally, support for policy research on law has not grown as fast as had been hoped, and the policy and academic agendas have tended to diverge. Much of the policy research that gave the movement its initial support base was tied to a political agenda that has largely disappeared. Also, policy research has become more focused and funds more tightly controlled by policy makers with explicit agendas.

Much of the internal debate within the Law and Society movement is concerned with these problems and challenges. The call for a critical sociology of law represents one option for the movement's future. It can be seen as an effort to retain the intellectual high ground, link law and society to vanguard thought both in law and the social sciences, and redefine the movement's relationship to politics.

C. Origins of Law and Society

I. Rotations

Before we assess this project, we must look backward to the Law and Society movement's origins and identify some of the basic ideas about knowledge, law, and politics which influenced its formative years. In its early period the movement adhered to an epistemology and legal theory that are increasingly coming under attack. To understand the critical sociology of law project, we have to understand the tradition it is reacting against.

We think the best way to understand the origins of law and society is to see it as a *legally constructed domain of social knowledge*. While recognizing that social science and social scientists have played an important role in the formation of law and society practices, we think that the impact of academic legal culture was a dominant force in the development of the movement's theories of knowledge and politics. Thus we want to portray the origins of law and society as a moment in America legal thought.[4] This perspective allows one to see how certain concerns and constraints of academic legal thought both inspired law and society studies and created – or at least sustained – views on the nature of knowledge and

[4] In explaining law and society as a legally-constructed domain of social knowledge we do not mean to deny other determinants of this scholarship. There may well be some truth to the traditional understanding that L&S was created as a discipline situated outside law, and to the view that many of law and society's assumptions were borrowed from the existing social sciences. The narrowness of our focus demonstrates our desire to bring an as-yet unrecognized or underappreciated cause to light.

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the function of law on which law and society scholarship has been traditionally based. Since these views are the main targets of the critique that the proponents of "critical empiricism" have put forth, this approach should facilitate understanding of the work of the Amherst Seminar and cognate projects.

American legal culture has demonstrated a strong commitment to three assumptions which we will call the centrality of the law, the neutrality and rationality of legal process, and the authority of legal scholarship. By justifying these three assumptions, schools of legal scholarship legitimate the continued existence of the legal system and the legal academy. Legal scholarship treats the law as a central framework for social interaction and a major institution for social guidance. Further, the law is pictured as a neutral process. It is seen as committed to the rational exploration of common values and goals and not as the instrument of some group, faction, or class. Finally, legal scholarship is presented as an authoritative voice, speaking from a position that reflects both the centrality and the neutrality of the law in whose name scholars speak, and the rationality of legal "science" itself.

These themes of legal scholarship are really quite problematic. They deny the frequent marginality of law, they ignore the constant play of class and interest behind law's neutral facade, and they deny the fragile foundations of legal scholarship. Therefore, our culture constantly produces challenges to them. These threaten to disintegrate the scholarly project, and the legal academy must respond to the challenges or lose its sense of boundaries and meaning.[5] But at the same time the challengers, caught in the web of academic legal scholarship, find themselves restating the themes of the vision they are reacting to, so that cycles of legal scholarship are often "rotations" around the abiding themes that law is vital, legal processes are neutral and rational, legal scholarship authoritative.[6]

We think that the history of the formation of the law and society movement can be told as a cycle of disintegration and reintegration, or as a rotation in mainstream legal culture. Telling the story in this fashion helps us highlight some of the basic features of the law and society movement's approach to law and knowledge, and thus to explain the origins of the ideas that have come under attack by the proponents of critical empiricism.

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[5] William Clune, *Legal Disintegration and Theory of the State* (1986), Paper presented to Bremen Conference, July 1986.

[6] David Kennedy, *A Rotation in Contemporary Legal Scholarship, in* CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE (Christian Joerges & David Trubek eds., 1989); Gary Peller, *The Metaphysics of American Law,* 73 CALIFORNIA LAW REVIEW 1159 (1985).

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II. Legal Realism

Legal Realism is the origin of the theories of knowledge and law around which the Law and Society movement took shape. In understanding the Law and Society movement as a legally constructed domain of social knowledge, therefore, we must look closely at Legal Realism. A key feature of Realist thought was the centrality of *empiricism* for legal studies. The reasons the Realists had for privileging empirical studies, and the particular definition of empiricism they offered, formed the intellectual heritage of the scholars who created the Law and Society movement. While one should date the formative movement of law and society in the late 1950s and early 1960s – well after the Realist epoch – Realist ideas and traditions created the framework within which law and society pioneers developed the idea of a scholarly program for using social science empiricism to illuminate the law in action.

The Realist's greatest contribution was their "deconstruction" of classical legal thought. They showed that legal doctrine was indeterminant and contradictory, thus demonstrating that doctrinal considerations could not explain legal outcomes. This posed a disintegrating threat to mainstream legal culture: Empiricism offered a possible mode of reintegration. The Realists' "discovery" of the indeterminacy of legal doctrine posed a threat to the classic themes of legal autonomy, neutrality and rationality, as well as to the bases for scholarly authority. If, as Karl Llewellyn put it[7] , the authoritative materials of the doctrinal tradition generated conflicting answers to important legal questions, and legal concepts were post-hoc rationalizations of decisions taken on grounds other than those deployed on the surface of legal argumentation, then forces other than those of "the law" (as conventionally understood) must be operative in the establishment of public policy, and reasons other than those given by legal scholarship must explain the choices that judges and other legal actors actually make. In a post-formalist world in which language seemed opaque and indeterminant, and conventional legal science a mere rationalization for decisions made in response to forces the legal academy could not even see, let alone explain or control, the practice of academic law seemed threatened.

Empiricism offered one answer to the threat of disintegration of the practice of academic law. As Peller[8] and Boyle[9] have pointed out, the Realists themselves constructed the answer to the threats their critique of doctrine posed for legal culture. They posited what Peller calls a "transcendental objectivity"[10] , a world of determinate "*realities*" beneath the

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[7] Karl Llewellyn, *Some Realism About Realism*, 44 HARVARD LAW REVIEW 1222 (1931).

[8] Peller, *supra*, note 6.

[9] James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 687 (1985).

[10] Peller, *supra*, note 6.

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empty rhetoric of traditional legal language. Positing a tangible, determinate world of facts or objective social functions whose operation could be seen at work upon, behind, or beneath the illusionary world of legal doctrine, the Realists pointed to a more fundamental basis around which legal science could be reconstructed – the observation of "reality". Reality meant tangible facts, rationally and thus objectively grounded social policies, and indwelling normative prescriptions which could be treated as factual premises rather than as contested social visions. This "reality", like nature, could be grasped through the same methods of empirical inquiry which the Realists (and probably most other American intellectuals of the time) thought that physicists and chemists used. Empirical methods would identify the real facts that law must deal with, unearth the real objective forces that determine law's response to social needs, reveal the real functional necessities of social life, specify the *real* indwelling norms that were shaped by these objective forces and functions, and equip reformers with the tools to perfect bodies of rules and systems of governance. A Realist legal science, modeled on the natural sciences, would restore the law's ability to serve as a central yet autonomous social "steering mechanism" because it would point to the needs that law must meet and the functions it must perform, and would equip the law with the tools required to rationally manage a complex society in accordance with non-problematic objectives. At the same time, by adopting the methods of natural science, the practice of academic law would itself once again become objective and thus consonant with the overall vocation of the modern university. In a sense, the invocation of science as the grounding for an authoritative legal scholarship was a very conservative move in the discourse of legal thought, for isn't that precisely what Langdell had argued for at an earlier day?

In this view, at the core of the Realists' effort to reintegrate academic legal discourse were themes which have become troubling in the autumnal period of the Law and Society movement. The Realists imagined an empirical science of law which would offer a new foundation for a troubled academic community. This science would reveal natural laws governing social interaction, explore the necessary functions of a legal order, identify normative commitments that were so universal or time-tested that they were uncontestable. The knowledge produced by such an empirical science of law would provide a rational grounding for the operation of the legal order, and would guide legal reform. In this sense, the move to empiricism served to preserve the core themes of academic legal discourse. Armed with scientific knowledge, law could maintain – or reclaim – its central position in American society. Further, objective science would ensure that law continued to perform a neutral role, rather than being the instrument of what we have come to call "special interests". Finally, objective scientific knowledge would strengthen the rationality of law and thus the authority of legal scholarship.[11]

[11] For illustrations, see John Henry Schlegel's discussion of the two traditions of social research in Legal Realism: the "progressive reform tradition" and the "social scientific tradition". The social scientific tradition eventually lost ground to the progressive reform tradition. While Underhill Moore was associated closely with the social scientific tradition, most Legal Realists were originally caught somewhere between the two traditions. When the time and energy required to produce good social science research became evident, it also became evident that the

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III. The Epistemology and Politics of the Law and Society Movement

The epistemology and politics of this "constructive" form of Legal Realism was accepted, tacitly at least, by many of the founders of the Law and Society movement. At the core of the original law and society understanding lay three very basic ideas: universal scientism, determinism, and untroubled reformism.[12]

Determinism presents a particular understanding of the nature of the social world. It suggests that social action is governed by laws, much like the laws which govern the rotation of the planets. These laws exist irrespective of our wills and provide social action with a deep logic. Law and society scholars who adopt a determinist perspective have hoped to develop models of the laws of social action which pertain to legal phenomena.

Universal scientism presents an understanding of the nature of knowledge and the process through which it is constructed. This theme, at least as reflected in law and society discourse, presumes a radical distinction between an external world of objects and behaviors and an internal world of consciousness. Among the statements which can be constructed within the internal world of consciousness there is a special class of statements whose objective is an accurate description of specific elements of the external world of objects and behaviors. If these statements are constructed through observation of the external world and meet the criterion of precise description, then they qualify as statements of fact. Under assumptions of universal scientism, scientific knowledge is a set of fact statements and, possibly, statements concerning the manner in which these fact statements are interrelated.[13] The ultimate arbiters of any scientific knowledge are the objects or occurrences in the external world which fact statements purport to describe. Scientific knowledge evolves through an iterative process by which we test fact statements against what we can demonstrate to be the case, and statements relating fact statements against those fact statements which we know to be accurate descriptions. Methods of

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knowledge produced would appear too late to be used for legitimating progressive reform proposals in political struggles. Consequently, most legal realists such as William O. Douglas and Charles E. Clark tended to move away from the social science tradition and toward the progressive reform tradition. See Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFFALO L. REV. 195, especially 293-94. See also Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459, especially 517-19 and 579-85 (1979).

[12] One of us has in an earlier paper specified two of these themes – universal scientism (positivism) and determinism – and the role they have played in constituting the original law and society perspective. See Trubek, *supra,* note 3, especially 579-585.

[13] These statements relating facts can be seen to be (1) presumptions about elements of the external world that go unseen; (2) generalizations of characteristics which a class of fact statements share; (3) creations of consciousness that serve as heuristic devices for controlling our comprehension of facts; (4) presumptions about unseen forces in the external world (such as the "laws" of a determinist perspective) which constitute actual connections between facts; or any of a number of other things.

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empirical inquiry allow us to determine if the scientific knowledge we hypothesize adequately describes the external world we can apprehend. Theory and method are defined in this context. We must make scientific statements in ways that allow them to be falsified by factual inquiry (theory), and we must have ways to measure the facts against the relationships posited by the theory (method).

