Framing the Field of Law's Disciplinary Encounters: A Historical Narrative

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In this article I address the historical interrelationship of law and social science. I explore the separation of "law" and "social science" during the later 19th century, examine their relationship over the next 50 years, and finally take up their more elaborate post–World War II interaction, culminating in the birth and development of the law and society movement. The narrative focuses on two realms of encounter, the intellectual and the institutional, or "spatial," and in the latter case on two particular locales—the academy and the state. Histories of the interaction of law and social science have mostly pursued its academic aspect, resulting in a history of encounters expressed primarily as pedagogical disputes. But encounters between law and the social science disciplines are also competitions between distinct languages of state formation. Moments of encounter are moments of rivalry in the state, not simply in the common room. Mostly, I conclude, law wins.

Prologue: History's Vision

> When you believe . . . that power in law resides in fields of practice, it is important to speak of places and people as well as ideas.
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> —John Brigham, "The Constitution of Interests"

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To frame a field is to define the space within which the actions that constitute the field occur.[1] In this instance, the field is that of the interaction between law and social science, and the framing is historical—ironically so, in that this account of disciplinary interaction is one in which history as a discipline itself hardly features. Both law and the social sciences have by and large rejected historicity when considering explanations (as opposed to exemplifications) of social action. "[T]he models of the social world that have dominated American social science in the twentieth century invite us to look through history to a presumably natural process beneath . . . . individual behaviors responding to natural stimuli" (Ross 1991:xiii. See also Rothman & Wheeler 1981; Demos 1981, esp. pp. 314–24).[2] Here, history's place is on the outside, a narrative of others' encounters rather than a participant.

Ironies notwithstanding, the outside has its advantages. A historicized world "is a humanly created one. It is composed of people, institutions, practices, and languages that are created by the circumstances of human experience and sustained by structures of power. History can be used to achieve a critical understanding of historical experience and allows us to change the social structures that shape it" (Ross 1991:xiii). Let us mobilize those advantages in framing this field. By this, I mean let us understand the field as a space of encounter conjured into existence by the activities and practices of its participants, by the locations of those activities, and by the relationships pertaining amongst them, but visible as a "field" only to the observer. Let us also understand that, as a necessary consequence, although this field is the outcome of the actors' activities and practices, intentions and choices, its framing—imperious chronologies of intellectual sequence, imposed linearity—will not necessarily be theirs at all. Indeed, their perceptions, including their perception of their history, may be very different. "The ground is not virgin: it already has a history." Here, "[i]t is not a question of correcting

[1] The concept of "field" denotes "an area of structured, socially patterned activity or 'practice'" that is "organized around a body of internal protocols and assumptions, characteristic behaviors and self-sustaining values" (Terdiman 1987:805, 806). It "is a tool for analysis and not a description of a fixed entity. It provides a way to represent certain semiautonomous social spaces" (Garth & Sterling 1998:415). Action within its boundaries is dynamic and relational. Struggles within the field "reconfigure the forces and . . . seek new positions within its hierarchy" redefining its "practices, understandings and customs" (Trubek 1990:12, n.21).

[2] The last two decades have, however, seen history acquire a degree of prominence as a site of disciplinary encounter with law. For convenient guides, see Gordon 1984, 1996, 1997; Kalman 1996; Reid 1993.

what is already there, of replacing it with a better route. It is a question of interpretation" (Carter 1988:174).

Conceived as an interpretive project, framing becomes an exercise in the recovery of the field's spatial as well as its conceptual dimensions.[3] The whole is organized by resort to three metaphors—revelation, production, and insufficiency. The first, revelation, is the key to the field's 19th-century configuration, lasting through the 1870s. It is succeeded by production, chosen to invoke law's encounter with the specialized ideologies of investigation and training that held sway for most of the next century, the century of American modernism and industrialism. Finally, the metaphor of production is succeeded by that of insufficiency, which stands for law's failed attempts at self-explanation, for the resultant large-scale turn to social science in the 1960s, and for the revealed insufficiencies of that turn.

As revelation is succeeded by production, both the relationship between law and materiality and the space of the disciplinary encounter that the relationship defines become problematic. In order to engage in an "encounter" at all, law and the disciplines must necessarily be separate. Yet for much of the 19th century they were not. The metaphor of "revelation," that is, stands for an initial and largely uncritical harmony between law and the materiality of "science," a mutual empiricism expressing a perceived mutual orientation to nature and discovery. "Production" stands for the separation of law from science, for their mutual self-reconstitution as "law" and "the disciplines," with separated self-defined purposes, for the beginnings of the critical encounter between them, and for the spaces—institutional and ideological, educational and governmental—in which that encounter occurred. Metaphors of "insufficiency," finally, describe the modern and postmodern continuation of that encounter in transformed spaces, and its consequences.

I. Revelation

> Society among nations, and especially among the people of each nation, is peculiarly and most happily characterized in the present age. No other period in the history of man is marked by such a condition of national intercommunication and of individual social intercourse. Legislation, science, arts and literature, are no longer even national, but are fast becoming the common right and possession of the world. . . . [T]he day [is]

[3] As Haskell (1977:1) puts it, "One must consider not only the genealogy of ideas, but also their institutional setting, their meaning and relevance for contemporaries, and their depth of penetration, both inward into individual consciousness and outward through society's many levels."

> approaching when the world may know but one homogeneous system of constitutions, laws, science, literature, and manners.
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> —David Hoffman, *A Course of Legal Study, Addressed to Students and the Profession Generally*

During the first half of the 19th century, law did not encounter so much as commingle harmoniously with other realms of human thought. In America, however, that commingling occurred in a singular intellectual context that Dorothy Ross has called "the vision of American exceptionalism"—the belief that "[t]he successful establishment of republican institutions and the liberal opportunity guaranteed by a continent of virgin land" exempted America "from qualitative change in the future." Embodied in "fixed laws of history and nature," exceptionalism assumed the position of a national ideology that, even as it proclaimed itself the epitome of human progress to the world at large, rendered moot the necessity of any further fundamental change at home. What remained was the responsibility to reveal those fixed laws, a responsibility that encouraged scientific inquiry to unite in a single discourse (Ross 1991: xiv, xv. See also McCurdy 1998:161). "How intimately are all the sciences connected," David Hoffman wrote in 1836 (I, 104), "and how much mistaken is the idea entertained by many in this country, that the lawyer (whose province is reasoning) can attain to eminence, though he restricts his inquiries within the visible boundaries of his peculiar science."[4]

Both American exceptionalism in general and the singularity of inquiry—the commonalities among the "peculiar sciences"—in particular were expressed in what Howard Schweber (1999) has termed the ideology of "Protestant Baconianism," which supplied the conception of science that dominated learned and professional discourse in the antebellum period. According to Schweber, Protestant Baconianism was characterized by four essential commitments: to natural theology (that the truths of religion could be revealed through the study of nature); to inductive inquiry and science as taxonomy; to systematic analogical reasoning, binding all forms of knowledge together in one grand synthesis; and to an understanding of science as a distinctively public undertaking that would bring moral and political uplift to the civic sphere. At the root of Protestant Baconianism lay the rejection of deductive reasoning, from given axioms to particular outcomes, in favor of the adoption of systematic discovery and classification. This was not a rejection born in skepticism, however, but in faith. "Rational reflection upon the truths of experience, including elementary moral intuitions—the common sense of mankind—validated both the common physical world and the

[4] Daniel Boorstin (1973:82) finds these also to be the themes imparted to law by Blackstone: "Blackstone held out to the student of law the unsatisfying certainty of being a powerless spectator of a happy story."

fundamental truths of morality and divinity embodied in Christianity" (Ross 1991:37. See also Schweber 1999: 423–24.)[5]

Antebellum intellectual culture pursued its common endeavor in a common space, one that was genteel, civic, and urban. Pointedly, this was also the designated space of the antebellum professions—law, medicine, and divinity. "Early American professionals were essentially community-oriented. Entry to the professions was usually through local elite sponsorship, and professionals won public trust within this established social context rather than through certification." A profession was more civic role and resource than discrete and learned discipline, "an emphasis within a shared and relatively accessible public culture." In turn, that public culture was centered on towns and cities, where it was nurtured in "general associations of cognoscenti" (Bender 1993:6. See also Haskell 1977:88). Urban did not mean impersonal: public culture was local and personal, for antebellum towns and cities were what Robert Wiebe has called "island communities" (1967:xiii)—discrete and self-contained. Within each island, intellectual life was actively inclusive, organized upon principles "of mutual instruction," a cultural pattern replicated "in locality after locality," each exhibiting the same "dense net-

[5] Somewhat in contrast to Schweber's emphasis on the widespread salience of Baconian science, William Novak (1996:19–50) has argued that the "first principles" for antebellum legal inquiry were derived from distinctive transatlantic traditions in moral philosophy, "the common intellectual framework for all the human sciences in antebellum America," and that the result was a skeptical, secular, pragmatic, and historical science of law and government that stressed the social and relational nature of man in society. Novak's argument thus implies a rejection of Americans' "exceptionalist" self-conception, and a sharp epistemological divide in the antebellum period between moral, or human, and natural science. Ross, we should note, refuses to identify moral philosophy with skepticism and secularity. In the American context, commonsense realism "supported belief in the harmony between science and religion, keeping the advance of science within the Christian purview" and slowing "movement toward a secular concept of nature and history" (Ross 1991:37). What of law in this context? Law in antebellum America, as Novak notes, was the object of reverence. Though he argues that the law so revered was a secular and historical phenomenon—social vision of law embedded in a vast array of contingent human experiences—one cannot easily separate the phenomenon of reverence for law from the peculiarly American context of distinctly postrevolutionary and increasingly millennial republicanism, in which it was offered. One should note that Novak's notion of "well-ordered governance" has been put precisely in this context, interpreted as a Christian and counterrevolutionary political ideology invoking a reverence for law precisely to forestall a change tending toward a secular conception of nature and history, not to embody it (Rodgers 1987:112–43).

As to the question whether moral philosophy and Baconian science represented distinct traditions, Ross has argued (1991:36–37) that Baconian empiricism and moral philosophy—particularly in the Scottish commonsense realist incarnation so influential in antebellum America—were intimately acquainted. Commonsense realism "encouraged the belief in Baconian empiricism as the proper method of all the sciences . . . trust[ing] that empirical observation would yield, through rational reflection upon its evidence, the highest truths of science." The connection is reinforced in behavior: both Schweber's Baconian scientists and Novak's legal scientists identified scientific inquiry as a public undertaking of decisive moral and political significance. Nor was there any difference in their methods: both rejected abstract reasoning in favor of experience-based induction. Similarities in the methodology and social purpose of scientific inquiry reinforce the implications of epistemological commonality.

works" of supporting institutions—"libraries and philosophical societies, mechanics and agricultural associations, historical societies, colleges, and small, informal discussion groups devoted to mutual education" (Bender 1993:7–8). Visiting mid-century Cincinnati, Charles Lyell wrote of how the joining together of literary and scientific men, lawyers, clergymen, physicians, and merchants had resulted in "a society of a superior kind" (As quoted in Bender 1993:33. See also, generally, 11, 22–23, 32–33; Konefsky 1988).

Mutuality of inquiry among the genteel reflected not just discursive commonality but also social self-assertion and self-defense. Confronted with the aggressive egalitarianism of antebellum democracy, social elites sought means "of establishing authority so securely that the truth and its proponents might win the deference even of a mass public, one that threatened to withhold deference from all men, all traditions, and even the highest values." To further their authority in virtually all fields of intellectual and cultural endeavor, elites designated themselves "communities of the competent." Professionalization was a crucial tactic: "the driving force of the movement to establish authority lay in the three classic professions—divinity, medicine, and law" (Haskell 1977:65, 66, 77). Those in the professions in turn became the core groups sustaining genteel intellectual culture and its brittle claims to social authority over knowledge.

Particular institutions were of strategic importance in genteel intellectual culture's efforts to organize and authorize knowledge in antebellum America. Colleges were significant resources, of course. "The job of the mid-nineteenth-century college professor was . . . to bind the cosmos itself to a coherent frame of law, and put the hunger for order and discipline sweeping through antebellum Protestantism into systematic form" (Rodgers 1987:118–19). But the antebellum colleges enjoyed only limited capacity to exercise widespread cultural-intellectual influence. As Francis Wayland observed with regret in 1842, in America "the College or University forms no integral or necessary part of the social system. It plods on its weary way solitary and in darkness" (Wayland 1842:41).[6] At least as important were communal cultural institutions—museums, social libraries, literary societies, and in particular the local institutes of arts and sciences popularly known as lyceums. Lyceums spread rapidly during the 40 years prior to 1860, their character "emphatically public," their members (amongst whom professionals of course featured prominently) engaged in a "mutual participation in each other's affairs," which in turn encouraged a "mutual appropriation of explanatory models" (Schweber 1999: 434, 432, and generally,

[6] According to Thomas Bender (1993:21), "The [antebellum] college was not the university writ small." It was no more than "one of many urban cultural institutions held together by an interlocking leadership supplied by 'society'" (p. 38).

433–41. See also Bender 1993:21–24). Here were the origins of what would become social scientific inquiry in America—the intellectual activities of literate genteel professionals organized socially in civic cultural institutions.[7]

As a genre of inquiry, these activities bore little relationship to what would emerge by the end of the century as professional social science. The texture of inquiry manifested in antebellum cultural institutions had a distinctly amateur, community-oriented quality. Instead of the modern emphasis on "scholarly productivity and the creation of knowledge" one finds "cultivation, pleasure and improvement." Instead of critical inquiry, or the formation of explanatory theories or hypotheses, one finds empiricism, observation, and taxonomy (Bender 1993:33. See also 20–29). The latter were outcomes generally associated with the Baconian method, although not by necessity, for "Baconianism" was not a single orientation. "For some, Baconianism meant empiricism, a belief that all science rested on observation and that generalizations were formulated out of the facts that were so observed. For others, it meant the avoidance of hypotheses, a flight from the theoretical to the real world of what could be observed. Finally, it could also mean classification, an identification of science with taxonomy" (LaPiana 1994:29). For antebellum Americans, the second and third meanings were uppermost, implying "a kind of naive rationalistic empiricism—a belief that the method of pure empiricism consistently pursued would lead to a rational understanding of the universe" (Daniels 1968:65; and see LaPiana 1994:29–30). This indeed is what Schweber has dubbed *Protestant* Baconianism—an empiricism tied not to a critical epistemology but to an affirmative exercise of working out the operation of a priori truths on the basis of observation of discrete instances, to the literally empirical discovery of what was already there. Baconian scientists, in all fields, "believed that their research revealed truth. Indeed, their work was revelation. The principles they adumbrated were real and true because, in the end, they were expressions of the Creator. The result of Baconian science, properly done, was a better understanding of God" (LaPiana 1994:32. See, generally, Schweber 1999:444–55).

Naive revelatory empiricism was not only the common currency of genteel antebellum intellectual inquiry, it also offered an intellectual basis upon which specifically legal inquiry could engage in common with other realms of antebellum scientific discourse. "Legal science" in this context meant the application of "Protestant Baconian" principles and method to law itself to reveal the "ordered principles" that gave organization and structure to the law. "What are individual cases but the data to be

[7] Furner (1975:1–2) describes "the first postwar social scientists" as "concerned citizens from various walks of life, brought together by a common interest in helping people who became casualties of industrial society."

observed? What is to be drawn from an observation of all cases but legal principles, the ordering of which should lead to rational understandings of the legal universe?" (LaPiana 1994:30)—and, of course, God's universe too. Confident of law's place in the grand synthetic community of antebellum discourse, proponents of legal science proceeded to claim its preeminence at the discursive intersection with science as a whole, and for that matter with society and politics too:

> Compare this science with any of the other sciences; with those which are esteemed the greatest in extent, and the most exalted in subject. Take even astronomy, that noble science . . . Sublime as this science is, it is but the science of inanimate matter, and a few natural laws; while the science which is the subject of our discourse governs the actions of human beings, intelligent and immortal, penetrates into the secrets of their souls, subdues their wills, and adapts itself to the endless variety of their wants, motives and conditions.
>
> Will you compare it with one of the exact sciences—as, for example, with mathematics . . . the science of calculation is occupied with a single principle. This it may go on to develop more and more, till the mind is almost lost in its immensity; yet the development of that one principle can never reach in extent, comprehensiveness, and variety the development of all the principles by which the actions of men toward each other are governed in all their relations. The law, it will be remembered, is the rule of all property and all conduct. (Field [1859] 1884:528)[8]

Systematic education in "legal science," however, was not the dominant taught tradition of antebellum American law. "The vast majority [of American lawyers] studied law only through apprenticeship and were never exposed to systematic instruction in the science of principles." The law office was the space where law was learned, and there the emphasis lay on the practical—pleading and procedure, the functional needs of clients. "In spite of all the praise and glorification heaped on the science of principles, a thorough knowledge of its precepts would not get a client's case before the court." Of course lawyers cultivated the image of learned professionals, speaking a scientific discourse, but they could not ground that image on the status imparted by academic training for the very good reason that institutionalized law teaching remained undeveloped throughout the antebellum period. Antebellum law schools were at best "adjunct[s]" to the urban law office. They provided "some instruction in legal principles through lectures and recitations" but "[t]he entire enterprise

[8] Offered on the brink of the Civil War, amid a crisis that illustrated to contemporaries the inescapable and irremediable failure of American political elites, Field's grandiloquent description of law—"equal in duration with history, in extent with all the affairs of men," without which "there could be no civilization and no order" ([1859] 1884: 519, 529)—is a major grab for transcendent intellectual authority.