Untroubled reformism presents an understanding of how social scientific knowledge is to be used. This perspective presumes that the product, procedures, and projects of social science should be used as instruments in the service of the legal system. Sociologists of law accepting this perspective are untroubled by the purposes to which their product is put either because they accept the purposes and worth of the law or because they believe that it is not the role of a social science to define the purposes to which it will be put.

IV. The Critique of the Original Understanding

Each of these themes has come under criticism. Critics assert that determinism and universal scientism are outmoded notions of social science. While some in the Law and Society movement still seek to develop empirically-tested scientific laws of law-related behavior, others have challenged this idea. Critics have questioned if one can separate "law" from other aspects of society and if it is possible to construct a macro-theory of the general "laws" of legal phenomena. They have questioned whether fact statements are distinguishable from theories, and whether fact and theory statements are distinguishable from value or interest statements. The critics suggest that the scientistic turn hides values and purposes behind this invocation of objective facts, forces, and functions.[14]

The critics also question the Law and Society movement's adherence to reformism. They assert that this embrace obscures questions of value which a critical social science must face. They suggest that instrumentalism naively embraces the purposes of the legal system and of those authoritative legal system actors who propose to "reform" the system. By taking the values of the legal system and the reformers as unproblematic, reformist studies may legitimate power rather than interrogate it, celebrate the law rather than draw it into question.[15]

The critiques of scientism, determinism and reformism mark the beginning of an effort to reconstruct law and society as a critical sociology of law. But the proponents of this move face two fundamental dilemmas. First, we are ourselves part of the discourse which we

[14] Austin Sarat and Susan S. Silbey, *Dispute Processing in Legal Thought: From Institutional Critique to the Reconstitution of the Judicial Subject*, Disputes Processing Research Program Working Paper 8-9 (1988); Trubek, *supra,* note 3.

[15] Sarat, *supra,* note 2.

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want to transform. We work with concepts and vocabularies imbued with meanings drawn from the very views of knowledge and politics we seek to escape. This is why the term "critical empiricism", at least when initially launched, seemed so paradoxical. Since empiricism had been identified with an objectivist discourse and an a-political stance, the idea of wedding empiricism to normative concerns and transformative politics seemed contradictory.[16] Second, in order to account for the prevalence of scientism, determinism and reformism in law and society, the critics have had to develop an account of the reasons why the movement originally adopted these views of knowledge and politics. This account – which we have drawn on in the preceding pages – has a strong structural dimension. It accounts for the dominant tradition by looking at the institutional position of the law and society movement within the academy and in relationship to policy makers. This account – summarized in such phrases as a "legally constructed domain of knowledge" and "the pull of the policy audience" – suggests that strong structural forces determine the movement's epistemology and political position. But if this were really the case, how could an alternative practice develop, unless of course the whole set of structural constraints were changed?

These problems are serious ones. But the fact that a new approach to social research on law is beginning to develop suggests that the tradition has never been as monolithic as the critics sometimes suggest, nor the structural forces as strong as might appear. Thus, there has always been a strand within law and society which rejected scientism, determinism, and reformism. Some law and society scholars have, since the beginning, questioned the idea of objective knowledge and challenged the values of the legal order. When the critics began to search for new directions, they could find a critical tradition within the discourse they wanted to transform. While these alternative practice and ideas may have been submerged or marginal, they were available as starting points for a new turn in law and society. After all, Silbey's call for "critical empiricism" was a plenary address to the Law and Society Association, given at a meeting whose theme was "Critical Traditions in Law and Society".

D. The Development of Critical Empiricism

While "critical empiricism" is a problematic concept, it does describe a project that is underway. To provide an idea of that project we turn now to the work of the Amherst Seminar. Since 1982 this group of social scientists living and working in and around Amherst, Massachusetts have met regularly to discuss their own and others' work in the sociology of law:

[16] For an effort to redefine these categories, see Trubek, *supra,* note 3.

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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."[17]

Amherst has been the informal headquarters of a movement that seeks to reconstruct law and society studies. Several of the seminar participants have adopted "critical empiricism" as a slogan to describe that project. A close analysis of the work and history of this group is a necessary starting point for any analysis of the new "rotation" within the law and society tradition.

In this section we will analyze some of the general programmatic statements the Seminar has produced; describe the account they give of the tradition they seek to reform; examine the sources they have drawn on for reconstructive inspiration; analyze some illustrative field studies they have conducted; and assess some unresolved questions.

I. Announcing the Program

Although relatively informal, the Amherst Seminar has institutional coherence. Participants meet regularly. They invite visitors, including Law and Society leaders (*e.g.* Marc Galanter), CLS scholars (*e.g.* Duncan Kennedy) and a significant number of European legal sociologists, many associated with European critical legal studies movements (*e.g.* Alan Hunt, Boaventura Santos, Maureen Cain, Peter Fitzpatrick, Yves Dezalay). They have edited a special issue of the *Legal Studies Forum*[18] composed entirely of articles by Seminar members. They are jointly editing a special issue of the *Law & Society Review* – one of the leading journals in the sociology of law.[19] They explicitly claim to be developing a new approach to socio-legal scholarship: Silbey "envisions" and "proposes" a sociology of law which "would" study law as a social practice.[20] Sarat "offers a reorienting strategy for empirical research on law in action."[21] John Brigham claims to "recast the study of impact into the framework of interpretive social science."[22]

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[17] Susan S. Silbey and Austin Sarat, *Critical Traditions In Law and Society Research*, 21 LAW & SOCIETY REVIEW 165-174, 166 (1987). Patricia Ewick has been a member of the Seminar since 1987.

[18] 9 LEGAL STUDIES FORUM NO. 1 (1985).

[19] Law & Society Newsletter, October 1987, 8.

[20] Silbey, *supra,* note 2, 7, 15, 21.

[21] *Id.*, 24.

[22] John Brigham, *Judicial Impact Upon Social Problems: A Perspective on Ideology,* 9 LEGAL STUDIES FORUM 47-58, 47 (1985).

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The work of the Amherst seminar is quite diverse. Participants come from a variety of disciplines.[23] They have produced empirical studies, analyses of legal concepts and movements, theoretical essays, and programmatic statements. The essays and statements, although often general, give some indication of the reconstructive project they jointly envision:

> "The task for those who seek to preserve that critical edge [in socio-legal studies] 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."[24]

These remarks by Susan Silbey and Austin Sarat give us an inventory of the objectives of the Amherst project. The members of the Seminar, we are told, seek to maintain the "critical edge" in Law and Society by (1) reconstituting the subject of socio-legal research. This requires (2) locating and examining law and society as a body of knowledge and as a tradition. The problematic of this tradition should then be transformed by (3) rethinking the relationship it proposes between law and society thus (4) defining new research projects for the field by (5) highlighting objects and spaces in the world not previously recognized as significant.

II. Constructing an Account of the Law and Society Tradition

A substantial portion of the recent work produced "at" Amherst has sought to locate presuppositions underlying law and society research in order to create an account of the tradition that can be critiqued. This account describes law and society as a mixture of an "instrumental" theory of action and a liberal legalist view of law.[25] The instrumental

[23] Brigham, Villmoare, and Harrington are political scientists. Merry and Yngvesson are anthropologists. Silbey is a sociologist. Sarat is a political scientist and lawyer.

[24] Silbey and Sarat, *supra,* note 17, 166.

[25] See, *e.g.*, Silbey and Sarat, *supra,* note 3, 6-12; Sally Engle Merry and Susan Silbey, *What Do Plaintiff's Want? Re-examining the Concept of Dispute*, 9 JUSTICE SYSTEM JOURNAL 151-178, 155-157 (1984); Sarat, *supra,* note 2: 24; Sally Engle Merry, *Disputing Without Culture: A Book Review of Dispute Resolution by Goldberg, Green, and Sander*, 100 HARVARD LAW REVIEW 2057-2073, 2062 (1987).

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theory of action sets the basic agenda for law and society research, and it is this agenda the Amherst scholars want to alter. To understand their project, it is essential to understand the model they critique and the alternative they offer.

In the Amherst account, the "instrumental theory" which animated original law and society work includes notions about social action and law. It rests on a fundamental distinction between, on the one hand, the subjectivity of actors and, on the other, the behavior of actors and material objects.[26] The subjectivity of actors includes (1) desired ends or values, (2) knowledge, perceptions, or descriptions of the objective world of things and behaviors, and (3) evaluative criteria. The objects of the material world – including the behaviors of other actors – represent the instruments and constraints an actor must take into account when orienting her own behavior. Actors use their knowledge of these instruments and constraints to ascertain the variety of behaviors they might possibly undertake. An actor chooses a value[27] and then uses her knowledge of the world to select a behavior which will realize that value. In selecting a given behavior – or "means" – actors employ certain evaluative criteria as the standard of selection.[28]

In the instrumental theory of action, the legal system is seen as a set of rules and institutions established to achieve certain ends. Legal doctrine and legal institutions thus constitute a set of means. The values the law is written or interpreted to achieve may be public values held consensually by all citizens, the private interests of a particular groups of citizens, or a balance of interests between competing groups.[29] The legal system furthers these ends by inducing or facilitating the required behavior.

The "instrumental theory" integrates the notions of action and law. Once created by human beings, laws and legal institutions act as material constraints on behavior.[30] Citizens perceive the legal system as a constraint and orient their behavior accordingly. Therefore, if the law is effective, the actual behavior of citizens will correspond to the behavior prescribed by legal doctrine. If legally-prescribed behavior occurs, the values which the law is designed to achieve are realized. This theory of law provides one means by which the instrumental theory of action explains how aggregates of individual behavior are patterned as social behavior. In a society with a multiplicity of values, behavior is

[26] Susan Silbey, *Ideal and Practices in the Study of the Law,* 9 LEGAL STUDIES FORUM 7-22, 8 (1985).

[27] Values may be understood as atomized and random or as systematic occurrences. See Parsons' 1949 (1937): 77-79.

[28] The instrumental model of action often presumes that actors use evaluative criteria of rationality: that is, they select those means which most efficiently achieve the desired ends. See Merry and Silbey, *supra,* note 25, 156-158.

[29] Sarat, *supra,* note 2, 24.

[30] Silbey and Sarat, *supra,* note 17, 166.

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patterned either because individuals internalize a common body of rules and the values implicit in them, or because they all experience these rules and the institutions which enforce them as constraints in an environment in which they must all act.

Implicit in the instrumental understanding of law is a project for an empirical social science. It is by no means certain that the behavior of citizens will conform to legal norms: the "law-in-action" (the actual behavior of citizens) may not correspond to the "law-on-the-books" (the prescriptive rules of legal doctrine as authoritatively interpreted). Empirical science can be used both (i) to determine whether actual behavior conforms to or deviates from the law and, if it does deviate, (ii) to specify the conditions which cause this variation. Empirical science can also aid the process of law formation by ensuring that law makers take account of existing conditions of the material world and the natural and necessary "laws" of human and social behavior. It makes no sense to pass laws that demand behavior that is impossible – that go against the basic "laws" of society or deny the functional necessities of social life. The instrumental theory of action conceives empirical legal science as: (i) valid descriptions of the world, (ii) statements describing the means that this world provides to achieve certain values, and (iii) criteria of rationality which can be used to select the most efficient of these means. Consequently, in this vision, empirical legal science is a neutral rather than a value-motivated activity. While it may be used in the service of certain values, values are not involved in its knowledge construction.