sometimes seems to have been something of a half-hearted charade" (LaPiana 1994:38, 42, 48, 52). Lawyers instead relied primarily on courthouse and bar intimacies, on legal periodicals, and—after the Civil War—on their bar associations to buttress their professional identity, and on genteel intellectual culture—the urban culture of the lyceum—as the space where their scientific discourse might most advantageously intersect with others, and hence where law's public claims to a unique ascendancy as "the science of mankind" could be put on best display.[9]

II. Production

> Broad points of view are not congenial to the attitude which has departmentalized our institutions of learning. The queer country of scholarship has been mapped out in little irregular patches of domain, staked out and appropriated by different groups with names derived from Latin and Greek sources. It is all right for the neighbors to get together now and then for a housewarming or for a cooperative effort in which the resources of their respective principalities are joined for the common good. But when one man crosses to his neighbor's domain to make maps and sketches of the fortifications, as if he contemplated changing the boundaries, he is greeted with suspicion and alarm. . . . The separation of powers . . . is the most important concept in the federation of independent intellectual sovereignties known as a University.
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> —Thurman W. Arnold,
> "The Jurisprudence of Edward S. Robinson"

If the antebellum period was characterized by an essential commonality of learned discourse, sustained by a culture of learning and inquiry that was distinctively genteel, urban, and public in its institutional aspects, the post–Civil War decades were characterized by that commonality's fragmentation and a profound reorganization of its institutional environment. The immediate cause was the decay of the local community as a discrete and significant common space amid the strains of accelerating urban-industrial development. The growing "interdependence" of modern society, according to Thomas Haskell (1977:42–44), increasingly relocated signification beyond the local, the familiar, the easily apprehended. It drained the "island communities, individuals and personal milieux" of the antebel-

[9] Bar associations, study groups, literary societies, and subscription libraries were all aspects of lawyerly self-definition in the later 18th and early 19th centuries (Ferguson 1984). Bar associations withered during the Jacksonian period, but revived after the Civil War. On lawyerly professional culture and self-expression in the antebellum South, see Bardaglio 1995:8–16. On the same in New England, see Konefsky 1988. Konefsky (1988:1156) concludes, "Although a cultural tug-of-war took place between 1805 and 1855, lawyers managed to maintain their cultural presence on each stage [whether with literary aspirants or, later, with entrepreneurs and industrialists]. . . . Their adaptability to the situation was impressive."

lum era of their descriptive and prescriptive significance, their explanatory capacity, their causal sufficiency. Simultaneously, the actualities of urban-industrialism—rapid population growth and rapid cultural diversification—"obliterated the social connections that had woven together the public culture," and "nourished an acknowledged learned society with shared purposes, traditions, and rules of discourse" (Haskell 1977:43). By the end of the century, "a new vision of urban order found expression in spatial specialization, social segmentation, and bureaucratization" (Bender 1993:34).[10]

At the far end of this transformation, their emergence integrally bound up in it, we encounter the modern university and the professionalization of both social science and legal education. Their near-simultaneous appearance comprised a "reordering of intellectual life—the creation of academic disciplines or intellectual cells" withdrawn from public view, withdrawing from each other, housed in universities that existed in a distinct and often problematic relationship to their urban environments. This underlined the abandonment of the "shared cultural space" of antebellum intellectual life for "more specialized communities of intellectual discourse" (Bender 1993:34, 43, and, generally, 39–46).

The intellectual and organizational transformation of learned culture took two decades. Its first concrete manifestation, the American Social Science Association (ASSA), created in 1865, represented a "pioneer effort" mounted by New England intellectuals to establish a translocal forum for public discourse on social issues that would "institutionalize social inquiry." The ASSA's goal was both to provide an institutional and intellectual focus for study and humanitarian reform of the mounting crises of urban-industrial development and to transcend the perceived incapacities of traditional state structures in responding to them. But the ASSA represented no decisive break with the past: both in discourse and structure it mimicked the naive empiricism and genteel intellectual tradition of the antebellum years, rather than foreshadowing the disciplines of the future. Its founders and members were "the last generation of amateur social scientists"—loosely-knit, unspecialized, unscholarly; professionals in their own occupations but not in their pursuit of knowledge. Their ultimate goal was to reaffirm the authority of their own "sound opinion," to ensure the leadership of the "community of the competent" in those areas of life "so problematical that laymen

[10] Rogers Smith (1997:349–50) writes that "old notions of unchanging individual natural rights seem[ed] like fairy tales. The hard truth seemed to be that all individuals and groups were engaged in a bitter struggle to survive amid an unfriendly nature. . . . The once eternal verities of the benefits of a market economy, republican institutions, the American way of life, even the Protestant faith in a hard but benevolent God that was at the core of so many tales of Americans as a chosen people, all had to be reconsidered."

cannot or should not bear the risk of decision alone." Conceptually, the framework they established extended and systematized but did not alter the antebellum era's civic focus (Haskell 1977:vi, 87). The practical beliefs "of informed and concerned citizens" remained the driving force (Bender 1993:42. See also, Ross 1991:63; and Furner 1975:2, 4–6, 10–34).[11]

> To twentieth-century eyes, the conglomeration of interests and activities that the ASSA tried to include under the rubric "social science" is a discordant hodgepodge. But contemporaries were not wrong to think that there was a common denominator. . . . "Social science" was understood by ASSA members to refer to the whole realm of problematical relationships in human affairs, those relationships that were unfamiliar to common sense and alien to customary knowledge. One became a "social scientist" by contributing to this store of esoteric knowledge and practical expertise. New ventilation or drainage techniques for the city dweller; new legal forms for the industrial corporation; a new theory of rent or prices; a new way to care for the insane or to administer charity—all of these were equally valuable contributions to "social science." Only by accumulating and systematizing such knowledge could the alarming new social tendencies of the age be confronted and made humanly tolerable. (Haskell 1977:86–87)

As this suggests, the ASSA was not "disciplinary" in orientation. It conceived of social inquiry (and social improvement) as work of substance. As in the antebellum Protestant Baconian idiom, truth was revealed through patient collection and investigation of material facts (Bender 1993:42, 44; Haskell 1977:101).

What was different was the scale on which inquiry might occur. The ASSA organized the process of fact-gathering into four subject areas or "departments"—Education, Health, Social Economy, and Jurisprudence. The division did not embody particularist commitments to distinct investigative or analytic methods; instead, each department reproduced the others, each furnishing a national forum for the discussion of appropriate substantive issues by those most competent to address them. Established thus, "social science" became defined as "a synthesis of the existing fields of professional knowledge in their most progressive, advanced form" (Haskell 1977:109). Through fact-gathering and

[11] The ASSA's founding force, Frank Sanborn, advertised its objectives as follows: "The discussion of those questions relating to the Sanitary Condition of the People, the Relief, Employment, and Education of the Poor, the Prevention of Crime, the Amelioration of the Criminal Law, the Discipline of Prisons, the Remedial Treatment of the Insane, and those numerous matters of statistical and philanthropic interest which are included under the general head of 'Social Science'" (Sanborn, as quoted in Haskell 1977:98). Stanley (1998) provides multiple and telling illustrations of the post–Civil War era's mobilization of social science for the investigation and solution of social "problems," but gives less attention to the transformation of social science into a professionalized discourse, and its relationship to law, postponing both to "the rise of realism in jurisprudence and the social sciences at the turn of the century" (p. 73).

discussion in each department, social problems would be resolved and social reality harmonized.[12]

Crucially, law was conceived as the agency of ultimate harmonization and reformative action: it was to the Department of Jurisprudence as "final resort" that the results of the deliberations ongoing in the ASSA's other departments were to be referred. "[W]hen the laws of Education, of Public Health, and of Social Economy, are fully ascertained, the law of the land should recognize and define them all" (ASSA Report of the Committee of Arrangements, clause 4, as quoted in Haskell 1977:105–6). Politics thus yielded to the inquiries of the most competent in the definition and resolution of social problems. Government became the act of registering the results of their deliberations. And law became, in David Dudley Field's words, "the rule of all . . . conduct."

The ASSA's departments, however, were not the future of social science. By the 1880s, "disciplines" drove the organization of the intellect. These were modes of specialized academic inquiry and professional self-identification defined in universities rather than by the public discourse and commonsense beliefs of the competent. College faculties had advanced no claims to a particular ascendancy in the "communities of the competent" that had defined the social organization of knowledge in the antebellum period. Nor had they been granted any particular authority within the ASSA's extrapolation on that organization. But, by the early 1880s, the modern university had effectively eclipsed the antebellum college and had initiated, quite decisively, the professionalization of investigation. Social science was redefined as "a university-based, research-oriented enterprise, with its own community of full-time practitioners." Their new methods of inquiry and conceptions of causation "generated by the changing conditions of explanation in an urbanizing, industrializing society" pushed the investigative traditions of genteel amateurism decisively to the margins (Haskell 1977:166, 234).[13]

The established professions continued to enjoy elite status within their own spheres of specialized knowledge, but they could no longer claim to be masters of all knowledge. "New professions and quasi-professions—the social sciences among them" now demanded equal stature in their realms of expertise (Has-

[12] "Economy, Trade and Finance" was soon split off from "Social Economy," establishing a five-department structure.

[13] In the opening lines of *Dynamic Sociology*, Lester Frank Ward ([1883] 1968) decried the "essential sterility of all that has thus far been done in the domain of social science," manifest both in "the superficial and organized labors of those who especially claim that field as their own" and also among others who, while employing properly scientific methods of inquiry, "not only fail to apply the data when obtained, but persist in teaching that no application of them can be made." Sociology, "which of all sciences should benefit man most," was "in danger of falling into the class of polite amusements, or dead sciences" (Ward [1883] (1968): I, v, vii).

kell 1977:166). The creation of disciplinary associations—the Modern Language Association (1883), the American Historical Association (1884), the American Economic Association (1885), the American Political Science Association (1903), the American Sociological Association (1905)—signified serial adoption of the model of heightened professional consciousness and differentiation. Spokesmen for the newly professionalized and academicized culture of inquiry, they confirmed the university as its proper home.

There is no little irony in social science's professionalization and spatial relocation in the university at the end of the 19th century. "The social complexity and confusion of urban life was embraced by academic social scientists as their special subject. The special capacity of their disciplines made them, so they said, uniquely able to grasp, interpret, and control this new social world. Yet, while making this positive claim, they created the university as an intellectual refuge where they could avoid the city's complexity and disorder in the construction of their discourse" (Bender 1993:45–46). The observation is especially pertinent to the history of the relationship between law and social science. First, as we have seen, it was precisely the spatial milieu of urban, genteel intellectual culture that had provided the locale for their initial commingling, one that, in the extrapolated form of the ASSA, had reached a high point of authority for law in the identification of the Association's Judiciary Department as "final resort" for discussion and implementation of social science's reflections on social organization. That concession of ascendancy surely helps explain why law's withdrawal from the ASSA was somewhat more protracted than that of the disciplines: Yale Law School's Simeon Baldwin, founder of the American Bar Association (1878), became the ASSA's President in 1897, precisely at the moment of its final eclipse by the disciplines, and tried to use the Association to advance law's professional interests and broad authority-claims (Haskell 1977:216–24).

Second, one might also propose that law's general withdrawal from the ASSA was less complete than that of the new social science disciplines precisely because law's withdrawal from engagement in the space of the city was also far less complete. In a very practical sense, law practice remained decisively oriented to the functional needs of clients in the commercial-industrial city. Downtown law office apprenticeship remained the prototypical knowledge-source for the mass of the profession through the end of the 19th century. Even after legal instruction moved into law schools, both spatially and conceptually legal education remained downtown, a metropolitan vocation physically separated in many settings from the newly suburbanized social sciences.[14]

[14] Legal education's physical location is a crucial condition of law's cultural existence in the academy that endures to the present. "Law schools and legal scholars are

Indeed, the objective of most university law schools was at first to reach an educational accommodation oriented to reproducing the practical benefits of metropolitan law-office training, rather than to seek to transcend the "common sense" of practice with a law-disciplinary education. Harvard's Charles W. Eliot, for example, "never lost sight of the practical aspects of professional education," accepting that the Law School's graduates should be "immediately useful as clerks" (LaPiana 1994:8). One may see, in short, late-19th-century law refusing to "withdraw," as the disciplines had, either from the city or from claims to the possibility of a *general* competency, and hence a *general* authority, continuing to claim—both by the invocation of the genteel tradition and the newer professional agitation—a practical ascendancy in aspects of social knowledge.[15]

Even at the cutting edge of legal education, the early direction of law's wave was not at first inconsistent with the desire to maintain law's general authority in the face of the disciplines' emerging particularism. Law teaching's leading post–Civil War innovator, Christopher Columbus Langdell, clearly sought to professionalize legal education by reconstituting it as the elaboration of a specific knowledge, attained through explicit and defined methods of inquiry and defended by exacting institutional standards. But at least during the first half of the 1870s Langdell also worked "within the framework of the ASSA," where he was secretary of a "committee on jurisprudence," chaired by Theodore Dwight Woolsey of Yale, created to "consider the state of the science of jurisprudence in the United States and to take proper action for enlarging the opportunities for instruction in that science in the universities of the country" (Haskell 1977:221). Admittedly, Langdell was skeptical. The study of jurisprudence did not "specially concern lawyers or those intending to become lawyers, but other portions of the community as well; some perhaps more, e.g., those aiming at public life or a high order of journal-

separated from colleagues in other disciplines in ways that create a sense of both specialness and isolation. Perhaps because of a lingering misconception that law students and law professors are forever running down to court at odd hours, or perhaps because of a subconscious fear that the practical aspects of legal studies may pollute the pristine abstractions of arts and sciences graduate students, law school buildings have traditionally been isolated from the mainstream of campus life—some are literally miles away, others are self-contained systems" (Kandel 1993:11).

[15] Gordon (1983:81) observes that although "no compelling evidence exists" that lawyers played a major instrumental role in crafting a response to America's urban-industrial transformation, contemporaries nevertheless "seemed to think that lawyers were influential in their own right, not simply as the henchmen of their business or banker clients. Moreover, corporate lawyers were frequently treated with a public deference [or fearfulness] beyond that usually accorded to expediters, clerks, and go-betweens." Gordon suggests that "the key to their influence lies precisely where the instrumental approaches decline to search for it—in the substance of the ideas they propagated, including the ideas in which their law schools trained them. Perhaps, after all, their main importance, both in their work for clients and in reform politics and public service, derived from their position as curators of and contributors to what many people in the society supposed to be vital forms and categories of public discourse."

ism." The chief business of a lawyer "is and must be to learn and administer the law *as it is*; while I suppose the great object in studying jurisprudence should be to ascertain what the law *ought to be*." Although the two pursuits might seem "of a very kindred nature, I think experience shows that devotion to one is apt to give more or less distaste for the other" (Langdell, as quoted in LaPiana 1994:77, original emphasis). Such sentiments presaged eventual withdrawal. But, for the time being, the site for consideration of "proper action" remained the Jurisprudence Department of the ASSA—the symbolic site of law's general civic authority vis-à-vis other emerging sciences of inquiry.

Yet the site was built on sand. During the 1870s, contention among "the various languages that comprised the knowledge base for social analysis" replaced harmony. In public policy formation and state action, legal discourse—at the beginning of the 1870s "the most authoritative American policy language"—was increasingly challenged by the newer "social vocabularies" of the disciplines. By the 1890s, law's "classical" antebellum claims to ascendancy—its "characteristic references to legal knowledge as the product of a gradual, incremental process of discovering and perfecting natural laws embedded in human nature and reflected in the constitutional order"—were explicitly at odds with disciplines that "understood theory as provisional, relative to the current economic and technological order, and defined rights, law and state forms as cultural creations, shaped by the conditions and needs of a particular historical context and subject to experimentation, growth and change" (Furner 1993: 174). Their long-term perspective on social development clearly indicated "that social conventions were too variable historically to be captured in political, legal, and economic doctrines held to be timeless and invariant, applicable without regard to ever-changing circumstances." To the extent that law study remained devoted to the law office and to elaboration of the antebellum era's "fixed laws of history and nature," it rendered itself dismissible as merely "a rather haphazard craft tradition, with its own conventions, inherently conservative . . . and quite independent of the newer currents of evolutionary thought." Legislators were advised to escape altogether from "the traditions of 'black letter learning' and to study society itself" (Lacey 1993:150, 151).

Lester Frank Ward elaborated the critique in his *Dynamic Sociology, or Applied Social Science,* published in 1883. There, Ward wrote with scorn of the "learned professions" of law, theology, and medicine, dominated by unscientific thought, unawakened intellect, derivative reasoning, and ignorance of social realities. "How utterly incompetent . . . are the men who have always held and still hold the reins of power in society!" (Ward [1883] 1968: II, 501, 502; I, 38). In their place Ward sought establishment of "a new system of governance" expressed in new laws and regula-

tory conventions premised "on the existence of reliable ways of publicly monitoring the actual effects of incentives in achieving social purposes" (Lacey 1993:152). In particular he sought a "liberal positivist" redefinition of law that would make it the product of scientifically informed legislative and administrative activity. Heretofore law had been the creation of "mere bunglers . . . ignorant of the forces over which they have sought to exercise control," men locked in "the 'stone age' of the art of government." But properly conceived, law was a process of invention, one that shared "actual identity" with processes of mechanical invention in that its successful conduct required the same mastery of the fundamental relationship between forces and objectives. Law should hence become the product of legislatures re-imagined as sites for the inculcation and application of the new social knowledges. Every legislature must become "a polytechnic school, a laboratory of philosophical research into the laws of society and human nature." Every legislator "must be a sociologist." None would be qualified "to propose or vote on measures designed to affect the destinies of millions of social units until he masters all that is known of the science of society." The legislature, then, was to become law's point of production. The outcome would be a new conception of the state that expressed "the combined effects of government and civil society in determining the overall conditions of the social order" (Ward [1883] 1968: I, 37, 38, 40. See also generally Lacey 1993:142–43.)