The Amherst account is that the Law and Society movement was constituted as an empirical science in this sense. Seminar members argue that law and society work began with an acceptance of the desirability of law and its contents. It then constituted itself as a policy science providing supposedly value-neutral knowledge which could be used by the legal system. Its task was to identify places in society where the law was ineffective in influencing social behavior and to explain the conditions which allowed such gaps between the law-on-the-books and the law-in-action to occur. This knowledge would then be used by policy makers to correct legal doctrine and to make legal institutions more effective:

> "The history of social research on law is quite closely tied to the study of legal effectiveness, that is, to the desire to understand the conditions under which legislation and/or judicial decision effectively guide behavior or result in anticipated and desired social changes ... Legal effectiveness research begins by identifying the goals of legal policy and moves to assess its success or failure by comparing the goals with the results produced. Where, as is almost inevitably the case, the results do not match the goals, attention is given to the factors which might explain the »gap« between law on the books and law in action."[31]

[31] Sarat, *supra,* note 2, 23, notes omitted.

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III. Rethinking the Law and Society Tradition

In a forthcoming article, Susan Silbey provides three critiques of the way the "sociology of law" has conceived the relationship between law and society. (Silbey, forthcoming). First, she argues that law and society research treats specific legal doctrines and the particular situations in which they are constructed and applied as abstract, universal categories: as *law* and *society*. Second, law and society research fails to problematize the idea of law itself. The boundaries of *the law* are defined as existing legal doctrine and institutions. Finally, in restricting its research agenda to questions of legal effectiveness, law and society research has limited its field of vision to problematic cases. By focusing only on cases of ineffectiveness and not on cases where the law is effective, it has provided a misleading representation of the legal system's social significance:

> "The research paints pictures of a legal system struggling to retain what seems like a tenuous grasp on the social order ... effacing the overwhelming reality of lawfulness, of law's contribution to the reproduction and maintenance of existing social relations and practices."[32]

Implicit in each of these criticisms of the law/society distinction is a critique of the instrumental theory of action. From them we can see an alternative view of action emerging which we will call the interpretive theory.[33] This theory rejects several key features of the instrumental approach.

First, instrumentalism appears to be excessively individualistic. For an interpretist, the values, knowledge, and evaluative criteria embodied in the subjectivity of the actor are not individually-held units of meaning but rather are the threads or traces of a collectively-held fabric of social relations. Further, in the interpretivist perspective the individual does not appropriate this fabric through the conscious selection of values or learning of existing knowledge. Rather, in some sense this fabric "appropriates" the individual so that without self-conscious reflection the actor comes to desire the ends, utilize the perspectives, and apply the rationality which constitute the social fabric. In the Amherst literature, this web of social meaning is designated as "ideology."[34]

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[32] Susan Silbey, *Law and the Ordering of Our Life Together: A Sociological Interpretation of the Relationship Between Law and Society*, *in* LAW AND THE ORDERING OF OUR LIFE TOGETHER (Richard John Neuhaus ed., 1989), 20.

[33] Trubek, *supra,* note 3, 600-605.

[34] The following quotes give an idea of the way the concept "ideology" is used in this literature: "Ideology, as I am using the term, describes an aspect or slice of culture located within a particular institutional arena. An ideology is a set of categories by which people interpret and make events meaningful ... Instead of viewing ideas and action as analytically distinct, the goal is to develop a way of understanding the social world that bridges these categories. Ideology is viewed as separate from action but as integral to all social practices. Ideology is constitutive, in that ideas about an event or relationship define that activity, much as the rules about a game define a move or a victory in that game" (Sally Engle Merry, *Everyday Understandings of the Law In Working-Class America*, 13 AMERICAN ETHNOLOGIST 253-270 (1986)); "[Legal Ideology is] the structure of values and cognitive ideas

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Second, instrumentalism misunderstands the relationship between social meaning and social action. Instrumentalism makes a radical distinction between ideas and behavior and conceives action as responding to external sanctions, legal and otherwise. The interpretive theory rejects the ideas/behavior distinction and conceives action as a synthesis of behavior and social meaning. It sees social action as practices which combine interests in the world and perceptions of the world to create implicit schemes of response, dispositions, or habits. In this new model, changes in ideas do not cause changes in behavior nor do changes in behavior cause changes in ideas. Rather, social actors apply (or attempt to apply) dispositions or meaningful patterns of action in changing situations. "[I]mplicit principles or schemes", writes Sally Merry, "enable actors to generate a wide variety of practices in response to an infinite array of changing situations without these schemes being constituted as explicit principles."[35]

These dispositions shape the initial responses individuals make to a new situation. They serve as one set of initial "constraints" defining the range of activity which can take place. However, since dispositions are open to adaption, and since they may be more or less suited to dealing with a new type of situation, the resulting interaction may introduce changes to actors' habits. Hence while dispositions provide an initial structuring of life activity, they are subject to change.

These principles of structuring and change are especially evident in social interactions involving two or more actors which may involve the clash of two or more schemes of action. The confusion resulting from the coming together of several actors, each seeking to enact their own dispositional schemes of activity, must result in the transformation of some if not all of these competing schemes. Amherst members use the terms "process" or "practice" to communicate this notion of interaction and meaningful action.[36]

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presupposed in and expressed through legal doctrines developed by courts and other practical law finding or law creating agencies and in the work of legislators and jurists insofar as these ideas and values serve to influence the manner in which social roles and relationships are conceptualized and evaluated" (Cotterrell quoted by CHRISTINE HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURTS (1985), 30; "Dispute processing ideology refers to the structure of values presupposed in justification for this reform and expressed through its practice. These values shape the way in which social relations are conceptualized and evaluated."

[35] Merry, *supra,* note 34, 253.

[36] The following quotes give an idea of the way the concept "process" is used in this literature: "Anthropologists moved from a study of the analysis of law as a system of rules to an analysis of law as a *process* for handling trouble cases. This shift paralleled a more general shift within the field to a more voluntaristic, actor-centered mode of analysis. The description of societies came to focus more on actors' strategies and choices rather than rules of behavior, on fleeting and ephemeral social aggregations such as networks and factions rather than enduring groups such as lineages and clans" (Merry and Silbey, *supra,* note 25, 159). The »*processual*« *approach* within legal anthropology is developing a way of understanding the flexibility of the process of invoking rules and norms in conflict situations that promises to provide the analytical basis for dealing with the relationship between legal ideas and systems of power, as is true of other legal anthropologists who are looking at the implications of systems of meaning for legal behavior" (Merry, *supra,* note 34, 267 note 3: emphases added).

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This interpretive theory of action, in which "ideology" and "practice" (or "process") are key concepts, generates a new conception of socio-legal studies which explains Susan Silbey's argument that the law and society tradition defined law too narrowly. Ideologies are webs of values, perspectives, and evaluative criteria which in some sense constitute subjects. Among the ideologies that exist in our society are sets of norms and perspectives in and about law. These legal ideologies operate most clearly in the core regions of legal doctrine and legal institutions, *but may be present in social practices taking place anywhere*. If these practices are not included within the domain of socio-legal research, something essential will be omitted. By limiting its conception of "law" to doctrine and legal institutions, Silbey argues, the Law and Society movement has missed a key feature of how law participates in the social construction of reality.

This leads to her second critique, that while law and society has focused on ineffectiveness it should also look at "effectiveness". Once we see law as an ideology that constructs social relations, she suggests, we will be as interested in situations in which prevailing legal norms and ideas are accepted unproblematically as we are in the cases in which they are resisted or ignored.

Silbey's third critique of law and society – its false universalism – addresses the flip side of this process. Another explanation for the presence of legal ideology outside the legal system is that this ideology originated outside the law and was imported into it. This possibility highlights the historicity of legal ideology. The contents of legal doctrine originate in specific historical processes through which ideologies are either constituted or transmitted. Therefore, determining the contents of a body of legal doctrine, as well as the sources from which they stem, are historical questions which can only be answered empirically. Hence, from the point of view of an interpretive theory of action, law and society's tendency to universalize its categories is wrong.

IV. Divergent Tendencies in the Construction of An Interpretive Sociology of Law

A lot of effort could be put into assessing whether the Amherst account of law and society as an instrumental theory of action accurately portrays the tradition it critiques. Indeed, arguments could be made that the Law and Society movement was more sensitive to ideology, more aware of practices outside doctrine and legal institutions, more concerned with contexts and particulars than this critique suggests.[37] But our interest is not in such quibbles. We read the Amherst account not as a full- blown intellectual history but rather

[37] See Abraham Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOCIETY REVIEW 15 (1967) and Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW AND SOCIETY REVIEW 115 (1979).

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as an outline of a new approach to the sociology of law. Seen this way, the critique can be seen as the emergence of a new perspective and the initiation of a new research agenda. The task is to assess this alternative vision.

One is immediately struck, however, by the fact that there is not one but several possible agendas that seem to be emerging. Indeed, if one projects each of the several tendencies that can be identified among the Amherst group, one could imagine a time when it would no longer be possible to think of the Amherst seminar as the site of a new "paradigm" in legal studies, but rather as the place where several rather different projects took shape.
If there is one thing that participants in a seminar on legal ideology should agree upon, it should be the importance of ideology as a concept for studying law. And, to be sure, all the Amherst scholars would probably agree on the following set of propositions:

Ideologies are systems of meaning through which actors' define their interests, perceive their world, and evaluate their options and activities.

The form and content of social relations are constituted, at least in part, by the perception of these relations found in the concomitant ideology. Thus, social relations are subject to changes in ideologies.

Ideologies are constituted, transmitted, and transformed through meaningful practices (or processes). Therefore, the form and content of ideologies are subject to changes in day-to-day practices.

Ideologies represent a terrain of struggle. In this context, power is the ability to persuade, coerce, or otherwise cause other actors to take on your ideology as their own.

There are a number of "legal ideologies". These include the elite production called legal doctrine, everyday understandings about law, and a range of intermediate views. These "ideologies" are present in a wide range of social locations, and are important in many social relations.

Understanding all these legal ideologies is an essential task for the sociology of law.

While Seminar participants may agree on these broad propositions and share an interest in key terms like "ideology", "practice", and "process", they reach agreement from very different starting points. Thus, in the varied writings of the group that meets together in Amherst, one can see the impact or trace of at least three rather different strands in contemporary social thought: Cultural Anthropology, British Neo-Marxism, and American Critical Legal Studies. Each of these (and other traditions as well) have been appropriated in the effort to redefine law and society research. But each of these primary sources of inspiration contains the potential for generating different answers to the questions posed by the effort to reconstruct law and society as a "critical empiricism". To understand more

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fully the origins of the Amherst project, and to see the potential for divergence among its proponents, one must look closely at the disparate strands the Seminar has sought to draw on and weave together.