The liberal positivists' general elevation of the state and their specific re-theorization of law as the product of legislative mechanics informed by expert study of society was a major challenge to law.[16] Langdell and his Harvard colleagues met it single-mindedly. Well before the end of the 1870s they had abandoned the ASSA. The Jurisprudence Department became "a stronghold of the Yale Law School," symbolic of Yale's stubborn attempt to maintain a "broad legal education" expressive of the very commitment to unchanging legal truth founded in "immutable and universal principles" that the rise of the disciplines and the simultaneous crumbling of the antebellum tradition had exposed as bankrupt (Haskell 1977:221; LaPiana 1994:142, 144).[17] Harvard's attention instead riveted on the development of a new model for legal education and its generalization by other means.

As I have already noted, Harvard's Law Dean, C. C. Langdell, was pivotal in that effort. Langdell had been recruited to the newly created deanship of Harvard Law School in 1870 by Charles W. Eliot, who had become the University's President the year before, at age 35. Eliot, a chemist, had already identified himself with the postwar reordering of intellectual and profes-

[16] For examples of this elevation of expertise, see Stanley 1998:70–84, 166–72.

[17] LaPiana notes that Yale adhered to a conception of legal education as propagation of a principles-based law well into the early years of the 20th century.

sional life—its withdrawal from the public culture of the city and its reconstitution in the university. "Universities," he argued, "should embrace all knowledge" (Eliot, as quoted in Stevens 1983:51). The antebellum model of genteel intellectualism had encouraged "loose and inaccurate statements" that undermined "single-minded" scientific inquiry in all fields (Bender 1993:35–36). Eliot's goal was to reorient scientific discourse in general toward academic expertise and away from speculation. In professional education this meant a move toward theory and research and away from on-the-job inculcation of craft skills. Both ambitions were served by attempts to alter the institutions responsible for scientific and professional education at Harvard—the Lawrence Scientific School (where Eliot had taught before becoming University President) and the Law School—from their original "adjunct" status as supplementary "service" departments to Harvard College to full-fledged graduate faculties.[18]

Langdell's appointment as Harvard's Law Dean was the key to the institutional transformation of the Law School. Under his direction, and with Eliot's constant support, the Law School established a sequenced two-year curriculum for the LL.B., then a three-year curriculum, and, finally, made a commitment to law as graduate education. The substance of the curriculum was confined to "pure law" subjects, with electives introduced in 1896. Admission requirements were substantially elevated, examinations were regularized, and a full-time academic faculty was recruited to replace adjunct practitioners.[19]

Above all, Langdell sought to reorganize Harvard's teaching around a particular pedagogical style, which was also a fundamental departure in legal analysis—the case method. Considered strategically, the case method was Langdell's retort to Lester Frank Ward's attempts to re-identify "law" as the expression of socially informed government regulation invented in legislatures. Langdell had no particular quarrel with the idea of law as invention, but the location of the creative process was of fundamental importance to the conception of law that emerged from the exercise. Langdell's method centered on a recognition and acknowledgment of judicial decisionmaking as the central and essential act of legal invention. "At the heart of Langdell's scholarship is a reverence for the decided case, the judicial opinion, as the root of all Anglo-American law and the source of principles rather than as a[n] . . . illustration of them (LaPiana 1994:70). In this, he was in his own way departing as radically from the antebellum

[18] In 1862 Louis Agassiz wrote of Harvard that the undergraduate college had "more the character of a high school than of a university," and the schools (law, divinity, medicine, and science) had "in no instance yet reached the true character of University faculties" but were rather "accessories or excrescences" of the college (Aggasiz, as quoted in Haskell 1977:123–24).

[19] LaPiana (1994:7–28) describes Langdell's innovations in detail.

perception of law as a "science of principles" as Ward was in his: it had been precisely to deny that judges made law rather than "discovered" it that the immutability of principles had originally been stressed. Joseph Story, for example, had described "the notion that courts of justice ought to be at liberty from time to time to change established doctrines, to suit their own views of convenience or policy" as "a most alarming dogma" that would subvert a free people's right to the administration of justice "upon certain fixed and known principles" (Story, as quoted in LaPiana 1994:35). Nor was Langdell's fight simply a historical one. "We deprecate the use of cases alone without reference to the fundamental principles of the law of which we believe them to be in all cases the application," stated Simeon Baldwin's ABA in the 1891 Report of its Standing Committee on Legal Education. Law was a system of preexisting principles, and the case method hence was erroneous because "the cases are not the original sources of law" (Baldwin, as quoted in LaPiana 1994:136, 138).

Observers have identified Langdell's "case" method of law teaching as the single most important component of the innovations that recast Harvard as the new model law school. Their opinions of its effects on legal education, however, have not been positive. Grant Gilmore denounced the case method as "indoctrination through brainwashing," a style of instruction and analysis at once dogmatic, rigid, and closed-minded, the *fons et origo* of law's formalistic separation from the world outside the appellate court, the intellectual stimulus to the excessive doctrinalism of legal scholarship (1974:12–13). But case method actually signified an attempt to apply methods of qualitative empirical inquiry to the analysis of legal phenomena. Rather than read about law secondhand in treatises devoted to the exposition of principles, Langdell required his classes to learn law from its primary sources. The use of the case method showed that "real" law, hence "real" lawyering, lay in the study of "narrow, technical principles that . . . courts use to decide real cases" (LaPiana 1994:58). Nor, at least at its inception, was the process of investigation that Langdell instituted doctrinaire. Langdell "explicitly and not infrequently changed his mind in class, confessed his ignorance or uncertainty about points of doctrine, and asked his students to venture judgments and to challenge both his own views and those expressed by the judges and counsel in the case reports." He "forc[ed] students to grapple with the contradictions among, and indeterminacy of, legal opinions, as well as the extratextual factors shaping legal doctrine." He "informed his [own] jurisprudence by 'careful observation' of extralegal factors" (Kimball 1999:61, 71. See also LaPiana 1994: 24–28, 57–58; LaPiana 1999: 141–44; Stevens 1983:55).[20]

[20] Minda (1995:13–14) restates the contrary, and more traditional, view that Langdellian jurisprudence took law to be "a complete, formal and conceptually ordered

Langdell's emphasis on the case gave law a sturdily reformed identity as a technically sophisticated and professionalized discourse of decisionmaking, located securely within the control of courts and law schools, an identity with which anyone desirous of implementing some new conception of the state as the regulator and administrator of the social order would surely have to contend.[21] His institutional reforms simultaneously identified Harvard as the model for modern legal education—"market leader and professional exemplar." Notwithstanding variation in the actual geographic spread of innovation, the national influence of Langdell's model was immense. In the half-century after 1870, Harvard Law School became "intellectually, structurally, professionally, financially, socially and numerically" dominant in American legal education. Columbia bowed to its example during the 1890s; Harvard's Joseph Beale was appointed Foundation Dean of the University of Chicago Law School in 1902; the Yale bastion finally fell in 1913. "[T]here was a basis for professional unification; someone had finally defined 'the law' by creating an orthodox educational system and a structure and curriculum for it. . . . [T]he law school could be recognized as the cradle of technique and produce the technocrats necessary to man the new system" (Stevens 1983:38, 41).[22]

system" derived from "a small number of relatively abstract principles and concepts" and "unaffected by social and economic context."

[21] Given the enduring strength of the positivist project in the late 19th century, one should have little doubt that the challenge was real and continuing. Lacey (1993:127) emphasizes the "compound of liberal and positivist beliefs that developed in opposition to the laissez-faire individualism of the period and in support of adoption by the federal government of new responsibilities" and how that compound would nurture the later "twentieth-century currents of thought . . . constitut[ing] the most sophisticated and fully developed sources of argument on the rationale for state intervention along the lines of the 'new' or collectively oriented liberalism that dominated public thought in the progressive and New Deal periods." Against this stood a trained profession with an increasingly self-confident elite sector dedicated to Langdellian jurisprudence as a wholly sufficient statement of "law" (White 1997).

[22] The Chicago case is particularly instructive, in that Beale's appointment was made conditional on the University's rejection of a foundation curriculum for the Law School—proposed by Ernst Freund, professor of Jurisprudence and Public Law in the University's Political Science Department—that stressed "scientific study of systematic and comparative jurisprudence, legal history and the principles of legislation," and proposed courses in "criminology, 'relation of the state to industry,' finance, railroad transportation, accounting, banking, experimental psychology, history of political ethics, comparative politics, diplomatic history of the United States and Europe, government of colonies, European political theory, and administrative law." For Freund's curriculum and details of his clashes with Beale and Harvard's James Barr Ames, see La Piana (1994:129–30); Kraines (1974:2, 86, particularly 191–92 n.276).

Freund's curriculum, and at first even his participation, in the new Law School set him at odds with Harvard's model of "pure" law, taught by a professionally qualified, full-time faculty. More important, his attempts to develop a science of legislation and administration, his scholarly advocacy of an expansive view of state and federal legislative capacities to regulate the social and economic conditions of industrialism in the interests of social justice, and his critique of judicial control over legislation ("The conflict between justice and policy [is] in reality nothing more than a conflict between different policies. . . . Under democratic institutions, the courts cannot be permanently at variance with the matured and deliberate popular will") set him at odds with both the form and the

If Langdell was, then, successful in creating both a distinct professional identity and a political presence for law that maintained its influence in state and society in the face of the disciplines, why the generations of professorial calumny heaped upon him, of which Gilmore's sneering disparagement is so typical?[23] Perhaps precisely because, considered strategically, Langdell's instructional and analytical tracks did not lead the law schools toward "membership in the university community," nor steer law professors into alliance with their university colleagues "in the common quest for the discovery of truth" (Minda 1995:16); instead, it embraced different institutional imperatives, distinct from those to which the emerging disciplinarity of the social sciences was responsive. Other comparisons are more instructive, both to an understanding of Langdell's purposes and to the future relationship of law and the disciplines.

C. C. Langdell was to the reconstitution of legal education and the production of law what his younger contemporary, Frederick Winslow Taylor, was to the reconstitution of industrial work and the production of manufactured goods. Each in his distinct sphere was a transformative figure of the half-century between 1870 and World War I, each a "pioneer" who attempted to reinvent both the institutional and the conceptual apparatus of his own field by creating new protocols and behaviors at its center. At the heart of these innovations, each located "an attitude of questioning, of research, of careful investigation . . . of seeking for exact knowledge and then shaping action on discovered facts"(Majority Report of Sub-Committee on Administration, American Society of Mechanical Engineers (1912), as quoted in Nelson 1980:198). Each experimented with methods of systematic "case" study to gain purchase on their core subjects (respectively, law and work),[24] using discrete instances to pick apart and examine accepted practices, strip them to their constit-

underlying rationale of the case- and court-centered Langdellian model. For Freund's conception of law, see Freund (1904:16–17). See also Fitzpatrick (1990:44–46). For a detailed description of the process of founding Chicago's Law School and the disagreements and compromises attending it, see Ellsworth (1977). Ellsworth notes that "the largest part of the Harvard-Chicago controversy was resolved in favor of Cambridge" (1977:74).

[23] Gilmore (1974:13) dismissed Langdell as "an industrious researcher of no distinction whatever either of mind or . . . of style," a dogmatist reliant not upon reason but upon "divine revelation." A more recent example along the same lines, in an otherwise fine and perceptive book on which parts of this article rely heavily, is Schlegel's (1995:25) observation that "Langdell's revolution in legal education . . . can only be understood as the aperçu of one possessed."

[24] Taylor called his discrete case studies "object lessons," his foremen "teachers," and himself "an industrial educator" (Korver 1990:59). In his turn, Langdell is famous for his references to the law library and the case texts it contained as the "laboratory" or "workshop" of professor and student alike (Schweber 1999:458–59). In both cases such metaphors are, of course, of a piece with Lester Frank Ward's contemporary invocation ([1883] 1968: I, 37, 38) of the legislature as a "polytechnic school" and a "laboratory," and of legislation as invention.

uent details, and reconstitute them in new ways that suggested reorganized institutions and reorganized people. Neither man was an academic or "theorist" of a discipline per se; instead, in designing his own innovations each drew on personal practical experience—Taylor on his four years as an apprentice machinist and patternmaker at the Enterprise Hydraulic Works in downtown Philadelphia, and afterward at Midvale Steel, where he became subforeman in the machine shop and novice mechanical engineer; Langdell on his years of law practice, particularly his 14 years in New York City, where he had specialized in the design of briefs and memoranda. Finally, each identified education and training as a central avenue of response to contemporary industrial society's transforming demands. Each saw education and training as deliberately conceived and deliberately managed processes that inculcated appropriate and useful "skills" (Nelson 1980; Korver 1990:59–72; Stevens 1983:54–57).[25]

To treat Langdell's pedagogy as the root of the intellectual isolation of academic law and to see the trajectory of the American law professoriat as one of periodic (but hopeless) revulsion from it (as Gilmore did in his romantic nihilist vein) is both to caricature the pedagogy and to misunderstand the reasons for the professoriat's dissatisfaction. In the late-19th and early-20th centuries, when law schools were establishing the terms of law's professional and methodological differentiation from other subject areas and modes of inquiry, they were doing little that was different from other sectors of the university. Langdell's jurisprudence was no more obsessively differentiated or technically formalistic than other modes of contemporary thought.[26] As we have seen, inquiry in general had fragmented under the impact of academic reorganization, and the disciplinary differentiation that had been established then would continue throughout the following century. In legal scholarship, this differentiation would continue to be evident, even in the work of those who regarded themselves as critics of the system that Langdell had founded. Law's difference, like the difference of other disciplines, always established the critics' point of departure.[27]

[25] Paul Carrington (1995:704) has emphasized the centrality of technocratic training to the emerging late-century definition of professionalism, and the transformative effect of the demand for technocratic training on American universities: "They became in important part what we now recognize as the factories of human capital run by educational entrepreneurs." In 1870, "higher education was about to become a major national industry."

[26] As Ross (1994:171) puts it, "The mainstream social science that took shape in the United States from the 1890s to the 1920s was ahistorical and technocratic, anxious to recreate the historical world in accord with the demands of scientific prediction and control."

[27] As Schlegel (1995:25) writes of the first and most famous assault on Langdellian legal education, "Realism . . . was an antiformalism that preached, and occasionally delivered evidence of, the importance of an empirical understanding of the workings of the legal system and yet somehow Realism always returned to case law analysis."

What really sustained law's difference was manifest institutional purpose—the Taylorized training of lawyers. This institutional project provided the foundation for the Langdellian system's maintenance of "law" as a distinct professional enterprise rather than merely as a subspecies of social knowledge and social ordering. The extraordinary and sustained diffusion of the model suggests its power. Natalie Hull (1997:27) has drawn to our attention the rapidly increasing "market demand for lawyers," which the late-19th-century law school answered with "a kind of mass production of lawyers that the former and time-honored method of [office] training could not begin to approach." Robert Gordon (1983:76) suggests that Langdell's innovations were profoundly influential because what they established was a translocal template for legal training that produced interchangeable lawyers, adaptable to any local office situation. It was their role in production, rather than their intellectual separation, that became the real source of later legal scholars' dissatisfaction.[28]

The move from law office apprenticeship to the law school as the strategic point of skills training was an "industrialization" of law and of legal education, part of a more general move in America away from apprenticeship as a means of skill inculcation and toward widespread experimentation with vocational education (Korver 1990). In the new industry of higher education, the law professor was an instructor "in the skill of thinking like a lawyer," a producer of "trained legal minds" (Stevens 1983:56), without the compensating pleasures, or status, of researcher and self-reproducing mentor of future generations of university teachers—the role that defined the graduate-oriented social science disciplines, organizationally and intellectually. Of course, the law professoriat was itself increasingly recruited from among law students, but future legal educators were only a tiny minority in the total output of lawyers—far too small for their distinct career needs to have much adaptive impact on a curriculum designed to train lawyers rather than to educate professional intellectuals.[29]

The first generation of academic legal scholarship complemented the training exercise and reflected its logic; hence, it also

[28] Karl Llewellyn revealed as much in the course of his scornful dismissal of the Harvard model of legal education as "blind, inept, factory-ridden, wasteful, defective, and empty" (in Kalman 1986:67). Factory-ridden is the only pejorative in his list that has any precision to it. See, generally, Bergin (1968). One must be careful, as Schlegel (1995:11) has pointed out, when inferring a general mood from the activities and sentiments of a minority of critics: "[I]t is perverse to attempt to delineate the nature of what it was (and is) to be a law professor by looking at individuals who, through their work, challenged accepted understandings of professional role." One should not ignore "those traditional legal academics who . . . quietly, but firmly, maintain a notion of professional role and thus of appropriate activities."

[29] As Kalman (1986:175) says, "Law professors were prisoners of their own education." When he industrialized the craft, one might observe, Langdell transformed law to save it, a process that earned his name the enduring enmity of many of the beneficiaries.

reproduced some of training's frustrations. Scholarly research in law became an exercise in jurisprudential systematization—a "painstaking arrangement of principles with a view to demonstrating the scientific underpinnings of legal doctrine" (Duxbury 1995:79).[30] The agenda was informed less by a disciplined research outlook than by the more general ideology of "science" and "practicality" that underpinned case method instruction. But, for the first generation of law school professors at least, this was new work to be done, and they busied themselves with the task. Their influence—scholarly and professional—was profound.

> Lawyers bought the new treatises—*Williston on Contracts*, *Thayer* and *Wigmore on Evidence*, *Scott on Trusts*, and the like—for their encyclopedic collections of cases; but, with the cases, they absorbed the categories and principles as well. . . . [T]he spread of classical-legal modes of thought into commonsense legal language is "Langdell's secret triumph": his generation's legacy is found in the distinctions we take for granted between private and public law; voluntary and involuntary obligation (contract, quasi-contract, and tort); intentional, negligence-based, and strict liability in tort; and many more. (Gordon 1995:1244–45)

The character of law in state and society and its institutional expression in legal education and scholarship were mutually reinforcing.

By 1920, however, much of this work had been completed. "There really wasn't much more to do" (Schlegel 1984a:1529). The terrain more or less colonized, "what then, beyond teaching, would be the *raison d'etre* of the American academic lawyer?" (Duxbury 1995:79). According to Neil Duxbury, it was precisely out of this gathering fog of "academic malaise" that legal realism emerged. Realism signified academic lawyers' discontent with Langdellian jurisprudence's limitation of "the range of intellectual activities that the academic lawyer could legitimately pursue" (p. 79). In Gilmore's terms, it was a major attempt to overcome the law professoriat's intellectual isolation.

This is only half of the explanation, but it is worth pursuing, for in the academic setting the clearest institutional expression of realism was indeed to be found in the repeated attempts made in leading law schools during the 1920s and early 1930s to improve legal education through curricular and intellectual innovation. Beginning at Columbia during the 1920s, law professors impatient with the technical emphasis and rigidity of the Harvard

[30] Duxbury (1995:79) adds that "the only significant choice open to the academic lawyer in the Langdellian tradition rested in the matter of which area of law to reduce to its basics." See also White (1997:14–23). It is worth remarking that, like almost every eponymous theory, "Langdellian" legalism was more the crystallized version, invented by the innovator's successors, than the practice of the innovator himself. White tends to associate Langdell closely with a "science of principles," which Langdell's stress on the decided case suggests he in fact looked upon with some suspicion.

model "sought to make legal education more efficient and more policy-oriented" by reorganizing the curriculum along "functional" lines "closely related to modern life" and premised on the necessity of relating the teaching of legal principles to factual situations that students were likely to encounter in the course of practice. They turned to social science disciplines to supply context for and means of comprehension of those situations (Kalman 1986:67, 70. See also Duxbury 1995:78–79).[31]

However, the returns on the Columbia initiative were meager. Argument over the alternative directions for the Law School that the disciplinary turn and the functional curriculum implied—research institution or training school—came to a head in 1928 over the appointment of Young B. Smith as Dean. Antagonized by the appointment, the core group of realists (William O. Douglas, Hessel Yntema, Leon Marshall, Herman Oliphant, and Underhill Moore) resigned. The functional curriculum remained in place, but Smith ended the realist attempt to inform legal instruction with social research. Social scientists and legal academics had "worked in isolation so long that they ha[d] developed dissimilar disciplines, dissimilar techniques, and dissimilar languages" (Smith, as quoted in Kalman 1986:74). Yntema, Marshall, and Oliphant thought otherwise and joined Walter Wheeler Cook at Johns Hopkins, the mother-church of arts and sciences disciplinarity, where in 1929 they founded the Institute of Law as a community of scholars devoted "to the nonprofessional study of law" in a research and graduate-training environment. The Institute, however, proved short-lived. Its scholars were unable to think of a justification for their research program that was more than "a bunch of slogans . . . and a grab-bag of problems" (Schlegel 1995:205, 206). The Institute became the target of intense criticism from its parent arts and science faculty. In 1933, amid the straitened circumstances of the Depression, the Johns Hopkins Institute closed (See, generally, Schlegel 1995:147–49, 158–210).

The Columbia and Johns Hopkins examples suggest that within the culture and consciousness of 1920s academic legal scholarship no clear intellectual basis existed for systematic reconciliation of the agendas of law and the social sciences. In an effort to find one, the realists had at first invoked the "sociological jurisprudence" of Roscoe Pound, but by 1930 they had soured on it (and on him). Sociological jurisprudence, Karl Llewellyn pronounced, was "bare of most of that which is significant in sociology" (Llewellyn, as quoted in Kalman 1986:45–46). Later com-

[31] Bergin (1968:640) characterized legal realism as an "academicizing thrust" at legal education—a "deliberate stepping outside the legal syntax system . . . th[e] adoption of the observational as distinguished from the participational role," but one undertaken, initially, for vocational reasons. The early realists "used the new sciences of language, psychology and social process in order to produce better lawyers."

mentators have agreed that sociological jurisprudence offered comparatively little that was systematically developed as theory or methodology. As a scholar, Pound "was a bricoleur, not an inventor . . . He had issued the call and explained the need for such a jurisprudence; he had offered sociology as its organizing principle . . . but he had not fully articulated [the] alternative." Indeed, Pound was uncomfortable with the adjective "sociological." He invoked it as a convenient label that loosely suggested change rather than as a precise statement of methodological or epistemological significance (Hull 1997:79, 84–85).[32] With nothing more substantial than this to go on, in the law schools "the integration of law with the social sciences so crucial to realism remained nothing more than a vague ideal" (Kalman 1986:73).[33]

In fact, there was a lot more to go on than this, but it was not to be found in the law schools. Pound's sociological jurisprudence might have failed to impress Llewellyn, but in advocating the "socialization" and "organization" of law—that is, attention to the social context and consequences of juridical decisionmaking and administrative reform of juridical institutions in order to deliver systematic "social justice"—it stood precisely at the strategic nexus between Langdell's insistence on the maintenance of judicial ascendancy in law-making and the discipline-based social knowledges that were competing with court-centered law to furnish the state's policymaking discourse. During his pre-Harvard career in Chicago, Pound had founded the American Institute of Criminal Law and Criminology at Northwestern University precisely to explore that nexus. He sought to use the Institute's *Journal of Criminal Law and Criminology* to put lawyers and judges in mutually-beneficial contact with "experts in the disciplines of social science, medicine, psychiatry, psychology and social work" (Willrich 1997:163. See, generally, 162–63, 166).

Chicago at that time was a fruitful locale for such endeavors. Not only was the University of Chicago (where Pound briefly taught in the years 1909 and 1910) center to some of the most advanced social scientific inquiry into turn-of-the-century urban-industrial society (Fitzpatrick 1990:39–70), but the results of these inquiries were already being incorporated concretely in local juridical administration. The establishment of a new Municipal Court system in 1906 created a centralized and bureaucratized administration of criminal law that injected judicial governance into the daily detail of human life throughout the city. The court, animated both by therapeutic ideologies of social

[32] White (1997:26) also argues that although "sociological jurisprudence" advertised a belief that law should be broadly responsive to changing social conditions, it evidenced no epistemological departure from "Langdellian" taxonomy. The "sociology" in Pound's thought, in short, addressed law's administration, not its formation. Pound was just another formalist. (See also Duxbury 1995:54–61.)

[33] Symbolic of the gulf, Pound, even though Harvard Law School's Dean, taught his sociological jurisprudence only *outside* the law school (Gordon 1995:1246).

intervention and "treatment" of individuals and by eugenic strategies of population management, practiced its "socialized justice" at large through a web of 37 branch courts and through a complex of more-specialized jurisdictions and institutions—a Domestic Relations Court, a Morals Court, and a Boys Court. Each had its own therapeutic establishment (social workers, probation officers, and so forth), serviced system-wide by a Psychopathic Laboratory, or "criminological clinic." The latter was the key institution in the court's practice of "eugenic jurisprudence"—the use of criminal legal authority to manage urban crime and the urban population at large through the development of profiles of criminal personality and routinized psychological testing of offenders for mental defects (Willrich 1997, 1998).

Chicago's example suggests that, in the state, pressure on law from the disciplines after the turn of the century had brought accommodations of disciplinary-based social science in concrete juridical practice, long before the appearance of legal realism announced legal academia's belated realization of the possibilities inherent in the encounter. Robert Gordon (1995) has made essentially the same argument, but elevated it to much loftier heights. "Lawyers," he has somewhat effusively claimed, were in fact "the vanguard of the progressive movement . . . the principal architects of the institutions of the modern regulatory state." They sat on the investigative commissions and boards that probed into "every conceivable aspect of social life"; they drafted the laws that gave life to all of the state's regulatory schemes and staffed the agencies and inspectorates that enforced them. "'Scientific' discourse saturated all of this activity, which was justified, analyzed, and debated in terms of . . . the fanciest new legal policy sciences—the administrative law branch of political science, marginalist and institutionalist economics, and industrial and urban sociology" (p. 1256).[34] The activities of these progressive lawyer-statesmen, Gordon argues, then became the stimulus for realism's anti-formalist attempts in the 1920s to enrich the Law School curriculum through engagement with the social sciences.

Examined closely, however, these examples of local and national state-building also suggest the institutional and ideological resilience of law in the face of pressure from the progressives' policy sciences. Langdellian jurisprudence having affirmed the

[34] Ernst (1993) provides a fine case study of the interaction of lawyers and social scientists in the processes of progressive and New Deal state-formation, which, inter alia, suggests the interaction was rather less intellectually seamless than Gordon implies. To make a more general point, lawyers were prominent not only among the architects of the modern regulatory state, as Gordon argues, but also prominent among the architects of resistance to it. (See, e.g., Salyer 1995; Clark 1994; and Thomas 1999.) Nor, as these works indicate, should one assume any necessary connection between progressive state-building and "progressive" outcomes. For additional illustrations of this point, through reference to the social-racial conservatism explicit in Southern lawyers' state-building initiatives, see Bardaglio 1995: 218–28.

primacy of the law made by the judge and the court as the place where the law was made, insistence on law's essential court-centeredness did not diminish after the turn of the 20th century as "law" as a discourse of rule came under challenge from the disciplines and social scientists' proposals to create alternative venues for rule and to make alternative forms of professional expertise rule's embodiment. In the Chicago case, notwithstanding its therapeutic and disciplinary-interventionist overtones, socialized law remained the dispensation of the courts. In the Chicago case, that is, one may see the Progressive Era's ideal of "socialized law" as in fact a demonstration of law's court-centered capacity to maintain ascendancy over the disciplines. Nor, at least in Pound's sociological jurisprudence, can one detect any desire to alter that ascendancy. The antipathy for "the jurisdictional imperialism of the modern administrative state" that Pound put on full display in the 1930s had deep roots. "Saving the law by reforming it seems to have been the chief motive behind Pound's advocacy of both the 'socialization of law' and the 'organization' of the nation's decentralized court system, which he hoped would make the courts more competitive with administrative agencies" (Willrich 1997:171, 172).[35] Even realists inspired by progressive state-building, though they would disdain Pound as too conservative and timid, held on to the idea that "courts could serve as agents of social integration and social reform" as much as they migrated toward strategies endowing the state with distinct forms of regulatory capacity (Ernst 1998:213).

Law's resilience as an authoritative state discourse is also underscored when it comes to the more general account of the course of early-20th-century state building (see, e.g., McCurdy 1998:181–97). Here, indeed, the "vanguard" contribution of progressive lawyer-statesmen steeped in the newest policy sciences takes on a distinctive coloration when considered from the standpoint of recent work by Theda Skocpol and others, which has stressed the fundamentally gendered character of progressive state-building. Skocpol argues that

> the United States did not follow other Western nations on the road toward a paternalist welfare state, in which male bureaucrats would administer regulations and social insurance "for the good" of breadwinning industrial workers. Instead,

[35] Ernst (1998:207) similarly remarks that Pound "criticized the 'mechanical jurisprudence' and needless procedural complexity of the judiciary not to justify a full-scale invasion of law by the regulatory state but to show how courts needed to be reformed if they were to retain their place in American governance. . . . [Pound] could find a role for administrative agencies in American jurisprudence, but only if the administrators were policed by 'a Bar of specialists' who combined a knowledge of an agency's particular mission with 'habits of thought [that] are critically conservative from the very nature of their calling. Even this compromise evaporated after [Pound's] encounter, as a member of the Wickersham Commission, with the administrative enforcement of Prohibition, which left Pound more persuaded than ever of the superiority of law and the courts to the administrative process."

> America came close to forging a maternalist welfare state, with female-dominated public agencies implementing regulations and benefits for the good of women and their children. From 1900 through the early 1920s, a broad array of protective labor regulations and social benefits were enacted by state legislatures and the national Congress to help adult American women as mothers or as potential mothers. (1992:2; and see, generally, 1–57, 525–39)[36]

Working hours' regulation, widows' and mothers' pensions, the federal Children's Bureau, the federal Women's Bureau, maternal and child health education, minimum wage statutes—all established a "sex-specific pattern of public policy" (Kornbluh 1996:181; see also Fitzpatrick 1990:39–200).

Both professionally and ideologically, however, maternalism's policy agenda was always vulnerable to law. Professionally, maternalism's base of social policy expertise and advocacy lay primarily in social work. The women who participated in the policy-forming and state-building activities of the period "were a relatively homogenous lot. They were settlement house residents, authors of children's welfare bills in the states, social work professors at the School of Social Service Administration (social work) at the University of Chicago, and officials of the federal Children's Bureau" (Kornbluh 1996:180). Few among these leading maternalists were practicing lawyers—hardly surprising, given that in 1920 there were but 1,738 women lawyers in the country as a whole (less than 1.5% of the profession). Social work, in contrast, was 66% female in 1920.[37] But social work offered no independent power base of sufficient stature to support a maternalist welfare state. Its professional standing was dubious and enjoyed few of law's resources or influence. Maternalist social welfare advocates crafting remedial legislation were, hence, heavily dependent upon alliances with "sympathetic" male lawyers—men like

[36] Skocpol's (1992) detailed assessment of the processes of state expansion and allocation of responsibility for its successes offers little support for Gordon's stress on the pivotal role of lawyer-statesmen. In particular, she argues that reform-oriented professionals were generally able to promote new social policies successfully only when allied with broadly organized popular constituencies. Effective alliances were not consistently achieved among men, hence the patchiness of "paternalist" reform. The most successful such alliances, she shows, were those between female intellectuals and broadly organized women's groups.

[37] Concerning women in law and social work, see Drachman 1998:253, table 2, p. 254, table 3. Not until 1970 would there be as many as 10,000 women lawyers—still less than 5% of the profession (Epstein 1993:4, table 1.1). Among the elite of early-20th-century social feminists, Sophonisba Breckinridge was one of the few with legal qualifications. Breckinridge graduated from Wellesley in 1888, read law in her father's Lexington, Kentucky, office, and in 1892 became the first woman admitted to the bar in that state. Unable to develop a practice of her own, in 1895 she departed for the University of Chicago, where she completed graduate study in political science with outstanding success but no offers of faculty positions. She remained at Chicago and became the first woman to be awarded a JD at the University's new Law School. Her academic and reform career, however, was to be in social work, not law or political science (Fitzpatrick 1990:9–14, 44–46, 82–83).

Felix Frankfurter—the members of Gordon's "vanguard." But on most cases the "expressed views" of these lawyers were substantially at variance with those of the maternalists. "Social feminists were saddled with lawyers who basically believed in women's inferiority, and who read proposals for highlighting women's differences as formulae for inequality" (Lipschultz 1991:210).[38] If professional dependence were not enough, maternalists also "faced a legal ideology strictly at odds with their perspective. . . . [L]egal discourse shaped and reshaped [their ideas] until [they] were no longer recognizable." Together, these vulnerabilities significantly restricted the compass of maternalist-inspired state development. "Although [the male] lawyers were needed for their prestige and national prominence in legal matters (and legal technicalities) they were not sympathetic to the new social feminist vision. They represented received law, not just the attitudes of lawyers, but also the ideology of law embedded in its language and its structure" (Lipschultz 1991:211, 225).

The vulnerability of maternalism/social feminism to law underlines law's capacity to police the entry of new forms of social knowledge into the state. Women, who were effectively excluded from participation in law's exercises of professional authority, saw in the state the possibility of alternative forms of authority (bureaucratic, administrative, regulatory) that might be employed to pursue maternalist/social feminist reform strategies. Male lawyers either resisted these new state forms or used their own participation in state-building exercises to reshape them in ways that protected their professional-ideological authority as lawyers and as men. Both professional and ideological exclusions remained intact into the 1980s.

[38] There are no women on Gordon's "vanguard" list (38 names) of leading progressive lawyer activists (1995:1256–57). This is not surprising, for few of the tiny number of women lawyers of the early decades of the century were activists. Most "broke the feminine stereotype in that few sought opportunities in the 'helping' side of law, such as social welfare, juvenile work, or legal aid." They did not "totally reject the notion of helping through the law" but "redirected it from public law to family law" and to other "caring" aspects of general practice (Drachman 1998:223–29). Most women lawyers, Drachman concludes, above all desired professional acceptance. They accepted male professional-ideological authority, adopted a male model of meritocratic advancement, and pursued it by emulating men. Of the minority who rejected the male model, some abandoned law altogether for social reform activism; others sought to satisfy their deep identification with law and their desires for professional involvement by working in institutions that "brought professionalism and reform together by paying lawyers to protect those who could not afford to protect themselves"—that is, institutions "such as legal aid societies, women's courts, and children's courts . . . the product of the combined efforts of feminists, male social reformers, and liberal male lawyers" (p. 228). Those identifying with this third group claimed (unrequitedly, given Gordon's list) that their practical legal work placed them "in the vanguard of the scientific reform of society," favorably comparing their own "planned application of trained intelligence to social problems" with the "amateurish and sentimental meddling" of non-practitioners (p. 228). But like Pound, their goal appeared to be not new forms of state authority but a reformed judicial system, in their case one "more responsive to the needs of women" (p. 229).