1. Cultural Anthropology

One source of Seminar concern with ideology and process comes from the anthropology of law. Anthropologists concerned with the comparative study of legal phenomena found a place within the Law and Society movement from the beginning.[38] The initial law and society agenda, with its related themes of universal science and determinism, raised questions which Anthropology and its methods seemed particularly well-suited to address. In order to provide a neutral, authoritative description of the central and autonomous role which the law played (or should play) in every society, socio-legal scholarship had to identify the functional needs in all societies which required law, or law-like institutions. What better way is there to identify these universal functional needs than through the comparison of legal phenomena in a number of diverse societies?

a) Defining the Disputes Paradigm

While anthropologists were happy to advance law and society's themes of determinism and universal scientism, they soon found problems with its theme of untroubled reformism. Recall that initially law and society scholars tended to accept the value and authority of existing legal institutions as self-evident. However, a cursory comparative study of legal institutions across cultures quickly demonstrated that the general concepts of "law" present in law and society scholarship were ethnocentric. For example, the movement's initial unquestioning acceptance of the value of adjudicatory institutions, anthropologists argued, blinded it to the fact that in other societies "legal functions" were carried out by non-formal, non-adjudicatory institutions. Therefore, they contended, socio-legal scholarship required a broader, more general framework for the analysis of law's general functions. They thus substituted for the study of law and society the study of dispute resolution institutions and disputes.[39] The emergence of this disputes paradigm

[38] Laura Nader represented the American Anthropological Association on the First Board of Trustees of the Law and Society Association. The first three volumes of the Law and Society Review included articles by Anthropologists Paul Bohannon and Karen Huckleberry, *Institutions of Divorce, Family, and the Law*, 1 LAW & SOCIETY REVIEW 81-102 (1966-67); Aaron Cicourel, *Kinship, Marriage, and Divorce in Comparative Family Law*, 21 LAW & SOCIETY REVIEW 103-129 (1966-67); and Charles Morrison, *Social Organization at the District Courts: Colleague Relations Among Indian Lawyers*, 3 LAW & SOCIETY REVIEW 251-267 (1967-69). Vol. 2 No. 1 (1967-68) was dedicated to an analysis of the Legal Profession of India. Vol. 4 No. 1 (1969-70) was a Special Issue on Law and Anthropology.

[39] See, for example, LAURA NADER, NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM (1980) and Richard Abel, *A Comparative Theory of Dispute Institutions in Society*, 7 LAW AND SOCIETY REVIEW 217 (1973).

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expanded the original law and society approach and agenda. By broadening the definition of legal institutions, the disputes paradigm created a framework within which existing American legal institutions could be critiqued. Thus, for example, the cross-cultural insights of legal anthropology provided the grounding for arguments that adjudication was ineffective for certain disputes, aggravated rather than resolved some conflicts, and denied "access to justice".

Initially, at least, proponents of the disputes paradigm did not question the underlying themes of determinism or universal scientism. It was assumed that all societies needed institutions to serve the function of resolving disputes, and that certain types of dispute resolution institutions were best-suited to deal with certain types of disputes. Researchers assumed that an empirical social science could identify universal types of dispute institutions and disputes, and specify the principles which defined the ideal fit of dispute and institution through the careful description and comparison of disputing in existing societies.

Many of the scholars who formed the Amherst Seminar were influenced by the original disputes paradigm and the anthropological ideas it drew on. However, some at least soon rebelled against the determinism that ran through it. It was their critical response to determinism and its implications for conceptualizing "disputes" and "dispute resolution" that led them to reformulate the paradigm by developing concepts like "practice" and "ideology". This move can be seen in the critiques which they have made of "formalism" in contemporary dispute resolution theory. For scholars like Merry and Sarat, much contemporary disputing theory is "formalist". Its' approach to the study of disputes is ahistorical, and employs a misleading model of social action.[40] When universal laws of social action are assumed to underlie disputing and dispute resolution institutions, disputes are understood to be static objects present in every society which are not dependent on the society in which they occur for the determination of their essential form or substance.[41] They are thus "disembodied from their social world."[42] And in this formalist account, individuals engaged in these disputes are mistakenly described as acting rationally to choose the most efficient forum for extricating themselves from these problematic relations.[43]

In contrast, the anthropologists and others in the Amherst group influenced by them find that application of concepts like "process" and "ideology" – *i.e.* an interpretive theory of

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[40] Merry, *supra,* note 25, 2063.

[41] Lynn Mather and Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 LAW & SOCIETY REVIEW 775 -822 (1980-81).

[42] Merry, *supra,* note 25, 2063.

[43] *Id.*, 2062.

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action – to the study of disputes adds a historical dimension to disputes research. Rather than accept disputes and dispute resolution institutions as societal givens, the new disputes paradigm can question the manner in which disputes are generated and change over time:

> "An assumption fundamental to our approach is that a dispute is not a static event which simply "happens", but that the structure of disputes, quarrels, and offenses includes changes or transformations over time. Transformations occur because participants in the disputing process have different interests in and perspectives on the dispute; participants assert these interests and perspectives in the very process of defining and shaping the object of the dispute. What a dispute is about, whether it is even a dispute or not, and whether it is properly a "legal" dispute, may be central issues for negotiation in the disputing process. *By transformation of a dispute* we mean a change in its form or content as a result of the interaction and involvement of other participants in the dispute process ... At a fundamental level, the transformation of a dispute involves a process of rephrasing – that is, some kind of reformulation into a public discourse."[44]

Note the concept of "ideology" implicit in this paragraph and the role ideology is assumed to play in the transformation of disputes. First, the perceptions of the parties involved in the processing of a dispute are elements which, in part, constitute a social relationship as a dispute. A change in the perception of the parties results in a change in the form and substance of the dispute. Second, these "perceptions" include not only the "factual" understanding or perspective that a party has of the dispute, but also the interest that a party has in the dispute. That is, the perceptions which constitute a dispute include both motivations (goals and values) and cognitions (of the "facts of the situation"). Third, perceptions are brought into the processing of a dispute both from the "Society" side (the parties) and from the "Law" side (by the third party intervenor). Finally, the perceptions brought into the dispute resolution forum interact with one another to form a new set of shared perceptions – a "public discourse".

Note also the concept of "process" implicit in this paragraph and the role it plays in explaining social and legal change. If the processing of the dispute involves the creation of a new set of shared perceptions by those involved (the "public discourse"), and if by perception we mean both cognitions and interests, then this suggests that these parties may leave with different interests and cognitions than they had when they entered the "process". When this insight is combined with the fact that those involved in a dispute include both the disputants and a third party, we obtain the notion that the transformative outcome of the processing of a dispute may be "carried back", so to speak, by the

[44] Mather and Yngvesson, *supra,* note 41, 776-777.

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disputants to "Society" and by the third-party to "the Law". The processing of a dispute can thus introduce transformations not only to the dispute itself, but to the legal system and the community as well. Dispute processing not only changes the form and content of the social relationship in question, but also may alter law and legal consciousness. Thus the concept "process" relates social change to legal change:

> "We are interested in the relation between the definition and transformation of disputes, on the one hand, and the maintenance and change of legal and other normative systems, on the other ... We argue here that the expansion of individual disputes is one way that social change is linked to legal change."[45]

This conclusion has radical implications for traditional assumptions regarding the relation between law and society. No longer can we think simply of them as separate spheres which affect each other. Rather, we now have a third element – "process" (or "practice") – which sits, if you will, *between* law and society. This third element serves as a condition of reproduction or transformation for both the legal system and the community. "Process" provides a site where legal meanings can "flow through" and become part of community meanings and vice-versa. It can thus serve as a source of transformations in the law or in society. It continually redefines not only the relations between law and society but the boundaries of these phenomena.

b) Disputing At the Boundaries: Developing A Research Agenda

Revision of the original disputes paradigm through incorporation of the interpretive theory of action generated a research strategy and agenda. A substantial portion of the field studies produced by Seminar participants in recent years reflects this strategy and develops this agenda. This work can be summarized as descriptions of instances where meanings originating within the legal system and the community are brought into contact with one another in common-place judicial institutions, are worked together in the processing of minor disputes, and are "returned" in their new form to both the legal system and the community. From a traditional law and society perspective, this can be seen as the process through which meanings originating from the community "flow into" and become part of the legal system and vice-versa. However, from an interpretive perspective this process is more complicated. The processing of the dispute is a dialectical process through which new patterns of meaning are constructed for both the legal system and the community out of traces from the past. These new patterns of meanings do more than simply redefine the content of legal and community ideologies; they also redefine the boundaries of these phenomena and the relations between them. This approach can be

[45] *Id.*, 776 and 779.

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seen in Merry and Silbey's study of inferior courts and mediation programs associated with them.[46] It is reflected in Harrington's examination of a Neighborhood Justice Center[47] , Yngvesson's study of criminal complaint hearings in lower criminal courts[48], Sarat and Felstiner's observations of lawyer-client conferences[49], and Merry's exploration of law in everyday neighborhood life.[50]

These studies have four distinctive features. First, they focus on "normal" disputes in institutional sites which are "low" in the judicial system hierarchy. These disputes rarely raise major doctrinal questions, and are rarely appealed. They are conceived of as "petty" by court personnel and hence relegated to institutions designated for processing petty disputes (such as small claims courts). Second, the studies emphasize the role participant subjectivity – perceptions, values, and criteria of judgment – plays in the definition of relationships as a "dispute". Third, in looking at participant perception, they pay attention to pictures of the world derived from legal doctrine, but also examine the use of narratives that employ meanings drawn from the community and the experiences of court personnel. Finally, they are concerned with the way lawyers and officials manage and transform participant perceptions and vice versa.

This brief account of the revised disputes paradigm shows how the Amherst seminar has challenged some of the core themes of the law and society tradition while holding on to others. To clarify this point, let us contrast these studies of "disputing at the boundaries" with the classic law and society "gap study". "Gap studies" compared law on the books with "law in action", measuring the distance between prescription and behavior. As Sarat has pointed out, the classical gap study confirmed the centrality and autonomy of the law while pointing to the limits of its impact.[51] Gap studies took the law as desirable, and assumed that "filling the gap" was a legitimate goal. Amherst studies of disputing at the boundaries, like gap studies, recognize that legal doctrine may be deployed in settings

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[46] Sally Engle Merry, *Concepts of Law and Justice Among Working-Class Americans: Ideology as Culture*, 9 LEGAL STUDIES FORUM 59-70 (1985); *Id.*, *supra,* note 34; *Id.*, *Crowding, Conflict, and Neighborhood Regulation*, *in* NEIGHBORHOOD AND COMMUNITY ENVIRONMENTS (Irwin Altman and Abraham Wandersman eds., 1987); *Id.*, *supra,* note 43; Merry and Silbey, *supra,* note 25; Susan Silbey and Sally Engle Merry, *Interpretive Processes in Mediation and Court*, 77-page paper prepared for presentation at the Law and Society Association Annual Meeting, Washington, D.C., June 1987.

[47] Harrington, *supra,* note 34.

[48] Barbara Yngvesson, *Legal Ideology and Community Justice In the Clerk's Office*, 9 LEGAL STUDIES FORUM 71-88 (1985) and *Id.*, *Re-examining Continuing Relations and the Law,* 1985 WISCONSIN LAW REVIEW 623-646 (1985).

[49] Austin Sarat and William L. Felstiner, *Law and Strategy In the Divorce Lawyer's Office*, 20 LAW & SOCIETY REVIEW 93-134 (1986).

[50] Merry, *supra,* note 46.

[51] Sarat, *supra,* note 2.

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where other discourses are also at play. But in contrast to the gap studies, research on disputing at the boundaries does not treat law and legal doctrine as universal, consensual, necessarily rational, or central in shaping behavior. Rather, in this picture, concepts drawn from formal doctrine are deployed along with other narratives in processes or interactions among disputants, attorneys, court officials, and judges. Legal doctrine is one of several ideological practices where interaction helps constitute subjectivities and define the boundaries of law and society.

The work on disputing at the boundaries also transforms some of the original law and society approach to social knowledge. Recall that the original law and society commitment to science included ideas of law's universalism (law-like functions are needed everywhere); determinism (society obeys "natural laws") and objectivism (socio-legal scholarship can report objective states of the world through valid techniques). The Amherst studies reject the first two aspects of the original understanding, while holding steadfastly to the third. Thus, they recognize that legal institutions do not perform necessary and universal functions, and their operations are contingent and subject to transformations arising out of practices through which legal ideology is constituted and transmitted. The operation of the law is, in this account, historicized and contextualized.