Law's institutional and ideological resilience is also suggested by the comparative modesty of the realists' aims and achievements on the legal-academic front. For one thing, the progressive lawyer-activists who wanted recognition for their new policy sciences in the law school curriculum saw their fight as one for inclusion in the dominant model of legal education rather than for wholesale abandonment of it. They concentrated on "supplementing, and only occasionally replacing, the [Langdellian] private law curriculum." For another, their success in securing the enlarged presence they sought was at best uneven. "Everywhere orthodox law teachers schooled in the Harvard religion bitterly fought off—on the whole successfully—the reformers" (Gordon 1995:1257, 1257–58). I have already traced the collapse of the Columbia initiative at the end of the 1920s. Yale, where the roots of the Harvard model were shallow, offers a degree of contrast. There, the adoption of a functional curriculum and an orientation toward social science in scholarship proceeded apace in the late 1920s and early 1930s. In 1933, the Law School's Dean, Charles Clark, could describe the curriculum as one consisting of "two broad fields . . . the first that of practical instruction in the details of the profession, giving necessary training for the practice of law; the other that of specialized courses affording the instructors an opportunity to develop their scientific theories and attracting the attention of the more advanced work in the social sciences." But as at Columbia, law and the disciplines failed to mesh, and empirical research was soon discontinued. "Realistic" legal education became associated with the first of Clark's broad fields—the move to approximate the realities of legal practice—rather than with an integration of law and social science in a research community. Even then, the move to a functional curriculum proved unsustainable. By the end of the 1930s, "all was in shambles" and Yale's curriculum soon reverted to "entirely standard exercises in case law." As elsewhere, both institutionally and intellectually, the legal imperative won out (Kalman 1986:117 [quoting Clark], 120).[39]

In only one instance, perhaps, did the close scholarly interaction of law and social science invoked by realism actually survive and, in the long term, prosper—the law-and-economics tradition at the University of Chicago Law School. And, in this case, the

[39] Schlegel reminds us that "good empirical work can be done in a law school, but it seems incapable of institutionalizing itself. . . . The law school, conceived of as a place for instructing students and other legal professionals by identifying and justifying . . . norms, is a very durable institution. While the content of the dialogue of justification that is the law school class and the scholarly legal article has changed much in the past one hundred years, its structure has changed little and its centrality to legal education none. The story of the Realists' attempts to engage in empirical legal research shows the resilience of the law school as an institution in which teaching and scholarship of a particular kind are done, in the face of challenges of other possible institutional forms and of other possible scholarly attitudes" (1995:10–11).

actual influence of realism in creating the tradition appears to have been slight (Kitch 1983:176). Like the realist initiatives elsewhere, economics gained institutional purchase in the Chicago Law School through curricular reform, "designed to introduce 'an evaluation of the social workings of the law,'" including (along with courses on psychology and history) economic theory, accounting, and "Law and Economic Organization" (Stevens 1983:159).[40] Also, as elsewhere, however, the interest of law faculty in actually integrating their teaching and research with social science disciplines remained faint: the first appointment of an economist to the Law School "was not . . . the result of a strongly felt need by the law professors to have an economist as a colleague" (Coase 1993:243), but instead was a pragmatic maneuver to retain the services of a particular individual (Henry Simons), who had been teaching a course in economics in the Law School but who lacked sufficient support in the Economics Department to remain at the university. Apart from Simons's teaching, the law/economics conjunction remained dormant until the reformed four-year curriculum was introduced at the end of the 1930s. Even then, economics was simply another ancillary subject on the periphery of law teaching at Chicago: there is little sign that economics in the Law School made any decisive impact until after World War II, when Simons was able, with Friedrich Hayek's help, to create a research institute of political economy and when he recruited Aaron Director to head it (Coase 1993:242–45). Thereafter, the future of economics in the Law School was assured, although, if Henry Manne and Ronald Coase are to be believed, legal education and the discipline of economics continued to remain distinct projects.[41] Many would suggest that it was only as a consequence of developments of the 1960s and 1970s—the example of Coase's remarkable theoretical work, Richard Posner's relentless proselytizing, Guido Calabresi's ap-

[40] Reform at Chicago owed something to the lasting influence of Ernst Freund, to whom Gordon (1995:1257) points as a pioneer advocate of the policy-enriched Law School curriculum. Freund's own retrospective comments on the discussions attending the founding of the Law School and its orientation sound more tentative, underscoring orthodoxy's institutional resilience and Freund's willingness to compromise with it. (As we have already seen, Freund gave up on most of his curricular innovations in the interests of seeing the Law School established.) From the vantage point of the early 1930s, Freund was represented, and to a degree represented himself, not as an opponent in these discussions of "a professional school" of "the highest professional standards" but as an advocate. Commenting on the wisdom of following a "merely professional" agenda of teaching students to become practicing attorneys as opposed to adopting a wider orientation to jurisprudence, understood as "the whole field of man as a social being," Freund observed: "To my question: Is jurisprudence something better than law? Is scientific different from professional law? Should scientific law be merged in the social sciences? I suggest a demurrer rather than an answer. I do think if we had established a school of jurisprudence we should have been disappointed in our expectations. As a professional school we have not failed, but it may well be that the task of the professional school has been conceived too narrowly" (Freund, as quoted in Kraines 1974:3).

[41] For Manne and Coase on the relationship of economics to law teaching, see Kitch (1983:191, 192–93).

plied analysis, and Manne's institutionalization of economics as a form of judicial training—that law and economics finally became fully established within the legal field (Minda 1995:83–105).[42]

Curricular innovation in the late 1920s and 1930s was not confined to such places as Columbia, Yale, and Chicago, but the outcome everywhere was more or less the same—some broadening of legal education's professional imperative in an attempt to accommodate practical circumstance, a companion move to enhanced clinical legal education, but no material alteration in law's scholarly separation from the disciplines. Moreover, it is important to realize that outside the relatively few schools (Stevens estimates two dozen) where curricular and research innovations were debated, realism's "intellectual ferment" was not much felt. "Preparation for the local bar exam, the primary purpose of many—perhaps most—schools, did not require innovative offerings or allow faculty time for research." As one law school bulletin put it in 1933, "The faculty has in mind no radical experiments in legal education. The subjects offered are found in the course of study of accredited schools. The method of instruction has been in use . . . for many years. . . . We stick to fundamentals" (as quoted in Stevens 1983:163). Considered spatially, realism was a phenomenon of the elite schools, a mandarin exception with which the generality of legal education, educators, and student trainees actually had little in common.[43] And, as we have seen, even in its elite strongholds it was "a flawed movement intellectually," unable to articulate, let alone implement, a strategy

[42] It is worth noting that the final establishment of economics within the legal field came about without any fundamental disturbance of law's conventional doctrinal geography. As Richard Posner makes clear, in the hands of its Law School proponents, law and economics has been primarily the application of a theory of human behavior to the analysis of the outcomes of legal processes rather than a critique of law, per se. Law and economics have explained outcomes rigorously, but done little to disturb the structure of law as a subject—the traditional categorization of the phenomena under observation. "There is an economics of accidents and accident law, of the family and family law, of property rights and property law, of finance and corporations, even of free speech and the first amendment, and so on through almost the whole law school curriculum" (Posner 1987:767). Hence, although Posner represents law and economics as a signal instance of the intellectual impairment of law's disciplinary autonomy, standing for law's incapacity to generate explanations of itself simply from the resources of a technical legal training, law and economics in fact conforms itself to law's autonomous existence as a subject.

Perhaps that larger structural conformity is why, as Garth (1990:59) suggests, "law and economics represents the one example of a social science that has successfully found a place at the core of the legal arguments made in courts, administrative agencies, and other legal settings," and why Posner can advocate law and economics and simultaneously declare "disinterested legal-doctrinal analysis of the traditional kind" to be "the indispensable core of legal thought" without a hint of any fundamental contradiction between the two. (Posner 1987:777.) It is likely that, to the extent that economics rather than law becomes the disciplinary site of "law and economics," the conjunction will become more complex and correspondingly less easily accommodated within law's conventional structure.

[43] "Arising almost exclusively within the world of legal academics, legal realists were represented by the law faculties at Columbia and Yale law schools, who were pitted against Langdell's Harvard Law School" (Minda 1995:25. See also Stevens 1983:157,163).

for curing the separation that it desired to erode (Kalman 1986:144).[44]

What, then, was realism's lasting significance? As a scholarly phenomenon—its usual guise—realism appears as a largely frustrated move to overcome law's academic isolation. Outside legal education, in the context of contemporary society and politics, realism appears in sharper relief, a response less to scholarly isolation than to erosion of law's political authority. As in the later 19th century, and again during the Progressive Era, so by the later 1920s, "the inconsistencies between the practices of a rapidly changing industrial nation and the claims of [the] . . . juristic system" had grown acute enough to suggest an erosion of law's position in the state. "Orthodox jurisprudence could no longer justify and explain contemporary practice" (Purcell 1973:79).

Pound (1921:xii) had warned what the implications of such a divergence, if uncorrected, would be: "obstinate persistence in legal paths which have become impossible in the heterogeneous, urban, industrial America of today" would breed not rational but positively dangerous innovations—"an administrative justice through boards and commissions, with loosely defined powers, unlimited discretion and inadequate judicial restraints," a development "at variance with the genius of our legal and political institutions."[45] In the flood tide of the New Deal his fears seemed confirmed. According to the Yale realist Edward S. Robinson, lawyers faced a fundamental choice. They could be merely "guardians of outworn ideas," or they could seek instead to become "leaders in social thinking," social engineers who could apply general social scientific method "over a wide front and in the practical solution of urgent social problems." By applying "the best available knowledge," the lawyer as social engineer could "teach men new and better ways of meeting their problems—of settling their disputes." The opportunity was there; so was the threat of irrelevance if it were not grasped. Would "the lawmen" respond or be bypassed by "a new type of public servant—a *real* social engineer?" (Robinson 1934:266–67 [emphasis added]).

What both Pound and Robinson described was in essence a choice confronting "lawmen" between taking sufficient advantage of other forms of social knowledge to maintain law's ascendancy and seeing law passed by altogether by "a new type of pub-

[44] "Legal realists made a good deal of fuss about bringing social sciences to the law schools. But they did disappointingly little with such sciences once they had got them there. Legal realists rallied against the Langdellian pedagogic framework. But they failed to devise a convincing alternative framework of their own" (Duxbury 1995:158).

[45] Michael Willrich, to whose own work on Pound I am indebted, notes the waning of enthusiasm for Pound's ideal of "socialized law" during the 1920s and 1930s (1997:464–86)—a waning, I should note, accompanied not by a simultaneous retreat from socialized law's institutional intrusion into everyday life but rather by a tendency to maximize intrusion's efficiencies in the interests of controlling crime. This, of course, was precisely the specter of administrative "justice without law" that so dismayed Pound.

lic servant."[46] This was exactly the same choice that the emerging disciplines' "new system of government" had posed in the late 19th century. The lawmen of the early 1930s responded with some enthusiasm. Some, as Ronen Shamir (1995:102–3) has shown, responded completely negatively, in defense of the unalloyed, court-centered rule of law that had created judges who spoke and acted "as if they were operating outside, if not above, the domain of the state." Others responded more creatively. They built on realism's recognition that while Langdell's court-centered law might be able to explain law to itself, it risked a wider irrelevance in failing to situate itself in regard to social circumstance. Just as Langdellian jurisprudence had been a reconstitution of law's political authority in the face of serious challenge, in other words, so was realism.

Realists took that understanding directly into the new regulatory-administrative state. The New Deal became "a great state service" for lawyers (Auerbach 1976:158). Leading realists, such as Jerome Frank, Herman Oliphant, Charles Clark, Thurman Arnold, William O. Douglas, and Felix Cohen, "all became ardent New Dealers, sharing a strong hostility to the method of juristic reasoning that struck down social welfare laws." As idealistic and progressive lawyers, they expressed "strong disapproval of the social and economic situation in the thirties, and they viewed themselves as fighting to extend democratic social values" (Purcell 1973:93. See also Kalman 1996:17–18). Yet their goal was hardly the demise of law and its replacement by a new genus of public service, but instead a reconstituted ascendancy for law in the state. As Neil Duxbury (1995:154) puts it, Thurman Arnold may have "ridiculed the essentially symbolic, toothless nature of American antitrust regulation" as little other than "a preaching device," but once head of the Department of Justice's Antitrust Division, he made revival and enforcement of the antitrust laws the "basis for public policy."[47] Nor in any case were "pure" realists the sum of lawyers entering state service in the 1930s. The most important stream was in fact one of lawyers trained in administrative law by men such as Felix Frankfurter and his Harvard colleagues James Landis and Calvert Magruder, for all of whom ensuring lawyers' prominence in "the emerging mandarinate of the regulatory state" bulked largest (Irons 1982:7).

Crucially, when that lawyerly mandarinate encountered "real social engineers" in the regulatory-administrative state it was the lawyers who prevailed. In the largest state-structural terms, we

[46] Indeed, as Pound had earlier noted, "When the lawyer refuses to act intelligently, unintelligent application of the legislative steam-roller by the layman is the alternative" (1921: xiv)

[47] Duxbury (1995:155) suggests that Arnold's turnabout indicates that the realists who flocked to Washington "did not necessarily take their realist ideas with them," but one might see it as no less a confirmation that in fact law (rather than social thought or social science) was always quite central to realist concerns.

may see this tendency expressed in the long-term reining-in of administrative discretion that began in the late 1930s and that culminated in the Administrative Procedure Act of 1946, which "facilitated the expanded role of lawyers in the regulatory state" (Hall 1989:303. See also Ernst 1998:213–14).[48]

The same tendency is illustrated by events within particular administrative agencies. Efforts in the late 1930s to save a role in the regulatory processes for the National Labor Relations Board's Division of Economic Research, for example, were strongly opposed by the Board's Legal Division, whose views were typified by the scathing commentary of NLRB general counsel, Charles Fahy:

> Sometimes economic research has played an important part as material evidence, but the necessity or desirability in some cases of bringing to bear upon the issues involved economic and social research does not change the character of proceeding in which the person is accused of violating the law to a mere *ex parte* investigation, as distinct from proceedings adversary in character. . . . Persons may not be found to have committed unlawful acts by some [people] called a Board going off by themselves and having a nice social and economic research party, whatever that is. (Fahy, as quoted in Tomlins 1985b:210–11)[49]

The Economic Research Division soon expired.

Whether in the law schools or in the state, the transforming conjunction of law and social science for which realism appeared to stand proved beyond achievement. In the majority of law schools the application of the disciplines was simply too distant from realization of the essential institutional imperative—training lawyers. In the state, it is true, the New Deal seemed an ideal environment in which broadly conceived strategies of social inquiry, allied with legal-administrative regulatory processes, might indeed provide a platform for fundamental departures in social organization. Robert S. Lynd wrote in 1935 of the opportunity "to open up wide, at this time of national re-appraisal, the question as to how modern democratic government may best func-

[48] One may take, successively, the Special House (Smith) Committee to Investigate the National Labor Relations Board, congressional passage (1940) of the Walter-Logan bill (vetoed by Roosevelt), and the eventual enactment of the Administrative Procedure Act in 1946 as proof of this tendency. See, generally, Chapman 1981: particularly pp. 88–105. The Administrative Procedure Act stood as the successor to earlier explicitly hostile attempts at administrative law reform, such as the Walter-Logan bill.