But while the universalism of *legal doctrine* is challenged, the universalism – and hence the authority of – *sociological studies of the law* is restated and its grounding reconstituted. The Amherst studies assume that social scientists are able to use standard social science methods to provide valid descriptions of the historical and contingent practices which the new paradigm identifies.[52] Moreover, the very discovery of historicity and contingency makes "social science" all the more important to law's understanding of itself. Since, in this approach, the true meaning and impact of law lies in complex and contingent practices often of exceedingly low visibility, the work of social scientists, especially those who have access to the methods and procedures of anthropology, becomes essential if we are to understand what is really going on.

2. British Neo-Marxism

A second source of Seminar interest in ideology and process derives from appropriation of ideas from the Marxist tradition, particularly recent efforts to theorize the role of law in the reproduction or transformation of capitalist hegemony. Marxist themes found a place within law and society's research agenda as soon as the movement's liberal concerns about unequal justice brought scholars to ask whether liberal legal institutions were not as much the problem as the answer to questions of justice.[53] Once an untroubled reformist

[52] For further discussion, see section D, *infra*.

[53] Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOCIETY REVIEW 95 (1974).

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approach to law was abandoned, law and legal institutions could be interrogated to discover the function they played in insuring that "the haves came out ahead."[54]

While the introduction of themes from the Marxist tradition contributed to the disintegration of the untroubled reformist theme in law and society, it also made it possible to reformulate and reintroduce determinism and universal scientism. To understand how this occurred, one has to trace the history of recent Marxist theories of law and their impact on the Amherst project.

Marxist studies of the late 1960's and 1970's were dominated by structuralist approaches. They posited deep structures or "codes" of social practices whose principles could be specified at a high level of abstraction. These practices, in turn, had three dimensions, each with its own specific code (or structure): economic practices, political practices, and ideological practices. For each mode of production, there were corresponding structured practices which reproduced the social order. Law was conceived as an ideological practice which reproduced capitalist relations of exploitation and domination by contributing to the constitution of subjectivity.

The Marxist structuralist account of law actually bears a strong relationship to the original law and society understanding. While Marxism abandons the idea that law is a social universal performing necessary and desirable functions in all societies, it does posit that law plays a necessary role in each mode of production. While Marxism abandons the idea that law fosters equal justice and serves society as a whole, replacing this with the notion that law is the instrument of the ruling class, it does assert the functional necessity and importance of law in capitalism. And since Marxism assumes that developments in legal phenomena must reflect underlying laws of society and perform socially necessary functions, Marxist ideas seem to provide the basis for scientific research designed to specify these laws and confirm their operation. Thus it is easy to see how disenchantment with the law and society tradition could lead to an embrace of Marxist themes, and how this would lead to the identification of ideology as central concept for legal studies.

While structural Marxism recognized that legal ideology was important, originally it provided neither encouragement nor direction for detailed empirical investigation because the functions and impact of law were taken for granted. It was only when a group of Marxist legal scholars began to develop a richer notion of ideology that it became possible to make "legal ideology" a theme for Marxist-inspired empirical studies of law. These developments in Marxist thought were followed closely by the Amherst group, and several leading Neo-Marxists scholars visited the Seminar and influenced the work of its members. The leading figures in this effort to rethink the Marxist notion of legal ideology are a group

[54] *Id.*; Sarat, *supra,* note 2, 27-28.

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of British scholars including Alan Hunt, Colin Sumner, and Roger Cotterrell.[55] Since Hunt has had substantial contact with the Amherst group, let us look specifically at his contribution to the discussion.

In a lecture given initially in Amherst and later published in the *Law & Society Review*, Hunt argues that the production, transmission, and effect of legal ideology can not be assumed but must be established empirically. He contends that Marxists err if they assume that legal doctrine (i) simply contains an unqualified restatement of capitalist values and ideals; (ii) is directly transmitted to all members of society; or (iii) operates mechanically to constitute all citizens as compliant subjects. In contrast, Hunt suggests that to fully understand the content and impact of legal ideologies we must identify these ideologies as they exist in the world; specify their content; and identify the institutional and economic contexts in which they operate through empirical investigation.[56] Note that this approach loosens the tight structuralist assumption of a deep and unalterable logic of social laws. Hunt thereby allows for the possibility that empirical investigations may uncover counter-hegemonic ideas and imperfect transmission. Nevertheless, Hunt does not abandon the goal of a "material" account of ideological practices. While he argues that the empirical study of legally-oriented ideologies in capitalism may reveal counter-hegemonic as well as hegemonic tendencies, at the same time he suggests that these "deviant" legal visions have no real persistence or impact unless they can find "material" support in institutional and economic practices. "My object", he writes, "is to use the concept [ideology] to explore the connection between ideas, attitudes, and beliefs, on the one hand, and economic and political interests, on the other."[57] Hunt refers to his approach as the study of "materialist ideology."

With Hunt's transformation of the Marxist concept of ideology, legal ideology's role in reinforcing, legitimating, or challenging existing relations of domination are opened to empirical examination. Whether ideologies are hegemonic or counter-hegemonic, and whether they find material support for their continued existence, depends on the nature of the relationship between ideologies and the institutional and economic context in which

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[55] Alan Hunt, *The Ideology of Law: Advances and Problems In Recent Applications of the Concept of Ideology to the Analysis of Law*, 19 LAW & SOCIETY REVIEW 11-37 (1985); COLIN SUMNER, READING IDEOLOGIES: AN INVESTIGATION INTO THE MARXIST THEORY OF IDEOLOGY AND LAW (1979); and Roger Cotterrell, *Law and Sociology: Notes on the Constitution and Confrontations of Disciplines*, 13 JOURNAL OF LAW AND SOCIETY 1 (1986).

[56] Empirical investigation must describe the various structures of value, perception and choice criteria embedded in legal thought; establish the boundaries of these ideological structures; establish their coherence or incoherence; identify the institutional and economic context in which they exist; determine the functions that these ideologies serve for their institutional context; determine the functions that the institutional context serves for these ideologies; and trace how these ideologies are produced, how they are transmitted, and whether their effects are reproduced or transformed through the empirical study of practices.

[57] Hunt, *supra,* note 55, 13.

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they exist. These relationships are determined conjuncturally, and thus their nature can only be established through empirical investigation.

This defines a research agenda for empirical social science, an agenda directly addressed by the work of Seminar members Christine Harrington, John Brigham, and Adelaide Villmoare, but reflected in the work of others as well. These studies seek to describe the ideologies of law and legal reform prevalent in policy circles today and to explain their production, persistence, or effect by relating them to the underlying structure of institutional and social relations in which they are situated.[58] Brigham[59] examines the ways the ideology inherent in legal doctrine affects how participants in social movements perceive the world and design their movement strategy.[60] He examines conservative opposition to abortion[61], feminist opposition to pornography, the gay movement for equal rights, and the dispute resolution movement as an alternative to adjudication.[62] In the case of abortion, for example, Brigham argues that the U.S. Supreme Court's *Roe v. Wade* decision simultaneously removed a major incentive that pro-abortion women's groups had to organize political action, provided an incentive for anti-abortion groups to organize politically, and determined that the law would be a primary arena for the anti-abortion coalition's political strategy.

Christine Harrington[63] is concerned with the rhetoric of legal reformers – be they academics, policy makers, or implementors. She wants to explain why these ideologies

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[58] Brigham and Harrington explicitly state this assumption of the relation between ideology and institutional context. Brigham writes: "Insight into the constitutive dimensions of ideology comes from establishing a referent or context that can be delimited ... [T]he very institutional relations that constitute the communities responsible for interpreting the law have considerable importance for social research ... This is due to the embodiment of ideology in the social relations of institutional life ... Doctrine as ideology can be understood through the social and institutional relations that determine its impact" (Brigham, *supra*, note 22, 49). Harrington writes: "The approach of this book has been shaped by the notion that reform ideology is itself problematic and linked to institutional practices ... A sociological perspective on legal ideology informs this study of the relationship between the ideology and institutions of informalism. This perspective leads to the examination of the content of ideology and its role in securing the conditions for the exercise of power ... The object is to identify »the conditions under which ideologies develop, are sustained and disintegrated because of the sociological and politically practical significance of the knowledge« [Cotterrell, *supra,* note 55, 70]. We are concerned with the structures of reform ideology and their political significance" (Harrington, *supra,* note 34, 11-13).

[59] Brigham, *supra,* note 22 and JOHN BRIGHAM, THE CULT OF THE COURT (1987A).

[60] "Movements are constituted in legal terms where they see the world in those terms and organize themselves accordingly. All the movements [Brigham discusses] ... are constituted, at least in part, by law. Legal forms are evident in the language, purposes and strategies of movement activity as practices" (Brigham, *supra,* note 22, 8-9).

[61] Brigham, *supra,* note 22.

[62] *Id.*, *supra,* note 59.

[63] Harrington, *supra,* note 34. *Id.*, *Socio-Legal Concepts in Mediation Ideology*, 9 LEGAL STUDIES FORUM 33-38 (1985B). *Id.*, *The Political Construction of Law: Legal Practice and the Administrative State*, Unpublished 8-page book

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take the form they do, why they are accepted or not and what impact they have on the nature of social relations. More specifically, she looks at reforms in dispute processing[64] and in the practice of law before federal agencies.[65] In her study of dispute processing ideologies, for example, she argues that reform ideologies which call for informalism have found acceptance not because of their explicit purpose to replace formal legal mechanisms for dispute processing with informal, delegalized mechanisms, but rather because these ideologies increase the scope, legitimacy, and efficiency of the existing (formal) judicial system.

Adelaide Villmoare argues for the determinative potential which "rights" ideology can have as a strategy for emancipatory social change. She argues that a reform ideology constructed around a new conception of legal rights can be an effective means to social change. However, in order for such an ideology to be effective, it must be constructed using theoretical categories which recognize the shape of existing legal, political, economic, and social institutions.[66] Otherwise, there will be no "material" basis either for the support of the ideology or for the practicality of its implementation.

The traces of Neo-Marxism in Amherst studies have a number of features which are in some tension with ideas drawn from the anthropological tradition. First, the Neo-Marxist account of ideologies directs attention to macro-political processes rather than to their manifestation in specific micro-encounters. Second, Neo-Marxism tends to stress that ideology's impact must be specified in relation to a political, institutional, and economic context. Third, in this perspective "ideology" trends to be considered as a relatively stable and definable set of categories which can be separated from the political and economic institutions it is associated with. Fourth, ideology is assessed in terms of whether it reinforces or challenges the hegemony of a dominant group or class.

Neo-Marxist themes would transform the law and society agenda, albeit in ways that might ultimately diverge from those inspired by anthropology. Marxist-inspired studies

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prospectus (1987A). *Id.*, *Regulatory Reform: Creating Gaps and Making Markets*, 41-page unpublished mimeo (1987B).

[64] *Id.*, *supra,* note 34 and *Id.*, *supra,* note 63 (1985B).

[65] *Id.*, *supra,* note 63, 1987 A & B.

[66] "One necessary step in analyzing changing formations of rights within the contemporary American legal system is to be able to identify new types of rights. In order to identify new forms, theoretical categories are needed for guidance. The building of categories to aid in perceiving new forms of rights is drawn from the conceptually informed observation of particular historical configurations of existing law and changing political, economic, and social relations. In other words, the theoretical construction of different kinds of rights is contingent upon the sophistication of abstract ideas as well as concrete historical circumstances" (Adelaide Villmoare, *The Left's Problems with Rights*, 9 LEGAL STUDIES FORUM 39-46, 43 (1985)).

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clearly reject notions about law's autonomous character and benign nature. They actually restate the theme of the centrality of law, but it is the centrality of a dominant ideology, not a neutral "social steering mechanism". Marxist-inspired studies will distance themselves completely from instrumental policy analysis. While they may examine policy formation, it is to expose the underlying play of interests behind seemingly-neutral reforms, not to carry the reforms forward in an instrumental fashion. Finally Marxism, like anthropology, is used to reconstitute law and society's claim to scholarly authority through science. Indeed the Marxist "trace" in Amherst work is close to the original law and society understanding. While the move from the structural Marxism of the 1970's to the current Neo-Marxist formulation abandons determinist themes about the deep-structural laws of the capitalist mode of production, Neo-Marxism continues a program of universal scientism by emphasizing the need to describe the structure of economic and political institutions in order to "explain" how ideologies function. Thus it points in directions that differ from the more contextualizing thrust of anthropology.

Indeed, just as the new disputes paradigm makes the role of social science in the study of law even more important than it was in the original law and society formulation, so the turn to Neo-Marxism provides a strong, though different, argument for conceiving legal studies as "science". If legal ideology is a central aspect of the process by which dominant groups maintain hegemony, then any understanding of social relations must deal with the production and reproduction of hegemony through law and understand how this ideology reinforces existing institutional and economic relations. If, further, the process of production and reproduction of society through legal ideology is more conjunctural than originally thought, then detailed study of this process in all its particularity is essential for a full understanding of the capitalist mode of production. Thus the Neo-Marxist turn offers both a reason why the study of legal ideology on the empirical level is important, as well as support for the notion that the ideology so described can only be explained by describing the functions it serves for economic and institutional structures.

3. American Critical Legal Studies

The Critical Legal Studies movement in American law schools has had a major impact on the work of the Amherst Seminar. This could be measured in a number of ways: frequency of citation, contacts, overlapping themes. But these measures do not really tell us very much. There are three reasons why it is difficult to trace the relationship between CLS and the Amherst project. First, CLS is itself heterogeneous, embracing a wide variety of "critical" traditions. Thus it is not easy to say what CLS "is" in any sense that would permit assessment of "impact". Second, CLS embraces and appropriates critical traditions that have had wide impact on several of the other disciplines the Amherst scholars work with. Thus one can see some of the themes described as coming from "anthropological" and "Neo-Marxist" sources in the work of CLS scholars as well as in the product of the Amherst seminar. Finally, the relationship between Amherst and CLS is very complex. Thus in an

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unpublished paper delivered in Amherst, Duncan Kennedy noted that CLS seems to have played two contradictory roles in the development of the Seminar:

> "a scapegoat role: cls represents some things that all ... can agree should be avoided, though this is putting it too mildly: the collective reference to the ways cls is to be avoided is one of the ways the group constitutes itself;
> an exemplary role: many of the positions or attitudes on which the group converges are important aspects of cls work, and as time passes more and more pieces by group members use references to cls as a shorthand way to refer both to commonly accepted background premises of their own work and to goals or aspirations of the work of the group".

As a result of these contradictory tendencies, Kennedy states, the Seminar has displayed "a striking ambivalence toward CLS."

One can see in this ambivalence the reiteration of yet another old theme in the history of the law and society movement. Since the beginning, law and society scholars have had a contradictory relationship with legal theory and scholarship. On the one hand, law and society scholars seek to identify themselves with the concerns of legal scholarship so their voices will be heard in academic legal culture. On the other, they have always sought to differentiate themselves from what legal (as opposed to "socio-legal") scholars do so they can claim a legitimate and distinctive role in the production of knowledge about law. What was always a complex relationship in the "liberal" era of legal reformism becomes equally if not more complex in the present moment when a critical tradition has emerged in the legal academy and has embraced and employed themes, concepts and modes of argument drawn from a variety of social disciplines. Amherst scholars may fear that if they embrace CLS wholeheartedly they will be swallowed up by it, but if they maintain too great a distance they will be isolated from a major and cognate development in legal thought.

Rather than try to trace the complexities of the relationship between two entities as complex as "the Seminar" and "CLS", we want to point out two aspects which seem to us both important and illustrative. These are the questions of scholarly position and of method.

CLS scholars have been quite concerned with the question of how the scholar positions herself in the process of knowledge production. CLS scholars occupy a contradictory position, and they are quite self-conscious about this. Their primary work is the production of academic legal theory. Yet they believe that legal theory is an ideological product, part of the complex process through which unequal and unjust relationships are produced and reproduced in society. The question of position is how to carry on transformative politics in legal theory.

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The debate within CLS over how this can be done is intense and unresolved. All CLS scholars would probably agree that the first task is to understand the political nature of the work of producing legal theory and doctrine, and to be self-conscious about how one's teaching and scholarship affects cultural definitions which have political implications. The question of what to do once this understanding and self-consciousness has been developed is more controversial. Some within CLS argue for a practice called "trashing", or the relentless critique of mainstream legal culture. Others favor a process of "deviationist doctrine". This means working within the tradition of mainstream legal culture to identify suppressed visions and counterhegemonic notions which can be found within legal thought and doctrine.[67] Because CLS scholars who favor the latter approach see legal thought and doctrine to be complex and contradictory, they believe that counter visions are already present within the very tradition they seek to transform.[68]

Some of the work of Seminar participants show an awareness of the need to understand the political significance of scholarly production and interrogate the scholar's role in this process. Thus, Susan Silbey and Austin Sarat are concerned, as CLS is with the problem of complicity in the production, reproduction, and transmission of legal ideology. This has inspired them to interrogate their own work as socio-legal scholars. If, they argue, socio-legal scholars are just as embedded in webs of meaningful activity as are the subjects they describe, then it behooves them to interrogate the structure of the discourse they weave. This requires interrogating the conceptual terrain which their language constitutes[69], the strategies their production of knowledge pursues, the interests their products advance, and the institutional position from which they carry on this production of ideology.[70]

If Silbey and Sarat's discussions of scholarly position seems to echo and reinforce aspects of the CLS approach, discussions by these two Amherst scholars and other Seminar participants on questions of scholarly method seem to draw clear lines between their work and that of the Critical Legal scholars. Thus, throughout the work of the Amherst group and particularly in Silbey and Sarat's recent essays one finds repeated references to the fact that CLS scholarship fails adequately to account for the *impact* of legal ideology because CLS scholars only study legal doctrine and do not examine the actual processes or practices through which this ideology is produced and transmitted. These critiques of CLS for limiting its analysis of ideology to the "mandarin materials" of elite legal culture permit Seminar participants to accept and embrace some of CLS' theoretical positions while asserting that full realization of the CLS project demands the collaboration of socio-legal scholars who really know how to discover the way in which power is produced and reproduced in

[67] Robert Gordon, *Law and Ideology*, 3 TIKKUN 14 (1987).

[68] ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986).

[69] Silbey, *supra,* note 26.

[70] Sarat, *supra,* note 2 and Silbey and Sarat, *supra,* note 17.

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everyday life. As Kennedy suggests, the group at Amherst has found in its shared background in the empirical disciplines a way both to relate to and distinguish itself from this new movement in American legal scholarship. By identifying empirical studies as a necessary aspect of a critical tradition in legal studies and by identifying social science as necessary for empiricism, this aspect of the Seminar's work restates the theme of scientism and thus promises continuity in law and society.

The foregoing sketch of the sources of the Amherst project is incomplete. It gives insufficient attention to influences, like post-structuralism, which are clearly at play in the work. It also could be misleading if it is read as suggesting that Amherst is just three very different groups and projects potentially at war with one another. By focusing on sources, and on the potential conflicts among the projects derived from these sources, we understate the degree of common commitment and give too little emphasis to the dialectical process of interaction that can be observed if the work of the Seminar is studied chronologically. Thus, one of the interesting features of Amherst scholarship is the amount of co-authored work that has been produced, as people who come from different disciplines and whose prior work draws on different sources have joined to produce co-authored work that seeks to synthesize different perspectives. We do think it is important to see the sources and the potential conflicts among them, but it is also essential to understand that as they draw on these sources to define a critical practice the Seminar participants share a common aspiration. This is to develop a critical sociology of law that incorporates ideas of structure without abandoning the idea of agency; is able to identify patterns and regularities while holding onto the basic insight that social life is indeterminant and unstable; and insists that micro and macro level analyses must inform one another.[71]

V.A Common Thread? – Scientism without Determinism

While no one can foresee the long term results of the Amherst project, three things can be said. First, in highlighting concepts like "ideology" and "process" and reconstituting the disputes paradigm, the Amherst Seminar has made a decisive turn in the law and society tradition. Second, this turn puts in question two of the original themes around which the movement was organized: untroubled instrumentalism and determinism. Third, despite their willingness to challenge two of the central pillars of the original law and society understanding, Seminar participants seem to retain and share a belief that social science can provide authoritative descriptions of the world. This belief keeps them from questioning the theme of universal scientism. It offers a possible point of agreement among an otherwise diverse set of perspectives. Yet it seems to be inconsistent with elements of the "interpretive" model of action which the Seminar itself is developing. And

[71] This interpretation was suggested by Boaventura Santos. Personal communication to the authors, May 1988.

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it raises serious questions about the nature of the "critical empiricism" participants champion. In this subsection we address the question of scientism without determinism. In the next section we will explore the problems this belief creates for the project of critical empiricism.

It would seem at first glance that the interpretive turn would lead Seminar participants to question the authority of scientific descriptions – yet few have. How can a literature which advances an interpretist theory of action through the use of concepts such as ideology and process maintain vestiges of an instrumental theory of action? Recall that the instrumental theory presumes a distinction between consciousness (internal) and objects/behavior (external). When scientific practice is conceived within an instrumental perspective, a distinction can be made between assumptions regarding the nature of the external object/behavior described by science (ontological assumptions) and assumptions regarding the nature of the process through which these descriptions are constructed (epistemological assumptions). As long as this distinction is maintained, it is possible to accept interpretive assumptions regarding the nature of the objects observed while simultaneously maintaining assumptions from the instrumental theory of action regarding the process through which scientific knowledge of these objects is constructed.

This is the most common theoretical position implicit or explicit in Amherst writings: an interpretive ontology coupled with an instrumental epistemology. When it is not stated explicitly, it manifests itself through statements in which an author claims that the reason why we should pursue a socio-legal strategy which abandons untroubled instrumentalism and determinism is that such a strategy provides a more "accurate", more "theoretical", less "narrow", more "complete", more "sociological" description of the nature of legal phenomena.[72]

The theme of universal scientism manifests itself within the instrumental theory of action through a particular understanding of the values, perspectives, and evaluative standards involved in the production of empirical scientific knowledge. A universal science is motivated by a value to construct valid descriptions of the world that can be used instrumentally for whatever purpose individuals find useful. The validity of the descriptions

[72] John Brigham, for example, in his study of judicial impact, argues that "to understand these processes, it is necessary to go beyond politics and attitudes. *The more accurate representation* presents both of the behavioral factors ... as functions of knowledge" (Brigham, *supra,* note 22, 51). Often such claims for a more accurate science are expressed indirectly through critiques of prevailing theoretical positions. Silbey and Sarat, for example, argue that the pull of the policy audience has caused socio-legal scholars to construct "a limited, partial, and distorted version" of the relation of law and society. If we shift to an interpretive ontology, it will "enable us to provide *a richer more complete picture* of law in society" (Silbey and Sarat, *supra,* note 3, 47 and 87). Another example is Yngvesson analysis of the 'continuing relations hypothesis.' She argues that while research motivated by this hypothesis has "made available a rich body of data", at the same time "it points to the *limitations* of a model which may indeed *distort our understanding*" (Yngvesson, *supra,* note 48, 624-25). All emphases in this footnote are ours.