[49] In correspondence with John R. Commons, board member William Leiserson (Fahy's chief adversary in the dispute over the Division of Economic Research), had earlier written that throughout the New Deal agencies, lawyers were threatening "the whole idea of scientific investigation and administrative control as it was thought out and worked out in Wisconsin years ago." Lawyers, he continued, "seem to have the notion that the only way of arriving at the truth is by two opposing lawyers trying to keep things out of the record[,] and whatever gets in . . . is the truth. They have no understanding of the method of investigation that we call economic or social research." Fahy retorted that Leiserson's views were "fantastic nonsense" (as quoted in Tomlins 1985b:209, 211, n.35).

tion in relation to . . . a socially guided economy" (Lynd, as quoted in Tomlins 1985a:27, n.32). But Lynd was a sociologist, not a lawyer. The legal mandarinate trained in the elite schools for the federal government's new administrative agencies proved quite capable of controlling embodiments and modalities of state purpose that competed with the fundamental authority of law. Realism, for all its liberal advocacy of social science, remained, as Robinson had broadly hinted in 1934, firmly focused on the ascendancy of a peculiarly *legal* liberalism.[50]

III. Insufficiency

> The man moved, lifted his foot from the water, set it down in the clinging grains of sand. Returned, Adair thought, to this other condition we are bound to. Both of us. All of us. The insufficient law.
>
> —David Malouf, *The Conversations at Curlow Creek*

Seen in retrospect, the curricular reforms of the late 1920s and 1930s were probably the most significant achievement of realism, for they underlined the capacity in American legal education and scholarship to recognize and react to moments of "slippage" in law's status and influence. They underlined (as had Langdell) the institutional capacity of law to innovate. Hence, they should be regarded as key refinements of the processes of producing lawyers and sustaining law's authority. At the same time, as we have seen, realism's particular curricular innovations lacked staying power. Nor did they have anything like the national impact of the Langdellian model so thoroughly disseminated only a generation previously. Stevens (1983) argues that during the 1930s and 1940s, once the law schools had finally completed their replacement of office apprenticeship as the effective point of production, the goal in legal education became a general raising of standards of entrance, instruction, performance, and output—a process in which curriculum reform was a part, but only a part. Indeed "for most schools outside the narrow elite, these were years when changes or innovations in curriculum and teaching methods paled into insignificance when compared with the energy needed to cope with the national efforts to 'raise standards'" (Stevens 1983:209–10). Requirements for prior collegiate education proliferated; part-time legal instruction was frowned upon; unaccredited law schools were pressured to improve or cease admissions; and library standards were established for accredited schools. But raised standards did not promise enhanced breadth, either of intellectual application or access—in-

[50] See McCurdy 1998:193–97. See also, generally, Tomlins 2000. As we have seen, realism in fact "left much of law's symbolism intact. . . . [L]egal realism is lawyer's law." In that form it has become orthodoxy—"the self conception of legal professionals" (Brigham & Harrington 1989:44).

stead, the reverse applied. Realism might have spoken to the professoriat's desire for law to be seen as an "intellectual" profession, particularly at such elite schools as Yale, but by the 1940s "standardized" schools were becoming the norm in the law teaching world at large, designed to train a homogeneous profession in a single career (Stevens 1983:209–10).

The tension that had engaged the second generation of law school faculty desirous of a more "intellectual" vocation than training a homogeneous profession increased multifold in the standardized law school of the postwar era, inducing what Thomas Bergin (1968) graphically described as "intellectual schizophrenia" in the law professoriat:

> By compelling true academics, or those who have the potential for serious scholarship, to play out a Hessian-trainer role, and by compelling highly skilled Hessian-trainers to make believe they are legal scholars, the disease dilutes both scholarship and Hessian training to the advantages of neither. . . . [T]here is no fact more visible in our law schools than that teachers with extraordinary scholarly skills are being made to "pay for their keep" by rule preaching and case parsing. The time they must give over to preparation for the Hessian-trainer roles makes it literally impossible to produce serious works of scholarship. (p. 645)[51]

Serially, policy science, process jurisprudence, Law and Society, and Critical Legal Studies—as well as the continuing movement in law and economics already adverted to—articulated successive alternative sites for the reconciliation of the law professor with the intellectual life of the disciplines. Each reflected, in one form or another, the legacy of the realists' interest in addressing law's conjunction with social science. Each might also be termed a "constructed" site, in that the disciplinary encounter was planned and created rather than—as in the case of realism—its advantages generally invoked but not systematically realized. At the same time, each (like realism itself) was determined by far more than just the intellectual needs and frustrated scholarly ambitions of legal academics. Law had prevailed in the initial struggles for ascendancy in the modern regulatory state created by the New Deal and war. But in the state's subsequent Cold War configuration, social science once more emerged as a valuable tool of state service. Each of the postwar sites thus presented a variation on a state and not simply an academic encounter between law and social science. By the 1960s, indeed, state sponsorship of social science as a policy resource had turned the disciplines toward the study of law as a social and material phenomenon to a

[51] By "Hessian-training" Bergin meant training for private practice at the bar. Notwithstanding renewed attempts at curricular innovation in the post-war period (Kalman 1986:150), in Bergin's view, Hessian-training in the postwar period was, as it had always been, the default setting of American legal education. Concerning law professors "yearn[ing] to incorporate other disciplines in their work," see Kalman (1996:61).

degree sufficient to create wholly new sites for disciplinary encounter.[52] This tendency was strong enough to result in the 1964 foundation of the Law and Society Association—a move confirming the existence for the first time of an altogether distinctive space for the study of law, that of the sociolegal, outside the control of law (Lipson & Wheeler 1986:4–5).

The first of the postwar sites, policy science ("Law, Science, and Policy"), was constituted in the second half of the 1940s as a deeply ideological intervention in legal education. Policy science was the design of Harold Lasswell, a political scientist, and Myres McDougal, a property lawyer, both of Yale University. Their design had its genesis as yet another reinvention of the Law School curriculum. Like the realists, Lasswell and McDougal sought an encounter between law and social science.[53] Unlike the realists, their design envisaged an encounter that was carefully and clearly articulated:

> Legal realists [had] . . . looked to the social sciences without any real idea of what they were looking for: the social sciences were simply something exotic, outside the framework of the law, and thus a source of inspiration—though inspiration for what it was not at all clear. . . . Although [Lasswell and McDougal] applauded realist jurisprudence for the fact that it represented, in general, a pioneering attempt to integrate law with the social sciences, they dismissed all particular realist attempts at integration as lacking clear, articulated objectives. (Duxbury 1995:171–72)

Far from identifying social science as a means to introduce objectivity into normative legal analysis, however, Lasswell and McDougal argued the opposite. Social scientists could never escape values, no matter how hard they tried. Hence, they should cease the attempt and instead use social scientific analysis explicitly to further the goals of liberal democracy. The encounter Lasswell and McDougal planned, then, was one in which it became the job of the social sciences, particularly political science, to invest democratic values in law: "If an interdisciplinary approach to legal research and law teaching was to serve a useful purpose . . . [it] was not simply to give the impression that legal critique may be 'scientifically' informed but, more importantly, to demonstrate to legal decision-makers, present and future, that

[52] Lipson & Wheeler (1986:3) write: "The enterprise of law and social science . . . [was] an outgrowth of the enormous expansion of the social and behavioral sciences that took place in the 1950s and afterward in the United States, building on wartime and postwar research and training. That general movement brought new funding for social research through the establishment of the National Institute of Mental Health and the social-science division of the National Science Foundation. It was also marked by a period in which private philanthropy, most notably the Ford Foundation, made significant grants for large-scale social research."

[53] Bergin (1968:640) describes Lasswell and McDougal's innovations as "the culmination of the academicizing thrust of legal realism."

the social sciences may be an invaluable source of normative guidance" (Duxbury 1995:172).

Here, at the outset of the Cold War, was a classic statement of liberal ideology that wrought law and disciplines into a pattern of renewed state service. Applied to the law school curriculum, policy science would reinvent legal education as "the training of policy-makers" (Kalman 1986:178). Applied to the state, that training would produce "social technicians" of "explicitly liberal-democratic persuasion," acting to further "the democratic objectives of 'authoritative community policy'" (Duxbury 1985: 180–81). The result would be "'the ever-more complete achievement of the democratic values that constitute the professed ends of American polity'" (Lasswell and McDougal, as quoted in Kalman 1986:178). Lawyers would be trained to create public policy. Social science would become the midwife of the liberal legal state, at home and abroad. Both social scientists and realists had suffered for their value "relativism" in the 1930s (Purcell 1973:115–231). Here, Lasswell and McDougal seemed to be saying, was a way to put subjectivity to good rehabilitative use.

As a proposal for a redesigned curriculum, however, policy science had little influence on the structure of the postwar law school. It was "too elitist, too expensive, and too academic." So far as both universities and the profession were concerned, law school remained "essentially a trade school" (Stevens 1983:266, 269). No funding existed to develop legal education along the lines suggested, or, more generally, to encourage research or scholarly specialization. Once again, in other words, the institutional imperative trumped the scholarly initiative (Stevens 1983: 268; Kalman 1986:186; Duxbury 1995:186).[54]

As a state language, policy science clearly had its uses as a medium for Cold War chauvinism, an instance of a legal ideology on a mission "not merely to promote democratic ideals but to save the free world." But what was "the free society" that policy science aspired to create domestically, and how was its aggressive promotion to be reconciled to the defense of the existing liberal legal order to which policy science was committed? For all their critiques of realism's indistinct invocation of social science in its pursuit of pedagogical and social reform, Lasswell and McDougall were in their own way as vague, projecting "a hazy vision of law in a future society without any real indication of how lawyers

[54] Stevens (1983:210) quotes contemporary observations that underline both the isolation of the "academicizing thrust" and the power of the institutional imperative: "The run-of-the-mill [AALS] school is, under ordinary circumstances, relatively small in size, is located in a provincial university, is geared currently to the production of lawyers for the local private practice, tends to be insecure from a budgetary standpoint, is manned by an ill-paid and frequently overworked faculty of sometimes modest performance potential, operates on a too-narrow pre-legal educational margin, and is virtually dependent for its very existence on the professional approval of the community in and for which it functions."

were supposed to turn that vision into reality" (Duxbury 1995:198, 184, 202), a vision compromised in its critique of the present by its aspirations to serve as a language of state decision-making.

If policy science was too idiosyncratic, too exclusive, and too compromised by its political engagements to construct a credible site for disciplinary encounter and synthesis, the jurisprudence of the 1950s legal process school suffered from too great a disengagement from social science itself. Although "at the heart of process jurisprudence generally there seem[ed] to rest the assumption that the social sciences will normally prove enlightening when adopted for the purposes of studying law," its proponents in no sense embraced an explicitly "interdisciplinary ethos," preferring to "borrow ideas *ad hoc*." This made legal process appear little different from the vague gestures toward the disciplines made by the realists from within their identifiably legal spaces. Hence "it is very difficult to conceive of [the process school] in a general intellectual as opposed to a specifically legal context" (Duxbury 1995: 208, 209). Indeed, to the extent that the process school's most forthright articulation of "faith in reason," or reasoned elaboration, as the basis of appropriate legal outcomes was identified with critique of the Warren Court, and in particular of the Warren Court's resorting (in *Brown v. Board of Education)* to sociologically grounded assertion rather than to legally-defensible reasoning (Duxbury 1995: 234–38), one might regard it as proof positive of the process school's repudiation of the conjunction of law and social science, the reassertion of law as a "craft," and of legal education as training students to think like lawyers.[55]

Yet legal process did prove to possess methodologically interdisciplinary implications. Once it was generalized from the craft technique of judicial reasoning to the wider forum of process considered as (1) investigation of the basis of the legitimacy of legal institutions, (2) their interrelated activities, and (3) the institutional conditions of appropriate outcomes, legal process's relationship to a long-established tradition of analysis in political science came into focus — namely analysis of the process of politics and government itself.

> Post-war political scientists . . . in studying the process of democratic government, regarded American democracy as a rational phenomenon, the product of widespread rational consensus. For these so-called "process theorists," reason informs political activity in a democracy, just as, for process jurists, such as Bickel

[55] Kalman (1996:41) comments that process theorists "sought to domesticate realism, constrain judges, and separate law from politics. Stressing that limits to judicial discretion did exist, they concentrated on the methods by which judges did and should reach decisions. Judges, [Henry] Hart said, should recognize their duty to articulate and develop 'impersonal and durable principles.' . . . The job of judges was to promote respect for the rule of law."

> and Wellington, it informs, or certainly ought to inform, judicial activity in a democracy. Although they demonstrated it in different ways, political and legal process theorists of the 1950s shared the same basic faith in reason as the cornerstone of democracy. (Duxbury 1995:250. See generally 242–51; Kalman 1996: 24–25)

For all the legal process school's legalism, in short, one can see here outlines of a disciplinary encounter—or if not an encounter at least a convergence of perspective—of some significant maturity, and with obvious state implications.

Legal process as a site of encounter is of added significance because it is in process that one finds emerging one of the most significant of the intellectual stimuli leading to the broad engagement between law and "the social" that would characterize the 1960s. Henry Hart and Albert Sacks's mid-1950s teaching text, *The Legal Process*—considered the classic statement of the legal process school (Duxbury 1995:251)—invoked the decisive importance of an encounter between law and social science. Indeed, Hart and Sacks went so far as to propose that law might indeed be reconstituted as an aspect of social science. But, like Lasswell and McDougal, they resisted the further implication that law so reconstituted would derive its structure and conclusions—its appropriate processes—from the observation of what people did, rather than from the moral rightness of action. The territory upon which law encountered social science was to be its own—the purposive pursuit of the normative and its translation into "objective fact." For Hart and Sacks, the worth of "every institutional procedure" could be assessed according to its contribution to the maximization of "the total satisfactions of valid human wants" (Hart & Sacks, as quoted in Duxbury 1995:254). Reason supplied the agenda of valid wants. Maximization of satisfactions was what the state was for, while social science measured outcomes. Law was the means to realize and to effectuate and validate the process.

It is important to note that Hart and Sacks were not the only progenitors of this argument. In fact, they had been anticipated somewhat by Lloyd Garrison and Willard Hurst of the University of Wisconsin, whose own teaching text, *Law in Society* (created in the academic year 1938/39, first used in class in 1939/40)[56] has been described as the first anywhere to treat public lawmaking as a historical process of norm creation, the first to explore institutional structure, procedure, relationship, and competence in that process, and the first to set both norm-creation and institutional process in the wider context of a mutually constituting interaction between law and social experience. "Law and Society are polar categories," Lon Fuller had written in 1934. Garrison and Hurst used his words as their own statement of intent.

[56] I am indebted to Daniel Ernst for this information.

"Though we are under the necessity of opposing them to one another we must recognize that each implies the other. If we deny one, the other becomes meaningless" (Garrison & Hurst, as quoted in Eskridge 1997:1187).

Hurst, of course, proceeded in his own scholarship to develop a critical historical perspective on the process approach to American law, which built upon its purposive assumptions even as he questioned the social sufficiency of the norms they translated. In the classic statement for which he is best known, *Law and the Conditions of Freedom in the Nineteenth-Century United States,* Hurst wrote in the process school's purposive-maximizing idiom of the consensual "working principles" that governed the uses of law in America and expressed its dominant values. The legal order should "protect and promote the release of individual creative energy to the greatest extent compatible with the broad sharing of opportunity for such expression;" it should "provide instruments or procedures to lend the support of the organized community to the effecting of men's creative talents;" it should "mobilize the resources of the community to help shape an environment which would give men more liberty by increasing the practical range of choices open to them" (Hurst 1956:6). But Hurst was less sure than his contemporaries that law was adequate to the public institutional task: men's articulated purposes were often defeated by their human limitations—of perception, imagination, and will—and by the forces of "drift and default" (p. 75) that these engendered. The same commitment to release of energy that governed the legal process, after all, had bred the "bastard pragmatism" that despoiled Wisconsin's woods (Hurst, as quoted in Hartog 1994:389–90).[57]

Thus, out of the ideology of legal process emerged both testable propositions about the role of law vis-à-vis state and society and scholars, like Hurst, committed to both a critical and a fully social, indeed a sociological (Novak 2000), account of that role. Hurst's work was exemplary in that, according to Arthur McEvoy (1997:1194), its commitment to empiricism and to interdisciplinary contact "transcended the recognized boundaries of legal scholarship." Hurst himself recalled that from the very beginning of his career at Wisconsin "[i]t was apparent . . . that this was a law school unlike most law schools, that did not exist in isolation from all the rest of the university. It was just taken for granted that we would have working contact with the economics department, with sociologists. . . . [I]t was taken for granted that people there were interested in the law school, and the law school was interested in them" (Hurst, as quoted in Hartog 1994:379).

[57] McEvoy (1997:1194) calls Hurst's scholarship "profoundly normative." Tushnet (1972) has argued that Hurst's legal history owed much more to the process tradition than to the realist tradition of American legal scholarship. (See also Duxbury 1995:443.)

Hurst himself was one of the principals that carried that ethos forward into the "Law and Society" movement, the third and most elaborated of the postwar sites of encounter between law and the disciplines. He was not alone, of course. Nor, in fact, was the initiative itself one that bore much resemblance to all those law school–based scholarly experiments that had gone before. The construction of Law and Society was far more systematic and far better funded. Most important, to a surprising, indeed a unique, extent it was initiated outside the Law School (Levine 1990:75; Menkel-Meadow 1990:92).

In the early 1960s, four university campus centers—Berkeley (1960), Wisconsin (1962), Denver (1964), and Northwestern (1964)—received funding from the Russell Sage Foundation to establish centers for the study of law and social science. These grants built on networks established through earlier Social Science Research Council–Ford Foundation grants that had funded summer programs on law and social science, beginning at Harvard in 1956 and continuing at Wisconsin. Outside SSRC and Russell Sage, significant funding for law and social science would later become available through the Meyer Research Institute, and eventually through the National Science Foundation. Initially, however, the Russell Sage Foundation was the most important source, adding funding in 1964 to create the Law and Society Association and to subsidize the *Law and Society Review* (Levine 1990:74–75; Schlegel 1995:238–51; Garth & Sterling 1998:419–55; Lipson & Wheeler 1986:4).

The rationale for Russell Sage's activities was not new, although the Foundation's involvement was. Russell Sage had long had an interest in philanthropic support of social action and social policy design; in the postwar period it redirected its emphasis from direct support for social action to funding for fundamental social research supportive of policy innovation and implementation. The particular expression of the new strategy was funding for research on the professions, specifically exploration of the social function of professional practice. At first, Sage's project focused on medicine, but by 1960 attention had switched to the legal profession, specifically to a more pointed proto-realist, proto-policy science inquiry into the capacities of law schools to create a legal profession adequately trained in techniques appropriate to modern governance (Hammack & Wheeler 1994:ix–xii; Wheeler 1994:81–139). Recognizing law as a strategic state language, Sage raised the perennial question whether legal education was competent to train state managers in appropriate realms of social knowledge.