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constructed is assured by following a defined set of procedures in the empirical observation of phenomena which meet certain *evaluative standards* of descriptive validity. The valid descriptions or perspectives so constructed serve as additions to "the big picture" of the world which scientific knowledge is slowly constructing.

Note that in each case above the element involved, be it the values, procedures, or products of science, should be universal. The value of constructing valid descriptions is universal to all scientific work and by definition excludes other, more particularistic values. The evaluative standards of descriptive validity and the procedures of proper scientific method which they define are universal because they insure the validity of the descriptions so produced regardless of what is being described or who is constructing the description. The perspective so constructed will be universal because any researcher accepting scientific values, following scientific methods, and attempting to describe the same phenomena will produce the same description.

Such vestiges of instrumentalism sneak into the most sophisticated interpretist accounts. Consider as an example Merry's 1986 study of working class ideology in small claims courts. The conceptual structure of this article maintains the presumption that empirical studies generate evidence from particular contexts which can be used for generating or verifying general theoretical insights. Merry justifies her research by identifying a lacuna in the current state of knowledge regarding the extent to which disputants in small claims courts see legal doctrine as legitimate.[73] In other words, she identifies an area of the world for which we have no accurate description. This lacuna in science's "big picture" is specified, in part, by her reference to certain existing literature which already provides a valid description of surrounding phenomena.[74] By identifying the lack of accurate description in the specified area, Merry defines the purpose of the research: to advance scientific knowledge by "filling the lacuna". Many Amherst articles explicitly state that the purpose of their writing is to provide science with accurate descriptions for the purpose of expanding general knowledge.

Having specified the purpose of her article, Merry then describes the methods of empirical investigation which she used in the construction of her description. It is assumed that these scientific procedures of data collection conform to universal criteria of validity; anyone who investigates the same phenomena while following these procedures of empirical investigation will construct the same description. By following these universal procedures, Merry insures that the description she constructs will be accurate. By

[73] "We [social scientists] have little empirical evidence about the extent to which legal doctrine is known to people in subordinate positions or the implications of this knowledge for their ideas about the legitimacy and justice of the social system ... As yet, the role of legal ideology in preserving or changing the existing power relations has not typically been addressed by anthropologists studying law ...". (Merry, *supra,* note 34, 255).

[74] Sarat's review of survey evidence about American legal culture indicates that those with firsthand contact with the legal system are less satisfied than those without contact (1977: 441) (*Id.,* 266).

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reporting her use of these procedures, she assures to her readers (her fellow scientists) that her results are valid.[75] Having substantiated her procedure as valid, Merry goes on to communicate the description she constructed and to derive certain general conclusions about the nature of reality from this description. She presents her description and her conclusions as authoritative scientific knowledge of the nature of legal phenomena.[76] Presumably, this knowledge is now available to be put to use by any reader who has an interest or value which can be achieved by using it.

In this example we find the three component processes of the instrumental theory of action: the descriptions of reality, evaluative criteria, and valued ends. Further, we find the assumption that these component processes are conducted as distinct activities. Merry implies that there can be descriptions of the world which may or may not be scientific. She seems to assume that if these descriptions follow certain procedures they will then be scientific. And she suggests that knowledge can be constructed without regard to the purposes to which it will be put.

Yet Merry's conclusions about the nature of legal phenomena demonstrate that the *phenomena* she describes operate according to the principles of an interpretive theory of action. "The extent to which a local ideology is controlled or constrained by a dominant ideology and an institutional structure is an empirical question ... .In different social situations, the relationship between local and dominant ideologies may be quite different".[77] In other words, there is no determinism to the content and impact of formal or local legal ideologies; however, we can establish this truth through the universalism of scientific inquiry.

The Amherst Seminar's failure to follow through on interpretism's implications for universal scientism, especially given their willingness to apply the interpretist critique to the themes of untroubled instrumentalism and determinism, suggests the radical implications which interpretist theory has for the self-understanding the Seminar members have of their role as social scientists and the institutional constraints placed on them by their disciplines. Taken to its logical conclusion, interpretivism would raise serious questions about their own practices and the institutions in which they work. Amherst Seminar members are social scientists concerned with redefining the activity of socio-legal research. Of the three themes of law and society scholarship we have identified, it is

[75] "This paper draws on several years of ethnographic research ... The study includes extensive ethnographic observation" (*Id.*, 256).

[76] The point here is to identify positive statements about the nature of the world that Merry makes on the basis of her structured empirical investigation. Example: "The extent to which a local ideology is controlled or constrained by a dominant ideology and an institutional structure is an empirical question ... In different social situations, the relationship between local and dominant ideologies may be quite different" (Merry, *supra,* note 46, 267).

[77] *Id.*

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universal scientism in which Amherst members and their disciplines (as opposed to legal system actors or traditional legal scholars) have the most at stake. The justification of the need for social scientific inquiry is based on its claims of providing authoritative descriptions and explanations. This justification provides social scientists with their own self worth as well as the status and material support they receive from the rest of society. Abandoning universal scientism could be seen as undermining socio-legal scholarship's own source of power. Even if a sophisticated social scientist such as Merry is willing to question this theme privately, it is difficult for her to do so in her public writing. For even if she is willing to undermine existing legitimations of her own authority, her colleagues may not be willing to accept the consequences of such writing for their discipline as a whole. Therefore, in order to get published she must keep her doubts to herself.

E. Criticism and Empiricism

How should a shift from an instrumental to an interpretive theory of action affect the way we understand our practice and products? In this section we examine the way several Amherst scholars dealt with this question, and clarify what is at stake when "criticism" is juxtaposed with "empiricism".

I. Law and Society Research as Ideological Practice

In the instrumental theory of action accurate descriptions of the world are necessary for effective achievement of ends no matter what those ends might be. The presumption is that all humans share a particular set of evaluative criteria by which they assess the degree to which descriptions of the world actually correspond to that world. In social science, these evaluative criteria provide a series of methods through which descriptions can be constructed which closely reflected the actual nature of external behaviors and objects. In this context, "empirical" investigation refers to a process of careful observation of the external world for the purpose of providing valid descriptions – "re-presentations" – of that world.[78]

Another necessary step in the instrumental theory of action is an individual's selection of the values she will seek to achieve through action. Insofar as there are a number of competing values from which she can select, she has to articulate the various values she can choose from and weigh the significance she attaches to each. This process of judgment might involve application of certain evaluative criteria, although not the ones used in the determination of valid knowledge discussed above. This process of deliberation over competing values is the instrumental notion of "criticism".

[78] Peller, *supra*, note 6.

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Under an instrumental theory, criticism and empirical investigation are related, yet distinct, procedures. They are related in that they both make a contribution to the determination of social action: empirical investigation describes the means at an actor's disposal while criticism selects the valued ends that the actor will pursue. However, each of these procedures is distinct from the other in that they each accomplished their assigned task without any involvement or contamination from the other. Each involves its own distinct set of evaluative criteria. Descriptions, for example, are value-free because their validity can be established without reference to either the particular purposes to which they may be put, or to the criteria which may be applied in the critical selection of those purposes. Values are independent of descriptions because their selection through judgment (choice) can be achieved without descriptive knowledge of the nature of the world. This is why, from the point of view of instrumental theory, "critical empiricism" is a contradiction in terms. According to an instrumentalist model of action, criticism and empiricism are by definition radically distinct processes.

However, the transition from an instrumental to an interpretive theory transforms our understanding of values, knowledge, evaluative criteria, and the manner in which these three phenomena are related. In this model, specific values, knowledge, and evaluative criteria combine into a common trans-individual web of meaning – an "ideology". The values, perceptions, and standards which constitute a specific ideology are thus deeply implicated with one another. A given perspective, for example, can be identified as part of a given ideology through the relations of meaning which bind it to the values and evaluative criteria which are also constitutive of that ideology. As one moves from one ideology to another, or as given ideologies are transformed, the values, knowledge, and criteria which compose those ideologies change as well. This means that values, knowledge, and evaluative criteria are historicized and pluralized: there are a multitude of values, knowledge perspectives, and criteria; these elements are different across societies and across time; and they are bound together by different relations in different combinations to constitute different ideologies.

A distinguishing feature of Amherst work is that all Seminar participants recognize ideologies to be objects of perception which can be described empirically. That is, our descriptions of the world can include a description of ideologies along with our description of behaviors and objects. However, only a small portion of Amherst work takes this idea to its conclusion. Only a few members have, in their published writings, worked out the radical implications interpretism has for socio-legal scholars' self-understanding of their knowledge production.

If we accept the concepts "ideology" and "process" as characteristic features of the social relations which we as social scientists describe, then we must accept these as characteristic features of our own meaningful behavior. Since the construction of scientific knowledge is one of our primary activities, we must recognize this activity as a moment in the reproduction, transmission, and transformation of ideologies. This implies that the

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values we advance, the perspectives we construct, and the evaluative criteria we apply are all historical; they are deeply implicated with one another; they hold together (though loosely) as webs of meaning; and they change over time and over space. In short, if we sincerely believe that an interpretive model of action is more appropriate than an instrumental theory, then we as Law and Society scholars must abandon not only our themes of untroubled instrumentalism and determinism, but our theme of universal scientism as well.

II. Tentative Steps by The Amherst Seminar

Despite its continued espousal of scientism, the Seminar's adoption of an interpretive perspective on its object of analysis has pushed several Amherst members tentatively to address the implications an interpretive perspective has for the practice of knowledge production. A review of these discussions of the relationship between "criticism" and "empiricism" will help us understand what it might mean to take the "interpretive turn" *an outrance*.

To do this we focus on Amherst efforts which examine socio-legal studies as an ideological enterprise. Do these works maintain or abandon the assumptions that science (i) is motivated by a universal set of guiding values and interests, (ii) constructs universally valid descriptions of the world, and/or (iii) follows universally-recognized procedures in its construction of knowledge? Our review of the Amherst literature identified three somewhat distinct epistemological positions with increasing reliance on interpretive assumptions:

1. The Description and Evaluation of Ideologies

A first set of articles makes an interpretive epistemological move by acknowledging that socio-legal scholars are themselves involved in an ideological practice when they produce knowledge. Consequently, the scientific knowledge they produce expresses a plurality of perspectives rather than a single universal discourse. Further, the ideologies orienting socio-legal work may be the same as those orienting the political strategies of policy-makers. Therefore, not only does the social science community produce a plurality of perspectives, but each of these perspectives relates to distinct political projects and institutional interests.

However, these works show a continued adherence to the objectivist orientation of the instrumental theory of action. They suggest that while social scientists are enmeshed in ideologies, some of these ideologies paint a picture of social relations which is more in keeping with the facts than others. In other words, valid descriptions constructed through the application of proper scientific procedures can be used to assess the degree to which

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the perspectives drawn by ideologies are accurate descriptions of the world. This same evaluation can then be used as a criteria for making a value choice between ideologies. This process of using positivist empirical investigations to "test" ideologies is often referred to as "the sociological perspective".[79]

These works imply that they are "critical" because they recognize that meaningful activity, including the activity of policy makers and socio-legal scholars, can only be described within the context of the ideologies through which this activity is perceived by the individuals involved. The perspectives constructed must therefore supplement descriptions of behavior with descriptions of the ideologies which frame that behavior. To this extent, all practices – including scientific practices – are ideological practices.

However, in this mode of thought "empirical research" is a practice framed by a special approach – "the sociological perspective" – which is distinctive in that it constructs a practice whose products provide accurate descriptions of the world. Therefore, for these articles, "critical empiricism" becomes a process through which ideologies are described ("critical") and then evaluated based on empirical investigation ("empiricism").

2. The Multiplication of Perspectives

In their 1987 article "Critical Traditions", Susan Silbey and Austin Sarat present a second epistemological position. In this article, which began as a plenary address to the Law and Society Association, they argue that the same indeterminacy that the Seminar assumes regarding the objects of their knowledge (ontology) also applies to the "scientific" knowledge they produce (epistemology). "To maintain a critical distance from our present project, we would be compelled to demonstrate regularly the indeterminacy of our analysis of indeterminacy."[80] If the perspectives we construct are indeterminate, then these perspectives can no longer be assumed to be universally-valid contributions to the project of building "the big picture". No "sociological perspective" exists which can distinguish between competing perspectives on the basis of the accuracy of their description. Consequently, this undermines the universalism of perspectives as well as the universal value of science. If it is no longer possible to construct "the big picture", then

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[79] Consider the following quote as an example: "This paper has examined the construction of social relations in law. I have tried to assess the role of dispute processing reform, such as regulatory negotiation, in constructing a »crisis« of regulatory litigation and defining a new partnership between regulated interests and the state. I have suggested that such an assessment should include an empirical map for interpreting the pace of regulatory litigation, and that this map does not give support to justifications for reform based on a crisis reading of regulatory litigation. The map is in contrast to the reform ideology because that ideology is wedded to a formalist view of law and dispute processing instead of a sociological perspective on disputing" (Harrington, *supra,* note 63, 1987, 27).

[80] Silbey and Sarat, *supra,* note 17, 169.

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science must pursue different purposes than those proposed by an instrumental epistemology.

However, even though Silbey and Sarat reject accurate description as the single goal of scientific research, they do not make the purpose of science relative to whatever interests are embedded in the ideological orientation of the scientist. Rather, science is seen as having a new, yet singular and distinctive, purpose all its own. This purpose is to continually "challenge the dominant paradigm" by "producing new understandings of law" which provides a central focus to that which was "marginal, invisible, and unheard" under the previous dominant paradigm.[81]

Consequently, this article proposes a new, yet (again) singular and distinctive set of procedures for science. These procedures are no longer designed to ensure the construction of valid descriptions. Rather, they provide a method through which the constitutive assumptions of the dominant paradigm can be identified and changed to construct a new perspective. This new method can be summarized as "participation at a distance".[82] It involves at least three steps:

> "First, we are asked to notice the location and historicity of the communities within which social construction takes place, 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.[83] [Third], criticism ... requires an unwillingness to rest content with primary orienting norms and a willingness to invert what is central so that the marginal, invisible, and unheard becomes a voice and a focus. However, fidelity also requires more than unmasking and debunking; it demands a willingness to construct anew."[84]

This perspective assumes "criticism" to mean the construction of a new perspective out of the prevailing one through the inversion of the dominant perspective's categories. This practice must also be "empirical". But in the context of this epistemology, "empiricism" does not mean the accurate description of the external world through careful observation. Rather, it means the imperative to construct new perspectives through (1) the study (if not observation and description) of meaningful activity in (2) locales that are defined as

[81] Silbey and Sarat, *supra,* note 17, 170-172.

[82] *Id.,* 165.

[83] *Id.,* 169-170.

[84] *Id.,* 172.

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unorthodox and trivial from the point of view of the dominant perspective. In other words, the process through which we describe, contextualize, and invert the categories of the dominant paradigm is not and cannot be limited to the analysis of doctrine. It must include the description, contextualization, and inversion of the boundaries defining the meaningful activities we study.[85] This means moving the "dominant discourse" beyond the boundaries of legal doctrine and legal institutions to the study of legal ideology in the community.

3. Knowledge as Politics

In an upcoming article on "The Pull of the Policy Audience", Silbey and Sarat suggest yet another interpretive epistemology.[86] At times, the position advanced in this paper sounds very much like the epistemology outlined in their "Critical Traditions" paper. That is, it assumes that the purpose of a science that is both critical and empirical is to give voice to perspectives which are marginal, invisible, and/or unheard in the prevailing scholarly paradigm.

However, in some passages the epistemology implied in "The Pull of the Policy Audience" goes beyond that in "Critical Traditions". In this epistemology, knowledge construction does not simply interpret the world; rather, it has a real impact on persons, groups, and institutions *in* that world. Consequently, "critical" knowledge construction can not be understood simply as a process of constructing new perspectives; for in constructing new perspective, one is valorizing particular voices and political projects while devaluing others. Further, in this most sophisticated epistemology, Silbey and Sarat want to reserve "critical" for knowledge construction which delegitimates certain voices and interests – specifically, the voices and interests of policy makers – and which legitimates others – specifically, the voices and interests of marginal and invisible groups. In this view, "empiricism" can no longer refer to a simple process of interpreting meaningful activity in unorthodox locals. It is now understood that in discussing these meaningful activities one is advancing a particular ideology. Therefore, one must consider the empirical impact which the knowledge one is constructing will have on specific persons, groups, and institutions, and decide whether one is ready to accept responsibility for this impact.

As an example of this new type of "critical empirical" research, Sarat and Silbey cite the work of Kristin Bumiller. They support Bumiller for giving voice to a marginal and

[85] "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 impossible." (Susan S. Silbey and Austin Sarat, *Critical Traditions In Law and Society Research*, 21 LAW & SOCIETY REVIEW 165-174 (1987).

[86] Silbey and Sarat, *supra,* note 14.

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dominated group (the victims of discrimination) and for explicitly calling upon her readers to identify with and work for social change which achieves their vision of society:

> "Recent work by Kristin Bumiller (1987) exemplifies the way sociologists of law, freed from the pull of the policy audience, can overcome the twin dangers of underestimating the hegemonic character of state law and of equating hegemony with uniformity. In so doing, she is able to give voice and credibility to those who question, in a fundamental way, state legality existing practices and institutions [sic] ... She calls upon her readers to identify with the victims rather than the powerful and to imagine new ways of organizing social life ... She finds in their narratives a powerful, alternative vision of persons and society."[87]

We should note, however, that while Sarat and Silbey describe the purposes of "critical" science in this fashion, no Amherst work has explicitly carried out such a project. No Amherst scholar has as yet produced a scholarly article that explicitly champions a specific marginalized group, consciously constructed a knowledge which can be used to advance their politics, and/or explicitly stated that *the purpose of the work is to advance this group's political agenda.*

F. Critical Empiricism: Paradox, Program, or Pandora's Box?

The title of this essay raises three questions about current developments in law and society research which have affected the work of many scholars and can be seen in sharp focus through the detailed analysis of the creative and innovative work being done "at" Amherst. These questions are:

Has the work of the Seminar resolved the paradox apparent in the juxtaposition of "critical" with "empirical";
has the Seminar developed a program or research agenda that will reconstitute law and society studies as critical sociology of law;
will the resolution of the paradox and the development of a critical research agenda open a Pandora's Box, threatening the hard won gains of the Law and Society movement and undermining its relative stability and integration just as it approaches the 25th anniversary of its founding?

Our answer to the first question is that "critical empiricism", as used by the seminar, remains a paradox. The basic antinomy between objectivism and social critique is reflected throughout their writings. Few, if any, have really abandoned the notion that science can

[87] Silbey and Sarat, *supra,* note 14, 85-86.

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and often does provide an authoritative description, or re-presentation, of the world. Because they have not fully worked out their views on the relationship between knowledge and politics, they have not fully recognized their own complicity in knowledge production. And perhaps because this has not occurred, the Seminar's work often lacks the sense of political engagement and the richness of moral criticism that one finds in the best work of CLS, feminist, and other scholars, who are engaged in critiques of the legal order. To be sure, the Seminar's practical critique of the law and society tradition and their practical adoption of an interpretist stance has disrupted the smug complacency of the law and society mainstream's commitment to policy science. The welcome but timid efforts to introduce marginal voices and valorize victims suggests the beginning of a politically self-conscious practice of knowledge construction. The debunking of specifically formed ideologies like that of the ADR movement has been liberating. And Seminar participants have produced empirical studies, like Sarat and Felstiner's (1986) study of divorce lawyers, which engage our moral imagination and point towards transformative action.[88] But often the most powerful moral political arguments, the most effective examples of "trashing", are shot-through with an objectivizing discourse that confirms the very idea of neutral science which the seminar has tried to make problematic, and which it must uproot if it is to launch a truly critical practice of knowledge construction.

Our answer to the second question is that the Seminar has developed multiple research programs with potentially divergent implications. Thus, in our survey of the "sources" of the interpretive and critical turn in law and society studies reflected in the Amherst work, we have suggested that there are several possible ways in which the project might play out. We have indicated that the Seminar is struggling toward a synthesis, in which socio-legal studies will recognize agency *and* structure, recognize regularity *and* indeterminacy, and investigate micro *as well as* macro arenas. But it is premature to say if this – or any other – synthesis will emerge.

Our answer to the third question is that the moves being made by the Seminar do represent a Pandora's Box, and that is a good thing. By this, we mean several things.
First, we admire the work being done at Amherst and deeply appreciate the difficulties it entails. While the role of critics and reviewers seems to permit us to speak with detachment and to claim a position that is somehow different and even superior to the work being reviewed, we renounce any such reading of this essay. Our project is largely the same as that we have been reviewing, our doubts and understanding of the dilemmas involved in transforming academic discourse similar to those of the scholars we have discussed. Indeed, our primary aim in this essay is to call attention to this project and make a modest contribution to furthering its goals.

[88] Sarat and Felstiner, *supra,* note 51.

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Second, if we have noted aspects of the project which seem tentative and incomplete, and have tried to suggest ways in which it might be pushed forward, it is because we think that of all the answers to the much observed malaise in law and society the one being urged by the Amherst Seminar seems the most promising. We think that the project labeled "critical empiricism" is both an expression of the best aspect of what the Law and Society movement has always stood for and its best hope for future vitality. While we, like many at Amherst, have stressed the dominance of scientism, determinism and reformism in the original law and society understanding, we have also suggested that there has always been a more or less suppressed tradition of critique that has given the movement much of its energy and justifies its existence. At a period in which energy seems to be lacking, we, like our colleagues in Western Massachusetts, want to revive the critical tradition and restore the original energy.

Third, we think that if this transformative project is pushed as far as it should and must go it will challenge the Law and Society movement in fundamental ways and will, indeed, threaten the unstable alliances on which it has been based for so long. As the project of critical empiricism unfolds, it will become apparent to many, as it is to us, that it can only be understood in political terms and that it only can be successful if it confronts its own role in the production and reproduction of social life. And if that occurs, it could imperil the Law and Society movement as currently constituted. Today, the movement is a shaky coalition of social scientists who wish to expand into new fields, lawyers who want to embrace social science method and theory to improve education and legitimate reform, policy makers who seek information for a reform agenda, researchers in policy bodies who seek contact with the academy. The move to a more open recognition of the relationship between knowledge and politics runs the risk of destabilizing this coalition. It is a risk worth running.

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