Although the conception was not new, Sage's initiative was appropriately timed. Notwithstanding serial attempts to remake legal education, law schools in the 1950s had remained by and large oriented to the legal profession and its narrow definition of

professional training (Wheeler 1994:113). Yet the period the schools and the profession were entering was to be another historical moment of "striking change" in American law. Change was evident by any number of measures: "the amount and complexity of legal regulation; the frequency of litigation; the amount and tenor of authoritative legal material; the number, coordination and productivity of lawyers; the number of legal actors and the resources they devote to legal activity; and the amount of information about law and the velocity with which it circulates" (Galanter & Edwards 1997:375). Between 1960 and 1994 the number of lawyers in the United States tripled (to about 900,000). The legal services industry's contribution to Gross Domestic Product (GDP) increased 250%. Over the same period the number of law teachers also tripled, and their scholarly interests diversified exponentially, transforming legal scholarship. "[T]he consensus on craftsmanship, process and incremental adjustment" that had dominated the landscape in the 1950s was replaced by "schools and movements of legal thought" displaying "an intellectual variety and critical edge unimaginable in 1960" (pp. 375–76).[58]

The Russell Sage Foundation helped to create an explicit field of encounter in which social science disciplines could be brought to bear on and combined with law and legal institutions in a systematic manner; thus, it was both responding to and contributing to that moment of striking change. The immediate result was the creation of the field of Law and Society. The larger methodological outcome, according to Marc Galanter and Mark Alan Edwards (1997:376), was the formation of a materialist consensus, stronger than on any previous occasion, "that legal activity was to be explained and understood as the product of exogenous forces," displacing "the long-challenged but resilient faith that law was an autonomous realm that could be comprehended by study of authoritative legal texts."[59] The larger political outcome was a reinforcement of the "faith in law as an instrument of progressive social change" associated with postwar liberal legalism. "[L]aw and society scholars were committed to uncovering various forms of inequality and injustice in American life and correcting them" (Trubek 1990:9. See also Kalman 1996:43).[60] More or less purged of its earlier Cold War triumphalism, though

[58] As evidence of legal scholarship's increasing diversity, Galanter and Edwards (1997:375–76) point to Law and Society, law and economics, Critical Legal Studies, feminist legal theory, law and literature studies, critical race theory, and other attempts "to understand law through social scientific or literary scholarship."

[59] For a variation on Galanter and Edwards's account, see Posner 1987.

[60] Trubek (1990:9–10, 9, n.16) writes of early Law and Society as a site of debate between "legalists . . . [who] would perfect the immanent rationality of the law or expand its instrumental sweep" and other scholars who expressed their skepticism about legalist assumptions "by studying the gap between liberal reform ideals and social reality." As Trubek indicates, legalists could always trump gap-obsessed skeptics with the assumption that better laws or better implementation would always close the gap (p. 9, n.16). Gap

not of its broader westernizing "colonizing" implications, liberal legalism now became something of an ideological counterpart to Law and Society's methodological consensus. The Law and Society moment had emerged at the high noon of law as state action in both domestic and international realms.[61]

Two long-term questions arise from this asserted methodological and political consensus. First, to the extent that any lasting consensus existed, who controlled the field of encounter in which it was situated? Second, did, in fact, any lasting consensus exist at all?

Spatially, the field of encounter created with Russell Sage Foundation funding was situated well outside the elite university law schools—Yale, Harvard, Columbia, Chicago—that had featured most prominently in the pre-1960s history of law's rather haphazard, rather vague encounters with the social sciences. This was not a planned outcome—at least not in the beginning. Russell Sage certainly contemplated investing in the elite centers rather than elsewhere. But, although willing to take the Foundation's money, the elite schools "did not care for instructions about how to spend it" (Wheeler 1994:113).[62] Hence, most of Sage's funding ended up going to sources that had been to that point largely unheralded, where key figures—all academic entrepreneurs, all uniquely liminal in their own relationships to the conjunction of law with social science disciplines—were ready to use it to implement distinctive programs. At the same time, Sage, by going outside in this way, created uncertainty, for what remained to be argued about was the revised balance of power between law and social science that a conscious strategy of innovation was intended to achieve.

The superficiality of law's encounters with social science prior to the later 1950s and 1960s can be attributed largely to where these encounters had taken place—in elite centers dominated by the institutional imperative and tradition of leadership in legal training and legal scholarship.[63] The prominence of these centers had been an important condition facilitating encounter, for it was that very prominence that had attracted an

analysis continued to dominate Law and Society research into the 1980s (Munger 1993:96, n.39).

61 On the latter realm, particularly in its relationship to "law and development," see Trubek 1990:22–24; and Trubek 1972.

62 Wheeler (1994:112) reports "a good deal of reticence on the part of a number of the leading law schools" when confronted with Russell Sage's proposals to fund "an expanded role for social science in their curricula, their training, and their research."

63 Those previous encounters seemingly left no larger spoor in the disciplines (with the exception of economics) than in law. According to Richard (Red) Schwartz, speaking of the early 1950s, law "was a kind of black hole in American sociology. . . . It no doubt had to do with the fact that the lawyers managed to be such impressive people and that they sounded as if they knew everything that ought to be known about the field and that you better not trespass on the territory unless you happen to be a lawyer" (as quoted in Garth & Sterling 1998:430).

academically ambitious faculty and had also permitted the commitment of institutional resources that had enabled experimentation to occur. But prominence was also a condition of experimentation's overall record of failure, in that the experimenters were always in the minority and were always subject to the constraining influence of the conviction of their parent institutions that the institution's abiding purpose was to play a vital strategic role in the mainstream of elite legal education. Social scientific experimentation was always marginal to the mission of parent institutions, except to the extent that it assisted them in their abiding purpose—sustaining the ascendancy of law. Sage, by moving outside the elite centers, therefore, created a key condition for more successful encounter. Simultaneously, however, it created a condition for uncertainty over who would have the upper hand in the encounter.

The most mainstream of the liminal figures was Willard Hurst. Hurst had arrived at Wisconsin in 1937, after undergraduate study at Williams College, Harvard Law School, a research fellowship with Felix Frankfurter, and a clerkship with Supreme Court Justice Louis Brandeis (Ernst 2000). Early identified as an innovator in legal education by his work with Garrison in creating *Law in Society*, Hurst played a decisive role in the early 1950s in defining early funding initiatives developed by the Rockefeller Foundation to improve the capacities of the legal profession to exercise postwar leadership responsibilities. He was also influential in the creation of the Meyer Institute and its program for funding sociolegal research. In both cases, Hurst's focus was on the inadequacies of the conception of legal education and scholarship that was dominant in the complacent eastern law school establishment. Building on his *Law in Society* experience, Hurst stressed the necessity of supporting scholars outside the stultifying constraints of the elite schools, who were capable of developing new teaching programs and new research that would place law in specific cultural and historical context. Traditional law schools would take the money—"but they won't hatch the chickens" (Hurst, as quoted in Garth 2000:46). But Hurst's emphasis remained on the reform of legal education and the legal profession from within. His call "for empirical research and social science" was meant to suggest "ways that the legal elite should retool to maintain a dominance over social scientists. Retooling required looking outside the academic establishment and building bridges to the social sciences that were gaining prestige at the expense of legal traditionalism" (Garth 2000:47, 48). The law schools, he insisted, had to remain "one of the truly strategic points for moving social science knowledge and philosophy about society into the currents of decision in the community" (p. 54). Wisconsin typified Hurst's perception in action. When it received its Russell Sage grant in 1962 it "did not have to create

anything new." Wisconsin "already had a thriving interdisciplinary community . . . centered in the law school" (Garth & Sterling 1998:434).

As at Wisconsin, Denver's developments were centered on the Law School. Robert Yegge helped create the Sage-funded Center on Judicial Administration in the College of Law, and as Dean of the College he hired a stream of social scientists, particularly sociologists, to expand the presence of social science in the law curriculum. According to Gresham Sykes, hired from Princeton in 1965, the idea was "to provide law students a basic understanding of modern sociological inquiry so that they will be better equipped for their professional work as lawyers — as practicing attorneys, legal policy makers, and legal scholars" (as quoted in Garth & Sterling 1998:424). Sociology, Sykes argued, was "becoming of ever greater importance to the law [,] with applications ranging from the presentation of evidence in court to the design of programs for legal reform" (p. 424).

Elsewhere, at least initially, the early entrepreneurs of Law and Society were less committed to law-centeredness. The first of the Sage grants had gone to Berkeley in 1960, where it funded the establishment of the Center for Law and Society, dominated by social scientists—sociologists Phillip Selznick, Sheldon Messinger, Jerome Skolnick, Phillippe Nonet; the anthropologist Laura Nader—with no more than "incidental contact," at least in the early years, with the law school (Schlegel 1995:249). Northwestern's Sage-funded program in law and social science had inputs from the Law School, but it was spearheaded by scholars in political science, anthropology, and sociology, who designed it to result in joint degrees. The idea of a Law and Society Association itself was first mooted at the 1964 Annual Meeting of the American Sociological Association. The following year, companion "law and society" organizational meetings were convened at the American Political Science Association and the American Anthropological Association (Levine 1990:73–74).[64]

Law and Society's quite pointed escape from the networks of the elite law school world that had dominated the curricular and intellectual intersection of law and social science for the first half of the century, along with the influential participation of scholars whose critical interest in law was located in the disciplines, underlined the extent to which Law and Society would comprise something quite different from what had gone before. Yet, having established that distinct scholarly locale, the trajectory that initiatives in Law and Society were following ten years after the establishment of the Association was one that, in terms of institu-

[64] Clearly, sociologists played a major role in the early history of Law and Society. At the same time it is worth noting that, according to Munger (1993:91), the institutional location for renewed interest in the sociology of law was "a faculty workshop at Rutgers Law School."

tional and scholarly leadership, remained in, and remained limited by, a legal orbit. For Robert Yegge at Denver, Law and Society "was directed mainly to the legal profession and the legal academy." At Berkeley, the sociologists of the Law and Society Center "sought to build law in[to] sociology," rather than the other way around; but remarkably, for empirical scholars, they took their understanding of law from the jurisprudential and philosophical agenda of elite scholarship, and eventually they moved their program fully into what had remained a mainstream Law School. At Northwestern, the existence of the joint-degree program did not make major inroads into what was also a quite traditional Law School; indeed, it may instead have provided a convenient reason that social science need not be further admitted. Meanwhile, key figures in the program's development, like Richard Schwartz, moved on, into law-teaching environments. If the goal for the centers had been the disciplinary transformation of legal scholarship and teaching, the results were, once again, disappointing (Garth & Sterling 1998:424, 432, 462).[65]

Law and Society enjoyed its greatest success at Wisconsin. There, however, the field did not "return" to law: law had been its central focus from the start. Conceptually, law-centeredness manifested itself in Wisconsin's forthright definition of the field's purpose—to investigate and "explain" law as a subject by locating it contextually as the dependent variable in a context of social and economic phenomena.[66] Institutionally, law-centeredness

[65] Schlegel (1995:250) notes that the Northwestern joint-degree program was a great success, but "[w]hat its impact on th[e] Law School was, other than as a matter of curriculum, is much less clear." At Berkeley, as we have seen, the Law and Society program actually moved into the Law School, but apparently with no more substantive impact on the Law School there than at Northwestern. "Propinquity to even a strong program guarantees nothing" (Schlegel 1995:249). Duxbury (1995:445) similarly comments that "[l]aw and society scholarship never really caught on in the American law schools. The empirical research which such scholarship often demands is considered by many law professors to be both unappealing and unrewarding." Thus, writing in 1997, Edward Rubin (1997:522) can still describe "standard legal scholarship" in terms that bear no imprint of Law and Society's governing ideology of empirical inquiry. Standard legal scholarship is "work which frames recommendations, or prescriptions, to legal decision-makers. . . . All this work is characterized by its normative quality and the direct engagement of its recommendations with identifiable legal decision-makers." It is not easy to square this description with Trubek's (1990:6) contention that "in some sense, we are all law and society scholars today."

[66] As Lawrence Friedman (1973) famously declared in his *History of American Law,* "[T]he development of modern social science . . . for all its deficiencies, gives us a way of looking at the world of law and legal history, a hope of cracking the code, a key to the horrendous mass of detail. . . . This book treats American law, then, not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society. It takes nothing as historical accident, nothing as autonomous, everything as relative and molded by economy and society" (p. 10). Hurst's position seems distinct, situating the project more at the intersection of social science, with law considered as a discipline rather than simply as a subject. "[I]nattentiveness to the study of large processes and end values" and above all "want of philosophy" were legal scholarship's worst failings. "Legal research has moved within very limited borders, relative to its proper field, because it has not been grounded in ideas adequate to the intellectual challenge which the phenomena of legal order present" (Hurst, as quoted in Novak 2000:99).

was expressed in the location of the explanatory project in the Law School, safely under the control of lawyers.[67] Both traits secured for Law and Society the "critical mass" at Wisconsin that it was unable to build elsewhere. Through the ubiquitous influence of Hurst and the cohort of sociology-influenced legal scholars that he helped to recruit (Lawrence Friedman, Marc Galanter, Stewart Macaulay, David Trubek), Wisconsin's contextual approach came to dominate the Law and Society field (Duxbury 1995:440; Garth & Sterling 1998:439–40).

At Wisconsin, law-centeredness was the condition of Law and Society's success. Law-centeredness guaranteed the necessary institutional security that permitted the field to develop, to attract local resources, to attain critical mass, and to achieve a transformative impact on legal scholarship. Necessarily, however, it also limited the extent of that transformation, and that limitation, too, was a condition of Law and Society's success. Elsewhere, the circumstances of Law and Society's turn to law-centeredness were less promising, for they signified the field's failure to sustain the independent and critical scholarly locale that it had promised, and had fought for, at its outset. As at Wisconsin, so elsewhere, that is, Law and Society returned to law more on law's terms than its own.[68] Investigating the field's trajectory, Trubek (1990:7–8) has explained how law-centeredness is the key both to its success and its failure:

> [F]rom the beginning, the interests of the legal academy strongly influenced the Law and Society idea. While the Law and Society movement succeed in creating a new object of study and a new domain of knowledge, it did so within a "legally-constructed" domain. Thus, Law and Society knowledge, while different from the traditional knowledges produced in the legal academy, necessarily reflects the needs and interests of legal elites.

In an important way, law-centeredness actually bred the fourth of the postwar sites of disciplinary encounter, Critical Legal Studies (CLS), and also determined its fate. Spawned to an important extent in the Law and Society movement, CLS emerged not as a complementary trajectory but as a critical reaction to Law and Society's ascendant metaphor, law as a depen-

[67] Writing of Willard Hurst, to whom he grants germinal influence on the development of the Law and Society field at Wisconsin, Garth (2000:57–58) concludes that "[Hurst] drew extensively on social science in his critiques of the legal establishment, but he did not place social scientists on an equal footing with lawyers. At times he deprecated social science for an inability to understand sufficient law, and he worked to design programs that would above all build up the skills and position of lawyers. Hurst thought lawyers should be at the top in the alliance with social science, and investment in social science would help to protect the position of lawyers. Hurst, not surprisingly, was building his position in law at the same time as he sought to maintain law's position."

[68] As Garth & Sterling (1998:462–66) point out, this return created a new separation between Law and Society (now reconceived as an interdisciplinary field within law), and the social science disciplines.

dent variable, and to its dominant empirical research practice, the ascription of objective meaning through positivist social scientific inquiry. In the CLS project, internal not external critique was the chosen strategy; social theory rather than social science the interrogatory vehicle;[69] and law's relative autonomy as institutional formation, profession, discipline, and ideology, rather than law as dependent variable, the point of departure. Objectively, the rise of CLS also confirmed that the resurgence of the law schools continued to prevail in the 1970s and 1980s and, indeed, that the center of gravity was shifting back toward the institutions from whose network Law and Society at its inception had been a departure. Considered spatially, that is, CLS, though politically left-wing, was—far more than Law and Society—a phenomenon of the legal academy, founded and largely led by legal scholars trained and in many cases based at elite law schools.[70]

Considered alongside the return to law of Law and Society, the spatial location of the CLS phenomenon confirmed that, seen at least in institutional terms, law had gained control of the field of encounter that had been initiated in the 1960s among law and other disciplines (Garth & Sterling 1998: 461, 464–65).[71] But the emergence of CLS simultaneously put in doubt whether in fact there existed any lasting consensus on the field's content. The supposition that explanations of legal activity that mapped determinative "exogenous forces" had successfully displaced treatment of law as at least in part the expression of "an autonomous realm that could be comprehended by study of authoritative legal texts" was, after all, precisely the rock on which Law and Society and CLS split (Galanter & Edwards 1997:376).

The original CLS critique of Law and Society scholarship had been in large part aimed at its excessive reflexivity; ten years later Robert Gordon (1985:14) could be found writing of CLS's prevailing understanding that law's "norms, rules, procedures, reasoning processes, etc. have an autonomous content, have an independent influence upon the actions of legal officials and ordinary persons in society" and that legal ideas "are immensely powerful influences in the formation of social purposes and in

69 Duxbury (1995:467) comments somewhat acerbically on CLS's characteristic "[f]aith in just about any type of 'radical' social theory."

70 Notably Harvard and Stanford, with Yale also an important point of origin. CLS's elite origins, connections, and ambitions are clearly on display in Schlegel 1984b. They are also remarked upon by White (1984:670–71; 1986:835, 839). Brigham & Harrington (1989:17) comment that "[t]he legal consciousness addressed by [CLS] is the mandarin consciousness of the legal academy and the elite bar. Its 'trash[ing]' of the tradition depends on its unsettling effects in a professional environment."

71 CLS's version of the affirmation of that control was the early banishment of scientific Marxism to the theoretical sidelines in favor of "deviationist doctrine." Arguably, the rise of law and economics furnishes a further example of law's institutional resilience, in that, until recently, its critique has been mounted largely from within the law school world, and largely without implying disturbance to conventional legal categories. On this, see above note 42.

the ways such purposes are acted upon" (See also Gordon 1984:116–25).[72] No less important was CLS's emphatic denial of the core assumption upon which Law and Society's field of encounter between social science and law had been founded in the first place; namely, that the resort to social science to undertake empirical mapping of "exogenous forces" would produce systematic and objective results. From the CLS perspective, systematic objective empiricism was impossible, merely a misleading positivism. The facts that empirical inquiry found were creatures of the observer's subjective position. Ideology and methodology were irremediably intertwined. "Of all the issues that were to demarcate Critical Legal Studies from the Law and Society movement, the association of objective empiricism with positivism was the most explosive and the most clearly joined. . . . [C]ritical theorists came to suggest that by ignoring ideology and autonomy and by not conducting research from an openly normative and critical perspective, reformist scholars were reinforcing the status quo" (White 1986:835).

CLS's critique of the disciplinary encounter as conceived of by Law and Society was effective enough to put an end once and for all to the simplistic proto-materialism that had attended law's serial invocations of social science since the 1920s. In part as a result, the Law and Society project languished somewhat during the 1980s, struggling for methodological orientation. CLS, however, was no more successful in developing an alternative. With little presence outside the law schools, CLS's critical trajectory took on an essentially jurisprudential mien, one that simply reinforced the return to law—and hence the isolation of law from the disciplines—that had been under way since the late 1970s. When implemented in academic practice, moreover, CLS's trajectory proved quite compatible in form (if not always in content) with the legal academy's conventions. "The case method provided a perfect springboard for critical legal teaching. . . . Comparisons of cases would often reveal to students the manner in which principles stand opposed to one another; and the Socratic style of teaching proved, for some critical legal scholars, to be a useful means to demonstrate how every effort at legal reasoning has a flip-side" (Duxbury 1995:477).

Within the legal academy, CLS helped to create space for the growth of further schools of critical theory—notably, critical race theory and feminist legal theory. However, these schools quite rapidly took on a distinct theoretical and political life of their

[72] White (1986:835) observes that the work of the most notable of early CLS scholars—Horwitz, Kennedy, Unger, and Tushnet—was "qualitative and even doctrinal" in methodology and emphasized interest in "legal doctrine, legal consciousness, and the ideological structures in which legal rules were embedded."

own.[73] And outside the legal academy CLS engaged in few disciplinary encounters and stimulated few departures.[74] One exception, of course, was CLS's fruitful encounter with history (Schlegel 1984b:407; Gordon 1984:57). Even here, however, proponents of CLS tended to find histories of legal discourse that "[took] dominant legal ideologies at their own estimation and [tried] to see how their components [we]re assembled," more "exciting" than approaches that were more explicitly embedded in society and economy. Here too, in other words, the agenda was primarily inward-looking (Gordon 1996:360).[75]

It is perhaps surprising that such an avowedly radical and transformative politics of law as Critical Legal Studies would nevertheless follow an agenda largely reflective of the internal practices and preoccupations of law and law schools, an agenda that, in the 1990s, has apparently run CLS out of steam and out of influence—now just one more harmlessly idiosyncratic tendency in the Balkans of legal thought.[76] One explanation of the out-

[73] In a fashion distinct from CLS's characteristic legal internalism, both feminist legal scholarship and critical race theory have undergone a trajectory of development much more in conjunction with extralegal influences and debates. The result is a quality of "groundedness" in social context that has been far more elusive in CLS scholarship. Thus, in her work on the legal profession, Barbara Allen Babcock (1998:1695, 1702, 1705) emphasizes the importance of always situating the history of women's lawyering—whether academic or professional—in the context of a feminism generated in larger struggles to transform the place of women in U.S. society. "[An] overarching theme of women's legal history is the necessity of feminism." Likewise, Carrie Menkel-Meadow (1989:312–13) starts from a feminist standpoint outside law, located in basic formulations of gender and gender difference, in order to generate questions about (and research to test) women's experience in the particular realm of the legal profession and the potential that the analysis of gendered difference offers for a transformation of law practice and jurisprudence. Martha Fineman (1991:xi–xvi) finds the principal difference between feminist and other approaches to theorizing law to inhere in the former's "belief in the desirability of the concrete" (p. xi), producing a level of analysis that "mediates between the material circumstances of women's lives and the grand realizations that law is gendered, that law is a manifestation of power, that law is detrimental to women" (p. xii). As in the case of Menkel-Meadow and Babcock, this leads Fineman to locate her point of departure "outside of law," in feminism as "a political theory concerned with issues of power" (pp. xv, xiv). In contrast to CLS assaults on the postulation of a determinate relationship between social context and legal event, its assertions of law's autonomy, law's capacity to play an independent role in influencing official action and the formation of social purposes, law's cache of suppressed alternatives for the realization of transformative change, Fineman holds more bluntly that law "has developed over time in the context of theories and institutions which are controlled by men and reflect their concerns," that it is, hence, relatively powerless as an agency of transformation so far as women are concerned. "[W]hile law can be used to highlight the social and political aspects it reflects, it is more a mirror than a catalyst when it comes to effecting enduring social change" (pp. xiii, xiv).

[74] As Minda (1995:127) acknowledges, CLS's influence (like that of realism before it) "is mainly felt in the world of legal scholarship."

[75] In his latest definition of the bounds of critical historicism in law, Gordon (1997:1023) states that "any approach to the past that produces disturbances in [legal discourse] . . . that unsettles the familiar strategies we use to tame the past in order to normalize the present" qualifies. As Gordon acknowledges, under this rubric virtually all historical research undertaken by contemporary historians could be termed "critical" once inserted into a legal context. But Gordon's eye is on law, not history; hence the rather low threshold of acceptance.

[76] Minda (1995:125–26) describes the abandonment of CLS's transformative politics and the dissipation of its energies in fragmentation and anomie.

come is provided simply by adapting Trubek's (1990:7–8) observations on the fate of Law and Society to include CLS. For, far more than Law and Society, Critical Legal Studies was configured within "a 'legally-constructed' domain." Throughout the century, as we have seen, the institutional imperative of the law school repeatedly created the terms for innovation in legal scholarship and teaching practice in response to perceptions of law's loss of intellectual authority or of strategic state influence. CLS knowledge, although obviously "different from the traditional knowledges produced in the legal academy," was created in accordance with the academy's terms for innovation, and hence, one might conclude, necessarily "reflects the needs and interests of legal elites" in maintaining law's resilience.[77]

Another explanation, however, would grant CLS's law-centeredness an independent rationality and would return to CLS its integrity as a radical response to law. Garth and Sterling have argued that Law and Society's move back to law following its initial development as a spatially distinct endeavor signifies law's success in reestablishing itself as a discourse of state expertise and governance after a period of uncertainty in which other expertises—sociology, political science—demonstrated their capacity to compete with it to guide state projects. "Law as the traditional language of the state appeared to be falling behind in the competition to define social problems and produce legitimate solutions" (Garth & Sterling 1998:456). But, as in the past, law regrouped, appropriated the social science that it needed, and reaffirmed its ascendancy in the state. As a one-time radical critique professing a transformative politics, it was appropriate that CLS should confront resurgent law on its own ground and seek to redirect its ascendancy along different paths.[78] It failed, but the attempt was not ill-conceived.

[77] Although at first sight this might seem far-fetched, Minda (1995:256–57) provides us with a telling illustration of how non-mainstream legal knowledges can serve elite ideological purposes: "It is a critical time for jurisprudential studies in America. It is a time for self-reflection and reevaluation of methodological and theoretical legacies in the law. At stake is not only the status of modern jurisprudence, but also the validity of the Rule of Law itself. In the current era of academic diversity and disagreement, the time has come to seriously consider the transformative changes now unfolding in American legal thought. The challenge for the next century will certainly involve new ways of understanding how the legal system can preserve the authority of the Rule of Law while responding to the different perspectives and interests of multicultural communities. . . . The proliferation of new forms of competing jurisprudential discourses, the willingness of some to try new methods, and the expression of discontent and resistance signify the end of neither professional discourse nor law as we have known it—all may simply be symptomatic of change from the old to the new."

[78] This is one of Robert Gordon's most trenchant themes in his debate with Paul Carrington over the meaning of CLS. See Carrington (1984), Gordon (1985).

Epilogue: Seeing Double

> Law is a distinct academic discipline.
>
> —Edward L. Rubin, "Law and the Methodology of Law"

"Currently," Laura Kalman (1996:239) has written in a recent epilogue of her own, "there is a backlash against interdisciplinarity." By "interdisciplinarity" Kalman means precisely the attempt to construct a space of encounter among law and "the disciplines," of which this article has been a history. Why a backlash? Because current legal scholarship evinces relatively few signs that meaningful encounter does, in fact, often occur, or, when it does, that it informs a strategically placed audience. "Too often the tale of cross-fertilization between disciplines turns out to be 'the story of the mutual enlightenment that never happened'." Many legal scholars engage in "frenzied interdisciplinary work," but they do so against the background of a counterchorus that finds the exercise pointless—"[w]holly gratuitous discussions of Nietzsche, Saussure, Derrida, and Foucault" intrude themselves into "law review articles about section 1983, contract doctrine, poverty law, and even Uruguayan prisons" (Kalman 1996:239–40, 244. See also Minda 1995:208–13).[79]

For Kalman (1996), the interdisciplinary impulse is rooted in law's restless search to justify its authority to others and to itself, to identify the rationale for its institutional imperative. Postwar legal liberals wanted to use law and legal education to remake the world; they enlisted other disciplines in the task of explaining why their ambition was appropriate. Kalman suggests that the legal scholars who followed this course were not particularly faithful to the integrity of the disciplines they appropriated, but that this failing can be rectified: "[I]t is possible for law professors to 'use' other disciplines more sensitively than they have in the past" (p. 239). She also suggests that law's fragile integrity is just as vulnerable to interdisciplinarity run riot as the disciplines are to law run riot—a vulnerability never clearer than in the postmodern 1990s, hence the backlash. But Kalman is unwilling to give up on the promise of interdisciplinarity. With good will, careful balancing, and mutual respect, interdisciplinarity will create the law—appropriately reformed, appropriately explained—that is capable of "holding culture together" (p. 246).

Kalman's story is open to criticism on one ground—the spatial—that has featured in this account. To her credit she makes the point herself. Her story is "mandarin legal history," taking as representative what some elite scholars in a few peak institutions may have thought about law and interdisciplinarity. Not many legal academics, she acknowledges, may ever have experienced a

[79] Among recent denunciations of interdisciplinarity in law scholarship, Edwards (1992) is probably the most notorious.

sense of crisis of function, or legitimacy, or tried to address it by turning to other disciplines (Kalman 1996:10). Out on the Great Plains of legal education, the institutional imperative—training lawyers—has always ruled. But one might also open the emphases and assumptions inherent in Kalman's story to careful examination on another front, too. In light of the other story told here—of law's serial successes in facing down challenges to its ascendancy in society and in the state from other practitioners of social knowledge—one might ask why lawyers should ever want to "make *better* use of other disciplines" than the uses they have made (1996:23, emphasis added). The story of law's disciplinary encounters to date has by and large been one of law's successful appropriation of what it could use and its indifference to, and eventual discard of, what it could not. Law's success in self-renovation, on its own terms, is surely the chief reason why it can be true that, as Paul Brest has put it, the "law student who fell asleep in 1963 and awoke in 1993 would not be all that astonished by his new surrounds," why "he would find much that was familiar" (Brest, as quoted in Kalman 1996:244).

This debate over the appropriateness, terms, and likely outcomes of disciplinary encounter is actually a debate over law's and legal scholarship's sufficiencies in what are two fields of encounter rather than a single field: the field of law as a modality of rule, and the field of law as a modality of self-explanation, or legitimation, of the form and expression of rule.[80] A recent article by Edward Rubin (1997) explores the relationship between these two fields and the disciplines that law encounters in each. Acknowledging that, for decades, legal scholarship has been "traipsing from door to door, looking for a methodological refuge" (p. 521), Rubin argues that law is nevertheless fully possessed of its own distinctive methodology and practices that render it an "epistemologically coherent" field in its own right (p. 541). In that field the character of legal scholarship is derived from law itself, which Rubin defines variously as "the product of conscious decision by public decision-makers," or "the deliberate action of state decision-makers" (p. 525, 529). Legal scholars seek to improve the quality of these decisions through prescriptive intervention, "according to the scholar's own views about law or public policy" (p. 525). They "instruct judges" (p. 529). They articulate arguments that conceivably can affect decisionmaking. They are, that is, "inevitably and intensely involved with the subject matter of their research" (p. 529). In this incarnation, legal scholarship is not a descriptive but a prescriptive practice. Legal scholars "are not trying to describe the causes of observed phe-

[80] For an explanation of the conception of law as a modality of rule, see Tomlins (1993:26–34). In proposing the idea of two fields of encounter I am also drawing on Bourdieu (1987:814–53).

nomena, but to evaluate a series of events, to express values, and to prescribe alternatives" (p. 527).[81]

Legal scholarship, then, is an active participant in the formation of law as a modality of rule. In this field, law is a discipline sufficient unto itself. It does not seek any direct encounters with other disciplines, because in this regard their methodologies are alien to its purposes.[82]

But, Rubin (1997:541) continues, legal scholarship does "seek the aid of other disciplines in characterizing various interactions between law and external phenomena." This is law's second field of encounter. No more here than in the design of rule (the first field) does law propose to yield to the disciplines, for "the prescriptive stance of law is not only an effort to influence public decision-makers," but is also itself "a mode of understanding" (p. 546). But that mode of understanding is quite insufficient when it comes to coping with "reality," with the "intense relationships" between law and the "external forces . . . [and] events" to which legal scholars must react, or with "the effects on such events that their recommendations to legal decision-makers will produce" (p. 550). A self-referential, internally generated legal discourse might be sufficient for legal scholars to communicate with judges or practitioners (see, for example, Edwards 1992), but not if law is to be explained and legitimated to other decisionmakers and to wider audiences—legislators, administrators, and above all the public and interests to whom they respond. Even as it "must continue to develop its own methodology for framing its characteristic prescriptions to legal decision-makers" legal scholarship "must rely on other disciplines to characterize external events and effects." Here, in what Rubin denotes as "structured debate about social norms," is where social science properly appears, not to resolve issues of "proper choice of purpose," but certainly to inform them (Rubin 1997:553, 555). In this field of encounter, therefore, social science plays an essential (though still subordinate) role in legal scholarship.

By distinguishing law's self-sufficiency as a modality of deployment of power and authority from its disciplinary insufficiency as

[81] As a matter of fairness to Rubin I should indicate that when describing his article as an "exploration" of the idea of two fields of encounter I am imposing my own theoretical formulation upon his work. Rubin's article stands as an illustration of that formulation, but it is not structured conceptually to that end.

[82] In Bourdieu's analysis, "practices within the legal universe are strongly patterned by tradition, education and the daily experience of legal custom and professional usage. They operate as learned yet deep structures of behavior within the juridical field—as . . . *habitus*. They are significantly unlike the practices of any other social universe. And they are specific to the juridical field; they do not derive in any substantial way from the practices which structure other social activities or realms. Thus, they cannot be understood as simple 'reflections' of relations in these other realms. They have a life, and a profound influence, of their own. Central to that influence is the power to determine in part what and how the law will decide in any specific instance, case, or conflict" (Terdiman 1987:807).

a modality of explanation and legitimation of the results in its interactions with audiences it must convince, we can approach, finally, the heart of the task undertaken in this article—to frame the field of law's disciplinary encounters to date and to use that framing to imply what the field should henceforth be. As Rubin (1997) suggests, law has shown a receptivity to encounters with disciplines that improve on its capacity to explain or refine or legitimate its performance in interactions with external phenomena, for it is here that law's self-insufficiency is manifest.[83] Law has shown less interest in encounters that intrude methodologically or ideologically upon its deployment of determinative power and authority, for here its disciplinary self-sufficiency is clearer, its methodological capacities more secure, its conversation more conveniently closed. Law's future disciplinary encounters might simply reproduce this pattern, in which case the agenda would continue to be law's, as it has been in the past, and the results essentially more of the same; or, the disciplines might instead discard law's agenda and pursue their own, by probing, decisively and systematically, for law's methodology of power.[84]

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[83] Receptivity is now a subject of critical disciplinary examination, as indicated, for example, by Brigham & Harrington's (1989:41, 42) comments that "[r]ealism manifests an essentially anti-law rhetoric while serving as the rationale for law-reform movements and as the basis of modern legal orthodoxy," that it lacks "an account of the social and institutional sources of legal power," and that "as legal authority [realism] promotes the view that law is indeterminate but leaves intact social arrangements and institutions determined by law."

[84] Martha Fineman (1991:xvi) identifies feminist scholarship with this approach: "[T]he very best feminist legal scholarship . . . is about law in its broadest form, as a manifestation of power in society, and for the most part, it recognizes that there is no division between law and power." (For other suggestive examples, see Brigham 1998; Munger 1993:120–25; and Tomlins 1993, 1995).

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